CURRENT LEGAL CONTEXT: EMPLOYEE TESTING

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1. Human Rights Context: Supreme Court Decision

- Federal Human Rights legislation prohibits discrimination on the basis of a disability. Current or former dependence on drugs or alcohol is considered a disability under the federal Act. Issues around reasonable accommodation for someone with a dependency, and establishing a *bona fide* occupational requirement for treating someone differently need to be addressed when implementing an alcohol and drug policy.

- The Supreme Court has helped clarify an employer's obligations when it comes to setting standards that some might consider discriminatory. The company is expected to establish those standards as a *bona fide* occupational requirement, and to do so must meet three tests. These were established by the Court in a British Columbia Human Rights Case[1], reinforced in a second case[2], and used by the Ontario Court of Appeal in its review of the Imperial Oil policy in Entrop, by the Federal Human Rights Tribunal in its review of the Autocar Connaisseur policy, and by arbitrators in subsequent arbitration decisions. The full decisions are below; the tests are:

  - Was the standard adopted for a purpose rationally connected to the performance of the job?
  - Did the employer establish that it adopted the standard in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose?
  - Did the employer establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose? - and to meet this test, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

  British Columbia (Public Service Employee Relations Commission) *v.* BCGSEU, [1999] 3 S.C.R. 3
  http://scc.lexum.umontreal.ca/en/1999/1999rcs3-3/1999rcs3-3.html (English)
  Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU, [1999] 3 R.C.S. 3
  http://scc.lexum.umontreal.ca/fr/1999/1999rcs3-3/1999rcs3-3.html (French)

  British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868
  http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html (English)
  Colombie-Britannique (Superintendent of Motor Vehicles) c. Colombie-Britannique (Council of Human Rights), [1999] 3 R.C.S. 868
  http://scc.lexum.umontreal.ca/fr/1999/1999rcs3-868/1999rcs3-868.html (French)

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[1] British Columbia (Public Service Employee Relations Commission) v. British Columbia government Service Employee's Union, SCC file No. 26274, September 9, 1999 (Meiorin)

[2] British Columbia superintendent of Motor Vehicles v. British Columbia Council of Human Rights, SCC file NO. 26481, December 16, 1999 (Grismer)

2. Human Rights Decision: Entrop and Imperial Oil

- This was the most comprehensive Court decision on a workplace policy and testing program as of 2000, and formed the basis for the federal and several provincial human rights policies. It was also the first time the Supreme Court test was used in reviewing a workplace policy. The Ontario Court of Appeal upheld the company's right to set standards, and the right to trigger discipline, although it would not accept termination in every situation stating a case by case assessment of consequences was needed.

- Alcohol testing was accepted in reasonable cause, post incident, certification (to a safety-sensitive position) and on a random basis after assignment, as well as in return to duty situations. Although the Court commented that drug testing would be acceptable in all but a pre-employment and random situation, it did not make a ruling (Entrop's complaint was against the alcohol testing part of the policy). In other words, it appears testing was acceptable consistent with the original Board of Inquiry decision in a reasonable cause, post incident and return to duty/follow-up testing situation. The Court also agreed with testing as a condition of certification to a safety-sensitive position for new hires and existing transfers.

- The Court's comment on random and pre-employment testing was that because urinalysis does not prove impairment at the time the sample is taken it does not meet the Supreme Court's *bfor* test in these situations.

  Entrop v. Imperial Oil Limited (July 21, 2000)
  http://www.ontariocourts.on.ca/decisions/2000/july/entrop.htm

3. Federal Human Rights Commission Policy

- In June 2002, subsequent to the Entrop decision, the Federal Commission reviewed its policy on testing, and took a position that somewhat mirrors but is not entirely consistent with the Court decision. Although there was no ruling on the drug testing components of the Imperial Oil policy, the Commission policy takes a stand similar to the Court's comments on drug testing but not completely. Reasonable cause, post incident and follow-up alcohol and drug testing are acceptable (subject to meeting *bfor* standard), and random alcohol testing is acceptable for safety-sensitive positions.

- The Commission policy did not find pre-employment or random drug testing, and testing as a condition of certification to a safety-sensitive position acceptable. Those who test positive must be accommodated up to undue hardship. For the motor carrier industry, compliance with U.S. regulations meets the *bfor* requirement.

- In the first Tribunal hearing at which the new federal policy was considered (Autocar noted below), the Tribunal ruled that "The Commission policy on testing is not binding on the Tribunal, and is nothing more than a statement of the Commission's opinion on the issue of drug and alcohol testing, an opinion that the Tribunal may agree with or not, as it sees fit."

