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Testing the Limits: Alcohol & Drug Testing For Offshore Employees

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Testing the Limits: Alcohol & Drug Testing For Offshore Employees

The legal limits of drug and alcohol testing by employers in the Atlantic Canada offshore are not yet entirely clear. To shed light on where these limits may lie, the authors examine the relevant law in the United Kingdom and the United States, together with the law on testing in Canada generally and the applicable provisions of the Accord Acts.

Il n'est pas encore clair où se trouve la limite pour les employeurs du secteur pétrolier extracôtier de la région de l'Atlantique qui ont recours à des tests antidopage de leurs employés. Afin d'élucider la question, les auteurs examinent les lois en vigueur au Royaume-Uni et aux États-Unis, de même que la loi régissant les tests antidopage au Canada et les dispositions pertinentes des Accord Acts.

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Introduction

> Working on an oil rig is dangerous business. It requires total concentration, precise timing, a fair degree of coordination and a significant amount of speed. Rig accidents can have disastrous consequences, ranging from severed limbs and multiple deaths to massive despoliation of the environment. It goes without saying that drug abuse has no place on oil rigs . . . .[1]
>
> - Kozkinski J., U.S. Court of Appeals for 9th Circuit

> The operation of a crane is clearly a safety-sensitive job, and [the employer] has the right to assess their operators to ensure that none of them is impaired while on the job ....
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> But we once again return to what the Board of Inquiry referred to as "the sticking point" in Entrop - the evidence is unequivocal... that a drug and alcohol test cannot establish impairment as at the time the urine, breath or saliva sample is taken. The onus is on the employer to establish that the persons who are negatively affected by the drug and alcohol policy are "incapable" of doing the job. The technology available to the employer cannot and does not in fact establish that incapability... [2]
>
> Vice-Chair Shouldice, Ontario Labour Relations Board

Working on an oil rig has been called "one of the most arduous and risky jobs in the world."[3] It has been reported that there have been over 140 major oil rig accidents since the 1950s.[4] In the offshore oil and gas industry, the consequences of impairment by an employee, whether a cook, helicopter pilot, roustabout, or drilling operator, could be disastrous. It is clear that for employees working offshore, "an accident which can result from a seemingly insignificant misstep can produce a catastrophe."[5] The use of drugs or alcohol by employees working on oil rigs only magnifies the job's inherent dangers. Employees impaired by drugs or alcohol not only affect the production and efficiency of the workplace, these employees are also a threat to themselves and their co-workers. Disasters such as the *Exxon Valdez,* which resulted in a major oil spill and in which the captain of the ship was impaired at the time of the accident, demonstrate drug and alcohol use by employees also has consequences for the public and impact on our environment.[6]

Employers have a legal responsibility to ensure a safe workplace, both through occupational health and safety legislation, and by way of civil liability. Achieving a safe workplace by intrusive methods of drug testing, however, raises the issue of employee privacy rights. There are also questions of whether a positive drug test, which proves past drug use, has any connection to whether an employee has the present ability to do the job. A number of employers currently operating offshore Newfoundland and Nova Scotia have drug and alcohol policies which attempt to

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1. *Sanders* v. *Parker Drilling Co.*, 911 F.2d 191 9th Cir. 1990, at 204, Kozkinski J., dissenting [hereinafter *Parker Drilling*].
2. *I.U.O.E., Local 793 and Sarnia Cranes* [1999] O.L.R.D. 1282 at para. 203.
3. *Parker Drilling, supra* note 1 at 203.
4. The International Labour Organization reports that oil rig accidents claim 250-500 lives annually, see *Parker Drilling, ibid.* at 213.
5. *Gulf Coast Industrial Workers Union* v. *Exxon Co.*, 991 F.2d 244 (5th Cir. 1993) at 252-53, citing Arbitrator Grimes in *Union Oil*, 818 F.2d at 439.
6. *Walker* v. *Imperial Oil*, (1998), 230 A.R. 325 (Q.B.).

ensure safety and limit impairment of employees on the job. These employers also operate in other jurisdictions where drug testing is the norm and is accepted by employees as a legitimate requirement of the job. A comparison of the laws in the United States and Canada demonstrates the unique position Canada has taken with respect to employee drug testing. In that regard, in the 18 July 2000 arbitral award relating to Canadian National Railway's drug and alcohol policy, arbitrator Michel Picher observed,

