

10-1-2003

Walking the Centre Line: Balancing an Employee's Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry

Harold Smith

Stewart McKelvey Stirling Scales

Joseph Anthony

Stewart McKelvey Stirling Scales

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Labor and Employment Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Harold Smith and Joseph Anthony, "Walking the Centre Line: Balancing an Employee's Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry" (2003) 26:2 Dal LJ 591.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Harold M. Smith Q.C.*
Joseph L. Anthony**

Walking the Centre Line: Balancing
an Employee's Right to Privacy in
Drug and Alcohol Policies in the
Atlantic Offshore Oil Industry

Should the principles applied to drug and alcohol testing on land be imported into the Atlantic offshore oil and gas industry? The authors take the position that there is room for the notion that the application of principles derived from safety sensitive land based industry ought not to be applied in a perfunctory or rote manner to the Atlantic offshore environment. The case law, since Entrop, shows a judicial tendency to apply the requirements established by the obiter dictum of Entrop. (Entrop dealt with safety sensitive but land-based industry.) The danger is that the principles, as developed by and since Entrop, may be applied by adjudicators perfunctorily without due regard to the unique and supervenient risks inherent in the offshore marine environment. The authors propose that aspects of drug and alcohol testing policies directed at managing the risks of impairment in the Atlantic offshore environment should be found to be valid notwithstanding that the same policies may, in land based safety sensitive industries, encounter difficulty under current interpretation of relevant statutes such as humans rights legislation.

Les principes appliqués aux tests de dépistage de la consommation de stupéfiants et d'alcool effectués sur la terre ferme doivent-ils s'appliquer à l'industrie pétrolière en zone extracôtière? Les auteurs adoptent la position qu'il existe une latitude suffisante pour que les principes dérivés de ceux qui ont cours dans une industrie non maritime où la sécurité est primordiale ne soient pas appliqués sans discernement dans l'environnement extracôtier atlantique. Depuis la décision Entrop, la jurisprudence révèle une cohérence des tribunaux à appliquer – à une industrie terrestre où la sécurité est primordiale – des critères énoncés dans l'obiter dictum de la décision Entrop. Cette cohérence judiciaire présente cependant un danger : les principes élaborés dans la décision Entrop et par la suite pourraient être appliqués aveuglément par des arbitres, sans que les risques uniques et particuliers inhérents à l'environnement marin aient été évalués. Les auteurs avancent que certains volets des politiques sur les tests de dépistage de la consommation de stupéfiants et d'alcool – politiques visant à permettre de gérer les risques liés à l'affaiblissement des facultés en zone extracôtière – doivent être considérés valides et ce, bien qu'il puisse être difficile, à cause de l'interprétation actuelle de certaines lois (par exemple, les lois sur les droits de la personne) d'appliquer les mêmes politiques dans des industries non maritimes où la sécurité est primordiale.

* Partner, Stewart McKelvey Stirling Scales, St. John's, NL.

** Associate, Stewart McKelvey Stirling Scales, St. John's, NL.

Introduction

- I. *Ideology of Competing Interests*
- II. *Early Jurisprudence on Drug and Alcohol Testing*
- III. *Impact of Human Rights Legislation Generally*
 1. *Substance Abuse as Disability*
 2. *Rights of Substance Dependent Individuals Under Human Rights Legislation*
 - a. *Establishing Discrimination*
 - b. *Employer Defences – Before and After Merorin*
 - c. *Accommodation and Undue Hardship*
- IV. *Leading Human Rights Jurisprudence on Workplace Drug and Alcohol Policies*
- V. *Emerging Trends of Apparent Judicial Consistency*
 1. *Considerations in Developing Drug and Alcohol Policies*
 - a. *Union Involvement*
 - b. *Extrinsic Factors Justifying Workplace Drug and Alcohol Policy*
 2. *Interpretation and Application of Drug and Alcohol Policy*
 - a. *Who can be tested? Safety-sensitive vs. Non-safety-sensitive Positions*
 - b. *Drug Testing: Reasonable Cause, Post-Accident and New-Miss*
 - c. *Alcohol and Drug Related Searches*
 - d. *Addressing the Results – Discipline or Disability?*
- VI. *Drug and Alcohol Testing in the Atlantic Offshore Oil Industry*
 1. *Human rights Jurisdiction in the Offshore*
 2. *Comparison of Human Rights Legislation*
 3. *Balancing Rights and Risks in the Atlantic Offshore*

Conclusion

Introduction

The oil industry is a high risk business. An accident... could create a catastrophic incident resulting in injury and death to employees, to the public and to the environment. The Exxon Valdez was a prime example.¹

* * *

Drug or alcohol abuse by oil rig workers magnifies tremendously the job's inherent dangers.²

* * *

[T]he use of a person's body without . . . consent to obtain information . . . invades an area of personal privacy essential to the maintenance of . . . human dignity.

Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy.³

The foregoing excerpts capture the quintessential nature of the equally valid, yet potentially conflicting interests facing employers in the Atlantic offshore oil industry. Although the potential consequences of an offshore incident due to impaired performance include loss of life, environmental damage and economic loss, prevailing jurisprudence mandates that risk management policies utilizing drug and alcohol testing be balanced against employee privacy rights, an issue complicated in the offshore by the necessity of billeting employees on-site.

Three years have passed since the Ontario Court of Appeal released its decision in *Entrop v. Imperial Oil Ltd.*,⁴ suggested by some commentators as having dealt "a serious blow" to drug and alcohol

1. *Walker v. Imperial Oil Ltd.*, 1998 CarswellAlta 859 at para. 84 (Alta. Q.B.) (eC).
2. *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990) at 213.
3. *R. v. Monney*, 1999 CarswellOnt 935 at para. 44 (S.C.C.) (eC) [*Monney*].
4. [2000] O.J. No. 2689 (C.A.) (QL) [*Entrop*].

testing in the workplace.⁵ While the ultimate impact of *Entrop* remains to be seen, it nevertheless marked a judicial watershed. The jurisprudence subsequent to *Entrop* reflects a remarkable consistency in the approach of courts, arbitrators, and human rights tribunals in delineating what is and is not acceptable in workplace drug and alcohol testing.

Though most of the cases come from outside the oil industry, the approach taken by adjudicators in balancing employee privacy with reasonable measures to prevent workplace impairment in risk-sensitive enterprises will undoubtedly influence the resolution of similar issues in the offshore context. These authorities provide a necessary guidepost not only to legal principles, but for distinguishing by comparison the unique circumstances in the offshore. A review of Canadian authorities reveals emerging trends, particularly since the release of *Entrop*, including the differential treatment of employees in safety as opposed to non-safety sensitive positions, the legal limits on drug and alcohol testing, what constitutes reasonable cause to require employees to undergo drug or alcohol testing, the ability to conduct investigatory searches of employees and their possessions and, perhaps most importantly, the identification and response to disciplinary or accommodative issues or both relating to employee drug and alcohol use.

The implications of the ever-increasing judicial consistency in the treatment of workplace drug and alcohol testing, while generally a positive development, nonetheless warrant a note of caution for employers in the offshore oil industry. To date, existing jurisprudence governing this area of law has developed solely in connection with land-based industries. Though, to a degree, comparisons can be drawn between land-based refineries or petrochemical plants and offshore oil rigs or production platforms, one need only consider the tragedy of the *Ocean Ranger*, or the environmental despoilation caused by the *Exxon Valdez*, to appreciate the added risks entailed in conducting operations two hundred miles offshore in an area renowned for cold temperatures, severe and unpredictable weather, and icebergs. Even with the best equipment and most rigorous safety procedures, employees in the offshore live with the knowledge that in the event of a crisis, evacuation may pose its own risks. Unlike land-based industries, adverse weather conditions may impede rescue personnel from responding to emergent situations in the offshore. Oil spills on land, while serious, pale in comparison to the catastrophic aftermath of

5. See e.g. Russell W. Zinn & Patricia P. Brethour, *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2002) at para. 5.50.

an offshore oil spill to the marine environment as well as to fishing and other industries dependent on that natural resource. Current jurisprudence on workplace drug and alcohol programs has yet to consider the supervenient nature of the risks inherent in the offshore oil industry. The question, therefore arises how steps taken by employers to minimize environmental and economic devastation and the risk to life due to an incident caused by workplace impairment should be balanced against employee privacy.

The following analysis examines the development of the law in this area and the emerging trends in the judicial approach to workplace drug and alcohol issues with a focus on the Atlantic offshore oil industry. In the authors' view while the significance of employee privacy cannot be undervalued, it is nonetheless an interest that must be subjugated to reasonably imposed measures to minimize the enormity of foreseeable risks flowing from an impairment-related incident in the offshore.

I. *Ideology of Competing Interests*

As a general rule an employer may not inquire into or interfere with an employee's off-duty conduct or impose discipline as a result of such conduct absent a substantial and legitimate business reason.⁶ The underlying rationale is, of course, based upon a recognition of the inherent value we all place on personal autonomy. As noted by the board in *Re Provincial-American Truck Transporters and Teamsters Union, Local 880 (Provincial-American)*⁷ in considering mandatory drug and alcohol testing by urinalysis:

There is a further aspect to the privacy argument in that, even assuming that the urine specimen is not used to determine anything other than whether there has been any past ingestion of alcohol and/or drugs, such testing necessarily involves the employer in an inquiry into what an employee is doing in his/her off-duty hours. Most reasonable people would probably consider that it was none of their employer's business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours.⁸

6. See generally Donald J. M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf (Aurora, Ont.: Canada Law Book Inc., 2003) at para. 7:3010 and cases cited therein; see especially *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson *et al.*) [KVP].

7. (1991), 18 L.A.C. (4th) 412 (Brent *et al.*) [*Provincial-American*].

8. *Ibid.* at 422.

Although “privacy” is conceptually elusive in that it has different connotations for everyone,⁹ it is irrefutable that the core value is inherent and fundamental for most of us. The Supreme Court of Canada has opined that “society has come to realize that privacy is at the heart of liberty in a modern state ... [g]rounded in man’s physical and moral autonomy, privacy is essential for the well-being of the individual.”¹⁰ The importance attributed to an individual’s privacy rights by the judiciary is further reflected by statutory enactments codifying the right to privacy, including the collection, use and disclosure of personal information.¹¹

Given the right to privacy’s preeminence, it is no surprise that some proponents of privacy regard workplace drug and alcohol testing as “chemical McCarthyism”¹² or an attempt by employers to open a “chemical window” to off-duty conduct.¹³ As noted by a particularly literal United States Court: Drug testing is a form of surveillance, albeit a technological one ... It reports on a person’s off duty activities just as sure as someone had been present and watching. It is George Orwell’s “‘Big Brother’ society come to life.”¹⁴ Rhetoric aside, drug and alcohol testing, whether through urinalysis or blood testing, is capable of revealing any number of personal attributes, including pregnancy, manic depression, diabetes, schizophrenia, heart trouble, and whether someone is HIV positive.¹⁵

Trite though it may sound, society is an exercise in the art of compromise and there are a plethora of situations in which the collective interest must prevail over individual rights. In the context of workplace drug and alcohol testing, the legitimacy of an employer’s interest in preventing off-duty conduct that could impair the performance of safety-sensitive duties is one such scenario. As noted by the Board in *Re Canadian National Railway Company and Canadian Auto Workers, United Transportation Workers Interveners*:¹⁶

9. Canada, Parliamentary Inquiry, *Report of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities* (Ottawa: Queen’s Printer, 1997) at 5-10.