  The Canadian Human Rights policy on workplace programs and testing is currently being reviewed:

  http://www.chrc-ccdp.ca/legislation_policies/policies-en.asp (English)
  http://www.chrc-ccdp.ca/legislation_policies/policies-fr.asp?lang_update=1 (French)

4. Provincial Human Rights Commission Policies

After the Imperial Oil/Entrop decision, some of the commissions revised and reissued their policies on workplace programs and testing.

Alberta:
http://www.albertahumanrights.ab.ca/publications/Information_Sheets/Text/Info_Drug_Testing.asp

Manitoba:
http://www.gov.mb.ca/hrc/english/publications/policies/L23.pdf (

Ontario:
http://www.ohrc.on.ca/english/publications/drug-alcohol-policy.shtml (English)
http://www.ohrc.on.ca/french/publications/drug-alcohol-policy.shtml (French)

New Brunswick:
http://www.gnb.ca/hrc-cdp/e/Guideline-on-Drug-and-Alcohol-Testing-in-the-Workplace.pdf (English)
http://www.gnb.ca/hrc-cdp/f/Ligne-directrice-depistage-alcool-et-drogues-au-travail.pdf (French)

Prince Edward Island:
http://www.gov.pe.ca/photos/original/hrc_drugs_alcho.pdf

Saskatchewan: http://www.gov.sk.ca/shrc/policy/policy4.htm

Although the other Commissions do not have specific statements on testing, they do provide guidance on discrimination because of a disability and employer obligations regarding accommodation.

British Columbia:
http://www.bchrt.bc.ca/guides_and_information_sheets/default.htm

Newfoundland: http://www.justice.gov.nl.ca/hrc/faqs.htm

Northwest Terriorities:
http://www.justice.gov.nt.ca/PDF/ACTS/Human_Rights.pdf

Nova Scotia: http://www.gov.ns.ca/humanrights/

Nunavut: Fair Practices Act / Loi Prohibant la discrimination
http://action.attavik.ca/home/justice-gn/attach-en_conlaw_prediv/Type0681.pdf

Quebec:
http://www.cdpdj.qc.ca/en/human-rights/discrimination-harassment.asp?noeud1=1&noeud2=3&cle=2 English)
http://www.cdpdj.qc.ca/fr/droits-personne/discrimination-harcelement.asp?noeud1=1&noeud2=3&cle=2 (French)

Yukon: http://www.yhrc.yk.ca/6-hr_workplaces.htm

5. Employer Obligations re. Due Diligence

- A series of decisions have confirmed the onus on employers to ensure the health, safety and welfare of employees; employers must prove diligence in minimizing or eliminating all potential safety risks, including those associated with unfit individuals on the job, safely operating company vehicles, hosting events where alcohol may be served, and obligations towards the safe operation of independent contractors

- A recent decision by the B.C. Court of Appeal[3] examined a company's obligations to accommodate someone with mental disabilities when the individual held a safety-sensitive position and could put clients and the public at risk. In overturning the decision of the B.C. Human Rights Tribunal which had found in favour of the complainant, the Court provided a perspective on the employer's obligations to balance safety with human rights obligations. They stated the following in their decision:

  "The value of human rights legislation is great and the courts accord more than usual deference to decisions of human rights tribunals. Human rights legislation, however, fits within the entire legal framework within which enterprises must function. That framework includes other standards that also reflect deep values of the community such as those established by workers' compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the standards of the law of negligence, for example the standard that applies to Oak Bay Marine Ltd. for its clients. *Even as full adherence must be given to the standards of human rights, a human rights tribunal must be mindful of the fuller legal framework regulating an enterprise when it assesses the occupational requirements asserted by that enterprise, and decide in a fashion harmonious with that framework in order not to force non-compliance with some legal obligations in exchange for compliance with the human rights legislation*."

  The full decision is available at:
  Oak Bay Marina Ltd. v. British Columbia (Human Rights Commission) 2002 BCCA 495
  http://www.lancasterhouse.com/decisions/2002/sept/bcca-gordy.htm

6. Elizabeth Metis Settlement: Alberta Court of Queens Bench, court of Appeal, and Human Rights Panel Decision:

- **Court of Queens Bench**: This decision dealt with the case of two administration officers whose employment was terminated for failure to comply with the settlement's alcohol and drug testing program. The issue of safety did not contribute to the decision when it came to assessing whether the *bfor* requirements were met.

