

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

SEASPAN ULC

(Seaspan)

AND:

CANADIAN MERCHANT SERVICE GUILD

(the “Guild”)

(Chambers and Group Grievances regarding Drug and Alcohol Testing Policy)

Arbitrator:	Joan McEwen
Counsel for Employer:	Chris Leenheer
Counsel for Union:	Sandra Banister, Q.C.
Dates of Hearing:	July 5, 6; September 8, 9; October 24, 31; November 21, 2015
Date of Award:	January 18, 2017

## I. INTRODUCTION

The Guild challenges Seaspan's right to require certain officers to undergo annual drug and alcohol testing pursuant to the "Marine Addendum," an attachment to its Substance Abuse Policy. The first of the two grievances before me was filed on behalf of Captain Mark Chambers; the second, a policy grievance, on behalf of the following officers: Dave Dawson, Derrick Georgeson, Robert Gibson, James MacNab, Angelo Pignatelli, Markus Sturm, Glen Pennington, Shawn Gryba, Edward Kingsland, Ryan Scott, Matt De Bourcier, Jordan Gadd, Ian Gravlin, Scott Toebosch, Gerrard Gill and Ronald Taylor.

## II. FACTS

Seaspan is a marine transportation company operating on the West Coast of North America. It operates some 37 tugboats and over 100 barges. Seaspan also provides ship-docking services in the port of Vancouver and other ports along the coast of British Columbia. Seaspan's core values are safety, efficiency, care and accountability.

The Guild is certified to represent the officers who work on the tugboats. The officers are the Captains, Mates and Engineers aboard the vessels.

The work performed by the officers is highly safety-sensitive: see *Seaspan ULC v. Canadian Merchant Service Guild (Westmoreland)*, [2016] C.L.A.D. No. 244, at para. 3; *Canadian Merchant Service Guild v. Seaspan International Ltd. (Carlson)*, [2007] C.L.A.D. No. 57, at para. 6; *Canadian Merchant Service Guild v. Seaspan International Ltd. (Fiddis)*, [2008] C.L.A.D. No. 403, at para. 6.

Article 1.10 of the Collective Agreement provides in part:

### 1.10 Medical Examinations

1. The Company has the right to have all Officers medically examined for fitness and any Officer found medically unfit for service will not be employed. Medical examinations will be at the Company's expense...

Article 1.02 provides in part:

... **Suspension**

An officer may be suspended or discharged for just cause. Just cause may include but is not limited to the following:

... (b) *The refusal by the Officer to submit to a drug test when reasonably and lawfully required by the Company's Substance Use policy or customer requirements.*

(emphasis added)

Seaspan's Substance Abuse Policy provides for drug and alcohol testing in certain circumstances, including reasonable cause, post incident investigation, and on a return-to-work after violating the policy or self-disclosing an addiction issue.

The disputed Marine Addendum came about in this way. Pursuant to what are called "Contracts of Affreightment," Seaspan transports fuel for Shell Trading Canada and other oil companies (including Imperial Oil, Exxon, etc.) for whom Shell acts as agent. Seaspan's contract with Shell requires it to transport Shell, or Shell-nominated, products to and from refineries and delivery points between the Lower Mainland, Vancouver Island, and at times the United States. Seaspan has a dedicated barge, the Seaspan 827, that is used to perform this work.

These American oil companies are members of the Oil Companies International Marine Forum ("OCIMF"), a voluntary association of companies with an interest in the marine transportation of fuel. OCIMF has developed guidelines for the control of drug and alcohol use:

OCIMF recommends that shipping companies should have a clearly written policy on drug and alcohol abuse that is easily understood by seafarers as well as shore-based staff. In order to enforce their policy, companies should have rules of conduct and controls in place, with the objective that no seafarer will navigate a ship or operate its onboard equipment whilst impaired by drugs or alcohol.

It is recommended that seafarers be subject to testing and screening for drugs and alcohol by means of a combined programme of un-announced testing and routine medical examination. The frequency of this unannounced testing should be sufficient so as to serve as an effective deterrent to such abuse.

The Contract of Affreightment provides:

Owners are aware of the problem of drug and alcohol abuse and warrant that they have a written policy in force, covering the vessel, which meets or exceeds the standards set out in

the “Oil Companies International Marine Forum Guidelines for the Control of Drugs and Alcohol On Board Ship” as published by OCIMF dated June 1995.

Owners further warrant that this policy shall remain in force during the period of this Charter and such policy shall be adhered to throughout this Charter. Owners warrant that the current policy concerning drugs and alcohol on board is acceptable to ExxonMobil and will remain so throughout the charter period.

Section 54 of the Contract of Affreightment provides that “This Charter shall be construed and the relations between the parties determined in accordance with the laws of Canada.

Pursuant to that Contract, Seaspan added to its Substance Abuse Policy the Marine Addendum, which Addendum provides in part as follows:

Seaspan may enter into service contracts with oil companies which contractually oblige the Company to implement additional drug and alcohol testing.

Where such contracts oblige Seaspan to implement additional drug and alcohol screening, employees in safety-sensitive positions, as defined by contractual obligation, who are engaged in work under these contracts or who will have access to client sites and/or equipment may be required to submit to the following:

- ... Periodic independent medical examinations which include testing for alcohol and drug use, in accordance with the provisions of the collective agreement.
- Unannounced alcohol breathalyzer testing for impairment.

Any employee found in violation of this policy will not be permitted to engage in work under these contracts or have access to client sites and/or equipment.

Shell made it clear to Seaspan that “the Policy shall include unannounced testing in addition to routine medical examinations,” and that (a)n objective of the Policy should be that frequency of unannounced testing be adequate to act as an effective abuse deterrent, and that all officers and barge pumpmen shall be tested at least once a year through a combined program of unannounced testing and routine medical examinations.” Seaspan, in turn, warranted to Shell that it had such a Policy and that the Policy “meets or exceeds” the specified standards.

The Policy was intended to apply to officers performing Shell-rated work.

Further to its guidelines, OCIMF developed a voluntary ship inspection program (“SIRE”), wherein vessels utilized to handle oil products are inspected and reports submitted. Shell arranges annual SIRE inspections of the tugs—referred to by Seaspan as “vetted vessels”—that have been nominated by Seaspan to handle its fuel barge. The Guild is not involved in that process nor is there mention of “vetted vessels” in the Collective Agreement.

The “vetting process” involves Shell nominating an inspector who, although a Shell employee, acts independently. The inspector fills out a SIRE report which is submitted online to OCIMF. Seaspan then has fourteen days to provide responses to any issues raised in the report.

The vetted vessels are/have been: the Seaspan Hawk, the Seaspan Falcon, the Cates 6 and the Cates 8.

In 2015, Seaspan decided to “tighten up” this annual testing by requiring, under threat of penalty, certain officers to attend annually for a drug and alcohol test. It is that change in practice that gave rise to these grievances. Prior to that, officers performing Shell-related work had been asked on an ad hoc basis to undergo, on a voluntary basis, an annual “medical examination” pursuant to Article 1.10. What occurred was not a medical examination but a drug and alcohol test. No-one (including Chambers) who refused to take the test was withheld from service or suffered any other adverse consequences.

As for the “unannounced” component of the promised “combined programme,” it never occurred. In cross-examination, Mike Crosby, Manager of Business Development, testified that, although he told Shell that Canadian law differed from U.S. law regarding drug and alcohol testing, he never explicitly advised Shell that requiring employees to submit to random testing was prohibited. Asked how Seaspan justified its non-compliance with that portion of the warranty, Crosby said that Seaspan, viewing the Marine Addendum requirements as a “guideline,” believed that its obligation could be met by testing mariners both annually and in the event of a marine incident.

The questions asked each year by the SIRE inspector are selected at random from among many hundred. A review of the annual SIRE inspection reports makes it clear that, on those occasions when questions were asked about drug and alcohol testing, the inspector noted that Canadian law

prohibits the implementation of a mandatory drug and alcohol testing procedure absent a marine incident, etc. For instance, the June 12, 2014 SIRE report for the Seaspan Falcon noted that very thing. Similar comments were recorded in the June 2, 2015 SIRE report on the Falcon, the May 24, 2016 report on the Falcon and the May 24, 2016 report on the Seaspan Queen. Other reports note "non-compliance" or "not applicable."

