2008 CarswellOnt 669
Ontario Superior Court of Justice (Divisional Court)

Imperial Oil Ltd. v. C.E.P., Local 900

2008 CarswellOnt 669, [2008] O.J. No. 489, 165 A.C.W.S. (3d) 94, 169 L.A.C. (4th) 257, 2009 C.L.L.C. 230-020, 234 O.A.C. 90

IMPERIAL OIL LIMITED (Applicant) and COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA, LOCAL 900, MICHEL G. PICHER, ROY C. FILION and JOHN MORE (Respondents)

Jennings J., Kiteley J., and Swinton J.

Heard: January 17, 2008
Judgment: January 31, 2008
Docket: Toronto 33/07

Proceedings: affirmed *Imperial Oil Ltd. v. C.E.P., Local 900* (2006), 2006 CarswellOnt 8621, [2006] O.L.A.A. No. 721, [2007] L.V.I. 3696-1, 157 L.A.C. (4th) 225 ((Ont. Arb. Bd.))

Counsel: John B. Laskin, R. Ross Wells for Applicant
Douglas J. Wray, Michael A. Church for Respondent, Union

Subject: Occupational Health and Safety; Labour; Public; Constitutional

Headnote

Labour and employment law --- Labour law — Collective agreement — Health and safety

Labour and employment law --- Labour law — Collective agreement — Management rights — Work rules — Miscellaneous

Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Miscellaneous

Table of Authorities

Cases considered:

Canada (Attorney General) v. P.S.A.C. (1993), 93 C.L.L.C. 14,022, 150 N.R. 161, 101 D.L.R. (4th) 673, 11 Admin. L.R. (2d) 59, [1993] 1 S.C.R. 941, 1993 CarswellNat 805, 1993 CarswellNat 1379 (S.C.C.) — considered

Canadian Pacific Ltd. v. U.T.U. (1987), 31 L.A.C. (3d) 179 (Can. Arb.) — considered

Entrop v. Imperial Oil Ltd. (2000), 2 C.C.E.L. (3d) 19, 189 D.L.R. (4th) 14, (sub nom. *Imperial Oil Ltd. v. Entrop*) 37 C.H.R.R. D/481, 2000 C.L.L.C. 230-037, 50 O.R. (3d) 18, 2000 CarswellOnt 2525, 137 O.A.C. 15 (Ont. C.A.) — considered

Hamilton (City) v. C.U.P.E., Local 167 (1997), 33 O.R. (3d) 5, 99 O.A.C. 155, 97 C.L.L.C. 220-029, 1997 CarswellOnt 1048 (Ont. C.A.) — referred to

Imperial Oil Ltd. v. C.E.P., Local 900 (2006), 2006 CarswellOnt 8621, [2007] L.V.I. 3696-1, 157 L.A.C. (4th) 225 (Ont. Arb.) — referred to

Metropolitan Toronto (Municipality) v. C.U.P.E. (1990), 69 D.L.R. (4th) 268, (sub nom. *Toronto (City) v. C.U.P.E.*) 39 O.A.C. 82, 74 O.R. (2d) 239, 1990 CarswellOnt 1088 (Ont. C.A.) — referred to

R. v. C. (R.) (2005), [2005] 3 S.C.R. 99, 237 N.S.R. (2d) 204, 754 A.P.R. 204, 32 C.R. (6th) 201, 135 C.R.R. (2d) 109, 2005 SCC 61, 2005 CarswellNS 445, 2005 CarswellNS 446, (sub nom. *R. v. C. (R.W.)*) 201 C.C.C. (3d) 321, 340 N.R. 53, (sub nom. *R. v. C. (R.W.)*) 259 D.L.R. (4th) 1 (S.C.C.) — referred to

Teamsters, Local 938 v. Lakeport Beverages (2005), 2005 CarswellOnt 3720, (sub nom. *Lakeport Beverages v. Teamsters Local Union 938*) 201 O.A.C. 267, 143 L.A.C. (4th) 149, (sub nom. *Lakeport Beverages v. Teamsters Local Union 938*) 77 O.R. (3d) 543, (sub nom. *Lakeport Beverages v. Teamsters Local Union 938*) 2005 C.L.L.C. 220-057, 258 D.L.R. (4th) 10, 34 Admin. L.R. (4th) 60 (Ont. C.A.) — referred to

Statutes considered:

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

Per Curiam:

1 Imperial Oil Limited (the "Company") has brought this application for judicial review to set aside part of an arbitration award dated December 11, 2006 [reported at [2006] O.L.A.A. No. 721 (Ont. Arb.)]. In that award, the majority of the arbitration board (the "Board") allowed a union policy grievance in part and held that the Company's policy requiring random drug testing of certain employees violates the collective agreement.

