IN THE MATTER OF AN ARBITRATION

BETWEEN:

TECK COAL LIMITED

("Employer")

AND:

UNITED STEELWORKERS LOCAL 9346 (ELKVIEW OPERATIONS); UNITED STEELWORKERS LOCAL 7884 (FORDING RIVER OPERATIONS)

("Union")

RE:

APPLICATION FOR INTERIM ORDER

COUNSEL:

FOR THE EMPLOYER:	**Peter A. Gall, Q.C., Melanie Vipond and Andrea Zwack**
FOR THE UNION:	**Marjorie Brown and Stephanie Drake**
DATE OF HEARING:	**February 18 and March 28, 2013 Vancouver, BC**

COLIN TAYLOR, Q.C.
Arbitrator

File: CT3289

I

[1] The Employer has introduced mandatory random alcohol and drug testing (the "Policy") at its safety-sensitive coal mining operations, including Fording River and Elkview, where employees are represented by United Steelworkers Locals 7884 and 9346 respectively (collectively, the "Union").

[2] The Union applies for an interim order prohibiting the Employer from continuing to implement the Policy at those locations, pending adjudication of the merits of the Union's grievance concerning it.

[3] Arbitrators in British Columbia have jurisdiction to make such a "stay" order pursuant to s.92(1)(c) of the *Labour Relations Code*, R.S.B.C. 1996, c.244: *White Spot Ltd.*, BCLRB No. B182/94. The parties agree that this is not an adjudication of the merits. The Union observes that the "fundamental difference" between an interim application and adjudication of the merits was aptly described by Arbitrator Steeves in *Otis Canada v. IUOE Local 82*, [2010] B.C.C.A.A.A. No. 28:

> **… in a non-labour context, the Supreme Court of Canada has directed that applications for interim relief are to be determined on the basis of "common sense" and "an extremely limited review of the case on the merits" and a "prolonged examination of the merits is generally not necessary or advisable" (*R.J.R. MacDonald v. Canada (A.G.)*, [1994] S.C.J. No. 17,**

> **paragraphs 50 and 78). A full examination of the evidence will take place at a later date and after there is a full hearing on the merits of the grievance. In the meantime, pending a final resolution of the issues in this grievance, if an interim application is successful it is not a remedy but a judgment about the merits of balancing the harm to preserve the *status quo* or not (*CEP, Local 2000 v. Pacific Press (Relke),* [2000] B.C.C.A.A.A. No. 121 (Dorsey), paragraph 27). (para.21)**

[4] The caution that findings of fact on the merits would be "inadvisable" is particularly apt in this case. The parties have filed extensive expert evidence. More is promised (by the Employer, and the Union has to date responded vigorously with reply expert evidence of its own). This expert evidence goes squarely to the factual underpinnings of the balance to be struck in the law on this area: the degree to which testing reduces the risk of workplace impairment and thus safety risk.

[5] The expert evidence is complex and contains a vast number of points whose force and relevance will need to be assessed in light of the whole of that expert evidence, then measured against the evidence as to the safety sensitive nature of the workplace and the positions therein. That evidence is not before me, except for the expert evidence that has been provided to date.

[6] The proposition that it would be "inadvisable" to make findings of fact on partial evidence thus carries particular force. I accordingly advised the parties on February 28, 2013, prior to their submissions on this application, that no definitive factual conclusions or findings would be made, and there would be no findings on which expert is right or wrong at this preliminary stage.

[7] In short, while this Award must necessarily cover similar terrain as the ultimate award on the merits, it does so from a different perspective, for a different purpose, and nothing in this Award predetermines anything concerning the merits. The merits will be decided after full evidence and argument. This Award concerns the Union's application that the Employer's policy should be prohibited on an interim basis until then.

[8] The focus in that regard is what is termed the balance of convenience, and in particular the risk of "irreparable harm": that is, harm that cannot be compensated adequately by damages (or other legal remedies) in the event that an interim order adverse to the party is made, but its position is ultimately vindicated on the merits.

[9] The Employer's position is that the risk of physical injury or death from an accident caused or contributed to by impairment is the very height of

irreparable harm. Conversely, it submits, the privacy interests of the employees can be adequately compensated by damages if the Employer is ultimately unsuccessful on the merits. The Employer submits that an interim injunction is an "extraordinary remedy", which "should not be granted if the result is a compromising of the safety of employees, which is the case here". Accordingly, the Union's grievance should be determined in the usual arbitral course.

[10] The Union's position is that the Employer's safety concerns are speculative, while the invasion of employees' privacy entailed by random drug and alcohol testing is widespread and certain. It submits privacy is a fundamental personal right, and its breach cannot be adequately compensated by damages. Invasion of privacy is irreparable harm, and is certain to continue if an interim order is not granted. The Union also submits the Employer's policy is prohibited by a prior decision between the parties. Accordingly, the Union submits an interim order should be granted prohibiting the Employer's Policy until the Union's grievance is heard and decided on the merits.

II

[11] The Employer describes its decision to introduce its current Policy as follows:

(1) Teck Coal has the legal and moral obligation to ensure the safety of its employees.

(2) Based on evidence that random testing significantly reduces accidents and injuries, Teck Coal implemented random drug and alcohol testing at its coal mines, beginning with its Cardinal River Mine in May 2012, and then at its other coal mines in the Elk Valley (Fording River, Greenhills, Line Creek, Elkview and Coal Mountain) in December 2012.

(3) The random testing is not just of bargaining unit employees, it applies to everyone who performs work at the coal mines – including contractors, suppliers and consultants as well as the Teck Coal managers at the mine.

(4) The reason it covers everyone at the site is that, given the highly safety sensitive nature of the coal mines, everyone on site is both at risk and poses a risk.

[12] The Employer describes its mine operations as follows:

52. Teck Coal's coal mines are extremely safety-sensitive workplaces.

53. Tons of rock are processed around the clock with numerous and varied specialized heavy equipment, including haul trucks, electric shovels, graders, large electric drills and bulldozers and crushing and processing equipment to clean thousands of tons of coal per hour.

54. Teck Coal's employees who operate this equipment must navigate inclined dirt roadways, working in [close] proximity to other pieces of equipment. The cliffs and piles of rock and soil at mine sites change constantly and can be unstable due in part to extreme weather conditions.

55. Controlling and guiding this specialized heavy machinery and equipment involves the use of highly advanced technology. Accurate and frequent monitoring and fast reaction times are vital to prevent accidents.

56. As Tech Coal's mines are constantly operating, this equipment is in continuous use, and the scale of the equipment makes accidents more dangerous, destructive and potentially lethal than in most other settings.

57. Blasting equipment and explosives are used by employees to excavate tons of waste rock and coal each hour.

> **58. Frequently, workers are on their own, out of sight of co-workers and supervisors for most of their shifts. Teck Coal's mines are expansive. For example, the Fording River mine site is 23,000 hectares in size.**
>
> **59. The vast majority of the bargaining unit employees represented by the Unions are in safety sensitive positions which involve the use of equipment and hands-on participation in mining operations. However, all bargaining unit employees work in and around the mine site, which is a safety-sensitive workplace.**

[13] The degree of safety-sensitive risk of the various positions is in issue; however, the above suffices for descriptive purposes.

