PRIVACY LAWS & EFFECTIVE
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BALANCING RIGHTS AND OBLIGATIONS AROUND EMPLOYEE MEDICAL INFORMATION

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INTRODUCTION

Privacy is a nebulous concept, which has evolved through the common law doctrines of property, tort and contract. The earliest conceptions of privacy are founded in the property law concepts of trespass and nuisance. The right to protect one's own property from intrusion by other individuals or by the state was a fundamental aspect of the earliest conceptions of privacy. Arguably, the common law in Canada now recognises a general right of privacy that is not dependent upon trespass or nuisance. This general right of privacy extends beyond traditional property-based rights and the right to limit the intrusion of the state upon the individual to a more general reasonable expectation of privacy. Privacy rights have also been furthered by legislation which criminalizes certain invasions of privacy and which limits access to personal information held by a government.

Personal medical records are afforded substantial statutory privacy protection. The extent of this protection attests to the significance of the privacy interests attached to personal medical records. There is extensive legislation governing the confidentiality of medical information. Both public institutions and health care providers are under a statutory duty to protect the confidentiality of patient medical records. It is an act of professional misconduct for members of the regulated health professions provide medical information about a client without the consent of the client or as required or allowed by law: See, for example, s 1(10) of Regulation 799/93 under the *Nursing Act*. Similarly, public hospitals are under a statutory duty to protect medical records and material pertaining to patient care from unauthorized access (s. 22, Regulation 965 under the *Public Hospitals Act*).

Medical records are also protected information under the federal *Personal Information Protection and Electronic Documents Act* (Canada) and the proposed provincial Privacy of Personal Information Act, 2002. Both the federal and provincial privacy legislation seek

to establish rules that govern the collection and the disclosure of personal information in a manner that recognizes both an individual's right to privacy and the need for organizations to collect, use or disclose personal information in a manner that a reasonable person would consider appropriate in the circumstances.

The statutory protections afforded to personal medical records are designed to protect against release of information without the consent of the individual. However, in the context of medical information in the workplace, the issue becomes one of whether an employee must consent to disclose medical information in order to establish either fitness to work or incapacity. In determining whether an employee is required to provide such consent, arbitrators and labour adjudicators have recognised individual privacy rights as a factor to consider when evaluating whether medical information should be disclosed. The balancing between an employee's privacy rights and an employer's need for information has been the subject of extensive litigation. As noted above, The importance of maintaining privacy with respect to personal medical information has been recognised in the development of legislation governing confidentiality of medical records. However, in the workplace context, it may crucial for an employer to have access to such information in order to operate its business safely and efficiently. These competing rights are at issue in many contexts, including:

i) Requests for access to medical information to prove fitness return to work, fitness to continue working or to establish illness or incapacity;

ii) Requests to have an employee to submit to medical examination by physician of employer's choice;

iii) Duty of an employee to provide information in the context of the duty to accommodate and return to work;

iv) Screening employees for drug and alcohol consumption.

i) Requests for access to medical information to prove fitness return to work, fitness to continue working or to establish illness or incapacity

Requests for access to medical information to prove fitness to work or to establish incapacity arise in the context of employee discharge, job competitions, medical leave, and return to work. As the cases below indicate, arbitrators are required to balance the competing interests of the privacy rights of an employee with the employer's legitimate need to access medical information in order to make fully informed decisions about an employee's fitness to work and/or to prove its case in the context of a hearing.

Pre-hearing Production Requests

The Ontario Labour Relations Act specifically gives arbitrators the power to:

> require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing, 48(12)(b)

The main elements in determining whether or not disclosure is appropriate are relevance to the issues in dispute and some analysis of prejudice. *West Park Hospital and ONA* (1993) 37 LAC (4th) 161 (Knopf) is a leading case regarding the disclosure of medical records at hearing. In *West Park*, the employer's request for pre-hearing production is denied; however the decision states repeatedly that the relevancy of medical evidence at the hearing regarding the merits of the case and/or issues as to the proper remedy may be brought up by either party during the hearing. The grievor, a nurse, had been discharged for incompetence. In determining the appropriateness of ordering disclosure, arbitrator Knopf set out the following five-fold test:

