



## Drug testing

# New Rules for a New Method

By Norm Keith and Ailsa Wiggins

**ILLEGAL DRUG USE BY WORKERS**, and the effect that may have on health and safety at work, is once again in the spotlight as new technologies and the ability to determine employee impairment continue to evolve.

The flames have been fanned most recently in an arbitration case - involving Imperial Oil Limited and the Communications, Energy & Paperworkers Union of Canada (CEP) - and by the availability of the oral fluid drug testing method, which some experts regard as more reliable than urinalysis. Dr. Robert Willett, head of Duo Research Inc. in Denver, and Dr. Leo Kadehjian, an independent bio-medical consultant in Palo Alto, California, testified during the arbitration case that oral fluid testing can be a reliable way of detecting impairment for drug use.

This development is in stark contrast to the uncertainty raised with respect to determining drug impairment in *Entrop v. Imperial Oil Limited*, released in 2000.

Martin Entrop, an employee of Imperial Oil's refinery in Sarnia, Ontario, filed a human rights complaint alleging the company's alcohol and drug policy - introduced after the grounding of its parent company's oil tanker, the Exxon Valdez, in 1989 - was discriminatory. Though an alcoholic, Entrop had not had a drink in seven years. He was relieved of his safety-sensitive position, as per the policy, which allowed for random testing of such employees.

The Court of Appeal accepted that random alcohol testing was a *bona fide* occupational requirement ("BFOR") for employees in safety-sensitive positions, provided the employer accommodated employees who tested positive, to the point of undue hardship. Mr. Justice John Laskin, writing for the three-judge panel in July of 2000, concluded the scope of the hearing should not have been expanded to include drug testing components of the company's policy.

Still, the ruling went on to deal with drug testing and what was seen as two fundamental flaws. First, a positive drug test using urinalysis shows only past drug use, not impairment. Second, the sanction for a positive test is too severe, more stringent than needed for a safe workplace, and not sufficiently sensitive to individual capabilities.

The recent Imperial Oil arbitration is the first case since *Entrop* to consider random drug testing, and the first case to consider oral fluid drug testing. Dr. Louis Francescutti,

director of the Alberta Centre for Injury Control and Research, noted in the arbitration case the correlation between substance use and injuries. Dr. Francescutti pointed to data indicating that a person who consumes 12 alcoholic drinks per year is three times as likely to die in an injury event than one who does not.

A Canadian Centre on Substance Abuse (CCSA) survey, released in 2004, shows that 79 per cent of respondents had used alcohol and 45 per cent had used illicit drugs at least once. In workplaces with 1,000 or more employees, alcoholism and excessive drinking was at 10 to 20 per cent; illicit drug use at two to seven per cent.

In March of 2006, the CCSA reported alcohol and illicit drug use combined to carry long-term disability costs of \$10.6 billion, and \$37.7 billion for short-term disability.

It's true our neighbours to the south have seen more catastrophic workplace incidents involving alcohol or drugs. However, Canadian workplaces are not immune.

### Another look

After *Entrop*, Imperial Oil temporarily suspended random drug testing and investigated other testing technologies. On July 1, 2003, after evidence from Dr. Willett and Dr.

Kadehjian satisfied the company that oral fluid testing could be used to prove impairment, Imperial Oil re-introduced random drug testing for cannabis using the test.

Oral fluid testing can also be used to detect impairment from, among other drugs, amphetamines, cocaine, opiates, and PCP. It is up to the employer, based on its own research and on medical advice, to determine the appropriate cut-off levels to detect impairment rather than mere presence.

But respect for individual dignity and privacy often requires a cautious and humane, non-interventionist approach. Oral fluid testing is less intrusive than urinalysis as an employee simply places a cotton swab in his/her mouth for two minutes and cut-off levels are used to detect impairment. The test, as well, is quick, relatively inexpensive and substitution of samples is not an issue because the test is conducted in front of the collector.

The new method was literally "put to the test" in the grievance filed by the CEP in October, 2003, in which the union challenged various aspects of Imperial Oil's policy.

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A preliminary award on February 20, 2005 narrowed the issues in dispute, upholding the company's objection to the union challenge to random alcohol testing.

### **Proof is proof**

The most important issue before the arbitration board was the legality of random drug testing. Imperial Oil argued that since the oral fluid drug test proved current impairment, it conformed to the Court of Appeal's decision in *Entrop* and was, therefore, permissible.

In the award released on December 11, 2006, the arbitration board accepted the evidence of Imperial Oil's expert witnesses, Dr. Willett and Dr. Kadehjian, that the method is a reliable means of detecting actual current impairment in the subject tested at the time the test is taken.

It is interesting to note that CEP did not challenge the expert testimony and that oral fluid testing has not been challenged under Ontario's *Human Rights Code*, presumably because it is acknowledged that a random drug test that proves impairment complies with the code. It was, therefore, somewhat surprising that the majority ruled random drug testing of safety-sensitive employees was still not permissible in a unionized workplace.

The arbitrator reviewed the arbitral jurisprudence and concluded that Canadian arbitrators have developed "relatively clear lines as to what constitutes an acceptable drug and alcohol testing policy in a safety-sensitive workplace which is governed by a collective bargaining regime." Summarizing what he called the "Canadian model", the arbitrator noted the approach permits reasonable cause and post-incident testing, and random testing only in the context of an agreed rehabilitative program.

Random testing may be permitted in "extreme circumstances," such as if "an employer could marshal evidence which compellingly demonstrates an out of control drug culture taking hold in a safety-sensitive workplace."

The arbitrator distinguished *Entrop* on the basis that the court only considered the validity of random drug testing in the context of what was permissible under the *Human Rights Code*, not under a collective agreement. Unions and employers may agree to sets of rights and obligations that are "greater than those found in statutes of general application intended to provide minimal protections in respect of individual rights, such as employment standards legislation and human rights codes."

The majority held that subjecting employees to random oral fluid drug testing was contrary to an express provision in the collective agreement that committed the company to a workplace "where individuals are treated with respect and dignity."

In a strong dissent, Imperial Oil nominee Roy Fillion wrote: "It is difficult to conceive how a drug testing process which complies with the Ontario *Human Rights Code* can, at the same time, violate the 'respect and dignity' clause in the collective agreement."

While the arbitration board accepted that oral fluid drug testing proved impairment, the majority refused to accept Imperial Oil's argument that such a test was fully analogous to the breathalyzer test endorsed by the court in *Entrop*.

The arbitrator noted the breathalyzer gives an immediate reading, serving the company's interest in safety by allowing it to prevent the impaired employee from returning to work. The oral fluid test used by Imperial Oil, for its part, required the sample to be sent to a lab, with test results available in a few days.

Fillion disagreed. "Although there is a delay in allowing the company to be informed of a positive test, the company still becomes aware that an employee was impaired while at work and can take measures to prevent a recurrence."

### **Down the road**

Whereas *Entrop* left the door open for employers to justify random drug testing as a BFOR if it could be shown that their testing methodology proved impairment, the recent arbitration ruling has limited random drug testing in unionized workplaces to only the most extreme situations.

On January 22, 2007, Imperial Oil began judicial review proceedings, signalling yet another chapter in the testing debate.

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