

GRIEVANCE ARBITRATION

BETWEEN:

MARINE ATLANTIC INC.

- and -

CANADIAN MERCHANT SERVICE GUILD

In Respect of Licensed Officers (Agreement A)

and

Masters, Chief Engineers and Chief Electrical Officers (Agreement E)

Counsel:

**Denis Mahoney
and
Brittany Keating
for MAI.**

**Andy Nielsen
for CMSG.**

Arbitrator:

Bruce Outhouse, Q.C.

DATE OF DECISION: April 16, 2021.

DECISION

Marine Atlantic Inc. (“MAI”) is a federal Crown Corporation which operates a ferry service between Nova Scotia and the Island of Newfoundland. The Canadian Merchant Service Guild (“Guild”) is the recognized bargaining agent for employees in two bargaining units – Masters, Chief Engineers and Chief Electrical Engineers (Agreement E) and Licensed Officers (Agreement A).

In 2001, MAI adopted a comprehensive alcohol and drug policy (“Policy”) which included, for the first time, random alcohol and drug testing. MAI consulted with the Guild and its other unions before implementing the Policy and those consultations resulted in some amendments being made; however, the Guild and the other unions did not agree to the Policy and no reference has been made to it in any subsequent collective agreements. MAI commenced random alcohol testing in February or March of 2003. It has never initiated random drug testing of employees although the Policy indicates that it reserves the right to do so. The Guild did not challenge the introduction of Policy or random alcohol testing.

In 2013, the Supreme Court of Canada issued a decision upholding the ruling of an arbitration board that, even in a dangerous workplace, an employer

could not impose random alcohol testing “in the absence of evidence of a workplace problem with alcohol use”. *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, para. 8 (“*Irving*”).

Following this decision, the Guild requested MAI to discontinue its random testing program. MAI declined to do so. In March of 2015, the Guild filed grievances under both Agreement A and Agreement E alleging that MAI had no right to conduct random alcohol testing in the face of the *Irving* decision and requesting that such testing immediately cease.

Arbitration Process

The hearing commenced September 1, 2016 and the only witness to testify was Paul O’Brien, a labour relations officer with the Guild. When the hearing reconvened the next day, MAI advised that it intended to present a motion for non-suit and it was agreed, following consultation between counsel, that the motion would be argued in writing. Briefs were subsequently received and, by decision dated February 27, 2017, the motion for non-suit was dismissed.

The hearing reconvened for three days on May 29, 30 and 31, 2017 and two days on July 17 and 18, 2017. During those five days the Employer

presented seven witnesses – Rhona Green, VP of Human Resources (ret'd); Captain Otto Gates, Designated Person Ashore; Captain Shri Madiwal, Director of Fleet Operations; Denise Forgeron, Organizational Development Manager; Paul Griffin, President and CEO; Karen Devoe, Occupational Health & Wellness Manager; and Murray Hupman, VP of Operations.

Both parties made brief oral submissions at the close of the hearing and agreed to advance more detailed submissions in writing. They subsequently filed comprehensive briefs and books of authorities on September 29, 2017 and rebuttals on October 13, 2017.

On September 26, 2018, MAI applied in writing to reopen the arbitration hearing to introduce new evidence. The Guild opposed the application by letter dated October 10, 2018. The application was granted on October 17, 2018.

On February 15, 2019, the parties submitted an Agreed Statement of Facts containing new evidence describing violations of the Policy which occurred after the hearing closed in October of 2017. The parties filed written submissions and rebuttals in relation to the Agreed Statement of Facts in March of 2019.

On December 9, 2019, arbitrator Ashley issued a decision which invalidated the random drug and alcohol testing provisions in Cougar Helicopters drug and alcohol policy. *Office and Professional Employees International Union and Cougar Helicopters Inc.*, 2019 CanLII 125448 (CA LA) (“*Cougar*”). Counsel for the Guild sent me a copy of the decision on January 24, 2020. At the request of counsel for MAI, a telephone conference was held on March 26, 2020 for the purpose of hearing oral submissions from the parties with respect to the meaning of the *Cougar* decision and its potential application to the issues in the present case.

Background

MAI operates a ferry service transporting passengers, vehicles and freight (including dangerous goods) between Nova Scotia and the Island of Newfoundland. The service includes a year-round 96 mile daily crossing between Port aux Basques and North Sydney and a seasonal 280 nautical mile crossing between Argentia and North Sydney. MAI’s fleet includes four Ropax vessels: the *MV Blue Puttees*, *MV Highlanders*, *MV Atlantic Vision* and *MV Leif Ericson*. These vessels are up to 200 metres long and are the largest such vessels operating in North America. In fiscal 2015-16, these vessels performed 1,684 sailings, transported 322,661 passengers, 166,574 passenger vehicles and 95,914 commercial vehicles.

It is common ground that employees on MAI's vessels work in a dangerous environment. The severity of this environment will be discussed in more detail later. Suffice it for now to say that very high winds and rough seas are not uncommon and ice presents an additional hazard in winter.

Crews on MAI vessels work in two-week tours. They live on the vessel for the two-week period, even when they are not on shift. The size of the crew varies depending upon the time of year. On any given tour, there would be 3 members from Agreement E (master, chief engineer and chief electrical engineer), 16 from Agreement A (deck officers, engineer officers, electrical officers and safety officer) and, depending on the season, somewhere between 40 to 80 from Agreement B (deckhands, engine room assistants, stewards, passenger services and similar classifications). As previously indicated, the Guild represents the employees in Agreements E and A. Unifor represents the employees in Agreement B. There are no designated management representatives on the vessels.

MAI also has shore-based facilities and employees in North Sydney, Port aux Basques and Argentina. Both management and unionized employees work in these facilities. Shore employees have not been subject to random alcohol

testing although the Policy designates some shore-based positions as being safety-sensitive.

By virtue of their status as licensed Transport Canada marine personnel, all members of Agreements A and E are responsible for acting in accordance with the *Canada Shipping Act*, its regulations and any other related legislation. The master has ultimate authority on the vessel while it is in operation and the chief engineer and chief electrical engineer have authority over their respective departments. The master is responsible to shore-based management.

Section 14 of the Safe Working Practices Regulations states:

“No person shall be permitted in any working area whose ability to work is, in the opinion of the person in charge of the area, impaired by alcohol or a drug.”

Historically, MAI had a bare-bones “Dry Ship Policy” which prohibited crew members from possessing or using intoxicating substances during their tour of duty. On July 5, 2000, MAI’s Board of Directors approved a plan for implementing a “zero tolerance policy” with respect to drugs and alcohol. A consultant was retained and a comprehensive draft alcohol and drug policy was developed by late 2000 or early 2001. The Employer sought and obtained input

from the Guild and other unions with respect to the draft policy. It made some changes and issued the Policy on May 10, 2001 with an effective date of June 15, 2001.

The Policy prohibited the use of both illicit drugs and alcohol. It contained detailed investigative procedures for ensuring compliance including alcohol and drug testing for (i) reasonable cause; (ii) post-incident after a significant work-related accident or incident; (iii) return to duty on conditions related to drug or alcohol use; (iv) post-treatment and resumption of duties after primary treatment for an alcohol or drug problem; and (v) unannounced random drug and alcohol testing for all individuals assigned to safety-sensitive positions or specified senior management positions. All vessel-based positions were expressly deemed to be safety-sensitive. The Policy also included detailed testing procedures for both drugs and alcohol.

Shortly after the Policy was issued, as alluded to earlier, the Employer abandoned its plan to conduct random drug testing. Effective September 20, 2002, the Policy was amended to reflect that change. The Policy was amended again in 2008, this time quite substantially. The current provisions of the Policy as they relate to alcohol are set out below:

IV. POLICY STANDARDS

To minimize the risk of unsafe and unsatisfactory performance due to the use of alcohol or other drugs, the following standards have been set out. Everyone is expected to report fit for duty, and remain fit throughout their work day, shift, or tour of duty.

ii. **Alcohol**: The use, possession, distribution, or offering of beverage alcohol is prohibited when on company business or premises, with the exception of the situations outlined below:

- use by vessel crew dead-heading after being relieved of duties at the end of their tour of duty and when not in uniform and when not in any crew areas. This does not apply to deadheading for purposes of transfer to other vessels;
- use by any employee when on vacation;
- responsible use when on business after the work day e.g. conferences, training sessions, when on travel status, specially approved social events etc.
- possession of factory-sealed containers stored in a personal vehicle parked on company premises;
- factory-sealed containers secured by the vessel Master in his or her office.

Individuals covered by this policy can not:

- report for duty or remain on duty under the influence of alcohol from any source,
- use alcohol after being notified to report for duty,
- use alcohol during the work day (shore) including during meals and breaks,
- use alcohol during a tour of duty (vessels)
- have an alcohol test result of .04 BAC (Blood Alcohol Content) or greater, or
- use alcohol after an accident until tested or advised a test is not required.

Any individual who holds a safety-sensitive position will be removed from duty if alcohol presence is identified through the testing program.

VII. INVESTIGATIVE PROCEDURES

iii. **Alcohol and Drug Testing:** Individuals covered by this policy will be subject to testing in the following circumstances.

e. **Random Testing:** All individuals assigned to safety sensitive position[s] or specified senior management positions are subject to unannounced random testing for alcohol. The company reserves the right to initiate a program of random drug testing for specific job categories when it is deemed necessary to meet the objectives of this policy. Employees in safety-sensitive positions subject to such random testing will be advised well in advance of initiation of the program.

IX. CONSEQUENCES OF A POLICY VIOLATION

i. **General Expectations:** Any violation of the provisions of this policy may be grounds for termination of employment. In all situations, an investigation will be conducted and documented to verify that a policy violation has occurred before disciplinary action is taken.

Therefore, management has the authority and discretion to hold out of service any individual who is believed to be involved in an incident that could lead to termination of employment pending the results of the investigation.

A positive drug test and an alcohol test result of .04 BAC or higher are considered a violation of this policy. Anyone who holds a safety-sensitive or specified management position and has an alcohol test result of .02 to .039 BAC will be removed from their job until considered safe to return. There will be an investigation and consequences appropriate to the situation, and the employee will be required to have a negative alcohol test (<.02 BAC) prior to return to duty. In addition, failure to report directly for a test, refusal to submit to a test, refusal to agree to disclosure of a test result to management, a confirmed attempt to tamper with a test sample, or failure to report an incident which may require testing, are grounds for termination of employment.

ii. **Conditions of Continued Employment:** Should the company determine that employment will be continued in a specific circumstance, the individual would be required to enter into an agreement governing their continued

employment which may require any or all of the following actions, or any other action deemed appropriate to the circumstance:

- temporary removal from their position;
- assessment by an expert to determine the need for a structure treatment program;
- adherence to a recommended treatment and aftercare program;
- maintenance of sobriety and satisfactory performance on return to duty;
- successful completion of a return to duty test;
- ongoing unannounced testing for the duration of their agreement; and
- no further violation of the policy.

Failure to meet the requirements of the agreement during the monitoring period will be grounds for termination of employment.

ALCOHOL AND DRUG TESTING PROCEDURES

Sample collection, testing and reporting of results will be conducted in accordance with the forensic quality assurance standards established by the U.S. Department of Health and Human Services and accepted in Canada, in order to ensure the accuracy and integrity of results. Rigorous sample collection, storage and chain-of-custody procedures will be followed in conjunction with independent medical review of results as required. In addition:

- Selection of individuals for random testing will be handled by a Third Party Program Administrator (TPA) using a selection rate as designated by the Company.
- Alcohol tests will be administered by a calibrated U.S. Department of Transportation approved breathalyzer with a printout of test results....
- Collection of urine or saliva specimens and administration of alcohol tests will be performed by trained nurses or trained collection agents at Company-designated collection sites. In post incident and reasonable cause testing situations, samples will be collected as soon as possible after the triggering event, but collection attempts will end eight (8) hours after

the incident for an alcohol test, and thirty-two (32) hours after the incident for a drug test.

- All individuals who are tested will be given a copy of the ...Alcohol Testing Form for their records.
- For the purpose of this policy, a positive alcohol test will be one in which the blood alcohol concentration is at or above .04 BAC. However, in those instances where an employee is subject to an unannounced testing program on return to duty after a policy violation or treatment, a positive test will be one in which the blood alcohol concentration is .02 or more. Employees who hold a safety-sensitive position will be removed from duty if they have an alcohol testing result of .02 BAC or higher.
- Any positive test result will be considered a violation of this policy, whether or not the drugs or alcoholic beverage were actually consumed on Company business or premises. Failure to report directly for a test, refusal to submit to a test, refusal to agree to disclosure of a test result to the Program Administrator or designate, or an attempt to tamper with a test sample are considered a violation of the policy.
- All test results will be reported directly to the Company Program Administrator or designate. Except for the release of information in accordance with this policy and in situations affecting the health and safety of workers and the public, results of all testing will be maintained by the Testing Program Administrator and will be kept confidential to the greatest extent possible except where required or permitted by law (e.g. in the case of litigation or government investigation).

MAI had originally intended to commence random testing for alcohol in the fall of 2002. However, implementation was delayed and, on January 10, 2003, MAI advised all vessel employees and designated managers that a random breath alcohol testing program would be introduced effective February 1, 2003. It appears that testing commenced in either late February or March, 2003.

On March 25, 2003, Marine Atlantic advised all captains that vessel employees would not be subject to random breath alcohol testing in the following circumstances:

- a) During refit (when the vessel is in dry dock);
- b) When the vessel is at dockside during a planned work period and dockside maintenance; and
- c) When an employee is on tour on the vessel, but not at work on an assigned shift or on overtime.

As prescribed in the Policy, MAI retained DriverCheck to be the third party program administrator. DriverCheck is responsible for the selection of individuals for random testing based on a selection rate designated by MAI. From the outset, the selection rate has been 7.5% of the crew on every tour.

