November 29, 2012

Random Drug and Alcohol Testing Policy Implicates Safety, Privacy, Human Rights and Civil Liberties

Written by: Linda McKay-Panos

Case commented on:

Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc. 2012 ABCA 307 ("CA")

The issue of random drug and alcohol testing in the workplace has now reached national importance. The Supreme Court of Canada recently granted leave to appeal in such a case. See: *Communication, Energy and Paperworkers Union of Canada, Local 30, v Irving Pulp & Paper Ltd*., 2011 NBCA, leave to appeal to Supreme Court of Canada ("SCC") granted: 2012 CanLII 14844 (SCC), ("*Irving*"). It is likely the SCC will hear this case in December 2012 (Jeff Gray, "Supreme Court to rule on random alcohol testing" *The Globe and Mail* 08 May 2012). Alberta has a keen interest in the outcome of this case as it has its own pending cases.

One such Alberta case has an interesting history. In a letter dated June 20, 2012, Suncor advised its employees that it would be introducing a new random drug and alcohol testing policy ("Policy") for *Communications, Energy and Paperworkers Union, Local 707* ("Union") members who work in "safety-sensitive" or "specified" positions. The Union applied for an interim injunction prohibiting Suncor from implementing the Policy until a Labour Arbitration Board renders a decision on the Union's grievance related to the Policy (*Communications, Energy and Paperworkers Union, Local 708 v Suncor Energy Inc.* 2012 ABQB 627, paras 1 and 2 ("QB")).

Previously in 2008, Suncor's drug and alcohol policy, which included provisions for post-incident testing for alcohol and drugs~~,~~ was the subject of a grievance. The Arbitration Board upheld the grievance noting that while safety at Suncor's worksite was very important, the procedures for post-incident testing required Suncor supervisors and managers to find evidence to justify post-incident testing (QB para 15).

Justice Eric Macklin noted that Suncor considers that about 85% of the Union members are working in "safety-sensitive" or "specified" positions. The Random Testing Standard developed by Suncor indicated that about 1,445 Union members would be randomly tested each year. Suncor also intends to implement the same Policy for its contractors and their employees on January 1, 2013 (QB, paras 16 and 17).

Justice Macklin noted that in order to succeed in an application for an interim injunction, the Union must establish (citing *RJR-MacDonald Inv v Canada (Attorney General),* [1994] 1 SCR 311):

a) there is a serious issue to be tried;
b) irreparable harm will result if an interim injunction is not granted and the Union is ultimately successful in its grievance;
c) the balance of convenience favours granting the injunction.

Discussing whether there is a serious issue to be tried, Justice Macklin noted that workplace safety is of paramount importance and also noted the number of cases where random testing was found to be a *bona fide* occupational requirement and others where these same policies were found to be invalid. In addition, Justice Macklin referred to the upcoming hearing by the SCC in the *Irving* case, indicating that there is a serious issue to be tried in the Alberta case.

In analyzing the potential for irreparable harm, Justice Macklin noted that courts have often considered drug and alcohol testing to constitute a "breach of privacy, dignity and bodily integrity of the individual being tested" (QB para 34). He indicated that in some cases the infringement may be adequately remedied by an award of damages, but in other cases the harm may be irreparable, resulting in humiliation and degradation (QB para 34). Justice Macklin stated that there was inadequate evidence before him to show that random testing actually reduces the safety risks. He was also concerned about the majority of employees who have been continuously employed, have no history of involvement in any incident and are not returning to work after a leave of absence for drug or alcohol related concerns. These are the people who may be irreparably harmed if the new Policy is eventually determined to be unreasonable (QB para 37). Thus, Justice Macklin held that irreparable harm would result if an interim injunction was not granted and the Union ultimately succeeds with it grievance.

Finally, Justice Macklin found that the balance of convenience favoured the granting of the injunction, as a temporary delay in imposing random drug testing would not be a great inconvenience to Suncor. The court also noted that the Policy for contractors and employees was not being implemented until January 1, 2013 (QB para 41).

Justice Macklin granted the Union's application for an interim injunction, holding that the grievance must be considered as soon as possible (QB paras 44-45).

Next, Suncor applied to the Alberta Court of Appeal to stay Justice Macklin's order pending an appeal of his order that is to be heard on November 28, 2012 (Ryan Cormier "Injunction Preventing Random Drug, Alcohol Testing at Suncor Upheld" *Edmonton Journal* 23 October 2012). Justice Jack Watson reviewed the application of the three-part test for an interim injunction, and held that he was satisfied that after considering the evidence and information provided to him, Suncor had a serious question to be argued on appeal (CA para 32). Further, as to irreparable harm (to Suncor), there was not an appreciable increase in the margin of risk to worker safety that required a demand that the Policy be implemented before the matter is heard on November 28 (CA para 40).

As for the balance of convenience, Justice Watson was persuaded that the current measures Suncor has in place were sufficient to address their safety concerns in the period before the matter was heard (CA para 41).

It seems that in all of the cases, a coherent approach needs to be established to determine what is a "safety-sensitive" position. Further, this should be decided based on objective evidence and analysis. Otherwise, the significant breaches of privacy, dignity and bodily integrity that follow random drug and alcohol testing would be justified by the subjective labelling of a workplace as

"safety-sensitive." Further, it would seem that there needs to be evidence that random testing actually works to reduce risk, especially in situations where there is no evidence of a pre-existing drug or alcohol problem in the workplace. Again, one should have to justify significant breaches of worker's personal dignity with the knowledge that these are justifiable for the safety of everyone. Workers should also be notified in advance that random testing is a condition of their employment. It would be very helpful to employees, employers and unions if a principled approach were provided by Canada's courts. The random drug and alcohol testing cases in the next few months should be interesting.