

## **Random Drug and Alcohol Testing Permitted at Toronto Transit Commission**

**Andrew Brown & Edward Snetsinger**

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In a recent decision of the Ontario Superior Court of Justice, the Amalgamated Transit Union (the “Union”) was denied its request for an injunction preventing the Toronto Transit Commission (the “TTC”) from implementing random drug and alcohol testing of employees.

The court’s decision does not determine the permissibility of the TTC’s random testing protocol, as there is an ongoing arbitration at which this issue will be determined, nor does it create new law. However, the decision does provide useful insight into the analysis a court may undertake when assessing random testing, particularly in a Canadian jurisdiction in which random testing is rarely permitted.

### **TTC’s Fitness for Duty Policy**

In September 2008, the TTC approved the implementation of a “Fitness for Duty Policy” (the “Policy”), which took effect in October 2010. The purpose of the Policy is 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/executive positions, under the following circumstances:

- Where there is reasonable cause to believe drug or alcohol use resulted in an employee being unfit for duty.
- As part of an investigation into a significant work-related incident or accident.
- In the context of a ‘return to work’ plan following treatment or after a violation of the Policy.
- As a final condition of employment into a safety sensitive position.

After the TTC announced the Policy, the Union alleged it was contrary to the collective agreement and *Human Rights Code* of Ontario. A grievance was brought to arbitration, which has been on-going for six years with, admittedly, no end in sight (the “Arbitration”).

### **TTC’s Random Drug and Alcohol Program**

In October 2011, in response to a culture of drug and alcohol use at some of its locations, the TTC announced its intention to expand the Policy to include random testing of employees in safety sensitive and specified management/executive positions. Generally speaking, courts and arbitrators have held random drug and alcohol testing is not permitted in Canada. However, in the 2013 decision of

*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd* (“*Irving Pulp and Paper*”), the Supreme Court of Canada confirmed a company may conduct random alcohol testing for a safety-sensitive position where the company can establish it operates a dangerous workplace and there is a general problem with alcohol abuse in the workplace.

Cognizant of the prevailing law, and its specific health and safety objectives, the TTC’s random testing program was proposed to be carried out as follows:

- Of the relevant employee group, 20% would be randomly selected each year for testing by an independent third party.
- Testing would be conducted through an alcohol breathalyzer and oral fluid sample (*e.g.*, oral fluid swab), not a more invasive method such as blood testing, or one that raises privacy considerations such as urinalysis.
- A request to submit to testing would be communicated to employees, testing itself would take place, and results would be stored, in manner that protects employees privacy and confidentiality.
- Threshold levels for a positive test 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 choices by screening out results that detect previous drug use unlikely to amount to impairment at the time.
- Substances covered by the testing (*e.g.*, cocaine, marijuana, opiates, *etc.*) would include only those which can impair a user’s psychomotor and cognitive ability.
- Employees would be given the opportunity to challenge and explain test results before they are reported to the TTC. As well, at an employee’s request, a second oral sample could be retested.
- A positive test result would be followed by a review with a Medical Review Officer who would discuss the results with the employee to determine whether there was a legitimate, medical explanation for the result. If so, the Medical Review Officer would have the discretion to report the test as negative.
- The Policy would include treatment for drug and alcohol use should it be appropriate.
- Failure to submit to testing would be a violation of the Policy.

### **Injunction and Court’s Decision**

Shortly after the TTC announced it would implement random testing, the Union brought a motion for an interlocutory injunction preventing the TTC from implementing the program pending a final determination of the issue through the Arbitration.

On an application for an injunction, the party requesting the injunction must demonstrate three things:

1. There is a serious issue to be tried.
2. If the injunction is not granted, the party (in this case, the Union) will incur irreparable harm that cannot be compensated in monetary damages.
3. The balance of convenience favours granting the relief, taking into account the public interest.

In refusing the injunction, the court responded to the three issues as follows:

Yes – There is a serious issue to be tried.

No – The Union will not suffer irreparable harm if the injunction is not granted. If the Policy, or its random component, is found to contravene the collective agreement or *Human Rights Code*, the law of Ontario provides for the payment of money damages to those employees who have been wronged. For instance, if an employee is terminated from employment because of a positive test result, and the Policy is found to be unenforceable, the Union can commence proceedings against the TTC to compensate the terminated employee.

No – The balance of convenience does not favour the Union. If random testing proceeds, it will increase the likelihood an employee in a safety sensitive position, prone to using drugs or alcohol too close in time to coming to work, will either be detected or deterred by the prospect of being detected. This will enhance public safety.

### **Key Findings of Fact**

In addition to the components of the program itself, the court accepted and commented favourably on the following additional evidence (in many instances unchallenged by the Union), which supported the rationale and reasonableness of the TTC's random testing program:

#### *Reasonable Grounds*

- There is a culture of drug and alcohol use at the TTC, particularly in certain large complexes and in the TTC yards. This is factually different from *Irving Pulp and Paper* in which the arbitration board concluded the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol.
- It is very likely an employee with a substance use disorder will report to work in an impaired condition.
- Many cases of drug and alcohol-related activity among TTC employees at work go undetected and unverified due to difficulties in detecting drug and alcohol misconduct.
- Between October 2010 and December 2016, approximately 2.4% of external applicants – individuals who knew they would be tested for drugs – nevertheless returned a positive test.
- Statistically, random workplace testing results in a significant decline in the rate of positive drug tests of employees.

#### *Reasonable Expectation*

- External candidates interested in working for the TTC in a safety sensitive position must pass a pre-employment urinalysis test for drug use. Hence the idea of on-going testing should be a reasonable expectation.

- TTC management and employees expect steps will be taken to ensure those in a safety sensitive position are fit for duty, thereby reasonably diminishing any expectation of privacy concerning drug and alcohol consumption.
- The TTC had distributed comprehensive information to all employees about the Policy and its intention to implement random testing.

#### *Minimal Intrusion Into Privacy*

- A breathalyzer measures a person's breath alcohol level at the time of the test; it does not reveal other personal information about the individual.
- General stigma and psychological and reputational damage, as a result of being tested, is unlikely given the use of random selection and that, in any year, 20% of employees would be tested, including senior executives.

#### *Reliability of Results*

- Oral fluid testing provides a better indicator of recent use and likely impairment than does urinalysis.
- The chance of a false-positive due to second hand smoke is remote.

### **Looking Ahead**

By denying the injunction, the court has permitted the TTC to begin to implement its random drug and alcohol testing program pending the outcome of the Arbitration. It has also provided important insight into the analysis a court may undertake when assessing random testing, particularly in a jurisdiction in which random testing is rarely permitted.

**We will continue to monitor this evolving area of the law and keep our readers updated. Meanwhile, for assistance addressing drug and alcohol testing in your workplace, contact the employment and labour law experts at Sherrard Kuzz LLP.**

***Andrew Brown and Edward Snetsinger are lawyers with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Andrew and Edward can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting [www.sherrardkuzz.com](http://www.sherrardkuzz.com).***

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