



# Canadian Model Best Practice Review

## COAA Best Practices Conference XIX Canadian Model Best Practice Review

May 18, 2011





## Workshop Ground rules

Please:

- put your cell phone on silent or vibrate,
- avoid side conversations, and
- keep all questions to the end.



## **Deliverables**

### **Provide an understanding of:**

- The history to, and the details of the recent changes to the Canadian model.
- Impacts of the recent changes to the DOT drug and alcohol testing protocols.
- The status of alcohol and drug testing within industry and human rights law.

### **Opportunity for questions**



## **Peter Dunfield**

- Chairperson for the COAA Canadian Model Best Practice for Alcohol and Drugs Guidelines and Work Rule (2003, 2005 and 2010 revisions).

## **Dr. Randy Leavitt**

- Dr. Randy Leavitt is Vice President of Pharmaceutical, Forensic and DNA Services at Maxxam Analytics.

## **Neil Tidsbury**

- President of Construction Labour Relations

## **Philip Ponting**

- Partner in McLennan Ross practicing administrative law with the major focus on employment law.



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The background of the slide is a faded, high-angle photograph of a construction site at dusk or dawn. Silhouettes of construction workers are visible against the bright sky. A large tower crane is the central focus, with its long jib extending across the frame. Other workers are seen in various positions, some near rebar structures and others near a concrete pump truck.

# **Canadian Model For Providing a Safe Workplace**

## **Addendum**

### **October 2010**

*Peter Dunfield*

## Canadian Model for Providing a Safe Workplace

A best practice of the  
Construction Owners  
Association of Alberta

Alcohol and Drug  
Guidelines and Work Rule



FEBRUARY 1999

## Canadian Model for Providing a Safe Workplace

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MAY 2001

## CANADIAN MODEL FOR PROVIDING A SAFE WORKPLACE

A best practice of the  
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October 2005

**Development of the Model has been an evolving process since 1999**

**The Model has been updated and revised to reflect the state of law and industry needs with versions published in 1999, 2001 and 2005**

**The most recent version of the Model was published as an Addendum in October 2010**

**CANADIAN MODEL  
FOR PROVIDING A  
SAFE WORKPLACE**

A best practice of the  
Construction Owners  
Association of Alberta

Alcohol and Drug  
Guidelines and Work Rule



October 2005 – Version 2 – Effective October 1, 2010

## October 2010 Addendum

**This Addendum updates  
and replaces the  
corresponding sections of the  
October 2005 Canadian Model.**

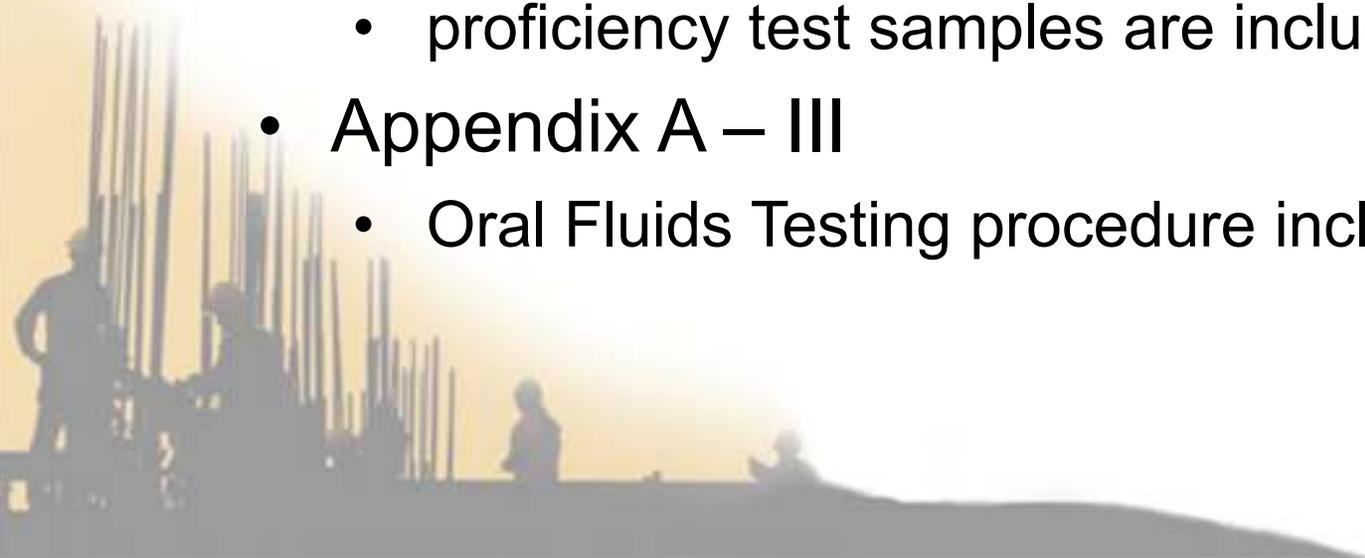
**Revisions reflect  
required drug concentration  
cut-off limits changes  
in effect from October 1, 2010**

