News

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Appeal court weighs in on workplace testing rules

MICHAEL BENEDICT

Another major legal battle over random drug and alcohol testing in the workplace is on the verge of a watershed decision by the Alberta Court of Appeal. On Nov. 7, that court will be the first at the appellate level asked to apply the Supreme Court of Canada's three-year-old principles and guidelines on when such testing is allowed. The adversaries this time are Suncor Energy, one of the world's largest independent energy companies, and Unifor, the country's largest private sector union.

In advance of the hearing, an Alberta appeal court judge recently approved, over the union's objection, intervener status for five heavy industry associations. They will be allowed to submit a joint brief in Unifor's appeal of a judicial review that quashed an arbitration panel's ruling overturning Suncor's testing policy. The panel agreed Suncor's oil sands operations were, indeed, dangerous, but found its random testing was unreasonable and that its rationale did not trump employee privacy rights. However, Queen's Bench Justice D. Blair Nixon ruled that the panel misapplied the criteria and standards for permissible random testing set out by the Supreme Court in *Communications, Energy and Paperworkers Union, Canada, Local 30 v. Irving Pulp & Paper, Ltd.* 2013 SCC 34. Nixon ordered a new arbitration panel to rehear the matter, and Unifor has appealed the decision in *Suncor Energy Inc. v. Unifor Local 707A* 2016 ABQB 269.

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>
> **Eric Adams**
> University of Alberta

Now, others will join in the action as a result of Justice Marina Paperny's ruling last month in *Suncor Energy Inc. v. Unifor Local 707A* 2016 ABCA 265. While Justice Paperny acknowledged the union's "compelling" submission that intervener status should be denied because its appeal involves a "relatively straightforward judicial review application involving the reasonableness of an arbitrator's decision…under a particular collective agreement at a particular worksite." However, she went on to say, "Nevertheless, the appeal will likely engage larger policy issues that may usefully be informed by the perspective offered by the applicant industry representations and the resolution of which may directly affect their members."

Justice Paperny also noted that Justice Nixon had granted intervener status to two of the now five applicants representing the mining, construction, electricity and upstream oil and gas industries. While this did not automatically grant them the right to also intervene on appeal, Justice Paperny said it is a "factor to consider." In granting their application, she added, "The interests of the applicants and the assistance they can provide in the appeal remain substantially the same as in the court below."

The case involves a 2012 Suncor random drug and alcohol testing policy for employees in safety sensitive positions. Citing its legal obligation to eliminate or control hazards in the workplace, the company showed evidence of more than 2,000 drug and alcohol-related security incidents over a nine-year period to justify the testing. Suncor also claimed that at least three of the seven people who have died at its worksites were under the influence of drugs or alcohol.

The union filed a grievance, claiming the company's evidence was vague and did not distinguish among unionized, non-unionized or contract employees. The arbitration panel agreed, adding Suncor also failed to show that a worksite problem was sufficiently serious to permit the intrusion of privacy involved in drug and alcohol testing.

But Suncor argued successfully before Justice Nixon that the panel wrongly applied a higher standard than set out by the Supreme Court in *Irving*. While *Irving* says a dangerous workplace does not automatically justify random testing, it adds that such testing is permissible if it is proportionate to the issue being addressed, balancing safety and privacy interests. Justice Nixon found the panel was wrong in requiring a "serious" or "significant" problem to justify random testing. He said Suncor need only establish a "general" problem and that it does not have to establish a causal connection between drug and alcohol usage and accidents.

University of Alberta law professor Eric Adams says Justice Paperny was right to allow the interveners to make arguments on applying *Irving*. "Even though the union argues that this is a narrow judicial review, in reality the case is being closely watched beyond the oil industry," he says.

Adams adds that next month's appeal court hearing will tackle the fundamental tension between safety and privacy in many workplaces. "It's a serious matter," he says. "The right to human dignity and body privacy can't be breached without serious cause.

"On the other hand, the threat of serious injury and catastrophic environmental damage is always there. The employer has a valid interest. *Irving* says there has to be a balance, and the argument will be about its threshold."

For his part, Toronto labour lawyer Jeffrey Andrew of Cavalluzzo Shilton McIntyre Cornish says it would have been surprising if the court had not allowed the others to intervene. "This is such a big issue in Alberta's oil and gas industry," he says. "They are trying to push the envelope to establish factors that will justify this invasion of privacy."

Adds Andrew: "However, if management unilaterally imposes random testing on a unionized environment, it needs evidence that the problem is related to union members. If the problem is elsewhere, it is not relevant to the bargaining unit."

Suncor's outside counsel, Barbara Johnston of Dentons Canada in Calgary, disagrees, saying the employer need only establish a general workplace problem to take remedial action. "*Irving* calls for a balancing, not a hierarchy, of interests," she says.

In Johnston's view, the looming Court of Appeal judgment will "impact on industry broadly and across Canada in regard to the safety of workers, the public and the environment."

Toronto lawyer Howard Levitt, whose practice, Levitt LLP, represents both management and employees, says worker and public safety issues should supersede privacy rights. Overturning the arbitration panel's finding was a "heartening" decision, he says. "Taking drug or alcohol tests is a mild inconvenience," Levitt adds, "when compared to working next to someone who is stoned and can endanger you as well as him or herself."

Brouwer: Federal Court has taken 'hands off' approach

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to the immigration detention system. "It has viewed the IRPA as sort of a coherent system for detention review," he said.

A recent Federal Court decision, *B.B. and Justice for Children and Youth v. Minister of Citizenship and Immigration*, found that the best interests of a child could be considered in their parent's immigration detention review hearing (Aug. 24, 2016, IMM-5754-15).

The Supreme Court of Canada, in *Kanthasamy v. Canada (Citizenship and Immigration)* 2015 SCC 61, also described the importance of the best interests of the child, but did not frame it as the primary consideration, the report found.

"That decision, like pretty much every domestic Canadian decision, has not gone as far as we're required to go under international law, which is an explicit requirement that decision-makers put the best interests of the child as the primary factor," Brouwer said.