Drug and Alcohol Testing

Arleen Huggins
and
Christopher J. Foy
Koskie Minsky LLP

Tuesday February 3, 2009

Ontario Bar Association
2009 Institute

Drug and Alcohol Testing:

Pre-Employment, Pre-Appointment & Pre-Access

Introduction

The focus of this paper is to discuss the legal issues involving drug and alcohol testing that arise in the pre-hiring process. In addition, this paper will discuss alcohol and drug testing in the post-hiring process in two areas: pre-appointment testing, that is testing existing employees prior to appointment to safety sensitive positions; and pre-access testing, where employees will be subcontracted to an owner's site which requires conformity to the owner's drug and alcohol policy.

Entrop: The Leading Authority in Ontario

The Ontario Court of Appeal decision of *Entrop v. Imperial Oil Limited* [2000] O.J. No. 2689 remains the leading authority in Ontario with respect to the issue of drug and alcohol testing. This case has also influenced the Ontario Human Rights Commission's *Policy on Drug and Alcohol Testing*, published in September 2000 and not revised.

Entrop deals with the rights of perceived or actual substance abusers in the context of the Imperial Oil drug and alcohol policy. In *Entrop*, Imperial Oil instituted a comprehensive alcohol and drug testing policy for its employees at its two Ontario refineries. Although the policy mainly focused on employees in safety-sensitive positions, it also provided for mandatory alcohol and drug testing for all job applicants as a condition of employment and testing for alcohol and specified drugs for all employees.

Mr. Entrop, an Imperial employee, was a recovered alcoholic who had not had a drink for seven years. The policy required him to disclose previous alcohol abuse because his job was classified as safety-sensitive. Upon disclosure, he was automatically reassigned to another position.

The Honourable Mr. Justice Laskin sets out the reasons for finding that Imperial Oil's policy was *prima facie* discrimination as follows:

> Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the Policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of handicap under the Code, anyone testing positive under the alcohol and drug testing provisions of the Policy is entitled to the protection of s. 5 of the Code. Imperial Oil applies sanctions to any person testing positive - either refusing to hire, disciplining or terminating the employment of that person - on the assumption that the person is likely to be impaired at work currently or in the future, and thus not "fit for duty." Therefore, persons testing positive on an alcohol or drug test - perceived or actual substance abusers - are adversely affected by the Policy. The Policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, prima facie discriminatory. Imperial Oil bears the burden of showing that they are bona fide occupational requirements. See Canadian Civil Liberties Assn. v. Toronto-Dominion Bank (1998), 163 D.L.R. (4th) 193 (Fed. C.A.).

Upon finding that there was a prima facie case of discrimination, the Court in *Entrop* then applied a three step test which had previously been established by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* [1999] 3 S.C.R. 3 ("*Meiorin*") to determine whether the Policy's provision for random alcohol and drug testing was justified as a *bona fide* occupational requirement ("BFOR").

The three step test established was as follows:

1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;

2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

3. That the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it was otherwise impossible to accomplish the work-related purpose without imposing undue hardship upon the employer.

The Court of Appeal held that random alcohol and drug testing for Imperial Oil employees in safety/sensitive positions, though *prima facie* discriminatory and contrary to the Ontario *Human Rights Code*, could be justified **if** the Policy could meet the three-pronged test.

In that respect, on the first prong of the test, the Court of Appeal found that the purpose of the Imperial Oil Policy in question was rationally connected to the performance of work at Imperial Oil's refineries as an accident at the refinery could have had catastrophic results for the employees, the public, and the environment. The Court found that promoting workplace safety by minimizing the possibility that employees would be impaired by either alcohol or drugs while working was a legitimate objective.

On the second prong of the test, the Court found that Imperial Oil adopted the Policy in an honest and good faith belief that it was necessary to the fulfillment of the legitimate work related purpose and noted that Imperial Oil consulted widely with its employees and with experts in both occupational health and safety and substance dependency prior to instituting the Policy.

In respect to the third prong of the test, the Court found that Imperial Oil had the right to assess whether its employees were capable of performing their essential duties safely as an employee working in a safety/sensitive position while impaired by alcohol or drugs presents a danger to the safe operation of the business.

