

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Between:**

**Salvatore Milazzo**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Autocar Connaisseur Inc.**

**Respondent**

**- and -**

**Motor Coach Canada**

**Interested party**

**Decision**

**Members:** Anne L. Mactavish, Pierre Deschamps and Michel Doucet

**Date:** November 6, 2003

**Citation:** 2003 CHRT 37

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[1] For several years, Salvatore Milazzo drove a bus for Autocar Connaisseur Inc. In August of 1999, Mr. Milazzo was ordered by his employer to undergo a drug test. The results came back positive for the presence of cannabis metabolites. As a result, Mr. Milazzo's employment with the company was terminated, in accordance with Autocar Connaisseur's 'zero tolerance' drug policy.

[2] Mr. Milazzo alleges that in failing to accommodate his perceived drug dependence, and in terminating his employment, Autocar Connaisseur has contravened section 7 of the *Canadian Human Rights Act*. It is further alleged that Autocar Connaisseur's policy requiring that bus drivers undergo drug tests violates section 10 of the *Act*.

## **I. The Events Giving Rise to Mr. Milazzo's Complaint**

### **A. Mr. Milazzo's Employment with Autocar Connaisseur**

[3] Mr. Milazzo was hired by Autocar Connaisseur in July of 1994. Autocar Connaisseur's business is largely dependent on tourism and is seasonal in nature, with the summer months being the company's busy period. In order to respond to the fluctuating demand for its services, Autocar Connaisseur employs a small group of permanent bus drivers who work year-round, and hires a larger group of drivers to work on a seasonal basis.<sup>1</sup> Mr. Milazzo fell into this latter category - driving a bus for several months each year, and collecting Employment Insurance benefits in the off season.

[4] It appears that Mr. Milazzo's employment history with Autocar Connaisseur was largely unremarkable, and there is no evidence before us of any significant problems with his

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<sup>1</sup> Mr. Milazzo testified that while he worked at Autocar Connaisseur, the company had between 150 and 200 employees driving buses in the summer months, and only 40 or 50 drivers working during the winter. Autocar Connaisseur witnesses testified that at the time Mr. Milazzo's employment with the company was terminated, it employed 115 drivers in peak season. As a result of a downturn in the travel industry, Autocar Connaisseur now only employs approximately 40 bus drivers during its busy period.

performance on the job. It should be noted, however, that Mr. Milazzo did not work for Autocar Connaisseur in the summer of 1997, as his driver's licence had been suspended, as a result of his having been convicted of impaired driving. This conviction relates to an incident occurring outside working hours, and there is no evidence before the Tribunal that Mr. Milazzo ever drove a bus while impaired by either drugs or alcohol.

[5] During the years that he worked for Autocar Connaisseur, Mr. Milazzo operated a 40 foot passenger bus or 'motor coach'. Mr. Milazzo was initially assigned to shuttle passengers between the Casino de Montréal and the casino parking lots, and to ferry passengers between city hotels and the airports. Autocar Connaisseur had ongoing contracts to provide these services, and the routes operated on a fixed schedule.

[6] Autocar Connaisseur also provided charter services to groups traveling throughout North America. In the course of his employment with Autocar Connaisseur, Mr. Milazzo drove groups of passengers all over Quebec and Ontario.

[7] By the summer of 1999, Autocar Connaisseur had lost the Casino contract. At this point, Mr. Milazzo was primarily driving airport runs. However, on June 4, 1999, Mr. Milazzo drove to upstate New York, meeting a bus returning from Virginia Beach, and driving it back to Montreal. According to Mr. Milazzo, he was not scheduled to drive to New York State, but was asked to go on short notice, because no other driver was available.

## **B. Milazzo's Drug Test**

[8] Although Mr. Milazzo claimed at one point in his testimony that he did not know that Autocar Connaisseur had a drug testing policy, it is clear from his other comments that he was well aware of the policy. However, Mr. Milazzo understood that only drivers going into the United States would be tested. As he did not drive to the U.S. on a regular basis, Mr. Milazzo did not think that the policy applied to him.

[9] According to Mr. Milazzo, in the summer of 1999, rumours began circulating within the company that all drivers were going to be tested, and not just the drivers going to the States. Sometime in mid-August, Mr. Milazzo came to work and was told by the dispatcher that he had missed his appointment for his drug test. When he advised the dispatcher that he did not know anything about a test, Mr. Milazzo says that he was told that a new date would be set for him to be tested. Mr. Milazzo says that the test was carried out less than a week later. It appears from the evidence of other witnesses that Mr. Milazzo's test took place on August 20, 1999.

[10] Mr. Milazzo was required to attend at a small clinic in downtown Montreal. He was asked for proof of his identity, and then told to go into a washroom, and provide a urine sample. The entire process took 10 to 15 minutes.

[11] On August 24, Mr. Milazzo received a telephone call from a doctor associated with the clinic, who advised him that his urine had tested positive for the presence of cannabis metabolites. The doctor further advised Mr. Milazzo that the positive test results would be reported to Autocar Connaisseur.

### **C. The Termination of Mr. Milazzo's Employment with Autocar Connaisseur**

[12] On August 25, 1999, Mr. Milazzo reported to work as usual. After completing one airport run, Mr. Milazzo was told to go to the office, where he met with one of the dispatchers - an individual identified only as "Denis". According to Mr. Milazzo, Denis told him that the company had been notified of Mr. Milazzo's positive test results. Denis then advised Mr. Milazzo that he was suspended from work for two days, until Pierre Bougie could review the matter, and decide what to do with Mr. Milazzo.

[13] It appears that Autocar Connaisseur had recently become unionized. Although Mr. Milazzo asserts that he was not a member of the union, he says that in the course of his discussion with Denis, Denis told Mr. Milazzo that he would try to get a union delegate to assist Mr. Milazzo, and that hopefully, Mr. Milazzo would be able to stay with the company.

[14] Two days later, Mr. Milazzo met with Pierre Bougie. M. Bougie did not testify, and his role with the company was never explained. It appears that M. Bougie was a member of the senior management at Autocar Connaisseur. Mr. Milazzo says that he told M. Bougie that he really loved his job, and that he was “ready to go to rehab for what happened”. Mr. Milazzo testified that he also asked for a second test, to be sure that he had really tested positive.<sup>2</sup> M. Bougie evidently responded by saying that he was sorry, but there was nothing that he could do - he had to fire Mr. Milazzo.

[15] During this meeting, M. Bougie had Mr. Milazzo sign a document which was written entirely in French. Mr. Milazzo testified that he has difficulty reading French, but that M. Bougie explained that a union representative should have been present at the meeting, and that, by signing the document, a union representative would be made available to assist him. In fact, the document is a waiver of Mr. Milazzo’s right to have a union representative present at the meeting. Mr. Milazzo was quite confused in his testimony on a number of points, including the status of the union at Autocar Connaisseur. We are not persuaded that M. Bougie intentionally misled Mr. Milazzo in order to have him sign the document. In all of the circumstances, we are of the view that it is more probable that Mr. Milazzo simply did not understand the explanation offered by M. Bougie regarding the issue of union representation.

[16] There are a number of inconsistencies in Mr. Milazzo’s evidence regarding his dealings with M. Bougie. Although Mr. Milazzo initially testified that M. Bougie was clear during the meeting that he had no choice but to fire Mr. Milazzo, Mr. Milazzo also says that M. Bougie said “due to the circumstances I cannot put you back to work right now. Give me a couple of days and I will see what I can do”. Mr. Milazzo then says that after his meeting with M. Bougie, he waited to hear from a union representative. He states that he made no effort to contact a union representative, as he was not allowed to be anywhere near the offices of Autocar Connaisseur.

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<sup>2</sup> It should be noted that although Mr. Milazzo asked for a second drug test in the course of his meeting with M. Bougie, neither the Commission nor Mr. Milazzo challenged the validity of the results of Mr. Milazzo's drug test at the hearing.

[17] A couple of days later, Mr. Milazzo received his Record of Employment from Autocar Connaisseur, indicating that he had been dismissed. Despite his testimony that he was not allowed near Autocar Connaisseur's premises, Mr. Milazzo says that he then went back to see M. Bougie, asking that he be laid off. Mr. Milazzo says that he did this so that he would be able to collect Employment Insurance benefits. This testimony must be considered in light of Mr. Milazzo's subsequent assertion that it was several months before he became aware that the termination of his employment by Autocar Connaisseur for cause would disentitle him to EI benefits.

[18] According to Mr. Milazzo, M. Bougie refused to lay him off.

[19] It is common ground that Mr. Milazzo's employment was terminated as a result of his positive drug test, and ultimately, nothing turns on these inconsistencies in Mr. Milazzo's testimony. Nevertheless, these and other inconsistencies in Mr. Milazzo's testimony cause us to approach his evidence regarding more central issues with some caution.

## **II. The Motor Coach Industry**

[20] Evidence with respect to the state of the motor coach industry was provided by James Devlin, and Brian Crowe. Mr. Devlin is the current President of Autocar Connaisseur. Mr. Crowe is the President of Motor Coach Canada, the trade association representing motor coach companies and motor coach tour operators in Canada. Motor Coach Canada represents approximately 95 bus operators and 115 tour operators - somewhere between 75% and 90% of the Canadian industry.

[21] Motor coach companies generally have approximately 75% of their employees working as drivers. Fifteen or 20% of the employees are mechanics, and the remainder provide administrative services. Most Canadian companies are fairly small, family-run businesses.

[22] The motor coach industry operates on an 'on demand' basis. According to Mr. Crowe, a typical operator in the bus industry operates 24 hours a day, 7 days a week. As Mr. Crowe



noted, the industry has to have services available when people want to move. This means that route patterns may be quite unpredictable: Mr. Crowe cites the example of travel to the United States, stating that a company may not go to the United States at all one month, and then make 20 U.S. trips the next month, because of customer demand.

[23] According to Mr. Crowe, it is this ability to respond quickly to customer demand that is one of the strengths of the motor coach industry.

#### **A. The Economic Condition of the Motor Coach Industry**

[24] Mr. Crowe described the Canadian motor coach business as a 'mature industry', meaning that there is little growth in this sector. Indeed, the industry is in decline. Mr. Crowe explained that charter bus companies in Canada have to compete against heavily subsidized transport providers such as the airlines and Via Rail. World events, such as the Gulf War, the September 11,2001 attacks, the war in Iraq, the SARs epidemic and the outbreak of Mad Cow disease in western Canada have combined to greatly reduce the tourism business available to the motor coach industry.

[25] The state of the market creates serious economic challenges for motor coach operators. Mr. Crowe explained that a motor coach costs \$600,000.00. Charter rates in Canada now vary between \$500 and \$700 per day, meaning that bus companies operate on very thin margins. This has resulted in a number of company bankruptcies in the industry in recent years.