Rob Armstrong, Port Captain, agreed in cross-examination that SIRE inspectors wrote comments to the effect that Canadian regulations prohibit testing except in the case of a marine accident, etc. He said that, at such times as the inspectors raised the matter with him, he would pass along information provided to him by Kim Skeath, Seaspan's Wellness Manager—information consisting of nothing more than the date of the last test, regardless of the reason for the test. Armstrong said that, though he eventually stopped passing along that information, the SIRE report was not failed.

As noted, Seaspan resolved in 2015—in order to "formalize" what had been an inconsistent process—to seek uniformity. Letters were sent to certain officers in April, 2015 (including Chambers) advising they must attend Cita Health Management Inc. for a "medical examination for fitness" in accordance with Article 1.10. The Cita Health "medical examination" consisted solely of a drug and alcohol test administered by Frank Soper, B.S.C. Kinesiology. Chambers testified that Soper told him that "the test is called a 'medical fitness exam' because they (Seaspan) know they cannot ask you to do a drug and alcohol test."

Those officers who, though in receipt of the April 2015 letter, had not yet complied were sent follow-up letters in November 2015. For the first time ever, the officers were warned that there would be consequences for non-compliance:

To ensure your continued ability to be crewed to vessels involving oil barge work for Shell or Imperial Oil your medical examination for fitness must be completed **before January 15, 2016**. Failure to attend this required medical examination will result in you not being eligible to be crewed on any vessel that commonly works for, or may work for, Shell or Imperial Oil.

On January 15, Steve Thompson, Manager Marine Personnel advised his staff that, because Chambers had refused to be tested, he "would not be eligible to work in the harbour or on any

tug that worked with Shell and Imperial products. This will limit Mark,” he said, “to working in the (Fraser) River, Roberts Bank or outside (up and down the West Coast) on non-vetted tugs, when and if his seniority allows him work.” When Chambers arrived on February 16 for his next scheduled shift, he was advised to that effect. That same month, a posting went up for captain of the Seaspan Falcon. Chambers was not awarded the job due to his failure to take the test.

Although Thompson did not testify, Seaspan conceded that his decision not to crew Chambers on *any* harbour boats was a mistake—“the result of individuals in personnel not being 100% clear on the Shell requirements.” The further evidence is that, although the company recognized its mistake early on in the process, it did nothing to correct it.

Seaspan agrees that, of all the testing performed to date—post-incident, periodic and pre-hire, only one Guild member has ever tested positive for cannabinoids. There is no substance abuse problem in the workplace. Indeed, Seaspan relies solely on its contract with Shell to support its demand for mandatory annual testing.

### **III. GUILD SUBMISSIONS**

Four issues arise to be determined, namely

- A. Do the Marine Addendum’s requirements constitute a breach of Canadian law, the Collective Agreement, and/or an employee’s privacy rights?
- B. If so, did Seaspan—by demanding compliance therewith—engage in an unreasonable, discriminatory or bad faith exercise of management rights?
- C. If so, what damages are appropriate?
- D. Regarding Chambers, did Seaspan exercise its management rights in bad faith by withholding Chambers from service (including on any vessels in the Vancouver Harbour), and by refusing to award him the posting on the Seaspan Falcon, due to his refusal to submit to drug and alcohol testing?

The Guild submits that Seaspan's insistence that employees submit to annual drug and alcohol testing is contrary to Canadian law, offends the *K.V.P.* principles regarding reasonableness and consistency, and violates the employees' privacy rights.

#### A. Does the Marine Addendum Violate the Collective Agreement?

The landmark decision of the Supreme Court of Canada in *Irving Pulp and Paper, Ltd. v. Communications, Energy and Paperworkers Union, Local 30*, 2013 SCC 34 conclusively settled the law in Canada: drug and alcohol testing is limited, save in the rarest of situations, to three specific instances, even in safety-sensitive industries:

- (i) there is reasonable cause to believe that the employee is impaired while on duty,
- (ii) the employee has been directly involved in a workplace accident or significant incident, or
- (iii) the employee is returning to work after treatment for substance abuse.

*Irving*, at para. 29

The Canadian approach to drug and alcohol testing, unlike the situation in the U.S., places significant emphasis on privacy rights.

The fact that a workplace is dangerous or safety-sensitive is merely the beginning of the inquiry and the balancing of interests: *Irving*, at para. 31; *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Policy Grievance)* (2006) 157 L.A.C. (4<sup>th</sup>) 225 (Picher); *Mechanical Contractors Association of Sarnia v United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (Surdykowski), at para. 144; *Teamsters Local Union No. 213 v. Linde Canada Ltd. (Driver Periodic Medical Assessment Program Grievance)*, [2015] B.C.C.A.A.A. No. 106 (Dorsey), at para. 58.

At para. 32, *Irving* cited with approval the following "blueprint" (as articulated in *Imperial Oil*) for dealing with drug and alcohol testing in dangerous workplaces:

- No employee can be subjected to random, unannounced alcohol or drug testing save as part of an agreed rehabilitative program.

- An employer may require alcohol or drug testing of an individual where the facts give it reasonable cause to do so.
- It is within the prerogative of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss where it may be important to identify the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem with alcohol or drug use. As part of an employee's program of rehabilitation, such agreement or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years. In a unionized workplace, the union must be involved in the agreement which establishes the terms of a recovering employee's ongoing employment, including random, unannounced testing. This is the only exceptional circumstance in which the otherwise protected employee interest of privacy and dignity of the person must yield to the interests of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.

None of those criteria is met in this case.

While it is open to employers and unions to negotiate agreements to address drug and alcohol testing policies, no such agreement was here negotiated.

Unilaterally imposed workplace rules must be reasonable, consistently applied, and consistent with the collective agreement: *KVP Co. v. Lumber & Sawmill Worker's Union, Local 2537*, [1965] O.L.A.A. No. 2. The employer bears the onus of establishing the rule or policy is reasonable: *Irving*, at paras. 81 and 92.

Where an employee's privacy rights are affected, the employer must meet a higher standard by proving its policy "is a necessary and proportionate response which is likely to meet a demonstrably legitimate need in the particular workplace, [and] which intrudes on employee privacy to the least possible extent:" *Mechanical Contractors*, at para. 130; see also *Trimac*, at para. 43. Minimal intrusion requires that less intrusive strategies must be exhausted before an employer may resort to coercive testing: *Irving*, at paras. 28 and 29; *Mechanical Contractors*, at para. 134.

The reasonableness of policies affecting employees' privacy rights is assessed by employing a "balancing of interests" approach—taking into consideration such circumstances as the nature of

the employer's interests, any less intrusive means available to address those concerns, and the policy's impact on employees: *Irving*, at para. 27.

Business interests do not outweigh employee privacy rights in the balancing of interests. As the arbitrator in *Mechanical Contractors* said at paras. 132 and 134:

although an employer's profit motive is not objectionable, it and management rights are derivative and cannot stand on the same footing as privacy rights. Management rights, though significant in the workplace, are not fundamental in the same sense as individual privacy rights.....

A legitimate business concern is not by itself sufficient to justify a significant intrusion on employee privacy rights. Trampling on the fundamental employee right to privacy in the interests of employer business is not balancing. Whatever the business concern, measures such as pre-access alcohol and drug testing which significantly invade employee privacy are only justified if there is a demonstrable need for health and safety action, the testing is likely to have the desired effect, and other less intrusive measures have been tried or are not reasonably available.

An employer cannot rely on the insistence of a third party—such as a corporation with whom it has a commercial contract—to justify what is an otherwise unreasonable policy: *Metropol Security*, at paras. 37-38.

In *Irving*, the Supreme Court of Canada confirmed the arbitral consensus against an inherent management right to impose random, mandatory and unannounced drug testing where no reasonable cause for such policy exists. As Justice Abella noted at para. 37, there are no cases “in which an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem.”

