BETWEEN:

UNITED STEELWORKERS

(hereinafter referred to the "Union")

- And –

EVRAZ INC.

(hereinafter referred to as the "Employee")

ARBITRATION DECISION

Counsel on behalf of the Grievor Union: Sonny Rioux
Employer: Michael Tocher, Q.C.

This is an arbitration brought pursuant to a grievance arising from the dismissal of Pino Carteri (the Grievor) from his employment at Evraz Inc.

Mr. Carteri was dismissed after having received two prior disciplinary sanctions within the two and a half months preceding his final dismissal including a three day and a five day suspension. He was dismissed for having been found smoking at his work place in contravention of both ***Occupational and Health Safety Regulations, 1996*** and Company Policy. The issue before this arbitration is whether that dismissal was justified.

Evidence

The first witness called on behalf of the Employee was Mr. Glen Simon. Mr. Simon has been employed at Evraz for 13 years and in the last six years has been a supervisor on the spiral line. He has known the Grievor for 11 or 12 years both as a co-worker and has supervised him directly for the last couple of years.

Mr. Simon testified that he had had numerous performance issues with The Grievor over the years. He described his understanding of how discipline worked and that it was to be

"progressive" discipline. That is, the discipline and sanctions would become more stringent as the number of disciplinary offences increased.

This is clear from the "Work Rules and Regulations Book" (Exhibit P1, Tab 2) which indicated "employees should expect that disciplinary action will be applied consistently and progressively, that is, similar violations will be subject to similar disciplinary actions, and more severe disciplinary action will be issued for more serious and/or frequent rule infractions".

Mr. Simon testified concerning the three disciplinary incidents.

The first sanctioned event took place on March 15, 2010 at approximately 8:00 in the morning. However, the discipline only took place on May 4, 2010 after an investigation by Management. The nature of the infraction and violation was "poor work performance" and the sanction was a suspension for three days. The general concern against the Grievor was that his actions were being destructive to co-workers, safety and production. There was a suggestion that he had delayed production and had told other employees especially new employees to slow down their work. There was apparently some kind of confrontation outside of the work buildings but apparently on company property between the Grievor and other employees. All of these incidents gave rise to the three day suspension. It is noted that that suspension was not grieved and although the Grievor indicated there was some confusion of the Union as to who was to file a grievance, none was ever filed.

It should be noted that the issues the Grievor continued. An e-mail from Glen Simon to Cindy Hinger in the Human Resources Department of IPSCO was very negative towards the Grievor. The body of the e-mail stated as follows:

> As most of you know, over the last few months Pino has become virtually impossible to work with. On a day to day basis myself and Scott Ducharmie will do whatever possible to avoid talking with Pino unless required to deal with production issues. It is at this point that wherever he is placed to work every piece of equipment has an issue. As well all his co-workers first start to complain about working with him, then they get to the point of laughing at him because of the ridiculous stuff that comes out of his mouth. When Pino was at the hydro he

was given discipline for intentionally slowing production. He was talked to on several occasions in regards to delaying production by both Keith and myself. As well, he had confrontations with fellow co-workers at the final inspection benches. Pino is getting to the point that he is uncontrollable. I do not feel that sending him to another shift/position is solution to what is going on with him. Trust me no other shift wants to see him there.

Very shortly thereafter on June 14, 2010 another incident took place. They are described as follows:

What: 1) Nature of infraction or violation:
Poor Work Performance, Work Rule infraction (in particular #12 and #18 of the Employee Conduct Guide and Insubordination.

Why:
Pino left his work station prior to his relief being present. Pino did not follow a direction from his direct supervisor to observe the correct walk way. Pino is not very respectful of co-workers and/or supervision.

It should be noted that the following was stated within the Notice of Disciplinary Action:

3) Future Action:
Explain to the employee what is expected in terms of future actions and behaviour:
Pino will observe all work rules and regulations.

And the consequence to the employee if the actions reoccur or the behaviour does not improve:
Should we have a recurrence, Pino will be released.

One assumes that the suspension took place after June 24, 2010. This was not grieved

Less than a month after the last disciplinary sanction on July 17, 2010 the Grievor was discovered by his supervisor, Glen Simon to be smoking at his work position. The cigarette was gone. The Grievor admitted smoking. The evidence confirmed this. This was a violation of the company's smoking policy. It should be noted that effective May 1, 2009 Occupational Health and Safety Rules had been changed prohibiting any smoking inside of buildings at work facilities. Prior to that smoking was not allowed at Evraz except in a few limited locations.

The Grievor was placed on an "indefinite suspension" which triggered a subsequent meeting between the Union, the Grievor and Management.

A subsequent meeting was held on July 22, 2010 (notes at Exhibit P1, Tab 15) where The Grievor gave his side of it. The Grievor accepted that he had smoked and this was a violation of the Rules but he did not apparently consider it a very serious matter. He stated that he "didn't think that strict on smoking".

After the meeting Management made the decision to terminate the Grievor employment.

