Chapter 8

COMPARATIVE ARBITRAL OUTCOMES

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Arbitrators and advocates in both the United States and Canada face similar issues, but the outcomes are often different due to differing values, customs, contracts, and statutory authority. Through a series of vignettes, the panel will illustrate differences in areas such as random drug testing, off-duty conduct, work/family conflicts, and hybrid discipline cases.

Newman: This panel is entitled "Comparative Arbitral Outcomes." My name is Margo Newman. I'm the moderator for this panel. I'm going to briefly introduce the panel but not say anything about them, because their bios are in your materials.

To my far right is Canadian employer counsel Roy Heenan. Roy is from Heenan Blaikie in Montreal. Next to Roy is Canadian arbitrator Jane Devlin, from Toronto. Next to Jane is Jeffrey Sack. He's Canadian union counsel from Sack Goldblatt Mitchell in Toronto. Next to Jeffrey is Gwynne Wilcox. She's U.S. union counsel from Levy Ratner in New York City. Next to Gwynne is Gil Vernon. He's a U.S. arbitrator from Eau Claire, Wisconsin. And next to me on my right is Alan Koral. He is a U.S. employer counsel from Vedder Price in New York City.

Let me explain what we're going to do here. There are two scenarios. The first scenario is going to be argued by Canadian counsel and ruled on by the Canadian arbitrator. Then we're going to get comments from the U.S. counsel and arbitrator on what they perceive to be the differences in approach and potential outcome.

The second scenario is going to be argued by U.S. counsel and ruled upon by the U.S. arbitrator. Then we're going to get comments from the Canadians concerning how the approach might be different or the outcome might be different in Canada.

I'm going to start this off by indicating that my part in this is a result of being one of the few arbitrators who arbitrates on both sides of the border. And I'm often asked when I come to an arbitration hearing, "What are the differences?" I put together a little list on certain procedural or process issues that people are curious about and that I thought I would share with you.

There are a few concerning pre-hearing conduct. Arbitrator appointments in the United States are purely consensual. There is not only a consensual process in Canada but also appointments through the ministries of labor on a statutory authority basis.

Generally, the hearing locations are determined by the parties in the States—hotels or whatever. And in Canada, at least in Toronto, there are some central places that are arbitration centers. We have one in Toronto, J.P.R. Arbitration Centre, where a number of arbitrators normally hold their hearings; so you do get to see each other on a regular basis.

Jurisdiction in the U.S., as we know it, is determined by the parties by stipulating the issue and there's a focus on the four corners of the agreement. But in Canada, we also have statutory authorities to do many things. Like similar legislation across Canada, the Ontario Labor Relations Act lists some of those. We can deal with external law. We have broad, remedial authority. There's a procedure for mediation with the arbitrator retaining jurisdiction with the consent of the parties and sometimes the expectation is that that process will occur here in Canada.

In terms of pre-hearing discovery, we know that there's none in the U.S. In Canada, often, the parties exchange particulars prior to the hearing so that there is no surprise. And those particulars could include an exchange of documents you're going to rely on or potential witnesses. Surprise, generally, when it comes up in the hearing, is the basis for an adjournment or potential exclusion of evidence if it hasn't been shared pursuant to a request.

At the hearing, one of the most interesting differences in evidentiary matters is that in the U.S., there's no requirement to put a witness on notice of contrary evidence that you intend to present. In Canada, we have what's referred to as the Rule in *Browne v. Dunn.* This evidentiary rule indicates that you have to put a witness on notice of evidence you intend to present and give him or her a chance to respond. If you don't do that, when it comes to presenting your evidence, you may be precluded from introducing it in your case. That way, people don't have to call people back on rebuttal to rebut something that may be presented. But you have to give them notice up front and give them the opportunity to do that.

And additionally, in the hearing there's the questioning of witnesses. In the U.S., we can go on and on with cross and re-cross and re-direct. Here in Canada, we do an examination in chief, a re-direct, and a re-examination and that's it. So we don't go on and on.

As for the record in the hearing, in the States we often use court reporters. Even if there are no transcripts, there is often an expectation by the parties that they will file post-hearing briefs, most often submitted simultaneously. In Canada, we don't use transcripts. There are no court reporters or briefs. In an exceptional case, perhaps there might be; but typically counsel come prepared to argue the case. They bring their book of authorities to the hearing. And the arguments at the end of the case include a right to reply for the party that has the onus of proof.