10. *R. v. Dymont*, 1988 CarswellPEI 7 at para. 28 (S.C.C.) (eC).

11. See especially the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. While it is beyond the scope of this analysis to fully detail the extent of an employer’s obligations under the *Personal Information Protection and Electronic Documents Act*, this legislation does impose certain obligations on employers in the offshore oil industry, particularly in relation to the disclosure of information concerning drug and alcohol tests administered to employees.

12. Douglas Isbister, “Justifying Employee Drug Testing: Privacy Rights” (1996) 5 Dal. J. Leg. Stud. 255 at 256.

13. Ontario Law Reform Commission, *Report on Drug and Alcohol Testing in the Workplace* (Toronto: Ontario Law Reform Commission, 1992) at 31.

14. *Ibid.* at 31, quoting from *Capua v. City of Plainfield*, 643 F Supp. 1507 at 1511 (D.N.J. 1986).

15. *Report on Drug and Alcohol Testing in the Workplace*, *supra* note 13 at 11-12.

16. (2000), 95 L.A.C. (4th) 341 (Picher) [*Canadian National*, 2000].

[T]here 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 the 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-bodied aircraft, before taking firm and forceful steps to insure 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 more an employer can, in my view, justify a pro-active, rather than a reactive, approach designed to prevent a problem before it manifests itself.¹⁷

When one considers the inherently dangerous nature of working on an offshore oil rig or platform, the potential for loss of life and environmental despoilation, few would not argue that employers in the offshore have a legitimate interest in preventing workplace impairment. Additionally, beyond safety-related interests, it has been suggested that other benefits accrue from workplace drug and alcohol testing, including: a reduction in the demand for illicit drugs, early identification of health problems in the persons being tested, identification of dependency-related problems and early referral to employee assistance programs,¹⁸ reduction of health care costs, promotion of efficiency, and global harmonization of operational requirements for enterprises in the international market.¹⁹

The issue, as in all cases, is how an employer's legitimate interest in preventing workplace impairment can be pursued without completely extinguishing employees' privacy rights. To fully appreciate the juridical response to this dilemma, manifested in the "balancing-of-interests" test, it is necessary, before exploring its specific application to the offshore, to examine the genesis and development of the law in this area and the impact of human rights legislation.

II. *Early Jurisprudence on Drug and Alcohol Testing*

The current proliferation of workplace drug and alcohol testing in risk-sensitive operations belies the fact that the issue is relatively new to Canadian jurisprudence. Surfacing in the late 1980s, the first cases arose

17. *Ibid.* at 378.

18. *Canadian National, 2000, ibid.* at 379-380; *Re Dupont Canada Inc. and CEP, Local 28-O* (2002), 105 L.A.C. (4th) 399 at 419 (Picher *et al.*) [*Dupont*].

19. Canada, Privacy Commissioner, *Drug Testing and Privacy* (Ottawa: Minister of Supply and Services Canada, 1990) at 5-8.

in the context of unionized public carriers. In the absence of specific jurisprudence, arbitrators addressed the issue by analogy to cases dealing with unilaterally imposed employer rules regarding mandatory medical examinations to ensure fitness for duty and the search of employees and their possessions to combat theft. Although the application of human rights legislation was not considered in these early decisions, arbitrators nonetheless adopted a “balancing-of-interests” approach in assessing the legitimacy of workplace drug and alcohol testing.²⁰

*Re Canadian Pacific Ltd. and United Transportation Union (Canadian Pacific)*²¹ is indicative of the approach taken in early arbitral jurisprudence. In that case, the grievor was a conductor who was discharged following his refusal to undergo a drug test after the employer became aware that he had been charged criminally for cultivating marijuana. Though the grievor had a clean disciplinary record, it was accepted by both parties that he held a safety-sensitive position. Interestingly, the employer had no drug and alcohol testing policy, but sought to impose drug testing as a means of reducing the risk of workplace impairment.

The essence of the Board’s decision in *Canadian Pacific* was that the employer’s right to require an employee to undergo a medical examination to ensure fitness for duty necessarily entailed a right to require a drug test where an employee’s duties are inherently safety-sensitive and there are “reasonable grounds” to suspect she or he may be impaired on duty.²² The absence of a formal drug and alcohol testing policy was largely irrelevant. Reasonable grounds existed as the grievor’s admitted cultivation of marijuana suggested a continued pattern of use.²³ Nevertheless, the Board cautioned that “it is not within the legitimate business purposes of an employer, including a railroad company, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing.”²⁴

20. Morton Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitrations*, looseleaf (Toronto: Lancaster House, 2002) at s. 13.4.2.

21. (1987), 31 L.A.C. (3d) 179 (Picher) [*Canadian Pacific*].

22. *Ibid.* at 184-186.

23. See also *Re Procor Sulphur Services and Communications, Energy and Paperworkers, Local 57* (1998), 79 L.A.C. (4th) 341 (Ponak *et al*) [*Procor*]. In that case, the Board found that random drug testing was justifiably required of employees who occupied safety-sensitive positions and were charged or reasonably suspected of having cultivated illicit drugs. At page 351, the Board stated: “In the final analysis, the Board’s reasoning, stripping away all legal complexities is fairly simple - if you grow substantial amounts of marijuana for your own use and you occupy a safety sensitive work position, your employer will have the right to test you for drug use.” See also *Fluor, infra* note 75. In *Fluor*, it was held that an admission by an employee to repeated off-duty drug use gave rise to reasonable grounds to suspect workplace impairment so as to justify the imposition of random drug testing.

24. *Supra* note 21 at 187.

In applying the reasoning in *Canadian Pacific*, arbitrators added another dimension to the analysis by assessing the reasonableness of workplace drug and alcohol testing through a balancing of interests approach typified by *Provincial-American*.²⁵ In that case, the issue was whether an employer could require mandatory universal drug and alcohol testing where the collective agreement provided that employees must consent to a medical examination if and when requested. The Board acknowledged that there was a legitimate and pressing interest to insure that employees in safety-sensitive positions work free from impairment, but noted that “the public good does not reasonably require a wholesale disregard for personal liberty.”²⁶

In considering the legitimacy of a policy of mandatory universal drug and alcohol testing, the Board applied the long-standing criteria used to assess the legitimacy of unilaterally imposed rules as established in *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd. (KVP)*, namely that:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement;
2. It must not be unreasonable;
3. It must be clear and unequivocal;
4. It must be brought to the attention of the employee affected before the company can act on it;
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge; and
6. Such rule should have been consistently enforced by the company from the time it was introduced.²⁷

The “reasonableness” component of the *KVP* test is predicated on a proportionality between the extent to which an employer-imposed rule is necessary to protect a legitimate interest of the employer and the impact of said rule upon an employee’s interests.²⁸ To apply the second branch of the *KVP* test imparts a two-step inquiry one must first, assess whether there is adequate cause or justification for the rule (i.e., a legitimate

25. *Supra* note 7.

26. *Supra* note 7 at 424.

27. *KVP*, *supra* note 6 at 85.

28. *Canadian Labour Arbitration*, *supra* note 6 at para. 4:1554 and cases cited therein.

employer interest to be protected or objective facilitated by the operation of the rule), and second, assess the reasonableness of the rule by considering whether the employer's interest could be protected or facilitated in a less intrusive fashion.²⁹ Under the *KVP* test, the greater the infringement of a rule on an employee's off-duty conduct, the more pressing and substantial must be the employer's interest if the rule is to be upheld as a legitimate exercise of management rights. The same analysis applies to assessing discipline imposed as a consequence of breaching such a rule.³⁰ As drug and alcohol policies necessarily restrict off-duty conduct that results in workplace impairment, the application of the *KVP* test places a high burden on employers to justify such policies as being reasonably necessary to protect a legitimate interest.

Applying *KVP*, the Board in *Provincial-American* found universal mandatory drug and alcohol testing to be manifestly unreasonable, though reasonable cause testing for employees in safety-sensitive positions would be permitted if based upon objective indicia of impairment. In reaching its conclusion, the Board noted that there was no evidence of a substance abuse problem in the workforce and no indication that the existing medical certification processes were ineffective in curbing on-duty impairment. While this aspect of the holding in *Provincial-American* under the second branch of the *KVP* test suggests that drug and alcohol testing [except for reasonable cause] is permitted only as a response to documented substance abuse problems in the workplace,³¹ recent authorities have accepted that employers in risk-sensitive enterprises can take a proactive approach to managing the risk of workplace impairment.³²

The impact of *KVP* on employers in risk-sensitive industries is that

29. See e.g. *Re Esso Petroleum and Communications, Energy & Paperworkers' Union, Local 614* (1994), 56 L.A.C. (4th) 440; [1994] B.C.C.A.A. No. 244 (McAlpine et al.) [*Esso*].

30. *Re Trimac Transportation Services - Bulk Systems and Transportation Communications Union* (1999), 88 L.A.C. (4th) 237 (Burkett) [*Trimac*]. At page 258 in that decision, the Board held that: "while the debate centres on the reconciliation of two competing interests, the contractual mechanism for determining which of the competing interests is to be given effect is the just cause provision. If an employer rule or policy is to have teeth, it is by means of the employer's power to discipline. Employees who disregard or otherwise refuse to comply with an employer rule or policy leave themselves open to discipline. However, discipline can only be imposed for just cause such that it is open to a union to challenge the enforceability of a rule or policy as constituting an unwarranted invasion of privacy."

31. See e.g. *Re C.H. Heist Ltd. and E.C.W.U., Local 848* (1991), 20 L.A.C. (4th) 112 (Verity) [*Heist*] and *Procor*, supra note 23.