The process is quite simple. MAI provides the crew list to DriverCheck which uses a random computer program to generate 7.5% of the crew by tour and vessel. That list is provided to the master of each vessel at the beginning of the tour and the selected employees are advised just prior to testing. The testing is performed while vessels are dockside during turnarounds at Port aux Basques and North Sydney. Up to four employees per turn are tested in the

summer but two or three would be the norm in the off-season. Once employees are notified that they have been selected for testing, they must proceed immediately to the designated testing site where they are met by a member of the Canadian Corps of Commissionaires who is trained in the collection of breathalyzer samples. The commissionaire provides the employee with an acknowledgement form to sign prior to the test; however, if the employee refuses to sign the form, the test is carried out anyway. The commissionaire conducts the test in accordance with standard breathalyzer protocol. If the test result is negative (less than .02 BAC), the employee is so informed and returns to duty. If the test result is positive (between .02 BAC and .039 BAC), the employee is removed from their job and required to have a negative alcohol test (less than .02 BAC) prior to return to duty. If the test result is .04 BAC or higher, and so confirmed by a second test 15 minutes later, the employee is removed from service and the matter is referred to MAI's Human Resources Department for appropriate action.

The number of random tests has varied over the years as illustrated by the following table:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total Random	181	289	390	406	370	324	172	112	57	103	64	2	268	406	209

TOTAL: 3,353

As can be seen, there was very little random testing done in 2011, 2013 and 2014. Indeed, the record indicates there was a complete cessation of random testing from August 2013 to January or February of 2015. The record is unclear as to why this occurred. One explanation was that it was probably due to organizational change. Another explanation was that the random testing program had been put on hold because one of the masters was upset about the way security officers and commissionaires were boarding his vessel to conduct breathalyzer tests.

Of the 3,353 random tests carried out between February 2003 and June 2017, four were positive. The supplemental evidence of the Employer in February of 2019 shows that there was one additional positive test in January of that year, thus making a total of five positive random tests.

Evidence

Mr. O'Brien testified that he joined the Guild in 2011 as a labour relations officer. He was generally aware of the Policy and had participated in a labour management meeting in July of 2013 at which MAI advised that it would be continuing conducting random alcohol tests following the *Irving* decision. Mr. O'Brien said he was approached by some members in early 2015 questioning why

MAI was allowed to randomly test them for alcohol despite the *Irving* decision. He said he consulted with his supervisor at the time who then sent a letter to MAI insisting that it cease random testing of the Guild's members. When MAI refused to do so, the Guild filed separate grievances under Agreement A and Agreement E respectively.

On cross-examination, Mr. O'Brien acknowledged that he was aware of two alcohol-related incidents on MAI vessels. One of the employees, upon being called for a random test, disclosed on arrival that he would fail it which he did. With respect to the other employee, it was Mr. O'Brien's understanding that he had alcohol in the engineering control room.

Much of MAI's evidence was focused on what it considers to be the extremely hazardous circumstances in which its ferry service operates and the potentially calamitous consequences of employees not being fit to perform their duties due to consumption of alcohol or other intoxicants. Captain Gates, Captain Madiwal and Mr. Hupman all described MAI's marine operating environment as "unique" and "harsh" in comparison to other ferry services. Captain Gates, a Master with over 35 years of experience around the globe, described MAI's operating environment as "one of the worst in the world". In this regard, he

referred to the extreme wind and weather conditions between the Island of Newfoundland and North Sydney, adding that the weather can change unexpectedly during a crossing with winds gusting to 50 or 55 knots in short order. He also pointed out that ice conditions are prevalent on the Port aux Basques - North Sydney route during winter months and recalled a relatively recent incident where an icebreaker got stuck in approximately 20 feet of ice damaging its rudders and propellers.

Mr. Hupman stated that the sea states where MAI operates are “incredibly rough”. He noted that MAI operates in the North Atlantic which is different from other bodies of water where Canadian ferries operate such as the Bay of Fundy and inland waters on the west coast. Because of this difference, MAI is the only ferry operating in Canada that is classified as “Near Coastal 1”, while other ferry services are classified as “Near Coastal 2”. Mr. Hupman also made reference to a study that compared the Gulf of St. Lawrence to the North Sea and found that the Gulf was a much more hostile environment because tidal impacts on the Gulf Stream created a “confused sea state”.

MAI’s witnesses also emphasized navigational hazards, the risk of fire and the fact that once the vessels are at sea there are no medical or firefighting

services to assist in the event of an emergency. Particular reference was made to the challenge of approaching the dock in Port aux Basques through tight quarters which requires multiple manoeuvres and an error in judgment could cause the vessel to run aground posing the risk of evacuation or capsizing of the vessel.

In this connection, several of MAI's witnesses described an incident in which the *MV Blue Puttees* grounded when exiting Port aux Basques due to human error. There was significant damage to the vessel but no passengers were injured. MAI's witnesses expressed the belief that the incident could have been far more serious if the vessel had run aground at a different angle. They described another incident involving the *MV Blue Puttees* that occurred when the vessel went into a series of rolls while making a course change in heavy seas resulting in a number of injuries to passengers and crew, including one passenger who hit his head and subsequently succumbed to his injuries in hospital. As well, MAI witnesses mentioned less serious incidents where vessels had hit the dock.

MAI's witnesses stressed the fact that all crew members have safety-sensitive duties. The masters, chiefs and other licensed officers are responsible for the safe navigation and operation of the vessel. However, all vessel employees have marine emergency duties due to the remoteness of the workplace and lack of

access to local emergency response providers. These duties include rescue, first aid, firefighting and evacuation. Captain Gates stated that an evacuation could involve upwards of 700 passengers and 100 crew.

MAI's witnesses also testified about what they characterized as a "unique working atmosphere" on its vessels. As previously mentioned, employees live on board the vessels during their two-week tours of duty. Thus, for approximately six months of the year in the case of full-time employees, they work and live in close quarters. According to MAI's witnesses, employees are often family or friends and develop closer personal relationships than exist in a typical workplace. In the opinion of MAI witnesses, the existence of such personal relationships has resulted in employees being very reluctant to report other employees for using or possessing alcohol or drugs in the workplace.

Ms. Forgeron, who has held senior human resources roles throughout her career with MAI commencing in 1998, gave two examples of non-reporting suspicions of alcohol impairment. One involved an employee in the engine room department who was reported by security as showing signs of impairment. However, while the employee's superior was notified, no further action was taken to report or investigate the incident. The other example involved an employee in

passenger services who left the vessel during a turnaround and was suspected by security of being intoxicated when he returned. Security reported this to the master who allowed the employee onboard. However, the master did not consult with Human Resources or onshore management about the situation.

MAI's witnesses made it clear that MAI places a very high priority on workplace safety in general and, in particular, safety aboard its vessels. In this regard, they referred to section 4 of the *Canada Marine Act* which states that the purpose of the *Act* is, *inter alia*, "to provide for a high level of safety and environmental protection". They also referred to section 14 of the Safe Working Practices Regulations which, as previously mentioned, contains a prohibition against any person impaired by alcohol or a drug from being permitted in any working area. Some of the witnesses expressed the opinion that without random alcohol testing MAI would be unable to ensure compliance with section 14 and that other alternatives to random testing are insufficient for this purpose.

As an example of MAI's commitment to safety, Captain Madiwal testified that it complies with the International Convention for the Safety of Life at Sea ("SOLAS") and the International Safety Management Code ("ISM Code"). Captain Madiwal acknowledged that Canada does not currently require compliance

with either SOLAS or the ISM Code but said that MAI voluntarily complies because both contain best practices in the industry. Captain Madiwal also conceded that neither SOLAS nor the ISM Code prescribe the use of random testing.

Some of MAI's witnesses cited examples of incidents experienced by other vessel operators. Among them was the *Costa Concordia* incident where an Italian cruise ship capsized and sank resulting in 32 deaths. Reference was also made to a fire on a Ropax ferry, the *MS Norman Atlantic*, in the Adriatic Sea which also resulted in loss of life. Other incidents involved vessels taking on water including one near Labrador involving the *William Carson* and one in the Gulf involving the *Patrick Morris* on a run from North Sydney to Port aux Basques. In the latter case, the vessel sank resulting in loss of life when water entered through the stern door due to human error. Finally, considerable emphasis was placed on the BC Ferries' incident in 2006 when the *Queen of the North* sank after striking an island and two lives were lost. Subsequent investigation by the Transportation Safety Board concluded that a number of vessel crew members regularly smoked cannabis between shifts on and off the vessel. As a result of that incident, Transport Canada sent a letter to all ferry operators, masters and crew reminding them of their responsibilities under the *Act* to ensure that no one impaired by

alcohol or a drug should be permitted in any working area, and advising that the government had a “tough on drugs” policy and wanted to ensure that safety would never be jeopardized by drug use on vessels.

MAI’s witnesses all supported the continuation of random alcohol testing for vessel employees. MAI presented a history of Policy violations by its employees dating back to the fall of 1996. Ms. Forgeron was the principal sponsor of this evidence and the results are summarized in Exhibit 37, an updated version of which was attached as Appendix A to the Employer’s closing argument. The following excerpt from that argument summarizes the information as follows:

- a. Pre- versus post-implementation of the policy:
Of the 63 incidents listed in Exhibit 37:
 - i. 11 of the incidents (between 27-Oct-1997 and 10-Jul-2001) occurred before the policy was introduced
 - ii. 2 incidents occurred while the policy was introduced but not yet implemented
 - iii. The other 51 incidents occurred after implementation of the policy
- b. Drug versus Alcohol
 - i. 40 incidents involved alcohol
 - ii. 18 incidents involved drugs
 - iii. 4 incidents could not identify drugs or alcohol because of a failure to report or failure to test
 - iv. 1 incident involved drugs and alcohol
- c. Vessel versus Onshore
 - i. 46 incidents involved vessel employees
 - ii. 12 incidents involved shore-based employees
 - iii. 5 incidents involved recruits or the cadet program

- d. Form of Testing
 - i. 26 incidents where alcohol appeared to be a factor but testing was not completed (either because of an admission, pre-random testing or unable to test for other reasons)
 - ii. 2 incidents where drugs appeared to be a factor but testing was not completed due to disclosure
 - iii. 8 were positive reasonable cause tests
 - iv. 5 were positive post-incident tests
 - v. 4 were positive random tests
 - vi. 6 were positive random tests that resulted from a return-to-work agreement
 - vii. 4 were not reported or failure to test and therefore no test was conducted
 - viii. 3 were refusals to submit to testing
 - ix. 3 were pre-access testing
 - x. 2 were failure to apply policy
- e. Bargaining Unit
 - i. 13 Agreement A
 - ii. 0 Agreement E
 - iii. 45 other bargaining units
 - iv. 5 recruits/cadets

In addition to the above, the following information is contained in

Exhibit 37:

- Prior to the implementation of random alcohol testing in early 2003, 10 violations involved vessel employees related to alcohol and 3 violations involved shore employees, 2 relating to alcohol and 1 to drugs.
- Of the 27 violations involving vessel employees related to alcohol since random testing was implemented, 6 arose out of what was essentially a single incident that occurred while the vessel was in refit in South Carolina.

The employees involved consumed alcohol while on shore and were unfit for duty upon their return.

The supplemental evidence introduced by MAI in February of 2019 was largely an extension of Exhibit 37. The evidence indicated that 10 additional Policy violations had occurred since the close of the hearing in October 2017. Two of the violations involved a vessel-based employee who was subject to a return-to-work agreement. He refused to report for unannounced testing and then later refused to submit to reasonable cause testing. He admitted to possessing and consuming alcohol while onboard and was terminated. Six of the violations related to positive drug tests and 2 incidents were related to positive alcohol tests, one for reasonable cause and the other unannounced random testing. Shore employees were involved in one alcohol-related violation and one drug-related violation. The other 8 violations related to vessel employees.

The supplemental evidence also indicated that subsequent to the arbitration hearing there had been 5 voluntary disclosures of drug and alcohol abuse by employees to MAI's Occupational Health nurses. Three of the disclosures were made by vessel employees and 2 by shore employees. Three of the 5 disclosures involved employees who admitted their dependence developed

because of use both at work and at home. The evidence did not indicate how many of the disclosures related to alcohol as opposed to drugs.

Guild Position

The Guild acknowledges at the outset that all its members work in a dangerous environment and occupy “safety-sensitive” positions within the meaning of the Policy. It also makes the point that the grievances only challenge one aspect of the Policy – unannounced random alcohol testing. There is no dispute about other forms of testing or any other aspects of the Policy.

The Guild states that the only issue is whether random alcohol testing of its members is an unreasonable unilateral policy within the meaning of the *KVP* framework. It says the *KVP* test has long been applied by arbitrators for the purpose of assessing employer rules and policies affecting employee privacy rights, particularly random alcohol or drug testing. In doing so, according to the Guild, arbitrators have used the “balancing of interest” approach which the Supreme Court of Canada expressly endorsed in *Irving*. The Guild notes that the majority in *Irving*, having considered the relevant arbitral authorities, concluded that:

“...arbitrators rejected unilaterally imposed universal random testing policies as unreasonable unless there had been a workplace problem with substance abuse and the employer had exhausted alternative means for dealing with the abuse.” (para. 29)

The Guild argues that *Irving* is the governing authority in the present case, being directly on point and setting out very clear rules. It allows that the rules were not created in *Irving* but says the decision confirmed well-established principles from decades of arbitration and court decisions. It asserts that in the years since *Irving* these principles have not been meaningfully challenged or distinguished by arbitrators or courts.

The Guild contends the invasion of privacy inherent in random testing weighs heavily in balancing the interests of the respective parties. In this regard, it adopts the following pronouncement by the arbitration board in *Irving*:

The invasion of that privacy by the random alcohol testing policy is not a trifle. It effects a significant inroad. Specifically, it involves a bodily intrusion and the surrender of bodily substances. It involves coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples. As we saw with Mr. Day, there can be an element of public embarrassment. Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy. (*Irving Pulp & Paper, Ltd. v. CEP, Local 30*, 2009 CarswellNB 543, para. 120)

The Guild notes that the Supreme Court of Canada expressly described the arbitration board's conclusion in the above paragraph as being "unassailable" (para. 50).

The Guild submits that the *Irving* test for permitting random alcohol and drug testing programs has two components: (1) the workplace is dangerous; and (2) there is evidence of "enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace." (*Irving*, paras. 29-31)

The Guild further asserts that random testing has consistently been rejected as "an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices". *Imperial Oil Ltd. v. CEP Local 900* (2006), 157 LAC (4th) 225, para. 101 ("*Nanticoke*").

The only exception to this prohibition, so the Guild argues, was articulated in *Nanticoke* as follows:

127 It may well be that the balancing of interests approach . . . would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace,

such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of ‘for cause’ justification.

The Guild emphasizes that privacy rights are *quasi* constitutional in nature and that “protection of privacy is a fundamental value in modern, democratic states”. In this regard, the Guild cites *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773; and *Douez v. Facebook, Inc.* 2017 SCC 33.

