New Nouveau Brunswick

JUSTICE

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Message:

I am sending by fax a copy of Mr. Justice William T. Grant's reserve decision on an application for judicial review, filed today with the Clerk's Office in Saint John.

S/M/21/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

Citation: 2010 NBQB 294
Date: 2010 09 17

IRVING PULP & PAPER, LIMITED

Applicant

- and -

COMMUNICATIONS, ENERGY and PAPERWORKERS UNION OF CANADA, LOCAL 30

Respondent

BEFORE:	Justice William T. Grant
HEARING HELD:	Saint John
DATE OF HEARING:	June 2, 2010
DATE OF DECISION:	September 17, 2010

COUNSEL:

William B. Goss, Q.C. and Melissa M. Everett Withers on behalf of the Applicant

David G.D. Gauthier on behalf of the Respondent

DECISION

GRANT, J.

[1] This is an application by Irving Pulp and Paper Limited ("Irving" or "the company") for judicial review of an award of the Majority of an arbitration Board ("the Majority") dated November 26, 2009. In the award the Majority upheld a grievance by Perley Day, a member of the Communications Energy and Paperworkers Union of Canada, Local 30 ("the union" or "Local 30"). In his grievance Mr. Day, who was randomly selected and tested for alcohol during work, grieved the company's drug and alcohol testing policy alleging that "... there was no reasonable grounds to test or a significant accident or incident which would justify such a measure."

[2] The company adopted a Policy on February 1, 2006 entitled "Irving Pulp and Paper Limited Policy on Alcohol and other Drug Use". The arbitration focused on Part V (iii) (c) of the Policy dealing with random alcohol testing which reads as follows:

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

[3] Irving asks this Court to quash the ruling of the Majority on the following grounds:

(a) The Arbitration Board Majority's Decision is unreasonable in that it contradicts the conclusion of the Ontario Court of Appeal in *Entrop v. Imperial Oil* [2000] O.J. 2689 (C.A.) to the effect that random alcohol testing for employees occupying "safety-sensitive positions" in a "safety-sensitive work environment" is a reasonable and permissible employer policy, without any intelligible, transparent or justifiable rationalization for such a contradictory result.

(b) The Arbitration Board Majority's Decision is unreasonable in that it purports to create a new, heretofore unheard-of employer category of "ultra-dangerous operations", as distinct from the previously universally accepted characterization of a "safety-sensitive" work place as being "an enterprise whose normal operations pose substantial risk for the safety of employees and the public" (or other similarly worded formulations of the same effect). The Arbitration Board Majority Decision then finds that other named industries fall within this new "ultra dangerous operations" category, in the complete absence of any evidence whatsoever as to the "safety-sensitivity" of those other named industries, while at the same time excluding the Applicant employer's Kraft Pulp Mill operations from the new "ultra-dangerous" category, in a conclusion of fact unsupported by, and contrary to, all of the evidence before it, and unsupported by the submissions of the Respondent union, a conclusion which is unintelligible, untransparent and unjustifiable.

(c) The Arbitration Board Majority's Decision is unreasonable in that, having cited with approval several authorities in support of the proposition that it is not necessary to "document near disasters" associated with workplace alcohol abuse before adopting "a vigilant and balanced policy of drug and

alcohol detection", the Majority Decision proceeds to substantially rely upon the absence of such "documented near disasters" as a justification for setting aside the Applicant employer's random alcohol testing program, a reasoning process that is not intelligible, transparent or justifiable.

(d) The Arbitration Board Majority's Decision is unreasonable in that the 10% per annum sample size chosen by the employer for the random alcohol testing program, in an effort to minimize the "intrusiveness" of the program, is then used against the employer as "indirect evidence from which the inference can be drawn that plant management does not regard the incremental safety risk posed by alcohol in this plant as being high among incumbents in the safety sensitive positions", an unintelligible and unjustifiable conclusion.

(e) The Arbitration Board Majority's Decision is unreasonable in relying upon the fact that there had been no positive random alcohol tests in the 22 months from the policy implementation date to the date of the Hearing for the conclusion "this evidence gives a push in the direction of the conclusion that the employer belongs at the lower end of the scale in terms of the existence of incremental safety risk posed by alcohol use", a conclusion which is not intelligible or justifiable.

(f) The Arbitration Board Majority's Decision is unreasonable in that, having acknowledged the Supreme Court of Canada's ruling in *R. v. Stillman* [1997], 1 S.C.R. 607 at page 659 that breathalyzer testing is "minimally intrusive", the Board Majority says the opposite in its conclusions: "It effects a significant inroad. Specifically, it involved a bodily intrusion and the surrender of bodily substances. It involves coercion and restriction on movement" and again later "The inroads into employee privacy are significant and out of proportion to any benefit ...". These internal contradictions in the Board Majority Decision are unintelligible and unjustifiable.