[14] The Employer submits that, over the past five years, there have been approximately 50 post-incident tests that have tested positive for drugs. It submits that this "clearly demonstrates that employees are using illegal drugs in a manner which has likely impacted on safety". The Union submits that, to the contrary, the number of positive tests is relatively low, in the context of the number of post-incident tests overall.

[15] The difficulty with the Employer's argument is that it assumes the link the Employer is trying to prove: the link between positive drug tests and impairment. I conclude that the Employer has not established a history of accidents related to drug or alcohol in this preliminary proceeding.

[16] While the Employer has an excellent safety record, its safety philosophy could be described as one of continuous improvement. For a number of years, it has employed pre-employment drug testing for all employees, and post-incident and reasonable cause drug and alcohol testing. Its policy concerning post-incident and reasonable cause drug and alcohol testing was introduced by its predecessor Fording Coal on October 14, 1999 and upheld in *Fording Coal and United Steelworkers of America, Local 7884*, [2002] B.C.C.A.A.A. No. 9 (Hope) ("*Fording Coal*"). That policy continued in place until the current Policy was introduced December 3, 2012.

[17] As noted, the controversial aspect of the current Policy is its addition of mandatory random drug and alcohol testing. As described by the Employer, this was introduced in response to evidence (post-dating *Fording Coal*) with respect to the efficacy of random drug and alcohol testing in ensuring safety, which the Employer says justifies the Policy's implementation.

[18] That is the essence of the Employer's case on the merits of this proceeding. It has introduced extensive

expert evidence which it says establishes that random drug and alcohol testing is sufficiently effective in preventing accidents due to impairment that, in highly safety-sensitive workplaces, it is justified under the established arbitral "balancing of interests" approach. It argues that other jurisdictions, and the Canadian Human Rights Tribunal, have upheld random testing on a similar basis.

[19] The essence of the Union's case on the merits is that the result sought by the Employer has been conclusively rejected by arbitrators in Canada, including arbitrations between these very parties. There is no current safety problem due to impairment at the Employer's mines, which to the contrary have exceptional safety records. There is therefore no justification for the invasion of privacy that random drug and alcohol testing entails. The Union argues the Employer's expert evidence is undermined and contradicted by the Union's expert evidence, and the approach in other jurisdictions should not be followed.

[20] The Employer's expert evidence to date is in the form of reports from Dr. Mace Beckson and Dr. Guohang Li. By way of the most brief introduction, Dr. Beckson is a forensic psychiatrist who has done extensive work in the areas of substance use disorders and treatment, the effect of alcohol and drug use on human performance, the development of safety-sensitive workplaces, and the development of workplace risk

management programs in relation to drug and alcohol use.

[21] Dr. Li is a medical doctor, who is a professor at Johns Hopkins School of Medicine and Director of the Center for Injury Epidemiology and Prevention at Columbia University Medical Center. His research focuses on the epidemiology and prevention of injuries and substance use disorders. For the past 15 years, he has led a group of researchers at Johns Hopkins and Columbia in conducting a series of studies examining the role of alcohol and drugs in transportation accidents and assessing the effectiveness of mandatory alcohol and drug testing programs in reducing aviation accidents and fatal crashes involving motor carriers.

[22] The Union's expert evidence to date is in the form of reports from Dr. Scott Macdonald. Dr. Macdonald has degrees in Psychology and Criminology, and a PhD in Epidemiology and Biostatistics. His focus is on conducting social epidemiological research related to substance use and abuse. An emphasis of epidemiology is on methodological issues in the collection of data, with a view to clearly establishing causative relationships.

[23] I will not attempt to summarize the expert evidence here. The Employer's summary, while exceptionally concise, is nonetheless 68 paragraphs. It

does not yet include the sur-reply evidence of Dr. Macdonald tendered by the Union.

[24] The essence of the Employer's expert evidence is that random drug and alcohol testing has been proven to be the most effective means of preventing industrial accidents due to impairment. Random drug testing is not directed at detecting impairment at work, but rather at reducing risky drug and alcohol drug use and thereby preventing impairment at work. Casual users are deterred from using drugs or alcohol in a manner that would be detected, leaving the most chronic users, who are most at risk of causing a workplace accident due to impairment, who can be identified and removed from the workplace to get the treatment they need, before an accident occurs.

[25] The Employer further submits that the expert evidence establishes that "carry-over effects from drug use impair performance well after the drug users come down from their high, and frequent drug use causes chronic impairment of cognition and performance". Accordingly, "the impact of drug use on an employee's ability to work safely extends far beyond the time period immediately following consumption of the drug".

[26] The essence of the Union's expert evidence is that the most reliable evidence indicates that random drug and alcohol testing does not reduce accidents or injuries due to impairment. Dr. Macdonald cites a

number of flaws or limitations in the studies to the contrary.

[27] Further, the extent of the "carry-over" effects of drugs and alcohol is also disputed. There are various disagreements in the expert reports concerning the magnitude and duration of these effects as regards different drugs. There is also disagreement concerning the length of time different drugs remain detectable without necessarily showing impairment.

[28] The expert reports of Drs. Beckson and Macdonald each cite literally dozens of research studies in support of their respective various conclusions. These range from small-scale, controlled studies to large-scale studies concerning data from millions of employees. In many cases, the reference to a particular study is a sentence long, and the limitations of the study and its applicability to the Employer's operations are not completely clear. In other cases, there are what appear to be salient conclusions; in some of those instances the experts join issue on aspects of these conclusions, and in other cases they do not.

[29] A flavour of the state of the expert evidence at this stage can be gleaned by example from one of the many studies, in this case relied on by Dr. Li.

He states:

> **My research team also studied the role of drugs in aviation accidents (Li et al 2011). Using data from over 1.1 million random tests and nearly 5000 post-accident tests during 1995-2005, we estimated that aviation employees who tested positive for drugs were nearly three times as likely to be involved in accidents as their counterparts testing negative for drugs.**

[30] In his February 4, 2013 report, Dr. Macdonald states as follows concerning this study:

> **Li et al (2011) found that aviation employees testing positive for drugs were nearly 3 times more likely to be involved in accidents as their counterparts testing negative for drugs. The authors indicate they conducted a case-control study; however, they did not match controls with the cases on known confounding variables, such as age and sex. Failure to control for known demographic (age and sex) and personal factors (ie. risk taking propensity) is a flaw of many studies. This limitation of this study was also noted by Frone (2013, p123). A couple of studies found where sex and age are controlled in the analyses, the relationships between drug use and job injuries have disappeared (Macdonald, 1995; Frone, 2006). The important limitation of aggregated data is noted in Li's limitation section but sex and age are not specifically acknowledged as potential confounders. The authors also acknowledge the limitation of urine tests in that they do not know whether those testing were under the influence of drugs at the time of their accident. (p.14)**

[31] Dr. Macdonald ultimately concludes: "There is no credible evidence that drug testing programs reduce job accidents". (p.16)

[32] Drs. Beckson and Li maintain precisely the opposite conclusion.

[33] There are dozens of points of disagreement, some of which are left unresolved between the initial reports, and some of which are carried through in the reply and sur-reply reports that followed the February 4, 2013 report of Dr. Macdonald noted above.

III

[34] The parties do not differ substantially on the test for a stay.

