

Privacy Matters: Drug and Alcohol Testing Policies in the Workplace

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... Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection...¹

Introduction

Personal privacy issues intimately affect the relationship between employer and employee. The extent of an employee's right to privacy at work is a hot button issue because it impacts an employee's sense of self-worth and well-being within an aspect of his or her life that is fundamental to his or her identity.² In the workplace, however, the personal privacy interests of employees are often seen to be in direct opposition to an employer's interest in maintaining a safe and accident free site. Nowhere is this clash of interests more apparent than when an employer seeks to introduce employee drug and alcohol testing policies.

The importance of the right to privacy is reflected not only in the common law, but also with the introduction of privacy legislation across the country. As a consequence of the privacy laws introduced during this decade, employers are (or at least they should be) cognizant of their legal obligations to obtain and manage personal employee information appropriately and lawfully.³ In contrast, neither the federal or provincial legislators in

¹ So commented LaForest J. in *R. v. Dyment*, [1988] 2 S.C.R. 417, a case that involved the taking of a blood sample for evidence of impairment.

² The Supreme Court of Canada has recognized the importance of work in a person's life. See: *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 (Dickson C.J.C.)

³ The *Personal Information and Electronic Documents Act*, S.C. 2000, c.5, [PIPEDA], regulates the collection, use, and disclosure of personal information in the federal public sector and federally regulated private sector (s. 4(1)(b)); and Alberta, British Columbia and Quebec have similar provincial legislation that applies to the provincially regulated private sector. Respectively these are the: *Personal Information Protection Act*, S.A.

Canada have seen fit to grant employers, by statute or regulation, the power to demand mandatory employee alcohol or drug testing in the workplace as a condition of employment.⁴ This legislative contrast illuminates the highly valued place that personal privacy holds in our society.

Employer policies that demand substance testing as a condition of employment invade employee privacy interests on two fronts: not only is intensely personal information gained, but also the testing constitutes an invasion of one's physical person.⁵ Therefore, it is not unexpected that alcohol and drug testing in the workplace conjures up more questions than answers - questions that are the subject of heated debate: Is there reliable scientific evidence to back up the claim that the testing works effectively as a deterrent, correlating to a lowered number of worksite accidents? Does a test that can only measure the past use of a substance further the goal of having safe worksites free from impaired workers? What activities of the employee is the employer entitled to control with respect to what the employee does on his or her own time?

The testing issue is also opening up a Pandora's box of questions relating to privacy: Is the assessment of *potential risk* an improper ground for a workplace testing policy - particularly when it could lead on the far end of the spectrum to testing for other personal or health issues that may potentially effect safety; for example, testing for diabetes, heart conditions, obesity, and the like? As technology advances, is the potential for misuse of the collected bodily substances for other purposes too great to justify its collection? For example, the samples collected from a buccal (oral) swab contain an individual's DNA, their most intimate personal identification. If the conditions of collection and analysis are

2003, c. P-6.5 [PIPA (AB)], *Personal Information Protection Act*, S.B.C., 2003, c.63 [PIPA (BC)], and *An Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q. P-39.1. [ARPIPS]. In Alberta, the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F025, regulates access to personal information held by public bodies. The scope of this paper is restricted to examining Alberta's PIPA.

⁴ The lack of Canadian legislation regulating workplace alcohol and drug testing policies stands in stark contrast to the power conferred by statute on employers in the United States where they generally have a far greater ability to enforce random testing of employees as a condition of employment.

⁵ See *Re Canadian National Railway Co. and U.T.U.* (1989), 6 L.A.C. (4th) 381.

not strictly controlled, the information gleaned from these types of samples could be (mis)used for a variety of other reasons. Further, if the analysis of the samples is done in the United States or in other countries, what are the implications of storing this information in jurisdictions that have differing legislation dealing with privacy and substance testing?

Today, drafters of worksite policies must work through and address these real interests and competing values. One Labour Arbitrator has commented "...the value of deterrence is but one element to be weighed in the balancing of interests. No doubt corporal punishment would also have a deterrent effect, but a free and civilized society puts limits on the value of deterrence."⁶ Care must be taken to ensure that any such policy does not usurp a worker's fundamental right to privacy, or the right of all individuals to be treated with dignity and respect.

This paper will discuss some of the considerations that have been found to be imperative when developing and implementing workplace alcohol and drug testing policies. It must be recognized that this paper is written from the perspective of an Alberta-based Union-side Labour Lawyer. Thus, this paper will mainly draw from the arbitral jurisprudence addressing alcohol and drug testing in the safety-sensitive workplace governed by a collective agreement. Examples are also largely drawn from Alberta jurisprudence.

The author believes that the canvassing of the arbitral jurisprudence is useful with respect to any future inquiries of a Privacy Commission relating to a substance testing issue. As yet this country's Privacy Commissioners have not had an opportunity to deal with questions involving the intersection of employer drug and alcohol testing policies and individual privacy rights. However, there is precedent for the consideration of arbitral case law by Alberta's Privacy Commissioner when analyzing the privacy rights of employees in the instance of a non-unionized employer's gathering of employer personal

⁶ *Imperial Oil Ltd. and C.E.P., Loc. 900 (Re)*, (2006) 157 L.A.C. (4th) 225 (M.G. Picher) ("*Imperial Oil*"), at para. 121.

information by video surveillance.⁷ Firstly, however, this paper looks at the jurisdiction of the various quasi-judicial forums where disputes over such policies have been, and could be, heard.

Choice of forums for dealing with disputes over employer drug and alcohol testing policies

In reality, the issue of drug and alcohol testing in the workplace is an increasingly complex matter. It can lead to an intersection of decision-making jurisdictions. It may engage human rights tribunals when violations of human rights legislation are alleged - claims of discrimination on the basis of disability or perceived disability in relation to alcohol and drug addictions, and employee accommodation issues. If the workplace is unionized, the issue will also engage labour arbitration boards as a matter relating, either explicitly or implicitly, to the collective agreement. Finally, it may engage Privacy Commissions in that the collection of bodily substances, and the use and retention of information derived from its collection, is considered to be one of the most intimate invasions of one's personal privacy, as well as issues regarding the collection and disclosure of personal information such as laboratory test results, information about counselling, collection of Social Insurance Numbers and other personal identifiers such as driver license numbers, and other privacy related issues.

The most obvious drawback to rolling out the arbitral jurisprudence as an example of current case law relating to alcohol and drug testing policies in the workplace is that these decisions are only binding on the parties to the dispute that are governed by the collective agreement in issue. There can be no public interest interveners in a private arbitration.

