2019 CarswellNat 7880
Canada Arbitration

OPEIU and Cougar Helicopters Inc. (Random Drug and Alcohol Testing), Re

2019 CarswellNat 7880

IN THTE MATTER OF A GRIEVANCE UNDER THE CANADA LABOUR CODE

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION (the "Union") and COUGAR HELICOPTERS INC. (the "Employer")

Susan M. Ashley Member

Heard: August 26, 2019; August 27, 2019
Judgment: December 9, 2019
Docket: None given.

Counsel: Wassim Garzouzi, Julia Williams, for Union
Denis Mahoney, Brittany Keating, for Employer

Subject: Labour; Public

Headnote

Labour and employment law

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***Susan M. Ashley Member*:**

1 The hearing on this matter was held in St. John's Newfoundland and Labrador on August 26 and 27, 2019. The parties had agreed to an expedited process, which included an agreed statement of facts. The parties called one witness each to provide context to the dispute — Scott Ferguson for the Union, and Hank Williams, for the Employer. The issue raised in the grievance is whether the Employer can implement random drug tests of incumbents in safety-sensitive positions, which include members of these bargaining units, as well certain non-Union and management positions.

2 The parties agree on the following facts. Cougar is a Transport Canada-Approved Maintenance Organization operating under Transport Canada Operating Certificate #6127 that supports operators within the oil and gas industry by providing offshore passenger transfer and search and rescue (SAR) support to the oil and gas industry offshore on the east coast of Canada.

3 Cougar Helicopters Inc. was founded in Halifax in 1984 and first entered the oil and gas industry in 1991. Upon entering the oil and gas industry, Cougar was awarded the offshore support services contract for Hibernia Management and Development Company in 1995, which prompted the relocation of their head offices from Halifax to St. John's. Cougar's current bases of operations are Halifax and St. John's. From St. John's, Cougar transports all personnel who work in the offshore of Eastern Canada in the four large oilfield sites and also supports drilling activity. The St. John's base operates 24/7. The Halifax base remains operational with a minimum number of staff to support *ad hoc* helicopter services, and Cougar support to the Royal Canadian Air Force CH-148 Cyclone operations.

4 Cougar currently operates a fleet of eight Sikorsky S-92 helicopters with six aircraft currently under contract supporting the Newfoundland and Labrador offshore. One of its Sikorsky S-92 helicopters is currently permanently dedicated to SAR. Cougar's operation occupies seventeen acres, which consists of a heliport, hangar, ramp space, and dedicated SAR facility in St. John's, as well a heliport in Halifax.

• Cougar Employees and Bargaining Units

5 Unionized employees at Cougar are divided among three bargaining units, all of which are represented by the Office and Professional Employees International Union (OPEIU) as their bargaining agent:

> i. Pilots, which includes all Pilots with the exception of the Operations Services Manager, Chief Pilot, Chief Training Pilot, Supervisors and those above the rank of Supervisor (CLRB Order No. 10151 and the summary of the Atlantic Region Registrar of the CIRB dated January 16, 2012).
>
> ii. "W.O.R.D.", which is comprised of all Dispatchers (including the Lead Dispatcher), Weather Observers, and Radio Operators excluding Supervisors and those above the rank of Supervisor (CLRB Order No. 11099-U and the summary of the Atlantic Region Registrar of the CIRB dated 31 st day of January 2017).
>
> iii. SAR Cabin Crew ("SAR CC") which is comprised of all Search and Rescue Cabin Crew (Rescue Specialists, Hoist Operators), Supervisors and those above the rank of Supervisor (CLRB Order No. 10294-U and the summary of the Atlantic Region Registrar of the CIRB dated August 3, 2012).

6 As of July 19, 2019, the approximate number of employees represented in each bargaining unit is as follows:

Bargaining Unit	Bargaining Agent	Number
A — Pilots	Office and Professional Employees International Union	44
B — W.O.R.D.	Office and Professional Employees International Union	13
C — SAR CC	Office and Professional Employees International Union	19

In addition to bargaining unit employees, Cougar has one hundred and sixty-five non-bargaining unit employees. Cougar's total workforce consists of two hundred and forty-one employees.

7 There are currently three collective agreements in force between Cougar and the Union, one with respect to each bargaining unit. All three collective agreements expire on June 30, 2020.

8 Safety-sensitive positions at Cougar include Pilots, SAR CC, Aircraft Maintenance Engineers, Maintenance Control Centre Staff, Ground Handling Crew, Passenger Movements Personnel who have Restricted Area Identity Cards (RAIC) or Airside Vehicle Operator's Permit (AVOP), and also various members of the Emergency Response Team.

• Passenger Operations

9 Cougar provides transportation services from St. John's to the offshore via helicopter in what has been described as a harsh operating environment as was explained in the evidence. Weather and ocean conditions *en route* to the offshore platforms can be hazardous. Cougar is consistently monitoring weather conditions as certain conditions may require a flight to return to base or direct the flight to an alternate site. Weather conditions that could cause an in-flight operation to change course include an increase in wind speeds or sea states, or availability of other landing sites. Flights must be modified daily based on the season, weather conditions, distance to travel, and payload, which will affect the number of passengers that can be transported. In 2018, Cougar had a total passenger movement count of 39,858.

10 Upon arrival for a flight at the heliport, passengers and crew go through check-in and security. Once through security, passengers are issued appropriate safety equipment including helicopter transportation suits, personal locator beacons, and helicopter underwater emergency breathing apparatus. Cougar is also contracted on an *ad hoc* basis to transport K-9 services offshore, which include a dog and a handler, to conduct drug and alcohol security sweeps.

11 When a flight lands offshore, there is an outbound check completed on the helicopter prior to takeoff. Helicopters may be shut down offshore to take on fuel or if there is anything questionable about the safety of the aircraft. When the flight is complete and passengers and crew have returned to home base, the pilots go through a debrief process to review all aspects of the flight.

• Safety

12 Cougar addressed in its testimony how safety is its number one priority. Operations success at Cougar is ensured through strict compliance with regulatory rules, operating limitations and an integrated Safety Management System (SMS). The Cougar SMS ensures that all facets of the operation are aligned such that the provision of service maintains safety of its employees and passengers.

13 Not only must the Cougar safety program protect the safety, security, and health of its employees, but it must equally guard the safety and security of its travelling passengers. Cougar operates by adhering to strict company standards that are supported by the Transport Canada approved Operations Manual and Standard Operating Procedures. As Cougar's SMS evolves, the focus is shifting from a primarily reactive approach to more proactive methods with the goal of mitigating or minimizing all safety risks.

18 A tragic accident occurred in 2009, where a helicopter crashed killing seventeen people. The Transport Canada Aviation Investigation Report A09A0016 was put before me. There are also reports of the Offshore Helicopter Safety Inquiry for Phase I (https://www.cnlopb.ca/wp-content/uploads/ohsi/ohsir.vol1.pdf) and Phase II (https://www.cnlopb.ca/wp-content/uploads/ohsi/ohsir.phaseii.pdf).

