DRUG AND ALCOHOL TESTING IN THE WORKPLACE

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INTRODUCTION

The purpose of this paper is to provide a cursory look at the law as it relates to drug and alcohol testing in the workplace and the most recent decisions on the topic. This paper will not provide an in-depth look at the history of drug testing in Canada, but rather, will provide a summary of the current position of the courts on this issue, and in particular, will touch on pre-employment testing, random testing, post incident or cause testing and testing in safety-sensitive positions.[1]

BACKGROUND

Drug and alcohol addictions are a physical and/or mental disability, which are a protected ground pursuant to human rights legislation in Canada and Alberta. In Canada, the governing legislation is the *Canadian Human Rights Act*[2], and in Alberta, the *Human Rights, Citizenship and Multiculturalism Act*[3] is the applicable authority.

In the past, an employee's drug or alcohol addition was treated as an issue of employee misconduct. This was based on the belief that individuals were able to control and take responsibility for their actions. However, for some time now, it has been accepted that drug and alcohol addictions are disabilities, rather than self-induced misconduct. Along with this recognition has come the acknowledgement that principles of human rights law will affect the employer's ability to discipline or dismiss an employee for addiction related problems. As a result of the treatment of addiction as a disability, an employer has the duty to accommodate an employee to the point of undue hardship.

Canadian case law has drawn a distinction between drug testing and alcohol testing. For instance, an alcohol test (i.e. a breathalyzer test) can determine whether a person has consumed alcohol and is impaired at the time the test is administered. Therefore, an alcohol test can determine whether an employee is unfit to perform their job at any one point in time. On the other hand, a drug test (i.e. urinalysis) cannot accurately measure whether the person is impaired at the time of testing and whether the person is likely to be impaired while working. Therefore, because of the inaccuracies associated with drug tests, an employer's right to implement drug testing policies is more restricted than compared with implementing alcohol testing policies. This distinction was outlined in *Entrop v.*

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1 This paper is based on a paper entitled Drug and Alcohol Testing-The Latest Word, presented and written by L. Frank Molnar and Jason P. Schlotter on May 2, 2000 at the Infonex Conference, Human Rights and Privacy in the Workplace held at the Sheraton Suites Calgary, located in Calgary, Alberta.

2 Section 25 of the Canadian Human Rights Act defines "disability" as "any previous or existing mental or physical disability and includes disfigurement or previous or existing dependence of alcohol or a drug".

3 Human Rights, Citizenship and Multiculturalism Act, Chapter H-14, sets out a distinction between a mental disability, which is defined as "any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder", and a physical disability, which is defined as "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device".

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Imperial Oil Ltd.[4] *("Entrop")*, a decision of the Ontario Court of Appeal, which is discussed in further detail below.

RECENT CASE LAW

In *Entrop*, the Court held that both blanket and random drug testing of employees violated human rights law, while, testing employees for alcohol does not, so long as certain conditions are satisfied.

In the *Entrop* case, largely in reaction to the Exxon Valdez incident, Imperial Oil adopted a comprehensive substance abuse policy. The policy included: a) blanket drug testing of all prospective employees; b) random drug testing of all current employees; and c) random alcohol testing for employees in safety-sensitive positions. The policy also required all employees to disclose any past or current substance abuse. There was a "zero tolerance" provision for substance use by employees in safety-sensitive positions.

Entrop was employed by Imperial Oil in a safety-sensitive position when the policy was introduced. Although he had not had a drink in seven years, he complied with the policy and informed Imperial Oil of a previous problem he had had with alcohol. Imperial Oil immediately reassigned Entrop to a non-safety-sensitive (and less desirable) position.

Entrop lodged a complaint with the Ontario Human Rights Commission on the basis that he had been discriminated against due to disability (ie: substance addiction). In response to that complaint Imperial Oil did reinstate Entrop to his prior job. Imperial Oil also, however, made that reinstatement subject to numerous conditions.

