

# CAN WE IMPLEMENT RANDOM CANNABIS DRUG TESTING?

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In certain circumstances an individual employee who has an alcohol or drug problem may be tested BUT random testing is not automatic. The courts may permit random testing in dangerous workplaces BUT only when such testing is a proportionate response which considers legitimate safety concerns and privacy issues. Although post-incident testing and testing where there are reasonable grounds to believe an employee is impaired is generally permitted, the courts have not yet ruled that employers can randomly test for marijuana use or other drug and alcohol use.

The current leading authority comes from the Supreme Court of Canada in ***Irving Pulp & Paper Ltd.*** ("**Irving**")<sup>[1]</sup>, where the court stated that:

*[T]he dangerousness of a workplace— whether described as dangerous, inherently dangerous, or highly safety sensitive – is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*

Drug testing an employee, including testing for marijuana use, is dependent on several factors. The Supreme Court of Canada has 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. A recent decision of Alberta's Court of Appeal ("**ABCA**"), ***Suncor Energy Inc. v. Unifor Local 707A*** considered the ongoing debate between employee privacy and maintaining workplace safety:<sup>[2]</sup>

## Background

In 2012, Suncor Inc. announced the introduction of a random drug and alcohol testing policy at its oil sands 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 asserted random testing of employees in safety sensitive and executive management positions was necessary.

Unifor, the union which represents more than 3,000 Suncor employees at its sites, alleged there was insufficient evidence of a pervasive problem to justify random testing. Moreover, Unifor complained Suncor's policy made no distinction between unionized employees, non-union employees and employees of third-party contractors. Consequently, Unifor filed a grievance and referred the matter 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 safety was important, it also opined 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 to justify random testing. The majority found, Suncor's evidence to be deficient because it concerned 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. However, before the matter could be referred back to arbitration, 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. In that case, the Supreme Court held 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.

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 sets 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 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.

The ABCA dismissed Unifor’s appeal and affirmed the lower Court’s decision to remit this matter back to arbitration before a new panel of arbitrators.

Following the release of the ABCA decision, Unifor obtained an interim injunction prohibiting Suncor from implementing the drug and alcohol testing policy pending either a fresh arbitration hearing or a successful application for leave to appeal to the Supreme Court. Unifor’s application to the Supreme Court was dismissed on June 14, 2018 with no reasons provided.

It will be up to a fresh arbitration panel to consider the proportionality of the drug and alcohol testing policy in light of the privacy concerns raised by the Union.

#### What Employers Should Know

Maintaining health and safety in the workplace is of paramount importance. However, random drug and alcohol testing is not automatically justified by the presence of danger in a workplace. Rather, 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).

At present, a “reasonable cause” or a “post- incident” drug testing policy is permissible where there are reasonable grounds to believe the employee is impaired. Conversely, a policy unilaterally imposing random drug testing, without reasonable cause and where there is no broader substance abuse problem in the workplace, is unlikely to survive a challenge.

Therefore employers need to know:

1. Random drug testing is not automatically justified in dangerous workplaces; and
2. Random drug testing must be a proportional response to evidence of a substance abuse problem within a workplace generally and not evidence unique only to the workers who will be directly affected.

by Gordana Ivanovic

[1] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34.

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

#### **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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