Drug Testing: A Wake-up Call to the Courts

by David J. Corry

Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2007 ABCA 426

http://www2.albertacourts.ab.ca/jdb/2003-/qb/civil/2006/2006abqb0302.cor2.pdf

Does it take the Hinton train disaster, the sinking of the Exxon Valdez and the sinking of the Queen of the North to send human rights commissions and the courts a wake-up call? In all of these tragedies, the crews responsible were under the influence of drugs and alcohol. Yet, until the Alberta Court of Appeal decision in *Kellogg, Brown & Root*, the courts had elevated casual drug users to a protected minority group under the guise of human rights legislation.

The issue of mandatory random drug testing came to the forefront in the investigation of the Queen of the North ferry disaster in British Columbia. On March 21, 2006, the ferry struck an island after a normal course correction was made on the route. The 42 crew members and 57 of the passengers abandoned the ferry and it sank soon after. Two passengers were killed. The investigations into the accident determined that the sinking was a result of human error. The investigation by the Transportation Safety Board of Canada (the "Board") revealed that several crew members of the doomed ferry had smoked marijuana between shifts. This took place both on and off the ferry.

The Board recommended that B.C. Ferries review its drug and alcohol policy and ensure the policy was properly enforced. B.C. Ferries acknowledged the report and agreed that it was important to address the issue. However, mandatory drug and alcohol testing has been challenged under human rights legislation and struck down by the courts.

B.C. Ferries said public safety is very important in the transportation industry and suggested the federal government give power to ferry operators across Canada to conduct mandatory drug and alcohol testing.

The investigation raises the issue of safety versus human rights in the debate involving employee drug testing. Courts have ruled that testing violates human rights, mainly because it only proves past use rather than present intoxication. However, it appears that the rights of casual drug users have taken a back seat to safety considerations.

Mandatory drug and alcohol testing was recommended by investigation boards following both the Hinton train disaster and the sinking of the Exxon Valdez. Both tragedies caused significant loss of life, extensive environmental damage and huge costs due to loss of property. Imperial Oil developed a zero tolerance and firm alcohol and drug use and testing policy following the Exxon Valdez disaster. However, its testing policies and programs have been struck down by human rights commissions, the courts and arbitrators in several decisions, including *Entrop* v. *Imperial Oil Limited* (2000), 189 D.L.R. (4th) 14 (Ont. C.A.). Each of these decisions has reflected a casual application of human rights law and has prevented employers from establishing effective mandatory drug testing policies.

That trend may have changed through the recent decision of the Alberta Court of Appeal in *Kellogg, Brown & Root*. In that case, the Alberta Court of Appeal (per Justices Elizabeth

McFadyen, Keith Ritter and Jack Watson) rejected a challenge by a casual drug user to a company's mandatory drug testing policy. The Court held that drug testing at a safety-sensitive Syncrude Oilsands project was justified for safety reasons. In its ruling, the Alberta Court of Appeal expressed disagreement with Ontario's Court of Appeal which, in the *Entrop* case decided in 2000, disapproved of mandatory drug testing on the ground that it treated casual drug users as addicts. The Alberta Court of Appeal held that such a policy "perceives that persons who use drugs at all are a safety risk in an already dangerous workplace" (at para. 34).

In its decision, the Alberta Court of Appeal got it right. Following general principles of human rights jurisprudence, the onus is initially on the complainant in a human rights complaint to establish that he or she has suffered discrimination on a prohibited ground set out in the human rights legislation. Casual drug users are not addicts. They do not suffer from disabilities. They use drugs because they choose to. As the complainant, John Chiasson, had not met the onus of showing that he suffered discrimination under Alberta's human rights legislation, his complaint was dismissed. It is only persons who suffer from drug or alcohol addiction who are disabled. In appropriate cases, where such individuals can establish discrimination based on an employer policy or conduct, then they certainly are entitled to remedies under the human rights legislation, including the duty to accommodate their disability unless it amounts to an undue hardship. However, that protection should not and does not extend to casual drug users.

Prior decisions such as *Entrop*, and the Court of Queen's Bench ruling in *Kellogg, Brown & Root* held that there was a prima facie case of discrimination because the employer discriminated against all drug users on the ground of a "perceived disability". That is, through the imposition of mandatory drug testing, the employer treated all drug users as if they were addicted to drugs. It is clear that human rights legislation protects persons who have, or have had, an actual or perceived disability. However, in protecting casual drug abusers, the tribunals have often misapplied the evidence.

For example, the evidence in *Kellogg, Brown & Root* was clear that the complainant was not addicted to marijuana, and was a recreational drug user. He was not disabled and did not require accommodation. The employer was not under any misapprehension that the complainant had a "perceived disability". On the contrary, the complainant admitted to his employer that he was a recreational drug user.

In declining to follow *Entrop*, the Alberta Court of Appeal held that the company's pre-employment drug testing policy did not, contrary to the lower court's conclusion, treat all those testing positive as if they were addicts and likely to report to work impaired. Rather, the policy "perceives that persons who use drugs at all are a safety risk in an already dangerous environment". This approach was justified in the Court's view given the evidence that:

> the effects of the casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety-challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed to actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict (at para. 33).

It is hoped that the sound reasoning of the Alberta Court of Appeal in *Kellogg, Brown & Root* will have influence on other human rights tribunals and courts throughout Canada. If so, then employers will finally be able to take effective steps in the workplace to eradicate drug and alcohol abuse which elevates the risk of workplace injury and death, drug dealing in the workplace and other drug and alcohol-related problems.

For an alternative opinion on this case, see "Court of Appeal Sends Court of Queen's Bench Decision on Pre-Employment Drug Testing to Rehab" by Linda McKay-Panos, http://ablawg.ca/wp-content/uploads/2008/02/lmp_chiasson_jan2008.pdf