Random drug testing has been struck down in countless cases, including: *Esso Petroleum Canada v. Communications, Energy & Paperworkers' Union, Local 614* (1994), 56 L.A.C. (4<sup>th</sup>) 440 (McAlpine) (request for review denied, BCRLB No. B257/96); *Metropol Security and USWA Local 5296 (Drug and Alcohol Testing)* (1998), 69 L.A.C. (4<sup>th</sup>) 399 (Whitaker); *Procor Sulphur Services and Communications, Energy and Paperworkers, Local 57 (Holden Grievance)* (1998), 79 L.A.C. (4<sup>th</sup>) 341 (Ponak); *Trimac Transportation Services – Bulk Systems v. Transportation Communications Union* (1999), 88 L.A.C. (4<sup>th</sup>) 237 (Burkett); *Sarnia Cranes*

*Ltd.*, [1999] O.L.R.D. No. 1282 (Ontario LRB); *Imperial Oil; Unifor v. Local 707A v. Suncor Energy Inc. Oil Sands (Random Testing Grievance)* (2014), 242 L.A.C. (4<sup>th</sup>) 1 (Hodges); *Teck Coal Limited –and- United Mine Workers of America, Local 1656*, unreported, December 7, 2015 (Alexander-Smith).

The caselaw emphasizes a distinctly Canadian approach—an approach requiring cogent evidence of “enhanced safety risks such as evidence of a general problem with substance abuse in the workplace” to justify random testing in a safety-sensitive workplace: *Irving*, at para. 31; *Teck Coal Limited*, at para. 493.

Additionally, any testing must be likely to effectively address the problem. As the arbitrator said at para. 72 in *Linde Canada*, “there must be some basis on which it can be said the program is responsive to a real, not simply perceived or speculated, problem and that the program adopted and implemented has a measure of effectiveness beyond good intentions....”

Pre-access policies are also governed by the law in *Irving* and *KVP*. The arbitrator in *Mechanical Contractors* rejected the argument that the potential detection of drug use provided by pre-access testing is sufficient to justify such a policy:

... it is not sufficient for an expert to opine that pre-access alcohol and drug testing may reveal that an employee who seeks access to a safety-sensitive workplace or position has used alcohol or drugs or may be a regular drug user who may in the future come to work under the influence of alcohol or drugs, or the debilitating after effect of alcohol or drug use. It is not enough to say that the pro-active response of pre-access testing may mitigate potential safety risks in that respect.

*That is not the free and democratic society that we live in.* This approach gives no thought to personal privacy considerations, to the onus on an employer to demonstrate with cogent evidence that this privacy invasive testing is reasonably necessary (not merely desirable) and is likely to have the desired effect, or to the proportionate balancing of interests so recently approved by the Supreme Court of Canada.

(para. 204, emphasis added)

When clauses in commercial contracts are determined to be illegal, those provisions are severed: *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] S.C.R. 249.

An employer's imposition of mandatory drug and alcohol testing under the guise of a medical fitness test is not permissible under Canadian law. Even when collective agreement language permits medical examinations, an employer may only demand medical certificates from individual employees where there is a reasonable basis to make those demands with respect to those particular employees: *Linde Canada*, at para. 68. Although the standard medical testing in that case—testing held in abeyance pending the outcome of the arbitration—did not include alcohol and drug testing, it did cover such things as vision testing, blood pressure and urinalysis. Citing the violation of drivers' privacy rights, the union argued that drivers would be randomly selected without an individualized event justifying the selection, and that there would be invasive drawing of blood without driver consent.

In response to the employer's reliance on collective agreement language providing that "(m)edical examinations requested by the employer shall be promptly complied with by all employees and the employer shall pay for all such examinations," the union responded that the language did not give the employer an unfettered right to compel a medical examination. Citing *Irving*, the union argued that, in all cases, the employer must have reasonable cause to make the request.

The arbitrator held that, because transportation is not an industry that justifies a cautionary program involving intrusion in employees' dignity and privacy as a proactive approach to prevent problems, the law compelled him to utilize "a carefully calibrated proportionate balancing of interests which seeks to determine fairness and justice in the unilateral exercise of management authority." (para. 58). In the result, he interpreted the medical examination article as meaning that, in the absence of individual employee consent, the employer must have reasonable cause to compel an employee to undergo an involuntary medical examination.

Employers may not extend the scope of medical examinations to encompass drug and alcohol testing: *Provincial-American Truck Transporters*, at para. 34, cited with approval in *Linde Canada*, at paras. 61-63.

A drug and alcohol policy does not become reasonable by virtue of being called a general medical examination permitted by a collective agreement. Rather, all such tests must be justified under the balancing of interests test articulated in *Irving*; *Linde Canada*.

Privacy rights are fundamental human rights that protect, at their core, the *Charter* values of human dignity, integrity and autonomy: *United Steelworkers Local 7552 v. Agrium Vanscoy Potash Operations (Grievance 16-10, Random Drug Searches/Interviews)*, [2015] S.L.A.A. No. 1 (Norman), at para. 10.

At paragraph 14 of *Irving*, the Court cited with approval this comment made by the arbitration board in *Irving v. CEP, Local 30 (Day)* (2009), 189 L.A.C. (4th) 218.): “Rights to privacy and to the related right of security of the person are important and prized incidents of Canadian citizenship. Reactions to invasion of them tend to be prompt, visceral, instinctive and uniformly negative.”

Privacy rights are infringed where one individual or entity extracts information from the body of another without their consent: *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 27. Mandatory drug and alcohol tests, which coercively seize bodily samples, constitute a “significant inroad” on the privacy rights of an employee: *Irving*, at paras. 49–50.

The employment relationship does not provide an employer with an unfettered right to infringe employees’ privacy:

It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to search an employee or subject an employee to a physical examination without consent.... Thus there is nothing that can be described as an inherent right to subject an employee to what would otherwise be a trespass or an assault upon the person.

*Monarch Fine Foods Co.*, [1978]  
O.L.A.A. No. 8 (Picher).

Any attempt to infringe such rights must be evaluated and justified at an extremely high standard: “As privacy rights are stripped away, it becomes even more important to carefully examine every new intrusion and to limit it to the extent that it is demonstrably necessary. (*Mechanical Contractors*, at para. 116; upheld at 2014 O.N.S.C. 6909.)

In summary, Seaspan’s attempted enforcement of the Marine Addendum constitutes a breach of the Collective Agreement.

## B. Mandatory Periodic Testing Constitutes an Unreasonable, Discriminatory and/or Bad Faith Exercise of Management Rights

As noted, Seaspan never introduced random testing as warranted and Shell—based on comments made by the SIRE inspectors—was well aware of that fact. Yet no vetted vessel failed a SIRE report and no deficiencies were reported—not even after Armstrong ceased passing on the date of the last test. Shell’s non-enforcement of the warranty is consistent with Section 54 of the Contract of Affreightment: “This Charter shall be construed and the relations between the parties determined *in accordance with the laws of Canada.*” (emphasis added) The fact is that the annual testing bore no relationship to safety in the workplace. Though the “objective” was to ensure that officers did not perform Shell work while impaired, the testing attempted by Seaspan was announced and, therefore, of no deterrent value.

Through its April 21, 2015 and November 3, 2015 letters, and others sent out thereafter, Seaspan hoped to tighten up the compliance process. Virginie Vigeant, Manager Employee Relations as of November 2015, testified that the decision to expand the program was motivated by the “will of the business to be consistent... to implement the policy in a more formal way with a more consistent application.”

The switch from the wording in the post-April 21, 2015 letters—namely, the change from characterizing the testing as a “medical examination“ as opposed to what it really was—substantiates the Guild’s claim that Seaspan knew all along that compulsory testing was not lawful in the circumstances.

Further, the argument that officers who choose not to be tested have the option of working on other vessels does not withstand scrutiny. Armstrong conceded that the majority of hours worked in the harbour are on vetted vessels. The decision to nominate a boat as a vetted vessel is purely within Seaspan’s control and discretion; increasing the number of vetted vessels provides Seaspan with greater operational flexibility; and Seaspan could potentially decide to have all vessels vetted.

Significantly, the Collective Agreement contains no reference to vessels being vetted. Postings are awarded based on seniority, subject to qualifications, experiences, and ability. Nor do the postings contain any reference to drug and alcohol testing.

Post *Irving*, the law is clear that mandatory testing is not permitted unless it has been negotiated by the parties—e.g., in the case of an employee with a chemical dependency. Seaspan has failed to establish that there is any safety problem occasioned by substance abuse.

