"A Heavyweight Tilt" – Weighing the Importance of Safety and Privacy in the Context of Random Drug and Alcohol Testing

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Protecting the safety of employees is one of the most important responsibilities of management. Employees place their well-being in the hands of their employers every time that they step foot in the workplace. Their friends and family members depend on employers to provide an environment free from danger. The importance of workplace safety is reflected in countless Canadian laws. The *Occupational Health and Safety Act* imposes strict requirements on employers and subjects them to heavy penalties for failing to comply with these rules.[1] The common law also vigorously protects employees from unsafe working environments, as evidenced by the Ontario Court of Appeal's recent decision awarding approximately $650,000 in damages to a victim of sexual assault.[2] Employers simply cannot afford to be complacent with respect to health and safety, both because of the inherent value of human life and the legal protection which has been afforded to the well-being of employees. In the hierarchy of employer interests, health and safety ranks near the top, if not at the pinnacle.

Privacy, however, occupies a similar position on the employee's list of needs. Individuals are entitled to make lifestyle choices and pursue their interests without being inhibited from doing so by the scrutiny of others. Embarrassment and loss of dignity can result when employers examine the private affairs of their employees. As with health and safety, Canadian law is replete with examples of rules which protect an individual's privacy. The *Charter of Rights and Freedoms* prevents the state from engaging in unreasonable search and seizure.[3] Privacy legislation such as the *Municipal Freedom of Information and Protection of Privacy Act* places

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[1] RSO 1990, c O.1.

[2] *M.B. v. 2014052 Ontario Ltd., carrying on business as Deluxe Windows of Canada, et al.* (2012), 109 O.R. (3d) 351.

[3] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 at s. 8.

strict limits on the collection and disclosure of private information.[4] Labour law is replete with jurisprudence raising and dealing with privacy interests in various forms and in the context of various different issues.

Another way of expressing the concerns often raised on behalf of employees and/or their bargaining agents (if they are subject to a collective bargaining environment) is to say that an employer must respect the principle that any workplace rules, including those which call for random drug and alcohol testing, must be reasonable in the circumstances. What is reasonable often depends on each case. This includes the nature of the work, industry, evidence of need and any number of such factors. In the collective bargaining world this is known as the *KVP* analysis. Reasonableness of course includes respect for employee privacy. It also implies a balancing of interests approach. This is generally the test applied in a collective bargaining regime absent other specific factors.

Random drug and alcohol testing is an intriguing issue, as it presents one of the clearest examples of a direct clash between vitally important interests of employers and employees. Drugs and alcohol can seriously hinder mental and physical performance, leading to lapses in judgment and attentiveness which can deter/produce devastating consequences. Although random drug and alcohol testing can reduce the possibility of such incidents, arbitrators and courts have failed to reach a consensus on whether it justifies intruding upon an employee's privacy by inquiring into whether the employee abuses drugs or alcohol.

This paper will present a review of the law surrounding random drug and alcohol testing in the context of unionized workplaces. Although the focus will be on random testing of entire workplaces, it will also comment on testing of individual employees. It will also explore the concept of "safety-sensitive work" by considering arbitral definitions of the concept and

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[4] RSO 1990, c M.56.

discussing its application to police work. In recognition of the evolving nature of jurisprudence in this area, we will focus on cases from the last 10 years.

A review of the recent caselaw on this issue begins with the Ontario Court of Appeal's decision in *Entrop v. Imperial Oil Ltd.* This case arose from a human rights complaint in which an employee who was a recovering alcoholic was re-assigned from his safety-sensitive position following disclosure of his past problem. It is important to know that this case did not involve an employee covered by a collective agreement so there is very limited discussion to the reasonableness or *KVP* test. A Board of Inquiry for the Human Rights Commission found this to be a breach of the Ontario *Human Rights Code* but also engaged in a much broader review of the overall drug and alcohol policy. The Divisional Court judicially reviewed this decision. The company policy included pre-employment and random drug and alcohol testing. The tests were only applied to employees in safety-sensitive positions, which amounted to approximately 10 percent of Imperial Oil's workforce. Imperial Oil defined a safety-sensitive position as those which "have a key and direct role in an operation where impaired performance could result in a catastrophic incident affecting the health or safety of employees, sales associates, contractors, customers, the public or the environment"; and "have no direct or very limited supervision available to provide frequent operational checks." After the Divisional Court's decision, the case proceeded to the Ontario Court of Appeal.[5]