#### **B. The Regulatory Environment**

[26] The motor coach industry in Canada is heavily regulated. Because Autocar Connaisseur operates out of the Province of Quebec, it is the regulatory environment in that Province that is germane to our inquiry.

[27] *An Act respecting owners and operators of heavy vehicles*<sup>3</sup> (Bill 430) came into force in Quebec in 1998, as a result of the tragedy at Les Éboulements - a bus accident that took some 40 lives. The Bill was designed to increase road safety, and introduced an administrative registration system for owners and operators of heavy equipment, including buses. Amongst other things, this regulatory scheme calls for on-going conduct reviews. The Quebec Transport Commission is authorized to impose administrative measures on operators who have been assigned conditional or unsatisfactory safety ratings. In particular, the Commission has the power to cancel the operating licences of companies who are found to have operated in an unsafe manner, effectively putting them out of business. As will be described further on in this decision, in 1999, Autocar Connaisseur was itself the subject of safety-related proceedings before the Transport Commission, and was at risk of losing its operating licence.

[28] Amongst other safety measures implemented as a result of Bill 430, motor coach company registration forms require bus companies to advise whether the company has a plan in place to control the consumption of alcohol and drugs by bus drivers.

[29] There are numerous other statutory obligations imposed on bus operators, including obligations under the *Canada Labour Code*<sup>4</sup>, the federal *Motor Vehicle Transport Act*<sup>5</sup>, 1987, and the *Québec Civil Code*.

[30] Cross-border travel presents a particular challenge for bus operators, as operators providing services to the United States are also subject to American laws, including laws relating to drug testing.

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<sup>3</sup> R.S.Q. 1998, ch. 40

<sup>4</sup> R.S.C. 1985, c. L-2

<sup>5</sup> R.S.C. 1985, c. 29 (3rd Supp.)

### **C. Cross-Border Travel and American Regulatory Requirements**

[31] Evidence with respect to the American environment was introduced through Ms. Barbara Butler, as well as through Mr. Crowe and Mr. Devlin. Ms. Butler was qualified as an expert in policy development and implementation for issues relating to alcohol and drugs in the workplace.

[32] American law requires that bus drivers operating vehicles in the United States be subjected to pre-employment, random, post-accident and for-cause<sup>6</sup> drug testing. The testing process is subject to strict regulation, and there are stringent protocols in place regarding the collection and analysis of samples.

[33] Several witnesses testified that the use of drug testing in the transportation industry was introduced as a part of the American “War on Drugs”. Whatever the reasons for the enactment of the legislation, as of July 1, 1996, commercial motor vehicle operators driving in the United States are subject to Federal Department of Transportation Alcohol and Drug Testing Regulations. This legislation also applies to Canadian companies driving in the United States, as well as to any Canadian driver who has “the reasonable potential for crossing the border”. According to Ms. Butler, this means any driver “... who can, will or does cross the border”.

[34] Ms. Butler testified that infractions of the law are treated very seriously by the American authorities: companies are liable to fines of up to \$10,000 (US), per driver, per trip, if drivers enter American territory without having been tested for alcohol or drugs. American government auditors regularly visit bus companies in Canada, in order to ensure that any cross-border travel is carried out in accordance with the American regulatory regime. Flagrant violations of U.S.

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<sup>6</sup> Ms. Butler explained that transportation companies can require a driver to undergo alcohol and drug testing where the company has a ‘reasonable suspicion’ that the driver is unfit for duty due to drug or alcohol use.

law can result in the cancellation of the certification that bus companies require to drive in the States.

#### **D. Drug Testing in the Canadian Motor Coach Industry**

[35] According to Mr. Crowe, about 90% of Canadian motor coach operators are licenced to drive in the U.S. As a result, the issue of drug testing is of considerable importance to the motor coach industry.

[36] Ms. Butler, Mr. Crowe and Mr. Devlin all expressed frustration with the Canadian government's actions regarding the application of U.S. law to Canadian bus companies. The American government initially looked at implementing alcohol and drug testing in the transportation industry in the 1980's. At that time, the Canadian federal Department of Transport expressed some interest in working with the motor coach industry, in order to develop a legislative framework to integrate US legal requirements into the Canadian milieu. Ultimately, however, the Department opted not to involve itself in the issue, leaving Canadian bus companies to their own devices in trying to figure out how best to deal with American legal requirements, while still complying with Canadian human rights law.

[37] Ms. Butler testified that most Canadian bus companies use alcohol and drug testing. Some companies segregate their drivers into two pools - one composed of drivers who travel on U.S. routes, or have the potential to drive to the U.S., and a second pool composed of drivers who only drive on Canadian routes. In such cases, only the former group will be tested. However, many companies have concluded that they want the same safety standards for all of their drivers, and subject all of their drivers to alcohol and drug testing as a result. In some companies, all drivers either go to the U.S. on a regular basis, or have the potential to drive there. In these companies, all drivers will therefore be subject to alcohol and drug testing.

### **III. Autocar Connaisseur**

#### **A. The Situation at Autocar Connaisseur in 1997-1999**

[38] At the time that Mr. Milazzo started working for Autocar Connaisseur, the company was owned by the Calci family. Lorenzo Calci ran the company on a day-to-day basis. In June of 1997, the company was acquired by Coach U.S.A. Inc. of Houston, Texas. Mr. Calci initially stayed on as President of Autocar Connaisseur until November 1997, when he was replaced by Mr. Devlin. Mr. Devlin was the President and former owner of several other bus companies that had been acquired by Coach U.S.A.

[39] Mr. Devlin testified that when Coach U.S.A. took control of Autocar Connaisseur, it quickly discovered that the company was in serious trouble. According to Mr. Devlin, record-keeping at the company was nonexistent, inventories were greatly overstated, and buses that were recorded as being part of the fleet could not be found. At the same time, the company was facing an application for certification from a trade union.

[40] As was previously noted, the bus industry in Quebec is under the supervision of the Quebec Transport Commission. In late 1997, Mr. Devlin became aware that the Société de l'assurance-automobile du Québec (or SAAQ) had commenced proceedings before the Transport Commission against Autocar Connaisseur. SAAQ was evidently seeking to have Autocar Connaisseur's operating license cancelled because of the way that the company was conducting its business. Autocar Connaisseur's new owners discovered that the company had previously lost its right to certify the roadworthiness of its buses, because of earlier problems with the Transport Commission. According to Mr. Devlin, at this point, serious consideration was given to simply shutting the company down, although ultimately the decision was taken to work with the SAAQ, to try to turn the situation around.

[41] Mr. Devlin testified that he attended a show-cause hearing before the Transport Commission in January of 1999. At the hearing, Mr. Devlin explained the different programs that he was going to implement at the company, dealing with bus safety and driver education.

Mr. Devlin advised the Commission that it would take six to nine months before the company would be in total compliance with the applicable regulations. The hearing resulted in a warning to Autocar Connaisseur that any further infractions would result in the automatic cancellation of the company's operating licence. Such a step would mean the end of Autocar Connaisseur.

[42] One of the measures taken by Autocar Connaisseur to satisfy the commitments made to the Transport Commission was a review of the implementation of the company's drug testing policy. It was this review that ultimately led to Mr. Milazzo being tested.

### **B. Drug Testing at Autocar Connaisseur**

[43] According to Denis Filiatrault, a long time bus driver and tour guide at Autocar Connaisseur, the company had long had an unwritten 'zero tolerance' policy regarding alcohol and drugs in the workplace. In late 1991 or 1992, Autocar Connaisseur introduced a written policy, which was the policy in effect at the time that Mr. Milazzo was tested. This policy was intended to apply to all of the company's drivers.

[44] Mr. Filiatrault explained that the policy was well known to Autocar Connaisseur employees. Copies of the policy were included with employees' pay information on at least two occasions, although it appears that this may have only occurred at the time that the written policy was first introduced in the early 1990's, well before Mr. Milazzo joined Autocar Connaisseur. The orientation program for new employees included a segment dealing with alcohol and drug testing, and the company's zero tolerance approach to alcohol and drugs in the workplace was often discussed at employee training sessions. Mr. Filiatrault and Mr. Milazzo agree that a copy of the policy was posted on the bulletin board in the driver's lounge at Autocar Connaisseur.

[45] Autocar Connaisseur's drug testing policy provides for both pre-employment and random testing. All Autocar Connaisseur drivers were subjected to pre-employment alcohol and drug testing. According to Mr. Devlin, if a prospective employee tested positive for either alcohol or drugs, Autocar Connaisseur's offer of employment would then be withdrawn.

[46] Once a driver was employed by Autocar Connaisseur, he or she would be required to undergo random alcohol and drug testing. In order to carry out these random tests, all employees' names were entered into a computer, whereupon the computer would periodically generate random lists of employees identified for testing. Employees could also be tested after an accident, or where the company had concerns regarding possible alcohol or drug use by the employee. Autocar Connaisseur's testing policy stated that all positive test results would result in the immediate termination of the driver's employment.

[47] Ms. Butler has worked with all of the major bus companies in Canada. She testified that Autocar Connaisseur's approach to alcohol and drug testing was similar to that taken by many small Canadian bus companies.

[48] According to Mr. Devlin, the review of the administration of the company's alcohol and drug testing program after the Transport Commission hearings disclosed numerous problems with the way in which the policy was being implemented. In particular, Autocar Connaisseur management became aware that drivers were not being told of their appointments for random tests. An audit of the program was then conducted by Peter Booth. Mr. Booth reported to Mr. Devlin, and was identified as the Director of Safety.<sup>7</sup> From a review of Autocar Connaisseur's payroll records, Mr. Booth discovered that certain drivers, including Mr. Milazzo, had not been included in the testing pool.

[49] Mr. Devlin testified that American Transportation regulations require that employees must first have a 'pre-employment' test, before they can be included in the testing pool for random drug tests. For this reason, Autocar Connaisseur considers the drug test taken by Mr. Milazzo to be a 'pre-employment' test, notwithstanding the fact that Mr. Milazzo had been working for Autocar Connaisseur off and on for several years prior to the test.

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<sup>7</sup> Although it is not entirely clear from the evidence, it appears that Mr. Booth worked for Coach U.S.A.'s Canadian interests (Coach Canada), rather than for Autocar Connaisseur itself.

**C. The Accommodation of Alcohol or Drug Dependent Employees by Autocar Connaisseur**

[50] Mr. Milazzo was summarily fired once his drug test came back positive for the presence of cannabis metabolites. It is common ground that no attempt was made to ascertain whether Mr. Milazzo suffered from a substance abuse disorder, or was merely a casual user of cannabis. Further, there is no suggestion that any attempt was made to accommodate Mr. Milazzo, once the results of his drug test were known.

[51] According to Mr. Devlin, although it was not explicitly spelled out in Autocar Connaisseur's original written drug testing policy, the company is quite prepared to accommodate employees with problems, including substance abuse disorders, provided that the employee comes forward voluntarily, and admits to having a problem. Examples were cited of employees who had acknowledged suffering from gambling addictions or alcoholism. In each case, Mr. Devlin says the employees were offered the opportunity to rehabilitate themselves, and resume active service with the company.