19 Cougar invests heavily in employee training to exceed the industry standard for training requirements. Cougar provides the flight crew with world class training that is completed in one of the most advanced flight simulators provided by CAE Inc. which is located in St. John's.

20 Cougar's purpose design-built maintenance facility is Transport Canada approved, and is a well-equipped and organized work environment because of the particular risks and standards to be met.

21 Cougar's fleet offers the latest in technological advancements to operate safely in harsh environments. Some of the technical and safety innovations incorporated into the aircraft include GPS technology, de-icing systems, satellite communications/tracking systems, helicopter flight data monitoring (HFDM), Health and Usage Monitoring System (HUMS), SAR Automatic Flight Control Systems (AFCS), a forward-looking infrared (FLIR) system with a designated cabin console, and a stand-up cabin that can accommodate auxiliary fuel tanks, medical litter kits and storage space.

22 Cougar also holds an extensive library of Canadian Transportation Agency (CTA) and Transport Canada licenses, certificates, and approvals for domestic and international services. These certificates and approvals are necessary to safely deliver the all-weather, instrument Flight

Rules (IFR), deep water offshore helicopter services requested by East Coast Canada Offshore Regulatory Authorities and Operators.

23 Cougar's dedicated SAR facility, which is a 27,500 square foot hangar that operates all day, every day, has been a further safety enhancement for the Newfoundland and Labrador offshore. SAR operations are committed to a response time of twenty minutes that is supported by a crew of ten Rescue Pilots and sixteen SAR Cabin Crew. All SAR crews have extensive experience working with harsh environments and North Atlantic operations. There is one S-92 helicopter in full SAR configuration that is available for the twenty minute response time. The SAR hangar houses operations and ready rooms, training, storage, SAR aircraft maintenance and on-site SAR crew rest areas.

24 Cougar's Operational Control Centre (OCC) also operates 24/7. All of Cougar's commercial, SAR, and Medevac flights are planned, supported, and satellite tracked through the OCC by Transport Canada certified flight dispatchers. Marine support vessels that are under contract with Cougar's offshore oil customers are also tracked and monitored by GPS. Before any flight is cleared for departure, it must be confirmed that the SAR aircraft is available and ready to operate as safety of the passengers and crew is the primary consideration every time a flight is prepared for takeoff.

25 The Cougar business of providing passenger transport, SAR and Medevac support to the Newfoundland offshore involves operations that require constant monitoring, reviewing and adjustment to ensure successful and safe execution.

26 In response to the legalization of marijuana, Transport Canada issued Directive 19-03R on May 17, 2019, stating its policy to prohibit flight crews and flight controllers from consuming cannabis for at least twenty-eight days before being on duty. The Directive states that:

> Effective immediately, Transport Canada is moving forward with a new policy prohibiting flight crews and flight controllers from consuming cannabis for at least 28 days before being on duty.
>
> The Canadian Aviation Regulations (CARs) require fitness for duty and that no person shall act as a crew member of an aircraft, air traffic controller, or flight service specialist while using or under the influence of any drug that impairs the person's faculties to the extent that aviation safety is affected. The change is aligned with the best available science and is consistent with other government departments' approach to legalization of cannabis including the Department of National Defence and the Royal Canadian Mounted Police. The policy does not prevent Canada's air operators from implementing more stringent prohibitions for their employees.
>
> Following the legalization of cannabis in October 2018, the Department undertook extensive policy review and consultation to determine the most effective means of ensuring aviation safety with regard to impairment overall, including cannabis.

• Cougar's Drug and Alcohol Policy

27 Cougar has had a Drug and Alcohol Policy in place since 2010. When the Drug and Alcohol Policy was introduced, it included random testing for drugs and alcohol for pilots. Around 2012, the group subject to random testing was broadened to include all safety-sensitive positions. Cougar continued to perform random testing in accordance with its Drug and Alcohol Policy until it suspended random testing in June 2016 in order to review and update the random testing process and the Drug and Alcohol Policy.

28 In June 2016, following an incident involving an employee who tested positive in a random test pursuant to the Drug and Alcohol Policy, management became aware that the random testing process was not being conducted properly at that time and therefore decided to suspend random testing in order to review and update the random testing process and the Drug and Alcohol Policy. The remainder of the policy continued in effect.

29 While Cougar was in the process of reviewing and updating the Drug and Alcohol Policy, in early 2017, the Canadian Government announced that it would be legalizing cannabis. This further impacted the timing required to review and update Cougar's Drug and Alcohol Policy.

30 The Employer and Union began consultations regarding a revised draft Drug and Alcohol Policy in the fall of 2018. A revised Drug and Alcohol Policy was proposed by Cougar and was provided to the Union in September 2018. As a result of the consultations, Cougar made numerous revisions to its Drug and Alcohol Policy in response to feedback from OPEIU. During those consultations, the issue of testing by oral swab and/or urinalysis was raised. OPEIU requested oral swab as they did not want urinalysis as a testing method under any circumstances. As a result of the consultation the Employer agreed to utilize only oral swab as the testing method for drugs and removed references to urinalysis as the initial stage test.

31 As a result of the extended consultation period to accommodate meetings requested by OPEIU, Cougar's intended launch of the revised Drug and Alcohol Policy by March 1, 2019 was delayed. The current version of the Drug and Alcohol Policy released by Cougar dated May 17, 2019, contains the following provisions

> **2.1 POLICY STATEMENT**
>
> Cougar Helicopters Inc. is committed to the safety and productivity of all operations on behalf of employees, contractors, customers and the communities in which we operate. We recognize the high level of skills and fitness for duty required for safe operation and that the use of alcohol, cannabis, illicit drugs, mood altering substances, and/or medication can have serious adverse effects on these skills and fitness for duty, and ultimately on the safety and well-being of employees, contractors, customers, the public or the environment.

This Policy and Procedure manual is intended to outline the standards and guidelines associated with alcohol, cannabis, illicit drugs, drug paraphernalia, mood altering substances, and/or medication. Contractors will be expected to enforce these requirements for their contract workers when working on Cougar Helicopters Inc. business or premises.

2.2 SCOPE

Cougar Helicopters Inc. will test any employee in the following circumstances on the terms outlined below:

1. Reasonable cause;

2. After a Significant Incident;

3. Random tests of persons in Safety Sensitive Positions;

4. Pre-Employment and Pre-Access tests when being considered for Safety Sensitive and Risk Sensitive positions; and

5. Follow-up testing following a positive test and treatment for substance abuse to comply with a return to work plan.

. . .

