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# APPELLATE COURT ISSUES FAVOURABLE DECISION FOR SUNCOR ON ITS RANDOM DRUG AND ALCOHOL POLICY

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The legal saga on the issue of random drug and alcohol testing of employees continues.

In *Suncor Energy Inc v. Unifor Local 707A*,[1] the Alberta Court of Appeal sent the issue of whether Suncor's random drug and alcohol testing policy violated the privacy rights of its unionized workers back to a new arbitration hearing before a different panel. It agreed with a reviewing court that the majority of an arbitration tribunal was unreasonable in taking into account only substance abuse among Suncor's unionized employees, rather than the whole workforce, when it allowed the union's policy grievance.

## Suncor's Attempts to Address Substance Abuse

The grievance was brought by Unifor in response to Suncor's introduction of random drug and alcohol testing in 2012 at its Regional Municipality of Wood Buffalo sites near Fort McMurray.

When the policy was introduced, Suncor indicated that employees in safety-sensitive positions would be subject to random testing. Executive members of the Suncor management team who were on site, including the CEO, would also be subject to such testing. Prior to implementing random testing, Suncor had taken extensive measures to address drug and alcohol concerns at its worksites. These included employee education and training, "post-incident" and "return to work" testing, an employee assistance program, a treatment program for employees with substance dependencies, a drug interdiction procedure, sniffer dogs and an alcohol-free camp policy.

There was no dispute that Suncor's operations were highly safety-sensitive and that proper safety procedures at these sites were critical to prevent workplace accidents which might result in human or environmental disaster.

## The Arbitration Decision

The grievance was the subject of a lengthy arbitration hearing with extensive testimony. Both parties called expert witnesses.

[1] *Suncor Energy Inc v. Unifor Local 707A*, 2017 ABCA 313.

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The key question was whether there was sufficient evidence of a substance abuse problem in Suncor's Fort McMurray operations to justify random drug and alcohol testing, given the privacy concerns inherent in such random testing.

Suncor led extensive evidence about employee substance abuse problems at its Fort McMurray operations. Some of the evidence directly implicated unionized members. However, much of the evidence related to the workplace as a whole and did not distinguish between unionized employees, non-unionized employees and contractors' employees.

Suncor also argued from a public policy perspective that if the tribunal allowed random testing of Suncor's own unionized employees, then it could in turn require its contractors to randomly test their employees. This would be in the public interest since it would significantly enhance Suncor's ability to mitigate workplace hazards.

The majority concluded that only evidence specific to Suncor's *bargaining unit employees*, not evidence of a problem in the workplace as a whole, could be assessed in determining whether there was a general substance abuse problem at the Fort McMurray operations. It held that the employer had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing and allowed the grievance. The dissenting member concluded that there was overwhelming evidence of safety issues within the workplace, including substance abuse issues, and would have upheld the employer's random testing scheme.

Suncor applied for judicial review of that decision. The reviewing court held that the majority decision was unreasonable and sent the matter back for a new hearing before a new arbitration panel. Unifor appealed.

## At the Court of Appeal

The Court of Appeal dismissed the appeal by focusing on one aspect of the lower court decision. It agreed with the lower court that the majority of the tribunal was unreasonable in finding it only needed to consider evidence of substance abuse within the bargaining unit, rather than the broader workplace.

The key issue was the interpretation of the Supreme Court of Canada's decision in *C.E.P., Local 30 v. Irving Pulp & Paper, Ltd.* (*Irving*).[2] In *Irving*, Justice Abella explained how a dangerous worksite is not, in itself, enough to justify management imposing random drug or alcohol testing on its unionized employees. She defined the test in terms of whether there are special safety risks, and in particular, whether there was evidence of a general problem of substance abuse *within a workplace*.

The majority of the tribunal stated that only evidence relating to Suncor's unionized employees could be assessed in determining whether there was a general substance abuse problem at the Fort McMurray operations. The Court of Appeal held that it was unreasonable for the majority to insist upon "particularized" evidence specific to Suncor's unionized employees. At arbitration, the uncontradicted evidence was that unionized employees, non-unionized employees, and contractor employees all worked side-by-side, in integrated workforces at integrated jobsites. As a result, the Court concluded that the majority of the arbitration tribunal could not reasonably justify drawing an arbitrary distinction between evidence of substance abuse problems in the workplace as a whole and evidence of substance abuse problems specific to the unionized employees. The Court of Appeal also concluded that the tribunal failed to give sufficient reasons as to why it preferred the evidence of the single Unifor expert over that of the three Suncor experts.

## Conclusion

This is a positive decision for workplace safety and for employers. The Court's decision indicates (in line with the *Irving* decision) that random testing may be permissible in some circumstances.

However, the legal saga will likely continue for several more years. A decision on Suncor's policy itself may be a long way away, as Unifor has already indicated that it intends to seek leave to appeal to the Supreme Court of Canada.

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[2] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34.