[52] The company is not, however, prepared to allow an employee who tests positive in an alcohol or drug test the chance to undergo rehabilitation. According to Mr. Devlin, an employee who knowingly comes to work with alcohol or drugs in his system so fundamentally breaches the trust between employer and employee that there is no alternative but to terminate the employment relationship. Mr. Crowe testified that most Canadian bus operators respond to a positive drug test by terminating the employee.

[53] If an employee tests positive in a random, post-hiring drug test, Autocar Connaisseur will provide the employee with the name of a substance abuse professional, but the employee is still fired. An individual who tests positive in a pre-employment test is not referred to a substance abuse professional. Rather, the individual is simply not hired by Autocar Connaisseur. Because Autocar Connaisseur viewed Mr. Milazzo's drug test as a pre-employment test, no effort was made to provide Mr. Milazzo with the name of a substance abuse professional once it was known that he had tested positive.



[54] It is clear from Mr. Devlin's testimony that he was of the view that Mr. Milazzo had tried to beat the system, and had knowingly put the ongoing existence of the company at risk by driving to the United States without having first undergone a "pre-employment" drug test. Mr. Devlin explained that if Mr. Milazzo had been caught driving a bus in the United States without having first been tested, Autocar Connaisseur would have been exposed to significant fines and the potential loss of its American operating licence. In addition, the Autocar Connaisseur bus could have been impounded by the American authorities. Passengers would thus have been stranded in the States, until Autocar Connaisseur could send a second bus to bring them home. In addition to the negative customer relations impact that this would have had, Autocar Connaisseur would also have incurred the expense of the second bus, and would have been exposed to potential claims from unhappy passengers for the disruption to their vacations.

#### **D. Autocar Connaisseur's New Drug Testing Policy**

[55] Subsequent to the termination of Mr. Milazzo's employment with Autocar Connaisseur in 1999, Coach Canada has developed a new alcohol and drug testing policy, applicable to employees of Autocar Connaisseur. Ms. Butler, who worked with Coach Canada in the development of the new policy, explained that the policy remains one of "zero tolerance", but now sets out clear rules, investigative tools and consequences for employees. The policy also focuses on prevention, through the use of supervisor training, and by encouraging employees to come forward voluntarily and to seek help where an employee thinks that he or she may suffer from a substance abuse problem.

[56] One of the most significant changes in the new drug testing policy is that the policy now covers bus mechanics and not just bus drivers. According to Mr. Devlin, bus mechanics are required to certify the road-worthiness of company buses, and, like drivers, are in safety sensitive positions.

#### IV. The Legal Framework

[57] Mr. Milazzo's complaint is brought pursuant to sections 7 and 10 of the *Canadian Human Rights Act*. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 10 makes it a discriminatory practice for an employer to establish or pursue a policy that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[58] Section 3 of the *Act* designates disability as a prohibited ground of discrimination. Section 25 of the *Act* makes it clear that the term 'disability' includes "previous or existing dependence on alcohol or a drug."

[59] Pursuant to section 15(1)(a) of the *Act*, it is not a discriminatory practice to treat an employee in a differential fashion, where the differential treatment is based upon a *bona fide* occupational requirement.

[60] As a result of the Supreme Court of Canada decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*<sup>8</sup> ('Meiorin') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*<sup>9</sup> ('Grismer'), the historic distinction between direct and indirect discrimination has been replaced by a unified approach to the adjudication of human rights complaints. Under this approach, the initial onus is still on a complainant to establish a prima facie case of discrimination. A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.<sup>10</sup>

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<sup>8</sup> [1999] 3 S.C.R. 3

<sup>9</sup> [1999] 3 S.C.R. 868

<sup>10</sup> *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558.

[61] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a bona fide occupational requirement. In order to establish this, the respondent must now prove that:

- i) it adopted the standard for a purpose that is rationally connected to the performance of the job;
- ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of that legitimate work-related purpose; and
- iii) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate an individual employee sharing the characteristics of the claimant without imposing undue hardship on the employer.<sup>11</sup>

[62] Subsection 15 (2) of the *Act* stipulates that the factors that may be considered in assessing whether or not an undue hardship defense is made out are health, safety and cost, although the term 'undue hardship' itself is not defined in the *Act*. However, *Meiorin* and *Grismer* provide considerable guidance in determining whether or not an undue hardship defense has been made out. In *Meiorin*, the Supreme Court observed that the use of the word 'undue' implies that some hardship is acceptable - it is only 'undue' hardship that will satisfy the test.<sup>12</sup> The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible

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<sup>11</sup> *Meiorin, supra.* at para. 54.

<sup>12</sup> In this regard, the decision in *Meiorin* adopts the reasoning in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

accommodation to the point of undue hardship.<sup>13</sup> It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship.<sup>14</sup> The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence will not generally suffice.<sup>15</sup> Finally, factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration.<sup>16</sup>

## V. What Is The Standard?

[63] It is common ground that what is in issue in this case is Autocar Connaisseur's 'zero tolerance' drug policy. The question then arises: Zero tolerance of what? Zero tolerance of employee impairment? Or zero tolerance of employees having drug metabolites in their systems?<sup>17</sup>

[64] This question is best answered by considering the wording of the policy itself. Autocar Connaisseur's alcohol and drug policy discloses that the mischief that the policy is aimed at addressing is employee impairment. The policy states:

[Translation]

Our policy is simple, it is a tolerance zero policy. That is, we cannot at anytime, afford to have employees who are intoxicated while on duty.

(Notre politique est simple, il s'agit d'un niveau de tolérance zéro. En effet, nous ne pouvons nous permettre d'avoir des employés en état d'intoxication à quelque moment que ce soit durant leur période de travail.)

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<sup>13</sup> *Grismer, supra.*, at para. 32

<sup>14</sup> *Grismer, supra.*, at para. 42

<sup>15</sup> *Grismer, supra.*, at paras 41 and 42

<sup>16</sup> *Meiorin, supra.*, at para. 63

<sup>17</sup> See *Entrop v. Imperial Oil Ltd.*, 50 O.R. (3d) 18 (Ont. C.A.), at para. 104, for a discussion of this issue.

[65] However, the standard that will attract adverse employment consequences is the presence of drug metabolites in an employee's urine:

[Translation]

All bus drivers will be tested upon receiving an offer of employment. Thereafter, they will be tested randomly in accordance with American legislation. Any positive result will lead to an automatic termination of employment.

(Tous nos employés chauffeurs seront testés dès qu'une offre d'emploi leur sera faite. Par la suite, conformément à la législation américaine, ils seront testés au hasard. Tout résultat positif entraînera le congédiement automatique.)

[66] Having concluded that the standard in issue in this case is Autocar Connaisseur's prohibition on employees having drug metabolites in their system while at work, we will now consider the application of the standard, first in the context of Mr. Milazzo's section 7 complaint, and then in the context of the section 10 complaint.

## **VI. The Section 7 Complaint**

### **A. Is There a Prima Facie Case of Discrimination?**

[67] In considering this complaint, we must first decide if Mr. Milazzo and the Commission have established a *prima facie* case of discrimination on the basis of disability. Autocar Connaisseur contends that no *prima facie* case has been established here, as it has not been proven that Mr. Milazzo actually suffered from a disability. The respondent further submits that in light of the wording of Section 25 of the *Canadian Human Rights Act*, the concept of perceived disability has no application in the case of drug dependence. In any event, the respondent says, Autocar Connaisseur did not perceive Mr. Milazzo to be disabled.

**B. Did Mr. Milazzo suffer from a disability?**

[68] The first question, then, is whether Mr. Milazzo suffered from a disability.<sup>18</sup> Although not necessarily dispositive of the issue, it should be noted that at the hearing Mr. Milazzo did not assert that he suffered from a drug-related disability at the time of his positive drug test.

[69] In understanding issues related to substance abuse and dependency, the Tribunal was aided by the testimony of Dr. Ray Baker and Dr. Jean-Pierre Chiasson. Dr. Baker was called by the Commission, and was qualified as an expert in addiction medicine, and the pharmacology, physiology, detection and treatment of substance abuse disorders. Dr. Chiasson was called by Autocar Connaisseur, and was qualified as an expert in addiction medicine, in particular, the detection and treatment of substance abuse and dependence. Both doctors have considerable experience with workplace issues relating to drug use.

[70] Dr. Baker and Dr. Chiasson were in substantial agreement that drug users fall into one of three categories: casual users, drug abusers and those who are drug dependent. Both doctors agree that casual users make a conscious choice to ingest drugs, and can basically 'take it or leave it' at will. They also agree that individuals who have become addicted or dependent on drugs lose their ability to control their drug use, and suffer from a disease. Dr. Baker refers to the disease as neurobiological in nature, whereas Dr. Chiasson calls it a brain disease. Whatever the appropriate description, the experts agree that drug dependent individuals suffer from a disability.

[71] The point at which the doctors diverge is in relation to the proper characterization of individuals in the intermediate stage of drug use - that is drug abuse. In Dr. Baker's view, drug

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<sup>18</sup> It should be noted that the Commission abandoned its support of Mr. Milazzo's section 7 complaint mid-way through the hearing, and made no submissions as to whether Mr. Milazzo suffered from a disability or not. Mr. Milazzo, who did not attend the last several days of the hearing, made no submissions in this regard.

abusers may suffer negative consequences as a result of their use of drugs, and may engage in hazardous behaviour, but these individuals have not lost control of their drug use. In other words, for the drug abuser, continued ingestion of drugs is still a chosen behaviour. According to Dr. Baker, drug abusers do not require treatment.

[72] Dr. Chiasson agrees that for drug abusers, continued drug use is more a matter of personal choice than a reflection of a loss of control. However, Dr. Chiasson testified that drug abuse causes problems for the individual, and can lead to drug dependance. For this reason, drug abuse is listed in the Fourth Edition of the Diagnostic and Statistical Manual published by the American Psychiatric Association. In Dr. Chiasson's opinion, both drug abuse and drug dependancy are brain diseases.

[73] As will be seen from the discussion that follows, we do not find it necessary to resolve the disagreement between the experts on this point.

[74] It will be recalled that Mr. Milazzo testified that when he was confronted with the positive result of his drug test, he told M. Bougie that he was "ready to go to rehab for what happened". One conclusion that could be drawn from this statement is that, as of August of 1999, Mr. Milazzo may have perceived that he had a problem with his cannabis use, and was seeking help. Of course, another reasonable inference is that Mr. Milazzo was desperate, and was saying whatever he thought it would take to help him keep his job.

