# Scorecard of the Key Workplace Drugs & Alcohol Cases Decided Since Marijuana Legalization

Using actual court cases to evaluate whether your workplace testing policies are legally sound.

It's been over 3 years since Canada officially legalized recreational cannabis on October 17, 2018. Of course, while the product might now be legal, using or being impaired by it **while at work** never has been and never will be. The same thing is true of other legal substances that have impairing effects, such as medical cannabis, alcohol and prescription drugs. Also unchanged are the rules governing an employer's right to test for cannabis and impose discipline for a positive result. As it always has, it all comes down to a balancing of the employer's right to ensure a safe workplace and an employee's right to privacy and freedom from discrimination.

What makes things so tricky for employers and OHS directors is that the rules aren't clearly spelled out in any legislation or regulation. Instead, their created by courts, arbitrators and other tribunals in individual cases based on their own unique set of facts. To make sense of this massive body of dense legal material, you must be able to not only track down the cases but also analyze them and seek to apply the lessons to your own policies and circumstances. Needless to say, that's a daunting task, especially if you're not a trained lawyer and don't have the budget to hire one to do the analysis for you.

With this in mind, OHS Insider created this SCORECARD, which boils down all of the key drug and alcohol testing and discipline cases decided in Canada through 2021. In addition to telling you who won, the SCORECARED explains why the particular testing or disciplinary action was or wasn't upheld in a way that you can use to evaluate the legal soundness of your own policies and practices.

## Employers Lose More Cases than They Win

There've been at least 47 significant workplace drugs/alcohol cases reported in Canada since October 17, 2018. Of these, employers have won 21; 25 have gone to workers or their unions, and there was 1 split decision.

## EMPLOYER WINS (21 CASES)

Most of the cases in which an employer won involved termination of a clearly safety-sensitive employee. Nine of those employees were caught in the act of doing their jobs while impaired by drugs or alcohol. Several tried to salvage the situation by claiming they had a disability and contending that the employer failed to accommodate them. In 3 cases, the employee got fired not for being impaired but for violating his commitment to undergo testing or assessment. And in 3 cases, termination was justified because the employee lied about and didn't disclose his dependency.

### 1. Employer Can Apply Zero-Tolerance Policy to Legal Medical Marijuana Use

**What Happened:** An air ambulance provider unilaterally adopted a zero-tolerance policy for cannabis use by safety-sensitive employees. What irked the union wasn't so much the policy, but the employer's insistence on applying it to an aircraft maintenance engineer who legally used medical marijuana for his anxiety disorder.

**Ruling:** The federal arbitrator ruled that applying the policy to the engineer was reasonable and nixed the grievance.

**Analysis & Takeaway:** Zero tolerance wasn't intended to punish but ensure that the highly safety-sensitive work be done "with the highest possible level of competence, skill, and attention." The arbitrator also noted that the policy included provisions to encourage and help employees who came forward to voluntarily disclose their problems with drugs and alcohol.

*Ornge Air v Office and Professional Employees International Union*, 2021 CanLII 126376 (CA LA), December 7, 2021

### 2. OK to Fire Truck Driver for Falsely Denying DUI Incident

**What Happened:** A truck driver with a record of attendance, performance and attitude issues managed to hang onto her job. The beginning of the end came when she was pulled over for suspected impaired driving on the way to work. She told her supervisor that she was late because of "truck problems" and maintained the denial at the hearing even though it was clearly false and the union steward urged her to tell the truth. "Everybody should mind their own f*** business," she exclaimed. Concluding it could no longer trust her, the company fired the driver.

**Ruling:** The union appealed but the New Brunswick arbitrator tossed the grievance even though the driver was now vaguely suggesting she had an alcohol problem.

**Analysis & Takeaway:** It wasn't so much the DUI but the failure to tell the truth, admit her wrongdoing or take any steps to deal with her "self-confessed alcoholism," that cost the driver her job.

*International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927 v Fundy Regional Service Commission*, 2021 CanLII 110245 (NB LA), November 1, 2021

### 3. OK to Fire Safety-Sensitive Worker for Not Being Fit for Duty

**What Happened:** A safety-sensitive tree utility worker got fired for flunking his drug test. There was no doubt that the worker's THC levels were above the limits in the employer's fitness for duty policy, as well as the *Criminal Code* for legal operation of a vehicle, including the truck he was driving before getting tested. But the Nova

Scotia labour standards officer found no just cause to terminate.

**Ruling:** The board reversed the ruling on appeal.

**Analysis & Takeaway:** Fitness for duty as a safety policy is generally easier to justify than zero tolerance. The worker in this case was fully aware of the policy. And while it was just a first offence, the violation was serious enough to warrant immediate termination, the board concluded

*Asplundh Tree Service ULC v Chipman,* 2021 NSLB 81 (CanLII), October 1, 2021

## 4. OK to Require Medical Exam of Marijuana User's Fitness for Safety-Sensitive Job

**What Happened:** An energy company required safety-sensitive workers to pass pre-assignment drug testing before letting them work at the refinery. The company learned that a journeyman electrician the union sent to the site used medical marijuana. So, it asked him to see a company doctor to determine his fitness to perform safety-sensitive work. At the union's insistence, he refused. Fine, then you can't take the pre-assignment drug test, the company responded.

**Ruling:** The company's position violated neither the collective agreement nor human rights laws, the Saskatchewan arbitrator ruled.

**Analysis & Takeaway:** The electrician's marijuana use gave the company "reasonable and probable grounds" to suspect he was unfit for the job and require a medical assessment, noted the arbitrator, citing its "overarching statutory [and collective agreement] obligation" to ensure the health and safety of all its workers.