This limitation is of particular concern in Alberta, where the issue of drug and alcohol testing of prospective employees before they are allowed on a worksite has arisen frequently on the Northern Alberta Oil Sands mega-project sites as well as in the oil and

⁷ *Investigation Report P2005-IR-004; R.J. Hoffman Holdings Ltd. (Re)* [2005] A.I.P.C.D. No. 49.

gas industry generally. Often, the demand for substance testing for employees is that of the project owners, rather than the contractors that are the actual prospective employers of those individuals required to undergo the testing. The project owners impose the policies on the contractor/employers as a condition of their contract. In a labour relations setting, this relationship poses a difficulty for a union that is attempting to bring a grievance involving these testing policies before a labour arbitrator as these owner/clients are not party to the union-contractor/employer collective agreement. It is trite law that with respect to the *in personam* jurisdiction of labour arbitrators, an arbitrator does not have jurisdiction to hear disputes where one of the parties to the dispute is not a party to the collective agreement.⁸ However, as employee privacy is at issue, a Privacy Commissioner could claim jurisdiction in this type of situation.

Additionally, if the policy also falls within the provisions of the collective agreement, a labour arbitrator will also have jurisdiction. Consequently, the question of who has jurisdiction - labour arbitrators or privacy commissioners or both - comes into play.⁹ It should be noted that the same issue arises if a simultaneous complaint at the Human Rights Commission is also lodged.

There is recent case law that provides guidance on determining matters of jurisdiction

⁸ *Finning (Canada) v. IAM, Local Lodge 99* [2005] AGAA No. 11 (January 7, 2005, Alberta Arbitration Board, A. Sims) where Shell built a tar sands project known as Albion Sands and adopted a site access policy of pre-access drug and alcohol testing which it required of all subcontractors. The Union had a bargaining relationship with Finning and not Shell. The arbitrator notes that Shell cannot be drawn into the dispute to defend its policy as it is not a party to the collective agreement (paragraph 37 and the decision of the Supreme Court of Canada referred to therein: *Quebec (Commission des droits de la personne ...) v. Quebec (A-G) 2004*. See also: *AMR Ground Handling Services* [1999] O.L.A.A. 43 (Saltman); *Babcock and Wilcox and U.A. Local 488* (1995), 50 L.A.C. (4th) 266 (Power); *U.A. Local 46 and Samuel Crump (Canada) Ltd.* (1963), 14 L.A.C. 39n; *IBEW, Local 424 v. Fluor Construction* [2003] A.G.A.A. No. 88 (P.A. Smith); *Calgary Firefighters' Supplementary Pension Plan (Trustee of) v. Calgary (City)* [2004] A.J. No. 171.

⁹ The author knows of one Alberta OIPC inquiry regarding a privacy complaint by a unionized employee concerning the administration of an owner-directed pre-site drug and alcohol test. The inquiry is in its initial stages and the question of jurisdiction remains a live issue.

between two competing, statutorily created tribunals. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)* [2004] 2 S.C.R. 185 (“*Morin*”) the issue was in regards to whether the Quebec Human Rights Tribunal had jurisdiction over a human rights issue arising from the teachers’ union’s collective agreement. Younger and less experienced teachers alleged that the collective agreement discriminated against them, treating them less favourably than older teachers and violating their equality rights. The Supreme Court upheld the Tribunal’s finding that it did have jurisdiction over the dispute, reversing the Court of Appeal’s decision.

The Supreme Court found that “[d]epending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.”¹⁰ McLachlin C.J., speaking for the majority in *Morin* held that there is “no legal presumption of [arbitral] exclusivity *in abstracto*.”¹¹ The Court in *Morin* articulated a two-step process to answer the question of jurisdiction, which can be summarized as follows:

- 1) Look to the relevant pieces of legislation to see what they say about the jurisdiction of the tribunals.

- 2) Look at the nature of the dispute, in its full factual context, to see if the legislature intended the matter to fall exclusively to the jurisdiction of an arbitrator (or another tribunal). The way that the dispute has been legally characterized is not determinative. The question is this: ‘what is the main fact that animates the dispute if the dispute is not viewed formalistically but in its essential nature?’^{12,13}

¹⁰ 11.

¹¹ *Ibid.* at p. 14.

¹² *Ibid.* at paras. 14 – 20.

¹³ Specifically with respect to the dispute within a unionized environment, the Court in *Morin* suggested that it is also relevant to consider if the complainant chose not to pursue a grievance under the collective agreement on the basis of the same facts, thereby avoiding duplication of processing the dispute. In a situation where a Privacy Commissioner was questioning whether or not to claim jurisdiction, if the following

When a dispute arises within a unionized environment, if any of the provisions of the applicable collective agreement either expressly or implicitly contemplate such a factual situation as the one at issue, then a grievance arbitrator has, at least, shared jurisdiction.¹⁴ When the jurisdictional contest is with the Courts, the Supreme Court has tended to accord grievance arbitrators a broad exclusive jurisdiction in situations where the dispute relates to conditions of employment if there is even a modicum of connection to a collective agreement.¹⁵ However, the same cannot be said when the jurisdiction of another statutory tribunal is at issue.¹⁶

For example, in a dispute over alcohol or drug testing, if the matter's essential nature pertained to an alleged violation of personal privacy, rather than to solely the interpretation and application of the collective agreement, then the Privacy Commissioner would arguably have, at minimum, overlapping or shared jurisdiction with a labour arbitrator.

factors were present, they would suggest that the Commissioner could successfully claim jurisdiction (at paras. 27 – 30):

- a) if the matter does not lend itself to “characterization as a grievance;”
- b) if one of the parties to the dispute is not a party to the collective agreement;
- c) if the union involved appears opposed in interest to the complainant, by nature of being one of the parties that created the collective agreement [if the validity/legality of the collective agreement is at issue in the dispute] and the complainant could be potentially left without legal recourse if the union refuses to file the grievance; or
- d) if the challenge (again to a collective agreement provision) affects hundreds of employees or union members, the jurisdiction of a Privacy Commissioner may be a “better fit” than a single arbitrator dealing with a single grievor's grievance.

¹⁴ *Bisaillon v. Concordia University* [2006] 1 S.C.R. 666 at para. 32 and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners* [2000] 1 S.C.R. 360 at para. 25.

¹⁵ See *Bisaillon* at para. 33.

¹⁶ *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)* [2007] A.J. No. 373 at para. 25 and *Amalgamated Transit Union, Local 583 v. Calgary (City)* [2007] A.J. No. 374 at para. 32.

The Alberta Court of Appeal has recently made this type of finding in respect to jurisdictional competitions between statutorily created tribunals. In *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)* [2007] A.J. No. 373, the Court of Appeal agreed that a grievance arbitration board and the Alberta Human Rights and Citizenship Commission had concurrent jurisdiction over a dispute involving an employee's complaint alleging discrimination on the basis of physical and mental disability. The employee filed both a grievance and a human rights complaint. The arbitration panel found it had jurisdiction.

In this case, the chambers judge found that as there was no broad social or public interest issue beyond a union/grievor-employer dispute, the arbitration panel had jurisdiction to hear the matter. However, the Court of Appeal found that the panel's jurisdiction did not simultaneously foreclose on the jurisdiction of the Commission. Further, the comments of the Court of Appeal supported the proposition that if there is a broad social or public interest matter at issue (beyond a union/grievor-employer dispute) than another Tribunal or Commission that has expertise in the area or is especially equipped to deal with that particular type of dispute, may be a "better fit" than an arbitration panel.

