Drug testing policies in the wake of Irving – Addressing legitimate safety concerns

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Introduction

Employers are increasingly looking to drug and alcohol testing to address workplace safety risks while employees and unions continue to challenge such testing on the basis of privacy concerns. Workplace safety and privacy issues came to a head when the Supreme Court of Canada, in its landmark ruling in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited*[i] (*Irving*), held that employers in a unionized workplace must lead evidence of a general workplace drug or alcohol problem in order to justify random drug and alcohol testing policies.

Since *Irving*, Canadian courts and arbitration boards have been divided on the enforceability of random drug and alcohol testing policies. The most recent decision, *Suncor Energy Inc. v. Unifor Local 707A*[ii] (*Suncor Energy*), highlights the evidentiary burden an employer must meet in order to justify a universal random drug and alcohol testing policy. The Alberta Court of Queen's Bench in *Suncor Energy* found that an employer must demonstrate: (i) that it has a dangerous workplace; and (ii) that there is a general problem with drug or alcohol abuse in that workplace.

Suncor Energy

The Alberta Court of Queen's Bench recently released its decision in *Suncor Energy*. Unifor had grieved Suncor's implementation of a random drug and alcohol testing standard for workers in safety-sensitive positions. The policy applied to both union and non-union workers. Suncor created this policy to address the significant safety hazards posed by workers' drug and alcohol use in its oil sands operations, which were and continue to be a dangerous work environment. At arbitration, a majority of the arbitration panel (the Panel) found that Suncor's random testing standard was unreasonable. Suncor sought judicial review of that decision.

On judicial review, Justice Nixon held that the Panel's decision was unreasonable. He found that the Panel had misapplied the test set out by the SCC in *Irving*. Suncor was only required to adduce evidence of a general problem with drugs and alcohol in the workplace, and Suncor was not required to establish a causal connection between substance abuse and specific workplace incidents. Justice Nixon also concluded that the majority of the arbitration panel wrongfully ignored or misunderstood much of Suncor's evidence of drug- and alcohol-related incidents in its operations in a manner that affected its decision. In simple terms, the Court concluded that the majority of the arbitration panel had placed an unreasonably high evidentiary burden on Suncor. The Court found that this unreasonably high burden would

have essentially foreclosed any possibility of random testing in Suncor's workplace.

At arbitration, Suncor had sought to demonstrate a significant and ongoing substance abuse problem in its workplace by leading evidence of a number of workplace security incidents involving drug or alcohol use. The Panel rejected evidence of incidents that could not be directly attributed to unionized workers. This was based on the fact that the grievance was advanced only on behalf of unionized workers. Justice Nixon held that the Panel had taken an overly narrow view of Suncor's evidence and that Suncor only had to demonstrate that there was a general problem with drug or alcohol use in the workplace, not within the specific bargaining unit. There was no evidence to suggest that drug and alcohol use amongst union workers differed in a meaningful way from that of Suncor's broader workforce. As a result, Justice Nixon held that the Panel should have considered all of Suncor's evidence of alcohol and drug incidents because workplace safety is an aggregate concept not merely confined to a bargaining unit.

Justice Nixon also found that the Panel had misconstrued the *Irving* test and had subjected Suncor to an unwarranted rigorous evidentiary standard. To justify random testing, Suncor was only required to adduce evidence of a general problem with drugs or alcohol in its workplace. The Panel had wrongfully required Suncor to provide evidence of a significant or serious workplace problem with drugs or alcohol. Further, Suncor was not obligated to establish a causal connection between substance abuse and specific workplace safety incidents – the Panel should have only considered whether employee privacy was appropriately balanced with workplace safety in light of workplace dangers and the evidence of substance abuse.

As a result, the Panel's decision was quashed and sent back to arbitration for rehearing by a new panel.

Other notable decisions

Since *Irving*, other decision-makers have been divided in concluding whether random drug and alcohol testing policies are enforceable and, in particular, what evidence an employer needs to lead to justify such policies.

Enforceable testing policies

A number of post-*Irving* decisions demonstrate that decision-makers are willing to accept proportionate drug and alcohol testing policies. In these decisions, the employers successfully led concrete evidence of a general workplace drug or alcohol problem, which justified their need to conduct random testing to address the safety hazards.