1. Information requested must be arguably relevant;
2. The request must be particularized so there is no dispute as to what is requested;
3. The board should be satisfied that the information is not being requested as a fishing expedition;

4. There must be a nexus between the information requested and the positions in dispute at the hearing; and

5. The Board should be satisfied that disclosure will not cause undue prejudice.

This test has been subsequently adopted by a number of arbitrators in the context of pre-hearing disclosure. See, for example: *Stelco Inc*. and *U.S.W.A.. Loc. 1005* (1994), 42 L.A.C. (4th) 270 (Dissanayake) and *Becker Milk Co. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees*, Loc. 647 (1996), 53 L.A.C (4th) 420 (Joyce).

Access to Entire Medical Record

Issue: **Is the Employer entitled to production of the grievor's entire medical record in order to meet its case at a discharge hearing?**

Are records pertaining to mental health issues subject to a different standard?

***Oliver Paipoonge and LIUNA, Local 607* (1999) 79 L.A.C. (4th) 241 (Whitaker)**

Facts:

- The grievor was discharged for being unable to do his job. The employer alleged that the information available to the employer at the time of discharge indicated that the grievor would be unable to do his job in the future.

- The union took the position that grievor was able to do his job at the time of discharge and was not planning on arguing that there were mental health issues; however, they reserved the right to do so pending hearing the employer's argument.

- The employer requested the grievor's entire medical file. The employer also requested that the grievor submit to a medical examination by a physician of its choice, in order to meet its case *[see below for a detailed discussion of the law pertaining to grievor submission to medical examination by physician of employer's choice]*.

Held:

- Arbitrator Whitaker found that the following principles emerged from his review of the case law pertaining to production of medical records and to grievor submission to medical examination:

  1) production of medical information and submission to an exam should only be made where it is clear that the grievor's health is being put in issue by the union or the employer needs it to prove its case;

  2) where mental health records are an issue, some standard higher than "arguably relevant" should apply; and

  3) the arbitrator should not award production until the point in the hearing where it becomes necessary.

- Arbitrator Whitaker noted that the obligation to produce mental health records and to submit to a psychiatric examination are "*prima facie highly intrusive*" and, as such, should be subject to a different standard because of the highly sensitive nature of the information contained therein.

- The employer's motion for an order compelling the grievor to an examination by the employer's expert and for production of medical records was dismissed as premature.

Access to Specific Diagnosis

Issue: Can the Employer require employees claiming medical leave to fill out a medical form requiring information about employee's health, including a diagnosis of condition?

Ottawa Citizen and Ottawa Newspaper Guild, Loc. 205 **(1996) 58 L.A.C. (4th) 209 (Dumoulin)**

Facts:

- The collective agreement stipulated that the employer could require a medical certificate signed by a qualified doctor stating the employee is incapable of working.

- The employer required employees to complete a company medical certificate form, which included the nature of the illness.

- The union filed a policy grievance.

Held:

- The requirement to provide a doctor's diagnosis or the nature of the illness goes beyond the collective agreement requirement to establish incapacity and requires a medical conclusion of a sensitive and private nature.

- Had the parties intended for the employer to have access to such information, they would have so specified in the collective agreement.

- The employer only has the right to know about work restrictions for return to work purposes.

Requirement of Medical Examination to Prove Fitness for Posted Position

Issue: **Can the Employer require a medical examination to prove that an employee is fit for posted position, which the employee is otherwise qualified to perform?**

Hudson Bay Mining and Smelting Co. (Zochem Division) and C. E. P. Loca 819 (Folo) **(2001) 93 L.A.C. (4th) 289 (Springate)**

Facts:

- The grievor was denied a posted position that he was entitled to under the posting and vacancy provisions of the collective agreement.

- The position involved heavy lifting. The grievor was 59 years old and had a history of lower back injuries.

- The employer requested that the employee submit evidence he could safely do the job, including medical examination, and take an ergonomics test.

