

**DRUG AND ALCOHOL TESTING  
IN THE WORKPLACE**

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## **Drug and Alcohol Testing in the Workplace**

The information in this paper is not information created by the Human Rights and Citizenship Commission. It is an interpretation of the law as it stands today with respect to drug and alcohol testing.

### **Disability**

Alcohol or drug addiction is considered to be a physical or mental disability. Discrimination based on physical or mental disability is prohibited in employment under s.7 of the Human Rights, Citizenship and Multiculturalism Act. In addition if an employee does not have a drug or alcohol addiction but is perceived to have a drug and alcohol addiction it is our position that this would be covered under the human rights legislation. An employer may require an employee to be tested for drug or alcohol addiction because of a perceived disability. In some jurisdictions the definition of disability includes perceived disability.

### **Perceived Disability**

The Supreme Court of Canada has looked at the meaning of disability and confirmed that disability can be real or perceived (see Granovsky v. Canada (Minister of Employment and Immigration) 2000 S.C.J. No 20) at paragraph 29 where the Court said.

*The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many aspects of life the so-called “disabled” individual may not be impaired or limited in any way at all.*

The case of Toronto Dominion Bank v. Canadian Human Rights Commission and Canadian Civil Liberties Association (1998) 32 C.H.R.R. D/261 (Fed. C.A.) – is instructive with respect to perceived disability and drug dependence. In this case, the Bank introduced mandatory drug testing of all new and returning employees. Under the

policy, new and returning employees who refused to submit to the drug test were to be dismissed for failing to comply with a condition of employment. The tribunal found employment can be terminated following the refusal of an employee to provide a urine sample because the termination would be for a breach of a condition of employment, rather than any perception of drug dependency (p. D/268 paragraph 18). The Federal Court of Appeal disagreed with this analysis stating (at p. D/270 paragraph 24):

*I do not see how one can avoid the conclusion that the Bank's drug testing policy constitutes a prima facie discriminatory practice. I say this because the Bank's policy raises the likelihood of drug dependent employees losing their recently acquired employment. An employment policy aimed at ensuring a work environment free of illegal drug use must necessarily impact negatively on those who are drug dependent. Surely, the Bank's policy qualifies as prima facie discrimination, that is to say an employment practice which "tends to deprive" drug dependent persons of an employment opportunity within the meaning of s.10 of the Act...*

### **Leading Cases**

The leading cases on drug and alcohol testing and human rights are Entrop v. Imperial Oil (1996) O.H.R.B.I.D. No. 30; Imperial Oil v. Entrop (2002) 37 C.H.R.R. D/481 (Ont. C.A.) and Canada (Canadian Human Rights Commission) v. Toronto Dominion Bank (1998) F.C.J. No. 1036. These are both Court of Appeal decisions.

### **Entrop**

In Entrop, the employee was required to disclose past drug and alcohol addiction to his employer as a result of a new drug and alcohol policy. Mr. Entrop disclosed to his employer that he was an alcoholic but had not had a drink since February 1984. Imperial Oil immediately removed him from his "safety sensitive" position but after a brief period recognizing he was not a risk they reinstated him to his old position. But in order to be reinstated Mr. Entrop had to agree to certain onerous terms including submitting to unannounced alcohol tests. The Court upheld the Board's finding that Imperial Oil

discriminated against Entrop. The reinstatement process was lengthy and demeaning and caused Entrop stress and anxiety that was unnecessary in light of Entrop's work record and years of sobriety.

### Experts

A number of experts gave evidence in the Entrop decision.

The experts testified that drug testing is not effective to determine whether a person is capable of performing the essential requirements of their job.