The Guild relies on the following passage from the *Irving* decision for the proposition that random alcohol testing, including breathalyzer testing, is an inherent violation of a person’s privacy rights:

50 ...Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that ‘the use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity’ (*R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.), at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399 (S.C.C.), it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the ‘seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements’.

The Guild concedes that *Irving* did not absolutely rule out the possibility of an employer being able to justify random testing in the absence of an established alcohol problem in the workplace. In this connection, the Guild refers to the following passage from paragraph 45 of the majority decision, the relevant portion of which reads as follows:

...It has never, to my knowledge, been held to justify random testing, even in the case of ‘highly safety sensitive’ or ‘inherently dangerous’ workplaces like railways (*Canadian National*) and chemical plants (*Dupont Canada Inc. v. C.E.P., Local 28-0* (2002), 105 L.A.C. (4th) 399 (Ont. Arb.)), or even in workplaces that pose a risk of explosion (*ADM Agri-Industries*), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.

The Guild adds, however, that the “extreme circumstances” exception has not been successfully invoked in any subsequent cases, although it was unsuccessfully sought in *Cougar*. The Guild also refers in this regard to the following comment by the majority in *Irving*:

...Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny. (para. 53)

Having regard to the foregoing, the Guild submits that the facts in the present case do not fit within the “extreme circumstances” exception and that random alcohol testing by MAI can only be justified if it can prove that there is a problem with alcohol use by employees on its vessels.

The Guild notes that prior to *Irving* there were only two arbitration decisions in which random alcohol testing was upheld – *C.E.P., Local 777 v. Imperial Oil Ltd.* (May 27, 2000), Christian Member (Alta Arb), unreported (“*Strathcona*”); and *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, [2007] C.L.A.D. No. 243 (Ont Arb) (Devlin) (“*GTTA*”). The Guild emphasizes the comment by the majority in *Irving* that these decisions were based on “a demonstrated general problem with alcohol use in a dangerous workplace”. The Guild maintains that MAI’s evidence in the present case falls well short of establishing that there was or is “a demonstrated general problem with alcohol use” among its vessel employees. In this regard, the Guild refers to *Mechanical Contractors Assn. Sarnia and UA, Local 663 (Alcohol and Drug Testing)*, 2013 CarswellOnt 18985 (“*Mechanical Contractors*”), in which arbitrator Surdykowski commented on the nature of the evidence required to satisfy the *Irving* test:

127 Our labour relations justice system is as reasonable and probable cause-based as the other components of our civil law and litigation system. It is evidence-based, not faith or belief-based. Accordingly, assumptions, unsupported presumptions, anecdotal or unparticularized evidence, and broad-based statistical inferential reasoning is typically 'not good enough' to satisfy the balance of probabilities onus of proof. The extent to which an employer can require an employee to undergo alcohol and drug testing will depend on the degree of safety sensitivity and demonstrated (not presumed) legitimate need in the particular workplace. The evidence sufficient for the purpose will depend on the circumstances of the particular case, but it must in any event always include cogent direct non-anecdotal evidence from that workplace. The employer must also establish that the rule or policy will probably improve workplace health and safety. Uncertain or speculative health and safety gains do not justify a significant invasion of employee privacy. The resulting threshold may be a high one, but the Supreme Court of Canada in *Irving Pulp & Paper, Ltd.* has made it clear that that is the way it should be, particularly when fundamental individual privacy rights are in the balance.

The Guild argues that the *Irving* test is stringent because it was designed to guard against unnecessary infringements on personal privacy by employers. It says the factual foundation for the balancing exercise is the testing itself, on the one hand, and the utility and necessity of the random program on the other. In this connection, the Guild refers to *Teck Coal Ltd. and USW, Local 7884* (2018), 286 L.A.C. (4th) 1, in which arbitrator Kinzie proposed a three-step process that (1) considered whether there was a privacy intrusion; (2) balanced that privacy intrusion against the employer's safety concerns; and (3) considered the proportionality of the employer's response (i.e., imposition of a random testing regime).

The Guild asserts that MAI's evidence in support of its contention there is a problem with alcohol use on its vessels is flawed in a number of respects. First, it says that the evidence presented by MAI's witnesses on this point was "anecdotal" or "speculative" and that there was scant "cogent direct non-anecdotal evidence from that workplace". Further, the Guild argues that much of the evidence in Exhibit 37 is irrelevant to the question at hand because it includes violations of the Policy:

- a) involving shore employees who are not subject to random testing and whose workplace is entirely different;
- b) involving non-employees at the pre-hire stage;
- c) involving unlicensed employees covered by Agreement B;
- d) involving the use of drugs; and
- e) involving "non-use incidents" such as "failing to report property damage".

As well, the Guild contends the evidence in Exhibit 37 does not meet the *Mechanical Contractors* standard of establishing that the Policy will "probably improve workplace health and safety". In support of this contention, the Guild says that during the period from 1996 to 2002 there was approximately one violation per year. It points out that this number certainly didn't decrease after random alcohol testing began in early 2003. While in some years there were only one or two

violations, there were substantially more in other years. Although the Guild does not accept the relevance of a large number of the reported violations, it submits that Exhibit 37 does not disclose any measureable relationship between the existence or frequency of random testing and the number of recorded Policy violations. The Guild also underscores the fact that in 2014, when no random alcohol testing was done, there were only two recorded Policy violations and neither involved alcohol.

The Guild argues the evidence put forward by MAI does not support the “belief” of its witnesses that random testing has a deterrent effect. The Guild asserts that “beliefs” are not evidence and the fact there were only four positive results from 3,353 random tests between 2003 and 2017 cannot be taken as an indication that the random testing program has had a deterrent effect. In this regard, the Guild refers to arbitrator Veniot’s comment in *Irving* that a low positive rate could just as easily be an indication there was a lack of an actual alcohol problem in the workplace. The Guild also notes that some arbitrators have cautioned against considering deterrence as a factor in deciding whether a random testing policy is justified. On this point, the Guild cites arbitrator Norman’s award in *Agrium Vanscoy Potash Operations and USW, Local 7552* (2015), 249 LAC (4th) 185, at para. 21 (“*Agrium*”).

For all of the above reasons, the Guild submits that the evidence does not disclose the existence of an alcohol problem which would justify the continuation of random alcohol testing of vessel employees. It says that the remaining aspects of the Policy, perhaps supplemented by other measures such as increased education about intoxication and the importance of reporting, would serve the purpose just as well without the pervasive privacy violations inherent in random testing. Accordingly, it requests that the grievances be allowed.

MAI Position

MAI's primary argument is that because of the unique marine environment in which its vessels operate, which is distinct from other workplaces described in the case law, the test established in *Irving* does not apply. It says that the severe nature of its marine environment and the real and palpable safety risks associated with its ferry operations justify random alcohol testing without requiring evidence of enhanced safety risks or a general substance abuse problem in the workplace. MAI also argues that the evidence establishes there are enhanced safety risks in the operation of its vessels which make random alcohol testing a reasonable exercise of its management rights.

In the alternative, MAI contends that the evidence meets the *Irving* test which requires “evidence of a general problem with substance abuse in the workplace”.

In the further alternative, MAI relies on the fact that the Guild acquiesced in the conduct of random alcohol testing for approximately 12 years prior to filing the grievances in 2015. It submits that such acquiescence either gives rise to an estoppel or that the practice of random alcohol testing has become an implied term of the collective agreements.

Extreme Circumstances

MAI repeats and emphasizes the testimony of its witnesses who described the harsh marine environment in which it operates. It also underscores the potentially disastrous consequences in terms of loss of life, injuries, environmental harm and property damage should one of its vessels suffer a serious mishap while at sea. From these perspectives, MAI characterizes its vessel operations as being more dangerous and higher risk than any operations considered in previously-reported cases. It contends that, while its operation is more closely aligned to an airline or a railroad than to Irving’s paper mill, it is even more inherently dangerous with additional risks to public safety and the environment. In

addition, MAI notes that its vessels have no access to local emergency response services and are providing a constitutionally-mandated essential passenger service between the Island of Newfoundland and Nova Scotia. Another important distinguishing feature, in MAI's view, is that its employees live together for approximately two weeks at a time and, even when they are off shift, they still have emergency response duties if an incident occurs.

Based on the foregoing, MAI submits that its workplace is unique and not comparable to other workplaces where random alcohol testing has been reviewed by arbitrators and courts. Consequently, it takes the position that it is not necessary to apply the *Irving* test in this case because the unique marine operating environment, the risk of catastrophic loss and the "culture of non-reporting" constitute "extreme circumstances" which justify random alcohol testing without the requirement to prove a substance abuse problem in the workplace.

Balancing of Interests

MAI asserts that the public interest is at stake in this case and strongly supports the reasonableness of random alcohol testing. It says that the *Irving* decision emphasized the importance of recognizing public safety as follows

But the reality is that the task of negotiating workplace conditions, both on the part of unions and management, as well as the arbitrators who interpret the resulting collective agreement, has historically – and successfully – included the delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy. Far from leaving the public at risk, protecting employees – who are on the front line of any danger – necessarily also protects the surrounding public. To suggest otherwise is a counter-intuitive dichotomy. (para. 19)

MAI also refers to *ATU, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078, 277 ACWS (3d) 620 (“*TTC*”). In that case, the union sought an injunction prohibiting random alcohol testing while the parties awaited an arbitration on the merits of the policy grievance. The Ontario Superior Court denied the request because it was not satisfied that the union would suffer irreparable harm if the injunction was not granted. In case it was wrong, the Court then went on to consider the “balance of convenience” test and, in the course of doing so, discussed the importance of the public interest at stake as follows:

96 In applications involving Charter Rights, in addition to the damage each party alleges it will suffer, the interest of the public must be considered when assessing where the balance of convenience lies: see *RJR-MacDonald* at paras. 69, 71 and 85.

97 On this motion, the interest of the public is also a consideration because, as indicated, people in Toronto make 1.8 million journeys on the TTC every day and it is important that they do so as safely as possible.

98 It is important, before proceeding further, to emphasize what could easily be forgotten. The applicants and the respondent agree

on the importance of public safety; they disagree on the importance of random testing in achieving the TTC's public safety goals.

107 ...One of the aspects of the public interest involved in this case is the interest of safety of millions of TTC passengers....

135 The TTC carries the complication that any accident can have tragic consequences for many people, not all of whom are TTC employees, and thus the TTC is not a typical Ontario workplace.

MAI argues that its workplace, like TTC's workplace, is not typical.

It says the passengers and crew on its vessels all have a right to safety and that it is MAI's responsibility for ensuring that passengers and crews are protected from unwarranted dangers. MAI submits, therefore, that the public interest in safety at issue here strongly supports a finding that it is reasonable to conduct random alcohol testing on its vessels.

MAI emphasizes that the test in *Irving* requires an arbitrator to balance the interests of privacy and safety. It says the test does not presume a balance in favour of employee privacy and requires a "contextual analysis that varies with every unilaterally imposed employer policy to each specific workplace". On this point, MAI refers to *Strathcona* and *GTTA* in which, as previously mentioned, random alcohol testing was upheld based on the balancing of interests.

MAI cautions against elevating the *Irving* test and points to the arbitration board's decision in *Suncor Energy Inc. and Unifor, Local 707A* (2014), 242 L.A.C. (4th) 1, as an example of such error. That decision was quashed by the Alberta Court of Queen's Bench as being unreasonable (2016 ABQB 269). The union's appeal was dismissed by the Alberta Court of Appeal (2017 ABCA 313) and the union's application for leave to appeal to the Supreme Court of Canada was denied without reasons. MAI submits that the *Suncor* arbitration decision was found to be unreasonable because the arbitration board had "put its thumb on the scales and upset the careful balance established in the arbitral jurisprudence". MAI submits that both the *Suncor* and the *TTC* cases signal a change in direction from previous arbitral jurisprudence, which imposed a higher threshold on employers to justify random testing, and demonstrate a stronger emphasis on an employer's interest in workplace safety.

MAI argues that the Guild did not put employee privacy interests in play because it failed to call any of its members to testify about how random alcohol testing infringes upon their privacy rights. MAI says that, as a result, it was not given any opportunity to test the alleged privacy infringement. Accordingly, in MAI's view, it is impossible to accord any weight in the balancing exercise to the alleged harm caused by random alcohol testing to the privacy rights of employees.

In the alternative, MAI asserts that, to the extent employees' privacy rights are found to be at stake, the method of random alcohol testing being used is minimally intrusive and does not outweigh its interest in protecting the safety of its passengers, crew and the environment. MAI cites passages from *Irving*; *Suncor*; *Bombardier Transportation and Teamsters Canada Rail Conference – Division 660*, 117 CLAS 404, 241 LAC (4th) 293 (Can Arb); *TTC*; *R v. Grant*, 2009 SCC 32, [1009] SCJ No. 32 (SCC); *R v. Stillman*, [1997] 1 SCR 607, [1997] SCJ No. 34 (SCC); and *GTTA*, which describe breathalyzer testing as being “minimally intrusive” as compared with other testing methods.

MAI denies there is any merit to the Guild's suggestion that its members are stigmatized, humiliated or embarrassed by random alcohol testing. It says that there is absolutely no evidence of this. It adds that it has been providing its employees with educational sessions on the testing policy and process since before it was implemented and has not received any complaints from employees that they feel stigmatized by the testing process.

MAI describes the testing rate of 7.5% of employees per tour as being minimally intrusive on the employees' privacy rights while at the same time being sufficient to achieve the desired deterrent effect. MAI refers to the 10% per year

testing rate in *Irving* and points out that the dissenting judges described it as “hardly out of the mainstream” and opined that a testing rate “higher than reasonably necessary to achieve the desired deterrent effect...may well fail to satisfy the minimal impairment analysis arbitrators have conducted as part of the balancing of interests.”

MAI argues that the Policy further preserves employees’ privacy rights by providing support for employees who identify alcohol dependency as a result of random testing. Under the Policy, a positive test result engages a formalized process which results in either accommodation or discipline. It says that, as a result of random, reasonable cause and post-incident testing, a number of employees have been referred to its EAP program, to substance abuse professionals and rehabilitation programs. The fact that there is a “treatment component” to the Policy, according to MAI, supports its argument that random testing is minimally intrusive on employee privacy rights. In support of this proposition, MAI cites *TTC* and *Entrop v. Imperial Oil Ltd.*, [2000] OJ No. 2689, 137 OAC 15, para. 111 (“*Entrop*”).

