Hard Pill to Swallow: Drug and Alcohol Testing by Employers in Canada

April 2010

Ogilvy Renault’s Employment and Labour Law practice is one of Canada’s largest management-side practices. We represent a significant number of private and public sector employers and provide a wide variety of advocacy services and strategic advice. This newsletter deals with issues of importance in Canadian labour and workplace law.

In Canada, drug and alcohol testing of employees continues to be viewed with concern because of its inherently intrusive nature. Canadian law circumscribes, to a significant extent, when it may occur. An employer seeking to implement a drug and alcohol testing protocol in Canada is compelled to engage in, essentially, a balancing act as between workplace safety and employee privacy rights. Furthermore, because drug or alcohol dependency (and perceived dependency) is regarded as a “disability” under anti-discrimination legislation in Canada, employers must ensure that any proposed drug and alcohol testing protocol does not discriminate against employees due to such disability.

The law on drug and alcohol testing in Canada is not captured by a single statutory code. However, a “Canadian model” has recently emerged from the jurisprudence to govern employers’ actions in this area. Generally, it has been recognized that employers may have a right to impose drug and alcohol testing policies that apply to employees in safety-sensitive positions. These can be defined as positions in which the employee has a direct role, with limited supervision, in a workplace operation where impaired performance could result in a catastrophic incident affecting the health and safety of the employee and others.

Although the safety-sensitive characterization is a primary factor in assessing whether drug and alcohol testing policies are acceptable, it is not determinative. The following summarizes the different scenarios in which testing is permissible under Canadian law:

- **Pre-employment drug and alcohol testing**: May be permissible for employees being hired into safety-sensitive positions, but failing the test or refusing to take it cannot necessarily result in the withdrawal of an offer of employment;
- **Random drug and alcohol testing**: Random drug testing is not permissible except possibly as part of a return to work rehabilitation program, while random alcohol testing may be permissible as long as a positive test does not result in the automatic termination of the employee; and
- **Reasonable cause and post-incident drug and alcohol testing**: Permissible, but automatic termination of an employee who fails or refuses to submit to a test under these circumstances will not always be justified.

Several recent cases described below have helped define these scenarios in Canada.

**PRE-EMPLOYMENT DRUG AND ALCOHOL TESTING**

Until lately, pre-employment drug and alcohol testing was held to be unlawful where the failure of a drug or alcohol test resulted in the revocation of an offer of employment. However, in *The Director of Alberta Human Rights and Citizenship Commission and Chaisson v. Kellogg Brown & Root* (“Kellogg”), the Alberta Court of Appeal concluded that the employer did not breach
human rights legislation when it refused to hire a prospective employee who tested positive for marijuana through a pre-employment drug test. As the prospective employee was only a recreational user of marijuana, the Court of Appeal concluded that he did not suffer from a disability and it was unnecessary to consider the question of human rights accommodation.

Similarly, in Weyerhaeuser Co. (c.o.b. Trus Joist) v. Ontario (Human Rights Commission) ("Weyerhaeuser"), the Ontario Divisional Court concluded that a prospective employee failed to establish a prima facie case of discrimination when a conditional offer of employment was withdrawn after he failed a pre-employment drug test. The complainant was also a recreational user of cannabis and the Divisional Court concluded that this did not constitute a disability.

Despite these decisions, the law has not yet evolved to such a point that the failure or refusal to submit to a pre-employment drug or alcohol test can necessarily result in the blanket withdrawal of an offer of employment.

RANDOM DRUG AND ALCOHOL TESTING

In Canada, differences in the law have emerged between random alcohol testing and random drug testing and between the unionized and non-unionized sectors as a result of the decisions of the Court of Appeal for Ontario in Entrop v. Imperial Oil Ltd. ("Entrop") and Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900 ("Imperial Oil").

In Entrop, the Court of Appeal was required to assess whether an Ontario Board of Inquiry had correctly interpreted the applicable human rights legislation when it decided that random alcohol and drug testing was discriminatory. The Court determined that the Board’s decision regarding random alcohol testing was incorrect and overturned it, on the basis that random alcohol testing by way of breathalyser measures present impairment and produces immediate results without impinging on an employee’s right to privacy. However, the Court went on to say that automatic termination as a result of a positive test result would likely be found to contravene human rights law if the need for accommodation had not first been explored.

The Court in Entrop determined that random drug testing, however, even for employees in safety-sensitive positions, could not be justified and that the decision of the Board of Inquiry in this regard was correct.

In Imperial Oil, the primary issue that a labour arbitrator was originally asked to consider was whether the employer’s random, unannounced alcohol and drug testing policy was reasonable. The Arbitrator did not consider the issue of alcohol testing because the employer’s practice in this regard had gone unchallenged by the union since 1992. However, the Arbitrator adopted the “Canadian model” regarding drug testing and found that random drug testing is not permissible since the methods of testing currently available, either urinalysis or buccal (oral) swabs, are highly intrusive and incapable of measuring present impairment in a timely way. The Arbitrator further concluded that such testing was not reasonably necessary to accomplish an employer’s goals of maintaining safety or promoting deterrence of drug use. The Court of Appeal for Ontario eventually opted to defer to the Arbitrator in this regard and did not overturn his award.

