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Test 'Em All: Drug Testing Law & Policy

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TEST 'EM ALL: DRUG TESTING LAW & POLICY

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I. Introduction

> What better way to shake it and move it, and drive some of 'em outta the program, than to implement drug testing.[1]

Drug testing, including workplace drug testing, is a multi-billion dollar global industry – and it is growing (BCC Research, Report, "Drug Testing: Technologies and Global Markets" (March 2015), online: BCC Research <http://www.bccresearch.com>). In the United States, compulsory drug

1 Isabel MacDonald, "The GOP's Drug Testing Dragnet" *The Nation* (3 April 2013), online: The Nation <http://www.thenation.com> [MacDonald]. These are the reported comments of Chris Williams, vice president at ArcPoint Labs, at the annual Drug & Alcohol Testing Industry Association conference, held in 2012 in San Antonio, Texas. ArcPoint is a "full service" drug-testing company, which, at the time of Mr. Williams' comments, was marketing welfare drug-testing services and assisting in efforts to drug-test unemployment insurance recipients in South Carolina.

testing programs began spreading in the public and private sectors in the mid-1980s, following the implementation of mandatory testing for all federal government employees (Canada, Library of Parliament, "Drug Testing in the Workplace" by N. Holmes & K. Richer (Ottawa, Parliamentary Information and Research Service, 2008) at 3).

Drug testing policies and practices have also been implemented in Canadian workplaces. Some employers have instituted stand-alone drug testing policies, mandating testing in certain specific circumstances. Others have embraced testing as components of mandated return to work arrangements for employees with substance use disorders.[2] This paper briefly focuses in on the latter.

The paper proceeds in four parts. First, I lay out the general arbitral framework for examining employer-imposed drug testing policies and practices, referencing a number of notable recent cases. Then, I discuss the related analysis under the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. Next, I quickly touch on *C.E.P., Local 30 v. Irving Pulp & Paper*, 2013 SCC 34 [*Irving*]. Finally, I focus in on return to work drug testing, questioning its utility and cost-effectiveness.

II. Arbitral Framework

The primary purpose of unilaterally-imposed drug testing policies is typically expressed in terms of safety concerns (see e.g. Trimac Transportation Services v. T.C.U. (1999) 88 L.A.C. (4th) 237 [Trimac]; *Imperial Oil v. C.E.P., Local 900* (2006) 157 L.A.C. (4th) 225 [*Imperial Oil*]; *Mechanical Contractor Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, [2013] CanLII 54951 (ONLA) [*Mechanical Contractors*]; *Unifor, Local 707A v. Suncor Energy*, [2014] A.G.A.A. No. 6 (QL) [*Suncor*]). An employer may sometimes articulate secondary purposes (e.g. productivity, deterrence, environmental protection); however, drug testing policies tend to be expressly driven by management perceptions of workplace safety risks.

A "substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated 'balancing of interests' proportionality approach" (*C.E.P., Local 30 v. Irving Pulp & Paper*, 2013 SCC 34 [*Irving*] at para. 4). The following is a brief review of this approach.

A. The *KVP* Test

The scope of an employer's unilateral rule-making authority under a collective agreement is set out in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537*, [1965] O.L.A.A. No. 2 (QL) [*KVP*]. Under the *KVP* test, a rule or policy unilaterally imposed by an employer and not subsequently agreed

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2 *Substance use* is a broad term, "describing the wide range of use of alcohol and other drugs, from moderate use to problem use." *Addiction* is "a state of dependence on a drug, in which the person continues substance use despite significant substance-related problems that may include harm to physical and/or mental health, social well-being and/or economic functioning" (Centre for Addiction and Mental Health, "Beyond the Label" (2005), online: <www.camh.ca> at 61-62). In this paper, I use the terms *substance use disorder* and *addiction* interchangeably. For a fulsome discussion of substance use disorders and addiction treatment, see Jonathan Chapnick, "Beyond the Label: Rethinking Workplace Substance Use Policies" (Paper presented to the CLE conference, *Human Rights Conference – 2014*, November 2014) [Chapnick].

to by the union must be consistent with the collective agreement and must be reasonable (*Irving* at para. 24; *KVP* at para. 34).[3]

The reasonableness analysis under *KVP* essentially comes down to a balancing of the employer's and the employees' competing interests (*U.B.C. Health Sciences Centre Hospital Society v. H.E.U., Local 80* (1985), 21 L.A.C. (3d) 132 at para. 11). In particular, in cases involving employee privacy interests, arbitrators will weigh various factors in assessing the reasonableness of a unilateral policy, including, for example, the following:

(1) The nature of the employer's interests.