MAI contends that advising employees before they are hired that they will be subject to random testing contributes to the reasonableness of such testing, again citing *Entrop* in support.

On the other side of the scale, MAI re-emphasizes what it describes as the overwhelming safety risk inherent in its vessel operations. It says a single incident on any of its vessels has the potential to result in extremely serious harm to passengers, crew and the environment. MAI asserts that it makes every effort to mitigate safety risks. One such mitigation measure is to randomly test vessel employees for alcohol during their tour of duty. It submits that such testing is an effective way to deter employees from reporting for work under the influence of alcohol or drugs.

MAI contends that the safety risks it faces are exacerbated by a “culture of non-reporting” among its vessel crews. It says that the crew members operate in a “family-like environment” and have a tendency to protect their fellow employees. In this connection, it refers to Mr. Hupman’s opinion that, despite efforts to encourage reporting, employees often delay reporting incidents until there is no other option. MAI suggests that the seriousness of the non-reporting issue is enhanced by the fact that there are no non-bargaining unit management

representatives on the vessels. Consequently, reporting a fellow employee is reporting a fellow union member. On the latter point, MAI refers to *Entrop* where the court found that alcohol testing was a reasonable requirement in safety-sensitive jobs where supervision was limited or non-existent. In addition, MAI says that the lack of reporting impedes the effectiveness of reasonable cause and post-incident testing as a tool to mitigate the risk associated with the use of alcohol by vessel employees.

MAI also contends that the safety interest should also be seen as a benefit to crew members. Indeed, it says a number of its witnesses testified they had been told by some crew members, including some masters, that they supported random alcohol testing.

Turning to the evidence required to satisfy the *Irving* test, MAI submits that it has met the test by establishing “enhanced safety risks, such as a general substance abuse problem in the workplace”. Here it emphasizes three main themes.

First, the analysis is focused on the “general workplace” and is not limited to the employees in any particular bargaining unit. In this regard, MAI

relies on the following passage in the Alberta Court of Queen's Bench decision in *Suncor* rejecting the arbitration board's finding that it could only consider evidence demonstrating an alcohol and drug problem within the bargaining unit:

In conclusion, the Court is of the view that the use of the term "workplace" rather than the phrase "bargaining unit" throughout the Irving decision and arbitration is meaningful. Workplace safety is an aggregate concept, especially in a dangerous environment.

The focus on the workplace in general rather than more narrowly on members of the bargaining unit is also consistent with the obligation that employers have to ensure the safety of their entire worksite. The Court is further comforted by the general workplace approach because it allows the dangerous environment to be considered in the context of the safety of everyone in that workplace.

As a final point on this matter, it is important to recall that the only "workplace" relevant to this case are the locations of the Oil Sands Operations in the Wood Buffalo Municipality. These are relatively small and well defined areas that are, by their very nature, dangerous. Further, the Random Testing Standard at issue in this case applies only to workers in safety-sensitive positions within those locations. Therefore, considering the "workplace" in general does not, in the Court's view, result in an overbroad analysis. [paras. 83-85)

Second, MAI contends that its workplace includes both its vessel and onshore operations. Therefore, in MAI's view, incidents of alcohol and drug use by shore employees are relevant in determining whether the *Irving* test has been met.

Third, MAI strongly disagrees with the Guild's contention that incidents involving drug use are not relevant to the question of whether random alcohol testing is an unreasonable infringement of employee privacy rights. It says that both alcohol and drugs are considered "substances" and that *Irving* "calls for a more holistic inquiry into drug and alcohol problems within the workplace generally". It notes that in *Suncor* both alcohol and drug use were considered and it submits that the same approach should be taken here.

Based on the foregoing, MAI submits that any attempt by the Guild to limit the evidence relied upon to establish a general substance abuse problem should be disregarded. It further submits that the evidence of drug and alcohol use presented in this arbitration is sufficient to establish there is a general substance abuse problem in its workplace.

MAI rejects the Guild's assertion that the *Irving* test requires employers to prove the effectiveness of random alcohol testing. It says that no such requirement exists and cautions that adopting same would represent an unwarranted extension of *Irving*. Further, it says the break in testing from August of 2013 to January of 2015 does not, as the Guild suggests, reflect the ineffectiveness of testing.

As well, MAI takes issue with the Guild's argument that the fact random testing has not reduced incidents of alcohol use in the workplace is somehow proof of its ineffectiveness. On the contrary, it argues that the continuing use of alcohol by employees, despite random testing, is evidence of an egregious problem and that discontinuing the program might well increase the number of alcohol and drug-related incidents. MAI asserts this is not a risk it is willing to take voluntarily.

MAI submits that Exhibit 37 contains more than ample evidence to establish a general substance abuse problem that has persisted throughout the history of its operations. That evidence includes examples of possession and use of alcohol, drugs and related paraphernalia aboard vessels; positive pre-hire, reasonable cause, post-incident, return-to-work and unannounced random alcohol tests; failure to report suspicions or knowledge of impairment; failure to report incidents that would trigger post-incident testing; and a variety of other Policy violations relating to drug and alcohol use.

MAI points to the following "particularly troubling incidents" related to drug or alcohol use which were described more fully by Ms. Forgeron in her testimony:

- a. There were multiple examples where employees had repeated violations of the Drug and Alcohol Policy (SM, RA, PB).
- b. During the refit incident in South Carolina, one employee, SM who had been previously disciplined for violations of the Drug and Alcohol Policy, was seen on video being put to bed by her coworkers. She subsequently reported for work the next morning, while still appearing to be under the influence of alcohol. The Senior Chief Steward on shift that day thought she was okay to return to work and she was then allowed to do so. This continued until later, when the Master and Human Resources were informed that she was suspected of being under the influence of alcohol, and it was ordered that she be removed from duty.
- c. A number of other employees, including JR, PG, BM, CO, and LM were also investigated in relation to the incident in South Carolina and determined to have breached the drug and alcohol policy during refit. There was evidence to suggest the company log book was suspiciously removed for the relevant period.
- d. DL, a Senior Engineer, was under the influence of alcohol while working on the vessel in Europe when testing is suspended, and was unable to take over his watch-keeping duties because of his intoxication.
- e. SM, a repeat offender of the Drug and Alcohol Policy, caused damage to property while attempting to park her vehicle in the parking lot of MAI's terminal, just before she was scheduled to report for work. She was under the influence of alcohol.
- f. HY was found laying on a bench and appeared intoxicated after being removed from the vessel. The police were called and the employee was taken to lock-up before MAI could conduct reasonable cause testing. The employee tested positive for marijuana the following day.
- g. A number of MAI witnesses referred to an incident where the Blue Puttees grounded and the Quartermaster tested positive for marijuana in post-incident testing. The Blue Puttees was taken out of service and taken over by Transport Canada to ensure the vessel did not sail until it was safe to do so. While this incident did result in property damages, lost revenue, and negative publicity when the

Blue Puttees was taken out of service for a period of time, the potential losses in that situation could have been catastrophic. Luckily, there was no loss of life in that incident.

MAI asserts that almost no job position has been immune from incidents of drug or alcohol use in the workplace. It says that among those who have failed drug and alcohol tests are chief stewards, assistant chief stewards, deckhands, shunt truck drivers, engine room storekeepers, passenger services employees, junior engineers, senior engineers, stevedores, second officers, electricians, and cooks. MAI notes that some of these employees are responsible for extremely important safety-sensitive duties, such as watch-keeping, fire patrols, mooring and unmooring and even operating the vessel.

MAI also notes that in addition to the violations recorded in Exhibit 37, there are a number of employees who have accessed its confidential employee assistance program or have reported substance abuse issues through disability management.

In any event, MAI argues that determining whether there is a general substance abuse problem in its workplace should not require quantitative analysis. It says there is no specific mathematical formula which triggers the justification for

random alcohol testing. What is clear from the evidence, in its view, regardless of the numbers and statistics, is that there is a pervasive and consistent problem with alcohol and drug use on its vessels.

MAI contends that, in other cases where arbitrators have held random alcohol testing to be unreasonable, the evidence of drug and alcohol use in the workplaces paled in comparison to the evidence here, citing *Irving*; *Agrium*; and *Mechanical Contractors*, as examples. MAI says that the evidence of a general substance abuse problem in its workplace is equal to or greater than the evidence of substance abuse problems in *GTTA* and *Strathcona* where random alcohol testing was upheld.

MAI asserts that random alcohol testing is a necessary and appropriate means to deter many of its employees from violating the Policy. In support of the proposition that random alcohol testing has a deterrent effect, MAI refers to the following passage from the dissenting judgment in *Irving*:

Indeed, the value of a random alcohol testing program comes not from what it detects, but from what it deters. Academic literature – not to mention common sense – teaches that even low testing percentages can be highly effective in deterring the relevant conduct. See, e.g., J. I. Borack, “Costs and Benefits of Alternative Drug Testing Programs”, U.S. Navy Personnel Research and Development Center (March 1998) (explaining that a 20 percent

random test rate “achiev[ed] significant benefits” in deterring drug use among service members while tripling the test rate to 58 percent would provide “modest increases [in deterrence]...but at significantly higher cost”. (para. 113)

MAI also refers to similar comments in *TTC* at paragraphs 145 to 148.

MAI submits that, apart from random testing, no other methods of testing for alcohol impairment are sufficient to deter employees from reporting to work under the influence of alcohol. It says that post-incident testing is not a preventative measure because it occurs “after the horse leaves the barn”. It acknowledges that reasonable cause testing may have somewhat of a preventative effect but it depends on when the possible use of alcohol is first detected. Moreover, MAI argues that the effectiveness of reasonable cause testing as a preventative measure is minimized in its workplace due to the culture of non-reporting. MAI emphasizes that all of its witnesses testified they believe random alcohol testing is a deterrent to alcohol use on its vessels. Accordingly, it concludes that, given the extreme safety risks inherent in the operation of its vessels, the stakes are simply too high to rely on other forms of testing and that random alcohol testing is both necessary and reasonable.

To underscore the importance of deterrence, MAI refers to the Supreme Court of Canada's decision in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, 2017 CSC 30 ("*Elk Valley*"). In that case, the employer's policy required disclosure of addiction issues before any drug-related incident occurred. A positive post-incident test following a failure to disclose would result in termination. An employee was terminated when he tested positive for cocaine following an incident and it was only afterwards that he admitted he had an addiction. The Supreme Court of Canada upheld the Human Rights Tribunal's decision that the employee was dismissed for breaching policy and not because of his addiction, so there was no *prima facie* discrimination. MAI quotes the following passages from the concurring decision of Justices Moldaver and Wagner, at paragraphs 53 and 55:

The Tribunal found that Mr. Stewart's immediate termination was reasonably necessary. Elk Valley had imposed an Alcohol, Illegal Drugs & Medication Policy ("Policy"), stating that if an employee was involved in a workplace incident and subsequently tested positive for drugs, the employee would be terminated. This "no free accident" rule was meant to deter employees from using drugs in a way that could adversely affect their work performance. ...

In our view, it was reasonable for the Tribunal to conclude that Mr. Stewart's immediate termination was reasonably necessary, so that the deterrent effect of the Policy was not significantly reduced. Elk Valley's coal mining operation was a "safety-sensitive environment" (Tribunal reasons, at para. 75). In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship: *Central Alberta Dairy Pool v. Alberta* (Human Rights

Commission), [1990] 2 S.C.R. 489 (S.C.C.), at pp. 520-21.

Subjecting Mr. Stewart to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of imposing the serious and immediate consequence of termination would undermine the Policy's deterrent effect. This, in turn, would compromise the employer's valid objective to prevent employees from using drugs in a way that could give rise to serious harm in its safety-sensitive workplace. ...

[emphasis added by MAI]

MAI argues that it is crucial to deter vessel employees from using alcohol in a manner that could negatively impact the performance of their duties in a safety-sensitive workplace. It says that it is justified in maintaining a forceful random alcohol testing policy and that the critical importance of workplace safety cannot be minimized in this case. Indeed, it asserts that if random alcohol testing is not permitted, consequences to the travelling public and its employees could be devastating.

Based on all of the foregoing, including the extreme nature of the marine environment, the public interest, the evidence of a general substance abuse problem and the safety risks unique to its workplace, MAI submits that random alcohol testing strikes an appropriate balance between privacy and safety and should be allowed to continue.

Acquiescence

MAI contends that one of the features which distinguishes this case from others is that the Guild was consulted throughout the development and implementation of the Policy, including random alcohol testing, but failed to raise any issue about it until more than a decade after it was implemented. MAI says that none of the reported cases dealing with random alcohol testing have had this element of acquiescence as part of the analysis in determining the reasonableness of the Policy.

MAI notes some arbitrators have recognized that an estoppel may arise from a union's silence for a long period in the face of a unilateral employer-implemented policy, citing *Ridgewood Industries v. UFCW, Local 175*, [2009] OLAA No. 183, 97 CLAS 229 (Ont Arb); *Ontario Hydro and Power Workers' Union, Re*, 1999 CarswellOnt 7169, 55 CLAS 118; *York Police Services Board and York Police Association (2005)*, 80 CLAS 422; and *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-242*, 6 LAC (3d) 30, 1982 CarswellOnt 2523 (Ont Arb).

MAI also notes that there is case law to suggest that imposition of an employer practice, if accepted by the union without objection for a long period of

time may become an implied term of employment. On this point, it cites *Petro-Canada v. CEP, Local 593*, [2004] OLAA No. 951, 132 LAC (4th) 422 (Ont Arb) (“*Petro-Canada*”); *Progistix-Solutions Inc. v. CEP, Local 26*, [2000] OLAA No. 393, 60 CLAS 349 (“*Progistix-Solutions*”); and *Halifax (Regional Municipality) v. NSUPE, Local 2*, 171 LAC (4th) 257, 93 CLAS 223 (NS Arb) (“*Halifax*”). On these authorities, MAI submits that its random alcohol testing policy is an implied term or condition of employment, based on past practice and the previous acquiescence by employees and the Guild.

For all of the above reasons, MAI urges that the grievances be dismissed.

Issues

The issues to be determined are as follows:

1. Are the dangers and risks associated with the operation of MAI’s ferry service so extreme that it is reasonable for it to conduct random alcohol testing of all vessel employees without having to meet the *Irving* test?
2. Has MAI met the *Irving* test?