Dr. Walsh indicated that it is virtually impossible to predict with any specificity the degree of impairment which will result from drug use:

*Currently the ability to predict the behavioral consequences of taking a drug is somewhat limited. [...] Although generalizations regarding drug effects on performance have been established, the specificity within which one can predict whether an individual is capable of performing a specific task under the influence of a drug remains minimal. The question that is often asked is, "If I have an employee who uses cocaine or smokes marijuana on Saturday night, will he be able to perform his job on Monday morning? The answer to this seemingly straightforward question is, "It depends!!!" [J. Michael Walsh and Steven W. Gust, "Drug Abuse in the Workplace" Seminars in Occupational Medicine Vol. 1, (New York: Thieme Medical Publishers, 1986) at p. 238.]*

At paragraph 71

*The expert evidence on the linkage between testing and impairment for drugs, as opposed to alcohol, is considerably more complex. Dr. Bhushan Kapur, a consultant in Toxicology at the Division of Clinical Pharmacology and Toxicology at the Hospital for Sick Children, stated that drug-testing techniques measure the presence of a drug or drugs but are "not sophisticated enough to measure impairment from drug use." Even at "high levels of concentration, "Dr. Kapur noted that "neither blood nor urine tests are sufficiently accurate to*

*indicate impairment” from drugs. Dr. Kapur used the example of marijuana to illustrate. Indicating that the clinical effects of marijuana peak in “about thirty to thirty-five minutes,” and last “the first few hours [after use] at the most,” Dr. Kapur testified that a positive test can continue to show up in the urine much longer. “I have seen positives for as...few as four to five days [and] as many as twenty days.” he stated, adding that in one exceptional case the urine actually tested positive for “about four months”.*

There is an acknowledgement at paragraph 74 of international recognition that although drug testing may indicate the use of a particular substance “no adequate test exists which can accurately assess the effect of drug use on job performance”.

At paragraph 83

*Barbara Butler conceded in cross-examination that there is “no Canadian study” of which she is aware that has concluded whether drug testing is effective or ineffective. The ILO Inter-Regional Tripartite Experts Meeting on Drug and Alcohol Testing in the Workplace, held in Oslo, Norway in May 1993, heard from American researchers who had reviewed a host of studies and determined that there is “not much scientific evidence supporting the efficacy of [drug] testing.*

There was evidence given with respect to alternative mechanisms of detection. These are described at paragraphs 76-79 and include: direct observations of employees by supervisors and co-workers, employee assistance programs, and health promotion programs.

Professor Backhouse made the following conclusion with respect to drug testing at paragraph 99(4):

*“The provisions of the Policy that provide for pre-employment and random drug testing are unlawful because the Respondent failed to prove that a positive test is correlated with impairment. Drug testing which takes place “for cause”, “post-incident”, upon “certification for safety sensitive positions” and post reinstatement may be permissible, but only if the Respondent can establish that*

*the testing is necessary as one facet of a larger process of assessment of drug abuse.”*

The decision of the Board of Inquiry was appealed to the Divisional Court. The court dismissed the appeal and found that all the Board’s orders and conclusions were supportable on the evidence.

### **Difference Between Drug and Alcohol Testing**

Imperial Oil made a further appeal to the Court of Appeal. At paragraph 86 the Court agreed that the drug testing provisions of the policy violate the Code but disagreed with the Board and the Divisional Court on random alcohol testing. The difference between drug and alcohol testing is that a positive drug test does not demonstrate impairment; a positive breathalyzer does. Therefore random alcohol testing for safety sensitive positions though discriminatory can be justified providing the sanctions for a positive test are individually tailored.

### **Sanctions**

The court says the second flaw with respect to Imperial Oil’s random drug testing provisions is that sanctions were too severe. At paragraph 102 the court says that automatic termination for a positive test is broader than necessary. Imperial Oil failed to demonstrate why it could not tailor its sanctions to accommodate individual capabilities without incurring undue hardship.

### **The Meoirin Test**

There is a test set out by the Supreme Court of Canada which must be met to justify a practice such as drug and alcohol testing in the workplace. This is the Meoirin test as set out in Meoirin (British Columbia Public Service Relations Commission) v. B.C.G.E.U. (1999) 3 S.C.R. 3. It said that an impugned standard may be justified by establishing on a balance of probabilities.

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 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 upon the employer.

At paragraph 93-100 the court of appeal analyzed Entrop as per the Meiorin test. Has Imperial Oil adopted alcohol and drug testing for a purpose rationally connected to the performance of the job?