(2) The purpose and reasonable necessity of the policy.

(3) The usefulness of the policy in achieving its purpose.

(4) Any less intrusive means available to address the employer's concerns.

(5) The policy's impact on employees.

See generally Irving; Vancouver (City) v. Vancouver Firefighters' Union, Local 18, [2010] B.C.C.A.A.A. No. 81 (QL) [Vancouver Firefighters]; Trimac; Mechanical Contractors.

The dangerousness of the workplace, while highly relevant, is not determinative of the balancing of interests proportionality analysis under *KVP* (see *Irving* at paras. 4, 31; *Mechanical Contractors* at para. 144).

Additionally, for a policy to be reasonable, it must be consistent with applicable legislative provisions (*Vancouver Firefighters* at para. 162). Thus, a workplace rule that violates the *Human Rights Code* will not meet the standard of reasonableness under *KVP*. Furthermore, where *Code* principles and protections are incorporated into the express terms of the collective agreement, a rule that violates the *Code* will not meet the *KVP* requirement of consistency with that collective agreement (see *H.E.A.B.C. v. H.S.A.* (2013), 237 L.A.C. (4th) 1 at para. 167).

1. Evidence and Onus of Proof

Under the *KVP* balancing of interests analysis, the onus is on the employer to establish the reasonableness of its policy (see *Irving* at paras. 81, 92). Where employee privacy interests are affected, the employer bears the burden of proving that its policy "is a necessary and proportionate response which is likely to meet a demonstrably legitimate need in the particular workplace [and] which intrudes on employee privacy to the least possible extent" (*Mechanical Contractors* at para. 130; see also *Trimac* at para. 43).

The evidence required to satisfy this burden will depend on the circumstances of the specific case; however, "it must in any event always include cogent direct non-anecdotal evidence" from the particular workplace (*Mechanical Contractors* at para. 127). Where the policy is driven by safety concerns, uncertain or speculative health and safety improvements will not justify a significant invasion of employee privacy (*ibid*.).

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3 Unilaterally-imposed rules/policies must also satisfy a number of other requirements (see *KVP* at para. 34).

2. Risk to Safety

In the context of intrusive policies imposed for safety purposes, a key aspect of the employer's evidentiary burden under *KVP* relates to risk. Where the employer seeks to justify its policy on the basis of an alleged risk to workplace safety, and where "countervailing privacy interests are at stake, there must be a balancing of impacts, such that the degree of risk must meet a threshold sufficient to override the privacy interest" (*Trimac* at para. 67).

The onus is on the employer to provide evidence of the extent of the purported risk, and "to establish that the risk threshold necessary to validate its initiative is met" (*ibid*.; see also *Irving* at para. 31). Arbitrator Burkett elaborated on this principle in *Trimac* at para. 68, stating the following in his analysis of a random testing policy aimed at alleged safety risks associated with the "residual effects" of substance use:

> It is not sufficient to simply refer to [residual effects such as] "fatigue", "crash phase" or "excited state" without establishing, by empirical studies or otherwise, the nature, extent and duration of the impairment caused by the residual effects of drug taking, relative to the work function at issue. Without such evidence, a finding cannot be made as to the extent of the risk. Do the residual effects of drugs or alcohol constitute a similar risk to that posed by an employee who comes to work with a headache, a cold, a poor night's sleep or suffering from allergies or do these residual effects constitute a greater risk sufficient to warrant the implementation of mandatory random drug testing? On the evidence, I am simply unable to make that finding. Accordingly, without stipulating what the risk threshold is, on the evidence before me, I am unable to find that a risk threshold sufficient to allow the Company to implement mandatory random drug testing and, thereby, to override employee privacy rights, has been met.