In the companion case of *Amalgamated Transit Union, Local 583 v. Calgary (City)* [2007] A.J. No. 374 ("*Amalgamated Transit Union*"), Paperny J.A., writing for the Court of Appeal elaborates on the issue of the concurrent jurisdiction of competing statutorily-created tribunals.

The case involved an appeal from a chambers judge's judicial review decision that overturned a labour arbitration board's decision. The Arbitration Board had concluded that it had exclusive jurisdiction to deal with both a grievance and an employee's human rights complaint. The employer in the case had asked the Arbitration Board to deal both with the grievance and the grieving employee's human rights complaint. The union objected as it had previously agreed with the employee not to grieve the alleged human rights violation, as the employee planned to pursue it before the Human Rights Commission. The Board held that the employee's allegations of discrimination, as set out

in her human rights complaint, could not be meaningfully or conveniently separated from the termination of her employment, and ruled that it had exclusive jurisdiction.

On judicial review, the chambers judge concluded that the Board could not exercise jurisdiction over a human rights complaint that was not brought before it by the Union. In the alternative, the chambers judge held that the Board could not exercise exclusive jurisdiction over the human rights complaint, foreclosing on the jurisdiction of the Commission. The employer appealed, and the Court of Appeal dismissed the appeal.

Paperny J.A. wrote the decision of the Court of Appeal. The Court of Appeal held that it was a Union's right not to take a grievance but that did not remove the employee's right to access the human rights regime, unless the legislation clearly stated otherwise, which was not found to be the case with the Labour Relations Code. The Court of Appeal held that where neither applicable statute expressly precluded access to the other forum, then jurisdiction was held concurrently. The Court of Appeal reasoned that tribunals are able to manage problems of multiple proceedings arising, and the doctrines of *res judicata* and issue estoppel are available to prevent such a multiplicity of proceedings.

Paperny J.A. wrote that it is important to distinguish between the cases that deal with a contest of jurisdiction between the superior courts and arbitration boards from those that deal with a contest between competing statutory tribunals, although some of the principles overlap.¹⁷ She held:

...In my view, however, it is unwise simply to import the principles developed in cases involving a contest between the courts and arbitration, including the inherent preference for the exclusive jurisdiction of arbitrators often apparent in those cases, into a situation where the court must consider two statutory regimes. In the latter situation there are two legislative intents to consider, not one. If we were to accept exclusive jurisdiction as a starting point, we would run the risk of giving the jurisdictional advantage to one statutory tribunal over another and thereby reducing the efficacy of the second statutory regime. ...¹⁸

¹⁷ *Amalgamated Transit Union* at para. 21.

¹⁸ 23.

The Court of Appeal maintained that the primary consideration remains the intent of the legislature when the court must decide which of two competing statutory regimes should govern a dispute:

... Where there are two or more legislative schemes creating two or more tribunals that could potentially govern the dispute, the court must consider to which of the competing regimes the legislature intended to grant jurisdiction...¹⁹

In *Amalgamated Transit Union*, the Alberta Court of Appeal held that any analysis must include looking at both pieces of legislation to see whether either “evinces an intention that the tribunal created by it has exclusive jurisdiction over this dispute.” Answering that question requires a consideration of the purpose of each statute, and the specific wording of the relevant provisions.”²⁰

Paperny J.A. canvassed both *Regina Police, Canada (House of Commons) v. Vaid*, [2005] S.C.C. 30, [2005] 1 S.C.R. 667 and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223, [2004] S.C.C. 40 (“*Charette*”), the companion case to *Morin*. In *Charette*, the majority of the Supreme Court held that the relevant legislation contained a clear exclusivity clause that stipulated the Commission des affaires sociales (“CAS”) was to hear, “to the exclusion of every other commission, tribunal, board or body”, appeals brought under the Income Security Act, which had the effect of giving the CAS exclusive jurisdiction. Paperny J.A. commented at para. 36:

... Binnie J., in his concurring reasons, held at para. 35 that “a judicial evaluation of the ‘essential nature’ of the dispute should not trump a clear legislative direction to have claims for provincial income security benefits determined by the [CAS].”

Such an exclusivity clause cannot be found within Alberta’s labour relations statutory regime, thus the door is left open for the Privacy Commission to find that it has jurisdiction to hear privacy complaints from unionized workers, even if a dispute arises under a provision of a collective agreement. Similarly PIPA, with very limited

¹⁹ *Ibid.* at para. 32.

²⁰ *Ibid.* at para. 43.

exceptions, was intended by the legislature to apply to “every organization and in respect of all personal information,”²¹ the unionized workplace being no exception.

An Emerging Role for Privacy Commissioners

Privacy Commissioners have an emerging role in determining the adequacy of Worksite Alcohol and Drug testing policies. It is well within the jurisdiction of the federal and provincial Offices of Information and Privacy Commissioners (“OIPC(s)”) to consider issues of public interest (through the representations of permitted interveners). As well, through the OIPC, unionized employees could challenge the substance testing policies that affect them even if parties other than their employers impose the policies. However, care must be taken by Privacy Commissioners to deal with these issues not only through the lens of privacy legislation, but rather by exploring the interplay of issues on the broader horizon - other relevant statutes (for example, human rights legislation) or a collective agreement – may be relevant. Failure to do so would result in compartmentalized “silo” decisions which fail to take into account the broader landscape of this contentious issue. It must be emphasized that this need not be so. In *Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006] S.C.J. No. 14; 1 S.C.R. 513, the Supreme Court commented:

¶ 24 In *Martin*, this Court repeated the principle that administrative bodies empowered to decide questions of law “may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard”: see para. 45. I must emphasize that the presumptive power to look beyond a tribunal's enabling statute is triggered simply where a tribunal (with the authority to decide questions of law) is confronted with “issues... that arise in the course of a case properly before” it. This can be contrasted with the power to subject a statutory provision to *Charter* scrutiny, which will only be found where the tribunal has jurisdiction to decide questions of law *relating to that specific provision*: see *Martin*, at para. 3.

¶ 25 I must conclude that the contrast in the wording of *Martin* is deliberate. Where a specific provision is being declared invalid, it is necessary to ensure that

²¹ PIPA (AB) section 4.

the tribunal is empowered to scrutinize it. Power to scrutinize other provisions is not sufficient, because the constitutional analysis is targeting one specific provision. But the same does not hold true when a tribunal is merely being asked to consider external sources of law. In such a situation, a specific statutory provision is not necessarily placed at the heart of the analysis; for instance, the tribunal may be asked to look beyond its enabling statute because its enabling statute is silent on an issue. Although consideration of the external source in the present appeal might lead to the inapplicability of a specific provision, this does not imply that the process is analogous to that of constitutional invalidation. When a tribunal is simply asked to apply an external statute, this Court has always focused the analysis on the tribunal's jurisdiction to consider the whole issue before it:

Although the *issue* before the arbitrator arose by virtue of a grievance under a collective agreement, *it became necessary for him to go outside the collective agreement* and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature: *McLeod v. Egan*, [1975] 1 S.C.R. 517, at p. 518. [Laskin C.J., concurring; emphasis added].