Status of Smoking at Evraz

Until the change to the Occupational Health and Safety Legislation, smoking was allowed at Evraz with a few limited exceptions in specific parts of the Plant. Employees were entitled to smoke at their jobs. However, on May 1, 2009 through a change in Government Policy, the Occupational Health and Safety Legislation was amended to prohibit smoking in work places in buildings. Smoking was permitted in open areas three metres away from doors.

To ensure compliance with the law signs were posted on all entrances and according to Management the smoking ban was implemented. The Employer had also prepared flyers about the ban and informed employees of the change.

According to Mr. Simon he disciplined at least six to ten people who were caught smoking after the ban was put in place. As well, the Grievor acknowledges that he had seen no smoking signs.

Mr. Simon further testified that employees could basically smoke at will as long as they went outside of the shop building and there were no restrictions on the number of absences an employee could take as long as they were getting their work done.

This would have required approximately a 50 foot walk by The Grievor from his work place position over a bridge to get to outdoors where his smoking would have been lawful and not against company policy.

Evidence of Cindy Hinger

Cindy Hinger also testified. Ms. Hinger is employed in Human Resources and Labour Department at Evraz. She has known The Grievor for many years through work and through some encounters on discipline issues.

Ms. Hinger followed processes that were required for someone to be dismissed at Evraz. She went through the various exhibits and produced and discussed them. She also discussed meeting with The Grievor on July 22, 2010. She testified as to the note she made and how they, in her mind, accurately set forth what happened at the meeting. The notes were apparently taken at the same time as the meeting took place.

Ms. Hinger testified that based on the interview, she did not believe that The Grievor was serious about changing and did not seem to take what had happened as being that big of a deal.

The Grievor also testified. He had been employed at Evraz for 11 years until his dismissal. He had worked in many branches of the plant but had spent the last couple of years working in his specific position. On the day of the smoking incident, he was at a different job. However, what job he was working at does not seem to have any relevance to the outcome.

The Grievor testified that he took a different view as to what had happened during the two prior disciplinary events. He denies that he had ever told other employees not to work but had told them simply to do their job and to do nothing more than their job. He was aware there were some attitude problems. He was aware that some other employees were hostile to him. However, no evidence was presented to justify any hard feelings by anyone against the Grievor. Nonetheless, he received the disciplinary sanction on May 4, 2010 for poor work performance. He was aware of the reasons for what had happened. He testified that he wanted to grieve the disciplinary action that it did not happen. From the Grievor point of view the Union had some

kind of communication failure and as a consequence a grievance was not filed. Nonetheless, I must take the disciplinary sanction as being well-founded as it was not subsequently appealed.

Similarly, with respect to the disciplinary action with respect to his actions on June 14, 2010 and subsequently delivered on June 25, 2010 which resulted in a five day suspension, he indicated that he had left work because he was ill and that is why he had not been present. It is not clear whether that was an excuse for the work rule violation. It is clear that neither was this particular sanction grieved. It must be taken as a valid one.

The Grievor also testified at length about his smoking, his inability to find employment and that he did not view the incident to be serious enough to warrant his dismissal. He indicated that violating the smoking ban under the Occupational Health and Safety Rules was frequent in the work place and it did not appear that Management was taking any effective steps to suppress it.

QUESTION PRESENTED:

Where an employee has a blemished record of employment, can smoking a cigarette be relied upon as the "culminating incident" in his or her dismissal from employment?

Both parties submitted a number of cases that were helpful.

CASES IN SUPPORT OF EMPLOYER:

***American Standard Inc. v. United Steelworkers of America, Local 13292* [2004] O.L.A.A. No. 102.**

In this decision, the arbitrator upheld the employer's decision to dismiss the employee for violating the "no smoking policy." The employer's use of hazardous materials had prompted a "zero tolerance" policy with respect to disciplining employees who were caught smoking on company premises. The employer had gone to extreme measures to convey the consequences that would result if their policies were violated, and employees were required to sign a document evidencing that they read and understood these policies. In spite of the employer's efforts, the

employee continued to violate the policy, and he was dismissed after being caught smoking in the men's washroom. The employee denied that he had been smoking, and the issue came down to the credibility of each witness. The arbitrator ultimately sided with the employer and upheld the employee's dismissal for a flagrant breach of a clearly made and articulated policy.

***Brown Brothers Ltd. v. Graphic Arts Int'l Union* [1973] O.L.A.A. No. 1.**

The employee in *Brown Brothers* was dismissed following a heated verbal exchange involving the employee making several racial slurs. The arbitrator upheld that the dismissal was for just cause equating the comments as a "verbal equivalent of assault amounting to a serious affront to the foreman's managerial authority."

***Canada Safeway Ltd. and U.F.C.W., Loc. 401, Re* [1992] A.G.A.A. No. 22.**

In this case, the employee had been dismissed for insubordination in conjunction with a record of previous disciplinary action at the work place. The employer had previously dismissed the employee for poor attendance but had subsequently reinstated him with a suspension and a "one last chance" warning. The culminating incident that precipitated his dismissal involved insubordination and aggressive behavior towards his supervisor only four months following his reinstatement. The arbitrator weighed heavily the fact that the employee knew his employment was on the line and that his prior record could be used against him should another violation occur. The arbitrator held that misconduct dissimilar to the culminating incident was not precluded from being looked at under the doctrine of culminating incident. As such, the arbitrator considered the employee's history of workplace violations and maintained the employee's dismissal for just cause.

