OHS & WORKERS' COMPENSATION ADVISOR

OHS & Workers' Compensation Commentary for Management

AUGUST 17, 2015

Random Drug & Alcohol Testing: Commentary on Current Legal Limits and Requirements in Canada

Authors: Paul D. McLean, Partner and Erich R. Schafer, Associate, Mathews, Dinsdale & Clark LLP

On March 24, 1989, Imperial Oil's *Exxon Valdez* struck a reef off the shore of Alaska and spilled over 10 million gallons of crude oil into the sea. The spill, which was thought to have been caused in part by the ship captain's alcohol abuse, formed part of the impetus for Imperial Oil to develop a random drug and alcohol testing policy. This policy was the subject of a human rights complaint that eventually made its way to the Ontario Court of Appeal and resulted in the well-known *Entrop v. Imperial Oil* decision, in which the court decided that Imperial Oil's policy infringed the Ontario *Human Rights Code*.

Undeterred by the result in *Entrop*, employers continued to implement random drug and alcohol testing policies in the years following the decision and unions continued to challenge these polices at arbitration. Unions claimed that the policies infringed employee privacy and were thus an unreasonable exercise of management rights. The policies were also sometimes challenged as discrimination on the basis of disability. Employers resisted these challenges on the basis that the policies were a legitimate attempt to deter substance abuse in the workplace that could cause disasters compromising either workplace safety, public safety or creating environmental impacts such as the *Exxon Valdez* spill.

Case Law on Random Testing: Evolving Since Imperial Oil

These legal skirmishes produced a number of inconsistent decisions. Adjudicators were not able to reach a consensus on the difficult issues surrounding random testing, such as whether employers had to wait for evidence of a drug and alcohol problem before implementing random testing. This article is intended to canvass the current legal limits and requirements in Canada, for those employers and organizations concerned about the safety and security of their operations, who still wish to consider the possibility of random drug and/or alcohol testing programs.

The Supreme Court sought to resolve some of this uncertainty in the summer of 2013 with its decision in *Irving Pulp*. This case arose after the union brought a grievance challenging the mandatory random alcohol testing policy that had been unilaterally implemented by the employer. The policy required that 10% of the company's employees in safety-sensitive positions undergo breathalyzer testing in the course of a year. The Supreme Court allowed the grievance, with the

majority deciding that the scant evidence of a substance abuse problem put forward by the employer was not sufficient to outweigh the employees' privacy rights.

The decision in *Irving Pulp* failed to put this issue to rest, and disputes concerning this issue continued to be litigated. On March 28, 2014, the majority of the arbitration board released its decision in *Suncor v. Unifor, Local 707A*. This marked the first reported arbitration decision on random testing since the Supreme Court of Canada weighed in on the issue with its *Irving Pulp* decision. The *Suncor* case is currently under judicial review, but a final decision has not yet been released.

More recently, in January 2015, a Saskatchewan arbitrator decided an employer contravened its collective agreement by stationing drug-sniffing dogs at the entrance to its premises.

While it is not accurate to say that random drug and alcohol testing is illegal in Canada, cases such as *Entrop*, *Irving Pulp* and *Suncor* have made it exceedingly difficult for employers to implement such policies in unionized workplaces. Only certain workplaces will give rise to the conditions that are prerequisites to the implementation of such policies. Even if those conditions exist, employers have to exercise a great deal of caution when designing these policies.

Current Requirements to Establish a Program of Random Testing

When discussing random testing, it is important to draw a distinction between the requirements flowing from human rights legislation and those which are drawn from management rights clauses in collective agreements. While human rights legislation applies to all employers, non-union employers are free from the restrictions imposed by management rights language. Of course, employers may protect themselves from policy grievances regarding random testing by negotiating the testing language into the collective agreement, but the current state of case law on this issue makes it highly unlikely that a union would voluntarily agree to such language.

There has not been a significant human rights challenge to a random testing policy since *Irving Pulp* (which was not a human rights complaint), and it will be interesting to see whether the Supreme Court's dim view of random testing in a unionized workplace will influence the treatment of such policies in a non-union environment. However, at the moment, different considerations apply to non-bargaining unit employees.

The following is a brief overview of the requirements that employers must consider before implementing a random testing regime in a unionized workplace.