More recently, Arbitrator Surdykowski made a similar point in *Mechanical Contractors* at para. 185, in relation to a "pre-access testing" policy:

> [The employer's witness]…asserts...that the 'Effects of drug or alcohol use are known to be a cause of workplace accidents, often with catastrophic results.' Is that so? Where is the evidence of this alleged truism? Further, there are undoubtedly numerous factors which tend to contribute to workplace health and safety issues. For purposes of this case the question is: to what degree of significance do alcohol and drug issues contribute to a health and safety problem on Suncor worksites which privacy-invasive pre-access testing is likely to significantly decrease?

In sum, then, arbitral jurisprudence establishes clear parameters around invasive employer rules (e.g. drug testing policies) that are imposed unilaterally. Unilateral rules must be reasonably necessary and proportionate, and minimally intrusive; they should reflect a careful balancing of competing interests. Most important, such rules must be firmly rooted in compelling evidence justifying their imposition.

III. Human Rights Code

The arbitral framework shares much in common with the discrimination analysis under the *Human Rights Code*. Both seek to balance legitimate competing interests, through the application of principles such as reasonable necessity, proportionality and least intrusiveness on a case-by-case basis.

The *Code* analysis applies to disputes involving employer-imposed drug testing policies insofar as these policies impact employees with disabilities, including employees with addictions/substance

use disorders.[4] Section 13 of the *Code* prohibits discrimination in employment on the basis of disability.

A. Definition of "Disability"

A "disability" under the *Code* is defined broadly to include "a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 79 [*Boisbriand*]; see also *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703). A disability need not give rise to any limitation or functional impairment (see *Boisbriand* at para. 41; *Morris v. B.C. Rail*, 2003 BCHRT 14 at para. 186 [*Morris*]), and whether an employee's condition or ailment "prevented her from working is not necessarily determinative of whether she had a disability within the meaning of the *Code*" (*Thompson v. Providence Health Care (c.o.b. St. Paul's Hospital*), 2003 BCHRT 58 at para. 24; see *Morris* at paras. 204-21).

Thus, the concept of disability under the *Code* encompasses "persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice of stereotypes that are associated with this ground" (*Boisbriand* at para. 80; *Morris* at para. 209).[5]

The following is a review of the discrimination analysis under the *Code*, particularly in regards to safety concerns and fitness to work issues related to people with disabilities.

B. Two-Stage Analysis

The analysis under section 13 of the *Code* proceeds in two well-known stages.

First, to establish a *prima facie* case of discrimination, an employee must show that she has (or was perceived to have) a disability, she experienced an adverse impact, and her disability was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61 at para. 33 [*Moore*]; *Kootenay Boundary Regional Hospital* at para. 38; see also *Davis v. Revera Long Term Care*, 2015 BCHRT 148 at para. 284 [*Davis*]).

Second, once a *prima facie* case has been made, the burden shifts to the employer to justify its rule, standard and/or conduct (hereinafter referred to generally as "standard") as a "*bona fide* occupational requirement," or "BFOR." (*Code*, s.13(4); *British Columbia (Public Service Labour Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*]). This means that the employer must show that it has acted in good faith, and that the standard was imposed for a rational purpose (see *Meiorin* at para. 54). The employer must also establish that the impugned standard was reasonably necessary to accomplish the intended purpose, and that the "duty to accommodate" has been discharged (*ibid.*).

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4 An addiction constitutes a "disability" within the meaning of the *Code* (see *Kemess Mines v. I.U.O.E. Local 115*, 2006 BCCA 58; *H.E.A.B.C. (Kootenay Boundary Regional Hospital) v. B.C.N.U.*, 2006 BCCA 57 [*Kootenay Boundary Regional Hospital*]; *Handfield v. North Thompson School District No. 26*, [1995] B.C.C.H.R.D. No. 4 (QL)).

5 For further discussion of the meaning and scope of disability-related grounds under Canadian human rights statutes, see Catherine Sullivan & Jonathan Chapnick, "Human Rights 101: The Prohibited Grounds of Discrimination in Employment" (Paper presented to the CLE conference, *Human Rights Conference – 2009*, November 2009).

The legal analysis is the same whether the employee (or union) is alleging individual or systemic discrimination (*Moore* at paras. 58-60). A policy or practice "is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several" (*ibid.* at para. 58). The "considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint," but the focus of the legal inquiry is the same (*ibid.* at para. 59).