## Key changes in the Addendum

- Section 3.1 Policy
  - New urine cut-off limits – amphetamines, cocaine, and 6-Acetylmorphine (Heroin)
  - Oral fluids drug panel as used in RSAP
- Section 4.6.3 (Random Testing)
  - to align with goals and objectives of the Drugs and Alcohol Risk Reduction Pilot Project
- Section 4.8
  - oral fluids to be done by a certified lab
  - oral fluids may be used for post incident, reasonable cause, and random testing

## Key changes in the Addendum

- Definition of Certified Laboratory
  - acceptable forensic practices and quality systems are maintained
  - specimen validity testing is deployed
  - regular independent audits occur, and
  - proficiency test samples are included
- Appendix A – III
  - Oral Fluids Testing procedure included



## Recent Questions...

- POCT devices not compliant to new Standards?
- Why not Oral fluids testing for Site Access?
- Should Owners receive Contractor test results?
- Duty to accommodate after a second positive tests?
- MRO Results – Medical Marijuana?
- Prosecutions for Impaired driving of company vehicles?





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**Recent Changes to DOT Drug &  
Alcohol Regulations: *Implications  
for Canadian Model Stakeholders***

*Dr. Randy Leavitt*

## CANADIAN MODEL FOR PROVIDING A SAFE WORKPLACE

A best practice of the  
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Why are there various levels or standards for testing for alcohol? For example, if the level for impaired driving is 0.08 grams of alcohol in 210 litres of breath, why does this model use 0.04 grams of

Can the company test me for other drugs besides those listed, or test for other medical purposes?

A company may choose to test for other drugs but these should be stated in the

The U.S. DOT standards have been mandated for the COAA Best Practice (Canadian Model for Providing a Safe Workplace) to ensure quality testing and legal defensibility of results.

in 210 litres of breath as cause to suspend a driver from driving at the time without further disciplinary action and a level of 0.04 grams of alcohol in 210 litres of breath as cause for suspension and disciplinary action.

Why are we using the United States Department of Transportation (U.S. DOT) standards for testing of Canadian workers?

The U.S. DOT standards are a rigorous set of procedures and protocols for employment-related drug testing. They were developed to ensure fair and reliable testing of workers covered by the United States mandatory drug

testing regulations. Instead of having no mandatory drug testing, the U.S. DOT standards have been mandated for the COAA Best Practice (Canadian Model for Providing a Safe Workplace) to ensure quality testing and legal defensibility of results.

Where can a copy of the U.S. DOT standards be obtained?

Copies of the standards may be obtained from laboratories that are certified to perform testing under the U.S. DOT standards. Alternatively, the standards can be found on the Internet.

a retest on the split portion of the original specimen, normally at the donor's expense, at the same laboratory or an alternative certified laboratory. This request must be made within 72 hours of the employee being notified by the MEO that the first test was found to be positive.

What are "reasonable grounds"?

In a case where an employee is caught distributing, possessing, consuming or using alcohol or drugs at work, an alcohol and drug test is not required to establish a breach of the standards. The act itself constitutes a breach of the standards set by the guidelines.

Appreciating that there may not always be direct evidence of a breach, and recognizing that early detection of safety concerns before the occurrence of an accident or incident is the hallmark of effective safety and loss management, testing is encouraged in cases where there are "reasonable grounds" for a supervisor or leader to believe that an employee may have consumed or used alcohol or drugs at work or may be under the influence of alcohol or drugs.

"Reasonable grounds" for believing that an employee may be in breach of the standards concerning detectable levels of alcohol or drugs can arise in two general situations.