In deciding whether discrimination had occurred, a unanimous Ontario Court of Appeal applied the bona fide occupational requirement ("BFOR")[5] test handed down by the Supreme Court of Canada in the *Meiorin*[6] decision (commonly known as the B.C. Firefighters case). In *Meiorin*, a female firefighter (who had otherwise been an adequate employee for three years) was fired when she failed to pass an aerobic capacity test the employer had introduced. Meiorin claimed the test was discriminatory because females generally have a lower aerobic capacity, and could not meet the standard set even with training.

In applying the BFOR test, if the answer is no to any of the questions outlined in the test, discrimination for which an employer can be held liable has occurred. In *Meiorin*, the Supreme Court held that the employer had failed to show that the level of fitness required to pass the aerobic test actually was the level of fitness needed to fight forest fires. On this basis, the policy of requiring employees to pass the test was struck down.

Applying *Meiorin* to Imperial Oil's treatment of Entrop, the Ontario Court of Appeal found that the automatic reassignment upon Entrop's disclosure of his past alcohol problem and the conditions placed on his reinstatement were unnecessarily severe and not individually tailored. In other words, random alcohol testing was considered properly "connected to" and "necessary" for the purpose of ensuring a substance free workplace, however, the Court found that Imperial Oil should have dealt with Entrop on a more individualized basis. Recognizing and treating Entrop as a *recovered* alcoholic would not have caused Imperial Oil "undue hardship".

4 (1995), 23 C.H.R.R. 196 (Ont. Bd.) [2000] O.J. 2689 (Ont. CA)

5 BFOR test: Once faced with a prima facie case of discrimination, to establish that a rule or policy is BFOR, an employer must demonstrate that 1) the policy or rule is adopted for a purpose rationally connected to the performance of the job, 2) the policy or rule was imposed in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose and 3) the policy or rule is reasonably necessary to the accomplishment of the legitimate work-related purpose.

6 British Columbia (Public Service Employee Relations Commission.) v. B.C.G.S.E.U. (1999), 176 D.L.R. (4th) 1 ("Meiorin").

Having dealt with the situation of *Entrop* specifically, the Court of Appeal also ruled on the legality of Imperial Oil's testing policy in general. The Court found that Imperial Oil had a proper health and safety purpose in attempting to ensure a substance free workplace. However, it also found that it was impairment *on the job*, and not elsewhere, which jeopardized the achievement of the purpose. Drug tests do not show whether employees are currently impaired, they only indicate that drugs have been used at some time prior to the test. Blanket or random drug testing, for prospective or current employees, was not sufficiently connected to the purpose of ensuring actual workplace safety. Imperial Oil's drug testing policy was struck down.

Alcohol testing was different. Breathalyzer samples *do* show current impairment. Such testing was considered justified in certain situations. Specifically, alcohol testing was found to be permissible for employees in safety-sensitive positions. However, the employers' response to positive tests must be tailored to the needs of the particular individual and also limited to what is reasonably necessary for achieving a substance free workplace.

The *Entrop* decision was made subsequent to the *Canada (Human Rights Commission) v. Toronto Dominion Bank*[7] case. In that case the Toronto Dominion Bank had implemented a policy, which required that all new or returning employees submit to a urine test within 48 hours of accepting an offer of employment. New or returning employees who refused to submit to the test were terminated for failing to comply with a condition of employment. If an employee tested positive and was drug dependent, the bank offered a rehabilitation program at no cost. During the period of rehabilitation, the bank continued to provide full wages and other employment benefits. An employee could be terminated if he or she refused the offer of the rehabilitation program or if rehabilitation efforts were not successful. Casual drug users could be terminated if they persisted in using illegal drugs and after having tested positive on at least three occasions. The Federal Court of Appeal held that the policy was discriminatory and could not be justified. As a result, the bank was not allowed to drug test its employees.

The Court held that the bank's drug testing policy failed to pass BFOR[8] test (which had then required that the policy be imposed in good faith for a purpose related to job performance and be reasonably necessary to assure the efficient and economic performance of the work in question without endangering the employee, his fellow employees, or the general public). The bank had passed the first requirement but failed the second. Justice McDonald noted that there was no evidence to support the bank's argument that there was a drug problem within the banking community and that the policy was not reasonably necessary as it had not been made applicable to all bank employees, just those who where new or returning. Further, Justice McDonald also noted that the bank had not demonstrated that drug testing was the least intrusive of the reasonable methods for assessing job performance.