C. Prima Facie Discrimination

In the context of an allegedly discriminatory drug testing policy, the key question at the *prima facie* stage is whether elements of the policy result in a disability-related adverse impact.[6]

Various circumstances and impacts may support a finding of *prima facie* discrimination in cases involving concerns about safety and fitness to work of people with disabilities. For example, overly intrusive inquiries into the private medical information of a person with a disability, and significant intrusions into her medical autonomy, may constitute adverse treatment related to her disability, particularly where the person with the disability is subjected to a more intensive and intrusive evaluation than others (see *Gichuru v. Law Society of B.C.*, 2009 BCHRT 360 [*Gichuru*] at paras. 465, 560, 565). Bodily intrusions and compulsory surrender of bodily substances may also constitute adverse impacts.

D. Justification Test: Rational Purpose and Good Faith

Where a *prima facie* case has been made in relation to standards under a substance use policy, the burden shifts to the employer to justify each standard as a BFOR. To do so, the employer must satisfy the three-part justification test established in *Meiorin* at para. 54, by showing that each standard was:

(1) adopted for a purpose rationally connected to workplace performance;

(2) adopted in an honest and good faith belief that it was necessary to the fulfilment of the work-related purpose; and

(3) reasonably necessary to the accomplishment of the work-related purpose.

Under the third part of this test, the employer must demonstrate that the "duty to accommodate" has been discharged – i.e. "that it is impossible to accommodate individual employees sharing characteristics of the claimant without imposing undue hardship upon the employer" (*ibid.*). In other words, the employer must show that it could not have done anything else reasonable or practical to avoid the adverse impact of its standard (see *Moore* at para. 49).

This "third and final hurdle" is usually the most difficult for an employer to overcome. The employer must establish that the impugned standard is both "reasonably necessary" to accomplish its purpose, and designed inclusively to accommodate the needs and characteristics of those otherwise adversely affected (see generally *Meiorin* at paras. 62-68). The imposition of these dual requirements (reasonable necessity and accommodation) allows for close scrutiny and removal of systemic barriers, rather than acceptance of these barriers as natural or unchangeable. It also requires that measures be taken to provide individualized relief from disadvantageous consequences

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6 Put another way, borrowing language used by Justice Wilson in *Law Society of B.C. v. Andrews* (1989) 56 D.L.R. (4th) 1 to describe discrimination at para. 37: Do aspects of the policy have the effect of imposing burdens, obligations or disadvantages on employees with addictions that are not imposed upon others, or which withhold or limit access to opportunities, benefits and advantages available to others?

of impairments and disabilities, where it is not possible to revise the underlying exclusionary standard.

The following are a few key elements of the third part of the *Meiorin* justification test.

1. Reasonable Necessity and Undue Hardship

The concept of "reasonable necessity" has been described as requiring that a standard not place an "undue burden" on those to whom it applies (see *Canadian Human Rights Commission v. Toronto Dominion Bank* (1998), 163 D.L.R. (4th) 193 (F.C.A.) at para. 38 [*TD Bank*]; see generally *Brossard (Town) v. Quebec*, [1988] 2 S.C.R. 279). This has been taken to mean that, to justify an impugned standard, an employer must show "that there is no other more reasonable, or less intrusive alternative" (*TD Bank* at para. 38). These requirements are similar to those imposed to unilateral employer policies under the *KVP* reasonableness framework.

Determining what constitutes undue hardship "is a question of fact and will vary with the circumstances of the case" (*Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970). Where safety is an issue, "both the magnitude of the risk and the identity of those who bear it are relevant considerations" (*Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at para. 63). The *magnitude* of the risk encompasses "the likelihood that loss or injury may occur and the seriousness of the loss or injury that may result" (*Nijjar v. Canada 3000 Airlines*, [1999] C.H.R.D. No. 3 (No. TD 3/99) cited in *Shuswap Lake General Hospital v. B.C.N.U.*, [2002] B.C.C.A.A.A. No. 21 (QL) at para. 110 [*Shuswap*]).

In general, and particularly in a safety context, it is important to ask some key questions in assessing reasonable necessity and undue hardship, including the following:

(1) Has the employer investigated alternative approaches that do not have a discriminatory effect?

