

June 3, 2016

Clarifying *Irving*: Can an Alberta Employer Implement a Random Drug and Alcohol Testing Policy in a Safety Sensitive Workplace?



By [Jenna Kirk](#) and [Christin Elawny](#)

Despite a new decision on the issue from the Alberta Court of Queen's Bench (the "Court") on May 18, 2016¹, the answer to this question remains "maybe." The Court has, however, provided us with a measure of clarity concerning what degree of evidence of a drug and alcohol problem in the workplace an employer will have to produce in order to justify a random testing policy: notably, the threshold identified by the Court is **not** as high as the one identified by a majority of the arbitration board (the "Majority") in *Suncor Energy Inc. and Unifor, Local 707A (Random Alcohol and Drug Testing Policy)*² ("*Suncor Arbitration*").

The leading case on this point is *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*³, ("*Irving*"), in which the Supreme Court of Canada held that employers must be able to show "sufficient" evidence of a drug and alcohol problem in the workplace in order to legally justify randomly testing workers in safety-sensitive positions. Unfortunately, it was not clear from the *Irving* decision what would actually constitute "sufficient" evidence of a drug and alcohol problem to justify random testing.

In its approach to this question, the Majority in the *Suncor Arbitration* determined that the threshold test from *Irving* required employers to establish:

1. A "serious" or "significant" problem with drug and alcohol abuse in the workplace; and
2. A causal connection between the drug and alcohol problem and workplace safety incidents.

The Majority also chose to exclude evidence involving employees in the workplace who were not members of the bargaining unit. This placed a tight restriction on the scope of the "workplace" for the purposes of assessing the reasonableness of the random drug and alcohol testing policy.

In its judicial review of the *Suncor Arbitration*, the Court determined that the Majority had inappropriately

elevated the threshold required to justify random drug and alcohol testing. The Court held that modifying the threshold set out in *Irving* – which required “sufficient” evidence of a drug and alcohol problem in the workplace – to a requirement to prove the existence of a “serious” or “significant” problem with drug and alcohol abuse, together with the added requirement of establishing a causal connection to workplace safety incidents, was an unreasonable interpretation of the test set out in *Irving*. Further, the Court found that excluding evidence of a problem with drugs or alcohol that involved non-unionized workers had unreasonably narrowed the scope of the “workplace.” The Court pointed out that “the focus on the workplace in general rather than more narrowly on members of the bargaining unit is ... consistent with the obligation that employers have to ensure the safety of their entire worksite.”

Ultimately, the Court chose not to exercise its power to substitute its own judgment for that of the Majority, and instead referred the matter back to be heard before a fresh arbitration panel. As the union has advised that it is appealing the Court’s decision to the Alberta Court of Appeal, the arbitration before a new panel will only occur if the Court of Appeal upholds the Court’s decision and if there is no further appeal to the Supreme Court of Canada. What this really means is that we are not likely to have a real answer to our question any time in the very near future.

Field Law will continue to keep you updated on the appeal of the Court’s decision and other developments relevant to the ability of employers to legally implement random drug and alcohol testing.

¹ *Suncor Energy Inc. v Unifor Local 707A* 2016 ABQB 269.

² 2014 CarswellAlta 457, Alta. Arb., March 18, 2014.

³ 2013 SCC 31.

SHARE THIS ARTICLE



CALGARY

400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON

2000 - 10235 101 ST
NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE

601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

© 2016 Field Law. All rights reserved.

Articles contain general legal information only - always contact your lawyer for advice specific to your situation.

“Field Law” and the Field Law logo are registered trademarks of Field LLP.

“Field Law” is a registered trade name of Field LLP.