

Grievance Arbitration

Between:

Unifor, Local 707A

(the Union)

and

Suncor Energy Inc.

(Suncor)

Policy Grievance SU-85-7-2012

Dissent

Arbitration Board:

Tom Hodges, Chair¹

Gwen Gray, Q.C., Union nominee

David Laird, Q.C., Suncor nominee

Counsel:

For the Union: John R. Carpenter and Michelle Westgeest

For Suncor: Barbara B. Johnston, Q.C. and April Kosten

¹ Appointed pursuant to section 138(1)(b) of the *Labour Relations Code*.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND	3
Prior Alcohol and Drug Policy Arbitration Award	3
Overview of Suncor’s Operations in the RMWB.....	4
III. DECISION	5
A. PRELIMINARY ISSUE: JURISDICTION	5
The Board’s Jurisdiction is Limited to the Face of the Grievance	5
B. RANDOM TESTING STANDARD IS A REASONABLE EXERCISE OF MANAGEMENT RIGHTS	8
The Majority Misapplied the Test in <i>Irving</i>	8
Random Testing Standard is Consistent with the Collective Agreement.....	8
Balancing of Interests Approach: Safety Outweighs Privacy.....	8
Privacy Rights Are Not Absolute	9
Safety Rights are Significant	11
Suncor’s Operations in the RMWB are Dangerous	11
The Majority Failed to Appropriately Consider Safety Concerns	13
Alcohol and Drug Use at Suncor’s Operations in the RMWB is a Safety Hazard	15
There is Compelling Evidence of a “General Problem” with Alcohol and Drugs “in the Workplace”	15
Suncor Has Implemented Incremental Safety Measures to Address Pressing Safety Concerns.....	16
Suncor Provides EFAP and Substance Abuse Treatment	19
Suncor Has Extensive Education & Training Programs	20
Compelling Evidence of a Problem at Suncor’s Operations in the RMWB	23
Positive Alcohol and Drug Tests	23
Alcohol, Drugs and Drug Paraphernalia.....	25
Numerous Suncor Employees have been Assessed as Dependent	29
Fatalities	31
Last Chance Agreements	32
Site Bans	32
Evidence of Drug Trafficking at Suncor’s Operations in the RMWB and in the Community	32
Integrity Hotline	32
The Union Acknowledged a Workplace Problem with Alcohol and Drugs.....	32
The Evidence Confirms a Workplace Problem.....	33
Rulings of the Majority Are Wrong and Not Defensible.....	34
A Causal Link is Not Necessary	34
The Experts Confirmed a Causal Link	36
There is Evidence of a “Workplace” Problem	43
There is a Bargaining Unit Problem	43
There is a Contractor Employee Problem.....	46

There is a Community Problem.....	48
There is a Compelling “Public Interest”	51
Suncor Must Address Safety Hazards.....	51
The Majority Misapplied the Alcohol and Drug Testing Data	52
Evidence is More Compelling than in Past Awards.....	53
Random Testing is an Effective Deterrent	57
Urine Testing is Reliable and Accurate	58
Alcohol & Drug Tests are Consistent with Safety Risks	61
No Evidence Regarding Oral Fluid Testing Before this Board.....	63
No Less Intrusive Measures	64
IV. CONCLUSION	67
SCHEDULE 1.....	68

[1] I dissent from the Award of the Majority for the following reasons.

[2] Suncor Energy Inc.'s ("Suncor") implementation of the Random Testing Standard at Suncor's oil sands and in situ operations in the Regional Municipality of Wood Buffalo ("RMWB") for safety-sensitive and specified positions is a reasonable use of management rights. Suncor's operations in the RMWB are dangerous and this Board heard overwhelming evidence of a profound and ongoing workplace problem with alcohol and drugs at Suncor's operations in the RMWB. There are pressing safety concerns in the RMWB related to workplace alcohol and drugs. Failure to implement the Random Testing Standard could result in potentially serious injuries, fatalities or serious environmental incidents.

I. INTRODUCTION

[3] Safety is paramount at Suncor. Suncor is committed to providing a safe work environment for all workers and for those whose safety may be affected by such workers. Safety is more than a priority for Suncor; it is a core value and a legal imperative. Alcohol and drug policies are only one facet of an overall approach to safety at Suncor.

[4] Suncor's operations in the RMWB are complex, diverse and hazardous. The slightest moment of inattention by a worker can cause serious consequences. The dangerous nature of Suncor's operations was evidenced by the 21 workplace fatalities in the RMWB; including 3 in the last seven years where alcohol and drugs were a known factor.

[5] For over 20 years, alcohol and drugs have posed elevated workplace safety concerns for Suncor in the RMWB. Suncor has taken steps to address the workplace hazards related to alcohol and drugs through progressive incremental measures. Despite comprehensive measures, including: employee education and training; supervisor training; a robust alcohol and drug policy, including post-incident, reasonable cause, return to work and follow-up testing; the provision of the Employee and Family Assistance Program ("EFAP"); treatment for employees with dependencies; and the implementation of interdiction programs through the use of sniffer dogs, both on site and at the camps, the problems associated with workplace alcohol and drug use are pervasive at Suncor's operations in the RMWB and continue.

[6] The evidence of a workplace problem with alcohol and drugs at Suncor's operations in the RMWB is overwhelming. Since the introduction of Suncor's alcohol and drug policy in 2003 in the RMWB, 247 Suncor employees (235 Union employees) have tested positive for alcohol and drugs (Exhibit 91). This includes 149 positive post-incident alcohol and drug tests since 2003. This is especially alarming considering the safety-sensitive nature of Suncor's operations in the RMWB and the fact that the Suncor employees who tested positive were working in very dangerous parts of Suncor's operations (Exhibit 76).

Further, since 2004 there have been 2,276 alcohol and drug-related security incidents recorded within Suncor's operations in the RMWB (Exhibit 63). Alcohol, drugs and drug paraphernalia have been found throughout Suncor's operations and camps in the RMWB, including in the midst of the live operating footprint and in the blast zone. There was evidence of drug trafficking occurring at Suncor's operations in the RMWB. A significant number of Suncor employees have been assessed as having an alcohol or drug dependency (Exhibits 88, 89, 91). Approximately 1,250 active individual site bans are in place relating to alcohol and drug issues. There are ongoing calls to Suncor's integrity hotline and anonymous tips relating to workplace alcohol and drugs. The evidence before this Board also confirmed a problem with alcohol and drugs in the community.

[7] On June 20, 2012, Suncor announced that it was introducing a site-specific Random Testing Standard at Suncor's operations in the RMWB (the "**Random Testing Standard**") as an additional incremental step to address the pressing safety concerns related to alcohol and drugs in Suncor's operations in the RMWB. The Random Testing Standard only applies to Suncor employees in safety-sensitive and specified positions at Suncor's operations in the RMWB. At the same time, Suncor introduced a new Canada-wide harmonized alcohol and drug policy (the "**2012 Alcohol and Drug Policy**") and supporting standards (collectively the "**2012 Harmonized Policy and Standards**", but excluding the Random Testing Standard). It was only the RMWB site-specific Random Testing Standard that was before this Board.

[8] On July 19, 2012, the Communications, Energy and Paperworkers Union, Local 707, now Unifor, Local 707A, (the "**Union**" or "**CEP**") grieved Suncor's implementation of the Random Testing Standard. The grievance stated that "all employees, including those employed at Suncor's Firebag operations, grieve the Employer's decision to institute a random drug and alcohol testing policy" (the "**Grievance**") (Exhibit 2). The Union did not grieve the 2012 Harmonized Policy and Standards. This issue will be discussed in further detail below.

[9] The Supreme Court of Canada confirmed in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Limited*, 2013 SCC 34, rev'g 2011 NBCA 58, rev'g 2010 NBQB 294, aff'g (2009), 189 LAC (4th) 218 (NB Arb) (Veniot) ("**Irving**") that random alcohol and drug testing is reasonable in a dangerous workplace where there is "enhanced safety risks, such as evidence of a general problem" with alcohol and drugs in the workplace: *Irving*, at para. 31. There can be no doubt that the overwhelming evidence in this case meets the test in *Irving*. The Majority's Award was wrong and cannot be sustained based on the evidence before this Board.

[10] This Board heard evidence of a profound problem with alcohol and drugs at Suncor's operations in the RMWB. There has not been a single case decided in Canada addressing random alcohol and drug testing that can parallel the compelling evidence heard by this Board of the alcohol and drug problems and enhanced safety risk at Suncor's operations in the RMWB.

[11] The problems with alcohol and drugs at Suncor's operations in the RMWB have not ceased; Suncor employees working in dangerous parts of Suncor's operations continue to test positive for alcohol and drugs, including following serious incidents or near misses. Since this hearing began (January 2, 2013 to November 7, 2013), 23 Suncor employees (20 Union employees) tested positive for alcohol and drugs, 14 of which were post-incident positive tests (12 Union employees) (Exhibit 91). There have been an additional 227 security incidents relating to alcohol and drugs (January 2, 2013 to August 26, 2013) (Exhibit 63). The alcohol and drug problems at Suncor's operations in the RMWB are serious, and Suncor was justified in implementing the Random Testing Standard. Suncor's current controls were insufficient. There were no less intrusive measures.

[12] Over 23 days of hearing, 19 witnesses, including 4 experts, testified on behalf of the Union and Suncor. A list of witnesses is set out in Schedule 1. A full day site tour was conducted on February 11, 2013 to allow this Board to view Suncor's operations in the RMWB.

[13] In allowing the Grievance, the Majority failed to consider material and relevant facts and was highly selective in its review of the evidence. The Majority also improperly considered evidence that was not before this Board. In addition, the Majority thoroughly reviewed the Union witnesses and expert in their examinations in chief but failed to review their cross-examination testimony. Similarly, the Majority neglected to outline most of the Suncor witnesses' examinations in chief, but focussed on their cross-examination testimony. Because of this selective, incomplete and improper review of the evidence, the evidence before this Board will be reviewed in detail throughout this Dissent.

II. BACKGROUND

Prior Alcohol and Drug Policy Arbitration Award

[14] In 2003, Suncor implemented an alcohol and drug policy (the "2003 A&D Policy"). The 2003 A&D Policy was a comprehensive policy that included education, assistance, treatment and testing. Post-incident, reasonable grounds, follow-up and return to work alcohol and drug testing were included. Drug testing was done through urinalysis and alcohol testing was done through breathalyzer. Two days after the 2003 A&D Policy was implemented, the Union filed a policy grievance (the "2003 Grievance") alleging:

Suncor has implemented a new drug and alcohol policy as of Oct 1st, 2003. They are not following the policy as it is written and have been implementing it in an unreasonable manner. The Policy also has elements to it that are unreasonable i.e. 5.1 (Exhibit 71).

[15] The 2003 Grievance was heard before an arbitration board (the “**Elliott Arbitration Board**”). On September 3, 2008, the Elliott Arbitration Board issued a decision (the “*Elliott Award*”) and concluded that: “[t]he importance of safety at Suncor’s worksite cannot be overstated. The Board is unanimous that neither alcohol nor drugs, nor their effects, have any place in or about the worksite” (Exhibit 15). The undesirable consequences of alcohol and drug use at the worksite, coupled with the nature of Suncor’s worksite, justified the need for an alcohol and drug policy, and in most respects, Suncor’s 2003 A&D Policy was “exemplary”. The Elliott Arbitration Board, however, recommended some refinements to the post-incident testing language. Neither party sought judicial review of the *Elliott Award*. Suncor made the amendments shortly after the decision was rendered in 2008 (the “**2008 A&D Policy**”) (Exhibit 11). This Board heard extensive evidence that since the *Elliott Award*, and despite additional incremental measures, serious safety concerns relating to alcohol and drugs at Suncor’s operations in the RMWB continue.

Overview of Suncor’s Operations in the RMWB

[16] Suncor has significant operations in the Athabasca oil sands located approximately 30 kilometres north of Fort McMurray, Alberta in the RMWB (“**Base Plant**”). In addition, Suncor has in situ operations at MacKay River and Firebag (“**In Situ Operations**”). Over the past fifteen years, Suncor has been involved in a number of major capital expansion projects. These projects were world scale and highly complex. Many of these projects were constructed in the midst of live operating environments.

[17] The Base Plant is approximately 25 kilometers from east to west by 15 kilometres from north to south and is adjacent to the Athabasca River. Individuals work as close as 10 to 20 metres from the Athabasca River and many pipelines containing froth, water, sand, diesel, natural gas and hot water go around and across the Athabasca River.

[18] Suncor’s operations in the RMWB are complex and hazardous with significant risks to workers, property and the environment. Much of the Base Plant is encompassed by a blast zone (Exhibit 20, Tab 1). The blast zone encompasses the majority of the upgrading and energy and utilities areas. The Board witnessed the dangerous nature of the worksite and the operations first hand on the extensive site tour. The hazardous nature of Suncor’s operations in the RMWB is discussed in greater detail at paragraphs 47 to 50 below.

[19] Suncor's operations in the RMWB operate 24 hours a day, 7 days a week and 365 days a year. A number of areas are congested with equipment and workers; however, many workers work in isolation with limited supervision. At any given time, hundreds, if not thousands, of individuals are working within the blast zone. The individuals working at Suncor's operations at the RMWB include employees represented by the Union (the "**Union Employees**"), non-represented Suncor employees ("**Non-Represented Employees**") (together Union Employees and Non-Represented Employees will be referred to as "**Suncor Employees**") and employees of contractor organizations working on site ("**Contractor Employees**"). As of July 1, 2013, there were 3,383 Union Employees working at Suncor's operations in the RMWB. Although there are approximately 2,963 Non-Represented Employees working in Oil Sands and In Situ, many of the Non-Represented Employees do not work in the RMWB (Exhibit 69). At any given time, there are up to 3,400 Contractor Employees on site at Suncor's operations in the RMWB; however, this number fluctuates significantly throughout the year. Contractor Employees can be involved in construction, planned and unplanned maintenance, repairs, long-term maintenance and augmenting mining operations. Contractor Employee numbers often peak during turnarounds and in the winter for seasonal work activities such as tree clearing, muskeg removal and ditching. This Board heard evidence that there is significant integration between Contractor Employees and Suncor Employees working at Suncor's operations in the RMWB. Contractor Employees and Suncor Employees frequently work side by side on Suncor's worksite in the RMWB. The actions of Contractor Employees impact Suncor Employees and vice versa.

III. DECISION

A. Preliminary Issue: Jurisdiction

The Board's Jurisdiction is Limited to the Face of the Grievance

[20] Despite the Majority's assertion at paragraph 196 of its Award, that the Union grieved the "proposed new harmonized drug and alcohol policy", the Union only grieved Suncor's decision to "institute a random alcohol and drug testing policy". The Union did not grieve any other aspects of the 2012 Harmonized Policy and Standards; nor did it grieve Suncor's ability to implement random alcohol and drug testing as part of its management rights or the method of testing, namely urinalysis.

[21] A board's decision must be limited to the face of the grievance and, in this case, to the "reasonableness" of the Random Testing Standard: Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Canada Law Book, 2012), at para. 2:1300; *Saskatchewan (Board of Education) and Allen, Re*, 2005 CarswellSask 1034 (Sask Arb) (Pelton).

[22] Throughout the Majority's Award, it erred in the interpretation and application of Suncor's 2012 Alcohol and Drug Policy and its interrelationship with the supporting standards. Following the merger of Suncor and Petro-Canada on August 1, 2009, both organizations had legacy alcohol and drug policies, including the 2008 A&D Policy that was in place in the RMWB. On June 20, 2012, Suncor announced that it would be introducing the 2012 Harmonized Policy and Standards. Effective October 15, 2012, all Canadian Suncor locations would have one universal alcohol and drug policy with supporting standards. The supporting standards include: the Medication Standard; the Social and Business Hosting Standard; the Alcohol and Drug Testing Standard; and the Substance Abuse Assessment Standard (Exhibits 5, 8, 9, 10). In addition, contractor organizations are required to adhere to Suncor's Contractor Alcohol and Drug Standard (Exhibit 7). As with the 2003 and 2008 A&D Policy, the 2012 Harmonized Policy and Standards are safety-based.

[23] Additionally, due to pressing safety concerns in the RMWB related to workplace alcohol and drug use and abuse, on June 20, 2012 Suncor announced the introduction of the site-specific Random Testing Standard for Suncor's operations in the RMWB effective October 15, 2012 (Exhibit 6). The Random Testing Standard would only apply to Suncor Employees in safety-sensitive and specified positions in the RMWB.

[24] The purpose of the Random Testing Standard is stated in the standard as follows:

Suncor is committed to providing a safe work environment for its Employees and for those whose safety may be affected by its Employees. Suncor recognizes that the use of Alcohol and Drugs can adversely impact a safe work environment. The Alcohol and Drug Policy, this Site Specific Standard, and other Supporting Standards are aimed at ensuring a safe work environment and outline specific responsibilities, requirements and expectations to adequately mitigate the workplace risks associated with Alcohol and Drugs.

The purpose of this Random Testing Standard (herein referred to as the "Standard") is to address and minimize the risks in the workplace associated with Alcohol and Drugs and to ensure that all Employees are Fit for Duty. This Standard supports the Environmental Health and Safety Policy and is only one facet of an overall approach to risk mitigation and safety.

Suncor has identified pressing safety concerns in the Regional Municipality of Wood Buffalo related to Alcohol and Drug use and abuse. Because of the elevated safety risks in this region, Suncor has implemented this Standard to enhance the effectiveness of the Alcohol and Drug Policy and other Supporting Standards and to ensure that the related safety risks are appropriately mitigated [Emphasis added.] (Exhibit 6).

[25] The Majority erred in considering the 2012 Harmonized Policy and Standards and the Random Testing Standard as just one “2012 Policy”. The Random Testing Standard is the only document that refers to and deals with random alcohol and drug testing. The Random Testing Standard is expressly stated to be site-specific to the RMWB. Section 13 of the 2012 Alcohol and Drug Policy makes it clear that site-specific standards are the exception (Exhibit 4). If the Union had concerns with any other component of the 2012 Harmonized Policy and Standards, it could have grieved those elements pursuant to the grievance procedures in the Collective Agreement (Exhibit 1, Article 13). The Majority was also wrong at paragraph 197 of its Award, when it found that Suncor “raised no issue of prejudice or surprise flowing from the Union’s position” on the scope of the Grievance. Suncor specifically confirmed in both its opening oral and written arguments that the Grievance was confined to the Random Testing Standard. This was acknowledged by the Union and accepted by the Board at the outset of the hearing.

[26] The Majority cannot amend the Grievance to conclude it has jurisdiction to consider all of Suncor’s alcohol and drug-related policies and supporting standards. In expanding the scope of the Grievance to cover the “2012 Policy” and the use of urinalysis as it relates to random alcohol and drug testing, the Majority exceeded its jurisdiction.

[27] Furthermore, urinalysis has been used at Suncor since 2003. Union witness, Roland Lefort, confirmed in cross-examination that the Union did not grieve the use of urinalysis in the 2003 Grievance (Exhibit 71). The Union was only concerned with the manner in which the 2003 A&D Policy was being applied. When it came to the methods used to test, Arbitrator Elliott concluded: “[w]e have no quarrel with the technicalities of the test and the appropriate and necessary care for proper labelling, transmission, testing and reporting of samples”: *Elliott Award*, at para. 89. As a result, the *Elliott Award* upheld that the technicalities and method of testing, including urinalysis, was reasonable. This Board heard evidence from Elizabeth Diamond, EH&S Manager at Suncor, that the technicalities and method of testing has not changed since the *Elliott Award*. Alcohol testing continues to be done by way of a breathalyzer and drug testing continues to be done by way of urinalysis. Furthermore, all testing continues to follow the United States Department of Transportation (“DOT”) testing procedures and testing continues to be conducted by a SAMHSA certified lab. If the Union had concerns with the method of testing used by Suncor, such concerns should have been raised long ago: *Imperial Oil Ltd. v CEP, Local 900* (2005), 138 LAC (4th) 122 (Ont Arb) (Picher). The Union is long out of time to grieve pursuant to the Collective Agreement (Exhibit 1, Article 13). In any event, the method and manner of testing was settled by the *Elliott Award*.