Held

- An employer can require a medical examination if it has reasonable and probable grounds to suspect that because of a medical condition an employee is a danger to himself or others or is unfit to perform his job.

- The employer in this case met the precondition: The grievor's extensive history of work related injuries was sufficient to establish there were reasonable grounds to believe the employee might harm himself given his history of back injury and the nature of employment.

- The request for medical information did not offend the dignity of the employee, which is the purpose behind the prohibition on discrimination in the *Charter* and the *Human Rights Code*. Furthermore, the employer's request was based on the grievor's personal characteristics, as opposed to the stereotypical application of group characteristics to the grievor, which would have violated human rights legislation. Accordingly, the employer's request for medication information did not constitute discrimination on the basis of disability or age.

- The grievance was dismissed.

Access to Medical Information for Attendance Monitoring Program

Issue: **Can the Employer require employees with attendance problems to consent to a medical release allowing the Employer to communicate directly with employee's physician?**

***Re Purolator Courier and Teamsters, Loc. 31* (2000), 89 L.A.C. (4th) 129 (Greyell)**

Facts:

- The employer implemented an "Attendance Awareness Management Program", which required, *inter alia*, that employees who exceeded a threshold number of absences in a quarter be placed on a program of progressive steps designed to encourage improved attendance.

- At the six-step interview, the employee was asked to sign a medical release form to permit the employer to communicate directly with the employee's physician for the purposes of discussing the "likelihood of satisfactory future attendance".

- The union filed a policy grievance.

Held

- While the employer is generally entitled to such medical information as to allow it to make an informed decision as to an employee's fitness to return to work or as to future prognosis regarding ability to attend work on a reasonably regular basis, the broad nature of the information which may be accessed under the medical release is offensive to the privacy rights of the employee concerned.

- Accordingly, the medical release requirement of the program was found to be invalid.

ii) Employer requiring employee to submit to medical examination by a physician of the employer's choice

A review of the jurisprudence reveals near consensus among arbitrators that absent either a contractual obligation or statutory authority, an employer does not have the right to require employees to submit to an examination by a doctor of the employer's choice for the purposes of confirming a disability or illness.

The source of the concern of the courts and of arbitrators is a long established principle of common law that, without consent, an examination by a doctor may amount to trespass or assault upon the person. It is a further established principle that persons do not, by virtue of becoming employees, lose those common law rights to privacy and integrity of the person: *see Latter* v. *Braddell et al.* (1881), 50 L.J.Q.B. 448 (C.A.).

A case often cited on this issue is *Re Thompson and Town of Oakville* (1963), 41 D.L.R. (2d) 294 (Ont. High Ct.), where the Ontario Court refused to recognize a right on the part of an employer to require its employees to submit to a medical examination. The Court stated:

> The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must depend either on contractual obligation or statutory authority.

Citing this principle, arbitrators have then reviewed the wording of the collective agreement in question in a particular case to determine whether or not there exists a contractual obligation on the part of the employee to submit to a medical examination. The cases below are recent examples of the application of these principles.

Issue: **Does the Employer have the authority to require the release of personal medical information to the Employer's physician, or to compel the employee to submit to medical exam by the Employer's physician?**

Can the Employer require an employee to consent?

***NAV Canada* and *Canadian Air Traffic Control Association* (1998) 74 LAC (4th) 163 (Swan)**

Facts:

- The employer sought to require the release of personal medical information to the employer's physician in a number of situations, including return to work and claimed sick leave.

- The collective agreement provided that sick leave could be taken where the employee satisfies the employer of the condition *in a manner satisfactory to the employer* and; that unless the employee is otherwise informed by the employer during or before the leave is taken that a medical certificate will be required, employee only needs to provide signed statement saying leave is required.

Held:

- The collective agreement provides discretion to the employer to require an employee to submit to a medical examination, and has discretion to refuse sick leave if not satisfied the employee is entitled, however, this discretion must be exercised reasonably.