(2) If alternative rules and standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(3) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

See *Meiorin* at para. 65.

2. Evidence, Onus and Risk

Similar to the *KVP* balancing of interests approach, the third part of the *Meiorin* justification test puts the onus on the employer to establish the validity of its standard or policy; anecdotal or impressionistic evidence will not suffice (see generally *B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)* (1999), 36 C.H.R.R. D/129 (S.C.C.) [*Grismer*]; *Shuswap; Gordy v. Oak Bay Marine Management*, 2004 BCHRT 225 [*Gordy #2*]). And under *Meiorin*, like under *KVP*, where the impugned standard is driven by safety concerns, a key aspect of the employer's evidentiary burden relates to risk. Arbitrator Gordon summarized this burden as follows in *Shuswap* at para. 114:

> In terms of the type of evidence that must be presented where a risk to safety is in issue, it is clear that impressionistic evidence will not satisfy the stringent test and will not therefore support a finding of undue hardship. Mere assertions of danger or excessive cost will not suffice. The evidence must clearly identify the risks and demonstrate why those risks cannot be reduced to an acceptable level through

> accommodative measures. In terms of the impossibility of reducing risks to an acceptable level, an employer must present evidence that it has considered and rejected all viable forms of accommodation.[7]

Consistent with Arbitrator Gordon's comments, the case law establishes or supports the application of various general principles in relation to the notion of risk in cases involving safety concerns and fitness to work issues related to people with disabilities.

For example, an employer's perception of a safety risk cannot be based on stereotypical assumptions related to an employee's disability (see *Davis* at para. 323). And even where safety issues exist, something more than merely a "real" or "minimal" risk must be established to justify discrimination against people with disabilities (see *Gichuru* at para. 496; see generally *Grismer*). A certain level of risk may be acceptable, depending on the circumstances (*Bendrodt v. B.C. Transit*, [1992] B.C.C.H.R.D. No. 19 at para. 139 [*Bendrodt*]). Whether or not a particular risk is sufficient to justify the employer's standard will depend on a variety of circumstances and considerations, including the dangerousness of the job, the dangerousness of the workplace, the characteristics of the specific person or group posing the risk, and the relationship between the specific risk and the safe performance of the relevant job duties (see generally *Robinson v. Canada*, [1991] C.H.R.D. No. 9 at 8 (QL) [*Robinson*]). The "quality of the employer's evidence is therefore crucial" (*Robinson* at 18; see also *Gordy #2* at para. 148).

Moreover, the mere existence of a serious risk does not necessarily prevent a finding of unjustifiable discrimination under the *Code*. Risk has a limited role under the third part of the *Meiorin* test, and is not an independent justification for discrimination (*Grismer* at para. 30). Rather, risk is *a factor* in the justification analysis (see *Gordy #2* at para. 157; see also *Grismer* at para. 30). Even where the evidence might establish a serious or unacceptable risk to safety sufficient to justify a general workplace standard, the employer must still show that individualized assessment and/or accommodation is not possible without reaching the point of undue hardship (see generally *Hussey v. B.C.*, [1999] B.C.H.R.T.D. No. 63 (QL)).

3. Individualized Assessment, Accommodation and Alternatives

In a safety context, the blanket application of a standard, with no allowance for exceptions or individual assessments, will not be justified unless there is no reasonable or practical alternative to the absolute rule (see generally *Grismer*). The standard must incorporate "every possible accommodation to the point of undue hardship" (*Grismer* at para. 32). Where a serious safety risk has been identified as the basis for the standard, it must be impossible (short of undue hardship) to reduce this risk to an acceptable level through reasonable accommodation (*Shuswap* at para. 142; see generally *Grismer*).

Thus, to reiterate, the arbitral framework reviewed in the first part of this paper, and the discrimination analysis discussed in this part, are fundamentally similar, in that each is aimed at balancing legitimate competing interests, through the case-by-case application of principles such as reasonable necessity, proportionality and least intrusiveness.

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7 Arbitrator Gordon also affirmed the principle that the onus is on the employer to show accommodation to the point of undue hardship; the employee does not bear the burden "of proving the negative" (*Interfor v. I.W.A.W.C., Local 1-3567*, [2001] B.C.C.A.A.A. No. 290 (QL) cited in *Shuswap* at para. 121).