[28] The Majority exceeded its jurisdiction by amending and expanding the scope of the Grievance.

B. Random Testing Standard is a Reasonable Exercise of Management Rights

The Majority Misapplied the Test in *Irving*

[29] The Majority misapplied the test articulated by the Supreme Court of Canada in *Irving*. The Majority elevated the test in *Irving* from evidence of a “general problem” with alcohol and drugs in the “workplace” to extreme evidence of a “bargaining unit” problem with alcohol and drugs. The test “made-up” by the Majority was wrong.

[30] Employers can implement alcohol and drug testing policies as part of their broad management rights. The test for assessing whether a rule is justified is set out in *Lumber & Sawmill Workers’ Union, Local 2537 v KVP Co.* (1965), 16 LAC 73 (Ont Arb) (Robinson) (“*KVP*”). The Supreme Court of Canada in *Irving* described “the heart” of the *KVP* test at paragraph 24:

... any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable...

Random Testing Standard is Consistent with the Collective Agreement

[31] The Random Testing Standard is consistent with the Collective Agreement. There is nothing in the Collective Agreement between Suncor and the Union which prevents Suncor from implementing the Random Testing Standard. There are broad management rights in the Collective Agreement (Exhibit 1, Article 3.01). Furthermore, the Union did not challenge Suncor’s right to implement alcohol and drug testing policies as part of its management rights in this Grievance, nor in the 2003 Grievance: *Elliott Award*, at para. 90. Suncor satisfied the first part of the *KVP* test.

Balancing of Interests Approach: Safety Outweighs Privacy

[32] The Supreme Court of Canada in *Irving* began its decision by stating the following regarding the balancing of interests at paragraph 1:

[p]rivacy and safety are highly sensitive and significant workplace interests. They are also occasionally in conflict. This is particularly the case when the workplace is a dangerous one.

[33] The Supreme Court of Canada in *Irving* confirmed that random testing will be justified in safety-sensitive workplaces where there is enhanced safety risk such as evidence of “a general problem” with alcohol and drugs in the workplace: *Irving*, at paras. 31, 37, 41, 45, 51, 52:

[b]ut the dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while

clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

...

But I have been unable to find any cases, either before or since Nanticoke, 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...

...

[t]his is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified. [Emphasis added.]

[34] The competing interests that are engaged in the Grievance are safety and privacy: *Irving*, at paras. 1, 36, 52. As described in greater detail below, the Majority did not properly consider safety in its analysis.

Privacy Rights Are Not Absolute

[35] Random alcohol and drug testing engages an individual's right to privacy. However, employees' privacy rights are not absolute: *Irving*, at paras. 1, 52. Employee privacy interests must be considered within the context of an employer's work environment, including an employer's obligation to maintain a safe work environment. An employee's right to privacy does not outweigh an employer's safety imperative: *R v Cole*, 2012 SCC 53, at para. 52; *Irving*, at paras. 1, 52; *Communication Energy and Paperworkers Union, Local 777 v Imperial Oil Limited*, (27 May 2000) (Alta Arb) (Christian), unreported ("*Strathcona*"), at p. 61.

[36] The *Elliott Award* at paragraph 83 concluded that:

[t]here is no excuse for working while under the influence of alcohol or drugs. Employees are entitled to a safe workplace and employers should take every reasonable step to ensure a safe workplace. Extending the right of privacy so as to impede a justified attempt to keep the worksite free of alcohol and drugs would, as the Court of Appeal has put it, fly in the face of logic. [Emphasis added.]

[37] The privacy interests engaged as a result of the Random Testing Standard must be considered within the context of the competing interest, safety.

[38] The Majority minimized the steps Suncor has taken to ensure that privacy rights are protected. Colin Foley, Vice President of EH&S, testified regarding Suncor's privacy policies and consents, including those relating to alcohol and drug testing (Exhibits 86, 87). Suncor's overarching privacy policy is the Personal Information Privacy Policy. Further, the health and wellness Privacy Standard governs all personal information managed by Health and Wellness (Exhibit 86). Mr. Foley testified that third party contractors used by Suncor, including Driver Check and Shepell FGI, are required to have their own privacy policies, which meet or exceed Suncor's policy and legislative requirements.

[39] On February 11, 2013, this Board visited the new alcohol and drug testing trailer as part of the site tour. The new trailers have been in use since October 2012. None of the Union witnesses who testified before this Board had been tested in the new testing trailers. This Board witnessed firsthand some of the extensive privacy measures undertaken by Suncor to ensure the privacy and integrity of Suncor Employees undergoing an alcohol and drug test. These measures include: sound proof walls; separation between the waiting room and testing rooms; closed doors to toilets (unobserved collections); solid doors that go from ground to ceiling; a radio playing in the background to drain out noise; blinds on the windows; separate entrance and exit doors; and a private room where testing is conducted (Exhibits 52, 53). This evidence was confirmed by Ms. Diamond in her testimony.

[40] Under cross-examination, Union witness, Brenda Sitko, admitted that since her first test in October 2003, the alcohol and drug testing process at Suncor had improved over the years. Ms. Sitko also testified about her testing experiences before the Elliott Arbitration Board. Ms. Sitko acknowledged that she had filed a grievance regarding her 2003 alcohol and drug test but the grievance was never advanced to hearing (Exhibit 18). Ms. Sitko testified that she had been subject to three alcohol and drug tests, all of which were post-incident and were conducted in accordance with Suncor's policies and standards. Ms. Sitko had not been tested since the introduction of the 2012 Harmonized Policy and Standards (or in the new testing trailers).

[41] The Majority's statement at paragraph 229 of its Award that the privacy and confidentiality obligations as it relates to the Random Testing Standard and the 2012 Harmonized Policy and Standards are different than the obligations of medical doctors who are governed by a code of conduct was wrong. No evidence was led regarding medical doctors' obligations nor was it argued by either party. As discussed above, Suncor has extensive privacy policies in place to ensure privacy and confidentiality within health and wellness and the integrated disability management process. These policies were ignored by the Majority in its analysis. Ms. Diamond testified that the health advisors are registered nurses who are governed by their own professional code of conduct. Furthermore, Ms. Diamond testified

that the testing and the review of test results are conducted behind a medical curtain. This Board heard evidence from Ms. Diamond that only the A&D Program Coordinator is provided with the test results at Suncor. Once the A&D Program Coordinator gets the information about a positive test, human resources and the leader are only advised that the Suncor Employee is not cleared to return to work.

[42] One of Suncor's experts, Dr. Beckson, testified that privacy concerns relating to urine testing are addressed by only testing specimens for specific drugs of abuse and not for medical conditions. Any personal information obtained by the Medical Review Officer ("MRO") is confidential and not shared with the employer (other than if the test is positive or negative) and the testing procedure is not unlike that of providing a clinical urine specimen at a doctor's office (Exhibit 58, at para. 185).

[43] Moreover, the Majority failed to review and consider evidence that not one Union witness, including the Union's expert, Dr. Macdonald, raised any privacy concerns with the use of breathalysers or random alcohol testing. The Majority stated at paragraph 273 of its Award that Union witness, Mohammed Al-Dhaby, testified that he felt "panicked" when he was asked to blow into the breathalyser and needed to try three times before succeeding. However, Mr. Al-Dhaby did not raise any "privacy concerns" regarding the alcohol test.

[44] As it relates to drug testing, privacy concerns raised by the Union witnesses were limited to "urine testing" in general, not to random drug testing specifically. Urine testing has been in use since the introduction of the 2003 A&D Policy for reasonable cause, post-incident, return to work and follow-up testing. Urine drug testing for pre-employment testing has also been in place since 2004/2005. Furthermore, no grievances have been advanced by Union Employees or the Union since the *Elliott Award* regarding any privacy concerns relating to alcohol or drug testing or the manner of testing.

[45] Union witnesses, Lori McDaniel and Mr. Al-Dhaby, both acknowledged in cross-examination that they were subject to pre-employment alcohol and drug testing, by way of breathalyzer and urinalysis. They did not object to the pre-employment alcohol and drug testing.

Safety Rights are Significant

Suncor's Operations in the RMWB are Dangerous

[46] The Majority failed to appropriately address how the dangerous nature of Suncor's operations in the RMWB impacts the reasonableness of the Random Testing Standard. The complex and dangerous nature of the operations and worksite in the RMWB were witnessed first-hand by this Board on the site tour on February 11, 2013 and were confirmed by the evidence of all of the witnesses in this hearing.

[47] Based on the evidence this Board heard from Suncor witnesses, and Union witnesses on cross-examination, there are a number of hazards at Suncor's operations in the RMWB, which include high voltage power lines, chemical hazards, radiation sources, high temperature steam, explosives, high pressure piping, and high temperature liquids and gases that can auto-ignite (Exhibit 20, Tabs 9, 19, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42). This Board heard evidence that some of the largest and most complex mining, industrial and upgrading equipment in the world are used at Suncor's operations in the RMWB, including heavy haul trucks that weigh in excess of 400 tons and cable shovels and hydraulic shovels which stand as high as 21 metres tall, which is the height of a five-storey building (Exhibit 20, Tabs 10, 11, 12, 13, 14, 15, 16, 17, 18). Much of the Base Plant is encompassed within a blast zone, an area in which thousands of workers may be working at any given time. This Board heard evidence that the consequences of a leak, explosion or incident may impact more than Suncor and the individuals working at Suncor. The environment, ecosystems and surrounding community could also suffer negative consequences (Exhibit 20, Tab 1). Mike Agnew, Vice President of Operations & Integration, testified that Suncor has comprehensive policies, procedures, standards and training to address safety concerns given the on-site risks (Exhibit 20, Tabs 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 15, 20, 26, 39, 40).

[48] Mr. Foley testified that approximately 10,000 incidents and near misses are recorded in Suncor's Incident Learning and Prevention ("ILP") system every year in the RMWB. The ILP system undergoes frequent review by Suncor to ensure continued improvements. A variety of injuries have been sustained as a result of incidents recorded in the ILP system, including burns, amputations, cuts, pinched limbs, fractures, back injuries, head injuries and fatalities. Mr. Agnew testified that Suncor Emergency Services responds to over 1,500 emergency calls a year at Suncor's operations in the RMWB.

[49] Mr. Foley testified regarding three large fires that occurred at Suncor's operations in the RMWB, which caused significant damage (Exhibits 74, 75). In each of those fires, there was a high potential for serious injury or fatality. This Board was shown a video of the 2005 fire, which demonstrated how quickly fires spread on site and the importance of being able to react quickly and appropriately to emergency situations. In the February 2010 fire in the Upgrader 1, there was a contractor employee in a nearby trailer, and the quick thinking of the workers got him out and kept him from harm. This situation was similar to the BP Texas City incident, where 15 people died while in a trailer near the explosion (Exhibit 75).

[50] Arbitrators and the courts have been unanimous that Suncor's operations in the RMWB are safety-sensitive: *Elliott Award*, at paras. 23, 90; *CEP, Local 707 v Suncor Energy Inc.*, 2012 ABQB 627, at

paras. 23-25 (“*Suncor QB*”) aff’d by 2012 ABCA 373, at paras. 14, 16, 18-19 (“*Suncor CA*”); *Suncor Energy Inc. v CEP, Local 707* (2004), 128 LAC (4th) 48 (Alta Arb) (Jones), at para. 81.

The Majority Failed to Appropriately Consider Safety Concerns

[51] The Majority erred in failing to address and consider the joint obligation of Suncor and the Union in the Collective Agreement to cooperate with the goal of achieving site safety:

14.01 [t]he Company recognizes the importance of and will promote and encourage safety in the Plant for the protection and general welfare of the employees. The Union recognizes its responsibility and will co-operate fully with the Company (Exhibit 1).

[52] Significantly, in its decision, the Majority also failed to consider Suncor’s legislative obligations to ensure the safety of its worksites in the RMWB. Suncor’s legal obligations to maintain a safe work environment, including for its own employees and workers present at its worksite, are entrenched in the *Occupational Health and Safety Act*, RSA 2000, c-O-2, s. 2 (the “*OHS Act*”). This obligation is not limited to the bargaining unit.

[53] Suncor must address hazards such as alcohol and drugs in the workplace. If a workplace hazard is identified, Suncor has a legal obligation to take corrective steps to eliminate or, if not reasonably possible, to control the hazard. In accordance with section 7 of the *Occupational Health and Safety Code, 2009* (the “*OHS Code*”), employers “must assess [their] work site[s] and identify existing and potential hazards”. If a workplace hazard exists, the *OHS Code* requires that the hazard be eliminated or controlled, if elimination is not possible. A failure to identify hazards and take corrective action can result in a conviction under the *OHS Act*, including exposure to significant fines and imprisonment: *R v XI Technologies Inc.*, 2013 ABCA 282, at para. 42; *R v Canadian Consolidated Salvage Ltd.*, 2013 ABPC 120, at paras. 1, 6, 54-60.

[54] Section 217.1 of the *Criminal Code*, RSC 1985, c C-45 (“*Criminal Code*”), imposes a duty on Suncor to ensure a safe work place by imposing on site owners a “legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task”. Failure to comply with the duty under section 217.1 can result in prosecution under the *Criminal Code*.

[55] In *R v Metron Construction Corp.*, 2012 ONCJ 506, aff’d by 2013 ONCA 541 (“*Metron*”), the employer pled guilty to a charge of criminal negligence causing death following the death of four workers. Three of the four workers who died, including a supervisor, had marijuana in their systems at a level consistent with having recently ingested the drug. The plea included a statement that permitting a

person to work under the influence of drugs can be a factor in establishing criminal negligence causing death. Metron was sentenced to a fine of \$200,000. On appeal, the fine was increased to \$750,000 because the previous fine failed to deliver a message on the importance of worker safety, ignored the gravity and circumstances of the offence, failed to send a message of deterrence and undermined the intent and effectiveness of the duty in section 217.1 of the *Criminal Code*.

[56] Joseph Vetrone, Vice President, Integration and Planning, and former Vice President EH&S, testified that alcohol and drugs are a significant workplace hazard at Suncor's operations in the RMWB. Suncor has had safety concerns relating to workplace alcohol and drugs at Suncor's operations in the RMWB for at least 20 years. This was a known pressing safety concern that was acknowledged by the Union and communicated by Suncor to the Union on numerous occasions. This was confirmed in the testimony of Eric Ingle, Vice President HR Business Partners, and Union witness, Mr. Lefort, in cross-examination.

[57] Additionally, the Majority failed to consider the significant evidence of Mr. Foley regarding Suncor's environmental liability and the potential impact on the environment. Suncor is subject to a number of regulatory regimes as it relates to the environment. The penalties imposed under the various legislative regimes, such as the *Alberta Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("*AEPE*"), are severe and include fines and imprisonment. Furthermore, liability can extend to directors of the corporation: *AEPE*, at s. 232.

[58] Mr. Foley testified that the oil sands industry and Suncor face scrutiny with respect to environmental issues. There are a number of oil sands campaigns that get extensive coverage in the media. For instance, in March, 2013 there was a release of pond effluent water into the Athabasca River. The impacts on the river were minimal; however, it became national news with over 2 million hits on social media.

[59] Mr. Foley testified that Suncor's reputation and licence to operate is impacted by its environmental performance. Suncor is accountable with respect to environmental issues to its key stakeholders, who include local residents in Fort McMurray and the surrounding areas and First Nations communities living downstream of Suncor's operations in the RMWB. There are significant environmental risks inherent in Suncor's operations in the RMWB, including those relating to land, air and water. Suncor could be subject to prosecution under environmental legislation. The consequences of an incident at Suncor's operations in the RMWB could be serious in terms of environmental damage. Furthermore, the potential consequences would be far reaching and not simply limited to Suncor and its employees in the RMWB.

Alcohol and Drug Use at Suncor's Operations in the RMWB is a Safety Hazard

[60] All of the Suncor witnesses and experts confirmed that workplace alcohol and drug use poses a significant risk to the safety of workers, the public and the environment. Further, all of the Union witnesses in cross-examination, including Mr. Lefort and the Union expert, agreed that alcohol and drugs have no place in Suncor's operations in the RMWB and that, if someone arrived unfit for work at Suncor due to the use or abuse of alcohol or drugs, they would be very concerned.

[61] There can be no doubt that alcohol and drug use is incompatible with working in Suncor's hazardous operations in the RMWB: *Elliott Award*, at para. 83. Most recently, at paragraphs 21 to 23, Justice Macklin in the *Suncor QB* decision stated:

[t]here is no doubt that much of the work at the Suncor plant involves the use of heavy equipment which is not only dangerous for the users of that equipment but also for those nearby. It is an inherently dangerous workplace and the risk of injury or death is high. Evidence from Suncor includes statistics showing that three fatalities at its plant out of the seven that have occurred since 2000 involved workers who died while under the influence of alcohol or drugs. Further, statistics from Suncor establish that between May 28, 2010 and June 30, 2012, there were over 100 reported security incidents involving alcohol or drugs at its operations. The records clearly indicate ongoing problems with alcohol and drug use among its workforce.

While the Union argues that these statistics include contractors who are not Union members, and therefore do not form a proper basis for implementing a policy of random drug and alcohol testing, I believe it would be naive to think that none of the incidents involved Union members. Drug and alcohol use by all workers, Union members or contractors, is a legitimate concern for Suncor.

I am also satisfied that Suncor's purpose for implementing the new policy is to address and minimize risks associated with the use of alcohol and drugs in the workplace. In short, and as stated by the arbitration board in its decision of September 3, 2008, "the importance of safety at Suncor's worksite cannot be overstated". Indeed, the importance of safety at Suncor's oil sands operation is readily and properly acknowledged by the Union. [Emphasis added.]

[62] Suncor's operations in the RMWB are dangerous. However, as set out in *Irving*, that does not end the analysis: *Irving*, at paras. 20, 31.

There is Compelling Evidence of a "General Problem" with Alcohol and Drugs "in the Workplace"

[63] As stated above, the Supreme Court of Canada in *Irving* confirmed that random testing will be justified in dangerous workplaces where there are enhanced safety risks, such as evidence of "a general

problem” with alcohol and drugs “in the workplace”: *Irving*, at paras. 31, 37, 41, 45, 51, 52. The Majority erred in elevating the onus in *Irving* to require an extreme problem with alcohol and drugs, a causal link between alcohol and drugs and incidents as well as a significant problem with the bargaining unit specifically. That analysis is wrong and contrary to the Supreme Court of Canada’s decision in *Irving*.

Suncor Has Implemented Incremental Safety Measures to Address Pressing Safety Concerns

[64] The Majority failed to properly address the numerous incremental measures that Suncor has undertaken to address the pressing safety concerns relating to alcohol and drugs at its operations in the RMWB. Each of the incremental steps undertaken by Suncor was fundamental to the analysis of the reasonableness of random testing in the RMWB.

[65] The incremental steps taken prior to 2008 were accurately summarized in Suncor’s argument as follows:

- (a) since the early 1980s, a work rule has been in place at Suncor’s operations in the RMWB prohibiting workers from possessing, or consuming alcohol or drugs at the workplace. Mr. Lefort described this as a “common sense rule” in his cross-examination;
- (b) the introduction of EFAP in 1989, which continues to date (Exhibit 127);
- (c) the introduction of Courage to Care to address issues associated with alcohol and drugs in the workplace.