32. *Canadian National*, 2000, supra note 16 at 378; *Dupont*, supra note 18 at 416; *Re Continental Lime Ltd. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local D575* (2002), 105 L.A.C. (4th) 263 (Freedman) [*Continental Lime*].

although there will always be a legitimate interest in avoiding the dire consequences of accidents due to the impaired performance of safety-sensitive duties, the legitimacy of workplace drug and alcohol testing will turn on whether such testing is the least intrusive effective means of preventing workplace impairment. If so, the intrusion on employee privacy is justifiable. If not, the rule or portion thereof will be unenforceable as unreasonable. In that regard, "reasonableness" is determined on the particular facts in each case, depending as much on the technology of drug and alcohol testing and its manner of application, as on the industry and employees to which it is applied.

Arbitrators utilizing the *KVP* criteria in assessing the reasonableness of workplace drug and alcohol policies and their implementation led to an emergence of identifiable trends in the early arbitral jurisprudence. These trends included: acceptance of reasonable cause drug and alcohol testing for employees in safety-sensitive positions (based on objective indicia of impairment),³³ prohibitions on mandatory universal drug and alcohol testing³⁴ and concomitant restriction of drug and alcohol testing to employees engaged in safety-sensitive duties (even where universal testing is required by a contract to which the employer is a party),³⁵ acceptance of whistle-blowing provisions requiring employees to report off-duty conduct of co-workers that gives rise to a reasonable suspicion of workplace impairment,³⁶ acceptance of random drug and alcohol testing as a condition of reinstatement following termination for workplace impair-

33. *Heist*, *supra* note 31; *Canadian National, 2000*, *supra* note 16; *Esso*, *supra* note 29; *Re Metropol Security, a division of Barnes Security Systems Ltd. and United Steelworkers of America, Local 5296* (1998), 69 L.A.C. (4th) 399 (Whitaker) [*Metropol*]. But see *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, 1999 CarswellOnt 1951 (OLRB) (eC) [*Sarnia*]. *Sarnia* is as yet the only reported decision in which a policy that provided for reasonable cause drug testing was struck down in its entirety. In the authors' view, the reasons in support of the ruling in *Sarnia* have been largely negated by the Ontario Court of Appeal's ruling in *Entrop*; *supra* note 4.

34. *Ibid.*

35. *Metropol*, *supra* note 33, in which it was held that an employer cannot impose drug and alcohol testing on employees engaged in non-safety-sensitive duties where the sole reason for so doing is to meet a customer's request pursuant to a contract of service; *Heist*, *supra* note 31, in which it was held that an employer could not suspend an employee in a non-safety-sensitive position following suspected on-duty drug use at owner's request under terms of its drug and alcohol policy.

36. *Canadian National, 2000*, *supra* note 16 at 397. See also *infra* note 82, *Occupational Health and Safety Act*, R.S.N.L. 1990, c.O-3, s.6; *Occupational Health and Safety Act*, S.N.S. 1996, c.7, s.17(2), which provisions require employees to inter alia "report immediately to his/her employer or supervisor a hazardous condition when they come to his/her attention." But see *Re Fording Coal Limited and United Steel Workers of America, Local 7884* (2000), 88 L.A.C. (4th) 408 (Hope).

ment or substance abuse,³⁷ prohibitions on the imposition of automatic disciplinary penalties for breach of a workplace drug and alcohol policy as being inconsistent with just cause provisions in collective agreements³⁸ and the sanction of proportionate disciplinary responses to breaches of workplace drug and alcohol policies, including refusals by employees in safety-sensitive positions to submit to reasonable cause drug or alcohol testing.³⁹

Human rights legislation, and in particular the duty to accommodate, impacts on workplace drug and alcohol testing. In doing so, it modifies the interests to be balanced, but not the balancing of interests test. To appreciate this distinction it is necessary to examine the general human rights principles affecting the issue of workplace drug and alcohol testing before turning to its application in the oil industry and, particularly, the offshore.

III. *Impact of Human Rights Legislation Generally*

1. *Substance Abuse as Disability*

Every jurisdiction in Canada has human rights legislation which prohibits discrimination in employment on the basis of physical or mental disability.⁴⁰ While each jurisdiction defines physical or mental disability differently, the view reflected in recent jurisprudence is that dependency

37. *Re Canadian National Railway Co. and United Transportation Union* (1990), 11 L.A.C. (4th) 364 (Picher), wherein random drug testing was imposed for a period of three years following an employee's positive test for marijuana use; *Re City of Winnipeg and Canadian Union of Public Employees, Local 500* (1991), 23 L.A.C. (4th) 441 (Baizley *et al.*) [*City of Winnipeg*], wherein random drug and alcohol testing for one year was upheld as a return to work condition following a suspension for on-duty drug use; *Re Lear Seating Canada Inc. and Amalgamated Clothing & Textile Workers Union, Local 753* (1993), 33 L.A.C. (4th) 307 (Craven), wherein random drug and alcohol testing was imposed as condition of reinstatement following termination for on-duty drug use.

38. *Trimac*, *supra* note 30.

39. *Re CP Rail and Canadian Automobile Workers, Rail Division, Local 101* (1991), 22 L.A.C. (4th) 164 (Picher), in which a discharge was upheld due to both employee dishonesty and a refusal to submit to drug testing on spurious grounds (i.e., unfounded concerns that test results could be tampered with); *Re National Gypsum (Canada) Ltd. and International Union of Operating Engineers, Locals 721 & 721B* (1997), 67 L.A.C. (4th) 360 (MacKeigan) [*National Gypsum*], wherein it was held that disciplinary action was permitted in response to an employee's refusal to submit to reasonable cause drug and alcohol testing, provided that "reasonable cause" for requiring the employee to submit to a test existed and that the basis for same was clearly communicated to the employee.

40. See generally Stacey Reginald Ball, *Canadian Employment Law*, vol. 2, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2003) at para. 33:60.

on drugs⁴¹ or alcohol⁴² is a protected form of disability. Though only Nova Scotia explicitly includes the “perception” of a disability within its definition of disability,⁴³ courts, arbitrators, and human rights tribunals in other jurisdictions have interpreted human rights legislation to prohibit discrimination in employment on the basis of a perceived disability.⁴⁴ In this regard, it should be emphasized that parties to a collective agreement cannot contract out of the protections afforded by human rights legislation.⁴⁵ A necessary corollary of this rule is that any provisions in a collective agreement purporting to abrogate the protections afforded by the applicable human rights legislation are of no force and effect as contrary to public policy.⁴⁶

2. *Rights of Substance Dependent Individuals Under Human Rights Legislation*

a. *Establishing Discrimination*

If an employee has or is perceived to have a drug or alcohol dependency problem, the issue then becomes whether, through testing or a response to a test result, he or she has been discriminated against by the employer. Although “discrimination” is by its nature contextual, the Supreme Court of Canada has described it in the following terms:

What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in the Court, in isolating an acceptable definition ... I would say then that discrimination may be

41. See e.g. *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*, 1998 CarswellNat 1352 (F.C.A.) (eC) [*Civil Liberties*].

42. See e.g. *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)*, 2002 CarswellSask 757 (Q.B.) (eC); *Niles v. Canadian National Railway Company* (1992), 94 D.L.R. (4th) 33 (F.C.A.); *Handfield v. Board of School Trustees, School District No. 26*, (1995) 25 C.H.R.R. D/452 (BCCHR); *Williams v. Elty Publications Ltd.* (1992), 20 C.H.R.R. D/52 (BCCHR).

43. *Human Rights Act*, R.S.N.S. 1989, c.214, s.3(1). But see *Human Rights Code*, R.S.O. 1990, c.H-19, s.10 as am. by S.O. 2001, c.32, s.27(2). Consequent upon this amendment, the previous definition of “handicap,” which was interpreted to include “perceived” disabilities, was replaced with a definition of “disability” that makes no reference to perceived disabilities.

44. *Canadian Employment Law*, supra note 40 at para. 33:60.4; *The Law of Human Rights in Canada: Practice and Procedure*, supra note 5 at para. 5.30.1; and see especially *Newfoundland (Human Rights Commission) v. Health Care Corporation of St. John's*, 2003 CarswellNfld 54 (C.A.) (eC).

45. *Newfoundland (Green Bay Health Care Centre) v. N.A.P.E.* (1996), 140 Nfld. & P.E.I.R. 63 (S.C.C.).

46. *Ibid.*; see also *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.

described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁴⁷

The authorities are clear that the initial onus is on an employee to establish a prima facie case of discrimination. This means that the employee must point to facts which would support a finding of discrimination, described above, on the basis of a disability. In this regard, all an employee need establish is that the impugned conduct was to some degree based on the employee's actual or perceived disability.⁴⁸ Some examples of employer responses to positive drug or alcohol test results that could be viewed as potentially discriminatory include: imposition of random drug testing to monitor drug use, imposition of random alcohol testing for employees in non-safety-sensitive positions, discharge, suspension, reassignment to non-safety sensitive duties (even without loss of pay or benefits) and denial of promotion or transfer.

b. Employer Defences – Before and After Meiorin

If an employee fails to make out a prima facie case of discrimination, the matter is at an end. However, if upon consideration of these threshold issues, an employee makes out a prima facie case of discrimination, the burden then shifts to the employer to defend the allegation and prove that the allegedly discriminatory conduct was justified or was in fact not discriminatory in a manner prohibited under human rights legislation.

As much of the human rights jurisprudence concerning workplace drug and alcohol testing arose prior to the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin)*,⁴⁹ it is useful to examine briefly the previous approach to discrimination. Prior to *Meiorin*, the defences available to an

47. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 173-175; *Gibbs v. Battliefords and District Co-operative Ltd.*, [1996] 3 S.C.R. 566 at para. 20.

48. *The Law of Human Rights in Canada: Practice and Procedure*, supra note 5 at paras. 15:10-15:20.2.

49. [1999] 3 S.C.R. 3 [*Meiorin*].

employer charged with discrimination depended on whether the policy or actions were classified as direct or adverse effect (indirect) discrimination. Direct discrimination occurred where a rule or practice specifically targeted a group or class on the basis of a prohibited ground of discrimination, whereas adverse effect discrimination arose where a rule of neutral application imposed adverse consequences on such individuals. If the policy or actions were found to be directly discriminatory, the employer bore the onus of establishing that the policy or action constituted a bona fide occupational requirement ("BFOR"), i.e., that the policy or action was imposed honestly and in good faith (subjectively) and was reasonably necessary to the performance of the work without placing undue burdens on employees (objectively). If the employer failed to meet this burden, the policy was struck down in its entirety, but if it succeeded, the policy was upheld and no issues of accommodation arose. By contrast, if the discriminatory policy fell into the adverse effect category, the employer had to prove that the policy was imposed honestly and in good faith, that it was reasonable insofar as it was rationally connected to job performance and that the discriminatory effect of the policy could not be ameliorated without undue hardship.⁵⁰

As a result of *Meiorin*, the distinction between direct and adverse discrimination has become largely irrelevant. To determine whether a discriminatory rule has a bona fide and reasonable justification, it must be established under the following test:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job [objectively];
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose [subjectively]; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer [objectively].⁵¹

50. *Leading Cases on Labour Arbitrations*, *supra* note 20 at 13-71-2.

