

EMPLOYMENT, LABOUR & EQUALITIES GROUP

CASE LAW UPDATE: DRUG AND ALCOHOL TESTING IN THE WORKPLACE

Max Brunette, Partner – Calgary



Matthew Warren, Associate – Calgary

NOVEMBER 23, 2022

PRESENTATION SPEAKERS





Max Brunette
Partner – Gowling WLG

 max.brunette@gowlingwlg.com
 +1 403 776-3374



Matthew Warren
Associate – Gowling WLG

 matthew.warren@gowlingwlg.com
 +1 403 298-1825

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation.
- For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information.

INTRODUCTION

Key Considerations for Drug and Alcohol Testing:

1. Testing should only be contemplated in a workplace **where employee impairment would threaten safety** in the workplace (i.e. safety sensitive environments);
2. Employers cannot likely justify testing that targets off-duty use that has no impairment in the workplace; and
3. Testing should be part of a holistic D&A policy aimed at deterring impairment in the workplace and accommodation of disabilities.

INTRODUCTION

At a minimum, your Drug and Alcohol Policy should include:

- ✓ Restrictions on drug and alcohol use in the workplace or outside the workplace in ways that may impair work
- ✓ Discipline for breach of the policy
- ✓ Education and awareness for employees
- ✓ Accommodation measures for employees with substance dependencies





RECENT DRUG AND ALCOHOL TESTING DECISIONS

Reviewing recent legal treatment of workplace drug and alcohol policies

WEYERHAEUSER CANADA AND UNIFOR LOCAL 447 (A), RE. 2019 CARSWELLALTA 2627

THRESHOLD FOR REASONABLE CAUSE TESTING

- **Background** - Four employees were on shift at the Employer's safety sensitive industrial site when a pouch with drug paraphernalia was found in a drawer in one of the men's washroom.
- **Response** - Employer Tested the employees for methamphetamine. None tested positive.
- **Under the Employer's Policy**, finding drug paraphernalia can constitute grounds for testing.

The Employees then made grievances challenging the Employer's random drug testing

Issue: Is it sufficient to require a test when someone was in the general area where drugs are found without other evidence to suggest they were the user, or only minimal circumstantial evidence?

WEYERHAEUSER CANADA AND UNIFOR LOCAL 447 (A), RE. 2019 CARSWELLALTA 2627

THRESHOLD FOR REASONABLE CAUSE TESTING

Employer's position:

- Drug testing was **justified**
- Only a limited number of employees had access to this washroom on that day and in the time frame of the kit's discovery, disappearance and reappearance.
- Based on the Company's investigation and interviews, there were four employees who were the only employees on site at the material time who were likely to have used or had regular access to the subject washroom.

Union's position:

- Drug testing was **not justified**
- While the finding of drug paraphernalia *can* constitute grounds for testing, the testing of individual employees must be based on reasonable proximity or some other nexus between the employee sought to be tested and the paraphernalia itself.

WEYERHAEUSER CANADA AND UNIFOR LOCAL 447 (A), RE. 2019 CARSWELLALTA 2627

THRESHOLD FOR REASONABLE CAUSE TESTING

Arbitrator Decision

- Found all four tests lacked justification under the Employer's policy. In all cases, the Employer has failed to establish the necessary nexus between what an admittedly very disturbing find and the employees.
- Finding of drugs or drug paraphernalia was an appropriate trigger for an investigation.
- It was **not** a justification for testing specific individuals unless there are additional factors, (*direct* or *circumstantial*) that justify linking the find to the individual in question.