[35] ***Accenture Business Services and COPE, Local 378 (Interim Relief Grievance)*** **(2008), 175 L.A.C. (4th) 353 (Taylor) sets out the general nature of the test for interim relief, followed by the four factors initially cited by the Labour Relations Board:**

> **Arbitrators in British Columbia generally consider, in deciding applications for interim orders, the balance of convenience and the interests of the parties. …**
>
> **The four factors generally considered are:**

> **(a) An adequate remedy would be unavailable at the final hearing without an interim order;**
>
> **(b) The claim must not be frivolous or vexatious [and usually must] be based on a prima facie case;**
>
> **(c) An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits;**
>
> **(d) The interim order must be consistent with the purposes and objects of the Code. (para. 30-31)**

[36] The Union submits that these principles are essentially consistent with those applied by the courts, and addresses those as follows:

> **75. The Supreme Court of Canada has articulated a three-part test that must be satisfied in order to grant an injunction. The three-part test is as follows:**
>
> **(a) there is a serious question to be tried;**
>
> **(b) the applicant would suffer irreparable harm if the application was refused; and**
>
> **(c) the applicant would suffer greater harm if the application were refused than would the respondent if it were granted pending a decision on the merits.**
>
> ***RJR-MacDonald Inc. v Canada (Attorney General),*** **[1994] 1 S.C.R. 311 at para.43**

> **76. In British Columbia, the test for an injunction is two-pronged, essentially combining the second and third parts of the three-part test, because the determination of whether the applicant will suffer irreparable harm is considered as part of the balance of convenience.**
>
> ***Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*** **2005 BCCA 5 at paras. 54-55**

[37] The Union further notes that in *RJR-MacDonald, supra*, the Court interpreted the term "irreparable" and held that it "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or cannot be cured". (para.59)

[38] I find the above to be a helpful distillation for purposes of this case.

[39] It is conceded that there is a serious question to be tried. The parties' submissions focus on the balance of convenience, in particular: (a) the effect of prior jurisprudence; and (b) irreparable harm. These issues are each addressed in turn below.

IV

[40] With respect to the balance of convenience, a major thrust of the Union's argument (upon which the

parties disagree) concerns the effect of prior jurisprudence on the merits.

[41] In particular, the Union submits *Fording Coal*, a binding decision between these parties, has already determined that random drug testing is impermissible. The Employer is acting in contravention of that decision, and that is grounds for an interim order unless and until the Employer can establish it should be departed from under the criteria in *Board of School Trustees, School District 57, Prince George and IUOE, Local 258* (1977), 1 CLRBR 45 (BCLRB) ("*Prince George*") ,

[42] As noted earlier, the former policy provided for reasonable cause and post-incident drug and alcohol testing. Arbitrator Hope reviewed the extensive authorities provided by the parties, and ultimately concluded that three were most helpful. Those were *KVP (Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.,* (1965), 16 L.A.C. 73 (Robinson)), *Trimac Transportation Services – Bulk Services and Transportation Communications Union* (1999), 88 L.A.C. (4th) 237 (Burkett) ("*Trimac*"), and *Canadian National Railway and CAW-Canada* (2001), 95 L.A.C. (4th) 341 (Picher) *("CN Rail")*: *Fording Coal* at para.4.

[43] In particular, Arbitrator Hope closely followed the analysis of Arbitrator Picher in *CN Rail* throughout his award.

[44] Arbitrator Hope relied on the oft-cited passage from *CN Rail* to the effect that, where an employer's operations are inherently safety-sensitive, it is not necessary for that employer, as a condition of instituting a policy, to establish a history of accidents due to impairment that other measures have failed to resolve. Arbitrator Hope held:

> **I turn next to the submission that the policy must be ruled invalid on the basis that it violates the KVP test of reasonableness. The reason advanced by the Union was that it fails to address whether the issue of drug and alcohol abuse can be "dealt with in a manner less invasive of employee privacy". That submission is contrary to the reasoning in [*CN Rail*] on pp.377-8 where the following extracts appear:**
>
> > **As a number of the arbitral awards reflect, it is generally accepted that in analyzing the reasonableness of a drug and alcohol testing policy for the purposes of KVP standards, there may be a burden upon the employer to first demonstrate the need for such a policy, including an examination of whether alternative means for dealing with substance abuse in the workplace have been exhausted. While I do not disagree with those principles, I believe a note of caution should be registered, particularly with respect to that requirement. It seems to the Arbitrator that there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of an employer without first requiring an extensive history of documented problems of substance abuse in the**

> **workplace. Few would suggest that the operator of a nuclear generating plant must await a near meltdown, or that an airline must produce documentation of a sufficient number of inebriated pilots at the controls of a wide-body aircraft, before taking firm and forceful steps to ensure a substance-free workplace, by a range of means that may include recourse to reasonable grounds drug and alcohol testing. The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, Boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.**

In that context I conclude that an open pit mine is a safety sensitive environment and that drug testing in defined circumstances is within the discretion of the Employer as a precautionary measure. On that basis, the conclusion invited by the facts in this dispute is the one expressed by Arbitrator Picher in [*CN Rail*] on p.377 as follows:

> **In the result, and consistent with the preponderance of the jurisprudence, I am satisfied that the balancing of interests approach is the correct one in a case of this kind, and that**

> **reasonable cause drug testing is an appropriate rule and policy, particularly within the context of a safety-sensitive industry such as railroading.**
>
> **That conclusion should not be read as ignoring the limitation acknowledged by Arbitrator Picher with respect to employees "who hold non-risk-sensitive positions". Here, as in most, if not all workplaces, there is a combination of what Arbitrator Picher describes as "risk-sensitive" employees and "non-risk-sensitive" employees. I agree with and adopt his conclusion on p.400 that the Employer in this dispute "has not demonstrated, by a balancing of interests, that [drug and alcohol] testing is a reasonable or necessary incursion into the privacy of employees who hold non-risk-sensitive positions". (para.23-4)**

[45] Arbitrator Hope went on to note that the issue of whether a particular position was safety-sensitive was a question of fact to be determined in the application of the policy, which was not the issue before him (which was the policy's validity): para.25.

[46] Arbitrator Hope also went on to note: "Speaking generally, random testing has been seen as an unreasonable invasion of privacy" (para.30). See also *Fording Coal Ltd. and United Steelworkers of America, Local 7884* (2000), 88 L.A.C. 4th 408 (Hope).

[47] The Employer's submission in response to the Union's argument that Arbitrator Hope has already ruled against random testing is straightforward. It argues:

> **317. With respect, that is not so.**
>
> **…**
>
> **319. The Fording River policy in issue in that case provided for reasonable cause and post-incident testing. It did not provide for random testing.**
>
> **320. Therefore, Arbitrator Hope's decision does not deal with random testing.**
>
> **…**
>
> **322. As he was not dealing with random testing, Arbitrator Hope cannot be taken to have precluded the implementation of such testing in a subsequent case where the evidence established it is reasonable.**
>
> **323. There was no evidence or argument on random testing in the Fording Coal case.**
>
> **324. By way of contrast, in this case, the issue is whether random testing is reasonable. And there will be extensive evidence produced by Teck Coal to prove that it is.**
>
> **325. That is the issue that will be addressed in the hearing on the merits of the Union's grievances in this case.**

[48] Insofar as it concerns this interim order stage, I accept the Employer's submission.

