Drug and Alcohol Testing: Recent Developments in the Law

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I. Introduction

In Canada, there is no legislative regime that governs drug and alcohol testing in the workplace. The body of case law that addresses the topic reveals two different approaches. Western Canadian case law has generally permitted broader drug and alcohol testing programs in workplaces that are safety-sensitive, with no requirement for the employer to demonstrate an existing substance abuse problem in the work environment prior to testing. Cases from Eastern Canada reflect a narrower approach that draws a strong distinction between drug and alcohol testing, and may limit testing to circumstances where workplace operations are “inherently dangerous” or where there is a history of drug and alcohol-related incidents.

However, the state of the law with respect to all types of drug and alcohol testing is evolving in Canada and requires employers to be vigilant in monitoring developments and considering the evidence that they can provide regarding the need for testing in their particular workplace. In December 2012, the Supreme Court of Canada heard the appeal of Irving, discussed below. It is expected that the Court will be releasing its decision in the near future.

II. Primary Sources of Employer Liability for Drug and Alcohol Testing

Both human rights and privacy concerns must be addressed by employers seeking to implement drug and alcohol testing in Canada. Employees may allege that drug and alcohol testing discriminates on the basis of a disability (substance dependency) and thus violates human rights protections. Once an employee has established that an employer policy is prima facie discriminatory, the onus shifts to the employer to prove that the impugned policy is a bona fide occupational requirement (“BFOR”). In Meiorin at para. 54, the Supreme Court of Canada set out what is now the accepted test for determining whether an employer has established a BFOR:

1. Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?
2. Did the employer adopt the particular policy or standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate, work-related purpose? and
3. Is the policy or standard reasonably necessary to accomplish that legitimate, work-related purpose?

Under the third criterion, an employer must show that the policy or standard adopted is the least discriminatory way to achieve its intended purpose. The employer must demonstrate that it is impossible to accommodate individual employees affected by the policy or standard without suffering undue hardship.

Accommodation to the point of undue hardship requires an employer to show that:

1. The cost of accommodation would substantially alter the nature and affect the viability of the employer’s enterprise; or
2. Notwithstanding accommodation efforts, health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing equal treatment to the worker with an addiction or dependency.

In addition, drug and alcohol testing policies can raise privacy concerns. Employees may, for example, challenge testing policies as an invasion of their privacy, if such a right is recognized in their province.

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of employment or under the terms of a collective bargaining or other agreement. Alternatively, such challenges may be brought on the basis that a policy breaches applicable statutes governing the collection, use and disclosure of personal information about the employee. For example, Quebec, BC, and Alberta have enacted legislation limiting the collection, use and disclosure of personal information about a person to what is reasonably necessary for the purposes of employment. Accordingly, the collection, use and disclosure of personal information obtained through drug and alcohol testing must be reasonably necessary in the circumstances of the employer’s operations.

III. A Disparate Approach—Case Law on Drug and Alcohol Testing Across Canada

With the divide between Eastern and Western Canada in mind, several key decisions provide guidance on the rights and obligations of an employer that chooses to implement a drug and alcohol testing policy.

A. Entrop (Ontario)

Entrop is an Ontario decision that has had a significant impact on the development of the case law on drug and alcohol testing nationwide. In Entrop, the Ontario Court of Appeal considered an employer policy instituted at Imperial Oil refineries that required employees in safety-sensitive positions to submit to random drug and alcohol testing, and provided for automatic dismissal upon a positive test result. Employees in safety-sensitive positions were further required to disclose any current or past substance abuse problems, resulting in mandatory reassignment.

The Court held that the employer's policy on pre-employment drug testing and random drug and alcohol testing of employees in safety-sensitive positions imposed sanctions on "any person testing positive ... on the assumption that the person is likely to be impaired at work currently or in the future, and thus not 'fit for duty'" (para. 92). In this fashion, the policy adversely affected persons testing positive as either perceived or actual substance abusers, making the policy prima facie discriminatory. However, the Court held that random alcohol testing of employees in safety-sensitive positions could be justified as a BFOR provided that sanctions are properly tailored to an employee’s individual circumstances.

The Court distinguished between drug and alcohol testing on the grounds that drug testing is indicative of past drug use rather than current or likely future impairment, and is therefore irrelevant to an employee’s capacity to perform his or her duties. Conversely, a positive breathalyzer reading is indicative of actual impairment and is therefore a reasonable requirement for employees in safety-sensitive positions.

As for testing post-incident and for cause, the Ontario Human Rights Commission accepted that alcohol testing in these circumstances was justified as “sufficiently related to job performance” (para. 114). No comment was made on this issue by the adjudicating Board or the Courts. With respect to drug testing, the Court of Appeal upheld the Divisional Court’s finding that post-incident and for cause testing is only acceptable as part of a larger drug abuse assessment program.

Further, relying on expert evidence, the Court found that employers could only impose disclosure requirements for current and past substance abuse problems experienced by an employee within a five to six-year cut-off period for alcohol abuse, and a six-year period for drug abuse. The Court also held that the employer had failed to establish that automatic reassignment upon disclosure of past substance abuse was reasonably necessary in all cases, finding that this component of the drug and alcohol testing policy failed to accommodate individual differences and capabilities as required by human rights law.

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**B. Follow-Up Decision to Entrop—Imperial Oil (Ontario)**

In 2003, Imperial Oil re-introduced a *random drug testing policy*. Imperial Oil justified this policy on the basis of new technology in the form of oral (or buccal) swabs, which it argued could measure current drug impairment and therefore responded to the concerns expressed by the Ontario Court of Appeal in *Entrop*. The union brought a grievance challenging the new policy on grounds including allegations that the testing procedures were contrary to the provisions of the collective agreement aimed at promoting an environment of respect and dignity in the workplace.

The majority of the arbitration board found “for cause” and “post-incident” drug testing to be justified. It also upheld testing that formed part of a continuing contract of employment for rehabilitation where an employee was clearly suffering from substance abuse (i.e., “return to work” and “last chance” agreements”). However, the Board held that, absent reasonable cause, random drug testing had been implemented in violation of the terms of the collective agreement.