*International Brotherhood of Electrical Workers, Local 2038 v PCL Intracon Power Inc*., 2021 CanLII 86790 (SK LA), August 31, 2021

## 5. Arbitrator Can't Bar Random Testing Mandated by Federal Regulation

**What Happened:** After 10 years of study, the Canadian Nuclear Safety Commission (CNSC) issued a regulation requiring nuclear power plants to perform random, post-incident, reasonable cause and pre-assignment alcohol and drug testing on safety-sensitive and safety-critical workers. As expected, when plants implemented testing policies implementing the new testing policy, the unions grieved. They also asked the arbitrator to "stay," that is, bar enforcement of the policy until a ruling on the merits of the grievance.

**Ruling:** The Ontario arbitrator denied the stay.

**Analysis & Takeaway:** In a significant ruling that the unions are bound to appeal, the arbitrator concluded not that the testing policy was legally valid but that labour arbitrators don't have jurisdiction, i.e., legal authority, to prevent enforcement of testing policies incorporating regulatory requirements mandated by a federal agency like the CNSC. However, the arbitrator ruled that the part of the policy that the plants added requiring testing of a group of workers not addressed by the CNSC regulations was fair game for review and issued a stay temporarily barring enforcement of those provisions.

*Ontario Power Generation, Bruce Power, Power Workers' Union, Society of United Professionals, The Chalk River Nuclear Safety Officers Association and International Brotherhood of Electrical Workers, Local 37 v Canadian Nuclear Laboratories and New Brunswick Power*, 2021 CanLII 65284 (ON LA), July 8, 2021

## 6. Drug Disclosure Policy Is Enforceable for Safety-Sensitive Workers

**What Happened:** A Crown corporation in Québec adopted a policy requiring dockworkers to disclose their use of medical marijuana or other legally prescribed medications that could potentially impair them at work. The policy also gave the employer the right to question the doctor who prescribed the medication about its impairing effects. The union grieved, claiming the policy violated employees' privacy rights under the Charter.

**Ruling:** The federal arbitrator disagreed, finding that the policy served a legitimate and important safety purpose and that the privacy invasion was minimal.

**Analysis & Takeaway:** The policy was enforceable, but only for crewmen and bridging and wharf attendants since those jobs are safety-sensitive; but it wasn't enforceable against maintenance and other job titles that weren't safety-sensitive

*Syndicat des employés de la Société des traversiers Québec – Lévis – CSN v Société des traversiers du Québec*, 2021 CanLII 77428 (CA SA), August 17, 2021

## 7. Positive Drug Test Ends Employer's Duty to Accommodate Alcoholic Worker on Last Chance

**What Happened:** For years, a plant tried to assist a mill hand in his battle against alcoholism. But after repeated DUI convictions and unsuccessful rehab attempts, the worker tested positive for alcohol in violation of his last chance agreement. It was the last straw and the plant terminated him.

**Ruling:** The New Brunswick arbitrator tossed the union's grievance.

**Analysis & Takeaway:** Although the plant had a duty to accommodate the worker's alcoholism, things had reached the point of undue hardship. The worker's job was safety-sensitive and after years of assisting him without success the plant was justified in concluding that further attempts at rehab would be futile.

*Unifor, Local 907 and J. B. v Irving Paper, Limited,* 2020 CanLII 89671 (NB LA), November 6, 2020

## 8. Smoking Pot at Work Is Just Cause to Fire Railway Worker

**What Happened:** A railway worker was fired after getting caught smoking pot at work twice. The worker didn't deny consuming cannabis at work or claim he had an addiction. He just relied on his clean disciplinary record, sincere remorse, family problems that made him turn to pot and the supposed condonation of his supervisor.

**Ruling:** The federal arbitrator upheld termination.

**Analysis & Takeaway:** The key factor in the arbitrator's eyes was that the worker smoked pot at work on more than one occasion even though his safety-sensitive railway job demanded that he be focused and alert at all times.

*International Union of United Metallurgy, Paper and Forestry, Rubber, Energy Manufacturing, Services and Allied Industries (Local 9344) c Compagnie de chemin de fer du littoral Nord de Québec and du Labrador inc. (IOC Mining Company – Rio Tinto),* 2020 CanLII 83837 (CA SA), November 3, 2020]

## 9. Near Miss Is Justification for Post-Incident Drug Testing

**What Happened:** After a Self-Propelled Modular Transporter (SPMT) collided with a set of scaffold stairs erected at the end of the dock against a barge, the manager at the site ordered the worker serving as spotter to undergo drug/alcohol testing. The union claimed that the incident wasn't a "Significant Event" justifying post-incident testing under the employer's testing policy because there were no injuries and only minimal property damage.

**Ruling:** The BC arbitrator sided with the employer.

**Analysis & Takeaway:** A near miss met the policy definition of "Significant Event," the arbitrator concluded, given the serious potential for significant injury and damage. The manager also followed the correct investigation procedures and SPMT crashes are rare events, supporting the suspicion of impairment

*Vancouver Shipyards Co. Ltd v Marine and Shipbuilders*, Local 506, 2020 CanLII 103785 (BC LA), December 29, 2020

## 10. OK to Fire Truck Driver for Not Disclosing Medical Marijuana Use

**What Happened:** The driver of a concrete truck claimed he disclosed his legal medical marijuana use before undergoing post-incident testing and then got fired for testing positive for marijuana. The company claimed he was fired not for the positive test result but because he never disclosed his medical marijuana use as required by the company's drug policy.

**Ruling:** The Alberta Human Rights Commission found that the employer didn't violate its duty to accommodate the driver.

**Analysis & Takeaway:** There was no evidence that the driver ever mentioned or that the company ever knew about his medical marijuana use until after the lawsuit. And since failure to disclose was the real violation, the actual test results were irrelevant.