(g) The Arbitration Board Majority engaged in an unreasonable decision making process that was neither transparent, nor intelligible, nor justifiable.

(h) The Arbitration Board Chair misconducted himself within the meaning and for the purposes of section 78(1) of the *Industrial Relations Act*, C. I-4, R.S.N.B. in that he breached the duty of procedural fairness and the rules of natural justice by engaging in consultations and Decision drafting with the Union nominee to this tripartite Arbitration Board in the absence, and to the exclusion, of the employer nominee, and by otherwise engaging in a deliberative and Decision making process which effectively thwarted the employer nominee's ability to have any meaningful or effective input into the "final draft" of the Decision.

STANDARD OF REVIEW

[4] The parties agreed that the standard of review that applies with respect to grounds (a) to (f) is the standard of reasonableness. The standard of review that applies to the process followed by the Board and the issue of natural justice is the correctness standard: see ***Rothesay Residence Association Inc. v. Rothesay Heritage Preservation and Review Board et. al.***, 2006 NBCA 61 (CanLII).

NATURAL JUSTICE

[5] The applicant claims that the Board Chair misconducted himself by breaching the duty of procedural fairness and the rules of natural justice in the process of drafting the decision. It asks the Court to set the Arbitration Board's award aside under section 78(1)(b) of the ***Industrial Relations Act*** R.S.N.B. 1973 c. I-4. It submits that the Chair engaged in consultations and decision drafting with the union nominee in the absence and to the exclusion of the employer nominee and that he effectively

thwarted the employer nominee's ability to have any meaningful or effective input into the final draft of the decision.

[6] In his affidavit David Lavoie, the employer nominee, states that there were no substantial deliberations or discussions amongst members of the Board at the conclusion of the hearings on January 15, 2009 and that he next heard from the Board Chair, Milton Veniot, by email on August 11, 2009. In the following two months there was an exchange of correspondence by email arranging for the timing of discussions and the sending of the first draft of the decision. That draft, which was prepared by Mr. Veniot and consisted of 77 pages, was sent on October 30, 2009.

[7] At paragraph 10 of his affidavit Mr. Lavoie deposes that he:

> **... participated in no substantial discussions, consultations or deliberations by or amongst the members of this Arbitration Board regarding the evidence or issues in this matter, prior to receipt of ...** (the draft) **... on October 30, 2009.**

[8] The members of the arbitration board then held a telephone conference call on November 2, 2009 to discuss the draft. At Mr. Lavoie's suggestion changes were made to the draft to include reference to evidence presented by the employer. He received a second draft on November 6, 2009 and a second telephone conference call was arranged for November 9, 2009.

[9] At paragraph 14 of his affidavit Mr. Lavoie deposes that during that call:

> **... I advised Mr. Veniot that I disagreed with his logic and that I would be preparing a dissenting opinion. At or near the conclusion of this telephone conference call Mr. Veniot**

> **advised Mr. Cook and myself that he would be reviewing his draft award because he felt that he had gone into too much detail in some areas and that he planned to cut out some material. He offered no specifics with respect to the details of this intended editing.**

[10] On November 13, 2009 Mr. Lavoie received the third draft together with the following email:

> **Gentlemen: Here is the draft I propose to publish. This will allow David an opportunity to prepare his dissent and I will discuss the draft with Larry. If there are any changes, I will make them available to David immediately. Kind regards to you both.**
> **Milton Veniot**

[11] On November 16, 2009 Mr. Lavoie wrote to Mr. Veniot as follows:

> **I will assume that there will be no further changes and I will start working on the dissent opinion later today with the objective of having it to you early next week.**

[12] Later that day he wrote to Mr. Veniot again as follows:

> **Rather than print and read the complete document again, can you advise as to the first page that has changes in it as compared to your last draft?**

[13] He deposes that he did not receive any response to that inquiry but that less than three hours later he received a document entitled "Final Draft" with what he calls " ... the accompanying admonition from Mr. Veniot: There will be no further changes". He deposes that it was then that he realized that there were substantial changes in the legal and factual analysis since the last discussion he had had with Mr. Veniot and Mr. Cook on November 9, 2009 though he does not say what those substantial changes were.