Background

2 The Company operates a refinery in Nanticoke, Ontario that refines crude oil into products such as gasoline, propane and aviation fuel. There are about 230 employees at this site. Given the nature of the materials, processes and products involved, safe practices are of great importance at the refinery.

3 The Communications, Energy and Paper Workers Union, Local 900 (the "Union") is the collective bargaining agent for the unionized employees. The Union and the Company negotiated their first collective agreement in 1996.

4 The Company has had an Alcohol and Drug Policy (the "Policy") since 1992, which initially included random alcohol testing of employees in safety-sensitive positions using a breathalyser and random drug testing for certain drugs using urinalysis. The objectives of the Policy are:

- to create a safe work environment by reducing the risk of accidents in which drugs and alcohol are a contributing factor; and

- to deter the use of alcohol, drugs and other substances where their use may negatively affect work performance and safety.

5 The random alcohol and drug testing under the Policy was challenged in a complaint under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "Code"). The challenge was ultimately determined by the Court of Appeal in *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).

6 The Court of Appeal held that both alcohol and drug testing were *prima facie* discriminatory under the Code's prohibition of discrimination on the basis of handicap. However, the Court held that random alcohol testing was a *bona fide* occupational requirement, so that it did not violate the Code. Promoting workplace safety by minimizing the possibility that employees will be impaired by either drugs or alcohol while working is a legitimate objective (at para. 94). Moreover, the Company had adopted the testing provisions in the good faith belief that they were necessary to meet its purpose (at para. 95).

7 The Court went on to conclude that the alcohol testing was reasonably necessary to achieve the Company's purpose. Breathalyser testing can show impairment, and the Company "can legitimately take steps to detect and deter alcohol impairment among its employees in safety-sensitive jobs" (at para. 110). Therefore, the Court stated, random alcohol testing is a reasonable requirement for employees in safety-sensitive jobs, where supervision is limited or non-existent. However, the Court noted that the Company had a duty to accommodate the needs of those who test positive, up to the point of undue hardship (at para. 112).

8 The Court held that random drug testing was not reasonably necessary to accomplish the Company's goal of a workplace free of impairment, because drug testing by urinalysis did not measure present impairment. All that the test could show was past drug use (at para. 99).

9 Following the decision in *Entrop*, the Company continued random breathalyser testing of safety-sensitive employees for impairment by alcohol, but stopped random drug testing. However, based on expert advice that oral fluid testing by a buccal swab can show current impairment by cannabis, the Company decided to resume random drug testing of safety-sensitive employees and employees in specified positions effective July, 2003. "Safety-sensitive positions" are positions that both:

- Have a key and direct role in an operation where impaired performance could result in a catastrophic incident, affecting the health and safety of employees, the public or the environment, and
- Have no direct or very limited supervision available to provide frequent operational checks.

"Specified positions" are ones with significant ongoing responsibilities for decisions or actions likely to affect the safe operations, finances or reputation of the Company.

10 There is no dispute that the current drug test does disclose impairment by cannabis, although the result of the test is not available at the time it is administered. The test result is received a number of days after it is taken, following analysis by a laboratory in Mississauga.

11 The Union filed a policy grievance in October 2003, challenging a number of aspects of the Policy, including random alcohol and drug testing.

The Collective Agreement

12 The parties' collective agreement contains a management rights clause in Article 2.01, which provides that the Company "maintains the exclusive rights to manage and direct all aspects of the refinery operation and the work force", including the right to discipline, suspend or terminate employment for just cause and the right to make, enforce and alter work rules.

13 Article 3.02 provides that there will be no discrimination, intimidation or interference because of membership or non-membership in the union. It goes on to say that the parties "are committed to a work place environment that is free of harassment and where individuals are treated with respect and dignity". The parties have also agreed in Article 19.01 that "emphasis shall be placed upon the need for safe and healthy working conditions".

14 The collective agreement also contains the usual language providing that a board of arbitration has no power to alter or change any provisions of the agreement (Article 7.05).

The Preliminary Award

15 The Company contested the Union's entitlement to challenge the Policy and the Board's jurisdiction on a number of grounds, including the extensive delay by the Union in challenging random alcohol testing. In the words of the Board, "Counsel submits that by reason of laches and undue delay the Union should not now be allowed to litigate a long standing practice which it has essential [*sic*] accepted" (Application Record, p. 93).