The Court of Appeal⁴ agreed with the Board that buccal swab testing for marijuana is not analogous to breathalyser testing for alcohol. The key difference was the lack of immediacy of the testing results; whereas a breathalyser could immediately return a result and allow an employer to take action to avoid impaired job performance, the swab had to be sent off-site for analysis with results available only after several days.

The decision in *Imperial Oil* may thus have added to the law in Ontario a requirement that drug testing mechanisms both demonstrate current impairment and provide results that are available immediately. It should be noted that this decision is in contrast to the 2007 Alberta Court of Appeal decision in *Chiasson*, discussed below, where the Court approved of random drug testing for marijuana as an acceptable practice.

**C. Goodyear Canada (Québec)**

The leading case in Québec is *Goodyear Canada*.⁴ In this decision, the Québec Court of Appeal struck provisions of Goodyear’s drug and alcohol testing policy that contemplated random testing for safety-sensitive positions at a tire manufacturing plant. The testing policy was challenged on the basis that it contravened the collective agreement in place at the plant, the *Civil Code of Québec* (“Civil Code”) and Québec’s *Charter of Human Rights and Freedoms* (“Québec Charter”).

The Court of Appeal found that there was no question that alcohol and drug testing policies could infringe individual rights as protected under both the *Civil Code* and *Québec Charter*. However, the *Québec Charter* permits restrictions on individual rights provided that a restriction is imposed in furtherance of a legitimate and substantial objective and is proportional to the end sought, meaning that the restriction is rationally connected to the identified objective and impairs the right at issue as little as possible.

The Court concluded that random drug and alcohol testing for workers in safety-sensitive positions was not a reasonably minimal impairment of individual rights. The Court said at para. 28: “Before random testing is imposed, measures based on reasonable cause, as well as screening to control accidents and absences related to alcohol or drugs, should be implemented.” The Court further commented that the business was not itself sufficiently dangerous to warrant the implementation of special protective measures, and that the factual record did not demonstrate a particular problem with

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⁴ *Imperial Oil Ltd. v. C.E.P., Local 900*, 2009 ONCA 420, 96 O.R. (3d) 668 [*Imperial Oil*].
⁴ *Communications, Energy and Paperworkers Union v. Goodyear Canada Inc.*, 2007 QCCA 1686, 61 CHRR D/1 [*Goodyear Canada*].
10.1.5

alcohol consumption or drug use amongst the employees at the plant in question. These conclusions, which reflect consideration of issues similar to those in *Irving*, were drawn notwithstanding the plant’s poor record for industrial accidents.

In striking the random testing provisions of Goodyear’s policy, the Court appeared to approve of the following statement regarding the reliability of drug testing, cited at para. 26:

Second, drug testing cannot measure impairment. It identifies only the past use of a drug. It cannot tell precisely when the drug is used, how much of the drug was used, or whether the person became impaired at the time of the use. It cannot tell whether the person is an occasional user or a serious addict. Most important it cannot identifies [sic] present impairment.

This statement accords with the reasoning in *Entrop*.

With respect to testing based on reasonable and probable cause, and testing further to an alcohol or drug-related absence or following a serious accident, the Court held that such types of testing are reasonable restrictions on an individual’s rights.

**D. Chiasson (Alberta)**

*Chiasson* is a decision of the Alberta Court of Appeal decided seven years after *Entrop*. In *Chiasson*, the Court considered an employee’s claim that he had suffered discrimination as a result of a zero-tolerance drug testing policy applicable to the post-offer/pre-employment stage of the hiring process. The policy provided that prospective employees who failed the test would not be hired, although they would be eligible for reconsideration after a period of six months. Mr. Chiasson failed the drug test as a result of marijuana use almost a week prior to testing. The Court found that the purpose of the policy was to “reduce workplace accidents by prohibiting workplace impairment” (para. 33).

Crucial to the Court’s reasoning is the context in which Mr. Chiasson sought employment, and in which the policy was imposed. The employer was a contractor involved in a plant expansion in the oil sands in the Fort McMurray area. Several different companies assisted with the expansion, which involved thousands of workers and the integration of construction with ongoing oil production. The Court of Appeal noted, “Some of the largest industrial equipment on the planet was in use and the accident risk was high. Consequences of accidents could impact workers, the plant and the environment” (para. 3).

The Court of Appeal overturned the chambers judge’s ruling that Mr. Chiasson, although not an addict, had been excluded from employment on the basis of a perceived disability resulting from a policy that treated all individuals with positive test results as drug dependent and therefore likely to report for work in an impaired state. Relying on evidence indicating that the effects of marijuana linger for several days after use and “raise concerns regarding the user’s ability to function in a safety challenged workplace” (para. 33), the Court held that the policy was aimed at actual effects experienced by recreational users and not perceived effects experienced by addicts. The Court admitted that there is overlap between the two but declined to accept that this overlap gives rise to the mistaken perception that the casual user is an addict. Recognizing that this conclusion was likely inconsistent with the ruling of the Ontario Court of Appeal in *Entrop*, the Court specifically declined to follow that decision.

The Court concluded, “In this case KBR’s policy does not perceive Chiasson to be an addict. Rather it perceives that persons who use drugs at all are a safety risk in an already dangerous workplace” (para. 34). Although the Court upheld the policy without resort to the BFOR analysis, the Court recognized

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that this emphasis on the connection between drug use and workplace safety is reminiscent of the “reasonable necessity” criterion under the *Meiorin* test: “Although it might be argued that this analysis really deals with the issue of bona fide occupational requirement we conclude that it also has a role to play in whether a workplace policy is discriminatory under the Act” (para. 34). Comparing the case at bar to the case of a trucking or taxi company that requires employees to refrain from drinking alcohol for a specified period prior to a shift, the Court commented, “Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic” (para. 36).