The court found two major problems with the company's drug testing policy. First of all, the court criticized the company's practice of using urinalysis for drug testing. The court noted that all of the drugs targeted by the company's policy had the capacity to impair job performance but that urinalysis was only a reliable method for showing past drug use. The "fundamental flaw" of urinalysis is that it cannot measure current impairment. The court relied on the Board of Inquiry's findings that "no tests currently exist to accurately assess the effect of drug use on job

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[5] (2000), 189 D.L.R. (4th) 14.

performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems."[6]

The second problem which the court found with the drug testing provisions was that the sanction for a positive test was too severe. The policy stated that for those in safety-sensitive positions, automatic dismissal would result from a positive test. The court took issue with this aspect of the policy, stating that "Imperial Oil failed to demonstrate why it could not tailor its sanctions to accommodate individual capabilities without incurring undue hardship."[7]

The Court of Appeal took a different view of the policy as it applied to alcohol testing. It accepted the use of a breathalyser to determine whether employees in safety-sensitive positions were under the influence of alcohol. The court rejected the argument that the company could rely on supervisors to detect impairment, noting that "a safety-sensitive position is one which by definition has no direct or very limited supervision." Further, this method of detecting impairment would distract supervisors from their main duties, place unnecessary pressure on supervisors who may be adverse to confrontation, and could lead to harassment or even discrimination against some employees.[8] The court ultimately concluded that this aspect of the company's policy did not amount to a breach of the *Human Rights Code*:

> *Imperial Oil can legitimately take steps to deter and detect alcohol impairment among its employees in safety-sensitive jobs. Alcohol testing accomplishes this goal. For employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement.*
>
> *... Because alcohol testing does indicate "actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system" and because Imperial Oil's Policy fairly notifies employees in safety-sensitive positions that they will have to undergo random alcohol testing, such testing is consistent with the Commission's Policy Statement.*

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[6] *Ibid* at pg. 50.

[7] *Ibid* at pgs. 50 – 51.

[8] *Ibid* at pg. 53.

The court, however, provided an extremely important caveat. Rather than automatically dismissing employees in safety-sensitive jobs who tested positive, Imperial Oil was required to consider accommodation of employees who failed the test. According to the court, "that accommodation should include consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or rehabilitation program".[9] In other words, an employer also needs a comprehensive policy to deal with those employees who need to be helped when caught in such tests.

Employers should exercise caution when using the Court of Appeal's decision in *Entrop* to assess the legality of random drug and alcohol testing. As we will see, this type of testing has come under attack – both human rights tribunals and arbitrators have been asked to assess the legality of random drug and alcohol testing. While arbitrators do have jurisdiction to apply human rights legislation, the tribunals charged with the responsibility of enforcing human rights codes do not have jurisdiction to enforce collective agreements. Thus, the Court of Appeal's analysis in *Entrop* only speaks to the question of whether random drug and alcohol testing infringes human rights legislation. It did not address whether the implementation of such testing would be considered a breach of a collective agreement. This would be addressed in another *Imperial Oil* case several years later involving a collective agreement.

Imperial Oil ceased performing random, unannounced drug tests by urinalysis following the Court of Appeal's decision. However, the company remained determined to prevent accidents caused by the use of drugs and alcohol. To that end, it began looking for a technology for drug testing that would immediately detect impairment. After conducting research, it decided to implement another policy. This one provided for the use of oral swabs to detect cannabis use, a process which would detect the likelihood of actual impairment. When implemented, its union filed a policy grievance that challenged the testing.