- The collective agreement is silent on employer's right to require third party access to medical information, but review of case law revealed that employer has right to assure itself that employees are medically fit to return to work or to remain at work, particularly when the work involves public safety. However, absent statutory authority or express consent in the collective agreement or contract of employment, the employer can not compel disclosure of personal medical information from an employee, or compel employee to be examined by the employer's physician.

- The collective agreement in this case permits the employer to refuse an employee a return to work until he or she can prove they can work safely, but it cannot compel the release of medical information or a third party exam. The employer can request and then, if the request is reasonable, impose consequences for employees. It is noteworthy that the employer cannot impose discipline as a consequence; however, can deny leave, return to work, etc.

- Medical information is sensitive and, therefore, should only be requested when necessary and, medical examinations should only be resorted to "in rare cases".

Pope and Talbot Ltd. and I.W.A. Canada Loc 1-423 **(1996) 57 L.A.C. (4th) 63 (Taylor)**

Facts:

- Employer application for order requiring the grievor to submit to a work capacity examination by the employer's physician. The employer claimed that this was necessary to ensure a full and fair hearing.

- The grievor had been terminated following the employer's determination that the grievor was unable to perform any of the entry-level positions for which he might be called, based on his seniority.

- The employer had access to reports prepared by the grievor's doctor. However, the employer took the position that these reports did not disclose "objective findings" and "considered medical opinion".

Held

- It is generally accepted that in the absence of an agreement or statutory authority, the employer has no authority to require an employee to submit to an examination by a doctor of the employer's choice.

- If an employer has reasonable grounds to believe that an employee is not fit to work, the employer may require a medical certificate and refuse work until a certificate is provided.

- Where there is a substantive issue as to whether or not a medical report is reliable in terms of its diagnosis or conclusions, and that issue is bound to be determined by an impartial tribunal, a party adverse in interest is entitled to have the benefit of an independent expert for the purpose of properly presenting its case to the impartial tribunal.

- The grievor's right to privacy must be balanced with the employer's right to a fair hearing. In the present case, the employer could seek the additional information it requires from the grievor's physician. Until the employer makes every reasonable effort to obtain the information it requires, there exists no reasonable justification for requiring the grievor to undergo an independent medical examination.

***C.U.P.W. (Ellis)* [1996] C.L.A.D. No. 980 (Devlin)**

Facts:

- Discharge grievance of employee for theft.
- The Union argued that the grievor was suffering from a mental condition that affected her judgement at the time of theft.
- The employer requested that the grievor by examined by the psychiatrist chosen by the employer.
- The union argued that ordering the grievor to submit to an examination by a psychiatrist chosen by the employer would breach the grievor's fundamental right to privacy.

Held:

- The union put the mental condition of the grievor in issue.
- The right to a fair hearing takes precedence over the grievor's concerns about her privacy. Further, there has already been significant disclosure of the grievor's personal circumstances as a result of the evidence of the grievor's psychiatrist.
- The union's argument that the Corporation's psychiatrist would be unable to shed light on the state of mind of the grievor at the time of the incidents goes to weight rather than admissibility.

The decision in *Ellis* was upheld on review, see [1997] O.J. 5302. In its endorsement, the Divisional Court upheld Arbitrator Devlin's reasoning on all points. The court held that, in order to ensure a fair hearing an independent examination was necessary. Since the union had put the grivor's mental condition in issue, a psychiatric examination by a doctor chosen by the employer was "vital" to the employer's ability to rebut the union's evidence. Further, the employee waived her privacy rights by putting her psychiatric condition in issue.

iii) Duty of an employee to provide medical information in the context of the duty to accommodate and return to work

Duty to Accommodate

An employee who is seeking accommodation on the basis of disability is required to advise the employer of the following:

i) That he or she has a disability (the employee is generally not required to disclose the specific disability); and

ii) Information regarding relevant restrictions and limitations.

See *Maple Leaf Foods Inc. and United Food and Commercial Workers, Local 175/633* (1996), 60 L.A.C. (4th) 146 (Kirkwood) and cases cited therein.

In the decision set out below, the employee's obligation to disclose the need for accommodation is considered in the context of an employee whose disability may have affected her ability to discharge her duty to disclose the need for accommodation.