Article 1.02 of the Collective Agreement specifies that refusal to be tested constitutes “just cause” only where the testing is “reasonably and lawfully required.” Chambers testified that the Guild made it clear at the bargaining table that it considered Seaspan’s mandatory annual drug testing policy to be both unlawful and unreasonable.

The narrow opening provided by *Irving* has no application in this case: There is no evidence of substance abuse problems in the workplace, let alone evidence of the kind of enhanced safety risks required, in exceptional cases, to permit such testing. Nor can Seaspan pretend this testing is a medical examination for fitness permissible under Article 1.10.

The sanctity of the employees’ privacy rights must be given precedence over any hypothetical concern regarding the potential loss of Shell business—particularly given the evidence that Shell continued its business relationship with Seaspan undeterred by confirmation in various SIRE Reports of Seaspan’s non-adherence to its warranty. The highly questionable commercial benefit to Seaspan is simply not proportional to the harm to the employees’ privacy.

Seaspan has overstepped the bounds of reasonableness by attempting to enact a policy similar to those that have been rejected by the courts and labour arbitrators across the country.

### C. Damages

Forcing the officers to provide urine samples constitutes not only an egregious breach of privacy; in light of *Irving* it is obviously unlawful. In the circumstances, there is ample authority to support awards of both general and punitive damages.

It is improper to continually and knowingly pursue an illegal policy: *Mechanical Contractors*, para. 211. Violating the privacy of an individual is tortious even where there is no pecuniary loss: *Privacy Act*, R.S.B.C. 1996, c-373.

Damages have been awarded by arbitrators for the wrongful imposition of a drug and alcohol policy: *Teck Coal Ltd. v. United Steelworkers Local 9346 (Elkview Operations)(Interim Order Application Grievance)*, [2013] B.C.C.A.A.A. No. 159 (Taylor); upheld BCLRB No. B28/2014.

In *Rio Tinto Alcan and Unifor, Local 2301 (Kemano)*, 2014 CarswellBC 4251 (Sullivan), the arbitrator awarded non-pecuniary damages for a breach of privacy rights involving a search of employee premises located at the employer's camp. In so doing, the arbitrator cited *Alberta v. A.U.P.E.* (2012), 221 L.A.C. (4<sup>th</sup>) 104 (Sims) and *Jones v. Tsige*, 2012 O.N.C.A. 32 (Ontario Court of Appeal).

At para. 87 of *Jones*, the Court listed as relevant these factors:

- The nature, incidence and occasion of the defendant's wrongful act;
- The effect of the wrong on the plaintiff's health, welfare, social, business or financial position;
- Any relationship, whether domestic or otherwise, between the parties;
- Any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
- The conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

Additional factors in this case include:

- Removing bodily fluids from an individual is a severe breach of his/her privacy rights;
- Seaspan enacted a policy it knew or ought to have known was unlawful and unreasonable;
- Seaspan made no admission of wrongdoing and issued no apology; and
- Not only has Seaspan continued this invasive and unreasonable policy; it has expanded it.

Arbitrators award punitive damages in extraordinary cases to punish employers for breach of good faith: *Hamilton Health Sciences Corp. v. O.N.A.*, (2009) 188 L.A.C. (4<sup>th</sup>) 327 (Harris).

Seaspan's determination to enact, pursue and expand the scope of its mandatory annual drug and alcohol testing policy, which is so clearly contrary to the law and imposes such a severe violation of employee privacy rights, is deserving of both general and punitive damages.

#### D. Chambers

Captain Mark Chambers, employed by Seaspan for 36 years, has a clean record and has not been involved in any accidents or incidents for many years. He has been a longtime member of the training committee and is currently a trainer on the tractor tugs. Rob Armstrong, Port Captain, described Chambers as a "very good tugboat operator. He is always welcome. I respect his abilities."

Chambers, a past member of the its Executive Board and a safety rep for the Guild, was—both at the time of his grievance and for three previous collective agreements—a member of the bargaining committee. As noted, he testified that, during the most recent round of bargaining, the Guild's lawyers signalled clearly to Seaspan that—consistent with *Irving*—"just cause" in Article 1.02 does not apply in cases where, as under the Marine Addendum, the testing is unlawful and unreasonable.

Chambers testified that, prior to January 15, 2016, he was a relief captain who had worked regularly on the Seaspan Hawk for several years. Although he had handled fuel barges since he commenced working as a Master, he had never before been required to submit to drug and alcohol testing. He characterized the first letter requiring him to submit to a "medical examination" as "totally insulting and degrading."

Upon removing Chambers from his schedule, Seaspan maintained that he was ineligible to work on *any vessel* in the Vancouver Harbour. It was not until this hearing that Seaspan conceded that an error had been made—a "misconception" or "oversight." Vigeant testified that, although Seaspan became aware of that mistake in early March, and although he checked with crewing at least weekly, no-one contacted him or offered him that work.

Regarding Seaspan's offer of work on the River, Chambers—not having performed the job for over 10 years—felt he needed familiarization. As well, given that River work involves the use of ladders, etc., he had concerns—due to his degenerative shoulder problem—as to whether he could do that job. In March, he notified Skeath that his shoulder problem might require surgical repair. She asked Soper to prepare a Functional Ability Report (“FAR”).

Soper determined that the shoulder problem prevented him from heaving lifting, raising his left arm above his waist, as well as pushing, pulling and climbing ladders—all of which functions, though not required in performing harbour work, are required in the physically demanding River job.

Upon receipt of Soper's FAR, Seaspan advised Chambers to apply for weekly indemnity insurance. Though he took that advice, he failed to qualify because, when asked by a WI employee whether he could perform the duties of his regular work, he said yes.

Nevertheless, Seaspan's payroll system listed him as being on WI and, thereafter, no efforts were made to crew him. Nor did anyone contact him to determine how his limitations affected his ability to work. Throughout this time, Steve Thompson—still (wrongly) maintaining Chambers was ineligible for any work in the harbour—knew that his physical impairment was limited to River and coastal tugs. Chambers' repeated inquiries regarding when he could return to work went unanswered.

Vigeant testified to the significant staff turnover underway at the time. Asked in cross-examination how the mistake regarding Chambers could have gone unrectified, she replied that “it was a case of the right hand not knowing what the left hand was doing.”

In summary, Seaspan unlawfully demanded that Chambers submit to drug and alcohol testing and thereafter withheld him from service and a posting for his refusal to do so. Seaspan is liable for all damages incurred by Chambers and the Guild resulting from its illegal actions, including damages for breach of privacy.

Chambers estimated he lost over \$55,700 for wages and a statutory holiday and did not receive substantial benefits including 1.24 lay days, pension contributions and vacation. The Guild was deprived of hourly contributions to the legal defence fund and hiring hall.

### E. Inconsistent Application of Policy

Seaspan applied the testing requirement inconsistently. Caselaw provides that unilaterally-imposed employer policies must be applied consistently. As well, Seaspan exercised its managements rights in a manner that was unreasonable, discriminatory and/or in bad faith.

The evidence is replete with examples of officers allowed to work on vetted vessels after Chambers was blocked from such work. As more than one management witness agreed, Seaspan was inconsistent in determining which employees were sent letters in April 2015 and which were not. Regardless of the intent in respect of the 2015 letters, several captains who were posted to and/or who worked on vetted vessels were not named as recipients thereof.

As of early January 2016, 58 officers had not been tested—including an officer who was posted to a vetted vessel. Permitting these officers to continue working on Shell barges, Seaspan failed to send them letters until late March or August 2016.

Asked about officers who, although untested, were permitted to continue to work on vetted vessels after Chambers was held out of service, Paul Hilder, Director of Operations for the past 7 months, agreed that that list includes the following:

- Gordon Lazarawich was permitted to work on the Hawk April 5 and May 5-11, 2016 even though he was not tested until September 6, 2016.
- Ed Kingsland worked on the Hawk March 30 to April 5, 2016 although he had not been tested (and still hadn't been as of September 8, 2016). Nor was he sent a letter requiring him to test.
- Ryan Scott was posted to a vetted vessel in 2015, yet he received no letter requiring him to test until 2016 which required him to test by March 31, 2016. Although he still had not tested, he continued to work on the vetted Falcon April 20 to 26, 2016 and on the Hawk June 2, 2016.
- Shawn Gryba worked May 29 to June 1, 2016 on the Hawk despite not having been tested. Although he was posted to a non-vetted vessel, he relieved on vetted vessels but received no letters requiring him to test. He still had not tested as of September 8, 2016.

