

# Preventing impaired flying: Where do we go from here?

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The recent arrest of an intoxicated Sunwing Airlines pilot, who made it as far as the cockpit before passing out, has garnered significant attention, and left many wondering how commercial air carriers can best ensure impaired pilots don't make it to take-off.

Last week, Federal Minister of Transport, Marc Garneau, sent a letter to commercial air carriers expressing his concern over the incident, and reminding carriers of their "obligation to ensure that flight crew members are fit to fly" and their "responsibility to have procedures in place to identify and manage hazards to aviation safety." Mr. Garneau requested that all carriers confirm the measures in place to verify pilots' fitness to fly by no later than February 15, 2017. He indicated that a workshop would be held in the spring to unite companies, unions, and medical experts to consider enhancements to aviation safety.

What exactly was meant by ensuring fitness to fly, and what procedures for managing hazards Mr. Garneau envisioned, however, is unclear. The question is an important one, concerning equally to airlines, their employees, and the passengers they carry. While random drug and alcohol testing may seem like a viable solution, the reality is more complex, and involves striking the right balance between multiple interests. Until Transport Canada provides further guidance, there are steps carriers can take in their efforts to ensure safe operations.

## **Current State of the Law**

As the law stands, Canadian airlines are neither required, nor expressly authorized, to conduct drug and alcohol testing of pilots, either randomly, prior to departure, or on a "for cause" basis.

The *Canadian Aviation Regulations* (CARs) mandate that no person shall act as a crew member of an aircraft:

- (a) within eight hours after consuming an alcoholic beverage;
- (b) while under the influence of alcohol; or
- (c) while using any drug that impairs the person's faculties to the extent that the safety of the aircraft or of persons on board the aircraft is endangered in any way.

Canada's *Criminal Code* also makes it an offence to have the care and control of an aircraft while a person's ability to operate the aircraft is impaired by alcohol or a drug, or having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

However, ensuring compliance with the law is up to individual airlines, since no Canadian law provides for enforcement measures.

A spokesperson for Employment and Social Development Canada told a Global News reporter that random testing of employees in safety sensitive positions, that is, "those in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others, or the environment," is permissible in a number of circumstances, so long as "employees are notified that alcohol testing is a condition of employment."

While such testing is not expressly prohibited by the *Canada Labour Code*, which is silent on the issue, the Supreme Court of Canada's 2013 decision in *Irving Pulp and Paper Ltd.* significantly narrowed employers' ability to unilaterally impose random drug or alcohol testing on unionized workers, even in highly dangerous workplaces. While upholding reasonable cause testing, the Court struck the portion of Irving's policy that provided for random testing, on the basis that it did not properly balance the privacy rights of individual employees.

The Supreme Court held that random drug and alcohol testing could be permitted, however, in dangerous workplaces in certain circumstances, where:

- (a) there is reasonable cause to believe that an employee is impaired while on duty;
- (b) the employee has been directly involved in a workplace accident or significant incident; and/or
- (c) the employee is returning to work after treatment for substance abuse.

Apart from such cases, where an employer seeks to impose a random testing policy, it must demonstrate particular risks within the workplace, for example, a general problem of substance abuse.

The Court referred to an earlier decision in which an arbitrator upheld an aviation employer's random alcohol testing policy for safety-sensitive positions, on the basis that the evidence demonstrated a pervasive alcohol problem in the dangerous workplace. Without evidence of on-the-job drug use, however, the arbitrator struck the random drug testing portion of the policy.

The Court also commented that although the unilateral imposition of random testing policies is unlikely to survive arbitral scrutiny, employers are free to negotiate such policies with unions.

Although the negotiation of policies with unions would likely be effective, unions in Canada have largely refused to consider random testing policies. The Air Canada Pilots Association (ACPA) told a Global News reporter that in Canada, “mandatory random testing is not generally supported by the jurisprudence.” And the Air Line Pilots Association (ALPA) released a statement expressing its support for the “existing layers of defence that ensure that pilots are fit to fly.” Unions are urged to support testing policies, in furtherance of ensuring safe operations and preventing avoidable incidents.

Apart from concerns of privacy and union objection, employers are subject to human rights obligations to employees with drug or alcohol addictions. For such employees, as compared to recreational users, employers are required to accommodate to the point of undue hardship.

The current state of the law, which lacks a clear mandate on drug and alcohol testing, has led to confusion within the aviation industry, and a hesitancy on the part of carriers to adopt random testing protocols.

### **Proposed Legal Scheme**

We submit that it is incumbent upon Transport Canada to implement uniform enforcement and testing measures for the prevention of drug and alcohol use prior to flight.