[14] Mr. Veniot filed an affidavit in response to Mr. Lavoie's affidavit in which he states, *inter alia*:

> **6. On January 15, 2009, all three members of the Board met immediately following the conclusion of the hearing and discussed both the merits of the case and how the matter would proceed from there. All three members put forward their original thoughts relating to the merits of the case. During this meeting it was agreed that I would prepare a draft and circulate it for discussion.**
>
> **7. My contemporaneous time records record the time spent in this meeting as .80 hours. My practice is to bill to the nearest highest tenth hour, so this meeting lasted between 48 and 54 minutes. It was recorded in my contemporaneous time keeping records with the following entry:**
>
> **1/15/2009 – caucus with board following hearing .80**
>
> **...**
>
> **9. On August 11, 2009, I circulated to Board members and to counsel by email a copy of an arbitration decision to which counsel had not referred, but which I believed was relevant. I invited both board members and counsel to comment on the decision. ...**
>
> **10. On October 30, 2009 I emailed to David Lavoie and Larry Cook the first draft award. ...**
>
> **11. On November 2, 2009, the Board met in a telephone conference call for 57 minutes, to discuss the October 30, 2009 draft. This is marked as 1 hour in ...** (my account) **... and 57 minutes in my telephone records.**
>
> **12. During this telephone conference all three members provided their points of view on the merits of the case. Mr. Lavoie's view was that I had failed to address the detail of some of the evidence relating to individual safety sensitive positions evidence which had been introduced by a witness but which had not been referred to in any detail at the hearing.**

13. During this telephone conference Mr. Lavoie advised that he would not support an award that allowed the grievance.

14. Following this telephone conference, I reviewed the evidence on the individual safety sensitive positions evidence (sic) referred to by Mr. Lavoie. I took that evidence into consideration in proceeding to the 2nd draft award and subsequently provided the 2nd draft award by email on November 6, 2009. ...

15. On November 9, 2009, all three members of the Board met by telephone conference and were able to put forward their points of view. This meeting was not recorded on my time records which was an oversight on my part. However, the telephone accounts record show that the call lasted 12 minutes. The third meeting ended after this period of time because Mr. Lavoie maintained his position that he would dissent. Thus, the board had reached an impasse with respect to progress to a unanimous award.

16. During the November 9, 2009 (sic) an agreement was reached between myself, Mr. Cook and Mr. Lavoie that I would prepare the final majority award in consultation with the consenting member Mr. Cook. Once it was reviewed with Mr. Cook I would send it to Mr. Lavoie and to give him an opportunity to either support it, or maintain the opt-out and write the dissent.

17. I circulated a third draft on November 13 to Mr. Cook and Mr. Lavoie by e-mail. In the accompanying e-mail, I advised as follows:

> **Gentlemen: Here is the draft I propose to publish. This will allow David an opportunity to prepare his dissent and I will discuss the draft with Larry. If there are any changes, I will make them available to David immediately. Kind regards to you both. Milton Veniot.**

18. I discussed the final award with Mr. Cook for 16 minutes on November 16, 2009. This finalized it as can be seen in Exhibit "A". I then sent it to Mr. Lavoie by e-mail

on the same date. ... In line with my e-mail of November 13, I advised Mr. Lavoie that there had been further changes and pointed him, in particular, to "more substantial changes in Issue 8, item (e)." I also set out the agreed procedure for finalizing matters. The full text of the e-mail is as follows:

> Dear David and Larry: I want to acknowledge receipt of David's two e-mails.
> There were some more changes, but Larry and I have agreed on a draft which will be signed. There will be no further changes. I'm attaching a copy of final draft. Most of the changes are grammatical, or stylistic — getting rid of redundancy, and so on — but there have been more substantial changes in issue 8, item (e).
>
> I have couriered Larry a signature copy which he will sign and return to me. I will then sign it as the majority award, and will wait for David's dissent which I will publish together with the majority award. I note David's comment that his objective is to have it ready by early next week, and that would certainly be agreeable. Thanks for all your help to date. Milton

Accordingly, Mr. Lavoie knew that changes had been made and was alerted to them by my November 16th e-mail, and invited to provide his dissent. ...

19. Accordingly, I disagree with Mr. Lavoie's statement made in paragraph 15 (sic) of his affidavit in which he informs that I did not respond to his 2 emails of November 16, 2009. I refer to my email of November 16, 2009 — Exhibit "G" — which is a reply and response to both of those e-mails.

20. In total the board had between 117 minutes and 123 minutes of caucus time, either face to face or telephone conference meetings on the merits of the grievance. These board caucuses ceased only when Mr. Lavoie made it clear that he would not support an award that allowed the grievance, and would file a dissent.

21. In my experience once a member has taken a final position to dissent, that dissenting member gets a copy of the final majority award. This process might lead to a change of opinion. In addition, having the majority award does in my experience provide the opportunity to have access to same while drafting the dissent.

22. While waiting for Mr. Lavoie's dissent on November 19, 2009 I sent an email to Mr. Cook and Mr. Lavoie to inform them of two grammatical changes to the signed award. ...

23. On November 20, 2009, I received an email from Mr. Lavoie providing an update on the expected date of completion of his dissent. ...

24. On November 22, 2009, I received an email from Mr. Lavoie providing a copy of his dissent. ...

...