- **The workplace must be dangerous:** Most of the case law on random drug and alcohol testing has concerned workplaces such as chemical plants and oil refineries, which are clearly very dangerous workplaces. Thus, the question of whether a certain workplace is dangerous enough to justify random testing has rarely been considered by adjudicators. However, it is clear that such policies will only be justified in "dangerous" workplaces.

  Unfortunately, for many employers, it is not clear whether their workplace is dangerous. We know that a nuclear power plant will be considered dangerous and a book store will not. The problem is that this leaves a lot of gray area. Medication errors in a long-term care home may result in illness or fatalities, but does that make such workplaces dangerous? What about high-rise construction projects, where momentary lapses in attention can result in serious injury? The answer is not entirely clear.

- **There must be evidence of a substance abuse problem:** In *Irving Pulp*, the Supreme Court resolved the divergence of opinion among arbitrators on whether employers had to find evidence of a substance abuse problem before implementing random testing. It decided that such evidence was required, and the majority in *Suncor* took this a step further by

making it clear that employers had to find evidence of a substance problem among the *bargaining unit* employees. Further, the evidence should differentiate among employees based on factors such as location, length of employment and work area, because the problem could be limited to a certain group. If an employer is relying on injuries, accidents or near misses to justify random testing, it must be established that these incidents were caused by drug or alcohol abuse.

- **Other measures to deter substance abuse have failed:** The infringement of privacy caused by random testing will only be justified if an employer can establish that other measures to deter substance abuse have proven ineffective. Such measures may include Employee Assistance Programs, training supervisors to identify impairment and education programs on substance abuse.

- **Testing must assess <u>current</u> impairment:** Arbitrators have held that, generally, employers have no legitimate interest in assessing whether an employee is using substances while off duty. It is only when an employee arrives at work in an impaired state that a risk to workplace safety is created and an employer is provided with justification to take action. For this reason, testing methods must assess current impairment.

  With respect to alcohol, breathalyser testing is acceptable. In Arbitrator Michel Picher's 2006 *Imperial Oil* decision (which concerned the revised policy that Imperial Oil put in place after *Entrop*), he noted that oral swabs will assess current impairment by marijuana. However, there is no technology capable of testing impairment by other drugs. To the best of the authors' knowledge, this has not changed since 2006. Unfortunately, this prevents employers from testing for drugs other than marijuana (eg. cocaine, opiates).

- **Appropriate "cut-off" levels:** This point is closely related to the issue of current impairment. The court in *Entrop* held that "zero tolerance" policies are unacceptable, as trace amounts of impairing substances will generally not seriously compromise an employee's ability to work safely. It stated that 0.04% BAC is an appropriate standard for alcohol. In *Suncor*, the majority approved of the employer's use of the US Department of Transportation standards for drugs.

- **Limit testing to "safety-sensitive" positions:** As with the issue of whether a workplace is dangerous, this point is often conceded by the union and has rarely been the subject of extensive consideration by arbitrators. However, in the 2002 *Irving Oil* decision by Arbitrator Michel Picher, he decided that a position will be considered safety-sensitive if impaired performance risks the safety of the employee, other employees or persons generally, or the safety of property and equipment.

- **Collection and handling of samples:** Samples should be tested by a laboratory and positive results should be reviewed by an independent expert to eliminate other possible explanations for the positive result. The donor of a positive sample should be given an opportunity to explain the positive result before that result is communicated to the employer. Finally, the independent expert should only inform the employer whether the test was positive. Information about the type of substance and the amount by which the sample exceeded the "cut-off" level should not be provided to the employer.

- **Limit intrusive nature of testing:** Employers should avoid any testing conditions that would make employees feel humiliated or uncomfortable (eg. making other employees aware that an employee is being tested). While none of the reported decisions on random testing have turned on the testing conditions, unions have often tried to lead evidence of humiliating testing conditions to establish that a serious breach of privacy has occurred.

- **Discipline:** Random testing policies cannot automatically impose certain discipline for violations. As the court put it in *Entrop*, sanctions must be tailored to accommodate individual capabilities up to the point of "undue hardship". This may include sanctions less severe than dismissal, as well as treatment or rehabilitation programs.