In *Teck Coal Limited v. United Steelworkers, Local 9346*[iii], the BC Labour Relations Board upheld an arbitrator's decision to dismiss the union's grievance regarding Teck's random drug and alcohol testing after concluding that the interest of safety outweighed the employees' privacy concerns. Notably, Teck had established a significant risk of industrial accidents at its workplace, even though it did not have a history of accidents caused by impairment. The arbitrator found that it was preferable to address grievances brought by employees on a case-by-case basis rather than striking down the policy altogether.

However, in Alberta, an arbitrator allowed a union's grievance respecting Teck's mandatory universal drug and alcohol testing program in *Teck Coal Limited and UMWA, Local 1656 (Drug and Alcohol Policy), Re*[iv]. The arbitrator concluded that Teck had not established an enhanced safety risk at its mining operation in Alberta. In support of this finding, she noted that

positive alcohol and drug test results were very rare at the workplace, and there was an absence of evidence of any link between a workplace incident and a "human factor" such as drug or alcohol use.

In *Mechanical Contractors Association Sarnia v. UA, Local 663*[v], the Ontario Superior Court of Justice upheld an arbitrator's decision to allow a grievance brought by a union against MCAS, invalidating its mandatory pre-access alcohol and drug testing. The arbitrator found that the worksite was safety-sensitive; however, there was no evidence of any alcohol or drug problem or even of any safety incidents at the worksite. As such, MCAS did not prove that its policy was reasonably necessary.

In *Bombardier Transportation and Teamsters Canada Rail Conference, Division 660, Re*[vi], an arbitrator partially allowed the union's grievance concerning Bombardier's drug testing policies. The arbitrator upheld a provision requiring employees to take a drug test when initially moving to a safety sensitive position, but not when moving between safety sensitive positions. However, the arbitrator invalidated a provision which deemed an employee with a positive drug test to be automatically unqualified to perform their job, finding that policies governing disciplinary actions should allow for a range of outcomes that depend on the circumstances of the incident.

Unenforceable testing policies

Some decision-makers have set a high evidentiary standard of proof on employers and have required employers to prove a specific drug or alcohol problem in a specific bargaining unit, rather than in the workplace as a whole.

For example, in *Agrium Vanscoy Potash Operations and United Steelworkers Local 7552, Re*[vii], the arbitrator allowed the union's grievance respecting Agrium's pre-access drug testing policy at a mine site. While Agrium had provided evidence of drugs and drug-contaminated paraphernalia being discovered at the mine, the arbitrator found that Agrium had not provided hard evidence of a problem with drug abuse in the specific bargaining unit bringing the grievance.

However, these decisions occurred before Justice Nixon's judgment in *Suncor Energy*, which held that employers did not need to meet this high evidentiary standard.

Implications for employers

Decision-makers will be more likely to uphold drug and alcohol testing policies that are tailored to address legitimate workplace safety hazards which can be demonstrated with concrete evidence of workplace drug or alcohol problems. In the absence of evidence of a workplace drug or alcohol problem, an employer's random drug and alcohol testing policy will likely be unenforceable.

Based on *Suncor Energy*, *Irving* and the relevant arbitration rulings post-*Irving*, an employer that wants to implement random drug and alcohol testing will need to lead evidence of a general workplace problem with drugs or alcohol, as well as evidence of the inherent dangers in its workplace if such problem is not addressed. Although unions have initially attempted to increase the burden on employers to demonstrate specific evidence of drug and alcohol abuse within the specific bargaining unit of the union bringing the grievance, it appears unlikely (based on *Suncor Energy*) that this argument will prove successful in the long run.

The union in *Suncor Energy* immediately indicated its intention to appeal, so the ratification and refinement of the *Irving* tests will continue at the appellate court level.

For further information regarding this Update, contact Damian Rigolo, Brian Thiessen or Shaun Parker.

** Our appreciation goes out to Rob Hamilton for his outstanding contributions to this Update.*

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[i] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34

[ii] *Suncor Energy Inc. v. Unifor Local 707A*, 2016 ABQB 269

[iii] *Teck Coal Limited v. United Steelworkers, Local 9346*, 2014 CanLII 37907 (BC LA)

[iv] *Teck Coal Limited and UMWA, Local 1656 (Drug and Alcohol Policy), Re*, 2015 CarswellAlta 2237

[v] *Mechanical Contractors Assn. Sarnia v. UA, Local 663*, 2014 ONSC 6909

[vi] *Bombardier Transportation and Teamsters Canada Rail Conference, Division 660, Re*, 2014 CarswellNat 240

[vii] *Agrium Vanscoy Potash Operations and USW, Local 7552 (16-10), Re*, 2015 CarswellSask 1