¶ 26 The presumption that a tribunal can go beyond its enabling statute -- unlike the presumption that a tribunal can pronounce on constitutional validity -- exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute. Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.

When Labour Arbitrators deal with grievances under a collective agreement, not only do they consider the interpretation, application, and administration of the provisions of the agreement, but they also have the ability to construe statutes outside of their enabling statute that have relevance in regards to the issue(s) brought by the grievance.²² In the course of their decision-making on the testing issue, labour arbitrators have considered common law and statutory privacy rights, as well as human rights and employment law legislation. When addressing these same issues, while the focus of Privacy

²² *McLeod v. Egan*, [1974] S.C.J. No. 62; [1975] 1 S.C.R. 517; *Parry Sound (District) Social Services Administration Board*, [2003] 2 S.C.R. 157.

Commissioners will remain the applicable privacy legislation, they should not hesitate to do the same.

Alcohol and Drug Testing in the Workplace and Alberta’s Applicable Privacy Legislation

A privacy complaint regarding substance testing in the workplace would raise important issues about the reasonableness of the collection, use and retention of the results of the testing, in relation to the employer’s stated purpose for the testing. In Alberta, the applicable law is the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”).

In subsection 1(j), PIPA defines personal employee information as a sub-category of personal information (“information about an identifiable individual”):

“personal employee information” means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

- (i) an employment relationship, or
- (ii) a volunteer work relationship

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship ...

Information gathered in the course of employee drug and alcohol testing falls into this category. Consequently, the rules governing the collection, use and disclosure of personal employee information under PIPA would apply - sections 15, 18 & 21 respectively.²³

²³ Section 15 of the Act addresses the collection of personal employee information. The use and disclosure of personal employee information is treated in the same way with similar language by PIPA in sections 18 and 21.

Collection of personal employee information

15(1) Notwithstanding anything in this Act other than subsection (2), an organization may collect personal employee information about an individual without the consent of the individual if

What is reasonable in the context of PIPA is not contemplated in detail beyond the provisions of section 2:

Standard as to what is reasonable

s. 2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, *is what a reasonable person would consider appropriate in the circumstances* [emphasis added].

As mentioned previously, Alberta's Privacy Commissioner has referred to arbitral jurisprudence to inform decision-making as to what is *reasonable* in relation to *purpose* in the context of video surveillance in the workplace. The arbitral jurisprudence relating to issues of workplace alcohol and drug testing is canvassed extensively below, and it is hoped that a Privacy Commission would take these cases into consideration should the alcohol and drug testing issue be litigated or commented on by the Commission. In addition, the general comments by Commissioners on the reasonableness of the treatment of personal employee information in the workplace generally are also instructive.

In *Investigation Report P2005-IR-004; R.J. Hoffman Holdings Ltd. (Re)*, [2005]

(a) the individual is an employee of the organization, or

(b) the collection of the information is for the purpose of recruiting a potential employee.

(2) An organization shall not collect personal information about an individual under subsection (1) without the consent of the individual unless

(a) the collection is *reasonable for the purposes for which the information is being collected*,

(b) the information consists only of information *that is related to the employment or volunteer work relationship* of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before collecting the information, *provided the individual with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected*. [emphasis added]

...

A.I.P.C.D. No. 49, the issue was the reasonableness of the collection of personal employee information by on-site video surveillance. Privacy Commissioner Denham commented:

¶ 35 PIPA provides that personal employee information is limited to personal information that is "reasonably required" solely to establish, manage or terminate an employment relationship [See Note 15 below]. PIPA also says that an organization can only collect and use personal employee information without consent if it is "reasonable for the purposes for which the information is being collected" [See Note 16 below]. We conclude that the determination of "reasonableness" in this regard can be determined by considering these questions:

- a) Are there legitimate issues that the organization needs to address through surveillance?
- b) Is the surveillance likely to be effective in addressing these issues?
- c) Was the surveillance conducted in a reasonable manner?

These criteria to determine the reasonableness of the collection of personal information were affirmed in *Order P2006-008; Lindsay Park Sports Society (c.o.b. Talisman Centre For Sport and Wellness) (Re)*, [2007] A.I.P.C.D. No. 16 (Commissioner Work).²⁴

Similarly, in a speech at Nymity's Employee Privacy Conference on May 17, 2004, Alberta's Privacy Commissioner Frank Work commented:

With respect to drug and alcohol testing, the case law to date has established that in the absence of an express statutory or contractual authority, there must, once again, be a compelling employer interest in administering drug and alcohol tests (i.e. objective evidence of alcohol and drug impairment in the workplace), a significant connection between the test results sought and the employee's work duties (i.e. a safety concern), and a no less intrusive alternative, before workplace drug and alcohol testing policies have been condoned by the Courts and arbitrators. Even where there is a statutory or contractual authority to conduct testing, such testing must be performed in a reasonable and non-discriminatory fashion, and the employer must demonstrate a reasonable likelihood that the

²⁴ However, the criteria were re-worded more generically, as follows:

- 1) Does a legitimate issue exist to be addressed through the collection of personal information?
- 2) Is the collection of personal information likely to be effective in addressing the legitimate issue? and
- 3) Is the collection of personal information carried out in a reasonable manner?

testing will be effective in reducing or eliminating impairment in the workplace.²⁵

One can expect that one of the pivotal issues that will inevitably appear before Canadian Privacy Commissions in the future is that of how the information collected in alcohol and drug testing will be restricted to only “information that is related to the employment relationship.” Potential opportunities for the misuse of such information abound, particularly when bodily fluid samples contain the DNA of the employee, and could be used to find out information about an individual unrelated to whether the presence of alcohol or drugs or their metabolites are found. As was the case in *Imperial Oil*, the information from the testing of Canadian employees was relayed to a U.S.-based employer, and stored within its American office databanks. Since the United States has legislation which is different from Canadian jurisdictions on privacy and substance testing, the treatment and use of such information in America (or in other countries for that matter) is an open question.

Finally, the Canadian Privacy Commissions are the perfect place to address the privacy and human dignity issues that arise *during the course of the collection* of the information on an individual’s testing status. If the environment in which the collection occurs is not strictly controlled (for example, see *Re Weyerhaeuser Co. and C.E.P., Loc. 447 (Roberto)*, (2006) 154 L.A.C. (4th) 3, discussed below), then the damage to one’s personal integrity can be immense.