[75] At the hearing, Mr. Milazzo testified that he used cannabis on a strictly recreational basis. In a letter sent to the Commission during the course of the investigation, Mr. Milazzo stated that he had consumed cannabis during his vacation, several weeks before his drug test, and that this had led to the positive result. However, other evidence before the Tribunal casts serious doubt on the reliability of Mr. Milazzo's explanation.

[76] Dr. Baker testified that Mr. Milazzo's urine contained 64 nanograms of cannabis metabolite<sup>19</sup> per milliliter of urine. Both Dr. Baker and Dr. Chiasson discussed the half-life of cannabis, and the rate at which cannabis metabolites are excreted by the human body. Factors influencing the level of the metabolite in the system include the amount of cannabis ingested, the potency of the cannabis, and when the ingestion took place. The frequency of ingestion is also significant: Dr. Chiasson explained that a one-time user will excrete all of the metabolite within a couple of days of ingestion. However, because cannabis metabolites are fat soluble, and build up in body fat with regular use, long term users will continue to excrete cannabis metabolites in their urine for up to sixty days after the last ingestion of cannabis.

[77] How then does Mr. Milazzo's testimony accord with the scientific data?

[78] Dr. Baker did not have any information regarding Mr. Milazzo's claims as to the frequency of his drug use, and thus was not in a position to offer an opinion as to whether Mr. Milazzo's testimony accorded with scientific knowledge regarding the excretion of cannabis metabolite. Based upon Mr. Milazzo's test results alone, Dr. Baker could not offer an opinion as to whether Mr. Milazzo was a drug abuser, or suffered from drug dependence.

[79] Dr. Chiasson agrees with Dr. Baker that one cannot deduce whether Mr. Milazzo was a casual user, an abuser, or drug dependent from the results of one drug test. However, Dr. Chiasson says that the test results call Mr. Milazzo's credibility into serious question. Dr. Chiasson was unequivocal that the level of cannabis metabolite found in Mr. Milazzo's urine on August 20, 1999, was inconsistent with Mr. Milazzo's being a recreational user who had consumed cannabis several weeks before the test. Citing existing research in the area, Dr. Chiasson stated that it is improbable that an individual who was a casual user would still test positive for the presence of cannabis metabolites even five days after his last use. If Mr. Milazzo

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<sup>19</sup> This metabolite is properly described as 11-nor-?-9-THC-9-COOH.



truly had not consumed cannabis for some time before the test,<sup>20</sup> the continuing presence of cannabis metabolite in his urine suggests long-term use, rather than occasional consumption.

[80] Mr. Milazzo insisted, under oath, that he was strictly a recreational cannabis user. While Dr. Chiasson's testimony leads us to suspect that Mr. Milazzo may well have had a more serious problem with his drug usage than he would have us believe, Mr. Milazzo has the burden of establishing that he suffered from a disability. In light of the inconsistencies in the evidence, we find that this burden has not been met.<sup>21</sup>

[81] The fact that we are not persuaded that Mr. Milazzo suffers from a disability is not necessarily fatal to Mr. Milazzo's section 7 complaint. Mr. Milazzo asserts that Autocar Connaisseur perceived that he suffered from a drug-related disability, and thus the issue of perceived disability must be considered.

**C. Does the Concept of Perceived Disability Apply to Cases of Alcohol or Drug Dependence?**

[82] Autocar Connaisseur acknowledges that in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*<sup>22</sup>, the Supreme Court of Canada held that the prohibition against discriminating on the basis of handicap or disability extends to prohibit discrimination based on perceived disabilities as well.

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<sup>20</sup> It is reasonable to assume that this was indeed the case: we know that Mr. Milazzo had several days warning that he was going to undergo a drug test. If Mr. Milazzo was indeed a casual user of cannabis (and therefore in control of his drug use), common sense would dictate that he would refrain from using cannabis in the period immediately before the test.

<sup>21</sup> In coming to this conclusion, we have considered the possibility that Mr. Milazzo's denial of the seriousness of his drug problem could itself be symptomatic of a drug-related disability. However, we note that having lost his job because of his drug use, Mr. Milazzo has faced the kind of crisis that can force a drug dependent individual face up to his disability, and nevertheless continues to maintain that he is not drug dependent. Further, he maintains this position even though it would clearly have been in his interest to claim that he suffered from a disability at the hearing.

<sup>22</sup> [2000] 1 S.C.R. 665

[83] However, counsel for Autocar Connaisseur notes that the decision in *Boisbriand* was based on the *Québec Charter of Human Rights and Freedoms*<sup>23</sup>. The Supreme Court also considered section 3 of the *Canadian Human Rights Act*, which includes “disability” as one of the prohibited grounds of discrimination. Counsel submits that in this case, regard must be had to the express wording of section 25 of the *Act*. Parliament has provided a specific definition for disabilities arising out of drug dependency, stating that “disability” includes “... previous or existing dependence on alcohol or a drug”. No mention is made of the concept of perceived disability in section 25. Thus, Autocar Connaisseur says, Mr. Milazzo must establish that he actually suffered from a previous or existing dependence on a drug. The concept of perceived disability has no application in this case.

[84] In support of its argument, counsel cites the Tribunal decision in *Vermette v. Canadian Broadcasting Corp.*<sup>24</sup> At issue in *Vermette* was whether the mere assertion that a complainant had previously been dependent on alcohol or a drug was sufficient to bring a case within the purview of section 25. The Tribunal concluded that it was not enough for a complainant to assert that she had a past dependency. There must be evidence before the Tribunal of a continuing disability, which disability is related to the past alcohol or drug dependence. With respect, we do not read *Vermette*, which predates the Supreme Court’s decision in *Boisbriand*, to address the question of the applicability of the notion of perceived disability to cases of alcohol or drug dependence.

[85] It is true that *Boisbriand* makes reference only to section 3 of the *Canadian Human Rights Act*, and does not expressly import the notion of perceived disability into section 25 of the *Act*. However, while section 25 does not expressly prohibit discrimination based on perceived dependence on alcohol or drugs, neither does section 3 of the *Act*. Nevertheless, using a purposive interpretation, the Supreme Court was able to interpret the prohibition against

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<sup>23</sup> R.S.Q. c. C-12, as amended.

<sup>24</sup> (1994) 28 C.H.R.R. D/89 (C.H.R.T.), aff’d (1996) 28 C.H.R.R. D/139 (F.C.T.D.)

discrimination on the basis of disability to include the prohibition against discrimination on the basis of a perceived disability.

[86] It is well established that human rights statutes are to be given a purposive interpretation - one that will best achieve their objectives.<sup>25</sup> In the case of the *Canadian Human Rights Act*, Parliament has identified the purpose of the *Act* in section 2, stating that:

The purpose of this Act is to extend the laws in Canada to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on .... disability.

[87] Thus, the purpose of the *Act* is to allow individuals the opportunity to realize their full potential, without being limited by arbitrary assumptions about their abilities, based upon their personal characteristics. A refusal by an employer to employ an individual, based upon the employer's perception that the individual is dependent on alcohol or drugs would, in our view, be contrary to the aims of the *Act*. Thus, the objectives of the *Canadian Human Rights Act* are best achieved by interpreting section 25 of the *Act* to include the prohibition against discrimination on the basis of a perceived disability.

[88] Having concluded that section 25 of the *Canadian Human Rights Act* includes the prohibition against discrimination on the basis of a perceived disability, the final issue for the Tribunal is to determine whether Autocar Connaisseur perceived that Mr. Milazzo suffered from a drug related disability.

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<sup>25</sup> *Meiorin, supra.*, at para. 43-44

**D. Did Autocar Connaisseur perceive Mr. Milazzo to be drug dependent?**

[89] The evidence before us does not establish that Autocar Connaisseur perceived Mr. Milazzo to suffer from a drug related disability. The evidence of Mr. Devlin shows that the reason that Mr. Milazzo was tested in August of 1999 was because Autocar Connaisseur had just discovered that he had not been subjected to a pre-employment test, as was required by Autocar Connaisseur's drug testing policy. There is nothing before us that would suggest that anyone at Autocar Connaisseur had any suspicions that Mr. Milazzo might be using drugs, or any concerns with respect to his performance.

[90] When Autocar Connaisseur became aware that Mr. Milazzo had tested positive for the presence of cannabis metabolites, Mr. Milazzo was summarily fired. There is no suggestion that any questions were asked, or any investigation carried out in order to determine whether Mr. Milazzo was drug dependent. Mr. Milazzo was fired because he failed his drug test. No one at Autocar Connaisseur knew, or cared, whether Mr. Milazzo was dependent on drugs. Indeed, there is nothing before us to suggest that anyone at Autocar Connaisseur ever turned their mind to the issue.

**E. Conclusion Regarding Mr. Milazzo's Section 7 Complaint**

[91] This is not an action for wrongful dismissal, and it is not for this Tribunal to determine whether testing positive for the presence of a cannabis metabolite constitutes just cause for Mr. Milazzo's dismissal by Autocar Connaisseur.

[92] In order to benefit from the protections afforded by the *Canadian Human Rights Act*, a complainant must demonstrate the involvement of one or more of the proscribed grounds listed in section 3 of the *Act*. Having failed to establish that he was either disabled, or was perceived by Autocar Connaisseur to be disabled, Mr. Milazzo has not established a *prima facie* case of discrimination, and accordingly, his section 7 complaint must therefore be dismissed.

[93] Having dismissed Mr. Milazzo's section 7 complaint, the section 10 complaint remains to be considered.

## **VII. The Section 10 Complaint**

[94] In contrast to complaints under section 7 of the *Canadian Human Rights Act*, which relate to employer actions affecting specific, named individuals, section 10 of the *Act* addresses the discriminatory effect that employer policies or practices may have on an individual or a class of individuals. The focus of our inquiry with respect to the section 10 complaint is thus not confined to the circumstances of Mr. Milazzo's own situation.

### **A. Is There a Prima Facie Case of Discrimination?**

[95] We have no hesitation in finding that Autocar Connaisseur's drug testing policy prima facie discriminates against employees who are drug dependent. Mr. Devlin testified that in cases where a prospective employee tested positive for drugs in a pre-employment test, Autocar Connaisseur's offer of employment would be withdrawn. Similarly, an Autocar Connaisseur employee who tested positive would have his or her employment summarily terminated.

[96] Some of these individuals will inevitably suffer from substance related disabilities. Indeed, Dr. Chiasson testified that a 1995 study disclosed that 50% of the employees who tested positive in a study of drug testing in industry suffered from either substance abuse or dependency.

[97] The fact that Autocar Connaisseur's drug testing policy has an adverse, differential effect on a protected class of individuals means that the policy is *prima facie* discriminatory.<sup>26</sup> Indeed, Mr. Devlin admitted as much in his testimony, and counsel for the respondent conceded that a *prima facie* case of discrimination exists in relation to the section 10 complaint.