27. At no point between January 15, 2009 and November 23, 2009 did Mr. Lavoie voice any concerns relating to the conduct of the chair nor the manner in which the board was proceeding to disposition. Mr Lavoie in his November 22nd, 2009 email referred to in Exhibit "J" also stated the following:

"It has been a pleasure working with you both".

LAW

[15] The employer relies on the following cases: ***U.N.A., Local 1 v. Calgary General Hospital*** (1989), 39 Admin. L.R. 244 (ABQB) and ***N.A.P.E. The Newfoundland*** (1995), 132 NFLD. and P.E.I. R. 205.

[16] In the ***Calgary General Hospital*** case a tripartite arbitration board heard an employee grievance after which the chair proposed a later meeting to reach a decision. In the event he met separately with the two nominees and prepared a draft after his first meeting with the employer's

nominee. In quashing the arbitration award the Court stated at paragraphs 8 and 9:

> **In my view the rules of natural justice require that, in the case of a tripartite board, there be an opportunity for deliberation by the board members before the issue is determined and an award is issued. ...**
>
> **... There are many ways in which deliberation by a tripartite board can be accomplished. What is essential is that the chairman arrange a means whereby each of the nominees has an opportunity to know and respond to, the opinions of the other nominee, and for the chairman to know the nominees' final opinions and responses before he issues an award. Whether this is accomplished by the board meeting together, or by conference telephone calls, or by an exchange of correspondence, or by some other means, is not important, so long as there is an opportunity for the board to deliberate before coming to a decision.**

[17] In the ***Newfoundland*** case the Board met for twenty minutes to half an hour immediately following the hearing. The chair did not express his views but subsequently sent a draft award to the nominees for their comments. The employer's nominee agreed with it and signed it and the chair asked the union nominee to do the same or he would assume the union nominee dissented. The union nominee met with the chair to voice his opinion but the employer nominee declined to attend that meeting unless the award was going to change. In that case the Court stated that it is necessary for each member of the board to be exposed to views and counter-arguments of the other members as they develop throughout the decision-making process and that board members must be open to a consideration of opposing points of view and be willing at least in principle to reconsider their position. Because that exchange of opinions was not conducted the Court quashed the award.

CREDIBILITY

[18] I find that the allegations made by Mr. Lavoie in his affidavit are not supported by the whole of the evidence. For example he states that following the completion of the hearing on January 15, 2009 the Board had no substantial deliberations. Mr. Veniot's time records contradict that as does his affidavit. The three members of the Board spent between 48 and 54 minutes discussing the case while it was fresh in their minds. In my view that is not an insignificant amount of time for the members to spend discussing the case.

[19] Mr. Lavoie then goes on to say that the first communication he received from Mr. Veniot regarding a deliberative or consultative or decision-making process was by email of August 11, 2009. He goes from saying that "no substantial deliberations" had taken place to "the first communication that I received" leaving the impression that there had been no caucus whatever following the conclusion of the hearing. I accept Mr. Veniot's evidence on this issue as it is documented by contemporaneous notes made by him at or about the time of that meeting.

[20] Furthermore Mr. Lavoie deposes that he sent an email to Mr. Veniot on November 16, 2009 asking him where he can find the first changes since the previous draft and that Mr. Veniot did not reply to that inquiry. However in exhibit 16 of Mr. Lavoie's affidavit there is an email to him from Mr. Veniot of the same date — November 16, 2009 — in which he encloses a copy of the final draft, describes most of the changes as

grammatical or stylistic but specifically refers to substantial changes with respect to one particular issue. In my view Mr. Lavoie's allegation that Mr. Veniot did not respond to his email is simply not credible.

[21] Finally, in the November 16 email in which Mr. Veniot responds to Mr. Lavoie he informs him and Mr. Cook that "there will be no further changes" to the draft which he and Mr. Cook have agreed to sign. Mr. Lavoie in his affidavit refers to this as "an admonition" suggesting that Mr. Veniot was foreclosing any further discussion of the award. In my view that completely mischaracterizes the message. When read in the context of the paragraph in which it is written and the email to which he was replying it becomes clear that Mr. Veniot was simply confirming the assumption made by Mr. Lavoie in his earlier email and using the very language that Mr. Lavoie had used in doing so. To imply that there is anything sinister about his statement is a complete distortion of it in my view.

[22] Because of the mischaracterizations in Mr. Lavoie's affidavit noted above, when his version of the facts on the issue of the decision-making process followed by the Board conflict with that of Mr. Veniot I accept Mr. Veniot's version which I find to be more consistent with the objective evidence and thus more reliable.

ANALYSIS AND DECISION

[23] The law on procedural fairness is not set down in any formula because each case must be analyzed according to its own facts. There are, however, principles which must be applied to each case as discussed in the ***Calgary General Hospital*** and ***Newfoundland*** cases, *supra*. There must be an opportunity for each Board member to be exposed to

the views and counter-arguments of the other members throughout the decision-making process and there must be an opportunity for the Board to deliberate before coming to a decision. That said, once the members of a tripartite Board have made a decision and one of them has decided to dissent then they must, of necessity, work on their own to some extent in preparing their awards.