The types of complaints and requests for review which have come before the Alberta Privacy Commission include the following issues (Provided by Jill Clayton, Senior Portfolio Officer, Office of the Information & Privacy Commissioner of Alberta):

“Complaints

- organization refused to provide copy of written D & A testing policies
- lab collecting DL# and/or SIN as identifier when individual presents for testing

²⁵ Commissioner Work’s speech is available on-line at:
<<http://www.nyimity.com/privaviews/2004/Work.asp>>

- employer's D & A policy alleged to allow for the collection of health information to an unreasonable extent
- employer allegedly left information about D & A test requirements on non-confidential answering machine, thereby disclosing personal information to complainant's ex-girlfriend
- employer failed to safeguard no re-hire list (list identified a number of employees who had failed D & A tests)
- other clients and lab technicians in same room when test results were reviewed and discussed with complainant
- lab threatened to disclose test results due to dispute with complainant about fees for service
- allegation that lab collecting saliva sample on swab also collected traces of blood – complainant alleges did not consent to collection/testing of blood sample
- complainant sent for post-incident return to work assessment following failed drug test; psychologist released full clinical report to union and employer (published IR)
- complainant alleges test results disclosed to other employees within organization and/or to new employer (have received a number of complaints about this)
- complaint that lab provided test results to employer without notification or consent
- employee on leave due to issues with alcohol; complaint that reasons for leave and detailed information about counseling provided to employer, and disclosed by employer to other employees
- complaint that lab's processes not reasonable to ensure accurate test results (adequacy of volume and temperature controls)
- reasonableness of pre-access/pre-employment testing (have received a number of complaints about this)

Requests for Review

- request to lab for test results and all other information held by lab – lab did not respond to written request
- request to employer for test results and all other information provided to employer by lab – employer did not respond to written request
- request for access to information disclosed by lab to applicant's employer, as well as date and time of disclosure
- request to correct information in employer's records that was provided by lab (records describe applicant's behavior when he attended at lab for testing)
- request to employer for access to information collected at each stage of testing process by contracted lab – alleged inadequate response by employer
- request to lab for access to all personal information related to testing – generated at each stage of process
- access to test results – alleged failure to assist'

Types of Alcohol and Drug Testing that may be required at the Workplace

A. Alcohol and Drug Testing in a Pre-Employment Setting (Pre-Site Access Testing)

Recently, the Alberta Court of Queen's Bench examined the legality of mandatory pre-employment drug testing where a positive test results in mandatory termination in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.* (2006) 59 Alta. L.R. (4th) 314; [2006] A.J. No. 583; ABQB 302 (“*Chaiisson*”). This complaint did not involve a unionized worker. While the decision was made on the basis of human rights principles, it is discussed briefly to provide the reader with information on the current status of the law with respect to mandatory pre-employment drug testing policies, as these types of policies are particularly prevalent in Alberta. However, it must be noted that this decision is presently under appeal to the Alberta Court of Appeal.

Upon judicial review of a Human Rights Panel decision, the Court found this type of zero-tolerance testing in a pre-employment context to be unlawful because it was discriminatory on the basis of disability, in breach of Alberta's human rights legislation. In this case, Mr. Chiasson, a recreational marijuana user, filed a complaint with the Human Rights Commission after the termination of his employment with the Employer for a positive pre-site drug test result. The Court found the Employer's policy to be discriminatory because it treated employees testing positive as substance addicts and accordingly disabled, and then failed to accommodate them. The Employer's policy directed mandatory termination of Mr. Chiasson on the basis of a perceived and unsubstantiated risk that he may be impaired on the job some time in the future. The Court found that while prohibiting impairment at work was a valid safety concern of the Employer, the link between a positive drug test and impairment at work was unconvincing. Further, since the Employer terminated Mr. Chiasson without regard to accommodation (of his perceived disability) to the point of undue hardship, it failed to justify its pre-employment drug testing policy.²⁶

²⁶ The Court used the three-part analysis outlined by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3

With respect to the interplay between equality rights and individual privacy rights, the Court explained:

¶ 99 Second, the issues associated with mandatory drug testing engage and straddle both individual rights and equality rights. Many of the authorities cited concerned whether employers could impose drug testing on unwilling unionized workers. That is not the issue in the case at bar, although KBR argues that Mr. Chiasson consented to the drug test, knew the risks, should have known about the probability of testing positive and did not have to leave his former employment. Consent answers any physical invasion and has implications for contract issues, privacy rights and security against unreasonable search and seizure. However, parties may not contract out s. 7 (1) of the Act. In that regard, some may argue that s. 7 should not do the work of privacy rights. However, equality rights, human rights and privacy rights do not exist in compartments. In *Law* the Supreme Court stated that a primary purpose of equality rights is the protection of the essential human dignity of each individual. The Act identifies human dignity and equality as fundamental principles to be cherished and protected in Alberta. This is illustrated in both the preamble and s. 16(1). Human dignity is therefore at the core of both privacy rights and equality rights. To extend the protection of perceived disability to individuals who test positive on this type of drug test within this type of policy promotes the protection of human dignity and strengthens rather than dilutes anti-discrimination norms.

S.C.R. 3 (S.C.C.) (“*Meiorin*”) to determine that the *prima facie* discriminatory policy could not be justified pursuant to human rights legislation.

The *Meiorin* analysis (adopted at paragraph 101 of *Chaisson*) is:

1. Did the employer adopt the standard for a purpose rationally connected to the performance of the job? (known as the ‘rational connection test’)
2. Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose? (known as the ‘good faith test’)

and

3. Is the standard is 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 is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship? (known as the ‘reasonable necessity/accommodation test’)

The burden of proof is on the employer to meet each test on the balance of probabilities.

In contrast, and within the context of a unionized workplace, a recent arbitration decision has distinguished *Chaisson* and found that pre-employment testing for all employees (with a site ban for those testing positive) did not violate human rights principles, nor was it an unwarranted invasion of an employee's individual privacy rights, nor was it unreasonable pursuant to the *KVP* test²⁷: *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co.* [2007] A.G.A.A. No. 33 (P. Smith) ("*Bantrel*").

In *Bantrel*, the employer adopted the site owner's pre-access drug testing policy as required by its contract with the employer. If an employee was found to test positive, he or she was banned from the site. Some of the employees had already been working on the site for a few months before the testing was introduced. After the implementation of the policy, the employer gave employees an additional two months to be tested. The Union grieved the policy on the basis that it did not meet the reasonableness test in *KVP*; it violated the collective agreement which had adopted the 2001 Canadian Model for Providing a Safe Workplace-Alcohol and Drug Guidelines and Work Rule (the "Canadian Model" discussed later in this paper); it was an unwarranted invasion into

²⁷ *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson) at p. 85 ("*KVP*") [This is the seminal case setting out the following principles]:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites in order to be upheld by an arbitrator:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

employee privacy rights; and finally that it was discriminatory on the basis of disability and was a breach of Alberta human rights legislation. The Arbitration panel dismissed the grievance on all points.

Given the safety-sensitive nature of the worksite and the fact that other industry employers had adopted policies of a similar nature, the panel in its view found the policy reasonable and within the types of policies contemplated by the 2001 Canadian model. The panel also found that the policy as written and as applied met the *Meiorin* test. It distinguished *Chaisson* on the basis that there was evidence that they believed there was a rational connection to the employer goal of workplace safety, and that the Employer had justified the policy as a reasonable necessity applied with a mind to alternative measures if an employee tested positive. Finally, the panel found that even if there was an unjustifiable violation of the collective agreement or human rights legislation, there was no remedy available given that the site owner enforced the site-ban on employees of contractors that tested positive or refused to be tested.