***Casco and U.F.C.W. Loc. 617P Re:* [1993] O.L.A.A. No. 114.**

Similar to *American Standard*, *supra*, this arbitration upheld the employee's dismissal for just cause where the employee had violated a zero tolerance "no smoking" policy which had been implemented in order to avoid fire or explosion in a corn processing plant. The employee had previously been caught smoking; however, the employer was lenient following this preliminary incident. The "zero tolerance" policy was thereafter made abundantly clear to the employee, and the employee testified that he was aware that discharge would result from a repeated violation.

Despite this, the employee was caught on video smoking two cigarettes at the workplace. When he was confronted about this incident by his supervisor, the employee lied and denied he had done so. In upholding the employer's decision to terminate employment, the arbitrator relied on the fact that smoking was a premeditated action and his decision to smoke put his co-workers in extreme danger.

Invista (Canada) Co. v. Kingston Independent Nylon Workers Union (Szymula Grievance) **[2010] O.L.A.A. No. 8.**

In this case, two employees filed grievances after being terminated for smoking on the roof of the employer's facility. The employer produced nylon fabrics and had a strict non-smoking policy for safety reasons. The grievances were dismissed as the employees were aware of the policy and had been reminded of it only two weeks prior to the violation. The arbitrator's decision was based, in part, on the employer's interest in deterring future violations of the policy.

Labatt Breweries of Newfoundland and N.A.P.E. Local 7004 (Re) **22 C.L.A.S. 472.**

The grievance in this case related to the employer introducing a progressive discipline policy that mandated, *inter alia*, serious penalties for uncorrected minor infractions. The policy instituted a series of five steps to deal with the offenses categorized as "minor:" (1) a verbal warning, (2) a written warning, (3) a one-day suspension, (4) a one-week suspension, and (5) termination. By implementing this system of progressive discipline, the employer intended to make employees accountable for even minor offenses such as being absent without leave, tardiness, leaving work without permission, and abusing rest breaks. The decision accepted that discharge from employment could result upon repeated violations of minor offenses under the culminating incident doctrine. *See paras.* 23-26.

> Employees realize that they will ultimately be discharged if they go all the way down the path of the progressive discipline system for minor offenses. There is nothing unreasonable about the maximum of five steps that the employer has prescribed in this system. The employer emphasizes that the 'normal progression' for offenses of a similar nature will be to follow the steps in turn. All the minor offenses grouped together in categories are similar in nature because they refer to types of human behaviour that can be characterized as being related to inadvertence, negligence, and carelessness, as opposed to major offenses which are related to intentional, reckless, or malicious acts. The minor

> offenses of a similar nature do not reflect the kind of activity that would normally attract a heavy penalty for a first offense. However, when enough of those offenses occur, it becomes apparent that the individual is not working out as an employee.

The arbitrator recognized that the progressive discipline system was compatible with the Collective Agreement even where minor offenses considered together could amount to discharge.

> Five minor violations of any type are sufficient to prove that an employee is unable to conform. Therefore, since all major offences are independently disciplinable, grouping any of them into categories has no meaning whatsoever . . . the foregoing demonstrates the fallacy of the expression 'the penalty should fit the crime.' In the workplace, the infraction *is* the crime. But because employers should consider an employee's entire circumstances, i.e. his previous discipline record, the time since the last offence, his length of service, etc, the actual penalty might be lighter or heavier than the incident itself might otherwise attract, depending on how favourable or unfavourable those other factors turn out to be *Id.* at 60 -61.

Re Rolland Inc, and Canadian Paperworkers Union, Local 310 **[1983] O.L.A.A. No. 75.**
The employee in this case was disciplined following an altercation he had with his supervisor that involved foul language and a shoving. After the incident, the employee was suspended for three weeks. While not decided pursuant to the culminating incident doctrine, the arbitrators' analysis centered on the same parameters. Specifically, the arbitrators relied on the fact that the employee had been warned on previous occasions to: (1) follow management's instructions, (2) refrain from arguing with his supervisors, and to (3) avoid using abusive language. As such it was acknowledged that the employee was adequately warned and should have been on notice that any further contraventions would result in discipline. The arbitrators upheld the three week suspension and commented on the arbitral trend to impose discharge where an employee has demonstrated a pattern of abusive or belligerent behaviour. *Citing E.E. Palmer, Collective Agreement Arbitration in Canada*, 2nd ed. (1983), pp. 333-337.

Re Volvo Canada Ltd. and United Automobile Workers, Local 720 **[1984] N.S.L.A.A. No. 2.**
This grievance was based on discipline that had been imposed on the employee for "slacking off." Specifically, the employee was a truck driver who on a number of occasions could perform

his job duties more productively and efficiently when supervised as compared to when he operated the truck alone. The employee was suspended for 10 days, and the employee made a grievance alleging that the penalty was excessive. The arbitrator upheld the employer's position that the penalty was reasonable under the circumstances, relying on the fact that the employee had been adequately warned that his production was under careful scrutiny and in recognition of his past disciplinary record.

