COURT UPHOLDS RANDOM ALCOHOL TESTING POLICY

by Erin Crosley, Associate, Labour & Employment

In the recent decision of *Irving Pulp & Paper Ltd. v. Communications, Energy & Paperworkers Union of Canada Local 30* ("*Irving*"), the New Brunswick Court of Queen's Bench wrestled with the issue of balancing the privacy rights of employees versus the rights of management to set policies in the workplace. Justice Grant for that Court held that an Arbitration Board's decision which struck down the employer's random alcohol testing policy was unreasonable. The employer's policy read as follows:

> Random Testing: Employees employed in Safety Sensitive Positions will be subjected to unannounced random tests for alcohol. In addition, applicants to a Safety Sensitive Position must pass an alcohol and/or drug test before entry to the position or re-entry to the position where they have participated in a treatment program.

The Arbitration Board held that the onus was on the employer to justify the policy by demonstrating that the benefit of the policy was proportional to the damage done to the employee's right to privacy. In this case, the Board found that the random alcohol testing policy was reasonable based on evidence showing concern for alcohol and safety issues in the workplace. However, the Board held that the employer did not make a sufficient case to demonstrate that the mill fell into the category of an "ultra dangerous operation" such as a nuclear plant, airline or chemical plant. There was also no evidence of a significant problem with alcohol-related impairment at the mill. The Board concluded that there was no real advantage to be gained through the policy, and correspondingly, it was a "significant inroad" into the employees' privacy rights.

On appeal, the New Brunswick Court of Queen's Bench noted that the Board's decision was based on a distinction between a "dangerous workplace" and an "ultra dangerous workplace", and that if the workplace fell within the former category, a history was required to justify a policy of random alcohol testing. The Court held that this distinction was not reasonable. Dangerous was dangerous and although there were degrees of danger, there was no doubt that the mill was a dangerous work environment. Further, it was not reasonable to require a history of accidents in a dangerous workplace where a potential for catastrophe existed in order to justify a policy for random alcohol testing. Although there was such a threshold between a dangerous workplace like a mill and an office environment, it was unreasonable to establish that threshold for a workplace like the mill. Such a standard was unreasonably high.

The Court also noted that the policy was minimally intrusive, as it only applied to those in safety-sensitive positions, and emphasized as follows:

> Prevention of one catastrophe in the lifetime of the [mill] would be enough to make it a reasonable policy…it [was] a dangerous place to work … it was not reasonable for the [Board] to conclude that little or no advantage [was] to be gained from having the policy based solely on the [mill's] history …

Based on this analysis, the Court quashed the Board's decision.

The *Irving* case is helpful for employers and affirms an employer's right to implement random alcohol and drug testing policies to address safety concerns in workplaces that are safety-sensitive and dangerous. Further, it seems evident that where employees are in such positions, it is not necessary for an employer to show a history of alcohol-related accidents or infractions to implement these types of polices.