

IN THE MATTER OF a complaint being
No. 2329 filed pursuant to section 9 of the
Human Rights Code.

BETWEEN

AL LEONARD

PLAINTIFF

AND:

HUMAN RIGHTS COMMISSION

COMMISSION

AND:

NOBLE DRILLING (CANADA) LIMITED

FIRST RESPONDENT

DECISION

Al Leonard was represented
by Augustine Bruce

Barry Fleming and Jane Fitzpatrick
appeared on behalf of Human Rights Commission.

Michelle Willette appeared on behalf
of the First Respondent, Noble Drilling (Canada) Limited.

Kimberly D. Burrige, Adjudicator
January 29, 2010

INTRODUCTION

1. This Board of Inquiry was appointed to adjudicate one complaint made by or behalf of Al Leonard (hereinafter referred to as “Al Leonard”, “Mr. Leonard” or “Complainant”) against Noble Drilling (Canada) Limited (hereinafter referred to as “Noble Drilling”, the “Employer”, or the “First Respondent”).
2. The Complaint, being Complaint No. 2329, was filed by Al Leonard and it was alleged that the Employer discriminated against Al Leonard by reason of physical disability by requesting a drug test on July 25, 2002, and further by terminating Mr. Leonard’s employment on August 8, 2002, all in violation of the *Human Rights Code* for the Province of Newfoundland and Labrador.
3. At the commencement of the hearing, the parties requested that this Board of Inquiry adjudicate the issue of liability only but reserve its jurisdiction to adjudicate the issue of damages, if necessary, upon request of the parties.
4. This Board of Inquiry has closely reviewed all of the extensive evidence proffered, including Exhibits and viva voce evidence. Its finding as to the relevant evidence for the time period of the Complaint are set out below.

RELEVANT EVIDENCE

5. Al Leonard testified that he began employment with the Employer on March 10, 1997 as a driller at the Bull Arm site. Consent #1 outlines his duties at that time. Mr. Leonard testified that a driller's duties included drilling the well, full control of drilling equipment, maintaining safety of well control equipment and the safety of a nine to fourteen person crew. He testified that the driller runs the equipment.

6. Mr. Leonard's work experience included various positions in the oil fields in Alberta from the 1980's onwards. He worked up to the position of a driller. He also worked offshore in the Arctic.

7. Mr. Leonard first began work with Noble Drilling as a driller, and over time, worked up to an Assistant Rig Manager. He testified that he also did various courses while he was with Noble Drilling.

8. In the Assistant Manager position, Mr. Leonard worked nights and his main duties included maintaining the operation during the night shift. He testified that he permitted module M72; prepared outcoming operations; housekept environmental issues; relieved drillers and completed associated paperwork. Mr. Leonard's specific duties are outlined in Consent #4. He testified that his shifts were 12 hours and that he was required to have a pre-shift meeting and usually had administrative work to complete after the shift. As a result, his shifts were between 12 and 15 hours. He testified that he would have scheduled the block outs and procedures to work on equipment. He would have coordinated with other departments and completed all documentation required. He testified that in the night time he was in the highest ranked position on the rig.

9. Mr. Leonard described the Heliport area where they prepared for transport to the Hibernia platform. He stated that the waiting room was out front and the preflight room was separate. He spent most of the time waiting for the flight in the preflight room.

10. Mr. Leonard testified that on July 25, 2002, he arrived at the Heliport with his family. He checked in to fly offshore at approximately 6 or 7 a.m. He described the check in procedure which included declaration of any medication, checking of weights, search of luggage, scanning and getting his survival suit. He testified that they would attend a preflight helicopter safety meeting where the pilot would come in and inform them of the time to go. Then they would get dressed and there would be a one and a half hour flight to Hibernia. When they arrived at the Hibernia site, they would be escorted to the reception room where they would take off their survival suits and be provided with their T cards (I.D.'s).
11. On July 25, 2002, Mr. Leonard, after arriving at that Hibernia site, chatted with friends and then went to his room and went to bed. He went to his regular shift later that day at 6 p.m. The next day at 12 p.m. we was awoken by Tony Chaytor, his Supervisor, and asked to meet in the reception room. No reason was given at that time.
12. Mr. Leonard testified that when he got to the reception room, he met the rest of the crew that was on the helicopter along with two passengers Rod Hafmer, EXXON Representative and Michelle Mooney, Hibernia Management and Development Company Inc. (hereinafter referred to as "HMDC"). It was reported that a marijuana cigarette was found in the reception area in the Heliport in St. John's. They were advised that a nurse from an Atlantic Offshore Medical Services (hereinafter referred to as "AOMS") would be arriving to do a drug test on all of those who were on the helicopter. Everyone from the flight provided a sample.
13. Mr. Leonard testified that he did not smoke on the day in question, July 25, 2002. He testified that he did not have any knowledge of the marijuana cigarette that was found or who owned it. He testified that it was not his. He was unsure as to whether there was another crew from another rig that may have gone through the same area that day. At the time they were in the area, there were no other crews. Mr. Leonard also testified that he was not a causal marijuana smoker nor was he a recreational marijuana smoker.

14. Mr. Leonard confirmed that the Noble Drilling Policy for drug testing for personnel was posted on the platform of the module M71 and M72 office doors. He testified that he had been aware of the Policy since 1997.
15. Mr. Leonard testified that he provided a urine sample around 12:30 p.m. After providing the sample he returned to bed.
16. Mr. Leonard testified that he later went to see Mr. Chaytor regarding the drug test. He advised Mr. Chaytor that he had been at a party of a neighbor and that he had a puff of a marijuana cigarette. Mr. Chaytor called the St. John's head office and spoke to Mr. Roche.
17. In cross-examination, Mr. Leonard admitted that he knew that when he went offshore that he would have had drugs in his system. He testified that he did not report the marijuana in his system while he was offshore because it did not affect his abilities to perform his duties.
18. Mr. Leonard testified that he was familiar with the check in procedure and that he would have to declare all medications. He testified that he understood that he would have to declare medications due to safety concerns so that if anything would happen, a medic can adhere to the medications. He acknowledged that it may also relate to concerns of impairment. He testified that anyone going through the check in would have to give the medications to the medic and that the medications would be returned to them when they arrived at the platform.
19. Mr. Leonard testified that he had been scheduled to work for three weeks. However, he was only permitted to work until July 31, 2002. Initially, after the testing, there was no change in his duties. On July 31, 2002, he was advised that his test was positive. He testified that he was advised that it was a borderline failure. As a result, he was advised that he could continue performing his office duties but was not permitted to perform the

other duties of his position. He was asked to leave as of August 1, 2002. Mr. Leonard testified that there was no change in his duties up to his suspension on August 2, 2002.

20. On cross-examination, Mr. Leonard was asked if he requested his second sample split-sampled and he indicated that he did not recall. He could not recall whether it was suggested to him and he indicated that he believed that if it was spoken about that he would have remembered it.
21. After leaving the Hibernia site, Mr. Leonard was asked to attend AOMS for a full medical immediately. After collecting his luggage he attended at AOMS and had a medical completed with Dr. McVicker. Mr. Leonard testified that the doctor asked whether he had a drug or alcohol dependency, to which he replied no to both. He was also asked if he smoked marijuana on a regular basis and he responded no.
22. Mr. Leonard testified that after the complete testing was done, he was taken to the office and provided with a suspension letter. The letter was dated August 1, 2002, and signed by Louis Puddister, Human Resources Coordinator with Noble Drilling. It stated that because of his positive drug test that he was suspended from employment without pay with Noble Drilling effective August 2, 2002, pending investigation of the incident.
23. Mr. Leonard was advised that he was to provide the second drug test because Noble Drilling had requested their own testing. The first test was completed by HMDC.
24. Mr. Leonard testified that as a result of the suspension he felt terrible. He was off work, no job, no pay. He found it hard to relate to his family.
25. On August 6, 2002, Mr. Leonard received a call from the doctor. He was unsure of her name but was advised that there was a negative result. He contacted the Employer and advised them that he had passed the medical and drug testing. However, within an hour of his call he was advised that his employment was terminated.

26. By letter dated August 6, 2002, C # 11, Kevin D. Roche, General Manager of Noble Drilling terminated Mr. Leonard's employment effective August 7, 2002. Mr. Roche stated:

"We have concluded this investigation and hereby inform you that you are dismissed Afor cause" for violation of Noble's policy on Drugs, Narcotics, Alcohol and Firearms (see attachment). You have also violated Hibernia's Alcohol and Drug Policy for platform employees by testing positive for the use of a banned substance on July 25, 2002, on board of the Hibernia platform".

27. Mr. Leonard subsequently spoke to Mr. Roche and asked him why he was terminated when he failed the drug testing and other employees had not been terminated when they failed the drug/alcohol testing. Mr. Leonard testified that Mr. Roche advised that Kurt Hoffman, the Western Hemisphere General Manager made the call.

28. Mr. Leonard testified that when he passed the second test, he had expected to be reinstated with full pay in accordance with the policy. He stated that the first test was performed by HMDC and that the second test was performed by Noble Drilling. As such, he has never failed a Noble Drilling drug test. Although the suspension letter had indicated that he would be suspended pending investigation, he felt that there was very little investigation after he received that letter.

29. Mr. Leonard testified that Steven Lewis, Rig Supervisor at the Hibernia platform provided him with a letter of reference dated March 27, 2002, Consent # 13. He had obtained that reference letter for future job search purposes. Mr. Leonard submitted a Noble Performance Appraisal dated July 5, 2002, Consent # 14, which indicated that he was competent and either met or exceeded the standards in all areas.

30. Mr. Leonard testified that he was aware of two other individuals who had dependency issues and were not terminated from their employment. One was alcohol related and the other one was in relation to someone involved in the building platform at Bull Arm.