Notwithstanding the above however, the contentious issue for the Court of Appeal was whether the means used to measure and ensure employees' freedom from impairment was reasonably necessary to achieve a work environment free of alcohol and drugs.

In this case, the drugs prohibited by the Policy all had the capacity to impair job performance, and Imperial Oil's method for showing the presence of drugs in a persons body was reasonable (urinalysis). Nonetheless however, the Court of Appeal found that the Policy's drug testing provisions were not *bona fide* occupational requirements because:

1. The drug testing purposed by the Policy could not measure **present** impairment, and therefore could not demonstrate that a person was incapable of performing the essential duties of the position; and

2. The sanctions for a positive drug test were too severe and more stringent than needed for a safe workplace and were not sufficiently sensitive to individual capabilities.

Furthermore, employees in non-safety sensitive jobs who tested positive for drug use were subjected to progressive discipline, while employees in safety-sensitive jobs who tested positive were terminated.

Contrast the above to the Court of Appeal's determination that the alcohol testing provisions of the Policy were justified as a *bona fide* occupational requirement as the alcohol testing could indicate the actual **present** level of impairment and the employee's ability to perform or fulfill the essential duties or requirements of the job, as opposed to merely detecting the presence of the substance in the system.

Note further that in an application of the *Entrop* decision by the Canadian Human Rights Tribunal in the case of *Milazzo v. Autocar Connaisseur Inc.*, [2003] C.H.R.D. No. 24 the Canadian Human Rights tribunal concluded that an employer's Zero Tolerance Policy, although meeting the rational connection, good faith and reasonable necessity tests enunciated in *Entrop*, did **not** satisfy the burden of demonstrating that it could not accommodate the employees (bus drivers) who tested positive for alcohol or drugs and who were alcohol and drug dependant. In that respect, it was the employer's failure to accommodate employees in the context of the drug and alcohol tests which proved to be fatal to the employer in respect to the Human Rights Complaint.

Pre-Employment Testing

The law regarding pre-employment drug and alcohol testing is in a state of flux at the moment, especially concerning the casual drug user. Two important cases will be explained with an attempt to draw out the applicable principles. It should be noted that in the arbitral context, Arbitrators are reluctant to find jurisdiction to rule on pre-employment drug and alcohol testing. In *Re Trimac Transportation Services -Bulk Systems and Transportation Communications Union (1998),* 74 L.A.C. (4th) 444, Arbitrator Burkett commented as follows:

> Having considered the submissions of counsel and the authorities cited, it is my finding that I do not have the jurisdiction to inquire into and rule upon the pre-employment drug testing that is complained about. It is trite to observe that the scope of the union's bargaining rights extend to the employees described as falling within the bargaining unit in respect of which the collective agreement applies. Absent express language extending provisions of the collective agreement to persons outside the scope of the union's bargaining rights as, for example, the application of a hiring hall provision to non-employees, the jurisdiction of an arbitrator appointed under a collective agreement is limited to the interpretation or application of that collective agreement to the employees within the bargaining unit.

Consequently, the relevant cases arise in the context of Human Rights Complaints under the applicable regime.

The first case of interest regarding the state of the law on drug and alcohol testing in the context of pre-employment is a case from the Alberta Court of Appeal, being *Alberta (Human Rights and Citizenship Commission)* v. *Kellogg Brown & Root (Canada) Co.* 2007 ABCA 426; leave to appeal to SCC refused [2008] S.C.C.A. No. 96.("*Kellogg*").

Kellogg Brown & Root (Canada) ("Kellogg") was a construction company whose hiring policy required all persons seeking non-unionized positions at Kellogg to take and pass a "post-offer/pre-employment" drug test before they would be hired. If the prospective employee failed the test, he or she would not be hired but would be eligible for hiring six months after the date of the failed test.

Mr. Chiasson, a prospective Kellogg employee for a safety-sensitive job, smoked marijuana on June 22, 2002. He took the Kellogg pre-employment drug test by urinalysis on June 28, 2002 and started working for Kellogg on July 8, 2002. He did not tell anyone at Kellogg that he had smoked marijuana and assumed that the marijuana would have cleared his system by the testing date.