II. CASES IN SUPPORT OF EMPLOYEE/UNION:

***Strongo Inc. v. National Automobile, Aerospace and General* [2010] O.L.A.A. No. 683.**

The grievance was allowed in this instance and where the arbitrator decided the penalty of termination was too severe in light of the employee's serious addiction to cigarettes. The employee was terminated for repeated violations of the employer's no smoking policy. The employee had received four disciplinary warnings, one written warning, and a one-day suspension all for smoking within the six months preceding the culminating incident. The employee denied smoking on the last occasion. Although the arbitrator refused to accept the employee's assertion that he was not smoking, the penalty of dismissal was found to be too severe in light of the employee's serious addiction to cigarettes. The arbitrator maintained that the employee should assist employees suffering from addictions by making resources readily available. The employee, although dismissed from work for over five months, was reinstated without compensation. The arbitrator held that the next violation of the employer's non-smoking policy would result in immediate dismissal, not subject to contest by way of grievance.

***Alcan Smelters and Chemicals v. Canadian Auto Workers, Local 2301* [2005] B.C.C.A.A.A. No. 179.**

In this case, in spite of the employee's contravention a well-delineated culminating incident policy, his termination was decided to be wrongful in light of his proximity to retirement security. The employee was hired in 1981 and had been with the employer for over 23 years. This employment relationship, however, had been tainted with approximately 20 incidents of discipline. The employee had been dismissed and reinstated on two former occasions.

The employer had a culminating incident policy in place dictating that whenever four instances of discipline occurred within a 12 month period, the employee could be discharged provided each instance warranted discipline by itself. This grievance was filed by the employee after he was terminated pursuant to this policy. The culminating incident itself was an accumulation of misconduct: (1) reporting late to work, (2) unacceptable behaviour towards a superintendent, and (3) being unfit for work/not clean shaven. The union challenged the dismissal as unjust.

The arbitrator identified a pattern of defiance of authority on the part of the employee.

> [The employee] has a problem with authority which has arisen and flourished intermittently over his employment history. [The employee's] defiance was omnipresent on that final day, and it extended into the events giving rise to the third incident involving the allegation that [the employee] reported late for work in an unfit condition in the sense that he had not removed the facial hair had been instructed to remove . . .

With respect to the employee's failure to report to work cleanly shaven, the arbitrator observed:

> [The employee] was given an ultimatum with respect to either wearing a racal or reporting for work clean shaven and that he elected to defy that instruction. In his defiance, he sought to plead ignorance about the instructions given to him and what was expected of him. His conduct in this incident was deserving of discipline.

The arbitrator acknowledged that the employee found that all of the incidents relied on by the employer constituted conduct deserving of discipline; however the employee's dismissal was not upheld as dismissal was considered to be an excessive response where it equated to a loss of the employee's retirement security.

***Alcan Smelters Inc. and Chemicals Inc. and Canadian Auto Workers, Local 2301* [1998] B.C.C.A.A.A. No. 596.**

The union in this case brought a grievance alleging that the employee had been dismissed without just cause after he had fought with another employee. The employer relied on the employee's poor disciplinary record and maintained that the culminating incident, even on its own, warranted dismissal. The arbitrator allowed the grievance, and found that while there was just cause for discipline, dismissal was an excessive response. The arbitrator considered the

employee's offenses cumulatively and held that since the employee's previous offenses were all confined to attendance violations, and there had been no prior violent incidents, the culminating incident was not part of a continuing pattern of misconduct, and the employee should be reinstated.

***Cominco Ltd. v. United Steelworkers of America* [2000] B.C.C.A.A.A. No. 62.**

The employer in this case had a policy in place that prohibited the use and personal possession of tobacco in any form anywhere on company property. This zero tolerance smoking ban was implemented in response to the health concerns posed by the materials at the plant that were particularly hazardous when ingested. It was the union's position that the policy discriminated against smokers who were unable to control their addiction, and the employer should be required to accommodate addicted smokers by providing an outside place designated for smoking. In the lengthy decision, the arbitrator referred extensively to the collective agreement and analyzed whether or not the total smoking ban was unreasonable and/or discriminatory. The arbitrator ultimately sided with the union and held that the smoking policy had a discriminatory effect because the burden of the policy falls disproportionately on heavily addicted smokers. Id. at 224. The arbitrator urged the employer to provide suitable ways to accommodate heavily addicted employees.

The Smoking Violation

It is clear that the Grievor was smoking in violation of Company Policy and in violation of the Occupational Health and Safety Smoking Regulations. The questions that arise are as follows:

1. Was the breach a serious or trivial breach?
2. Is the Grievor's position affected by the fact that smoking is an addiction?

One question that needs to be discussed is the seriousness of the Grievor's breach by smoking within the confines of the building.

Up to May 31, 2009 the Employer had a partial ban on smoking in the workplace and merely placed restrictions on the location for smoking. There was no evidence that in the part of the plant where the Grievor worked that smoking constituted a specific safety hazard.