*[94] Meiorin tells us that the first step focuses not on the validity of the particular challenged workplace rules but on their more general purpose. The stated purpose or objective of the Policy “is to minimize the risk of impaired performance due to substance use” in order “to ensure a safe, healthy and productive workplace”. This general purpose is rationally connected to the performance of the work at Imperial Oil’s two refineries. Common sense and experience suggest that an accident at a refinery can have catastrophic results for employees, the public and the environment. Promoting workplace safety by minimizing the possibility employees will be impaired by either alcohol or drugs while working is a legitimate objective. Imperial Oil has met the first step of the Meiorin test.*

Did Imperial Oil adopt these testing provisions in an honest and good faith belief that they were necessary to accomplish the company’s purpose?

*[95] The second step is the subjective element of the test. The Board found that Imperial Oil developed and implemented the challenged provisions of the Policy honestly and in good faith. That finding is reasonably supported by the evidence.*

*Imperial Oil consulted widely with its employees and with experts in both occupational health and safety and substance dependency.*

Are these testing provisions reasonably necessary to accomplish Imperial Oil's purpose? [96] This third step of the Meiorin test focuses on the means Imperial Oil has used to accomplish this purpose. The question is whether Imperial Oil has shown that the alcohol and drug testing provisions of the Policy are reasonably necessary to identify those persons who cannot perform work safely at the company's two refineries, because they are impaired by alcohol or drugs. To meet this third requirement, Imperial Oil must show that it cannot accommodate individual capabilities and differences without experiencing undue hardship.

At paragraph 99 the court found that random drug testing for employees in safety sensitive positions does not meet the third part of the Meiorin test:

*...But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.*

### **Toronto Dominion Bank Case**

The Toronto Dominion Bank case was about drug testing in the work place. The Bank established a policy requiring employees to submit to a urine drug test. The Bank would pay for rehabilitation programs for employees who had positive results. The Panel

dismissed the complaint. The Panel held that when employment is terminated following the refusal of an employee to comply with the policy, the termination is for breach of a condition of employment and it is not necessary to look beyond that for a perception of drug dependence.

At paragraph 26 the Panel further held that by referring the employees for assessment after a second positive test and by paying for whatever treatment is indicated, as well as by maintaining the employee on the payroll during that time, the appellant reasonably accommodated the employee.

The Commission appealed and the Motions Judge concluded that there was adverse effect discrimination and the Panel erred in concluding the policy was non discriminatory.

The Court of Appeal rendered its decision prior to the Supreme Court of Canada decision in Meorin (British Columbia Public Service Relations Commission) v. B.C.G.E.U. (1999). In Meoirin the Supreme Court effectively abandons the distinction between direct and adverse effect discrimination. Direct discrimination occurs when a party adopts a rule, practice, preference or makes a distinction which on its face discriminates on a prohibited ground such as an employment policy which states that no blacks, women or Catholics may be employed. (Zinn and Brethour "The Law of Human Rights in Canada" p. 1:20.1). Adverse effect discrimination arises where an employer for genuine business reasons adopts a rule or standard which on its face is neutral and which applies equally to all employees but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic that employee or group obligations penalties or restrictive conditions not imposed on other members of the work force.

The decision in the Toronto Dominion Bank case is made on this distinction. Two of the three court of Appeal judges classified the bank's work rule as indirect discrimination. Justice Robertson considered the bank's rule to be direct discrimination but said at paragraph 174 if in error and the policy qualifies as adverse effect discrimination then it

fails by reason of the Bank's failure to satisfy the rationale connection test, ie. the policy is not rationally related to the employment. The Bank's rationale for implementing its policy is that it is concerned with the effect drugs have on work performance as well as an employee responsibility. The Court said the Bank's policy was under inclusive. If the Bank were truly concerned with the correlation between drug use and employee job performance and responsibility it would have adopted a rule for random testing which applies to all employees including those at the senior levels (paragraph 203).