- Marion Dylewski was posted to a vetted outside boat, the Cavalier, in 2015 but was not sent a letter requiring him to test. He continued to work at his posting from April 12 to 26, 2016 although he was not tested until May 2, 2016.
- Lindsay Bradwell was posted to the Falcon and received the same letter as Chambers in March 2015. Although he did not test, he continued to work on the Falcon December 27 to 29, 2015, January 6 to 12, 2016, January 20 to 27, 2016, February 4 to 9, 2016 and March 2 to 8, 2016. He finally tested on April 27, 2016.
- Chris Knudsen continued to relieve on the Falcon May 18 to 26, 2016 although he had not tested.
- Gerrard Gill worked the vetted “Cates 6” May 2 to 4, 25, 26, 30, 31, June 1 and 2, 2016 although he had not tested. Although he worked relief on vetted vessels in 2015 and worked on a vetted vessel on January 13, 2016, he was never given a letter requiring him to test until August 16, 2016.
- Zack Jordan worked on the vetted Cates 6 May 18 to 24, 2016 and on the vetted Cates 8 June 21 to 24, 2016 although he had not been tested. Nor was he given a letter requiring him to test.
- Dave Howitt worked on the Falcon May 7, 2016 even though, despite receiving a letter in 2015, he did not test in 2015 and had not tested by September 30, 2016.

The Guild submits that, although there may well be other examples, it only had access to log books to the end of June 2016.

Although Chambers was removed from the Hawk and denied the posting on the Falcon because he had not tested, others who were posted to those vessels were permitted to continue in their postings and other relief captains were permitted to work on both of those vessels despite not having submitted to testing.

Hilder, asked in cross-examination to explain why Chambers couldn't obtain the posting on the “Falcon” while others who hadn't tested were permitted to work on it, said that he did not know.

Only Chambers, and possibly Howitt, was denied work on non-vetted boats in Vancouver Harbour. During that same time, employees junior to Chambers—many of whom had not been tested—worked shifts on both vetted and non-vetted vessels.

The Cates 3 is a non-vetted vessel, working steadily in the harbour from January 20, 2016. Chambers was competent to operate the Cates 3 and, at a minimum, should have been permitted to do so.

Seaspan refused to accept evidence of his fitness from Soper, notwithstanding its previous reliance on his report regarding the same issue. Moreover, Thompson knew Chambers' shoulder problem only disqualified him from working on the River and on outside boats.

Seaspan acted in bad faith by requiring a medical report regarding Chambers' fitness to work before returning him to work on non-vetted vessels. It further acted in bad faith by not immediately returning him to work after receipt of that report on June 24.

In *Weyerhaeuser v. CEP, Local 447*, [2006] CarswellAlta 1859 (Sims), \$10,000 damages were awarded (in the context of post-incident testing) to an individual who had been treated “deplorably.” The arbitrator held that the tort (civil wrong) of “the intentional infliction of emotional suffering” had been established.

#### **IV. SEASPAN SUBMISSIONS**

##### **A. Introduction**

This case is not about Seaspan's management right to implement a drug and alcohol policy. The law is settled on that point. Nor is this case about random drug testing. Although there is a requirement of Shell that Seaspan have a policy that includes random testing, the evidence is clear that Seaspan never implemented such testing. The law is well settled on that point as well.

Rather, this case is essentially about two things:

1. Can Seaspan rely on a customer demand to require its employees to submit to drug and alcohol testing to comply with customer requirements; and

2. Can Seaspan require drug and alcohol testing as part of an annual medical examination for fitness?

The law is not settled on these points and these are the two issues that fall to be determined in this case.

Seaspan did not discriminate against Chambers by keeping him from service after his refusal to submit to a drug and alcohol test. Chambers refused to work on the River due to a shoulder injury. He did not wish to work on coastal tugs. Seaspan made an honest mistake in not crewing him in Vancouver Harbour. However, by the time the mistake was realized, Chambers had raised issues of fitness and had applied for weekly indemnity benefits.

Should the requirement to submit to drug and alcohol testing be found to have been an unreasonable exercise of management rights, the damages for lost wages must take into consideration the fact that Chambers was unfit for duty during the period he was applying for weekly indemnity.

Regarding the Guild's "bad faith" argument, the failure to crew Chambers in the harbour was an honest mistake. As for the delays in respect of returning Chambers to work, Vigeant explained that, after the first "without prejudice agreement" reached between the parties, Seaspan required Chambers to be examined by a physician regarding his "fitness to work" in view of his advice that he required shoulder surgery.

Further, at the time Chambers tendered the results of his without prejudice drug and alcohol test, the crew on the Falcon was in the middle of a shift rotation. Instead of returning Chambers mid-schedule and hence causing significant operational issues, Seaspan offered him work at Roberts Bank. He commenced working there on July 13 and has worked there ever since.

## B. Law

### 1. Management's Right to Implement a Drug and Alcohol Policy

Management has the right to introduce a policy that deals with drug and alcohol in the workplace; such policy may allow for testing in appropriate circumstances: *Vancouver Shipyards*

*Co. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 170*, [2006] B.C.C.A.A.A. No. 168 (Hope); *Weyerhaeuser Co. v. IWA*, [2004], B.C.C.A.A.A. No. 71 (Taylor); *Esso Petroleum*.

Given that the Collective Agreement does not contain a traditional management rights clause, Seaspan has retained all powers which it had prior to its signing. Hence, its rights are broad, limited only by express provisions of the Collective Agreement and the law: *North Central Plywoods v. Pulp and Paper Workers of Canada, Local 25 (Gullacher)*, [2000] B.C.C.A.A.A. No. 85 (Greyell); *Firestone Tire & Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113*, [1960] C.L.A.D. No. 2 (Little).

This dispute concerns whether Seaspan has the management right to require annual drug and alcohol testing for employees who work in connection with Shell products. Seaspan submits that it is entitled to implement a policy to comply with customer requirements.

In *Suncor Energy Inc. v. Unifor Local 707A*, [2016] A.J. No. 530, the Alberta Court of Queen's Bench set aside the *Suncor* award relied upon by the Guild. The majority of the arbitration board had in essence ruled that random drug and alcohol testing is never allowed, even in highly dangerous workplaces. The Alberta Court of Queen's Bench noted that, although the Court in *Irving* had said that a dangerous workplace does not *automatically* justify random testing, Justice Abella added at para. 45, "That is not to say that it is beyond the realm of possibility in extreme circumstances , but we need not decide that in this case."

It is true that the current state of Canadian law does not permit *random* testing in circumstances where, such as here, an employer cannot demonstrate a general workplace problem. However, the law has developed significantly since the early 1990's—namely, respecting a unionized employer's right to require drug and alcohol testing either generally or in connection with unilaterally introduced policies.

## 2. The Term "Medical Examination" may include Drug and Alcohol Testing

In *Esso Petroleum*, one of the early seminal cases on drug and alcohol testing, the arbitration board dealt with an employer-promulgated drug and alcohol policy including mandatory *bi-annual* medical examinations—and, as part of those medical examinations, drug and alcohol

testing. Though the board struck down and/or amended many aspects of the comprehensive policy, including that pertaining to random testing, it did not strike down the bi-annual testing requirement.

Specifically, the board upheld the employer's right to require its employees, in safety-sensitive positions and absent the need to demonstrate a problem in the workplace with drugs or alcohol, to undergo a medical examination, including a drug and alcohol test, every two years. The policy was deemed reasonable by mere virtue of the fact that the employees occupied safety-sensitive positions. At paragraph 173, the board held:

Notwithstanding (union nominee) Ms. Jackson's position, in my respectful view, the employer's provision for mandatory medical examinations every two years for employees in safety-sensitive positions is a reasonable measure of safety commensurate with the responsibility imposed on employees holding those positions. Critical to that finding is the board's direction that the medical examinations are to be conducted by a physician of the employees' own choice....