[24] I accept Mr. Veniot's evidence that the Board had between 117 and 123 minutes of caucus time including both a face to face meeting and two telephone conferences dealing with the merits of the grievance. That is not insubstantial in my view. Moreover, once Mr. Lavoie made it clear that he was going to dissent he was not cut off from further involvement in the majority award but rather kept advised and provided with drafts of it as it progressed. In fact before he started to write his dissent the majority award was virtually complete.

[25] Moreover Mr. Lavoie was advised of the ongoing discussions being held by the Majority prior to them occurring and could have requested the chance to participate or requested a further meeting to discuss the majority award. There is no evidence that he did either.

[26] I also accept Mr. Veniot's evidence that there was a process agreed upon for finalizing the award and I find that it was fair process which, I note, Mr. Lavoie did not object to at the time.

[27] In my view this tripartite Board took the opportunity to deliberate on the merits of the case before and during the determination of the issues and before the award was issued. There is no evidence that the opinions of the other nominee, Mr. Cook, or Mr. Veniot changed or evolved in any significant way after Mr. Lavoie made it clear that he was

going to write a dissent. In his email of November 16, 2009 replying to Mr. Lavoie, Mr. Veniot specifically directs him to any substantial changes in the final draft of the majority award. In my view he was given ample opportunity to discuss and deliberate with the other members of the Board before the decision was made.

[28] I therefore find that there is no merit to the employer's allegation that the Chair engaged in consultations and decision drafting with the union nominee in the absence and to the exclusion of the employer nominee or that he effectively thwarted the employer nominee's ability to have any meaningful or effective input into the final draft of the decision.

[29] I further find that the Board Chair did not misconduct himself by breaching the duty of procedural fairness and the rules of natural justice in the decision-drafting process and I dismiss the employer's request to set aside the award under section 78(1)(b) of the ***Industrial Relations Act***, *supra*.

REASONABLENESS

POSITIONS OF THE PARTIES

[30] This case involves two competing rights which have been the subject of much commentary in the judicial and arbitral jurisprudence *viz.* the privacy rights of employees versus the right of management to set policies in the workplace. In brief the company takes the position that because the Irving Pulp and Paper Mill is a workplace that is dangerous then it is reasonable for them to set a policy which allows them to conduct random alcohol testing on employees who work in safety sensitive positions. The union's position is that the reasonableness of the policy is

not dependent on whether or not the plant is dangerous or the work is safety sensitive but rather on the history of safety in the workplace.

THE MAJORITY DECISION

[31] After setting out the facts which gave rise to the grievance as well as the positions of the parties the Majority identified the main issue as a conflict between two asserted rights, the employees' right to privacy and the employer's right to make rules in the workplace. It concluded that the two rights cannot be measured against each other but that they must be measured against objective standards.

[32] The parties agree that the Majority applied the proper standards in analyzing the authority of an employer to make rules in the workplace. Those standards were set out in the case of ***Re Lumber and Sawmill Workers Union, Local 2537 and K.V.P. Co. Ltd.*** (1963), 16 L.A.C. 73 as follows:

> **A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:**
>
> **1. It must not be inconsistent with the collective agreement.**
>
> **2. It must not be unreasonable.**
>
> **3. It must be clear and unequivocal.**
>
> **4. It must be brought to the attention of the employee affected before the company can act on it.**
>
> **5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.**

6. Such rule should have been consistently enforced by the company from the time it was introduced.

[33] The Majority found that standards 1, 3, 4, 5 and 6 were met in this case and focused on standard #2, i.e. whether or not the policy of random alcohol testing was unreasonable. Neither party took issue in this Court with those findings or that approach to the grievance.

[34] The Majority then reviewed the jurisprudence on the question of what is meant by "reasonable" in the law and referred to the following quotations from the Supreme Court decision in ***Dunsmuir v. New Brunswick***, 2008 1 S.C.C. 9 where Lebel and Bastarache JJ. wrote at paras. 46-7 as follows:

> **...Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality...**
>
> **47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.**

[35] The Majority also relied on the following passage from Binnie, J. at para 150 of ***Dunsmuir***:

> **[150] I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.**

[36] They then referred to the comments of Sopinka J. in ***Central Okanagan School District No. 23 v. Renaud***, [1992] S.C.R. 970 where he discussed the concept of reasonable measures in relation to the duty to accommodate in the workplace by stating:

> **What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.**

[37] Finally the Majority referred to the following passage from Brown and Beatty's **Canadian Labour Arbitration** (4th Ed. 2006) Loose-leaf Update to 2009 at 4:1554 concerning the application of the standard of reasonableness in assessing an employer's policy:

> **In applying the standard of reasonableness, arbitrators assess the extent to which the rule is necessary to protect the employer's interests in operating the plant, in preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner. At the same time, the impact of the rule upon the employees' interests must be assessed and a balance struck that gives an appropriate effect or proportional regard to each interest...**

[38] The Majority then concluded that the onus is on the employer to justify a policy by demonstrating that the benefit of the policy is proportional when measured against the damage done to the employee's

right to privacy. It concluded that to do so the employer must demonstrate a need for the rule which justifies intrusion by the employer on the employee's right to privacy.