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[9] *Ibid* at pgs.53 – 54.

Arbitrator Michel Picher, writing for the majority of a board of arbitration, undertook an extensive review of the caselaw. He developed a five-point summary of the relevant jurisprudence, which he termed "the Canadian model" for alcohol or drug testing. He concluded that arbitrators generally allow drug and alcohol testing under certain conditions. An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so. Post-incident testing could be undertaken as part of an investigation into a significant accident or near miss. Further, random drug and alcohol testing is "a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use", although time limits were generally imposed on such testing.

However, Arbitrator Picher did not take a friendly view of policies which subjected an entire portion of a workforce to random drug and alcohol testing. After laying out his "Canadian model", he made what is, to date, one of the strongest arbitral statements condemning such testing:

> *As set out above, a key feature of the jurisprudence in the area of alcohol or drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated. It is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices.*

Arbitrator Picher decided to allow the grievance. The board declared the company's policy null and void and directed Imperial Oil to cease applying the policy.[10]

It should be mentioned that the union had also challenged Imperial Oil's use of breathalysers to monitor alcohol impairment. The arbitration board, however, dismissed this aspect of the grievance on a preliminary basis because the policy had been in place for over 10 years before the union objected to the practice. The Board concluded that it would be "inequitable, and indeed inconsistent with the parties' own interpretation of the collective agreement, to now entertain the grievance to the extent that it seeks to challenge the administration of random alcohol breathalyser tests in the work place."[11]

Despite Arbitrator Picher's strong criticism of random testing, employers were given minor cause for optimism by Arbitrator Devlin's 2007 decision in an arbitration involving the Greater Toronto Airports Authority ("GTAA") and the Public Service Alliance of Canada. The GTAA had begun subjecting employees in safety-sensitive positions to random drug and alcohol testing. A computer program was used to randomly select individuals for testing. The selection rate was 25% annually and individuals could be tested more than once a year. The alcohol testing involved the use of a calibrated breathalyser and the drug testing was accomplished by urinalysis.

Although Arbitrator Devlin assessed much of the same caselaw which informed the development of Arbitrator Picher's "Canadian model", her description of this caselaw was drastically different from his:

> *Based on the awards referred to, it is apparent that in balancing the interests of an employer in providing a safe workplace against the privacy interests of employees, in cases involving random testing, Arbitrators have required evidence of a drug and/or*

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[10] *Imperial Oil Ltd v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Policy Grievance)* (2006), 157 L.A.C. (4th) 225 (Ontario).

[11] *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)* (2005), 138 L.A.C. (4th) 122 (Ontario).

> *alcohol problem in the workplace which cannot be addressed by less invasive means. In* Trimac, *Arbitrator Burkett suggested that it is also appropriate to consider the extent to which the particular form of testing serves the legitimate interests of the employer and the degree of intrusion involved. As noted by Arbitrator Burkett, were it not for the issue of employee privacy, any discussion of random drug testing would focus solely on its efficacy as a tool for achieving a safe and productive workplace. However, because the requirement to provide a urine sample for purposes of drug testing "constitutes a significant invasion of personal privacy, the debate is a much more complex one".*

Arbitrator Devlin found the company's use of urinalysis to be illegal. Her reasons for doing so were quite similar to the court's in *Entrop*. She noted that a positive test does not prove impairment or provide evidence of an increased accident risk. Thus, the company's testing lacked the "necessary nexus" to job performance and "a positive test cannot be regarded as evidence that an employee is incapable of carrying out his or her job duties safely". Further, it was highly intrusive of the company to require a urine sample. As an employee who provided a urine sample would return to work pending the results of the test, they could continue to endanger their co-workers while the sample was processed. The company's policy, therefore, did not enhance safety as it was intended to do. For these reasons, the drug-testing aspect of the policy was declared illegal.