*Bird v Lafarge Canada Inc.,* 2021 AHRC 50 (CanLII), February 23, 2021

## 11. Legalized Marijuana Gives Employer More Leeway for Random Testing

**What Happened:** The union contended that unannounced random urine drug testing of safety-sensitive airport workers was an undue invasion of privacy. While acknowledging that case law has weighed heavily against random drug testing, the airport noted that those cases were decided before marijuana legalization. The situation has changed dramatically since then, the airport argued.

**Ruling:** In a potentially significant ruling, the federal arbitrator upheld the random test policy.

**Analysis & Takeaway:** Even though its urine and saliva testing methods were highly intrusive, the arbitrator said the policy was an essential safety measure and deterrent, particularly in the age of legalization.

*Ottawa Macdonald-Cartier International Airport Authority v Ottawa Airport Professional Aviation Fire Fighters Association,* 2021 CanLII 44861 (CA LA), May 18, 2021

## 12. OK to Terminate for Drunk Driving of Railway Vehicles

**What Happened:** Sensing that something wasn't right, a railway worker advised a

Signals & Communications Maintainer (SCM) to take a cab home. But the SCM ignored the advice and proceeded to drive rail vehicles. After the co-worker felt compelled to report, the SCM tested positive for alcohol and was fired; he was also charged with a criminal offence. After a 3.5 hour expedited hearing, the arbitrator upheld termination. The union appealed and added a new claim—disability discrimination.

**Ruling:** The federal labour arbitrator rejected the grievance.

**Analysis & Takeaway:** It was too late to argue discrimination; besides, there was no evidence the SCM was alcoholic or entitled to accommodation. And even though he was genuinely sorry and took responsibility for his behaviour, operating a railway vehicle while intoxicated was just cause to fire him from his safety-sensitive job. The arbitrator cited extensive case law supporting a railway employer's rights to terminate safety-sensitive workers found to be impaired on the job to deter other workers from doing the same.

*Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11*, 2019 CanLII 123925 (CA LA), December 23, 2019

## 13. OK to Fire Engineer for Using Cocaine While Operating Train

**What Happened:** An engineer had to take a for-cause drug test after driving his train off the rails. The test came back positive for cocaine and the engineer was fired. The union contended the engineer had a disability, namely, drug dependency and that the railroad violated his right to accommodation by firing him.

**Ruling:** The federal arbitrator upheld the termination.

**Analysis & Takeaway:** The arbitrator concluded the engineer was actually a casual user, noting that the only medical evidence of dependence was a doctor's note referring to his undefined "problem." As a result, the case was a disciplinary rather than disability discrimination matter and operating a train while impaired was just cause to terminate.

*Teamsters Canada Rail Conference v Canadian Pacific Railway,* 2019 CanLII 89682 (CA LA), September 22, 2019

## 14. OK to Fire Railway Worker for Positive Drug Test

**What Happened:** A railway worker involved in a near-miss incident had to submit to post-incident urine testing. When the test came back positive for marijuana, he admitted to using pot the night before. The follow-up test of his oral sample detected both pot and cocaine. The worker exercised his right for a re-test, but there wasn't enough of the sample left. A few weeks later, he underwent genetic hair follicle testing at his own expense. Although that test came back negative, he was fired 2 days later. The arbitrator rejected the union's grievance.

**Ruling:** The Manitoba court dismissed the union's appeal.

**Analysis & Takeaway:** The medical evidence and test results supported the arbitrator's finding that the employee was impaired at the time of the incident; and the negative genetic test didn't contradict that finding. The other reason the employer won is that it stuck to the terms and procedures of the testing policy contained in the collective agreement.

*UNIFOR and its Local 100 v. Canadian National Railway*, 2020 MBQB 91 (CanLII), June 8, 2020

## 15. OK to Fire Employee Caught Smoking Pot on the Job

**What Happened:** A waste management company fired an employee for smoking pot at work. Among the evidence was video from a colleague's cell phone showing the employee, who was already under suspicion due to the marijuana odor on his clothes and his history of toking on the job, smoking from a pipe on the second floor of the work facility. The employee denied the charge, insisting that the guy on the cell phone wasn't him and that he hadn't gotten high at work for a "long time."

**Ruling:** The Ontario Labour Relations Board found just cause to terminate.

**Analysis & Takeaway:** As even the employee admitted, toking in that safety-sensitive workplace was a clear violation of company policy and grounds for termination. And even without the cell phone video, there was plenty of evidence showing that he was smoking pot at work that day.

*Miller Waste Systems Inc. v Christopher Charlebois*, 2019 CanLII 29752 (ON LRB), April 2, 2019

## 16. OK to Terminate Warehouse Worker for Drinking While on Safety Duty

**What Happened:** A warehouse worker was found drinking beer in his car while serving as shift safety supervisor. After initially insisting he had only half a beer, he finally 'fessed up and asked for leniency.

**Ruling:** The Québec tribunal ruled that the employer was justified to fire him for safety reasons.

**Analysis & Takeaway:** He knew the rules banning drinking at work and deliberately violated them while on safety duty. "He has irreparably broken the employer's trust and must bear the consequences," the arbitrator concluded.

*Pelletier and Costco Wholesale Canada Ltd. / Costco Lévis*, 2019 QCTAT 4890 (CanLII), November 6, 2019

## 17. Alcoholism No Excuse for Crane Operator Fired for Sleeping on Job

**What Happened:** A steel mill decided that a probationary crane operator wasn't suitable for full-time employment after finding him asleep at the switch. The operator admitted the offence but blamed it on his alcohol dependence.