[39] The Majority then makes a finding that the onus is on the employer to prove that the benefit gained by the policy is proportionate to the damage done to the employee's privacy right. They then review cases dealing with random testing. The first of these is the case of ***Imperial Oil Ltd. v. C.E.P. Local 900***, [2007] 157 L.A.C. (4th) 225 which is known as the "Nanticoke" case. In that the case the union objected to the company's use of random, unannounced alcohol and drug testing. Random alcohol testing had been in use in the workplace since 1992 and the employer made a preliminary objection on the grounds that the union had waived any right to object by its inaction. The Board upheld that and did not deal further with the issue of random alcohol testing though it did deal with random drug testing which it rejected.

[40] The Majority also noted that the Board in the ***Nanticoke*** case distinguished the decision of the Ontario Court of Appeal in ***Entrop v. Imperial Oil*** [2000] O.J. No. 2689 ("Entrop"). In ***Entrop*** the Court of Appeal set aside a decision of the Ontario Human Rights Commission to the effect that random alcohol testing breached the Human Rights code. The Court of Appeal upheld the policy as a *bona fide* occupational requirement on the grounds that it was reasonable. In the ***Nanticoke*** case the arbitration Board distinguished ***Entrop*** as being limited to human rights cases and noted that it did not involve a collective agreement. The union in this case makes the same argument.

[41] The Majority agreed with the Board in ***Nanticoke*** when it found that ***Entrop*** concerned the human rights test and the standards that govern such matters. It also found that, being a human rights case, it did not involve a balancing of interests such as occurs in arbitration cases. The Majority stated at page 33:

> **... at the point at which an arbitrator turns to a balancing of interests, the Human Rights Tribunal takes another fork in the road — that of reasonable accommodation — because that is what Human Rights laws require. The Majority then rejected the employer's submission that the *Entrop* case decided the issue in this case.**

[42] The Majority then reviewed the standards referred to in the ***Nanticoke*** case as "the Canadian model" and rejected them as having little value with respect to the issue before the Board in this case.

[43] Curiously, the Majority then continued with an analysis of the Canadian model by reviewing two cases dealing with random alcohol testing. In the first, ***Re: Communication, Energy and Paperworkers Union, Local 770 and Imperial Oil Ltd.*** (unreported, May 27, 2000 Christian, Chair), the grievor was subjected to random alcohol testing which he failed and Imperial Oil dismissed him. The arbitration Board noted the need for "some reasonable and significant concern before the employer limits employee privacy" as well as "evidence upon which the employer could rationally conclude that alcohol and drug use might cause catastrophic damage at the ... refinery". After reviewing the evidence concerning the risk situation at the refinery the Board concluded that the employer was justified in implementing the random alcohol testing policy saying "the company had the evidence it needed to act".

[44] The Majority also reviewed the case of ***Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004***, [2007]

C.L.A.D. No. 243 where the union grieved the implementation of a drug and alcohol policy under the collective agreement, the Charter of Rights and the *Canadian Human Rights Act*. In the forty-day hearing the Board heard a great deal of evidence regarding alcohol problems in the workplace as well as safety issues that had arisen. The arbitrator concluded that the random alcohol testing provisions of the policy were justified. The Majority in this case noted that the arbitrator distinguished other decisions reaching a contrary conclusion on the basis of his assessment of the evidence of risk dealing with the use of alcohol in the workplace.

[45] The Majority then stated:

> **... To succeed, it is necessary for this employer to demonstrate on the evidence that the risk it appreciates and addresses by its *Policy* exists to a degree sufficient to justify the means chosen to address it. ...**

[46] They then went on to consider what is meant by risk and find that it can refer to at least three different situations:

- **the risk of inherent (sic) in the performance of the duties of a particular position or class of positions in the workplace;**
- **the risk attached to a particular enterprise, considered on its own;or**
- **the risk associated with the enterprise considered as an exemplar of a highly safety sensitive industry.**

[47] The Majority then found that drug and alcohol testing policies don't address the risks directly so much as they do increments to risks in the workplace. They also found that an assessment of the risk is "... an exercise in identifying whether, in the particular workplace under consideration, there is an increment to normal operations risk associated

with alcohol use. This is a question of fact to be decided on the evidence".