IV. Irving

Within the broader legal frameworks outlined above, a fairly consistent labour relations jurisprudence has developed specifically in relation to drug testing. In 2013, the arbitral approach to such testing was authoritatively reviewed in the *Irving* decision. In its findings, the majority of the Court in *Irving* summarized the jurisprudence as follows at para. 5-6:

> ... arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> But a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.

In a nutshell, then – and consistent with the analytical thrust of the *KVP* approach and the discrimination analysis under the *Code* – employer-imposed drug testing will only be justified if it represents a reasonable and proportionate response in light of both legitimate employer concerns (e.g. workplace safety) and employee interests (e.g. privacy) (see *ibid.* at para. 52).

V. Return to Work (Abstinence) Testing

The *Irving* decision confirms that a return to work agreement for an employee with a substance use disorder may properly involve random drug testing for a limited period of time. In other words, there can, in certain circumstances, "be testing of an individual employee who has an alcohol or drug problem" (*ibid.* at paras. 32-33).

In British Columbia and elsewhere, many employers have embraced the idea of drug testing as a component of return to work arrangements. In fact, some employers have made such testing mandatory for *all* employees with substance use disorders. These employers will generally require an employee with a substance use disorder to sign a return to work "agreement," which will typically mandate the employee's adherence to a monitored "relapse prevention program," aka "medical monitoring." Under the medical monitoring program, the employee will usually be required to maintain complete abstinence, participate in twelve-step programming, and comply with random biological testing for at least a two-year period.[8]

This type of return to work regime replicates the specific plan of treatment and monitoring typically used by physician health programs (PHPs), and has been described by leaders of the American drug testing industry – namely Robert Dupont – as the "*New Paradigm*" of drug treatment and long-term recovery (see *e.g.* Robert L. Dupont & Keith Humphreys, Editorial, "A New Paradigm for Long-Term Recovery" (2011) 32 Substance Abuse 1-6; Corinne L. Shea, ed., "The New Paradigm for Recovery" (Report of the John P. McGovern Symposium hosted by the Institute for Behaviour and Health, Inc., March 2014) [Shea]). Dupont served as drug policy director under presidents Nixon and Ford and now heads the Institute for Behaviour and Health, Inc., an active voice in American anti-drug efforts. According to a report in *The Nation*:

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8 For more discussion of such regimes, see Chapnick.

> Since the 1980s, [Dupont] has been in the business of selling drug-testing services to employers. As far as he's concerned, drug tests should be given to 'anybody who receives a benefit,' from unemployment insurance to welfare. 'Test 'em all!' he exclaims (MacDonald at 2).

In the view of Dupont and his monitoring industry colleagues, the so-called *New Paradigm* can be applied universally to individuals across the spectrum of substance use problems; the key is "to find elements of the *New Paradigm* that are affordable and easily implemented based on individual need" (Shea at 14). There is one element of the paradigm, however, that is non-negotiable: "The *New Paradigm* should always include random drug testing" (*ibid.*).

In British Columbia, the *New Paradigm*/PHP model has been widely promoted and utilized by monitoring companies, professional regulatory bodies, certain physicians, and even some unions (see *e.g.* Alliance Medical Monitoring, online: <http://www.alliancemedicalmonitoring.com>; Pegasus Recovery Solutions Ltd., online: <http://www.pegasusrecoverysolutions.com>; College of Registered Nurses of BC, "Early Intervention Program (Health)," online: <https://www.crnbc.ca>; Dr. Ray Baker, "Determination of Fitness for Duty" (Paper presented to the CLE conference, *Human Rights Conference – 2010*, November 2010) [Baker]; Ray Baker, "Accommodating Mental Illness and Addictions at Work: Balancing Safety, Human Rights, Performance, and Best Medical Care" (Paper presented to the Bottom Line Conference, *Bottom Line 2014*, March 2014); BC Nurses' Union, "Early Intervention Health Program," online: <https://www.bcnu.org>).

This approach has, in turn, been adopted in many workplaces, in the form of return to work policies and practices related to employees with addictions. The legality of drug testing within these return to work regimes is assessed in accordance with the analytical frameworks discussed above.[9] But what about the utility and cost-effectiveness of drug testing in this context? For the following reasons, such testing may actually be more trouble than it is worth.