# Why US DOT?

DOT establishes rules (49 CFR Part 40) on drug and alcohol testing:

- Specimen Collection
- Drugs/concentrations to be tested
- Specimen validity tests
- What scientific procedures to use when testing
- Standards for certification and review of laboratories



**Scientific Accuracy**  
+  
**Forensic Integrity** = **Legal Defensibility**



# DOT Analytical Strategy

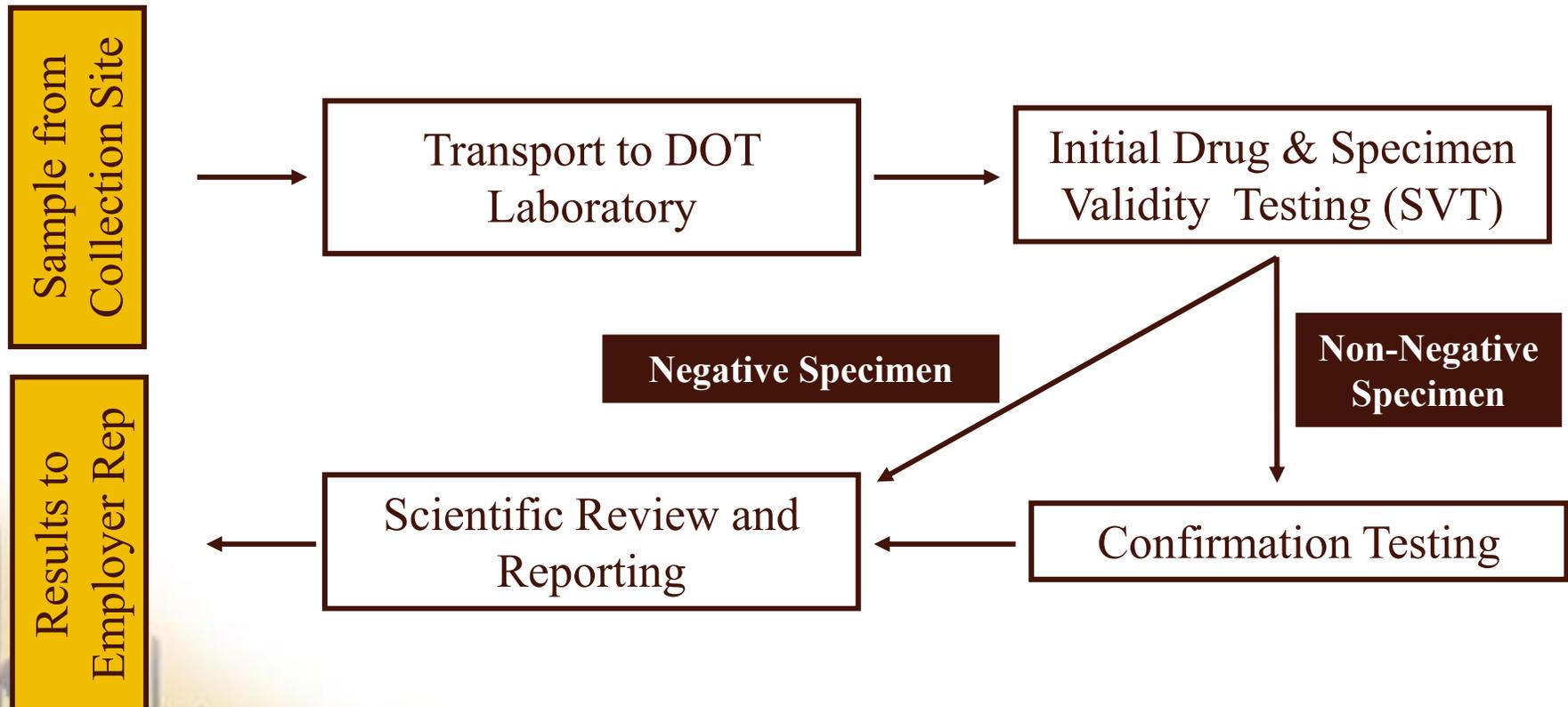
Cocaine

Marijuana

Opiates

Amphetamines

Phencyclidine



## April 2004 Proposed Changes

1. Addition of heroin and ecstasy (MDMA) to initial test suite
2. Lower cutoff concentrations for cocaine and amphetamines
3. ~~Oral fluid, sweat and hair with drug cutoff concentrations~~
4. ~~Point of Collection Testing Devices – Quick Tests~~
5. Certification of Instrumented Initial Test Facilities (IITF)
6. Additional standards for collectors, collection facilities and MRO's