**Ruling:** The Ontario arbitrator rejected his disability discrimination claim.

**Analysis & Takeaway:** While the operator drank and had a DUI conviction, drinking too much isn't necessarily a disability. After the incident, the operator was specifically asked if he had a substance abuse problem but said no. The only evidence of dependency was the operator's declaration that he was an alcoholic. But mere self-declaration isn't enough to prove a disability, the arbitrator reasoned in tossing the grievance.

*Algoma Steel Inc. v United Steelworkers,* 2020 CanLII 35300 (ON LA), May 21, 2020

## 18. Concealing Medical Marijuana Use Is Just Cause to Terminate

**What Happened:** A bus driver who fell asleep at the wheel was fired for not disclosing his sleep problems and the fact he smoked pot to treat them on his pre-employment medical questionnaire. While not denying the allegation, the union grieved claiming the termination letter was too vague as to the reasons for firing.

**Ruling:** The federal arbitrator upheld the firing.

**Analysis & Takeaway:** The termination letter was fine. And even if it was defective, the driver's concealment of his sleep and drug issues was grounds for finding that he was hired under false pretenses and that his employment contract was null and void.

*Outaouais Transportation Corporation (STO) c United Transportation Union (Unit 591)*, 2019 CanLII 49260 (CA SA), May 31, 2019

## 19. Breaking Promise to Submit to Random Drug Testing Is Just Cause to Terminate

**What Happened:** As part of a return to work agreement, a personal support worker (PSW) agreed to submit to off-site random drug testing. But when her supervisor asked her to take a test, she refused. As a result, she was fired.

**Ruling:** The Ontario arbitrator dismissed the union's wrongful termination grievance.

**Analysis & Takeaway:** While acknowledging that the refusal violated the agreement, the PSW blamed it on humiliation and the tough personal times she was experiencing with her mother. But the agreement provided for this possibility and specifically said that the PSW "cannot use childcare obligations or any other reason as an excuse" to not undergo testing.

*Regional Municipality of Peel and Community Workers The Sheridan Villa v Canadian Union of Public Employees, Local 966*, 2019 CanLII 91782 (ON LA), September 26, 2019

## 20. OK to Fire Worker for Violating Terms of Alcohol Treatment Plan

**What Happened:** A mining company had a program offering assistance to workers with substance abuse issues and allowing them to return to work after successfully completing residential treatment and aftercare. A safety-sensitive heavy equipment operator with an alcohol dependency entered the program requiring him to, among other things, call into a Substance Abuse Professional at least once a month for 9 months after completing the residential portion of the program. But after missing 4 calls in a row, the company decided it had had enough and fired him.

**Ruling:** The Northwest Territories' court upheld the arbitrator's dismissal of the union's grievance.

**Analysis & Takeaway:** The arbitrator had found that the operator was fired not because he was disabled but because he deliberately failed to follow the terms of his treatment plan. The argument that the calls were useless, even if true, cut no ice because the operator agreed to make the calls and deliberately broke his promise. The court said the arbitrator's decision was reasonable and tossed the appeal.

*Public Service Alliance of Canada v Dominion Diamond Ekati Corporation*, 2019 NWTSC 59 (CanLII), December 20, 2019

## 21. Medical Marijuana User Justifiably Terminated for Refusing Medical Assessment

**What Happened:** Just as he was about to undergo random testing, a cement operator admitted to using medical marijuana. After he tested positive for THC, the employer referred him for medical assessment and looked for non-safety-sensitive jobs he could do. But the operator made a stink and didn't show up for the assessment. As a result, he was fired.

**Ruling:** The Alberta Human Rights Commission dismissed the operator's disability discrimination complaint.

**Analysis & Takeaway:** The operator's deliberate failure to cooperate torpedoed the employer's efforts to accommodate the operator's medical cannabis use.

*Bourassa v Trican Well Service Ltd.,* 2019 AHRC 13 (CanLII), May 2, 2019

## EMPLOYER LOSES (25 CASES)

Several of the cases ruling for the unions emphasize that because of marijuana's metabolic properties and the fact that it can remain in the system long after the buzz is gone, a positive marijuana test isn't enough to prove the employee was impaired at the time of testing. Another important point is the need to accommodate employees with a dependency, as opposed to casual drugs and alcohol users.

### 22. Failing to Disclose Medical Marijuana Use Doesn't Cost Employee His Job

**What Happened:** A welder on a last-chance agreement and subject to random testing knew that ingesting medical marijuana might cause him to flunk his drug test. But since the pot was legally prescribed, he assumed he could just take the stuff without telling his employer. It turned out to be a bad assumption.

**Ruling:** The Saskatchewan labour board agreed that the employer had just cause to discipline the welder for violating the company drug policy and last-chance agreement.

**Analysis & Takeaway:** Because it was an honest mistake and the welder had diligently abstained from the alcohol that got him into the last-chance testing protocol in the first place, it reinstated the welder provided that he complete return-to-work education provided by the employer.

*Nutrien v United Steelworkers, Local 7552*, 2021 CanLII 72192 (SK LA), August 3, 2021

### 23. Firing Worker for Alcohol-Related Absenteeism Is Failure to Accommodate

**What Happened:** A veteran mine worker with a history of attendance problems got fired for not showing up for 2 shifts in a row without notifying a manager at least an hour before the shift began in violation of his last chance agreement (LCA).

**Ruling:** The Nova Scotia arbitrator ruled that the LCA was invalid and reinstated the worker.

**Analysis & Takeaway:** The LCA addressed just the absenteeism issue without dealing with its underlying cause, namely, the worker's alcohol dependence. True, the worker never acknowledged his dependence; but the employer had plenty of evidence and didn't take the trouble to explore and confirm its suspicions. As a result, enforcing the LCA violated the worker's rights to accommodation.

