

Safety-Critical Workers: Diminished Expectation Of Privacy In Alcohol And Drug Testing



The Federal Court of Appeal recently issued a decision signaling that employees working in safety-critical roles have a “diminished expectation of privacy” in regard to random alcohol and drug testing. Given the unique environment of a safety-critical worker’s job, including the highly regulated nature of their work and the public interest in ensuring safety, the diminished expectation of privacy may be justified in certain circumstances.

Background information – “pre-placement” and random alcohol and drug testing

In *Power Workers’ Union v Canada (Attorney General)*, 2024 FCA 182 the Court of Appeal reviewed the validity of “pre-placement” and random alcohol and drug testing, which the Canadian Nuclear Safety Commission (the “Commission”) wanted to impose as a licence condition for those licensed to operate high security nuclear facilities. Safety-critical workers include employees who make decisions or take actions that have a direct and immediate impact on nuclear safety.

Six affected workers and their union claimed that pre-placement and random alcohol and drug testing breached their

rights under the *Canadian Charter of Rights and Freedoms*, including: section 7 which is the right to life, liberty and security of the person; section 8 which includes the right to be secure against unreasonable search and seizure; and the right to equality under section 15.

Alternatively, they claimed the licence requirement was unreasonable on administrative law grounds. The workers brought applications for judicial review, which the application judge dismissed on all grounds.

The Federal Court of Appeal's comments

Section 8

The Federal Court of Appeal began by focusing on section 8 of the *Charter* and the right to be secure against unreasonable search and seizure. The court did not deny alcohol and drug tests involved the collection of personal information and therefore amounted to a search and seizure. However, the court noted this was a relatively non-invasive process.

A section 8 challenge to a search and seizure requires a two-step analysis: 1) does the impugned search or seizure interfere with an individual's reasonable expectation of privacy? 2) if so, is the action reasonable?

Having acknowledged there was a search and seizure and that section 8 of the *Charter* was engaged, the court stated that the reasonable expectation of privacy requires an analysis of the unique context of the case – particularly here, where the highly regulated nuclear industry considers safety the most important priority given the potential for devastating and long lasting impacts in the event of a nuclear incident.

The court decided it was not necessary to find evidence of a substance abuse problem in the workplace before implementing testing requirements. Ultimately, a pre-emptive and proactive

approach to safety measures was favoured over a “wait and see” approach, given the severe consequences that could follow.

Turning to whether the testing was reasonable, the court considered the highly regulated nature of the nuclear industry, stating the main purpose of the regulatory framework was to limit the risks to national security, the health and safety of people, and the environment. As a result, an employee’s fitness for duty plays a key role in reducing the risks of impairment-related safety events. The court emphasized that the nuclear industry is unlike other inherently dangerous industries given the magnitude and dangers a nuclear incident can cause.

Considering the context of this case, the court concluded there was a diminished expectation of privacy for safety-critical workers. Although the testing requirements engage section 8, they do not infringe the rights conferred under that section. The testing requirements were considered authorized by law and reasonable considering the regulatory context, the public interest in nuclear safety, the need to bolster fitness for duty programs, the reliability of the testing methodology and the availability of judicial oversight.

Sections 7 and 15

The court considered, and rejected, the alleged violation of section 7 of the *Charter*, noting there is no danger to the security of the person because the tests included the non-invasive taking of saliva, urine or breath samples.

Finally, the court considered, and also rejected, the alleged violation of section 15 of the *Charter* based on the union’s failure to establish that the testing requirements created a distinction or had a disproportionate impact based on an enumerated or analogous ground of discrimination. There was no evidence the testing requirements would result in an arbitrary

disadvantage for safety-critical workers with drug or alcohol dependencies and no evidence to establish the testing requirements are discriminatory by being arbitrary or prejudicial.

The Federal Court of Appeal agreed with the application judge and dismissed the appeal, noting there is no breach of the Charter given the safety-critical nature of the work.

Administrative law claim dismissed

In the alternative, it was argued that the testing requirements are unreasonable because they were adopted without adequate reasons and they offend administrative law principles.

The court took issue with this argument, noting the Commission's most important responsibility is to regulate the development, production and use of nuclear energy in a way that prevents unreasonable risk to the environment and the health and safety of persons. Therefore, the Commission had authority to adopt and implement the testing requirements in an effort to reduce the likelihood of human performance-caused safety events.

Takeaways for employers

This decision from the Federal Court of Appeal provides some important points to consider for employers in determining whether it is appropriate to implement random alcohol and drug testing in the workplace:

1. First, the appropriateness of these measures will be based on the specific job and nature of the industry involved. In this case, the safety-critical nature of the work in the nuclear industry led the court to finding that employees in this industry have a diminished expectation of privacy when it comes to

random alcohol and drug testing. This analysis is likely to apply in other safety-sensitive contexts.

2. Second, random alcohol and drug testing imposed on all employees in a dangerous workplace is generally rejected for being unreasonable, however, when it applies to a subset of only safety-critical workers, it is less likely to be scrutinized. In this particular case, the safety-critical workers represented less than 10% of the nuclear industry's entire workforce, and was not imposed on workers outside safety-critical roles.
3. Third, if alcohol and drug testing is implemented, it is important that the method used is reliable, consistent and accurate at detecting drug and alcohol impairment. In confirming the testing was reasonable, the court noted the reliability and accuracy of the system used to help support the testing being implemented as a license condition.
4. Finally, any program, such as alcohol and drug testing, that involves the collection, use and disclosure of personal information (almost anything about an identifiable individual) should be reviewed from a privacy perspective to enable the program to be developed and implemented in accordance with privacy laws and minimize privacy related risks.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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