On July 17, 2002, Kellogg's medical director informed Mr. Chiasson that he had failed the test. He then admitted that five days before the test he smoked marijuana. Mr. Chiasson was told to leave the work site. In October 2002, Mr. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission.

On the issue of discrimination, the Panel acknowledged that Kellogg's drug testing Policy was *prima facie* discriminatory against drug dependent individuals. However, the Panel found that there had been no discrimination against Mr. Chiasson. The Panel focused on Mr. Chiasson's statement that he was only a recreational drug user to find that his drug use was "a matter of personal, voluntary choice, and not a disability." There was no perceived disability concerning Mr. Chiasson because his work was considered excellent and there was nothing to show that the employer suspected him of serious drug use or on site impairment. The finding that there was no disability, real or perceived, led to the dismissal of Mr. Chiasson's claim.

On judicial review to the Alberta Court of Queen's Bench, the Court recognized that it was the first time it had been asked to address pre-employment drug testing under the Alberta *Human Rights, Citizenship and Multiculturalism Act*. The Court found *prima facie* discrimination. The Court held that Kellogg's Policy combined mandatory pre-employment testing for all covered employees, automatic termination for a positive result and no accommodation. By doing so the Kellogg Policy failed to assess each prospective employee according to her or his own personal abilities, and instead judged them against presumed group characteristics. The Kellogg Policy on pre-employment drug testing was found to exclude addicted individuals from employment on the basis of actual disability and non-addicted and non-impaired employees from employment based on perceived disability.

Kellogg's appeal to the Alberta Court of Appeal was allowed. From the evidence, the Court of Appeal concluded that Mr. Chiasson was not in fact drug addicted, nor was he terminated based on the perception by any Kellogg employees that he was drug addicted. The Court of Appeal upheld Kellogg's Policy.

The Alberta Court of Queen's Bench conclusion that the effect of Kellogg's Policy was to exclude Mr. Chiasson from employment on the basis of perceived disability could not be sustained. The Court of Appeal declined to follow *Entrop* stating that:

> The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict. To the extent that this conclusion is at odds with the decision of the Ontario Court of Appeal in ***Entrop v. Imperial Oil Ltd.*** (2000), 50 O.R. (3d) 18, 189 D.L.R. (4th) 14, we decline to follow that decision.

The Court of Appeal saw no difference in Kellogg's Policy with that of a trucking or taxi company which has a policy requiring its employees to refrain from the use of alcohol for some time before the employee drives one of the employer's vehicles. The Court of Appeal stated the following:

> Such a policy does not mean that the company perceives all its drivers to be alcoholics. Rather, assuming it is aimed at safety, the policy perceives that any level of alcohol in a driver's blood reduces his or her ability to operate the employer's vehicles safely. This is a legitimate presumption. Its goal is laudable since carnage on the highways is a leading, but often ignored, cause of death nearing epidemic proportions. Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic.

Leave to appeal to the Supreme Court of Canada of Kellogg, which would have offered the Supreme Court an opportunity to provide guidance on the matter, was recently refused. Thus, there are now conflicting Court of Appeal decisions in this area, being *Entrop* and *Kellogg.*

The interesting case of *Weyerhaeuser (c.o.b. Trus Joist)* v. *Ontario (Human Rights Commission)* (2007), 279 D.L.R. (4th) 480 (Ont. Div. Ct.) ("*Weyerhaeuser*"); leave to appeal to the Ontario Court of Appeal refused (M34362), November 8, 2007 and (M34351), August 21, 2007 involves a judicial review of a preliminary decision by the Ontario Human Rights Tribunal that it had jurisdiction to review *Weyerhaeuser's* Policy of pre-employment drug testing for safety sensitive positions.

The facts are similar to those in *Kellogg*, supra, although the decision in *Weyerhaeuser* came after the judicial review decision in *Kellogg* but before the Court of Appeal decision.

In *Weyerhaeuser*, a prospective employee, Mr. Chornyj, was offered a safety sensitive position which was conditional on passing a drug test as required by Weyerhaeuser's drug and alcohol policy. Prior to starting work, Mr. Chornyj tested positive for marijuana. He initially claimed that the positive test was a result of secondhand smoke. He later admitted that he had smoked marijuana. Weyerhaeuser revoked its offer of employment.

