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THE EMPLOYERS' Edge BULLETIN

Appeal Court Stays the Course and Upholds Imperial Oil Decision

In the Spring 2007 edition of our Newsletter, we reported on the Board of Arbitration (the "Board") decision in *Imperial Oil v. CEP* which extensively canvassed the issue of random drug testing in safety sensitive unionized workplaces. Now, two years later, the Ontario Court of Appeal has followed the Divisional Court in upholding the arbitration decision.

In the original hearing, the Board found that randomly testing employees for marijuana impairment by way of a saliva swab is not permitted, except in exceptional circumstances. The Board also found that Imperial Oil was not authorized under its collective agreement to conduct random, unannounced saliva testing.

Despite intervening decisions in Alberta that seemed to indicate a preference for the goals and types of testing present in *Imperial Oil v. CEP*, the Court of Appeal approved the Board's reasons. However, even though Imperial Oil's policy was struck down by the Board, certain statements of the Board – outlined below – are nevertheless positive developments in the law from an employer's perspective:

- In applying the "balancing of interests" approach in which the employer's interest in maintaining a safe environment is weighed against the employee's right to privacy, respect and dignity, the Board found that employers have been entitled to test employees for drugs in two circumstances: where the employer's industry is safety-sensitive and the employer has reasonable cause to conduct the test; and where an employee is undergoing rehabilitation for an acknowledged alcohol or drug use problem (then only for a limited period of time).

- The Board found that Imperial Oil's general, random unannounced drug testing may be permissible in extreme circumstances, such as where there is an out-of-control drug culture taking hold in a safety-sensitive workplace.

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Unionized employers, then, can at least take heed of the circumstances in which they may be allowed to build drug testing policies into their collective bargaining relationships. For non-unionized employers, we suggest that the same balancing exercise may be appropriate, but against the backdrop of the Human Rights Code as opposed to a collective agreement.

While no indication has yet been given with respect to whether Imperial Oil will seek leave to appeal to the Supreme Court of Canada, it is the opinion, and hope, of many interested parties and observers in the legal community that the Supreme Court will have opportunity to pronounce on this issue. This would have the effect not only of addressing a so-called "hot-button" issue, but also the salutary effect of addressing the divergence in approaches between Ontario and Alberta case law on this issue, which can only lead to easier administration of policies for employers.

As always, the lawyers at Crawford Chondon & Partners LLP will continue to monitor this important and evolving area of the law.