A. Off the Mark

If the ultimate target is workplace safety, an employer strategy that devotes a disproportionate amount of time and money to return to work testing for employees with addictions misses the mark, and represents a misallocation of resources. Research demonstrates that substance-related *problems*, not *dependence*, actually account for most substance-related harms and costs to society, such as those harms and costs stemming from impaired driving and unintentional injuries, which often involve individuals who are intoxicated but in most cases do not have a substance use disorder (see Chapnick at 8.1.10).

In any event, proponents of drug testing and medical monitoring acknowledge that there are many conditions and characteristics that can impair an employee's concentration, coordination, reaction time, perception and judgement – and substance use disorders are not necessarily at the top of the list (see Baker at 5.1.1). For instance, the results of one study in relation to the impairing effects of fatigue suggest that moderate levels of fatigue produce performance impairment equivalent to or greater than those observed at levels of alcohol intoxication deemed unacceptable when driving, working or operating dangerous equipment (N. Lamond & D. Dawson, "Quantifying the

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9 Under certain circumstances, a reasonable monitoring regime, implemented consensually upon an employee's return to work, may be properly understood as an accommodative measure. See Chapnick at 8.1.36.

performance impairment associated with fatigue" (1999) 8 J. Sleep Res. 255-262).[10] And other studies have shown, for example, that a variety of factors – such as smoking, obesity, musculoskeletal disorders, hearing disabilities, and cognitive disabilities – are associated with occupational injuries (see N. Chau, et al., "Relationship between job, lifestyle, age and occupational injuries" (2009) 59 Occupational Medicine 114-119).[11]

The notion that *all* employees with substance use disorders are *uniquely* and *extraordinarily* unsafe at work – such that they may justifiably be singled out and subjected to exceptional "safety measures" – is stigma, not science.

B. Ineffective

Even if they actually hit their mark, current return to work testing regimes would still be ineffective for achieving legitimate workplace purposes (e.g. safety, job performance).

Return to work regimes that replicate the PHP model typically include random urine screening, two to three times per month. According to leading experts, "since urine tests cannot detect whether individuals are in fact under the influence of drugs at the time of the test, they are a 'poor measure of fitness to work'." In addition, "both alcohol and drug tests have 'little utility' in detecting individuals experiencing symptoms of withdrawal, or long-term effects after abstinence" (*Suncor* at para. 133; see also Michael R. Frone, *Alcohol and Illicit Drug Use in the Workforce and Workplace*, (Washington: American Psychological Association, 2013) and Gabriel M.A. Somjen, "Impairment Testing: Another Tool to Ensure Workplace Safety" (Paper presented to the CLE Conference, *Human Rights Conference – 2010*) [Somjen]).

Essentially, medical monitoring programs test for abstinence – rather than acute impairment or substance use at work. Tests are almost always administered off-site, and results are typically analysed days later. Moreover, even where notice of a random test order is delivered during work hours, an employee will usually be permitted to attend for testing following the completion of her shift.[12] If the end goal of such testing is to address workplace safety concerns or job performance issues, this seems like a circuitous route to get there.

C. Unproven

Efficacy issues aside, what about the therapeutic utility of return to work drug testing? Proponents of urine screening under PHP-type medical monitoring programs claim that such testing represents a powerful tool for "motivating recovery" (Dr. Ray Baker, "Management of Personnel with Addictions" (PowerPoint lecture presented to the Bottom Line Conference, February 2015)).

Such claims, however, are questionable.

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10 More generally, see R.N. Kling *et al.*, "Sleep problems and workplace injuries in Canada" (2010) 33(5) Sleep 611; K. Uehli *et al.* "Sleep problems and work injuries: a systematic review and meta-analysis" (2014) 18(1) Sleep Medicine Review 61.

11 See also K.T. Palmer *et al.*, "Chronic health problems and risk of accidental injury in the workplace: a systematic literature review" (2008) 65 Occupational & Environmental Medicine 757.

12 In fact, some employers actually prohibit employees under monitoring programs from attending for biological testing during work hours.