These two cases have been instrumental in developing policy and guidelines for both the Canadian Human Rights Commission and the Alberta Human Rights and Citizenship Commission.

In October 2002, the Alberta Human Rights and Citizenship Commission ("AHRCC") had the opportunity to consider drug and alcohol testing policies in the *Sonia Jacknife and Cassandra Collins v. Elizabeth Metis Settlement*[9] decision.

7 1998), 32 C.H.R.R. D/261 (Fed.C.A.)

8 Subsequently modified in Meiorin, supra, note. 5.

9 (December 6, 2002), Complaints N0006069 and N0006084 (Alta. H.R.C.C.). This case may be viewed at the following website: http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisJacknife.asp

In this case, the Settlement administration had adopted a mandatory drug testing policy aimed at all Settlement business employees, as well as a drug and alcohol testing policy which included periodic alcohol and drug testing for employees who were in sensitive work assignments, as well as employees who were in positions where the duties could affect personal safety, the safety of the public, co-workers and the environment.

The administration directed all administration employees to take the drug/alcohol test. Both complainants refused to submit to the test and were subsequently terminated. Sonia Jacknife argued that not all of the employees presented themselves for the test and that the respondent did not accommodate her. She testified that she was required to drive to work, that she had been provided with treatment for alcoholism while in another position with the Settlement and that the new policy did not form part of the terms of her employment. Cassandra Collins also noted that not all employees were present for the test, that the test was conducted in a public building and that the test was not in accordance with the terms of her employment. The respondent Settlement argued that substance abuse was a huge problem for the Settlement and that the Settlement had gone to the RCMP with regard to the problem. Further, three employees did not present themselves for testing and all three were treated in the same manner.

The AHRCC Panel accepted that the Settlement was an Aboriginal Community (pursuant to the *Metis Settlement Act*), which provided them with the authority to implement a substance abuse policy. The Panel also found that the Settlement experienced a major substance abuse problem. The Panel concluded that Sonia Jacknife had a disability but that the Settlement had accommodated her to the point of undue hardship and that "substance abuse on her part could adversely affect her employment productivity". Further, operating her vehicle was found to be a bona fide occupational requirement, given the isolated location of the Settlement. The Panel held that the policy was applied in "an identical, non-discriminatory manner" and that the complainants were terminated for failing to follow an administrative policy. The Panel stated:

> While the expert testimony in other judicial proceedings is noted and that current testing methods cannot quantify productivity impairment, the panel takes the view that substance abuse does impair an individual's performance to some extent, whether measurable or not. The panel does not accept Ms Jacknife's allegation of non-accommodation, in view of the benefits provided by the employer with regard to her alcohol rehabilitation… It is the perception of the panel that the complainants were terminated through failure to adhere to an administrative policy, rather than through a disability…

The Panel assumed that the *Entrop*[10] decision was correct with respect to finding that random drug and alcohol testing is prima facie discrimination and that the policy implemented by the Settlement was also discriminatory. However, Sonia Jacknife's complaint was dismissed because the Settlement justified the policy by satisfying the BFOR[11] test adopted in Meiorin. Further, because Cassandra Collins did not adduce evidence of having a disability her complaint was dismissed.

Even though both complaints were dismissed and the Entrop case was applied, there are several points that did not appear to be sufficiently addressed in the case. For instance, it is unclear whether the policy enforced was the drug policy aimed at *all* employees, or whether it was the policy aimed at employees in safety-sensitive

10 Supra, note 4.
11 Supra, note 5.

positions. If it was the former, it appears that the Panel may support blanket drug policies (perhaps based on the facts of this case and in particular, the serious substance abuse problem faced by the Settlement). Further, after finding that the policy was in fact discriminatory, Cassandra Collins' claim was dismissed without going through the analysis outlined in *Entrop*.