Mr. Chornyj filed a human rights Complaint. However, he did not claim that he abused marijuana, nor did he claim he used marijuana because he suffered from an existing disability. The only evidence before the Tribunal was that Mr. Chornyj claimed to be a recreational user of marijuana. The Tribunal refused Weyerhaeuser's application to dismiss Mr. Chornyj's Complaint. Weyerhaeuser sought judicial review of that decision to the Divisional Court.

The Divisional Court held that the Tribunal erred in failing to dismiss the Complaint, both on the basis of no actual disability and on the basis of no perceived disability. There was no evidence that anyone at Weyerhaeuser perceived Mr. Chornyj to have a disability. In addition, Weyerhaeuser's drug and alcohol Policy did not support an inference that Weyerhaeuser perceived Chornyj as having a disability. The Court made the following comments:

> The decisions in *Entrop* and *Kellogg* do not stand for the proposition that the mere existence of a drug testing policy is *prima facie* discriminatory on the ground of perceived disability. The effect of the drug testing policy must be examined in each particular case to determine if a claim of perceived disability is supportable.

The Court went on to distinguish Weyerhaeuser's drug and alcohol Policy with those found in *Entrop* and *Kellogg*; concluding that in the latter polices, a positive drug test resulted in automatic dismissal. In contrast, under Weyerhaeuser's drug and alcohol policy, a positive drug test did not automatically lead to dismissal or to the revocation of an offer of employment.

According to Weyerhaeuser's drug and alcohol Policy, once a person had tested positive, they could commence work if they subsequently provided a negative drug re-test and signed a Commencement of Duty Agreement. The Commencement of Duty Agreement stated that the person "may" be terminated if he or she engaged in "Prohibited Conduct" within the next five years. "Prohibited Conduct" included being at work with a blood alcohol concentration of 0.001; using alcohol within 8 hours of performing a safety sensitive task; using alcohol within 8 hours of an accident; possessing and consuming alcohol while on duty; using or possessing controlled substances (including marijuana) at any time; and refusing to submit to an alcohol or drug test.

In Mr. Chornyj's case, Weyerhaeuser argued that it revoked the offer of employment not because of the positive drug test, but because of Mr. Chornyj's lack of candor in admitting that he had used marijuana.

It is difficult to reconcile the cases of *Entrop*, *Kellogg* and *Weyerhaeuser*, especially when it comes to the casual drug user. Arguably, *Entrop* would find a *prima facie* case of discrimination even where the policy does not differentiate between an employee with a substance abuse problem and an employee who only casually uses drugs. In contrast, *Kellogg* would not find a *prima facie* case of discrimination if the policy is directed at actual effects suffered by recreational drug users, rather than being directed at perceived effects suffered by drug addicts. *Weyerhaeuser* suggests an individualized contextual analysis beginning with the premise that

just because a policy affects substance abusers and casual users in the same manner, doesn't necessarily establish a *prima facie* case of discrimination.

What does seem to be consistent is that, at least in Ontario, if a pre-employment drug and alcohol policy is going to have a chance of surviving the scrutiny of the Human Rights Code, it must avoid an automatic termination for a positive test.

Pre-appointment Testing

Greater Toronto Airports Authority v. *Public Service Alliance of Canada, Local 0004*, [2007] C.L.A.D. No. 243 ("*GTAA*")is an arbitration decision delivered by Arbitrator Devlin concerning a Union grievance to the implementation of the Greater Toronto Airports Authority ("GTAA") drug and alcohol Policy.

The GTAA Policy included a provision for pre-appointment drug testing of internal and external applicants for positions which had been designated as safety-sensitive. The failure to pass a test or refusal to undergo a test would render the employee ineligible for the position.

Safety-sensitive positions were defined in the Policy as those in which individuals have a key and direct role in an operation where impaired performance could result in a significant accident or incident affecting the health or safety of employees, others working at the airport, customers, the public or the environment, or an inadequate response to an emergency or operational situation.