[49] If random testing *had* been in issue before Arbitrator Hope, and after hearing evidence and argument on the point he had decided it was impermissible, in my view that is a circumstance that could provide compelling justification for an interim order (in addition to whatever other remedies the Union might have in that circumstance). However, that is not the case. (The same point also applies to *Elk Valley Coal Corporation and USWA, Local 9346 (Pauline Coster Arbitration),* unreported, February 18, 2005 (McPhillips)).

[50] The Union further relies on Arbitrator Hope's conclusion at para.38 that drug testing "is not supported by an elimination of risk objective, but could only be supported on the basis of reasonable cause", arguing this is a "clear direction" to the Employer. However, the basis of that conclusion must also be noted:

> **I agree with the submission of the Union on p.10 that "drug testing is not supported by an elimination-of-risk objective". On p.11 the Union cites CN Rail and CAW … for the proposition that risk elimination is not an appropriate basis for mandatory drug and alcohol testing. On pp.127-8 [382-3] Arbitrator Picher wrote:**
>
> > **The Company has offered no evidence whatsoever to confirm any meaningful statistical likelihood that persons who consume alcohol or non-prescription drugs are by that fact likely, in any meaningful sense, to report for duty, to be subject to duty or to be on call**

> **while impaired or suffering the after-effects of impairment so as to render them unfit for duty.**
>
> …
>
> **A mandatory discharge rule based on such flawed logic cannot be held to be reasonable within the strictures of the KVP standard, and certainly cannot justify encroaching gravely upon the privacy rights of employees by the intrusion expeditious of urinalysis.**

[51] The evidence noted as lacking is precisely what the Employer has tendered in this case. (Concerning the second quoted excerpt, the Employer also submits employees who test positive are not subject to discipline.)

[52] The effect of the comments in the Hope award remain open for argument on the merits, including the issue of the *Prince George* principle. It suffices to say that the Union has not made a sufficiently compelling case on the point at this stage to foreclose or outweigh the assessment of irreparable harm.

[53] The Union also relies on the observations of Arbitrator Hope (in the excerpt quoted above) that there are both safety-sensitive and non-safety-sensitive positions at the site. It submits that the Employer has "ignored" those comments, and instituted random testing throughout the site on the grounds of the site's safety-sensitive nature.

[54] In my view, there is some force to the Union's argument in this regard on the merits. However, the difficulty with employing this as justification to stay the Policy (in its entirety, or as to certain positions) is that there is no indication in the Hope award as to how many positions might be non-safety-sensitive, or how that issue should be determined (which is no small task, in the context of the Employer's integrated mine operation). That is because none of those issues were before Arbitrator Hope: as he emphasized throughout his award, he was concerned with the policy's validity, not the issues that may arise in its application, and he carefully distinguished between the two, noting that the issue of whether a position was safety-sensitive fell into the latter category.

[55] The safety-sensitive nature of a position is, of course, a highly fact-dependent determination. As with safety-sensitive operations, there may be a continuum. The Employer's argument concerning the safety risk of positions is highly bound up in its case that the mine itself represents an integrated, highly safety sensitive operation. It submits that all positions, at the very least, present a safety risk.

[56] This issue, and its legal significance, must be determined based on all the evidence. For present purposes, the facts before me do not indicate a significant proportion of employees in the mine

operations who can be distinctly segregated as non-safety-sensitive at this stage. Accordingly, while the Union's argument concerning Arbitrator Hope's statement carries some weight at this stage, that weight is necessarily limited.

[57] In sum, while the Union's arguments concerning the *Prince George* principle remain open for argument on the merits, I do not find they provide grounds for an interim order.

[58] The Union also relies on the jurisprudence in a broader sense. It submits the above passage in *Fording Coal* represents the weight of arbitral authority on the issue of random testing.

[59] The Employer argues that *Fording Coal* (and many of the other cases) did not consider random testing, and that it will demonstrate, by extensive evidence and by reference to other authorities, that in the context of its safety-sensitive workplace, random testing is justified.

[60] The Employer argues that much of this evidence and authority is recent and has not been considered in the jurisprudence cited above, or the earlier jurisprudence from which it draws (e.g. *Trimac*, which did consider random testing).

[61] That appears to be the case. The dozens of studies relied on in the expert evidence almost entirely post-date the 1999 *Trimac* decision. So too does the jurisprudence relied on by the Employer approving random drug testing in safety-sensitive employment, which includes authority from other jurisdictions (Europe, Australia and New Zealand), and the Canadian Human Rights Tribunal (*Milazzo v. Autocar Connaisseur Inc.*, [2003] C.H.R.D. No. 24).

[62] In the particular circumstances of this case, I am not persuaded the merits of the Employer's case can be safely assessed one way or the other before it is fully heard.

[63] The legal test to be applied to the issue of drug and alcohol testing is well settled in the arbitral sphere: it is the "balancing of interests" approach: *Trimac; CN Rail; Fording Coal*. Where that balance is to be struck has always been largely dependent on factual considerations. In other words, the law does not stipulate a particular result; it stipulates that the appropriate result is the balance that is justified in the particular case. The "balancing of interests" approach is described in *Trimac:*

> **The "best" reconciliation of two legitimate but competing interests is achieved by measuring their competing impacts. Accordingly, an assessment of the extent to which mandatory random drug testing futhers**

> **the objective of a safe and productive workplace and a corresponding assessment of the extent to which it invades individual privacy is required. (para.41)**

[64] There is considerable force to the Employer's argument that there is no case that considers the evidence and authorities it relies on, in support of the balance it says is justified in this case. It would thus be difficult, and imprudent, to discount the Employer's case on a preliminary basis.

[65] Conversely, however, given the earlier arbitral jurisprudence, I am also not persuaded that the strength of the Employer's case is a factor in its favour at this preliminary stage.

[66] I have addressed above the Union's submissions concerning its challenge to the most controversial aspect of the Policy: random drug testing. Given its status in the jurisprudence, that point is deserving of distinct treatment. What is ultimately subject to the balance of convenience, however, is the entirety of the Union's challenge to the Policy, which also encompasses random alcohol testing, and any drug testing for safety-sensitive positions, except for cause. These two points appear to stand on a different footing in the jurisprudence, and should therefore also be addressed distinctly.

[67] I begin with random alcohol testing.