As part of the introduction of Courage to Care, a video was prepared in 2000. The Union introduced this video into evidence. Walter Manning, former Union President, acknowledged in the video that there was a problem with alcohol and drugs at Suncor’s operations in the RMWB and “doing nothing was not an option” (Exhibit 117). Mr. Lefort testified that he agreed with the position of the Union in the video. In the video, Mr. Manning stated:

... As a union of course we have to represent our members and a lot of time was being spent representing members who because of their involvement with drugs and alcohol, performance issues, absenteeism issues, a lot of time and resources were being spent on that and we thought we have to do something differently here.

...

What we are doing differently is we're facing the issue head on. It is historically as I said we would hide the issue and hope that it would go away and what we saw was that taking that course of action was just prolonging the inevitable.

...

And thank you for your support Mike and if you remember that 16 or 18 months ago when we first started talking about this initiative we had some difficulty. The union of course was against drug testing but we knew that doing nothing wasn't an option and together we dialogue this issue and we came up with a pretty much grass roots program between Suncor and Local 707 and I think it's wonderful [Emphasis added.] (Exhibit 117).

Mr. Lefort confirmed in cross-examination that the Union unilaterally withdrew from Courage to Care after the introduction of the 2003 A&D Policy (Exhibit 129);

- (d) the introduction of the 2003 A&D Policy, which was a comprehensive alcohol and drug policy that contemplated education and awareness training, assistance, post-incident, reasonable cause, return to work and follow-up alcohol and drug testing and rehabilitation;
- (e) the introduction of pre-employment testing for all Suncor Employees in 2004/2005;
- (f) in 2005, the introduction of a pre-access alcohol and drug testing requirement for Contractor Employees;
- (g) in 2007, the approval of the use of the rapid site access program by contractors (Exhibit 38); and
- (h) in 2008, Suncor's alcohol and drug policy underwent some revisions to reflect the *Elliott Award* (Exhibits 11, 15).

[66] This Board heard evidence that following the *Elliott Award* in 2008, Suncor continued to have pressing safety concerns related to alcohol and drugs at Suncor's operations in the RMWB. Suncor continued to add incremental steps after 2008 to address these concerns as follows:

- (a) in 2008, in an attempt to address safety concerns associated with drug possession, use and trafficking at the Suncor lodges, Suncor implemented a Drug Interdiction at Suncor Accommodations Procedure (Exhibit 64). The purpose behind this procedure was to detect, intercept and mitigate illegal drug possession, use and trafficking in or at the Suncor lodges through the use of sniffer dogs; and

- (b) in 2009, Suncor implemented an Alcohol Free Lodge Policy at Suncor's lodges (Exhibit 67).

[67] This Board heard evidence from Mr. Vetrone in 2009 that a further risk assessment in accordance with occupational health and safety legislation was performed assessing alcohol and drugs as a workplace hazard in the RMWB (Exhibit 20, Tab 3). Assessing the combination of frequency through significant finds and positive alcohol and drug tests, in combination with the potential consequences, including fatalities, it was concluded that safety risks associated with alcohol and drugs were a risk rank 1, the highest risk rank on Suncor's risk matrix (Exhibit 20, Tab 3). Hazard assessments with a risk rank 1 are elevated to the executive leadership team at Suncor, including the Chief Executive Officer. Once alcohol and drugs were determined to be a risk rank 1, Suncor reviewed existing controls and considered what additional controls could be implemented to address the hazards.

[68] Mr. Vetrone indicated that following Suncor's review of the controls, it was determined that the alarming safety concerns with alcohol and drug use within the workplace in the RMWB continued. As a result, Suncor introduced the next incremental step in June 2011, the Drug Interdiction at Suncor Sites Procedures (the "**Site Interdiction Procedure**") (Exhibit 65). Through the use of sniffer dogs, the Site Interdiction Procedure is intended to ensure the safety of all workers, the public and the environment by minimizing the hazards associated with the possession, use, storage, distribution or trafficking of alcohol and drugs in Suncor's operating footprint. Signs that sniffer dogs are used on site are prominently displayed throughout Suncor's operations in the RMWB (Exhibit 66).

[69] The Site Interdiction Procedure only applies to Suncor's operations in the RMWB given elevated safety concerns related to alcohol and drugs. Mr. Ingle testified that as with the introduction of the 2003 A&D Policy, the Union immediately grieved the Site Interdiction Procedure on June 21, 2011, a day after it was implemented (Exhibit 72). The Union only withdrew the Site Interdiction Procedure towards the end of this hearing on September 18, 2013 (Exhibit 124).

[70] As demonstrated above, the Majority's statement at paragraph 271 of its Award that "Suncor's more recent measures [are] ones that relate to detection of drugs and alcohol at its bunkhouses or 'Lodges'" was wrong. The Majority failed to adequately consider the introduction of significant incremental steps, including the Site Interdiction Procedure in 2011 and the data collected as a result (Exhibits 63, 65, 68, 76).

[71] Mr. Vetrone confirmed that following the introduction of the Site Interdiction Procedure, Suncor continued to have an alarming number of positive alcohol and drug tests and continued to find alcohol,

drugs and drug paraphernalia, further escalating Suncor's concerns that alcohol and drugs were a pressing safety concern in the RMWB and additional controls were necessary.

[72] As each additional incremental measure was implemented, Mr. Ingle testified that there was ongoing dialogue with the Union regarding the pressing safety concerns related to alcohol and drugs at Suncor's operations in the RMWB. This dialogue occurred at formal meetings, whenever there was a positive alcohol and drug test, whenever a Last Chance Agreement was entered into, and every time a new incremental control was put in place, like the 2003 A&D Policy, the 2008 A&D Policy and the Site Interdiction Procedure. In cross-examination, Mr. Lefort acknowledged this ongoing dialogue (Exhibit 130).

[73] Mr. Ingle testified that the Union has grieved every significant control that Suncor has put in place in the RMWB to address pressing safety concerns related to alcohol and drugs. Mr. Lefort also acknowledged in cross-examination that the Union, including the CEP National (now Unifor), has a stated public opposition to any form of alcohol and drug testing (Exhibits 117, 133).

Suncor Provides EFAP and Substance Abuse Treatment

[74] Ms. Diamond testified regarding the measures Suncor has in place to assist employees with alcohol and drug dependencies. Suncor engages in extensive education and training of Suncor Employees to promote awareness of EFAP (Exhibit 50). Ms. Diamond testified that in 2012, over 600 Suncor Employees accessed EFAP in the RMWB.

[75] Ms. Diamond explained Suncor's Substance Abuse Assessment Standard (Exhibit 10). Effective June 20, 2012, Suncor began paying for the costs of recommended treatment programs. Prior to June 20, 2012, costs were paid by Suncor on an ad hoc basis. Suncor Employees can self-refer or may be referred for a mandatory substance abuse assessment following a failed alcohol or drug test. A similar process was in place under the 2003 and 2008 A&D Policy. If a Suncor Employee is assessed as dependent, a substance abuse professional ("SAP") will recommend a course of treatment, and provide recommendations for aftercare. Suncor Employees participating in treatment are eligible for disability benefits. Following treatment, the Suncor Employee undergoes a post-treatment assessment, must pass a return to work alcohol and drug test and is required to participate in an aftercare monitoring program that normally includes unannounced follow-up testing, on a schedule and frequency recommended by the SAP.

[76] Ms. Diamond testified that the majority of dependent Union Employees return to work following treatment. In 2010, 2011 and 2012, 34, 36 and 42 Union Employees, respectively, were actively being

accommodated through Last Chance Agreements in the RMWB for alcohol and drug issues (Exhibit 51). These are all Union Employees who have tested positive for an alcohol or drug test and then returned to work. This evidence was not reviewed by the Majority.

Suncor Has Extensive Education & Training Programs

[77] The Majority failed to properly consider the extensive ongoing safety training and education, including specifically with respect to alcohol and drugs, of Suncor's work force since the early 2000s.

[78] Anne Marie Toutant, Vice President Optimization and Integration for Oil Sands, testified that the comprehensive safety programs at Suncor's operations in the RMWB start with Suncor's Environment, Health and Safety ("EHS") Policy and Statement (Exhibit 21, Tabs 2, 3; Exhibit 73). Ms. Toutant testified that safety is more than a priority for Suncor; it is a core value. New safety policies are constantly created and old ones amended to meet current needs and concerns (Exhibit 21, Tabs 3, 4). Alcohol and drug testing is only one facet of a comprehensive approach to safety.

[79] Ms. Toutant explained that all new Suncor Employees and Contractor Employees undergo a number of orientations, including the General Health and Safety Orientation and any business area specific safety orientations (Exhibit 21, Tabs 6, 7, 8, 9, 10). In orientations, Suncor's mission, values, Journey to Zero and Life Saving Rules are reviewed. EFAP, alcohol and drug policies and interdiction programs are also reviewed. Since January 2006, every new Suncor Employee is required to complete the EHS Learning Unit, which includes training on how to manage risk, how to identify and control hazards, safety communications, alcohol and drug policies and the Life Saving Rules (Exhibit 21, Tabs 11, 12).

[80] Ms. Toutant testified about Suncor's introduction of the "Journey to Zero" program in the early 2000s. The goal of Journey to Zero is for Suncor to be free of incident and injury (Exhibit 21, Tab 13). As part of the roll-out of Journey to Zero and in order to educate Suncor Employees regarding the program, a number of workshops have been held for all Suncor Employees in the RMWB. Follow-up sessions and training continue to be held to date. Journey to Zero continues to be a significant focus at Suncor today. Some of the training and communications on Journey to Zero included (and continue to include): walk-about; presentations; orientations; EHS Learning Unit; posters and signage; safety moments; safety meetings; web-based training; communications to Suncor Employees; and all Suncor Employee emails (Exhibit 21, Tabs 14, 15, 16, 17, 18).

[81] Ms. Toutant testified that Suncor provided extensive education and training regarding the 2003 A&D Policy (Exhibit 21, Tabs 19, 20, 21, 22). There was also specific training for supervisors regarding how to apply the 2003 A&D Policy (Exhibit 21, Tab 25).

[82] Suncor continued with its extensive efforts to educate and train Suncor Employees and supervisors regarding the 2008 A&D Policy and the availability of assistance for alcohol and drug problems (Exhibit 21, Tabs 23, 24, 25, 26). Ms. Toutant testified that Suncor Employees are consistently and regularly reminded of Suncor's alcohol and drug policy and the availability of EFAP. Some of these reminders include:

- (a) the alcohol and drug policy and EFAP are reviewed in orientation;
- (b) the alcohol and drug policy is reviewed in the EHS Learning Unit;
- (c) the introduction of Suncor's 10 Life Saving Rules, which includes the requirement to follow the alcohol and drug rule;
- (d) employee notices and bulletins placed throughout Suncor's operations in the RMWB reminding employees of the alcohol and drug rule and the availability of EFAP;
- (e) presentations to Suncor Employees at monthly safety meetings, tool box talks and radio communications on alcohol and drug issues and EFAP;
- (f) supervisor training and education on alcohol and drug policies and EFAP;
- (g) signage and brochures located throughout Suncor's operations in the RMWB reminding Suncor Employees of EFAP, the life saving rules and the prohibitions against alcohol and drugs in the workplace;
- (h) Suncor's 360 magazine, an internal communication for Suncor Employees, and Suncor's intranet system, the CORE;
- (i) safety moments and safety reflections; and
- (j) the inclusion in the EHS Policy of the requirement that all employees "must arrive and remain fit for duty according to the terms of Suncor's alcohol and drug policy" (Exhibit 21, Tabs 6, 7, 11, 30, 31, 32, 33, 34, 35, 36, 37, 38; Exhibits 50, 79).

[83] Ms. Toutant gave evidence regarding the introduction of the Life Saving Rules at Suncor's operations in the RMWB in 2009. The Life Saving Rules include the requirement to "follow the alcohol and drug rule by arriving fit for duty" (Exhibit 21, Tabs 27, 28). Following the creation of the Life Saving Rules, Suncor again undertook an extensive education and training campaign. In November 2010, a letter was sent to each Suncor Employee's home in the RMWB outlining the 10 Life Saving Rules and

reinforcing the significance of these rules to achieve the “goal of eliminating all occupational injuries at our worksite” (Exhibit 21, Tab 29). A lanyard tag was enclosed with each letter that included the Life Saving Rules. Signs are permanently and prominently posted throughout the workplace (Exhibit 21, Tabs 6, 7, 11, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38).

[84] The Majority was wrong at paragraph 250 of its Award in concluding that alcohol and drug training provided to the Suncor Employees was inconsistent. There was no evidence before this Board to support such a conclusion, nor was this raised in argument by either party. The evidence of Ms. Toutant was uncontroverted. The Majority failed to distinguish between Suncor’s alcohol and drug testing policies and Suncor’s other education campaigns. In any event, there is no inconsistency. The Life Saving Rules simply incorporate, as one of the rules, a requirement to follow the alcohol and drug policy. As described above, Suncor provided its employees and supervisors’ extensive training specifically on the 2003 A&D Policy and the 2008 A&D Policy. Similarly, Suncor provided additional training during the roll-out of the 2012 Harmonized Policy and Standards (Exhibits 19, 78, 80, 85, 126).

[85] The Majority’s comments at paragraph 334 of its Award regarding the “contradictory messaging” as it relates to the new “Fit for Duty” standard introduced following the *Elliott Award* was wrong. The 2008 A&D Policy and the 2012 Harmonized Policy and Standards are both safety based policies that address the concept of fitness for duty. There was no change in this aspect of the alcohol and drug policies. In 2008, the only change made to the 2003 A&D Policy was with respect to post-incident testing. The *Elliott Award* found that the 2003 A&D Policy was otherwise exemplary. In any event, the Board exceeded its jurisdiction. The Grievance is limited to findings as it relates to the Random Testing Standard.

[86] Further, the Majority’s statement at paragraph 67 of its Award that Mr. Lefort gave evidence that there were 70 outstanding individual grievances “that are in the grievance procedure but yet to be resolved” was wrong and was not the evidence before this Board. Mr. Ingle testified that following the *Elliott Award*, the Union did not file any policy grievance challenging any aspects of the 2008 A&D Policy or the manner in which Suncor was applying the policy. Furthermore, Mr. Ingle testified that the Union did not take any steps to advance any individual grievance relating to alcohol and drugs despite there being 70 outstanding individual grievances going back as far as 2003 in relation to alcohol and drug testing matters that have been held in abeyance for years. Mr. Lefort confirmed on cross-examination that the Union had taken no steps to advance any of these grievances. The Majority stated that Mr. Lefort testified that in 2012, the Union identified 5 grievances that it would pull out and put back into the

grievance process. However, the Majority ignored that Mr. Lefort confirmed in cross-examination that no steps were taken by the Union to advance those 5 grievances to arbitration.

[87] The fact that no individual or policy grievances have been advanced to hearing since 2008 relating to the 2008 A&D Policy demonstrates that Suncor Employees have a clear understanding of the 2008 A&D Policy and any expectations placed on them as a result of that policy. Further, there have been no privacy concerns raised with the alcohol and drug testing.

Compelling Evidence of a Problem at Suncor's Operations in the RMWB

[88] As set out above, the Supreme Court of Canada in *Irving* confirmed that random testing will be justified in a dangerous work environment where there is enhanced safety risk such as evidence of a general problem regarding alcohol and drugs in the workplace. Suncor's operations in the RMWB are dangerous. Further, the evidence in this case overwhelmingly demonstrated evidence of increased safety risks due to an alcohol and drug problem at Suncor's operations in the RMWB. However, the Majority failed to consider much of this evidence and instead, was selective in what evidence it relied on.

[89] This Board heard compelling evidence about alcohol and drug concerns at Suncor's operations in the RMWB which indicate that, despite Suncor's efforts, alcohol and drugs continue to pose an ongoing serious safety hazard. This evidence is summarized at paragraphs 90 to 121 below.

Positive Alcohol and Drug Tests

[90] There have been 247 positive alcohol and drug tests for Suncor Employees from October 1, 2003 to November 7, 2013 (Exhibit 91), which includes:

- (a) 36 positive reasonable cause tests;
- (b) 149 positive post-incident tests;
- (c) 34 positive follow-up tests; and
- (d) 28 positive return to work tests (Exhibits 88, 89 and 91).

[91] Significantly, 149 of the positive tests occurred after a Suncor Employee was involved in an incident, near miss or other potentially dangerous occurrence where there was no credible explanation for the incident. In each case, the Suncor Employee was tested because it could not be ruled out that alcohol or drugs did not play a factor in causing the incident or near miss pursuant to the 2008 A&D Policy or the 2012 Harmonized Policy and Standards.

[92] Mr. Foley testified that Suncor Employees who tested positive work within the operating footprint of Suncor's operations in the RMWB where the slightest moment of inattention could cause serious adverse consequences. The location of where the Suncor Employees who tested positive worked was mapped on Exhibit 76. Contrary to the Majority's assertions at paragraph 252 of its Award, the Suncor Employees who tested positive were at the time of the incident or near miss working in very dangerous parts of Suncor's operations.

[93] This Board heard evidence that 95% of the positive alcohol and drug tests (235/247 positive tests) were for Union Employees from the period of October 1, 2003 to November 7, 2013. 96% of the positive post-incident tests (143/149 positive tests) were for Union Employees.

[94] Since 2009, there have been 138 positive alcohol and drug tests, including 23 reasonable cause tests (19 Union Employees); 87 positive post-incident tests (84 Union Employees); 17 positive follow-up tests (16 Union Employees); and 11 positive return to work tests (11 Union Employees).

[95] Since this hearing commenced on January 2, 2013, there have been 23 positive alcohol and drug tests up to November 7, 2013 (20 Union Employees) (Exhibits 89, 91).

[96] From January 1 to June 30, 2013, 58% of the positive tests tested positive for cocaine; 17% for marijuana; 17% for amphetamines; and 8% for alcohol. During the period of July 1, 2013 to September 18, 2013, 63% of the positive drug tests were positive for cocaine and 45% of the positive alcohol and drug tests during the same time frame tested positive for polysubstances (Exhibits 88, 89 and 91). The Majority failed to consider the evidence that there is a significant problem with other drugs, including cocaine. Suncor does not simply have a problem with marijuana at its operations in the RMWB as suggested by the Majority. The Majority also ignored concerns with polysubstance use and its impact on safety.

[97] In the one week period from September 1, 2013 to September 8, 2013 alone, 3 Union Employees tested positive for both cocaine and marijuana and 1 Union Employee tested positive for cocaine.

[98] The drug tests are not testing positive at the margin of the cut-offs set out in the Alcohol and Drug Testing Standard. Many of the drug tests are testing positive at levels that are significantly above the cut-offs. Of the 124 positive drug tests between January 1, 2005 and October 15, 2012 where levels were known, 117 of the drug tests were more than 200% of the cut-off level set out in the 2008 A&D Policy. Of those positive tests that were more than 200% of the cut-off:

- (a) 24 were between 200% and 500% of the cut-off;

- (b) 23 were between 500% and 1,000% of the cut-off;
- (c) 19 were between 1,000% and 2,500% of the cut-off;
- (d) 18 were between 2,500% and 5,000% of the cut-off; and
- (e) 33 were more than 5,000% of the cut-off (Exhibit 88).

[99] It is important to note that the testimony of Dr. Kadehjian and Dr. Beckson was that the low doses of drugs used in controlled-dosing studies are not representative of the higher doses used in real world settings (Exhibit 48, at pp. 5-6; Exhibit 58, at pp. 26-29). As a result, given that real world doses are higher than those used in experimental studies; conclusions on performance deficits would underrepresent what happens in the real world.