*UNIFOR, Local 823 v K + S Windsor Salt Ltd (Pugwash Facility, Nova Scotia*), 2020 CanLII 64088 (NS LA), September 9, 2020

### 24. Firing Alcoholic Employee for Coming to Work Drunk Is Disability

### Discrimination

**What Happened:** What would you do if one of your employees showed up late to work intoxicated by alcohol and prescription drugs, interrupted a staff meeting and belligerently cussed out his boss to the point where you had to call his wife to pick him up and take him home? The car dealer in this case decided on termination.

**Ruling:** The Alberta Human Rights Tribunal found disability discrimination and awarded the employee $30,000 in damages

**Analysis & Takeaway:** Termination might have been justified had the employee just been a casual drinker. But this employee had an alcohol dependency. The dealer knew or should reasonably have known of the dependency and how it rendered the employee incapable of complying with the workplace sobriety policy and at least considered making accommodations to the point of undue hardship.

*Kvaska v Gateway Motors (Edmonton) Ltd*., 2020 AHRC 94 (CanLII), December 14, 2020

## 25. Employer Must Try to Accommodate Safety-Sensitive Worker's Alcoholism

**What Happened:** After nearly 16 years of excellent performance, a found himself on the wrong end of progressive disciplinary actions for lateness, harassing a colleague and other offences, culminating in his termination. Not coincidentally, the problems began when the millwright developed a drinking problem. The union contended that the dependence caused the misconduct and claimed disability discrimination.

**Ruling:** The Alberta arbitrator agreed and reinstated the millwright without loss of pay or seniority.

**Analysis & Takeaway:** The fact that the position was safety-sensitive didn't justify the company's decision to fire him without even trying to accommodate him. Nor could the company blame the millwright for failing to come forward and seek help since it didn't have a mandatory self-disclosure policy.

*United Steel- Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, Local 5220 v Altasteel*, 2021 CanLII 7103 (AB GAA), February 3, 2021

## 26. Unsupported Suspicions Not Enough to Require Post-Incident Drug Testing

**What Happened:** A safety-sensitive refinery worker was the prime suspect for causing the roughly $1,100 worth of bumper damage to a truck he admitted to commandeering for personal use during his shift. As a result, he had to undergo testing, which came back positive for marijuana, ultimately leading to his termination.

**Ruling:** The Saskatchewan arbitrator knocked the penalty down to a 6-months' suspension.

**Analysis & Takeaway:** First, the employer's suspicions, which weren't supported by any evidence, weren't adequate grounds for post-incident testing. And even if they had been, the positive test didn't prove he was high because the company's metabolic standards for impairment were too low. However, the worker deserved to be disciplined for lying about his marijuana use.

*Gibson Energy (Moose Jaw Refinery Partnership) v Unifor, Local (Mike Chow*), 2021

CanLII 16446 (SK LA), February 16, 2021

## 27. Positive Marijuana Test Doesn't Prove Worker Was Impaired at Time of Testing

**What Happened:** A machine operator subjected to post-incident testing after backing his Cat Loader into a pole, tested positive for THC, the ingredient in marijuana that causes impairment. As a result, he got fired.

**Ruling:** The federal arbitrator reinstated him without loss of pay and $5,000 in damages.

**Analysis & Takeaway:** The company didn't give the union all of the necessary evidence before doing the test. Just as importantly, the THC levels weren't enough for the company to prove that the operator was impaired **at the time of testing**. The arbitrator dismissed the company's contention that the nature of the incident was all the evidence necessary to show impairment as a "flimsy" argument.

*Canadian National Railway Company v United Steelworkers*, Local 2004, 2021 CanLII 30111 (CA LA), April 15, 2021

*Ontario Power Generation, Bruce Power, Power Workers' Union, Society of United Professionals, The Chalk River Nuclear Safety Officers Association and International Brotherhood of Electrical Workers, Local 37 v Canadian Nuclear Laboratories and New Brunswick Power*, 2021 CanLII 65284 (ON LA), July 8, 2021

## 28. Positive Urine and Negative Oral Swab Test Don't Prove Marijuana Impairment

**What Happened:** A railway worker had to undergo post-incident drug testing after being involved in a hi-rail truck derailment. He tested positive for marijuana and the railway company fired him.

**Ruling:** The federal arbitrator reinstated the worker.

**Analysis & Takeaway:** The derailment wasn't reasonable cause for drug and alcohol testing. "An accident, by itself, is usually not enough to justify testing," the arbitrator reasoned. Besides, because marijuana lingers in the metabolism after the high disappears, the positive test didn't prove he was impaired at the time of the incident, especially since his alcohol and swab tests came back negative. "A positive urine test, but a negative oral swab test, do not demonstrate impairment" under current case law, according to the arbitrator.

*Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company*, 2021 CanLII 69959 (CA LA), August 4, 2021

## 29. Failing to Disclose Medical Marijuana Use Doesn't Cost Worker His Job

**What Happened:** A welder on a last-chance agreement and subject to random testing knew that ingesting medical marijuana might cause him to flunk his drug test. But since the pot was legally prescribed, he assumed he could just take the stuff without telling his employer. It turned out to be a bad assumption.

**Ruling:** The Saskatchewan labour board reinstated the welder.

**Analysis & Takeaway:** The board agreed that the employer had just cause to discipline

the welder for violating the company drug policy and last-chance agreement. But because it was an honest mistake and the welder had diligently abstained from the alcohol that got him into the last-chance testing protocol in the first place, it reinstated the welder provided that he complete return-to-work education provided by the employer.

