

## Employee Alcohol and Drug Testing Once Again At Issue

By Linda McKay-Panos

### Cases Considered:

[United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co.](#), 2009 ABCA 84

Alcohol and drug testing of employees is a tricky issue from a legal perspective. For example, in an [earlier post](#), I commented on *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, where in cases of pre-employment drug testing, there seem to be conflicting court decisions that make it challenging to implement effective policies. (Since the post was written, the Supreme Court of Canada denied the Alberta Human Rights and Citizenship Commission's application for leave to appeal on May 29, 2008). What about the situation where an employer seeks to implement a new drug testing policy to apply to existing unionized employees as a condition of access to a construction work site?

Bantrel is a unionized employer, and a grievance was made by three out of eight unions involved on the construction site of an Edmonton Diesel Desulphurization unit located in the County of Strathcona. The contract between Bantrel and the owner of the site, Petro-Canada ("Petro-Can"), required Bantrel to:

Comply with the Owner's Code of Business Conduct, and policies and procedures respecting Prevention of Workplace Harassment and Prevention of Sexual Harassment, and Contractor's Alcohol and Drug Use Policy. Contractor's Alcohol and Drug Use Policy shall meet or exceed the requirements of Owner's Alcohol and Drug Use Policy. (*United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co.* (2007), 162 L.A.C. (4th) 122 (Alta. Arb. Bd. Mar. 21, 2007) at para. 5).

There is no dispute that the worksite was hazardous and required a high emphasis on safety. Hazards included high voltage lines, unknown underground conditions, and relatively cramped working conditions. Before November 15, 2004, the drug and alcohol testing policies were those set out in the 2001 Canadian Model for Providing a Safe Workplace, ("Guideline"), a set of guidelines and protocols endorsed by the building trades and the Construction Owners

Association of Alberta. The Guideline did not deal with pre-access testing and did not authorize random drug testing of current employees.

The three unions filed grievances on December 24, 2004, alleging that the employer, Bantrel, had violated the provisions of their collective agreements by requiring union members, already working on the construction site, to comply with the pre-access testing policy that was introduced on November 15, 2004 ("Policy"). Bantrel had unsuccessfully attempted to exempt the existing employees (about 200) from the requirement. However, Petro-Can adopted the pre-site access testing Policy for most of the employees, and advised Bantrel that its failure to adhere to the Policy could result in the termination of the construction contract.

At the Arbitration Board hearing, a three-member panel ("Panel") was asked to decide whether Bantrel had breached the Collective Agreements by requiring employees already working on the Petro-Can site to be tested before they could return to work after the Christmas shutdown. The unions argued that the implementation of the Policy was flawed, there was no evidence to justify it, and its application was inconsistent because not all refinery employees were required to submit to testing. They also argued that the Collective Agreements only permitted testing in accordance with the Guideline, which did not provide for such testing. Further, they argued that the management rights provisions in the Collective Agreements were expressly subject to its other terms and therefore did not justify the imposition of the testing Policy. In the alternative, the unions argued that the Policy failed a test of reasonableness and that the demands of a third party (Petro-Can) could not justify Bantrel's breach of the Collective Agreements. The unions also relied on the decision in *Kellogg* in which the Court of Queen's Bench had held that pre-employment testing could be a human rights violation (as noted above, the decision was overruled by the Alberta Court of Appeal).

Two of the three Panel members concluded that the Guideline was not a complete code because its introductory guideline contemplated employer-specific needs and testing as a condition of employment in some circumstances. Therefore, the Policy did not violate the Collective Agreements. They also found the Policy justifiable in the context of the work site and its history. They held that testing was not random but mandatory and applicable to each Bantrel employee coming onto the site.

The one dissenting panel member held that the Guideline was a complete code and concluded that the new Policy exceeded the Guideline's requirements. Further, Bantrel's unilateral adoption of the Policy undermined the bargaining process and thus violated the Collective Agreements. In addition, the Policy was unreasonable because the Guideline had already incorporated risk management concerns and balanced these against employees' right to be free from undue intrusion into their off-duty conduct, and there was inconsistent treatment of the exempted employees.

Justice J. Gill of the Alberta Court of Queen's Bench used a reasonableness standard to review the decision of the Panel and dismissed the union's application for judicial review (see

[United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., 2007 ABQB 721](#)).

The unions then appealed to the Alberta Court of Appeal and the matter was heard by Justices Constance Hunt, Ronald Berger and Jack Watson. The Construction Association of Alberta intervened and emphasized the importance of safety in the workplace. In the Memorandum of Judgment, the Court of Appeal applied a reasonableness standard of review and concluded that the Panel had erred. The Court held that the Panel had incorrectly interpreted the Guideline. In particular, the interpretation of “condition of employment” should have referred to a pre-employment condition and not a condition that applied to existing employees, as was the case here. The Panel had also misapplied the *expressio unius* rule of interpretation. This rule holds that to express or include one thing implies the exclusion of another. Properly applied, this rule would exclude pre-site access testing from the Guideline because the only type of testing contemplated by the Guideline was pre-employment testing as a condition of employment (at paras. 37-38).

Further, the reviewing judge did not consider whether the Panel had misinterpreted the Guideline and this was a critical part of assessing the reasonableness of the Panel’s decision. Bantrel had argued that the following phrase in one of the Collective Agreements supported the Panel’s decision: “parties will cooperate with clients who institute pre-access drug and alcohol testing.” The Court interpreted this clause to merely mean that the union had agreed to negotiate and the use of the word “cooperate” was not strong enough to indicate an endorsement of pre-access testing given its inclusion from the Guideline (par.45).

In the end, the Panel’s decision was quashed. Thus, collective agreements that incorporate policies about employee drug and alcohol testing could prevent an employer from imposing more stringent testing requirements on existing employees.

Perhaps partially in response to this issues raised by this kind of case, the Guideline was amended in 2005 and now includes pre-access drug and alcohol testing. See 2005 [Canadian Model for Providing a Safe Workplace: Alcohol and Drug Guidelines and Work Rule](#) (Rule 4.7). Nevertheless, this case and others that deal with drug and alcohol testing in the workplace illustrate the complexity of the issue from both an employer’s and the employee’s perspective.