3. Does the fact that the Guild did not challenge the random alcohol testing program for approximately 12 years after it was implemented give rise to an estoppel or implied term of the collective agreement which effectively precludes the Guild from successfully challenging the program through the grievance procedure?

Analysis and Decision

Before turning to the specific issues at hand, it is useful to consider the underlying legal framework about which there is relatively little dispute between the parties. *Irving* is undoubtedly the governing authority and was referred to extensively by both parties in their submissions.

In *Irving*, the employer had a policy on alcohol and drug use which provided for “unannounced random tests for alcohol” but not for drugs. Thus, the only issue before the arbitration board, and subsequently the courts, was whether the employer had the authority to mandate random alcohol testing for bargaining unit members in safety-sensitive positions.

The arbitration board, after balancing the employer’s legitimate interest in workplace safety against that of the workers’ privacy rights, held that

mandatory random testing could only be permitted based on evidence of an actual problem with alcohol in the employer's workplace. That award was quashed on judicial review and that decision was affirmed by the New Brunswick Court of Appeal. However, in a 5-3 decision, the Supreme Court of Canada allowed the union's appeal and reinstated the arbitration board's award. Abella J. wrote the majority opinion.

The following passages from the majority decision are instructive in the present case:

[1] Privacy and safety are highly sensitive and significant workplace interests. They are also occasionally in conflict. This is particularly the case when the workplace is a dangerous one.

[2] In a unionized workplace, these issues are usually dealt with in the course of collective bargaining. If an employer, however, decides not to negotiate safety measures before implementing them, and if those measures have disciplinary consequences for employees, the employer must bring itself within the scope of the management rights clause of the collective agreement.

...

[4] A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.

[5] This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.

[6] But a unilaterally imposed policy of mandatory, random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace. This body of arbitral jurisprudence is of course not binding on this Court, but it is nevertheless a valuable benchmark against which to assess the arbitration board's decision in this case.

...

[27] In assessing KVP reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:

Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.

...

[29] The balancing of interests approach was subsequently applied in assessing the reasonableness of unilaterally imposed employer policies calling for universal random drug or alcohol testing of all employees performing safety sensitive work. Universal random testing refers to the testing of individual employees randomly selected from all or some portion of the workforce. ...[A]rbitrators rejected unilaterally imposed universal random testing policies as unreasonable unless there had been a workplace problem with substance abuse and the employer had exhausted alternative means for dealing with the abuse.

...

[31] But the dangerousness of a workplace – whether described as dangerous, inherently dangerous, or highly safety sensitive – is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

[32] The blueprint for dealing with dangerous workplaces is found in Imperial Oil Ltd. and C.E.P., Loc. 900 (Re) (2006), 157 L.A.C. (4th) 225 (“Nanticoke”), a case involving a grievance of the employer’s random drug testing policy at an oil refinery, which the parties acknowledged was highly safety sensitive. Arbitrator Michel Picher summarized the principles emerging from 20 years of arbitral jurisprudence under the *KVP* test for both drug and alcohol testing:

- No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitative program.
- *An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.*
- It is within the prerogatives of management’s rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. As part of an employee’s program of rehabilitation, such agreements or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years. In a unionized workplace the Union must be involved in the agreement which establishes the terms of a recovering employee’s ongoing employment, including random, unannounced testing. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interests of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.

[33] There can, in other words, be testing of an individual employee who has an alcohol or drug problem. Universal, random testing, however, is far from automatic. The reason is explained by Arbitrator Picher in *Nanticoke* as follows:

... a key feature of the jurisprudence in the area of alcohol or drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated. It is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices.

[34] Significantly, Arbitrator Picher acknowledged that the application of the balancing of interests approach could permit general random testing “in some extreme circumstances”:

It may well be that the balancing of interests approach . . . would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of “for cause” justification. (*Nanticoke*, at para. 127)

...

[36] The balancing of interests approach has not kept employers from enacting comprehensive drug and alcohol policies, which can include rules about drugs and alcohol in the workplace, discipline for employees who break those rules, education and awareness training for employees and supervisors, access to treatment for substance dependence, and after-care programs for employees returning to work following treatment.

[37] But I have been unable to find any cases, either before or since Nanticoke, in which an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem (*Esso Petroleum*, at pp. 447-48; *Metropol Security v. U.S.W.A., Local 5296* (1998), 69 L.A.C. (4th) 399 (Ont. Arb.); *Trimac Transportation Services - Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237 (Can. Arb.); *Canadian National*, at pp. 385 and 394; *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [2002] B.C.C.A.A.A. No. 9 (B.C. Arb.), at para. 30; *ADM Agri-Industries Ltd. and CAW-Canada, Local 195, Re*, [2004] C.L.A.D. No. 610 (Ont. Arb.), at para. 77; *Petro-Canada Lubricants Centre (Mississauga) v. C.E.P., Local 593* (2009), 186 L.A.C. (4th) 424 (Ont. Arb.) (Kaplan), at pp. 434-37; *Rio Tinto*, at para. 37(a) and (d)).

...

[45] But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It has never, to my knowledge, been held to justify random testing, even in the case of “highly safety sensitive” or “inherently dangerous” workplaces like railways (*Canadian National*) and chemical plants (*Dupont Canada Inc. and C.E.P., Loc. 28-0* (Re) (2002), 105 L.A.C. (4th) 399 (Ont. Arb.)), or even in workplaces that pose a risk of explosion (*ADM Agri-Industries*), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.

...

[52] This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.

[53] Moreover, the employer is not only always free to negotiate drug and alcohol testing policies with the union, as was said in *Nanticoke*, “such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated” (para. 101

(emphasis added)). But where, as here, the employer proceeds unilaterally without negotiating with the union, it must comply with the time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences. Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny.

[underlining added]

All subsequent decisions by arbitrators and courts dealing with random alcohol and drug testing have treated *Irving* as binding authority on this issue in terms of the applicable legal principles and approach. Indeed, they are obliged to do so unless and until the Supreme Court of Canada revisits the matter.

1. Are the dangers and risks associated with the operation of MAI's ferry service so extreme that it is reasonable for it to conduct random alcohol testing of all vessel employees without having to meet the Irving test?

MAI's argument here is based on the last sentence in paragraph 45 of the majority decision which indicated "it was within the realm of possibility" that an employer could impose random testing in "extreme circumstances" without the need to demonstrate that there was a problem with alcohol use in its workplace. The Guild, for its part, does not deny that *Irving* left the door ajar, so to speak, but emphasizes that to date there have been no cases where an arbitrator or court has upheld random testing on the basis of the "extreme circumstances" exception.

MAI contends that the following considerations, taken together, bring this case within the exception:

- the severely harsh marine environment in which its vessels operate;
- the potentially disastrous consequences in terms of loss of life, injuries, environmental harm and property damage should a serious mishap occur at sea;
- the remoteness from emergency response services;
- the public interest in safety and the reliable operation of a constitutionally-mandated ferry service; and
- the “culture of non-reporting” among its vessel crews.

I am not persuaded that these factors constitute extreme circumstances which would warrant a departure from the *Irving* test. As previously mentioned, there appear to have been no reported cases in which random alcohol or drug testing has been upheld in the absence of a demonstrated problem with alcohol or drug use in the workplace. *Cougar* is the only case brought to my attention where an employer has even attempted to justify random testing based on the “extreme circumstances” exception. However, that attempt was unsuccessful.

There are a number of factual similarities between the present case and *Cougar* including the following:

- Cougar provided transportation for passengers between the Island of Newfoundland and offshore rigs in the North Atlantic.
- The weather and the marine environment in which Cougar operated was extremely harsh.
- There was nothing in Cougar's collective agreement about its drug and alcohol policy.
- Random alcohol and drug testing was ongoing for approximately 6 years before being challenged by the union.
- The only aspect of Cougar's drug and alcohol policy challenged by the union was the random testing component.
- Cougar's operations were regulated by Transport Canada.
- Cougar was a "safety first" company.
- Cougar's safety plan and safety management system exceeded current Transport Canada requirements.

Arbitrator Ashley accepted Cougar's evidence about the harshness of its operating environment and the risks associated therewith, commenting as follows:

The uncertainties of the weather in the North Atlantic and the precarious nature of the landings and exits from the various structures being serviced make this workplace uniquely challenging. Granted, the work environments disclosed in many of the cases were dangerous as well. This is not a contest as to which environment poses the most potential danger; however, the risks of this particular environment, involving passenger flights over open sea in the North Atlantic in all seasons, are at a different level. The work environment is severe, unpredictable and changeable from moment to moment. (para. 100)

Arbitrator Ashley also noted that Cougar had implemented random testing in the wake of a tragic accident in 2009 in which 17 passengers and crew were killed while making a trip to one of the rigs. As well, she referred to the related reports from the Transportation Safety Board and the Wells Inquiry which highlighted the extreme conditions in which flights to the rigs were undertaken.

Arbitrator Ashley went on to describe the intensive training received by flight crews and support personnel, the multiple checkpoints between them, use of a Risk Assessment Matrix, flight monitoring and pre-flight discussions between the pilots. She characterized the level of both human and electronic monitoring of

every flight as being impressive. Despite this, however, she acknowledged the practical reality that there would always be the potential for accidents.

Arbitrator Ashley took note of the fact that Cougar, although operating in a heavily regulated industry, surpassed those standards and that “safety culture is imbedded in the relationship between the Employer and its workforce.” She then alluded to the recent legalization of cannabis in 2018 and the imminent legalization of edible cannabis products which would pose an even greater challenge in terms of enforcement of drug policies by employers.

Arbitrator Ashley identified Cougar’s “main point” as being that random testing would give it assurance that intoxicating substances had not been consumed and would act as a deterrent to other employees. As she put it, Cougar’s objective was “to leave no stone unturned to ensure the safest possible working environment for its staff, passengers, clients, the industry and the public.” However, in her opinion, the issue was whether or not random testing was either necessary or reasonable to achieve that objective.

Turning to that issue, arbitrator Ashley began by describing the *Nanticoke* “blueprint” referred to in *Irving*, which is also known as the “Canadian model”:

Acceptance of the “Canadian model” which limits the application of random testing, has not resulted in serious incidents of substance abuse related incidents in safety-sensitive workplaces. Despite the difficult and extreme working conditions at Cougar, there have been no drug or alcohol related incidents in many years. (The post-incident refusal in 2018 is in dispute between the parties.) The Employer has the ability to test in a variety of circumstances, including for reasonable cause. This gives a fairly broad authority to pursue testing in circumstances where there are grounds to believe a test is warranted. (para. 106)

After distinguishing the *Strathcona*, *GTTA* and *TTC* cases, arbitrator Ashley briefly discussed the fact that oral swab testing was less than intrusive than other means of testing, she concluded as follows:

While random testing by oral swab is much less intrusive than other means of testing, it still amounts to a removal of intimate bodily information, including DNA, without the consent of the employee. On balance, I find that this is an unjustified affront to the dignity and privacy rights of the affected employees, and that the protection of these privacy rights, in all of the circumstances, outweighs the Employer’s legitimate interest in promoting safety. The Employer, through its practices, policies and procedures, accepted by the workforce, developed through its regimen of comprehensive checks and balances, pre-flight and in-flight, a system to significantly mitigate risks of substance abuse. (para. 109) [emphasis added]

MAI does not suggest that it operates in a more dangerous or higher risk environment than Cougar. However, it says that *Cougar* is distinguishable because of the safety culture which was found to exist among Cougar's employees and the comprehensive checks and balances, both pre-flight and inflight which arbitrator Ashley described as "a system to significantly mitigate risks of substance abuse". MAI submits that, but for this significant mitigation of risk, arbitrator Ashley may well have decided that Cougar's legitimate interest in safety outweighed the privacy rights of the affected employees and that Cougar was therefore entitled to conduct random drug and alcohol testing in the absence of any demonstrated problem with substance abuse in its workplace.

With respect, I do not agree that *Cougar* is so readily distinguishable from the present case. The crux of arbitrator Ashley's decision is that random drug and alcohol testing is an "unjustified affront" to dignity and privacy rights and that protection of those rights, in all of the circumstances, outweighed Cougar's legitimate safety interest. In reaching her decision, arbitrator Ashley took into account the safety-promoting policies and procedures which Cougar already had in place to mitigate the risks of substance abuse; however, it is entirely speculative to say that arbitrator Ashley would, in the absence of such policies and procedures, have allowed random testing without any demonstration of a drug or alcohol

problem in the workplace. The availability of mitigating measures is, of course, a relevant factor in the balancing exercise under the *Irving* test and I will come back to that later.

In my opinion, the *Cougar* decision does not in any way depart from the *Irving* test or the Canadian model. It also serves to re-emphasize that in all but the rarest of cases will an employer be able to justify random alcohol or drug testing without establishing that there is a demonstrated or general problem with alcohol or drug use in its workplace. Indeed, to date there have no such cases.

I am not satisfied that the circumstances in this case set it apart from all previous cases. MAI's ferry service has been operating for many years. The dangers and risks have always existed. Its vessels today are more modern and better equipped than they were in the past. Communications and weather forecasting have also improved over the years. It is difficult to imagine that MAI's operations are somehow more dangerous or risky today than they were prior to 2003 when random alcohol testing was first introduced. The record indicates that there have been some mishaps either with or aboard MAI's vessels over the years, but relatively speaking they have been few and far between, especially when one considers the sheer volume of crossings on an annual basis. Moreover, there is no

indication in the evidence that any of these mishaps were related to alcohol use by vessel employees.

In mid-2000, MAI decided to implement a zero tolerance policy with respect to drugs and alcohol. Pursuant to that decision, it prepared a comprehensive draft drug and alcohol policy with the assistance of a consultant. While MAI sought and obtained input from the Guild and other unions on the draft policy, it did not try to negotiate the policy with them. Instead, it chose to proceed unilaterally and eventually implemented random alcohol testing for vessel employees in early 2003. Very little random testing was done in 2011 and there was a complete cessation of testing from August 2013 until early 2015. Why this happened is unclear from the record and seems to be a bit of a mystery. In any event, given that throughout this entire period MAI's main priority was safety, it seems fair to infer that the random alcohol testing program was not seen as being a critical tool for promoting safety. Certainly, it does not bespeak the existence of such "extreme circumstances" that random alcohol testing could be justified in the absence of a demonstrated problem with alcohol in MAI's workplace.