Under the Policy, alcohol testing was to be conducted using a breathalyzer for which the cut-off level was generally .04% blood alcohol concentration. Drug testing involved urinalysis to detect the presence of specified drugs for which there were prescribed cut-off levels.

It was recognized that management's authority to create a drug and alcohol policy is a part of its rule-making authority. However, this was found to be subject to the proviso that the policy must be lawful, clear and unequivocal, not be inconsistent with the collective agreement; and not be unreasonable.

The Arbitrator noted the Canadian arbitral approach in assessing the reasonableness of a drug and alcohol policy:

> In Canada, policies have been considered on a case by case basis and in the context of a collective agreement; Arbitrators have invariably balanced the legitimate interests of the employer in providing a safe workplace against the privacy interests of employees.

The Arbitrator went on to adopt the balancing of interests approach whereby the legitimate interests of the employer in providing a safe workplace are balanced against the privacy interests of employees. Arbitrator Devlin quoted the case of *Re Canadian National Railway* Co. *and C.A.W-Canada* (2000), 95 L.A.C. (4th) 341 *("C.N.R.")* for a description of the balancing of interest approach:

> … in determining whether an employer may resort to drug and alcohol testing of its employees, a board of arbitration must endeavour to balance the interests of employees in the privacy and integrity of their person with the legitimate business and safety concerns of the employer. Within that theoretical framework, neither the employee nor the employer can assert an absolute right. Rather the analysis focuses on whether, given the nature of the enterprise and the work performed, reasonable limitations on the individual rights of employees can be fairly implied. If so, then a correlative right may vest in the employer to require a medical examination of the employee, including alcohol or drug testing.
>
> ....
>
> While the time-honoured concept of the sovereignty of an individual over his or her own body endures as a vital first principle, there can be circumstances in which the interests of the individual must yield to competing interests, albeit only to the degree that is necessary. The balancing of interests has become an imperative of modern society: it is difficult to see upon what basis any individual charged with the responsibilities of monitoring a nuclear plant, piloting a commercial aircraft or operating a train carrying hazardous goods through densely populated areas can challenge the legitimate business interests of his or her employer in verifying the mental and physical fitness of the individual to perform the work assigned. Societal expectations and common sense demand nothing less.

With respect to pre-appointment testing, the Arbitrator held that she did not have jurisdiction to deal with pre-appointment testing on external candidates. However, with respect to internal candidates, she found that she had jurisdiction.

The Arbitrator agreed with the Union's argument that under the Policy, all employees who tested positive on a pre-appointment test were denied promotion or transfer to a safety-sensitive position, presumably on the basis that they were likely to be impaired at work. In this respect, therefore, both casual drug users and those with substance abuse problems were treated in the same manner. In keeping with the decision in *Entrop*, the Union emphasized that human rights legislation applies not only to those who are actually disabled but also to those who are perceived to be disabled.

The Arbitrator found that the Policy was *prima facie* discriminatory as it denied promotion or transfer to employees with substance-related disabilities and treated employees without substance-related disabilities similarly as they were perceived to be disabled.

Applying the three part *Meiorin* test in the context of pre-appointment testing, the Arbitrator held that the automatic denial of a safety-sensitive position for a positive test was overly broad and could not be regarded as a BFOR. Consequently GTAA's drug and alcohol Policy contravened the Collective Agreement and the *Canadian Human Rights Act.*

Unfortunately, the Arbitrator's finding that the pre-appointment drug and alcohol testing Policy constituted a *prima facie* case of discrimination on the basis of a perceived disability lacked any detailed analysis. The Divisional Court's reasons in *Weyerhaeuser* were unavailable when the parties in *GTAA* made their final submissions to Arbitrator Devlin in October, 2006.

GTAA is interesting as it does not solely rely upon a "balance of interests" test, which many arbitration decisions have used to the exclusion of a human rights analysis and the applicability of *Meiorin.* Rather, GTAA applies the balancing of interests test as well as the *Meiorin* test. The balancing of interests offers the required context that makes for a comprehensive and practical *Meiroin* analysis.