## **B. Has Autocar Connaisseur Discharged its Burden?**

[98] Having found that Autocar Connaisseur's drug testing policy is *prima facie* discriminatory, the onus shifts to the respondent to establish that not having drug metabolites in one's system is a bona fide occupational requirement for bus drivers. There are three elements that must be established in order to demonstrate the existence of a bona fide occupational requirement. Each of these elements will be considered in turn.

### **(i) Rational Connection**

[99] In order to prove the existence of a bona fide occupational requirement, Autocar Connaisseur must first establish that requiring that its bus drivers not have drug metabolites in their systems is rationally connected to the function that drivers perform. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose.<sup>27</sup>

[100] We have previously identified the purpose of Autocar Connaisseur's drug testing policy as being the prevention of employee impairment. The Commission concedes, and we find that Autocar Connaisseur's goal of promoting road safety by preventing driver impairment is rationally connected to the business of providing bus transport.

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<sup>26</sup> We note that our finding that an employer drug testing policy is *prima facie* discriminatory is consistent with the existing Canadian human rights jurisprudence in this area. See, for example, Entrop, *supra*, *Canadian Civil Liberties Association v. Toronto Dominion Bank*, (1997) 163 D.L.R. (4th) 193 (F.C.A.), and *Alberta (Human Rights and Citizenship Commission) v. Elizabeth Métis Settlement*, 2003 ABQB 342.

<sup>27</sup> *Meiorin, supra.*, at para. 59

**(ii) Good Faith**

[101] The second element that must be demonstrated by Autocar Connaisseur is that it adopted its zero tolerance standard in relation to the presence of drug metabolites in good faith, in the belief that it is necessary for the fulfilment of a legitimate work-related purpose. If the standard was not thought to be reasonably necessary or was motivated by discriminatory considerations, then it cannot be justified.

[102] Once again, the Commission concedes that Autocar Connaisseur has acted in good faith in the promulgation of its drug testing policy. The Tribunal notes that, like other Canadian transport companies doing business in the United States, Autocar Connaisseur was placed in a very difficult position, as a result of the introduction of the American Department of Transport drug testing regulations. Transport companies were essentially left to fend for themselves, without any guidance or assistance from the Canadian government as to the appropriate method for satisfying American drug testing requirements within the Canadian legislative environment. It appears that Autocar Connaisseur did the best that it could, in difficult circumstances.

[103] In all of the circumstances, the Tribunal is more than satisfied that the good faith element of the *Meiorin* test has been met.

**(iii) Reasonable Necessity**

[104] Finally, the onus is on Autocar Connaisseur to establish that its refusal to tolerate employees having drug metabolites in their system while at work is reasonably necessary to accomplish the company's goal of promoting road safety, by preventing driver impairment . To show that the zero tolerance standard is reasonably necessary, it must be demonstrated that it is impossible for Autocar Connaisseur to accommodate disabled employees who test positive for drugs, without imposing undue hardship on the company.

[105] In examining whether Autocar Connaisseur's drug testing policy is reasonably necessary to promote road safety, consideration must first be given to the employment context in which Autocar Connaisseur's bus drivers operate.

**(a) The Employment Environment for Bus Drivers at Autocar Connaisseur**

[106] Mr. Devlin described the duties associated with driving a motor coach, explaining that alertness, as well as an ability to 'multi-task' are essential. In addition to having to navigate a large vehicle through traffic, drivers have to be aware of the passengers at all times. By way of example, Mr. Devlin says a driver has to be aware if a passenger gets up to use the washroom, as a quick manoeuvre by the driver could result in serious injury to the passenger.

[107] Further, the environment in which motor coach drivers work makes it very difficult for bus companies to ensure that drivers are always up to the task.

[108] Unlike the situation in previous drug testing cases, where employees worked under fairly close supervision inside bank offices (TD Bank), petroleum processing plants (Entrop) or the administrative offices of an Indian Band (Elizabeth Métis Settlement), bus drivers at Autocar Connaisseur spend a considerable portion of their time on the road, away from the watchful eye of their superiors. Drivers doing casino and airport runs would be on the road much of each day, whereas drivers taking charter groups on tour could be away from the Autocar Connaisseur offices for as much as thirty days at a time. While drivers check in with Autocar Connaisseur dispatchers each day by telephone, the company is unable to verify that the driver had actually carried out the necessary pre-trip inspections, or to properly assess if the driver is indeed fit to drive.

[109] Mr. Filiatrault testified that during the years that he has been with Autocar Connaisseur, problems have been encountered from time to time with bus drivers over-indulging in alcohol or other substances. These cases usually manifested themselves by drivers acting up in hotel bars during overnight stays during bus tours. Such incidents often came to the company's attention



when passengers present in the bar complained to the tour guide, if one was accompanying the driver, who would, in turn, report the driver's behaviour to Autocar Connaisseur.

[110] This inability on the part of Autocar Connaisseur management to closely supervise its workforce presents particular challenges for the company in monitoring employee performance. These difficulties are compounded by the somewhat transient nature of much of Autocar Connaisseur's workforce, with many drivers working for the company on a seasonal basis.

[111] Mr. Crowe described the precarious economic position of the Canadian motor coach industry, indicating that the situation at Autocar Connaisseur was no different than that at other Canadian motor coach companies. As Mr. Devlin explained, Autocar Connaisseur's ability to monitor its workforce was also limited by the financial constraints under which the company operated. Mr. Devlin testified that in 1999, Autocar Connaisseur had a fleet of 125 buses. Although the company generated gross revenues of \$10 million in 1998, in fact, Autocar Connaisseur was losing substantial sums of money. Mr. Devlin quickly realized that the charter market in Quebec was simply not there to support a fleet of that size. The decision was thus made to reduce the size of Autocar Connaisseur's fleet, and the company currently operates 29 vehicles.

[112] Subsequent events such as the terrorist attacks in the United States on September 11, 2001 further depressed the tourist industry. In 2002, the company realized a profit of \$400,000 on sales of \$5 million, but continues to carry an accumulated deficit of \$10 million.

**(b) Route Assignments and Autocar Connaisseur Drivers**

[113] Mr. Filiatrault described the way in which routes are assigned to bus drivers. Autocar Connaisseur uses a seniority system for route assignment. Periodically, drivers are given the opportunity to bid on routes, with the most senior drivers choosing first. Mr. Filiatrault explained that the type of work that would be viewed as the most attractive would vary, depending on the types of clients and the distances involved.

[114] According to Mr. Filiatrault, Mr. Calci would assist drivers with criminal records, who may have had problems entering the United States, by allowing them to drive on Canadian routes. It was not made clear how this would work, having regard to the seniority system.<sup>28</sup>

[115] According to both Mr. Filiatrault and Mr. Devlin, there was no guarantee that drivers assigned to Canadian routes would not have to enter the United States on short notice. For example, the company could be called upon to provide a bus and driver in response to last minute charter requests. A bus could break down in the United States, making it necessary to send another driver and bus down to the States, to collect the passengers, and bring them back to Montreal. Even drivers assigned to airport runs could be called upon to drive to the United States on short notice, where, for example, a plane that was scheduled to land at Dorval airport was re-routed to Burlington, Vermont, because of weather conditions.

[116] Indeed, Mr. Milazzo himself acknowledged that Autocar Connaisseur drivers could be called upon to drive anywhere.

[117] During the time that Mr. Milazzo worked for Autocar Connaisseur, the company's seasonal drivers would be laid off at the end of the tourist season, when the charter business dried up. Autocar Connaisseur's permanent driving staff would then take over the contract work, such as casino and airport shuttle service. By the end of 1999, however, Autocar Connaisseur had lost both of these contracts. We were not told how many drivers Autocar Connaisseur now has on staff in the winter months.

[118] With this understanding of the operating environment at Autocar Connaisseur, we will next examine the expert evidence regarding the use of drug testing in the workplace.

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<sup>28</sup> It will be recalled that Mr. Milazzo himself had a criminal record, as a result of his 1997 impaired driving conviction, but was nonetheless able to enter the United States in the summer of 1999. Mr. Milazzo suggested that a conviction for impaired driving might not interfere with his ability to cross the border. In fact, there is no evidence to suggest that the border authorities were ever aware of his record.

**(c) The Effects of Cannabis on the Brain**

[119] Dr. Baker and Dr. Chiasson each gave testimony with respect to the effects of cannabis consumption on the human brain, and once again were in substantial agreement on many points. The active ingredient in cannabis is Nine Delta tetrahydrocannabinol or 9 THC. The level of 9 THC in the cannabis available in Canada today is significantly higher than in the past, and the drug accordingly that much more potent.

[120] Nine Delta tetrahydrocannabinol is released when cannabis is first ingested. The 9 THC takes effect immediately, with the acute phase of intoxication peaking ten to thirty minutes later. Cannabis users generally remain acutely intoxicated for a couple of hours, followed by a period of sub-acute intoxication. This sub-acute intoxication lasts for an additional 12-24 hours.

[121] During the period of acute intoxication, the cannabis user experiences a sense of euphoria or 'high'. During this phase, cannabis affects the user's memory, cognition, perception and motor activity. This is followed by a period of 'coming down', that can last an hour or so. During this period, the user's concentration, memory and reflexes may be affected. The intoxicating effect of cannabis may be enhanced or multiplied, if cannabis is ingested along with another intoxicant such as alcohol.

[122] According to Dr. Chiasson, for chronic cannabis users, the sub-acute or 'hangover' phase of cannabis intoxication is characterized by ongoing neuropsychological dysfunction that can impair the user's ability to drive a motor vehicle. Chronic users of cannabis can require up to 28 days of abstinence or 'washout' before their neuropsychological tests results return to normal. Dr. Baker testified that studies have shown impairment of fine motor skills for up to 24 hours, post-consumption, although he indicated that there is some question as to the validity of these studies.

[123] In some cases, the consumption of cannabis can have longer-term effects on the user's ability to function. Chronic cannabis users can go through a period of withdrawal if they stop using the drug. Symptoms of withdrawal include irritability, restlessness, vivid disturbing dreams

and poor concentration. These symptoms can persist for one to three weeks. During the withdrawal period, the user's perception, cognitive functioning and motor skills could be sufficiently impaired that the individual should not operate a motor vehicle.

[124] Flashbacks are a second potential long-term effect of chronic cannabis use. Dr. Chiasson testified that in some cases, chronic cannabis users can experience the symptoms of acute cannabis intoxication quite suddenly, without having actually ingested the drug. These recurrences or flashbacks typically occur when the user is tired or under stress.

[125] Dr. Baker and Dr. Chiasson agree that individuals employed in safety sensitive positions - that is, positions where an employee could put his own safety or the safety of others at risk - should not be performing tasks such as driving motor vehicles while their ability to drive is impaired by the use of cannabis.