The actual ban of smoking in the work place was imposed by the Government of Saskatchewan through Regulations under *The Occupational Health and Safety Act, 1993.* The Regulations were approved by Order in Council dated October 31, 2008 and came into force May 31, 2009, more than one year prior to the incident in question. The relevant provisions make it an offence to smoke in a work place and the employer must "ensure" that no person smokes in a work place. The Grievor clearly breached the rules. Given the positive obligation on the employer contained in the legislation it is possible Evraz was in breach as well.

It should be noted that the Employer has an onus to comply with occupational health and safety rules and indeed faces very severe sanctions for any violation of those rules by their employees.

Section 58 of *The Occupational Health and Safety Act* provides that the Employer could have been subject to a fine of up to $10,000.00 had the smoking been discovered by the appropriate inspector rather than by his supervisor. Indeed, the liability extends to the corporate directors of the Employer pursuant to Section 60 of the same Act.

Given the violations of *The Occupational Health and Safety Act* are classed as regulatory offences, then there is a heavy onus upon the Employer to prove that they had exercised due diligence to ensure that their employees comply with the law. This would include that it has policies and practices in place to ensure compliance. One of the necessary elements is that the Employer has proper disciplinary responses ready in the event of a violation by any of its employees of *The Occupational Health and Safety Act* or its Regulations.

In this case, it is quite reasonable for the Employer to treat the infraction here, smoking in violation of the Regulations, as a very serious matter indeed.

It is apparent that Employees had been warned and a number had been disciplined.

In my view the onus is on the Employer to show that violations of occupational health and safety rules are treated very seriously and that they were active in ensuring the Act was complied with. As a consequence, there is a heavy onus on the Employer to comply with work place health and safety rules.

The Employer had engaged in education programs, apparently offered some support to quit smoking, and posted signs. The Employer allowed smoking on the site so long as it was outdoors.

In this case the employer had diligently informed it employees of the change, had signs posted at all entrances, and was complying with its statutory duty to enforce occupational health rules. The Employer is not in a position to pick and choose which are to be enforced. The Employer must take all of the rules and regulations seriously.

Furthermore, it would have been extremely easy for The Grievor to comply with the policy. He merely needed to walk outside. The evidence was he could have done so at any time. There is no evidence that management had placed any kind of undue or unreasonable restrictions on smokers. The Grievor simply had to wait for a few seconds to complete the short walk outside to smoke. He did not do that.

It is clear he was aware of the policy. It is clear he had a duty to comply with the policy. It is clear that the Employer must enforce this policy rigorously.

With respect to the willfulness of the Grievor's action, society has been restricting the places people can smoke for many years. That restriction has increased over time. Smoking has been banned from public transportation for decades. Smoking was restricted and then banned from restaurants, bars, hotels and other public locations many years ago. Most employers had restricted smoking in many workplaces either banning it entirely or restricting it to specific locations as Evraz had done.

The changes to the Regulations simply extended that ban. The Grievor in this case was well aware by his basic life experience that there were very few places he was actually permitted to smoke. This restriction had been in place for more than one year.

The Employer also permitted smoking where it was lawful (outside) .

As a consequence, I do not accept that the violation was trivial nor should management treat it as trivial.

Given the Grievor's recent history of workplace problems, it is difficult to believe that he was unaware that he was violating the occupational health rules. He may have viewed as trivial. The Company is not obliged to take the same and indeed must take the breach as a serious one. It was a wilful breach of both the Employer's policy and the law.

The breach here was significant.

Smoking as an Addiction

One of the arguments made on the Grievor's behalf is that he was addicted to smoking and as a consequence, some leniency was justified and that this should be viewed as an "addiction". This would change the categorization of his conduct.

In other cases, addition is almost always referring to either an alcohol or substance abuse issue and that they should be treated as illnesses. It is accepted now as part of Human Rights Law that those kinds of addictions are illnesses and as a consequence, some extra accommodation needs to be made.

As well, there is no causal link established that the mere fact he was addicted to cigarettes would force him to smoke at his work station as opposed to walking outside.

I reject the "addiction" argument if it is meant to suggest that The Grievor is not responsible for his actions of smoking in the work place and deliberately violating the rules. He may have had a compulsion to smoke. He had a very simple choice about going outside and was not restricted by Management from doing it in any way.

Insofar as the Grievor was addicted to cigarettes the Employer duly accommodated his addiction by allowing him to go smoke when he felt the need to and he had immediate access to the outside.

Law

While a smoking violation in the workplace has constituted "just cause" by itself, this scenario generally unfolds where the employer has implemented a "zero tolerance" policy and where smoking is a serious safety infraction due to hazardous workplace conditions (i.e. flammable materials). See *Invista (Canada) Co. v. Kingston Independent Nylon Workers Union (Szymula Grievance)* [2010] O.L.A.A. No. 8; *Casco and U.F.C.W. Loc. 617P Re:* [1993] O.L.A.A. No. 114. Where a smoking ban is implemented in the workplace in response to health and safety legislation, it may not be sufficient in and of itself to constitute just cause. However, where the workplace ban is well-broadcast to employees, its violation may constitute a "culminating incident," allowing an employer to consider past instances of an employee's misconduct in making out just cause in support of the employee's dismissal.