The Supreme Court of Canada denied leave to appeal the decision in *Chiasson*,
making the Court of Appeal’s ruling the most authoritative decision on drug testing in employment in Alberta. Although *Chiasson* concerned pre-employment testing, the Court’s finding that drug testing is an effective indicator of current impairment suggests that the reasoning can be extended to random testing. However, it is unclear whether the decision applies to drugs other than marijuana.

E. Milazzo (Canadian Human Rights Tribunal)

*Milazzo* is a decision of the Canadian Human Rights Tribunal decided prior to *Chiasson* but with a similar emphasis on the primacy of workplace safety. In *Milazzo*, the Tribunal held that *pre-employment and random drug testing* of bus drivers, although *prima facie* discriminatory, was “reasonably necessary to accomplish the company’s legitimate work-related goal of promoting road safety” (para. 173). The Tribunal’s decision in this regard was based on the following considerations:

1. the evidence suggested that drug use by drivers in the transportation industry is “a real problem, with significant implications for public safety” (para. 129);
2. bus drivers spend significant time on the road without supervision, with no way to detect drug and alcohol abuse;
3. the workforce is seasonal and transient, making costly pre-employment assessment of employees economically unfeasible;
4. a positive drug test, although not indicative of actual impairment, is a “red flag” to assist in identifying drivers who are at an increased risk of accident;
5. the testing policy was necessary to comply with American drug testing legislation applicable to drivers on cross-border routes.

However, although the Tribunal found drug testing to be “a legitimate way to promote road safety” (para. 175), it ruled that the employer’s practices were nonetheless discriminatory due to the absence of accommodation. The Tribunal held that employers are not entitled to terminate employment or withdraw offers without first providing accommodation to the point of undue hardship for those persons suffering from a substance-related disability.

In the subsequent decision of *Dennis v. Eskasoni Band Council,* the Canadian Human Rights Tribunal reached the opposite conclusion, finding accommodation measures incorporated into the band’s comprehensive drug and alcohol testing policy to be “more than reasonable” (para. 115): “The opportunity to re-test, obtain an assessment and receive treatment available under the ‘Fit to Work’ policy stands in stark contrast to the component of the policy in *Milazzo* that was the basis on which the Tribunal found that the policy in that case did not satisfy the Act’s requirements” (para. 113).

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6  [2008] SCCA No 96 (QL).
7  *Milazzo v. Anticuer Connaissier Inc.*, 2003 CHRT 37, 47 CHRR D/468 [*Milazzo*].
8  2008 CHRT 38.
IV. Timing, Reason and Purpose—Legal Status of Different Testing Regimes

A. Pre-Employment Drug and Alcohol Testing

The law in Canada with respect to pre-employment testing is currently unsettled, and employers should therefore be cautious in adopting and implementing such measures. An employer may be entitled to engage in pre-employment drug and alcohol testing provided that the testing policy is reasonably necessary for the achievement of its intended purpose, and provided that the employer takes all steps to accommodate employees to the point of undue hardship in the event of a positive test result. As components of the BFOR test, these requirements apply to all types of drug and alcohol testing.

B. Post-Incident Drug and Alcohol Testing and Testing for Reasonable Cause

Post-incident testing and testing for reasonable cause are likely permissible in a safety-sensitive workplace. To date, no cases have come before the courts regarding reasonable cause and post-incident drug and alcohol testing of employees in non-safety-sensitive positions. If an employer could demonstrate that there was no other way to ensure overall workplace safety, then a testing policy intended to apply to individuals in non-safety-sensitive positions might pass the reasonable necessity arm of the Meiorin BFOR test.

C. Random Drug and Alcohol Testing

Random alcohol testing of employees in safety-sensitive positions may be permissible where such testing is reasonably necessary in the context of the employer’s operations and provided that the employer takes all steps to accommodate to the point of undue hardship in the event of a positive test result. Conversely, random alcohol testing of employees in non-safety-sensitive positions is generally not acceptable. However, the case law in this area is relatively unsettled. Random alcohol testing for employees in non-safety roles may be acceptable in very limited circumstances if the employer policy is aimed at reducing overall substance abuse problems in a small community: see Alberta (Human Rights and Citizenship Commission) v. Elizabeth Métis Settlement,9 where the Alberta Court of Queen’s Bench found that alcohol testing for administrative staff on a native reserve qualified as a BFOR. However, this decision was overturned by the Alberta Court of Appeal10 on the basis that the wording in the employer’s policy did not address general substance abuse in the community as a foundation for testing and also failed to include the administrative employees under any of the relevant categories of employees subject to testing (i.e., those in safety-sensitive positions). The validity of the lower court decision regarding the BFOR test is therefore questionable.

Random drug testing is not permissible in Ontario and other jurisdictions that follow Entrop, as such testing is viewed as a poor indicator of present impairment and therefore not reasonably necessary to achieve the intended purpose of preventing impairment in the workplace. However, following the ruling in Chiasson, random drug testing may be permissible in Alberta for marijuana and other drugs with lingering effects that raise concerns for workplace safety. In these circumstances, drug testing is considered evidence of actual impairment, rather than perceived disability. Milazzo offers a third approach, whereby positive test results are viewed as a “red flag” to help identify employees who are at increased risk for workplace safety incidents (para. 171).

D. Drug and Alcohol Testing Post-Reinstatement (Return-to-Work and Follow-Up Testing)

Post-reinstatement testing is tied to an employer’s accommodation of employees with substance-related disabilities, and may be incorporated into a rehabilitation program. Such testing would still have to meet the

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9  2003 ABQB 342, 336 AR 343.
10  2005 ABCA 173.
Meiorin BFOR criteria, meaning that it must be reasonably necessary in the context of workplace operations and must be accompanied by employer accommodation efforts to the point of undue hardship.