31. After being terminated from Hibernia, Mr. Leonard applied for positions around town and in Halifax. He testified that he was unable to find any work after his termination for approximately four months. He testified that he did apply for E.I. but initially denied. He did eventually receive E.I. benefits. Later, a job opened up in Asia and he obtained employment.
32. Mr. Leonard testified that he felt that he was discriminated against since he was terminated from his employment without cause. His current position with his current employer is a day tool pusher. It is the same as a day time driller coordinator.

MAURICE GILLINGHAM

33. Maurice Gary Gillingham testified on behalf of the First Respondent. Mr. Gillingham is an employee of Kruger Helicopters and has been employed by them for nine and a half years. His job title is that of passenger movements, security, baggage search and ramps.
34. Mr. Gillingham's duties in security includes searching baggage, seizing alcohol, weapons, matches and other things that are not permitted offshore including cell phones, cameras, medications, vitamins, prescriptions. As a baggage handler, once security has been completed and baggage checked, he would load the cart then the aircraft. As a ramp agent, he would bring the baggage on the ramp and prepare for flight.
35. Mr. Gillingham testified that he was in this position in 2002 and he is still in the same position at the date he testified.
36. Mr. Gillingham testified that he also acted as a janitor since 2001 under a separate contract. That contract involved cleaning the washrooms, replacing hand towels, taking out garbage, dusting, stripping and waxing the floors, etc. He performed his duties from Monday to Friday between 5 p.m. and 7 a.m. each day.

37. Mr. Gillingham testified that the area would be shut down at the end of the flight. For the most part that would be between 6 and 7 p.m.
38. Mr. Gillingham testified that passengers would arrive about one hour prior to departure. At that point, I.D.'s would be checked, the bags would be weighed and they would request for medications and the person's weight, search baggage, check baggage and take baggage for flights. They would also scan each person to search for metal object. The passenger would then proceed to the next room which is a waiting room to obtain the survival suit. The passengers would then go into a briefing room. They would retrieve shoes from the workers and provide them with a manifest printed with a list of travelers, freight and cargo. They would get these items and would load up the cargo box and proceed to load the helicopter. When they returned, the pilots would come down, pick up the manifest, board the aircraft and start the aircraft. Once they were ready, they would call on the radio to bring out the passengers. The passengers would suit up and get ready to load the helicopter. One employee would lead the passengers to the helicopter and one would follow immediately behind. This would be for security purposes.
39. On July 25, 2002, shortly after the security baggage search, Mr. Gillingham found a marijuana cigarette on the floor in the proximity of the body scanner which is behind the security camera. At that time the passengers were in the briefing room or the back lodge. All of them had already proceeded through security. There was one other security employee with Mr. Gillingham, Chad Madden. He first showed the marijuana cigarette to Chad and then gave it to the check in agent on duty, Lisa Efford. She made a call to someone at Exxon Mobile.
40. Mr. Gillingham testified that he had completed the janitorial surface that morning of July 25, 2002. It did not include a sweep.
41. Mr. Gillingham testified that there were usually four to five flights per day. On July 25, 2002, that was the first flight of that day. He testified all the janitorial services would have been completed by 7 a.m. The first area would have been completed between 4:30

and 5 a.m. There would be nobody else in the Heliport when the cleaning was completed. He testified that the flight was scheduled to depart at 8 a.m. No other clients other than the offshore use the Heliport.

42. Mr. Gillingham testified that he was also drug tested. Everyone involved with that flight were tested that morning.
43. Mr. Gillingham testified that Lisa Efford worked with Kruger. Gordon Butt was their Hibernia head of security. He was not an employee of Kruger. He was present at the facility from 5 a.m. until the end of flights that day. He did not see any evidence of marijuana use including smell. Mr. Gillingham reviewed the incident report, MG # 1, and indicated that the report was accurate. To his knowledge the marijuana butt was to be tested.

TONY CHAYTOR

44. Tony Chaytor, the Rig Manager at the Hibernia platform for Noble Drilling, testified that he had been employed with Noble Drilling since August 1996. He had this position in 2002. He testified that he was Mr. Leonard's supervisor and knew Mr. Leonard.
45. Mr. Chaytor testified that as a rig manager he was in control of safety, rig operations, logistics, safe equipment use, day to day running of the rig. He advised that there were four rig managers and four rig assistant rig managers. He testified that Mr. Leonard was the assistant rig manager at night, 6 p.m. to 6 a.m. shift and that he was the manager from 6 a.m. to 6 p.m. so they would speak during the changeover. He testified that Mr. Leonard was his equal at night time. He testified that they were both safety conscious positions. He supervised the rig, two crews and maintenance. There were 10 to 12 employees per crew and approximately 10 for maintenance. In total there would be 20 people.

46. When questioned as to the extent that Mr. Leonard was supervised; Mr. Chaytor testified that Mr. Leonard was in charge. There would have been an EXXON representative on shift as well. Any communication between him and Mr. Leonard would be on a as need basis as it arosed throughout the night.
47. Mr. Chaytor testified that they would be transported to the Hibernia platform via helicopter or vessel when it is too foggy to land the helicopter.
48. Mr. Chaytor testified that during Mr. Leonard's last crew shift change, he received a telephone call from David Acker, Offshore Installation Manager (hereinafter referred to as "OIM"), approximately one-half hour after the helicopter arrived, around 9:30 am. He wanted all of the people that had came in on the flight back in because they found a roache or portion of a marijuana cigarette and wanted all individuals to do drug testing. He asked Mr. Chaytor to contact all Noble Drilling people under his supervision.
49. Mr. Chaytor contacted his office and informed his supervisor, Harvey Stone, of the situation and there was no objection by Noble Drilling. He contacted all of the people that were on flight and someone from OIM came in and informed them of the situation and their intention to do a drug screening. They flew in someone from St. John's to do the testing.
50. Mr. Chaytor testified that he went to Mr. Leonard's room and woke him up. He was on the bunk at that time. He did not note any impairment nor did he notice any impairment that day.
51. Mr. Chaytor testified that Mr. Leonard did contact him that day and visited him in his office. Mr. Leonard had concerns as to whether he would pass the drug screening test. Mr. Leonard testified that he did not see any signs of impairment. After Mr. Leonard left his office, he phoned his supervisor, Harvey Stone, and advised him of the conversation. They both took a wait and see approach. Mr. Chaytor testified that he did not keep any notes of this meeting. It was Harvey Stone who contacted him that day.

52. Mr. Chaytor testified that after the testing, everyone went back to their prior duties. He did send everybody to work. He spoke to his supervisor and was advised that he cannot refuse work unless the employee showed signs of impairment. It was a decision made by him and Harvey Stone. It was some days later before they received the results and he had to make arrangements to send Mr. Leonard onshore. It took a couple of days before he was able to get back to City of St. John's due to fog.
53. Mr. Chaytor testified that he was accountable 24 hours per day. Mr. Leonard would have his authority at night but if an issue arose Mr. Leonard would have to notify Mr. Chaytor. He testified that he had supervised Mr. Leonard for a number of years including during the time he was a driller. He first met Mr. Leonard in 1997 during recruitment and worked with him on two rigs. He had no concerns regarding Mr. Leonard's performance. He was not consulted in relation to the termination of Mr. Leonard. He was only advised that Mr. Leonard would not be returning. David Acker is an operations employee with HMDC, not Noble Drilling. It was David Acker who arranged the drug test.

SUSAN LIND

54. Susan Lind testified on behalf of the First Respondent. She is a registered nurse, certified as an Occupation Health Nurse. At the time of her testimony, she had been working in the field for approximately six years. She was employed with AOMS from August 2001 to April 2007. In 2002 she was a clinical coordinator.
55. Ms. Lind testified that while she was with AOMS, she did training for drug and breath alcohol collection. She did training with new employees on how to collect drug and breath alcohol. She trained under the DOT (Department of Transportation) procedure. She testified this was the highest standards available and were adopted from the United States. She testified that Canada did not have regulations in that area.

56. She testified that during a testing an example of a fatal testing error would be a situation where they seal the bottle, put a number on it and the number did not match up with their documentation. This would be fatal to the testing. She has never had a fatal error.
57. She testified that she met Mr. Leonard on the platform when he was called out to do a urine collection. She does not remember the date but she does remember the occasion because it was the only time she flew out to the platform.
58. She testified that she was set up in a room where they gathered before going up to the deck. She sealed up the washroom. This involved taping up all sources of water, including the toilet, sink, soap dispenser, etc. She would use a blue dyeing agent in the toilet. When she started collection, she requested picture I.D.'s or the OIM would identify them.
59. Ms. Lind testified that she did not remember how Mr. Leonard was identified, however she did testify that everyone had been identified by one of those methods. They were sent over one at a time.
60. Ms. Lind reviewed the Non-DOT Testing Custody and Controlled Form, SL # 1. She then reviewed the steps in testing, as outlined in Form SL # 2. After sealing the bathroom, the collection would begin. She would have the forms and drug kits. She would open the cup, in front of the donor, allow them to wash hands and then go into the bathroom for collection. They were instructed to provide 45 cc of urine. The employees were instructed not to flush in the washroom. Ms. Lind would listen to ensure that they did not flush. Once they came out of the bathroom, they would be allowed to wash their hands and she would seal the specimen. She would record the temperature of the cup. She would put the urine in two bottles and zip lock them into two separate bags.
61. Specimen A would have 30 ml while Specimen B would have 15 ml. The number on the cups would correspond with the number on the top right hand of the form. She would date the seals and get the individual to initial on the seal. The donor would fill out step

number 5 on copy number 2 of the form. She would finish step number 4 and release it to the Purolator carrier. She would then remove the lab copy which would go into the bag with the bottles. She would remove the blue label and seal it. She would put the bag into the box and then seal the box with the other seal. If the box arrived at the lab and the seal was broken, the lab would not process the samples.