**(d) The Extent of the Problem in the Transportation Industry**

[126] Alcohol and drugs are widely used in the general population in Canada. Ms. Butler referred to 2001 data compiled by the Centre for Addiction and Mental Health, which indicates that 83.6% of men and 75.7% of women are 'current drinkers'. Eighteen percent of adult males reported having driven within an hour of drinking two or more drinks. Current marijuana users constitute 15.4% of the adult male population, and 7.3% of the female population. Some 4.9% of current cannabis users met the criteria of dependency. The CAMH study also reports a steady increase in the use of cannabis.

[127] Dr. Baker's evidence in relation to cannabis was that 34% of Canadians have tried the drug. According to Dr. Chiasson, in the Province of Québec, nearly 40% of the population reports having tried cannabis. Ten to fifteen percent of cannabis users have problems of abuse or dependency, according to Dr. Chiasson.

[128] Insofar as the transportation industry is concerned, Ms. Butler testified that the Canadian government's lack of involvement in regulating alcohol and drug testing means that there is a

limited amount of Canadian research available in this area. She did refer to a study conducted by the British Columbia Trucking Association in 1989. According to Ms. Butler, three-quarters of the drivers surveyed reported that alcohol had compromised safety, with one in nine drivers admitting that his or her own alcohol use had compromised safety at work. Seven out of ten drivers reported having worked while affected by alcohol, and half of the drivers reported knowing other drivers who drank at work. With respect to drugs, three-quarters of the drivers surveyed reported that drug use had compromised safety, with one in twelve drivers admitting that his or her own drug use had compromised safety at work.

[129] This evidence certainly suggests that the use of drugs by drivers in the transportation industry is a real problem, with significant implications for public safety.

[130] Evidence with respect to the level of alcohol and drug use in the transport industry in Quebec was provided by Maxime Brault, an epidemiological statistician with the Société de l'assurance-automobile du Québec. M. Brault is currently involved in a study investigating road safety in the Province. In this context, M. Brault is investigating the use of alcohol and drugs by truck drivers in Quebec. In the course of M. Brault's research, he familiarized himself with other research carried out by the SAAQ.<sup>29</sup>

[131] A study conducted by the SAAQ in 2001 used the roadside interception of trucks on Quebec highways in order to measure the incidence of alcohol and drug use amongst truck drivers. The study disclosed that 9% of drivers tested positive for one or more drugs in their system, with 4.8% testing positive for the presence of cannabis metabolites. It should be noted that 17% of the intercepted drivers declined to participate in the study.

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<sup>29</sup> M. Brault was not offered as an expert witness, and was not qualified as such. The Tribunal allowed M. Brault to refer to previous SAAQ research, but given his status as a lay witness, did not allow him to offer opinions as to the conclusions that could be drawn from the research. M. Brault was not cross-examined with respect to the statistical information, however, and the evidence is uncontradicted. Similar statistical information with respect to the Quebec study was also provided by Barbara Butler. Accordingly, the Tribunal is prepared to accept this evidence.

[132] Insofar as the experience at Autocar Connaisseur is concerned, we were told that there have only been a couple of drivers in recent years who have had problems with alcohol. It appears that Mr. Milazzo is the only Autocar Connaisseur driver who has had a positive drug test. However, this evidence cannot necessarily be interpreted to mean that there is little problem with alcohol or drug use amongst Autocar Connaisseur drivers, and that therefore a drug testing policy is unnecessary. As will be explored more fully further on in this decision, there is at least some evidence that would suggest that the presence of an alcohol and drug testing policy may have a deterrent effect.

**(e) What Drug Tests Look For**

[133] Dr. Baker and Dr. Chiasson gave extensive testimony with respect to drug testing, and once again, were in substantial agreement on many points. Workplace drug testing programs typically test for what is known as the “NIDA 5”<sup>30</sup> group of drugs. These drugs are marijuana or cannabis, cocaine, amphetamines, phencyclidine and opiates.

[134] In the case of cannabis, what is measured in the urine is 11-nor- $\Delta^9$ -THC-9-COOH<sup>31</sup>, a non-psychoactive by-product or metabolite produced when  $\Delta^9$ THC is broken down in the body. In order to avoid false-positive tests in situations where, for example, an individual may have been passively exposed to cannabis in a smoky room, a cut-off level of 50 nanograms per millilitre is used. Urine samples containing less than 50 nanograms per millilitre of THC-acid will be recorded as negative.

[135] A positive urine test will not indicate when the cannabis was used, or how much was ingested. All that a urine test shows is that an individual has used cannabis at some time in the past.

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<sup>30</sup> "NIDA" is an acronym for the National Institute of Drug Abuse. It is common ground that Mr. Milazzo's urine was tested for the NIDA 5 group of drugs.

<sup>31</sup> 11-nor- $\Delta^9$ -THC-9-COOH is also called THC-acid or THC-carboxylate.

[136] Unlike alcohol testing, where there is a direct correlation between the blood alcohol reading and the probable degree of impairment, the fact that an individual may test positive for the presence of cannabis metabolites in his urine does not mean that the individual was necessarily impaired at the time of the test. It takes thirty minutes after ingestion before cannabis metabolite will be detectable in urine, while the effect of the cannabis may peak as quickly as 10 minutes after consumption. As a result, an individual could be acutely intoxicated, and still test negative for cannabis metabolites. By the same token, cannabis metabolites could still be present in the system long after the individual ceases to be impaired.

**(f) The Efficacy of Drug Testing as a Means of Promoting Road Safety**

[137] The principle point of divergence between Dr. Baker and Dr. Chiasson relates to the efficacy of drug testing as a means of promoting road safety. The doctors agree that there is no single perfect means of detecting substance use in employees in safety sensitive positions, and that some cases will be missed, whatever approach is followed. While Dr. Chiasson believes that drug testing is a useful tool in managing employee impairment, Dr. Baker is of the view that there are other, more effective methods of achieving this goal.

**1. Dr. Baker's Position**

[138] According to Dr. Baker, there are many conditions that can compromise the ability of an employee in a safety sensitive position to perform his job in an appropriate manner. Alcohol or drug intoxication is one, but conditions such as fatigue, diabetes, depression and stress can all have a negative impact on employee performance. After alcohol, over-the-counter medications are the commonest source of employee impairment.<sup>32</sup> Dr. Baker questions the utility of testing for impairment caused by alcohol or any of the NIDA 5 drugs, when no tests are carried out with respect to these other common causes of impairment.

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<sup>32</sup> While Dr. Baker testified that over-the-counter medications are the commonest source of employee impairment, Barbara Butler says that cannabis is the most frequently identified drug in any studies of unsafe driving practices.

[139] In Dr. Baker's view, drug testing is a very 'blunt instrument'. He feels that there are boundary issues involved, and that it is not an employer's place to attempt to make medical diagnoses. Dr. Baker also questions the accuracy of drug test results, stating that employees exposed to regular testing quickly become adept at finding ways to beat the system through the use of adulterants and clean urine from other sources, or by drinking large quantities of water to dilute their own urine, thus reducing the concentration of drug metabolites below the permissible levels.

[140] The preferable course is for employers to have clearly articulated policies, which are consistently applied. The workforce should be educated about substance abuse and the problems that it can cause. One goal of this training is to encourage employees to come forward if they observe a co-worker in trouble, rather than covering for the colleague, as is often the case. Supervisors should also be educated as to the warning signs of substance abuse disorders. Indicators that can often signal the presence of a substance abuse problem include things such as erratic employee attendance at work, behavioral issues and performance problems.

[141] Once an employee is identified with a suspected substance abuse problem, the employee should be confronted about the employer's concern. Assistance should be offered to the employee in dealing with the problem. The employer may demand that the employee remain off the job until the employee has been evaluated by a physician, and has been determined to be fit to return to work.

[142] Cases where an employee breaches a zero tolerance policy through the voluntary ingestion of either alcohol or drugs, because of a personal choice as opposed to a dependency problem, should be dealt with through the regular employer disciplinary process, with sanctions up to and including termination.

[143] In situations where employees are going to be put into safety sensitive positions, Dr. Baker says that employers have a responsibility to have the individuals medically assessed in order to ensure that they are able to safely carry out their job. This evaluation should include a



thorough biological, psychological, social and addiction evaluation, looking for any conditions that could interfere with the person's ability to perform his job safely, including invisible disabilities such as diabetes, coronary artery disease and substance dependence. Drug testing may play a useful part in such an assessment.

[144] According to Dr. Baker, the cost of such a pre-employment evaluation is in the vicinity of \$500 to \$800 per employee.

[145] Dr. Baker testified that this approach can be a more effective method of detecting substance abuse problems in the workplace than drug testing. In support of this contention, he cited the example of a West Coast marine organization, where several prospective employees with substance abuse problems tested negative in drug tests, but were subsequently identified through the use of a pre-employment medical assessment.

[146] In Dr. Baker's view, drug testing also serves a useful role, as part of a monitoring program used to follow the recovery of individuals with substance abuse problems, after their return to work in safety sensitive positions. The Commission's own policy relating to workplace drug testing recognizes the usefulness of drug testing where an employer has reasonable cause to believe that an employee may be impaired by alcohol or drugs, or where an incident such as an accident raises questions as to the employee's fitness.<sup>33</sup>

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<sup>33</sup> The "Canadian Human Rights Commission Policy on Alcohol and Drug Testing". Online: CHRC Homepage <[http://www.chrc-ccdp.ca/Legis&Poli/DrgTPol\\_PolSLDrg/DrgPol\\_PolDrg2.asp?l=e](http://www.chrc-ccdp.ca/Legis&Poli/DrgTPol_PolSLDrg/DrgPol_PolDrg2.asp?l=e)>. It should be noted that the Tribunal has previously ruled that the Commission's policy is not binding on the Tribunal, and is nothing more than a statement of the Commission's opinion on the issue of drug and alcohol testing, an opinion that the Tribunal may agree with or not, as it sees fit. (See *Milazzo v. Autocar Connaissanceur Inc.*, T-713/1802, Ruling No. 1, (Nov. 12, 2002))

## 2. Dr. Chiasson's Position

[147] Dr. Chiasson acknowledges that there are many other things that can impair employee performance, apart from the 5 drugs tested for in the NIDA 5 group. Drug testing is, however, one quick, reliable, cheap and easily administered tool that can effectively assist employers in identifying potential problems in employees in safety sensitive positions.

[148] Dr. Chiasson agrees with Dr. Baker that drug testing is not perfect, but then, Dr. Chiasson says, neither is the type of assessment process advocated by Dr. Baker. Dr. Chiasson explained the difficulty in identifying some substance dependent individuals, noting that he has employed four secretaries with drug problems. Despite his training in the field, in each case, he was unaware of the individual's situation.

[149] Dr. Chiasson testified that he has assessed patients whose substance abuse problems were not obvious to him. In these cases, the diagnosis was ultimately made with the assistance of drug testing. For Dr. Chiasson, drug testing provides useful, objective information.