Arbitrator Devlin did, however, allow the company to continue its alcohol testing. She decided that the GTAA had provided sufficient evidence of alcohol use to justify this testing. Its witnesses had established that alcohol use had been "pervasive" on the job among employees for a "significant period of time". Arbitrator Devlin concluded:

> *In the result, having carefully considered the matter, in the particular circumstances of this case, I cannot conclude that the implementation of random alcohol testing of employees in safety-sensitive positions was unreasonable. As noted previously, such testing involves the use of a calibrated breathalyzer, which can accurately detect impairment. Moreover, although the Union pointed to a number of awards in which random testing was rejected, those cases are distinguishable as the Arbitrators found no evidence of an alcohol problem in the workplace which would justify that form of testing.*

Although Arbitrator Devlin allowed the alcohol testing to continue, she stated that "periodic review" would be appropriate to assess the need for continued testing.[12] Moreover, the *GTAA* decision is not generally followed as is the Picher decisions.

Although the *Greater Toronto Airports Authority* decision may have provided some employers with hope that arbitrators were beginning to take a more lenient view of random testing, these hopes were dashed in the years following that decision. In *Goodyear Canada Inc.*, the company had provided the union with the text of a policy regarding alcohol consumption and the use of drugs and medication. The union filed a grievance related to the policy and, as part of the arbitral award, the arbitrator developed a policy meant to check whether a job applicant or employee was under the influence of alcohol or drugs. The policy provided for random, unannounced testing of employees in safety-sensitive jobs. The union filed a motion to review the arbitrator's award, which was dismissed by the Superior Court. The case proceeded to the Quebec Court of Appeal. That court commended Arbitrator Picher's analysis of the jurisprudence and struck down the part of the policy which allowed for random testing.[13]

By 2009, an appeal of Arbitrator Picher's *Imperial Oil* decision had made it to the Ontario Court of Appeal. There, the court approved of Arbitrator Picher's decision that the testing policy at issue infringed a collective agreement provision requiring the company to treat individuals with "respect and dignity":

> *[T]he Majority provided several cogent reasons for its holding that the random drug testing measures at issue offended Article 3.02. These included: (i) the method and timing of the random drug tests, which the Majority found do not permit the immediate detection of impairment from cannabis at the time of testing but, rather, only after the passage of the several days required for analysis of the test specimen and reporting of the test results; (ii) Imperial's obligation to respect an employee's expectation of*

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[12] *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 004*, [2007] C.L.A.D. No. 243.

[13] *Local 143 of the Communications, Energy and Paperworkers Union of Canada v. Goodyear Canada Inc.*, [2007] Q.J. No. 13701.

> *privacy absent consent to or reasonable cause for a random drug test; and (iii) the fact that this court's decision in* Entrop *did not assist on the issue of the scope of Article 3.02 since* Entrop *did not involve the interpretation or the application of the Collective Agreement. The Majority's reasons on this issue are clear and intelligible. They provide ample justification for its conclusion that Imperial's random drug testing, absent reasonable cause, offended Article 3.02.*

The Court of Appeal allowed Arbitrator Picher's decision to stand.[14] There was no appeal to the Supreme Court of Canada. This is therefore the law in Ontario as of today.

Arbitrator Picher's analysis was also approved by Arbitrator Kaplan in his 2009 decision of *Petro-Canada Lubricants Centre*. In that case, the employer implemented random alcohol testing of its employees in the absence of any evidence that there had been a problem with alcohol abuse in its workplace. Arbitrator Kaplan reviewed the Court of Appeal's decision in *Imperial Oil* and concluded that the court had supported Arbitrator Picher's reasoning:

