

Ontario Board Draws New Line On Arbitrator Review Of Drug Testing Policies



Labour arbitration boards have served as the primary battlefield in the decades-long war between employers and unions over the [legality of workplace drug and alcohol testing](#) policies. However, if it holds up on appeal, a recent Ontario case would remove certain kinds of [testing policies](#) from an arbitrator's review.

The Nuclear Plants Testing Case

The federal Canadian Nuclear Safety Commission (CNSC) issued a regulation requiring nuclear power plants to perform random, post-incident, reasonable cause and pre-assignment alcohol and drug testing in the workplace. The testing requirements applied to 2 sets of employees: safety-critical workers and safety-sensitive workers.

The unions asked the Ontario labour arbitrator to "stay" the policy until there was a ruling on the merits of the grievance. The arbitrator didn't rule on the actual legality of the policies. It simply concluded that it lacked jurisdiction, i.e., legal authority, to prevent enforcement of testing policies incorporating regulatory requirements mandated by a federal agency like the CNSC [[Ontario Power Generation, Bruce Power, Power Workers' Union, Society of United Professionals, The Chalk River Nuclear Safety Officers Association and International Brotherhood of Electrical Workers, Local 37 v Canadian Nuclear Laboratories and New Brunswick Power](#), 2021 CanLII 65284 (ON LA), July 8, 2021].

Takeaway

While the whole jurisdiction bit may sound like a legal technicality, it has enormous practical significance. Simply put, it means the plants can enforce the policies unless and until a court strikes them down. If it survives the likely appeal, the principle of barring arbitrator review of drug testing policies that come directly out of federal regulation would establish a potentially significant loophole allowing for [random testing](#) of safety-sensitive workers in certain federally regulated settings.