

Random Drug and Alcohol Testing in the Workplace:

Balancing Employee Privacy Interests with Workplace Safety

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In modern society, safety and privacy interests frequently seem to conflict, particularly in the workplace. Random drug and alcohol testing is one instance when these interests may conflict. Employers are obligated under occupational safety legislation to provide a safe workplace for employees. The risk of workplace accidents increases if employees are working under the influence of drugs or alcohol. To mitigate that risk, some employers have implemented policies of random drug or alcohol testing. Employees and unions often object to such policies on the basis that random drug or alcohol testing infringes employee privacy interests.

Several months ago, the Supreme Court of Canada ruled that employee privacy interests outweighed employer safety concerns in *Communications, Energy and Paperworkers Union, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (“*Irving*”). *Irving* marks the first time the Supreme Court of Canada has considered workplace drug or alcohol testing. Further, *Irving* is a departure from some of the earlier appellate court decisions on drug and alcohol testing, which focused on the legality of such policies under human rights legislation, as opposed to privacy considerations.

For example, the Ontario Court of Appeal’s earlier decision in *Entrop v Imperial Oil Ltd.* (2000), 50 OR (3d) 18 (CA) (“*Entrop*”), suggested that random alcohol testing would be permissible under human rights legislation. The complainant in *Entrop* was not represented by a union, and the Court of Appeal did not consider the issue of employee privacy rights in *Entrop*. Based on *Entrop*, some observers concluded that random alcohol testing may be permissible, at least in non-union workplaces; whereas random drug testing was not permissible.

In *Irving*, the majority of the Supreme Court of Canada concluded that neither random alcohol testing, nor random drug testing, should be conducted in a unionized workplace without evidence of a problem with alcohol or drug use. Applying the majority’s conclusion to future cases may present a couple of issues.

First, *Irving* may lead to a divergence between the rules applicable to random alcohol and drug testing in unionized workplaces, where employees appear to have protected privacy interests, and those applicable to non-union workplaces, where employees may be able to rely only on human rights legislation.

Second, the majority’s decision in *Irving* arguably was too broad in that it made statements about both random alcohol testing and random drug testing, even though the issue of random drug testing was not before it. As suggested above, previous cases had distinguished between random alcohol testing and random drug testing. Given that only random alcohol testing can show present impairment and given that it seems reasonable to require employees to attend work sober, it appears preferable to continue assessing the reasonableness of random alcohol testing separately from the reasonableness of random drug testing.

These potential difficulties in application, coupled with the Supreme Court's rejection of random alcohol testing, highlight the need for labour relations and human resources professionals to develop and apply policies regarding drugs and alcohol in the workplace.

Facts

Irving Pulp & Paper, Ltd. ("Irving") operates a paper mill in New Brunswick. Irving introduced random alcohol testing as part of a comprehensive policy regarding drug and alcohol use. Every year, 10 percent of employees in safety-sensitive positions would be selected for random breathalyzer tests. If the breathalyzer test found a blood-alcohol level greater than 0.04 percent, the employee would not be allowed to work.

Under Irving's policy, employees could also be tested for drugs and alcohol following an accident or where there was reasonable cause to suspect alcohol or drug use (e.g. smell of alcohol). The Union did not grieve drug and alcohol testing in these other circumstances. The issue at arbitration was solely whether Irving could implement random alcohol testing of safety-sensitive employees without the Union's consent.

Arbitration Decision

The Board of Arbitration held that to implement a policy of random alcohol testing, an employer must establish the need for such a policy and that the risk of alcohol use in the workplace justified intrusion into employees' privacy interests.¹ The Board stated that an employer could rely upon evidence of an alcohol problem in its workplace or evidence regarding the nature of the industry itself. The Board stated that the burden of justification would be lighter if an employer were engaged in an "ultra-hazardous endeavour".² The Board of Arbitration found that Irving's mill was dangerous, but not "ultra-dangerous."³

Irving introduced evidence of at least eight specific alcohol-related incidents in the workplace from 1991 to 2006, immediately prior to the introduction of the policy. Irving's witness testified that on "a lot of occasions" other employees were sent or taken home after attending work impaired by alcohol. The Board of Arbitration found that Irving's evidence "cannot be said to be indicative of a significant problem with alcohol-related impaired performance at the plant."⁴

In the 22 months between the introduction of the policy and the arbitration, no employees had tested positive on the random breathalyzer test.

