



# What's New in HR Law

## Alberta Court of Appeal Says Random Drug and Alcohol Testing Justified in Some Situations

October 25, 2017

### **BOTTOM LINE**

The Court of Appeal of Alberta reiterated that random drug and alcohol testing may be justifiable in circumstances where there are specific safety risks, such as a general problem of substance abuse within a workplace.

### **Facts: Employer implemented random drug and alcohol testing**

In 2012, Suncor introduced random drug and alcohol testing. The random testing would apply to employees in safety-sensitive positions, as well as others on site, including the CEO.

Before implementing its random testing policy, Suncor had taken extensive measures to address drug and alcohol concerns at its worksites. These included:

- employee education and training;
- “post incident” and “return to work” testing;
- an employee assistance program;
- a treatment program for employees with substance dependencies;
- a drug interdiction procedure;

**This update is for general discussion purposes and does not constitute legal advice or an opinion.**

- sniffer dogs; and
- an alcohol-free camp policy.

### **Unifor grieved alleged infringement of its members' privacy rights**

The majority of an arbitration panel ruled in favour of Unifor. Suncor applied for judicial review of the arbitration decision. The reviewing court held that the arbitration decision was unreasonable and sent the matter back for reconsideration by a new arbitration panel. Unifor then appealed the judicial review decision to the Court of Appeal of Alberta.

### **Random Drug and Alcohol Testing: Special safety risks must be established**

The parties disputed the extent to which drugs and alcohol were a problem at the workplace. The arbitration decision held that the employer had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing.

However, the Court of Appeal of Alberta ("the Court") determined that by focusing on the bargaining unit, rather than the workplace, the majority of the arbitration panel had unreasonably narrowed the inquiry into whether a drug and alcohol problem existed.

Relying on the leading Supreme Court of Canada decision of *Irving Pulp & Paper Ltd. v CEP, Local 30*, the Court stated:

Irving calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision.

While in some instances there may be good reason to distinguish between the evidence of substance abuse by unionized and non-unionized employees, in this case, the different types of employees worked side by side in integrated workforces at integrated jobsites.

The Court dismissed Unifor's appeal and sent the matter back for a new arbitration before a fresh panel.

### **Check the Box**

Whether random drug and alcohol testing is justified in a safety-sensitive workplace is an issue that will be assessed on a case by case basis.

- A dangerous worksite, in and of itself, is not sufficient to justify random drug or alcohol testing in a workplace given the privacy concerns inherent in such testing.
- To justify such testing, an employer must be able to establish evidence of a general problem with alcohol and drugs in the workplace, or some other specific safety risk.
- When assessing whether a general problem of substance abuse exists within a workplace, employers are not necessarily required to provide bargaining unit-specific evidence of the problem.

- Employers should stay on the alert for further developments, as Unifor has indicated that it intends to seek leave to appeal to the Supreme Court of Canada.

**Forum:** Court of Appeal of Alberta

**Date:** September 28, 2017

**Citation:** *Suncor Energy Inc. v Unifor Local 707A*, 2017 ABCA 313

For further information, please contact Alexandra Jamieson at 416-408-5560, or your regular lawyer at the firm.



**Toronto**

Bay Adelaide Centre  
333 Bay Street, Suite 2500,  
PO Box 44  
Toronto, Ontario M5H 2R2  
tel: 416.408.3221  
fax: 416.408.4814  
toronto@filion.on.ca

**London**

620A Richmond Street, 2<sup>nd</sup> Floor  
London, Ontario N6A 5J9  
tel: 519.433.7270  
fax: 519.433.4453  
london@filion.on.ca

**Hamilton**

1 King Street West, Suite 1201  
Box 57030  
Hamilton, Ontario L8P 4W9  
tel: 905.526.8904  
fax: 905.577.0805  
hamilton@filion.on.ca