[100] Furthermore, the above data regarding the number of positive alcohol and drug tests does not include refusals. For example, Mr. Agnew testified that in March 2012, a furnace overheated in the diluent recovery unit in Plant 57 (in the blast zone) during the shutdown on the unit. A Union Employee pulled hydrocarbon from the furnace and there was a miscommunication between Union Employees. A fire resulted and the furnace melted. The Union Employee involved refused to take an alcohol and drug test (Exhibit 20, Tab 41).

Alcohol, Drugs and Drug Paraphernalia

[101] This Board heard extensive evidence of security incidents related to alcohol and drugs at Suncor's operations in the RMWB from Grant MacPhee, Senior Security Advisor at Suncor. Mr. MacPhee worked with the RCMP for 29½ years in drug enforcement prior to joining Suncor in February 2008. While with the RCMP, Mr. MacPhee was trained on the identification of drugs and drug paraphernalia and has been qualified by the courts as an expert in drug identification. Mr. MacPhee testified that drugs, including cocaine, crack cocaine, marijuana, ecstasy, cannabis resin (weed oil/hash), methamphetamines, and prescription pills like oxycodone have been found at Suncor's operations in the RMWB, including within the operating facilities and within the blast zone. Furthermore, drug paraphernalia such as drug kits, weigh scales, pipes, syringes, rolling papers, hoses and hot knives have also been found. Alcohol is commonly found on site.

[102] Mr. MacPhee testified about a number of measures used by workers at Suncor's operations in the RMWB to evade detection for drugs, such as: (i) concealing drugs in public areas (stash sites) such as: roof panels; vents; bushes; bathrooms; stairways; parking lots; and areas within the operating footprint, such as between beams; in lunch rooms; under pallets; in C-cans; and under bleachers; (ii) packaging drugs with camouflage agents, such as: Bounce sheets; peppers; coffee; cayenne pepper; several layers of

bags; and “smelly proof” bags; (iii) the use of unique containers to hide drugs such as: mason jars; containers with false bottoms and flashlights; and (iv) the presence of devices used to defeat drug tests such as whizzinators or bottles of urine.

[103] Mr. MacPhee testified that there have been 2,276 reported security incidents related to alcohol and drugs from 2004 to August 26, 2013 at Suncor’s operations in the RMWB; with 1,813 of the incidents occurring since 2009 and 227 incidents occurring since this hearing started, on January 2, 2013, to August 26, 2013. Many of these alcohol, drug and drug paraphernalia finds are in the midst of live operating environments, including within the blast zone and on equipment operated by Union Employees (Exhibits 63, 68, 76).

[104] Alcohol, drugs and drug paraphernalia have been found within the operating footprint at least 83 times since 2009, including within the blast zone (Exhibits 63, 68).

[105] There were over 1,400 reported incidents related to alcohol, including over 135 security incidents where individuals were suspected of intoxication and, since 2009, there were approximately 40 security incidents involving impaired driving (Exhibits 63, 68).

[106] The Majority minimized the extensive security evidence discussed above. However, this evidence is real and cannot be ignored. This Board witnessed firsthand some of the locations of where alcohol, drugs and drug paraphernalia were found within the operating foot print and the blast zone during the site tour. This Board also heard evidence and reviewed pictures of some of the significant alcohol and drug finds (Exhibits 63, 68, 76). Mr. MacPhee reviewed the representative significant finds in detail, which showed that alcohol, drugs and drug paraphernalia were pervasive at Suncor’s operations in the RMWB. Some of the 2,276 security incidents included:²

² See also Exhibit 63: May 2009, a bag with what appeared to be marijuana was found in the KMC lunchroom at Plant 300 at Base Plant, which is in the operating footprint; June 2010, an empty bottle of vodka was found in the Millennium Mine at MD2 Shift Change Road at Base Plant, which is in the operating footprint; June 2010, a bag of marijuana was found on the floor in the CMS lunch room at Base Plant, which is in the operating footprint and within the blast zone; September 2010, a sniffer dog alerted to 2.5 grams of marijuana hidden beneath the bleachers at the baseball diamond on the Firebag Site, which is in the operating footprint; December 2010, a crack pipe was found in a toque in a contractor vehicle in Energy & Utilities at Base Plant, which is in the operating footprint and is within the blast zone; January 2011, an empty bottle of tequila was found in the men’s washroom beside a toilet at the Firebag Aerodrome, which is within the security area that includes the operating footprint; April 2011, pictures of a potential marijuana grow operation were found in a terminated Suncor Employee’s locker in the Extraction East Tailings Building at Base Plant in the operating footprint; April 2011, a bottle of wine was found on Pad 23 at Firebag, which is in the operating footprint; April 2011, an empty whiskey bottle was found on the side of the north road to Pad 25 at the Drilling and Completions Camp, which is in the operating footprint; June 2011, an individual was witnessed smoking a marijuana pipe on the south side DSU lunch room at the Firebag Site, which is in the operating footprint; June 2011, a substance that appeared to be marijuana was found in a cupholder in a haul truck at the Plant 86 Batch Plant at Base Plant, which is in the operating footprint; July 2011, marijuana was discovered in the lunchroom on the Stage Three Construction Site at the Firebag Site, which is in the operating footprint; July 2011, a pipe was found sitting on a ceiling tile in the Millennium Naptha Unit 400 man lunchroom at Base Plant, which is in the operating footprint and within the blast zone; July 2011, during a routine sniffer

- April 2009, suspicious pills were found at shift change by a Union Employee in a 224 haul truck at the Millennium Mine at Base Plant, **which is in the operating footprint**. Mr. MacPhee testified that the pills were found in a “one grammer” bag, which are commonly used for the distribution of drugs;
- October 2009, a heavy hauler rear-ended another heavy hauler on the Oil Sands Expressway at the Base Plant, **which is within the operating footprint**. A search of the Suncor Employee’s personal effects was conducted and drug paraphernalia was found, including razor blades with drug residue. A sniffer dog alerted positive for the presence of drugs on the items found;
- July 2010, marijuana, a drug pipe and a lighter were found in a Union Employee’s locker in the Steepbank Mine Complex at Base Plant, **which is in the operating footprint**;
- August 2010, a ziploc bag containing cocaine was found on the Firebag Stage 3 Construction Site near the smoke area near a trailer, **which is in the operating footprint**. Mr. MacPhee testified that the cocaine was found in a “one grammer” bag, which are commonly used for the distribution of drugs;
- September 2010, cocaine and a glass pipe were found on an I-Beam in Plant 54 at Base Plant in the Upgrading U-2 Hydrogen Plant, **which is in the operating footprint and within the blast zone**. Mr. MacPhee testified that the cocaine and drug paraphernalia were found in a “drug kit”. Drug kits are used by people who consume on a regular basis, not one-time users;

dog search, approximately 39 grams of marijuana in 2 separate ziploc bags wrapped in bounce sheets and multiple layers of plastic was found on the Firebag Site in a contractor trailer, which is in the operating footprint; August 2011, a glass pipe was found at the bottom of the stairs of the DSA (8 stack) at the Firebag Site, which is in the operating footprint; August 2011, after a routine search, a sniffer dog alerted to a back pack hanging on the back of a chair in a contractor lunch room at the Firebag Site, which is in the operating footprint. Approximately 21 grams of marijuana contained in 6 different ziploc bags, rolling papers and a skull shaped marijuana grinder were found in the back pack. Mr. MacPhee testified that this is not a consumer but a seller of marijuana. The bags were marked with different numbers and were sample bags with different flavours; September 2011, marijuana was found in a tent in Area 8000 at the Firebag Site, which is in the operating footprint; September 2011, an empty bottle of vodka was found when cleaning the locker of a terminated Suncor Employee at the CMS at Base Plant, which is in the operating footprint and within the blast zone; October 2011, a sniffer dog alerted to a sweater hanging in a coat room in the lunch room building near Pump House C in the mine/extraction area at Base Plant, which is in the operating footprint. 4 grams of marijuana and a pipe were found; November 2011, a sniffer dog alerted to a backpack sitting on a bench in the Canonbie Yard at the Firebag Site, which is within the operating footprint. Rolling papers with some residue and loose tobacco which contained some marijuana flakes and stems were found; January 2012, an empty bottle of rum was found on the road in the mine at Base Plant, which is in the operating footprint; January 2012, a bottle of scotch was found in an office in CCMT2 at the Voyageur Upgrader, which is in the operating footprint; January 2012, a sniffer dog alerted to a backpack hanging on the back of a chair in a lunch room in the Canonbie Lunchroom at the Firebag Site, which is within the operating footprint. A ziploc bag containing 2.3 grams of marijuana and another bag containing 2.2 grams of hash were found; February 2012, a sniffer dog alerted to an area in the storage yard at the Firebag Site, which is in the operating footprint. A ziploc bag with 6 marijuana roaches was found; July 2012, a smell of marijuana was detected in the co-gen area at the Firebag Site, which is in the operating footprint. A sniffer dog alerted to a metal frame under the building and a plastic bag with marijuana residue was found; February 2013, baggies with flakes of marijuana were found in the garbage in the mens’ washroom at the Coker Complex at Base Plant, which is in the operating footprint and is within the blast zone.

- October 2010, drug paraphernalia was found near the CMD building in Upgrading at Base Plant, **which is in the operating footprint and is within the blast zone.** The CMD building is across from the Plant 68 Sulphur Pit;
- January 2011, a marijuana joint was found in a Suncor haul truck in the Millennium Mine at Base Plant, **which is in the operating footprint;**
- January 2011, a search of a Union Employee at the Millennium Mine at Base Plant, **which is in the operating footprint,** revealed a urine collection device with urine inside. The Union Employee admitted that it was a masking device to attempt to defeat alcohol and drug tests;
- April 2011, a case of beer containing 15 unopened cans of beer was found on the ground north of the rat-hole at the Old Mine Overpass, **which is in the operating footprint;**
- May 2011, a Suncor Employee was looking for a tool and opened a C-can near Plant 85 OPPS and detected a strong odour of marijuana. A marijuana roach was found. Plant 85 OPPS is at Base Plant, **which is in the operating footprint;**
- July 2011, approximately a 1/2 ounce of marijuana and rolling papers were found in a contractor backpack in a trailer in Major Projects Yard 5 at Base Plant, **which is in the operating footprint.** The marijuana was contained in a vacuum-packed bag to avoid detection;
- July 2011, during a routine search at the Millennium Naptha Unit Construction site at Base Plant, a sniffer dog alerted to a pallet beside a wash car **within the upgrader operating footprint and within the blast zone.** Two grams of marijuana were found;
- October 2011, rolling papers and a drug pipe were found on a table in the Plant 85 OPP A tool crib at Millennium Primary Extraction at Base Plant, **which is in the operating footprint;**
- March 2012, a sniffer dog alerted to a Union Employee's locker in the Steepbank Mine Complex at Base Plant, **which is in the operating footprint.** Marijuana flakes were found in the locker in his clothing pockets;
- March 2012, a marijuana joint was found by a Union Employee in the vent under the seat of a Suncor backhoe in the Millennium Mine at Base Plant, **which is within the operating footprint;**
- April 2012, a bag containing what appeared to be marijuana was found in the CM-FO-09 parking lot on the Voyageur Upgrader Site, **which is in the operating footprint;**
- April 2012, cigarettes and a suspected marijuana roach were found in the coker fab shop at Base Plant, **which is in the operating footprint and is within the blast zone;**

- September 2012, an unopened can of beer was found by a Suncor Employee inside the dash area, behind the glove box, in a services vehicle that was taken into the LVF Shop at Firebag, **which is in the operating footprint**;
- November 2012, a sniffer dog alerted to a Union Employee's locker in the men's locker room in the Extraction East Tailings Building at Base Plant, **which is in the operating footprint**. Marijuana flakes and stems were found;
- April 2013, a Suncor Employee found a drug pipe on site at Pond 8A at the East Tailings Complex at Base Plant, **which is in the operating footprint**;
- April 2013, a Suncor Employee found an empty alcohol bottle on site at the Coker Complex at Base Plant, **which is in the operating footprint and is within the blast zone**;
- May 2013, security received a report that an alcohol bottle was seen in the passenger door of a vehicle on site at the East Tank Farm at Base Plant, **which is in the operating footprint and is within the blast zone**;
- July 2013, a sniffer dog alerted to a trailer in the yard beside the Coker Fab Shop at Base Plant, **which is in the operating footprint and is within the blast zone**. Three marijuana roaches were found under the trailer tucked between roles of plastic sheeting; and
- July 2013, a glass drug pipe was found on the ground at Pad 108 at the Firebag Site, **which is in the operating footprint**.

[107] The Majority minimized the evidence contained in the security incident report at paragraphs 253 to 257 of its Award by cherry picking from the security incidents. The Majority cannot reduce the enormity of the problem and the impact of this evidence. Of particular concern, Exhibit 76 showed the location of some of the significant alcohol, drug and drug paraphernalia finds. This demonstrated that alcohol, drugs and drug paraphernalia are being found in very hazardous parts of Suncor's operations in the RMWB, including the blast zone. Moreover, the Majority's statement at paragraph 54 of its Award that the RCMP are not contacted following an alcohol and drug find was wrong and inconsistent with the evidence provided by Mr. MacPhee and the interdiction procedures themselves. All seized drugs or drug paraphernalia are reported to the RCMP and placed into a storage locker to be picked up by the RCMP (Exhibit 64, at s. 5; Exhibit 65, at s. 5).

Numerous Suncor Employees have been Assessed as Dependent

[108] The Majority failed to appropriately consider and apply Suncor's evidence relating to dependency assessments.

[109] Dr. Mace Beckson, a licenced physician, who is Board Certified in Psychiatry, Addiction Psychiatry, Forensic Psychiatry, and Addiction Medicine, testified on behalf of Suncor. Dr. Beckson has published research in peer reviewed scientific journals and has done clinical work with individuals with substance use and abuse issues. Dr. Beckson has worked as a research psychiatrist, has served as a director of clinical trials, studied potential treatments, was a co-director of a brain imaging program (using MRI and PET scans) and has done studies on the effects of drugs on the brain. In these programs, Dr. Beckson used urine drug testing with a SAMHSA-certified lab. Dr. Beckson is a MRO and has been certified by the American Society of Addiction Medicine (Exhibit 58).

[110] In his evidence, Dr. Beckson testified about substance dependency assessments. Dr. Charles Els, a psychiatrist from Edmonton, sat in on the testimony of Dr. Beckson on behalf of the Union. However, the Union did not to file an expert report for Dr. Els and did not call him as an expert. Dr. Beckson's evidence on addiction was uncontroverted. Further, Dr. Beckson was the only expert who reviewed Suncor's alcohol and drug testing data and Suncor's data on alcohol and drug dependencies.

[111] Dr. Beckson testified regarding the serious safety risks associated with alcohol and drugs addicts working at Suncor's operations in the RMWB. In the last 3.5 years, 96 Suncor Employees have been assessed as having an alcohol or drug dependency (Exhibits 88 and 89), including 40 in 2012. In Dr. Beckson's expert opinion, 40 addicted employees in a safety-sensitive workplace is compelling evidence of more than "a general problem" with Suncor's workplace; it is evidence of an endemic problem. As Dr. Beckson noted in his expert report and in his testimony before this Board:

[a]gain, these high risk employees were addicted for a substantial period of time prior to their detection, undoubtedly including multiple instances of being at work with significant alcohol- and drug-use-related performance deficits.

...Having 40 addicted employees in a safety-sensitive workplace is very concerning.

The number one priority of an addicted individual is using the substance(s) to which the individual is addicted; everything else has a lower priority. Of specific relevance to Suncor, workplace safety has a lower priority than substance use for the addicted employee.

Intoxication, carry-over effects, and chronic effects of their substance use overlap with their workdays and affect their work performance. Based upon my clinical experience and training, the addicted employee can be expected to be at work repeatedly with significant performance deficits. The risk of having an incident rises over time as the addiction worsens and performance becomes progressively more affected.

In addition to the addicted employees identified in 2012, undoubtedly there are many other addicted employees who have not come forward or tested positive. These are the addicted employees who are not ready to change (e.g., in the precontemplative or contemplative stages). Addicted individuals who are not ready to change continue to use substances frequently and in large amounts. They repeatedly come to work in an unfit state. Their performance deficits elevate the risk of human error, in turn elevating the risk of incidents and injuries. These addicted employees maintain secrecy around their alcohol and drug use. They may be in denial that they have an addiction or they hide the fact that they do. Their number one priority is the use of alcohol and drugs to which they are addicted. Everything else, including their own safety and those of fellow workers, is a lower priority. This is obviously of great concern in a hazardous workplace. Based upon my clinical experience, these addicted employees likely will remain in the workforce even as their addiction worsens in severity, until they move into a state of readiness to change, or are detected.

...

The determination of addiction in 40 employees in 2012 suggests a workforce culture in which substance use is endemic. In addition to these identified addicted employees, there likely are a greater number of undetected addicted employees remaining in the workforce; and a greater number still of undetected employees who would be assessed as substance abusers; and even a greater number still of undetected employees who may not be addicts or abusers, but who intermittently use alcohol and drugs in a manner that increases their risk of performance deficits. I infer from the statistics that in the Suncor workforce, there is a permissive attitude towards alcohol and drug use among the employees, despite the comprehensive multifaceted alcohol and drug program. (Exhibits 58, 88, 89).

[112] Dr. Beckson testified that the rate of substance dependencies at Suncor's operations in the RMWB was significantly higher than the prevalence of drug dependencies in the United States. He testified that the dependency rates for Suncor Employees in the RMWB was concerning.

Fatalities

[113] As noted above, there were 21 fatalities in Suncor's operations in the RMWB since 1970. The investigations into these fatalities determined that at least three of the workers who died in the last seven years were under the influence of alcohol or drugs at the time of their deaths.

Last Chance Agreements

[114] As set out in paragraph 76 above, Ms. Diamond testified that there were a rising number of “Last Chance Agreements” for Union Employees each year from 2010 to 2011 to 2012 (34 to 36 to 42, respectively) (Exhibit 51).

Site Bans

[115] Mr. Ingle testified that there were over 1,250 active individual site bans in place relating to alcohol and drug incidents. These did not include older inactive site bans that were removed from the site ban list.

Evidence of Drug Trafficking at Suncor’s Operations in the RMWB and in the Community

[116] Mr. MacPhee testified that there was evidence of a significant problem with alcohol and drugs in the RMWB, including a significant problem with drug trafficking, organized crime and alcohol and drug use by individuals within the RMWB (Exhibit 61). Sergeant Peyton confirmed a significant problem with cocaine trafficking in the RMWB. The cocaine problem was evidenced in Suncor’s own testing data.

[117] Mr. MacPhee testified that there are clear indications of drug trafficking at the Suncor work sites and camps in the RMWB, such as: significant quantities of drugs, well beyond that associated with personal use; the manner in which the drugs are packaged, including little baggies; the manner in which the drugs are concealed; finding sample bags labeled with different names; findings of weigh scales; and firearms (Exhibits 63, 68).

[118] As noted at paragraphs 155(d), a heavy equipment operator Union Employee was charged with drug trafficking in December 2012.

Integrity Hotline

[119] Mr. MacPhee testified that there were ongoing anonymous calls to security and the integrity hotline involving alcohol and drug issues, including with respect to Union Employees.

The Union Acknowledged a Workplace Problem with Alcohol and Drugs

[120] Mr. Manning confirmed that there was a problem with alcohol and drugs at Suncor’s operations in the RMWB and acknowledged he had been aware of the concerns since at least prior to the introduction of Courage to Care in 2000. Further, Mr. Manning stated that the Union had often ignored the problem, “covering up” alcohol and drug issues involving Union Employees (Exhibit 117). Mr. Lefort agreed with this evidence in his cross-examination.

[121] Mr. Lefort confirmed in his evidence that he had personally confronted and, subsequently, sent home, Union Employees, who attended work unfit for duty due to the use of alcohol and drugs. He confirmed in cross-examination that the CEP (now Unifor) had publically acknowledged in October 2012 in the media that there was a problem with alcohol and drugs at Suncor's operations in the RMWB.