32 Since 2017, Cougar has experienced four incidents involving violations of the Drug and Alcohol Policy. In 2017, there was one pre-access test failed; in 2018, there was one post-incident refusal to be tested; and in 2019, there were two pre-access tests failed. Cougar has acknowledged to OPEIU that the above record does not reflect a drug and alcohol problem at Cougar at a level like those that have been considered in case law with respect to random drug and alcohol testing.

33 The administration of oral swab drug testing and collection of specimens is conducted by a qualified third party company on-site at Cougar facilities pursuant to recommended chain of custody procedures. The employee places a long cotton swab in his/her mouth to retrieve a saliva sample and the swab is placed into a transport tube by the administrator for shipment. The test specimen is couriered to a certified laboratory in Ontario. Negative results are generally available within twenty-four hours after specimens are received at the laboratory. Confirmation of a presumptive positive test is usually available within seventy-two hours. Cougar can reinstate the urinalysis quest cup method as a preliminary screen to identify risk as outlined in an earlier draft of the policy discussed between the parties in the event that the oral swab testing is considered a determining factor against random testing.

34 The only issue in dispute with respect to Cougar's Drug and Alcohol Policy which has been referred to arbitration by OPEIU is random testing. OPEIU maintains that random testing is unreasonable, is a violation of employees' privacy rights and is otherwise unlawful. The parties

also agreed to the introduction of a document outlining current information concerning the effects of drug and alcohol use, which will be referred to as required in this Award. The parties agreed that this document is part of the agreed facts, and is referred to as Appendix A to that statement. Appendix A is prefaced by the following statement:

> OPEIU submits that the information contained in this Appendix A is not relevant due to its position that random drug and alcohol testing is unlawful, whereas Cougar Helicopters submits that it is relevant in support of its position that random drug and alcohol testing is justified at Cougar Helicopters.
>
> Cougar and OPEIU agree — for the purpose of this arbitration only — to the use of Appendix A pertaining to workplace drug and alcohol testing should the arbitrator decide to consider such information in deciding the issue in dispute in this grievance arbitration. Cougar takes the position that this summary contains the most current medical, science and pharmacological evidence available pertaining to workplace drug and alcohol testing and OPEIU, for the purposes of this arbitration, does not dispute that. OPEIU and Cougar also agree that they can refer to science referenced in caselaw, to the extent there is no contradiction to the evidence provided in Appendix A.

35 The above constitutes the agreed facts.

Evidence

36 The Union's only witness was Scott Ferguson, a helicopter pilot. He started with Cougar in 2005, having started in its international division in Louisiana. He is currently an S-92 training captain, and does offshore passenger transport. He has approximately thirty years experience as a helicopter pilot. The S-92 Sikorsky helicopter that he pilots carries seventeen passengers, plus the required two pilots. As training captain, he ensures that all SOPs are followed on flights, and does Operational Professional Checks (OPCs) every six months, which exceeds Transport Canada requirements. He checks runs with other pilots, and reports on them.

37 Pilots work three weeks on and three weeks off. In those three weeks when they are on duty, they generally work five to six days days; weekends tend to be lighter, though one might have to be on standby. When on duty, they start at daylight and work until dark, with the hours depending on the season. In summer, it takes approximately one and one-half hours to go to the offshore site; they spend twenty to forty minutes at the rig, and then fly back. It is a three and one-half to four hour round trip. In a day, they generally do two round trips, with a twelve hour duty day.

38 Of the two pilots, one is designated as captain, with the other as first officer. The captain is responsible for the flight and passengers and the first officer assists. Both are able to fly. They discuss the flight in the morning and decide who will be the flying pilot, and who will be the pilot monitoring. Typically if they do two flights in one day, that would switch roles for the second trip.

39 The pilots report an hour before departure to the lounge and sign in on the computer. They have a short discussion about things that might affect the flight, such as personal issues, including such things as fatigue and family stresses. If one pilot has expressed a concern, either pilot could make a change to who is in charge of the flight. If everything is well, both then go to their separate computer and check off certain items, before the briefing with the dispatcher.

40 They determine their risk assessment matrix (RAM score), covering such things as pilot concerns, environmental conditions, complexity, personal stress, and bird activity. The answers produce a green, yellow or red code, which goes into the data base, which goes to the dispatcher. They then check the weather conditions on departure, *en route*, at the destination, and at the designated alternate airport. Both the captain and the first officer check separately, side by side, and discuss the findings. Either can stop the process if there are concerns. They then enter the briefing room, meet with the dispatcher, and receive the flight plan. Both the pilot and the dispatcher must sign off on the flight plan. If either doesn't sign off, the flight doesn't go ahead until further investigation.

41 The dispatcher will have a check list of items to be discussed, which are checked off as completed, including pilot profiles, RAM scores, and the detailed weather briefing. Captain Ferguson noted that offshore flights that leave St. John's airport must have an on shore alternate airport, and they must carry enough fuel to get from base to the rig and back, plus an extra thirty minutes of fuel. If both the pilot and dispatcher agree to the plan, the pilot takes a copy, one for the way out and one for the return. The most common reason for not signing off on a flight plan is weather or icing conditions, which would put the flight temporarily on hold.

42 If the pilot and dispatcher sign off, the pilots go to the change room, where they put on their immersion suits and life jackets. On arrival at the helicopter, the flying pilot will typically do an outside check of the aircraft. The monitoring pilot will check things inside, including the log book that the engineering staff leave on the front seat. The monitoring pilot then activates the HUMS, which will record all the technical data during the flight. They cannot fly without the card in place. If the two pilots think there is an issue, either one of them could stop or pause the process.

43 If everything is fine, they then sign the log book to indicate that all the inspections have been done. The maintenance engineer will have arrived as they enter the cock pit, and goes through a check list before they start, outside the craft. All three — the flying pilot, the monitoring pilot, and the maintenance engineer — communicate through head sets. The monitoring pilot will read off items on a check list from the iPad; a challenge and response system is used. If all is fine, the engines will be started, with the engineer still near, on the headset. He will come into the cabin for another check. Again, if everything if fine, the engineer will leave, close the doors, and give a thumbs up, at which point they can taxi.

44 They taxi two hundred to three hundred meters to pick up the passengers. A reposition check list is completed before the craft is moved. They will make a radio call to PMC (Passenger Movement Control) to ensure the passengers are ready to embark, before they start the aircraft.

45 If they are ready to taxi, they go to the assigned 'hot spot', where another check list is completed. A PMC person brings the passengers out in single file to the aircraft. They pass the pilots the manifold, giving the flight number, destination, and number of passengers. The crew double checks the weight, and enters the payload to ensure it coincides with their own information. There are sometimes issues with weight, in which case they might speak with the dispatcher. Once the passengers are aboard, the PMC person leaves, and gives a thumbs up if all is good, which is their cue that they are ready to take off.

