

Courts Quash Another Alcohol And Drug Testing Policy



The law in Canada with regard to workplace alcohol and drug testing is becoming clearer, and the emerging picture indicates employers need to proceed with caution.

The latest news comes from an Ontario Superior Court of Justice decision, which upheld an arbitrator's decision to invalidate an employer association's pre-access alcohol and drug testing policy.

The case arose in December 2012, when the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663 (the "Union") grieved the Mechanical Contractors Association Sarnia's adoption of a directive from Suncor Energy Inc. ("Suncor") to test all employees for alcohol and drugs prior to being allowed access to a Suncor worksite in Sarnia, Ontario.

In August 2013, the arbitrator, in a long decision¹, declared the policy is an unreasonable violation of the affected employees' privacy. As such, the arbitrator held that the policy violated, both, the applicable collective agreement and the *Ontario Human Rights Code*² (the "Sarnia Arbitration"). The Employer's Association applied for a judicial review, and a three-member panel of the court upheld the arbitrator's decision as reasonable³ (the "Sarnia Review").

The Sarnia Review is the most recent in a string of employer defeats with regard to the enforceability of alcohol and drug testing policies in Canada, the most impactful of which was a Supreme Court of Canada decision from June 2013⁴ ("Irving"). In early 2014, an arbitration decision in Alberta rendered a Suncor random alcohol and drug testing policy unenforceable⁵ (the "Suncor Arbitration").

A key issue in the Sarnia Review was whether pre-access testing (testing employees prior to allowing them access to a worksite) is more like conduct-based testing or random testing.

The Employer's Association argued pre-access testing is similar to conduct based testing, which is allowed for employees in safety-sensitive positions following an incident or near miss when all other causes have been ruled out, as a condition of return to work following a positive test, or where there is cause to believe the employee is impaired at work.

However, the Union argued pre-access testing is more akin to random testing, which is allowed only in narrow circumstances, such as when the impugned worksite is dangerous and additional evidence—for example, a substance abuse problem at the impugned workplace among the employees to be tested—demonstrates an enhanced safety risk.

In a terse decision, the court in the Sarnia Review decided pre-access testing is more akin to random testing. As such, pre-access requires the employer to meet the high threshold required to justify random testing. The court further held that, based on the evidence presented, it was reasonable for the arbitrator to decide that the high threshold was not met in this case.

The court in the Sarnia Review also summarily dismissed all of the Employer Association's other arguments, including that the arbitrator's language indicated a bias against the Employer Association's evidence, and that the Employer Association had adduced enough evidence to demonstrate a problem with substance abuse at the impugned worksite in order to meet the higher threshold.

The Sarnia Review is problematic for employers seeking to introduce pre-access or random alcohol and drug testing at its worksites, and it is particularly troubling news for Suncor, which applied for a judicial review of the Suncor Arbitration, for which arguments were heard in October 2014, and a decision is expected in 2015.

The forthcoming decision in the Suncor Arbitration judicial review is seen as one of the final hopes for the courts to allow for random alcohol and drug testing at worksites in Canada, particularly as Suncor argued in the Suncor Arbitration that an alcohol and drug problem exists among its employees at the impugned Suncor Alberta worksite that is "unparalleled in any other workplace in Canada"⁶. As such, if random alcohol and drug testing is not allowed at the impugned Suncor worksite, the already narrow circumstances in which unionized employees may be randomly tested in Canada will closed off even further.

However, the news is not all bad for Canadian employers that want to implement pre-access or random alcohol and drug tests as a means to keep workers and the public safe. Of course, it is still available for employers to enter into collective agreements and individual employment contracts that allow the employer to conduct pre-access or random alcohol and drug tests. Also, the Sarnia Review is not binding in any court outside of Ontario.

In any case, the manner in which the Ontario court applied the principles set out in Irving to the Sarnia Review sends a strong message to employers across the country: tread carefully if you seek to introduce a pre-access alcohol and drug testing policy, because it is likely the law will deem it unenforceable.

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Article by Ryan K. Smith