> *In my view, the Court of Appeal made clear that it accepted Arbitrator Picher's analysis and conclusions based as they were on the facts, the language of the collective agreement and the synthesis of the arbitral authorities all set out within a context of balancing of interests. Even if Arbitrator Picher's conclusions were not judicially endorsed, having carefully reviewed all of the authorities relied on by counsel, I find* Imperial Oil *persuasive and almost on all fours with the facts of this case. No evidence of a problem. A collective agreement that protects employees against harassment and acknowledges their right to be treated with respect.*

The arbitrator also adopted Arbitrator Picher's comments regarding possible exceptions to the prohibition against random testing:

> *To be sure, some cases, cited in argument, have allowed random testing but only in circumstances where cause has been established either on an individual basis, or where it has been agreed to as part of a back to work protocol, or where, as Arbitrator Picher anticipated, a provable substance abuse culture had become entrenched in the workplace.*

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[14] *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900*, (2009), 306 D.L.R. (4th) 385.

He concluded that none of those exceptions applied to the case in front of him. The employees had earned the employer's trust and were "entitled to be free from what they testified they experienced as the harassment" of random alcohol testing. Arbitrator Kaplan characterized the company's attempt to introduce the policy as "disrespectful" and upheld the grievance.[15]

The most recent significant decision involving random alcohol testing is the New Brunswick Court of Appeal's decision in *Irving Pulp & Paper*. The employer had introduced random and mandatory alcohol testing by breathalyser for employees holding safety sensitive positions. An arbitration board declared the policy impermissible, but the company filed a successful appeal with the Court of Queen's Bench. The case then went on to the Court of Appeal. This court interpreted Arbitrator Picher's decision as rejecting only mandatory drug testing. According to the court, his comments did not apply to random alcohol testing because the grievance regarding breathalyser tests had been dismissed on a preliminary basis. With respect to the court, this is not an accurate representation of Arbitrator Picher's position. While his comments regarding alcohol testing could be considered less significant because the alcohol testing grievance was not before him, there is no question that Arbitrator Picher conceptually rejected the use of random alcohol testing.

The court undertook its own analysis of the previous caselaw on this issue and concluded as follows:

> *In my view, the balancing of interests approach which has developed in the arbitral jurisprudence and which is being applied in the context of mandatory random alcohol testing warrants approbation. Evidence of an existing alcohol problem in the workplace is unnecessary once the employer's work environment is classified as inherently dangerous. Not only is the object and effect of such a testing policy to protect the safety interests of those workers whose performance may be impaired by alcohol, but also the safety interests of their co-workers and the greater public. Potential damage to the employer's property and that of the*

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[15] *Petro-Canada Lubricants Centre (Mississauga) and Oakville Terminal and C.E.P., Local 593 (Re)* (2009), 186 L.A.C. (4th) 424 (Ontario).

> *public and the environment adds yet a further dimension to the problem and the justification for random testing. As is evident, the true question is whether the employer's workplace falls within the category of inherently dangerous. It is to that issue I now turn.*

The court went on to note that the workplace in question contained very toxic materials. Further, the company's pressure boiler had a "high potential" for explosion. "The intra-city location of the kraft mill and its proximity to the St. John River and Bay of Fundy would cause concern for any environmentalist." The Court concluded that the mill in question was inherently dangerous and thus upheld the quashing of the arbitration award.[16] As the reader will soon see, this decision is currently under review by the Supreme Court of Canada.

Some points of law have emerged from the foregoing jurisprudence. It seems well-established that random drug testing cannot be implemented by employers. According to arbitrators and courts, the technological limitations of existing methods for detecting drug impairment are such that employers simply cannot design policies which provide the necessary link between drug testing and safety. Although urinalysis provides evidence of past drug use, it cannot detect current impairment. Cheek swab tests, which were used by Imperial Oil, do accurately detect actual impairment in the subject at the time the test is taken. However, as with urinalysis, the amount of time which it takes to process the sample means that even an impaired employee will be permitted to return to work pending the results of the test[17] and the period of impairment detected by the test would have passed by the time the test was finished. Moreover, this type of testing has usually been found to be unreasonable and not a balanced test (in terms of the interests of all parties). It offends the *KVP* test. For these reasons, random drug testing usually not been allowed by arbitrators.