More evidence was ultimately required to link a specific individuals to the drug paraphernalia, or to indicate that they had recently used drugs

PRACTICAL TIPS: REASONABLE CAUSE TESTING

Practical Considerations for Reasonable Cause Testing:

- ✓ Where possible, require a supervisor to receive agreement from another member of management that a test is **necessary, prior** to requesting a test. Second member of management should attempt to **observe employee as well**.
- ✓ **Tailor the test to the observations.** For example, where odor of alcohol on breath is the sole observation that should result in a breath test, whereas an additional urine test for drug use is not required.
- ✓ **Be reasonable in your assessment.** Are there alternative reasons for the employee's odd behaviour? Ask the employee. Record observations and your decision making process.
- ✓ **Develop and utilize reasonable cause checklists.**



VANCOUVER SHIPYARDS CO. AND MARINE AND SHIPBUILDERS, LOCAL 506 (RC), RE 2022 CARSWELLBC 3040

POST-INCIDENT TESTING AND RANDOMIZED TESTING

- **Background** - Worksite was a shipyard repairing, maintaining and constructing marine vessels (safety sensitive environment).
- **Incident** - A collision occurred between a modular transporter and set of scaffold stairs.
- **Violation** - Employee tested positive for cannabis, negative for alcohol.
- **Discipline** - Because of the positive test, the Employee suspended for 10 days without pay, and was further required by the Employer to:
 1. Undergo an Independent Medical Evaluation ("IME"); and
 2. Agree to random substance testing for a period of 12 months.

VANCOUVER SHIPYARDS CO. AND MARINE AND SHIPBUILDERS, LOCAL 506 (RC), RE 2022 CARSWELLBC 3040

POST-INCIDENT TESTING AND RANDOMIZED TESTING

- **Employer's Privacy Policy:** The Employer will collect, use and disclose employee personal information that is reasonably required for purposes related to establishing, managing and terminating an employment relationship with the Employer.
 - However, the Employee was never warned that random monitoring would be imposed if he violated the Drug and Alcohol Policy by testing positive for marijuana metabolites.
- Arbitrator at paragraph 277 held: "It is common ground in this case that a positive urine test result does not establish impairment, only use of cannabis."
 - Employer's Drug and Alcohol Policy did not prohibit off-hours use of marijuana and did not create a cut-off time to guide employees.
- Employee was not disciplined for working in an impaired condition, only for the positive urine test. As a result, the Employer cannot rely on the test result to impose discipline.

VANCOUVER SHIPYARDS CO. AND MARINE AND SHIPBUILDERS, LOCAL 506 (RC), RE 2022 CARSWELLBC 3040

POST-INCIDENT TESTING AND RANDOMIZED TESTING

- Random testing required the employee to respond promptly to each notification by attending a facility designated as a suitable lab site:
 - On one occasion, he was on leave in the Maritimes and was forced to drive four hours (one way) to take a test.
 - Employee fully complied with the monitoring program and testified he was not anxious, because he had decided to stop using marijuana.
- Nevertheless, **the burden and the affront to personal dignity was significant.**
- Employee even ended some friendships to avoid the marijuana social setting.
- Moreover, [the] removal of bodily fluids was a “highly invasive form of search.”

VANCOUVER SHIPYARDS CO. AND MARINE AND SHIPBUILDERS, LOCAL 506 (RC), RE 2022 CARSWELL BC 3040

POST-INCIDENT TESTING AND RANDOMIZED TESTING

- In awarding damages in the amount of \$15,000, the arbitrator found the Grievor's privacy rights were violated:
 - (a) by the direct referral to an IME with a Company-selected specialist physician; and
 - (b) by the imposition of one year of random drug monitoring.
- Records and documents in the Employer's possession relating to the IME and random drug monitoring ordered to be destroyed.
- 10-day suspension was set aside.
- Compensation was awarded for lost wages and overtime, and for expenses incurred as a result of his participation in random drug monitoring.

PRACTICAL TIPS: POST-INCIDENT TESTING

Post-incident testing is triggered by the incident itself, and not by observed employee behaviour that suggests impairment (reasonable cause)

Ensure your D&A Policy does the following:

- ✓ **Defines incidents appropriately**, i.e. personal injury, lost working time, mandatory OHS reports, property damage greater than a certain amount;
- ✓ Bake in some **discretion to order the test**—if a manager can objectively determine D&A was not a factor, waive the test;
- ✓ Focus in this area is more about **investigating the incident and the employee's connection to it**, rather than a focus on possible impairment;
- ✓ To test, it is not enough to speculate the employee was involved, must have **concrete evidence** the employee was instrumental in the incident (*Gibson*)