[68] The law concerning drug and alcohol testing has recently been the subject of forceful disagreement, not just at the level of correctness, but "unreasonableness". Two cases are of note in that regard: ***Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers of Canada, Local 30,*** **2010 NBQB 294, affd. 2011 NBCA 58 (*"Irving Pulp"*), and** ***Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.,*** **2012 ABQB 627, affd. 2012 ABCA 373 (*"Suncor"*). *Irving Pulp* concerned random alcohol testing. (*Suncor* concerned a stay application with respect to random drug testing, and will be addressed in the following section dealing with the balance of convenience.)**

[69] In *Irving Pulp*, the majority of an arbitration board had rejected a policy of random alcohol testing for safety-sensitive positions at a pulp mill. As summarized by Grant, J. in the initial judicial review decision:

> **[47] The Majority then found that drug and alcohol testing policies don't address the risks directly so much as they do increments to risks in the workplace. They also found that an assessment of the risk is "… an exercise in identifying whether, in the particular workplace under consideration, there is an increment to normal operations risk associated with alcohol use. This is a question of fact to be decided on the evidence".**

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

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

> **vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.**

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

[70] Grant J. held as follows:

ANALYSIS AND DECISION

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

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

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

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

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

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

…

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

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

> **[71] In my view this comment is particularly *a propos* to this case.**
>
> **[72] For the foregoing reasons I find that the decision of the Board was unreasonable and it is therefore removed into this Court and quashed.**

[71] The appeal from that decision was dismissed. Robertson J.A. for a unanimous Court would have upheld the conclusion of Grant J. that the arbitration award was "unreasonable": 2011 NBCA 58, para.27. However, the Court held the applicable standard of review was "correctness", and on that basis engaged in a more detailed review of the arbitral jurisprudence. One of the cases it relied on in that review was *Fording Coal*:

> ***Weyerhaueser I [Weyerhaeuser Co. and Industrial Wood and Allied Workers of Canada*, 2004 B.C.C.A.A.A. No. 71 (Taylor)] also relied on *Fording Coal* (Arbitrator Hope) to substantiate the finding that proof of a substance abuse problem in the workplace is not necessary in cases where the employer's operations could be classified as inherently dangerous. In the latter case, there was a challenge to the employer's policy of reasonable cause testing for drugs and alcohol. The employer operated an open pit mine. Arbitrator Hope concluded that employers were not required to establish the existence of an alcohol or drug problem in the workplace with respect to industries that are by their very nature safety sensitive so long as the policy applied only to those who hold safety sensitive positions. He found the mining operation qualified as inherently dangerous because of the use of explosives, flammable, caustic and corrosive materials**

> **and chemicals. In reaching his conclusion, Arbitrator Hope relied heavily on the *CN Rail* decision of Arbitrator M.G. Picher. See also *Continental Lime Ltd. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. D575,* (2002) 105 L.A.C. (4th) 263, where a drug and alcohol testing policy was upheld without evidence of an alcohol or drug problem in the workplace and the employer operated an open face quarry mine. (para.41)**

[72] The Court summarized the existing jurisprudence as follows:

> **C. Summary Observations on the Extant Jurisprudence**
>
> **[51] The above analysis undermines the union's position that arbitrators in Canada have overwhelmingly rejected mandatory, random and unannounced drug and alcohol testing and that sufficient evidence of a pre-existing drug or alcohol problem in the workplace is therefore a pre-condition to the enforceability of such policies, unless the workplace qualifies as ultra-dangerous. Having regard only to the arbitral jurisprudence discussed above, it is safe to conclude that, on balance, arbitrators have rejected the need to adduce such evidence in cases where the employer is able to establish that the workplace is inherently dangerous. It is true that the early jurisprudence reveals an antipathy towards drug and alcohol testing in the workplace and, in particular, to drug testing: e.g., *Esso Petroleum Canada v. Communications, Energy & Paperworkers' Union, Local 614,* [1994] B.C.A.A.A. No. 244, 56 L.A.C. (4th) 440 (J.D. McAlpine, Chair). Random alcohol testing, however, gained early acceptance once testing was restricted to employees holding safety sensitive positions and the testing would be**

by breathalyser. This left for consideration the pivotal question whether the workplace in question fell within the "highly" or "inherently" dangerous category. Employers involved in the production and refining of oil products or chemicals, or in the mining and forestry sectors of the economy, have been able to persuade arbitrators and arbitration panels that such operations so qualify and usually without adducing evidence of an existing alcohol problem in the workplace. By contrast, there has been a resistance to classifying trucking operations as inherently dangerous.

[52] As matter of policy, this Court must decide whether an employer is under an obligation to demonstrate sufficient evidence of an alcohol problem in the workplace before adopting a policy requiring mandatory random alcohol testing. In my view, the balancing of interests approach which has developed in the arbitral jurisprudence and which is being applied in the context of mandatory random alcohol testing warrants approbation. Evidence of an existing alcohol problem in the workplace is unnecessary once the employer's work environment is classified as inherently dangerous. Not only is the object and effect of such a testing policy to protect the safety interests of those workers whose performance may be impaired by alcohol, but also the safety interests of their co-workers and the greater public. Potential damage to the employer's property and that of the public and the environment adds yet a further dimension to the problem and the justification for random testing. As is evident, the true question is whether the employer's workplace falls within the category of inherently dangerous. It is to that issue I now turn.

[73] The Court answered that question in the affirmative, and dismissed the appeal.

[74] The Employer submits:

> **306. The *Irving Pulp* decision has been appealed to the Supreme Court of Canada (the appeal was heard in December, 2012). However, unless and until the Supreme Court of Canada overturns the decision of the New Brunswick Court of Appeal, Teck Coal submits that this decision is the governing authority on the legality of random alcohol testing.**

[75] I reject the Employer's submission that *Irving Pulp* is "the governing authority", for the simple reason that a decision of the New Brunswick Court of Appeal is not binding on an arbitrator in British Columbia. Its status in this jurisdiction is persuasive authority only.

[76] In addition, one cannot ignore the fact that the Supreme Court of Canada has granted leave to appeal. That Court's ultimate decision is anticipated by all who practice in this area, as it may provide considerable guidance. On the other hand, that Court is not bound to do so, as its decision may also turn on deference and standard of review.

[77] Ultimately, what I take from *Irving Pulp* is the point that arises from the arbitral jurisprudence that predates it.

[78] The legal test that applies to random alcohol testing is the same as that for random drug testing: the "balancing of interests" between privacy and safety, in the relevant factual context. However, there are elements that affect the balance differently, both in terms of privacy (alcohol testing is conducted via breathalyzer, rather than urinalysis), and safety (alcohol testing is generally considered to be able to detect impairment at the time of the test).

[79] The last point is fundamental. The strongest criticism of drug testing is that it cannot prove impairment at the time. That is not the case with alcohol testing.

[80] Accordingly, what must also be factored into the balance of convenience on this application is the Union's challenge to random alcohol testing, administered by breathalyzer, to detect employees impaired by alcohol while working in the mine.

[81] Turning to the point concerning the scope of drug testing, the Union opposes increasing its scope beyond the current policy that was upheld in *Fording Coal*. That policy mandates drug testing in two situations, which could both be termed "for cause", as they reflect situations where there is some justification for drug testing beyond mere employment in a safety-sensitive

position. Those are testing post-incident and for reasonable cause.

[82] The Employer has also had, for some years, mandatory pre-employment drug testing for all employees. That issue does not appear to be within the scope of an arbitrator's jurisdiction: *Trimac*, para.1. (That is not to say it is beyond the scope of the law, e.g. scrutiny by the Human Rights Tribunal.) In any event, that issue is not within the scope of what is before me to decide.

[83] The jurisprudence approved in *Fording Coal* also, however, approves mandatory drug testing upon transfer into safety-sensitive positions: para.39 of *Fording Coal*, quoting *CN Rail*. That issue, of course, is within an arbitrator's jurisdiction. This was not part of the drug policy considered in the case, and therefore, like random drug testing, there is no issue as to it being binding in the *Prince George* sense. It is also not a stipulated part of the Policy, but that is merely because it is encompassed in the changes that are part of the Policy. It is therefore encompassed in the balance I must decide.