[150] While acknowledging that there are methods that can be used to defeat drug tests, Dr. Chiasson says that testing laboratories are adept at detecting attempts to thwart the process. For example, the specific gravity of urine is analyzed, in order to see if the urine has been diluted. The temperature of the urine is measured, in an effort to identify situations where clean urine is being substituted for that of the test subject. Tests are also carried out for the presence of adulterants.

[151] Drug tests do not operate in a vacuum, according to Dr. Chiasson. When an individual tests positive in a screening test, it is then necessary to subject the individual to an evaluation, in order to determine whether the person suffers from a dependency problem. He testified that the cost of a follow-up evaluation, once an individual tests positive, is between \$2000 and \$4000.

[152] What a drug test does do is provide a snapshot, at a specific time, which will document whether a person has been in contact with an illegal, and potentially addictive psychoactive substance that has the potential to endanger safety. According to Dr. Chiasson, this signals to the employer that the test subject is at an increased risk of posing a danger to safety in the workplace.

**(g) Positive Drug Tests as an Indicator of Increased Risk**

[153] This takes us to the heart of the disagreement between Dr. Baker and Dr. Chiasson. Both doctors agree that the fact that an individual tests positive for the presence of cannabis metabolites in their urine does not mean that the individual was necessarily impaired at the time of the test. Where the experts appear to disagree is on the question of whether an employer should be able to use drug testing in order to evaluate workplace risk.

[154] Dr. Baker testified that information from urine tests as to whether a test subject had been exposed to cannabis at some point would be useful information for a health professional in assessing the risk posed by that employee. Indeed, he seems to agree that there is a correlation between a positive drug test and an increase in risk, although he was not aware of any studies that have demonstrated a correlation between the two. In Dr. Baker's view, 'it seems intuitive' that this would be the case.

[155] Dr. Baker's real problem with employer drug testing relates to a philosophical concern with boundaries and the appropriate role of health care providers and employers, respectively. In Dr. Baker's view, while an employer is absolutely entitled to evaluate workplace risk, he says that there are other ways that an employer can identify employees at risk of substance abuse problems, through the methods previously discussed, such as attendance monitoring. If an employer is going to test for health-related risk, then there are other health conditions that the employer should test for, in order to ensure that the workforce is not impaired. In Dr. Baker's opinion, employers do not test for conditions such as diabetes or coronary artery disease, because they recognize that it is not their role to do so. By the same token, Dr. Baker says, it is not for employers to subject their employees to urine testing.

[156] Although Dr. Baker was not aware of any studies in the area, it appears that some research has indeed been done on the relationship between positive urine test results and motor vehicle accidents. In Canada, the most relevant study is that currently being carried out by the SAAQ. M. Brault testified that the purpose of the study was to examine the role that alcohol and drugs played in fatal motor vehicle accidents on Quebec's highways.

[157] There are several aspects to this study. First, voluntary random roadside screening was carried out with respect to Quebec drivers, in order to determine the prevalence of alcohol and drug use by recreational drivers. A similar study was carried out for commercial drivers of vehicles weighing over 3000 kilograms, such as trucks and buses, to see if this group consumes the same substances, in the same proportions. In each case, the drivers were subjected to an interview, as well as to Breathalyzer, saliva and urine testing. Adjustments were made to the results to take into account the significant number of drivers who refused to participate in the study.

[158] These results were then compared to the incidence of positive alcohol and drugs tests in another group of drivers. This group is comprised of drivers who had been killed in Quebec road accidents, in circumstances where the drivers had been deemed to be at fault in causing the accident. The results of this comparative analysis would then help determine whether the presence of certain substances in a driver's system indicates that the driver presents a higher risk of being involved in an accident.

[159] The analysis of the data relating to the random roadside screening of Quebec drivers has now been completed. For recreational drivers, cannabis was the drug most frequently found, with 6.7% of this group testing positive for the presence of cannabis metabolites.<sup>34</sup>

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<sup>34</sup> As was previously noted, in an earlier SAAQ study, 4.8% of drivers of *commercial* vehicles tested positive for cannabis metabolites.

[160] The aspect of the study dealing with the prevalence of alcohol or drug use amongst drivers causing fatal motor vehicle accidents is not yet final, because the researchers have not yet obtained a sufficiently large sample of data from deceased drivers in order to be completely satisfied beyond all doubt as to the reliability of the information. Preliminary results have, however, already been obtained and published. These results indicate that 69 out of 364 or 19.5% of deceased drivers responsible for fatal motor vehicle accidents tested positive for the presence of cannabis metabolites. By comparing this figure to the 6.7% incidence in the general driving population, the authors of the study have concluded that the presence of cannabis metabolites in a driver's urine is associated with a 2.2 times greater risk of being involved in a fatal motor vehicle accident.

[161] The actual risk of accident associated with cannabis impairment may in fact be more than 2.2 times greater, as people may continue to test positive for the presence of cannabis metabolites after they ceased to be impaired.

[162] Given Dr. Baker's acknowledgement that a positive drug test is useful in assessing the risk posed by a particular driver, coupled with the testimony of Dr. Chiasson and the findings, albeit preliminary in nature, of the SAAQ study, we are satisfied that urine testing for the presence of cannabis metabolites does assist in identifying drivers who are at an elevated risk of accident.

**(h) Do Drug Tests Serve to Deter Employee Impairment?**

[163] A further argument advanced in defense of the practice of drug testing bus drivers is the deterrent effect that the presence of a drug testing policy allegedly has. In support of this contention, Autocar Connaisseur points to the fact that between January 1, 2000 to March 20<sup>th</sup>, 2003, the company has carried out 166 random drug tests. During that thirty-nine month period, not one Autocar Connaisseur bus driver tested positive for alcohol or drugs. While impressive, the utility of this evidence is diminished by the fact that we do not have similar data for the period before the drug testing policy was introduced. In other words, there is no way of knowing

how many Autocar Connaisseur drivers would have tested positive for either alcohol or drugs if Autocar Connaisseur had not had a clearly articulated alcohol and drug testing policy.

[164] Ms. Butler testified that deterrence is an important part of any drug testing policy. While few studies have been undertaken on the deterrent effect of workplace drug testing policies, Ms. Butler notes that in Australia, where random roadside alcohol screening is used, the incidence of alcohol related accidents has been significantly reduced. Studies have found that the possibility that motorists could, at any time, be subject to screening, will inevitably cause the potential drinking driver to think twice before getting behind the wheel.

[165] Dr. Baker acknowledges that the presence of a drug testing policy could discourage drug dependent candidates from applying to a workplace that had this type of policy in place. The presence of such a policy would also tell employees not to consume drugs prior to regularly scheduled tests. Dr. Baker did not indicate whether non-dependent employees would also choose to permanently abstain, if the employee was exposed to the ongoing possibility of random testing.

[166] Dr. Baker does point to the American experience, where there has been a significant reduction in the number of positive employee drug tests, but no corresponding diminution in the prevalence of substance abuse disorders in the workplace. Dr. Baker suggests that this means that employees are simply devising ways to beat the system. It seems to us, however, that another possible explanation for this phenomenon is that those with control over their alcohol or drug use are choosing to abstain, as a result of the knowledge that they could be tested, leading to a reduction in the number of positive drug tests, whereas those who are alcohol or drug dependent continue to consume on a regular basis.

[167] Common sense dictates that individuals with control over their alcohol or drug use would, at a minimum, be more careful about their consumption if they knew that they were at risk of an unannounced alcohol or drug test in the workplace. There is, however, insufficient evidence before us to conclude that the presence of an alcohol or drug testing policy would deter

employees with substance abuse problems from continuing to use alcohol or drugs. Further, the fact that the presence of a drug testing policy may serve to discourage the alcohol or drug dependent from applying to work at a specific company is evidence of the potentially systemic discriminatory effect that such policies can have.

**(i) Conclusions Regarding the use of Drug Testing By Autocar Connaisseur**

[168] It is clear from the testimony of Dr. Baker and Dr. Chiasson that there is no single, ideal means of detecting employee impairment, or of identifying those who are at increased risk of being intoxicated in the workplace. While the approach advocated by Dr. Baker is a good one, in principle, it is clear from the evidence of Dr. Chiasson that it will not necessarily catch all of those employees who are at risk of putting the lives of passengers in jeopardy. We are also not persuaded that, in the specific context in which Autocar Connaisseur found itself during the summer of 1999, that Dr. Baker's method would have been all that workable.

[169] First of all, Dr. Baker's approach relies to a large extent upon the observations of supervisors. While such an approach may work well in a factory or office environment, where employees are closely supervised, it is less useful in a work environment such as that at Autocar Connaisseur, where bus drivers are unsupervised for much of the time.

[170] Dr. Baker's approach is also costly. He testified that a pre-employment employee assessment would cost between \$500 to \$800 per employee. We know that Autocar Connaisseur has a transient workforce, and hires many of its employees on a seasonal basis. We also know that the company was losing money at the time that Mr. Milazzo was tested, and was in danger of being shut down altogether. While we do not have evidence as to the precise cost of administering a urine test to an employee, Dr. Chiasson did tell us that the process is cheap, and was obviously within the means of Autocar Connaisseur.

[171] Although a positive drug test does not indicate that a bus driver was actually impaired while on the job, for the reasons discussed earlier in this decision, we are satisfied that a positive

test result is a 'red flag', to use Dr. Chiasson's term. The presence of cannabis metabolite in an employee's urine does assist in identifying drivers who are at an elevated risk of accident.

[172] We have also found that the presence of a drug testing policy will serve to deter at least some employees from using alcohol or drugs in the workplace, in a manner that would put themselves or others in danger.

[173] For these reasons, we find that Autocar Connaisseur's drug testing policy is reasonably necessary to accomplish the company's legitimate work-related goal of promoting road safety.

[174] There is one further reason why we have concluded that Autocar Connaisseur's drug testing policy is reasonably necessary, and that is the company's obligation to comply with American drug testing legislation. Counsel for the Commission suggested that Autocar Connaisseur should maintain two pools of drivers, one for drivers going to the United States, and a second for those driving exclusively in Canada. Only drivers going on American routes should then be subject to alcohol and drug testing. Based upon the testimony of Mr. Crowe, Mr. Filiatrault and Mr. Devlin, however, we do not think that this is a workable solution. It is clear that to remain competitive, Autocar Connaisseur has to have drivers available to allow the company to respond to customer demand in a timely manner. In addition, the company also has to be able to respond quickly to inclement weather conditions and emergency situations. We are satisfied that in a small company such as Autocar Connaisseur, all drivers have "the reasonable potential for crossing the border",<sup>35</sup> and that it would cause Autocar Connaisseur undue hardship if it could not test all of its drivers in accordance with American legislative requirements.

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<sup>35</sup> Mr. Milazzo and Mr. Filiatrault both testified that Mr. Calci would restrict drivers with criminal records to Canadian routes. This certainly indicates that it is possible to accommodate a specific individual with a known restriction that would prevent him from crossing the border by trying to have him drive only in Canada. However, it is clear from Mr. Milazzo's own experience that this was not always possible. Indeed, he was called upon to drive to the United States on short notice, even though his employer was aware that he had a criminal record, because no other driver was available.