In terms of length of hearings, I think that there's an expectation in the States—at least from my experience—that the hearing will complete in one day. And you usually start at 9 a.m. and try to do that. That's a possibility when you're filing briefs because you don't have to deal with arguments, mostly. In Canada, rarely do you finish a case in one day because of factors such as preliminary legal issues or agreed facts.

The other thing I wanted to mention is post-hearing and has to do with publication. In the U.S., we need the permission of both parties to publish because it's a private, contractual process. As a result, there's really no focused, intentional development of a stream of precedent on important issues. We all know you can find a case on anything that you need to find a case on. However, in Canada, arbitration is more in the public domain. A quasi-public function is involved and so all of our awards have to be filed with the respective Ministries of Labor. And then publishing

houses determine if the awards are noteworthy enough to warrant publication. As a result, in Canada, jurisprudence in arbitration has evolved on various subject matters. And arbitrators are more apt to follow that jurisprudence.

Now, if I could please take a moment to just look over scenario number one and then counsel will begin their argument.

Mr. Heenan? Would you like to begin our arguments?

Heenan: Thank you. Madam Arbitrator, it's a pleasure to appear before you again. And the union is represented by my friend, Mr. Sack. I'll summarize the facts very quickly for you. Mr. Smith has worked for our corporation, which is a fairly pressure-packed corporation, for 15 years. He has had previous discipline. However, the reason he was discharged was quite simple. In the fall of 2007, he got into an argument with his co-workers, and the co-workers refused to work with him. He was verbally warned by his supervisor that if this continued, it would lead to a tragic end. He was invited to use the employee assistance program, the EAP, but he didn't follow through.

In February 2008, he got into a physical fight. Punches were exchanged with a fellow employee. And both employees were suspended for five days. Again, Mr. Smith was told that he should go to the EAP to get himself treated. He refused to do so, saying there was nothing wrong with him.

In March 2008, he tried to attack his supervisor and had to be physically restrained. I can show you photographs of the bruises on some of the people who restrained him—a serious outbreak of violence. As a result of that, he was terminated. He was terminated in accordance with a workplace violence policy, which is designed to protect the employees in the workplace. That is the purpose of it—it is perfectly clear. It says that you can be terminated after the first incident; but if it isn't the first incident, if violence reoccurs, termination is automatic. The policy is there to protect the employees in the workplace, an obligation that the employer has.

Subsequent to Mr. Smith's suspension pending the discharge, doctors' letters were filed that said the nature of his illness is such—and we were not aware of this illness—is such that when he experiences pressure, he can lash out at his fellow employees. Nothing in those letters suggests that this can be controlled or that this is temporary.

So the issue is simply this: The company has an obligation to protect the employees in the workplace. We are told we must have a workplace violence policy. We have one that is entirely neutral.

The illness cannot be accommodated. The grievant can lash out at any time.

I refer you to the recent Supreme Court of Canada decision in *McGill University Health Centre,* where the Chief Justice stated that automatic termination clauses are not presumptively discriminatory. There's no prima facie discrimination in those clauses and the union has not claimed that. If Mr. Smith or the union felt that the grievant could control his violent behavior, then they would have the obligation to present that evidence. They have not even tried to do so.

So we have a policy, which is a legitimate policy for an employer—indeed, a mandatory policy for the employer—which has been neutrally applied. This is the second incident of violence involving the grievant. We cannot just permit this to go on. Somebody is going to get hurt.

We have to realize that employers are subject to that great obligation to protect employees at work. That's the least employees expect from an employer.

In a last case that I would refer you to—*Canadian Forest Products Ltd.*—the arbitrator noted that employees have the right to work in an environment free of harassment, a fact conceded by the union witnesses. And employers have duties to maintain harassment-free environments at the workplace. That's exactly what this policy does. Unfortunately, Mr. Smith is violent and he does not seem to be able to control that. We have an obligation to protect the employees. We have applied our policy. We'd ask you to dismiss the grievance. Thank you.

Newman: Thank you, Mr. Heenan. Mr. Sack?

Sack: Thank you, Madam Chair. From the facts, I didn't gather that there were any punches landed in the final incident. Indeed, I can't see anything in the grievant's behavior that's any different than the behavior that my friend and I have exhibited toward each other over the last number of years. In any case, I want to assure the audience that, unlike the grievant, today we're "on our meds." So I don't expect anything untoward to occur.