PHILLIPS V. WESTCAN, 2020 ABQB 764

RANDOMIZED TESTING

- **Background** – The Employee accepted an offer of employment from Westcan for the position of Long-haul truck driver. The offer included an express condition that the “offer is made subject to your compliance with: ... our corporate policies...” and noted the position was “safety sensitive” as it required remote transportation of dangerous goods, frequently without supervision.
- All applicants, including the Employee, signed an “expectation agreement” prior to the commencement of employment that included the following clause:

To help us achieve the highest level of safety, Drivers are expected to understand and abide by the transportation legislation and our policies and procedures including ... drug and alcohol policy (including pre-employment, random, post-incident and for cause testing of drivers) ... I have read and have had an opportunity to ask questions about the driver expectations set forth by [Westcan]. I understand by signing this document that should I become a driver with [Westcan] I will be held to these expectations.

PHILLIPS V. WESTCAN, 2020 ABQB 764

RANDOMIZED TESTING

- The Employee also completed Westcan's Operations Training Program, which reviewed applicable policies and procedures.
- Following the training, the Employee was successfully examined on the material, demonstrating his understanding that safety sensitive employees were subject to random drug and alcohol testing.

Notwithstanding the foregoing, the Employee then applied to the ABQB for an injunction restraining Westcan from randomly testing its employees for drugs and alcohol

PHILLIPS V. WESTCAN, 2020 ABQB 764

RANDOMIZED TESTING POLICY UPHELD

The Alberta Court of Queen's Bench held:

Contractual Terms of Employment: Not Unconscionable

[5] - The enforceability of a contractual drug and alcohol testing regime does not turn on the reasonableness of that regime, as it would if random testing were imposed unilaterally. An employer and employee are free to agree to conditions of employment, provided those conditions comply with employment standards, human rights and other legislation, which have not been raised by Mr. Phillips, and provided those conditions of employment are not otherwise unconscionable. Random drug and alcohol testing is not an unconscionable term in an employment agreement for a driver hauling dangerous goods over long distances, without supervision. [...]

[6] Even if Mr. Phillips' employment were governed by a contract which did not expressly permit Westcan to conduct random testing, Westcan would be justified in unilaterally imposing random testing on its drivers, because of the enhanced safety risks of Westcan's business.

PHILLIPS V. WESTCAN, 2020 ABQB 764

RANDOMIZED TESTING POLICY UPHeld

- **The Work:** There was evidence from Westcan of serious incidents in recent years, proving the inherent danger in driving heavy trucks carrying dangerous goods over long distances
- **The Workplace:** Opportunities to observe indications of impairment, such as glassy eyes, slurred or incoherent speech, or difficulty walking were very limited
 - Post-incident testing was practically impossible due to geographic remoteness (physically getting to employee for testing could take over 24 hours in certain driver locations)
- **The Workforce:** There was physical evidence of employees using alcohol at work, including instances of beer cans in company trucks and hard liquor at the shop

PHILLIPS V. WESTCAN, 2020 ABQB 764

RANDOMIZED TESTING POLICY UPHELD

The Alberta Court of Queen's Bench held:

Westcan's Right to Unilaterally Impose Random Testing

[35] - Most of the parties' submissions were focused on whether the circumstances of Mr. Phillips' employment with Westcan justify the imposition of random drug and alcohol testing, following either the *Irving* test or the *Entrop* test. Those tests apply where an employer unilateral imposes random testing. Those tests do not apply where an employer and employee have expressly agreed to random testing, which is the case here.

[36] - For the sake of completeness and providing the parties with a decision on the main issue they argued, I have considered whether Westcan would be justified in unilaterally imposing a random drug and alcohol testing regime, if it did not have an express contractual agreement with Mr. Phillips which includes that provision. [...] In my view, even if the *Irving* test applied in this case, it would be met in the case of Westcan's drivers, because of the work, the workplace and the workforce.

PRACTICAL TIPS: WHAT DO YOU NEED FOR EVIDENCE OF AN ENHANCED SAFETY RISK

What evidence supports the introduction of a Randomized Testing program?