2. Has MAI met the Irving test?

In order to properly apply the *Irving* test, it is necessary to decide three preliminary issues. The first is whether the relevant workplace is confined to just the employees represented by the Guild. The second is whether the workplace includes both vessel and shore employees. The third is whether drug use or drug-related incidents are relevant for purposes of the *Irving* test when the issue at hand relates solely to random alcohol testing.

Restriction to Bargaining Unit Employees

The Guild argues that Exhibit 37 improperly includes evidence of Policy violations which involve unlicensed employees covered by Agreement B. I disagree. The relevant workplace is not limited to the Guild's members. The arbitration board in *Suncor* held that it could only consider evidence demonstrating an alcohol and drug problem within the bargaining unit. The Alberta Court of Queen's Bench quashed the board's award on the ground that the board had misconstrued the *Irving* test in another respect and also because it erred in restricting the evidence of alcohol and drug use to the bargaining unit. This decision was upheld by the Alberta Court of Appeal solely on the ground that the arbitration board erred by only considering evidence demonstrating drug or alcohol problems within the bargaining unit. The Court stated:

It was unreasonable for the tribunal majority to insist upon “particularized” evidence specific to Suncor’s unionized employees. This sets the evidentiary bar too high. *Irving* defined the balance process in terms of workplace safety and workplace substance abuse problems – not bargaining unit safety and bargaining unit substance abuse problems. *Irving* calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision. (para. 46)

Based on *Suncor* and the emphasis placed on the “workplace” in *Irving*, it seems clear there is no logical or legal basis for restricting evidence of alcohol or drug use to the Guild’s members.

Restriction of the Workplace to Vessel Employees

Here the Guild is on much firmer ground. Only vessel employees are subject to random alcohol testing. Even those shore employees who occupy designated safety-sensitive positions are not random tested. More importantly, the evidence is very clear that these are two very distinct workplaces – the vessels being one and the shore facilities being the other. All of the evidence concerning danger and risk pertains to the operation of the vessels, not to onshore activities or facilities. Indeed, MAI emphasized the distinction between the two workplaces in its own submissions, stating at paragraph 271:

It is clear that MAI considered the nature of its workplace when developing the policy to include random testing. In particular, the random testing portion of MAI's policy is only applied to vessel-based employees and is not applied to shore-based employees based on differences in the nature of the two workplaces.

In my opinion, incidents and violations of the Policy involving shore employees are not relevant or meaningful in the present case. Shore employees work and live in an entirely different environment from the vessel employees. While they work for the same employer, they perform completely different jobs in a totally separate location. Even if one gives a broad meaning to "workplace", it would not include both vessel employees and shore employees.

Suncor was cited by MAI as authority for the proposition that the term "workplace" is all encompassing. In fact, however, the Court of Queen's Bench was careful to point out that it favoured the "general workplace approach because it allows the dangerous environment to be considered in the context of the safety of everyone in that workplace". I interpret that to mean everyone in the dangerous workplace. I also note that the Court went on to explain that the workplace did not include all of Suncor's operations, stating at paragraph 85:

As a final point on this matter, it is important to recall that the only "workplace" relevant to this case are the locations of the Oil Sands Operations in the Wood Buffalo Municipality. These are relatively

small and well defined areas that are, by their very nature, dangerous. Further, the Random Testing Standard at issue in this case applies only to workers in safety-sensitive positions within those locations. Therefore, considering the “workplace” in general does not, in the court’s view, result in an overbroad analysis.

I conclude, therefore, that for purposes of applying the *Irving* test, evidence of Policy violations by shore employees cannot be considered. It follows from this conclusion, of course, that Policy violations by any other persons, such as prospective employees and cadets, must also be excluded from consideration.

Restriction to Evidence of Alcohol Use

The issue here is whether evidence of drug use by vessel employees is relevant to the question of whether random alcohol testing can reasonably be justified. In my opinion, such evidence is not relevant.

While it is true, as MAI argues, that a number of cases including *Irving* refer to a problem of “substance” use or abuse and no doubt the word “substance” in this context includes both alcohol and drugs. However, many of the cases involve random testing for both alcohol and drugs so it is not surprising that the broader term is used. However, even in cases involving both random drug and alcohol testing, the evidence of drug use and alcohol use are considered separately. In *GTTA*, for example, the arbitrator considered the evidence of alcohol testing and

drug testing sequentially. Based on the evidence, the arbitrator concluded that the use of alcohol was a longstanding and chronic problem in the workplace and upheld random testing. The arbitrator then considered the evidence of drug use and found that there were relatively few incidents spread over a period of many years. The arbitrator went on to conclude that the random drug testing policy was not a valid exercise of management rights.

As a practical matter, it is very difficult to see how incidents related to drug use in the workplace are relevant to the question of whether random alcohol testing is a reasonable invasion of employee privacy. Random alcohol testing does not provide the employer with any information respecting drug use. Neither does it deter drug use. Consequently, it is very difficult to understand how the prevalence of drug use in a workplace could impact on the question of whether and to what extent random alcohol testing would enhance safety in that workplace.

In *Irving*, the Supreme Court referred specifically to the arbitration board's finding that the employer had "exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use." (para. 8) (emphasis

added). Similarly, after a comprehensive review of the arbitral authorities, the Court stated:

In the only two arbitration decisions that have upheld random alcohol testing, the employers were found to be justified in implementing random alcohol testing for employees in safety sensitive positions because there was a demonstrated general problem with alcohol use in a dangerous workplace. (para. 38)

Without parsing the language of the cases too finely, it appears that when courts are dealing with the general subject matter of random testing for both alcohol and drugs, they tend to use the word “substance” to cover both. However, I can find no case involving only random alcohol testing where evidence of drug use has been considered, or vice versa. *Irving* is the most obvious case in point. The only issue there was the validity of random alcohol testing and the only evidence considered related to alcohol use.

Based on the foregoing, I find that evidence of Policy violations related to drug use are not relevant for purposes of applying the *Irving* test in the present case.

Applying the Irving Test

The *Irving* test has two components. First, it must be determined whether the evidence establishes that there is a demonstrated problem with alcohol use on MAI's vessels. Second, if this question is resolved in the affirmative, then it must be determined whether random alcohol testing is a proportionate response to the problem having regard to all the circumstances of the case, including the conflict between privacy interests and safety interests.

Turning to the threshold issue, the onus is on MAI to establish through evidence that there is a problem with alcohol use in its vessel workforce. That evidence can be summarized as follows:

- During the period from October of 1996 until February of 2003, prior to the implementation of random testing, there were 10 alcohol-related Policy violations involving 9 different employees. Four of the incidents involved reporting for work under the influence, 2 of which involved employees being denied access to the shipyard where their vessel was in refit. There were 3 incidents where employees consumed alcohol on tour. The other 3 violations involved deckhand trainees who were found in possession of alcohol in a room on the vessel. Disciplinary action was taken in all cases with penalties ranging from a written warning to a 45-day suspension.

- During the period from February or March of 2003 until October 2017, there were 27 alcohol-related violations involving 24 different employees. As previously mentioned, 6 of those violations occurred when an MAI vessel was in refit in South Carolina and a group of employees were intoxicated when they returned to the vessel after having consumed too much alcohol while ashore. One employee, a three-time offender, was terminated; another received a 7-day suspension; 2 received 3-day suspensions and 2 were given written warnings.
- Four employees were disciplined for failing random alcohol tests. Two received one-month suspensions and one received a two-month suspension. The other employee was treated in a non-disciplinary manner following a medical referral. All four employees returned to work on conditions.
- One employee refused to submit to reasonable-cause testing and, following treatment, was returned to work on conditions. She also received a 2-day suspension. This is the same employee who was ultimately terminated as a third-time offender following the incident in South Carolina.
- Two employees failed reasonable-cause testing. One of the employees involved was tested after he became aggressive with a supervisor. Following a medical assessment and 3-month suspension, the employee was returned to work subject to conditions. However, he resigned shortly thereafter. The

other employee tested positive after being stopped by security when trying to board his vessel. He was suspended for 6 months and returned to work on conditions. Less than a year later, he breached those conditions by failing an unannounced alcohol test and was terminated.

- There was one failure of a post-incident test. The employee hit another car in MAI's parking lot when she was coming in for training. Following a medical assessment, the incident was dealt with in a non-disciplinary manner and the employee was returned to work subject to conditions.
- Two employees breached return-to-work conditions by failing unannounced testing and both were terminated.
- One employee was removed from his vessel because he was intoxicated. He retired prior to being disciplined.
- One employee was found to be under the influence while on duty. The vessel was in the process of being delivered from Europe at the time and not carrying passengers. The employee was initially terminated but his grievance was settled on terms whereby he received a 3-month suspension.
- Two other employees were disciplined for being under the influence during their tour of duty. One case was assessed in a non-disciplinary manner following medical assessment and the employee was returned to work subject to conditions. The other employee received a verbal warning from

the master who did not consult with management or Human Resources before imposing disciplinary action.

- Two alleged violations related to failure of a chief officer and second officer to properly apply the Policy in a situation where security had reported that an engine room employee was boarding the vessel and appeared to be impaired. However, the officers involved apparently deemed him not to be unfit and allowed him to assume his duties. The officers were not disciplined but received “coaching”.
- Another alleged violation involved an employee who tested positive for marijuana during his tour of duty. The previous day he went ashore in Port aux Basques and appeared to be intoxicated. He spent the night in jail and when he returned to the vessel the next day he tested positive for marijuana. Too much time had passed for alcohol testing. The employee was suspended for one month and then returned to work on conditions.
- Finally, 3 violations occurred while employees were deadheading and not on tour. One employee consumed alcohol offsite while wearing her MAI parka and returned to the vessel visibly intoxicated for the deadhead crossing home during which she continued to wear the parka and had donned an MAI hardhat. A passenger complained and she received a written warning. The second employee consumed alcohol while deadheading to work and then

refused to submit to a for-cause test before commencing his tour. He was suspended for one month and returned to work on conditions. The third employee was seen carrying unopened alcohol on terminal property while deadheading home following her tour of duty. This was contrary to the Policy because she was identifiable as an MAI employee. She was not disciplined but received coaching.

October 2017 to February 15, 2019

During this period, there were 4 alcohol-related Policy violations. One employee on return-to-work conditions failed to report for testing. He claimed that due to operational issues onboard he forgot about the scheduled test and was issued a letter of warning. Less than a year later, he refused to submit to reasonable-cause testing and was terminated for breach of his return-to-work conditions. Another employee also failed reasonable-cause testing and received a 2-month suspension. She disclosed alcohol abuse and returned to work on conditions. Finally, the other employee failed a random alcohol test and the investigation of that case was still ongoing as of February 15, 2019.

In addition during this period, there were 5 voluntary disclosures of drug or alcohol abuse illnesses by employees to MAI's Occupational Health nurses.

Three of the 5 were vessel employees and the other 2 were shore employees. It is unclear from the record whether any of the disclosures made by the vessel employees involved alcohol.

Taking all three periods together, there were 41 alcohol-related Policy violations involving 36 different employees from October 1996 to February 15, 2019, a period of slightly more than 22 years. Two violations were for not applying Policy and no discipline was involved. Another violation involved an employee carrying unopened alcohol in MAI's terminal after she had finished her tour and was on her way home. Her only offence was that she was identifiable as an MAI employee. No discipline was involved. I do not consider these 3 violations to be relevant to the issue at hand. Accordingly, I would put the number of actual violations at 38 and the number of employees involved at 33.

With respect to discipline, there were 4 terminations and 22 suspensions as a result of alcohol use. All of the terminations occurred after implementation of random alcohol testing. Nine of the suspensions were imposed before random testing and 13 afterwards.

There were no violations involving the masters and chiefs covered by Agreement E. Only 8 violations involved licensed officers covered by Agreement A. Two of those infractions were committed by the same employee and he was terminated. Two others were non-use violations for failing to properly apply the Policy and were treated as non-disciplinary.

There is nothing in the evidence to indicate that any of the 38 Policy violations caused any accidents or near misses on MAI's vessels.

On balance, I find that MAI has met the onus of establishing that it has a problem with alcohol use by employees on its vessels. The problem can be characterized as persistent in the sense that it is of a longstanding and ongoing nature. In my opinion, however, the problem is not pervasive and there is no indication in the record of "an out of control alcohol culture". The problem appears to be somewhat more serious than that presented in *Irving* where there was evidence of 8 specific alcohol-related incidents over a period of almost 15 years. Five of those incidents involved employees being in the workplace under the influence of alcohol. There was also evidence that other employees had been found in similar circumstances but not dealt with in a disciplinary manner.

On the other hand, the evidence here falls considerably short of establishing the extent of drug or alcohol use found to have existed in *Strathcona* and *GTTA*. I would rate the alcohol problem in MAI's vessel workforce as being in the mid to low end of the range. Nonetheless, I find that the problem is of sufficient magnitude to warrant moving on to the next step in the analysis – whether random alcohol testing is a proportionate response to the problem. This involves balancing the legitimate interests of both parties including the safety benefits which MAI seeks to achieve by random testing and the negative impact of random testing on employee privacy rights.

Dealing first with the impact of random testing on employee privacy rights, it is instructive to consider the following observations by other arbitrators and courts:

- 1) The invasion of that privacy by the random alcohol testing policy is not a trifle. It effects a significant inroad. Specifically, it involves a bodily intrusion and the surrender of bodily substances. It involves coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples. As we saw with Mr. Day, there can be an element of public embarrassment. Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy. (*Irving Pulp & Paper, Ltd. v. CEP, Local 30, supra*, para. 120)
- 2) On the other side of the balance was the employee right to privacy. The board accepted that breathalyzer testing “effects a significant inroad” on privacy, involving

coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples.... Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy. (*Irving*, para. 49)

That conclusion is unassailable. Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that “the use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity” (*R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.), at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399 (S.C.C.), it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the “seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements” (para. 23). (*Irving*, para. 50)

- 3) ... a key feature of the jurisprudence in the area of alcohol or drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated. It is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices. [*Nanticoke*, para. 101] [emphasis added]
- 4) ...The right to one's privacy is the right to protection from the unwarranted intrusion of others in one's life. The underlying premise is that in a democratic society, an individual is free to live as he/she pleases without interference or monitoring, so long as there is no adverse impact upon another nor breach of the law. The Canadian acceptance of the right to privacy is traced through legislation, international and constitutional law, scholarly writings and judicial statements by O'Connell in *Drug Testing and Privacy*, Vol. 2, *Canadian Labour Law Journal* 325. The conclusion there is that privacy, as protected under Section 8 of the Charter, is "an essential value in Canadian society". Specific reference is made to the judgement of the Supreme Court of Canada in *R. v. Dyment* (1988) 2 S.C.R. 417, a case involving the taking of a blood sample for evidence of impairment. In his

judgement, Justice Laforest referred to privacy as “at the heart of liberty in the modern state” and as grounded in man’s physical and moral autonomy (and) ... as essential for the well-being of the individual ... (and) for the public order.” Although conceding that privacy must be balanced against other societal needs, the court found that “persons are protected not just against the physical search but against the indignity of the search. ...” The court concluded that:

The use of a person’s body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity.