## 30. Not Hiring Medical Marijuana User Is Failure to Accommodate

**What Happened:** The issue was whether an employer could refuse to hire a safety-sensitive construction worker who admitted to legally vaping 1.5 grams of medical cannabis containing high THC levels after work for Crohn's disease pain. The worker was entitled to accommodations, the Newfoundland arbitrator ruled, but without a test capable of detecting current impairment, hiring him for a safety-sensitive job would be undue hardship.

**Ruling:** The Newfound Court of Appeal reversed the ruling and said the employer didn't do enough to accommodate the worker.

**Analysis & Takeaway:** The lack of a reliable test is too easy an excuse since all employers must do to deny employment to medical cannabis users is show their jobs are safety-sensitive. The Court said the standard should be higher. Maybe there are other ways to determine a worker's fitness for duty, like a daily pre-shift functional assessment. Employers should have the burden of proving they considered these alternatives and explaining why they were rejected.

*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*., 2020 NLCA 20 (CanLII), June 4, 2020

## 31. Failed Drug Test Without Proof of Impairment Is Not Just Cause to Terminate

**What Happened:** A safety-sensitive railway worker involved in a collision incident was fired after his post-incident urine test came back positive for cannabis. The worker admitted to smoking pot while off duty the night before but insisted he wasn't high when the incident occurred. But the railway claimed it had the right to terminate him for failing the drug test regardless of whether he was actually impaired at the time of testing.

**Ruling:** The federal arbitrator disagreed and ordered the company to reinstate him, but without awarding him damages.

**Analysis & Takeaway:** Once more, the lack of a reliable test for cannabis impairment came back to bite an employer. A drug policy allowing for termination merely because of a positive test without requiring proof of impairment is unreasonable even for a safety-sensitive work and operation, the arbitrator concluded.

*Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference*, 2020 CanLII 53040 (CA LA), August 4, 2020

## 32. Pot Odor from Worker's Car Doesn't Prove Impairment at Work

**What Happened:** An elevator mechanic with a history of cannabis use got fired for allegedly smoking pot before his shift. The chief evidence: The project manager smelled marijuana smoke as he walked by the mechanic's jeep in the parking lot.

**Ruling:** Not enough proof, said the Nova Scotia arbitrator who reinstated the mechanic with no loss of pay (but also subject to the current last chance conditions imposed

on him as a result of his unrelated attendance problems).

**Analysis & Takeaway:** While the manager might have thought he *smelled* pot, he acknowledged that it was too dark to *see* anything. What he might have smelled was the stale aroma of old pot mixed with tobacco smoke, which confirmed the mechanic's story that he was smoking a cigarette when the manager passed by. After all, nobody else testified to detecting the smell of pot on or any signs of impairment in the mechanic once work began. The company also had a safety policy banning workers from working impaired. So, while not doubting the sincerity of the manager's suspicion, the arbitrator chided him for allowing the mechanic to proceed to work his safety-sensitive job and then drive home

*Kone Inc. v International Union of Elevator Constructors, Local 125*, 2020 CanLII 2377 (NS LA), Jan. 18, 2020

## 33. Reporting Non-Safety Sensitive Medical Marijuana User's Drug Test Is Disability Discrimination

**What Happened:** After testing non-negative for THC, an applicant for a nursing position at an offshore oil platform explained that he had spinal bone cancer and used legally authorized medical marijuana to treat the pain. The testing company, AOMS, a medical services company hired to provide nursing staff for the platforms, flagged the applicant as a safety risks and reported the results up the chain of command to the subcontractor and thence to the Husky, the energy company that owned the sites as the latter's drug policy required.

**Ruling:** The Newfoundland Human Rights Commission found AOMS guilty of disability discrimination. AOMS appealed but to no avail.

**Analysis & Takeaway:** The Husky policy required AOMS to report positive tests of applicants for safety-sensitive jobs. But the applicant didn't test positive; and the nursing job he was seeking wasn't safety-sensitive. AOMS also treated the Husky policy as a zero tolerance policy and disregarded the allowances and accommodations it made for legal users of prescription drugs. Result: AOMS owed the applicant damages and a written apology.

*Maharajh v Atlantic Offshore Medical Services Limited*, 2020 CanLII 49888 (NL HRC), July 14, 2020

## 34. Arbitrator Strikes Down Overly Broad Drug/Alcohol Testing Policy

**What Happened:** The union claimed that certain aspects of a health agency's new drug and alcohol testing policy were overly broad and unenforceable.

**Ruling:** The Sask. arbitrator agreed.

**Analysis & Takeaway:** The arbitrator cited the following problems for striking down the policy:

- Instead of defining all health workers in a classification as safety-sensitive, the agency should have done a position-by-position assessment
- The agency's right to "ask" non-safety-sensitive workers submit to testing and put a note in their files if they refused unreasonably pressured workers to consent
- Random testing for any worker treated for an addiction disability or committed a policy violation was overbroad and violated Supreme Court random testing rules
- Post-incident testing after incidents, accidents and near misses was too broad

and should have required evidence that impairment was a factor.

*Sask Health Authority v Health Sciences Association of Sask,* 2020 CanLII 25719 (SK LA), March 31, 2020

## 35. No Random Drug Testing of Safety-Sensitive Helicopter Pilots

**What Happened:** A helicopter company seemed to have a compelling case that random drug testing of pilots shuttling between offshore oil platforms was a necessary safety measure. True, there was no documented history of drug problems *at this workplace*. But you shouldn't need one in these kinds of "extreme circumstances," the company argued. After all, helicopter pilots are clearly safety-sensitive (the policy was adopted after a tragic 2009 helicopter crash in which 17 people were killed), the flying conditions in the North Atlantic were treacherous and legalization made cannabis use more likely. Moreover, the testing method relied on oral swab rather than urine samples.