46 The captain calls for the taxi check list, and prepares to taxi to the runway for departure. They call St. John's air traffic control (ATC) for clearance to taxi to the departure runway. The monitoring pilot would read back clearance to ATC, and the captain would repeat it to the first officer to confirm that he understood. During takeoff the first officer monitors the other pilot to ensure they are flying the take off profile as required in the Employer's SOP.

47 They are trained in simulation to deal with situations where there may be a problem with the flying pilot. They also train for it in crew resource management training (CRM), and discuss various forms of incapacitation. If one of the pilots notices that the other is non-responsive, they use a two challenge verbal acknowledgement. If the compromised pilot does not respond after the two challenges, the other pilot would indicate that they are taking control of the aircraft. There is a high level of automation on the craft. The S-92 cannot be flown by just one pilot.

48 The entire flight out is a series of check lists. As they near the rig, they are in contact for updated weather, wind and boat activity. They do an approach briefing. The pilot doing the approach briefing is not the pilot that will do the landing. The pilot will take control when they have visual. They descend typically to fifteen hundred feet. Before landing, there are further checklists. They are flying visually at that point. The landing decision is for the pilot. If they do not have a visual, the landing pilot will say 'negative contact', and that will be a missed approach. Once landed, the helideck crew will approach. The Helideck Landing Officer (HLO) stands in pilot view, and monitors the passengers getting off and refueling, if necessary. That person is extensively trained by Cougar, and is in charge of the helideck. The two pilots while in the craft are in constant communication. Captain Ferguson noted that there is a "sterile cockpit" rule in the SOPs, which means that if they are below minimum altitude, they only discuss the aircraft profile.

49 The return trip follows essentially the same routine. Once they have landed at St. John's the maintenance engineer will retrieve the HUMS card and download the data. The craft cannot go on another flight until this data is analysed. The monitoring pilot will enter the data concerning the flight (times, passengers, cargo, who was in command etc.). That generates a flight time and

air time which is entered in the log book. The flying pilot will fill out the log book and sign off. The paperwork is audited by the other pilot. They meet with dispatch to debrief, and the captain and dispatcher sign off. The HFDM (Helicopter Flight Data Management) system is monitored by the quality control department, the same day as the flight. This data gives a representation of the instruments and the flight itself, showing if they flew according to Cougar's SOPs. It can detect human error.

50 Captain Ferguson worked in SAR for four or five years and is familiar with the crew. There are always three on duty (two rescue specialists, and one hoist). He testified that in his fifteen years with Cougar, the issue of impairment of a co-pilot has never arisen.

51 At Cougar, pilots receive training every twelve months, which includes twelve hours in the simulator, and extensive ground school, including two examinations (one regarding the aircraft, the other general knowledge). The tests must be competed before training starts. They do eight to ten hours in ground school, with the next three days in the simulator. On the last day the crew being trained will do a Transport Canada check ride. If everything is done properly, the training will be signed off. Cougar trains pilots on every rotation, two hours in the simulator, a one hour briefing, and up to an hour debriefing. Training pilots are encouraged to do detailed reports. Pilots are assessed on a four point marking scale. Every manoeuvre is assessed. They also do eight or nine on-line training courses per year on a variety of subjects.

52 Captain Ferguson's main concern regarding random testing was privacy. He has forty years experience as a pilot, and feels a strong sense of professionalism. He takes seriously his obligations to Transport Canada, the passengers and crew, and does not think random testing at Cougar is necessary. If he felt a colleague was impaired or otherwise challenged, he testified that he had an obligation and the opportunity to raise it at every step.

53 In cross-examination he agreed that the S-92 helicopter is much more complex than the Bell 412, which Cougar also has. The S-92 is fully automated, and very capable for the environment. It has de-icing capability which the Bell does not have. While its capacity is nineteen passengers plus two crew, they carry two less passengers because two of the seats are taken by internal fuel tanks, which gives the craft extra flying time, which would be required if they are using a land-based alternate airport. It also has a flotation system, which is designed to keep afloat for evacuation into life rafts. There are external life rafts, and tanks outside that can be jettisoned. The SAR aircraft flies with two internal fuel tanks, which gives more time to recover passengers. The S-92 sometimes carries less than seventeen passengers; one of the offshore sites is farther away, which requires more fuel, which will drop the passenger payload considerably. The trip to the Flemish Pass is two hours each way plus time on deck. There are a variety of types of structures they fly to, including rigs fixed to the sea bed, floating structures (FDSOs), and speciality ships. The fixed structures do not move, while FDSOs are subject to heave, pitch and roll, which will affect conditions.

54 In terms of environmental conditions for passenger and SAR flights in offshore Newfoundland, more than fifty percent of the flying is in instrument conditions, Fog, snow and rain mean that there is no contact with the ground/surface. These are challenging conditions, and they are very well trained to deal with them. Each season provides different environmental challenges.

55 Passengers all wear immersion suits during the flight, which allow them to stay twenty-four hours in the water, if required. There are also flotation devices they can wear over the suits, and emergency location beacons. They carry a signal mirror, a whistle, a device to cut a seat belt, as well as an oxygen supply which will give up to twelve breaths if they go underwater. On take off and landing, passengers place the hoods of their suits over their head, with zippers sealed. Passengers must have offshore survival training before they have access to the helicopter. This includes practice escaping from the helicopter, and being inverted and escaping through the hatches. The crew also do this training, and do one or two sessions in the dark. This training is refreshed every three years. He has seen the Cougar passenger safety video, which is more complex than that used in commercial aviation.

56 He agreed that the safety culture at Cougar is very strong, and that it has developed over the years to be very effective, through evolution and constant improvement. Cougar follows Transport Canada requirements and exceeds some, including operational proficiency checks, CRM training, simulator training, the RAM score, HFDM, the sterile cockpit rule on takeoff and landing, having a camera on the tail of the helicopter so that the pilot can identify problems on the outside of the craft, particularly if there were an engine fire. It is a 'safety first' workplace.

57 He agreed that in his duties with passenger transport or SAR, medium to high levels of concentration are required, depending on the situation, and that focus is essential. The work is such that much is unpredictable, requiring immediate response. In his time with Cougar, the number of SOPs has grown and they are more easy to follow. The potential consequence of error is extreme.

58 He agreed with the conclusion of the Transport Canada investigation of the 2009 crash at p.83 that different personality types between the pilot and first officer can have an effect on communications, though he felt that the existence of strong SOPs lessens that possible impact.

59 He agreed with the conclusion of the Wells' report that the Newfoundland offshore presented one of the most difficult environments in the offshore helicopter world (p.59), with very cold water at all times, and high winds particularly from October to May which causes severe sea states. They do not land on an installation if the sea state is over six meters. The threat of fog in the offshore is constant. He also agreed with the conclusion of the Wells report that transporting passengers over open ocean conditions is more hazardous than over land, and with the conclusion at p. 303 regarding the interests of the public. He agreed that his responsibility lies with the travelling public/passengers, as well as to the first officer.