51. *Meiorin*, *supra* note 49 at para. 54.

Consequently even if an employer can establish that it had an objectively rational reason to impose drug and alcohol testing and that it did so in good faith, whether the testing infringes human rights legislation will depend on whether, in the circumstances, the disadvantage imposed by the rule can be alleviated by individual accommodation to the point of undue hardship.

c. Accommodation and Undue Hardship

Accommodation to the point of undue hardship is always a question of fact dependent on the circumstances of each case. Nevertheless, the Supreme Court of Canada has identified certain factors to be taken into account in determining whether such accommodation is possible. In *Central Alberta Dairy Pool v. Alberta Human Rights Commission*, Wilson J. held that:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar—financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.⁵²

As a general rule, undue hardship means something more than a negligible effect or inconvenience. "Undue hardship" has been interpreted to mean that a considerable degree of hardship can be required in the accommodative process.⁵³ Notably, both the Canadian Human Rights Commission and the Ontario Human Rights Commission have indicated that an employer will meet the test for undue hardship if it can show that either the cost of accommodation would alter the nature or affect the viability of the enterprise, or that notwithstanding accommodative efforts, health or safety risks to workers or members of the public are so serious that they outweigh

52. 1990 CarswellAlta 149 at para. 74 (S.C.C.) (eC) [*Central Alberta Dairy Pool*].

53. *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577 (S.C.C.).

the benefits of providing individualized accommodation or consideration to a worker with an addiction or dependency problem.⁵⁴

IV. *Leading Human Rights Jurisprudence on Workplace Drug and Alcohol Policies*

The most significant decision preceding the Ontario Court of Appeal's ruling in *Entrop* is that of the Federal Court of Appeal in *Canadian Civil Liberties Assn. v. Toronto Dominion Bank (Civil Liberties)*.⁵⁵ In that case, a bank introduced a universal drug and alcohol policy, mandatory for lower level employees, requiring drug and alcohol testing through urinalysis. The purpose of the policy was to facilitate a safe, healthy, and productive workplace, safeguard funds and confidential banking information, and protect the bank's reputation in the community. Employees who tested positive were required to attend treatment and rehabilitation counseling at the employer's expense, with the provision that if rehabilitation failed or was refused by the employee, termination would follow.

The crux of the Court's decision turned on the fact that the policy at issue, treating casual drug and alcohol users the same as dependent users, linked loss of employment with drug or alcohol use. Consequently, as drug and alcohol dependencies were accepted as protected disabilities, the effect of the policy was prima facie discriminatory against substance-dependent employees. The Court rejected the notion that only an individual's failure to comply with the policy would result in loss of employment and held that provision of accommodation cannot save an otherwise discriminatory rule that is unreasonable. Drug and alcohol testing through urinalysis could not be shown to be rationally connected to the objective of ensuring the efficient, safe, and honest performance of the non-safety-sensitive duties performed by those subjected to testing.

Notwithstanding the foregoing, *Civil Liberties* does stand for the proposition that drug testing is acceptable in certain circumstances. As noted by Macdonald J.A.:

54. Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing*, (5 August 2002), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/English/publications/drug-alcohol-policy.shtml>>; Canadian Human Rights Commission, *Policy on Drug and Alcohol Testing* (10 July 2002), online: Canadian Human Rights Commission <http://www.chrc-ccpd.ca/legislation_policies/alcohol_drug_testing-en.asp>.

55. *Civil Liberties*, *supra* note 41.

If, however, an employee exhibits poor performance and the Bank believes it may be related to a drug dependency, then (and only then) should the Bank be able to test the employee and, if necessary, send the employee to some form of rehabilitation or counseling program. To comply with the reasonable accommodation component an employee cannot be tested *unless after receiving treatment his or her work performance remains inadequate*. Thus, if after receiving treatment, the employee's work performance is fine, no further tests should be undertaken. If after receiving treatment the employee's performance continues to remain inadequate, the Bank is justified in re-testing and dismissing the employee if the poor performance is related to drugs. The Bank need not send the employee out for further treatment.⁵⁶

Civil Liberties set the stage for *Entrop*, which remains the most influential decision on the issue of workplace drug and alcohol testing. The plaintiff in that case, Mr. Martin Entrop, was employed at Imperial Oil's Sarnia Refinery from the mid-1970s, and from 1987 held the position of senior control board operator responsible for controlling several oil refining processes. In 1991, Imperial Oil introduced its new drug and alcohol policy. Under the policy, safety-sensitive positions were identified as those which "have a key and direct role in an operation where impaired performance could result in a catastrophic incident affecting the health or safety of employees, sales associates, contractors, customers, the public or the environment." Given Mr. Entrop's duties, his position was classified as safety-sensitive.

As required by the policy, Mr. Entrop disclosed that he had previously been an alcoholic, but also that he had not had a drink since 1984. Nevertheless, on receipt of this information, Imperial Oil reassigned Mr. Entrop to a non-safety-sensitive position at the same rate of pay, which led to his filing a complaint with the Ontario Human Rights Commission. By the time the case worked its way to the Court of Appeal, the issues to be determined related to whether the provisions of the policy applicable to Mr. Entrop infringed the Ontario Human Rights Code (the "Code"). In that regard, it should be emphasized that only the aspects of the policy dealing with alcohol testing and the consequences were properly before the Court of Appeal. Therefore, other aspects of the decision dealing with drug testing are obiter. As will be shown, however, the decision has persuasive

56. *Civil Liberties*, *supra* note 41 at para. 38 [emphasis in original]. However, the Federal Court of Appeal did note that the ability to impose workplace drug testing may differ for employees in safety-sensitive operations.

force and is indicative of the way in which similar issues will likely be dealt with by other courts.

As a starting premise, it was accepted that drug or alcohol dependency was a protected handicap or disability under Ontario human rights legislation. The policy imposed sanctions ranging from a refusal to hire a job applicant to discipline up to and including dismissal for anyone testing positive for drugs or alcohol. Employees in safety-sensitive positions were subject to automatic dismissal following a positive drug or alcohol test. As casual drug and alcohol users were subject to the same penalties as substance abusers under the policy, and because “perceived disability” is protected under the Code, anyone testing positive was entitled to the protection of the Code. In other words, the policy treated anyone who tested positive as a “perceived” substance abuser because it was assumed, as reflected by the penalties imposed, that anyone testing positive would likely be impaired at work presently or in the future. A *prima facie* case of discrimination was thus established and the onus shifted to the employer to defend the policy.⁵⁷

In assessing the employer’s defence, the Court of Appeal applied the *Meiorin* test to determine the compliance of the policy with the Code. In applying the first part of the test, Laskin J.A. noted that the focus of this part of the test is not on the validity of the rule, but its general purpose (i.e., whether the rule was adopted for a purpose rationally connected to the performance of the job). Insofar as “an accident at a refinery can have catastrophic results for employees, the public and the environment,” the purpose of the policy, being to ““minimize the risk of impaired performance due to substance use’ in order ‘to ensure a safe, healthy and productive workplace,’”⁵⁸ satisfied the first part of the test. Similarly, the Court held the second part of the test was satisfied in that Imperial Oil introduced the policy honestly and in good faith as shown by the fact that it had consulted widely with both its employees and experts in the field of substance abuse.⁵⁹ The crux of the decision relates to the application of the third part of the *Meiorin* test and whether the provisions of the policy were reasonably necessary to accomplish Imperial Oil’s purpose, Imperial Oil could provide individualized accommodation without suffering undue hardship. Generally, Laskin J.A. noted that:

57. *Supra* note 4 at 17-18.

58. *Supra* note 4 at para. 94.

59. *Supra* note 4 at paras. 18-19.

An employer's workplace rule may fail to satisfy the third step in the *Meiorin* test in several ways. For example the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than reasonably necessary to achieve the employer's purpose; the rule may unreasonably not provide for individual assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose.⁶⁰

The Court of Appeal found that the provisions of the policy concerning both random and pre-employment drug testing infringed the Code. Although urinalysis can show the presence of drug metabolites, indicating past drug use, it cannot measure present impairment *vis-à-vis* an individual's ability to perform his or her job safely. As a positive drug test cannot provide evidence of impairment or the likelihood of future impairment, it was found not to be reasonably necessary to the fulfilment of Imperial Oil's purpose. Further, the automatic termination of safety-sensitive employees for a positive drug test was too severe in that dismissal exceeded what was reasonably necessary to ensure a safe workplace and precluded accommodation. It was held that pre-employment drug testing suffered from the same two flaws and was likewise contrary to the Code.⁶¹

The provisions of the policy dealing with random alcohol testing were, however, another matter. The Court of Appeal set aside the Board's ruling by holding that random alcohol testing of employees in safety-sensitive positions is permitted by the Code as long as individualized accommodation is provided to employees who test positive. Unlike urinalysis, breathalyser testing can show present impairment and is therefore a reasonable means of preventing workplace impairment.⁶² The 0.4 percent blood-alcohol standard was accepted given expert evidence indicating that most individuals show discernible signs of impairment at that level of intoxication.⁶³ As to the issue of accommodation, Laskin J.A. held the impugned policy would necessarily include sanctions less severe than termination

60. *Supra* note 4 at para. 97.

61. *Supra* note 4 at paras. 99-105.

62. The Court's rationale suggests that whether or not random testing is permitted depends on the capacity of the test being administered to show present impairment. Under this reasoning, if and when drug testing technology develops to the point that such tests can determine if a person is presently impaired by drug use, random drug testing would be permitted of employees in safety-sensitive positions. Employers would therefore be well-advised to stay abreast of developing drug testing technologies.

63. Compare *Dupont*, *supra* note 18 at 434. In that case, the Board accepted that a post-rehabilitation or post-policy breach testing regime where zero consumption is considered to be a condition of the reinstatement permits a ratio of 0.02 blood alcohol.

and, where appropriate, provision of employee support through facilitation of treatment or rehabilitative programs.⁶⁴

The sections of the policy authorizing post-incident, post-accident, and near-miss drug and alcohol testing were upheld as consistent with the Code. However, as only alcohol testing can show present impairment, drug testing in these situations is permitted only as a necessary “facet of a larger assessment of drug abuse.”⁶⁵

The mandatory disclosure provisions of the policy were found to be reasonable, but only to a point. It would be unreasonable to require an employee to disclose a previous substance abuse problem in respect of which the risk of recurrence is no greater than that of a member of the general public of developing a dependency problem. That being the case, and based upon the expert evidence before the Court of Appeal, mandatory disclosure of past dependency problems is permitted by the Code if limited to substance abuse problems suffered within five to six years of successful remission for drug dependency and six years for alcohol dependency.⁶⁶ Similarly, mandatory automatic reassignment of employees following disclosure of a past substance abuse problem was found to violate the Code for the same reasons. However, temporary reassignment to non-safety-sensitive duties may be permitted where an employee has a current or recently active dependency problem.