**Notice of Final Revisions Nov. 2008 →  
Implementation Oct 2010**



Initial Test Analyte	Initial Test Cutoff Concentration	Confirmatory Test Analytes	Confirmatory Test Cutoff Concentration	Required Change
Marijuana metabolites*	50 ng/mL	THCA	15 ng/mL	
Cocaine metabolites*	150 ng/mL	Benzoylcegonine	100 ng/mL	Lower cutoffs
Opiate Metabolites				
Codeine/Morphine	2000 ng/mL	Codeine Morphine	2000 ng/mL 2000 ng/mL	
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL	Specific initial test
Amphetamines				
AMP/MAMP	500 ng/mL	Amphetamine	250 ng/mL	Lower cutoffs
		Methamphetamine	250 ng/mL	Lower cutoffs
MDMA	500 ng/mL	MDMA	250 ng/mL	Initial & confirmatory test
		MDA	250 ng/mL	Confirmatory test
		MDEA	250 ng/mL	Confirmatory test
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL	



# Implications of Required Changes

## Positive Rates:

### Lower Cocaine Cutoffs

- 88% increase in detection rate with concomitant increase in confirmed positives (Clinical Reference Laboratory)
- 30% increase in detection and confirmation rates (Quest Diagnostics)

**Lower cocaine metabolite cutoff concentrations have translated into significantly more cocaine positive reports**



# Implications of Required Changes

## Positive Rates:

### Heroin Metabolite

- Number of positives increase 8-29% (Research Triangle Institute literature review)
- 819/820 positive 6-AM samples had morphine > 2000 ng/mL (Clinical Reference Laboratory)
- Of 1.2M opiate positive samples, 6 samples had positive 6-AM concentrations that would have been missed (Quest Diagnostics)

**Increase in Positive Rate for heroin is inconsequential due to the low prevalence of heroin use in the demographic**

# Implications of Required Changes

## Positive Rates:

### Amphetamines

- 3100 samples tested: confirmations increased from 11 to 51 with 0 additional reportable positives (Clinical Reference Laboratory)
- Positive screen rate for lower AMP cutoff expected to increase 40% to approx. 1 per 100 specimens. Also, MDMA positive rates expected to be 1 per 10,000 specimens (Quest Diagnostics)

**Lower cutoff concentrations for Amphetamines will increase number of confirmation tests but not number of reportable positives.**

**Addition of MDMA to test suite will identify a small number of positive samples**



# Implications of Required Changes

## Other Considerations:

- Longer detection times for drug use
- Increased costs for drug testing programs
- Longer turnaround times





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# Trends and Emerging Issues in Industry

*Neil Tidsbury*



## Trends

- Declining “Reasonable Cause” Frequency
- “Reasonable Cause” Failure Rate ~50%
- “Post Incident” Failure Rate ~7-9%
- “Site Access” Failure Rate ~4-5%



## Trends

- Sharp increase in SAE assessments past two years
- Longer wait for Drug Test Results
- Preference for Oral Fluid Drug Tests



# Collective Bargaining

- References to 2010 Updated Canadian Model
- Reservation of limited Grievance prerogatives
- Oral Fluids for RC, PI, Random
- Few Canadian Model based grievances



## Concerns

- Prevalence of “Point of Collection Tests”
  - Not consistent with Canadian Model
- Process deviations



# Drug & Alcohol Risk Reduction Project

- Project Documents
- Pilot Project Coordinator
- Owner alignment
- Application process
- Preparation for launch
- Fall 2011?



# **Drug and Alcohol Testing in the Workplace**

*Prepared by Phil Ponting, Q.C. and  
Jody Sutherland of McLennan Ross LLP*



# WORKPLACE TESTING AND THE “CASUAL” USER

## OVERVIEW

- The Alberta Court of Appeal decisions in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company (Chaisson)* and in *Donald Luka v. Lockerbie & Hole Inc.* and *Syncrude Canada Ltd. (Luka)* have confirmed that pre-employment drug testing does not discriminate against “casual” users based on perceived disability and Syncrude is not an employer of Lockerbie’s employees.
- Any policy regarding this type of pre-employment drug testing is therefore not *prima facie* discriminatory under the *Human Rights, Citizenship and Multiculturalism Act*.
- *Chaisson* and *Luka* have since prompted the Director of the Human Rights Commission to dismiss several claims on the basis that there are no facts or law that exist that would support findings of discrimination.