60 The Employer called evidence from Hank Williams, Chief Operating Officer at Cougar. He reports to CEO Ken Norrie; while the Chief Safety Officer reports directly to Mr. Williams, he has a 'dotted line' reporting relationship with the CEO. For the last twenty-two years, Cougar's three core customers are Exxon Mobil, Suncor, and Husky Energy. In addition to the offshore platforms, Cougar supports a number of explorations offshore,

61 He referred to the 2019 Safety Plan and to the SMS, which was put in place by Cougar. This exceeds current Transport Canada requirements. The HFDM data is collected at the end of each flying day and analysed the next morning. HUMS monitors the helicopter's performance and HFDM monitor's the pilot's performance and shows where there has been deviation from the SOPs. Transport Canada does not require Cougar to have a Drug and Alcohol Policy.

62 Cougar's safety culture is built on management commitment, supervisor engagement, and employee buy-in, with the focus on being safer every day. HFDM gives assurance that pilots adhere to the SOPs, and HUMS monitors the helicopter. He felt that random testing would both address assurance and deterrence. The positions in question work in very complex conditions, often landing on moving decks in unpredictable weather. Focus and concentration are essential, and Cougar wants to ensure that flying crews maintain peak performance to give the safest possible transportation.

63 He noted that the new Transport Canada directive does not restrict operators from expanding on the minimum requirement. The directive was received over six months after cannabis was legalized. While it requires that cannabis not be consumed in the twenty-eight days prior to flying, Cougar crews work twenty-one days on/off. In his view, there is no other way to ensure compliance with the directive than by random testing. He noted that the directive only refers to flight crews, while Cougar's policy refers to other safety sensitive positions which can influence the safety of the flight.

64 In cross-examination, he confirmed that there was no drug and alcohol problem in the workplace similar to the levels identified in the reported cases, and that the post-incident refusal in 2018 is subject to a grievance which is challenging the termination. When testing is done, the employee remains in service pending receipt of the result of the test, which is done by an independent third party. He emphasized that when testing is required, there is an important opportunity for employees to self-disclose. He agreed that perhaps having to wait for the results of the test is not the best option, but once results are received, it gives the Employer assurance or indicates that there is a problem.

Argument

65 Counsel for the Union argued that the Canadian approach to random drug and alcohol testing both at the provincial and federal level has been remarkably consistent from 1987 to the present.

There must be a workplace issue with drugs or alcohol to allow the Employer to unilaterally implement random testing. He noted that on three occasions an arbitrator or court allowed an Employer to perform random testing, and each time, it was recognized that there was a workplace problem: *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, [2007] C.L.A.D. No. 243 (Ont. Arb.) (Devlin); *C.E.P., Local 777 v. Imperial Oil Ltd.* [(May 27, 2000), Christian Member (Alta. Arb.)] (Christian); *ATU, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078 (Ont. S.C.J.) [hereinafter TTC].

66 The issue here is narrow, and raises the reasonableness of the Employer's decision to implement random testing. Counsel for the Union referred to each case dealing with random testing, starting with the 1987 Michel Picher decision in *Canadian Pacific Ltd. v. U.T.U.*, [1987] C.L.A.D. No. 61 (Can. Arb.), which held that an Employer does not have the right to encroach on employee's privacy rights unless there are reasonable grounds for requiring a drug test. In *Provincial-American Truck Transporters v. Teamsters, Local 880*, [1991] O.L.A.A. No. 16 (Ont. Arb.) (Brent), a similar approach was taken, using the reasonableness of undertaking a search as an analogy, in the absence of a problem in the workplace: See also *Esso Petroleum Canada v. C.E.P., Local 614*, [1994] B.C.C.A.A.A. No. 244 (B.C. Arb.) (McAlpine); *Metropol Security v. U.S.W.A., Local 5296*, [1998] O.L.A.A. No. 1052 (Ont. Arb.) (Whitaker); *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, [1999] O.L.R.D. No. 1282 (Ont. L.R.B.). In 1999 Arbitrator Burkett in *Trimac Transportation Services - Bulk Systems v. T.C.U.*, [1999] C.L.A.D. No. 750 (Can. Arb.) found that the Employer's mandatory random drug testing policy was not rationally connected to a business purpose and not supported by the collective agreement, and that it improperly infringed employee privacy rights. See also: *Canadian National Railway v. CAW-Canada*, [2000] C.L.A.D. No. 465 (Can. Arb.) (M. Picher) [hereinafter CNR]; *Dupont Canada Inc. v. C.E.P., Local 28-0*, [2002] O.L.A.A. No. 156 (Ont. Arb.) (P. Picher); *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [2002] B.C.C.A.A.A. No. 9 (B.C. Arb.) (Hope); *ADM Agri-Industries Ltd. and CAW, Local 195, Re*, [2004] C.L.A.D. No. 610 (Ont. Arb.) (Springate).

67 He referred to *Imperial Oil Ltd. v. C.E.P., Local 900*, [2006] O.L.A.A. No. 721 (Ont. Arb.) [hereinafter Nanticoke] (M. Picher) (upheld on judicial review and appeal) which summarized the "Canadian model" for drug and alcohol testing, which severely limits the Employer's right to unilaterally impose random testing. [See also: *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, [2007] C.L.A.D. No. 243 (Ont. Arb.) (Devlin); *Imperial Oil Ltd. v. C.E.P., Local 900* (2009), 96 O.R. (3d) 668 (Ont. C.A.); *Petro-Canada Lubricants Centre (Mississauga) v. C.E.P., Local 593*, [2009] O.L.A.A. No. 400 (Ont. Arb.) (Kaplan); *Rio Tinto Alcan Primary Metal v. CAW-Canada, Local 2301*, [2011] B.C.C.A.A.A. No. 17 (B.C. Arb.) (Steeves)]

68 Counsel for the Union then referred to the decision of the Supreme Court of Canada in *Irving Pulp & Paper Ltd. v. CEP, Local 30*, [2013] 2 S.C.R. 458 (S.C.C.), where the Court reviewed the arbitral and other jurisprudence concluding that an Employer cannot unilaterally impose random testing in the absence of a workplace problem with substance abuse. He argued that

the cases following *Irving* continue to apply this 'Canadian model': *Mechanical Contractors Assn. Sarnia and UA, Local 663 (Alcohol and Drug Testing), Re* [2013 CarswellOnt 18985 (Ont. Arb.)] (Surdykowski); *Suncor Energy Inc. and Unifor, Local 707A (Random Alcohol and Drug Testing Policy), Re* [2014 CarswellAlta 457 (Alta. Arb.)] (Hodges); *Teck Coal Ltd. and UMWA, Local 1656 (Drug and Alcohol Policy), Re* [2015 CarswellAlta 2237 (Alta. Arb.)] [2014] (Alexander-Smith); *Seaspan ULC and CMSG (Drug and Alcohol Testing Policy), Re* [2017 CarswellNat 1435 (Can. Arb.)] (McEwan); *Teck Coal Ltd. and USW, Local 7884, Re* [2018 CarswellBC 119 (B.C. Arb.)] [2018] CanLII 2386 (Kinzie).