62. Ms. Lind testified that it was her signature on Consent # 7 which was Controlled Form No. 22021536. Ms. Lind then reviewed each of the copies of the form noting that some of them were different and did not include certain information depending on who's copy it was. Copy 1 was a copy for the laboratory, copy 2 was the medical review officer copy, copy 3 was a collector copy, copy 4 was the employer copy and copy 5 was the donor copy.
63. Ms. Lind noted that Mr. Leonard's I.D. number was not on the form. It was noted as 0001. She later provided an affidavit to correct this omission, SL # 4. Ms. Lind testified that this was not a fatal error. The number was noted just to say that he was identified whether by picture or drivers license.
64. She testified that after the bag was sealed it stayed with her in the area at all times and she was permitted to keep it with her while on the helicopter on the way back to shore. She took the samples with her and placed them in a second fridge. She took the bag into work the next day and then put them in the fridge at AOMS. Those samples were then Purolated to MAXXAM.
65. Ms. Lind testified that she met with Mr. Leonard later to do a second drug screen. The second testing followed the same procedure but was done on behalf of Noble Drilling. Dr. McVicker was the medical doctor in relation to the second testing.
66. Ms. Lind testified that she had done over one thousand collections. When questioned whether she observed the donors as to whether they were intoxicated or under the influence, she testified that she was not qualified to make those observations in relation to

drug testing. In relation to alcohol she would have been able to tell fairly easily. She did not keep any notes.

67. When asked about the omission of the I.D., she testified that the number would usually be a number or driver's license but if none were available then she would just use any number. When questioned as to the importance of using an I.D., she testified that was only for the purposes of confidentiality. When it goes to the lab they only need to show that they could actually identify the donor. She testified that she was certain that Mr. Leonard was identified whether by providing an I.D. or being identified by one of the supervisors. However, she had no independent recollection of how he was identified. If he was not identified, she would have not taken a specimen from him. The purpose of the affidavit and number 0001 was to complete the form.
68. Ms. Lind testified that she was unaware of any requirement for the specimens to be tested within a certain time period. She testified that rule of thumb was 48 hours after being collected. She was asked whether there was any temperature group control with the carrier. She testified that there wasn't. Blood work would be placed in the cooler but most likely urine would not be. She was not aware of any regulations or stipulations in relation to temperature. The laboratory would have to answer any questions in relation to that. She would read the temperature of the bottles to ensure that it came from a person at the time she collected the sample. Ms. Lind testified that there was no doubt in her mind that the sample was provided by Mr. Leonard.

DR. CHARLES MCVICKER

69. Dr. Charles McVicker testified that he was an Occupational Physician since 1999. He became qualified as a General Practitioner in 1999. He worked with AOMS since January 1998 in a part-time position and in a full-time position since 1999.

70. Dr. McVicker testified that he worked as an emergency physician in Clarendville from 1990 to 1997 and an emergency physician in St. John's from 1998 to now on a part-time basis.
71. When questioned as to whether there was any special training for his type of work, he testified that there were two manners in which you could be certified. He indicated that he did not have either but he was doing courses and keeping up to date in the field. He was also continuing his medical education.
72. When questioned as to his role with AOMS, he testified that when he first stated he was seeing patients on a day to day basis and doing medicals, case managements, FCE's, etc. At the date of his testimony, he stated that he was in a management role, only seeing patients two days per week.
73. Dr. McVicker testified that he was certified as a Medical Review Officer, (hereinafter referred to as "MRO"). He obtained his training in 2001 from the United States - MROCC. His role as a medical review officer was to verify drug and alcohol testing. His training included a three day course and a three hour exam. He did his last exam again in July 2007. He has to repeat the exam every six years and do a number of hours per year in that field.
74. As a MRO, Dr. McVicker interprets drug testing. There is a negative or a non-negative, not a positive. If it is non-negative then the MRO will speak to the donor to see if there is any medical reason for it being non-negative, for example marijuana approved for MS patients. So, in fact, a positive could be reported as a negative. Another example would be cocaine used for nose surgery.
75. When he speaks to the donor, Dr. McVicker uses a form and reads the donor his Miranda rights. He explains why he is calling and he confirms that he is speaking to the right person. He asks if they had any trouble with the collection and whether they had any recent surgery or are taking medications. He will then discuss the results and advise them

of their right to have the B sample tested at the other lab. He advises them that they have to provide 72 hours of the process and then he advises them that he has to tell the employer. Next he would fill out the paperwork and speak to the designated employer rep.

76. If there is a legal reason for the individual to have tested positive, he will report it as a negative.
77. The laboratory that was used in 2002 to perform the drug testing was MAXXAM. All laboratories must be HHS certified. They use the DOT procedure. He testified that DOT sets the gold standard.
78. When asked if a second hand smoke would result in a positive test, Dr. McVicker testified it would not be a legitimate reason for a positive. He stated that it would be very rare for it to be positive. He testified under the DOT regulations, you would need 12 people smoking marijuana or a 12 hour period in a 12 foot trailer to test positive at the cutoff levels of the industry.
79. Dr. McVicker testified that he wrote a letter to Louis Puddister of Noble Drilling on May 20, 2003; CM # 1; as a result of inquires by Mr. Puddister in relation to the procedure.
80. Paragraph 4 of the letter stated that:

“The urine specimen is shipped in a secure package to a certified laboratory. The laboratory will run a screening test on specimen A. If a sample has concentration of less than 50 ng/ml, the test will be reported as negative, however, if the sample has a concentration of 50 ng/ml or greater a confirmation test using gas chromatography or mass spectrometry will be undertaken. The confirmation test if very accurate and will be reported as positive if the level is 15 ng/ml or greater.”

81. When questioned about the use of the 50 ng/ml cutoff, he explained that this was just a cutoff or screening confirmation point. He compared it to the 80 mg per litre used with alcohol testing. He stated that it would be 50 ng in 1 ml of urine. He testified that initially the first test would be like a home pregnancy test where it would turn white if it was negative and color if it was non-negative. If it was non-negative then they would do a further testing, gas chromatography or mass spectrometry, to obtain a more accurate measurement and determine the amount of drugs in the urine. He testified that the screening cutoff would be 50 ng/ml. They could confirm the presence of drugs at 15 ng/ml.
82. Dr. McVicker testified that if a split sample was to be tested, it would be sent to a new laboratory as a safeguard to ensure that the first laboratory was not having problems. There is no cutoff for the level for the B test. It is just negative or positive.
83. Doctor McVicker testified that there was no temperature requirement for storage of the urine. There is also no temperature requirement for transportation.
84. Dr. McVicker testified that when the sample leaves St. John's and goes to MAXXAM, he usually gets a negative result within 48 hours or a non-negative within 5 to 7 days.
85. He testified that the reason for the affidavit requested from Ms. Lind was that the I.D. was omitted. He testified that this was a non-fatal error; however, they needed an affidavit within a five day period. When they receive a form they will ensure that everything is filled out and will notify the collector if there is anything missing. He had no concern about the validity of the test as a result of this error. He would confirm the name of the donor by looking at the sample I.D. and matching it up with the form with the person's signature. He would match up the date of birth.
86. Dr. McVicker testified that fatal flaws included the following: where the CCF number and number sample do not match; tampering or leakage of the samples; not enough volume in the sample; the collector did not sign or put name on the form.

87. Dr. McVicker testified that Mr. Leonard was referred for the assessment for Fitness to Work. He completed a medical questionnaire and did a complete physical. This assessment was requested by the employer, Noble Drilling. Typically this assessment was completed as a result of the positive drug test. He will be looking for any drug or alcohol addiction.
88. Dr. McVicker reviewed CM # 2, the Medical Examination of Fitness for Offshore Employment and Physical Assessment of Al Leonard dated August 2, 2002.
89. The Medical Examination Form indicated that Mr. Leonard drank approximately 1 case per week of alcohol and he did not have any medical problems due to mind altering, street or addictive drugs.
90. On page 2 of the Form, it noted that the patient admitted to being positive for THC with the level recorded at 44 ng/ml. It was noted that Mr. Leonard stated that three nights before going offshore, he was at a neighbor's house and admits to drinking too much rum. A joint was passed around and he joined in. He indicated he was not a regular use. It was Dr. McVicker's opinion that the patient was fit for work as a manager. The CAGE is a questionnaire used as a drug and alcohol screening tool. The results of the CAGE questionnaire indicated that Mr. Leonard was not addicted to drugs.
91. Dr. McVicker stated that although the discussion was more than five years ago, after prompting by reviewing his notes, he did recall the discussion. He thought that Mr. Leonard was very honest with him and told him what happened.
92. Dr. McVicker testified that the second testing was negative. Dr. McVicker testified that if a person is an irregular user of marijuana, the drugs would be in his system for 7 to 10 days. If they were a regular user, then they could test positive up to two months after the last use. He testified that the record is 88 days. If Mr. Leonard was a frequent user, then he would most likely have tested positive in the second test.

93. Dr. McVicker testified that he signed the Fitness Certification for Offshore Employees dated August 2, 2002, stating that Mr. Leonard was fit for employment onshore, temporarily pending specialist evaluation.
94. When questioned regarding the opinion of fitness given on CM # 2 and the temporary allowance on CM # 3, Dr. McVicker testified that the CM # 3 was going to the employer and they would have to consider other issues, for example, the second drug test, when determining whether the person would be fit to return to work.
95. Dr. McVicker testified that he did not feel that Mr. Leonard had an addiction problem. He testified that most people will deny a problem, but when caught they will fess up to the addiction. The CAGE questionnaire is framed to see if there is a hint of problem. In this case there was no problem for Mr. Leonard.
96. Dr. McVicker testified that there are usually other indicators from coworkers or family members. It is unusual for a person with an addiction to go unnoticed. He indicated that there was nothing in the documentation to indicate that there were any other indicators for Mr. Leonard.
97. Dr. McVicker was questioned regarding the letter dated August 5, 2002, C # 10, from Dr. O'Shea to Louis Puddister of Noble Drilling and copied to Dr. McVicker and a Dr. Walker. Dr. McVicker testified that Dr. O'Shea is the senior medical officer and owner of the company. Dr. O'Shea would have had discussions with Dr. McVicker before sending the letter. Dr. McVicker testified that Dr. O'Shea agreed with his opinion that Mr. Leonard was fit to return to offshore work.
98. Dr. McVicker testified that THC in the urine only indicates that there was a use but does not indicate impairment. It is different than an alcohol testing wherein if there is alcohol in the blood the amount of alcohol reflects the impairment. When questioned whether a positive test on July 25, 2002, would show if there was an impairment at that time, Dr. McVicker said that no it would not show if there was an impairment. There is no test to

show an impairment at the time a person is impaired. He stated that the police force are trying to develop tests to see if a person is impaired by drugs, for example physical signs, pupils, etc, however, there is nothing in the industry at this time.