**Ruling:** In the Newfoundland arbitrator's eyes, the pilots' privacy rights trumped all of this.

**Analysis & Takeaway:** While not as intrusive as other test methods, oral swab testing "still amounts to a removal of intimate bodily information, including DNA, without the consent of the employee" and constitutes "an unjustified affront to the dignity and privacy rights of the affected employees," the arbitrator concluded in striking down the policy.

*Office and Professional Employees International Union v Cougar Helicopters Inc*., 2019 CanLII 125448 (NL LA), December 9, 2019

## 36. Daily Random Alcohol Test Monitoring Protocol Is Too Intrusive

**What Happened:** An Edmonton police officer who admitted his reliance on alcohol to deal with the stressors of his personal life was put on leave and required to complete rehab. To return to work and avoid disciplinary consequences, he also had to agree to undergo alcohol testing multiple times per day for 2 years using a Soberlink breathalyzer device. The officer claimed the testing protocol was unreasonable.

**Ruling:** The Alberta arbitrator agreed.

**Analysis & Takeaway:** Although test monitoring for safety-sensitive jobs like police officer may be reasonable, the Soberlink device's methodology of analyzing oral breath samples was highly intrusive and not justified in these circumstances. The other problem was that the test results were kept in the US beyond the control of Canadian regulators and could be disclosed without the officer's consent in no fewer than 20 different situations. So, the arbitrator awarded the officer $7,500 in breach of privacy damages.

*Edmonton Police Association v Edmonton Police Service,* 2020 CanLII 59942 (AB GAA), August 25, 2020

## 37. Finding Drug Kit Not Grounds to Test Everyone at Plant

**What Happened:** All 4 employees on shift at the time a supervisor at a safety-sensitive paper mill found a drug paraphernalia kit in the men's washroom were required to undergo—and passed—for-cause drug testing. The union claimed that the testing was unjustified.

**Ruling:** The Alberta arbitrator agreed and awarded the employees damages for breach of

privacy.

**Analysis and Takeaway:** Just being at the plant when the kit was found wasn't sufficient evidence to trigger testing under the policy. There had to be at least circumstantial evidence linking the kit to the particular *individuals* tested.

*Weyerhaeuser Canada v Unifor Local 447*, 2019 CanLII 116919 (AB GAA), Nov. 28, 2019

## 38. Co-Worker's Accusation Not Enough to Justify Reasonable Cause Testing

**What Happened:** A mine worker complained that a co-worker on his crew was smoking pot. At the supervisor's urging, the worker gave a written statement indicating that the co-worker and another crew member "were both smoking drugs all morning, it goes on a daily basis." So, the supervisor asked the 2 accused workers to submit to drug testing under the company's reasonable cause testing policy. When they refused, the company fired them. All agreed that the policy itself was legit, especially since the workers were safety-sensitive. The question was whether there was "reasonable suspicion" to test.

**Ruling:** The federal arbitrator said no.

**Analysis & Takeaway:** The policy said "reasonable suspicion testing [must be] based upon the employee's conduct *as observed by* a supervisor." And since the supervisor didn't actually observe the alleged drug use, testing wasn't justified. The employer contended the arbitrator read the policy too literally, but the court disagreed and tossed the appeal. The clause requiring direct suspicion by a supervisor was clear and if the employer thought it was being applied too narrowly, it should have reworded it.

*Mudjatik Thyssen Mining Joint Venture v. Billette*, 2020 FC 255 (CanLII), Feb. 14, 2020

## 39. Not Enough Proof to Discipline Nurse for Stealing Drugs

**What Happened:** A health agency disciplined a veteran nurse for stealing a bottle of morphine tablets from the home of a patient she was treating. The nurse denied the charge.

**Ruling:** The Saskatchewan arbitrator sided with the union.

**Analysis & Takeaway:** There were no eyewitnesses, only circumstantial evidence suggesting that the nurse committed the theft. What was clear is that the nurse had a 20-year discipline-free service record and so much to lose if she got caught. And since the employer had the burden of proof, the close case went in the nurse's favour.

*Saskatchewan Health Authority v CUPE*, 2019 CanLII 2192 (SK LA), Jan. 3, 2019

## 40. Firing Addicted Nurse for Stealing Drugs May Be Discrimination

**What Happened:** A nurse admitted to stealing drugs from the hospital for her own use but blamed it on her drug addiction. The arbitrator didn't buy it and found that her actions were "voluntary."

**Ruling:** The Ontario appeals court reversed the arbitrator's ruling as unreasonable.

**Analysis & Takeaway:** "Voluntary" for purposes of committing a criminal act is

different from voluntary for purposes of determining if there's a causal connection between behaviour and an addiction disability. Because the arbitrator's decision didn't address this issue, the case had to go back down for a new trial.

*Ontario Nurses' Association v. Royal Victoria Regional Health Centre,* 2019 ONSC 1268 (CanLII), June 10, 2019

## 41. Another Court Says Firing Addicted Nurse for Stealing Drugs May Be Discrimination

**What Happened:** A hospital fired a registered nurse with 28 years of service for stealing narcotics. The arbitrator agreed that the nurse had a disability, namely drug addiction, but still upheld the termination.

**Ruling:** The Ontario appeals court found the arbitrator's ruling unreasonable, ordered a new trial and awarded the nurse $8,000 in legal costs.

**Analysis & Takeaway:** Having found that she was addicted and that her addiction was a contributing factor in stealing the drugs, the arbitrator should have recognized that the nurse had a valid legal claim and given her a chance to prove it at trial.