69 Counsel for the Union asked that I allow the grievance and strike down the random testing provisions of the Alcohol and Drug Policy, and remain seized with respect to implementation of the Award.

70 Counsel for the Employer argued that I have the authority to determine that resumption of the random testing element of the Employer's Drug and Alcohol Policy is reasonable and justified, based on the evidence and the law, in these circumstances. The Employer is compelled, particularly following the 2009 disaster, to strive relentlessly to deal with safety in this dangerous environment. The policy has been in place since 2010, including random testing, though that was removed from the policy in 2016 for other reasons. The policy is rooted in fitness for duty, not impairment. The consultation process was substantive and focussed, and appropriate modifications were made. A modest number of positions are subject to random testing. The disclosure piece is designed to be preventative, and does not presume a violation of the policy.

71 The location and nature of the installations Cougar services are unique as is the operating environment in which they work. Weather conditions are harsh, hazardous and unpredictable. He argued that the regulatory environment for the Cougar operation is very different from other workplaces referenced in the caselaw. They far exceed the Transport Canada minimum standards. He agreed that checklists and training are critical to safety but they do not address fitness for duty.

72 He noted that all of the cases, especially *Irving*, were written in a different environment, prior to the legalization of cannabis, and analysis of its impact and risks. The pending legalization of edibles could further increase potential risk.

73 He argued that resumption of random testing is consistent with the new Canadian Aviation Regulation requiring fitness for duty, and the prohibition of flight crews and controllers from consuming cannabis for at least twenty-eight days before being on duty. There are still many unknowns regarding the impact of cannabis, and without the ability to measure the risk, the Employer cannot manage it.

74 He argued that *Irving* does not require evidence of a general drug or alcohol problem in the workplace to justify random testing. The shifting safety landscape demands that *Irving* be applied as it was written, noting that at paragraph 34, the court quoted Arbitrator Picher as approval of

the principle that "in some extreme circumstances" "general" random testing could be permitted, noting as well that here, the Employer is not suggesting general random testing. In his view, the Supreme Court left it open for courts/arbitrators in 2019 to allow random testing by indicating, at paragraph 45, that "*it is not beyond the realm of possibility in extreme circumstances*" that random testing might be permissible.

75 He argued that the test was one of a balance of interest, rather than that random testing can only be done if there is evidence of a workplace problem. He argued that the "Canadian model" is premised on a unionized environment which ignores the regulations unique to this industry, as well as particular safety concerns. The context at Cougar must be a factor in any decision. First, the 2010 policy was in effect since 2010, applying mainly to pilots and SAR CC. The first collective agreement between these parties was signed in 2012. There is nothing in the collective agreement concerning the Drug and Alcohol Policy. The collective agreement contains a strong management rights clause, which is subject to law including the Canadian Aviation Regulations. The Employer cannot enforce policies that are inconsistent with the collective agreement, which the policy is not. Further, he argued that the Picher decision in 1987 was not a case dealing with random testing, and the reliance in ensuing cases, including *Irving*, is premised on *obiter* comments. The evolution of this case law continues until the further Picher decision in 2006 (*Nanticoke*). Counsel for the Employer argued that one arbitrator has defined the arbitral view between 1987 and 2006, which was relied on by the Supreme Court of Canada in its 2013 decision. He argued that the time is right to reinterpret this line of cases, in light of the heightened safety concerns and the regulatory environment.

76 As part of the changing safety environment, he cited *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (S.C.C.) where the Court found that termination because of breach of mandatory drug and alcohol policy, post-incident, was not *prima facie* discrimination, where the Employer gave the opportunity to disclose addiction prior to the testing. See also: *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard), Re*, 2018 CarswellNfld 198 (N.L. Arb.) (Roil), (upheld on judicial review, currently under appeal).

77 He referred as well to *Toronto Transit Commission* (*supra*) where the Ontario Superior Court recognized that the large number of riders expect that steps will be taken to make sure those in safety critical positions are fit for duty, and that these safety concerns will reasonably diminish their expectation of privacy. [See also: *Seaspan International Ltd. and CMSG (Carlson), Re*, 2007 CarswellNat 6920 (Can. Arb.)]

78 Counsel for the Employer argued that no strong argument has been made as to the privacy issues at stake, apart from Mr. Ferguson's reference to his sense of professionalism being undermined if he were subject to random testing. There was no argument in terms of the other positions. In any event, he argued that oral swab testing is minimally invasive, and referred to the comments of the Court on this point in *TTC*.

79 He also pointed to comments of Arbitrator Picher in *CNR* (2000) noting that the more highly risk sensitive the enterprise, the more an employer can justify a proactive, rather than a reactive approach designed to prevent a problem before it occurs.

80 He referred to two Newfoundland cases dealing with the requirement of fitness for duty: *Terra Nova Employers' Organization v. Communications, Energy and Paperworkers Union, Local 2121*, 2018 NLCA 7 (N.L. C.A.), and *USW, Local 9508 and Vale Newfoundland and Labrador Ltd. (Cooney), Re*, 2019 CarswellNfld 272 (N.L. Arb.) (Oakley). In summary he noted that these cases uphold the importance of safe workplaces, and that the standard is an evolving one.

81 He argued that the Employer has met the reasonableness test in these unique circumstances, and that the random testing aspect of its Drug and Alcohol Policy should be upheld.

82 In reply counsel for the Union noted that none of the cases cited by the Employer deal with the option of random testing in the absence of a workplace problem, Because collecting DNA is inherently intrusive, there must be a clear reason to do so, which is not the situation. He noted as well, that in light of the twenty-eight day CARs prohibition, this could be resolved through further regulation, or through bargaining. In his view the case law is consistent and binding.

Analysis and Award

83 Cougar's Drug and Alcohol Policy was introduced in 2010, in the wake of the catastrophic accident in 2009 in which seventeen people were killed. (The accident was in no way related to concerns about the possible use of alcohol and/or drugs in the workplace.) The policy was in place before the three bargaining units were certified, which occurred in 2012. It was enforced in its entirety, including the random testing component, until 2016, when the random testing provisions came under scrutiny because of the manner of their application. Since that time, significant legislative and judicial events have intervened, including the 2013 Supreme Court of Canada decision in *Irving* (*supra*) and the legalization of cannabis in 2018.

84 *Irving* upheld the finding of a New Brunswick Arbitration Board (chaired by the late Arbitrator Milton Veniot) in deciding that random drug/alcohol testing was not a reasonable incursion into employees' privacy rights, in the circumstances. The Arbitration Board relied heavily on *Nanticoke*, a 2006 decision of Arbitrator Michel Picher. I do not find it necessary to review the earlier cases, which are generally captured in the above decisions, though I have carefully considered all of the cases cited to me.