- ✓ Actual, measured **evidence of safety risks and substance use** at your workplace (rather than general industry trends)
- ✓ More than a few anecdotes about **observed use of substances**
- ✓ Evidence of a **causal connection** between substance use and accidents is most persuasive
- ✓ **Can consider evidence from the entire work site, not just a subset**, particularly where union, non-union and contractors intermingle (*Suncor*)



FORT MCKAY LOGISTICS LP AND TC, LOCAL 362 (DAWSON), RE [2022] AWLD 4037

POST-INCIDENT TESTING

- **Background** - Employee picked up cargo in a truck to return to the Employer's warehouse. When the employee unloaded the cargo, due to failure to secure materials properly, a new fire extinguisher had fallen out of the truck and a chemical was flowing from the top of the box. The incident was not deemed dangerous, but resulted in appx. (\$100.00) of damage.
- **Reason for Testing Employee under Policy** - **“Equipment damage”**
 - The Employer's Alcohol and Drug Policy was modelled on the *“Canadian Model for Providing a Safe Workplace - Alcohol and drug guidelines and work rule”*
- **Violation** - Employee tested positive for marijuana
- **Discipline** - Because of the positive test, the employee was **terminated**

FORT MCKAY LOGISTICS LP AND TC, LOCAL 362 (DAWSON), RE [2022] AWLD 4037

POST-INCIDENT TESTING

*At issue in this arbitration is **the application of the Employer's Alcohol and Drug Policy which was modelled on the "Canadian Model for Providing a Safe Workplace - Alcohol and drug guidelines and work rule"**. The Policy has been in effect since October 2018 and was last revised on February 16, 2021. The Policy sets out the circumstances in which an employee may be required to be tested and has other provisions which deal with investigations and the manner and extent of the prescribed testing.*

[...]

*But the **reasonableness of its application is raised in this individual grievance** and the fact that the Union has not previously grieved the Policy itself does not preclude such an analysis.*

FORT MCKAY LOGISTICS LP AND TC, LOCAL 362 (DAWSON), RE [2022] AWLD 4037

POST-INCIDENT TESTING

Three elements essential to the determination to require post incident testing:

1. the **threshold level of incident** needed to justify testing,
2. the **degree of inquiry** necessary before the decision is made, and
3. the **necessary link** between the incident and employee's situation to justify testing

FORT MCKAY LOGISTICS LP AND TC, LOCAL 362 (DAWSON), RE [2022] AWLD 4037

POST-INCIDENT TESTING

Decision: Grievance allowed

- Under the first step, **the threshold was not met**. From every perspective including that of the Employer's supervisors and managers, this was a minimum risk low impact incident.
 - Employee should never have been tested based on the elements that the Employer must meet to require testing.
 - The entire subsequent basis of the termination rested on an improperly obtained test result.
- Preventing employers from relying on improperly obtained test results will serve as a deterrent to employers seeking testing where it is apparent that the threshold has not been met.



A photograph of construction workers on a city site. In the foreground, several workers wearing white hard hats and high-visibility green safety vests are seen from behind, looking towards a large building under construction. One worker in the center has their right hand raised. In the background, a tall, modern skyscraper with a glass facade stands prominently against a clear blue sky. Other construction elements like scaffolding and cranes are visible.

HUMAN RIGHTS DECISIONS

Disclosure of drug and alcohol-related matters in the workplace

STEWART V. ELK VALLEY COAL CORP., 2017 SCC 30

REFRESHER – DISCLOSURE OF ADDICTION

- **Background/Incident** – Complainant operated heavy equipment as a loader, for a coal company and was involved in accident in the workplace. Pursuant to the D&A Policy the Employee was required to undergo drug testing. The results however came back positive.
 - During a meeting with his Employer after the accident, the Employee disclosed to his Employer that he thought he may be addicted to cocaine.
 - Pursuant to the Employer’s D&A Policy, Employees were required to disclose any dependence or addiction issues before any drug-related incidents occurred. If they did, they would be offered treatment. However, if they failed to make this disclosure and were involved in an incident, and tested positive for drugs, they would be terminated.
- Employer dismissed the Employee pursuant to D&A policy, on the basis that any addiction issue had to be raised to management prior to any accident occurring.

