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UPDATE

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Strike Two: Ontario Court of Appeal Slams Imperial Oil's Random Drug Testing for the Second Time in Nine Years

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The Ontario Court of Appeal recently called "strike two" on Imperial Oil's ("Imperial") long-running quest for the right to conduct random drug testing. The Court unanimously upheld a decision of an Ontario Board of Arbitration that struck down Imperial's policy of random unannounced drug testing for safety sensitive positions at a unionized worksite in Ontario.

Background: *Entrop v. Imperial Oil*

Imperial is not new to high-profile litigation involving random drug and alcohol testing. In the early 1990s an employee (Entrop) challenged the random testing section of Imperial's comprehensive drug and alcohol policy. The Ontario Court of Appeal ultimately held that random breathalyzer testing of employees in safety sensitive positions, where supervision was limited or non-existent, was reasonable and did not contravene the Ontario *Human Rights Code* ("the Code"). However, the portion of the policy concerning random urinalysis drug testing was found to violate the Code, primarily because the technology was insufficient to establish on-the-job impairment. Such tests could only identify past drug use and not impairment at work.

Following the Entrop decision, Imperial experimented with other drug testing technologies in an effort to find a means to distinguish between on-the-job impairment from prior drug use and eventually settled on oral fluid (saliva) drug testing. In 2003, Imperial resumed random unannounced drug testing (for cannabis only) using this new method for employees in safety sensitive positions.

The union grieved.

Imperial Oil v. Communications, Energy & Paperworkers Union of Canada, Local 900

In 2006, a majority of a board of arbitration upheld the company's "for cause" post-incident drug testing but determined that absent express language in the collective agreement, random unannounced drug testing was only permissible as part of a rehabilitative program where an employee has a identifiable drug or alcohol problem. The majority of the board's analysis weighed employees' privacy interests with the company's right to ensure the safety of its employees, and found that the random drug testing provisions of the policy violated Article 3.02 of the collective agreement, which required the parties to commit to a work place where individuals are treated with "respect and dignity".

Imperial sought judicial review in the Ontario Divisional Court and then the Ontario Court of Appeal, where both levels of court upheld the majority's decision as it related to Article 3.02.

Writing for the Court of Appeal, Justice Cronk affirmed the majority's reasoning that absent reasonable cause Imperial was not entitled to conduct random unannounced saliva drug testing.

Lessons for Employers

The scope of an employer's right to require its employees to submit to drug and alcohol testing has received extensive arbitral and judicial attention over the years. Simply stated, the debate has been whether, and under what circumstances, an employer can demand an employee undergo a drug test; or more specifically (and controversially) a random unannounced drug test.

Although the Ontario Court of Appeal has twice taken a restrictive stance on the subject, courts in other provinces have taken a more employer-friendly view, most notably in *Chiasson v. Kellogg Brown*, where the Alberta Court of Appeal took a permissive approach towards random drug testing. The court in that case expressly noted that its decision might conflict with the Entrop decision. Ultimately this debate will have to be resolved by the Supreme Court of Canada.

Until then, employers in Ontario should be mindful of the restrictive approach towards drug testing expressed in the two Imperial decisions. In particular, unless and until the Supreme Court of Canada considers the issue, arbitrators and courts in Ontario will likely take a strict approach towards assessing whether an employer can conduct random drug tests of employees in safety sensitive positions, absent just cause or as part of a rehabilitation program in certain circumstances.

In addition to the "respect and dignity" clause, which was not a factor in the Entrop decision, the Court of Appeal cited and affirmed the board of arbitration's concern with saliva testing technology. Again, Imperial Oil's drug testing technology was rejected. If and when the technology progresses to the same level as the breathalyzer, perhaps Imperial and other companies will have success in imposing random drug testing, even where provisions such as Article 3.02 are present.

Since the Court of Appeal concluded that the majority's decision that the policy violated Article 3.02 was reasonable, it did not have to consider and determine the alternate finding that absent reasonable cause, random drug testing required express language in the collective agreement signifying employee consent to such testing measures. This leaves the door open for the possibility that employers can impose random drug testing if on-the-job impairment testing technology is ever perfected.

Until the technology issue is resolved, unionized employers in Ontario with similar "respect and dignity" language in their collective agreements should approach random drug testing with caution. Arbitrators are likely to take an unfavourable view towards random unannounced drug testing absent permissive language in the collective agreement, reasonable cause, or as part of a rehabilitative program.

However, it is worth noting that even absent collective agreement language committing to "respect and dignity", arbitrators and courts may imply such a duty through management rights

clauses and the common law, respectively. Both unionized and non-unionized employers should be concerned that they may be found to owe this implied duty to its employees, which in light of this decision would restrict their ability to conduct random drug testing.

Non-unionized employers using or considering saliva drug testing technology should consider this decision a shot across their collective bows. Like urinalysis before it, saliva testing has failed to receive the endorsement of the Ontario Court of Appeal as a valid form of on-the-job impairment testing.

This is strike two. Given Imperial's determination to resolve the issue, it will not be surprising if we see it step back up to the plate in the near future.

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