> [t]he approach to substance use and abuse among employees in Canada has differed markedly from the legislative and regulatory approach found in the United States, particularly as it relates to employees in the transportation industry. The Canadian approach, as reflected in the decisions of the courts, boards of arbitration and human rights tribunals, has consciously sought to give the fullest possible protection to the privacy and dignity of individual employees, while respecting the legitimate business interests of employers responsible for a safety sensitive enterprise . . . .[7]

The recent decision of the Ontario Court of Appeal in *Entrop* v. *Imperial Oil*, which struck down policy provisions on random and pre-employment drug testing as discriminatory, suggests that in Canada drug testing is not always acceptable, even for those employed in safety-sensitive positions.[8] Whether such policies are lawful in the offshore context has yet to be decided in Canada. Offshore oil and gas companies are testing the limits as to the acceptable measures of ensuring safety offshore while remaining in compliance with Canadian human rights law.

I. *The International Context*

1. *United Kingdom*

Drug and alcohol testing of employees is routine in many countries, including the United Kingdom. Pre-employment, periodic, random and for-cause testing are all accepted practices in the U.K. For example, in the early 1990s, Texaco introduced random drug testing for all its U.K. employees, as did the International Petroleum Exchange.[9] In a guide for employers, the U.K. government has said that drug abuse should be treated as a health issue, rather than cause for immediate termination; however, those operating in safety-sensitive positions may need to be temporarily transferred to another position.[10]

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7. *Canadian National Railway Company* v. *CAW-Canada*, [2000] C.L.A.D. No. 465 (QL) at 74 [hereinafter *C.N.*].
8. (2000), 50 O.R. (3d) 18 (C.A.) [hereinafter *Entrop*].
9. P. Housing, "Column Eight: Troubled Waters in Oil" *The Independent* (12 December 1992).
10. Health & Safety Executive, "Drug Misuse at Work: a Guide for Employers" INDG91 (rev2) 1/98 C750, online: HSE <http://www.healthandsafety.co.uk/hsdrugs.html>.

2. *The United States*

Drug testing of employees is common in the United States and has been described by Huberman and Townshend as "standard business practice, sometimes being based on safety considerations, other times on productivity considerations, and sometimes in an attempt to regulate employee morality."[11] In the United States, 196 of the Fortune 200 companies have drug testing programs.[12] The American approach is to target drug use itself, even apart from preventing workplace accidents. This is demonstrated by the fact that, in certain jurisdictions, even students who wish to participate in extra curricular sports must submit to drug tests.[13]

Anti-discrimination legislation in the United States usually provides no protection for individuals who test positive for drugs.[14] Those who test positive are generally considered to be "current drug users." The fact that drug tests do not indicate current impairment is not a significant issue in the United States.[15] Under certain circumstances, drug addiction can constitute a disability for the purpose of anti-discrimination legislation. The *Americans with Disabilities Act* prohibits discrimination against a "qualified individual with a disability," but specifically excludes from protection persons who are currently using illegal drugs.[16]

Pre-employment drug testing is largely upheld by courts across the United States.[17] Random drug testing is also generally upheld, although several American jurisdictions have ruled that only safety-sensitive employees should be subject to such testing.[18] The bar as to what is required to be considered safety-sensitive, however, can be low. In *Knox County Education* v. *Knox County Board of Education* an appeal court held that pre-employment drug testing of employees in safety-sensitive

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11. B. Butler, M. Huberman, & R. Townshend, *The Drug Testing Controversy: Imperial Oil and Other Lessons* (Toronto: Carswell, 1997) at 3.
12. M. Costello, "A Testing Time for UK Plc's High Flyers" *The Times* (28 October 1998).
13. *Vernonia School District* v. *Acton,* 515 U.S. 646 (1995), and *Anderson Community School Corps* v. *Willis*, cert. denied, 119 S. Ct. 1254 (1998).
14. J. Klein & N. Pappas, "Implementing and Enforcing Drug-Testing Programs - Part 1", *New York Law Journal* (3 August 1998).
15. *Exxon Corp.* v. *Esso Workers' Union, Inc.,* 118 F. 3d 841 (1st Cir. 1997) at para. 45.
16. 42 U.S.C. § 12112(a) (1990). Those with a previous addiction are protected unless they pose a direct threat to the health or safety of others: *Americans with Disabilities Act (ADA)* A Technical Assistance Manual, I-6.1.
17. *Wilkinson* v. *Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989). However, various states are beginning to place more limitations on pre-employee drug testing. In *O'Keefe* v. *Passaic Valley Water* 602 A.2d 760 (N.J., 1992) the court held that pre-employment testing could not be upheld for employees in non-safety sensitive positions.
18. *Webster* v. *Motorola,* 418 Mass. 425, 637 N.E. 2d 203 (1994); *Twigg* v. *Hercules Co.,* 406 S.E. 2d 52 (W. Va 1990). *Luck* v. *Southern Pacific Transportation Co.,* 267 Cal. Rptr. 618 (Ct. App. 1990).