Indeed, Canadian police are prohibited from taking breath or other bodily samples without reasonable and probable cause to suspect that an individual is under the influence of drugs or alcohol. In short, it is beyond debate that protection of the individual from unwarranted physical or property intrusion, including unwarranted searches, seizures or surveillance, is a core value of Canadian society.

The recognition of employee privacy is a core workplace value, albeit one that is not absolute.... [*Trimac Transportation Services – Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237, paras. 42 and 43 (Burkett)]

- 5) ...universal no-cause random testing has been consistently described as an intrusive process and a significant infringement upon employee privacy interests within the workplace. I agree. In my opinion, it is not just the requirement to surrender bodily fluids that infringes upon privacy rights. Rather, that infringement extends and endures, in varying degrees, throughout the testing protocols, some of which include: removal from the workplace; escorted attendance for mandatory testing; the nature of the mandatory steps required throughout the testing protocols; the nature and extent of personal disclosures required throughout the Assessment process; and, for those without a substance abuse, dependence or addiction problem, the further encroachments required under a Monitoring Agreements for a 2 year period. [*Teck Coal Ltd. and UMWA, Local 1656 (Drug and Alcohol Policy Testing)*, 2015 CarswellAlta 2237, para. 480 (Alexander-Smith)]
- 6) While random testing by oral swab is much less intrusive than other means of testing, it still amounts to a removal of intimate bodily information, including DNA, without the consent of the employee. On balance, I find that this is an unjustified affront to the dignity and privacy rights of the affected employees, and that the protection of these privacy rights, in all of the circumstances, outweighs the Employer’s legitimate interest in promoting safety.... (*Cougar*, para. 109)

It is clear from these authorities and others that random alcohol testing constitutes a serious invasion of privacy rights of employees. This is so even though, as MAI correctly points out, breathalyzer testing is minimally intrusive compared to other forms of testing. Consequently, while there is not a presumption that privacy rights trump an employer's legitimate interests in promoting safety, it is fair to say that privacy rights must be given very serious consideration in balancing the competing interests.

I do not accept MAI's argument that the Guild's failure to call any witnesses to speak to the impact that random testing has had on them personally should diminish the weight to be accorded to their privacy rights. The facts establishing intrusion on those rights are matters of record. Many of them are imbedded in the Policy itself which contains explicit investigative procedures and testing protocols. Moreover, they were testified to in detail by Ms. Deveau who was in charge of running the program. Parading witnesses to the stand to say that they were offended or embarrassed by being subject to random testing would serve little or no purpose. As I have already stated, it is clear from the authorities that random breathalyzer testing constitutes a serious intrusion on the privacy rights of employees.

Likewise, I cannot accept the Employer's argument that advising new employees when they are hired that they will be subject to random alcohol testing somehow justifies an intrusion on their privacy rights that would not otherwise be permissible. In the first place, privacy rights are *quasi* constitutional in nature and it is debatable whether an employer could insist that a prospective employee waive his or her privacy rights as a condition to being hired. Secondly, pre-employment contracts are not recognized in a unionized workforce. Thirdly, accepting MAI's argument on this point would logically lead to the conclusion that the balancing of interests would tip in favour of the Employer but only with respect to those employees who were hired after the commencement of random testing in 2003. In my view, such a result would be untenable.

On the other side of the scale, there can be no doubt that the safe operation of MAI's vessels is also an extremely important interest. As previously described, these vessels operate in a very hazardous marine environment and the potential for catastrophic loss exists. That risk cannot be ignored and MAI has responded to it by making safety its highest priority. This is perfectly understandable but it doesn't answer the question of whether, in all the circumstances, it reasonably justifies the imposition of random alcohol testing on all vessel employees. For the reasons which follow, I am not satisfied that it does.

I agree with MAI that the public interest in safety is a relevant consideration in this case. A serious mishap on its vessels could endanger the lives of many passengers. In addition, MAI's ferry service is a vital transportation link between the Island of Newfoundland and mainland Canada. The public has a right to expect that MAI would take all reasonable measures to ensure the safety of its vessels, passengers and crew.

I also agree with MAI that past experience shows a reluctance on the part of vessel employees to report alcohol use by other crew members. MAI has made substantial efforts to educate employees on the dangers of alcohol use and the importance of reporting such use if they observe or suspect it. So far, however, there is no evidence that MAI's efforts in this regard have been successful. While this is not a desirable state of affairs by any means, the record indicates that the reluctance by employees to report alcohol use by other employees existed well before 2003 and was neither eliminated nor reduced by implementation of random alcohol testing. Unless MAI succeeds in its attempt to instill a reporting responsibility in its employees, it appears that non-reporting will continue to be a problem with or without random testing. Consequently, in the present context, the relevance of the so-called "culture of non-reporting" is that it may lead to some unknown number of alcohol use violations going undetected. I would add that, as

far as I am aware, there is nothing which prevents MAI from addressing the non-reporting issue more directly by putting designated management representatives on its vessels.

The main benefit MAI hopes to achieve through random testing is deterrence. MAI's position is that it makes every effort to mitigate safety risks and that random testing is the most effective way to deter employees from reporting for work under the influence of alcohol. Further, it contends that no other measures, in particular post-incident testing, are effective in deterring alcohol use. The other benefit MAI seeks to achieve through random alcohol testing is to detect alcohol use and remove impaired employees before they cause any harm. In this regard, MAI acknowledges that reasonable-cause testing does have some preventative effect but says that it is limited by the culture of non-reporting.

In the final analysis, the issue comes down to whether or not the benefits which MAI can reasonably expect to achieve through random alcohol testing are sufficient to outweigh the employee's privacy rights. Despite the obvious dangers and risks associated with the operation of MAI's ferries, the fact is that it has been operating safely for many years and for a good deal of that time without the benefit of modern marine technologies, communications and weather

services. Over those many years, it does not appear that any of MAI's vessels have been involved in a serious mishap or accident caused by alcohol use. This is not the sort of track record one would expect to see if MAI had, as it claims, a pervasive history of alcohol use in its vessel crews.

In this connection, it is worth emphasizing that there is very little evidence of a problem with alcohol use by the Guild's members. There were no Policy violations by masters, chief engineers and chief electrical engineers during the approximately 22-year period from October 1996 to February 2019. In that same timeframe, there were only 8 alcohol-related violations involving licensed officers, 2 of which were for non-use violations and were not treated as being disciplinary in nature. By any fair measure, this does not represent a significant problem with alcohol use by the Guild's members. This is an important consideration because they are responsible for the operation of MAI's vessels. They control the movements of the vessel while at sea as well as during the docking and departure process. In a very real sense, the duties they perform on a day-to-day basis effectively put the safety of the vessel, passengers and other crew members in their hands. While employees covered by Agreement B may be called upon in emergency situations, it is readily apparent that the magnitude of the risk

created by their use of alcohol pales in comparison to the risks that would be associated with alcohol use by the Guild's members.

The parties disagree about the effectiveness of random testing in deterring employees from alcohol use. MAI's witnesses testified they believed it was effective and expressed concern that without random testing there would be increased use of alcohol by employees in the workplace. However, there is no objective evidence to support these conclusions. In the period from October 1996 to February 2003, vessel employees were involved in 10 alcohol-related Policy violations, an average of about 1.6 per year. Post-implementation, over the next 16 years there were 38 such violations, an average of about 2.4 per year. This represents an average increase per year of 50%. In this connection, I note that during the 18-month period when random alcohol testing was discontinued from August of 2013 to January or February of 2015, there were only 2 alcohol-related incidents involving vessel employees which is below the average for the period when random alcohol testing was being conducted. I recognize that average percentages can be misleading, particularly when dealing with small numbers, but directionally they show that random testing has not reduced the number of alcohol-related violations by vessel employees. Indeed, in fairness to MAI, it did not claim that alcohol use by employees had declined since the introduction of random

alcohol testing. Rather, its fear is that use of alcohol among its employees might well be even more serious but for what it believes to be the deterrent effect of random testing and it does not want to risk discontinuing the program for that reason.

MAI contends that, apart from random testing, there are no other available measures which it can use to effectively deter alcohol use by its employees. Almost all large employers have alcohol and drug policies and the primary purpose of those policies is to deter the use of alcohol by employees in the workplace. This is particularly so in the case of dangerous workplaces and safety-sensitive positions. Judging from the authorities, very few of those policies in Canada provide for random testing for either drugs or alcohol. They typically provide for reasonable-cause testing, post-incident testing and unannounced testing for employees who have experienced substance abuse problems and return to work on conditions related to use of alcohol or drugs. Moreover, the policies usually provide for the imposition of strict penalties, including discharge, when employees fail such tests or are otherwise determined to have been impaired while at work. I am satisfied that such policies can and do deter alcohol use in the workplace.

This point was recently reinforced by the Supreme Court of Canada in *Elk Valley*. In that case, the employer's alcohol and drug policy contained a "no free accident" rule which was designed to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problem compromised safety. If an employee did come forward, they would be offered treatment. However, if they failed to do so and were involved in an incident, then they would be terminated if they tested positive in a post-incident test. That is what happened to Mr. Stewart. He was a cocaine user but did not disclose this to the employer and was involved in a mine accident while driving a loader. The post-incident test was positive for drugs and in a subsequent meeting with the employer he disclosed that he thought he was addicted to cocaine. The employer responded by terminating his employment. Mr. Stewart filed a complaint with the Alberta Human Rights Tribunal alleging he had been dismissed because of his addiction. The Tribunal dismissed his complaint because it concluded that he was not adversely affected by the policy because he had the ability to comply with its terms. The dismissal of Mr. Stewart's complaint was affirmed by the Alberta Court of Queen's Bench, the Alberta Court of Appeal and the Supreme Court of Canada. The following passages from the concurring opinion of Justices Moldaver and Wagner were quoted in MAI's closing argument and they are instructive on the

deterrent effect of post-incident testing in combination with the penalty of termination:

The Tribunal found that Mr. Stewart's immediate termination was reasonably necessary. Elk Valley had imposed an Alcohol, Illegal Drugs & Medication Policy ("Policy"), stating that "if an employee was involved in a workplace incident and subsequently tested positive for drugs, the employee would be terminated. This "no free accident" rule was meant to deter employees from using drugs in a way that could adversely affect their work performance. As indicated, Mr. Stewart tested positive for cocaine after being involved in a workplace incident and was therefore subject to termination under the Policy. The Tribunal reasoned that if Elk Valley had to offer the opportunity for individual assessment to Mr. Stewart or replace the immediate effect of termination of employment with less serious consequences (such as a suspension), the deterrent effect of the Policy would be significantly lessened. Given Elk Valley's safety objectives and responsibilities at the coal mine, the Tribunal found that this reduction in the Policy's ability to deter other employees from using drugs constituted undue hardship.

...

In our view, it was reasonable for the Tribunal to conclude that Mr. Stewart's immediate termination was reasonably necessary, so that the deterrent effect of the Policy was not significantly reduced. Elk Valley's coal mining operation was a "safety-sensitive environment" (Tribunal reasons, at para. 75). In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.), at pp. 520-21. Subjecting Mr. Stewart to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of imposing the serious and immediate consequence of termination would undermine the Policy's deterrent effect. This, in turn, would compromise the employer's valid objective to prevent employees from using drugs in a way that could give rise to serious harm in its safety-sensitive workplace. Therefore, the Tribunal reasonably concluded that

incorporating these aspects of individual accommodation within the “no free accident” standard would result in undue hardship: see *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.), at para. 42. (paras. 53, 55) [emphasis by MAI]

In my view, *Elk Valley* illustrates the general acceptance by arbitrators and courts that alcohol and drug policies do have a significant deterrent effect irrespective of whether or not they provide for random testing. The combination of clear rules, strict penalties and consistent enforcement constitute a strong incentive for employees to comply. In a large workforce, of course, compliance will never be perfect but, as the evidence in this case demonstrates, that is also true in workplaces which have random testing. In balancing the competing interests of the parties, therefore, the question is what incremental benefit MAI has achieved or will achieve in terms of deterrence from continuation of random alcohol testing. In my opinion, the answer appears to be very little based on the evidence.

Apart from deterrence, the only other benefit of random testing is detection of crew members who are impaired by alcohol to some degree while on duty. Random testing is not performed on crew members when they are off shift. The threshold level of impairment for taking crew members out of service is .02 BAC which is 4 times less than the Criminal Code threshold for operating a motor vehicle. The threshold level for automatic referral to Human Resources is .04

BAC, one-half the Criminal Code limit. In the 16-year period from February 2003 to February 2019, 5 crew members failed random tests, an average of approximately 1 every 3 years. From February 2003 to June 2017, 3,353 random tests were conducted with 4 positive results which translates into a positivity rate of .0012% (1 in every 838 tests). All of the employees who failed random testing were in the bargaining unit covered by Agreement B and were not directly involved in the operation of the vessel itself. There was no evidence of the actual degree to which the 5 employees in question appeared to be impaired at the time and their BAC readings were not disclosed. Further, there was no evidence that the employees posed any danger to themselves or others. More fundamentally, it is self-evident, in my view, that a random testing rate of 7.5% per tour demonstrates that MAI could not reasonably rely on such testing as an effective preventative measure. On any given two-week tour, 92.5% of the employees are not being tested. Taken together, the low positivity rate and the low selection rate clearly point to the conclusion that MAI is not receiving any significant benefit from random testing in terms of detecting employees on duty whose functional abilities are impaired by alcohol.

