

June 2013

Supreme Court of Canada Upholds Labour Arbitration Board Decision Rejecting Random Alcohol Testing

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On Friday June 14, 2013, the Supreme Court of Canada released its eagerly-awaited decision, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, a case concerning random alcohol testing at a paper mill operation in Saint John, New Brunswick. A majority of the Court upheld the decision of the labour arbitration board that mandatory random alcohol testing by breathalyzer was not permitted even though it was limited to employees in safety-sensitive positions.

The Court unanimously agreed that, in a unionized setting, any rule or policy unilaterally adopted by an employer and not subsequently agreed to by a union must be consistent with the collective agreement and be reasonable. For random alcohol testing, the Court similarly agreed that the employer must first establish that there is a substance abuse problem in a safety sensitive work environment to justify such testing as reasonable.

Writing for the majority, Madam Justice Abella found that the unilateral imposition of the random alcohol testing policy by the employer was not justified because there was insufficient evidence of a substance abuse problem in the workplace. While the Court did not take issue with the finding that certain positions in the paper mill were safety sensitive, the majority found that the employer's evidence, which amounted to seven instances over fifteen years where employees were under the influence of alcohol, consuming alcohol, or in the possession of alcohol on company premises as well as testimony by a former superintendent of a pervasive alcohol abuse problem at the mill, did not demonstrate a significant problem with workplace alcohol use which could justify the imposition of random alcohol testing. The majority noted that random testing, be it by blood, urine, or breathalyzer, amounted to a significant infringement of employees' privacy rights.

For employers in a unionized setting, the decision confirms that random alcohol testing for safety sensitive positions will only be permitted where there is evidence of a substance abuse problem in the workplace or where testing is agreed-to by the union through the collective bargaining process. An "inherently dangerous" or "safety sensitive" work environment is not, in and of itself, sufficient to justify the imposition of random drug or alcohol testing. The evidentiary standard required to justify random testing appears to be something more than a half-dozen recorded instances of alcohol abuse and, based on the reasons of the dissenting judges including the Chief Justice, it is likely that a higher standard is required to justify random drug testing than random alcohol testing. The decision does, however, confirm that alcohol and drug testing is permitted where there is reasonable cause to suspect impairment or following an accident in the workplace, or where an employee returns to work after treatment for substance abuse.

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