Not surprisingly, in light of the foregoing, the Court of Appeal found the policy provisions requiring two years' rehabilitation followed by five years' abstinence to be unreasonable and overly broad, since such a lengthy period would not be necessary in all cases. The corollary of this finding noted by Laskin J.A. is that universal boilerplate conditions on reinstatement are similarly unreasonable since such conditions are not necessary in all cases and should reflect individualized accommodation appropriate to each situation.⁶⁷

64. *Supra* note 4 at paras. 106-112.

65. *Supra* note 4 at para. 114. But see Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing*, *supra* note 54 at 6. Though neither the Board nor the Court of Appeal elaborated on what a “larger assessment of drug abuse” entails in this context, the Ontario Human Rights Commission suggests that “this larger assessment could include a broader medical assessment under a physician’s care where there are reasonable grounds to believe that there is underlying problem of substance abuse. Additional components of a larger assessment may include employee assistance programs, peer reviews and supervisory reviews.”

66. The actual period of time during which a person with a previous substance abuse problem is at a greater risk of suffering a recurrence than a member of the public is of developing a substance abuse problem is a question of fact dependent on expert evidence. Therefore, if similar policy provisions in other cases are subject to judicial challenge, the applicable period of time for reporting prior drug or alcohol dependency problems could vary from those accepted by the Court of Appeal.

67. *Supra* note 4 at para. 124.

Interestingly, the sections of the policy requiring drug and alcohol testing as a component of certification prior to promotion or transfer into a safety-sensitive position were upheld.⁶⁸ Taken with the prohibition on pre-employment drug and alcohol testing, it appears that an employer, as part of an overall certification process, can require incumbents of safety-sensitive positions to submit to drug and alcohol testing, provided that individualized accommodation is given to individuals who test positive.

While *Entrop* has attracted considerable academic comment,⁶⁹ the case has received surprisingly little judicial treatment outside the arbitral context in connection with workplace drug and alcohol testing. Nevertheless, one recent authority suggests that courts will apply the obiter comments in *Entrop* concerning drug testing.

*Alberta (Human Rights & Citizenship Commission) v. Elizabeth Metis Settlement*⁷⁰ provides some guidance on the likely treatment of *Entrop* by other courts in connection with drug and alcohol testing. In that case, the employer implemented a drug and alcohol testing policy in response to a documented workplace substance abuse problem. The policy required *inter alia* mandatory universal random drug testing, and the case arose following the dismissal of two municipal administrative employees for refusing to undergo drug and alcohol testing. The court adopted the reasons set forth in *Entrop* and found that the mandatory universal random drug testing provisions of the policy were *prima facie* discriminatory in that adverse consequences followed in the event that employees tested positive.⁷¹ Nevertheless, given the cloistered nature of the community and the exalted position of municipal employees therein, in applying the *Meiorin* test, the court found that employees remaining substantially free from drug and alcohol use was a *bona fide* occupational requirement and upheld the policy on the basis that the employees were to serve as role models for a community suffering from widespread substance abuse problems. An appeal of this decision has been filed, but has not been adjudicated.⁷²

68. *Supra* note 4 at paras. 128-9.

69. See e.g. *Canadian Employment Law*, *supra* note 40 at para. 33:60.4; *The Law of Human Rights in Canada: Practice and Procedure*, *supra* note 5 at para. 5.30.1; Brian Johnston & Tara Erskine, "Testing the Limits: Alcohol & Drug Testing for Offshore Employees" 24 Dal. L.J. 316.

70. 2003 CarswellAlta 570 (Q.B.) (eC) [*Elizabeth Metis Settlement*].

71. *Ibid.* at paras. 20-41.

72. In the authors' respectful view, it appears that the court in the *Elizabeth Metis Settlement* may have misapplied the third branch of the *Meiorin* test by failing to consider whether accommodation was possible, i.e., by assuming that the issue of accommodation did not arise once it has been established that the discriminatory conduct is rationally connected to the fulfillment of a legitimate business-related objective of the employer.

As held in *Entrop*, whether or not the effect of a drug and alcohol testing policy constitutes direct or indirect discrimination is largely irrelevant in light of *Meiorin*. Nevertheless, under both the previous jurisprudence and the three-part *Meiorin* test, in order for any prima facie discriminatory policy to be upheld, it must be reasonable. In this context, the reasonableness requirement means that the imposition of drug and alcohol testing must be rationally and necessarily connected to a legitimate business interest. As noted by several recent authorities, assessing the reasonableness of a workplace drug and alcohol testing policy under the *Meiorin* test requires the same balancing of interests test applied under the *KVP* criteria.⁷³ Arbitral jurisprudence can therefore be particularly helpful in delineating some of the finer points to be considered in developing and administering a workplace drug and alcohol policy.

V. Emerging Trends of Apparent Judicial Consistency

1. Considerations in Developing Drug and Alcohol Policies

a. Union Involvement in Development and Administration of Drug and Alcohol Policies

Employers are not under a positive obligation to involve unions in the development or implementation of drug and alcohol policies as such authority is within the purview of management rights and thus subject only to the *KVP* guidelines.⁷⁴ However, this is not to suggest that there are no advantages to involving unions at the development stage, or that unions have no role to play in administering drug and alcohol policies.

In situations where a union has been voluntarily consulted by the employer and involved in the development of a drug and alcohol policy to which it later consents, the focus of any subsequent challenge to tests imposed in accordance with the policy is distinct from situations such as the *KVP* case in which testing is required under a unilaterally imposed policy. This is exemplified by the Boards' decisions in *Re Fluor Constructors Canada Ltd. and International Brotherhood of Electrical Workers, Local 424*⁷⁵ and *Re Construction Labour Relations and United Broth-*

73. *Metropol*, *supra* note 33 at 408; *Trimac*, *supra* note 30 at 277-79; *Canadian National, 2000*, *supra* note 16 at 386-7; *Dupont*, *supra* note 18 at 419-422.

74. *Dupont*, *supra* note 18 at 413-414. The Board in *Dupont* rejected the argument that the union, as exclusive bargaining agent, ought to have been involved in negotiating the terms of the drug and alcohol policy as same represent terms and conditions of employment.

75. (2001), 100 L.A.C. (4th) 391 (Elliott) [*Fluor*].

erhood of Carpenters and Joiners of America, Locals 1325 and 2103 (Construction Labour Relations).⁷⁶ In each case, the Board dismissed allegations of discriminatory testing because the union, as the employees' exclusive bargaining agent, had been consulted and agreed to the terms of the policy at issue (i.e., the arbitrator's role was to apply the terms of the policy as agreed between the parties). While the reasoning in each case is sparse on the point, it appears that the Boards' rulings, following a thorough review of jurisprudence, were predicated on their findings that the agreed-upon policy at issue in each instance was compliant with human rights legislation and in conformity with the rationale in *Entrop*.

As all human rights legislation imposes reciprocal tripartite duties on employers, employees, and unions *vis-à-vis* accommodative responsibilities,⁷⁷ arbitrators require union involvement in return-to-work, reinstatement or after-care agreements governing the ongoing terms of employment following an employee's breach of a drug and alcohol policy. However, implicit in the statutorily imposed duty to accommodate is a requirement that unions not unreasonably withhold their consent to after-care, return-to-work or reinstatement conditions, including, where necessary, the imposition of random drug and alcohol testing.⁷⁸

b. *Extrinsic Factors Justifying Imposition of Workplace Drug and Alcohol Policy*

Insofar as offshore oil rigs and platforms are inherently safety-sensitive work areas, it is highly unlikely that further support would be necessary to justify the proactive imposition of a drug and alcohol policy to manage the risk of workplace impairment.⁷⁹ Under the second branch of the *KVP* criteria, this principle has been expressed to mean that the test of justification, or adequate cause, is met where management can show either evidence of a substance abuse problem in the workplace or reasonable grounds for concern given the severity of potential consequences to persons, property, or the environment in the event of a workplace accident.⁸⁰

76. (2001), 96 L.A.C. (4th) 343 (Beattie *et al.*) [*Construction Labour Relations*].

77. See e.g. *Canadian Human Rights Act*, *infra* note 119 ss. 10, 25; *Human Rights Code*, *infra* note 120 ss. 9, 2(k)(n); *Human Rights Act*, *infra* note 121 ss. 5, 3(k); see also *Irving*, *infra* note 84 at 342; *Dupont*, *supra* note 18 at 427-428.

78. *Irving*, *ibid.* at 342.

79. *Canadian National, 2000*, *supra* note 16.

80. *Continental Lime*, *supra* note 32 at 284.

To facilitate a broad purposive approach to determining whether the imposition of workplace drug and alcohol testing is justifiable, the Board in *Re Continental Lime Ltd. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local D575 (Continental Lime)* considered, *inter alia* the statutory obligations and liabilities of the employer. In that case, provisions enacted under the applicable occupational health and safety legislation imposed a duty on the employer to take steps to prevent the impairment of employees through drug or alcohol use, a duty which was found to justify the imposition of a workplace drug and alcohol testing policy.⁸¹

Though the legislatively mandated duties on employers in the Atlantic offshore oil industry are less explicit than those at issue in *Continental Lime*,⁸² under the current occupational health and safety regime,⁸³ employers are required to take all reasonable steps necessary to ensure that employees work free from any impairment that could create a risk of injury to themselves or others. In the authors' view, this obligation is binding on both employers and employees and lends further support to the imposition of workplace drug and alcohol testing as a means of ensuring workplace safety in the Atlantic offshore.

81. *Continental Lime*, *supra* note 32 at 282-283; see also *Canadian National, 2000*, *supra* note 16 at 376-378.