99. Dr. McVicker testified that the cutoff test would show the presence of THC at a level of 15 ng/ml. Mr. Leonard's was 44 ng/ml. Anything more than 15 ng/ml is a fail.

PHILIP WHALEN

100. Philip Whalen testified for the First Respondent. He has been running his own company, Whalen Petroleum Personnel Management and Newfoundland Personnel for two and one half years. Prior to that he worked with Puglisevich Group for 20 years, the last 10 years as a Vice President of Human Resources and Business Development.
101. Mr. Whalen testified that his duties at Puglisevich Group included management of the company, hiring and policies, procedures and client relationships.
102. In May of 2003, Mr. Whalen hired Mr. Leonard for a position with one of their clients, Global Santa Fe, on the Glomar Grand Banks. He had received a call from Kevin Roche who highly recommended Mr. Leonard. He was aware that Mr. Leonard had been terminated by Noble Drilling.

GORDON BUTT

103. Gordon Butt testified for the First Respondent. Mr. Butt testified that he was no longer employed but had worked with Hibernia from 1995 to 2007 when he retired. Prior to working with Hibernia, Mr. Butt had been employed with the Royal Canadian Mounted Police for 36 years. When he left the RCMP, he was a Chief Superintendent, Commanding Officer for Newfoundland and Labrador.

104. With Hibernia, Mr. Butt testified that he was a security advisor. His duties included security for the offshore program and travel to and from the offshore.
105. Referring to GB #1, Mr. Butt testified that on July 15, 2002, he received a telephone call from Hank Williams who had received a call from Lisa Efford, a passenger movement officer at Hibernia. They found what appeared to be a marijuana butt on the floor near the check in counter. It was found by Maurice Gillingham, an employee of Cougar Helicopters.
106. Mr. Butt testified that he drove to the heliport and met with Lisa Efford and Maurice Gillingham. The joint was approximately one half inch in length. He took possession of the butt and drove to the Hibernia offices on New Gower Street and met with Mike Ryan who referred him to Len Coughlin, his boss who used to be in charge of logistics.
107. Mr. Butt testified that Mr. Coughlin called the O.I.M., David Acker. Mr. Butt advised Mr. Coughlin that, to the best of his knowledge, it was a marijuana butt. For verification, Mr. Butt contacted Staff Sergeant Randy Hogg, who was in charge of the drug unit with the RCMP. In Staff Sergeant Hogg's view, it was definitely a marijuana butt. The butt was never tested to determine that it was marijuana. The marijuana butt remained in Mr. Butt's possession until June of 2007 when he retired. The new security advisor, Randy Mercer, now had possession of the butt.

LISA EFFORD

108. Ms. Lisa Efford testified on behalf of the First Respondent. She worked as a Traffic Agency Supervisor for 10.5 years with Cougar Helicopters.
109. She testified that she was a traffic agent in 2002. Her duties included monitoring flights, packages, proper documentation and flight sharing between operations (combining flights between two companies).

110. Ms. Efford was shown a Security Incident Report dated July 25, 2002, MG # 1, and signed by her. She testified that she recalled the incident and that she was notified by Chad Madden that they had found a Roche. They thought it was a bug initially; however it turned out to be a marijuana joint. She contacted the Passenger Movement Coordinator and was told to contact Gordon Butt. She was also told to secure the area and that they would come and collect the marijuana butt.
111. Ms. Efford testified that the procedure in this case would be for this to be reported to her or the Passenger Movement Coordinator; however, he had not reported in to work at that point. The Security Incident Report, MG # 1, would have been completed after the butt was turned over to Gordon.
112. When questioned about the passenger manifest, LE # 1, she stated that it comes from the Personnel On-board System. It is generated by a checking agent and provided to the pilots prior to departure. It tells the pilot who is on board and the baggage.
113. Ms. Efford testified that after she turned the butt over to Mr. Butt, she had no further involvement.

KEVIN ROCHE

114. Mr. Roche testified on behalf of the First Respondent. Mr. Roche is the President of Noble Drilling. He testified that he had been with Noble Drilling for 13 years and 2 months at the time of his testimony. Noble Drilling is a division of Noble Corporation which operates out of Houston.
115. Mr. Roche testified that he was a mechanical engineer by trade and he was also the manager of contexts and contracts, including the Hibernia Contract. He also had the position of vice-president of the corporation, Noble Corporation, US Corporation, and he looked after the technology in the Houston office. His responsibilities at Noble Drilling included ultimate accountability for the execution of the contract with Hibernia.

Indirectly, he was accountable for the Leduc operation, which is the international recruitment office.

116. In relation to Noble Corporation, he directs technology, the drilling technology division and development, and development of new technology that compliments their drilling business and core business.
117. In 2002 he was the general manager for Noble Drilling.
118. Mr. Roche testified that Noble Drilling has 150 employees, 135 of which work offshore. He testified that there were 14 employees under the Hibernia contract on the Hibernia platform. He testified that the operator of the Hibernia platform was EXXON Mobile. He testified that HMDC was the operator and that EXXON was the lead partner in the consortium made up of 6 partners. In terms of reporting, Mr. Roche testified that he was accountable to Noble Corporation and the drilling manager based in St. John's with Hibernia.
119. Mr. Roche testified that safety was the most important aspect of the operation. He stated that if we can't do something safely then we won't do it period. If they don't do their job safely, they would not have a job. Mr. Roche referred to a magazine called Link which was an internal magazine that is prepared by the corporate office in Houston, KR #1.
120. Mr. Roche reviewed articles in the company indicating that Noble was recognized as one of America's safest companies in 2006. He noted in the magazine that as of May 2007, the M71 unit at Hibernia, working under Noble's direction, achieved 8 years without a lost time. Hibernia M72 was recorded under the 3 year section for no lost time.
121. The Noble Corporation's Sustainability Report 2006, Volume 5, was entered as KR#2. Mr. Roche testified that it was a corporate magazine used to indicate elements of their sustainability, objectives within the organization, and ties back to the awards that they have received. It shows how they integrate safety management and environmental

stewardship into their core business. He testified that Noble became the first drilling contractor 4 or 5 years ago to achieve I.S.O. 9000 status. I.S.O. is the International Standards Organization. The 9000 refers to quality management system. The I.S.O. 14000 refers to environmental management system. Taken together, they are both templates for how you execute your business and how you are subject to external audit to validate what you say you do is actually what you do. It is a system of management, a quality management system.

122. Mr. Roche testified that he set up the Health, Safety and Environmental Committee. The Magazine also indicated that Noble was doing better than the industry average in relation to safety performance.
123. Mr. Roche also discussed safety training stop program and advanced stop, and job safety analysis and permanent work which are tools used for safety management systems. Each month the corporation issues awards to individual employees for finding an environmental hazard, safety issues, and observation of a safe or unsafe act.
124. Mr. Roche also discussed the regulatory legislative standards that Noble Drilling must follow. He testified that the regulator for Hibernia is the CNLOPB which is a joint provincial and federal regulator. That regulator issues a license to the operator. So a regulator deals directly with the operator in terms of defining the requirements and guidelines for training, common safety and Occupational Safety and Health, as well as maintenance, management, and backlog management systems. Hibernia, then in turn, through its contracts with its 14 contractors takes those requirements and rolls them down into rules and responsibilities for their subcontracts. The Hibernia contract was entered as Exhibit KR # 3.
125. When asked what were the consequences for Noble Drilling not meeting its regulatory requirements, Mr. Roche testified that they would lose their Hibernia Contract.

126. Mr. Roche referred to Section 5.12 of the Contract that dealt with Health, Safety and Environment, including a clause on drugs. Under Section 5.12.15 any material breach or violation of the obligations under Article 5.12 representing a material and substantial breach of a contract. Section 5.12.16 stipulated that if Noble Drilling breached its obligations under 5.12, Noble Drilling would have to indemnify and hold harmless the operator from all damages.
127. Mr. Roche also went through Section 9 of the contract which deals with indemnities and liabilities. Mr. Roche testified that risk management was part of his job. It was part of everything that they do.
128. Mr. Roche testified that he became familiar with Al Leonard in 1999 as a result of three incidents that caused a lot of strain with their relationship with Hibernia. The first incident occurred on June 22, 1999, and was reported in Hibernia Incident Investigation Report Form serial # F1367, KR # 4. In that case, Mr. Leonard had to stop the movement of a load he was lifting suddenly and that caused problems with the lifting equipment. The incident did not result in any injury however, the incident was sufficient enough that it presented safety concerns and it was investigated. The recommended correction was that Mr. Leonard and his crew needed to improve their method of communication and spend more time understanding and stressing the importance of operating equipment in a safe and controlled manner.
129. The second incident occurred on July 2, 1999, and occurred when Mr. Leonard was lowering the string and concentrating on the weight indicator while setting the UNER hanger. The drill crew forgot about the toggerline on the cement house suspended 60 feet above in the derrick. As a result, when the string was lowered the sling took the full weight of the block snapping the sling and causing damage to the hose which would require it being taken out of service. As a result of the incident there was considerable damage to the equipment and it created a sufficient potential for risk of injury to people. The damage to the equipment cost was between \$30,000 and \$40,000 and it shut down operations for approximately 6 hours. The findings related to taking more care and

attention and the driller being more aware of what he was doing. The Offshore Team Lead's comments were that the majority of incidents of late was associated with the general lack of concentration and attention to detail and required changing people's behaviors and attitudes.