positions was not unconstitutional. The safety-sensitive positions included not only bus drivers, but also teachers, principals and school secretaries.[19] In *Hennessey* v. *Coastal Eagle Point Oil*[20] an employee who failed a mandatory random drug test claimed wrongful dismissal and that the drug testing policy violated a clear mandate of public policy based on common law and statutory rights to privacy.[21] The court ruled that neither random drug testing by private employers nor termination of an employee in a safety-sensitive position as a result of a positive random drug test violated public policy. It found that the privacy rights of the employee were outweighed by the potential hazard to co-workers, the workplace and the public if the employee was to work while impaired.

In the offshore context, in *Luedtke* v. *Nabors Alaska Drilling Inc.*, the Supreme Court of Alaska upheld the termination of two employees working on an oil rig who were dismissed after refusing to submit to a drug test.[22] It determined that individual privacy rights were considerably outweighed by health and safety concerns. The oil rig was considered a very dangerous working environment and the court considered several cases of offshore accidents resulting in serious injury and death. Thus, testing was held not to be an unreasonable intrusion of an employee's privacy rights.[23]

II. *The Law on Employee Drug Testing in Canada*

The Canadian approach to drug testing differs markedly from that of the United States and the United Kingdom. Employee drug testing is not as widespread here, and Canadian courts have been stricter in upholding employee privacy rights. Human rights legislation has been at the centre of the debate, because substance addiction, whether past or current, is generally considered a disability. In contrast to the American position, which encourages employers to implement active drug testing programs, the Canadian stance is to place a rather strict onus on employers to prove that their particular drug testing program is justified and reasonable.

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19. 158 F.3d 361 (6th Cir. 1998).
20. 609 A.2d 11 (N.J. 1992).
21. American Law recognizes a general tort for invasion of privacy: *Restatement (Second) Torts*, § 652D (Minneapolis: American Law Institute, 1977). Government employers are limited by the 4th Amendment to the U.S. Constitution against unreasonable searches and seizures, and several state constitutions protect the individual's right to privacy: *Alaska Constitution*, art. I, § 22 (adopted 1972). The general right to privacy is recognized as fundamental to the concept of liberty guaranteed by the *Bill of Rights: Griswold* v. *Connecticut*, 381 U.S. 479 at 486 (1965).
22. 768 P. 2d 1123 (Alaska S.C. 1989).
23. But see *Kelley* v. *Schlumberger Technology Corp.*, 849 F. 2d 41 (1st Cir. 1988), where an employee was discharged from an offshore rig in the Gulf of Mexico after urinalysis showed the presence of marijuana. A jury found for the plaintiff for tortious invasion of privacy and awarded damages of $125,000.00 for negligently inflicting emotional distress.

1. *Human Rights Jurisprudence*

Human rights legislation in Canada generally prohibits discrimination on the basis of a disability or handicap. The Nova Scotia *Human Rights Act* specifically addresses drug or alcohol addiction in defining disability to include "previous dependency on drugs or alcohol," but does not explicitly protect against discrimination for current drug or alcohol dependency.[24] Other provinces, such as Alberta and Newfoundland, do not deal directly with drug or alcohol dependency in their human rights legislation, but the general prohibitions against discrimination have been interpreted to include persons suffering from a drug or alcohol dependency.[25] Disability is a prohibited ground of discrimination under the *Canadian Human Rights Act*.[26] It is the only legislation in Canada which specifically includes existing dependence on alcohol or a drug in the definition of disability.