Balancing all of the above considerations, I am not persuaded that the benefits of MAI's random alcohol testing program are sufficient to outweigh the

privacy interests of its vessel employees. In other words, random alcohol testing is not a proportionate response in all of the circumstances of this case and “is an unjustified affront to the dignity and privacy rights of the affected employees”.

3. Does the fact that the Guild did not challenge the random alcohol testing program for approximately 12 years after it was implemented give rise to an estoppel or implied term of the collective agreement which effectively precludes the Guild from successfully challenging the program through the grievance procedure?

Estoppel

It is well established that the doctrine of estoppel can apply to prevent one party from insisting on its strict rights under a collective agreement if the following four essential conditions are satisfied:

- 1) a clear and unequivocal representation, particularly where the representation occurs in the context of collective bargaining;
- 2) the representation was made with the intention that it was to be relied on by the other party;
- 3) the other party relied on the representation; and
- 4) the reliance would be detrimental to the other party if the party making the representation was allowed to insist on its strict rights under the collective agreement.

It is also clear from the authorities that the representation can be based on conduct or silent acquiescence in appropriate circumstances. *Brown and Beatty*, 2:2211.

It is debatable whether the first three requirements of estoppel have been made out in the present case. MAI never sought approval of the Policy or random alcohol testing from the Guild or any of its other unions. Instead, it chose to proceed unilaterally as a matter of management rights. For the same reason, it is difficult to discern any reliance by MAI on any express or implied representation by the Guild. Even assuming, however, that the first three requirements were satisfied, there is no evidence at all that MAI would suffer any detrimental reliance as a result of some express or implied representation by the Guild. It certainly did not lose any bargaining opportunity. The grievances were filed in early 2015 under collective agreements which did not expire until December 31, 2016. Even if the Guild was bound by an estoppel, it was entitled to terminate same upon giving notice prior to the commencement of the next round of collective bargaining, which it obviously did by filing the grievances. Consequently, MAI had ample time to deal with the issue in the round of bargaining to renew the agreements which expired December 31, 2016 if it saw fit to do so. Given the absence of any evidence on the point, I can only assume that MAI did not adopt that course or, if it did, the negotiations did not produce an agreement on the issue of random testing.

Accordingly, the estoppel argument must fail.

Implied Term

It is well settled that terms may be implied in collective agreements, just as they may be in other contracts. However, arbitrators should not be quick to do so having regard to the fact that collective agreements are required by statute to be in writing and almost always deny arbitrators the “power to add to, or subtract from or modify any of the terms of the Agreement”, as is the case here. The test for implying contractual terms is set out as follows by arbitrator Saltman in *McKellar General Hospital v. Ontario Nurses’ Assn. (Absenteeism Policy Grievance)* 1986, 24 L.A.C. (3d) 98, at paragraph 14:

...In essence, the test holds that an arbitrator (or board of arbitration) has the power to imply a term into a collective agreement if two conditions are met:

- (1) if it is necessary to imply a term in order to give “business of collective agreement efficacy” to the contract, in other words, in order to make a collective agreement work; and
- (2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.

The foregoing test has been applied in numerous subsequent awards.

See, for example, *Perelmutter v. Office of the Superintendent of Financial*

Institutions, [2013] C.P.S.L.R.B. No. 11 (Bendel); *Scarborough Hospital v. Ontario Nurses' Assn. (Providing Schedules Grievance)*, [2015] O.L.A.A. No. 91 (Slotnick); *Assn. of Justice Counsel v. Treasury Board*, 2016 LNPSLREB 48 (Olsen); and *Cariboo Pulp and Paper Co. v. Unifor, Local 1115 (Baker Grievance)*, (2020) B.C.C.A.A.A. No. 120 (Kandola). In all of these cases, the arbitrators refused to imply terms in the collective agreements before them because the terms sought to be implied were not necessary to give the agreements “business or collective agreement efficacy”, “to make them work” or were terms that the parties “would have agreed without hesitation” to insert in the collective agreement had they turned their minds to the issue.

In *Perelmutter*, adjudicator Bendel stated at paragraph 25:

The reality is that the absence of the implied term advocated by the employer in this case creates no problems for the employer. ... According to *McKellar General Hospital*, before an adjudicator can properly conclude that a term should be implied, it must be shown that it is “...necessary to imply a term to give ‘business or collective agreement efficacy’ to the contract, in other words, in order to make the collective agreement work...” I am satisfied that there is no such necessity in this case.

In *Justice Counsel*, adjudicator Olsen expressly adopted the *McKellar* test and its application by adjudicator Bendel in *Perelmutter* stating:

I have decided to apply the test set out in *McKellar General Hospital* for the same reasons as Adjudicator Bendel, as it is a test that arbitrators and adjudicators continue to follow. (para. 123)

In *Scarborough Hospital*, the issue was whether the employer was required to provide certain work schedules to the union. Among other things, the union argued it was an implied term of the collective agreement that the employer was required to provide the schedules in question. Arbitrator Slotnick rejected this argument stating, at paragraph 23:

...there is no basis to imply a term in the collective agreement requiring production of the schedules, as the parties have clearly addressed which schedules are to be provided to the union. The test for implying a term in the collective agreement, as outlined in the *McKellar Hospital* case, has not been met here. Regarding the second part of that test, the very fact of this dispute means that this is clearly not a situation where the parties would have agreed to the term's insertion had they been aware of the omission....

In *Cariboo*, the union argued, among other things, that a term should be implied in a collective agreement to ensure that a seasonable benefit would not be denied to employees who were hired part way through the season. Arbitrator Kandola responded to this argument as follows at paragraph 39:

With respect to implying terms, the Union acknowledges that arbitrators must be careful to avoid implying terms that the parties did not agree to. Further, and in any event, the case law relied

upon by the Union indicates that an arbitrator may only imply a term into the collective agreement if: It is necessary in order to give business or collective agreement efficacy; and if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion: *McKellar General Hospital and O.N.A.* (1986), 24 L.A.C. (3d) 97 (Butler). ...Ultimately, I cannot find that in this case, implying a term into Article 25 that would result in the issuance of Car Wash Vouchers to any employee who worked during the winter season, regardless of their hire date, is something necessary to give the collective agreement efficacy and make it work. As set out above, I have found the interpretation advanced by the Employer is reasonable and fair, and hence, workable. Nor do I find that implying such a term is something “so obvious that it goes without saying”, or is something the Employer would have agreed to without hesitation had it been made aware of the omission. There is simply no basis upon which I could make such a finding.

Having regard to the facts of the present case, I am not persuaded that MAI has met either of the two conditions for implying a term in its collective agreements with the Guild to the effect that MAI is entitled to conduct random alcohol testing of the Guild’s members. Such a term is not necessary to give “business or collective agreement efficacy” to the agreements or otherwise to make them “work”. There is absolutely nothing in the evidence to suggest that the collective agreements between MAI and the Guild are not working or would be significantly impacted in their operation if random alcohol testing were to cease. Indeed, testing was discontinued for approximately 18 months just prior to the grievances being filed without any noticeable impact. Furthermore, it seems readily apparent from the conduct of the parties throughout that random alcohol

testing is not something to which both parties would readily have agreed to include in the collective agreements if they had been aware of its omission. Indeed, it was always clear to both parties that random alcohol testing and the Policy pursuant to which it was implemented were never part of the collective agreements. MAI consciously decided not to bargain the Policy or any of its various components, including random alcohol testing, with the Guild and its other unions. Having done so, it cannot now be heard to say that the Policy and random alcohol testing are implied terms of the collective agreements.

MAI cited the following cases in support of its argument for an implied term based on acquiescence by the Guild: *Petro-Canada v. C.E.P., Local 593*, 2004 CarswellOnt 4931 (Solomatenko); *Progistix-Solutions Inc. v. C.E.P., Local 26*, 2000 CarswellOnt 5866 (Newman); and *Halifax (Regional Municipality) v. N.S.U.P.E., Local 2*, 2008 CarswellNS 462 (Veniot). In my opinion, these cases are distinguishable because they do not apply or even purport to apply the established test for implying contract terms.

In *Petro-Canada*, the grievance alleged that the employer violated the collective agreement by having its security personnel conduct searches of employees' bags two days each month when the employees were leaving work.

There was no reference to such searches in the collective agreement. The employer argued that the bag searches were a longstanding and reasonable practice. After reviewing the circumspect manner in which the searches were conducted, the arbitrator concluded as follows at paragraphs 38 and 39:

On the evidence before me, I must also conclude that not only was the practice with the union's knowledge but with its acceptance as well. There was no evidence that throughout this history there has been any other grievance challenging these inspections. The union has not even suggested that any employee other than Scott has ever refused to submit to the inspection. The company's unchallenged evidence was that there has been no other employee who has refused. One can safely assume that in the course of 25 years there have been several sets of negotiations for renewal of the collective agreement. But, there was no evidence that the union ever addressed the issue of bag and parcel searches in those negotiations....

In those circumstances, especially having regard to the duration of the practice, the conclusion can only be that the bag and parcel checks have become an implied term or condition of employment. The fact alone distinguishes this grievance from any of the arbitration awards that the union has relied upon, such as *Chrysler Canada, supra*, in which the company instituted a search to deal with one particular circumstance or other cases where the employer tried to initiate searches and the union objected immediately to the practice.

The arbitrator then immediately went on, at paragraph 41, to introduce the following important caveat:

However, where there is an implied right of employers to engage in such searches arbitrators have had close regard to the balancing of interests between the employer's right to security of property and

premises and the rights of employees with respect to their personal privacy; see, e.g., *Denison Mines, supra*, at p. 183, and the cases cited therein. The cases suggest that in the course of that balancing of interests arbitrators have considered a variety of factors such as the necessity of the searches, degree of invasiveness of the search and whether the searches target specific individuals in a discriminatory fashion.

What the arbitrator was referring to, of course, is the same “balancing of interests” or “proportionality analysis” discussed earlier in this decision. Based on the evidence before him, the arbitrator concluded that the searches did not constitute a substantial violation of personal privacy and were a legitimate preventative measure to discourage the unauthorized removal of company property which did not violate specific rights granted either in the collective agreement or general legal principles. Having balanced the competing interests in this manner, the arbitrator denied the grievance.

In *Progistix-Solutions*, the issue was the reasonableness of the employer’s implementation of employee clothing searches. For some years prior, the employer had been conducting searches of employees’ parcels without complaint by the union and the grievance related only to clothing searches. The arbitrator adopted a balancing of interests approach and concluded that the clothing portion of the search policy unjustifiably violated the privacy rights of employees and sustained the grievance. In the course of doing so, the arbitrator made certain

obiter comments about parcel searches in paragraphs 30 and 35, which MAI quotes in its closing arguments as follows:

...There is no doubt that employee parcels have been searched at least since 1991, and that the Company implemented the parcel search portion of its new security policy in April, 1998 without objection from the Union. Thus, implied consent for reasonably conducted parcel searches can be found in the past practice of the parties and the acquiescence of the Union and employees.

...

The Management Rights clause herein contains language giving the Company broad power to manage its operations; it does not specifically grant the Company the right to conduct personal searches of employees. Thus, I can find no explicit consent for the clothing searches within the language of the Agreement. While implied consent for the parcel search policy exists in this case based on the nature of the Company's operation, the conceded reasonableness of its concern about theft by employees and others with access to the warehouse, and the established practice of conducting such searches with acquiescence of the Union and employees, there has been no similar practice of conducting, or acquiescence in, clothing searches. The question which must be resolved is whether the particular clothing search policy implemented in September, 1999 was justified under the circumstances and strikes the proper balance in favour of the Company's right to control theft in the workplace.

In my opinion, to the extent that these comments can be construed as implying a term in the collective agreement, they do not comport with the *McKellar* test. Moreover, absent estoppel or an implied term, I do not see any valid basis upon which acquiescence can somehow be transformed into an enforceable term or condition of employment in a unionized workplace.

In *Halifax*, the issue was whether the installation and operation of a call recording system at the employer's call centre constituted a violation of the privacy provisions in the *Municipal Government Act* or were otherwise an unreasonable violation of the privacy rights of employees working at the call centre. The arbitrator held in the affirmative on both grounds and allowed the grievance. The first ground is not relevant here. With respect to the second ground, the arbitrator commented as follows at paragraph 131:

This analysis, I think, is the true basis for two intimately connected practical notions which are seen to be at work in the cases: the requirement for employer justification and the proportionality criterion. The idea that employee privacy rights accompany the employee into the bargaining unit leads naturally enough to the notion that if the employer takes action which is objected to and which is found or admitted to infringe employee privacy, it is for the employer to justify the infringement. Because the privacy interest is a relative one, it is subject to derogation effected by the operation of the terms and conditions of employment in force for members of the bargaining unit. The employer may be able to justify in a variety of ways – by pointing to a specific provision in the agreement, or, more typically, by reference to general agreement language which has the effect of reserving to it the right to run its enterprise and to direct the work force, or by reference to long accepted practices in the workplace. There may be others. [MAI's emphasis]

MAI relies on the highlighted portion above. However, there was no issue of acquiescence in *Halifax* and no discussion of past practice giving rise to an implied term of the collective agreement. Consequently, the arbitrator's reference to long-

accepted practices as being a justification for invasion of employee privacy rights is clearly *obiter*. Furthermore, I note that the arbitrator immediately went on to emphasize the importance of privacy rights, quoting the following from *Canada Post Corp. v. C.U.P.W.* [1988 CarswellNat 876 (Can. Arb.)]:

The right of privacy, including the right of an employee to refuse to permit an employer to take fingerprints, is fundamental to any free society and should not be infringed upon by an employer in the absence of clear and unequivocal statutory authority, clear and unequivocal contractual language or by a clear and compelling inference to be drawn from contractual language. None of these is present in the grievance before me. (pp. 411-12) [emphasis added]

Having reviewed these authorities, I remain of the view that acquiescence alone is not a sufficient basis upon which to imply a term in a collective agreement which would permit an employer to substantially intrude on the privacy rights of its employees. As previously indicated, there is no necessity for implying such a term and, as the record shows, it is not a term which the parties would readily have agreed to if it had been raised at the bargaining table.

Conclusion

For all of the above reasons, the grievances are allowed. By way of remedy, it is hereby declared that random alcohol testing of MAI's vessel

employees, upon pain of discipline, constitutes an unreasonable invasion of their privacy rights and thereby violates the Guild's collective agreements.

DATED at Halifax, Nova Scotia, this 16th day of April, 2021.



BRUCE OUTHOUSE, Q.C.
Arbitrator