130. An email from Team Lead East Drilling to Louis Puddister and copied to Kevin Roche with the subject Corrective Coun. dated July 3, 1999, was entered as KR # 5. Attached to the email was an Incident Report serial # F1369. The email recommended corrective counseling (level 1) with Al Leonard as a result of a recent incident (Hibernia IR-1369) which resulted in some costly equipment damage on M71. It is noted that this was the second incident that Al Leonard had been involved in ten days or so. The discussion was on responsibilities of a driller and the need to stay more focussed on the job at hand.

131. Mr. Roche then entered KR # 6 which included a corrective action and advisory dated July 13, 1999, an email from Steve Sharpe of Noble to Said Shamloo and copied to Kevin Roche and Louis Puddister regarding incident F-13 and an additional email from Team Lead East Drilling to Louis Puddister, Mike Cadigan and copied to Kevin Roche and OTL Development regarding Al Leonard and his new duties. Mr. Roche testified that this was the third incident which happened on July 13, 1999, which was 11 days from the previous incident and 18 days from the first incidents. A completion string, which weighs 167 tons, was inadvertently dropped during the final stages of setting that completion string into the well by crew on the tower. Al Leonard was the driller and it was his crew that was leading that operation. The corrective counseling progress notice stated that this incident was graded alert. A piece of equipment was being used that Al Leonard was operating remotely to lift the 167 ton weigh. That piece of equipment would have to close completely on a square shoulder in order to take the full 167 ton weigh. At the very final stage of picking up that weight, it was subsequently determined that the door which should have closed all the way for taking the weight didn't close all the way and when some weight was taken, the door opened in a uncontrolled manner and the load dropped from the drill floor approximately 100 feet in an uncontrolled manner. Coincident with the droppage of the 167 ton weight, there were two control wheels sitting

adjacent to the load that were being used to feed cables into the well, connected to 167 ton rope. When the load was dropped, those two cable wheels flew from the floor and tried to follow the drop weight down the hole. Two people standing between those wheels and the hole were struck with the flying reels, which resulted in the two people being medi-vac'd from the platform. One person suffered a loss time injury and had some neck injuries. The other person had bruised ribs and minor cuts and scrapes. This was a significant event that resulted in a Corrective Action Advisory being released by the Operator's Representative. A notice was issued advising Al Leonard that his undue care and inattention resulted in an injury to personnel and a substantial business loss was being called.

132. In relation to the operations, Mr. Roche stated that they were in the very last stages of delivering this well to production for producing oil gas. These programs typically would take anywhere from 120 to 150 days to complete. In order to recover from the droppage, there was an additional 48 days added to the well program at a loss of 12 million dollars. In addition to the 12 million, there was approximately another 3 million in damages to the equipment that was dropped in the hole. Mr. Roche testified that the rig cost one day at Hibernia at that time was approximately \$240,000.00 a day.
133. Kevin Roche testified that Hibernia wanted Noble Drilling to terminate Al Leonard's employment. After lots of haggling and negotiation, they agreed to the plan that they had submitted to keep Mr. Leonard in the system, set him up in a different position and to give him some corrective measuring. They set Mr. Leonard up in a new role, a Safety Training Specialist (hereinafter referred to as "STS"). STS was a safety training specialist role. That person would monitor activities and stop actions if they were heading in the wrong direction. It also provided someone to cover the drillers chair intermittently. The position was ideally suited for someone in Mr. Leonard's position in that he would not be disconnected from the driller role. Mr. Leonard was in this position for approximately nine months. Mr. Leonard did well in that time and after nine months both Noble Drilling's supervisors and Hibernia's supervisor agreed to put him back in to the driller role.

134. In cross examination, Mr. Roche acknowledged that one of the incidences involving Mr. Leonard and the equipment also involved a problem with an indicator light that was supposed to tell the operator when it was safe to lift. The light was not working correctly.
135. Mr. Roche testified that after a year back in to the driller role, Mr. Leonard was promoted into the Assistant Manager Rig role.
136. Mr. Roche testified that he first became aware of the marijuana butt in 2002 when Harvey Stone, the Onshore Rig Manager advised him that the Rig Manager, Tony Chaytor, had called him about the butt.
137. As a result of the call, Mr. Roche called the Drilling Manager at Hibernia to find out the details of what went on. The Drilling Manager explained to him that the security from Cougar helicopter had found something at Heliport and they had taken it upon themselves to send another helicopter out and to do drug testing.
138. Mr. Roche would not have been aware that Mr. Leonard tested positive until five to six days later. He believed that it was his Human Resources Officer, Louis Puddister, who received a call from AOMS. As a result of the positive drug test, Mr. Roche met with Harvey Stone, the Operation Superintendent, and it was decided to bring Mr. Leonard in from the platform. It was Mr. Roche, Louis Puddister and Harvey Stone that was involved in the decision making. It was Mr. Roche's decision to suspend Mr. Leonard.
139. As a result of the test being positive, Mr. Roche testified that they needed to understand whether there was a dependency issue and that was the reason for the further investigation. Mr. Leonard was arranged to see Noble Drilling support service, AOMS, and be assessed by their doctor. The decision for the investigation and further testing was made by Mr. Roche. The purpose of the second drug test and the assessment was intended to be the main element of their investigation to determine whether they had to accommodate for any dependencies. As a result of the investigation, the second test was

negative and Mr. Leonard was determined not to be dependent on drugs. Without a dependency, Mr. Roche testified that Mr. Leonard had breached their basic policies, the drug and alcohol policy. There was no accommodation made for that. It was Mr. Roche who had decided that Mr. Leonard's employment would be terminated.

140. Prior to terminating Mr. Leonard, Mr. Roche spoke to a number of individuals, Lou Puddister, Mark Moyer, the Drilling Manager at Hibernia, and his supervisor, Kurt Hoffman. Mr. Roche testified that it was he who made the decision to terminate Mr. Leonard's employment.
141. Mr. Roche testified that he gave the termination letter to Mr. Leonard and it was explained to him the reason for the termination was due to the fact of policy for testing positive at the work site. He explained that he was very disappointed and explained to him that in a supervisory role, it was very damaging to have the Assistant Rig Manager test positive at the work site. Mr. Leonard asked Mr. Roche about other Noble Drilling personnel who had been treated differently. Mr. Roche explained to Mr. Leonard that each case they deal with people who have drug and alcohol issues on a case by case basis. Each case has its own peculiarities and he was not at liberty to discuss the details of those cases. Mr. Roche did tell Mr. Leonard that he would help him with finding other work.
142. When asked if Mr. Leonard had not had three incidents in 1999, would some lenience been granted for the positive drug test, Mr. Roche replied yes.
143. Mr. Roche went on to testify that he was responsible for administrating the policies in Canada. When asked what extent he administrated drug and alcohol policy exactly as it is written, he testified that the policy as its written is primarily focused on deterrence. He stated that in their business, safety was paramount. The application of the policy would be done in accordance with the local law. As such, they try to strike a balance between the requirements to achieve a safe operation with recognition of human rights issues. If the individuals require accommodation then they would accommodate.

144. Mr. Roche testified about two individuals who failed drug or alcohol tests but retained their employment with Noble Drilling. The first individual, with the pseudonym of Allen Abbott, had been hired for about eight months when Mr. Roche had received a letter on his desk with no name indicating that the worker had a drug abuse problem. They contacted the worker. The worker agreed to cooperate and he had a drug test performed. The worker was not in offshore position. The test results were positive for drugs. Upon receipt of the positive results, they wrote him a letter and explained to him that if he was in an offshore position at this time that the positive test would result in a termination of his employment. They put him on a 12 month probationary period and he was subject to a random drug testing. He was recommended for dealing with an EAP Counselor. He was assisted through that process and determined not to be addicted and deemed to be not at risk. They continued managing him on a 12 month probationary period. Mr. Roche testified that Mr. Abbott was not terminated because he was not in an offshore position. His functions were not safety sensitive. He was not flying in a helicopter to get to work. In cross-examination, Mr. Roche acknowledged that Mr. Abbott tested positive for cannabis and cocaine and the employee eventually worked offshore for Noble Drilling. This was after a 12-month probationary period where he was subject to annum testing.
145. The second individual, pseudonym Bob Bennett, was found to have a 2 oz bottle of alcohol in his bag when he reported to the Heliport in October 1999. He admitted at that point that it was inadvertently put there from air travel that he had recently taken. He was not admitted for travel offshore. Mr. Bennett was issued a seven day suspension for violating the policy. They had a meeting with Mr. Bennett and he confided in their HR people that he had alcohol problems. At that point he was referred to an EAP counselor. Eventually he attended a detox center in Newfoundland was set up on a mandatory drug testing program for 12 month probationary period. That employee eventually went back to work and just over a year later reported a relapse with the alcohol addiction. He was assessed by their medical onshore support group and deemed unfit for work. Mr. Roche testified that even though the trigger point for this case was a breach of the possession policy, it eventually led to accommodation because the worker was addicted and the

addiction persisted for some time. Mr. Roche testified that Mr. Bennett was accommodated because he had an addiction.

146. When asked why Mr. Leonard was not treated the same, Mr. Roche testified that Al Leonard tested positive at the work site, was involved or assigned to a safety sensitive position in a role model or supervisory role. As well they had an independent assessment to confirm that he was not addicted. He knowingly travelled offshore with drugs in his system and admitted such to his supervisor.

147. Mr. Roche reviewed the policy 5.12.13 which states:

“The use, possession, distribution or sale of alcohol, illegal drugs or drug-related paraphernalia, firearms, explosives, (except for explosives required for the work), weapons or dangerous substances or articles is not permitted on the Platform. Entry onto the Platform is consent to and recognition of the right of Company and its authorized representatives to search at any time the person and other property of individuals while entering on, or departing from the Platform. Company may, if it has reasonable cause to believe that a contractor’s employee is under the influence of alcohol or drugs, require such employee to be tested for use under Contractor’s own alcohol and drug policy, or require an employee to be removed from the Platform and denied further access”.