E. Customer Required Testing

Canadian law permits employers to require employees to adhere to drug and alcohol testing requirements imposed by customers or site owners. However, where drug and alcohol testing requirements are downloaded from a site owner or customer to an employer, the employer remains responsible for ensuring compliance with human rights protections, including providing for appropriate accommodation measures where an employee is found to be suffering from drug or alcohol dependence. In *Luka v. Lockerbie & Hole Industrial Inc.*, a contractor’s employee was denied access to a work site because he failed a drug test required by the site owner. The Alberta Court of Appeal at para. 26 held that the contractor, and not the site owner, was the employer for the purposes of human rights legislation:

In this case Mr. Luka was admittedly employed by Lockerbie & Hole, he provided his services to it, he was directed and paid by it, and Lockerbie & Hole was his employer within the meaning of the Act. He had no contractual relationship with Syncrude, he was not functionally a part of its organization, he did not report to it, and Syncrude did not direct his work. His work did not involve extracting oil from oilsands, or operating Syncrude’s plant. His relationship with Syncrude was too remote to justify a finding of employment, even under the expanded meaning given to that term in human rights legislation. *It is Lockerbie & Hole that must ensure that Mr. Luka’s rights under the Act are respected and that any discrimination demonstrated by Mr. Luka is either a bona fide occupational requirement under ss. 7(3), or “reasonable and justifiable in the circumstances” under s. 11. Any duty to accommodate a disability that arises must be met by Lockerbie & Hole. Mr. Luka is not denied rights under the Act, but the burden of protecting them falls on Lockerbie & Hole.* [emphasis added]

V. Dismissal Law Update: When Can You Terminate an Addict?

Aside from whether drug and alcohol testing in and of itself is permissible, a key question for employers is what can be done with the results. Generally, as discussed above, if an addicted employee is disciplined or terminated on the basis of a positive test result, this will be considered discrimination on the basis of a disability unless the employer can demonstrate that a negative test result is a BFOR. If not, the disability must be accommodated to the point of undue hardship. However, a further key consideration is whether a positive alcohol or drug test or other alcohol or drug related infraction is sufficient to ground a just cause termination at common law. Additionally, it is important to consider how an employee’s addiction may impact a dismissal decision even when it is arguably unrelated to the misconduct.

A. Termination on the Basis of Breach of Employer Policy

Many employers rely on the breach of the relevant drug and alcohol policy to ground a termination for just cause. It is noteworthy that terminations on the basis of breach of company policy in any case require a contextual analysis that considers not only the breach of the policy but the totality of the circumstances. Employers should expect to defend their drug and alcohol policies on these grounds.

The onus is on the employer to establish on a balance of probabilities that there was just cause for the employee’s dismissal. Generally, companies must establish the following factors in order for a breach of a company rule to constitute cause for discharge:

1. The rules must be distributed (distributing a pamphlet to notify employees will suffice);
2. The rules must be known by the employees;
3. The rules must be unambiguous;
4. The rules must be consistently enforced by the company;
5. The rules must be enforced and, consequently, employees must be warned that they will be terminated if a rule is breached;
6. The rules must be reasonable; and
7. The rule must be sufficiently serious to justify termination.

Termination for cause based on a breach of rules or company policies can be considered in a similar fashion to termination based on employee misconduct. Whether misconduct constitutes just cause must be analyzed in the circumstances of each case. Following the Supreme Court of Canada’s decision in McKinley v. BC Tel, [2001] 2 S.C.R. 161 [McKinley], “[... ] cause is determined by an objective contextual and proportional analysis. A finding of misconduct does not, by itself, give rise to just cause; the question is whether, in the circumstances, the behaviour is such that the employment relationship could no longer viably subsist. A balance must be struck between the severity of an employee’s misconduct and the sanction imposed. The factors considered include the employee’s tenure, employment record, and the seriousness of the misconduct.”

The Ontario Court of Appeal in Dowling v. Ontario (Workplace Safety and Insurance Board), [2004] O.J. No. 4812 gave further insight as to how the case-by-case approach in McKinley should be interpreted by courts:

[...]

Application of the standard consists of:
1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[...]

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It is generally more difficult to justify for cause dismissal based on a single incident or breach of a zero tolerance policy; however, if the employee’s misconduct interferes with and prejudices the safe and proper conduct of the business of the employer and has serious consequence a single incident can be sufficient to justify dismissal. Each termination and policy will be analyzed on its own facts and considered accordingly.

B. Termination for Multiple Causes/Causes other than Addiction

Jurisprudence suggests that it is rarely the addiction alone that is the reason for the employee’s dismissal or suspension. In most cases, the employee commits an offence or violation of company policy that warrants discipline from the employer and subsequently claims that the offence was caused by the addiction. Courts and arbitrators then have to determine, as a second preliminary issue, whether or not the offence was in fact caused by the grievor’s addiction. The panel in United Nurses of Alberta, Local 33 v. Capital Health (Royal Alexandra Hospital) set out the following test for determining causation:

... [T]he proper test of causation to apply in discrimination cases challenging the automatic discharge of an employee is as follows: Was the grievor’s judgment so impaired by his or her craving for alcohol, loss of control over his or her drinking, or dependence on alcohol, that his or her alcoholism became a significant factor in motivating the commission of the major industrial offence in question? ... If the answer to the question is yes, it will be concluded that the grievor’s alcoholism was a significant cause of the commission of the offence for which the grievor was automatically discharged, and the discharge will become liable to be set aside as prima facie discriminatory under the Human Rights Code.

Therefore, assumptions that addiction is always a causal factor in an employee's misconduct should be avoided. Several BC cases have considered the issue of whether an employee's addiction played a role in the employer's decision to terminate the employee or if the employee was terminated like any other employee would have been.

In Kemess Mining Ltd. v. International Union of Operating Engineers, the employee was addicted to marijuana and was dismissed after he was caught smoking marijuana in his room at a mine site. He was terminated for breaching the mine’s “zero tolerance policy.” The employer argued that his misconduct constituted just cause, and that the grievor was fired for violating the company’s policy on drug use and not because of his addiction. However, the arbitrator found that there was a nexus between the grievor’s medical disorder of cannabis dependence and his possession and use at the mine site. The grievor’s addiction therefore contributed substantially to the particular misconduct.