Interestingly, the Arbitration panel also failed to find an unwarranted invasion of employee privacy rights in this case:

¶ 92 The Unions' primary assertion with respect to the policy is that the drug and alcohol testing policy was flawed because it did not measure impairment, which is the only reason to put such a policy in place and therefore represents an unreasonable intrusion into employees' privacy. That submission has received approval in cases such as *Sarnia Cranes*. However, such an approach ignores the reason for the rule, which is risk management. To the extent that *Sarnia Cranes* finds such a rationale unreasonable in all circumstances we respectfully disagree. In an era in which employers are subject to increasingly severe penalties for workplace safety incidents, and employees understandably look to the employers to make and enforce rules to protect their safety on the worksite, risk identification and management is of necessity an essential part of an employer's operating responsibilities. There is no doubt that the testing does not measure the degree of impairment, although it measures some degree of drug and alcohol use which is more than incidental given the cut-offs contained in the policy. The design of the policy insofar as it applied to current employees was such that it would only detect, through non-negative test results, the most significant risks to the workplace, namely persons who were either unwilling to or unable to give up drug use for any time at all. This conclusion arises from the fact that current

employees were given up to two months to complete their testing after the policy was announced and none of the drugs tested for under any scenario would remain in any form in the body for any time approaching two months. This was not random testing in the sense considered by the cases. In relative terms it was not intrusive in the same sense that typical random testing is.

It must be remembered that this decision is very fact specific – the requirement of the testing was announced to all employees well in advance of their timeline to complete the test, and the policy was found not to violate the provisions of the applicable collective agreement. As well, there was a strong dissent written by the Union Nominee, W.J. Johnson, Q.C..

Nominee Johnson would have held that the 2001 Canadian model “occupied the field” with respect to testing and as such was a “complete and restricted code respecting drug and alcohol testing.” Further, he felt that the testing policy should not be classified as “testing as a condition of employment,” which is not within the scope of the model’s contemplation, but rather as “testing on demand with advance notice for compliance”, as the employees were already on-site at the time the testing was introduced. If characterized this way, the testing was not in compliance with the 2001 Canadian Model. Therefore, he disagreed with the conclusion of the majority that the Model did not restrict employer alcohol and drug testing policies to those specifically specified in the Model.

Nominee Johnson also did not agree that the testing policy introduced by the employer met the reasonableness requirement of the *KVP* test. As a comment in the employer’s policy represented to employees that any intrusion into their off-duty conduct would be in-line with the 2001 Model’s approach, any subsequent introduction by Bantrel of testing over and above what was contemplated by the Model would be, by its nature, be unreasonable. Finally, Nominee Johnson also stated that the majority was in error when it did not consider the inconsistent application of the owner’s policy to other workers on the site to be a relevant factor when determining the reasonableness of the employer’s policy (as imposed by the owner).

B. Other types of Alcohol and Drug Testing within an Unionized Employment Setting

The following section addresses current considerations that must be taken into account where testing is in the context of unionized, safety-sensitive worksites. The principles are as articulated in recent Labour Arbitration case law.

I. Balancing of Interests Approach

Canadian Arbitrators have generally taken a “balancing of interests” approach when addressing the issue of alcohol and drug testing policies. The legitimate interests of the employer – maintaining a safe workplace and deterring employee impairment while at work - must not overwhelm the privacy rights and personal right to dignity and integrity of every employee. In resolving disputes by balancing the interests of the Employer and its Employees, the arbitrator will look at the following factors: the nature of the business and the work being performed; the effectiveness of the employer approach to dealing with any concerns of employee impairment or potential impairment; and the extent to which the employee’s human dignity and privacy is invaded.²⁸

In unionized environments, where an alcohol and drug testing policy is developed through employer-union negotiations, the legal issues differ from those policies unilaterally developed by the employer. This is because the rights of the employer and the employees can be seen to have been “balanced” through the negotiation of the collective agreement, with the union ultimately consenting to any resulting policy. Any *mandatory, random* testing policy, however, must be clearly and unequivocally explicit within the collective agreement. Generally management rights or safe practices provision

²⁸ See *Re Canadian National Railway Co. and C.A.W.- Canada* (2000), 95 L.A.C. (4th) 341 at 367-369; *Re Trimac Transportation Services – Bulk Systems and T.C.U.* (1999), 88 L.A.C. (4th) 237; *Re Weyerhaeuser Co. and C.E.P., Loc. 447 (Roberto)*, (2006) 154 L.A.C. (4th) 3 (“*Weyerhaeuser*”).

have been not found to be sufficient to confer authorization upon the employer to undertake such invasive testing.

When management does unilaterally impose its own alcohol and drug testing policy, it must meet the accepted standards for all workplace rules that are unilaterally created by management:

...The fact that the Company did not consult the Union in the creation of its Policy respecting Drug and Alcohol does not breach any provision of the collective agreement. The Company is entitled to make rules respecting the operation of its business, inclusive of rules in furtherance of its ongoing effort to ensure safety in the workplace. The general limitation on the Company's entitlement to make such rules and policies is that they may not be inconsistent with the terms of the collective agreement; they must abide by the standard of reasonableness, as set out in *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson)²⁹, and they must also, of course, be consistent with any law of general application, such as the Human Rights Code, R.S.O. 1990, c.H.19, of Ontario, as amended, and any related principles such as the duty of reasonable accommodation in respect of disabilities [at p. 414].

Re DuPont Canada Inc. and C.E.P. Loc. 28-O (2002), 105 L.A.C. (4th) 399

Within defined limits as discussed below, unilaterally introduced alcohol and drug testing policies are currently considered to be reasonable (within the *KVP* element) in safety-sensitive³⁰ industries.³¹ However, even where a policy passes muster, its application is still subject to challenge by an individual grievor. Each factual situation has given rise to a different degree of invasion of the individual employee's privacy rights, and with the "balancing of interests" by arbitrators, a different discretionary answer as to what degree the invasion is allowable. Unfortunately, no "bright-line" tests have evolved to determine what ultimately constitutes a permissible invasion into an employee's right to dignity and privacy. Additionally, a practical problem arises in that if an employee believes his or her fundamental rights are about to be violated in an unacceptable way, in a unionized

²⁹ Discussed at page 18, above.

³⁰ Some commentators have expressed concerns over the excessive and inappropriate labeling of positions as 'safety-sensitive' by employers to justify more aggressive testing.

³¹ See *Re Weyerhaeuser Co. and C.E.P., Loc. 447 (Roberto)*, (2006) 154 L.A.C. (4th) 3. ("Weyerhaeuser") (pg 19 of 51 QL)

environment they are still faced with the “obey now grieve later” principle. [Where the workplace is non-union, refusing to take an alcohol or drug test because of these concerns is likely to also result in severe sanctions, including termination.]