L.B. (Committee of) v. Newfoundland (Human Rights Commission) **[2002] N.J. No. 187 (N.C.A.)**

Facts:

- This case was an appeal from a decision overturning the finding of an adjudicator that the employer had discriminated against the Complainant, in violation of the *Human Rights Code*, R.S.N. 1990.

- The Complainant was discharged for continued unexplained absence from work.

- The Complainant had failed to comply with the employer rule which required a medical certificate following an absence of more than five days.

- The Adjudicator found that the requirement of a medical certificate after five days of illness discriminated adversely against the employee and that the employer had not accommodated the employee to the point of undue hardship.

- The Adjudicator reasoned that the employer rule that a doctor's note must be provided following absences of longer than five days did have an adverse affect on the Complainant because her paranoid disorder would have affected her appreciation of the need to comply with this requirement. The adjudicator also found that the employer had not demonstrated that it had not "done anything else reasonable or practical in the circumstances" to accommodate the Complainant.

- The trial judge allowed the employer's appeal of the adjudicator's decision, holding that the evidence did not support a finding that the Complainant's appreciation of the need to comply with the rule was "affected" by her disorder and that the employer was not sufficiently informed of the Complainant's condition to have been required to accommodate the Complainant.

Held, on appeal to the N. C. A. :

- Two questions were considered on appeal, one of which is relevant for our purposes: Did the trial judge err in finding there was no discrimination?

- The Court applied the 3-part *Meorin* analysis to determine whether or not the employer's requirement discriminated against the Complainant.

- The analysis focussed on the third branch of the test: The employer must demonstrate that it is impossible to accommodate individual employees sharing that characteristics of the claimant without imposing undue hardship on the employer.

- Reviewing the case law, the court cited with approval the passage in *Renaud* stating that the duty to accommodate is a multi-party inquiry.

- The Court held that the employer made reasonable efforts to obtain information from the employee. The court held that even if the failure to provide information can be attributed to the individual's disability, in the absence of knowledge of the disability, the employer could found to have failed to accommodate the Complainant.

- The Complainant was not dismissed because the employer relied upon negative stereotypes surrounding people with mental illness; rather she was dismissed because she failed to provide medical evidence to support her claim of illness, and absent adequate information to accommodate, the employer can not be held responsible.

Canada Safeway and U.F.C.W. Local 401 provides an interesting contrast to the analysis in *L.B.*, *supra*. Arbitrator Wakeling held that the employer had failed to accommodate a grievor to the point of undue hardship, despite the fact that the grievor's underlying mental problems were unknown by the grievor's supervisor at the time of discharge. It is noteworthy that the "personal" nature of mental health issues was accepted as a rationale for the grievor's unwillingness to disclose his medical condition to the employer and that the employer was required to assume some responsibility for the adverse consequences of the grievor's failure to disclose his medical condition.

Canada Safeway and U.F.C.W. Local 401 **(1992) 26 L.A.C. (4th) 409 (Wakeling)**

Facts:

- The grievor was terminated for poor work performance. The grievor's behaviour was described and unusual and strange. The employer was otherwise unaware of the grievor's underlying mental problems at the time of discharge.

- The employee had a mental illness which caused him to make "poor work choices", resulting in consistent discussions about performance with his manager.

- The analysis focussed on whether there was a duty to accommodate and the scope of this duty.

Held

- The substandard work performance was a result of a mental illness, however this mental illness was never communicated to the employer.

- The holding in *Central Alberta Dairly Pool* implies that the employer's duty to accommodate is predicated on the necessity of the employee or union to communicate to the employer the need for accommodation.

- Although the employee and the union have responsibility in most cases to inform an employer, it is different where mental health issues are concerned.

- Most employees would likely be reluctant to state that he or she has a mental disability for fear that this information will be used to their detriment. For this reason the grievor was unwilling to share this "very personal information" with persons who had the authority to decide his employment fate.