[175] For these reasons, we find that Autocar Connaisseur has met the burden on it of establishing that subjecting its employees to pre-employment and random drug testing is a legitimate way to promote road safety.

[176] That is not the end of the matter, however. According to the Supreme Court decisions in *Meiorin* and *Grismer*, in order to satisfy the third element of the bona fide occupational requirement defense, Autocar Connaisseur must also show that it is impossible for it to accommodate employees who test positive for drugs, and who suffer from a drug-related disability, without imposing undue hardship on the company. This issue will be considered next.

**(j) Can Autocar Connaisseur Accommodate Bus Drivers Who Have Tested Positive?**

[177] In accordance with Autocar Connaisseur's drug testing policy, any employee testing positive for either alcohol or drugs will be summarily terminated. Where a prospective employee tests positive, Autocar Connaisseur's offer of employment will be withdrawn.

[178] It will be recalled that Mr. Devlin testified that Autocar Connaisseur was of the view that these actions are necessary because an employee who knowingly comes to work with alcohol or drugs in his system so fundamentally breaches the trust between employer and employee that there is no alternative but to terminate the employment relationship. It may well be that such a course is open to Autocar Connaisseur (at least from a human rights perspective) where employees use alcohol or drugs as a matter of personal choice, and voluntarily breach the company's alcohol and drug policy.

[179] The situation is different, however, in cases where the individual suffers from a condition that qualifies as a disability. In such cases, an employer has an obligation to accommodate the employee to the point of undue hardship, unless it is impossible to do so.

[180] The fact that an employee tests positive in an employer-sponsored drug test does not automatically mean that the employee is disabled. In order to distinguish between employees who suffer from a substance-related disability and those who do not, it may well be necessary to

require that the employee submit to a professional assessment by an appropriate health care practitioner. While employers must be sensitive to the role that denial can play in substance abuse disorders, ultimately, the onus is on the employee or prospective employee to demonstrate that they are entitled to the protection of the *Canadian Human Rights Act*.

[181] We do not accept Mr. Devlin's evidence that Autocar Connaisseur could not accommodate alcohol or drug dependent employees or prospective employees who test positive in random or pre-employment alcohol or drug tests. Mr. Devlin himself acknowledged that the company can and does accommodate employees who voluntarily come forward and admit to having an alcohol or drug problem. In such cases, Mr. Devlin says, employees will be given the opportunity to rehabilitate themselves, and will be allowed to return to work when they are fit to do so. Mr. Devlin confirmed that the company was prepared to offer this form of accommodation even though he assumes that an employee with an alcohol or drug problem would, in all likelihood, have driven a bus while his ability to do so was impaired. Surely driving a passenger bus while impaired is at least as serious a breach of trust as testing positive in an alcohol or drug test?

[182] Further, Mr. Devlin's position with respect to the need for there to be voluntary self-disclosure before any effort will be made by the company to accommodate a substance-dependent employee ignores the very real role that denial plays in alcohol or drug related disorders.

[183] Dr. Baker and Dr. Chiasson each discussed the role that denial plays in substance abuse disorders. Both doctors agree that addicts will continue to deny that they have a problem until the personal cost of using alcohol or drugs outweighs the benefits of continued use. In most cases, Dr. Chiasson says, it will take a crisis such as the loss of a job or spouse before a person who is dependent on either alcohol or drugs will confront the fact that they have a problem, and seek help. Dr. Chiasson testified that he has never seen a situation where an addict spontaneously had a crisis of conscience, and came forward voluntarily seeking help.

[184] While we have found that a positive alcohol or drug test is a ‘red flag’, that is, an indication that the employee presents an elevated risk of accident, the safety concerns raised by the test results can be addressed by removing the driver from behind the wheel of a bus.<sup>36</sup> In light of the safety concerns created by the positive test result, however, we do not think it appropriate to require Autocar Connaisseur to assign the driver to a Canadian route as a form of accommodation. In any event, we have already concluded that the operational demands at Autocar Connaisseur are such that there can be no assurance that a driver assigned to a Canadian route would not have to drive into the United States on short notice.

[185] Given the testimony as to the small size of the company, the limited number of non-driving positions available, and the specialized training that these positions require, it may well be that there are no alternate, non-driving positions available for bus drivers at Autocar Connaisseur.

[186] At the very minimum, however, a company such as Autocar Connaisseur should be able to extend the same opportunity to a substance-dependent driver who has tested positive as it does to drivers who come forward voluntarily with substance abuse problems. That is, these individuals should be afforded the opportunity to rehabilitate themselves, and to return to work when they are fit to do so. In our view, the company would also be justified in implementing appropriate follow-up monitoring measures to ensure that the individual continues to abstain from the use of alcohol or drugs. Finally, Autocar Connaisseur may also be able to terminate the employment of those individuals who fail to rehabilitate themselves after being afforded the reasonable opportunity to do so, although each of these situations would have to be carefully considered, on a case-by-case basis.

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<sup>36</sup> American Department of Transport Regulations require that an employee who tests positive for either alcohol or drugs be removed from a safety-sensitive position. Nothing in the American legislation, however, requires that the employer terminate the individual's employment. Indeed, the *American Omnibus Transportation Employees Testing Act of 1991* (49 USCS 31306 (b)(1)(A)), under whose authority the Regulations are promulgated, recognizes the critical role that rehabilitation plays in any testing program.

[187] In the case of prospective employees suffering from drug-related disabilities who test positive in pre-employment tests, employers are not entitled to automatically withdraw offers of employment, without first addressing the issue of accommodation. It may be that in some cases no accommodation will be possible where, for example, the candidate is being hired to meet an immediate, short-term need, and the period of time off of work required to complete a program of rehabilitation would be longer than the term of the employment. In other situations, some form of accommodation may be possible. Each situation would have to be carefully assessed on a case-by-case basis.

**(k) Findings Regarding Liability and the Section 10 complaint**

[188] Under the *Meiorin* and *Grismer* decisions, the burden is on Autocar Connaisseur to establish that its non-accommodating standard is reasonably necessary to achieve its goal of promoting road safety.<sup>37</sup> While Autocar Connaisseur has justified its policy of subjecting its bus drivers to pre-employment and random drug tests, it has not satisfied the burden on it of demonstrating that it could not accommodate bus drivers who have tested positive for alcohol or drugs and are alcohol or drug dependent. Accordingly, Mr. Milazzo's section 10 complaint is sustained.

**(l) Comments Regarding Autocar Connaisseur's New Alcohol and Drug Testing Policy**

[189] Before turning to the question of remedy, we wish to make a brief comment with respect to Autocar Connaisseur's new alcohol and drug testing policy. It will be recalled that this policy, which only came into force in March of this year, applies not just to bus drivers, but to bus mechanics as well. This policy is not the subject of Mr. Milazzo's complaint, and, in our view, we would be overstepping our jurisdiction if we were to extend the scope of our inquiry to

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<sup>37</sup> See, for example, *Grismer, supra.*, at p. 886.

include a consideration of the legality of testing mechanics.<sup>38</sup> Accordingly, we make no finding regarding Autocar Connaisseur's new policy, and specifically with respect to the question of whether the testing of Autocar Connaisseur's bus mechanics is reasonably necessary.

### **VIII. Remedy**

[190] Having found that Autocar Connaisseur has not met the burden on it with respect to the section 10 complaint, it remains to be determined what the appropriate remedy should be. Where a respondent is found to have engaged in a discriminatory policy or practice, the Tribunal will ordinarily order the respondent to immediately cease committing the discriminatory practice. In this case, if it is to continue doing business in the United States, Autocar Connaisseur must continue to test its bus drivers. What it cannot continue to do is to automatically withdraw an offer of employment or terminate the employment of drivers who test positive in employer-sponsored drug tests, where those employees or prospective employees can establish that they suffer from substance-related disabilities.

[191] We therefore direct Autocar Connaisseur to immediately cease the discriminatory practice of failing to accommodate employees or prospective employees who test positive in company-sponsored drug tests, in cases where the individual can establish that he suffers from a substance-related disability.

[192] We further direct Autocar Connaisseur to take steps, in consultation with the Canadian Human Rights Commission, to formulate a drug testing policy that ensures that drug dependent employees or prospective employees who suffer from drug-related disabilities, who test positive in employer-sponsored drug tests, are accommodated, to the point of undue hardship, in accordance with this decision.

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<sup>38</sup> See *Entrop, supra*. at paras. 44 to 59. It should also be noted that the Commission took the position at the hearing that the Tribunal had no jurisdiction to consider Autocar Connaisseur's new drug testing policy, and that very little time was spent by either party on the question of the propriety of testing mechanics.

[193] We further direct that, within six months of the date of this decision, the parties shall file with the Tribunal a copy of Autocar Connaisseur's revised drug testing policy. In the event that the parties are unable to agree with respect to any of the terms of this revised policy, the Tribunal retains jurisdiction to deal with any outstanding issues.

## **IX. Order**

[194] For the foregoing reasons, we declare that Autocar Connaisseur's alcohol and drug testing policy discriminates on the basis of disability, contrary to the provisions of section 10 of the Canadian Human Rights Act, and order that:

- i) Autocar Connaisseur immediately cease the discriminatory practice of automatically withdrawing an offer of employment or terminating the employment of drivers suffering from substance-related disabilities who test positive in an employer-sponsored drug test.
- ii) Autocar Connaisseur take steps, in consultation with the Canadian Human Rights Commission, to formulate a policy that ensures that individuals who suffer from substance-related disabilities who test positive in employer-sponsored drug tests are accommodated to the point of undue hardship, in accordance with this decision
- iii) Within six months of this decision, the parties shall file with the Tribunal copies of Autocar Connaisseur's revised drug testing policy. If the parties are unable to agree with respect to any of the terms of the revised policy, the Tribunal retains jurisdiction to deal with any outstanding issues.

[195] Mr. Milazzo's section 7 complaint is dismissed.

*Signed by*

Anne L. Mactavish  
Chairperson

Pierre Deschamps  
Member

Michel Doucet  
Member

Ottawa, Ontario  
November 6, 2003

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T713/1802

**Style of Cause:** Salvatore Milazzo v. Autocar Connaisseur Inc. et al.

**Decision of the Tribunal Dated:** November 6, 2003

**Date and Place of Hearing:** November 25-26, 2002  
March 24-25, 2003  
April 23-24, 2003  
May 20-21, 2003  
June 2-4, 2003  
Montreal, Quebec

#### **Appearances:**

Salvatore Milazzo, on his own behalf

Patrick O'Rourke and Céline Harrington, for the Canadian Human Rights Commission

Louise Baillargeon and Philippe-André Tessier, for the Respondent

George Vuicic, for the Interested Party