85 The starting point for any analysis of the application of drug and alcohol testing must be the collective agreement provisions. All three collective agreements contain robust management rights clauses, in Article 2.2:

2.2 EXCLUSIVE RIGHT TO MANAGE

The Union recognizes that the Company has the sole and exclusive right to manage the affairs of the business and to direct the working forces of the Company, except to the extent that such rights, privileges and prerogatives are amended by specific terms of the Agreement. Without restricting the generality of the foregoing, the Union acknowledges that the Company has the exclusive function:

- To establish and administer its policies and directives;
- To set the mission of the Company;
- To determine and maintain standards of service and operations;
- To direct, schedule, and maintain efficiency of the workforce;
- To establish new or improved methods, procedures, practices, technologies or facilities that the Company may deem necessary or advisable for efficient operation;
- To select, hire, direct, promote, demote, assign, transfer, test, lay off and recall workers to work based upon the Company's needs and standards of selection;
- To stand down a Union employee between contracts;
- To establish, alter, consolidate or abolish any job classification, department, operation or service;
- To control and regulate the use of facilities, supplies, equipment and other property of the Company;
- To establish new or improved methods, practices, procedures, and technologies or facilities that the Company may deem necessary or advisable for efficient operation;
- To fulfill all of the Employer's legal responsibilities;
- To determine the assignment of work, qualifications required, and the size and composition of the workforce;
- To discontinue, reorganize or combine any department or branch of operations;
- To establish and change work schedules;
- To discharge, suspend, or otherwise discipline Union employees for just cause;
- To establish contracts or subcontracts for operations;
- To maintain the integrity and efficiency of operations;

> • To exercise complete control and discretion over the organization and the technology of performing the work of the Company;
>
> • To take whatever action may be necessary to carry out the Company's responsibilities in cases of emergency.
>
> **2.3 RIGHT TO ENFORCE POLICIES NOT INCONSISTENT**
>
> The Company retains the right to enforce and/or alter, from time to time, its policies and practices, rules and directives including those included in the Company Employee Manual, when these rights are not specifically modified by the terms of this Agreement. The Company will inform the Union of significant alterations to its policies, rules, directives and practices that it intends to make. Where possible, this discussion will occur before the change is made.

86 There is nothing specific in the collective agreement about the Drug and Alcohol Policy. Having said that, the parties have successfully negotiated all aspects of the policy, with the exception of random testing. There is agreement that the Employer may test where there is reasonable cause to do so, in post-incident situations, as follow-up after a positive test, or following treatment for a substance abuse issue to comply with a return to work plan. It may also be used for pre-employment screening.

87 It is accepted that even with strong management rights clauses, Employers' rights to implement policies or parts of policies unilaterally carries with it a requirement of reasonableness, as noted in *Irving* at paras 4, 5, and 6:

> 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 hall mark 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.

• The 'Canadian model'

88 Arbitrator M. Picher referred to the 'Canadian model' as the framework for dealing with random testing, in *Nanticoke*, as follows:

> ...[T]he "Canadian model" for alcohol or drug testing in a safety sensitive workplace as developed in the arbitral jurisprudence generally contains a number of elements as summarized below:
>
> • 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 prerogative 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.
>
> • The cases generally recognize that an employee's refusal or failure to undergo an alcohol or drug test in the three circumstances described above may properly be viewed as a serious violation of the employer's drug and alcohol policy, and may itself be grounds for serious discipline. The failure or refusal to take an alcohol or drug test, however, like the registering of a positive test, does not necessarily justify automatic termination. The appropriate disciplinary sanction in such a case remains subject to the general just cause provisions of the collective agreement and is an issue to be determined on a case by case basis, having regard to all of the relevant facts.

> ...[T]he "Canadian model" has gained broad acceptance within safety sensitive industries in Canada. The reported jurisprudence is devoid of any serious incidents or accidents attributed to workplace drug use. That would suggest, as a general rule, that the balancing of interests approach evolved by Canadian Arbitrators has been an appropriate, measured and ultimately effective response in balancing the rights of employers and employees in this sensitive area.

89 The Supreme Court refers to this approach in its discussion of reasonable cause testing in a dangerous workplace, adopting the above analysis. Justice Abella begins that discussion at paragraph 30:

> 30 In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measure have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance 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. v. C.E.P. Local 900***, 157 L.A.C. (4th) 225 (Ont. Arb.) (***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 twenty 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*.
>
> [Emphasis added; para. 100.]

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 and 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.
>
> [Emphasis added; para. 101]

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)

> 35 In the case before him, however, since there was no evidence of a substance abuse problem at the oil refinery, the random drug testing component of the policy was found to be unjustified (***Nanticoke***, at para. 127). His decision was upheld as reasonable by the Ontario Court of Appeal. ...
>
> 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. ...

90 I agree with counsel for the Union who suggests that it would be difficult, at this point in the random testing jurisprudence, to suggest that there is not a 'Canadian model' which applies to random alcohol/drug testing.

• 'demonstrated workplace problem'

91 Justice Abella went on to note the two arbitral awards that have upheld random testing in dangerous workplaces: *C.E.P., Local 777 v. Imperial Oil Ltd.* (May 27, 2000), Christian (*Strathcona*), and *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, [2007] C.L.A.D. No. 243 (Ont. Arb.) (Devlin) (*GTAA*). These cases bear scrutiny.

92 In *Strathcona*, the Grievor had been terminated from a safety sensitive position at an oil refinery, for testing positive in a random alcohol test. The random testing policy was implemented after the Employer had surveyed the workforce with regards to alcohol-related incidents and near misses. The results indicated that employees in the Grievor's group had a disproportionately high rate of accidents due to substance abuse, with 2.7% of employees reporting that they had personally had near misses due to substance use in the previous twelve months. The arbitrator found that this was a sufficient justification for the Employer to impose random testing, and found the Employer's decision to do so reasonable.

93 Similarly, in *GTAA* the evidence showed a pervasive problem with alcohol use in the workplace, with reports of employees being seen drinking on the job or storing alcohol at work, employees smelling alcohol on the breath of other workers, or the presence of empty alcohol containers at the workplace. On the basis of this evidence, the arbitrator concluded that random alcohol testing was a reasonable exercise of the Employer's management rights. However, since

there was no similar problem of on the job *drug* use, that aspect of the drug and alcohol policy was not upheld.

94 Since *Irving*, we have the decision of the Ontario Superior Court in *ATU, Local 113 v. Toronto Transit Commission* (*supra*). *TTC* involved an application for an interlocutory injunction restraining the Employer from implementation of random drug and alcohol testing until completion of the arbitration hearing dealing with the validity of the policy. There was no "demonstrated workplace problem" of substance abuse as in *Strathcona* and *GTAA*, but there *was* sufficient evidence for the Court to conclude that there was a culture of drug and alcohol abuse which was hard to detect and verify, particularly in certain areas of the workplace (para. 136).

