BY ERIN KUZZ AND LISA BOLTON

WITH LEGALIZED MARIJUANA AROUND THE CORNER…

What is the state of the law on drug and alcohol testing in Canada?

On April 13, 2017, the government of Canada introduced Bill C-45, the *Cannabis Act*, which, once passed, will remove from the *Criminal Code* incidental marijuana consumption and possession. Expected to become law by July 1, 2018, the *Cannabis Act* will also regulate marijuana production, distribution and retail sale. Now, more than ever, employers are concerned about employees coming to work impaired and are asking, "*when and how can an employer test for drugs and alcohol in the workplace?*"

Two recent employer-friendly decisions, including one from the Supreme Court of Canada, help answer that question and provide valuable guidance to employers about how to successfully implement a workplace drug and alcohol policy and testing.

HISTORICALLY SPEAKING

Traditionally, drug and alcohol testing in Canadian workplaces has been permitted sparingly as courts and arbitrators try to balance the competing interests of privacy, human rights and safety. Testing has been allowed where the position at issue is "safety sensitive" and:

1. The employer has reasonable cause to believe the employee is impaired at work.
2. The employee has been involved in a significant workplace incident or "near miss."
3. It is a component of a return-to-work arrangement following an employee's treatment for drug or alcohol addiction.

In 2013, the Supreme Court of Canada gave employers some leeway at least in respect of random alcohol testing. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.* ("*Irving Pulp and Paper*"), the court confirmed an employer may conduct random alcohol testing for a safety-sensitive position where the employer can establish it operates a dangerous workplace and there is a general workplace problem with alcohol abuse.

Fast forward to 2017 and two new decisions are reshaping the law of workplace drug and alcohol testing.

DECISION #1:
THE TORONTO TRANSIT COMMISSION IMPLEMENTS RANDOM TESTING

In the spring of 2017, the Ontario Superior Court allowed the Toronto Transit Commission ("TTC") to implement random drug and alcohol testing pending the conclusion of an ongoing arbitration.

WHAT HAPPENED?

In October 2010, the TTC implemented a drug testing policy designed to "[e]nsure the health and safety of [the TTC's] employees and the safety of [the TTC's] customers and members of the public." The policy provides for drug and alcohol testing of employees in safety-sensitive and specified management positions. The union representing TTC employees grieved the policy on the basis it violated the collective agreement and *Human Rights Code*.

RANDOM DRUG AND ALCOHOL TESTING

The following year, the TTC announced its intention to expand the policy to include random drug and alcohol testing of employees as follows: 20 per cent of employees would be randomly tested each year by an independent third party; testing would be conducted through a non-invasive alcohol breathalyzer and oral fluid sample; threshold levels would be higher than in other internationally recognized programs, ensuring a greater likelihood of impairment at the time of testing based on recent drug use and minimizing intrusion into an employee's personal life by screening out results that detect previous drug use; a positive test result would be reviewed with a Medical Review Officer to determine whether there was a legitimate, medical explanation; treatment was an option; and failure to submit to testing would be a violation of the policy.

INJUNCTION DECISION

The union brought a motion for an injunction preventing the TTC from implementing the random program pending a final determination of the issue through the grievance arbitration. In refusing the injunction the court held that, although there was a serious issue to be tried, the union could not establish its members would suffer irreparable harm if the testing was permitted (a wronged employee could receive damages), and the balance of convenience did not favour granting the injunction (random testing would increase the likelihood an employee in a safety-sensitive position, prone to using drugs or alcohol too close in time to coming to work, would either be detected or deterred by the prospect of being detected).

The court also accepted certain evidence advanced by the TTC to support and underscore the necessity and reasonableness of the random testing program, including:

- There is a culture of drug and alcohol use at the TTC.
- It is very likely an employee with a substance use disorder will report to work impaired.
- Random workplace testing results in a significant decline in the rate of positive drug tests of employees.
- General stigma and psychological and reputational damage is unlikely given random selection.
- Oral fluid testing provides a good indicator of recent use and likely impairment.

DECISION #2

SUPREME COURT OF CANADA UPHOLDS TERMINATION OF TRUCK DRIVER WHO FAILS TEST FOR COCAINE; CLAIMS ADDICTION

The Supreme Court recently decided an appeal of a decision from the Alberta Court of Appeal involving a truck operator who, following a workplace accident, tested positive for cocaine, claimed to have a drug dependency, and was nevertheless dismissed *(Elk Valley Coal Corporation*).

WHAT HAPPENED?

The employer's drug and alcohol policy required an employee disclose a drug dependency without fear of discipline or termination, and with the promise of rehabilitation assistance. However, if an employee came forward only after an incident and positive test, the employee would not be shielded from discipline or termination.

Ian Stewart's employment was terminated two weeks after he drove his truck into another and tested positive for cocaine. During the investigation, he acknowledged a history of drug use and claimed to have a drug dependency which, he said, resulted in denial of his addiction and the failure to disclose, contrary to the policy.

Mr. Stewart was dismissed because he breached the policy by failing to disclose, not because he used drugs or had a dependency. He was also offered an opportunity to be reinstated in six months with proof of successful completion of a rehabilitation program, 50 per cent of the cost of which would be covered by the employer. Mr. Stewart rejected the offer and instead complained to the Human Rights Commission alleging discrimination on the basis of a disability (addiction).

DISABILITY NOT THE REASON FOR DISMISSAL

Both the Commission and all levels of court found that although Mr. Stewart had an addiction, he was not fired because of it, but rather because he failed to disclose his drug use as required by the policy. They also found that, despite his addiction, Mr. Stewart nevertheless had the capacity to comply with the policy (and make the requisite disclosure), but chose not to. He therefore suffered no adverse impact by virtue of his disability.

On the relationship between "addiction" and "denial" the Supreme Court of Canada was clear to state a connection cannot be assumed and must be demonstrated on a case-by-case basis:

> It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence.

LESSONS FOR EMPLOYERS

The *TTC* and *Elk Valley* decisions reiterate the importance of a well-drafted drug and alcohol policy, tailored to the workplace, and that proactively addresses key factual and legal issues. The Supreme Court decision also confirms that parties and adjudicators ought not to assume addiction means an employee does not have the capacity to comply with workplace rules. Each case must be decided on its own factual basis.

At minimum, an employer concerned about the impact of drugs and alcohol in its workplace should consult with experienced counsel and consider the following:

- Are there sufficient factual grounds to implement a testing policy? For example, is there a culture of, or prevalent, drug or alcohol use among employees engaged in safety-sensitive work?
- Does the policy:
  - Require an employee to proactively disclose drug use (prescription and legal recreational) that may impair the ability to perform work safely?
  - Include immunity for proactive self-disclosure, and access to treatment?
  - Appropriately address safety, privacy and human rights issues?
  - Identify consequences in the event of a breach (*i.e.,* discipline and termination), including failure to disclose drug use and/or participate in testing?

To learn more and for assistance addressing drug and alcohol issues in your workplace, contact the employment law experts at Sherrard Kuzz LLP.

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