[84] This is relevant in two respects. First, it may be relevant as part of the balance before me. If one takes *Fording Coal* and *CN Rail* as broadly representative of the balance struck in the arbitral jurisprudence to date (as I think is fair to say at this preliminary stage),

that balance may include testing on entry into a safety-sensitive position.

[85] Second, this point is relevant to the broader difference between the parties' positions, as it does not fall neatly into either of them. Testing on entry into a safety-sensitive position is neither random testing (the Employer's position) nor the Union's (testing only for cause). How this relates to the rationales underlying the parties' position remains to be seen.

[86] In summary on this point, the aspects of the Policy challenged by the Union are not limited to mandatory random drug testing. They also include random alcohol testing, and any testing of employees in safety-sensitive positions other than for cause.

[87] These aspects of the parties' arguments are not neatly severable, and neither party has advanced any positions in the alternative: i.e., that the Policy should be stayed in part.

[88] All aspects of the parties' positions are dependent on the appropriate balance to be struck between safety and privacy. This is a highly fact-dependent exercise, upon which the parties take very different positions. The relevant facts include the reasonable expectation of privacy, the extent of intrusion into that reasonable expectation, and the

need for any such intrusion. The last noted-issue (the need for any such intrusion), in turn, involves assessment of the safety needs of the operation; the safety needs of the position; the extent to which those may be put at risk by impairment; and the extent to which the intrusion overcomes that risk. On the limited evidence heard to date, and their forecast of the evidence to come, the parties' differences on these facts are both thorough and substantial.

[89] A further, underlying issue is whether the matter is solely the utilitarian calculation outlined above, or whether it may also invoke issues of principle concerning the limits of the employer-employee relationship. It is safe to say the parties differ fundamentally there as well.

V

[90] I turn next to the risk of "irreparable harm". This is often the determinative factor in stay applications, where it is found to exist.

[91] The Employer submits its evidence demonstrates – on a *prima facie* basis, appropriate to the nature of the assessment in a stay application – that in the context of its safety-sensitive mine operations, there is a significant risk of injury or death due to accidents

related to drugs or alcohol, which the Policy may prevent.

[92] I begin by noting that I accept that submission. The Employer has presented substantial and extensive evidence indicating that measures such as the Policy may have significant preventative effect on accidents related to drugs or alcohol. It has also presented evidence that its workforce is not immune from the societal prevalence of either. It has presented sufficient evidence to put in issue a genuine risk of serious accident, in the balance of convenience.

[93] As I have advised the parties, at this stage I am not weighing the evidence, preferring the evidence of one expert over another, or making findings of fact.

[94] In its submission, the Union has argued that in that case, in light of Dr. Macdonald's opinion (that, *inter alia*, "there is no credible evidence that drug testing programs reduce job accidents"), the most that can be said is that there is a conflict in the evidence, and the Employer's evidence that random drug testing programs are effective in reducing job accidents therefore cannot establish a *prima facie* case for purposes of the balance of convenience.

[95] I reject this submission for two reasons. First, it misconstrues my earlier ruling. The effect of that ruling is that both parties' expert evidence is

considered at face value at this stage, and considered in the balance of convenience. (In other words, Dr. Macdonald's opinion is also considered for the risk that the Employer would ultimately be unsuccessful.) It was not a ruling that differing opinions would thereby nullify each other.

[96] Second, even if I were to take the approach urged by the Union, which, effectively, amounts to a weighing of the experts' evidence – I would not find it has the effect the Union contends.

[97] In summary on this point, the Employer's evidence is sufficient to factor a genuine risk of serious accident into the balance of convenience.

[98] A number of caveats should immediately be placed on that conclusion.

[99] First, the existing arbitral jurisprudence may allow an employer to introduce random drug and alcohol testing, where it demonstrates a sufficient problem with accidents related to workplace impairment that other measures have failed to address (see *Trimac*, para.61). That is not the nature of my conclusion here, as noted earlier. A conclusion of that nature would obviate the need for the expert evidence and authority the Employer has introduced in order to justify a different balance than the *Trimac* case, because it

would put it in a different category than *Trimac* altogether.

[100] Second, this workplace in fact has an exceptionally good safety record. That is not to say it is a workplace that is exceptionally "safe", in the sense of being exceptionally risk-free. To the contrary, it is inherently risky: *Fording Coal*. However, that risk has been well-managed to date. That is a factor in the balance of convenience. (Further, the Union's expert report cites a study which indicates drug programs are likely to have little effect in workplaces that already have good safety records. The force of that evidence and applicability to the Employer's mines remains a question on the merits.)

[101] Third, this is only a *prima facie* assessment of the Employer's evidence; it is not a finding of fact on the merits. In addition, even if the finding of fact on the merits ultimately were that the Policy reduces the risk of accident, that of course is far from determinative; there are other interests factored into the balance.

[102] Fourth and finally, this is not determinative of this stay application, either; there are other interests to be weighed here as well. It is to those that I now turn.

[103] The Employer submits that drug and alcohol testing, if it is found to have been improperly done,

does not result in "irreparable harm". It submits that, to the contrary, it is amenable to being compensated in damages. The Employer refers to a host of recent privacy cases, pointing out that courts, privacy commissioners and arbitrators have all awarded compensation for breach of privacy without undue difficulty. The Employer also notes that the Privacy Commissioner, under British Columbia's private sector privacy legislation, has not been given the power to issue a stay. It submits this signals the Legislature's view that breaches of privacy are compensable in damages, and do not result in irreparable harm.

[104] The Union strongly disagrees. In terms of the nature of the privacy interest infringed by drug testing, the Union relies, *inter alia*, on the law as set out in para.42 of *Trimac*. Arbitrator Burkett stated in that case:

> **Against this background it is useful to discuss in broad terms the meaning and importance of privacy in the Canadian setting. The right to one's privacy is the right to protection from the unwarranted intrusion of others into one's life. The underlying premise is that in a democratic society, an individual is free to live life as he/she pleases without interference or monitoring, so long as there is no adverse impact upon another nor breach of the law. The Canadian acceptance of the right to privacy is traced through legislation, international and constitutional law, scholarly writings and judicial statements by Oscapella in Drug Testing and Privacy,**

Vol. 2, Canadian Labour Law Journal 325. The conclusion there is that privacy, as protected by Section 8 of the Charter, is "an essential value in Canadian society". Specific reference is made to the judgement of the Supreme Court of Canada in *R. v. Dyment*, [1988] 2 S.C.R. 417, a case involving the taking of a blood sample for evidence of impairment. In his judgement, Justice Laforest referred to privacy as "at the heart of liberty in the modern state" and as grounded in man's physical and moral autonomy (and) … as essential for the well-being of the individual … (and) for the public order." Although conceding that privacy must be balanced against other societal needs, the court found that "persons are protected not just against the physical search but against the indignity of the search …" The court concluded that:

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

… In short, it is beyond debate that protection of the individual from unwarranted physical or property intrusion, including unwarranted searches, seizures or surveillance, is a core value of Canadian society.

