



McCarthy Tétrault *Advance*™
Building Capabilities for Growth



Drug and Alcohol Testing – Where Are We Now?

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Drug and Alcohol Testing – Where Are We Now?

- Overview of Legal Landscape
- Recent Cases on Random Testing
 - Supreme Court of Canada: *Irving Pulp & Paper*
 - Labour Arbitration Response
- Pre-access Testing
- Reasonable Cause Testing

Drug and Alcohol Testing

- Drug and alcohol testing in Canada has typically been restricted to:
 - reasonable cause
 - post-incident
 - return to work from rehabilitation

Random Testing

- Pre-employment and random testing policies have often been ruled as impermissible
- Key factors are:
 - The limited ability of drug testing technology to distinguish present impairment and past use
 - An employee's right to ensure workplace safety versus an employee's right to privacy
 - The employer's obligation under human rights legislation to accommodate perceived or actual disability

Irving Pulp & Paper, 2013 SCC 34

- The Basic Facts
 - Comprehensive drug and alcohol policy
 - Paper mill
 - Unionized
 - 8 incidents

Irving Pulp & Paper, 2013 SCC 34

- One feature challenged
 - Unannounced breathalyzer testing for alcohol
 - Employees in safety sensitive positions
 - Random selection of 10% each year
 - Positive test or refusal → discipline/dismissal

Irving Pulp & Paper, 2013 SCC 34

→ Issue

- Can an employer of a unionized workforce impose random alcohol testing on its safety sensitive employees under the management rights clause of the collective agreement?

Irving Majority Decision

- Supreme Court of Canada:
 - Balance interests
 - Workplace safety vs. employee privacy
 - Testing in a dangerous workplace if:
 - Safety sensitive employees
 - Reasonable cause
 - Accident or incident
 - Return after treatment
 - Out-of-control drug culture

Irving Majority Decision

- Supreme Court of Canada:
 - Not significant evidence of alcohol-related problems
 - 8 in 15 years
 - None from test to arbitration
 - “very low incremental risk of safety concerns based on alcohol-related impaired performance of job tasks at the site”
 - Deterrence vs. no abuse to deter

Irving Majority Decision

- Held:
 - Low safety gains
 - Severe privacy impact
 - Low evidence of alcohol-related problems
 - Unreasonable drug and alcohol policy

Irving Dissent

- Arbitration Decision Not Reasonable
- Two problems:
 1. Elevated the threshold of evidence required
 - Need evidence of an alcohol problem in the workplace
 - Not of a “significant” or “serious” problem

Irving Dissent – Arbitration Decision Not Reasonable

- 2. No need for causal link between alcohol and accident, injury or near-miss
 - “...to require that an employer tie alcohol use to actual incidents ... is not only unreasonable, it is patently absurd. ... evidence of alcohol use at an inherently dangerous facility ... - where the impact of a catastrophic failure could extend well beyond the safety of workers – is ‘a problem’ enough.”

Irving Pulp & Paper, 2013 SCC 34

- Implications for employers
 - Must justify intrusion on employee privacy
 - Assess the particular risks in the particular workplace
 - Balance safety and privacy issues
 - Inherently dangerous workplace is probably not enough
 - Carefully investigate and document incidents
 - Involve the union, if possible

Suncor Arbitration Decision, 2014, AB LA

14

- Random drug and alcohol testing of employees at a Suncor site outside of Fort McMurray
 - Policy was quickly halted due to an injunction
- Arbitration board took issue with application applied to inclusion of all employees: contract workers, non-union and unionized employees
- Risky trends not sufficient evidence of a problem related to drug and alcohol use at work

Suncor Arbitration Decision

- Arbitration board held there was no “out of control” drug and alcohol culture:
 - “the evidence does not demonstrate a culture at the Oil Sands Operations where the consumption of alcohol is so pervasive as to be accepted by employees, where employees go together to drink openly and where such activity is either condoned or encouraged by management’s practices or inaction”.

Suncor Arbitration Decision

- Dissenting member of the board found sufficient evidence of a “general problem” with drugs and alcohol
 - 3 fatalities
 - Almost 150 positive post-incident drug and alcohol tests over 10 years

Suncor Arbitration Decision

- The board listed a number of factors which may have made the policy reasonable, including:
 - time limit to review the policy
 - measure effects and results of the policy
 - limit the policy's application
 - use accurate and/or least intrusive testing methods available
 - communicate false positive results to employees
 - consistently train and educate employees

Sarnia Construction Association, 2013

ON LA

- Pre-access testing not reasonable
- Employer bears onus of establishing that:
 - the rule or policy is a necessary and proportionate response
 - likely to meet a demonstrably legitimate need in the particular workplace
 - intrudes on employee privacy to the least possible extent.

Sarnia Construction Ass'n.

- Jurisprudence on the issue of alcohol and drug testing continues to evolve
 - ... reasonable cause, non-random evidence based post-incident, and return to work monitoring post-treatment alcohol and drug testing are no longer controversial
 - ... so long as it is a component of a broader approach ... [para. 102]

Sarnia Construction Ass'n.

- ... any employer may implement pre-access alcohol or drug testing ... if it can demonstrate that such testing will probably have a meaningful ameliorating effect on an actual substance abuse problem at that work site...[and is] consistent with the *Ontario Human Rights Code*. [para. 227]

Cases to Watch

- *Teck Coal Limited*
 - Interim order to block random testing denied
 - Appeal to BCLRB
- Will new evidence be sufficient?

Reasonable Cause Testing

- Different approach to testing where reason to believe employee is impaired
 - *Clearwater Fabrication GP Inc.* 2013
 - *Eurocan Pulp & Paper Co.*, 2009
- Vs.
 - *Vancouver Drydock*, 2009

Comprehensive, Preventative and Rehabilitative Approach

- Drug and alcohol policy as one part of safety and environment protection
 - Testing as one part of drug and alcohol policy
 - Random testing as one part of testing
 - Education, prevention, assistance
 - Accommodation and rehabilitation

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