There have as yet been no decisions on drug and alcohol testing in the context of the human rights legislation of either Nova Scotia or Newfoundland. The most significant court decision in Canada to date on drug and alcohol testing of employees involved an alleged violation of the *Ontario Human Rights Code*.[27] In July 2000 the Ontario Court of Appeal released its long awaited decision in *Entrop* v. *Imperial Oil*.[28] The Imperial Oil policy provided for random testing of employees and required employees in safety-sensitive positions to disclose past and current substance abuse problems. Entrop, an employee at Imperial Oil's Sarnia refinery, was reinstated to a less desirable position following disclosure of a past alcohol problem, despite the fact that he had not had a drink for several years. Entrop filed a complaint of discrimination on the basis of disability with the Ontario Human Rights Commission. A board of inquiry of the commission found that the policy was contrary to the *Ontario Human Rights Code* in that it discriminated on the basis of disability.[29] The decision was appealed to the Ontario Court of Justice,

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24. *Human Rights Act,* R.S.N.S. 1989, c. 214, s. 3(1)(vii).
25. *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980 c. H.-11.7, s. 7; *Human Rights Code*, R.S.N. 1990, c. H-14. For example, *Handfield* v. *North Thompson School District No. 26*, [1995] B.C.C.H.R.D. No. 4, concluded alcoholism was both a mental and physical disability under the B.C. *Human Rights Code.*
26. R.S.C. 1985, c. H-6, ss. 10, 25.
27. R.S.O. 1990, c. H-19.
28. *Supra* note 8.
29. (1996), 24 C.C.E.L. (2d) 122 (Board of Inquiry). Section 5 includes a past, existing or perceived handicap as a prohibited ground of discrimination and s.10 defines 'handicap' as inclusive of mental disorder.

which upheld the board's decision and reiterated that mandatory self-disclosure of substance abuse problems resulting in reassignment was discriminatory.[30]

Imperial Oil then appealed to the Ontario Court of Appeal. In the interim, the Supreme Court of Canada released *B.C. Government and Service Employees Union* v. *British Columbia (Public Service Employee Relations Commission)*, where physical standards for firefighters were challenged when a female firefighter was dismissed when she was unable to meet those standards.[31] *Meiorin* changed the way that discrimination cases are analyzed because it removed the distinction between direct and indirect discrimination and devised a new three-step test for establishing a *bona fide* occupational requirement (BFOR). In order to justify an impugned standard, an employer must now establish the following requirements on a balance of probabilities:

> (1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[32]

In *Entrop* the Ontario Court of Appeal assessed Imperial Oil's alcohol and drug testing policy using this new unified approach to adjudicating discrimination claims. The Court of Appeal considered various aspects of Imperial's policy; namely random drug testing, random alcohol testing, pre-employment drug testing, as well as mandatory disclosure, reassignment and reinstatement provisions. In applying the three-step test to the policy, the court found that the stated purpose of the policy, of minimizing "the risk of impaired performance due to substance abuse" in order to ensure a "safe, healthy and productive workplace" was rationally connected to the performance of the job.[33] The court further found that Imperial Oil proved that the testing provisions were adopted in an honest and good faith belief that they were necessary to accomplish the company's purpose.

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30. [1998] O.J. 422 (QL) (Div. Ct.).
31. (1999), 176 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Meiorin*].
32. *Ibid.* at 25.
33. *Supra* note 8 at para. 94.

Having met the first and second parts of the test, the remaining and important issue was whether the drug and alcohol testing provisions were reasonably necessary to accomplish Imperial Oil's purpose. Imperial Oil had to establish that individual capabilities and differences could not be accommodated by the company without undue hardship. Laskin J.A., writing for the court, held that random drug testing for employees cannot be justified as reasonably necessary to accomplish Imperial Oil's objectives. That was because such testing by its nature does not measure present impairment. As current technology in drug testing is limited to showing past use, and cannot show when drugs were used or how much, a positive drug test does not provide evidence of impairment on the job.[34] The court found the penalty of automatic termination of an employee who tests positive for drugs or alcohol to be too severe, and that it did not accommodate individual differences where an employee's circumstances may justify a lesser penalty. Pre-employment drug testing also failed to show future impairment on the job.

With respect to the Imperial Oil policy provisions for mandatory disclosure, reassignment and reinstatement, the court ruled that "requiring an employee to disclose a past substance abuse problem, no matter how far in the past, is an unreasonable requirement."[35] However, no blanket prohibition was placed on disclosure requirements. Laskin J.A. confirmed the Board of Inquiry's conclusion that the cut-off point for disclosure of a past problem is five to six years of successful remission for alcohol abuse, and six years for drug abuse.[36] Further, automatic reassignment out of a safety-sensitive position following disclosure of a past substance abuse problem is also not reasonably necessary.