  The Court found that a policy requiring employees to be tested where potential consequences of a positive includes loss of employment treats them as if they were disabled and is a violation of the Human Rights, Citizenship and Multiculturalism Act. Likewise termination for refusal to be tested would be a violation on the basis that the employee is perceived to be disabled.

[3] Oak Bay Marina and B.C. Human Rights Tribunal and Robert Gordy, September 2002

However, the Court found that if testing is a *bfor*, the prohibition against discrimination does not apply. Using the Supreme Court's tests, they concluded the *bfor* is met by the Settlement as the employer implemented the policy in response to a unanimous vote of members in response to ongoing concerns about a serious drug and alcohol problem, including with employees. "The policy creates a bona fide occupational requirement for Settlement employees to set a positive standard for the community as well as addressing safety and performance concerns."

The Court concluded that an expectation of exemplary behaviour by Settlement employees by remaining alcohol and drug abuse free was a purpose rationally connected to employment performance, the policy was adopted in good faith, and the Settlement policy was reasonably necessary for the accomplishment of a legitimate work related purpose. The Alberta Commission's policy "overstates the conclusion of the Ontario Court" and does not have a force in law, the *bfor* requirement does not have to relate to job safety or performance (these were simply a function of the IOL case), other options had been tried by the problem continued, the possibility of testing would result in employees more likely to report to work in a sober condition, treatment was offered to those who failed the test, assistance was available for anyone with a problem, and there is no requirement to offer rehabilitation to someone who simply refuses to be tested.

The decision was issued in April 2003 and was appealed. The original decision can be accessed at:
Alberta (Human Rights and Citizenship Commission) v. Elizabeth Metis Settlement, 2003 ABQB 342
http://www.albertacourts.ab.ca/jdb/1998-2003/qb/Civil/2003/2003abqb0342.pdf

- **Court of Appeal**: The Court of Appeal examined whether the policy was properly applied when the two complainants were tested, assuming the policy itself is valid. The policy does not provide for blanket testing, only testing in specific circumstances including after an accident or near miss, or 'periodic or site specific" circumstances which the Settlement argued was the trigger in this situation. The original Panel and the reviewing judge (judgment above) looked at the issue of discrimination, and not whether the policy was properly applied.

  The Court noted that periodic or site specific testing was only to be applied where, due to the nature of sensitive work assignments, someone's job duties could affect personal safety, co-workers safety, the safety of the public or the safety of the environment. Both complainants had administrative positions; one rarely drove a vehicle and the other drove short distances a few times a week. The Court concluded although there is an element of safety in all jobs, their work did not meet the elevated safety standard.

  The Settlement argued that the reason for the policy was partly to ensure staff acted as role models for the community, however there is nothing in the policy that states this is a trigger for testing; this explanation can not justify a past demand for testing.

  The appeal was allowed, and the case returned to the human rights panel to determine what procedure to follow now that the demand for testing these individuals could not be justified. The Court's decision is in the list of recent legal judgments dated May 20, 2005 under the title:
  Alberta (Human Rights and Citizenship Commission) v. Elizabeth Metis Settlement, 2005 ABCA 173
  http://www.albertacourts.ab.ca/jdb/2003-/ca/civil/2005/2005abca0173.pdf

- **Alberta Human Rights Panel 2006:** On looking at the governing bylaws, the Panel agreed the members of the Settlement can provide direction to Council on establishing policy, and that the direction to implement drug testing was provided at a public meeting. The Council developed a policy to address their perceived problem, with work rules governing substance use, general requirements, employee assistance and administration. Alcohol and drug testing was part of the policy, with ramifications for testing positive or refusal to test. The Panel noted that there was no requirement for an initial test of current employees stated in the policy, or at any related meetings.

  The Interim Administrator of the Settlement issued a memo to staff outlining the requirement for initial testing two weeks after the effective implementation date of the policy, and found no authority had been issued for this. The Panel concluded that even if the policy is considered valid, the initial testing did not fall within the confines of the policy, and there was no other jurisdiction for such testing.

  As remedy, the Panel directed the Settlement to refrain in the future from drug testing without cause the administrative staff. There was no order regarding the validity of the drug and alcohol policy itself or its application, although the Settlement was directed to undertake a full review of the policy in light of the Human Rights, Citizenship, and Multicultural Act. Direction was provided for compensation of lost wages and benefits, damages for injury to dignity and self respect, and costs for both complainants.

