

## ARBITRATOR REJECTS RANDOM DRUG TESTING

*On January 22, 2007, Imperial Oil applied for judicial review of Arbitrator Picher's decision.*

*By Debra C. Curley*

In light of the Ontario Court of Appeal decision in *Entrop v. Imperial Oil* (2000), 50 O.R. (3d) 18, Imperial Oil suspended random drug testing of employees in safety-sensitive positions. In that decision, the Court held that random alcohol testing was a *bona fide* occupational requirement for employees in safety sensitive positions. However, the Court struck down the random drug testing component of the policy on the grounds that it violated the Ontario *Human Rights Code* because the testing did not provide proof of actual impairment.

In July 2003, Imperial Oil re-introduced its drug testing policy because a test had been developed that could demonstrate drug impairment by way of an oral fluid (saliva) sample. The drug policy included testing of all employees for reasonable cause and for rehabilitative purposes. In addition, employees in safety-sensitive positions were subject to random drug and alcohol testing. The Union challenged all aspects of the policy.

The Board of Arbitration, chaired by Arbitrator M. Picher, upheld testing of employees for reasonable cause and for rehabilitative purposes; however, the Board struck down random testing of employees for drug impairment. Interestingly, the Board dismissed the Union's challenge to random alcohol testing because the Union had acquiesced to the testing for many years.

Focusing on the random drug testing procedures, the Board was satisfied that expert evidence confirmed that the oral swab test accurately detected impairment at the time the test was taken. However, the Board struck down this portion of the policy for four reasons.

First, the Board was concerned that the drug test did not yield an immediate result as did the breathalyzer test; therefore, the person submitting the test could be returned to the workplace even if impaired by drugs. Accordingly, the Board held even if *Entrop* were applicable, the test still did not meet the requirements of immediately ensuring safety in the workplace.

Second, Arbitrator Picher held that the proposed test was inconsistent with arbitral jurisprudence which overwhelmingly rejects mandatory, random, and unannounced drug testing as an implied management right. He noted that arbitrators have developed a 'balancing of interests' approach in which the employer's interest in ensuring a safe workplace is balanced against the countervailing employee's interest in dignity and privacy. Arbitrator Picher found that in the absence of any legislative underpinning, and against a backdrop of successful industrial relations experience, it was clear that the 'balancing of interests' approach had achieved both the employer's and employees' legitimate goals without imposing random alcohol or drug testing on employees.

Third, Arbitrator Picher analogized the proposed tests to state-imposed DNA tests to which criminals are subject, and held that it should not be lightly inferred that the fact that an

employment relationship exists permits the employer to assert an authority the government itself does not have. In a unionized environment, the Arbitrator wrote, such an incursion in the rights of employees must be expressly and clearly negotiated. He held there was no such language in Imperial Oil's collective agreement.

Finally, Arbitrator Picher focused on language in the collective agreement that provided that individuals were to be treated with "respect and dignity." He held that "in a society based on respect for the integrity and dignity of the individual, an employer must bear a heavy onus" to justify intruding on employees' rights with random drug testing. He was not persuaded that the Company's goals of deterrence and behaviour modification were sufficient to discharge the onus. Rather, he held that random drug testing might be justifiable if an employer could demonstrate "an out-of-control drug culture." He found there was no significant evidence of drug use at the worksite or within the workforce at Imperial Oil to justify random testing under the policy.

Employer nominee, Mr. Roy Filion, dissented from the views of the majority and held that he would have upheld random drug testing.

First he noted that random *alcohol* testing had been carried on at Imperial Oil since 1992; therefore, it was reasonable to conclude that under the language in the collective agreement, the parties had agreed to random testing. Accordingly, "randomness" could not be the issue; rather, the Board should have focused on the differences between alcohol testing by breathalyzer and drug testing by oral swab. In Mr. Filion's view, there was no qualitative difference between the two tests because both were minimally intrusive.

Second, Mr. Filion noted that the Court of Appeal in *Entrop* did not strike down random drug testing because it failed to show immediate results; rather, the testing was struck down because it could not demonstrate impairment such that the employee was incapable of performing the essential duties of the position. He wrote that while it would be preferable to get immediate results, the fact that they were not available did not diminish the importance of a positive test and the actions Imperial Oil could take to prevent a recurrence.

Third, Mr. Filion distinguished law in the criminal context from law in the workplace. He noted the interest at stake when the state collects DNA from criminal suspects is far different from that in the employment context in which employers are subject to affirmative legal duties to take all reasonable steps to ensure the safety of employees, and are also vicariously liable for harm caused by the acts or omissions of their employees. Accordingly, these different interests gave rise to different considerations.

Finally, Mr. Filion found that it was a curious proposition that according to the majority, random drug testing did not comply with the "respect and dignity" provision in the collective agreement; whereas, it would have complied with the *Human Rights Code*. He wrote "if the Company's Policy complies with the *Code*, it cannot at the same time violate the requirement of respect and dignity." Mr. Filion concluded that "one of the best manifestations of respect and dignity for employees is to provide them with the safest possible working environment."

This decision is problematic for employers who seek to extend random alcohol testing to include random drug testing. The onerous standard of demonstrating an "out of control drug culture taking hold in a safety-sensitive environment" will be difficult to meet. Moreover, it is unclear

what steps an employer should take to align testing provisions with dignity expectations of employees that comply with the *Human Rights Code* but do not comply with a collective agreement. Finally, Arbitrator Picher's principled approach with respect to arbitral jurisprudence that overwhelmingly rejects random testing will be difficult to distinguish.

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