The recognition of employee privacy as a core workplace value, albeit one that is not absolute, has been recognized by arbitrators dealing with searches, surveillance, medical examination and, more recently, drug testing. The ultimate determination in these awards rest on their individual facts. However, in all cases, the ultimate determination is arrived at on a balancing of the aforementioned competing impacts,

> **with the onus upon the employer to establish that its business interest outweighs the employee's privacy interest. Employers initiated mandatory (i.e. involuntary) random drug testing brings to the fore the question of the extent to which employer business interests may override employee privacy interests. This is so because such testing, while conducted in the interests of safety, not only provides others with access to personal information, but also constitutes a physical invasion. … (paras.42-43)**

[105] The Employer submits this interest must be considered in context:

> **251. In choosing to work in a safety sensitive workplace, employees must be taken to accept that the need for safety will, to some extent, outweigh their privacy interests and indeed that some intrusion is required to keep themselves and others safe …**
>
> **252. In *R. v. Cole*, 2012 SCC 53, the Supreme Court stated that "… the privacy they [employees] might otherwise have expected … was limited by the operational realities of their workplace" (para.56). The operational reality in this workplace is that it is highly safety sensitive and every possible measure must be taken to protect the safety of employees.**
>
> **253. The same result has been reached by the courts in New Zealand and the United States as reflected in the *Air New Zealand* decision:**
>
> > **[261] In arriving at our conclusions we have accepted as valid the proposition**

> **that has found favour with the majority in the United States Supreme Court that persons employed in safety sensitive areas must have a lesser expectation of privacy and personal autonomy than employees charged with less heavy responsibility. Therefore, it is reasonable to require them to co-operate with the employer when it desires, in the interests of public safety as opposed to general morality (on which subject there could be differences of views), to require the workplace to be kept free of the undesirable influence or risk of impairment through the taking of alcohol or drugs including prescription medication.**
>
> **254. Pre-employment, reasonable cause and post-incident testing has been done for many years by Teck Coal at its mines and has been accepted as reasonable.**
>
> **255. With random testing, the frequency of such tests will be increased but this is simply a change in the degree or extent of such testing – it is not something new being imposed on employees.**

[106] The Employer also submits that *Suncor* (discussed below) is the only case that has ever granted an interim injunction with respect to random testing. In other arbitrations, the random testing has taken place while its validity has been adjudicated in the normal course: e.g., *Irving Pulp; CEP, Local 777 and Imperial Oil Ltd.* (unreported, May 3, 2000) (Christian).

[107] I accept that the consequences of an improper drug (or alcohol) test are substantially compensable in

damages. I also accept that courts, privacy commissioners and arbitrators have of late become more expert in quantifying damages for breach of privacy.

[108] However, I also agree with the Union that the breach of privacy inherent in a random drug test also has an element that cannot adequately be compensated in damages, i.e., irreparable harm: *Trimac*: see also *Suncor, infra*.

VI

[109] I have found both sides have established irreparable harm. On the one hand, the Employer has established a risk of industrial accidents which, if the Policy (or its relevant part) is ultimately vindicated, would have been prevented, but for the stay.

[110] On the other hand, the Union has established that the Policy will, as a certainty, result in widespread drug testing, which if not upheld, will unnecessarily invade the privacy of those involved, if a stay is not granted.

[111] I therefore turn to the difficult task of balancing degrees of irreparable harm.

[112] The Employer submits the courts have held that "[t]he potential for physical injury or loss of life is the most irreparable form of harm, and damages would not be adequate compensation": *590470 Alberta Ltd. v. Edmonton (City)* 37 Alta. L.R. (4th) 216 (ABQB) (para.36). The plaintiff's undertaking in damages (which is also offered by the Union in this case) did not alter that concern: *ibid*. The Employer also cites *United Nurses of Alberta v. St. Michael's Health Centre* (ABQB, unreported, affd. 203 ABCA 5) to the effect that a high probability of harm need not necessarily be shown; rather, the assessment is always a matter of assessing the nature of the harm against the risk of occurrence. That case thus concluded that "evidence of a reasonable probability of personal injury is sufficient justification for concluding that the irreparable harm test has been satisfied" (para.11).

[113] Both parties rely on the *Suncor* decision noted earlier. That decision is not binding on me, but is instructive.

[114] In that case, the employer intended to introduce a policy mandating random drug and alcohol testing. The policy was to apply to safety-sensitive or specified positions: approximately 85% of the unionized employees (2012 ABQB 627, para.16).

[115] The Union applied to the Alberta Court of Queen's Bench for a stay of the policy pending arbitration. In

a passage relied on by the Employer in this case Macklin J. held:

> **It is also important to note that random drug and alcohol testing may, in fact, do little to detect employees who pose a safety risk in the workplace. While there are a significant number of employees working in safety-sensitive positions at the Suncor workplace, *random testing itself may do little to detect those employees who pose a significant safety risk. While the threat of random testing may be sufficient to reduce the risk, there is insufficient evidence before me that such is the case.* Again, Suncor is not seeking to test on the basis of reasonable grounds to believe that a person may be under the influence of alcohol or drugs, but rather to simply randomly test any employee. (para.35: emphasis added)**

[116] The majority in the Court of Appeal similarly relied on the absence of evidence of the effectiveness of random testing: para.7. The Employer submits this is the key distinguishing factor: in this case, it has provided substantial evidence that random drug testing reduces safety risk.

[117] Under the heading "irreparable harm", Macklin J did not address any issue of irreparable harm due to safety or injury, but did address the issue of irreparable harm to privacy. Macklin J.'s analysis under this heading begins:

> **As indicated above, Courts have often considered drug and alcohol testing to constitute a breach of the privacy, dignity and bodily integrity of the individual being tested. In some cases, such an infringement may be capable of being adequately remedied by an award of damages. In other cases it may not. In these latter cases, the harm may be irreparable. … (para.34)**

His analysis under this heading concludes:

> **Given the impact on the innocent employees' privacy, dignity and bodily integrity, and the possibility that such an infringement could not capably be remedied, it is my view that the non consensual seizure of bodily fluids from innocent employees may cause irreparable harm if an injunction is not granted and the Union is ultimately successful before the arbitration board. (para.41)**

[118] Macklin J. granted the interim stay. It is evident that he was of the view that the stay would only be in effect for a short period of time (paras. 17 and 45-46; see also 2012 ABCA 307), though the Court of Appeal ultimately determined the conditions he imposed in that regard were not material, and therefore his jurisdiction to impose them did not need to be considered (2012 ABCA 373, para.4).

[119] On appeal, the majority (*per* Bielby J.A.) agreed that continuance of the policy would constitute "irreparable harm", stating that "[t]he non-consensual

taking of bodily fluids is a substantial affront to an individual's privacy rights" (para.5).

[120] The majority was otherwise not convinced that "the standard of review [had] been met" (para.5), concluding that the lower court's decision on the balance of convenience was not "unreasonable" (para.6).