The Court of Appeal upheld the monetary awards made by the Divisional Court and the board, where Entrop was awarded $1,241.93 in special damages for lost overtime as a result of his reassignment, $10,000.00 in general damages for the infringement of his rights, and $10,000.00 for mental anguish as a result of the "wilful and reckless manner" of the infringement by Imperial Oil. The court did rule that post-incident and for-cause drug testing, "after a significant work accident, incident or near miss" or "where reasonable cause exists to suspect alcohol or drug use or possession" was justifiable if Imperial Oil could establish that such testing was "necessary as one facet of a larger assessment of drug abuse."[37] The Court of Appeal further found that the

34. *Ibid.* at para. 99.
35. *Ibid.* at para. 121.
36. *Ibid.*
37. *Ibid.* at para. 114.

random alcohol testing provisions of the policy were not discriminatory. Unlike current technology for drug tests, breathalyser testing can show present impairment of an employee from alcohol. Laskin J.A. held that, "for employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement."[38]

The other significant Canadian court case on drug testing arose in the federal context. In *Toronto Dominion Bank* v. *Canada (Canadian Human Rights Commission)*,[39] the bank's policy provided for mandatory testing and rehabilitative services for employees who tested positive. The Civil Liberties Association filed a complaint with the Canadian Human Rights Commission alleging that the policy constituted discrimination on the basis of disability. The Federal Court of Appeal held that the policy was directly discriminatory since it had direct consequences for drug dependent individuals. The court found that the testing of bank employees was not a BFOR because there was no evidence of a drug problem among bank employees. Furthermore, the policy was not the least intrusive means of monitoring job performance.

While the Court of Appeal found the policy to be discriminatory and without a valid defence, McDonald J.A. suggested that the decision was not to be interpreted as absolute. He stated that "indeed drug testing in safety sensitive industries is allowed and pursued."[40] Significantly, McDonald J.A. also said that "casual users are not protected under the Act .... Drug dependent users are therefore the only individuals protected from this policy under the Act." Arbitrator Picher in *C.N.* reached the same conclusion, saying:

> to the extent that employees whose use of alcohol or drugs is unrelated to any addiction or dependence, those individuals can claim no protection under the *Canadian Human Rights Act*, as they cannot claim a protected disability.[41]

2. *Arbitral Jurisprudence*

Decisions from arbitration boards make up the majority of employee drug testing jurisprudence in Canada. They are relevant even for non-union employers when assessing the legality of drug and alcohol testing policies. Where a drug or alcohol testing policy is at issue in a grievance arbitration, questions include not only whether the policy is inconsistent with the collective agreement or whether the rules are an unreasonable

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38. *Ibid.* at para. 110. This finding was subject to Imperial Oil meeting its duty to accommodate those who test positive, such as providing support for treatment and rehabilitation.
39. (1998), 163 D.L.R. (4th) 193 (F.C.A.).
40. *Ibid.*
41. *Supra* note 7 at 89.

infringement of privacy rights,[42] but also whether the policy complies with human rights legislation.

It is only in the very recent arbitration award in *C.N.* that an arbitrator has allowed widespread drug testing. In the context of safety-sensitive positions, arbitrator Michel Picher said that such testing could occur post-incident, for cause, post-reinstatement and as part of a medical examination with respect to promotions or transfer to a risk sensitive position.[43] Until that decision, the arbitral jurisprudence was to the effect that drug testing of employees was not allowed in Canada.[44] For example, in *Re Esso Petroleum Canada and C.E.P., Loc. 614*,[45] Esso's policy, which provided for random drug testing of employees in safety-sensitive positions, was deemed unacceptable because Esso failed to show that there was a drug problem at that workplace or that the testing could not be done in a less invasive way.

In *I.U.O.E., Local 793 and Sarnia Cranes Ltd.*, the Ontario Labour Relations Board considered a drug and alcohol policy designed by Imperial Oil used for Sarnia Cranes' employees.[46] The policy provided for pre-access testing, reasonable cause testing, post-incident testing, and monitoring of "risk-sensitive" employees. The board determined the policy unreasonable because a positive test result is not proof of impairment and there was no evidence presented to show that Sarnia Cranes had an existing drug or alcohol problem at the workplace. Further, the policy was not clear and unequivocal, and did not clearly establish the consequences of a positive test. The board also concluded the test was discriminatory and contrary to the *Ontario Human Rights Code*. Relying on the finding of the board of inquiry in *Entrop*, the Ontario board said that because a drug or alcohol test cannot establish present impairment, the employer was unable to establish the incapability.[47]

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42. *KVP* (1994), 56 L.A.C. (4th) 440 established an employer has the right to implement rules and policies, but they must not be unreasonable, inconsistent with the collective agreement and meet other requirements.
43. *Supra* note 7 at 98.
44. *Trimac Transportation Services-Bulk Systems* v. *Transportation Communications Union* (2000), 88 L.A.C. (4th) 237. An arbitration board found that the trucking company's random drug testing policy was in violation of the collective agreement in that it was an unreasonable invasion of employee privacy rights.
45. *Supra* note 42.
46. *Supra* note 2.
47. *Ibid.* at para. 203.