STEWART V. ELK VALLEY COAL CORP., 2017 SCC 30

REFRESHER – DISCLOSURE OF ADDICTION

- Complainant brought an AHRC complaint against their Employer on the basis that they were terminated due to their disability, i.e. addiction.
- AHRC Tribunal however held that:
 - The Employee's termination was for breaching the D&A Policy, not because of Employee's drug use and or addiction. This was further reflected in the Employee's termination letter. As a result, there was no prima facie discrimination.
 - The Employees alleged denial about their own addiction was irrelevant and it could not be assumed that addiction diminished his ability to comply with the terms of the policy.
- **The decision outlines that positive disclosure obligations on addiction(s) in D&A Policies can be used to insulate employers from liability under the *Alberta Human Rights Act*.**

BIRD V. LAFARGE CANADA INC., 2021 AHRC 50

DISCLOSURE OF PRESCRIPTION MEDICINE

- **Background/Incident** – Employee was a ready-mix truck driver, i.e. a safety-sensitive position, and was involved in an accident while driving a concrete truck on a public roadway. Per the D&A Policy, the Employer notified him that he would be sent for a post-incident testing.
 - The Employee then told his manager that he had a prescription for cannabis;
 - The Employee had not disclosed this prescription earlier, as per the D&A Policy, nor had he informed the Employer of any related disabilities and or need for accommodations; and
 - Test company later opined from the results that the THC concentrations in the Employee likely were sufficient to interfere with his ability to operate safely in his position.

BIRD V. LAFARGE CANADA INC., 2021 AHRC 50

DISCLOSURE OF PRESCRIPTION MEDICINE

- The Employee was terminated for contravening the D&A Policy, in failing to disclose their cannabis prescription. The termination letter however did not raise the issue of whether the Employee was necessarily impaired during the incident.
- **The Employee filed an AHRC complaint against his Employer on the basis that it would not accommodate medical marijuana or his disability.**
- AHRC dismissed the complaint:
 - The Employee had in the past acknowledged the D&A Policy, and should have been aware of its application. Further, the Employee was terminated, not because he was using medical cannabis, but for failing to disclose this use until after an accident, thereby contravening the D&A Policy.



ADDITIONAL FUTURE CONSIDERATIONS FOR EMPLOYERS

LEGISLATIVE AND SOCIAL DEVELOPMENTS

Decriminalization of Drugs

- British Columbia is set to decriminalize the possession of certain drugs for personal use for a trial period of three years between **January 31, 2023 – January 31, 2026**:
 - **Opioids** (heroin, morphine, and fentanyl);
 - **Cocaine** (crack and powder cocaine);
 - **Methamphetamine** (meth); and
 - **MDMA** (ecstasy).
- **This is unlikely to have any impact on Employers' ability to regulate these substances in the workplace.** However, it is anticipated that these changes could cause confusion with some BC employees as to what their lawful entitlements are.

GENERAL RECOMMENDATIONS & REMINDERS

Basic D&A Tips for Best Practices:

- ✓ Employers should ensure Employees are aware of the specific protocols under any D&A Policies and that they are consistent and reasonable in their application and enforcement.
- ✓ Employee testing should be directed towards addressing safety risks related to possible employee impairment, vs targeting off-duty conduct that does not impact the workplace.
- ✓ Where testing is necessarily engaged, whether reasonable cause or post-incident, Employers should be sure that individual circumstances are considered for context, as Employer conduct is more likely to be held unreasonable where individual circumstances are ignored and testing is treated as automatic.



Additional Considerations:

- ✓ If an Employer engages third party entities to conduct testing under a D&A policy, ensure these entities are compliant with applicable privacy laws.

CONTACT INFORMATION





Max Brunette
Partner – Gowling WLG

 max.brunette@gowlingwlg.com
 +1 403 776-3374



Matthew Warren
Associate – Gowling WLG

 matthew.warren@gowlingwlg.com
 +1 403 298-1825



GOWLING WLG