The Evidence Confirms a Workplace Problem

[122] Justice Côté in his dissent in the Alberta Court of Appeal decision in *Suncor CA*, expressed concern about the “overwhelming” evidence of a problem with alcohol and drugs and the concomitant safety risk at Suncor's operations in the RMWB at paragraphs 14, 16, 18 and 19:

[v]ery full detailed and overwhelming evidence here shows the dangers of accidents, and of the danger of drinking or drugs among workers. Privately giving a urine sample to be tested for alcohol or drugs does not begin to equal death or dismemberment, or widowhood or becoming orphaned, by an accident.

...

The physical dangers would be bad enough if those facing the perils of accidents were all Suncor employees and members of the respondent union. But they are not; those people work alongside thousands of other workers. Any accident, ranging from a truck backing up to a huge explosion, is likely to kill or injure others. Maybe even to kill or hurt members of the public not employed at the plant in question. Those others have no say in this litigation. The evidence here shows that this plant contains a number of very dangerous substances, often under pressure or at high temperatures. Some small leaks could be catastrophic.

...

Even if an accident caused no death, no injury, and no significant direct harm to nearby individuals nor to Suncor, it could well produce spills, leaks, smoke, pollution, or death or harm to fish or wildlife. The public and media of North America and Europe already take an enormous interest in the environmental impact of these very oil sands plants. The environmental penalties imposed on Suncor after such an accidental event could equal those for the Exxon Valdez grounding or the BP well fire in the Gulf of Mexico. (One intoxicated man caused the Exxon Valdez incident.) And the media and government reaction against all the Fort McMurray plants and their producers and those marketing their products could then be enormous and incalculable.

It is not certain that there will be an accident or that substance impairment will cause it. But the evidence shows it is likely.

[123] A review of the evidence described above is compelling and clearly meets the test set out in *Irving* of “a general problem” with alcohol and drugs “in the workplace”. In its review of the evidence, the Majority ignored or misapplied much of this evidence.

[124] As a result of the overwhelming evidence of a problem with alcohol and drugs in its workplace and following over two decades of incremental measures aimed at addressing the associated safety risks, Suncor evaluated the next incremental step. Mr. Vetrone testified that in December 2011, Suncor completed a review with the executive leadership team, which included the Chief Executive Officer, to discuss the pressing safety concerns relating to alcohol and drugs at Suncor's operations in the RMWB and the insufficiency of current controls. Mr. Vetrone testified that a follow-up review took place at the end of April 2012. A further review with the executive leadership team took place in May 2012. A recommendation was made that Suncor move ahead with implementing random alcohol and drug testing for safety-sensitive and specified positions in the RMWB as the next incremental step. Mr. Vetrone testified that the decision was ultimately made by Chief Executive Officer, Steve Williams, on June 4, 2012. Mr. Vetrone testified that there was no consideration given to moving to random alcohol and drug testing outside of the RMWB as other areas did not have the same elevated pressing safety concerns (Exhibit 90).

Rulings of the Majority Are Wrong and Not Defensible

A Causal Link is Not Necessary

[125] The Majority erred by holding that there was a requirement to establish a causal link between incidents on site and alcohol and drugs. This ruling was wrong and is inconsistent with *Irving*.

[126] In any event, Suncor provided evidence demonstrating a clear causal link between alcohol and drugs and safety risks. Suncor has had a total of 149 positive post-incident alcohol and drug tests from October 1, 2003 to November 7, 2013. This Board heard evidence that not every incident or near miss triggers a post-incident test pursuant to the 2012 Alcohol and Drug Policy (and previously the 2008 A&D Policy), a threshold must be met before a test is required. This was confirmed by Union witness, Ms. McDaniel, in her cross-examination, wherein she confirmed that she had not been tested following every incident in which she had involvement.

[127] Mr. Foley testified that Suncor Employees who tested positive following an incident or near miss have caused or could have caused significant harm not only to themselves, but also to other workers, the environment and the surrounding communities.

[128] Mr. Foley testified that from October 1, 2003 to June 30, 2013, there were 141 incidents and near misses that resulted in a positive alcohol or drug test (this data was updated by Mr. Vetrone to 149 positive post-incident tests to November 7, 2013). These were all incidents or near misses where alcohol or drugs could not be ruled out as a cause or contributing factor to the incident. The Majority ignored the

evidence of Mr. Foley when he testified regarding some of the incidents or near misses where there was a positive alcohol and drug test, including:

- (a) in one case, a sulphur pit overflowed and a couple hundred gallons spilled out of the pit. This caused the alarm to go off. It took over an hour before the issue was dealt with. There was a large discrepancy between when the alarms rang and when the Union Employee took action to address the alarm, and there was no credible explanation for that discrepancy (Exhibit 132);
- (b) in another case, a Union control room operator needed to put in a bypass around a valve. There is a permitting system to make sure controls are in place to lock out equipment. The Union Employee control room operator improperly had someone else do the work and that person turned the wrong valve. This resulted in a significant environmental release. In addition, when the paper work was reviewed following the incident, the Union Employee control room operator had signed off that he did the work when in fact it was done by somebody else; and
- (c) in the final case discussed, a Union Employee haul truck driver who was waiting to dump his load was found passed out and non-responsive. Suncor emergency services was called to revive the Union Employee. This incident took place at 10:00 a.m., which meant that the Union Employee had been driving around on shift for several hours.

[129] Mr. Foley testified that Suncor Employees who tested positive following a post-incident test were working in very dangerous parts of Suncor's live operating footprint, including in the blast zone and in the mine, where the slightest moment of inattention could have catastrophic consequences (Exhibit 76).

[130] As discussed in paragraph 100 above, Mr. Agnew further testified regarding some serious incidents that have occurred at Suncor's operations in the RMWB where Union Employees refused to undergo a post-incident alcohol and drug test.

[131] Ms. Toutant testified about Suncor's 21 fatalities at its operations in the RMWB. She confirmed that alcohol and drugs were a factor in at least three of the fatalities. More specifically, Ms. Toutant gave evidence that:

- (a) in 2007, a Contractor Employee stole a van and drove through the front security gates at Base Plant. The Contractor Employee drove at excessive speeds into the upgrader area within the blast zone. The van was driving erratically and was weaving, narrowly

avoiding a collision in the live operating environment towards the upgrading area. The Contractor Employee drove to Plant 52 in the operating footprint, climbed up the structure and jumped to his death. The individual was above twice the legal limit for alcohol and there was cocaine in his system;

- (b) in August 2009, a Contractor Employee was killed at Base Plant while working on a Suncor heavy hauler tire. The Contractor Employee was killed when a wheel rim struck him in the upper body while he was attempting a tire repair. The post-incident investigation found that a bottle of rye whiskey was in the cab of the service truck that the Contractor Employee was operating. In addition, a thermal mug which contained dark liquid and smelled of alcohol was found. The report prepared by the medical examiner indicated that the Contractor Employee's blood alcohol level was more than twice the legal limit for the operation of a motor vehicle in Alberta. Mr. Vetrone testified that the contractor company was banned from the Suncor site following the incident; and
- (c) in 2011, a fatality occurred at the Suncor MacKay River Lodge. The Contractor Employee was found unresponsive in his room. Medical personnel were contacted and brought to the scene but were unable to revive the individual. The Contractor Employee had been consuming alcohol in excess to the point that he suffocated on his vomit and died.

[132] Further, all Suncor and Union witnesses confirmed that alcohol and drug use was incompatible with working in Suncor's operations in the RMWB.

The Experts Confirmed a Causal Link

[133] All of Suncor's experts confirmed the causal link between alcohol and drug use and workplace incidents and injuries.

[134] Dr. Louis Hugo Francescutti testified on behalf of Suncor as an expert in injury control and epidemiology. He has a MD/PhD (Immunology) from the University of Alberta and completed a Masters of Public Health degree and a Preventive Medicine Residency at the Johns Hopkins School of Public Health in Baltimore. Dr. Francescutti is a professor of Epidemiology and Injury Control in the School of Public Health at the University of Alberta and practices emergency medicine at both the Royal Alexandra Hospital and the Northeast Community Emergency Departments in Edmonton, Alberta. Dr. Francescutti is the President of the Royal College of Physicians and Surgeons of Canada and the President-Elect of the

Canadian Medical Association (Exhibit 22). Dr. Francescutti was the only emergency room physician and the only expert in injury control to testify in this hearing.

[135] Dr. Francescutti provided testimony regarding the alarming prevalence of chemical dependency and alcoholism in injury patients he sees in the emergency. He also testified that a report of the Alberta Office of the Chief Medical Examiner (“OCME”) determined that 44% of the people who died from injury in Alberta in 2009 tested positive for alcohol; 82% of whom were above the legal limit (Exhibit 23, at p. 5).

[136] Dr. Francescutti testified that in his expert opinion, including based on his own experience as an emergency room physician in Alberta, there is a clear relationship between alcohol and drug use and injuries. The relationship is also clear from the published literature.

[137] Close to 69% of trauma patients in Alberta meet the criteria for substance abuse or dependence. Dr. Francescutti testified that if an individual is under the influence of alcohol or drugs, they increase their chance of being injured. Alberta leads the country with drivers who have died under the influence of alcohol. Further, about 40% of trauma patients test positive for chronic alcohol abuse. There is also a high rate of re-injury with trauma patients who use alcohol or drugs (Exhibit 23, at p. 6).

[138] Dr. Francescutti testified that alcohol and drug use has an impact on workplace injury. He reviewed a United States study that found that 12.7 million of the 20.6 million adults with substance dependence or abuse issues were employed full time; these are people who self-identify that they have substance dependencies and who attend work. Dr. Francescutti testified that in his expert opinion, and based on his clinical experience, workers in Alberta continually attend at work under the influence of alcohol and drugs.

[139] Dr. Francescutti testified that there is a clear correlation between marijuana use and injury. A study by Goodwin et al. in April 2003 looked at nearly 65,000 subjects, of whom, over 13,000 were current marijuana users. The study found that male marijuana users had a 28% higher rate of hospitalization due to injuries than non-users (Exhibit 23, at p. 7; Exhibit 32). This is consistent with his own clinical experience as an emergency room physician and consistent with his work as an epidemiologist.

[140] Dr. Francescutti concluded his examination-in-chief by testifying that Alberta has a problem with alcohol and drug use. Albertans die as a result of injuries. There is a relationship between alcohol and drugs and injuries. Proactive actions taken before an injury event occurs can make a difference. It was Dr. Francescutti's expert opinion that random alcohol and drug testing at Suncor's operations in the RMWB would save lives.

[141] Dr. Kadehjian is an expert in forensic toxicology. Dr. Kadehjian has a B.S. in organic chemistry from M.I.T. and a PhD in biochemistry from Stanford University. Dr. Kadehjian has provided toxicology consulting oversight to the U.S. Federal Courts' drug testing programs and has served on the faculty of the National Judicial College. Dr. Kadehjian has extensive experience in the neurobiology of addiction, psychomotor and the cognitive effects of alcohol and drugs, pharmacology and pharmacokinetics of drugs of abuse, alcohol and drug testing technologies and specimens, and the clinical interpretation of alcohol and drug results (Exhibit 47).

[142] Dr. Kadehjian and Dr. Beckson testified about the psychomotor and cognitive deficits associated with alcohol and drug use and their impact on workplace safety. The Majority failed to appropriately address this evidence. Some of the evidence provided by Dr. Kadehjian and Dr. Beckson can be summarized as follows:

- (a) alcohol causes a dramatic reduction in psychomotor skills and cognitive function, including visual disturbance, effects on judgment, lack of coordination and lack of motor skills. Alcohol use is incompatible with safe work performance in a safety-sensitive work environment. Suncor's alcohol cut-off levels of 0.02% and 0.04% comport with well recognized and established criteria to identify individuals presenting increased safety risks from alcohol use;
- (b) cocaine use causes psychomotor and cognitive performance deficits, including risky behavior, effects on judgment and decision-making, decreased coordination, anxiety, blurred vision and dizziness. In chronic users, there are changes to neuron pathways that affect judgment and cognitive function. There are adverse effects associated with abstinence from cocaine use. Neurological studies confirm that people who regularly use cocaine have altered their brain structures, which negatively affects cognitive function. The changed neurons that allow individuals to weigh consequences of behavior are impacted. It can take weeks or months to return to normal. Cocaine users also experience a "crash". The "crash" after cocaine use includes adverse performance deficits such as exhaustion and depression. The cut-off levels for cocaine in the Suncor Alcohol and Drug Testing Standard identify recent use of cocaine, which is consistent with known psychomotor and cognitive deficits that are incompatible with working in a safety-sensitive work environment.

The psychomotor and cognitive defects associated with cocaine are particularly concerning to Suncor given the significant problem with cocaine at its operations in the RMWB (Exhibits 63, 88, 91);

- (c) amphetamines are associated with a number of adverse performance deficits, including risky behavior, violent aggressive behavior, impaired concentration, impaired vision, impaired temporal processing, impaired memory and increased impulsivity. The use of amphetamines can have negative effects on driving, such as not stopping at traffic lights and not braking. A post-use crash occurs; recovery from which can take several days. There are also withdrawal effects associated with amphetamines use, including aggressive violent behaviour, fatigue and hallucinations. Amphetamine users may also binge for several days in a row followed by several days of sleep. Workplace safety concerns exist well after the acute intoxication phase. Suncor's cut-off levels for amphetamines are consistent with known adverse performance deficits. The use of amphetamines cannot be considered acceptable for those working in safety-sensitive positions;
- (d) there are many serious performance deficits associated with opiate use. Opiates have a depressant effect on the central nervous system, which have been associated with a significant impact on psychomotor and cognitive functions, including drowsiness and mental confusion, which significantly impact driving ability. Heroin is a potent derivative of morphine. Heroin is short-lived in the body, with a half-life of minutes. The first metabolite of heroin, 6-acetylmorphine or "6-AM", is longer lived, although still relatively short-lived, can only be detected in urine specimens for several hours after heroin use. Detection of 6-AM is definitive proof of heroin use as it only arises as a metabolite from the use of heroin. The cut-off levels for opiates in Suncor's Alcohol and Drug Testing Standard are consistent with known adverse performance deficits and the use of opiates is incompatible with working in a safety-sensitive work environment; and
- (e) there are many psychomotor and cognitive deficits associated with use of marijuana, including hallucinations, visual disturbances, inability to concentrate, decreased motor control and decreased ability to respond quickly to events. Marijuana use cannot be considered safe when driving or operating equipment. With marijuana use, people can sometimes function at simple tasks, but for complex tasks with greater demands on memory, there are concerns. Marijuana users suffer short-term memory loss. Marijuana

use by drivers is associated with increased accidents and fatalities. Additional performance deficits are associated with long-term chronic marijuana use. Dr. Beckson also testified that there may be persistent cognitive performance deficits despite abstinence for chronic users (Exhibit 58, at pp. 23-24). A study of the Harvard Medical School studied heavy marijuana users and whether being abstinent resulted in any observable effects. It was found that abstinent heavy users experienced clear adverse effects, including anxiety and violent and aggressive behaviour, for 3 to 7 days and, for some, as long as 28 days. There are many studies looking at marijuana and its effects; however, it is important to remember that these are controlled dosing studies where drugs are given at low doses. Even with low doses, studies have generally demonstrated adverse performance deficits lasting as long as 48 hours. Higher doses result in more pronounced performance deficits. The cut-off levels for marijuana in Suncor's Alcohol and Drug Testing Standard are consistent with known adverse performance deficits and the use of marijuana is incompatible with working in a safety-sensitive work environment.

[143] Dr. Beckson further testified that alcohol and drug use, abuse and addiction are prevalent in the workforce, particularly in industries that are inherently dangerous. In safety-sensitive workplaces, the goal of a comprehensive multifaceted alcohol and drug program that includes random alcohol and drug testing is to minimize the risk of substance use-attributable incidents and injuries. Dr. Beckson testified that substance use in close temporal proximity to work can result in performance deficits that significantly increase the risk of human error and injury. Drug use during this period can impact workplace safety as a result of intoxication, post-intoxication carry-over effects, crash, hangover, withdrawal or chronic effects. Further, the performance deficits caused by drugs may manifest during situations of high cognitive load, such as multitasking or a situation in which an employee is faced with a non-routine, unexpected, or emergency situation, in which rapid and appropriate response is required to avoid an incident. Dr. Beckson testified that tasks such as driving a heavy hauler involve situations of high cognitive loading.

[144] The Union's expert, Dr. Macdonald, has a PhD in biostatistics. In cross-examination, Dr. Macdonald testified that he is not a toxicologist, has no training in bio-chemistry, has no training in psychiatry, has no experience in neuropsychology, has no experience in the recognition of psychomotor or cognitive deficits and has never treated patients as a clinician. Where the evidence of Dr. Macdonald was inconsistent with the evidence of Suncor's experts, the evidence of Suncor's experts must be preferred.

[145] Significantly, the Majority failed to review Dr. Macdonald's cross-examination wherein his own evidence and published articles contradicted his report. Dr. Macdonald acknowledged in cross-examination the inconsistencies between his expert report and some of his published articles. He noted that he does not agree with "every paper he has authored and published". Dr. Macdonald's evidence also contradicted Dr. Francescutti's expert evidence on epidemiology and injury control. Dr. Macdonald's credibility was directly undermined on a number of issues. Further, Dr. Macdonald's evidence was accepted by the Majority in areas where Dr. Macdonald has no training or expertise.

[146] The Majority completely ignored the following admissions by Dr. Macdonald in his cross-examination:

- (a) there is a high correlation between alcohol use and injury;
- (b) the acute effects of cannabis increase the risk of a crash. An individual should not smoke a marijuana joint and drive a car or operate equipment;
- (c) alcohol and drugs have no place in the workplace;
- (d) opiate use may increase the risk of an accident;
- (e) after heavy use of cocaine or amphetamines, there is a crash of mood and individuals can be anxious, depressed and sleepy;
- (f) it is not uncommon for heavy cocaine users to go on 24-hour binges, and in some cases longer;
- (g) withdrawal effects of cocaine may include anxiety, fatigue, depression, cravings and the desire to get the drug to reduce the craving;
- (h) males are more likely to be in traffic accidents than women, are more likely to drink and drive and are more likely to use drugs;
- (i) drug users are more likely to take risks;
- (j) alcohol and drug users tend to have interrupted sleep patterns;
- (k) impairment can be described as "having enough of alcohol or drugs in your system that you are a safety risk, and this may include more than the acute intoxication phase". As

Frone notes, substance impairment has two dimensions: intoxication and withdrawal (Exhibit 93, Tab 29, pp. 20-21);

- (l) heavy chronic marijuana use can cause withdrawal effects;
- (m) those with addiction issues with alcohol, cocaine or marijuana are more likely to engage in risky behaviors;
- (n) if someone suffers from an addiction, that individual is more likely to use alcohol and drugs at work;
- (o) 10% of individuals who are using alcohol and drugs may attend work under the influence of alcohol and drugs;
- (p) if a workplace has a higher proportion of younger men, Dr. Macdonald would expect a higher prevalence of alcohol and drugs at work;
- (q) someone using drugs or alcohol while driving increases their likelihood of being in an accident or injured;
- (r) there is an increased risk of injury if an individual using alcohol or drugs is operating machinery in a safety-sensitive sector;
- (s) he would be concerned if someone was driving a vehicle at the Suncor operations in the RMWB while smoking a joint, drinking alcohol or using cocaine at work;
- (t) it would not be a good thing to be working in a safety-sensitive environment like Suncor's during a crash or binge phase after cocaine use; and
- (u) individuals who use cocaine often use a variety of other drugs, such as alcohol, opiates and marijuana.