One thing about this case that is important is that the behavior of the grievant is disability-related. I mean, for 15 years he was virtually undisciplined, presumably a good employee, and suddenly something went awry. It's pretty clear what happened. His wife left him and he hasn't been the same since. He stopped taking his prescribed medicines. And, of course, his wife had been the one who administered them.

My friend is quite wrong when he says that there's no evidence that the grievant can be controlled. Indeed, the fact situation itself says that his general anxiety disorder results in panic attacks when he's not under control with meds.

So clearly, the answer to this case is to order that the grievant undergo treatment and that he return to work when a medical certificate is produced confirming that he has done so. Indeed, what distinguishes this case from the cases my friend has submitted is that there is medical evidence, here, that this was causally related, that without the meds he becomes withdrawn and can be seen to be threatening and lashing out.

Now, as far as the one or two cases to which my friend has referred particularly, the *McGill* case is clearly distinguishable because in that case the parties had agreed to a clause providing for deemed termination in the event of extended absence from work. Here, there's nothing in the collective bargaining agreement to suggest that there would be automatic discharge for any conduct whatsoever.

Finally, I would refer you to our unique Canadian law, which basically incorporates all of human rights legislation into collective agreements. And that includes, of course, the duty to accommodate and includes the definition of "disability" in the human rights code. In Canada, that definition is very, very broad. It's not de minimis. It extends across the landscape. And in terms of the duty to accommodate, it's not a de minimis obligation; it extends to the point where it's impossible to accommodate the grievant without undue hardship.

Now, here, it's clearly not impossible. This grievor deserves one last chance.

Newman: Thank you, Mr. Sack. Ms. Devlin?

Devlin: Well, let me say, first of all, that I'm very glad that both counsel are on their meds today because usually they don't get along quite this well.

Based on the arguments, we have a situation where the company is asking that the violence policy prevail, that it's a neutral policy, and that it's there for the protection of the workers. And on the other hand, we have the union saying that the conduct in this case is entirely related to the grievant's disability, and therefore should be treated in a non-culpable way.

To me, this case is a mix of culpable and nonculpable elements. We have, on the one hand, a situation where the grievor raised his fists to the foreman, would have punched the foreman if the

co-workers hadn't intervened. And yet, at the same time, medical reports have been filed indicating that he suffers from depression and a general anxiety disorder that can lead to panic attacks.

In view of those reports, it would be necessary for an arbitrator to consider a human rights analysis. And in Canada, there wouldn't be any issue about an arbitrator's jurisdiction to do that. And as Margo indicated, I believe, the Americans have been provided with copies of excerpts from the Ontario Labor Relations Act, which expressly confers authority on arbitrators to consider employment-related statutes.

In this case, the first question I'd have to ask is whether or not there is a connection between the grievant's misconduct and his disability. And there's a suggestion of that, certainly, in the medical reports. And I would expect at the hearing that medical evidence would be called either because Jeffrey would call the psychiatrist or he would tender the psychiatric report and then Roy would ask to have the psychiatrist made available for cross-examination.

If it was a situation where I found that the grievant's condition was a factor in his behavior and that he lashed out because of it, then I would likely find that there was a prima facie case of discrimination and that he engaged in this conduct related to his disability, that his employment was terminated, and that his disability was a factor in his discharge. And I would then have to consider the violence policy. And there would be no issue that it's connected to the job, it's for the safety of employees, and it would undoubtedly have been implemented in good faith by the company.

So it would then come down to the question of the duty to accommodate and whether the employee could be accommodated to the point of undue hardship in accordance with the human rights code. And the issue on that would be whether or not he could be reinstated to employment without jeopardizing the safety of other employees.

It would be important if the grievant were to give evidence that he understood that his behavior was inappropriate, that perhaps, as Jeffrey says, that when he separated from his wife, she wasn't there to nag him about the medication, that he realizes now that he's got to take his medication, and that he understands that he can't go around getting into arguments with coworkers.

I think in those circumstances, I would reinstate him subject to the condition that he comply with the directions of his physician, because an employee would have a duty to cooperate in the

accommodation process. But having said that, I probably would not give him a free pass on the final incident in which he raised his fists to the foreman unless it was a situation—I don't think this would be borne out by these facts—that he really had no control over. Or if it was a situation where he had been on medication but, again, had stopped taking the medication. Then in those circumstances, I could find that there was a culpable aspect and impose some discipline. So likely, I would reinstate this employee subject to his compliance with the direction of his physician, and I would impose some discipline for the incident involving the foreman.