According to *Weyerhaeuser*, the cases of *Entrop* and *Kellogg* do not stand for the proposition that the mere existence of a drug testing policy is *prima facie* discriminatory on the ground of perceived disability. Rather, *Weyerhaeuser* states that some evidence is required, on an individual basis, to establish *prima facie* discrimination. Consequently, it cannot be taken as a given that even the low threshold of a *prima facie* case is met when there is no factual matrix to support it.

What can be taken from *Weyerhaeuser* and *GTAA* is that firstly, if supported by the facts, there is a possibility that an employer's policy on pre-appointment drug and alcohol testing will be found to be *prima facie* discriminatory, and secondly, that the policy will not constitute a BFOR if there is an automatic denial of the position if a positive drug test occurs. Consequently, having a policy that does not call for the automatic denial of the position as a result of a positive drug test and also having accommodation provisions available for employees with substance abuse issues will enhance the possibility of the policy being upheld.

Pre-access Testing

Pre-access testing occurs when an employer contracts with an owner to perform work at the owner's work site and where the contract between the employer and the owner contains a provision requiring the employer's drug and alcohol policy to either meet or exceed the requirements of the owner's drug and alcohol policy. Where the employer's policy does not comply with the owner's policy, the owner refuses to allow access to the employer's employees on site.

There are very few cases regarding pre-access testing. In the trucking industry, pre-access testing sometimes occurs as a result of United States Department of Transportation Regulations for drivers who do cross-boarder transportation. For example, in *Allied Systems (Canada) Co.* v. *Teamsters Local Union 938 (McLean Grievance)* [2008] C.L.A.D. No. 15, the Arbitrator found that compliance with those regulations was a *bona fide* occupational requirement for drivers who are required to cross the U.S. border.

In the unionized environment there is an issue as to whether an arbitrator will take jurisdiction to hear the matter. For example, in the recent case of *United Assn. of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663* v. *Mechanical Contractors Assn. of Sarnia* (Drug and Alcohol Policy Grievance) [2008] O.L.A.A. No. 621, a case dealing with the employer's compliance with Imperial Oil and Suncor's drug and alcohol Policy, the Arbitrator stated the following:

> No doubt, Imperial Oil and Suncor have been openly insistent as to their stated requirements for independent contractors with whom they do business on their industrial sites. The Union may well find this to be a galling situation. Nevertheless, I am of the view that my jurisdiction does not include ruling on the compellability, or even the efficacy or soundness, of the Imperial Oil or Suncor workplace policies, whatever they might be, and whether espoused by them as "General Requirements", or asserting a "no presence" standard as to drugs or their metabolites were that to occur. They certainly present a complicating factor for the MCAS member contractors in their dealing with the Union, and also may have forced their hand in the manner in which they chose to confront the possibility of their employees using alcohol or drugs on site, or being affected by their prior consumption while working. Nevertheless, for my purposes, I conclude that I must view the Imperial Oil and Suncor efforts, even the suggested guidelines presented by the SCA, as essentially background to my consideration of the workplace obligations relative to the collectively bargained contractual relationship between the MCAS employer contractors and the Union.

The Alberta decision of *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors* [2007] A.G.A.A. No. 33; application for judicial review dismissed [2007] A.J. No. 1330, dealt with pre-access drug and alcohol testing where the Union was not contesting the Policy itself, which had been adopted by the employer. Instead, the Union was contesting the Policy's applicability to its members who were working at the site prior to the implementation of the Policy.

The Arbitration Panel applied the Ontario Divisional Court's decision in *Weyerhaeuser* and held that there was no *prima facie* case of discrimination in the factual circumstances of the case. However, the Panel stated that had a case of *prima facie* discrimination been made out, in applying the *Meiorin* test, the Panel would have found that the employer's pre-access Policy met the test and would be upheld. The Panel stated that:

> We are satisfied that Bantrel has met its burden with respect to the third part of the test. It has chosen a testing policy which operates in conjunction with an assessment and counseling regime. Its testing program for current employees was for the purpose of identifying the most serious risks - those who could not or would not stop taking drugs. While the panel acknowledges that drug testing does not measure impairment, it does reveal risks that can be further investigated. That is exactly what this policy does.

