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Suncor's Random Drug and Alcohol Testing Policy Continues to be the Subject of Litigation

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Case Commented On: *Unifor, Local 707A v Suncor Energy Inc.*, 2018 ABCA 75 (CanLII)

There have been several previous ABlawg posts on this litigation related to drug testing in the workplace. See here, here, here, and here.

Suncor Energy Inc. appealed an interim injunction granted by the ABQB (*Unifor, Local 707A v Suncor Energy Inc.*, 2017 ABQB 752 (CanLII)), which prohibited it from implementing random drug and alcohol testing of members of Unifor Local 707A (Unifor) in the Regional Municipality of Wood Buffalo until a new arbitration is ordered, unless the Supreme Court of Canada determines that a new arbitration is unnecessary (application for leave to appeal *Suncor Energy Inc v Unifor Local 707A*, 2017 ABCA 313 (CanLII) (the arbitration matter) to the SCC was initiated in November 2017). In the instant case, a majority of the Alberta Court of Appeal (per Justices Ronald Berger and Patricia Rowbotham) upheld the interim injunction.

The history of this litigation is complex. This particular segment had its beginnings in 2012, when Suncor introduced a new drug and alcohol testing policy that would include random testing in safety sensitive positions. Unifor obtained an interim injunction preventing random testing until an arbitration board rendered a decision on Unifor's grievance against the policy. The arbitration on this policy is ongoing, and the parties are currently waiting for the Supreme Court's decision on whether it will grant leave to hear Unifor's appeal of the arbitration matter (this application is still in process as of April 3, 2018). Previously, the Court of Appeal upheld the Court of Queen's Bench's judicial review which had set aside the arbitration award in favour of Unifor and remitted the matter for a new arbitration before a fresh panel (2018 ABCA 75 (CanLII) (*Unifor,* ABCA 2018) at para 2). Thus, at the time of the application for an interim injunction, Suncor was able to implement random drug testing and had indicated that it would start to do so on December 1, 2017.

Because Suncor refused to extend a 2016 standstill agreement, Unifor applied for a declaration that the 2012 injunction remained in effect or alternatively for a new interim injunction (*Unifor*, ABCA 2018 at para 3). The Court of Queen's Bench chambers judge (Justice R.P. Belzil) decided he should consider whether a new interim injunction should issue, and he concluded that it should (*Unifor,* ABCA 2018 at para 5). The reasons for his decision were discussed in my previous post.

On appeal, Suncor argued that the chambers judge made three errors, which included:

> (i) misapplying the legal test and ignoring or failing to adequately consider relevant evidence; (ii) failing to apply the law with a reasonable view of the facts, resulting in a manifestly unjust outcome; and (iii) failing to consider the significant deference that should be given to parties dealing with matters through negotiated collective agreements, including the implementation of policies through their management rights and the use of the grievance procedure. (*Unifor*, ABCA 2018 at para 6)

The majority of the Court of Appeal found that the chambers judge had summarized the evidence of two Unifor experts, who had opined that a random drug and alcohol testing policy would not measurably improve public safety, and had also considered Suncor's expert's opinion that random drug and alcohol testing improves detection, strengthens deterrence and decreases the risk of incidents. Thus, the chambers judge did not fail to consider the evidence (*Unifor*, ABCA 2018 at para 11).

Second, the chambers judge had found that if Unifor was ultimately successful in the arbitration, the impact on the privacy and dignity rights of the employees could not be remedied; in the absence of the continuance of the injunction the Unifor employees would suffer irreparable harm from the non-consensual taking of bodily fluids, which is a substantial affront to individuals' privacy, security and bodily integrity (citing *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc*, 2012 ABCA 373 (CanLII) at para 5) (*Unifor*, ABCA 2018 at para 12). The majority of the Court of Appeal was not persuaded that there was any reviewable error in the chambers judge's conclusion regarding irreparable harm.

Finally, the majority held that the chambers judge did not err when concluding that balancing safety interests against privacy interests should be done by the arbitration panel, and held that in the interim, the balance of convenience favours Unifor's position (*Unifor*, ABCA 2018 at paras 14, 19, 20).

Thus, the majority of the Court of Appeal concluded that there was no reviewable error in the chambers judge's exercise of discretion and dismissed Suncor's appeal.

Justice Frans Slatter dissented. He agreed that there is a serious issue to be tried which ultimately must be decided by the arbitration board (*Unifor*, ABCA 2018 at para 31). However, he held that the respondent had failed to demonstrate that the harm to privacy would be irreparable, and hence the chambers judge had made a reviewable error. In addition, he would have held that the application should have failed on the balance of convenience. He noted that the conflict is between the privacy rights of employees who would be subjected to random drug testing, and the safety concerns of co-workers who are working with other employees under the influence of intoxicating substances. In addition, the employer's positive duty to ensure that a workplace is safe must also be factored into the balance of convenience (*Unifor*, ABCA 2018 at para 41). He concluded that the anxiety that would result from being tested would only last for hours or days, while seriously injured workers' injuries could last a lifetime (*Unifor*, ABCA 2018 at para 46). Thus, the chambers judge's conclusions about irreparable harm and the balance of convenience were outside the range of any reasonable conclusion, and the injunction should be set aside. Justice Slatter also noted that the parties should have applied to the arbitration board for interim

relief, and the courts should have exercised restraint once invited to become involved in arbitration, as this causes unnecessary delay (*Unifor*, ABCA 2018 at para 45).

It does seem that this matter, which is legally significant, is taking a long time to resolve – perhaps because the issues are critically important to both sides. In order to justify a serious violation of personal privacy and dignity, there must be clear evidence that random drug testing reduces accidents or improves safety. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*., 2013 SCC 34 (CanLII) (*CEP*) the Supreme Court previously ruled that mandatory, random alcohol testing on unionized workers in a dangerous workplace for safety sensitive positions is unreasonable. The majority said that dangerousness of a workplace only justifies testing particular employees in certain circumstances:

- Where there are reasonable grounds to believe an employee was impaired while on duty.
- Where an employee was directly involved in a workplace accident or significant incident.
- Where the employee returns to work after treatment for substance abuse. (*CEP* at para 45)

Further, the Supreme Court noted that safety has never been held to justify random testing even in the case of "highly safety sensitive" or "inherently dangerous workplaces" such as railways and chemical plants or those that pose a risk of explosion in the absence of a "demonstrated problem with alcohol use in that workplace" (*CEP* at para 45). The Court seems to require random testing to be supported by evidence of significant numbers of incidents involving alcohol (or drugs) and particularized evidence of the deterrent effect of the random testing policy balanced against the serious implications on the workers' rights to privacy (*CEP* at paras 45-51).

CEP appears to set the bar for justifying random drug and alcohol testing quite high. It will be interesting to see if Suncor can ultimately make the leap.

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