I also could see somewhat different evidence that would be perhaps more favorable to the company even on the same facts, the same analysis. Say Roy calls the supervisor and, unlike the supervisor yesterday who was so traumatized in some way he couldn't have children—this supervisor would still be able to have children but perhaps has been on stress leave, a very mild-mannered individual, clearly distraught about what happened. Roy also subpoenas a number of bargaining unit employees who say that they've been terrified by the grievant for years and that, of course, they didn't want to report him to management. There have been some incidents in the workplace. But now that he's out of the workplace, they don't want him back. The grievant gets up, tells me it's the foreman's fault and becomes quite agitated and quite angry during Roy's cross-examination; there might be evidence that there have been long-standing issues with compliance with his medication.

So to me, this is a case that's going to turn entirely on the evidence. From my point, the bottom line is going to be whether or not there's a connection between the grievant's conduct and his disability. And secondly, whether or not he can be accommodated by being returned to the workplace in a way that will not jeopardize the safety of other employees.

Newman: Thank you. So, any comments from the USA? Go, Alan.

Koral: From the employer point of view, this would come out very differently in the U.S., I think, without doubt. First, I thought Jeffrey rather skillfully conjured some sort of medical control of this gentleman's condition, which is not actually evident in the fact statement. And the arbitrator accepted that for what it was worth and, obviously, accepted it pretty deeply. In the U.S., I think we would maintain that this individual is responsible for his own behavior. He'd been disciplined over the years; he had never

sought reasonable accommodation, which, in the U.S., is generally the burden of an individual who wants accommodation. He had never disclosed his condition to anybody at the company nor, for all we know, to the union. This seems to be a last-ditch effort. And there is no evidence that the employer had any obligation to accommodate. And I think that's a big difference between what we see in the U.S., where we don't just simply import the Americans With Disabilities Act (ADA) into our collective bargaining agreements, and Canada, where there's a statutory obligation to consider disability law.

So I think that the case would probably turn on Mr. Smith's failure to seek reasonable accommodation, his violent behavior in violation of the anti-violence policy, his being a danger to co-workers and to his supervisor, and his failure to do anything about his condition.

Gwynne? Your turn.

Wilcox: I would say that the union would have a good chance of putting Mr. Smith back to work. Now, I think given the fact that he was a long-term employee who did not have significant discipline and that his discipline that became more serious was during the last year of his employment prior to the suspension, where it was caused by his medical condition, that the union would be able to argue that that termination would be too severe.

I don't disagree with the fact that the grievant never made the company or the union aware of his condition, which is certainly troublesome that he didn't follow up. I would also make the argument that if the company has an EAP, that the employer had additional responsibilities other than just to say, "go to Employee Assistance," where the supervisor counseled the employee. There are cases that also require that the employer and the union and the employee discuss this and every effort is made to reasonably accommodate someone's disability.

Newman: Gil, did you want to say anything?

Vernon: I'm not sure that the analysis in the U.S. would be as statutorily based. I don't think the presentations necessarily would be. Certainly, the two statutes that potentially apply would be the ADA and the Rehabilitation Act, which introduced the idea of undue hardship. And there are lots of questions under the ADA that could be addressed, including whether Joe had a disability that met the three-part test under the ADA, particularly whether his mental impairment substantially limited one or more of his major life activities. But I think most U.S. arbitrators would not

wade into it on the theory that the arbitrator's authority is to interpret the collective bargaining agreement, not the statute.

There are collective bargaining agreements, however, that do use words like "reasonable accommodation" and there may be past practices of accommodations. And in those circumstances, certainly, we would wade into it. But generally speaking, I don't think the arbitrators would. I think arbitrators in the U.S. would approach this as strictly a just cause matter; it would come down to weighing the mitigating factors against the aggravating circumstances and factors, including his two prior disciplines and referral to EAP.

And that might be enough for some arbitrators to accept the company's position. But I think this case would largely come down to a sense of the grievant. And if the grievant came off reasonably well, contrite, gave the arbitrator the sense that he could control himself, and so on and so forth, then I think there are some arbitrators who would consider putting him back to work with no back pay. I don't see any arbitrators—maybe one out of ten—who might put this grievant back to work with back pay, but very unlikely.