# WORKPLACE TESTING AND THE “CASUAL” USER

## ***Stilwell v. Edmonton Exchanger & Manufacturing Ltd., 2010 AHRC 5***

- **The late Cam Stilwell filed complaint against his employer and Syncrude.**
- **Complaint was dismissed because complainant now deceased.**
- **Tribunal held legislation does not permit any other party to take over a complaint should a complainant die.**
- **Even after death, Cam still pointing out defects in legislation.**

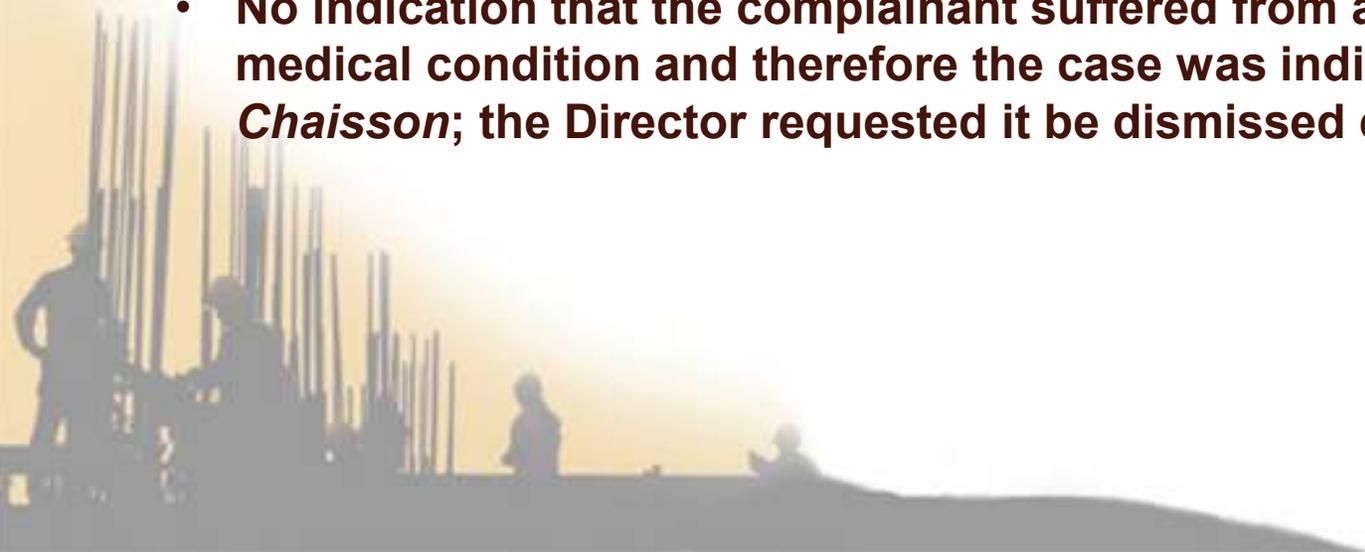




# WORKPLACE TESTING AND THE “CASUAL” USER

## *Ofstedahl v. Comstock Canada Ltd., 2010AHRC 4*

- Complainant alleged discrimination when foreman required drug and alcohol test after smelling alcohol on complainants breath at work.
- After the test, complainant was told to return home to await results.
- The following week complainant was told he failed the test and was banned from the worksite for the next six months.
- No indication that the complainant suffered from an addiction or other medical condition and therefore the case was indistinguishable from *Chaisson*; the Director requested it be dismissed entirely.





# WORKPLACE TESTING AND THE “CASUAL” USER

## ***Bley v. Syncrude Canada, 2010 AHRC 6***

- **Complaint brought after Bley saw a posting on employer’s bulletin board regarding new Syncrude policy requiring pre-access or pre-employment drug and alcohol testing. Without the testing, access would be denied.**
- **Commission acknowledged that, as per *Chaisson*, drug and alcohol testing policies have a role in managing risk in safety sensitive workplaces and are not discriminatory. The complaint was dismissed.**
- **Point for the future – Director is recorded as saying in own submissions that it is acceptable for employers to require a job-related medical examination where it relates to the requirements of the job.**





## ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3***

### ***Facts***

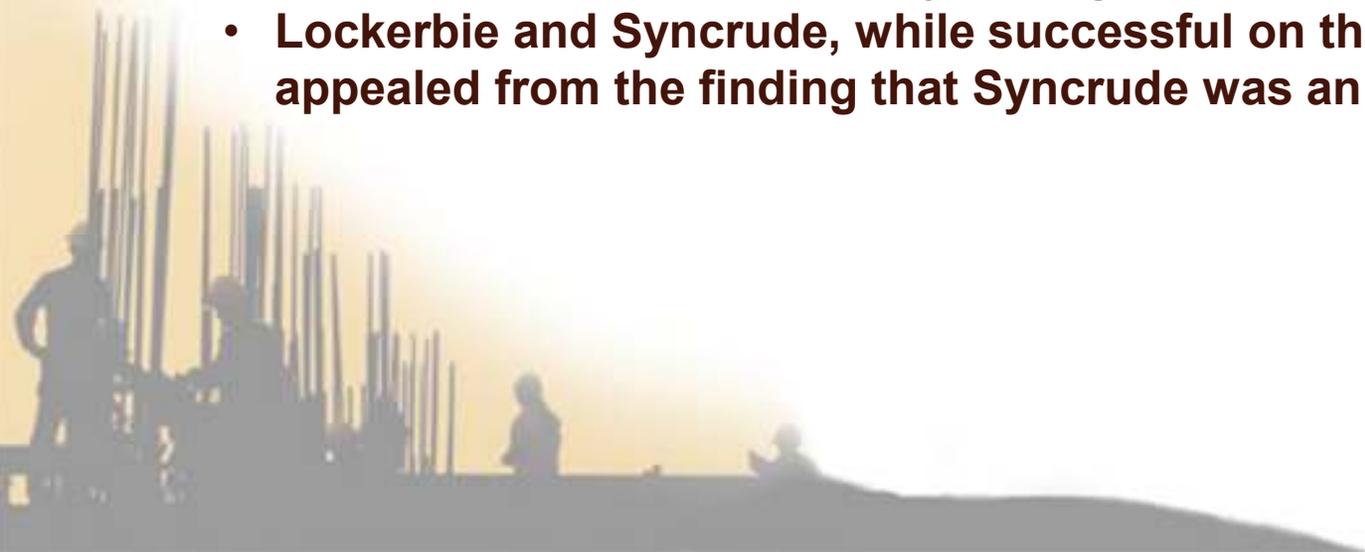
- **Luka was long-term employee of Lockerbie & Hole, a contractor for Syncrude.**
- **Upon being transferred to perform work at Syncrude site, Luka was required to undergo and pass a drug test**
- **Syncrude policy stated that no contractor could bring a worker onto the site unless a drug test had been passed.**
- **At no point was Syncrude ever Luka's employer in any conventional sense.**
- **Lockerbie & Hole hired, paid and directed Luka's activities.**
- **After testing positive for marijuana, Luka brought a complaint to the Human Rights Commission alleging discrimination.**



## ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3 (cont'd)***

### ***Facts (cont'd)***

- **The decision of the Commission was significant for two reasons:**
  - i. held that Luka had not been discriminated against as he was not an addict, and therefore, there was no duty to accommodate.**
  - ii. held that Syncrude was not Luka's employer in the conventional sense, but was considered an employer because it was utilizing Luka's services indirectly through Lockerbie.**
- **Lockerbie and Syncrude, while successful on the discrimination issue, appealed from the finding that Syncrude was an employer.**