  The decision was issued in May 2006 under the title:
  Sonia Jacknife/Cassandra Collins v. Elizabeth Métis Settlement
  http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisCollinsJacknifeMay06.pdf

7. Federal Human Rights Tribunal Decision: Autocar Connaisseur

- This was the first Tribunal ruling since the TD Bank case several years ago, and focused on a policy in a safety-sensitive industry – motor coach. The Commission's former policy was in force at the time of Mr. Milazzo's dismissal for failing a "pre-employment" drug test to qualify for U.S. work. He had previously worked for the company and in fact had crossed the border, but was not subject to the random testing program. The Commission requested that the Tribunal refer to their new policy, and Coach Canada (Autocar's parent company) requested that, in that case, the Tribunal refer to their new, more comprehensive policy as well.

  The Coach Canada policy which was before the Tribunal covered all employees, and placed all drivers and mechanics (who all have to road test the vehicles) in the safety-sensitive category whether they operated into the U.S. or not. This includes transit and school bus drivers. The policy requires reasonable cause and post incident testing for all employees; applicants to a safety-sensitive position must pass a drug test and are subsequently subject to alcohol and drug testing on a random basis.

  Mr. Milazzo's complaint before the Tribunal was that he had been discriminated against because the company perceived he was dependent when they terminated his employment after a positive drug test result. The Tribunal concluded Mr. Milazzo did not meet his burden to establish that he suffered from a disability, or that he was perceived to be disabled by Autocar, and his section 7 complaint was dismissed.

Regarding the company policy before the Tribunal at the time, the Tribunal ruled that Autocar's drug testing policy discriminates against employees who are drug dependent since anyone who tests positive is either not hired, or their employment is terminated, and some of those people will have a substance-related disability. They looked at whether the requirement not to have drug metabolites in one's system is a *bona fide* occupational requirement for bus drivers in light of the Supreme Court's three tests and concluded:

- since the purpose is prevention of employee impairment, the goal of Autocar to promote road safety by preventing driver impairment is rationally connected to the business of providing bus transport;

- the company more than satisfied the good faith requirement in the promulgation of its drug testing policy, given the lack of direction from Transport Canada, and the need to comply with U.S. requirements within the Canadian legislative framework;
- in terms of reasonable necessity, urine testing for the presence of cannabis metabolites does assist in identifying drivers who are at an elevated risk of accident and the presence of a drug testing policy will serve to deter at least some employees from using alcohol or drugs in the workplace, in a manner that would put themselves or others in danger; but
- the employer has a duty to accommodate anyone who tests positive on a random or pre-employment test and has a problem by referring them for assessment and accommodating their problem up to undue hardship.

The company revised the policy to allow for a Substance Abuse Professional assessment of anyone in violation of the policy, and to allow for accommodation of an individual in this circumstance who was found to have a problem. Follow-up testing is a condition of continued employment for those who violate the company policy.

The full decision is available at:
Salvatore Milazzo v. Autocar Connaisseur Inc. and Motor Coach Canada 2003 CHRT 37
http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=502&lg=_e&isruling=0

- On January 28, 2005 the Tribunal issued a subsequent decision confirming:

- that they had in fact addressed the broader Coach Canada policy in their decision, which upheld pre-employment and random alcohol and drug testing for bus drivers in all categories working for the company, and not just those assigned to U.S. routes;
- that the definition of "safety-sensitive position" did not need modification, and can include mechanics who operate a bus from time to time to road test it (the Commission had requested that SSP only apply to drivers "not under regular supervision" which would mean mechanics could not be included);
- because the scope of the case was limited to safety-sensitive positions, there was no ruling on whether testing of other employees is reasonably necessary;
- the provisions in a last chance agreement after an individual has failed a test and is found to have a dependency need to leave the consequences of a second violation flexible and determined on facts specific to the case – the word "will" was changed to "may" when it comes to automatic termination in this case. Termination may be warranted, but must be concluded on a case-specific basis; and
- the concept of accommodation has its limits, and the employer is not subject to an endless rehabilitation process. The decision can be accessed at:
Salvatore Milazzo v. Autocar Connaisseur Inc. and Motor Coach Canada 2005 CHRT 5
http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=586&lg=_e&isruling=0

8. Other Human Rights Decisions

Two recent decisions by Alberta Human Rights Panels provide further guidance on testing applicability at the provincial level.