[121] Côté J.A., dissenting, disagreed, stating in part:

> **[12] I would allow the appeal and remove the injunction.**
>
> **[13] Administrative inconvenience of Suncor is not the important issue, and at times tends to become a straw man.**
>
> **[14] Killing or maiming people in a big accident, or a number of smaller accidents, is a uniquely weighty danger. The legal term "convenience" or "inconvenience" scarcely suffices. The big issue here is the "balance of convenience". Very full detailed and overwhelming evidence here shows the dangers of accidents, and of the danger of drinking or drugs among workers. Privately giving a urine sample to be tested for alcohol or drugs does not begin to equal death or dismemberment, or widowhood or becoming orphaned, by an accident. People routinely go to labs to give their physicians urine samples, and for a far broader set of tests. If the chambers judge did not see comparing death or maiming with that as the pivotal issue, that was error of law. And if it was seen, the contrary view is unreasonable, in my respectful view.**

[122] The decision on the *Suncor* stay application, like this decision, is a balancing based on the particular circumstances of the case. It does not turn on a principle of law (hence the appellate review on a standard of "reasonableness"), and does not establish a precedent. However, one must attempt to draw out those principles that may be applicable.

[123] The judgments in *Suncor* are difficult to reconcile.

[124] In my view, the fact that Macklin J. balanced the interests involved by stating that a temporary delay "would not be a great inconvenience to [Suncor]" must be understood in light of the fact only a brief delay in introduction of the policy was contemplated. This also explains why the risk of physical injury was not discussed under the heading of irreparable harm. I also accept the Employer's submission concerning Macklin J's express reliance on the lack of evidence before him concerning the efficacy of random drug testing in preventing any such harm.

[125] The case thus does not do away with the well-established proposition that risk of physical injury weighs heavily in the balance of irreparable harm. It is better seen as a case where that risk was not established, in the balance there at issue concerning the temporary stay.

[126] The other aspect of the judgments that is difficult to reconcile is the treatment of the countervailing concern. Macklin J. (supported by the majority of the Court of Appeal) described drug testing as a "non-consensual seizure of bodily fluids". Côté J.A., on the other hand, compared it to a routine visit to a doctor's office.

[127] Watson J.A., who heard the application for an appellate stay in between the two decisions, appeared to situate himself in between those two positions in substantive terms as well:

> **There is considerable force on the Union's side of the debate also. One of the authorities cited for the Union to frame the debate was the decision in *R v Dyment*, 1988 Can LII 10 (SCC), [1988] 2 SCR 417 at 429, 55 DLR (4th) 503, where LaForest J referred approvingly to the view that one's "sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons are protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense." As the Union says, this sort of intrusion by random alcohol and drug testing is inevitable. It is not for me, for the purposes of the present motion, to speculate whether the average heavy machinery operator or oil worker would be sensitive to a non-accusatory random testing process applied as broadly as proposed by Suncor. One might think they would be of at least customary**

> **phlegm, but that is for the panel and the arbitrator to decide. (para.39)**

[128] In my view, Côté J.A. – like Macklin J. in his consideration of risk of physical injury – was not intending to depart from the law in relation to the privacy interest, but rather considering it in context: specifically relative to the other type of "irreparable harm" at issue. In other words, his dissenting judgment was not a departure from the law that drug testing by urinalysis is generally considered "invasive", but rather a reflection of its relative magnitude in that regard, as against the comparator of bodily injury by industrial accident.

[129] In the case at hand, the Employer has presented evidence to support its position that its Policy will prevent industrial accidents. The Union describes the Employer's safety concerns as "speculative". I would not use that term (though I agree the risk is uncertain). The substantial degree of risk inherent in the Employer's operations has already been objectively determined. The degree to which the Policy may reduce that risk is supported by extensive evidence, although an objective determination on that point has yet to be made.

[130] What the Employer's case lacks is compelling direct evidence of injury caused by impairment at its own operations.

[131] Having said that, there is merit in the concern that evidence of harm to employees can only be obtained as a result of harm to employees. The law does not permit employers to act peremptorily without justification, but that justification does not necessarily require allowing harm to occur. As Arbitrator Picher stated in *CN Rail:*

> **The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, Boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.**

[132] Whether the policy strikes the appropriate balance is to be determined on the merits, but that, and the safety concern, have been sufficiently put in issue. The point at this juncture is that the law does not necessarily require evidence of harm in order for prevention of harm to be a serious consideration; objective, significant risk of substantial harm may suffice.

[133] In the final analysis, what is determinative in my view is that the task before me now is not balancing the safety interests on the one hand, versus the privacy interests on the other. That will be the task on the merits. Rather, the key issue in the inquiry at hand is the degree to which each of those interests are irreparable.

[134] In this case, I conclude that the interest with the greatest degree of irreparable harm is safety.

[135] The Employer's mine operations have already been determined to be inherently safety-sensitive. The Employer has presented extensive and substantial evidence to support its case concerning reduction of safety risk from a preventative standpoint. That evidence cannot be ignored. It must be assessed on its merits, to determine whether it establishes the legal scope of the Employer's ability to act in relation to safety, as the Employer asserts.

[136] If it does not, the Employer faces liability in damages. The longer it continues the Policy without a determination on its merits, the greater its potential liability in damages. Further, the Employer is taking this step in the interest of safety, rather than to achieve a profit (out of which it could pay such damages). While I appreciate these proceedings may be extensive, that ought to provide considerable incentive

to the Employer to proceed expeditiously, despite the absence of a stay.

VII

[137] This is a very difficult decision. Notwithstanding the irreparable nature of an industrial accident, the Union has presented two strong arguments. The first is that the Employer has not demonstrated a compelling problem with accidents due to impairment. This will remain an important consideration on the merits: i.e., in determining the scope of the Employer's rights. However, in the context of an inherently risky workplace, I have determined it does not justify intervening to preclude the Employer from acting on a preventative basis, where the Employer has a substantial and *bona fide* argument that it is entitled to do so.

[138] That leads to the second point: the Union has presented a strong argument that the Employer's actions, insofar as drug testing is concerned, are precluded by existing jurisprudence. I have ultimately concluded that the existing law is the "balancing of interests", which does not dictate a particular result, but rather the balance that is justified in the particular case. The case put forward by the Employer here relies, in support of the balance it says is

justified in this case, on very substantial expert evidence and authority that does not appear to have been considered in the earlier arbitral jurisprudence. I am not able to discount the case on its merits, at this preliminary stage, on the basis of arbitral jurisprudence that does not consider it. It is a case that cannot reliably be assessed until its full merits are heard.

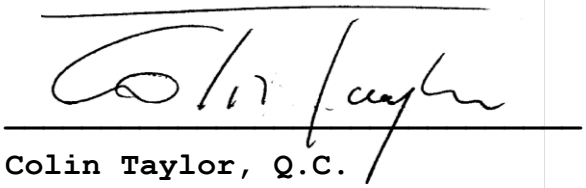
[139] The Union's application for a stay also includes the Policy's random alcohol testing. Accordingly, the considerations relevant to that balance between privacy (administration by breathalyzer) and safety (detection of impairment by alcohol at work) are also part of the balance to be weighed in this stay application.

[140] In the result, I am left with a weighing of drug and alcohol testing versus the risk of industrial accident in terms of "irreparable harm". I have concluded that drug and alcohol testing are more amenable to being compensated in damages, whereas the risk of industrial accident carries greater potential for irreparable harm.

[141] It should go without saying that this determination is limited to the particular circumstances before me, and further, does not decide any issue concerning the merits of the case.

[142] In the result, the application for an interim order is dismissed.

DATED at Vancouver, British Columbia, this 9th day of May 2013.



Colin Taylor, Q.C.