And at paragraphs 244-246:

In the board's view, it is reasonable for the employer to require not every employee but an employee applying for and continuing in a safety-sensitive position to undergo medical examinations every two years. At the same time the board must have regard to the invasive nature of medical examinations and the employee's right of privacy....

There is no perfect solution. In balancing the respective interests of the individual employee and the employer, the board strikes a balance. Mandatory medical examinations are acceptable to the board if conducted by the employee's own doctor.

... The employer would provide information as to the nature of the employee's duties to the employee's physician. The scope of the medical examination will be determined by prevailing and appropriate medical standards. The scope designated by the employer would not go beyond these standards. The board accepts the employer's position that one aspect of an employee's current fitness is whether or not the employee has a current substance abuse problem. With that end, the company is entitled to require their employees in safety-sensitive positions to undertake the blood test prescribed as part of the mandatory medical examination.

There is no material difference between bi-annual and annual testing. Nothing in Article 1.10 prescribes that periodic testing may only occur every *second* year. Seaspan's current policy of annual testing should be upheld—in line ,as it is, with the finding in *Esso Petroleum* that

employers may require employees in safety-sensitive positions to undergo periodic testing as part of a mandatory medical examination.

While the Guild argues that *Esso Petroleum* has been overtaken by *Irving* and is, in any event, distinguishable on its facts, the award in that case has been widely adopted by arbitrators and courts, including the Supreme Court of Canada in *Irving*. Although the issues addressed in these kinds of cases predominantly deal with the issue of random testing, no court or arbitrator has specifically rejected the finding in *Esso Petroleum* that an employer may require *periodic* drug and alcohol testing in safety-sensitive positions. Given the endorsement of *Esso Petroleum* by the highest court in the land, that finding must stand as a binding precedent in this case.

Secondly, the collective agreement in *Esso Petroleum* did not contain a provision allowing management to require a medical examination of its employees. Because such a provision is present in our case, there is an even stronger argument that Seaspan, in order to comply with Shell's requirements, is within its rights stipulating that medical examinations, including drug and alcohol testing, shall occur on a periodic basis. Indeed, the new Collective Agreement language supports that view. As noted, that language provides:

... **Suspension**

An officer may be suspended or discharged for just cause. Just cause may include but is not limited to the following:

... (b) The refusal by the Officer to submit to a drug test when reasonably and lawfully required by the Company's Substance Use policy *or customer requirements*.

*Emphasis added*

The Court in *Irving* makes it clear that parties to collective agreements may negotiate drug and alcohol testing provisions notwithstanding human rights legislation that may otherwise apply.

The Court said at paragraphs 17 and 19:

At the outset, it is important to note that, since we are dealing with a workplace governed by a collective agreement, that means that the analytical framework for determining whether an employer can unilaterally impose random testing is determined by the arbitral jurisprudence. Cases dealing with random alcohol or drug testing in *non-unionized* workplaces under human rights statutes are, as a result, of little conceptual assistance (*Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.))....

But the reality is that the task of negotiating workplace conditions, both on the part of the unions and management, as well as the arbitrators who interpret the resulting collective agreement, has historically—and successfully—included the delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy. Far from leaving the public at risk, protecting employees—who are on the front line of any danger—necessarily also protects the surrounding public. To suggest otherwise is a counter-intuitive dichotomy.

The Supreme Court went on to discuss how collective agreement cases invoke a “balancing of interests” approach. When, however, there is express recognition of rights regarding the safety of the workplace, those should be honoured.

There has been wide acceptance in the law that an employer may require testing for employees who transfer into or are promoted into safety-sensitive positions. Thus, regardless of whether such employee has been a good, clean employee for 20 years with no record of any issues with drugs or alcohol, testing is permitted if that employee wishes to move into such a position: see *CNR v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2000] C.L.A.D. No. 465 (Picher); *Weyerhaeuser v. IWA*.

In *CNR*, for example, the arbitrator states at paragraph 209:

Given the highly safety-sensitive nature of the Company’s operations as a railway, it is reasonable for the Company to require employees in risk-sensitive positions to undergo drug and alcohol testing in circumstances where it has reasonable grounds to believe that an employee is impaired while on duty, while subject to duty or while on call, including where an employee has been involved in a significant accident or incident, or when an employee seeks promotion or transfer into a risk-sensitive position. While it is true that in all of the foregoing circumstances a positive drug test would not give the employer conclusive proof that an employee was or would be impaired while at work, or that he or she suffers from an alcohol or drug addiction dependency, it may nevertheless be a significant and relevant piece of evidence which the employer can legitimately weigh in the balance in considering the merits of discipline, renewed safety measures or additional vigilance in the aftermath of an accident or promotion or transfer into a risk sensitive position. That is not to say, however, that an employee who tests positive for drugs or admits occasional alcohol consumption must automatically be rejected for promotion or reassignment. Much will depend on the individual circumstances of the case, and it is impossible to posit any general or sweeping rule in that regard. By way of example, however, it does appear to the Arbitrator reasonable for the Company to have pause before promoting a person to the responsibilities of a locomotive engineer or a train conductor if, as part of a medical fitness examination, that individual tests positive for the use of cocaine, a highly addictive substance. I cannot conclude that drug testing as part of the

medical examination that would lead to that discovery is unreasonable, unrelated to the legitimate business interests of the employer or an undue encroachment on the privacy rights of individuals whose expectations must conform to the risk-sensitive concerns of the industry in which they seek to hold employment.

In the result, I am satisfied that those aspects of the drug and alcohol testing policy which would require an employee, under pain of discipline, to undergo drug and alcohol testing on the basis of reasonable grounds, including after a significant accident or incident, or as a pre-condition to promotion or transfer into a risk-sensitive position are not, of themselves, unreasonable by the standards of *KVP* and are not a violation of the collective agreements....

Just as testing may be permitted in situations of promotion or transfer into safety-sensitive positions, so too requiring periodic testing to address those same concerns is defensible. The testing of individuals being promoted or transferred is not to determine present impairment, but constitutes a relevant piece of evidence for an employer attempting to maintain a safe working environment.

In summary, the approach in *Esso Petroleum* should be adopted to allow Seaspan to continue to require annual testing of officers who work in connection with the Shell contract, pursuant to management rights and the express provision for medical examinations in the Collective Agreement.

### C. Alleged Discriminatory Treatment

Where there is an allegation of discriminatory treatment of an employee, the union bears the burden of proving the decision was arbitrary, discriminatory, and/or unreasonable: *Brown & Beatty*, at 7:2300—*Burden of Proof*.

Further, the differential treatment must arise in circumstances where two employees are alike in all relevant aspects: *Brown & Beatty* at 7:4414—*Discrimination*.

The burden on the union is described in *Mackenzie (District) v. Canadian Union of Public Employees, Local 3706*, [2003] BCCA No 373 (Jackson) at para. 56: “The evidentiary burden is on the union to show that the same or very similar misconduct by other employees was treated differently by the employer.”

The authorities on discriminatory treatment typically involve issues of discipline. Although Chambers was not disciplined *per se*, the same principles apply to the Guild's allegation that he was singled out for different treatment due to his refusal to submit to testing.

In years prior to 2015-2016, officers who were provided letters under the Shell contract were not warned of consequences should they fail to be tested. Further, no adverse employment consequences ensued for those refusing to undergo drug or alcohol testing in connection therewith. The mere fact that Chambers was the first employee to be impacted by Seaspan's tightened-up process does not make the impact on him discriminatory.

Further, the fact that he was prevented from working on any vessel in the harbour is not evidence pointing to discriminatory treatment. While Seaspan concedes that a mistake was made, the Guild has adduced no evidence to the effect that the mistake was in any way a result of discriminatory treatment, intentional or otherwise.

In any event, even if a finding of discriminatory treatment were to be made, such would not, absent any evidence of bad faith, result in an award—other than the normal make-whole remedy—of additional damages.

In *Purolator Inc. and Teamsters Local 31*, [2015] C.L.A.D. No. 254 (McEwen), the arbitrator found that the employer had engaged in discriminatory treatment in dismissing the grievor for an offence dealt with less severely in the case of other employees. The union claimed additional damages because of this conduct. The arbitrator found that a damage award may be appropriate but that a finding of bad faith must be made. Although she was critical of the employer in the manner of dismissing the grievor, she found that the evidence did not meet the high bar required in proving bad faith. Thus, the grievor was made whole without an award of additional damages.

