The Supreme Court rules on workplace drug and alcohol testing

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In its decision in C.E.P., Local 30 v. Irving Pulp & Paper Ltd., 2013 SCC 34, a divided Supreme Court has ruled for the first time on the issue of drug and alcohol testing in **unionized workplaces.**

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UNIONIZED WORKERS ARE PROTECTED FROM RANDOM DRUG TESTING

The case involved a random alcohol testing policy established by Irving Pulp & Paper in the exercise of its management rights. The policy applied to employees in safety-sensitive positions in a craft paper mill that constituted an admittedly dangerous work environment. An employee selected for random alcohol testing objected and the union grieved the policy. The grievance was allowed by the arbitration board, essentially on the ground that the employer had failed to show a serious problem of alcohol abuse in the workplace (there had been eight incidents where employees were found to be under the influence of alcohol in the 15 years prior to the filing of the grievance) that would make imposing such a rule a reasonable exercise of management rights. The New Brunswick courts quashed the decision as an erroneous application of the law.

The majority decision endorses a line of arbitral case law that permits testing of employees in safety-sensitive positions in dangerous work environments for cause and, in strictly limited circumstances, for alcohol impairment on a random basis.

The majority decision strongly emphasizes that, in a **unionized environment,** an employer must either negotiate a drug and alcohol testing policy with the union or bring any policy established as an exercise of management rights within the tests for reasonableness in the exercise of management rights set out in *KVP Co.* (1965), 16 L.A.C. 73.

The Supreme Court majority found that the *"Nanticoke"* decision (*Re Imperial Oil Ltd. and C.E.P., Local 900* (2006), 157 L.A.C. (4th) 225 (M. Picher)) set out the consensus among Canadian arbitrators on an employer's right to establish drug and alcohol testing policies *as an exercise of management rights*; the majority holds that an employer and a union are of course free to negotiate drug and alcohol testing policies as part of a collective agreement.

For the majority, Canadian arbitral case law permits drug and alcohol testing in inherently dangerous work environments as an exercise of management rights in two sets of circumstances:

a. **"for cause"** testing of individual employees where there are reasonable grounds to consider they may be under the influence of drugs or alcohol; where an employee has been involved in an accident or other incident causing safety concerns; and as part of a return to work agreement negotiated with a union. In this case, *the agreement can include random drug and alcohol testing of the individual employee.*

Under a Collective Agreement:

"There are no cases in which an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem."

Supreme Court Justice, Rosalie Abella

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b. if an employer can demonstrate that there is a generalized problem of drug or alcohol abuse in a particular workplace that is an inherently dangerous working environment, random drug or alcohol testing can be permissible.

The majority of the Supreme Court found that the arbitration board's decision was a reasonable application of these principles of arbitral case law. Hence, the courts below should not have intervened and set aside the board's decision. The majority relied to a large degree on what it found was the employer's failure to demonstrate in *Irving Pulp & Paper Ltd.* a general problem of alcohol abuse in its workforce.

In reaching this conclusion, the Supreme Court majority refers with apparent approval to two arbitral decisions in which a random alcohol testing policy was upheld. In one of these decisions (*Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*, [2007] C.L.A.D. No. 243 (QL) (Devlin)), the employer relied on detailed evidence of the presence of empty alcohol containers in the workplace, numerous instances where employees were observed drinking in the workplace or were observed to smell of alcohol and numerous incidents of unreported alcohol abuse at work.

In the other decision (*Communications, Energy and Paper Workers Union of Canada, Local 777 v. Imperial Oil Ltd*. (T.J. Christian), May 27, 2000 (unreported)), the employer relied on the results of a survey of employees conducted by an outside professional polling company concerning alcohol related incidents and near accidents due to alcohol. The results showed a disproportionately high rate of accidents due to substance abuse, with 2.7% of employees reporting "near misses" due to alcohol abuse in the preceding year. The arbitration board found that such survey evidence justified the employer's random testing policy.

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NON-UNION EMPLOYEES DO NOT HAVE THE SAME RIGHTS AS UNIONIZED EMPLOYEES

CONCLUSIONS

- Importantly, both the majority and minority judgments reject the drawing of distinctions among inherently dangerous workplaces based on efforts to distinguish precise degrees of dangerousness.

- Overall, the result in *Irving Pulp & Paper* is that employers may continue to test individual employees for cause in dangerous work environments and may randomly test employees in such work environments if they establish the existence of a substance abuse problem there. In short, it confirms one approach in Canadian arbitral case law rather than establishing wholly new rules for drug and alcohol testing.

- The majority notes that parties are free to negotiate their own rules of drug and alcohol testing and include them in their collective agreement. These rules may differ from the ones limiting drug and alcohol testing under a general "management rights" clause. The minority does not disagree with this proposition. Negotiated terms would, of course, have to take into account the duty of reasonable accommodation for employees with substance abuse problems.