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Alberta Court of Appeal Rejects Narrow Interpretation of the Irving Test Justifying Random Drug and Alcohol Testing

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The leading Supreme Court of Canada case on the balancing of employees' privacy rights with random drug and alcohol testing in safety-sensitive workplaces is the 2013 case *CEP, Local 30 v Irving Pulp & Paper Ltd* ("*Irving*"). The Supreme Court in *Irving* found that the random drug and alcohol testing policy at issue in that case violated employees' privacy rights, and would only be justifiable in situations where there is:

1. A dangerous workplace; and
2. Enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.[1]

The Supreme Court specifically stated that their decision in *Irving* did not mean that an employer can never impose random drug and alcohol testing in a workplace,[2] but it was unclear following the decision what threshold of evidence would be required to satisfy the test.

The issue of what is required for an employer to demonstrate "a general problem of substance abuse in the workplace" featured prominently in the Alberta Court of Appeal decision in *Suncor Energy Inc v Unifor Local 707A* ("*Suncor v Unifor*"). The Court reaffirmed that it is possible to justify random drug and alcohol testing in certain cases, and provided useful guidance on when this is possible.

Background

The drug and alcohol policy at issue in *Suncor v Unifor* required employees at Suncor's oil sands operations working in safety-sensitive positions to undergo random drug and alcohol testing. The issue in this case was whether Suncor's policy was justifiable, considering the infringement that random drug and alcohol testing has on employees' privacy rights. The first part of the *Irving* test, whether there was a dangerous workplace, was not disputed. All parties acknowledged that the workplace was dangerous.

In attempting to show that it had met the second part of the *Irving* test, Suncor presented evidence to the arbitration board highlighting issues with substance abuse at the worksite. Suncor had approximately 10,000 workers on site at any given time, of which 3,383 employees were unionized workers represented by Unifor, 2,963 were non-unionized workers, and the rest were contract employees. The arbitration board ultimately rejected much of Suncor's evidence regarding the issues of substance abuse at the worksite, since the evidence related to incidents involving all 10,000 of its workers, and did not specify whether or not members of the bargaining unit were involved. The arbitration board said that it could not make a decision that would infringe the privacy rights of a limited group of employees (the members of the bargaining unit), when it could not definitively say based on the evidence that those employees were a part of the problem of substance abuse.[3] As such, the arbitration board held that Suncor had not shown there was a significant problem

with substance abuse in the workplace, and it therefore failed to meet the second part of the *Irving* test.[4]

On judicial review, the Court of Queen's Bench found that the arbitration board's decision was unreasonable because the arbitration board misapplied the *Irving* test by requiring Suncor to show there was a "significant" problem, rather than a "general" problem, and because the arbitration board did not consider all of the relevant evidence.[5] The Court ordered that the case be remitted to a fresh panel for new consideration. Unifor appealed this decision to the Alberta Court of Appeal.

Court of Appeal Decision

The Court of Appeal dismissed Unifor's appeal, and upheld the decision of the Court of Queen's Bench to remit this matter for consideration by a fresh panel. The Court of Appeal found that by excluding Suncor's evidence of substance abuse in the workplace because it did not relate specifically to the bargaining unit, the arbitration board had improperly narrowed the scope of the *Irving* test. The *Irving* test requires consideration of a substance abuse problem *in the workplace.* It is not limited to a substance abuse problem *in the bargaining unit*. While in some circumstances it may be reasonable to distinguish between groups of employees for the purpose of this question, there was no reason to do so in this case, as the different employees worked together in an integrated workforce.

The Court of Appeal held that by unreasonably narrowing the evidence it considered, the arbitration board effectively asked the wrong question and applied the wrong legal test.[6]

Comment

Whether Suncor's drug and alcohol policy is justified in this case remains to be determined, but the Court of Appeal's decision made it clear that in making this determination, the *Irving* test is not to be interpreted more strictly or narrowly than it was framed by the Supreme Court of Canada. All evidence of a substance abuse problem in the workplace is relevant to this determination, even if it does not specifically relate to the group of employees opposing the policy.

The Court has reaffirmed to employers that despite the issues relating to employee privacy, justification of random drug and alcohol testing policies is possible in a dangerous workplace, where there is a general problem of substance abuse.

[1] *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 at para 31.

[2] *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 at para 52.

[3] *Unifor, Local 707A v Suncor Energy Inc*, 2014 CanLII 23034 at para 264.

[4] *Unifor, Local 707A v Suncor Energy Inc*, 2014 CanLII 23034 at para 341.

[5] *Unifor, Local 707A v Suncor Energy Inc*, 2016 ABQB 269 at paras 69, 95.

[6] *Unifor, Local 707A v Suncor Energy Inc*, 2017 ABCA 313 at para 48.

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