82. At issue was Man. Reg. 228/94, s. 31. This statutory requirement, considered by the Board in *Continental Lime*, explicitly provides that an employer shall take all reasonable steps to prevent a worker from: "bringing alcoholic beverages or drugs to a mine, consuming or keeping alcoholic beverages or drugs at a mine . . . and working in or about a mine while under the influence of alcohol or under the influence of a drug that impairs or could impair the worker's ability to work safely." Compare *Occupational Health and Safety Act*, R.S.N.L. 1990, c.O-3, ss. 4, 5; *Occupational Health and Safety Regulations*, Nfld. Reg. 1165/96, s. 27; *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, ss. 13, 17, 28. See also *Newfoundland Offshore Petroleum Drilling Regulations*, S.O.R./93-23, s. 136; *Nova Scotia Offshore Petroleum Drilling Regulations*, S.O.R./92-676, s. 136; *Petroleum Occupational Health and Safety Regulations - Newfoundland*, Canada-Newfoundland Offshore Petroleum Board <<http://www.cnopb.nfnet.com>> (last modified: July 29, 2003), s. 17, enforced pursuant to s. 138, *Newfoundland Accord Act*, *infra* note 123; *Nova Scotia Offshore Petroleum Occupational Health & Safety Requirements*, Canada-Nova Scotia Offshore Petroleum Board <<http://www.cnsopb.ns.ca/Healthsafety/healthsafety.html>> (last modified: June 30, 2003), s. 17. Though the aforementioned regulatory provisions require that employers in the offshore maintain a safe workplace and concomitantly that employees work free from impairment, there are as yet no regulatory provisions in the offshore requiring employers to take active measures to ensure that employees comply with this obligation.

83. *Newfoundland Accord Act*, *infra* note 122 at s. 152; *Nova Scotia Accord Act*, *infra* note 123 at s. 157. Under the *Accord Acts*, provincial occupational health and safety legislation applies in the offshore as respectively Newfoundland and Nova Scotia "social legislation."

2. Interpretation and Application of Drug and Alcohol Policies

a. Who can be tested? Safety-sensitive vs. Non-safety-sensitive Positions

Most authorities restrict drug and alcohol testing to incumbents of, or successful applicants for, safety-sensitive positions. Whether or not a particular position is safety-sensitive is necessarily a question of fact in all the circumstances. Simply classifying a position as safety sensitive does not automatically make it so, and there must be a factual basis for any such designation.⁸⁴ In that regard, recent authorities provide support for concluding that all positions on an offshore oil rig or platform are inherently safety-sensitive.

Two recent authorities are of particular relevance in addressing this issue: *Re J.D. Irving Ltd. and Communication, Energy and Paperworkers' Union, Locals 104 and 1309 (Irving)*⁸⁵ and *Re Dupont Canada Inc. and CEP, Local 28-O (Dupont)*.⁸⁶ The drug and alcohol policy in *Irving* defined "safety-sensitive position" without reference to the degree of supervision to which such positions are subject. The union argued, based on *Entrop*, that in order for a position to be correctly designated as "safety-sensitive," it had to be one in which there was little or no direct supervision. The Board resoundingly rejected this argument and held that:

Bearing in mind that the impairment of an individual by drugs or alcohol is not always readily apparent and detectable, from a purposive standpoint, direct oversight, whether constant or occasional, by a supervisor does not change the safety-sensitive nature of the work being performed. . . .

In our view for the purposes of drug and alcohol testing the identification of safety-sensitive positions is more usefully achieved by asking what consequences are risked if the person performing a particular kind of work does so impaired by drugs or alcohol. . . .

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

84. *Re Osberg and Westcan Bulk Transport Limited*, [2001] C.L.A.D. No. 122 (QL); *Continental Lime*, *supra* note 32 at 265.

85. (2002), 111 L.A.C. (4th) 328 (Picher *et al.*) [*Irving*].

86. *Supra* note 18.

equipment that he or she operates and the nature of the material he or she handles which must be at the core of the determination of whether his or her position is safety sensitive.⁸⁷

The Board in *Dupont* found that the risks attendant upon the performance of an employee's duties can be as much a function of the materials and equipment to which he or she is exposed as the nature of the duties themselves. The evidence before the Board showed that the chemical plant employees routinely rotated through safety and non-safety-sensitive positions and that all employees had access to potentially dangerous equipment and materials. Consequently, all employees were held to occupy safety-sensitive positions.⁸⁸

In the authors' view, the principles established in *Irving* and *Dupont* are unassailable and applicable to employees of offshore oil rigs and production platforms. Considering the difficulty of detecting workplace impairment, particularly drug use, coupled with the competing demands on supervisors, it is evident that restricting drug and alcohol testing to employees working with little or no supervision would render impossible any meaningful attempt to manage the risk of workplace impairment. All employees in the offshore, from cooks to drilling crews, perform duties, access and utilize equipment and materials that could, if misused, place themselves, others and the environment at serious risk. This threat of imminent danger is in fact one of the defining qualities of employment in the offshore. Thus, segregating employees into safety or non-safety-sensitive designations would be a theoretical exercise representing the antithesis of risk management as those working on an oil rig or platform are in the same position as employees in a chemical plant insofar as "the safety of all can hinge on the wellness of one."⁸⁹

b. *Drug Testing: Reasonable Cause, Post-Accident and Near-Miss*

As with the administration of any workplace rule, policy or agreement, the starting point must be the language of the policy itself. In most cases, employers in risk-sensitive industries can be expected to structure drug and alcohol policies in accordance with *Entrop* principles.⁹⁰ Consequently,

87. *Irving*, *supra* note 85 at 337-338.

88. *Dupont*, *supra* note 18 at 415-417.

89. *Dupont*, *supra* note 18 at 416.

90. It can therefore be anticipated that many drug and alcohol policies will allow random alcohol tests to be administered, by breathalyser, to employees in safety-sensitive positions.

most drug and alcohol policies will ordinarily provide for drug testing where there is reasonable cause to suspect impairment. "Reasonable cause"⁹¹ has been interpreted to mean that, at a minimum, the risk of impairment from drug use, objectively assessed, exceeds the risk of impairment from minor medical problems (e.g., colds, allergies and headaches) that go largely unnoticed, even in risk-sensitive industries.⁹² This interpretation makes sense, since reasonable cause drug testing would otherwise be indistinguishable from random drug testing.

Although detecting impairment from drug use is a difficult exercise, this dilemma does not alter the reasonable cause threshold employers must meet before an employee can be required to undergo a drug test.⁹³ The issue is one of detection and in that regard, *Re Tembec Inc. and Industrial Wood and Allied Workers of Canada, Local 1-1000*⁹⁴ is a useful authority. In that case, the Board considered the imposition of discipline following the refusal by two employees to submit to drug testing in circumstances where they were observed by three supervisors as "talking loud" and "agitated." The employees appeared "tired looking" and were observed to have "red eyes" and dilated pupils. The policy at issue did not provide examples of the signs of impairment that give rise to a reasonable suspicion, but the Board held that they would likely include, but not be limited to:

abnormal or exaggerated gait;
 alcohol smell on breath;
 excessive coloration, pale or ruddy;
 abnormal (e.g., slurred or stilted) speech;
 exaggerated gestures;
 avoidance of eye contact when speaking;
 dilated pupils;
 unexplained agitation; and
 shaking of, for example, arms or shoulders.⁹⁵

Employers must be cautious in basing their assessment of reasonable cause solely on the reported observations of a single employee. In *National Gypsum*,⁹⁶ it was held that a claim by a co-worker to have smelt marijuana

91. *Supra* notes 21 and 23 and accompanying test. Cultivation of illicit drugs or admission of repeated drug use by employees have been found to constitute reasonable cause to require drug testing.

92. *Trimac*, *supra* note 30 at 272-275.

93. See e.g. *National Gypsum*, *supra* note 39 at 374.

94. [1999] O.L.A. No. 85 (Murray) (QL).

95. *Ibid.* at para. 18.

96. *Supra* note 39.

in the vicinity of another employee, absent any objective indications of impairment, was insufficient to require a drug test under a policy that permitted drug testing "when there are reasonable grounds to suspect impairment." Similarly, the Board in *Re C.H. Heist Ltd. and E.C.W.U. Local 848 (Heist)*⁹⁷ held that in order for a co-worker's allegation to have detected the scent of marijuana on another employee to give rise to a reasonable suspicion of drug use, there had to be objectively verifiable evidence (e.g., signs of smoke, butts or matches proximate to an employee) linking the employee to suspected drug use.⁹⁸

Although it is impossible to enumerate every potential sign of impairment, employers would be well-advised to include some examples of objective indicia of impairment in drug and alcohol policies to better enable employees to recognize, record, and report suspicious behaviour. Similarly, the obligation on employees to disclose to supervisors the identity of anyone exhibiting signs of impairment ought to be included in any workplace drug and alcohol policy.

As with reasonable cause testing, whether a drug test can be required after an accident, incident or near miss will depend on both the facts of a given case and the wording of the policy at issue. Some guidance, however, is provided by the Board's decision in *Construction Labour Relations*, which addressed the legitimacy of requiring an employee to submit to a drug test following an accident in which a minor injury resulted that required medical attention.⁹⁹ Although the injured employee showed no objective signs of impairment at the time of the accident, he was unable to explain how the accident occurred. The policy at issue permitted drug testing where an employee was "involved in an accident, near miss, or other potentially dangerous incident," though "potentially dangerous" was not defined. The Board held that the policy permitted the employer to require an employee to undergo a drug test following any accident that results in an injury requiring medical attention (i.e., any injury requiring more than routine first aid). The Board's ruling in

97. *Supra* note 31.

98. But see *Canadian National, 2000*, *supra* note 16 at 377: "Suppose, for example, that a supervisor enters a warehouse where four individuals are working. The smell of marijuana is clearly detectable and an extinguished "roach" is found. All four employees deny any use of the drug while at work. If, the following day, or perhaps even the following week, each of the employees concerned takes a drug test by urinalysis, and one produces a positive result, the combination of circumstantial evidence, including the odour, the finding of a discarded "roach", and the positive drug test of only one of the four employees would, at a minimum, constitute a factual basis upon which meaningful inferences could be drawn, on the civil standard of the balance of probabilities."

99. *Supra* note 76.

Construction Labour Relations suggests that an employee could be subject to drug testing where he or she narrowly escapes injury that would doubtless have resulted in injuries requiring medical attention.

*c. Alcohol and Drug Related Searches*¹⁰⁰

As a general rule, employers have no absolute right to search the person or personal effects of employees. This flows from a recognition of the intrinsic value of an individual's right to privacy. However, several exceptions to the general rule have evolved in an attempt to balance employee privacy rights with an employer's need to effectively and safely manage the workplace.¹⁰¹ An employer, in furtherance of an investigation undertaken pursuant to a substance abuse policy, has some latitude for the conduct of searches. This is, of course, reasonable to the extent that a policy aimed at preventing workplace impairment would be incomplete if it did not also provide some means to detect the presence of impairing substances on employer property. The judicial approach to this issue recognizes workplace searches and drug and alcohol testing as moieties and thus subject to the same concerns regarding the balancing of employee privacy with the prevention of workplace impairment.

