

# ALBERTA DECISION A WIN FOR RANDOM DRUG & ALCOHOL TESTING (FOR NOW)

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A recent decision of Alberta's Court of Appeal ("ABCA") is being heralded as a victory for employers in the ongoing tug-of-war between employee privacy and maintaining workplace safety.[\[1\]](#)

## Background

In 2012, Suncor Inc. announced that it would be introducing a random drug and alcohol testing policy at its oil sands operations sites in northeastern Alberta. Employees at these sites worked 12 hour shifts, and operated some of the largest and most complex mining and industrial equipment in the world (including heavy haul trucks as large as multi-story buildings). All of the sites were located near environmentally sensitive areas and densely populated communities. It was not disputed that accidents at these sites could result in human or environmental disaster.

According to Suncor, the workplace drug and alcohol concerns at these sites were "unparalleled" in Canada. While it had taken extensive measures to address these concerns – including employee education and training, a drug interdiction procedure, and sniffer dogs – these efforts had proved largely ineffective. As such, Suncor's position was that random testing of employees in safety-sensitive and executive management positions was needed.

However, the Unifor union which represents more than 3,000 Suncor employees at the sites alleged that there was insufficient evidence of a pervasive problem justifying random testing. Moreover, Unifor complained that Suncor's policy made no distinction between unionized employees, non-union employees and employees of third-party contractors. Therefore, Unifor grieved to a panel of arbitrators.

## Lower Level Decisions

The majority of the arbitration panel ruled in favour of Unifor. While the panel agreed that the Suncor sites were dangerous and that safety was important, it also opined that random testing was not automatically justified in dangerous workplaces. In the majority's view, Suncor had failed to demonstrate sufficient safety concerns involving unionized employees specifically in order to justify random testing. Apparently, Suncor's

evidence was deficient because it related to the workplace as a whole.

Suncor applied to the Alberta Court of Queen's Bench for judicial review of the panel's decision. The court agreed with Suncor and found that the panel's decision was unreasonable. Before the matter could be referred back to arbitration, however, Unifor appealed the court's decision to the ABCA.

### **Random Drug & Alcohol Testing: When is it Allowed?**

The ABCA's analysis began by looking at the Supreme Court of Canada's decision in *Irving Pulp & Paper Ltd. ("Irving")*.<sup>[2]</sup> In that case, the Supreme Court stated that on the issue of random testing, a balancing of interests is required to determine whether the rule sought to be imposed by the employer is proportionate to the concern it seeks to address.

The ABCA agreed with the panel that a dangerous worksite is not, in itself, enough to justify the imposition of random testing. Whether or not there is a problem with drug and alcohol use in a dangerous workplace is a question that must be assessed on a case by case basis. The Supreme Court defined this balancing test in terms of whether there are special safety risks and evidence of a general problem of substance abuse within a workplace.

In the present case, the ABCA found, as did the lower court, that it was unreasonable for the panel to require evidence of safety concerns specific to Suncor's unionized employees. Such a requirement would set the evidentiary bar too high. Even though Suncor's evidence did not distinguish between unionized, non-union and third-party contractors' employees, it still showed that more than 95% of employees who were tested following safety incidents in the workplace had traces of drugs and/or alcohol in their system. Further, there was no evidence to suggest that drug and alcohol use differed in any meaningful way between unionized and non-union employees.

In the result, the ABCA dismissed Unifor's appeal and affirmed the lower court's decision to remit this matter for a new arbitration, to be heard by a fresh panel.

### **What Employers Should Know**

Maintaining health and safety in the workplace is of paramount importance. However, it does not follow that random drug and alcohol testing is automatically justified in dangerous workplaces. In order to be permissible, random testing must be a proportional response to evidence of a problem of substance abuse within a workplace generally (as opposed to evidence unique to the workers who will be directly affected).

Note, however, that the ABCA's decision could still make its way up to the Supreme Court. Even if it does not, the battle over Suncor's random drug and alcohol testing policy will continue to be fought before a fresh panel

of arbitrators.<sup>[3]</sup>

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[1] Suncor Energy Inc. v. Unifor Local 707A, 2017 ABCA 313.

[2] 2013 SCC 34.

[3] Suncor wins ruling on random drug testing, but union vows to keep fighting (September 28, 2017) CBC News. Retrieved from <http://www.cbc.ca/news/canada/calgary/suncor-alcohol-testing-ruling-appeal-1.4312421>.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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