In today’s Industrial Construction Industry in Alberta, and across the country in other unionized safety sensitive work environments, the “Canadian Model” for alcohol and drug testing is generally followed.³² The Model has to date not included random, unannounced alcohol or drug testing although there is now a contractor/owner impetus to introduce random testing in an updated version of the Model. It is yet to be determined if Unions will agree to adopt this approach.

The bulk of arbitral jurisprudence has found that company policies directing mandatory random testing are unjustifiable intrusions into the privacy of individual employees. There are three exceptions to this rule – random testing by agreement with an employee with a known alcohol or drug problem as part of a rehabilitation program (testing as part of a “last-chance agreement”); testing following a workplace accident or near miss (“post-incident”); and testing where an employer has reasonable and probable cause to suspect employee impairment while on-site (“reasonable cause”).

II. Mandatory Random, Unannounced, Not-For-Cause Testing

The rejection of random alcohol and drug testing by Labour Arbitrators is distinguished from the approach taken by Human Rights Commissions on the issue. The contrast between these decision-makers is seen when comparing the Ontario Court of Appeal decision in *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (ON CA) (“*Entrop*”) with the recent decision of Arbitrator Picher’s panel in *Re Imperial Oil Ltd. and C.E.P. Loc. 900 (Re)* (2006) 157 L.A.C. (4th) 225 (“*Imperial Oil*”).

³² The Canadian Model was developed as a negotiated balancing of the safety interests of employers and the individual privacy rights of employees. See: *Tracer Canada Co. v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 110*, [2004] A.G.A.A. No. 68. The Canadian Models currently integrated in collective agreements are the 2001 Canadian Model and the 2005 Canadian Model.

In *Entrop*, Mr. Entrop, a non-unionized Employee at Imperial Oil's Sarnia refinery was a recovering alcoholic that had not had a drink for seven years when the company introduced its alcohol and drug policy in 1992. As was required by the policy, Mr. Entrop disclosed this personal information, and as a result was re-assigned by the employer from the safety sensitive position he held to another position. Although he was eventually returned to his original position, Mr. Entrop brought a human rights complaint to the Ontario Human Rights Commission alleging that his employer had discriminated against him on the basis of disability. The case made its way from the Commission to judicial review³³ and eventually to the Court of Appeal. The Court of Appeal discussed the Commission's rulings and in one aspect of its decision dealt with the legality of random employee alcohol and drug testing.

The Court of Appeal agreed with the Commission that "freedom from impairment" by alcohol or drugs is a *bona fide* occupational requirement ("BFOR") for the company's employees. The Court found that in order to meet the company's purpose of creating a safe work environment by identifying impaired employees, on-site alcohol testing through the use of a breathalyzer (which immediately identifies the current state of impairment of an individual) was permissible for employees holding safety-sensitive positions. However, using the test developed by the Supreme Court of Canada in *Meiorin*, the Court held that drug testing by urinalysis was not permissible for the same purpose in a similar situation on the basis that drug testing by urinalysis cannot prove impairment, as it only demonstrates that some level of a drug or its metabolites was present at the time of the test within an individual.³⁴

More recently in Ontario, in the *Imperial Oil* case argued before the Picher Arbitration Panel Imperial Oil argued that as random alcohol testing using a breathalyzer was held to be permissible in *Entrop*, the same principles should apply to random testing that could

³³ The *Entrop* case at the Ontario Divisional Court level is cited as: [1998] O.J. No. 422.

³⁴ The drug testing failed the rational connection test as set out in *Meiorin*. See also: *Re Trimac Transportation Services – Bulk Systems and Transportation Communications Union* (1999), 88 L.A.C. (4th) 237 (Burkett).

measure the current state of impairment by marijuana of an employee through the use of oral (buccal) swabs. To consider this question the Panel turned its mind to “general societal values and standards with respect to the protection of the dignity of the person, in particular as relates to rights of personal privacy and the surrender of bodily substances.”³⁵

Arbitrator Picher took pains to distinguish the considerations of the Court of Appeal in *Entrop* from those of labour arbitrators making judgments about alcohol and drug testing in the context of the interpretation, application, or administration of a collective agreement. He held that:

...Critically, the Court was never called upon to consider whether the Company's policy might violate the express or implied terms of a collective agreement, including a provision such as article 3.02 of the instant collective agreement protecting the dignity of employees, including employees who are not disabled or perceived to be disabled. Understandably, therefore, the Court of Appeal in *Entrop* made no reference to the extensive body of arbitral jurisprudence in Canada dealing with the balancing of interests approach and the "for cause" analysis overwhelmingly endorsed in the preponderant arbitral jurisprudence concerning alcohol and drug testing. The Court of Appeal in *Entrop* was focused solely on [page278] the interpretation of the Human Rights Code. It did not address the interpretation of a collective agreement and thereby did not address the impact of the widely accepted principles of drug testing under the "Canadian model" in a workplace governed by a collective agreement. In approaching this issue it is important to remember that that which is permissible under human rights legislation may not be permissible under a collective agreement...³⁶

Commenting on the balancing of rights approach taken by labour arbitrators, Arbitrator Picher discusses the importance of the privacy rights of individual employees:

The dignity, integrity and privacy of the individual person is among the most highly prized values in Canadian society. Employment is a large part of the human experience, normally spanning the better part of an adult life. The place of a person in his or her profession, trade or employment is therefore a significant part of his or her humanity and sense of self. That reality is deeply reflected in the law of employment and labour relations in Canada. It is therefore not surprising

³⁵ *Imperial Oil* at para. 74.

³⁶ *Ibid.* at para. 110.

that, as contrasted with developments in other countries, the federal and provincial governments in Canada have not rushed to enact legislation or regulations authorizing employers to alcohol or drug test their employees. Nor is it surprising that boards of arbitration have been careful to seek a balance which protects the privacy and dignity of employees in this area.³⁷

Ultimately, Arbitrator Picher held that random alcohol and drug testing was contrary to the balancing of interests approach taken by arbitrators determining the validity of testing policies in safety-sensitive environments. Arbitrator Picher held that the company's policy directing the random testing of an employee's bodily fluids was an unwarranted intrusion on privacy and an affront to the dignity of the individual employee, and could not be reconciled with the provisions of the collective agreement calling for a workplace "...where individuals are treated with respect and dignity."³⁸

II. Random Testing by Employee Agreement

A type of random drug or alcohol testing that has been found permissible by labour arbitrators is within the context of a last chance contract with the employee. Where an employee has a known or employee disclosed drug or alcohol use or abuse issue, arbitrators have supported unannounced drug testing. However, this type of testing *for that employee* is by agreement with the employee as part of a return to work / rehabilitation or accommodation program and is generally only allowable for a limited time period.

III. Post-incident Testing

Alcohol and drug testing has generally been considered an acceptable requirement when there has been a significant accident or near miss incident at a safety-sensitive worksite. These situations would include where damage has occurred to an employer's property, an incident has given rise to serious safety concerns, or an interaction has taken place that had the potential to result in significant injury or property damage. If there has been such

³⁷ *Ibid.* at para. 117.