Newman: Thanks. Jane?

Devlin: I just want to make one comment about the offers that were made to the grievant in terms of the EAP program. And I don't believe in Canada that those offers would be considered sufficient to satisfy the duty to accommodate the grievant. Having said that, the grievant didn't take up the offer on either occasion. And I don't think that that's fatal to the union's claim for reinstatement because the unfortunate reality is that an employee is often very reluctant to disclose a mental disability. We often see in addiction cases that, in fact, the evidence comes in sometimes at the time of the hearing.

So as I say, I don't think the offer of the EAP is the end of the matter. I have to have a level of confidence that putting this employee back to work is not going to jeopardize the safety of other employees.

Newman: Okay. Thanks. We're going to move on to the second scenario. Mr. Koral, would you like to begin?

Koral: Good morning, Gil. Good morning, Gwynne. I'm here to defend the termination of Sam Stoner for violation of the company's drug and alcohol policy by appearing at work under the influence of marijuana. The union grieves his termination. And the union also grieves the adoption by the company of the drug and alcohol policy under which Mr. Stoner was terminated.

The facts are essentially undisputed. Sam was a forklift operator in the warehouse. One Sunday night he went to a party where he had several joints. He then appeared at work at 7 a.m. for his usual shift. At 9 a.m. the company received a call saying "Sam Stoner is stoned." The foreman inspected him, determined that he looked very tired and that his eyes were bloodshot, and instructed him to report to the health department to get a urine test pursuant to the policy. Stoner initially refused, but then consented when he was told he was going to be fired for refusing.

As far as we can tell, the union was not involved at all at this point. Sam tested positive—in fact, so positive that he was 40 percent over the threshold set forth in the policy for impairment—for being under the influence of marijuana. He was then terminated.

I'll turn first to the union's objections to the existence of this policy at all. The policy was adopted by the company more than a year ago. My question first is whether this case is even arbitrable under that basis. The union doesn't point to any contract provision that was violated by the company in adopting this policy. In fact, there is a very strong management rights clause that would appear to permit the company to adopt policies that are intended to protect both person and property of coworkers and of the employee him- or herself.

Second, the policy grievance is untimely. This policy has been in place for a year. The union never said a word about it. It was well-publicized. Everybody knew about it. And the union had no objections until Mr. Stoner appeared stoned at work. Accordingly, it seems to me that the union has essentially waived its right to grieve the adoption of the policy by the company.

Third, the policy is reasonable. The U.S. Drug-Free Workplace Act of 1988 imposes on companies that are federal contractors, such as this company, the duty to adopt drug-free workplace policies, which include mandatory drug testing, at least where there is probable cause.

Fourth, I believe that the adoption of this drug program is, in fact, within the company's rights under the collective bargaining agreement's management rights clause.

As for the grievance regarding Mr. Stoner's termination, it can hardly be disputed that the company had reasonable cause to test him. They had a tip. He appeared tired and bloodshot. He was asked to take a test. He consented to taking the test. And he tested positive. Accordingly, I see no problem with the company's attempt

to weed out employees who appear at work under the influence of illegal drugs in order to protect the employee, coworkers, and property.

Second, Stoner did hold a safety-sensitive position. He's driving a forklift. This is a complicated and dangerous instrumentality that could easily cause injury and damage. Third, Stoner did consent to the test. He didn't have to consent. He could have called a union shop steward. He didn't do that. He could have refused, been terminated, and the union could then have grieved the termination on the basis that there was no reasonable cause or any other basis that the union might believe was reasonable.

But instead, because he consented, it seems to me that he's not in a good position to object to being terminated on the basis of the results of the test. In effect, he wants to retroactively retract his consent.

The fact that he got stoned off duty and off site I think is irrelevant. The policy is very clear that you cannot appear on site and appear for work if you are under the influence of an illicit drug such as marijuana.

And finally, there is no statutory issue here at all under the ADA. There is no protection for users of unlawful drugs. Even the argument that might be made elsewhere that he was regarded as being an addict, when there's no evidence to support that, would not bring him within the protection of the ADA. Therefore, both of the union's grievances should be denied.

Newman: Thank you. Ms. Wilcox?

