

## Ontario arbitration board upholds 'Canadian' approach to random drug testing

Readers of FOCUS might recall the lengthy legal battle over Imperial Oil's alcohol- and drug-testing policy in *Entrop v. Imperial Oil* (see "[Court of Appeal overrules human rights board on legality of random breathalyzer testing](#)" on our Publications page). While that case was instrumental in establishing alcoholism as a disability under human rights legislation, and resulted in key provisions of the company's policies being struck down, the Ontario Court of Appeal upheld the company's random breathalyzer testing, but ruled that automatic dismissal could not be imposed for employees who tested positive.

Now another similar policy implemented by Imperial Oil, this time involving mandatory, random taking of oral swabs for detecting marijuana use, has come under challenge and has been found wanting. In *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900* (M.G. Picher – December 11, 2006), the random drug-testing policy was struck down based on well-established arbitral principles about such testing.

The issue arose in Imperial Oil's Nanticoke refinery in May of 2003. At that time, the company announced the suspension of random urinalysis drug testing and its replacement by random testing by means of saliva samples for employees in safety-sensitive positions. The company explained that it suspended its previous drug-testing program in 2001 because the Court of Appeal in *Entrop* expressed doubts about the ability of urinalysis to predict likely impairment. The company advised that it believed that saliva testing would address the Court's concerns over the questionable reliability of the urinalysis test. The union responded by grieving the policy.

By a 2-1 majority, the board of arbitration held that the program violated the collective agreement. In striking down the policy, the board made note of the following factual circumstances:

- For more than 15 years, no employees had been found to be impaired by drugs.
- There was no evidence that cannabis use was on the rise in the refinery.
- While the results of the oral swab test do predict impairment, the condition of impairment is known only several days after the test is administered, following the completion of laboratory analysis.

### THE 'CANADIAN MODEL'

The board then reviewed how random drug testing in safety-sensitive workplaces has been treated in Canadian arbitral case law. The board noted that under the "Canadian model," unlike the approach taken in the U.S., arbitrators preferred reasonable-cause testing over random, no-cause testing of employees in safety-sensitive industries. The board cited this quote from an earlier award as summing up the Canadian view:

"The value placed on our personal privacy generally outweighs the right to test simply because some employees sometimes might be abusing alcohol or drugs and coming to work impaired. The balance tips, however, when an employer has good reason to suspect that the risk factor of impairment has been increased for an employee who occupies a safety-sensitive position."

The board then listed the basic elements of the Canadian approach to random drug and alcohol testing as developed in the jurisprudence:

- No employee can be subjected to random testing, except as part of an agreed-on program of rehabilitation.
- An employer can require an employee to submit to testing where there is reasonable cause to do so.
- Management rights include the power to require employees to submit to testing following a significant incident, accident or near-accident where it is important to identify the cause of what occurred.
- Random testing is legitimate for employees found to have drug- or alcohol-use problems, usually for a limited period of time. The union must be involved in negotiating the terms on which testing for the employee will be implemented.
- Where testing is warranted, as in the above circumstances, refusal or failure to submit to the testing can be grounds for discipline, but do not constitute automatic grounds for termination. Each case must be assessed individually.

### ENTROP NOT DETERMINATIVE

The board then considered the effect of the Court of Appeal's decision in *Entrop* on the established arbitral approach. In the board's view, the Court of Appeal was dealing with the narrow application of the *Human Rights Code* to the company's drug- and alcohol-testing policy, with specific focus on whether random testing could be a *bona fide* occupational requirement, and thus a defense to a human rights complaint, in a safety- sensitive environment. The Court was not considering whether the policy might violate the collective agreement and consequently also did not consider the extensive body of arbitral jurisprudence on random testing. Further, the board held, the protections conferred under the collective agreement may be greater than those offered under the *Code*:

"[I]t is important to remember that that which is permissible under human rights legislation may not be permissible under a collective agreement. [...] It is manifestly open to a trade union and an employer to agree, within the terms of their collective agreement, to sets of rights and obligations which might be greater than those found in statutes of general application intended to provide minimal protections in respect of individual rights, such as employment standards legislation and human rights codes."

The board rejected the company's argument that the oral swab test at issue here was analogous to the breathalyzer test considered in *Entrop* and that the result in *Entrop* should determine the outcome of the grievance. First, the board stated, the oral swab, unlike the breathalyzer, did not give instant results, and the tested employee was sent back to work, pending the receipt of results from the lab several days later. Accordingly, oral swab testing did not meet the test applied in *Entrop* of being reasonably necessary to ensure immediate workplace safety.

More important, however, in the board's view, was the fact that subjecting all employees to random oral swab testing could not be reconciled with the established arbitral approach to such testing. That approach permitted testing of an employee when there was reasonable cause to do so, or when an accident or incident justified such a measure.

In supporting the balancing approach adopted by Canadian arbitrators, the board expressed the view that the experience of safety-sensitive industries in Canada has shown that random testing is neither necessary nor justified. Major employers such as CN, Dupont and Irving have achieved their safety goals without resorting to such testing.

Accordingly the majority of the board ruled that the random-testing program was in breach of the collective agreement and must be struck down.

## **In Our View**

The board's majority did uphold other aspects of the employer's policy. These included the requirement that employees consent to drug testing where there is cause to conduct the test or where testing is part of a rehabilitative program for the employee being tested. As well, the provisions giving local supervisors the discretion to order post-incident testing were upheld. With respect to the provisions that made the presence of drugs or drug metabolites in the body a violation of the policy, the board stated that such employees were protected by the just cause provisions of the collective agreement: for some employees the presence of drugs in the body might not be a sign of impairment, while for others the presence of drugs might constitute a violation of a rehabilitative program that is a term of the employee's continued employment.

The Employer has applied for judicial review. We will keep readers informed of future developments in this case.

For further information, please contact [J.D. Sharp](#) at (613) 940-2739.

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