³⁸ *Ibid.* at para. 113 – 128.

an incident, the testing is considered to be a component of the employer's investigation to determine its cause. Historically, no objective sign of employee impairment has been required for an employer to insist that all employees involved in the incident undergo the testing.

Any such requirement for post-incident testing must be set out by the employer in policies complying with the KVP standards³⁹ (see above) or be developed in conjunction with the union (for example, through the adoption of the Canadian Model). To effectively balance employee privacy interests with employer concerns, the threshold for requiring testing must be more than a minimal incident or near miss.

Very recently, Arbitrator Sims in *Weyerhaeuser* has set out what conditions are required to be met before post-incident testing is justifiable. The case involved two grievors implicated in workplace accidents that were required to undergo alcohol and drug testing as per the "post-incident" provisions of the Employer's policy. Neither grievor tested positive for any substance, so neither was subject to further disciplinary or other consequences under the policy. However, the grievance took issue with the manner in which the testing occurred, as well as the question of whether Employer insistence on post-incident testing is always permissible. Arbitrator Sims found that post-incident testing is not always justified, and that Employers cannot blindly apply a policy – discretion must be exercised.

With respect to the question of post-incident testing, Arbitrator Sims noted that the focus of the inquiry is to be on the nature of the incident that has occurred. He states:

There are three elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.⁴⁰

³⁹ *Weyerhaeuser*, [pg. 31 of 51 QL]. See footnote 27 for the KVP standards.

⁴⁰ *Weyerhaeuser*, [pg. 31 of 51 QL].

Arbitrator Sims concluded that the incident or near miss must be of sufficient gravity to justify overriding employee privacy rights by ordering such a test. In cases of property damage, any damage must be more than trivial. Importantly, the demand for testing must be able to be seen by a third party as not being “arbitrary or capricious.” It must follow a “real investigation” and a “reasoned decision” by a responsible manager, in light of all the circumstances. Arbitrator Sims advised that the individual to be tested should be asked for their explanation. While their connection to the incident might justify an inquiry into their state of impairment, their explanation may also be relevant in determining whether testing would be justified. The individual’s connection to the incident must go to the “root cause” of the incident, rather than merely a tangential relation. The Employer must look into any other possibilities that could realistically have caused the incident. Without thoughtful balancing of the rights in issue, an Employer approach based on completing a checklist to reach “we’ve got enough to test” was held to be inappropriate. Arbitrator Sims held that it is unreasonable for an employer to attempt to use post-incident testing as a deterrent mechanism.

IV. Reasonable Cause

Within a unionized, safety-sensitive environment, it is also generally accepted that an employer may require an employee to undergo alcohol or drug testing if the employer has reasonable and probable grounds to suspect impairment at work. Objective signs, like an individual’s appearance or presentation constitute reasonable and probable grounds to require such testing.⁴¹ No particular incident or accident is required.

It is not surprising, however, that particular concerns for an individual’s privacy and personal dignity arise in this instance, given the stigma that accompanies a revealed suspicion of alcohol or drug abuse within the workplace. Perhaps a higher threshold than mere appearance is required to truly balance employee privacy interests with the

⁴¹ For a list of examples of signs of impairment that would qualify as giving rise to a reasonable suspicion, see: *Re Tembec Inc. and Industrial Wood and Allied Workers of Canada, Local 1-1000 (Thibert Grievance)* [1999] O.L.A.A. No. 85 (at para. 18).

employer's safety interests – a threshold more in-line with significant post-incident testing. Not only should the employer be able to articulate why the situation is serious enough to justify this type of invasion of the employee's privacy, but the employer should also be alive to the power dynamics that exist on the shop floor and take the necessary steps to prevent supervisors from being heavy-handed or applying policies inappropriately.

V. Other Issues

Privacy Interests and the Application of Drug and Alcohol Testing Policies

In *Weyerhaeuser*, one of the questions that Arbitrator Sims examined was the manner in which substance testing was carried out following incidents involving two grievors at the Employer's mill in Edson, Alberta. One of grievors, a Ms. Roberto, was forced to take her substance test in a cheap motel room, while a number of men sat on the bed and waited for her. The manner in which she was escorted to the test and directed to take the test was in poor taste and clearly unprofessional. She was subsequently known in her small community as the person who had been drug tested. Suffering humiliation following the testing, Ms. Roberto developed significant anxiety and symptoms of Post Traumatic Stress, and required medical intervention as a result. Arbitrator Sims noted that that her right to liberty and her personal dignity and privacy was run rip shod over and he awarded her \$10,000 in damages for enduring this treatment and for her subsequent mental suffering.

Arbitrator Sims reviewed *Re Canadian Pacific Ltd. and U.T.U.* (1987) 31 L.A.C. (3d) 179 (M.G. Picher). In that case, Arbitrator Picher outlined the high technical and professional standards required of a substance testing procedure in order for it to be admissible as reliable evidence that withstands evidentiary challenge. In relation to the privacy interests of the employee, Arbitrator Sims recognizes that this is not the only reason why the standards for sample collection should be top-rate: "...the invasion of privacy occurs whether or not the results are needed as evidence. Those who test

negative care little that they could have challenged the results if they proved positive.”⁴² Arbitrator Sims carries on to note that, in relation to the manner of testing, privacy and dignity issues do not end once the right to test is established. In fact, they:

“...extend to the assurances the person has that the information obtainable from the samples taken from them are used only for the purposes for which they were taken, and that reliable and enforceable measures are taken to prevent any ulterior use, whether accidental or deliberate and whether now or in the future through unauthorized data banking. When tests are taken by professionals bound by laws enforceable in Alberta, such as in a hospital or clinic, or by a professionally qualified occupational health care employee, the individual has the assurance that the person's professional ethics and practice are subject to regulation by their licensing body. When the testing is by someone less clearly regulated and the results are analyzed beyond the reach of local or even national licensing bodies, the privacy concerns for an individual are higher.”⁴³

Conclusion

Where Privacy Commissions venture with respect to the privacy issues surrounding drug and alcohol testing is yet to be determined. Aside from questions of jurisdiction it is likely that the questions faced and the decisions rendered by Privacy Commissions are unlikely to touch on issues such as accommodation related to disability or the enforcement of collective agreements. It is trite to say that Privacy Commissions are restricted to determining those issues which are directed to them by the legislature under privacy legislation. However, it is possible that Privacy Commissions will take notice of and may rely on the general principles surrounding the issues of privacy and rights of human dignity touched on by adjudicators in the human rights, arbitral and court fields. How Privacy Commissions choose to apply those principles to questions such as accessibility of employees to copies of employers' or site owners' written drug and alcohol testing policies, the use and disclosure of driver license and social insurance numbers as identifiers, employer's collection of health information as part of its drug and alcohol inquires, the extent of disclosure of drug and alcohol test requirements or results,

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⁴³ *Ibid.* [15 of 51 QL].

as well as the very reasonableness of pre-access/pre-employment testing, is yet to be determined. Most importantly, the question of what is “reasonable” in all of these circumstances is very much a live and contentious issue.