The practical reality, had the decision found in favour of the Union, would be that the Arbitration Panel would have no jurisdiction to enforce a remedy on the owner, in this case Petro-Can, but only as against the employer. Even in such a case, the Arbitration Panel acknowledged that reinstatement to the owner's site would not be an available remedy. As stated by the Panel:

> Whether such a decision by Petro-Can was discriminatory or otherwise illegal is not a matter within our jurisdiction. But such decision severely limits any remedy available to the Unions. Normally if an arbitrator found that discharge was unjust the remedy would be reinstatement. In the face of a site ban imposed by a third party not meeting the just cause standards imposed by a collective agreement, arbitral jurisprudence has found that the appropriate response from the employer is to lay off the individual from the site in question and transfer such employee to another site, if the employer has such site available. In this case Bantrel did layoff the employees who refused or failed the test, as Petro-Can denied access to such persons, but had no other work site available for transfer.

As well as proceeding under a collective agreement by way of grievance, an individual employee can challenge the pre-access policy of the owner through a complaint within the applicable Human Rights Regime. This was done in the case of *Grey* v. *Albian Sands Energy Inc.* 2007 ABQB 466 under the Alberta *Human Rights, Citizenship and Multiculturalism Act*.

In this case Mr. Grey was employed by Tracer Industries Canada Ltd. ("Tracer"), which was acting as a subcontractor for Albian Sands Energy Inc. ("Albian"). Subsequent to Mr. Grey's employment, Albian imposed a pre-employment drug-testing Policy, which he refused to participate in. Mr. Grey claimed that his rights were violated, as he had only agreed to an incident-related drug testing policy in his employment agreement with Tracer. Mr. Grey was subsequently laid off, ostensibly as "reduction of force", but he asserted it was as a result of his refusal to abide by the pre-access testing Policy.

The Human Rights Panel held that Mr. Grey failed to establish a *prima facie* case of discrimination, in part because there was no causal link between his termination and the impugned drug-testing Policy. Consequently, the Panel ruled that it was unnecessary to decide whether or not the drug and alcohol testing Policy violated the Act, and equally unnecessary to decide whether Albian could raise a *bona fide* occupational requirement as a defence.

On judicial review, the Court upheld the Panel's decision to dismiss the Complaint without consideration of the Albian drug and alcohol Policy. On the particular facts it was found that the drug and alcohol Policy was not the cause of Mr. Grey's lay off.

Conclusion

It would seem that the law in this area is not quite settled. Bearing that in mind, it is prudent for an employer to craft policies keeping in mind that *Entrop* is still the leading case in Ontario. The following is a checklist setting out the minimum pre-conditions necessary for a drug and alcohol policy to withstand scrutiny:

1. the policy should set out the prohibited drugs (ie. the use of non-prescription or elicit substances) in the workplace;

2. the policy should not be arbitrary in terms of which groups of employees are subject to testing, although it may be justifiable to only test employees in safety-sensitive positions;

3. the policy should set out a procedure for competent and accurate testing (ie. urinalysis); which procedure must be able to ascertain the employee's **present** ability to perform or fulfill the essential duties or requirements of the job (as opposed to merely detecting the presence of substances in the system);

4. the results of the testing must be handled confidentially, and be reviewed with the employee;

5. the sanction/discipline imposed by the policy must not be more severe than necessary to maintain a safe work environment and also must be sensitive to the individual capabilities of each employee. Accordingly, a policy based on automatic termination will not be upheld. Also, discipline must be applied in an even handed manner; and

6. the policy should contain the duty set out under applicable Human Rights legislation to accommodate the individual needs of employees who test positive, including, if warranted, considering sanctions short of dismissal and where appropriate, providing the necessary support to permit the employee to undergo treatment or a rehabilitation programme in the case of a possible drug or alcohol dependency problem.

Short of the above steps being taken, there is no expectation that a drug and alcohol testing policy will be upheld in the event of challenge by any employees through a Human Rights Complaint process, or, alternatively, in the event of a Court challenge after being terminated by reason of the positive drug and/or alcohol test.

In the event that the employer is unable to establish the above noted pre-conditions, it must rely on the traditional "non-scientific" means, such as observation and workplace investigations, to ensure and maintain a drug and alcohol free workplace.