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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

DRUG TESTING IN CANADA: A Tale of Two Provinces

Many employers struggle with the question of whether they can require employees to undergo drug and alcohol testing. Employers want testing to enhance workplace safety and productivity. Employee advocates resist testing because, they argue, testing is an infringement on an employee's privacy, and can result in discrimination on the basis of a disability (i.e. substance dependency). So, what can an employer do?

A Provincial Divide

Two recent Court of Appeal decisions, one from Alberta and one from Quebec, have received considerable attention and brought the issue of workplace drug and alcohol testing back into the spotlight.

In the Alberta case of *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)*, the Court considered a drug and alcohol testing policy as it related to pre-employment testing in a construction environment. The policy required all applicants to undergo drug and alcohol test prior to commencing employment, reflecting the employer's concern about the impact of substance use on an employee's ability to function safely in the workplace.

The employee, described as a "casual" user of marijuana, had smoked pot approximately five days prior to the test. Despite the lapse in time the drug test came back positive and the employee, who had already commenced employment, was terminated. The employee filed a complaint with the Alberta Human Rights Commission and the complaint made its way to the Alberta Court of Appeal. The Court decided in favour of the employer on the grounds that the employee did not suffer from a disability that afforded him protection under human rights legislation. The Court also noted that an employer's human rights obligations do not override its responsibility to provide a safe workplace.

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April 2008 Vol. VII No. 2

"Drug Testing in Canada..." continued from page 1

Some commentators have interpreted the Court's decision as expanding the circumstances in which pre-employment testing can operate. They rely on the Court's observation that human rights do not trump workplace safety. However, as we will explain in this article, this interpretation may read too much into the Court's decision.

In the second case, the Quebec Court of Appeal decision in *Goodyear Canada Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 143*, the Court considered a policy of random drug and alcohol testing in a safety-sensitive work environment. The employer argued that random testing was necessary for safety reasons. The union maintained that random testing, even in the context of safety-sensitive positions, constituted an unjustifiable intrusion on employee rights.

The Court decided in favour of the union. It concluded that random testing constituted a major intrusion on employee privacy, a protected right under the Quebec *Charter of Human Rights and Freedoms*. However, the Court then qualified this protection by stating that the right was not absolute; it can be limited where there is a substantial objective to be achieved and where the limitation is as minimal as possible. Applied to the facts of this case the Court found that there was no evidence that random testing was essential to protect the health and safety of other employees. As such, the policy was struck down.

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What These Decisions Mean for Employers

As mentioned earlier, some suggest that because the Alberta Court of Appeal did not strike down employer's pre-employment testing protocol, the Court has expanded the circumstances in which this kind of testing is appropriate. However, this analysis reads too much into the Court's decision.

The Alberta Court focused primarily on whether the employee at issue suffered from a disability that afforded him protection under human rights legislation. Having found that he did not, no human rights remedy was available. It was therefore not necessary (and the Court declined) to decide whether the testing policy would have been enforceable in other circumstances. As such, this issue is still very much alive.

As for the decision from the Quebec Court of Appeal it appears to reinforce the traditional view on drug and alcohol testing. A testing protocol – in particular random testing – must be justified on the basis that it is essential to protect workplace health and safety, and interferes with a protected right only to the extent necessary, and no more.

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The net result is that, as a general rule, the following guidelines are applicable:

1. Testing is permitted as part of an investigation to determine the cause of a significant workplace safety incident, accident or "near miss".
2. Random testing is permitted in safety-sensitive positions as part of a "return to work" agreement or other rehabilitative program. These arrangements typically follow after an employee's leave of absence to seek treatment for an identified drug or alcohol dependency.
3. Random testing may be permitted where the employees operate in highly safety-sensitive positions and are under little or no supervision. For example pilots in the airline industry.
4. Pre-employment testing is not permitted because the results of such a test do not accurately identify whether an employee will be impaired in the future.

For further information about drug and alcohol testing or for assistance developing a drug and alcohol protocol in your workplace, please contact a member of the Sherrard Kuzz team.

FIRST CRIMINAL CONVICTION Under Bill C-45 Amendments

On March 17, 2008, Transpave Inc., a Quebec manufacturer of concrete blocks, was convicted under the *Criminal Code* of criminal negligence arising out of a fatal accident involving one of its employees, and ordered to pay a fine of $110,000.