In cross-examination, Hilder was shown a number of vessel log books indicating that certain officers had worked, though untested, in connection with the Seaspan 827. Presumably, the purpose of this evidence was to show that Chambers was accorded discriminatory treatment when he was advised he could not work in the harbour unless he tested.

However, Kellock's evidence was clear that all employees were treated the same. While the identified employees would have received letters, they had not yet received the follow-up letters.

At the time Chambers was taken off the harbour boats, only Dave Howitt was in a similar situation. From January 15, 2016 to February 4, 2016, Howitt worked on the non-vetted Eagle but did not work in connection with the Shell contract. After being tested on February 4, Howitt was permitted to again work on vetted vessels. All other officers who worked on vetted vessels had either tested or had not yet reached the deadline in their second follow up letter.

In summary, all employees were provided a period within which to get tested. This explains why some employees continued doing Shell work despite not having tested—as, indeed, Chambers had done in the past.

There is no evidence of discriminatory treatment, and certainly no evidence of bad faith towards Chambers. Thus, the Guild has failed to make out a case for damages.

#### D. Mitigation of Damages

Should it be found that Seaspan erred in requiring Chambers to be tested in connection with Shell work, Seaspan submits that he should not be made whole. Any compensation award must take into account the period he had essentially declared himself unfit for work by applying for weekly indemnity.

When told on January 15, 2016 that he could no longer be crewed in Vancouver Harbour, Chambers was offered alternate work. While he testified that he would not consider coastal work—which requires absences from home for several days at a time—for personal reasons, he indicated that he may be willing to perform work in the River subject to being provided with re-familiarization.

After being told by his partner that, in view of his shoulder condition, he was “crazy” to consider River work, Chambers decided to have Frank Soper assess him. Immediately noticing an issue with Chambers’s shoulder, Soper completed a Functional Ability Report (“FAR”) on Friday, March 4, 2016 which Chambers in turn provided to Seaspan.

Vigeant testified that the FAR—which indicated an issue for Chambers in lifting his arm above waist height—concerned her to the point of questioning whether he was fit to perform the duties of a Master. Chamber applied on March 11th for weekly indemnity benefits. Vigeant testified

that, as per Seaspan policy, Chambers was thereafter “blocked off pay.” Once an employee applies for weekly indemnity,” she said, “eligibility for which depends on the inability to perform one’s job, the employee is blocked off pay during that process.”

In the circumstances, Seaspan says that, should I order that Chambers be compensated for lost earnings, such earnings should only cover the period from January 15, 2016 until March 11, 2016 when he applied for weekly indemnity.

## **V. DECISION**

After carefully considering the evidence and the submissions, I am satisfied that the grievances must be upheld.

Seaspan had no history of substance abuse problems. However, because Seaspan valued its contract with Shell, it gave the appearance of compliance while, at the same time, balancing the constraints of Canadian law with Shell’s wishes. Seaspan never implemented random testing despite having warranted to do so. It rationalized this omission by viewing “post-incident testing” as bearing a kind of equivalency to random testing. The two kinds of testing are of course materially different.

Regarding its commitment to conduct “announced” (periodic) testing, Seaspan’s practice was spotty at best—even after its attempt in 2015 to tighten up the process. Notwithstanding Kellock’s understanding that Chambers was treated no different from any other officer, I prefer the evidence of Director of Operations Paul Hilder, a man with significantly more direct knowledge of the situation. As Hilder testified, many untested officers worked on vetted vessels after Chambers was held out of service.

At the same time, Shell chose—in full knowledge that the Marine Addendum was not being enforced in such a way as to ensure that the operators of vetted vessels were not impaired—not to insist upon compliance therewith.

The Supreme Court of Canada’s decision in *Irving* makes it clear that drug and alcohol testing is limited, save for the rarest of exceptions in safety-sensitive industries, to three specific instances, namely:

- (i) there is reasonable cause to believe that the employee is impaired while on duty,
- (ii) the employee has been directly involved in a workplace accident or significant incident, or
- (iii) the employee is returning to work after treatment for substance abuse.

*Irving* at para. 29

None of those instances obtain in the case before me.

Seaspan however contends that 1. the Court in *Irving* must be taken to have endorsed the “periodic testing” exception upheld in *Esso Petroleum*; 2. both *Irving* and *Suncor* (Alberta Court of Queen’s Bench) make it clear that, while the fact of a dangerous workplace does not automatically justify random testing, *nor does it automatically negate it*; 3. the arbitrator in *Linde Canada* erred by determining, notwithstanding collective agreement language providing for medical examinations, employers must have “reasonable cause” to compel them; and 4. by agreeing to the new language in Article 1.02, the Guild conceded that Seaspan is entitled to mandate annual testing.

### 1. *Esso Petroleum*

Leaving aside the awards in *CNR* and *Weyerhaeuser v. IWA*—both of them being pre-*Irving* and, therefore, in my view, of no assistance to the company, Seaspan singled out *Esso Petroleum* for special mention. Though it stands for the same proposition as the others—namely, that an employer may require *periodic* drug and alcohol testing of employees in safety-sensitive positions *regardless of a substance abuse problem*—Seaspan says that, because the Court in *Irving* cited it with approval, that Court must be taken to have endorsed it.

I disagree. First, *Esso Petroleum* was cited in *Irving* for the proposition that *random* drug testing had been struck down in countless cases. That issue is of course not before me. Secondly, the sole reference in *Irving* to periodic testing was in the context of individuals found to have a problem with alcohol or drug use. For ease of reference, the relevant passage in *Irving*, citing with approval *Imperial Oil*, is as follows:

Drug and alcohol testing is a legitimate part of continuing contracts of employment *for individuals found to have a problem with alcohol or drug use*. As part of an employee's program of rehabilitation, such agreement or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally *for a limited period of time, most commonly two years*. In a unionized workplace the union must be involved in the agreement which establishes the terms of a recovering employee's ongoing employment....

(Emphasis added)

Similar reasoning is found in *Esso Petroleum*:

The board accepts the employer's position that one aspect of an employee's current fitness is whether or not the employee has a current substance abuse problem. *With that end, the company is entitled to require their employees in safety-sensitive positions to undertake the blood test prescribed as part of the mandatory medical examination.*

(Emphasis added)

Even if *Esso Petroleum* is not confined to substance abuse problems, the subject case is distinguishable on the basis that neither Seaspan nor its customer, Shell, has treated enforcement of the Marine Addendum as critical to its safety interests.

As discussed, Seaspan—having assured Shell in 2013 that the “frequency of unannounced testing (will) be adequate to act as an effective abuse deterrent, and that all officers (will) be tested at least once a year through a combined programme of unannounced testing and routine medical examinations”—failed to implement such a “combined program.” Not just that; the testing that did occur—testing announced well in advance of the actual test—lacked the kind of deterrent value contemplated by the OCIMF. In short, no nexus exists between Seaspan's testing program and the work being performed on the vetted vessels.

And finally, Shell failed to object—thus further undercutting the argument that the customer was concerned that its safety interests were in jeopardy.

## 2. Linde Canada

Seaspan argues that the arbitrator erred in *Linde Canada* by determining that, where an employee's privacy interests are involved, collective agreement language providing for medical examinations can never, absent “reasonable cause,” be interpreted as permitting such intrusion.

Instead, argues Seaspan, the arbitrator should have concluded that, because the Medical Assessment program there in issue used the “least intrusive means” to obtain the necessary information—the assessment was limited to standard testing that may be done by the driver’s own doctor, and the employer was told only whether the driver was fit, unfit or fit with restrictions—the program should have been upheld as a reasonable balancing of the employees’ interest in privacy and the employer’s interest in safety.

I disagree that *Linde Canada* was wrongly decided. As arbitrator Dorsey noted, the award is consistent with the principles espoused in *Irving, Firestone Tire & Rubber*, and *Provincial-American Transporters*. As he said, “(t)he longstanding prevailing arbitral consensus is that an employer demand for medical certification of fitness requires reasonable and probable grounds for questioning the employee’s fitness.”

