Alberta Court Quashes Decision Of Alberta Labour Board Panel

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Suncor Energy Inc v Unifor Local 707A, 2016 ABQB 269 ("Suncor decision")

Justice D. Blair Nixon of the Alberta Court of Queen's Bench has quashed the majority decision of the arbitration board (the "Majority") in the case surrounding Suncor's proposed random drug and alcohol testing program and sent the case back for a new hearing before a newly constituted panel. In finding that the decision of the Majority was unreasonable, the Court was not, however, prepared to substitute its own view for that of the panel, finding that it could only be done in cases where the facts of the case permit only one reasonable result and remitting the case back for a new hearing "would serve no useful purpose". Early comments from the Union indicate that it will appeal the decision.

Background Facts

Suncor conducts operations in the Athabasca oil sands near Fort McMurray, Alberta. The workplaces are inherently dangerous, involving such hazards as working with or around heavy equipment, including heavy haul trucks, cable and hydraulic shovels, high voltage power lines, radiation, chemicals, explosives, high temperature steam, high pressure piping, high pressure, flammable liquids and gases, and in blast zones. At its two worksites, Suncor employs up to 10,000 workers, 3,383 of which are represented by Unifor Local 707A.

Suncor has, over the years, adopted and modified its drug and alcohol policies to address the impact impairment due to drugs and alcohol can have on the safety of its workers and its operations. The policies and programs adopted by Suncor over the years have been extensive, including employee and supervisor education and training, post-incident, reasonable cause and return to work testing programs, counselling and support programs for workers and their families to address dependency issues, detection programs and the like.

In furtherance of its safety program, on June 20, 2012, Suncor announced that it was introducing a Random Testing Standard as part of a new Canada-wide drug and alcohol policy. The new testing protocol provided for random drug and alcohol testing for its employees holding safety sensitive positions. On July 19, 2012, Unifor Local 707A filed

a grievance objecting to the random testing standard. In defence of the random testing protocol, Suncor took the position that there was a pervasive problem with drug and alcohol use at its sites that is unparalleled. The Union, however, rejected the evidence presented as being "unparticularized and unrefined" and took significant issue with the fact that the evidence did not distinguish between contractors, union and non-union workers.

Arbitration Decision

The grievance was heard by a panel of 3 arbitrators over the course of 23 hearing days, where 19 witnesses, including 4 experts, gave testimony. The evidence included technical evidence on drug and alcohol testing methodologies and results. The decision included a lengthy Majority decision and a detailed dissent. Both the Majority and dissent referred to the Supreme Court of Canada decision in the *Communications, Energy and Paperworkers Union, Canada, Local 30 v Irving Pulp & Paper Ltd.* case: 2013 SCC 34, 2 SCR 458 ("*Irving*") and agreed that the fact that a workplace is dangerous does not automatically justify a random testing program. The Majority and dissent accepted that a balancing of interests is required as per the decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co* (1965) 16 LAC 73 ("*KVP*"). In this case, the competing interests are the privacy rights of the worker versus safety in the workplace.

In making his assessment and quashing the Majority decision, Mr. Justice Nixon found that the reasonableness standard of review applied to this case. A review on the basis of reasonableness, applying the standard from the Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"), means that the decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."1 The decision of the reviewing court is not to substitute its own view: "However, as long as the process and outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."2 That being said, the Court confirmed that if the wrong legal test is applied or if the correct legal test is misapplied, that will result in the decision being found to be unreasonable.3

Decision of the Alberta Court of Queen's Bench

The Court, in its review of the Majority decision, focused on three issues:

1. Did the Majority elevate the *Irving* test, concerning the degree of evidence necessary to establish a problem, to an unwarranted threshold?
2. Was it appropriate for the Majority to only consider evidence of issues with drug and alcohol use within the bargaining unit?
3. Did the Majority fail to properly consider the evidence presented at the arbitration?

In quashing the Majority decision, the Court decided the three issues as follows:

1. Yes. The Court held that the Majority misapplied the *Irving* test. In *Irving*, the Supreme Court of Canada held that random testing might be justified if a general problem with drugs and alcohol in the workplace could be demonstrated by the

evidence adduced by the employer. The Majority, however, stated the test as requiring evidence of a "serious" or "significant" problem. The Court found that this was an unwarranted elevation of the *Irving* test. The Majority at arbitration found "...the evidence does not demonstrate a culture at the Oil Sands Operations where consumption of alcohol is so pervasive as to be accepted by employees, where employees go together to drink openly and where such activity is either condoned or encouraged by management's practices or inaction."4 The Majority also required evidence of a causal connection to the accident, injury or near miss incidents at the plant, both of which are not thresholds required in *Irving*, leading the Court to the conclusion that the *Irving* test had been misapplied.

2. No. The Court rejected the Majority's assertion that it would only consider evidence of issues with drug and alcohol use by the bargaining unit. The standard articulated by the Supreme Court in *Irving* was that of a general workplace problem, not one specific to the bargaining unit. The Court , in review, found that worker safety applied throughout the Suncor operations, to all workers at its two sites, however only workers in safety sensitive positions were affected by the Random Testing Standard. Therefore the Court was satisfied that considering the "workplace" in general, within this context, does not result in an overbroad analysis.
3. Yes. A failure to discuss a relevant factor will not necessarily result in the Majority decision being unreasonable, however, "[a]n omission is a material error only if it gives rise to the reasoned belief that the Majority ignored or misunderstood the evidence in a manner that affected its decision."5 In reviewing the Majority decision, the Court found that the Majority did ignore and diminish the evidence relating to the "security incidents" concerning drug and alcohol use by taking an overly narrow, analytical approach to the evidence. Some examples included the Majority attempts to narrow the evidence to evidence that could be directly attributed to bargaining unit members only, by speculating on the meaning of the evidence where the evidence did not permit such conclusions, and in referring to "other, more advanced methods" of drug testing where no such evidence was presented. In doing so, "the Court finds that the Majority's "threshold" approach to *Irving* and its incorrect elevation of that threshold forecloses virtually any possibility of random testing, regardless of the circumstances."6 Based on the Majority's assessment of the evidence, the Court found that the Majority's evidentiary analysis, and thus, its decision, was unreasonable.

In quashing the decision and remitting the matter to a new panel for rehearing, the Court found that it could not substitute its own view for that of the Majority, holding: "This, however, is appropriate only where the facts before the administrative decision maker permit only one reasonable result and remitting the matter for re-arbitration would serve no useful purpose. In the view of this Court, that is not the case here."7

This will continue to be a case to watch, as the early indications from Unifor are that it intends to appeal this decision to the Alberta Court of Appeal.

1 *Dunsmuir* at para 47.

2 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

3 *Suncor decision* at para 64.

4 *Suncor decision* at para 73.

5 *Suncor decision* at para 87.

6 *Suncor decision* at para 96.

7 *Suncor decision* at para 100.

By

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