Transpave's criminal conviction is the first registered under the Bill C-45 amendments to the *Criminal Code*. These amendments received a great deal of attention upon their introduction four years ago as they significantly expanded the role of the *Criminal Code* in regulating workplace safety. However four years later not a single conviction had been registered until now.

Does the Transpave decision mark the beginning of a new and more aggressive era in workplace health and safety enforcement?

A Brief History

As many of our readers will recall, Bill C-45 emerged in response to the 1992 Westray coal mine disaster in which 26 miners lost their lives in a tragic mine collapse. It was widely concluded that the deaths were a result of the mining company's negligence. Through Bill C-45 the government acted on its stated view that "*the criminal law can provide an important additional level of deterrence if effectively targeted at and enforced against companies and individuals that show a reckless disregard for the safety of workers and the public*".

The Bill established new types of offences for safety breaches and imposed serious penalties for violations that result in injury or death. Corporate defendants face a maximum fine of $100,000 for a summary offence and no maximum for an indictable offence. Corporate representatives and senior officers face fines and imprisonment for up to 25 years. This is in addition to any fine or imprisonment which may be levied under the applicable provincial health and safety legislation.

The Transpave Decision

Twenty-three year old Steve L'Écuyer was fatally crushed on October 11, 2005 when he attempted to clear a jam in one of the company's machines. An investigation led by Quebec's Health and Safety Board and the provincial police resulted in charges being laid. The company was charged with criminal negligence for having allowed L'Écuyer to operate the machine with its motion detector safety mechanism deactivated. Transpave plead guilty to the charge on December 7, 2007.

Although not an insignificant sum, the fine in *Transpave* could have been much larger. The reduced figure reflects the fact that following the accident Transpave spent in excess of $750,000 on safety improvements. As well, Transpave was a relatively small company (employing approximately 100 workers). The fine of $110,000 was sufficient to have a meaningful economic impact. A larger organization would likely have received a much higher fine designed to ensure "punishment".

What This Means For Employers

Every responsible organization is conscious of its obligation to ensure a safe workplace. However, the *Criminal Code* provisions added through Bill C-45 up the *ante* considerably. Increased fines, lengthy jail sentences and the stigma of criminal prosecution are all on the table. The decision in *Transpave* delivers a message to employers; fail to provide a safe workplace and you may face severe sanction through the criminal law.

As an employer there are steps you may consider to protect both your people and organization. Some are industry-specific, while others are more general in nature. In any event, the responsibility to provide a safe workplace is on-going and should be re-evaluated at regular intervals. At the very least, every organization should:

1. Educate and re-educate its people about the evolving nature of workplace safety – the legal obligations (federal and provincial) and cost of non-compliance both financially and in human terms.
2. Conduct regular, detailed and honest internal audits of safety practices and protocols.
3. Create formal and informal lines of communication that encourage the free-flow of ideas and the sharing of safety related information.
4. Foster a workplace environment in which every person is expected to plan safely, work safely and take responsibility for the well being of others.

The team at **Sherrard Kuzz LLP** regularly advises employers regarding the full range of health and safety matters, including training, workplace audits, best practices, discipline, enforcement mechanisms, work refusals, appeals of inspectors' orders and defending employers in prosecutions under applicable legislation.

For more information please contact a member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

As of February 15, 2008, Ontario workplaces are required to post a revised and updated version of the Ministry of Labour's "What You Should Know About the Employment Standards Act". Failure to place the poster in a conspicuous location may result in the issuance of a Compliance Order, a Notice of Contravention, or a prosecution under the ESA. The poster is available free from either the Ministry of Labour or Sherrard Kuzz LLP.

HReview Seminar Series

Next in our series of employment and labour law updates:

Ontario's New Human Rights Regime - What Every Employer Should Know

- **What is the new regime?**
- **When will it be in place?**
- **What happens to Complaints that have already been filed?**
- **How will all of this affect employers?**
- **What steps should employers consider putting into place now to prepare?**

DATE: Thursday May 29, 2008; 7:30 - 9:30 a.m. (program at 8:00 am; breakfast provided)

VENUE: **Hilton Garden Inn Toronto - Vaughan, 3201 Highway 7 West**
Vaughan, Ontario 905.660.4700

COST: Please be our guest

RSVP: By Monday May 19, 2008 to info@sherrardkuzz.com or 416.603.0700

*** HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.**

SHERRARD KUZZ LLP
Employment & Labour Lawyers

155 University Avenue, Suite 1500
Toronto, Ontario, Canada M5H 3B7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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