A unanimous Court of Appeal accepted that the grievor’s disability was a factor in the dismissal and that the grievor’s use of marijuana at work was partly the product of substantially diminished control due to his addiction. Reconciling the opinions of the employer’s and union’s medical experts, the
arbitrator found that at least some persons satisfying the criteria for cannabis dependence do suffer a degree of diminished control over their use of marijuana.\textsuperscript{23}

In the subsequent case of \textit{British Columbia (Public Service Agency) v. British Columbia Government and Service Employees’ Union},\textsuperscript{24} the Court of Appeal came to a different conclusion. In this case, the grievor worked at the liquor distribution branch and began to steal alcohol from the store he managed several times per week for a year. Employees of the store complained, and when confronted, the grievor admitted to a drinking problem. The grievor was suspended without pay and entered a rehabilitation program. However, upon completing an investigation of the grievor, the employer terminated him for theft. The Court held that the grievor was terminated like any other employee would be for committing a crime, stating:

\begin{quote}

The fact that alcohol dependent persons may demonstrate “deterioration in ethical or moral behaviour”, and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer’s conduct in terminating the employee was based on or influenced by his alcohol dependency.\textsuperscript{25}
\end{quote}

The Court went on further to emphasize that in circumstances where crimes occur, an addiction will be irrelevant if the admitted dependency plays no role in the decision to terminate and the employee suffers no impact greater than another employee.\textsuperscript{26}

In the tribunal decision of \textit{Ryan v. Canada Safeway Ltd.},\textsuperscript{27} Ryan was an alcoholic who was terminated after she violated her employer’s ‘zero-tolerance’ policy when she stole money from the register with an intention to pay it back. She filed a human rights complaint, arguing that she had a substance abuse problem that her employer was aware of and that the termination of her employment demonstrated a failure to consider the impact of her addiction and the duty to accommodate her. The arbitrator in this case stated “... it is possible that Ms. Ryan’s misconduct was related to her alcoholism. Any poor decision by a person suffering from a substance abuse problem could, in some sense, be said to be potentially related to that problem.”\textsuperscript{28} However, the arbitrator eventually concluded that Ryan was unable to establish that her misconduct was related to her alcoholism. The arbitrator accepted expert evidence that alcohol dependence did not play a direct or causative role in her behaviour.\textsuperscript{29}

In the tribunal decision of \textit{British Columbia v. British Columbia Crown Counsel Assn. (Termination Grievance)},\textsuperscript{30} the grievor AB was employed as a Crown Counsel and was arrested and charged for possession of cocaine after being observed by Vancouver City Police in an area frequented by drug users. He was suspended without pay and subsequently terminated. The grievor was an alcoholic and claimed that his alcohol addiction factored into his conduct. His employer asserted that the addiction did not play a role in its response to the conduct.

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\textsuperscript{23} Ibid. at para. 7.
\textsuperscript{24} \textit{British Columbia (Public Service Agency) v. British Columbia Government and Service Employee’s Union}, 2008 BCCA 357 [Gooting].
\textsuperscript{25} Ibid. at para. 11.
\textsuperscript{26} Ibid. at para. 15.
\textsuperscript{27} \textit{Ryan v. Canada Safeway Ltd.}, 2008 BCHRT 12, [2008] BCHRTD No. 12.
\textsuperscript{28} Ibid. at para. 45.
\textsuperscript{29} Ibid. at para. 32.
\end{flushleft}
The arbitrator cited both the Kemess and Gooding decisions and held that post-Gooding, the test for prima facie discrimination is less onerous in that it now merely requires a finding that the misconduct was, in part, related to the addiction and not that the addiction was a factor in the adverse treatment. In this case, the arbitrator found the inability to distinguish Gooding on the facts on a substantive basis, determining that a case of prima facie discrimination did not exist. Like the facts in Gooding, the misconduct at issue “rose to a level of crime” and the arbitrator accepted the evidence that the grievor was dismissed because of his misconduct and not an assumption of a stereotype about disabilities. The arbitrator was not prepared to regard the grievor’s conduct as any less serious than the misconduct in the Gooding case.

In the Ontario case Toronto Transit Commission v. Canadian Union of Public Employees, Local 2 (MS Grievance), the arbitrator rejected the BC Court of Appeal holding in Gooding that the discriminatory ground alleged need only be related to the misconduct. Instead, the arbitrator adopted the minority reasons of Madam Justice Kirkpatrick, in which she stated:

In a situation of adverse effects discrimination, the employee must adduce evidence establishing a nexus between the addiction and the misconduct—the stated reason for termination. This evidentiary burden is significant, for it cannot be assumed that addiction is always a causal factor in an addicted employee’s misconduct. In its factum, the employer submitted, “[g]iven the prevailing view of addiction experts that addiction can result in a lowering of moral and ethical conduct on the part of the addicted person, it will be a rare case where some connection between the addiction and the misconduct cannot be established.” This view undervalues the importance of evidence in cases of this kind, and the necessity for a contextual inquiry that considers the nature of the disability and the misconduct, and the connection between the two.

The arbitrator went on to uphold the grievor’s dismissal because he found that there was no causal connection between the gambling and drug addiction suffered by the grievor and the misconduct of theft. Although the grievor argued that he stole and sold company property to feed his addictions, the arbitrator was persuaded by the fact that the grievor had about $1,073 in his bank account throughout the period the grievor stole from the company. Therefore stealing from the company to buy drugs instead of using his own money, which the grievor had readily available, was a personal choice he willingly made unconnected to his addiction.

Similar to the holding in TTC, in the case Mississauga (City) (Mississauga Transit) v. Amalgamated Transit Union, Local 1572 (Lyons Grievance), the arbitrator held that there was no nexus of conduct between the grievor’s prohibition from driving derived from his DUI arrest and the employee’s disability of alcoholism. In this case, the grievor worked as a transit driver and was required to take a leave without pay until his license was reinstated. The grievor argued that the company’s duty to accommodate should include finding a position that did not require him to have a driver’s licence. The arbitrator held that although the DUI arrest was caused to some extent by alcoholism’s effect on rational decision making, the arrest was not an inevitable consequence of alcoholism. Therefore, the

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31 Ibid. at para. 132.
32 Ibid. at para. 86.
arbitrator held that the nexus of conduct between the loss of driving privileges and the disability of alcoholism was not sufficient enough to require the employer to provide further accommodation.\textsuperscript{37}

The case law demonstrates that there exists an evidentiary burden on both employers and employees to establish whether or not there was a nexus between the impugned conduct and the addiction. It is apparent that expert evidence is an important factor in assessing this issue. It further appears that the decision on whether addiction is a factor in the adverse treatment may be influenced by how egregious the employee’s conduct was and whether it rose to a level of crime.