Random searches of employees and their possessions aimed at uncovering drugs or alcohol on employer premises have been consistently found to be unreasonable and hence unenforceable. Searches cannot be speculative, abusive or arbitrarily undertaken,¹⁰² particularly insofar as the discovery of prohibited substances can give rise to a reasonable cause to require an employee to undergo a drug or alcohol test.¹⁰³ Otherwise, search powers could be used to circumvent the limits imposed on an employer's ability to test its employees for drug or alcohol use. As a result, searches pursuant to workplace drug and alcohol policies are permitted to the extent that these searches are based upon reasonable cause to suspect the presence of alcohol, drugs or drug paraphernalia in the specific location, or on the particular individual, to be searched.¹⁰⁴

100. *Irving*, *supra* note 85 at 343-344. Contrary to the popular belief held by many employees, police assistance in conducting workplace searches, while often helpful, is not a "strict legal requirement."

101. *Re Algoma Steel Corporation Ltd. And United Steelworkers, Local 2251* (1984), 17 L.A.C. (3d) 172 at 177-178 (Davis *et al.*); *Re Glenbow-Alberta Institute and Canadian Union of Public Employees, Local 1645* (1988), 3 L.A.C. (4th) 127 at 144 (Beattie); *Re British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6* (1987), 29 L.A.C. (3d) 353 at 367-368 (Hope); see generally *Canadian Labour Arbitration*, *supra* note 6 at paras. 7:3560, 7:3625.

102. *Canadian National, 2000*, *supra* note 16 at 398; *Esso*, *supra* note 29 at paras. 250-253.

103. *Supra* note 23 and accompanying text.

104. *Canadian National, 2000*, *supra* note 16 at 398; *Esso*, *supra* note 29 at paras. 250-253; *Irving*, *supra* note 85 at 343-344; *Dupont*, *supra* note 18 at 434-435.

As in the case of assessing whether there are reasonable grounds to require an employee to undergo a drug or alcohol test, reasonable grounds to search employees or their possessions must be based on objectively verifiable indicia suggesting the presence of prohibited substances on employer property. A search may also be conducted (as part of an employer's overall investigation) if there are reasonable grounds to suspect an employee is presently impaired.¹⁰⁵

Workplace searches are somewhat more complicated in the Atlantic offshore oil industry in that platform and oil rig employees live on-site for weeks at a time. Although there are no reported cases directly on point, based on established principles, searches of an employee's living quarters would only be permitted if based upon clear evidence giving rise to a reasonable suspicion that prohibited substances will be found.¹⁰⁶

d. *Addressing the Results of Drug & Alcohol Testing — Discipline or Disability?*

As reflected by the preponderance of jurisprudence canvassed thus far, employers can reasonably expect that the most contentious issues likely to arise in the course of administering a workplace drug and alcohol policy will relate to the consequences imposed on employees for a policy violation, particularly when there are issues of disability due to alcohol or drug dependency involved.

The prepotency of *Entrop* as reflected in subsequent jurisprudence has established that workplace drug and alcohol policies must allow for both a disciplinary and non-disciplinary response to violations, depending on whether the impugned behaviour is culpable or non-culpable.¹⁰⁷ In either case, an employer's response must be individually tailored to the employee relative to his or her personal circumstances *vis-à-vis* the specific infraction. In land-based industries, policies that impose automatic termination or other such blanket responses to specific infractions, culpable or otherwise, are likely to be struck down and rendered void and unenforceable,¹⁰⁸

105. *Canadian National, 2000*, *supra* note 16 at 398; *Esso*, *supra* note 29 at paras. 250-253; *Irving*, *supra* note 85 at 343-344.

106. There can be little doubt that oil rig and platform employees have a lesser expectation of privacy in their on-site living quarters than that which they would have in their own homes in that their living quarters are routinely shared and occupied by other employees during non-working periods.

107. *Supra* note 62 and accompanying text; *Irving*, *supra* note 85; *Canadian National, 2000*, *supra* note 16; *Trimac*, *supra* note 30; *Dupont*, *supra* note 18; *Esso*, *supra* note 29.

108. See *e.g. Canadian Labour Arbitration*, *supra* note 6 at paras. 7:1100, 7:1200, 7:300, 7:4000; *Dupont*, *supra* note 18 at 421-424.

particularly if there is a clause in an applicable collective agreement providing that no discipline will be imposed without “just cause.”

Generally, absent issues relating to disability, the greater the degree of on-duty impairment from drugs or alcohol, the more serious the employee’s misconduct and more severe the disciplinary response warranted. There is no doubt that in appropriate circumstances, and particularly with respect to serious policy violations by employees in safety-sensitive positions, termination may be an appropriate response. Statements in workplace drug and alcohol policies to the effect that discipline or even termination may result from certain prohibited conduct are a perfectly acceptable “form of warning to employees that in the eyes of the employer certain forms of offence are . . . so serious as to possibly justify the termination of an employee regardless of his or her prior record.”¹⁰⁹

With respect to the possession, use or distribution of a banned substance on company property or during working hours, such conduct is *per se* justification for disciplinary action proportionate to the offence.¹¹⁰

A breathalyzer test which shows an employee was impaired while on-duty may serve as the basis for imposition of a proportionate disciplinary response, subject to issues regarding disability. However, an employee testing positive for drug use cannot be disciplined on that basis alone as such tests cannot show present impairment. Nevertheless, a positive drug test result coupled with independent evidence of workplace impairment is material evidence in support of a finding of misconduct.¹¹¹

Issues of accommodation under human rights legislation do not arise until an employee is found or perceived to be disabled due to a substance

109. *Irving*, *supra* note 85 at 346.

110. See *e.g. Middlemiss v. Norske Canada Ltd.*, 2002 CarswellBC 2014 (B.C.H.R.T.) (eC) [*Middlemiss*]. In that case, a human rights tribunal ruled that the refusal to continue the employment of a stevedore caught smoking marijuana at the employer’s premises during working hours, given that the employee did not claim to have a substance abuse problem, did not constitute discrimination. The employer’s action was undertaken as a disciplinary response to the complainant’s misconduct; *Re Lear Seating Canada Inc. and Amalgamated Clothing & Textile Workers Union, Local 753* (1993), 33 L.A.C. (4th) 307 (Craven), wherein the Board ordered the conditional reinstatement of an employee who had been terminated for smoking hashish in the employer’s parking lot during a lunch break; see generally *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884* (2001), 94 L.A.C. (4th) 354 at 368 (Hope), wherein it was held by the Board that “a distinction must be made between the right to privacy and the right to possess marijuana. Privacy is the right recognized in the law. Possession of marijuana is prohibited under the law, and since its use involves possession, the use of marijuana must also be taken to be prohibited even though it is not a separate offence. Hence, the possession and the use of marijuana is not a right possessed by employees which is protected by their right of privacy.”

111. *Dupont*, *supra* note 18 at para. 28; *Canadian National, 2000*, *supra* note 16 at 386-387.

abuse problem. Accommodation, therefore, is not an issue affecting the propriety of imposing a drug or alcohol test, but rather in assessing the propriety of an employer's response to the results of a drug or alcohol test.¹¹² If an employee legitimately claims a disability as the cause of misconduct, his or her right to accommodation under human rights legislation arises. Put simply, employers are not required to accommodate casual or recreational drug or alcohol use that is not the result of a dependency.¹¹³ In that regard, however, many employers find it particularly difficult to determine whether an employee who claims to be substance-dependent does so legitimately, or as an attempt to escape the consequences of culpable behaviour.

Assessing the validity of an employee's claim to be substance-dependent or addicted in considering an appropriate response to what would otherwise be culpable misconduct can be fraught with difficulty. In the authors' view, consideration should be given not only to the factual underpinning of the incident at issue, but also to the employee's employment history, specifically whether any objective indicia such as excessive absenteeism, unexplained performance inconsistencies, or erratic behavioural changes in workplace relationships suggest a pattern of drug or alcohol use. In considering the incident at issue, employers should pay particular attention to the explanation or lack of explanation offered by the employee. Absent objective indicia suggesting drug or alcohol dependency, an employer is within its rights to dismiss an employee's bald assertion of dependency as an excuse for culpable misconduct and proceed accordingly. Conversely, if there is evidence suggesting a pattern of drug or alcohol use, or evidence that raises doubt as to whether an employee is substance dependent, the employer should treat the employee's claim as valid and address the incident within the context of accommodation. Such an approach is judicially sanctioned insofar as employees claiming to be substance dependent must point to facts from which such an inference can be reasonably drawn—an employer's duty of accommodation is not triggered by an employee merely raising the possibility that she or he is or has been perceived to be substance-dependent.¹¹⁴

As a result of *Meiorin*, in situations where there is evidence to

112. *Irving*, *supra* note 85 at 339-340.

113. See *e.g.* Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing*, *supra* note 54 at 2-3.

114. *Middlemiss*, *supra* note 110 at para. 29. See also *Ericson v. Collagen Canada Ltd.*, 1999 CarwellBC 3129 at para. 87 (B.C.H.R.T.) (eC).

suggest an employee is substance-dependent, the propriety of an employer's response to workplace impairment turns on whether it has or can provide accommodation to the point of undue hardship.¹¹⁵ In almost all cases, an employer's duty to accommodate will require, at a minimum, that it facilitate some rehabilitative effort to be undertaken by the employee. Such accommodation can be effected through employee assistance programs or employer-assisted referral to treatment or rehabilitative programs. While it is incumbent on an employer in most cases to maintain the employment relationship, it may in so doing impose reasonable conditions on the employee's return to work, including a requirement that the employee consent to random post-return-to-work drug or alcohol testing, on-going substance abuse counseling or reassignment to a less safety-sensitive workplace or position.¹¹⁶ However, an employer's duty of accommodation is not without limit. An employer is not required to continue its accommodative efforts where there is a sound basis to believe an employee cannot be rehabilitated (e.g., where an alcoholic or drug addict has been through several rehabilitation programs, but continues to use drugs or alcohol in a manner affecting work performance).¹¹⁷

Lastly, regardless of the circumstances of discrimination at issue, an employer is relieved of its duty to accommodate where to do so would constitute an undue hardship. As earlier noted, undue hardship can be established if the cost of providing accommodation would render the enterprise infeasible, or where, despite accommodative efforts, health or safety risks to workers, the public or the environment are of such magnitude as to outweigh the benefits of providing accommodation. As will be shown, this latter consideration lies at the heart of applying existing jurisprudence concerning workplace drug and alcohol policies to the Atlantic offshore oil industry.

VI. *Drug and Alcohol Testing in the Atlantic Offshore Oil Industry*

Although employers in the offshore have implemented drug and alcohol testing policies for more than two decades, there have been no reported cases in which this practice has been judicially challenged. This may reflect a universal recognition by unions and employees alike that impair-

115. *Meiorin*, *supra* note 49 and accompanying text.