- The employer must share in the adverse consequences that attended the grievor's unwillingness to inform his employer of his mental illness. Accordingly, the employer should have taken positive steps, such as advising the grievor of the employee assistance program, in response to the grievor's strange and unusual behaviour on it own initiative.

- Accordingly, on the facts, the employer did not accommodate the employee's mental illness and the employee was reinstated

Return to Work

When an employee returns from a period of absence due to illness or injury, the employee will bear the onus of proving that he or she is fit to return to work. Normally, this burden is discharged by the employee presenting a medical certificate of fitness; however, most arbitrators have recognised that the employer has a right to satisfy itself that the employee is medically fit to return to work. In ***Proboard***, Arbitrator Burkett considered the medical documentation necessary to satisfy the onus on the grievor to prove fitness to return to work. *The limitations on the employer's right to satisfy itself are discussed in further detail in section (i) above.*

Re Proboard Ltd. and C.E.P., Loc. 49-0 (Fredrickson) **(2001), 97 L.A.C. (4th) 271 (Burkett)**

Facts:

- The grievor was off on a work-related back injury for a period of 18 months.

- The grievor supplied the employer with a letter from his doctor stating that the grievor was "ready to try an attempt to return to work".

- The employer was not satisfied that the grievor was fit to return to work on the basis of the letter and insisted that the grievor submit to both an examination by an independent medical specialist (IME) and a fitness assessment evaluation (FAE) before being allowed to return to work.

- The union grieved the employer's requirement that the grievor submit to the IME and the FAE and claimed compensation for the five week period during which the grievor was waiting for IME and was not working.

Held

- When an employee has been off work due to illness or injury, there is a presumption that the employee is *prima facie* unfit to work. As a precondition to any return to work, the employee must establish fitness to work without posing a health risk to himself or others.

- While the employer did not have the statutory or contractual right to insist on the IME, the grievor did not discharge the onus of establishing his fitness to return to work.

- Upon communicating the basis for its conclusion that medical documentation is insufficient, the employer is not under a positive obligation to prepare a specific list of questions for presentation to an employee's doctors.

- Following a prolonged absence, an employee is required to provide "full and complete medical clearance".

- It was open to the grievor to refuse to undergo an IME; however he would have remained out of work, subject to satisfying the onus of establishing his fitness to return to work.

- The grievor could have returned to his own physician for the purposes of obtaining a "full and complete" medical report documenting his fitness to return to work.

iv) Screening employees for drug and alcohol consumption

The screening of employees for drug and alcohol consumption is a form of medical examination. The tension between employee privacy rights and the employer's need for information is heightened in the context of employee drug and alcohol screening due to the intrusive nature of the screening and the workplace safety and human rights considerations invoked by such testing. The caselaw to date clearly establishes that universal random drug testing and pre-employment urinalysis violates human rights legislation. However, the law remains unsettled in the area of whether drug and alcohol testing is appropriate in more narrowly defined circumstances, such as "post-accident/incident" or in "safety-sensitive" positions. As the cases set out below indicate, adjudicators have reached contradictory conclusions regarding whether or not "reasonable cause" drug and alcohol testing is permissible.

Random Drug and Alcohol Screening

***Entrop* v. *Imperial Oil Ltd.* (2000), 189 D.L.R. (4th) 14 (Ont. C.A.)**

Facts:

- Martin Entrop was employed by Imperial Oil in a "safety sensitive" position.
- Mr. Entrop was a former alcoholic, who had quit drinking in the mid-1980s.
- Imperial Oil introduced a policy which, *inter alia*, required Mr. Entrop to submit to random alcohol testing by breathalyser and random urine drug screens.
- Mr. Entrop challenged this policy before a human rights board of inquiry.

N.B. The decision of the Board of Inquiry was subsequently appealed to the Divisional Court and the Court of Appeal. For the purposes of this discussion, the findings of the Court of Appeal in the issue merits of the employer policy will be provided.

Held:

- Since the employer intended to sanction anyone testing positive, random and pre-employment drug and alcohol testing were *prima facie* discriminatory.