When it comes to preventing intoxicated crew members from taking flight, the United States Federal Aviation Administration’s (FAA) random drug and alcohol testing requirements could provide a blueprint for a Canadian model. The FAA Regulations, and its Drug Abatement Division’s policies and guidelines, provide for a comprehensive scheme of random testing for safety-sensitive aviation employees. In the United States, the legal blood alcohol content limit for pilots is 0.04, while in Canada, it remains the same as for driving at 0.08.

The FAA Regulations require aviation employers to develop and maintain an unannounced random drug and alcohol testing program that selects employees for testing using a scientifically valid method, tests employees in an unannounced way, spreads testing reasonably throughout the year, and tests a mandated minimum percentage of employees annually (currently, 25% for drug testing and 10% for alcohol testing). In addition to strengthening public trust, such a scheme serves an important deterrent function.

In India, the rules are even stricter. Their regulations mandate one hundred percent screening for crew of Indian carriers before every flight departing from an Indian airport and after every flight arriving into the country.

Transport Canada should consider the imposition of a system of mandatory testing, either

randomly or prior to departure. The collective interest in safety outweighs the modest invasion of privacy. Such a scheme could include, for example, a breath analysis mechanism on each aircraft, annual minimum requirements for random testing, and/or mandatory testing at ramp inspection. This would provide a level of consistency across commercial air carriers, as well as predictability and accountability measures.

While testing for alcohol, by way of breath analysis, is generally accepted as accurately identifying current impairment, the same is not true of drug tests, which identify past use. In light of this fact, and the increasing use of medical cannabis, it is clear that improved methods of testing for current impairment due to drugs are also necessary.

In short, while Canadian law does strictly prohibit the operation of aircraft while impaired, further measures, ideally uniformly legislated, are necessary to ensure the law is given full effect.

### **What Carriers Can Do**

Until Transport Canada provides guidance on the means by which carriers can meet their obligations, the following are suggested steps carriers may take, to balance the privacy interests of pilots with the safety interest of passengers, crew members, and of pilots themselves.

#### *Justify the policy, or take a risk*

Introduce a comprehensive drug and alcohol policy. Consider whether there are alcohol or substance abuse problems in the workplace that might justify adding a random testing program.

In the absence of evidence of such a problem, consider whether it is worth the risk of such a policy being challenged and struck. Some air carriers already have random testing programs in place. Where the workforce is not unionized, the risk of legal challenge is lower.

#### *Talk to the union*

In a unionized workplace, initiate discussions with affected unions. This is an important safety issue, and dialogue with all stakeholders is the preferred course. Attempt to create and agree upon a random testing policy together. Include reference to the relevant CARs requirements, and consider modelling after the FAA scheme, tailored as appropriate.

In a non-unionized workplace, involve the Joint Health and Safety Committee in discussions regarding the introduction of a random testing policy.

#### *Impose stricter rules*

Consider updating policies to go beyond the CARs requirements, for example, by limiting alcohol consumption to twelve hours prior to flight, rather than eight, as some carriers already do.

### *Provide training*

Regardless of whether a policy of random testing is introduced, ensure that all employees coming into contact with flight crew are trained to recognize impairment, and encouraged to report any suspicious incidents or behaviour. Foster a culture of openness and collective responsibility. Remind all employees of the CARs restrictions, and include these in the Standard Operating Procedures.

### *Communicate the policy*

If a testing policy is introduced, communicate the policy to employees and provide appropriate training. Ensure the policy is understood as being preventative and not punitive.

### *Support employees*

Whether a testing policy is introduced or not, put in place a comprehensive accommodation policy and appropriate accommodation measures for employees with substance abuse problems. Ensure employees feel comfortable and supported when divulging an addiction. Introduce an Employee Assistance Plan to provide confidential support to employees.

## **Conclusion**

The safe operation of airports and airplanes is the responsibility of everyone involved, including employers, employees, and unions. While we have focused on flight crew, all employees in safety-sensitive positions in the aviation industry, from ground crew who operate vehicles to service providers and airport staff, some of whom may operate machinery, should be subject to restrictions on working while impaired.

The Sunwing incident serves as an important reminder of joint responsibilities, and provides an opportunity for reflection on and revision of existing policies and procedures.

The incident also likely precipitated a Safety Management System (SMS) report. Safety Management Systems are required by Transport Canada of many aviation companies, and assist in identifying safety risks. Where a safety event takes place, a report is required as part of the company's response. This provides a valuable opportunity for the parties involved – employers, employees, and unions – to examine processes and develop solutions. For carriers that do not have an SMS in place, the same principles should be applied to engage all involved in efforts to

ensure safety.

Carriers with questions or requiring guidance and suggestions on drafting compliant, effective, and appropriate policies for preventing the intoxication of crew members during and prior to duty are invited to contact Emond Harnden's Aviation Human Resource Law team members, [Steven P. Williams](#) at 613-940-2737 or [Larissa Volinets Schieven](#) at 613-563-7660.