Significantly, a recent arbitration award in *Fording Coal* v. *United Steelworkers of America, Local 7884* saw Arbitrator Allan Hope allow mandatory drug testing including multiple and random testing when an employee was found in possession of drugs in the workplace and the employee admitted being a frequent user.[48]

Despite decisions which have held random drug testing to be either unreasonable or discriminatory, random alcohol testing is now considered acceptable. In *C.E.P.U., Local 777* v. *Imperial Oil*[49] an arbitration board upheld a policy that required oil movement and storage area technicians at the Strathcona refinery in Alberta to submit to random breathalyzer tests. Tests showing a blood alcohol level of 0.04 percent or higher would result in consequences up to and including termination. The arbitrator considered the refinery in general to be a high risk environment and determined that the employees to whom the policy applied were in safety-sensitive positions. Alcohol testing has also been upheld in the wrongful dismissal context. In *Walker* v. *Imperial Oil*, the Alberta Court of Queen's Bench held that Imperial Oil was justified in dismissing an employee who held a safety-sensitive position for being at work with a blood alcohol level in excess of 0.08 percent.[50]

III. *Canadian Law Applied to Alcohol and Drug Testing for Offshore Employees*

1. *What Law Applies?*

There have been no reported cases which have considered alcohol and drug testing relating to the Canadian offshore. That is surprising in some respects, since the Canadian offshore has had some vigorous alcohol and drug policies in place for a decade. Perhaps it is an indication of the acceptance of such policies in light of the inherent dangers present.

To determine the applicable law, one may start with the Newfoundland and Nova Scotia *Accord Acts*,[51] which both provide that the respective provincial "social legislation" applies to "marine structures . . . ".[52] In each of Nova Scotia and Newfoundland, "marine structure" is defined as

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48. (6 September 2000) (Hope, Arb.) at 49 [hereinafter *Fording Coal*].
49. (12 April 2000) (Christian, Arb.) [hereinafter *Strathcona*].
50. *Supra* note 6.
51. The Newfoundland and Nova Scotia *Accord Acts* refer to the federal statutes passed to implement the accords as law. Both Newfoundland and Nova Scotia passed mirror legislation to enact the accords provincially. This article refers only to the federal statutes, the *Canada-Newfoundland Accord Atlantic Accord Implementation Act*, S.C. 1987, c. 3 [hereinafter *Newfoundland Accord Act*] and the *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*, S.C. 1988, c.28 [hereinafter *Nova Scotia Accord Act*].
52. *Newfoundland Accord Act*, *ibid.*, s.152(2) and *Nova Scotia Accord Act*, *ibid.*, s.157(2).

any ship, offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, not including supply or support vessels.[53] However, the social legislation applying to such marine structures differs, in that the Nova Scotia legislation states that social legislation consists of the *Labour Standards Code,* the *Occupational Health and Safety Act,* the *Trade Union Act* and the *Workers' Compensation Act.*[54] In Newfoundland, "social legislation" consists of the *Boiler, Pressure Vessel and Compressed Gas Act,* the *Elevators Act*, the *Labour Standards Act*, the *Occupational Health and Safety Act*, the *Radiation Health and Safety Act*, and the *Workers' Compensation Act.*[55]

Neither *Accord Act* specifically says that the provincial human rights statutes apply. Paragraph 5(a) referred to in s. 157(1)(b) of the Nova Scotia *Accord Act* refers to the power of the federal government to make regulations pursuant to s. 157(5) prescribing the application or exclusion of any Nova Scotia statute from the applicability of s. 157(2).[56] Therefore, the *Nova Scotia Human Rights Act* could be explicitly brought within the definition of "social legislation." As a result, there remains a question as to whether it is the federal act or the provincial acts which have application to marine structures. However, there is more to the offshore than marine structures. Policies involving drug testing may affect employees on supply vessels, docks, pipe yards, warehouses and so on.