[147] Despite asserting that there was no causal link between alcohol and drugs, Dr. Macdonald's cross-examination testimony and published papers suggest otherwise, including that multiple injuries are more likely to be associated with licit and illicit substance use (Exhibit 95).

[148] Dr. Macdonald was cross-examined regarding his PhD dissertation, which confirmed a strong correlation between alcohol use and injury. As part of Dr. Macdonald's PhD dissertation, he studied approximately 400 individuals with alcohol dependencies. Dr. Macdonald testified in cross-examination that those 400 individuals studied in his PhD dissertation had over 20,000 drinking and driving events in a

single year. Dr. Macdonald testified that many of the 400 individuals were drinking and driving every day.

[149] Dr. Macdonald also agreed in cross-examination that the Snowden and Brady studies cited in Dr. Beckson's report satisfied the criteria of methodologically-sound studies. In the Snowden article, the authors concluded that federally mandated random alcohol testing was correlated with a 14.5% reduction in alcohol involvement among large truck drivers involved in fatal crashes (Exhibit 58, Tab 138). In the Brady and Li study, the authors analyzed data for driver fatalities in the U.S. from 2005-2009 (Exhibit 58, Tab 18). In that study, of the 20,150 driver fatalities, 57.3% tested positive for alcohol or drugs, with 19.9% positive for two or more substances. Dr. Macdonald did not review either of these studies in his report.

[150] Additionally, the Majority relied on Frone in its Award. However, the Majority failed to note Dr. Macdonald's admission in cross-examination that Frone accepted that "the common use of drug testing for safety- and security-sensitive positions is a reasonable exception" to any concerns with alcohol and drug testing (Exhibit 93, Tab 29, at p. 175).

[151] As a result, the Majority's finding that there was no evidence of a causal link between incidents and injuries and alcohol and drugs at Suncor's operations in the RMWB was unfounded and the Majority ignored the compelling evidence before this Board.

There is Evidence of a "Workplace" Problem

[152] The test in *Irving* requires evidence of enhanced safety risks such as evidence of a "general problem" in the workplace. The Majority erred by limiting the test to evidence of a bargaining unit problem.

There is a Bargaining Unit Problem

[153] In any event, the Majority's finding that there was no problem with alcohol and drugs as it related to the "bargaining unit" was wrong. As noted above, there was clear evidence before this Board of a problem with alcohol and drugs with respect to Union Employees. From October 1, 2003 to November 7, 2013, 235/247 positive alcohol and drug tests were Union Employees and only 12 were Non-Represented Employees (Exhibit 91). As set out at paragraph 128 above, Mr. Foley testified regarding some of the serious incidents and near misses involving Union Employees, which resulted in a positive alcohol or drug test.

[154] The evidence demonstrated that a number of the reported security incidents relating to alcohol and drugs involved Union Employees. Further, there are hundreds of alcohol, drug, and drug paraphernalia finds that cannot be attributed to any particular individual. As Justice Macklin stated at paragraph 24 in *Suncor QB*: “it would be naive to think that none of the incidents involved Union members”.

[155] Further, the evidence of the Union and Suncor witnesses confirmed a “bargaining unit” problem with alcohol and drugs:

- (a) Mr. Lefort gave examples of personally confronting Union Employees who were trying to attend at work when not fit for duty due to the use of alcohol and drugs. He turned the Union Employees around and sent them home;
- (b) in the video put into evidence by the Union through Mr. Lefort, Mr. Manning acknowledged there was a concern with alcohol and drug issues with Union Employees and doing nothing was not an option. He also stated that the Union had often ignored the problem, “covering up” alcohol and drug issues involving Union Employees (Exhibit 117). Mr. Lefort agreed with Mr. Manning’s statements in the video;
- (c) the evidence of Last Chance Agreements discussed at paragraph 76 (Exhibit 51);
- (d) a former Union Employee working as a heavy equipment operator at Suncor’s operations in the RMWB was charged with possession for the purposes of trafficking drugs, including cocaine. He was terminated by Suncor on May 22, 2013 (Exhibit 131);
- (e) as discussed in paragraphs 100 and 128 above, Mr. Foley and Mr. Agnew testified about incidents or near misses involving Union Employees where there had been a positive alcohol or drug test or a refusal to test;
- (f) there was evidence of drug finds in Suncor equipment that was operated by Union Employees and in lockers belonging to Union Employees (Exhibits 63, 68). Some recent examples include:
 - (i) in January 2011, a marijuana joint was found in a Suncor haul truck by a Union Employee;
 - (ii) in January 2011, a search of a Union Employee working in the mine revealed a urine collection device with urine inside. The Union Employee admitted that it was a masking device to defeat alcohol and drug tests;

- (iii) in April 2011, pictures of a marijuana grow operation were found in a terminated Union Employee's locker;
 - (iv) in March 2012, a marijuana joint was found by a Union Employee in the vent under the seat of a backhoe in the Millennium Mine;
 - (v) in March 2012, a sniffer dog alerted to a Union Employee's locker in the Steepbank Mine Complex. Marijuana flakes were found in the locker in his clothing pockets;
 - (vi) in September 2012, an unopened can of beer was found by a Union Employee inside the dash area, behind the glove box, in a services vehicle that was taken into the LVF Shop; and
 - (vii) in November 2012, a sniffer dog alerted to a Union Employee locker in the men's locker room in the Extraction East Tailings Building. Marijuana flakes and stems were found; and
- (g) of the 235 Union Employees who tested positive following an alcohol and drug test; 143 were post-incident and 33 were for reasonable cause (Exhibits 89, 91).

[156] Additionally, the Majority failed to consider evidence of alcohol and drug incidents at Firebag, where approximately 215 Union Employees work 7 days on and 7 days off (Exhibit 69). During their days on, this Board heard evidence from Mr. Ingle that Union Employees reside in camps, which are located right within the operating footprint, and also work within the operating footprint. As described above, there are numerous alcohol and drug finds in the Firebag location, including in the live operating areas.

[157] Finally, at paragraph 302 of its Award, the Majority found that Firebag should be treated differently from the Base Plant because it is staffed almost entirely by commuting workers living in camp accommodations. There was no evidence or argument before this Board that Firebag should be treated differently than Base Plant. Further, such statements ignored Mr. Ingle's evidence that a number of Union Employees working at Suncor's operations live outside of the RMWB and commute to work. In 2013, 27%, or approximately 913, Union Employees, commuted to work at Suncor's operations in the RMWB (Exhibit 69). Pressing safety concerns are present at all Suncor's operations in the RMWB as a whole. This can be contrasted to Suncor's other sites across Canada.

[158] In Mr. Ingle's testimony, he contrasted the workplace demographics of Suncor's operations in the RMWB with some of Suncor's more stable operations and refineries. For instance, the wage rates for Union Employees in the RMWB are high compared to Suncor's operations across the rest of Canada. The typical cash compensation, including retention, holiday pay, overtime, incentives and annual wage, is approximately \$173,000 for a B-rate level Union Employee, plus at a 28% benefit burden (Exhibit 69). Mr. Ingle testified that Suncor's other operations have a more stable employee base, including a lower attrition rate and longer years of service. Further, there were only 5 positive alcohol tests and no positive drug tests in Suncor's operations in the rest of Canada (excluding the RMWB) from January 1, 2009 to December 31, 2012 (Exhibit 90) and no alcohol or drug finds.

[159] Mr. Ingle testified regarding the ongoing dialogue with the Union regarding the pressing safety concerns relating to alcohol and drugs at Suncor's operations in the RMWB. On February 21, 2012, a meeting was held between the Union executive and the human resources leadership. In that meeting, alcohol and drug testing trends were discussed, including Suncor's concern that there continued to be pressing safety concerns with alcohol and drugs. Despite past efforts to address the problem, something further had to be done (Exhibit 70). Mr. Ingle testified that when Suncor requested assistance from the Union in how to address those concerns, the Union only suggested that Courage to Care be reinstated despite the fact that the Union had unilaterally withdrawn from the program and the program had been a failure. Furthermore, while the branding of Courage to Care ceased following the Union's unilateral withdrawal from the program, elements of the program continue to date. On May 14, 2012, there was another Union Executive and human resources leadership meeting where alcohol and drug issues were discussed. In this meeting, Suncor confirmed its concerns that despite Suncor's efforts to ensure a safe work environment, alcohol and drugs remained an ongoing workplace hazard at Suncor's operations in the RMWB. Suncor further confirmed that it had a positive obligation under occupational health and safety legislation to maintain a safe work environment. Throughout this time, the Union maintained its stated opposition against alcohol and drug testing.

There is a Contractor Employee Problem

[160] The evidence regarding Contractor Employees is relevant to the issue of whether there is a general workplace problem with alcohol and drugs at Suncor's operations in the RMWB. Alcohol and drugs on site is a problem faced by every worker working at Suncor's operations in the RMWB, regardless of whether the worker is a Suncor Employee or Contractor Employee. Furthermore, Suncor's obligations under the *OHS Act* are not limited to only Union Employees, but all workers on its worksite: *OHS Act*, at

s. 2(1)(a)(ii). Additionally, the *Criminal Code* expands that legal obligation to the general public: *Criminal Code*, at s. 217.1.

[161] The Majority's finding that it did not have jurisdiction to consider relevant evidence of alcohol and drugs relating to Contractor Employees on Suncor's operations in the RMWB because its jurisdiction was limited to hearing evidence regarding Union Employees was wrong. The Supreme Court of Canada in *Irving* defined a "general workplace" problem, not a bargaining unit problem. Workplace alcohol and drug use which directly impacts all Suncor Employees cannot be ignored when making a decision that could be a matter of life and death. The entire "workplace" must be considered.

[162] As previously mentioned, this Board heard evidence from Robert Neil Tidsbury, Chief Operating Officer and President of the Construction Labour Relations - an Alberta Association ("CLR"), and Mr. Agnew that Contractor Employees and Suncor Employees are significantly integrated into Suncor's operations in the RMWB. Suncor must be concerned whether any worker attends the workplace unfit for duty.

[163] The actions of Contractor Employees can and have impacted Suncor Employees and vice versa. Ms. Toutant testified that both Contractor Employees and Suncor Employees are both often directly or indirectly involved in the incidents relating to fatalities. Further, the impact of a fatality is significant, regardless of whether the deceased is a Contractor Employee or a Suncor Employee. For instance:

- (a) in July, 2008, a heavy haul truck was being towed into the maintenance shop for repairs. A Union Employee loader operator was towing the truck and a Union Employee haul truck operator was in the driver's seat of the truck. Two Contractor Employee mechanics were following the unit. During the tow, the cable that attached the loader to the truck separated from the haul truck bumper and the job paused. The Contractor Employees started to straighten out the cable when the hydraulics that were keeping the service break on the haul truck bled down and the haul truck started moving unexpectedly. This caused the haul truck to roll, killing one of the Contractor Employees. The other Contractor Employee and the Union Employee load operator were seriously injured;
- (b) in 2011, a Contractor Employee died at Firebag. The Contractor Employee obtained a permit to remove a cap from a pipe. Permits are issued by Union Employees. The pipe was still energized and the pressure in the pipe caused the cap to strike the Contractor Employee and kill him; and

- (c) a fatality in 1996 involved a Union Employee heavy equipment operator driving a haul truck. The Union Employee driver ran over a pick-up truck driven by a Contractor Employee. The Contractor Employee in the pick-up truck died.

[164] Justice Macklin in the Court of Queen's Bench decision in *Suncor QB* stated at paragraph 22: "[d]rug and alcohol use by all workers, Union members or contractors, is a legitimate concern for Suncor".

[165] The existence of a contractor problem at Suncor's operations in the RMWB was confirmed by the evidence this Board heard regarding alcohol and drug incidents involving Contractor Employees at Suncor's operations in the RMWB. This included the evidence of security incidents, both on site and in the camps (Exhibits 63, 68), the approximately 1,250 individual active site bans at the Suncor's operations in the RMWB relating to alcohol, drugs and fatalities. Further, evidence of a problem is addressed below with respect to CLR alcohol and drug testing data and Construction Employee and Family Assistance Program ("CEFAP") data (Exhibits 37, 39). Many CLR contractors work at Suncor's operations in the RWMB.

There is a Community Problem

[166] Again, the Majority's determination at paragraphs 261 and 264 of its Award that it did not have jurisdiction to consider evidence of a community problem was wrong. In *Irving*, the Supreme Court of Canada considered Arbitrator Picher's comments regarding an "out-of-control" drug culture: *Irving*, at para. 34. In *Imperial Oil v CEP, Local 900* (Policy Grievance) (2006), 157 LAC (4th) 225 (Ont Arb) (Picher) ("*Nanticoke*"), Arbitrator Picher said evidence "**within the workforce, away from work, or within the surrounding community**" should be considered: *Nanticoke*, at para. 127. The Majority incorrectly disregarded compelling evidence of a problem with alcohol and drugs in the community by stating it had no jurisdiction to consider such community evidence.

[167] Sergeant Peyton, Special Enforcement, K-Division with the RCMP in Fort McMurray, testified that the RMWB has unique and significant community concerns regarding alcohol and drug use and, in particular, cocaine trafficking. This evidence was confirmed by Mr. MacPhee in his testimony and was uncontroverted. Sergeant Peyton testified that there are a number of organized crime groups in operation in the RMWB, including traditional outlaw motorcycle gangs that are actively involved in drug trafficking in the RMWB. The volume of trafficking and sale of cocaine in Fort McMurray is significant. Fort McMurray is considered an end use destination for drug trafficking, unlike drug hubs like Vancouver

and Edmonton, which are part of the distribution network. Therefore, the large quantity of cocaine being found in Fort McMurray region is unique because it is all being consumed in the RMWB.

[168] Sergeant Peyton testified that there have been a number of significant criminal charges and convictions relating to drug possession and trafficking in the RMWB. Sergeant Peyton is the regional leader of the Alberta Law Enforcement Response Team in the RMWB, which is a proactive team addressing organized crime and drug trafficking. He gave evidence regarding some of the recent significant drug seizures in the RMWB. For example:

- (a) in December 2012, two individuals were charged with possession for the purposes of trafficking in relation to the seizure of over \$750,000 worth of drugs, including 3 kilograms of cocaine; 900 grams of ecstasy; 3 liters of Gamma Hydroxybutyric; 1000 prescription pills; and anabolic steroids. One of the individuals charged, a Union Employee, was a heavy equipment operator;
- (b) in August 2013, two individuals were charged with possession for the purposes of trafficking in relation to the seizure of over \$700,000 worth of drugs, including almost 5 kilograms of cocaine and over 26 kilograms of marijuana; and
- (c) during that same week, in August 2013, there were 2 other significant drug seizures. An individual on his way from Jasper coming into Fort McMurray was arrested with 4 kilograms of cocaine and 3 kilograms of MDMA. In the same week, a traffic unit south of Fort McMurray stopped a vehicle with another 4 kilograms of cocaine. In seven days, 12 kilograms of cocaine destined for Fort McMurray were seized. Sergeant Peyton testified that the seizure did not result in any reduction in the availability or sale of cocaine in Fort McMurray (Exhibits 61, 131).

[169] Sergeant Peyton indicated that the volume of cocaine entering Fort McMurray is significant compared to other communities. For instance, 12 kilograms equals 12,000 grams. One gram is equal to approximately 1 dose. In a population the size of Fort McMurray, approximately 70,000 residents, 12,000 grams of cocaine a week would be enough for approximately 1 in 5 individuals in Fort McMurray.

[170] Sergeant Peyton testified that the number of seizures made in Fort McMurray relating to drugs is concerning given that Fort McMurray is a small community. Given the higher disposable income found in Fort McMurray, individuals have an ability to make larger purchases of more expensive drugs. There is also a different type of street level user in Fort McMurray; it is a high end business. Currently, much of

the drug sales are being trafficked through sophisticated dial-a-dope operations. People call specific numbers based on the type of drug and volume they want to purchase.

[171] The existence of a community problem with alcohol and drugs in the RMWB was further confirmed in Mr. Tidsbury's data with union building trade employees. Many of the building trade Contractor Employees are long-term employees who live in Fort McMurray, including many who work at Suncor's operations in the RMWB. For example, Transfield Asset Management, a CLR member, carries on long-term maintenance work at Suncor's operations in the RMWB. Approximately 200 of the Transfield Asset Management workers reside in the RMWB.

[172] Mr. Tidsbury testified that between 2009 and 2011, CLR recorded 2,335 non-negative pre-access alcohol and drug tests (which include positive tests and refusals); 275 non-negative post-incident tests; and 155 non-negative reasonable cause tests (Exhibit 37).

[173] Mr. Tidsbury also testified regarding CEFAP utilization rates. Mr. Tidsbury testified that when pre-access alcohol and drug testing came into effect in late 2004/early 2005, there was a 2.5 times increase in new CEFAP alcohol and drug related files. From July to November 2012, there was a 3-fold increase. This increase coincided with Suncor's announcement that it would be requiring contractor organizations to introduce random testing at Suncor's operations in the RMWB. The numbers dropped off in December 2012 and January 2013, which is coincident with the time of the Suncor injunction when the potential for random testing was put on hold. At that time, Contractor Employees stopped accessing CEFAP for alcohol and drug related issues in such high numbers. Mr. Tidsbury testified that no other event would explain that increase in files from July to November 2012 other than the Suncor announcement requiring random alcohol and drug testing (Exhibit 39).

[174] Concerns regarding alcohol and drug issues in the RMWB are evidenced by the Drug and Alcohol Risk Reduction Pilot Project ("DARRPP"). DARRPP is an initiative developed by industry, labour and the government, to evaluate and report on the effectiveness of comprehensive workplace alcohol and drug programs, including random alcohol and drug testing given elevated safety concerns regarding alcohol and drugs in the RMWB (Exhibits 40, 41). Mr. Vetrone confirmed that Suncor was participating in DARRPP meetings, but Suncor's decision to move to random testing in the RMWB was made as a result of the ongoing pressing safety concerns Suncor had at Suncor's operations in the RMWB; it was not made because of DARRPP. This was also confirmed by Mr. Ingle.

[175] The Majority's comments at paragraph 322 of its Award that Suncor has significantly deviated from the 2005 Canadian Model for Providing a Safe Workplace - Alcohol and Drug Guidelines and Work Rule

as amended on October 1, 2010 (the “**Canadian Model**”) and DARRPP are both irrelevant and wrong. Firstly, the Canadian Model has no application to Suncor Employees. Furthermore, DARRPP is nothing more than a voluntary pilot project that industry and government has proposed with general guidelines for those that wish to participate.

There is a Compelling “Public Interest”

[176] The “public interest” in this case is significant. Not only did the Majority misstate Suncor’s arguments regarding the “public interest”, it also failed to address the compelling “public interest” that must be considered.

[177] Any decision by this Board will have a profound impact on the public interest as it will affect Suncor’s ability to take necessary steps to address workplace hazards associated with alcohol and drugs: *Strathcona*, at p. 50; *Suncor CA*, at paras. 14, 16, 18, 19. As the Supreme Court of Canada in *Irving* noted at paragraph 19:

... the reality is that the task of negotiating workplace conditions, both on the part of 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. [Emphasis added.]

[178] This Board heard extensive evidence that the consequences of an incident at Suncor’s operations in the RMWB could be serious or catastrophic in terms of worker safety and environmental damage. The potential consequences would be far reaching and not limited to workers at Suncor’s operations in the RMWB. Serious adverse consequences could impact stakeholders in the surrounding community, including local residents, First Nations communities and the ecosystem downstream of Suncor’s operations in the RMWB. Therefore, it would be contrary to the public interest to fail to take additional steps to address known pressing safety concerns.