C. Post-Discharge Evidence

The analysis of whether the employee can meet their employment obligations is based on the entire situation. Therefore, post-discharge evidence has been accepted as relevant and considered by arbitrators in the undue hardship analysis, but only in certain cases. The Supreme Court of Canada in \textit{Cie miniere Quebec Cartier v Quebec (Grievances arbitrator)},\textsuperscript{38} held that an arbitrator can rely on subsequent-event evidence only where it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented.\textsuperscript{39}

The use of post-discharge evidence can be a powerful tool for employers to avoid having to reinstate troublesome employees. For example, in \textit{Dover}, the grievor’s efforts to become sober were minimal and plagued by several relapses. Post-discharge evidence of an inability of the grievor to complete treatment programs helped support the argument that the grievor was unlikely to fulfill his employment obligations.

This finding can be contrasted with the outcome in \textit{Fearman’s Pork Inc. v. United Food & Commercial Workers International Union, Local 175 (Kutlesa Grievance)}.\textsuperscript{40} In this case post-discharge evidence was used as justification to reinstate the employee after dismissal because the employee showed positive signs of recovery in the form of actively pursuing a program for rehabilitation. Evidence of positive progress was also provided by his sponsor.\textsuperscript{41} The grievor in this case was a long-term employee with 29 years of service.

VI. The Battle in Alberta: Drug and Alcohol Risk Reduction Pilot Project (“DARRPP”) Update

A. The Nature of the Program

DARRPP is a two-year pilot project announced on June 20, 2012, led by major oil sands industry employers and labour providers. The purpose of the project, which provides for a comprehensive regime of drug and alcohol testing including random testing, is to “investigate a newly enhanced and coordinated industry approach to reduce safety risks related to the use of alcohol and other drugs in the oil sands operations and maintenance, industrial construction, industrial construction and maintenance, and related industries.”\textsuperscript{42} The implementation of testing is scheduled for late 2012 and early 2013.

\begin{itemize}
\item \textsuperscript{37} \textit{Ibid.} at para. 21.
\item \textsuperscript{38} \textit{Cie miniere Quebec Cartier v. Quebec (Grievances arbitrator)}, [1995] 2 S.C.R. 1095 \textit{[Cie miniere]}.
\item \textsuperscript{39} \textit{Ibid.} at para. 13.
\item \textsuperscript{40} \textit{Fearman’s Pork Inc. v. United Food & Commercial Workers International Union, Local 175 (Kutlesa Grievance}, [2011] OLAA No 388.
\item \textsuperscript{41} \textit{Ibid.} at paras. 43-54.
\end{itemize}
The materials released by DARRPP emphasize consultation with the Alberta Human Rights Commission ("AHRC"), as well as the Office of the Information and Privacy Commissioner. It is clear from these materials that DARRPP draws its legitimacy from the following statement in the AHRC March 2012 information sheet on "Drug and Alcohol Dependencies in Alberta Workplaces" at 3: "it is not the testing that triggers the protection of human rights law. It is how the employer treats employees who are dependent on drugs or alcohol." To promote compliance with human rights and privacy protections, DARRP requires participating organizations to adhere to the following:

(1) Have a mechanism in place for assessment by a third party of individuals who test positive for alcohol or drug use, to determine whether any individual suffers an addiction (disability).

(2) Offer rehabilitation and accommodation for at least those who are diagnosed with an addiction (disability).

(3) Have controls in place that ensure protection of privacy and personal information of workers who are tested.43

The Communications, Energy and Paperworkers Union (the "CEPU") has made it clear that they view the pilot project as an impermissible intrusion on the rights, privacy and dignity of employees, asserting that there is no evidence that random drug testing improves workplace safety.44 Arbitration proceedings are currently ongoing in Alberta with respect to random drug testing under the DARRPP regime.

B. Privacy Analysis

Although not common law right to privacy has been recognized in Canada, organizations are required to comply with relevant privacy legislation which requires all collection, use and disclosure of personal information, with consent or otherwise, to be reasonable. The additional layer of intrigue in the labour context is the acceptance of an employee's right to privacy, disallowing drug and alcohol testing on this basis. The language employed by many of these decisions is reflective of the Canadian Charter of Rights and Freedoms, the decision-makers seemingly accepting a "Charter values" analysis as explored by the Supreme Court of Canada in RWDSU v. Dolphin Delivery Ltd.45 Indeed, publicists46 have posited that, when considering drug and alcohol testing policies, decision-makers should weigh employee privacy rights with the legitimate employer interest in promoting safety with an analysis similar to that undertaken when s. 1 of the Canadian Charter of Rights and Freedoms is engaged as set out in R. v. Oakes.47 Accordingly, DARRPP is likely to be subject not only to privacy legislation but also arguably deeper scrutiny if the "Charter values" argument is accepted. Indeed, this argument was raised and seemingly accepted, at least in passing, by the Alberta Court of Appeal when it considered DARRPP, as described below.

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C. Human Rights Analysis

The participation criteria outlined above may be sufficient to allow DARRPP to survive scrutiny by the Alberta Human Rights Commission (“AHRC”) and the courts. First, it could be argued that the pilot project avoids violating human rights by requiring third party assessment of employees with positive test results, as well as accommodation and rehabilitation support for employees found to be experiencing drug or alcohol addiction. This scheme clearly distinguishes between the treatment of recreational users and employees with substance dependency issues and, as a result, may avoid the problem identified in Entrop of treating all employees with positive test results as having a disability, actual or perceived. The AHRC information sheet makes it clear that recreational drug users are not protected by human rights legislation.