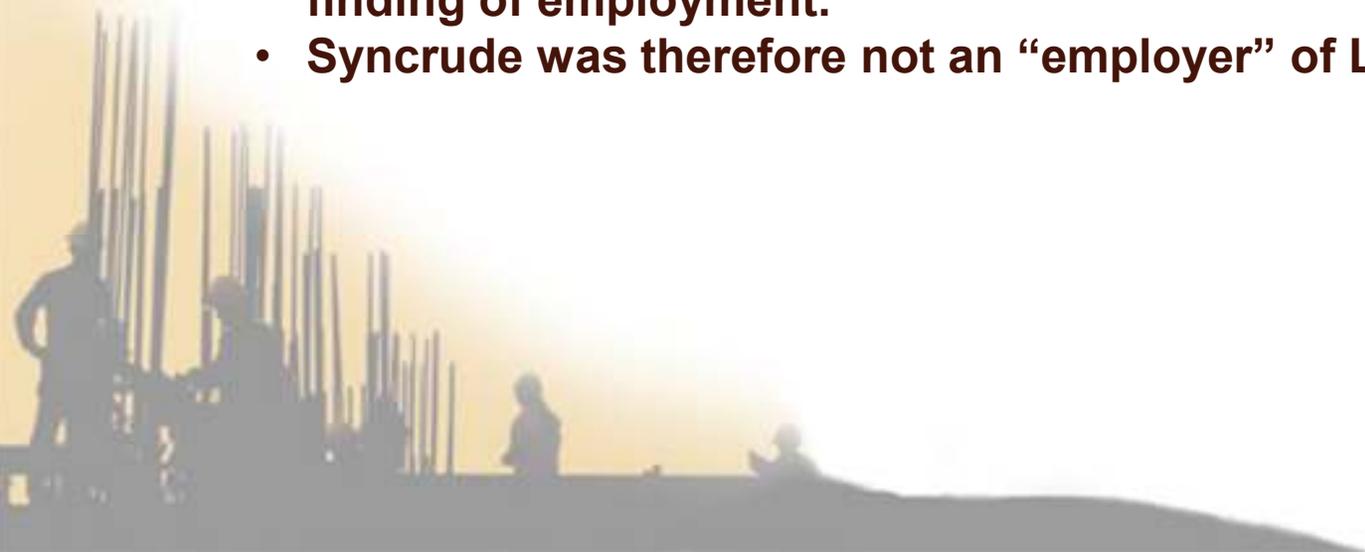




## ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3 (cont'd)***

### ***Decision***

- **Court of Appeal found that there was no contractual relationship between Syncrude and Luka, Luka was not functionally part of its organization and did not report to it, and Syncrude did not direct Luka's work.**
- **The relationship between Luka and Syncrude was too remote to justify a finding of employment.**
- **Syncrude was therefore not an "employer" of Luka.**





***Rio Tinto Alcan Primary Metal Kitimat/Kemano  
Operations B.C. and National Automobile, Areospace  
Transportation and General Workers of Canada (CAW-  
Canada), Local 2301 2011 CanLII 7211 (BC L.A.)***

## ***Decision***

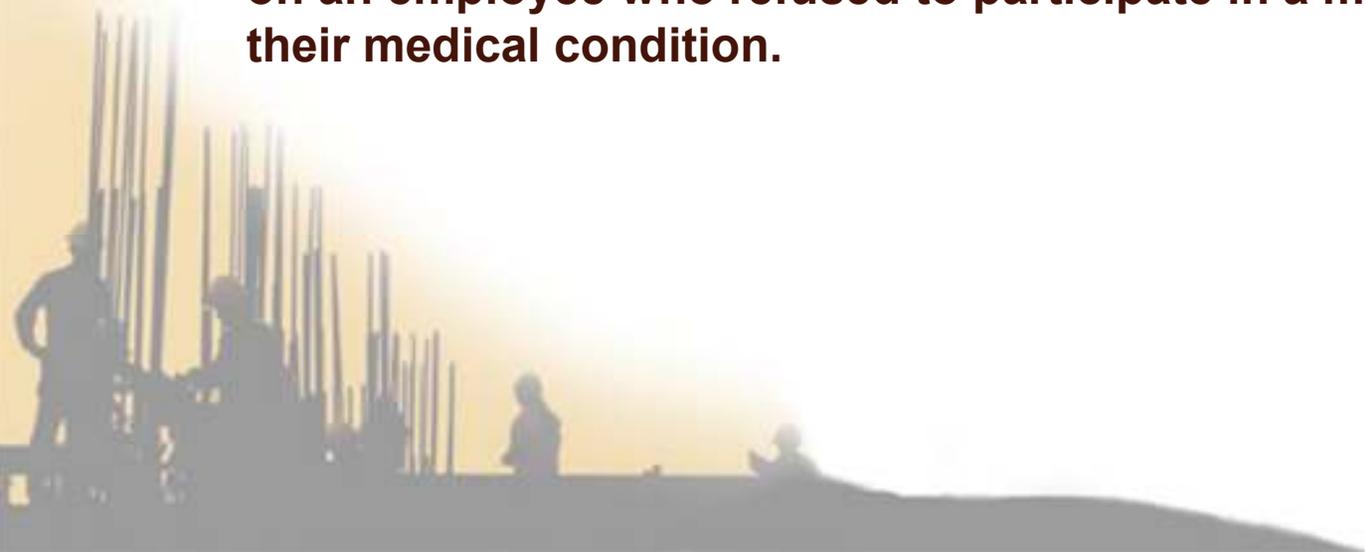
- **Arbitrator emphasized that:**
  - **The Employer has the right to introduce unilateral rules and policies, subject to it being consistent with the collective agreement.**
  - **The Employer is required to remove hazards from the workplace - an employee who is impaired for any reason may be such a hazard.**
  - **The Employer is entitled to insist that an employee take an immediate test for alcohol or drug use where there are reasonable grounds for the test, and if the employee refuses, he/she can be disciplined.**