Suncor Must Address Safety Hazards

[179] The Majority’s statements that because Suncor’s safety record has “improved”, Suncor cannot take appropriate action to address a known safety risk was wrong. Suggesting Suncor should ignore pressing safety concerns and known workplace hazards related to alcohol and drugs because its “safety record is improving” is contrary to law, contrary to the public interest, contrary to Suncor’s own policies and is simply wrong. Suncor has an obligation to address and remediate safety hazards.

[180] It is unacceptable for any worker to put the safety of others at risk. The number of positive alcohol and drug tests at Suncor's operations in the RMWB is unacceptable from a safety perspective and will lead to serious adverse outcomes. The Majority referenced "root cause" assessments at paragraph 308 of its Award. However, the Majority misconstrued the evidence relating to the ILP system. Mr. Foley explained that the ILP system is only an incident learning and prevention system. Many of the incidents or near misses included in the ILP system would not have triggered an alcohol or drug test given the threshold required to trigger a post-incident test under the 2008 A&D Policy and the 2012 Alcohol and Drug Policy. Furthermore, due to privacy concerns, the involvement of alcohol or drugs as a contributing factor in an incident would not be included in the ILP system.

[181] Furthermore, the Majority has misstated evidence as it relates to Suncor's safety statistics at paragraph 249 of its Award. The Majority relied on a few slides from training presentations to state that Suncor's safety statistics are improving (Exhibit 21, Tabs 18, 31(b)). However, those presentations do not provide complete safety statistics of Suncor's operations in the RMWB. For instance, one presentation only provided mine statistics up to 2009 and another presentation provided statistics out of Firebag up to 2011. These presentations cannot be relied on in any meaningful way to provide any real indication of Suncor's safety statistics. In any event, Mr. Vetrone testified that although overall safety was improving, the alcohol and drug risks remained a serious safety concern. There are elevated safety concerns in the RMWB relating to alcohol and drugs. This is confirmed in the stated purpose of the Random Testing Standard. Alcohol and drug hazards were identified as a risk rank 1 and Suncor was obligated to address these known safety hazards and environmental risks.

[182] In any event, the Majority ignored *Irving*. The test in *Irving* is not whether a "safety record is improving" but whether there is an enhanced safety risk, such as "a general problem" with alcohol and drugs in the workplace.

The Majority Misapplied the Alcohol and Drug Testing Data

[183] The Majority's analysis of Suncor's alcohol and drug testing data was wrong. The Majority failed to properly consider the evidence of the 247 positive alcohol and drug tests. The Majority also ignored the evidence of the ongoing problem. Knowing that 23 Suncor Employees (20 Union Employees) tested positive for alcohol and drugs in a 10 month period in 2013 during the hearing (January 2, 2013 to November 7, 2013) is alarming. This was already 4 more positive tests than the entire year in 2012.

[184] Further, the Majority's finding at paragraph 251 of its Award that there were 14 positive alcohol tests since 2000 was wrong. Similarly, the Majority's statement at paragraph 341 of its Award that there

were 14 positive alcohol tests over a 9 year period was also wrong. From 2009 to September 18, 2013 alone, there were over 16 positive alcohol tests (Exhibits 88, 89, 91). There were also over 1,400 alcohol-related security incidents (Exhibits 63, 68, 76), including finding bottles of alcohol in the mine, hidden in equipment and vehicles on site and in lunch trailers; smelling alcohol on employees' breath and incidents involving intoxicated driving.³ Many of these alcohol-related security incidents were within the operating footprint and the blast zone. There were also active site bans and calls to the integrity hotline with anonymous tips relating to workplace alcohol risks. Additionally, a number of the fatalities at Suncor's operations in the RMWB involved alcohol. The problem with alcohol at Suncor's operations is real and is ongoing.

[185] The Majority stated at paragraph 252 of its Award that it could not consider Contractor Employee data when considering the evidence before this Board, but it included Contractor Employee numbers in the denominator to dilute the percentage of positive alcohol tests for Suncor Employees at Suncor's operations in the RMWB. The Majority also improperly included the Non-Represented Employee total workforce numbers in the denominator. Many of those employees do not work in the RMWB (Exhibit 69). Including workers who are not even subject to testing by Suncor is an obvious distortion of the testing data. It is important to note that Suncor has no involvement in alcohol and drugs tests conducted by Contractor Employees and does not get the results of such tests.

Evidence is More Compelling than in Past Awards

[186] The evidence of a problem adduced by Suncor is profound and is significantly more compelling than the evidence in any other decision in Canada considering random alcohol and drug testing.

³ See for example Exhibit 63: June 2010, an empty bottle of vodka was found in the Millennium Mine at MD2 Shift Change Road at Base Plant, which is in the operating footprint; April 2011, a case of beer containing 15 unopened cans of beer was found on the ground north of the rat-hole at the Old Mine Overpass at Base Plant, which is in the operating footprint; April 2011, a bottle of wine was found on Pad 23 at Firebag, which is in the operating footprint; April 2011, an empty whiskey bottle was found on the side of the north road to Pad 25 at the Drilling and Completions Camp, which is in the operating footprint; April 2011, an unopened bottle of vodka was found on the roof of Trailer 3, which is north of Plant 91-1000 at the Firebag Site, which is within the operating footprint; July 2011, a foreman entered the 92-1000 lab at the Firebag Site and upon conversing with the operator in the lab, an odor of alcohol was detected from the individual. The 92-1000 lab is in the operating footprint; September 2011, an empty bottle of vodka was found when cleaning the locker of a terminated Suncor Employee at the CMS at Base Plant, which is in the operating footprint and within the blast zone; January 2012, an empty bottle of rum was found on the road in the mine at Base Plant, which is in the operating footprint; January 2012, a bottle of scotch was found in an office in CCMT2 at the Voyageur Upgrader, which is in the operating footprint; September 2012, an unopened can of beer was found by a Suncor Employee inside the dash area, behind the glove box, in a services vehicle that was taken into the LVF Shop at Firebag, which is in the operating footprint; April 2013, a Suncor Employee found an empty alcohol bottle on site at the Coker Complex at Base Plant, which is in the operating footprint and is within the blast zone; May 2013, security received a report that an alcohol bottle was seen in the passenger door of a vehicle on site at the East Tank Farm at Base Plant, which is in the operating footprint and is within the blast zone; May 2013, an empty bottle of rum was found at the Upgrading Operations Building at Base Plant, which is in the operating footprint and is within the blast zone; May 2013, 4 empty beer cans were found at one of the fuel tanks storage pits south of the SWS trailer at the Firebag Site, which is in the operating footprint.

[187] The Majority relied on the *Nanticoke* case, yet the evidence in *Nanticoke* was that in a period of over fifteen years, there had never been a positive drug test as provided at paragraph 88:

[i]n a period spanning more than fifteen years there has never been a case of an employee being found to be impaired by drugs at work. Indeed, there was only one instance of a positive urinalysis test, said to have occurred prior to the certification of the Union in 1995 ... Since then, through thousands of drug tests, there has not been a single positive result... the evidence tends to the contrary, revealing the picture of a mature and safety conscious workforce with almost no record of drug use or abuse.

[188] In any event, Arbitrator Picher confirmed in *Nanticoke*, at paragraph 127 that:

[i]t may well be that the balancing of interests approach, which we favour, would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety.

[189] Similarly, in *Trimac Transportation Services - Bulk Systems v Transportation Communications Union* (1999), 88 LAC (4th) 237 (Can Arb) (Burkett), there had not been a single incident involving alcohol or drugs from 1990 to 1996: *Trimac*, at para. 6.

[190] In *Esso Petroleum Canada v CEP, Local 614* (1994), 56 LAC (4th) 440 (BC Arb) (McAlpine), Arbitrator McAlpine concluded that the evidence did not support a random testing program because there were no reported incidents involving alcohol and drugs in the workplace: *Esso Petroleum*, at para. 151. Further, there were no incidents or near misses where alcohol and drugs were suspected. This is significantly different than the 149 positive post-incident tests at Suncor and the 2,276 alcohol- and drug-related security incidents.

[191] In *Petro-Canada Lubricants Centre (Mississauga) v CEP, Local 593* (2009), 186 LAC (4th) 424 (Ont Arb) (Kaplan), there had never been any alcohol-related incidents involving the drivers at the Oakville Terminal or employees in safety-sensitive positions: *Petro-Canada*, at para. 28. Unlike the evidence before this Board, Arbitrator Kaplan found evidence of years of spotless service and “earned trust” with no substance abuse culture: *Petro-Canada*, at paras. 28 and 34.

[192] The Majority’s reliance on *Mechanical Contractors Association Sarnia v UAJ*, 2013 CanLII 54951 (ON LA) (Surdykowski) is unsound. The decision is irrelevant as it concerned pre-access alcohol and drug testing; no witnesses testified on behalf of the respondent; the respondent relied on “will say

statements” and there was no evidence of a problem. Further, the decision is contrary to settled law confirming the reasonableness of pre-access and pre-employment testing: *U.A. Local 488 v Bantrel Constructors Co.* (2007), 162 LAC (4th) 122 (Alta Arb) (Smith), aff’d by 2007 ABQB 721, rev’d on other grounds by 2009 ABCA 84; *Chiasson v Kellogg Brown & Root (Canada) Co.* (2005), 56 CHRR D/466, rev’d by 2006 ABQB 302 aff’d by 2007 ABCA 426 leave to SCC refused (2008), 460 AR (note); *Luka v Lockerbie & Hole Inc.*, 2008 AHRC 1, rev’d 2009 ABQB 241, (rev’d only on employer issue) aff’d 2011 ABCA 3; *McNamara v Lockerbie & Hole Inc.*, 2010 AHRC 7; *PCL Industrial Constructors Inc. and BBF Local Lodge No 146* (2007), 91 CLAS 378 (Alta Arb) (Jones).

[193] The Supreme Court of Canada in *Irving* did not find sufficient evidence of a problem in the context of Irving’s work environment where there were 8 alcohol-related incidents over a 15-year period, no accidents, injuries or near misses connected to alcohol use and no positive random or reasonable cause tests in the prior 22 months. This is very different than the evidence before this Board.

[194] The Majority’s Award at paragraph 233 takes the incidents in *Irving* and equates them with a positive alcohol test to create a percentage of how many workers “test positive for alcohol impairment” every 3 years (0.3%). However, the “incidents” in *Irving* were not positive alcohol tests. The Majority erroneously went on to compare these “made-up” percentages to the percentage of positive alcohol tests at Suncor’s operations in the RMWB. In making this comparison, the Majority significantly failed to take into account the actual positive alcohol tests at Suncor and the numerous other alcohol-related incidents at Suncor’s operations in the RMWB, as stated above, including over 1,400 alcohol-related security incidents and the fatalities involving alcohol and drugs.

[195] Furthermore, in *Irving*, both the majority and minority of the Supreme Court of Canada cited with approval two decisions where arbitration boards found sufficient evidence to justify random testing due to a demonstrated problem with alcohol use in a dangerous workplace: *Greater Toronto Airports Authority v PSAC, Local 0004*, [2007] LVI 3734-2 (Ont Arb) (Devlin) (“*GTAA*”); *Strathcona*. Even when reviewing those decisions, the evidence before this Board was overwhelming compared to the evidence of those cases.

[196] In *Strathcona*, Imperial Oil implemented a random alcohol testing policy after surveying employees in its Edmonton refinery about alcohol-related incidents. According to the survey, 2.7% of employees reported that they personally had near misses due to substance use in the previous 12 months. The Arbitrator accepted the survey results as a “rational and sufficient foundation for the random testing policy” and concluded that “there is evidence of a problem with alcohol use by employees at the

Strathcona Refinery”: *Strathcona*, at pp. 60-73. Arbitrator Christian, found that the best evidence of a problem was the positive alcohol test, which was the subject of the grievance.

[197] In *GTAA*, the employer introduced a random alcohol and drug testing policy for employees in safety-sensitive positions. Arbitrator Devlin found a “pervasive problem” in the workplace with alcohol based on the evidence. Witnesses testified about occasions when they had seen employees drinking on the job or storing alcohol at work, smelled alcohol on other employees’ breath, or found empty liquor containers on site. Therefore, the Arbitrator concluded that random alcohol testing was a reasonable employer policy. Because there was little evidence of problems associated with drugs, the random drug testing aspect of the policy was not justified: *GTAA*, at paras. 262, 267; *Irving*, at paras. 38, 40, 41. The evidence of drugs only included one instance where a joint was passed around in a work vehicle, finding a joint in equipment, smelling marijuana in a vehicle and a couple of positive drug tests.

[198] The evidence before this Board was extreme compared to the decisions cited above. This Board heard evidence of over 16 positive alcohol tests from January 1, 2009 to November 8, 2013 alone; over 1,400 alcohol-related incidents, including finds of empty and full bottles in the operating footprint and within the blast zone; reports of workers reporting to work under the influence of alcohol and driving around intoxicated; and active site bans in place relating to alcohol issues (Exhibits 63, 68, 76, 88, 89, 91).

[199] In addition to the positive drug tests, there were over 700 drug-related security incidents, including finding drugs and drug paraphernalia within the operating footprint (including within the blast zone) and in the camps and smelling drugs in certain locations, including within the operating footprint (Exhibits 63, 68, 76). Further evidence is reviewed at paragraphs 90 to 121 above.

[200] Mr. Vetrone testified that there was no evidence of a pressing safety concern relating to workplace alcohol and drugs outside of the RMWB. Therefore, Suncor did not introduce the Random Testing Standard outside of the RMWB. Suncor’s evidence was that there have been a total of 5 positive alcohol tests and no positive drug tests from January 1, 2009 to December 31 to 2012 (Exhibit 90) at Suncor’s Canadian operations outside of the RMWB. At paragraph 268 of its Award, the Majority criticized Suncor’s testing data for other Canadian locations as being “unrefined” and stated that there was no other information provided. However, this information was entered into evidence by Suncor after a specific request from the Board Chair. The Board Chair confirmed during the hearing that the evidence provided was sufficient and that he did not need any further details than what was provided by Suncor. In any event, the Board ignored the evidence of Mr. Ingle regarding the demographics of Suncor’s operations outside of the RMWB.

Random Testing is an Effective Deterrent

[201] It is well established in jurisprudence and confirmed by all of Suncor's experts that workplace incidents are preventable and that policies that enforce safety procedures, like random alcohol and drug testing, reduce the likelihood of workplace incidents through their powerful deterrent effects.

[202] This deterrent effect was confirmed by all of Suncor's experts, who testified that workplace incidents are preventable and that policies that enforce safety procedures, like random alcohol and drug testing, reduce the likelihood of workplace incidents through their powerful deterrent effects (Exhibits 23, 48, 58).

[203] Dr. Francescutti testified that random alcohol and drug testing has a powerful deterrent effect and it helps to identify individuals who need help. Further, policies that support random alcohol and drug testing in the workplace can reduce injury (Exhibit 23, at pp. 19-20).

[204] Similarly, Dr. Kadehjian testified that random alcohol and drug testing was one of the most important components of an effective and comprehensive alcohol and drug testing program. Random alcohol and drug testing has the strongest deterrent effect. If employees know they could be subject to an alcohol or drug test at any time during the working period, it provides a strong deterrent effect against them risking the use of drugs (Exhibit 48, at pp. 16-17). Alcohol and drug testing based on reasonable cause and post-incident, while important components of a comprehensive alcohol and drug testing program, are reactive responses to safety risks that have been identified or have already occurred (Exhibit 48, at p. 16).

[205] Dr. Beckson opined that deterrence is very effective in modifying alcohol and drug-using behavior of employees who are not addicted; these employees respond by altering their behavior around alcohol and drug use. These non-addicted employees typically choose not to use drugs or binge on alcohol in close temporal proximity to work. Deterrence is only effective when everyone in a safety-sensitive position on the worksite is included in the random testing program (Exhibit 58, at paras. 124-144).

[206] Dr. Beckson testified that deterrence is also effective for addicted employees who are ready to change. Random alcohol and drug testing can help move such employees into an action stage of change, in which they come forward to request assistance for their addiction. In addicted employees who are not ready to change, random alcohol and drug testing is effective in detecting such high risk employees before they have an incident. Detection is important as it facilitates the removal from the workplace of these high risk addicted employees. If not detected, such addicted employees continue to use large

amounts of substances frequently and surreptitiously, and come to work repeatedly unfit for duty, elevating the risk of incidents and injuries in the hazardous workplace (Exhibit 58, at para. 122).

[207] Suncor's self-referral data also confirms a deterrent effect. Following the announcement of random testing, there was a significant spike in self-referrals for alcohol and drug-related issues. After the injunction, the numbers have fallen back to pre-announcement trends. A similar deterrent effect was also seen in the union building trades' CEFAP data (Exhibits 39, 88).

Urine Testing is Reliable and Accurate

[208] As stated above, the use of urinalysis for drug testing is not before this Board and by making comments regarding the validity of urinalysis and the testing protocols, the Majority exceeded its jurisdiction. Furthermore, the test set out by the Supreme Court of Canada in *Irving* is not about demonstrating "impairment", but rather requires demonstrating evidence of "a general problem" in the workplace: *Irving*, at para. 31. The Majority overlooked this in its Award. In any event, all of Suncor's experts confirmed the correlation between a positive drug test and safety risk.

[209] Ms. Diamond testified that drug tests are done by way of urinalysis. As with the 2008 A&D Policy, urine drug tests under the 2012 Harmonized Policy and Standards are initially done by point of collection tests ("POCT"). This allows for immediate test results so Suncor Employees can be returned to work as quickly as possible. Urine POCTs are reliable and accurate. If the alcohol and the POCT drug test results are negative, the Suncor Employee is cleared immediately to return to work. This evidence was ignored by the Majority. If there is a non-negative drug test the Suncor Employee is sent home with pay pending the confirmation drug test. Ms. Diamond and Dr. Kadehjian testified that strict chain of custody procedures are used for all drug tests. All laboratory drug testing is conducted by a fully accredited SAMHSA-certified laboratory. The confirmation test involves sophisticated and sensitive techniques, including gas chromatography and mass spectrometry (Exhibit 58, at p. 69). If the lab-confirmed drug test is negative, the Suncor Employee is returned to work.

[210] When a lab certifies a test result as positive, that result is sent to a MRO for review. The MRO is a medically-trained person with certified training in the area of the interpretation of drug test results. The MRO makes a decision based on his or her clinical judgment if the result should be reported to the employer as positive or negative. The MRO will confidentially contact the donor and review the test result with the individual to determine if there is any valid medical reason for the positive test. Ms. Diamond testified that Suncor follows this process.

[211] The Majority referred to false positive test result at paragraphs 209, 344 and 346 of its Award; however, there was no evidence that any false positives have occurred or that this was a legitimate concern. Ms. Sitko testified that she was once sent home pending lab confirmation of her drug test result. However, contrary to the Majority's statement, there was no evidence that the test result was a "false positive". In accordance with Suncor's policies and standards, Ms. Sitko's non-negative test was sent to the lab and reviewed by a MRO, wherein it was determined that the drug test was a lab confirmed negative. As soon as this determination was made, Ms. Sitko was informed by Suncor that she could return to work. During the time in which she was away from work, Ms. Sitko was paid by Suncor.

[212] The Union's expert, Dr. Macdonald, testified regarding the reliability of urine drug testing. However, this evidence was outside of his area of expertise. The Majority failed to acknowledge his lack of expertise and failed to consider the numerous admissions Dr. Macdonald made during cross-examination. Dr. Macdonald acknowledged in cross-examination that he did not know what kind of certification standards labs have in place or who certified the labs; did not know what a lab looks at to detect an adulterated or dilute sample; was not aware that creatinine or specific gravity levels are reviewed at the lab to ensure a sample is not adulterated or dilute; and did not know what a urine test measures for PCP, opiates, cocaine, and methamphetamines. Despite these acknowledgements and his lack of expertise in the area, Dr. Macdonald testified about cut-off levels and testing, the acute effects of different drugs, the efficacy of urine testing and laboratory procedures and the limitations on urine testing. This evidence must be ignored.