There are three distinct questions in a typical discharge grievance. First, had the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in light of all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable? *Wm. Scott and Co. Limited and Canadian Food and Allied Workers Union, Local P-162* [1977] 1 C.L.R.B.R. 1 cited in *Alcan Smelters and Chemicals v. Canadian Auto Workers, Local 2301, infra.* The onus is on the employer to establish just cause for the imposition of discipline and just cause for the penalty selected. *Alcan Smelters Inc. and Chemicals Inc. and Canadian Auto Workers, Local 2301* [1998] B.C.C.A.A.A. No. 596 at 44.

When faced not with one single incident of misconduct, but rather a history of repeated violations, the analysis to apply can be somewhat different. The culminating incident doctrine allows the employer to consider a culminating incident in a history of misconduct in making out just cause for dismissal from employment. While the violations considered in isolation would seldom constitute just cause, the totality of the employee's presumably tarnished work record warrants termination.

> The doctrine of culminating incident delineates those circumstances in which it is proper for the employer to consider an employee's past employment record in matters pertaining to discipline. Where, by the terms of the doctrine, an employer is permitted to review an employee's past record of discipline, its effect is nothing more than the converse of the proposition that an employee's long and blameless employment record may be properly relied on by an arbitrator to ameliorate a disciplinary penalty.
>
> Specifically, the doctrine of culminating incident posits that where an employee has engaged in some final, culminating act of misconduct or course of conduct for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered and blameworthy employment record in determining the sanction appropriate for the final incident . . . *Brown and Beatty, Canadian Labour Arbitration*, 3rd ed., paras7:3424 and 7:3410 cited in *Canada Safeway Ltd. and U.F.C.W., Loc. 401, Re* [1992] A.G.A.A. No. 22.

In applying the culminating incident doctrine, a distinction should be drawn between prior misconduct which was subject to formal disciplinary proceedings and incidents for which no formal disciplinary action was taken. *Ontario (Ministry of Community & Social Services) v. O.P.S.E.U.* [1992] O.J. No. 2235. If a formal disciplinary response was not taken in relation to the prior misconduct, the employer has been prohibited from using the employee's past record in disciplining the employee and/or making out a case under this doctrine. *Esso Petroleum Canada v. E.C.W.U., Loc. 614* (1989), 9 L.A.C. (4th) 390; *Mount Sinai Hospital v. Nurses Assoc. Mount Sinai Hospital* (1976), 13 L.A.C. (2d) 103.

In this case, witnesses were called by the employer to indicate that the Grievor had always been a problem to the employer. That was not backed up by any prior disciplinary action and was vague at best. I do not view that evidence to be helpful. The only evidence of prior disciplinary problems that were supported by the disciplinary relates to the two specific formal grievances that were dealt with in May 2010 and June 2010. Any other issues the employer had with the Grievor I have not considered.

The importance of the prior disciplinary proceeding is that it provides the employee with notice of the employer's complaint. It has been well-established that for the doctrine to apply, the employee should be, "perched precariously on the edge of discharge even for the most minor infraction." *Ideal Railings Limited* [1991] O.L.R.B. Rep. July 873 at 22. This means that for a

dismissal to be upheld pursuant to the culminating incident doctrine, the employer should be adequately warned that further infractions, however minor, may result in dismissal.

Additionally, for the doctrine to apply, the culminating incident must deserve discipline in and of itself. In *Abenakis of Wolinak Band (Council) v. Bernard*, the court held that the culminating incident itself had to be "worthy" of discipline when considered in isolation, even if it would not be sufficient reason to justify a dismissal. [2000] F.C.J. No. 327. Additionally, the doctrine is less effective when the employee has been working for the employee on a long-term basis or where the employee stands to lose retirement security. *Rutkowski v. Edmonton Transit Mix & Supply Co. Ltd.* [2007] A.J. No. 1197; *Alcan Smelters and Chemicals v. Canadian Auto Workers, Local 2301* [2005] B.C.C.A.A.A. No. 179.

The following cases demonstrate the culminating incident doctrine (or analogous legal frameworks) being relied upon to uphold dismissals from employment where the actual culminating incident may be considered a "minor" infraction.

***Halifax (Regional Municipality) v. Canadian Union of Pacific Employees, Local 108* [2010] N.S.J. No. 343.**

In this case, the Nova Scotia Supreme Court upheld the employer's decision to terminate the employee based on the culminating incident doctrine. Specifically, the employer terminated the employee after a progressive series of discipline for repeated absenteeism had adequately warned the employee that his conduct was under scrutiny and any further misconduct would, "result in further disciplinary action up to and including termination from employment." The culminating incident involved the employee leaving work without authorization. The arbitrator acknowledged that the culminating incident justified termination only when it was considered in the context of the employee's history of misconduct. Finding no evidence that the employee's "unacceptable attitude to his work responsibilities" would change, the arbitrator upheld the dismissal which was subsequently upheld under appeal.