148. Mr. Roche testified that the last sentence means that since the platform is owned by EXXON, they have the right to initiate testing. Pursuant to this contract, the testing will be evaluated on the basis of the contractor’s own alcohol and drug policy. When asked to what extent the HMDC alcohol and drug policy applied to Mr. Leonard’s test of July 25, 2002, he applied that it does not.

149. Mr. Roche reviewed the Noble Drilling drug policy which stated that: *“When the second test of a urine specimen is confirmed to test positive for drug or controlled substances, or when a person refuses to provide a requested urine specimen, the following action will be taken: the employee is subject to immediate discharge.”*

150. Mr. Roche went on to testify that the part A of the test is tested and if it is positive, suspension happens. Then part B is of the sample is tested and if it confirms the results of part A, then the employee is subject to discharge. So basically it's a safety check to make sure that if the lab makes a mistake on part A. The policy goes on to state that "*If the second test of urine specimen is not confirmed for drugs or control sustains the following action will be taken: the employee will be reinstated with pay for wages loss due to a suspension*". Mr. Roche testified that this is a safety precaution in any event that the lab makes a mistake on specimen A. If specimen B does not compare with specimen A, then the process is thrown out and the employee is reinstated without loss. When asked if that applied to Mr. Leonard, Mr. Roche confirmed that the policy applied to Mr. Leonard.
151. Mr. Roche went on to testify that he did tell Mr. Leonard that he would assist him to find work because he didn't like to see him not working. So within two days of his meeting with Mr. Leonard, he had called a friend who was involved in finding work for people in offshore positions and put in a reference for Mr. Leonard at that time. That person was Phil Whalen. He was told by Phil Whalen in a casual meeting later that he managed to get Mr. Leonard assigned to a project with Global Santa-Fe.
152. Mr. Roche confirmed in cross examination that there were no signs of impairment prior to Mr. Leonard taking the first drug testing. As well Mr. Roche confirmed that Mr. Leonard worked in his normal job as Assistant Rig Manager from July 25 to July 31 with no restrictions or limitation on his duties. He performed those duties without impairment at that time.
153. In cross-examination, Mr. Roche was questioned about the HMDC policy that says: "*The following situations result in termination of employment for all employees in termination for Hibernia work for all contracts and second workers*" And the last item on the page, "*If positive test result for drugs, in conjunction with impaired capacity to perform the essential components of the job safely, efficiently or reliably.*" It was suggested that that policy was not applied to Mr. Leonard. Mr. Roche answered by referring to another part

of the contract or policy which states that *“Drugs present in the body is determined through a testing program while on Hibernia business or on Hibernia premises is prohibited.”*

154. Mr. Roche testified that their contract, as it existed in 1994 until 2002 when the event occurred, was that Noble Drilling had to apply its own drug and alcohol policy but Hibernia retained the right to do testing. In this case it was HMDC that did the first test.
155. When questioned in cross examination as to if Mr. Roche had applied the Hibernia policy as set out on Page 3, Mr. Leonard would not have been fired, Mr. Roche agreed. Mr. Roche testified that issues regarding the policy to be applied were resolved in 2006 with the new contract.
156. When asked about what happened with Mr. Leonard, where he was suspended without pay, and then asked to take a second test, and that under the policy if a second test was negative then he would be reinstated, Mr. Roche was asked to comment on what the impression would have been. Mr. Roche said he could not understand the confusion but he asserted that Mr. Leonard was aware of the procedure. Mr. Roche based his comment upon that fact that he would have been explained the process by the doctors involved in testing the samples. When questioned about his letter of August 2, 2002, Mr. Roche explained that the policy Al Leonard signed upon hiring, which was Consent #2, indicates that if you test positive to any of the substances listed on that form that he is in breach of this policy and is subject to dismissal. Mr. Roche testified that Consent #6 is a testing procedure that goes along with the policy.

DR. LIN HUNT

157. The next witness called by the First Respondent was Dr. Lin Hunt who testified via video conferencing from California. Dr. Hunt is a physician working in California. In 2002 she was working at Newberry Park Urgent Care and Family Practice. She also worked as a MRO for a drug test conducted on the complainant in this hearing, Al Leonard. Dr.

Hunt had worked as an MRO for approximately 11 years, having done her training and recertification in Toronto.

158. Dr. Hunt testified that she never met Mr. Leonard but had a telephone conversation with him as a part of the MRO review. Dr. Hunt went through the non DOT Custody and Control Form 22021536. She testified that once she received a non-negative test result, she identified the donor from copy 2 of the Custody and Control Form under step #5 with his name and phone number. Dr. Hunt testified that the laboratory results showed the level positive for a marijuana metabolite at a level of 44 nanograms per ml.
159. Dr. Lin testified that when urine goes to the laboratory the Lab does screening levels on the five panel drug screen. If anything lights up on the screening, then a confirmation is done. The confirmation is done by a mass spectrometer and a gas chromatograph. Based on those tests, a level is given, if positive. She testified that the confirmation level is 15 nanograms per ml.
160. Dr. Hunt then went through an interview checklist marked LH # 6 which she would have used to do an interview with Mr. Leonard. She notes that she discussed the results of the test with Mr. Leonard and whether he had any medical condition or medical prescription that would be applicable and various other issues that were listed in the checklist. She also asked him if he would like to have a specimen tested to which he answered no.
161. Dr. Hunt testified that Mr. Leonard admitted to going to a party the previous weekend and smoking marijuana. She counseled him on the side effects of the marijuana and he declined the analysis of the split specimen.
162. Dr. Hunt reviewed LH # 8 which refers to a conversation she had with Kevin Roche. He had questions about the urine drug screening and confirmation levels. Dr. Hunt advised him that the screening for marijuana cutoff was 15 ng/ml but it was for THC metabolites. If the screening is positive, then confirmation is done using the mass spectrometer and gas chromatograph. With a cutoff at 15 ng/ml, that cutoff is not for the whole pool of

metabolites. It is for one metabolite only, the 11 or delta 9, THC 9 carboxylic acid. She advised Mr. Roche that it was not possible to tell from the level of marijuana, when the marijuana was smoked or how much was smoked or the level of impairment.

163. In cross-examination Dr. Hunt indicated that B is not ever automatically tested and must be requested by the donor. Dr. Hunt testified that if the split sample would have been completed, it would have been done within 72 hours from the interview with the donor.
164. In cross-examination Dr. Hunt also explained fatal flaws. She indicated that the error with the I.D. number was not a fatal flaw. It was a correctable flaw. It was corrected by an affidavit from the collector.

EXHIBITS

165. The following Consent Exhibits were entered by the Parties at the commencement of the proceedings:
- a. Consent #1 – Noble Drilling Letter of Employment Offer to Al Leonard dated March 31, 1997
 - b. Consent #2 – Noble Drilling Policy – Drugs, Narcotics, Alcohol and Firearms Relevant Sections:

*In the interest of maintaining safe, orderly and efficient operations, the following conduct is absolutely prohibited. The Policy applies while working on Company facilities, or being transported to or from work, platform or drilling site locations, whither by motor vehicle, boat or aircraft. **ANY VIOLATION OF THIS POLICY INCLUDING FAILURE TO SUBMIT TO A DRUG SCREED OR INDIVIUDAL SEARCH, IS CAUSE FOR IMMEDIATE TERMINATION.***

1. *Using, transporting, or showing signs of the use of alcoholic beverages, drugs or controlled substances*, or possessing drug paraphernalia; or*
2. *Possession or transportation of firearms, explosives, or incendiary devices.*

**Drugs or controlled substances includes Marijuana, Amphetamines, Barbiturates, Opiates, Cocaine, Codeine, Morphine, Hallucinogenic*

Substances (LSD), and any other similar drugs and/or chemical synthetics.

Note:

Employees may be required to submit to random periodic alcohol and/or drug tests (Urinalysis and/or Blood Tests) or when specific circumstances warrant. The Company reserves the right to conduct searches or inspections of employees' personal effects and lockers to assure that no employee is in possession of such illegal or unauthorized items. Employees may be subject to voluntary search prior to transportation to and from location and at all times while on drilling site locations, platforms, yards, or warehouses, or other company premises.

- c. Consent # 3 – HMDC Alcohol and Drug Policy
- d. Consent # 4 – Noble Drilling Role Description for Drilling Co-ordinator/Rig Manager III
- e. Consent # 5 – Noble Drilling Promotion Letter to Al Leonard dated April 20, 2001
- f. Consent # 6 – Noble Policy Drug Testing for Personnel

Relevant Section:

When the initial test of a urine specimen is found to be positive for the presence of drugs or controlled substances, it is tested by a different method for confirmation of the initial test results.

When the initial test of a urine specimen is positive for drugs or controlled substances, the following action will be taken:

1. *Noble employees: Immediate suspension without pay pending receipt of results of second test for confirmation of the initial result.*
2. *Employees of Noble's subcontractors: Immediate expulsion from Noble property pending confirmation of initial test results as defined in Point 1 above.*
3. *Prospective new employees of Noble: Application process suspended without employment pending confirmation of initial test results as defined in point 1 above.*

When the second test of the urine specimen is confirmed to test positive for drugs or controlled substances, or when a person refuses to provide a requested urine specimen, the following action will be taken:

1. *Noble employees: Subject to immediate discharge.*
2. *Employees of Noble subcontractors: Subject to being prohibited from entering upon Noble property.*
3. *Prospective new employees: Subject to being denied employment with Noble.*

If the second test of the urine specimen is not confirmed positive for drugs or controlled substances, the following action will be taken:

1. *Noble employees: Reinstatement with pay for wages lost due to suspension.*
2. *Employees of Noble's subcontractors: Re-entry upon Noble property permitted.*
3. *Prospective new employees of Noble: Eligible for employment.*

- g. Consent # 7, 8 & 12 – Various copies of Maxxam Non-DOT Drug Testing Custody and Control Form No. 22021536
- h. Consent # 9 – Noble Drilling Suspension Letter to Al Leonard dated August 1, 2002

Reproduced below:

*This is to advise you that because of your positive drug test result from testing that was completed last **Thursday, July 25, 2002**, you are hereby suspended from employment without pay with Noble Drilling (Canada) Ltd. Effective August 2nd, 2002 pending investigation of this incident.*

This infraction is a clear violation of Noble Drilling (Canada) Ltd.'s Drug and Alcohol policy (see attached). Once we have completed the investigation we will advise you of any further action that may be required.