Although evaluations of PHPs have suggested that such programs are successful based on certain metrics, reliance on the body of research supporting employer-mandated treatment, generally, and PHPs, in particular, is problematic, because of the generally poor methodological quality of available studies. For the most part, the study designs that have been used to evaluate workplace-mandated treatment and PHPs are not methodologically rigorous; an analysis of potential biases and their likely impacts on findings suggest that the research base is not compelling. Thus, claims of the unique effectiveness of these types of treatment approaches, which involve prolonged medical monitoring, are not supported by persuasive evidence (see Chapnick at 8.1.10).

It should also be noted that, although there is an overall dearth of research around the potential negative consequences of policy approaches that involve compulsory treatment and medical monitoring, there is some evidence that, on average, legal mandates undermine client confidence in treatment, treatment commitment and counseling rapport. Moreover, influential theories of human motivation and behaviour change support the proposition that coercive treatment and monitoring is counterproductive (see *ibid.* at 8.1.13).

D. Expensive

In the employment context, medical assessments, drug testing and monitoring services under the PHP model are generally provided outside of the public health care system; these services are not covered under BC's Medical Services Plan. Similarly, residential treatment and counselling services typically associated with the PHP approach are largely private-pay.

Employers will sometimes pay out-of-pocket for such services, or, under certain circumstances, coverage will be provided through an employer-sponsored disability benefits plan.[13]

The return to work process under the PHP approach is not cheap. It typically involves the following expenses:

(1) A three-hour "occupational addiction medicine assessment" (roughly $2,500).[14]

(2) A six to eight week stay in a residential treatment program (generally ranges from $17,000 to $25,000, depending on fee structure and length of stay).

(3) Two to five years of medical monitoring (generally ranges from $3,600 to $51,000, depending on fee structure and length of program).

(4) One or more "occupational addiction medicine reassessments" (roughly $1,000 per reassessment).

These costs are excessive by any reasonable measure, particularly given the questionable therapeutic utility of PHP-type programs, and their ineffectiveness in terms of detecting workplace impairment

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13 The question of whether an employer is legally required to pay for treatment and monitoring associated with an employee's return to work is discussed in Chapnick at 8.1.37.

14 For the most part, physicians selected or approved by BC employers to carry out such assessments are General Family Physicians; they do not hold specialty registrations with the College of Physicians and Surgeons of BC and are not licensed for specialist practice. In particular, they are not certified in the subspecialty of Occupational Medicine. Nor are they "specialists" in addiction medicine. Addiction medicine is not a recognized medical specialty in Canada. In other words, there is no such thing as an "addiction specialist" within the meaning of the *Health Professions Act*, R.S.B.C. 1996, c. 183, the Medical Practitioners Regulation, B.C. Reg. 416/2008, or the Bylaws of the College of Physicians and Surgeons of BC.

or substance use. It should also be noted that the research literature supports a variety of more cost effective addiction treatment options and therapeutic approaches (see Chapnick at 8.1.10), and many such options are available through the public health care system. Moreover, if employers are legitimately concerned about substance use and impairment at work, there are certainly less invasive options for addressing such issues (e.g. impairment testing based on a supervisor's observations), as well as other approaches that test impairment or fitness-for-duty directly (see Somjen at 5.2.12).

VI. Conclusion

An employee must not enter or remain at the workplace if her ability to work is impaired by psychoactive substances. This is the law (see Occupational Health and Safety Regulation, B.C. Reg. 296/97, ss. 4.19, 4.20). It does not follow, however, that every employee with an addiction must necessarily complete intensive treatment and submit to prolonged, abstinence-based monitoring, including drug testing, in order to function safely and productively at work.

Both from an arbitral perspective and under the *Human Rights Code*, the law around drug testing is clear and straightforward. Unilaterally-imposed testing rules and policies must be reasonably necessary, proportionate, and minimally intrusive. They should reflect a careful balancing of competing interests, and must be firmly rooted in compelling evidence justifying their imposition.

These principles apply to various forms of testing, from "reasonable cause" testing, to urine screening under monitoring programs for employees with addictions who are returning to work. The utility and effectiveness of the latter, however, are questionable. Employers and their counsel would be wise to consider other, less invasive and more efficacious and cost-efficient options for protecting and promoting workplace safety and productivity.