***Canada Safeway Ltd. and U.F.C.W., Loc. 401, Re* [1992] A.G.A.A. No. 22.**

In this case, the employee had been dismissed for insubordination in conjunction with a record of previous disciplinary action. The employer had previously dismissed the employee for poor

attendance but had subsequently reinstated him with a suspension and a "one last chance" warning. The culminating incident that precipitated his dismissal involved insubordination in the form of aggressive behavior towards his supervisor only four months following his reinstatement. The arbitrator weighed heavily on the fact that the employee knew his employment was on the line, and his prior record could be used against him should another violation occur. The arbitrator held that misconduct dissimilar to the culminating incident was not precluded from being looked at under the doctrine of culminating incident. As such, the arbitrator considered the employee's history of workplace violations and upheld the employee's dismissal was for just cause.

***Daley v. Depco International Inc.* [2004] O.J. No. 2675.**

In *Daley*, although the court did not apply the culminating incident doctrine, an analogous "cumulative just cause" approach was relied upon in upholding the employer's decision to dismiss the employee. The employer fired the employee after nearly 13 years of service on the basis of accumulative misconduct. Nearly all of the documentation regarding its concerns referenced prior warnings and indicated what the next step might be if problems persisted. It was recognized by the Ontario Court of Justice that the employee had been given adequate notice that his employment was on the line as series of progressive discipline had been imposed over the 28 months preceding his termination. The employee was ultimately dismissed on the basis of nine incidents which the employer claimed were sufficient to constitute "cumulative just cause." The incidents included : (1) workplace altercations, (2) alcohol-related unsteadiness, (3) production line stoppages, and (4) a significant lubricant spill which occurred while the employee was absent from his work station. The court dismissed the employee's action for damages for wrongful dismissal and held that while each of these incidents may not have been sufficient to amount to just cause by themselves, when viewed collectively, the conclusion that had to be drawn was that there was sufficient employee misconduct to amount to just cause. Having regard to the cumulative misconduct, the arbitrator held that the employee's continued carelessness evinced an intention to no longer be bound by his employment agreement. This dismissal was upheld.

***Nossal v. Better Business Bureau* (1985) 12 C.C.E.L. 85 (Ont. C.A.).**

Like *Daley*, this decision was not analyzed under the culminating incident doctrine, however the arbitrator applied the comparable "cumulative just cause" approach in its decision to uphold the dismissal of the employee. In this case, the employer appealed a judgment awarding the employee damages for wrongful dismissal. The employee had been working for the employer for over one year when personal problems began to impinge on the effectiveness of her work. Specifically, attendance violations were documented on 90 occasions. A lack of punctuality was also marked in the later part of her tenure with the employer. The employee was warned about her pattern of lateness on two occasions. A replacement was thereafter found for the employee who was reassigned to a different position. The employee was unhappy with this transfer and a heated exchange took place in which she threatened her supervisor. Following this incident, the employee assumed the new position, and her productivity declined. Other employees were forced to take on responsibilities intended for her. The final act of misconduct leading to her termination occurred when the employee was absent from a meeting in which her attendance was crucial. It was the employer's position that its dismissal was justified based on the accumulation of the plaintiff's misconduct. The Court aligned itself with the employer and found that the employer had just cause to terminate the employee based on her accumulated misconduct.

> ... past misconduct of an employee, whether sufficient to amount to just cause for discharge or not, can be used or put on the scale with subsequent misconduct to determine if the accumulation amounts to just cause.

The court applied these principles and held that the earlier pattern of lateness, the threats against her supervisor, and her wrongful absence at a critical time, taken together, amounted to just cause to entitle the employer to dismiss the employee without penalty.

***Robertson v. Complex Services Inc.* [2006] O.J. No. 2887.**

The employee in this case appealed his dismissal from his position as a table games supervisor at Casino Niagara. He had been employed for approximately five years at the time of his termination. The employee had been given verbal warnings, written warnings, and suspensions for various instances of misconduct, which included joking and bantering with other employees while working, making inappropriate noises directed at another employee, and making improper gestures suggestive of oral sex in full view of casino patrons. The employee appealed his

dismissal and submitted that the employer did not have just cause. The court disagreed, and held that just cause existed in light of his accumulated misconduct. The dismissal was upheld.

***Bonneville v. Unisource Canada, Inc.* [2002] S.J. No. 443.**

In Saskatchewan, a parallel legal analysis referred to as the "contextual approach" has been determined to be the correct method of analysis in all situations in which just cause is alleged in an employee's dismissal. *Bonneville v. Unisource Canada, Inc.* [2002] S.J. No. 443 at 32. Like the culminating incident doctrine, the contextual approach allows employers to consider the circumstances surrounding an employee's history of misconduct. Citing the Supreme Court of Canada's decision in *McKinley v. B.C. Tel*, it was held that:

> When examining whether an employee's misconduct-including dishonest misconduct-justifies his or her dismissal, courts have often considered the *context* of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, *in the circumstances*, the behaviour was such that the employment relationship could no longer viably subsist. [2001] 2 S.C.R. 161.

In its holding, the court in *Bonneville* adhered to precedent establishing that just cause can be made out from accumulated workplace violations.

> The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company. *Id.* citing *Blackburn v. Victory Credit Union Ltd.* (1998) 36 C.C.E.L. (2d) 94.