- i. Consent # 10 – AOMS Letter to Noble Drilling regarding the fitness of Al Leonard dated August 4, 2002
- j. Consent # 11 - Noble Drilling Letter of Termination to Al Leonard dated August 6, 2002

Relevant section:

Subsequent to our discussion today this is to advise you that your employment with Noble Drilling (Canada) Ltd. is hereby terminated effective August 7, 2002.

On August 2, 2002 your employment was suspended without pay pending investigation of your removal from the Hibernia Platform. We have concluded this investigation and hereby inform you that you are dismissed "for cause" for violation of Noble's policy on Drugs, Narcotics, Alcohol and Firearms (see attachment). You have also violated Hibernia's Alcohol and Drug Policy for platform employees by testing positive for use of a banned substance on July 25, 2002 on board with the Hibernia Platform.

- k. Consent # 13 – Letter of Recommendation from Steven Lewis Dated March 27, 2002 for Al Leonard
 - l. Consent # 14 – Noble Performance Appraisal for Al Leonard dated July 5, 2002
 - m. Consent # 15 – Noble Drilling (Canada) Ltd. Employee Handbook dated December 1, 2000, Revision 1
166. The following exhibits were entered through Susan Lind:
- a. SL # 1 – Blank Non-DOT Drug Testing Custody and Control Form
 - b. SL # 2 – Sample Drug Kit
 - c. SL # 3 – Maxxam Non-DOT Drug Testing Custody and Control Form No. 22021536
 - d. SL # 4 – Human Drug Testing Department Sample Status Report Affidavit of Susan Lind dated July 29, 2002
167. The following exhibit was entered through Maurice Gillingham:
- a. MG # 1 - Security Incident Report No. 311 dated July 25, 2002
168. The following exhibit was entered through Lisa Efford:
- a. LE # 1 – MAPS Production System Crew Change Passenger Manifest for July 25, 2002
169. The following exhibit was entered through Dr. Charles McVicker:
- a. CM # 1 – AOMS Letter to Noble Drilling dated May 20, 2003
 - b. CM # 2 - Medical Examination of Fitness for Offshore Employment for AL Leonard dated August 2, 2002
 - c. CM # 3 – Fitness Certification for Offshore Employees for Al Leonard dated August 2, 2002
170. The following exhibits were entered through Kevin Roche:
- a. KR # 1 – Noble Link Magazine for Spring 2007
 - b. KR # 2 Noble Corporation Sustainability Report 2006

- c. KR # 3 – Hibernia Development Project, Contract No. C10-138 (211.223) between Hibernia Management and Development Company Ltd. and Noble Drilling (Canada) Ltd.

Relevant Sections:

Contract No. C10-138

5.12.13 The use, possession, distribution or sale of alcohol, illegal drugs or drug-related paraphernalia, firearms, explosives (except for explosives required for the Work), weapons, or other dangerous substances or articles is not permitted on the Platform. Entry onto the Platform is consent to and recognition of the right of Company and its authorized representatives to search at any time the person and other property of individuals while entering on, or departing from the Platform. Company may, if it has reasonable cause to believe that a Contractor's employee be tested for use under Contractor's own alcohol and drug policy or require employee to be removed from the Platform and denied further access.

5.12.15 Company and Contractor agree that the provision of this Article 5.12 are of the highest importance. A breach or violation of the terms of this Article 5.12 by Contractor shall be considered to be a material and substantial breach of this Contract. If Contractor fails to promptly cure said breach or violation or to otherwise comply with this Article 5.12, Company may seek removal of Contractor as provided in this Section A and may take any other action permitted by the terms of this Contract or at law, including termination of this Contract. Nothing contained in this Article 5.12 or the Contract shall be interpreted as enlarging the legal duty of Company to Contractor and Contractor's agents, employees and subcontractors and to third parties or as altering the status of Contractor as an independent contractor as set forth in this Contract.

- d. KR # 4 – Hibernia Incident Investigation/Report Form No. F1367
- e. KR # 5 – Documentation, including email and Hibernia Incident Report No. F1369
- f. KR # 6 – Correction Action Advisory and emails pertaining to Hibernia Incident Report F 13
- g. KR # 7 – Details of Employees with Drug and Alcohol Issues – “Allan Abbott”
- h. KR # 8 – Details of Employees with Drug and Alcohol Issues – “Bob Bennett”

171. The following exhibit was entered through Dr. Lin Hunt:

- a. LH # 1 – MRO Verification Worksheet for LA Leonard dated July 31, 2002
- b. LH # 2 – Facsimile from Dr. Hunt dated July 31, 2002 re test results of Al Leonard

- c. LH # 3 – Human Toxicology Department Forensic Drug Screen Laboratory Report for Specimen No. 22021536
 - d. LH # 4 – Transmission Report dated July 31, 2002
 - e. LH # 5 – Facsimile dated July 31, 2002 to Dr. Hunt with results of testing for AL Leonard
 - f. LH # 6 – MRO/Employee Interview Checklist for AL Leonard dated July 31, 2002
 - g. LH # 7 – Notes from conversation Dr. Lind had with Al Leonard on July 31, 2002
 - h. LH # 8 – Notes from conversation Dr. Lind had with Kevin Roche on August 6, 2002
 - i. LH # 9 – Transmission Report dated August 7, 2002
 - j. LH # 10 Facsimile dated August 7, 2002 from Dr. Hunt to Kevin Roche enclosing information on metabolites
 - k. LH # 11 – Test Results of AL Leonard
172. The following exhibit was entered through Gordon Butt:
- a. GB # 1 - Email dated July 25, 2002 to Len Coughlin re Marijuana Roach found at Heliport
 - b. GB # 2 – PAX List for July 25, 2002 and other notes

ISSUES:

173. It is the finding of this Board of Inquiry that the issues relative to the within Complaint is as follows:
- a. Has the Complainant and the Commission proven discrimination against the Respondent pursuant to the *Human Rights Code* when Noble Drilling performed the drug test and terminated his employment for testing positive for drugs while on the Hibernia platform?
 - b. If it is established that Mr. Leonard was discriminated against because of a disability defined in the *Code*, did Noble Drilling establish a good faith occupational qualification defence to the discrimination.

DECISION

174. **Issue One - Has the Complainant and the Commission proven discrimination against the Respondent pursuant to the *Human Rights Code* when Noble Drilling performed the drug test and terminated his employment for testing positive for drugs while on the Hibernia platform?**

175. The relevant sections of the code state as follows:

2(h) *“mental disability” means*

- (i) a condition of mental retardation or impairment,*
- (ii) a learning disability, or a dysfunction in 1 or more of the processes involved in understanding or using symbols or spoken language, or*
- (iii) a mental disorder;*

...

2(l) *“physical disability” means any degree of infirmity, malformation or disfigurement of the body suffered by a person as a result of injury, illness or birth defect, and includes a handicap resulting from epilepsy, paralysis, lack of co-ordination, amputation, blindness, deafness, muteness or reliance on a dog guide, a wheelchair, a cane or crutch or other remedial appliance or device;*

9(1) *An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of*

- (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or*
- (b) that person's age, if that person has reached the age of 19 years,*

but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

176. Human Rights legislation has been given a special status - "not quite constitutional but certainly more than the ordinary" (*Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). As a result, a liberal and purposive approach to interpretation is appropriate. In *University of British Columbia v. Berg*, , [1993] 2 S.C.R. 353, at para. 7, however, Lamer C.J., for the majority said at page 371:

This interpretive approach does not give a board or Court license to ignore the words of the Act in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [of the British Columbia Human Rights Act], that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and Courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.

177. However, in considering the definition of disability, the test should not be so broad that it would include injuries or illnesses which may be either transient or of short duration. The Supreme Court of Canada considered such an approach in *Quebec v. City of Montreal*, [2000] 1 S.C.R. 665. At paragraph 82 L'Heureux-Dube, J. considered the definition of "handicap" (which is similar to the definition of disability as set out in the Code) as follows:

"These guidelines are not without limits. Although I believe that health may constitute a "handicap" and thus be a prohibited ground of discrimination under s. 10 of the Charter, the same cannot be said of personal characteristics or "normal" ailments. There is not normally a negative bias against these kinds of characteristics or ailments, and they will generally not constitute a "handicap" for the purposes of s. 10. As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold for example) or personal characteristics (such as eye colour) will not necessarily be excluded from the scope of "handicap", although they may be discriminatory for other reasons.

178. In *City of Montreal*, the Supreme Court of Canada acknowledged that factors external to an individual could define his or her disability. The broad purposive approach requires a recognition that discrimination may be based on perception, myths and stereotypes as well as on functional limitations (see: s. 39). In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at p. 724, Binnie J. said, in the context of s. 15(1) of the Charter:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.

179. In *City of Montreal*, the Supreme Court of Canada considered the issue of perceived handicap under the Charter. That case considered the refusal to hire Mercier as a gardener-horticulturalist and another individual as a police officer because the pre-employment medical exam in both cases revealed an anomaly of the spinal column. Triolo was dismissed from his position as a police officer because he suffered from Chron's Disease. The medical evidence in each case established that the individuals could perform the normal duties of the positions in question and that they had no functional limitations.
180. In the case involving Merceier, the City was concerned about the possibility of Merceier developing lower back pain, even though the complainant had never suffered from any low back pain and a serious injury. Further medical reports confirmed that she had no functional limitations and could perform the duties of the position.
181. In the Triolo case, the employer dismissed Triolo because he was diagnosed with Chron's and they wished to minimize the potential costs by filling its complement of permanent employees with police officers who presented the lowest risk of absenteeism. The medical reports indicated that Triolo was in good health, asymptomatic and able to perform short and medium term duties of a police officer.
182. In the Hamon case, the employer refused to hire Hamon because he had a spinal anomaly and they had a policy excluding such people on the grounds that, in performing their duties as police officers, there is a risk that they will develop incapacitation and recurrent lower back pain.