[48] They further found that evidence of risk could be available from the nature of the industry itself and that there is a lighter burden of justification on an employer engaged in the operation of "an ultra hazardous endeavour". In support of that finding the Majority relied on the case of ***Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)***, [2000] 95 L.A.C. (4th) 341, where the arbitration Board stated at paragraph 195, inter alia,

> **...It seems to the Arbitrator that there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of an employer without first requiring an extensive history of documented problems of substance abuse in the workplace. Few would suggest that the operator of nuclear generating plant (sic) must await a near meltdown, or that an airline must produce documentation of a sufficient number of inebriated pilots at the controls of a wide-body aircraft, before taking firm and forceful steps to ensure a substance-free workplace, by a range of means that may include recourse to reasonable grounds drug and alcohol testing. The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather an a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, Boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.**

[49] The Majority further noted that the question of whether an industry is in that category is a matter of evidence.

[50] The Majority then set out the components of the policy in this case and its consequences and reviewed the evidence of the employer's expert. They then reviewed the evidence of risk at the employer's plant and concluded at page 59:

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

[51] The Majority then reviewed the evidence of Leo Moorehouse who worked for the employer for 37 years retiring in July of 2009. For 15 of those years he was in a union and for the remainder he was industrial relations superintendant. Mr. Moorehouse stated:

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

[52] The Majority then commented that when read in conjunction with the documentary evidence "there is significant support for much of his comment". Then, after reviewing the descriptions of a number of the positions, the Majority found "... that the mill in normal operation is a dangerous work environment."

[53] The Majority then found that Mr. Moorehouse's evidence did not persuade them that the mill was as dangerous as he testified that it was. They stated at page 64:

> **His evidence on this point was conclusionary to the effect that this plant belongs in the category of ultra dangerous operations, to which he believes chemical plants belong. On the evidence I have, I do not share that conclusion. There is not a sufficient case made out to put the operation of this Kraft pulp mill in the same category of risk as a nuclear plant, an airline, a railroad or a chemical plant, or like industries.**

[54] The Majority then reviewed the evidence of incremental risk of alcohol-related impaired performance in the plant. They found that there were only five incidents where employees had attended work under the influence of alcohol in a 15 year span ending in January 2006 but did not accept the employer's evidence that there were other occasions where employees had not been sent home or the incidents were not documented. They concluded that the evidence did not indicate a significant problem with alcohol-related impaired performance at the plant. They also noted that there was no evidence of any actual experience with accident, injury or near miss and with what groups of employees and still less, any causal link to such incidents and the abuse of alcohol.

[55] The Majority then drew an inference that management does not regard the incremental risk posed by alcohol in the plant as being high among the incumbents in safety-sensitive positions because it only tests ten percent of the safety-sensitive employees per year whereas in other cases the numbers ranged up to one hundred percent.

[56] The Majority then noted that from the time the policy had been implemented there had not been a single positive random alcohol test nor any positive tests for reasonable cause at the Irving plant. They did not accept the suggestion by Mr. Moorehouse that this indicated that the deterrent effect of the policy was working but concluded rather:

> **This evidence gives a push in the direction of the conclusion that the employer belongs at the lower end of the scale in terms of the existence of incremental safety risks posed by alcohol use. My conclusion on the evidence, overall, is it shows a very low incremental risk of safety concerns based on alcohol-related impaired performance of job tasks at the site.**

[57] The Majority then considered the various methods of testing for alcohol and referred to the case of ***R. v. Stillman***, [1997] 1 S.C.R. 607 where the Supreme Court described the breathalyzer testing procedure as "minimally intrusive" (p. 659). They then concluded that this means of testing, which the employer uses in its random alcohol testing, would have the lowest impact on the privacy of employees and was therefore a reasonable choice for this employer.

[58] The Majority then conducted a balancing of the interests focusing on the issue of proportionality i.e. measuring the benefits to the employer from random alcohol testing against the harm to the employee's right to privacy. They concluded that there is no significant degree of incremental safety risk attributable to employee alcohol use in the workplace, and when that is taken together with the low testing percentages used by the employer they found it was unlikely that anyone would ever be caught with a blood alcohol concentration over the limit set out in the policy. As a result they concluded there was little or no concrete advantage to the employer to be gained through the random alcohol testing policy.

[59] The Majority then balanced that against the infringement on the employees' privacy rights, concluded that random alcohol testing is a significant inroad against those rights and that all in all "... the scheme effects a loss of liberty and personal autonomy". In the result they concluded that Irving was not able to justify the imposition of random alcohol testing as a proportionate response to a demonstrated incremental risk in the workplace and that the policy did therefore not meet the reasonableness test set out in the ***K.V.P*** case *supra.* The Majority then allowed the grievance.