CANADIAN HUMAN RIGHTS COMMISSION POLICY ON DRUG AND ALCOHOL TESTING

The Canadian Human Rights Commission's ("CHRC")[12] general policy statement on drug testing is as follows:

> Requiring an employee or applicant of employment to undergo a drug test as a condition of employment will, in most cases, be considered a discriminatory practice on the ground of disability.

The CHRC has outlined that policies aimed at pre-employment drug testing, pre-employment alcohol testing, random drug testing and random alcohol testing of employee's in non-safety-sensitive positions are not acceptable. However, the CHRC has acknowledged that an employer may implement one or more of the following testing programs where the employer can demonstrate a BFOR[13]. For instance, random alcohol testing of employees in safety sensitive positions[14] and drug or alcohol testing that is administered for reasonable cause or post-accident incidents may be acceptable. Also, where the employer has been made aware that a drug or alcohol problem exists, a periodic or random testing program may be necessary if it is tailored to the employee's circumstances and is part of a wider program designed to monitor and support the employee. Lastly, a policy that requires mandatory disclosure or present and/or past drug or alcohol dependency may be allowed for employees in safety-sensitive positions, provided that the employer has taken measures to accommodate the employee.

Where the employer has properly implemented a program, if an employee tests positive, the employer must accommodate the employee to the point of undue hardship. The CHRC has stated that the employer will not be required to accommodate an individual that is drug- or alcohol-dependant where:

> 1. the cost of accommodation would alter the nature or affect the viability of the enterprise, or
> 2. notwithstanding the accommodation efforts, health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing individualized accommodation or consideration to a worker with an addiction or dependency problem.[15]

ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION DRUG AND ALCOHOL TESTING

The AHRC[16] agrees that drug and alcohol addiction are a physical and/or mental disability that is protected by the Alberta *Human Rights, Citizenship and Multiculturalism Act*. Further, the AHRCC has applied the *Entrop* decision, however

12 The CHRC has produced a policy on drug and alcohol testing which may be viewed at http://www.chrc-ccdp.ca/Legis&Poli/DrgTPol

13 BFOR outlined in Meiorin, supra, note. 5

14 "A safety-sensitive job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation.", supra, note 12.

15 Supra, note 12.

16 The AHRCC has produced comments on this subject, which may be viewed at the following address: http://www.albertahumanrights.ab.ca/publications/Info_Drug_Testing.asp

does not have a detailed policy on the subject like that of the CHRC.

PRE-EMPLOYMENT, RANDOM AND POST-INCIDENT TESTING[17]

With respect to pre-employment testing, the CHRC has outlined that because drug and alcohol testing at the pre-employment stage can in no way predict the impairment of an employee while he or she is working, it is not "reasonably necessary to accomplish the legitimate goal of hiring non-impaired workers." In other words, drug and alcohol testing at the pre-employment stage does not pass the "reasonable necessity" branch of the *Meiorin* test outlined above.

Generally, because a drug test can only measure exposure to drugs and not current impairment, random drug testing is prohibited in any case because if fails the reasonable necessity branch of the *Meiorin* test.

However, where an employee is in a safety-sensitive position, random alcohol testing may be allowed. In these instances, the employer has a duty to accommodate the employee, up to the point of undue hardship, if he or she tests positive. Further, the employer must inform the employee in advance that the random test is a condition of his or her employment. For employee's who are not in a safety-sensitive position, random alcohol testing is not permitted unless the employer can show reasonable cause to think the employee is unable to do his or her job because of consuming alcohol.

Post-incident or "cause" testing may be allowed in certain circumstances, like in safety-sensitive work environments. For example, where an employee appears to be unable or unfit to perform his or her job, and there are grounds for believing the employee suffers from substance abuse, or following an accident, an employer may have grounds for determining whether the employee's condition could have contributed to the incident. However, an employer will still have to ensure that the employee is accommodated up to the point of undue hardship before dismissal or other severe forms of discipline are imposed on the employee. The CHRC has stated:

> An employer can generally establish that "reasonable cause" and "post-incident" testing is reasonably necessary to ensure the heightened safety standard that is necessary in risk-sensitive environments, if testing is part of a broader program of medical assessment, monitoring and support.