Wilcox: Yes. Mr. Arbitrator, it's the union's position that both the unilateral implementation of the drug policy as well as the discharge of Sam Stoner should be overturned. The union's position is that the employer did not have the right to implement a policy and that the termination of Mr. Stoner should be denied and that he should be reinstated and be made whole in every way.

I will start with regard to the unilateral implementation of the drug policy. It's well established under the National Labor Relations Act that the employer had the obligation to bargain with the union over a mandatory subject of bargaining. And in this instance, the employer failed to do so.

The employer did not have the right to implement the policy without negotiating with the union. Therefore, we believe that even though the policy was put into effect a year ago, the company did not give notice to the union of the policy. And secondly and more importantly, this is the first case where the employer

has implemented random drug testing of this employee or any employee in the bargaining unit.

Arbitrators have to look at the determinations as to whether the policy is reasonable or whether the policy is being appropriately applied. And we believe that, as the facts in this case show, the zero-tolerance policy directly conflicts with the just cause provisions of the collective bargaining agreement. And accordingly, that policy should fail under those circumstances.

With regard to Mr. Stoner, the facts clearly stated that he was performing his work for two hours without any problem. The anonymous tip that was received by the employer was not a proper cause for the employer to test him. And in fact, the evidence shows that there were no outward signs of his being intoxicated or impaired or that he engaged in any unsafe driving as a forklift operator.

There was absolutely no evidence presented by the employer that Mr. Stoner had a drug problem or a substance abuse problem or that there was pervasive use of drugs in the work site. And so, under the facts in this case, there was absolutely no harm to the employer's business. And to the extent that he engaged in any type of off-duty conduct, it did not adversely affect his performance of the job nor did it cause any other problems among the other employees.

Newman: Thank you, Ms. Wilcox. Mr. Arbitrator?

Vernon: First, regarding the refusal-to-bargain argument, I think many arbitrators would note that the management rights clause recognizes the company's authority to make reasonable work rules. And it is a reasonable work rule not to come to work loaded. And I think that most U.S. arbitrators would consider the reasonableness of this work rule in the context of these particular facts. And I would note and disagree with the word "random" that Gwynne just used. I don't view this as a random test. I view this as a reasonable-cause test. And I think that's the threshold issue. And that's what jumps out at me first. And that's one of the reasons I probably would sidestep the bargaining issue because there's this juicy tidbit of an issue on reasonable cause. And I purposely distinguish reasonable cause from probable cause as to not confuse the more rigorous standard of probable cause under criminal law.

And I think the threshold question is reasonable suspicion. And even though not controlling—and for the purposes of discussion here as to what constitutes reasonable cause—I would be guided by some of the most rigorous drug testing rules and procedures in our country. And that's in rail, airlines, and trucking. This was

a reasonable suspicion, a reasonable cause, case. The Department of Transportation guidelines say that the decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug, and that specific, contemporary physical behaviors are performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test the employee.

The key facts here that jumped out at me were that he worked for two hours without incident and that there were no outward signs of impairment. And that, coupled with the anonymous tip, I don't think adds up to reasonable cause. And also to show all our neighbors that we're not citation-dysfunctional here in the U.S., I found no cases in my research where an anonymous tip constituted reasonable cause for drug testing.

I did find two cases where the combination of an anonymous tip plus admitted past drug use was sufficient. And for you citations freaks, it's 92 LA 1033—*Georgia Power*. Abrams was the arbitrator. And I found another case where the combination of an anonymous tip and a drug-sniffing dog constituted probable cause. And that was also a Georgia Power case, 93 LA 846, arbitrator Holley. And I thought, maybe it's not coincidental that they're both Georgia Power cases. I guess in Georgia, when the power company employees say "we light up," they're not suggesting that they energize your house.

I think most arbitrators and most observers acknowledge, in my research, that evidence of impairment in a drug case is more difficult with drugs than alcohol. And according to my feeble Google skills—because I did research this and wanted to be prepared—there was one important study on this point and the headline read as follows: "Canadian Study Confirms That Marijuana Impairs Driving Less Than Alcohol." And one of the conclusions of the study was there's a very real possibility that, taken alone without alcohol, marijuana might actually reduce accidents by young men who would otherwise be driving too fast.

So, I guess if you're on booze, you run the stop sign; if you're stoned, you may never leave the stop sign.

Newman: Comments from the Canadians? Anybody?

