

Drug and Alcohol Testing by Employers in Canada — A Legal Issues Pulse-Check

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Since our last communication regarding the state of the law on drug and alcohol testing by employers in Canada, three significant decisions have been rendered, one by an arbitrator in Ontario, one by the Quebec Court of Appeal and one by the Alberta Court of Appeal.

THREE NEW CANADIAN CASES

In *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*¹ ("GTAA"), Arbitrator Jane Devlin reviewed the drug and alcohol policy applicable at Toronto's Lester B. Pearson International Airport. In *Syndicat canadien des communications, de l'énergie et du papier (section locale 143) c. Goodyear Canada inc.*² ("Goodyear"), the Quebec Court of Appeal assessed an arbitrator's review of Goodyear's Drug and Alcohol Policy. Finally, in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*³ ("Kellogg Brown"), the Alberta Court of Appeal examined the legality of post-offer/pre-employment drug tests in safety sensitive positions.

Although these decisions add some new distinctions, the traditionally accepted principles related to drug and alcohol testing by employers in Canada remain valid.

In *GTAA*, Arbitrator Devlin confirmed the following scenarios in which drug and alcohol testing is permissible, subject to certain conditions:

- In safety-sensitive positions where the employer has reasonable cause to require the employee to submit to such testing or where an accident or incident justifying such a measure has occurred;
- On an unannounced basis as part of a post-treatment monitoring program (on a case-by-case basis and as negotiated with a union if one is present);
- On an unannounced basis as a condition of continued employment after a drug and alcohol policy violation has occurred (on a case-by-case basis and as negotiated with a union if one is present);
- Prior to appointment to a safety-sensitive position, as part of the qualification process. However, automatic denial of promotion or transfer based on a positive drug or alcohol test was found to be unreasonable and, according to Arbitrator Devlin, amounted to illegal discrimination.

In *Goodyear*, the Quebec Court of Appeal endorsed some of the same basic principles set out above, namely, that drug and alcohol testing in safety-sensitive positions will be considered a reasonable restriction on an employee's right to privacy in situations involving "reasonable and probable cause", following an accident or incident, or following an absence related to the consumption of drugs or

alcohol. The conclusions reached by the Court were in line with the Canadian model for drug and alcohol testing in a unionized workplace. However, it is important to note that the Court reviewed Goodyear's policy in accordance with distinct criteria drawn from the relevant provisions of the *Civil Code of Québec* and the Quebec *Charter of Human Rights and Freedoms* dealing with the employee's right to privacy and integrity of the person.

The third case emanating from the Alberta Court of Appeal, *Kellogg Brown*, is distinguishable from the two foregoing precedents notably in that it concerns an individual complaint by Mr. Chiasson as opposed to a policy grievance like in the other cases. Mr. Chiasson was a casual user of marijuana (but admittedly not an addict) who had been terminated by Kellogg Brown because he had failed a post-offer/pre-employment drug test. The court rejected Chiasson's allegation that he had been illegally discriminated against on the grounds of the test result. It confirmed the validity of pre-employment/pre-access drug testing, in the particular context of a safety-sensitive construction site where several thousand workers worked for different companies.

The Court refused to accept the principle to the effect that recreational users of drugs should automatically be entitled, on the basis of a notion of "perceived disability", to the same human rights protections as the ones conferred to persons suffering from medically established drug addiction and in that regard dissociated itself from the Ontario Court of Appeal's decision in *Entrop*.⁴

Kellogg Brown is the first higher court decision which explicitly recognizes the employer's right to impose pre-employment drug testing in safety-sensitive jobs.

RANDOM DRUG AND ALCOHOL TESTING

A central issue in both the *GTAA* and *Goodyear* decisions was random drug and alcohol testing. Consistent with the jurisprudential trend on this issue, both Arbitrator Devlin and the Quebec Court of Appeal struck down the parts of the employers' policies that dealt with random drug testing for employees in safety-sensitive positions. In view of these two recent rulings, it appears that random drug testing by employers in Canada is prohibited, even in safety-sensitive positions.⁵

However, the two cases differed in outcome as regards random alcohol testing in safety-sensitive positions. In *GTAA*, Arbitrator Devlin found that random alcohol testing (using a calibrated breathalyser) could be imposed on employees in safety-sensitive positions where the evidence had clearly established that an alcohol problem existed in the employer's workplace, although the burden of proof required to show that such a problem existed was a heavy one, with periodic review required to substantiate the need for continued testing. In *Goodyear*, on the other hand, the Quebec Court of Appeal declined to allow random alcohol testing in safety-sensitive positions, citing the failure of random testing for either drugs or alcohol to meet the test of minimal impairment of employees' individual rights.

DRUG AND ALCOHOL TESTING STILL A LIVE ISSUE

The above "pulse check" on developments in the law on employer drug and alcohol testing illustrates that the issue is alive and well in Canadian workplaces and tribunals. In all these cases, the parties presented extensive expert evidence on the justification for testing as part of their drug and alcohol policy, the form of testing proposed, the nature of the positions concerned and the balancing of interests between the employer's obligation to maintain a safe workplace and the employee's right to privacy.

The cases in this bulletin highlight the value of well-defined drug and alcohol policies, especially in safety-sensitive industries, and confirm the legitimacy of the objectives pursued by such policies, namely:

- 1) employee education and awareness,
- 2) identification of potential offenders and risks,
- 3) prevention of drug and alcohol problems, and
- 4) deterrence.

However, employers contemplating the adoption of testing as part of a drug and alcohol policy will need to consider the burden they have to show that testing is necessary as one facet of a larger process of preventing drug or alcohol abuse. They should also be mindful of their obligation to demonstrate the reasonableness of each testing standard and their duty to accommodate employees suffering from drug abuse or addiction problems (including alcoholism) to the point of undue hardship.

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1. [2007] C.L.A.D. No. 243.
2. [2007 OCCA 1686](#) (available in French only).
3. [2007] A.J. 1460; leave to appeal to the Supreme Court of Canada is currently being sought by the Alberta Human Rights and Citizenship Commission.
4. *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.). It should be noted, though, that the legislation in Alberta considered by the Court did not include “perceived disability” in the statutory definition of disability. A perceived disability is included in the statutory definition of “handicap” in the *Ontario Human Rights Code* but not in the *Canadian Human Rights Act*. Thus, this aspect of the decision may not apply to provincially regulated employers in Ontario.
5. A new saliva-based test for marijuana, which tests for impairment, was considered by a panel chaired by Arbitrator Michel Picher in *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900*, (2006) 157 L.A.C. (4th) 225. Because the new test can show impairment, it is similar to alcohol testing, which was found to be permissible in *Entrop*. The majority of the Board of Arbitration in *Imperial Oil*, however, ruled that random testing for marijuana impairment via the saliva-based test was impermissible. The decision of the panel was upheld by the Divisional Court (reported at [2008] O.J. no. 489); leave to appeal to the Court of Appeal is currently being sought by Imperial Oil.



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.

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