As a result of the decision in Imperial Oil, random drug testing can generally only be performed in the unionized context as part of a rehabilitative program for employees with a proven drug or alcohol dependency. Often such arrangements are imposed in lieu of termination of employment and are agreed upon by the employer, employee and union in the form of a “last chance” or “return to work” agreement. However, where a drug and alcohol policy requires automatic return to work testing in every case, it could be viewed as unreasonable and/or contrary to Canadian human rights law. Furthermore, in circumstances where there is no evidence of dependency or abuse, but only a positive drug test, it is unlikely that an employer can impose random, unannounced return to work testing.

REASONABLE CAUSE DRUG AND ALCOHOL TESTING

Where employees occupy safety-sensitive positions, in most cases employers have the right to require employees to submit to a drug or alcohol test where there is “reasonable cause” to suspect impairment on the job, absent any contrary provision in a policy, contract or collective agreement. In United Association, Local 663 v. Mechanical Contractors Association of Sarnia (Drug and Alcohol Policy Grievances), a labour arbitrator upheld the validity of alcohol and drug testing policies that included reasonable cause and post-incident testing. A request to perform reasonable cause testing will generally be considered proper where the employee has exhibited signs which sufficiently arouse the employer’s suspicion of impairment. In such a case, a test is ordered only as an objective measure of the employer’s subjective view of the employee’s actions, behaviour or physical characteristics (e.g. glassy eyes, the odour of alcohol, slurred speech, dilated pupils, impaired gait, etc.).

Where an employee fails or refuses to submit to a reasonable cause drug or alcohol test, it may not always be possible to automatically terminate. If a drug or alcohol dependency surfaces, the employer is generally required to accommodate the employee’s disability, which could include placing the employee in an alternative non-safety-sensitive position for a period of time, if one is available.
POST-INCIDENT DRUG AND ALCOHOL TESTING

After an accident, dangerous incident or near miss has occurred, drug or alcohol testing may be justified where there is reason to believe that an employee’s acts or omissions could have been a contributing factor and that there may have been impairment at the time of the incident. Testing of this nature has been consistently deemed to be acceptable by labour arbitrators. In Canadian National Railway Company v. CAW-Canada, while the Arbitrator struck down certain portions of the policy, he upheld testing for safety-sensitive positions where there is an accident, dangerous incident or reasonable cause, i.e. some demonstrable justification for post-incident drug and alcohol testing.

Again, however, it may not always be appropriate to immediately terminate employment when a post-incident test result is positive.

CONCLUSION

Employers contemplating the adoption of testing in Canada as part of a drug and alcohol policy will need to show that testing is necessary as one facet of a larger process of preventing drug or alcohol abuse in the workplace. Canadian courts and adjudicators will continue to be sceptical about any practice of random drug testing that does not indicate immediate impairment or was not premised upon reasonable cause, post-incident or as part of an individual employee’s rehabilitation plan.

Employers must also be mindful of their obligation to demonstrate the reasonableness of each testing standard and their duty to accommodate employees suffering from addiction problems (including alcoholism). Accordingly, it is imperative that employers review their drug and alcohol testing policies in order to minimize exposure to a successful challenge.

5 United Association, Local 663 v. Mechanical Contractors Association of Sarnia (Drug and Alcohol Policy Grievance), [2008] O.L.A.A. No. 621 (QL) (T. Jolliffe). This case, wherein the employer was represented by Ogilvy Renault, reversed the decision of the Ontario Labour Relations Board in Sarnia Cranes Limited, [1999] OLRB Rep. May 479 (Shouldice) which struck down drug and alcohol policies that provided for reasonable cause and post-incident testing.
6 Canadian National Railway Company v. CAW-Canada, [2000] C.L.A.D. No. 465 (QL) (M. G. Picher). This case, wherein the employer was represented by Ogilvy Renault, clarified for the first time in Canada that post-incident and reasonable cause testing may be permissible.

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Ogilvy Renault LLP or any member of the firm on the points of law discussed.

For further information, please contact one of the following lawyers:

1. R. LUC BEAULIEU MONTREAL 514.847.4428 lbeaulieu@ogilvyrenault.com
2. CHRISTIAN J. BEAUDRY MONTREAL 514.847.4416 cbeaudry@ogilvyrenault.com
3. RICHARD J. CHARNEY TORONTO 416.216.1867 rcharney@ogilvyrenault.com
4. MARY J. GLEASON OTTAWA 613.780.8635 mgleason@ogilvyrenault.com
5. JOCELYN F. RANCOURT QUEBEC 418.640.5003 irancourt@ogilvyrenault.com

© Ogilvy Renault LLP 2010