- **Other helpful measures:** The majority in *Suncor* recommended periodically reviewing the policy to ensure it is having its intended effect and establishing a dispute resolution mechanism to administer disputes regarding the policy's implementation. While these are not strict requirements, they may assist employers in defending random testing policies.

Even before the release of the *Suncor* and *Irving Pulp* decisions, employers seeking to implement random testing policies faced an uphill battle. The heavy evidentiary burden imposed by these recent decisions serves to make the task significantly more difficult. This is unfortunate, because, as noted by a number of the expert witnesses in random testing cases, these policies can function as an effective method of deterring substance abuse and removing offenders from the workplace. There is no doubt that random testing policies can infringe upon human rights and raise privacy issues, but the evidence put forward in these cases suggests that, if the threshold tests for safety and risk in a workplace discussed above are met, appropriate policy design may alleviate most concerns arising from those areas.

The judicial review of the *Suncor* decision will give Canadian courts another opportunity to strike an appropriate balance between privacy, human rights and workplace safety. Hopefully, Canadian adjudicators can find a solution that protects employee privacy and human rights while allowing employers to avoid incidents such as the *Exxon Valdez* spill.

About the Authors:

Paul D. McLean, Partner

A Partner in our Employment Law and Litigation Practice Group, Paul has been recognized as a leading litigator by Best Lawyers in Canada. Working in our Vancouver office, Paul advises clients throughout Western Canada on all aspects of the employment relationship. Paul has significant experience in wrongful dismissal litigation, injunctions, CCAA proceedings, occupational health and safety, workplace class actions and executive compensation, including retention and incentive plans. He regularly appears before courts, administrative tribunals and commercial arbitrators. Paul also assists employers with workers' compensation and occupational health and safety matters.

Contact details: T 604.638.2044
pmclean@mathewsdinsdale.com

Erich R. Schafer, Associate

Erich joined the firm as an Associate in 2012 after completing both our Summer and Articling Programs. At Osgoode Hall, he volunteered with the Community Legal Aid Services Programme and the Ontario Justice Education Network. Erich's practice covers all areas of labour and employment law. He has experience assisting employers with respect to issues arising from grievance arbitrations, labour board proceedings, wrongful dismissal actions and human rights law.

Contact details: T 416.869.8539
eschafer@mathewsdinsdale.com

This article is not intended as legal advice. Any employer or organization seeking assistance with random drug and alcohol testing programs should feel free to contact the authors, any member of Mathews, Dinsdale & Clark LLP or our CompClaim Consulting Practice.

National Expertise. Legal and Consulting Services for Management.

Ontario

Cheryl A. Edwards* — *Partner*
T 647.777.8283 C 416.452.4958

Jeremy Warning* — *Partner*
T 647.777.8284 C 647.407.5732

Mark D. Mills — *Partner*
T 416.869.8547 C 416.561.0610

Hal P. Rolph* — *Partner*
T 416.869.2505 C 416.574.5742

S. David Gorelle — *Partner*
T 416.869.8543 C 647.293.0812

Laura A. Russell — *Partner, Licensed Paralegal, CRSP*
T 416.869.8541 C 416.580.5444

Ian B. St. John — *Partner*
T 416.869.8552 C 416.706.6007

** former OHS prosecutor*

Matthew S. Carroll — *Associate*
T 416.869.2503 C 416.670.9714

Daniel E. Attwell — *Associate*
T 416.869.8535 C 647.200.6299

Emily A. Russell — *Consultant*
T 416.869.8537 C 647.224.2360

Debbie A. Martin — *Consultant, Licensed Paralegal, RPN*
T 416.869.2504 C 647.297.8770

British Columbia / Alberta

Loretta Bouwmeester — *Partner*
T 403.538.5042 C 403.831.2252

Paul D. McLean — *Partner*
T 604.638.2044 C 604.897.4870

Gradin D. Tyler — *Partner*
T 604.638.2043 C 604.830.1618

Need Immediate OHS Assistance?
Call **1-855-MDC-4-OHS** (1-855-632-4-647) available 24/7.

Toronto • Vancouver • Calgary • Sarnia • Sault Ste. Marie

www.mathewsdinsdale.com

OHS law spoken here

mathews dinsdale compclaim