95 In dismissing the motion, the Court focussed to a large extent on public safety, given the large number of passengers using the service each day, also mentioning the deterrent effect of random testing. The conclusion to dismiss the Union's application for an injunction would have the effect, of course, of allowing the Employer to perform random testing until the validity of the policy was determined at arbitration. The Court was not itself deciding whether random testing was reasonable. It followed the accepted test for determining whether interlocutory relief should be granted, found in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). That test requires that 1/ there is a serious issue to be tried, 2/ the party seeking the injunction will suffer irreparable loss if the relief is not granted, and 3/ the balance of convenience, taking into account the public interest, favours granting the interim relief. That is different test entirely than that in *Irving*, which makes the case distinguishable.

96 The case is important though, particularly for the comments made in terms of the safety of the public, which in our case, is a relevant factor in weighing the balance of interests between the Employer and the Union. In particular, the Court at para. 151 noted that

> ...[T]he workplace is literally the City of Toronto and as a result all the people who move about in the city, whether or not they are passengers on the TTC, have an interest to the TTC safely taking its passengers from one place to another.

Both witnesses agreed with the comments of Mr. Justice Wells in the concluding words of his report, at page 303:

> ...As I have said earlier in this Report, offshore oil developments are developments of a public resource. Members of the public become workers in all aspects of offshore exploration and production. The interests and concerns of the public extend especially to safety, which encompasses prevention of injury, prevention of loss of life, and protection of the environment. After catastrophic disasters over the years, the most recent being the Deepwater Horizon tragedy in the Gulf of Mexico in 2010, we are beginning to understand that we are all stakeholders now.

97 Justice Abella at paragraph 45 refers to the possibility of a finding that random testing may be found to be reasonable *in the absence of* a demonstrated drug or alcohol problem in the workplace, in certain extreme circumstances:

> 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 be 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. 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.*** [My emphasis]

• "extreme circumstances"

98 The crux of the matter before me is whether the situation at Cougar represents an "extreme circumstance" that could justify random drug and/or alcohol testing in the absence of evidence of a more generalized workplace substance use problem.

99 The evidence, the agreed statement of facts, and the history all support that this is an extreme work environment. Critical to the context surrounding implementation of the initial policy in 2010 is the tragic accident in 2009, in which seventeen passengers and crew were killed while making a trip to one of the rigs. This event triggered reports from the Transportation Safety Board and the Wells' Inquiry, which highlight the extreme conditions under which these flights are undertaken. The accident also shone a bright light on the need for a safety-first environment, now a central tenet of the company, a goal shared by the Union.

100 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.

101 It is true that the affected employees receive intensive training and testing, including simulation. There are multiple check points between crew and support personnel, as well as inflight and pre- and post-flight monitoring. The evidence of both witnesses impressed me with the level of monitoring, both human and electronic, that is part of every flight. Checks, training, testing, equipment and monitoring are crucial for improved safety, but they do not address fitness for work. Having said that, some practices, such as the discussions between the pilots pre-flight and the use of the RAM score, can address more personal factors which can also have a significant effect on the success of a flight. With all of this, there will always be potential for accidents. The question is the extent to which that risk can be mitigated.

102 Despite operating in a heavily regulated industry, it is accepted that Cougar operates above those standards, and that the safety culture is embedded in the relationship between the Employer and its workforce. Even so, it is clear that the legalization of cannabis in 2018, and the imminent legalization of edible cannabis products, has made this enterprise even more challenging. Transport Canada regulations responded to cannabis legalization more than six months after it was enacted, by imposing a rule against consumption of cannabis at least twenty-eight days of flight crews or controllers being on duty.

103 The TSB regulation applies to applies to crew, air traffic control, and flight service specialists. The ban on consumption of cannabis within twenty-eight days of being on duty will obviously interfere with an affected employee's ability to consume legal cannabis products during his or her off time. The regulation is not specific as to how it will be enforced. However, random testing is not necessarily the only or the best solution. To be certain that the affected employees were in compliance with the regulation would suggest *mandatory* testing of all crew and support personnel prior to being on duty, which is not what the Employer is seeking, and in my view, would be unreasonable.

104 Detection was also a concern raised in the report of the Transportation Safety Board into the 2015 in-flight breakup of a Carson Air cargo flight, killing the two passengers on board (both pilots). It was found that the captain had consumed a significant amount of alcohol on the day of the incident, and that alcohol "almost certainly" played a role in the events leading to the accident. The report also noted that the captain's tolerance to some of the effects of alcohol "likely allowed his impairment to go undetected on the morning of the accident" (page 33). The TSB report does not disclose whether the Employer had a Drug and Alcohol Policy and if so, whether it included random testing.

105 The above relates to the Employer's main point, particularly through the evidence of Mr. Williams, that random testing would give the Employer assurance that substances had not been consumed, and would act as a deterrent to other employees. I understand the wish of the Employer to leave no stone unturned to ensure the safest possible working environment for its

staff, passengers, clients, the industry, and the public. Whether random testing is necessary or reasonable to achieve that goal is the question.

106 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.

107 Nor have the floodgates opened since cannabis was legalized. It is speculative at this point to project that the legalization of edible cannabis products will increase what has to date been a non-existent problem. It may well be that Transport Canada will introduce more comprehensive rules as time goes by. Or, if there were some evidence that edibles were indeed a problem in the workplace, the parties are free to negotiate a resolution. On that point, it should be noted that a "demonstrated" workplace problem is not a standard carved in stone. For example, the evidence of the breadth of the problem in *Strathcona* and *GTAA* was much more tangible than that in *TTC*. It is open to the parties to determine what constitutes a "demonstrated workplace problem".

108 Drug testing is invasive, though it is generally accepted that oral swab testing is less intrusive and less demeaning that urinalysis. The Court in *TTC* described oral swab testing as "minimally invasive". I am not overly concerned that the test sample must be sent to a lab outside the province with a turn-around time for receiving the result being approximately three days. Currently, the tested employee continues to work until the result is received. This could obviously be a problem if the test result is ultimately positive. However, this problem is not insurmountable. For example, the Employer could take the affected employee out of service in the interim, with pay, which would alleviate that particular risk.

109 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.

110 Should the situation vis-à-vis substance abuse change, it may be that the Union would not object to appropriate remediation, including the "minimally invasive" oral swab testing. Failing that, existing arbitral jurisprudence and indeed the *Irving* decision of the Supreme Court of Canada

suggest that random testing would be deemed reasonable. For these reasons, the grievance is allowed. I will remain seized as to the implementation of this Award.

111 The parties referred me to a large number of cases, all of which I have carefully considered. I have limited my references to those which bear directly on the points raised in this Award.