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[16] *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 348 D.L.R. (4th) 105.

[17] *Imperial Oil*, *supra* note 8 at pgs. 278-9.

For non-police employers, it seems fair that arbitrators have prohibited the use of urinalysis. Such testing may reveal drug use that occurred when an employee was off work or use which, although occurring at work, did not result in time theft and was too slight to induce impairment. Drug use of that nature would not compromise the health and safety of others. It is not the role of non-police employers to dictate morals to their employees, prohibit certain lifestyles or ensure their employees are complying with the criminal law while off work. To do so invades too much upon the privacy of employees without necessarily providing any corresponding increase in the safety of those employees.

Arguably, the balancing of interests approach presents a different outcome in the police sector. One of the main purposes of police forces is the enforcement of criminal law, including laws prohibiting drug use. Even if a police employee engages in drug use while off duty, this may provide grounds for discipline. Arbitrators have recognized that employers can impose discipline for off-duty conduct if it detrimentally affects the employer's reputation, renders the employee unable to properly discharge his or her employment obligations, causes other employees to refuse to or be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct its workforce.[18] Thus, the argument could be made that a test showing past drug use which did not assess current impairment would be relevant in the police sector, as even past use may provide grounds for discipline (although the discipline would be imposed for different misconduct than that which was targeted by the initial test).

The problem with this argument is that arbitrators have required employers to demonstrate actual harm to its interests in order to discipline for off-duty conduct. An employer cannot discipline on the basis that an employee engaged in activity which would have the potential to harm its employer's interests if it were discovered. A police employer would have no

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[18] *Ottawa-Carleton District School Board and O.S.S.T.F., District 25 (Cobb) (Re)* (2006), 154 L.A.C. (4th) 387 (Ontario; Goodfellow, Templin and McKeown).

way of knowing if a police officer's drug use had harmed its interests. If the use occurred in private, it is arguable that it may not result in any harm to the reputation of police employers. Thus, even in the police sector, urinalysis results may be found to be too great an infringement on an employee's privacy to be justified.

Some may argue that Arbitrator Picher's condemnation of cheek swab tests arguably goes too far in protecting the privacy interests of employees. True, an employee who tests positive for drug use may be permitted to return to work while the test is completed. However, regardless of when the test comes back, it will confirm that the employee may have put the health of his co-workers at risk by coming to work impaired. It may not prevent the day of the test but could prevent future occurrences. It may be argued that it cannot be considered an invasion of privacy for an employer to inquire into whether an employee's mental state is such that they cannot perform their work in a safe manner. Could this be information which an employer is entitled to have? If employers can require employees to submit medical information attesting to their health upon return from a lengthy absence[19], it can be argued, why should they not be able to randomly test for drugs using methods which do reveal impairment at work? Further, it is somewhat absurd to suggest that returning to work and exposing co-workers to further danger after a positive test provides a justification for allowing the employee to avoid discipline. On the other hand, testing even innocent employees seems unreasonable and not a balancing of interests.

To say the law on random alcohol testing is unsettled at this point is somewhat of an understatement. Some arbitrators and courts have flatly rejected the notion that such testing is appropriate in most any circumstances. Others have accepted that it can be undertaken in dangerous workplaces, even in the absence of a history of an abuse problem in the workplace. Others take a middle view, holding that such testing can be implemented if the history of the

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[19] *AG Simpson Automotive Systems* (2005), 143 L.A.C. (4th) 419 (Ontario, Barton).

company gives the company reasonable cause. Of course, even those arbitrators, like Devlin in the *GTAA* decision, that have allowed random alcohol testing have generally imposed restrictions on such testing, such as the need to periodically review the substance abuse problem which prompted the policy's implementation and the requirement to accommodate workers that test positive.