The court in this case adhered to the concept of using the employee's history of misconduct in making the decision to terminate employment while distinguishing between junior and senior employees with respect to how strictly the doctrine should be applied. In Bonneville the Court allowed an action for wrongful dismissal.

***Henson v. Champion Food Service Ltd.* [2005] A.J. No. 323.**

Like the Saskatchewan Court of Queen's Bench in *Bonneville*, the Alberta Court of Queen's Bench in *Henson* adopted an analogous approach to the culminating incident doctrine that

involved a consideration of the totality of the evidence in its evaluation of whether just cause supported the employee's dismissal. *Id.* at 50. While the dismissal in this case was ultimately not upheld, the court approved the system of progressive discipline that had been implemented by the employer. Specifically, the court recognized the fact that the employer had set out clear policies and expectations for employees to follow. The court noted that the employer's system of keeping records of past dealings with employees and utilizing clear and effective warnings allowed the employee's history of employment to be considered cumulatively.

***Boulet v. Federated Co-operates Ltd.* [2001] M.J. No. 306.**

The Manitoba Court of Queen's Bench upheld the employee's dismissal in this instance based on cumulative instances of the employee's misconduct. The employee was a warehouse supervisor who had been with the employer for over 20 years. His work performance was assessed annually, and after a negative assessment he was put on probation and given an opportunity to improve his performance. The employee refused to take responsibility for his misconduct, and following a second negative assessment, he wrote a critique in an effort to refute the criticisms set forth by his supervisor. The Court upheld the termination finding that the appraisal process was appropriate and fair. In its holding the court noted that the employee had been given adequate warnings and reasonable time to correct his performance. His continued failure to do so amounted to just cause.

I have also considered **Agribrands Purina Canada Inc. v. (CAW CANADA), Local 636 (Boniface Grievance) [2011] O.L.A.A. No. 454.**

CONCLUSION:

The question in this case is simply was dismissal an appropriate response to the smoking violation or whether it was a excessive.

Although several civil cases have been cited it is important to recognize that in a labour case different remedies are available and the issue in this case the question is should there be reinstatement.

Although the Grievor had been an employee for Evraz for approximately 11 years, his recent tenure has been fraught with disciplinary issues. He had been given two prior disciplinary sanctions within the two and a half months preceding his final dismissal. He was warned after the second violation that should there be another violation, release from employment would result. Thereafter, the Grievor was discovered by his supervisor to be smoking at his work position in violation of admittedly known company policy.

Although there was a time that smoking could have been categorized as a "minor" violation, given the Regulations, the Employer is entitled to treat it as a serious breach of Employer policy with exposing the Employer to potentially serious negative consequences.

As well, the behaviour appeared to be willful violation of the Rules. The Grievor did not view the breach to be serious. He appeared to willingly take the risk of possible discipline. Given his recent serious breaches, this was very risky behaviour and shows an attitude that management was entitled to consider in making its decision.

While this incident considered in isolation may not be sufficient to justify termination, it can be relied upon as the culminating incident as it occurred at a time when the Grievor should have been especially mindful of adhering to company rules.

The Grievor's decision to smoke a cigarette at his work position, instead of traveling the few metres required to adhere to company policy, when considered in light of his accumulated misconduct, evidences a chronic inability to adhere to workplace expectations. As such his dismissal should be upheld.

In light of the fact that two previous episodes of documented misconduct had been gone uncontested, and the Grievor had been given adequate warning that a subsequent violation would result in his dismissal, The Grievor should have put forth a great effort to abide by all company rules. The third transgression, was a breach of a known smoking ban and was sufficient to constitute a culminating incident, especially where no significant restrictions prevented the Grievor from taking a smoking break only a short distance away.

Simply put, the smoking incident allowed Evraz to consider the violation in conjunction with his history of repeated violations and/or misconduct in making out cumulative just cause.

In March 2010 The Grievor exhibited behaviour which warranted a three day suspension by the Employer. The suspension happened in May of 2010. It should be noted that a three day suspension is a very serious matter and very serious notice to the employee that certain behaviour was highly unacceptable. The suspension was served in May. Notwithstanding this notice and notwithstanding the issue that arose, The Grievor was subsequently disciplined in June 2010 and suspended for five days. At that point, it was clear that The Grievor had serious problems with the Employer. The Employer has the right to manage its affairs and the right to ensure that employees comply with the various rules.

The final violation happened in the following month of July 2010 not long after the end of his most recent suspension.

This indicates there was a certain wilfulness or wanton disregard for corporate rules on the part of the Grievor. In addition, the breach was not a trivial one. At one time it may have been considered trivial. However, the change to the Regulations indicated that the breach was not trivial at all.

As a consequence, there were ample grounds upon which the company could take a very serious and negative view of the Grievor's behaviour. They had already suspended him for three days and then for five days. It would seem that management was entitled on any number of grounds to take severe steps against The Grievor including dismissal.

They elected to dismiss the Grievor and I find that this was reasonable and appropriate in all the circumstances.

As a consequence, the grievance is dismissed.

DATED at the City of Regina, in the Province of Saskatchewan this 28th day of May, 2012.

R. BRADLEY HUNTER Q.C.
Arbitrator