ANALYSIS AND DECISION

[60] The Majority's decision, in my view, is based largely on the distinction between what is a dangerous workplace and what is an ultra-dangerous workplace. If a workplace falls within the latter category, they find, no history is required to justify a policy of random alcohol testing; if it falls within the former, as the Irving mill does, then the policy will only be reasonable if the employer can show that there is a history of alcohol-related incidents at the plant.

[61] In my view that distinction is not a reasonable basis on which to reject this policy. Dangerous is dangerous and while there are degrees of danger such that the potential for catastrophic loss is easily recognized in a nuclear plant or an airline, the fact still remains that, as the Majority concluded, the Irving mill "in normal operation is a dangerous work environment". They also stated at p. 59:

> **It is evident ... that the Irving plant is one in which great care must be taken with safe work practices. There are perceived risks and dangers in the operations**

performed both to the incumbent, and to others, as well as to the environment and to property.

[62] As the Majority also found, "... the operation of the plant under normal circumstances carries with it the risk that certain malfunctions could have repercussions going well beyond the safety of the actor who caused the incident." In other words the potential exists for a catastrophic accident in this workplace.

[63] In my view it is not reasonable to require a history of accidents in a dangerous workplace where the potential for catastrophe exists in order to justify a policy of random alcohol testing. That is tantamount to requiring that the operator must wait until a catastrophe occurs before taking some proactive measure to prevent it, a requirement that, I find, is not logical or defensible in the context of the Majority's findings of fact.

[64] There is unquestionably a threshold that exists somewhere between a dangerous workplace such as the Irving mill and an office environment, for example, below which an employer must show a history of accidents to justify such a policy. However, I find that it is not reasonable to establish that threshold above the level of a workplace as dangerous as the Irving mill such that only workplaces that are in the category of "ultra dangerous" are permitted to proactively implement such a policy without a history of accidents. That standard is unreasonably high in my view as it fails to take into account some of the Majority's own critical findings.

[65] Once the Board found that the mill was a dangerous workplace, the only question left for them to answer, in my view, was whether or not

the employer's policy was a proportionate response to the potential danger.

[66] In dealing with the issue of proportionality the Majority engaged in a balancing of the interests and concluded that there was no significant degree of incremental safety risk from employee alcohol use demonstrated to exist at the plant and that given the low percentage of employees tested, it was unlikely that any employee would ever fail a test. Based on that reasoning they concluded that there was little or no advantage to be gained by the employer through the random alcohol testing policy.

[67] They then balanced those findings against the intrusion into employee's right to privacy and concluded, contrary to their earlier finding that breathalyzer testing is minimally intrusive, that the intrusions were significant and out of proportion to any benefit actually and reasonably to be expected by the employer from the implementation of the policy.

[68] In my view these findings are not reasonable given the dangerous nature of the workplace. I find that the fact that there is a risk that a catastrophic incident could occur at the plant makes the Majority's finding that there is little or no advantage to be gained from implementing the policy an unreasonable finding.

[69] Moreover, when that is balanced against the fact that the method of testing is, as the Majority found, minimally intrusive and that it is not a policy that is applied to a large number of employees, only those in safety-sensitive positions, I find that the Majority's conclusion that the policy is out of proportion to any benefit actually and reasonably to be

expected is unreasonable. Prevention of one catastrophe in the lifetime of the plant would be enough to make it a reasonable policy in my view. Unfortunately, such statistics are not measurable but, as the Majority clearly found, it is a dangerous place to work, creating "... dangers in the operations performed both to the incumbent, and to others, as well as the environment and to property." I therefore find that it was not reasonable for the Majority to conclude that little or no advantage is to be gained from having the policy based solely on the plant's history.

[70] In summary, I find the decision of the Majority to be unreasonable in that it is not an outcome which is defensible in the context of their earlier findings regarding the dangerous nature of the workplace and the minimally intrusive nature of the testing. I agree with the comments cited by the Majority from the ***Canadian National Railway*** case *supra* ., that,

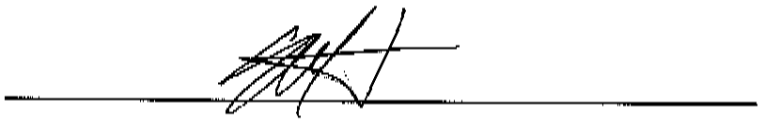
> **...Boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.**

[71] In my view this comment is particularly *a propos* to this case.

[72] For the foregoing reasons I find that the decision of the Board was unreasonable and it is therefore removed into this Court and quashed.

COSTS

[73] While the applicant has been successful and would normally be entitled to costs, because of what I regard as their unreasonable position on the issue of procedural fairness and the cost to which they put the respondent on that issue, I make no order as to costs.



William T. Grant
Judge of the Court of Queen's Bench
of New Brunswick