It also appears, that in following the *Entrop* decision, an employer may legitimately ask the employee to disclose a past and/or current substance abuse problem in safety-sensitive positions but not in non-safety-sensitive job. Further, if an employee has disclosed that he or she has a substance abuse problem, an employer may enforce unannounced random testing if the program is tailored to the individual employee and is part of a broader program that monitors and offers rehabilitation and support for the affected employee.

CONCLUSION

The courts have been clear that drug or alcohol dependency qualifies as a disability and is therefore, protected under human rights legislation. Mandatory or random drug testing policies in non-safety-sensitive positions are not acceptable (although see the *Jacknife*[18] case, where a substance abuse problem existed and the employer properly accommodated the employee),

17 The following analysis is provided by the CHRC, supra, note 12.

18 Supra, note 9.

whereas alcohol testing in these situations may be permitted in the right circumstances. On the other hand, employers may implement drug testing policies, as well as alcohol testing policies in safety-sensitive positions or post-incident scenarios, so long as the employer accommodates the employee to the point of undue hardship.

A "zero-tolerance" approach to drug and alcohol abuse is not acceptable. This means that once a policy is in place and an employee has tested positive, the employer must accommodate the employee to the point of undue hardship before taking severe disciplinary action like terminating his or her employment.

An employer may require an employee to submit to an alcohol and/or drug test in the following circumstances:

a. Prior to an employee's certification to work in a safety sensitive position.
b. Where it is suspected that an employee has a substance abuse problem and where the opinion was formed as a result of physical observation. This is commonly referred to as "for cause" testing. An employer in this circumstance can expect that, for the demand for testing to be found reasonable, it will have to establish that its grounds for suspecting drug use were reasonable and were based on more than allegation and impressions.
c. Post-incident. In this case, where there has been a workplace accident, an employer can ask the employee(s) involved to submit to testing to determine if the accident can be attributed to a drug abuse problem.
d. For the purposes of monitoring an employee's rehabilitative efforts. In this case, whether an employee's substance abuse was discovered by the employer, or whether the employee voluntarily disclosed the problem, the employer may require testing to ensure that the employee is following the rehabilitative program and is not regressing to their former dependency on drugs and/or alcohol. This testing is as much to provide encouragement to an employee to stay clean as it is to allow the employer to monitor the employee's progress. An employer will also have to carefully consider how long the employee will be subject to the testing requirement. At some point, the employee will have tested negative enough times that the concerns of current drug abuse will be sufficiently low that the employee can be treated like every other employee.

Is should be kept in mind that the law with respect to this area is not settled and the Supreme Court of Canada has not laid out the grounds where testing will be permissible. In any case involving substance abuse, before doing anything, an employer will be well advised to consult its legal counsel.

LIST OF AUTHORITIES

1. Canadian Human Rights Act R.S. 1985, c. H-6.
2. Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000 Chapter H-14.
3. Entrop v. Imperial Oil Ltd. (1995), 23 C.H.R.R. 196 (Ont. Bd.) [2000] O.J. 2689 (Ont. C.A.).
4. British Columbia (Public Service Employee Relations Commission.) v. B.C.G.S.E.U. (1999), 176 D.L.R. (4th) 1.
5. Canada (Human Rights Commission) v. Toronto Dominion Bank (1998), 32 C.H.R.R. D/261 (Fed. C.A.).
6. Sonia Jacknife and Cassandra Collins v. Elizabeth Metis Settlement,(December 6, 2002), Complaints N0006069 and N0006084 (Alta. H.R.C.C.). Please see the following website: www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisJacknife.asp
7. Canadian Human Rights Commission policy found at: http://www.chrc-ccdp.ca/Legis&Poli/DrgTPol.
8. Alberta Human Rights and Citizenship Commission commentary found at: http://www.albertahumanrights.ab.ca/publications/Info_Drug_Testing.asp.
9. Molnar, Schlotter, Drug and Alcohol Testing-The Latest Word, (May 2000) presented at the Infonex Conference, Human Rights and Privacy in the Workplace held at the Sheraton Suites Calgary, located in Calgary, Alberta.

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