Although random drug and alcohol testing of entire workforces has not fared well in arbitral decisions, it is widely accepted that random testing is permissible in the case of individual employees who are undergoing rehabilitation and whose alcoholism has affected their performance in the past. This is particularly true for those caught impaired or under the influence at work. Such testing, however, is often limited to a period of two years and must be done "in cooperation with, and with the full awareness and agreement of, the union". The union's agreement cannot be unreasonably withheld and, if the union does refuse to agree, the company may discharge the employee in question.[20]

The caselaw on random alcohol testing of individuals should inform the manner in which arbitrators address employer testing of entire workforces. If employers are entitled to respond to evidence of alcohol abuse by randomly testing the employees that have shown they have a problem, then random testing of the entire workforce is difficult to justify. It merely provides a mechanism for the employer to test those employees that have not shown any evidence of impairment at work, because arbitrators have already given them the means to deal with employees that have shown they may have a problem. Although random testing may reveal abuse by employees that effectively hid their drinking for a period of time, the caselaw suggests that this is not enough to justify the intrusion on privacy. Due to the availability of individual testing, allowing employers to implement random testing of the entire workforce does not

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[20] *DuPont Canada Inc. and C.E.P., Loc. 28-O (Re)* (2002), 105 L.A.C. (4th) 399 (P. Picher, Canada); *Kimberly-Clark Forest Products Inc. and P.A.C.E. International Union, Loc. 7-0665 (Re)* (2003), 115 L.A.C. (4th) 344 (Levinson, Ontario)

increase safety to a significant extent. The employees that have shown they are a safety risk should have already been dealt with by the employer through a program of individual testing. Although the effect on safety may not be great, the impact on reasonableness and privacy is. Most random alcohol testing policies expose sizable portions of the workforce to employer scrutiny of their lifestyle choices. Even those employees who never drink alcohol and/or ingest drugs often resent employees unilateral random, not for cause mandatory testing, absent reasonable cause. The availability of individual testing tips the scales in favour of employees when considering whether random alcohol testing of entire workforces enhances safety enough to justify infringing privacy.

There is reason to believe that the law on this issue will become much clearer within the next few months. On December 7, 2012, the Supreme Court heard argument in the union's appeal of the Court of Appeal's decision in *Irving Pulp & Paper*.[21] It is likely that a decision will be issued by the Supreme Court within the next few months. Hopefully, this decision will provide definitive guidance on the parameters of acceptable random drug and alcohol testing.

There is also ongoing litigation involving Suncor Energy Inc.'s ("Suncor") decision to implement random drug and alcohol testing. In June 2012, Suncor advised its employees that it would be introducing a new drug and alcohol testing policy on October 15, 2012. Pursuant to that policy, individuals in "safety-sensitive" positions would be subjected to random tests. The union filed a grievance regarding this policy, which was then referred to arbitration. The union also went to the courts, asking the Alberta Court of Queen's Bench to issue an injunction pending the results of the arbitration proceedings. The court agreed to issue an injunction, noting that the "non consensual seizure of bodily fluids from innocent employees may cause irreparable harm if an injunction is not granted". This invasion of privacy outweighed any

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[21] Author unknown, *Workplace alcohol testing decision to come from top court*, online: CBC News <http://www.cbc.ca/news/canada/new-brunswick/story/2012/12/07/nb-irving-random-alcohol-testing.html>.

increase in safety which Suncor could gain by implementing the policy prior to the release of the arbitrator's decision.[22] Suncor filed an appeal of the court's decision three days after it was released, but the Alberta Court of Appeal declined to overturn the Court of Queen's Bench.[23]

The cases demonstrate that even in situations where random alcohol testing has been approved, such testing has been limited to those in safety-sensitive positions. This means it is necessary to consider the meaning of the phrase "safety-sensitive". The leading arbitral definition of that phrase comes from Michel Picher, who explained the concept as follows:

