

Workwise

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Supreme Court Speaks On Random Alcohol Testing

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The Supreme Court of Canada has released its decision in a much-anticipated case about random alcohol testing in the workplace. In a split decision, a majority of the Court decided that a policy requiring employees in a New Brunswick pulp and paper plant to submit to random alcohol testing was not reasonable.

The employer in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper, Limited* operated a paper mill in New Brunswick. There was no dispute that the mill was a potentially dangerous environment, where safety was very important. The mill was a unionized workplace. In 2006, the employer introduced a drug and alcohol policy. The policy was imposed unilaterally by the employer, without the agreement of the union.

Among other kinds of testing (which were not challenged), the policy provided for unannounced alcohol testing of randomly selected employees. Approximately ten per cent of employees would be selected for random testing each year. Not long after the policy was introduced, the union grieved on behalf of an employee who was tested after being randomly selected. The employee in question did not drink and tested negative, but objected to being required to submit to the test.

The grievance was heard by a labour arbitration board. The arbitration board heard evidence about whether there was an alcohol problem in the workplace. The employer presented evidence of eight documented incidents over a fifteen year period in which employees consumed alcohol in the workplace or were impaired by alcohol at work. There was no evidence of accidents or near misses related to alcohol use by employees. The arbitration board concluded the employer had not established that the need for random alcohol testing justified the intrusion into workers' privacy. The employer had therefore exceeded its rights by unilaterally imposing it. The New Brunswick Court of Queen's Bench overturned the arbitration board's decision on judicial review. The New Brunswick Court of Appeal upheld the Court of Queen's Bench's decision.

Six justices of the Supreme Court of Canada reversed the decision of the New Brunswick Court of Appeal, holding that random alcohol testing was unreasonable. Three justices would have upheld the decision, permitting random alcohol testing in this workplace.

Both the majority and the dissenting justices sought consistency with prior labour arbitration decisions. Both noted that Canadian labour arbitrators have found random drug or alcohol testing to be reasonable only if the evidence establishes a general problem in a dangerous workplace. Labour arbitrators have rejected random drug or alcohol testing imposed only to deter drug or alcohol use in a workplace without a demonstrable problem. The differences between the majority and minority concerned their interpretation of the facts in this case.

The majority found it was reasonable to conclude that there was no general problem with alcohol in this paper mill. Further, there was little evidence about the effectiveness of random testing as a deterrent in this workplace. Given the arbitration board's factual findings, its conclusion was consistent prior labour arbitration decisions.

The minority interpreted the evidence differently. In its view, there was some evidence of an alcohol problem in the workplace. It was not necessary to establish a significant problem or that alcohol use had led to accidents or near misses before introducing random testing. The minority also found the arbitration board wrongly minimized the deterrent effect of random testing.

The Supreme Court's decision does not significantly change the law on random drug or alcohol testing in the workplace. All the justices of the Court upheld principles already established in labour arbitration case law. In drug and alcohol testing, safety or other interests must be balanced against workers' privacy interests. Random testing is considered especially intrusive, and will be justified only if there is evidence that safety cannot be achieved by less intrusive methods.

As we reported to you in December, an Alberta labour arbitrator is currently hearing a case involving Suncor's plans to implement random drug and alcohol testing of employees in safety-sensitive positions. The decision in that case, which will no doubt refer to the Supreme Court's decision, may provide some further guidance on the circumstances where random drug or alcohol testing will be justified. We will continue to keep you informed of developments in this area.

Contact one of our professionals in our experienced [Labour and Employment Group](#) for more information on how legislations regarding random drug or alcohol testing in the workplace may impact you.

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