Heenan: Yes, I'd say there are two issues here. First, in terms of the report that Gil just referred to, I wondered what medication the person who wrote that was on because it would not be a normal study. I think that studies have to be looked at quite carefully.

Two grievances: One, the policy grievance, I agree entirely with Alan. It was promulgated a year ago. If the union wanted to grieve that—and I presume it would have been circulated to it—if the union wanted to grieve it as an unreasonable policy, it should do so right away. This is a serious policy, one that employers have to undertake. And to me, appearing for work under the influence or in possession of any type of drug is strictly prohibited and immediate discharge is not an unreasonable policy. So in terms of the policy, I think Gil stepped around that quite nicely, saying he probably wouldn't get into that. I think that policy is quite reasonable.

On the facts, how safety-sensitive was the job? How safety-sensitive is the workplace? I think that the argument will turn on, was there reasonable cause for suspecting that Mr. Stoner was stoned? It seems to me that the observation and the testing on that would be what this case would turn on.

Here, in Canada, we're going through a tremendous debate. We have two courts of appeal, one in Ontario and one in Alberta, taking entirely opposite positions on this issue. And so it probably will go to the Supreme Court. It's one of the problems that happen when you have several jurisdictions with several pieces of legislation. And the Alberta Court of Appeals has very recently said that, as far as they're concerned, the approach of the Ontario courts, which they followed for some time, is wrong. If you're serious about preventing workplace accidents, you can pass a piece of legislation that deals with drugs.

The answer would be far from clear in Canada right now because of the public policy debate that's going on around this subject. Also, a lot of it depends on what exactly the policies say. I don't find this policy, myself, unreasonable.

Sack: First, there is no obligation in Canada to challenge employer policies when they are originally issued; they can be challenged when they are applied. Second, it's not reasonable, in my view, to set standards for impairment that aren't agreed to. And the policy is discriminatory insofar as it provides for termination even if the employee has a disability (i.e., drug addiction). Indeed, even if the grievant was a casual drug user, there might still be a problem with the policy, as it assumes that a positive drug test can reliably determine present impairment when in fact that is not the case. I don't think this case would stand much of a chance—in terms of the employer's chances—at the hearing. The thing that strikes me as the most interesting is this: There's no consideration of whether the grievant is an addict, and whether

therefore accommodation is required for a disability. Here, we would say, at the very least, that even if all this occurred, and even if the evidence was that the policy was reasonable and that he was impaired, the grievant would be entitled to a chance to show that his condition was disability-related (i.e., an addiction) and that he was entitled to accommodation. As Roy points out, however, there is a difference between Alberta and Ontario jurisprudence.

Now, here, there's no accommodation policy. And what I wonder about is if American arbitrators have to take into account American regulation regarding whether a workplace is safety-sensitive, why can't they take into account American legislation providing for accommodation?

Unidentified Male Speaker: If I understood that question correctly, Jeff, in America, there is such a sense that use of illicit substances is reprehensible—it is so reprehensible that it requires no accommodation. It was specifically written out of the ADA. There is simply no protection for anybody who is engaging in current drug use. An employer might—but I don't know of any that have—negotiate something different with the union in a collective bargaining agreement. But our statutes are uniformly clear on that. I don't know of a single state that has adopted any protections for current users of illicit drugs.

Devlin: In terms of the initial refusal, and then he takes the test because he's told that he's going to be fired, I don't think that in any way precludes a challenge on the part of the union. I think from just a very practical point of view, an employee who's told that if he doesn't take the test and otherwise he's going to be fired is going to take the test.

I would also view this situation as an issue of whether or not there was reasonable cause to test. And almost I think without exception in Canada, reasonable cause testing has been found to be appropriate for employees occupying safety-sensitive positions. And I think that in this case, certainly, it looks as if he's in a safety-sensitive position. But I agree with Gil, it's very weak. There's just the anonymous tip, which certainly is the basis for the company going and conducting some kind of investigation, taking him off the forklift, maybe interviewing him, doing a variety of things. But all they've got here are bloodshot eyes.

In terms of the policy, itself, the policy prohibits drugs in an employee's system above the detection level. And the difficulty I have with that is that in the case of drugs, marijuana in particular, the drugs can be detected long beyond the period when any expert

would say that the employee's performance would be affected. And the other difficulty with the policy is that it doesn't provide for accommodation for an employee who may be addicted. It simply provides for termination.

Newman: Thank you very much.