- Following its finding of *prima facie* discrimination, the court proceeded to apply the three-step analysis set out in *British Columbia* v. *B.C.G.S.E.U.* (Meiorin) (1999), 176 D.L.R. (4th) 1 (S.C.C.) to determine whether the testing was a BFOR.

- Random and pre-employment drug testing was held to not be a BFOR since the testing could not provide evidence of impairment or likely impairment in the job. The policy's zero tolerance for the presence of drugs in the body was arbitrary, since a positive drug test does not demonstrate inability to perform work safely.

- Random alcohol testing was held to be a BFOR on the basis that most individuals show signs of impairment at a certain blood alcohol concentration. As such, the testing was considered reasonable.

- With respect to alcohol testing, the court concluded that a automatic termination in all cases was too severe a penalty and would not meet the duty to accommodate.

Reasonable Cause Drug and Alcohol Testing

Sarnia Cranes, [1999] O.L.R.B. Rep. May/June 479

Facts:

- Sarnia Cranes, a contractor, was required to implement a drug and alcohol policy acceptable to Imperial Oil, if it were to continue to perform work under contract with Imperial Oil.

- The policy designed by Sarnia Cranes provided for pre-hiring testing of all employees, as well as testing "post-incident", for reasonable cause, and as part of rehabilitative monitoring.

- The union filed a policy grievance with respect to the proposed alcohol and drug testing policy.

Held:

- The employer policy violated the Human Rights Code because it imposed sanctions on those who tested positive or who were perceived to be substance abusers. As such, the testing is *prima facie* discriminatory.

- The Employer was unable to demonstrate that the a drug test was a *bona fide occupational requirement* (BFOR) because the test was incapable of establishing whether or not an employee was impaired while on the job.

- The implementation of the policy, with respect to both drug and alcohol testing, is an unreasonable exercise of management rights, contrary to the collective agreement because the testing could not establish impairment.

- There was no logical or scientific basis for the employer's assumption that, where an employee refuses to take a test, he or she would necessarily test positive

Canadian National Railway Co. and C.A.W. **(2000), 95 L.A.C. (4th) 341 (M.G. Picher)**

Facts:

- The union mounted a challenge to the employer's "Policy to Prevent Workplace Alcohol and Drug Problems".

- The policy entailed post-accident/incident testing; testing in the context of reinstatement following confirmed policy violation; follow-up testing following treatment for drug or alcohol abuse; and testing upon application for "safety-sensitive" positions.

Held

- Just as the common law privacy rights of employees not to have their personal effects searched has been found by boards of arbitration to properly yield to a legitimate employer interest to further the security of its operations by reasonable rules , so too there may be circumstances in which it is reasonable and appropriate for an employer to require an employee to undergo an alcohol or drug test.

- An essential part of the balancing of interests is to determine whether an employer promulgated rule is reasonable.

- The are certain industries which are so highly safety sensitive as to justify a high degree of caution on the part of the employer without first requiring an extensive history of documented problems of substance abuse in the workplace. The more highly safety-sensitive an enterprise is, the more an employer can justify a proactive rather than reactive approach designed to prevent a problem before it manifests itself.

- The balancing of interests approach is the correct one in a case of this kind, and reasonable cause drug testing is an appropriate rule and policy, particularly within the context of a safety-sensitive industry such as railroading.

- Drug and alcohol testing for the above listed purposes would not be in violation of the *Canadian Human Rights Act*, as applied to persons holding risk-sensitive

positions. Freedom from impairment by drugs or alcohol, and freedom from active addiction or dependency on those substances which could cause impairment constitutes a self-evident BFOR for any person who exercises risk-sensitive duties and responsibilities within a railway.

CONCLUSION

As the above review of the caselaw demonstrates, labour adjudicators have clearly recognised that employee privacy rights are a factor to be balanced against an employer's legitimate need for information. The law has recognised the significance of employee privacy interests, particularly as they pertain to highly personal information and invasive procedures, such as psychiatric records and drug and alcohol testing. In this balancing of competing interests, labour adjudicators must ensure that the privacy interests of employees are protected the greatest extent possible, while still permitting an employer to operate its business in a safe and efficient manner.