### **Alberta Human Rights and Citizenship Information Sheet**

The Alberta Human Rights and Citizenship Commission has put out an information sheet based on the Entrop decision. It confirms that blanket drug testing of employees or prospective employees is discriminatory even for safety sensitive positions since it does not reflect actual or future job impairment. Tests should be given only where there is reasonable cause to suspect an impaired ability by the employees to safely and satisfactorily perform job duties. The current law distinguishes between drug and alcohol testing because a positive breathalyzer shows impairment and therefore alcohol testing is acceptable for safety sensitive positions.

### **Canadian Human Rights Commission Policy on Alcohol and Drug Testing**

The Canadian Human Rights Commission has a policy on Alcohol and Drug Testing. This is an in depth interpretation of the law. This policy can be accessed on the web at [www.chrc-ccdp.ca](http://www.chrc-ccdp.ca). Then go to the Legislation and Policy section to find this document.

### **Testing that is not acceptable**

There are four types of testing that are not seen as acceptable. These include: pre-employment drug testing, pre-employment alcohol testing, random drug testing and random alcohol testing of employees in non safety sensitive positions.

### **Testing that may be acceptable**

Random alcohol testing of employees in safety sensitive positions, drug or alcohol testing for reasonable cause or post incident, periodic or random testing following disclosure of a current drug or alcohol problem may be acceptable.

Any pre-employment testing must be limited to determining an individual's ability to perform the essential duties of the job. Pre-employment drug or alcohol testing cannot be shown to be reasonably necessary to accomplish the goal of hiring non impaired workers as a positive pre employment drug or alcohol test will not show whether an individual will be impaired at any time while on the job.

Pre-employment drug and alcohol testing may occur for employment in a safety sensitive position in limited circumstances such as where an individual has disclosed an existing drug or alcohol problem or where a medical examination indicates there may be a problem.

### **Random Testing for Drugs and Alcohol**

A positive drug test cannot measure present impairment or whether a person was impaired on the job. It can only confirm that a person has been exposed to drugs in the past. Random drug testing fails the reasonably necessary test.

Random alcohol testing on the other hand may be permissible for employees in safety sensitive positions as long as the employees are notified that alcohol testing is a condition of employment. The reason for this is a breathalyzer reading can identify whether or not a person is impaired while on the job.

It is not acceptable to test at random an employee in a non safety sensitive position unless an employer believes the employee is unfit to do his or her job as a result of alcohol abuse.

### **Drug or Alcohol Testing for “Reasonable Cause” or “Post Incident”**

This may be acceptable in a safety sensitive environment in specific circumstances for example if there are grounds to believe there is a substance abuse problem or if there is an accident and there is reason to believe drugs or alcohol may have contributed to the accident.

To my knowledge the courts have not looked at drug and alcohol testing of employees in non safety sensitive positions for “reasonable cause” or “post incident”. It is suggested that testing should only be considered if an employees on the job behaviour indicates impairment.

### **Accommodation**

The employer whose work rule discriminates against an employee has to provide accommodation up to undue hardship. The Supreme Court of Canada in Alberta Human Rights v. Central Alberta Dairy Pool (1990) 12 C.H.R.R. D/417 has described what is considered when determining undue hardship at paragraph 62.

*“financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer’s operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and the facilities can be adopted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. The list is not...exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.”*

Any individual found to have a drug or alcohol addiction must be accommodated by the employer unless the employer can show this would cause undue hardship.

Accommodation should include referral to a substance abuse program and considering sanctions less severe than dismissal.

A policy which stipulates automatic discharge for an employee who violates the policy has been found to be unreasonable. Fording Coal Ltd. v. United Steelworkers of America, Local 7884 (2002) B.C.C.A.A.A. No. 9 paragraphs 31.

An employee with a substance abuse problem may be temporarily removed from a safety sensitive position. The employee should be returned to his or her position once rehabilitation has been completed. Where safety is a concern, follow-up testing may be a condition of continued employment.

In conclusion, without question safety is a concern to everyone. The need to ensure safety must be balanced with the requirement that employees not be discriminated against. It is important for employees to look at alternatives to drug and alcohol testing. For example supervision and peer monitoring are effective ways of detecting substance abuse. Education and rehabilitation are effective ways of dealing with substance abuse.

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