However, DARRPP’s survival may be contingent on a finding that random drug testing is an accurate indicator of actual impairment, or at least a “red flag” for persons at increased risk for workplace safety incidents, and therefore either non-discriminatory on the prima facie analysis or justified as a BFOR on the basis of the Meiorin test. If the AHRC and the Alberta courts follow the Court of Appeal’s ruling in Chiasson and confirm its application to substances other than marijuana, then random testing may survive scrutiny. Participating employers may be required to demonstrate that, like marijuana, the drugs targeted by the testing policy have lingering effects that raise concerns in a safety-challenged work environment.

Lastly, DARRPP employers have commented that current drug and alcohol testing programs are not sufficient to protect workplace safety in the oil sands and construction industries. Given the emphasis on safety in Chiasson with regard to drug testing and the operation and construction of oil sands facilities, evidence of unmet safety concerns may help solidify the argument that random testing pursuant to DARRPP is either non-discriminatory at the prima facie stage of analysis or reasonably necessary to achieve safety objectives and therefore justified as a BFOR. Participating employers may be able to rely on the following statement of the Alberta Court of Appeal in Chiasson: “Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic” (para. 36).

D. Current Status of DARRPP

The CEPU has filed a grievance challenging the policy on the grounds that it is contrary to the collective agreement, contrary to the common law as animated by values and principles developed under ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, and contrary to both provincial privacy and human rights protections.

In October 2012, the CEPU successfully sought an interim injunction at the Alberta Court of Queen’s Bench to prevent Suncor Energy from implementing random drug and alcohol testing until a labour arbitrator rules on the CEPU’s grievance. Watson J.A. of the Alberta Court of Appeal declined to grant a stay of the injunction order pending Suncor’s appeal of the decision, which was heard on November 28, 2012. In a split decision focused on employee privacy rights, the Court dismissed Suncor Energy’s appeal and upheld the injunction ordered by Macklin J.48 Côté J.A., dissenting, would have allowed the appeal for reasons similar to those set out in Chiasson, stating that safety concerns should trump privacy rights in the hazardous environment of Suncor’s oil sands operations. Bielby J.A., writing for the majority, seeming accepted the “Charter values” argument stating that “[t]he non-consensual taking of bodily fluids is a substantial affront to an individual’s privacy rights.”49 Moreover, Bielby J.A. rejected the efficacy at paras. 7-9:

49 Ibid. at para. 5.
The evidence does not disclose that the application of this policy, detecting as it would only prior use of drug and alcohol, would have any immediate effect on prevention of job site accidents nor that it would do so more effectively than the currently operating policy, which limits testing to circumstances in which there is evidence creating a suspicion of drug or alcohol use. The new policy does not purport to limit its application to only those employees who operate machinery or otherwise engage in hazardous work; its application to “safety-sensitive” positions casts a wide net over employees whose work may not involve a real risk of accident.

Evidence shows that only 6% of employees tested under the original policy during the January 1, 2009 through June 30, 2012 period tested positive. Suncor experienced only seven fatalities at its workplace in the oil sands over the 12-year period from 2000 to 2012, with just three of those killed having been shown to have been under the influence of drugs and alcohol at the time of their deaths. There is no evidence of any environmental peril having been incurred due to employee substance abuse. Suncor offered no evidence that the operation of the current drug and alcohol policy had reduced rates of accidents during its years of application.

There is, therefore, no suggestion of immediate peril caused by wide-ranging drug or alcohol use, or significant risk of loss by accident at the Suncor site so as to swing the balance of convenience in favour of the more intrusive new policy, pending receipt of the arbitrator’s decision. Simply brandishing the concern of accident, or the mention of the word “safety,” even in the context of this mining operation, is not enough to support the conclusion that such balance must favour the immediate implementation of such intrusive testing, on such a large number of Suncor’s employees.

This reasoning appears to ignore that random drug and alcohol testing can also be useful as a general deterrent to alcohol and drug use. Simply considering the number of positive test results pursuant the current reasonable cause testing and how that figure may be affected by the introduction of random testing is not sufficient to evaluate the efficacy of the program. Moreover, recognizing that the inquiry as to whether substance abuse played a role in the workplace fatality is a legitimate inquiry, the language employed by Bielby J.A. of “only seven” and “just three” in regard to workplace fatalities demonstrates the Court’s quasi-academic view of this real and substantial workplace issue.

In any event, Alberta energy sector employers wait with baited breath for the outcome of the CEPU arbitration and further challenges to DARRPP. The injunction obtained by the CEPU from the Alberta Court of Queen’s Bench and upheld by the Alberta Court of Appeal prohibits the implementation of its random drug and alcohol testing program before the grievance is resolved by arbitration. The arbitration commenced in January 2013.

VII. Supreme Court of Canada Update: Impact of Irving and R. v. Cole

A. Irving Pulp & Paper Ltd. v Communications Energy and Paperworkers Union of Canada, Local 30, 2011 NBCA 58, 375 NBR (2d) 92

Irving50 is a recent labour relations decision from the New Brunswick Court of Appeal that addressed the issue of whether an employer is required to adduce sufficient evidence of alcohol-related incidents in the workplace to justify instituting a policy of mandatory random alcohol testing for employees in safety-sensitive positions. In restricting the authorities considered to those dealing with alcohol rather than drug testing, the Court at para. 29 approved of the divergent approach to the two substances reflected in Entrop:

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... While it is true that testing for both substances has a deterrent effect, drug testing cannot measure present impairment. A positive test simply means that the employee has taken drugs in the past. By contrast, alcohol testing is able to detect on the job impairment and minimize the risk of impaired performance. As well, alcohol testing by breathalyser has always been regarded as minimally intrusive when it comes to an employee’s right to privacy and freedom from unreasonable searches. ...