The July 17, 2000 decision of the Federal Court of Appeal in *Halifax Longshoremen's Assn., Local 269* v. *Offshore Logistics*[57] has done little to clarify the jurisdictional issue. The Canada Industrial Relations Board "unionized" the Halifax dock where Offshore Logistics loaded and unloaded vessels chartered to Mobil. Offshore Logistics appealed this arguing that its employees were not in the longshoring industry and in any event, the work fell under provincial and not federal jurisdiction. That argument was consistent with the Canada board's earlier decision in *Halifax Offshore Terminal Services.*[58]

Ultimately, the Federal Court of Appeal was satisfied that the board's finding of "longshoring" was not unreasonable. Further, it was not prepared to disturb the board's constitutional finding. Offshore Logistics had argued that any longshoring at the docks was provincial and not

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53. *Newfoundland Accord Act, ibid.*, s. 152(1)(a) and *Nova Scotia Accord Act, ibid.*, s.157(1).
54. *Nova Scotia Accord Act, ibid.*, s.157(1).
55. *Newfoundland Accord Act, supra* note 51, s.152(1)(a).
56. *Nova Scotia Accord Act, supra* note 51. Provisions parallel to these are found in the *Newfoundland Accord Act, supra* note 51, c. 3, s.152(5) and its relation to s.152(2).
57. [2000] F.C.J. No. 1155 (C.A.).
58. (1987), 71 di 157. (CLRB no. 651) [hereinafter *Checkers*].

federal because the shipping involved was not interprovincial or international.[59] However, because notice of a constitutional question pursuant to the *Federal Court Act*[60] had not been provided at the board level when the matter was originally heard, the court declined to decide the constitutional question relating to intraprovincial shipping.

On the basis of the foregoing, a supply base could yet be considered provincial. Further, the argument that supply vessel operations were intraprovincial was also left unanswered. As a result, one needs to canvass all of Nova Scotia, Newfoundland and federal human rights law in considering alcohol and drug testing for offshore employees.

a. *The Nova Scotia Human Rights Act*

The *Nova Scotia Human Rights Act*[61] protects against discrimination on the basis of "previous dependency on drugs and alcohol"; not current dependency.[62] However, at the same time the statute prohibits discrimination on the basis of a disability; that may lead to the argument that merely protecting against previous dependency is "under-inclusive" and therefore, notwithstanding the explicit wording of the *Act*, current dependency is protected as well.

b. *The Newfoundland Human Rights Code*

The *Newfoundland Human Rights Code*[63] protects against discrimination on the basis of a disability. Alcohol or drug dependency, current or past, are not explicitly mentioned. However, one could reasonably expect that the *Act* provides protections with respect to both existing and past dependency.

c. *The Canadian Human Rights Act*

The federal *Act*[64] prohibits discrimination on the basis of a "disability"[65] defined as including "previous or existing dependence on alcohol or a drug."[66]

2. *What are the Limits on Drug Testing in the Offshore?*

Obviously, Canadian law relating to drug and alcohol testing is evolving. The arbitration board in *Strathcona* acknowledged in its April 2000 decision:

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59. *Supra* note 57 at para. 46.
60. R.S.C. 1985, c. F-7, s. 57(1).
61. *Supra* note 24.
62. *Ibid.*, s. 3(1)(vii).
63. *Supra* note 25.
64. *Supra* note 26.
65. *Ibid.*, s. 3(1).
66. *Ibid.*, s. 25.

> [n]o Canadian arbitration Board, human rights tribunal or Court that has considered the random testing component of the Policy has upheld it. Rather, the random testing provision in the Policy has been consistently criticized as an unjustified infringement of the fundamental rights and interests of workers.[67]

Despite the strong and negative view about random testing expressed by the Ontario board in *Sarnia Cranes*[68] which introduced this article, the arbitration board in *Strathcona* allowed random alcohol testing.