- Chiasson v. Kellogg, Brown and Root: In the first human rights decision to reference the Milazzo ruling, KBR's decision to withdraw an offer of employment to an applicant for a high risk position on a client's site was upheld. The individual tested positive and had started working, but was in the probation period and the condition of hire included passing a medical and a drug test. The individual said he did not have a problem, and there was no evidence of perceived discrimination. The Panel looked at the situation in light of the Supreme Court tests as well. Although the company's actions were supported, the Panel ruled that had the applicant established evidence of a disability, real or perceived, the withdrawal of an employment offer would have been discriminatory and the third element of Meoirin would not have been totally met. (June 2005) The ruling can be reviewed at:
  John Chiasson v. Kellogg, Brown & Root (Canada) Company (Halliburton Group Canada Inc.)
  http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisChiasson.pdf

  This was appealed to the Court of Queen's Bench of Alberta which reversed the ruling, stating that there are flaws in pre-employment testing deriving from "the fact that a positive test does not show future impairment, or even likely future impairment on the job, yet the applicant who tests positive is not hired." Further problems with the company program were that all applicants were subject to testing, not just those applying for safety-sensitive positions, and that the testing was not part of a larger process of assessment of alcohol or drug abuse (as set out in the Entrop decision). The Court said prohibiting impairment at work is a valid and compelling safety and security concern, and there is a "legitimate interest in prohibiting drug use at work because it is dangerous and exposes employees to increased risk of accident or injury." But there was no evidence accepted that pre-employment testing improved workplace safety.

  The company was found to be contravening the Act, and directed to "revise its policy to eliminate pre-employment drug testing, or in the alternative, if pre-employment drug testing is found to be reasonably necessary for deterring impairment on the job," the company is ordered to "offer a process of assessment or accommodation to individuals failing a pre-employment drug test." The Court noted these directions are specific to the KBR Policy and left open the question of whether other policies would meet the *bfor* standard. The ruling can be reviewed at:
  Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2006 ABQB 302
  http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2006/2006abqb0302.cor1.pdf

- Halter and Ceda-Reactor Ltd.: This decision drew on the Supreme Court *bfor* tests, as well as the Entrop and Milazzo rulings. Halter worked in a safety-sensitive position on a client's site in the oil sands. The company policy includes testing, but random testing is only for cross-border drivers. On the basis of safety concerns and indications a number of employees were using drugs and alcohol on site, a decision was made to test an entire work team for "reasonable suspicion". Half tested positive, were given two week suspensions and offered assistance if they had a problem. They were retested and only Halter tested positive again. Offered an opportunity to take another test at his expense, he declined and was terminated. The Panel found insufficient emphasis was put on the policy at time of hiring, but a signed acknowledgement form confirmed he knew there was one. It was established he was a casual user and although there was no evidence Ceda had assessed any need for accommodation, neither had Halter established he had a problem, therefore, he did not qualify for protection under the Act.

  The testing did not meet the reasonable cause standard, and thus the blanket random test indicated all members of the crew were perceived to be substance abusers. Halter was discriminated against on the basis of a perceived disability, the testing was discriminatory, and their program did not have the range of components needed to meet requirements set in Entrop. The company did not meet the court tests: introducing a policy solely because others in the industry were doing this, and because a client required it was not sufficient. Further there should have been a written record he had been offered assistance, and he should have been accommodated in a non-sensitive position until he had a negative test; Ceda is a large company and did not accommodate to the point of undue hardship. A further decision on remedy will be issued. The decision can be viewed at:
  Les Halter v. Ceda-Reactor Limited
  Complete decision:
  http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisHalter.pdf
  Decision on remedy:
  http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisHalter.remedy.pdf

9. Arbitration Trends

- Although there have not been many arbitration decisions dealing with testing programs specifically, the trend amongst arbitrators is to make an attempt to find a reasonable balance between public safety issues and employee rights when discussing medical examinations and drug testing. The issues are also often discussed within the context of human rights guidelines and principles.

- These decisions are specific to the company policy being reviewed in each case, however, the general trend appears to be to accept alcohol and drug testing in a reasonable cause situation, as part of a complete investigation into a serious accident or incident, as a condition of assignment to a higher risk position, and on a case by case basis on return to duty after treatment for a problem, or as a condition of continued employment after a violation. More recent decisions have accepted random alcohol testing consistent with the Imperial Oil/Entrop decision, but have not upheld random drug testing. There has been no ruling on pre-employment testing as the arbitrators and unions have no jurisdiction. There are several arbitrations scheduled for 2005 in which these issues will be further addressed.