> *It seems to the Arbitrator that there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of an employer without first requiring an extensive history of documented problems of substance abuse in the workplace. Few would suggest that the operator of a nuclear generating plant must await a near meltdown, or that an airline must produce documentation of a sufficient number of inebriated pilots at the controls of wide-body aircraft, before taking firm and forceful steps to ensure a substance-free workplace, by a range of means that may include recourse to reasonable grounds drug and alcohol testing. The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risks for the safety of employees and the public.*[24]

This term has generally been applied to workplaces such as railways, oil refineries, and saw mills. There is little caselaw addressing its application to police forces. Arbitrator Germaine refused to characterize a police services board's fleet supervisor as a safety-sensitive position in a 2002 award, noting that her duties "did not subject her to any specific consideration of

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[22] *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*, [2012] A.J. No. 1049.

[23] *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*, [2012] A.J. No. 1207.

[24] *Canadian National Railway Co. and C.A.W.-Canada (Re)* (2000), 95 L.A.C. (4th) 341 (Canada).

danger or safety."[25] However, aside from that comment, we are not aware of any cases that address the issue of whether police work would be considered safety-sensitive.

It seems fairly clear that, if the issue were to arise, police work would be found to be safety-sensitive. Police officers are expected to pursue dangerous criminals, handle weaponry and respond rapidly to calls. While actual danger may not always be present, the threat of danger certainly is. Although this danger may not be of the same variety as that which exists in workplaces such as oil refineries and mills, the danger is certainly present. When police officers fail to perform their duties to the best of their abilities, they place members of the public in harm's way, just as employees of oil refineries do. Although mistakes by police officers may not create massive refinery explosions, they can certainly result in the injury or death of members of the public. This reasoning applies not to only police officers, but also some civilian members of the police force such as dispatchers. If police officers depend on civilian members of the force for support, and the work of police officers is safety-sensitive, then those who must remain alert in order to provide necessary support to police officers should also be considered to be occupying safety-sensitive positions.

Of course, there may be some positions in police bargaining units that would not fall under this category. Stenographers, for example, may not be said to be performing work of a safety-sensitive nature. One could not accurately state that, in the normal course, lapses of attention on the part of a stenographer would place members of the public in harm's way. Only police officers and those who provide necessary administrative support to them should be considered to be employed in safety-sensitive positions.

It seems that employers will face an uphill battle during litigation if they choose to implement random drug and alcohol testing. Although random drug testing is viewed less

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[25] *Vancouver Police Board and Teamsters, Loc. 31 (Re)* (2002), 112 L.A.C. (4th) 193 (British Columbia) at pg. 239.

favourably by adjudicators, random alcohol testing has not found much success either. Employers considering such a policy would be well-advised to wait and see how the upcoming *Suncor* and *Irving Pulp* decisions address this issue. The existing caselaw does suggest that, with respect to random alcohol testing, employers can maximize their chances of success by waiting until they have seen evidence of an alcohol abuse problem at their workplace prior to implementing random tests. Employers who do choose to implement random testing must ensure that their policy does not provide for automatic termination upon a positive test. Rather, employees should be assessed individually to determine whether accommodation measures are warranted.

A review of the foregoing jurisprudence suggests that, in the clash between collective bargaining, individual and employee rights created by random employer testing for drugs and alcohol, the balancing approach seems to have gained the upper hand. From the standpoint of adjudicators, the increase in safety which may come as a result of random drug and alcohol testing is not worth the loss of individual or collective bargaining rights which such testing would entail. Thus far, it seems that the prevention of the risk of workplace accidents has generally not been found to provide sufficient justification for the loss of such rights.

The coming months will be an interesting time for those who have followed the development of this debate over the last few years. By the time the next PAO conference begins, the nation's highest court will hopefully have weighed in on this issue and further addressed the proper balance between these two interests. The arbitrator's decision in *Suncor* will also provide insight on this issue. Privacy may have taken most of the early rounds, but the fight is just getting started.