This is the backdrop to the Ontario Court of Appeal's decision in *Entrop* of July 2000.[69] *Entrop* specifically recognized that freedom from drug and alcohol impairment was a *bona fide* occupational requirement.[70] One would expect no different conclusion with respect to the offshore. Through its decision, the court also held that many of the elements of a modern alcohol and drug test policy did not offend the Ontario *Human Rights Code*. To put this in context, *Entrop* may be summarized in the following chart:

	ALCOHOL	DRUGS
Pre-Employment Testing	No	No
Random Testing	Yes; if safety sensitive position and sanctions are individually tailored	No; because positive test does not demonstrate impairment
For Cause Testing	Yes	Yes, if necessary facet of a larger assessment
Post-Incident Testing	Yes	Yes, if necessary facet of a larger assessment
Post-Reinstatement Testing	Yes, if necessary facet of a larger assessment	Yes, if necessary facet of a larger assessment
Mandatory Disclosure of Current Problem	Yes	Yes
Mandatory Disclosure of Past Problem	Limited to about 5-6 years since successful remission	Limited to about 6 years since successful remission

67. *Supra* note 49 at 17.
68. *Supra* note 2.
69. *Supra* note 28.
70. *Ibid.* at para. 98.

The *Entrop* position against pre-employment alcohol and drug testing and random drug testing would not be a problem under Nova Scotia law. That is because Nova Scotia does not explicitly protect from discrimination based on existing dependence. Therefore, a positive Nova Scotia test during pre-employment or random testing measuring an "existing" condition should not offend the *Nova Scotia Human Rights Act*. However, because the federal *Act* and the *Newfoundland Human Rights Code* would be considered similar to Ontario's with respect to existing dependency, one could expect similar challenges under the Newfoundland and federal statutes as that in *Entrop*.

Nonetheless, *Entrop* makes it clear that various forms of alcohol and drug testing are viable, namely:

(1) random testing for alcohol if a safety sensitive position and sanctions are individually tailored;

(2) for cause for alcohol;

(3) for cause for drugs, if a necessary facet of a larger assessment;

(4) post-incident for alcohol;

(5) post-incident for drugs, if a necessary facet of a larger assessment;

(6) post-reinstatement for alcohol and drugs, if a necessary facet of a larger assessment; and

(7) certification for "safety sensitive" positions, if a necessary facet of a larger assessment for both alcohol and drugs.

The foregoing testing should not be problematic for offshore employees governed by Newfoundland or federal law.

Significantly, *Entrop* considered that mandatory disclosure of a current problem relating to alcohol or drugs was acceptable. Even mandatory disclosure of a past problem was acceptable, but limited to five to six years for alcohol and six years for drugs post-successful remission. Such a finding will also be helpful to employers operating in the offshore. As for random drug testing, if Newfoundland or federal law applied to the offshore, an employer's ability to engage in such testing could be subject to challenge. That would not be the case in Nova Scotia. Nonetheless, under Newfoundland and federal law, based on *Entrop*, there could be drug testing as part of a certification for safety-sensitive positions if such testing were a necessary facet of a larger assessment. Such testing could possibly have a random component and might be capable of being extended to re-certification testing. Further, the Canadian Human Rights Commission's Policy on Drug Testing (1999) has said that

> [d]rug testing, including pre-employment or random testing, may be permissible for jobs where safety is of fundamental importance, provided the employer can demonstrate that there is no other feasible method to assure employees are not incapacitated on the job.

More recently, in *C.N.*, arbitrator Picher said that

> [i]t would appear that this may be the first arbitral award or tribunal decision of any kind, which finds drug testing to be permissible as a pre-condition to promotion or transfer into a risk sensitive position.[71]

Based on arbitral jurisprudence to date, establishing that offshore employment is risk or safety-sensitive should not be difficult. However, it may be important to show that there are no other feasible means to assure that employees are not incapacitated.

Conclusion

Employment in the offshore can be properly characterized as dangerous and risky. Testing for alcohol and drugs is both necessary for safe operations and feasible from a human rights perspective. However, any such testing must be consistent with human rights protections and the Supreme Court of Canada's three-step test, namely,

1. that the standard is adopted for a purpose rationally connected to job performance;
2. that the standard is adopted in good faith;
3. that the standard is reasonably necessary, bearing in mind the need to accommodate individuals without undue hardship to the employer.[72]

It is clear that tests will be allowed if they can be justified as a means to ensure a safe workplace. However, testing must be justified objectively and subjectively. Evidence of a drug problem can be of substantial assistance in justifying such tests. However, the magnitude of the risks involved in the offshore should not require an extensive documented history of problems. As stated by arbitrator Picher in *C.N.*,

> [i]t seems to the Arbitrator that there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of the employer without first requiring an extensive history of documented problems of substance abuse in the workplace.[73]

Certainly, the magnitude of the risks involved in the offshore can be used to justify a vigilant and balanced policy of drug and alcohol detection.

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71. *Supra* note 7 at 89.
72. *Supra* note 31.
73. *Supra* note 7 at 83.