*Ontario Nurses' Association v. Cambridge Memorial Hospital*, 2019 ONSC 3951 (CanLII), July 17, 2019

## 42. Alcohol Possession Firing without Asking About Dependency Is Failure to Accommodate

**What Happened:** A social welfare worker in a distant, isolated rural community where alcohol was banned got fired after the RCMP confiscated a package addressed to her containing beer, wine and hard liquor. The union claimed discrimination because the employer didn't first ask the worker if she had an alcohol dependency requiring accommodation.

**Ruling:** The arbitrator found the employer liable for failure to accommodate and upheld the grievance.

**Analysis & Takeaway:** To activate the accommodations process, employees are supposed to come forward and seek help for their dependencies. The problem is that employees often don't realize they have dependencies. And given previous indications, the employer should have at least asked the employee if she had alcohol issues before deciding to fire her for smuggling in booze.

*Union of Northern Workers v Govt. of the Northwest Territories*, 2019 CanLII 18391 (NT LA), Feb. 19, 2019

## 43. Firing Medical Marijuana User May Have Been Disability Discrimination

**What Happened:** A store fired an assistant manager soon after learning that she used medical marijuana for migraine headaches and anxiety. The assistant manager claimed the timing was no coincidence and sued for disability discrimination.

**Ruling:** The BC Human Rights Tribunal allowed the case to go to trial.

**Analysis & Takeaway:** At this stage, it was too early to rule out the possibility that the assistant manager had actual disabilities and that this factored into the decision to fire her. So, dismissing the claim without giving her a chance to prove

the allegations would be premature and unfair.

*McNish v. The Source and others*, 2019 BCHRT 126, June 21, 2019

## 44. Firing for Alcohol-Related Absenteeism Is Failure to Accommodate

**What Happened:** A veteran mine worker with alcohol issues and a history of attendance problems got fired for not showing up for 2 shifts in a row without notifying a manager at least an hour before the shift began in violation of his last chance agreement (LCA).

**Ruling:** The arbitrator reinstated the worker, but without compensation and on a conditional basis because of his failure to come forward and disclose his alcohol problem.

**Analysis & Takeaway:** The LCA was defective to the extent that making a person-to-person call to a manager of an underground mine is extremely difficult. More significantly, the LCA addressed just the absenteeism issues without dealing with their underlying cause, namely, the worker's alcohol dependence. True, the worker never acknowledged his dependence; but the employer had plenty of evidence of it and didn't take the trouble to explore and confirm its suspicions. As a result, enforcing the LCA violated the worker's rights to accommodation.

*UNIFOR, Local 823 v K + S Windsor Salt Ltd (Pugwash Facility, Nova Scotia*), 2020 CanLII 64088 (NS LA), September 9, 2020

## 45. Maid Fired for Violating Last Chance Alcohol Agreement Wins Reinstatement

**What Happened:** A ritzy hotel fired a housekeeper who got caught with alcohol in her lemonade bottle at work 10 months after signing a last chance agreement promising not to drink before shifts.

**Ruling:** The BC arbitrator reinstated the housekeeper with no loss of pay.

**Analysis & Takeaway:** The hotel had a legitimate interest in maintaining its reputation. It also recognized the and tried to accommodate the housekeeper's stress issues via the last chance agreement. For her part, the housekeeper was forthright and honest about her alcohol use. So, the arbitrator decided that termination was too harsh and reinstated her with no loss of pay, provided that she complied with new, stricter conditions in her last chance agreement.

*Harrison Hot Springs Resort v Unite Here, Local 40*, 2019 CanLII 28162 (BC LA), March 11, 2019

## 46. Ontario Arbitrator Reinstates Transit Worker Fired for Refusing Drug Test

**What Happened:** A worker was found asleep in his car 30 minutes into his shift. Upon waking him up, the foreman notice that his eyes were bloodshot and that he was walking and talking unusually slowly. Suspecting drug/alcohol use, the foreman asked the worker to submit to testing under the company's fitness for duty (FFD) policy. The worker refused and was fired.

**Ruling:** The arbitrator found no just cause to terminate and reinstated the worker.

**Analysis:** It came to the witnesses. Most of them testified that the worker seemed

“very alert” during the shift and was normally sluggish. The arbitrator found the foreman who testified against the worker to be less credible and suggested that his “negative history” with the worker might have factored into his demand that the worker undergo FFD testing.

*Toronto Transit Commission v Amalgamated Transit Union, Local 113,* 2019 CanLII 36521 (ON LA), April 24, 2019

## SPLIT DECISION (1 CASE)

In addition to the above 15 rulings, there was one split decision in which for-cause testing was appropriate for one safety-sensitive worker but not another based on the circumstances involved.

### 47. Post-Incident Testing OK for One Safety-Sensitive Worker but Not Another

**What Happened:** Two safety-sensitive workers had to submit to drug and alcohol testing after being involved in separate safety incidents. The first worker seriously injured himself by kicking a steel crowbar he was using to try to move a heavy load; the second worker was involved in a forklift spill with no injuries and only minor property damage. Both tested negative. The question: Was the company justified in requiring them to undergo post-incident testing?

**Ruling:** Yes, for the first worker and No for the second, concluded the Alberta arbitrator.

**Analysis & Takeaway:** The first worker’s decision to kick a load that could have easily been moved with a forklift was “impetuous and rushed,” not to mention out of character for a veteran worker with his excellent safety record; the second incident, by contrast, was fairly insignificant and thus not grounds for post-incident testing. However, since operator error was clearly involved and the forklift driver had been involved in 2 previous incidents, the company was justified in issuing him a warning.

*Interfor Acorn v United Steelworkers, Local 2009*, 2020 CanLII 47162 (AB GAA), June 17, 2020