¹ *Irving Pulp and Paper, Ltd. v Communications, Energy and Paperworkers Union, Local 30*, [2009] NBLAA No 28 at para 69.

² *Ibid.* at para 75.

³ *Ibid.* at para 102.

⁴ *Ibid.* at para 109.

Irving had called an expert witness who testified that random alcohol testing would have a deterrent effect on employees. Nevertheless, the Board of Arbitration found that the Irving's decision to randomly test only 10 percent of safety-sensitive employees suggested a "very low incremental risk of safety concerns based on alcohol-related impaired performance of job tasks at this site."⁵

The Board of Arbitration concluded as follows with respect to the benefits of random testing:

In a word, on the evidence I heard, I do not conclude that any significant degree of incremental safety risk attributable to employee alcohol use has been demonstrated to exist in this workplace. Taken with the low testing percentages, I believe it is likely that the employer's policy will seldom, if ever, identify any employee with a blood alcohol concentration over the 0.04% Policy cut-off limit. I therefore see little or no concrete advantage to the employer to be gained through the random alcohol testing policy.⁶

On the other side of the scale, the Board of Arbitration found that random breathalyzer tests represented a "significant inroad" into employee privacy.⁷ The Board of Arbitration concluded that Irving had failed to establish that random alcohol testing was reasonable in the circumstances.⁸ As a result, the Board of Arbitration set aside that part of the policy allowing random alcohol testing.

Decision of Court of Queen's Bench

Irving applied for judicial review of the arbitration decision, and the Court of Queen's Bench of New Brunswick quashed the decision.

The Court of Queen's Bench found that it was unreasonable to distinguish between dangerous and ultra-dangerous workplaces. Once the Board of Arbitration found that the mill was a dangerous workplace, it should have considered whether or not random alcohol testing was a proportionate response to the potential danger by weighing the benefits of the policy against the intrusion into employee privacy.

Further, the Court found that the Board of Arbitration's conclusion that there was little or no benefit to implementing random alcohol testing was unreasonable, in light of its finding that

⁵ *Ibid.* at para 113.

⁶ *Ibid.* at para 120.

⁷ *Ibid.* at para 122.

⁸ *Ibid.* at para 123.

there was a risk of a catastrophic incident at the mill. In the view of the Court, prevention of one catastrophe would be sufficient to make it a reasonable policy.⁹ When this benefit was weighed against the Board's finding that the method of testing was minimally intrusive, the Court held that the Board of Arbitration's conclusion that the policy was not a proportionate response was unreasonable.

Decision of the Court of Appeal

The Union appealed to the New Brunswick Court of Appeal. The Court of Appeal dismissed the appeal, but based its decision on different reasons than the Court of Queen's Bench.

The Court of Appeal found that in inherently dangerous workplaces, employers were not required to establish sufficient evidence of a pre-existing alcohol problem to justify random alcohol testing.¹⁰ The Court of Appeal concluded that Irving's paper mill was inherently dangerous, like railways and chemical plants, which had been classified as inherently dangerous in other cases.¹¹ Accordingly, Irving could implement random alcohol testing.

Decision of the Supreme Court of Canada

A majority of the Supreme Court of Canada overturned the decision of the New Brunswick Court of Appeal and restored the decision of the Board of Arbitration.

The Supreme Court upheld the balancing of interests approach applied by the Board of Arbitration. Under this approach, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs its impact on employees' interests, including privacy interests. While the dangerousness of a workplace was one factor to be considered, the majority of the Supreme Court held that it was not determinative.¹²

The majority held that a unilaterally imposed policy of "random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators ... unless there is reasonable cause, such as a general problem of substance abuse in the workplace".¹³ Although the arbitral jurisprudence was not binding on the Supreme Court of Canada, the majority found that it was a valuable benchmark in assessing the reasonableness of the Board of Arbitration's decision.

The majority of the Supreme Court stated that it was unaware of any arbitration awards finding that an employer could unilaterally implement random drug or alcohol testing, even in a

⁹ *Irving Pulp and Paper, Ltd. v Communications, Energy and Paperworkers Union, Local 30*, 2010 NBQB 294 at para 69.