***Rio Tinto Alcan Primary Metal Kitimat/Kemano  
Operations B.C. and National Automobile, Areospace  
Transportation and General Workers of Canada (CAW-  
Canada), Local 2301 2011 CanLII 7211 (BC L.A.)***

## ***Decision***

- **An Employer is not, however, entitled to discipline employees for refusal to provide medical information or participate in medical tests that are not associated with unauthorized substance use or abuse.**
- **To this extent, the Policy was found unreasonable as it imposed penalties on an employee who refused to participate in a medical assessment of their medical condition.**



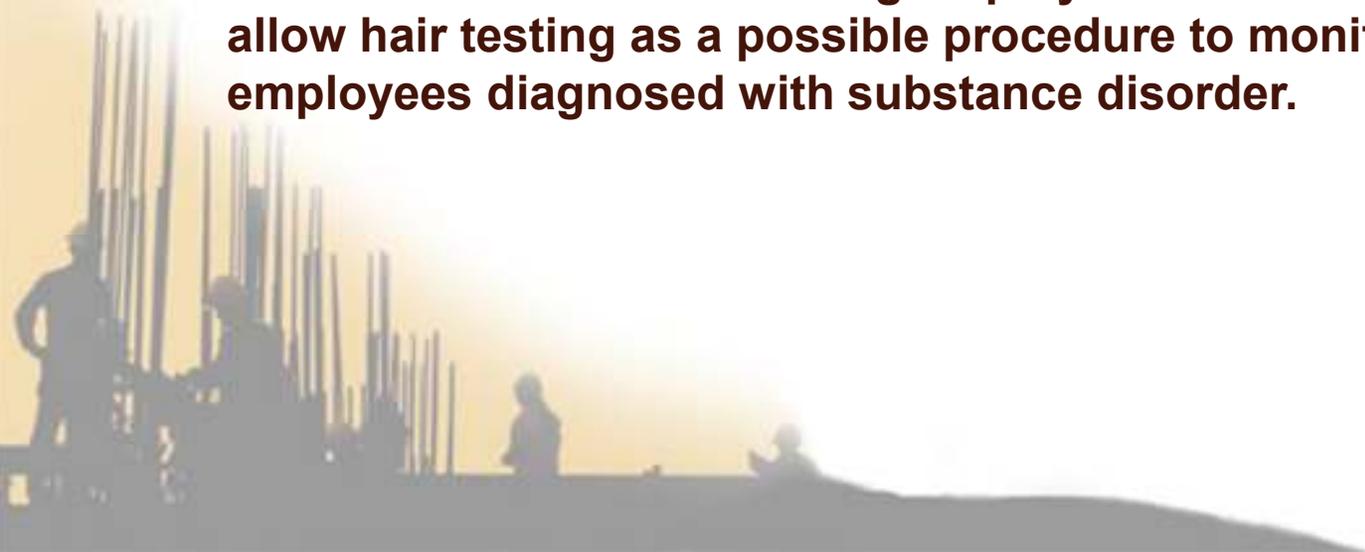


# THINGS TO WATCH FOR - ALTERNATIVE FORMS OF TESTING

***(Re) Canadian National Railway Co. and Teamsters  
Canada Rail Conference 2011 CLB 8064***

## ***Facts***

- **Union brought complaint regarding reasonableness of Company's decision to amend continuing employment/reinstatement contracts to allow hair testing as a possible procedure to monitor abstinence for employees diagnosed with substance disorder.**





**(Re) *Canadian National Railway Co. and Teamsters*  
*Canada Rail Conference 2011 CLB 8064 (cont'd)***

***Decision***

- **Grievance rejected on procedural grounds.**
- **Deliberately, no comment was made regarding whether hair testing, as part of the ongoing employment regime of a reinstated employee would or would not violate the collective agreement or the protections of employment related statutes such as the *Canadian Human Rights Act*.**





***(Re) Canadian National Railway Co. and Teamsters  
Canada Rail Conference 2011 CLB 8064 (cont'd)***

***Decision (cont'd)***

- **The decision says that determining reasonableness of hair testing will depend on evidence as to the nature of information gathered and/or the reliability of hair testing results and the issues of custody and privacy that may relate to it.**
- **Expect to see more decisions with regard to the above, if this or similar types of alternative testing are implemented.**