The Court of Appeal upheld the decision of the application judge, finding that “[e]vidence of an existing alcohol problem in the workplace is unnecessary once the employer’s work environment is classified as inherently dangerous” (para. 52). The Court observed that employers engaged in the mining, forestry, and oil and gas sectors of the economy have successfully persuaded arbitrators that their operations qualify as “inherently dangerous,” concluding that the craft paper mill at issue should be similarly categorized. In support of this conclusion, the Court commented on the mill’s use of chemicals and hazardous materials, and the presence of a pressure boiler with a high potential for explosion.

It is unclear whether other courts in Eastern Canada will follow the decision in *Irving* by requiring employers to establish that their workplace operations are “inherently dangerous” in order to justify drug and alcohol testing for employees in safety-sensitive positions or, as a possible alternative, to prove the existence of a history of drug and alcohol-related incidents in the work environment. Both of these factors were considered by the Québec Court of Appeal in the earlier decision of *Goodyear Canada*, discussed below.

The Supreme Court of Canada heard the appeal of *Irving* in early December 2012 and reserved judgment. There is great hope that the *Irving* decision will not only address random alcohol testing but bridge the great divide in the regional approaches to random drug testing. However, given that *Irving* directly considers random alcohol testing, it is entirely possible that the Court will address only this narrow question and leave random drug testing for another day. In any event, it is anticipated that a ruling will be released in the near future.

B. *R. v. Cole*

The Supreme Court of Canada addressed an employee’s expectation of privacy in the context of the use of workplace computers and the competing employer-employee interests thereof in *R. v. Cole*, 2012 SCC 53 [*Cole*]. Although the decision did not directly consider the issue of drug and alcohol testing of employees, *Cole* has the potential to significantly inform an employee’s expectation of privacy at work.

In its decision, the Supreme Court of Canada held that that Canadians may reasonably expect privacy in information contained on workplace computers where personal use is permitted or reasonably expected. The Court described such information as “meaningful, intimate and touching on the user’s biographical core.” While computer and data ownership, workplace policies and practices, and technologies in place for monitoring network activity may diminish an employee’s expectation of privacy, such “operational realities” will not extinguish the expectation of privacy in its entirety.

Cole concerned a teacher who was criminally charged with possession of child pornography following the discovery of nude, sexually explicit photographs of a female Grade 10 student on the hard drive of his school-owned laptop. The teacher, who was authorized to act as a network supervisor, had copied the photos after finding them on another student’s email account. Observing a high level of activity between the teacher’s laptop and the school server, a computer technician employed by the school board accessed the teacher’s hard drive remotely to verify the integrity of the system. The computer technician found the photos in a hidden folder on the laptop hard drive.

The teacher returned his laptop to the school principal upon request, but refused to disclose his password, advising that the school board computer technicians would be able to access the computer hard drive without it. Compact discs containing the photos, a screenshot of the laptop including the
file path and thumbnail pictures, and temporary internet files pulled from the teacher's browsing history were ultimately provided to the police, who proceeded with a warrantless search. The teacher challenged the search, and sought to exclude the evidence based on an alleged violation of his right to be free from unreasonable search and seizure under s. 8 of the \textit{Canadian Charter of Rights and Freedoms} (the "Charter").

The Court found that the actions of the police in conducting a warrantless search violated the teacher's s. 8 Charter rights. However, Fish J. for the majority concluded that the admission of evidence would not bring the administration of justice into disrepute, in part because the impact of the breach was decreased by the teacher's diminished privacy interest in the laptop materials and because of the ultimate discoverability of the evidence based on the existence of reasonable and probable grounds to search.

Although \textit{Cole} is a criminal case, it is relevant to employers in the civil context in that it reflects a clear departure from Canadian common law, US and arbitral jurisprudence favouring an employer's right to protect the integrity of its business operations over employee privacy in material stored, viewed or transmitted using employer-owned hardware and network systems. That said, it remains to be seen what impact \textit{Cole} will have on the admissibility of evidence and an employer's ability to prove just cause in civil actions for wrongful dismissal.

\textbf{VIII. Industry Specific Implications: Mining, Oil & Gas and other “Dangerous” Workplaces}

The Supreme Court of Canada has stated that "[w]here safety is an issue both the magnitude of the risk and the identity of those who bear it are relevant considerations." Safety is a consideration both for the general public and co-workers. Indeed, the Court in \textit{Irving} recognized at para. 51:

Employers involved in the production and refining of oil products or chemicals, or in the mining and forestry sectors of the economy, have been able to persuade arbitrators and arbitration panels that such operations so qualify and usually without adducing evidence of an existing alcohol problem in the workplace.

Workplaces across Canada, particularly in the energy, construction and resources sectors, are faced constantly with the challenge of weighing employee privacy and human rights issues against avoiding workplace injuries and fatalities not only to keep their employees safe but avoid prosecution pursuant to occupational health and safety legislation. This is only exacerbated by the high instance of drug use in these industries. Indeed, the highest occurrences of drug use are in the financial, upstream oil, forestry/mining and construction industries. Moreover, the energy, construction and resource industries are inherently dangerous and only made more so by the developing complexity of equipment and use of technology. In 2006, there were eight workplace fatalities reported in the upstream petroleum industry in BC, an increase from five in 2004 and three in 2005. From January 1, 2008 – July 21, 2008, there have been 75 injuries in the forestry industry, 39 of these injuries occurred in sawmills, and nine of these injuries resulted in death. Although certainly safety should not be a non-negotiable trump card in favour of testing, it is particularly compelling for these industries.

\begin{footnotesize}
\begin{enumerate}
\item 52 Roger K. McDougall, \textit{Canadian Workplace Alcohol and Drug Programs}.
\item 53 Worksafe BC, 2007.
\item 54 BC Forest Safety Council.
\end{enumerate}
\end{footnotesize}
IX. Conclusion

Given the current fractured nature of the law of drug and alcohol testing and the competing challenges of human rights, privacy and safety, counsel across Canada are uniquely challenged to provide not only legally compliant but practical advice to employers. While there is great hope that the Supreme Court of Canada will provide some guidance in *Irving*, it is important for counsel to be aware of the “situation on the ground” and not just the legal principles we hold dear.