¹⁰ *Communications, Energy and Paperworkers Union, Local 30 v Irving Pulp and Paper, Ltd.*, 2011 NBQA 58 at para 51.

¹¹ *Ibid.* at para 56.

¹² *Communications, Energy and Paperworkers Union, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving*") at para 4.

¹³ *Ibid.* at para 6 [emphasis in original]. The issue in *Irving* was not random alcohol testing of all employees, but rather only those in safety-sensitive positions.

dangerous workplace, without a demonstrated workplace problem.¹⁴ In the two arbitration decisions upholding random alcohol testing, the Supreme Court found that employers had established a general problem with alcohol use in a dangerous workplace.¹⁵ In one of the decisions referred to by the Supreme Court, the arbitrator found “evidence of a problem with alcohol use by employees” based on an anonymous employee survey in which 2.7 percent of employees reported that they had had “near misses” due to substance use in the past 12 months.¹⁶ In the other decision, the arbitrator found a “pervasive problem” with alcohol use, based on testimony from both employer and union witnesses about seeing employees drinking at work and finding bottles of alcohol in the workplace.¹⁷

The majority of the Supreme Court concluded that the arbitral jurisprudence did not permit random alcohol testing without a demonstrated problem with alcohol in the workplace, regardless of the dangerousness of a workplace. The majority conceded that random drug and alcohol testing without evidence of a drug or alcohol problem may not be “beyond the realm of possibility in extreme circumstances,” but provided no explanation of what may amount to such extreme circumstances.¹⁸

The majority of the Supreme Court accepted as reasonable the Board of Arbitration’s finding that eight incidents over a 15-year period did not reflect “a significant problem with workplace alcohol use”.¹⁹ The majority also found the Board’s conclusion that breathalyzer testing “effects a significant inroad” into employee privacy to be “unassailable”.²⁰

Application of Irving

Although the decision in *Irving* may not be as favourable as some employers may have hoped, certain aspects of the decision are helpful to employers, and it may be possible to argue that the decision should be narrowly applied, at least in some respects.

The three dissenting justices of the Supreme Court of Canada would have upheld random alcohol testing in the circumstances of this case. They found the Board of Arbitration’s decision to be unreasonable, in part because the Board erred in elevating the threshold of evidence that Irving was required to lead to justify its random testing. The Board required Irving to provide evidence of a “significant problem.” The dissenting judgment reviewed the decisions regarding random alcohol testing and found that they did not require the employer to establish evidence

¹⁴ *Ibid.* at para 37.

¹⁵ *Ibid.* at para 38.

¹⁶ *Communications, Energy and Paperworkers Union, Local 777 v Imperial Oil Ltd.*, T.J. Christian, May 27, 2000, unreported.

¹⁷ *Greater Toronto Airports Authority v Public Service Alliance of Canada*, Local 0004, [2007] CLAD No 243 (QL) (“*Greater Toronto Airports Authority*”).

¹⁸ *Irving*, *supra* at para 45.

¹⁹ *Ibid.* at para 47 and 51.

²⁰ *Ibid.* at para 49 and 50.

of a significant problem, but simply evidence of an alcohol problem in the workplace.²¹ Since the Board of Arbitration applied an evidentiary threshold that was too high without explanation, the dissenting justices of the Supreme Court found the decision to be unreasonable.

The majority judgment of the Supreme Court of Canada did not state that employers would be required to provide evidence of a serious or significant problem with alcohol or drug use in the workplace in order to implement random testing. Unlike the dissenting judgment, however, the majority judgment did not find it unreasonable that the Board of Arbitration appeared to have applied a higher threshold. Based on the principles of administrative law, courts generally will not interfere with decisions of arbitrators provided they are reasonable, even if they are not necessarily correct or what the reviewing court would have decided.

Because the Supreme Court applied a reasonableness standard, and based upon the previous arbitral jurisprudence reviewed by the dissenting justices, an employer probably could argue that it is not required to provide evidence of a serious or significant alcohol problem to implement random testing. Evidence of “a problem” in this regard may be sufficient.

Further, the Supreme Court clearly held that evidence with respect to the dangerousness of the workplace is relevant, although not determinative. If a workplace is truly dangerous, and particularly if an accident would pose risks to third parties and the environment, this should tend to justify some intrusion into employee privacy rights.