[213] Dr. Macdonald also confirmed in cross-examination that he was not aware of what cut-offs were used in Suncor's Alcohol and Drug Testing Standard nor did he know what cut-off levels were used in his own opinion relating to detection times in urine. Dr. Macdonald was not familiar with Suncor's operations in the RMWB and had not reviewed the 2012 Harmonized Policy and Standards, the Random Testing Standard or any of the Suncor alcohol and drug testing data or dependency data. The Majority's decision to prefer Dr. Macdonald's evidence over Suncor's experts was unreasonable based on the evidence before this Board, his lack of expertise in most areas of his testimony and the contradictions in his evidence. Dr. Kadehjian was the only toxicologist who testified in this hearing and as a result, his evidence is uncontroverted.

[214] Contrary to the Majority's Award, Dr. Kadehjian testified that the quantitative information provided by the lab is useful to interpret a test result. It is different if someone is positive just at a cut-off level as opposed to someone who is significantly above the cut-off level. Dr. Kadehjian testified that urine drug

testing provides objective information about a donor's recent drug use, the status of the donor and the associated safety-related risks.

[215] Dr. Kadehjian confirmed that "use of urine as a specimen to accurately identify recent drug use has been reinforced over decades of scientific development and is now widely accepted as an accurate and reliable technology". The expert evidence was that urine is the gold standard and is highly accurate. Further, Dr. Kadehjian testified that many of the older studies that considered urine testing and detection times must be disregarded given significant recent scientific advancements.

[216] Dr. Kadehjian testified that with the cut-off levels used in the Suncor test menu, an occasional marijuana user will only test positive for one to two days following use, and rarely longer, depending on dose. That period of time is consistent with known performance deficits. This was confirmed by Dr. Beckson (Exhibit 59).

[217] Dr. Kadehjian and Dr. Beckson both testified that urine drug testing is an accurate and reliable method to identify recent drug use associated with increased workplace safety issues. Urine tests identify sufficiently recent use associated with performance deficits and safety risks. Alcohol tests are also accurate and reliable. Alcohol tests provide a likelihood of known performance deficits. The breath test confirms that there is alcohol present in the body at the time the specimen is collected. It also confirms that the person has recently used alcohol and there are concomitant psychomotor and cognitive deficits.

[218] Finally, in cross-examination, Dr. Macdonald confirmed that urine drug testing was considered the "gold standard". Further, Dr. Macdonald acknowledged that he was not opposed to urine drug testing for reasonable cause, return to work and follow-up testing in a safety-sensitive environment. However, he opposed random and post-incident urine drug testing. Dr. Macdonald, however, did not oppose random drug testing through the use of blood testing; a far more intrusive testing method than urine testing. Dr. Macdonald made no comments on oral fluid testing. Additionally, as set out above, Dr. Macdonald had no concerns with random alcohol testing.

[219] Furthermore, all the concerns raised by the Majority regarding urine testing were in relation to its ability to detect marijuana. However, as provided in Suncor's evidence, a high percentage of the positive alcohol and drug tests are positive for other drugs like cocaine, heroin and other opiates and amphetamines. Further, recent tests also showed a high prevalence of polysubstance use (Exhibits 88, 89, 91). From January 1 to June 30, 2013, 58% of the positive tests tested positive for cocaine; 17% for marijuana; 17% for amphetamines; and 8% for alcohol. During the period of July 1, 2013 to September 18, 2013, 63% of the positive drug tests were positive for cocaine and 45% of the positive alcohol and

drug tests during the same time frame tested positive for polysubstances (Exhibits 88, 89 and 91). In the one week period from September 1, 2013 to September 8, 2013 alone, 3 Union Employees tested positive for both cocaine and marijuana and 1 Union Employee tested positive for cocaine. The Majority failed to consider this evidence. The experts were unanimous that use of cocaine is incompatible with working in a safety-sensitive environment.

[220] In cross-examination, Dr. Macdonald confirmed that the use of cocaine and alcohol leads to violent behaviours and creates a new molecule which prolongs “acute intoxication” for four times as long.

[221] In any event, this Board exceed its jurisdiction because the method of alcohol and drug testing was not before this Board. In the *Elliott Award*, Arbitrator Elliott concluded: “[w]e have no quarrel with the technicalities of the test and the appropriate and necessary care for proper labelling, transmission, testing and reporting of samples”: *Elliott Award*, at para. 89.

Alcohol & Drug Tests are Consistent with Safety Risks

[222] A positive alcohol and drug test, at the cut-offs set out in the Random Testing Standard, are consistent with adverse performance deficits that are incompatible with working in a safety-sensitive environment.

[223] In *Strathcona*, CEP, a sister local to the Union, argued that alcohol and drug testing was not reasonable as it did not measure impairment. This argument was rejected by Arbitrator Christian at pages 79 and 80:

[b]ased on this evidence we conclude that while a breathalyzer may not provide definitive proof of an individual’s level of impairment, it is able to measure blood-alcohol content. The degree of impairment is an inference based upon blood-alcohol content. It may well be that the degree of impairment varies from individual to individual. However, this fact does not undermine the validity of universally applicable standards. Any standard can be challenged when it is applied to an individual. For example, an individual trans border trucker might argue that he can hold his liquor and that his performance is not adversely affected at .02 or even .08. That is not a successful challenge to universal standards. If it were, all breathalyzer testing would fail.

We agree with the views expressed by Nash J. in *Walker v. Imperial Oil* (Court of Queen’s Bench Action No. 9403 11151, unreported, Sept. 18, 1998) where she held that Imperial Oil was justified in dismissing an employee who held a safety-sensitive position, for being at work with a blood-alcohol level in excess of 80 milligrams of alcohol per 100 milligrams of blood. She held it is not necessary that the Employer

prove the degree of inability to perform particular tasks at paras. 82 and 75:

Exxon had a right to ensure that an employee in a safety-sensitive position was not impaired by alcohol thereby constituting a risk to the lives and safety of others.

I reject the contention of the plaintiff that Exxon must establish that [the plaintiff] was incapable of actually performing his duty and that this was manifested by physical symptoms displayed by [the plaintiff].
[Emphasis added.]

[224] Furthermore, at paragraph 71 of its Award, the Majority incorrectly stated that Suncor relied on the DOT regulations as comporting with all of its own alcohol and drug policies. Ms. Diamond testified that Suncor utilizes the DOT regulations only for the cut-off levels and testing procedures. Other elements of the DOT regulations were not before this Board. Any additional information relating to other elements of the DOT regulations was based on the Chair's "own internet research", as indicated by the Chair on November 22, 2013 during the parties' closing arguments. The Chair's own "internet research" was improperly considered in the Majority's Award.

[225] The Majority's comments at paragraph 72 of its Award that the cut-offs for alcohol testing gives supervisors sole discretion to allow Suncor Employees to return to work when they test positive with a 0.02% to 0.039% BAC level was wrong. The Alcohol and Drug Testing Standard provides that if an alcohol test result is .02 to .039 BAC, the employee will be removed from duty until it is safe for the employee to return. The employee must have a BAC below 0.02% to return to work. Ms. Diamond testified that Suncor Employees cannot return to work until cleared by health and wellness and only then are they returned to work upon approval by their leader. Dr. Kadehjian reviewed Suncor's Alcohol and Drug Testing Standard and testified that the Suncor's alcohol cut-off levels are consistent with the cut-off levels set out in the DOT regulations (Exhibit 48, at p. 4). In any event, the reasonableness of the alcohol cut-off levels was not grieved by the Union and was not properly before this Board.

[226] Additionally, the Majority's assertions at paragraph 330 of its Award that Suncor significantly changed its drug cut-offs was wrong. While there were some minor changes to the confirmation cut-off levels from the 2008 A&D Policy to the 2012 Harmonized Policy and Standards, the confirmation levels only changed for cocaine and amphetamines; the confirmation levels for marijuana, opiates, codeine and PCP remained unchanged from the 2008 A&D Policy. Ms. Diamond testified that the changes to the cut-off levels between the 2008 A&D Policy and the 2012 Harmonized Policy and Standards were consistent with those updated cut-offs adopted by the DOT. This was confirmed by both Dr. Kadehjian and Dr.

Beckson. Furthermore, the confirmation cut-off levels which result in a positive drug test, are included the Alcohol and Drug Testing Standard. In any event, this was not grieved or argued by either party.

[227] Contrary to the Majority's assertions at paragraph 333 of its Award that Suncor failed to train its employees on the cut-off levels, the Alcohol and Drug Testing Standard, with the confirmation cut-off levels, were reviewed as part of the roll-out of the 2012 Harmonized Policy and Standards and Random Testing Standard. All Suncor Employees were required to complete a 30-minute mandatory web based training session (Exhibit 19, 126). The training covered employees' roles and responsibilities under the 2012 Harmonized Policy and Standards, including the Alcohol and Drug Testing Standard, preventative measures, and information regarding assistance for affected Suncor Employees, reporting and investigation measures and consequences of violations. Training was required to be completed no later than December 31, 2012. Constant reminders were made in this regard to Suncor Employees and leaders (Exhibits 81, 82, 83). No witness, including Union witnesses, expressed any concerns regarding their understanding of the 2012 Harmonized Policy and Standards or the Alcohol and Drug Testing Standard.

[228] Finally, it is important to note that the Majority's comments made regarding the DOT regulations and the Transport Canada Regulations are without foundation. The Majority, at paragraph 330 of its Award, refers to the DOT regulations and Transport Canada Regulation requirements and suggests that these regulations require four hours of pre-duty abstinence. However, this evidence was not before this Board.

No Evidence Regarding Oral Fluid Testing Before this Board

[229] The Majority's statements regarding oral fluid testing were made without any evidence or foundation. Contrary to the statements at paragraph 339 of its Award, at no time throughout these lengthy proceedings did either the Union or Suncor provide any evidence regarding oral fluid testing, nor was it addressed by either party in argument. In fact, the Union's own expert, Dr. Macdonald, on cross-examination, stated that he was specifically advised by Union counsel that oral fluid testing was not to be discussed by him as it was not before this Board. The Majority improperly considered evidence that was not before this Board.

[230] Contrary to the findings by the Majority at paragraph 342 of its Award, at no time did any of Suncor's experts provide evidence that oral fluid testing was preferred to urinalysis, nor that oral fluid was more accurate or more difficult to adulterate. The experts did not opine on oral fluid. The only evidence regarding oral fluid testing was when Dr. Kadehjian was questioned regarding oral fluid POCT testing and he confirmed that unlike POCT urine testing, the toxicology community has not yet embraced

POCT oral fluid tests. This Board heard no evidence of any scientifically acceptable POCT for oral fluid that would allow workers to return to work upon a negative test result. Additionally, the Majority misstated Mr. Tidsbury's evidence. Mr. Tidsbury's evidence was that the Canadian Model expressly contemplates the use of either urine testing or oral fluid testing (Exhibit 35, at s. 4.8).

[231] In making its findings regarding urine and oral fluid testing, the Majority ignored the evidence of Dr. Kadehjian. Dr. Kadehjian, the only toxicologist who testified before this Board, stated that urine as a specimen to accurately identify recent drug use has been reinforced over "decades of scientific development" and is "widely accepted as an accurate and reliable technology" (Exhibit 48, p. 14). Urine POCTs further provide the benefit of immediate results. Initial negative results are available immediately and only initial non-negative results require additional time to obtain confirmation results from an accredited lab. Dr. Kadehjian testified that the use of an accredited lab is a recognized strength of the Suncor program. Furthermore, to ensure that samples are not adulterated, urine drug testing procedures incorporate urine specimen validity tests (Exhibit 48, p. 14).

No Less Intrusive Measures

[232] Finally, contrary to the findings by the Majority, there are no less intrusive effective measures to address the pressing safety concerns related to alcohol and drugs in the RMWB. The Union did not introduce any evidence of effective alternatives to random alcohol and drug testing at Suncor's operations in the RMWB.

[233] At paragraph 346 of its Award, the Majority urges that a random alcohol and drug testing policy may be reasonable, subject to certain restrictions, if a peer care program similar to Courage to Care is introduced. However, this ignores the evidence before this Board. This Board heard no evidence that Courage to Care would be an effective alternative. The only evidence before the Board from Mr. Ingle and Mr. Lefort in cross-examination was that Courage to Care was a failure (Exhibit 129). Arguments related to Courage to Care being an alternative were argued and rejected in the *Elliott Award*. As Arbitrator Elliott noted, "very few employees came forward...There was no improvement in safety at the workplace" (Exhibit 15). Furthermore, Mr. Ingle testified that Courage to Care was not effective and, although the formal program ended with the unilateral withdrawal by the Union, elements of the program continue today. Further, elements of the Courage to Care program are included in the 2012 Harmonized Policy and Standards. The 2012 Harmonized Policy and Standards encourage self-help (Exhibit 4). EFAP also continues to date. Additionally:

- (a) section 1(a)(v) of the 2012 Alcohol and Drug Policy provides that co-workers are required to intervene if they believe a co-worker is not fit for duty. More particularly, all Suncor Employees must “notify their Leader if they believe a co-worker, contract worker or visitor is not Fit for Duty on the job”.
- (b) section 3(b) of the 2012 Alcohol and Drug Policy states:
 - (vi) Employees must advise a Leader if a person may not be Fit for Duty, may be under the influence of Alcohol or Drugs, or may otherwise be in violation of this Policy and Supporting Standards. Reports must be made as soon as possible.

(See also: Exhibits 4, 21, Tabs 1, 11, 24, 30(d), 31 (d)).

[234] Moreover, at paragraph 202 of its Award, the Majority’s statement that, under the Random Testing Standard a minimum of 50% of the 2,771 Union Employees in safety-sensitive positions will be tested in each calendar year, was wrong.

[235] This Board heard evidence from Mr. Foley that as of October 15, 2012, there were 2,771 Union Employees in approximately 15 positions who were deemed to hold safety-sensitive positions in the RMWB. In addition, as of October 15, 2012, there were 777 Non-Represented Employees in approximately 13 positions holding safety-sensitive positions in the RMWB (Exhibit 84). The Majority neglected to refer to this evidence in its Award. Furthermore, the Majority failed to refer to specified positions. As of October 2012, there were approximately 33 specified positions that would be subject to random testing in the RMWB. Mr. Foley testified that both he and the Suncor CEO, Steve Williams, were in specified positions (Exhibit 4, at s. 2(x)).

[236] Ms. Diamond testified that the random draw is based on the current listing of specified and safety-sensitive positions that are maintained in a confidential computer program. The random testing program tests a minimum of 50% of the total Candidate pool every year. To ensure randomness, once a Candidate is tested, they are put back into the pool. The random pool includes all Suncor Employees (Union Employees and Non-Represented Employees) who are in safety-sensitive and specified positions. The Majority ignored over 800 Suncor Employees who are part of the random testing pool.

[237] Additionally the Majority’s comments at paragraph 202 of its Award that testing 50% of the Candidates is too high was inconsistent with the evidence before this Board. Dr. Beckson testified that 50% was an adequate minimum testing rate for effective deterrence (Exhibit 58, at p. 68). This evidence was uncontroverted. Additionally, the Majority relied on *Irving* to argue that testing 10% of Candidates

would be sufficient. However, the Arbitration Board in *Irving*, at paragraphs 108 and 109, opined that the 10% rate was too low.

[238] Finally, the Majority's comments at paragraph 344 of its Award that a reasonable policy would be one that tests only new Suncor Employees for a period of time was made without any evidence or foundation. This issue was not raised or argued by either party in this hearing. This Board heard no evidence that the Union Employees who tested positive for alcohol and drugs were predominantly new hires. To support the assertion at paragraph 344 of its Award, the Majority relied on "new hire" alcohol incidents at the security access points from August 2012 to August 2013. However, the Majority ignored that each of those incidents were "voluntary" turnovers, not incidents where there were efforts to circumvent detection, nor were those incidents related to a positive test. Furthermore, 47 of those new hire voluntary turnovers were at the camp access gates, other than Firebag. The Majority found at paragraph 302 of its Award that few Suncor Employees stay in camps outside of Firebag. As a result, the Majority's recommendations are inconsistent with its own findings. The Majority also ignored evidence that during that same period of time, August 2012 to August 2013, there were 287 other security incidents involving alcohol, drugs and drug paraphernalia where no reference is made to a new hire.

[239] In any event, new hires are already subject to pre-access alcohol and drug testing (for Contractor Employees) and pre-employment alcohol and drug testing (for Suncor Employees). The Majority ignored this evidence. Furthermore, as described above, Suncor's experts confirmed that not applying random alcohol and drug testing to the entire safety-sensitive and specified position workforce would eliminate any deterrent effect.

[240] The Majority's comments at paragraphs 344 and 346 of its Award that the Random Testing Standard was unreasonable because it was not time limited and did not contain provisions for ongoing review and modifications are without foundation and wrong. The Majority neglected to consider section 12 of the 2012 Alcohol and Drug Policy, which provides that the "Policy and Supporting Standards are subject to ongoing review and modifications as may be necessary from time to time" (Exhibit 4).

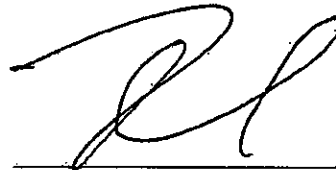
[241] Finally, the Majority's comments at paragraphs 346 to 348 of its Award are inconsistent with the rest of its Award. In its Award, the Majority found that Suncor has failed to provide sufficient evidence of an alcohol and drug problem to justify random testing. However, the Majority concluded at paragraph 348 of its Award that "the 2012 Policy, **in its present form**, as it applies to random drug and alcohol testing" was unreasonable, suggesting a random alcohol and drug policy is necessary at Suncor's operations in the RMWB.

IV. CONCLUSION

[242] The Majority erred in finding that Suncor has not met the test in *Irving*. Suncor's operations in the RMWB are dangerous. Suncor has overwhelmingly demonstrated evidence of a serious problem with alcohol and drug use in the workplace and an enhanced safety risk. Suncor has addressed the ongoing safety concerns with incremental measures over the last two decades. Further incremental steps are necessary. There are no less intrusive measures. Failure to implement the Random Testing Standard could result in potentially serious injuries, fatalities and potential environmental catastrophe.

[243] The Grievance should be dismissed for the reasons stated in this Dissent.

DATED at Calgary, Alberta, this 25th day of March, 2014.



David Laird, Q.C.
Suncor Nominee

**Schedule 1
The Hearing**

Dates and places of the hearing:

- January 2-3, 2013, Calgary, Alberta
- February 11, 2013, Site Tour of Base Plant, Fort McMurray, Alberta
- February 12-13, 2013, Fort McMurray, Alberta
- March 5, 2013, Calgary, Alberta
- April 24-25, Calgary, Alberta
- April 28, 30, 2013, Calgary, Alberta
- May 1, 2013, Calgary, Alberta
- September 16-20, 2013, Calgary, Alberta
- September 23-25, Fort McMurray, Alberta
- September 27-28, 2013, Fort McMurray, Alberta
- November 21-22, 2013, Edmonton, Alberta.

Witnesses:

for the Union:

Mohammed Al-Dhaby
Ian Beaton
Don MacNeill
Brenda Sitko
Dr. Scott Macdonald
Lori McDaniel
Roland Lefort

for Suncor:

Mike Agnew
Anne Marie Toutant
Dr. Louis Francescutti
Robert Neil Tidsbury
Dr. Leo Kadehjian
Elizabeth Diamond
Dr. Mace Beckson
Grant MacPhee
Eric Ingle
Colin Foley
RCMP Sergeant Kirk Peyton
Joseph Vetrone