116. *Central Alberta Dairy Pool*, *supra* note 52.

117. *Civil Liberties*, *supra* note 41 and accompanying text; see also *Chopra v. Syncrude Canada Ltd.*, [2003] A.J. No. 741 (Alta. Q.B.) (QL), wherein it was held that an employer had exhausted its duty to accommodate an employee suffering from alcoholism and was justified in terminating the employment relationship following the fourth breach of the employer's workplace drug and alcohol policy.

ment in the offshore is too great a risk to justify a lackadaisical approach to workplace safety,¹¹⁸ or it may merely reflect that disciplinary sanctions imposed on employees for drug and alcohol use in the offshore have not as yet proceeded to full arbitration. Whatever the case, the applicability of the existing jurisprudence is a question yet to be answered. While employers are well-advised to consider the foregoing legal principles in developing and administering drug and alcohol policies, care should be taken to ensure that such initiatives proceed with appropriate regard for the inherently unique circumstances in the Atlantic offshore oil industry.

1. *Human Rights Jurisdiction in the Offshore*

Prior to assessing the impact of current jurisprudence on the implementation of drug and alcohol policies in the offshore, it is first necessary to determine under which legislative regime an employer is answerable. An employer in the offshore cannot rule out the possibility of being subject to two jurisdictional regimes, namely the *Canadian Human Rights Act*¹¹⁹ and either the Newfoundland *Human Rights Code*¹²⁰ or the Nova Scotia *Human Rights Act*.¹²¹

Jurisdiction in the offshore is governed by harmonized federal legislation, respectively, the *Canada-Newfoundland Atlantic Accord Implementation Act*¹²² and the *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*¹²³ (collectively the *Accord Acts*). The *Accord Acts* provide that enumerated “social legislation” from Newfoundland and Nova Scotia will apply to any “marine installation or structure,” which is defined as including “any ship, offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform,” but not vessels providing supply or support services to such structures.¹²⁴ Notably, while the *Accord Acts* further define applicable “social legislation” from Newfoundland and Nova Scotia, neither specifically provides that provincial human rights legislation is applicable to the offshore.

Although there have been no definitive juridical pronouncements on the applicable human rights regime in the offshore, the jurisprudence

118. “Testing the Limits: Alcohol & Drug Testing for Offshore Employees”, *supra* note 69 at 323.

119. R.S.C. 1985, c. H-6 [*Canadian Human Rights Act*].

120. R.S.N.L. 1990, c. H-14 [*Human Rights Code*].

121. R.S.N.S. 1989, c. 214 [*Human Rights Act*].

122. S.C. 1987, c. 3 [*Newfoundland Accord Act*].

123. S.C. 1988, c. 28 [*Nova Scotia Accord Act*].

124. *Ibid.* s. 157(1); *Newfoundland Accord Act*, *supra* note 122, s.152(1).

does indicate that absent a conferral of such authority to the provinces by Parliament, sole and exclusive jurisdiction on all matters in the offshore remains with the federal government.¹²⁵ Therefore, as neither of the *Accord Acts* explicitly confer human rights jurisdiction in the offshore to the provinces, it would appear that the *Canadian Human Rights Act* applies. Nevertheless, until provincial human rights legislation is added to the definition of “social legislation” in the *Accord Acts*, or there is a definitive judicial pronouncement on the issue, it is possible that an employer could face a complaint lodged with the Newfoundland or Nova Scotia Human Rights Commission.

2. Comparison of Human Rights Legislation

Ultimately, despite differences in legislative language, each potentially applicable human rights regime prohibits discrimination on the basis of disability or perceived disability due to alcohol or drug dependency and each regime is subject to the ruling of the Supreme Court of Canada in *Meorin*. There is, however, one notable difference: while both the *Canadian Human Rights Act* and the Newfoundland *Human Rights Code* provide protection for current disability,¹²⁶ the Nova Scotia *Human Rights Act* provides protection against discrimination only on the basis of “previous dependency.”¹²⁷ It could therefore be argued that discrimination on the basis of a current dependency problem may not offend the Nova Scotia *Human Rights Act*,¹²⁸ whereas the converse would be the case under the Newfoundland or federal regimes.¹²⁹ The Nova Scotia argument, however, would only be available if it is determined that the *Canadian Human Rights Act* does not apply to the offshore; a result that seems somewhat dubious without further amendment of the *Accord Acts*.

3. Balancing Rights and Risks in the Atlantic Offshore

Whether framed as an issue of management rights under *KVP* or human rights under *Meiorin*, the issue to be decided if and when drug and alcohol policies in the Atlantic offshore oil industry are challenged can be simply

125. *S.I.U. v. Crosbie Offshore Services Ltd.*, 1982 CarswellNat 49 (F.C.A.) (eC), leave to appeal to S.C.C. refused (1981), 135 D.L.R. (3d) 485 (S.C.C.); see also *S.I.U. v. Tap Catering & Management Ltd.*, 1983 CarswellNat 613 (CLRB) (eC).

126. *Canadian Human Rights Act*, *supra* note 119, s.25; *Human Rights Code*, *supra* note 120, s.2(1).

127. *Human Rights Act*, *supra* note 121, s.3(1)(vii); see also Nova Scotia Human Rights Commission Policy Compendium, c.2, s.2.17.3, in which it is stated that “the Commissions will accept complaints of discrimination based on previous dependencies on alcohol or drugs.”

128. “Testing the Limits: Alcohol & Drug Testing for Offshore Employees”, *supra* note 69 at 325.

129. But see *supra* note 56 and accompanying text.

stated: Where should the line be drawn between managing the potentially catastrophic risks of an impairment-related incident in the offshore and an employee's right to privacy?

In *Meiorin*, the Supreme Court of Canada emphasized that in order to comply with human rights legislation employers cannot set uncompromising standards without establishing that to do otherwise would constitute an undue hardship.¹³⁰ The same principle holds true in respect of workplace drug and alcohol policies, whether in assessing the legitimacy of testing *per se*, or the consequences imposed by such a policy on employees who test positive for drug or alcohol use. Though the jurisprudence is clear that undue hardship is established if it can be shown that the benefits of providing accommodation are outweighed by the health or safety risks to workers or members of the public, this proposition has never been judicially tested in the offshore context *vis-à-vis* workplace impairment.¹³¹

In assessing the safety risks posed by failing to test for drug or alcohol use or permitting an employee with an active dependency to continue working in a safety-sensitive position, four considerations arise: the type of the risk, the consequences of the risk, the probability of the risk materializing,¹³² and, of inestimable import, the identification of those who bear the risk.¹³³ In this regard, history is our best authority and we cannot ignore either the tragic loss of life on the *Ocean Ranger* or the crippling environmental and economic damage caused by the *Exxon Valdez*, the effects of which are felt to the present day. These are the risks to be managed and recent history demonstrates their compelling force.

Many authorities have recognized that reducing the stringency of an employer rule or standard can compromise public safety and special recognition and weight must be given to the public interest in determining whether any abatement of the rule is possible without imposing an undue hardship.¹³⁴ As noted by the Federal Court of Appeal in *Mahon v. Cana-*

130. *Meiorin*, *supra* note 49 at para. 62.

131. *Supra* notes 52-53; see generally "Testing the Limits: Alcohol & Drug Testing for Offshore Employees," *supra* note 69.

132. Kevin D. MacNeill, *The Duty to Accommodate in Employment*, vol. 1, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2003) at para. 12:40:30.

133. *Ibid.* at para. 12:40:40.

134. See *e.g.* *Zinck v. Halifax (City) Fire Dept.* [1990] N.S.H.R.B.I.D. No. 2 (Yogis) (QL), *aff'd* [1991] N.S.J. No. 259 (C.A.) (QL), wherein the risk to public safety outweighed the benefits of accommodating applicants for firefighting positions who fell short of the visual acuity standard imposed by the employer; *Re NAV Canada and International Brotherhood of Electrical Workers* (2001), 101 L.A.C. (4th) 158 (Cherkow), wherein it was held that to laterally transfer an employee would constitute an undue hardship where his fear of flying could impede his ability to maintain systems upon which public safety depended during air travel.

dian Pacific Ltd.:

a job-related requirement that, according to the evidence, is reasonably necessary to eliminate a real risk of a serious damage to the public at large must be said to be a *bona fide* occupational requirement. . . .

The decision under attack, it seems to me, is based on the generous idea that the employers and the public have the duty to accept and assume some risks of damage in order to enable disabled persons to find work. In my view, the law does not impose any such duty on anyone.¹³⁵

In the context of accommodating substance-dependent employees in the offshore oil industry, the issue becomes whether the benefits of accommodation outweigh the risks attendant upon allowing substance-dependent employees to work in an environment in which even a momentary lapse in judgement could have tragic consequences. In the authors' view, whether an employee is actually substance-dependent or merely perceived to be so is irrelevant to this determination. An individual with a perceived disability is entitled to no greater protection than someone suffering from an actual drug and/or alcohol dependency.¹³⁶

Given the gravity of the additional risks inherent in the offshore oil industry, and the dire consequences that could result from an impairment-related incident, employers would be well-advised to use every means at their disposal to minimize the risk of workplace impairment. Though employee privacy is a right to be judiciously guarded, it cannot take precedence over the necessity of taking every available measure to prevent incalculable loss of life and environmental ruination. Thus, as a general proposition, the authors suggest that the more risk-sensitive an industry and more serious consequences of an impairment-related incident to the public interest, the more justifiable are the measures aimed at reducing the risk of workplace impairment. Any other conclusion would run afoul of both common sense and the prevailing jurisprudence.

135. 1987 CarswellNat 199 (F.C.A.) at paras. 25-26, leave to appeal to S.C.C. refused (1987), 86 N.R. 263.

136. *Canadian National*, 2000, *supra* note 16 at 386.

Conclusion

If the foregoing analysis has demonstrated anything, it is that the struggle to balance employee privacy rights with risk management policies utilizing drug and alcohol testing is fraught with difficulty. Though *Entrop* appears to have ushered in trends of judicial consistency, all the authorities to date have developed in the context of land-based industries. The jurisprudence will undoubtedly influence the resolution of workplace drug and alcohol issues when and if they are judicially tested in the offshore. However, the law is neither rote nor mechanical. As noted recently by the Supreme Court of Canada, “the common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future.”¹³⁷ While it is unknown where courts, arbitrators and human rights adjudicators will draw the line between employee privacy and managing the risk of an impairment-related incident in the offshore, it can be safely assumed that the lessons of history will not and should not easily be forgotten.

137. *Pepsi-Cola Canada Beverages (West) v. R.W.D.S.U., Local 558*, 2002 CarswellSask 22 (S.C.C.) (eC) at para. 19.