The majority judgment of the Supreme Court suggested two types of evidence that employers could present to establish the need for random alcohol testing. First, the employer could present evidence from an anonymous employee survey conducted by an independent company. Second, the employer could present evidence regarding employees who were seen drinking on the job or exhibiting symptoms of alcohol use (e.g. smell of alcohol, slurred speech), as well as other signs of alcohol use, like hidden bottles and empty bottles in work areas.

Distinction between Random Alcohol and Drug Testing

Although random alcohol testing was at issue in *Irving*, the majority of the Supreme Court frequently referred to drug and alcohol testing. As suggested in the dissenting judgment, a distinction should be drawn between alcohol testing and drug testing.

A negative drug or alcohol test rules out impairment on the job. The impact of a positive test, however, will depend on whether the test was for alcohol or drugs. A positive alcohol test by breathalyzer confirms the individual was impaired at the time of taking the test. In contrast, a number of cases, including *Entrop*, have held that that a positive drug test by urinalysis only

²¹ *Ibid.* at para 97.

establishes the presence of a drug in an individual's system and cannot establish impairment.²² Since an employer generally cannot regulate off-duty conduct that does not affect an employee's fitness at work, this difference is significant.

In recent years, some employers have begun using oral fluid (saliva) drug testing instead of urinalysis to test for present impairment by cannabinoids. *Imperial Oil and C.E.P., Local 900* (2006), 157 LAC (4th) 225 ("*Imperial Oil*") dealt with random saliva testing for cannabis. Arbitrator Michel Picher held that random drug testing by saliva was not permissible under the collective agreement, in part because saliva testing could not immediately establish whether or not an employee was impaired. Imperial Oil did not receive the test results from an off-site laboratory until several days after the test. An employee who was randomly tested would therefore be returned to his or her safety-sensitive duties pending the results of the drug test. Arbitrator Picher concluded that Imperial Oil had not established that random drug testing was justified based on the balancing of interests approach. This decision was upheld by the Court of Appeal for Ontario.²³

Unless the technology improves such that employers can immediately obtain reliable results, it appears likely that random drug testing will continue to be harder to justify than random alcohol testing.

The Role of Human Resource Professionals

Following *Irving*, well-trained labour relations and human resource professionals will remain critical in creating drug and alcohol-free workplaces.

First, labour relations and human resource professionals should investigate all allegations of drug or alcohol use during working hours or that may affect employees' fitness for duty. All such incidents should be documented.

Second, labour relations and human resource professionals should develop and implement a clear policy regarding drugs and alcohol that is appropriate to the work environment. In any workplace where employees could injure themselves or others if they are impaired, it is advisable to develop a policy that prohibits alcohol or drug use at the workplace or during working hours. In addition, employees should be prohibited from attending work under the influence of alcohol or drugs.

²² *Entrop v Imperial Oil Ltd.* (2000), 50 OR (3d) 18 (CA); *Greater Toronto Airports Authority, supra*; *Imperial Oil and C.E.P., Local 900* (2006), 157 LAC (4th) 225; aff'd by Ont CA 2009 ONCA 420 ("*Imperial Oil*").

²³ *Imperial Oil, supra*.

In safety-sensitive environments and under some circumstances, a comprehensive drug and alcohol policy may include drug and alcohol testing. While *Irving* focused on random alcohol testing, the majority judgment of the Supreme Court acknowledged that other kinds of testing may be permissible:

In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is “reasonable cause” to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse.²⁴

The circumstances under which other kinds of drug and alcohol testing may be permitted are beyond the scope of this paper.

Third, labour relations and human resource professionals will need to enforce the organization’s policy regarding drugs and alcohol. Where appropriate, employees who violate the policy should be disciplined; however, labour relations and human resource professionals should consider whether an employee who breaches the policy may need to be accommodated in accordance with human rights legislation. Labour relations and human resource professionals should direct employees with suspected substance abuse issues to Employee Assistance Programs and other resources in the community.

Finally, if drug or alcohol use in the workplace is a particularly grave concern for an employer, the labour relations or human resources professional may wish to consider retaining an independent firm to conduct an anonymous employee survey regarding drug or alcohol use. This could help the labour relations or human resources professional in assessing the magnitude of the risk. If the risk appears to be high, the survey could form evidence supporting the implementation of a policy of random alcohol testing.

²⁴ *Irving*, *supra* at para 30.

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