183. The Supreme Court of Canada concluded that a handicap under the Charter can include both an ailment, even one with no resulting functional limitation, as well as perception of such an ailment.

184. At paragraph 79, the Court stated:

“Thus, a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the Charter.”

185. The Commission and counsel for the complainant relied heavily on the Court of Appeal decision in *Imperial Oil Ltd. v. Entrop* (2000), 37 C.H.R.R. D. 481 and the Trial Division decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown and Root (Canada) Company*, 2006 A.B.Q.B. 302. In *Entrop*, the Court of Appeal found that the policy itself provided evidence that the employer perceived the complainant to be dependent upon drugs. In that case, the policy provided guidelines that listed the following categories of substance abusers:

[90] A person who tests positive on a random alcohol or drug test may be a casual user, not a substance abuser, and may, therefore, not actually be handicapped. But the policy treats even casual or recreational users as substance abusers. The policy's administrative guidelines, which are "intended to provide additional details, interpretative guidance and administrative procedures" in support of the policy list the following categories of substance abusers:

CATEGORIES OF SUBSTANCE ABUSERS

EXPERIMENTER

An individual who experiments with alcohol or drugs, usually out of curiosity.

RECREATIONAL USER

A person who uses and gets "high" on alcohol or drugs at special occasions, e.g. parties.

REGULAR USER

One who adopts a constant pattern of alcohol or drug abuse while attempting to maintain normal day-to-day activities.

BINGE USER

An individual who consumes alcohol or drugs in an uncontrolled manner for short periods of time and then abstains until the next binge.

DEPENDENT USER

A dependent, or addicted, user has become psychologically or physically dependent on the use of drugs, characterized by a progressive loss of control despite either a desire to reduce intake or knowledge or recurring disturbances in health, work of social functioning.

186. The guidelines then went on to state: *“In the cycle of substance abuse, users frequently begin by experimenting with drugs and progress to the dependant user stage later on.”*
187. The Court concluded at paragraph 92 that: *“...though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the policy.”*
188. In *Kellogg Brown and Root (Canada) Company*, at the Trial Level, the judge adopted the approach in *Entrop* stating that *“...anyone testing positive under the KBR policy is entitled to the protection of the Act.”* The Court when on to state that:

87 The definition of "handicap" in the Ontario Act considered in Entrop is also identical to the definition of physical disability in s. 44 of the Act, save for the examples of disability provided. Laskin J. held that the section protects those who have, or have had, an actual or perceived disability. An employer can perceive employees to be disabled through the operation of a drug testing policy which fires or refuses to continue to hire individuals who test positive on drug tests: Entrop, Halter and Halter v. Ceda-Reactor Limited (Bryant) Alta. Human Rights Panel, June 6, 2005.

189. The Court found that the employer sanctioned any person testing positive by the removal of the employment on the assumption that the person is likely to be impaired at work in the future and thus not “fit for duty”. The policy treats all employees who test positive for drugs as drug dependent and that they are likely to report to work impaired. Although Mr. Chaisson was not a drug addict, the Court found that he was treated as if he was:

89 I find the approach in Broisband helpful even though the Court did not expressly address drug testing. In my view, the principles outlined were intended to provide guidance on all forms of perceptions based on physical conditions, understanding that perception of disability is a potentially wide category which spans the full range of what one person may think about another. In some instances perceptions of disability may have some basis in fact and in some they may not. Perceptions may be over broad, based on stereotype, or simply erroneous. They are to be measured, in part, by the result the employer seeks when creating and crafting a policy. The perceptions of an employer can create a class of persons, as it did here: all persons who test positive on the pre-employment urine test are deemed not fit for work. Such employees are kept from the workforce because the employer believes they will be unable to do their job because of their physical condition. This is not simply different treatment because the grounds for differentiation involve physical attributes and the motivating perception is linked to an assessment of the ability of the employee to do the job. The perception and assumption is tied to illness, drug use and incapacity. The penalty attached is also relevant to whether or not the employer perceives a disability and in the case at bar a person is precluded from employment. This sends the clear message that such prospective employees are not wanted.

90 The reasoning in Broisband can be applied to the KBR Policy. Mr. Chiasson is being treated as an addict, even though the employer's evidence is that only ten percent of those who test positive are likely to be impaired at work. Not only does that mean that there is discrimination against those who are addicted, it treats the other ninety percent as if they were addicted and would be impaired at work. While an analogy between illness such as Crohn's Disease or spinal deformity on the one hand, and recreational drug use on the other, is not perfect, both concern perceived limitations based on extraneous extrapolations from known facts and ungrounded assumptions with regard to work-related limitations. In Boisbriand the assumptions concerned physical/medical conditions that were proven to be non-limiting in their actual effect, but were treated by the employers! , out of ignorance of their true nature, as if they fit within the category of work-limiting medical conditions. The stated purpose of the KBR Policy is to prohibit workplace impairment and yet under its terms, Mr. Chiasson is

made to suffer severe employment related consequence, notwithstanding that he attended work in an unimpaired state.

190. In *Kellogg Brown and Root (Canada) Company*, the complainant was not a drug addict. The Court found that there was a perceived disability on the basis that the policy treated him as if he was a drug addict.
191. Counsel for the First Respondent argued that, not only was Mr. Leonard not a drug addict, but also, the Employer did not perceived him to be one.
192. Counsel for the First Respondent noted that the Court of Appeal in *Chaisson v. Kellogg Brown and Root (Canada) Company*, [2008] W.W.R. 63, rejected the Chambers Judge's approach stating that the evidence produced supported the fact that the effects of cannabis sometimes linger for several days after use and that these lingering effects raise some concerns regarding the user's ability to function in a safety challenged environment. The Court of Appeal concluded at paragraph 33 that the policy: "... is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by addicts. Although there is no doubt overlap between the effects of causal use and use by addicts, this does not mean that there is a mistaken perception that the causal user is an addict. "
193. The Court of Appeal declined to follow the reasoning in *Entrop* and concluded that the employer did not perceive Chaisson to be an addict but perceived all persons who use drugs at all are a safety risk in an already dangerous workplace.
194. In *Human Rights Commission v. Health Care Corporation of St. John's and Evans*, 2003 NLCA 13, our Court of Appeal considered whether Evans was discriminated against her on the basis of disability by considering prior use of sick leave in determining which of two employees should be awarded the position of "lead hand" porter.
195. The Court found that disability is proven in two ways: 1) by establishing that the complainant has some physical or mental impairment and functional limitation, matters which, absent exceptional circumstances, would be known to the complainant but may

not be known by the employer; or 2) by proving that the employer believes, albeit wrongly, that the employee has a physical or mental impairment and has or will have in the future a functional limitation.

196. The Adjudicator had found that there was no perception of disability on the part of the employer. The Court of Appeal found that finding of fact to be a reasonable one. The Court of Appeal also added that there was no reasonable basis to conclude that the employer anticipated that Ms. Evans will have disability in the future. The Commission argued that the use of sick leave records demonstrated stereotypical analysis of the kind condemned by the Supreme Court of Canada in *City of Montreal*. The Court of Appeal disagreed stating at paragraph 30 that: “...[i]f it can be said that that there is a stereotypical view of persons with disabilities which includes the notion that they are often absent from work, it does not follow that persons who are often absent from work are persons with disabilities.”
197. In the case at hand, the policy is significantly different than the one in *Entrop* and there was no evidence adduced to prove that the effects of drugs lingered in a person’s system days after use. I find, based on the evidence from Mr. Leonard, Mr. Roche and Dr. McVicker, that Noble Drilling did conduct an investigation into whether Mr. Leonard was an addict and that it was concluded by the Employer Mr. Leonard was not an addict.
198. Mr. Leonard acknowledged that he did not have a drug addiction nor is the Commission and Mr. Leonard’s counsel asserting as such. In fact the evidence is to the contrary. Based on the evidence of Mr. Leonard and Dr. McVicker’s testimony regarding his medical assessment of Mr. Leonard, I find that Mr. Leonard was not a drug addict.
199. Having found no disability, this Board of Inquiry must consider whether Mr. Leonard can show that he was perceived to have a disability. The Commission and Mr. Leonard’s counsel argue that the fact that the employer terminated Mr. Leonard’s employment after one fail is evidence that the employer perceived Mr. Leonard to be a drug addict and

would likely use drugs in the future. It was accepted that a drug addiction, actual or perceived, would be a disability within the meaning of the Code.

200. Mr. Roche testified that he terminated Mr. Leonard's employment because Mr. Leonard contravened the policy and he was not an addict. All of the evidence adduced supports the finding that Noble Drilling did not perceive Mr. Leonard as disabled.
201. Further, I have difficulty with the assumption that because Noble Drilling terminated Mr. Leonard for having tested positive for drugs, they must perceive him to be a drug addict. A recreational user who is aware that their employer has a drug policy requiring termination of employment to test positive for drugs while at work and does expose himself to drugs, can justify a conclusion by the employer that the employee may use drugs in the future and may have drugs in their system while at work while not being addicted to drugs. It does not necessarily follow that assumption that he may use in the future means that they perceive him as a drug addict.
202. As a result, I find that the Respondent did not perceive Mr. Leonard to be a drug addict. As such, Mr. Leonard is not disabled within the meaning of the *Code* and cannot claim protection under the *Human Rights Code*.
203. Given my findings, it is not necessary to deal with the analysis under section 9 of the *Code* or to consider the other issue.

DISPOSITION

204. This Board of Inquiry dismisses the Complaint of Al Leonard against the Respondent, Noble Drilling (Canada) Limited Inc.

DATED AT Corner Brook, in the Province of Newfoundland and Labrador, this 29th day of January, A.D., 2010.

KIMBERLY D. BURRIDGE
ADJUDICATOR