Although Article 1.10 of the Collective Agreement permits “medical examinations,” the arbitral consensus is that it cannot be construed as including, without reasonable cause, something as invasive as drug and alcohol testing.

#### 4. Article 1.02 Language

Seaspan argued that, by agreeing that officers will be subject to discipline for refusing to be tested pursuant to the Substance Abuse policy or customer requirements, the Guild must be taken to have agreed that Seaspan is entitled to compel annual testing.

The evidence does not support that proposition. Not only was the language negotiated against the backdrop of *Irving, Chambers*, the only witness who gave evidence regarding this matter, testified that the Guild made clear its position to Seaspan: The testing here in issue is neither “reasonable” nor “lawfully required.”

In summary, I am satisfied for all of these reasons that the policy is not reasonable as per the principles in *KVP* and therefore constitutes a breach of the Collective Agreement. Seaspan overstepped the bounds of reasonableness by attempting to enact a policy similar to those that have been rejected by judges and labour arbitrators across the country.

I am further satisfied that the privacy rights of the affected officers have been violated. The sanctity of those rights must be given precedence over any hypothetical concern regarding the potential loss of Shell business—particularly given the fact that Shell has, as noted, continued its business relationship with Seaspan undeterred by SIRE Reports stating that the subject testing is unlawful in Canada. The highly questionable commercial benefit to Seaspan is simply not proportional to the harm to the employees’ privacy.

Seaspan’s insistence that employees submit to annual drug and alcohol testing in order to work on vetted vessels is not permissible under Canadian law, breaches the Collective Agreement and the employees’ privacy rights, and is an unreasonable exercise of management rights.

## **B. Damages**

As the Supreme Court of Canada said in *Irving* at para. 14, “Rights to privacy and to the related right of security of the person are important and prized incidents of Canadian citizenship. Reactions to invasion of them tend to be prompt, visceral, instinctive and uniformly negative.”

The law is well settled that, where a breach of privacy has been established, an award of general damages is appropriate. The circumstances unique to each case dictate where the amount falls on the spectrum from moderate to significant.

In *Jones v. Tsige*, the Ontario Court of Appeal said at para. 71:

The key features of this cause of action are, first, that the defendant’s conduct must be intentional within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and, third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that, given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

### 1. Group Grievance

As the applicable caselaw makes clear, the factors relevant to quantum include:

- The nature of the invasion: The consensus is that removing bodily fluids (urine) constitutes a highly invasive search and is a severe breach of the individual's privacy rights;
- The policy is one which Seaspan knew or ought to have known was unlawful and unreasonable. Instead of ending it when the Guild filed its grievances, Seaspan continued to expand it;
- The consequences of refusing testing—no ability to work on a vetted vessel—is significant. The evidence supports the Guild's argument that the decision to nominate a boat as a vetted vessel is within Seaspan's control; increasing the number of vetted vessels provides Seaspan with greater operational flexibility; and Seaspan could potentially decide to have all vessels vetted.
- The relationship between the offending party and the victim is one of employer/employee rather than, for example, offender/stranger. The employment relationship has long been viewed as one that has a significant trust element: *Loomis Armored Car Service Ltd., Re* [1997] B.C.C.A.A.A. No. 697 (Kelleher).
- Seaspan made no admission of wrongdoing nor did it issue an apology or offer in any way to make amends; and
- Impact on employee sense of well-being and security: Both the threatened consequence of non-compliance and the lack of a timely admission of error or apology must be taken to have exacerbated the presumed mistrustful environment caused by the improper testing.

These factors, taken together, point to a significant damage award. In the circumstances, and taking into account comparable awards and decisions in this regard, I set the amount payable to each of the affected officers at \$3,000.00.

## 2. Chambers Grievance

### (a) Make-whole order

Seaspan argues that Chambers failed to mitigate his losses and therefore monies should be deducted from the total amount of lost earnings, benefits, etc otherwise due and owing to him. Any compensation award, it says, must take into account the period he had essentially declared himself unfit for work by applying for weekly indemnity. For that reason, any compensation award should be limited to the period from January 15, 2016 until March 11, 2016—the date Chambers applied for weekly indemnity.

However, not only was it at Seaspan's suggestion that Chambers applied for weekly indemnity. The evidence is clear that, were it not for Seaspan's "mistake" in withholding from him all harbour work, he would have duly mitigated his losses.

In the circumstances, I am satisfied that a make-whole order, without any discounting, is appropriate.

#### (b) Damages for Breach of Privacy

Chambers testified that being told to test or face the consequences was "insulting and degrading." He said that those who submitted to the test found the process "embarrassing."

He further testified that, upon receipt of the April 21, 2015 letter, he told Armstrong that such testing was illegal in Canada and he would not submit to it. Armstrong, replying that "that's why they call it a medical examination," said that Seaspan needed a number of men tested so they "could hand Shell their names."

When the ultimatum arrived via the November 30, 2015 letter, Chambers ignored it. Not only was he denied work in the harbour after January 15, 2016; he failed to be awarded the Falcon posting because he had not tested. The posting was awarded to an employee junior to him in the 3<sup>rd</sup> week of February 2016.

Throughout the entire time he was withheld from duty, Chambers was well aware that officers who had not been tested continued to work shifts on vetted vessels. In addition, after being withheld from duty, he was told—Seaspan submits in error—that he could not access available work of any kind in the harbour. Although management learned of that error almost immediately, it did nothing to rectify it.

Regrettably, that “error” caused a chain reaction—the weekly indemnity failed application, the requirement that Chambers prove his (medical) fitness to work as a Master, etc.—all of which resulted in his missing many months of work. Yet through it all and despite repeated efforts on his part to get answers from management, not a single person sat down with him to discuss the situation and review his options.

The Guild argues that Chambers—a long-service employee, characterized by the Port Captain as a “very good tugboat operator,” a man whose abilities are “respected” and who is “always welcome”—was treated in a discriminatory and high-handed manner.

That argument has considerable merit. At a minimum, Chambers was not treated with the professionalism and dignity owed him by an employer as sophisticated as Seaspan.

However, the onus, as argued by Seaspan, is on the Guild to prove “bad faith.” In the absence of evidence to that effect, the Guild in effect asks me to speculate: Chambers was too outspoken; too active in the Guild or on safety committees; etc. I cannot of course speculate. Alternatively, I am being asked to conclude, based solely on the events as they unfolded, that Seaspan acted in bad faith. I am simply not satisfied, on the evidence, that such is the case.

The case before me bears none of the hallmarks of the “bad faith” cases cited by the Guild—no evidence of “malicious and unsupported accusations;” no “recklessness” (as opposed to “the right hand not knowing what the left hand was doing”); no “reprehensible conduct” or “deplorable behaviour” requiring “punishment.”

As noted by Seaspan, the employer in *Purolator* had engaged in discriminatory treatment in dismissing the grievor for an offence that management had dealt with less seriously vis-à-vis other employees. I found that, in order to render an award in damages, bad faith must be proven. As in that case, the evidence before me in these proceedings does not meet the high bar required in proving bad faith.

In summary and while I am satisfied that Chambers, for the reasons just discussed, is deserving of a damage award materially higher than his fellow officers, I cannot conclude on the evidence that Seaspan was motivated by personal animus or reasons unrelated to what it believed (albeit erroneously) as the proper exercise of its management rights.

The arbitrator in *Weyerhaeuser v. CEP* awarded damages of \$10,000 for the “intentional infliction of emotional suffering.” In the circumstances of this case, and in the absence of proof of a civil wrong over and above that of breach of privacy, I am satisfied that a damage award of \$7000 to Chambers would be appropriate.

## **VI. SUMMARY**

In summary, the grievances are upheld and it is hereby ordered as follows:

- The officers covered by the Group Grievance are each entitled to a damage award of \$3000 for breach of privacy.
- Chambers is entitled to a damage award of \$7000 for breach of privacy.
- Chambers is to be made whole for the period from January 20, 2016 to July 20, 2016, including compensation (if any) flowing from his failure to be awarded the Seaspan Falcon posting.

I will remain seized to deal with any issues that may arise regarding the interpretation, application or implementation of this Award.

Dated this 18 day of January, 2017.

“Joan I. McEwen”  
Joan I. McEwen  
Arbitrator