16 In a Preliminary Award dated February 20, 2005, the Board unanimously accepted the Company's argument with respect to delay, stating:

> Firstly, we are satisfied that it would be inequitable, and indeed inconsistent with the parties' own interpretation of the collective agreement, to now entertain the grievance to the extent that it seeks to challenge the administration of random alcohol breathalyser tests in the work place. We consider it significant that the Company has followed that practice since 1992. The practice was in place when the Union negotiated its first collective agreement in 1996. Given that the Union filed no grievance against that aspect of the Company's policy from 1996 until 2003, a period of close to seven years, we are satisfied that the parties must be taken to have mutually accepted that random breathalyser testing was acceptable under the provisions of the collective agreement. By essentially acquiescing in the longstanding practice of the Company in this regard, the Union must be taken to have waived any objection which it might have to that practice. (Application Record, pp. 95-96)

17 Later in the award, the Board stated that the practice of random alcohol testing "has been effectively accepted by the Union and must be taken to be permissible under the terms of the collective agreement" (Application Record, p. 98). Therefore, the Board refused to entertain the grievance as it related to random alcohol testing.

The Majority Award

18 The award on the merits followed eight days of hearings and written submissions. The majority award deals with random drug testing, a consent form used by the Company, and post-incident drug testing. Given that this application for judicial review challenges only the decision respecting random drug testing, I will not refer to the Board's reasons dealing with the other issues.

19 The reasons of the majority cover 71 pages and describe in detail the evidence given at the hearing and the submissions of the Company and the Union. The Board's analysis begins at p. 44 of the reasons.

20 After setting out certain undisputed facts, the Board reviewed in depth the evolution of Canadian arbitral jurisprudence respecting the right of an employer, in a safety-sensitive industry, to require employees to undergo drug and alcohol tests. A number of the leading awards were written by the chair of this Board — for example, *Canadian Pacific Ltd. v. U.T.U.* (1987), 31 L.A.C. (3d) 179 (Can. Arb.) (M.G. Picher). This jurisprudence is summarized at para. 92 of the award as follows:

> In the nearly twenty years since the above decision in *Canadian Pacific Ltd.* the preponderance of Canadian arbitral jurisprudence has not varied from the conclusion that in a safety sensitive industry, where there is reasonable cause to do so, absent any contrary provision in a collective agreement, it is open to an employer to require that an employee undergo a drug test. From the outset it was recognized that to conduct a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause. The notion that under a collective bargaining regime based on bargaining between union and employer it is implicitly open to an employer to subject all employees, regardless of cause, to speculative, random drug testing has been all but universally rejected.

21 The Board stated that the jurisprudence "has come to be viewed as tantamount to a Canadian code for drug testing in a safety sensitive workplace governed by collective bargaining" and has been recognized as the "Canadian model" (at para. 99). The components of this model are then summarized at paragraph 100.

22 The Board noted that the Canadian arbitral jurisprudence has rejected the argument that random testing of safety-sensitive employees for drugs and alcohol is an implied right of management under the terms of a collective agreement. Nor can such a policy be justified on the basis of collective agreement language enshrining safety and safe practices (at para. 101). The Board stated (at para. 101),

> Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated.

23 The Board noted that the Union here had "effectively accepted" the legitimacy of random alcohol testing by breathalyser because of its failure to grieve over the years. However, the Board distinguished those circumstances from the current dispute over random drug testing by the analysis of oral fluids, introduced in May 2003 (at para. 102).

24 The Board made reference to the larger legal context, commenting on the absence of federal or provincial legislation permitting employee testing. This was contrasted to the situation in the United States (at para. 103). The Board also noted that the cases indicated that the Canadian model had gained broad acceptance within safety-sensitive industries in Canada (at para. 104).

25 The Board considered the decision in *Entrop*, *supra* and concluded that the decision was not determinative, because it dealt with the application of the Code. The Court of Appeal did not deal with the interpretation of a collective agreement, which was the issue before the Board (at paras. 106-111).

26 The Board also rejected the Company's argument that the drug testing was permissible under the Code because it shows actual impairment, and this should trump the arbitral jurisprudence (at paras. 116-123).

27 The Board entered into a more detailed analysis of the collective agreement and the evidence starting at paragraph 124. It noted that the test being used does not immediately show impairment because of the delay in obtaining results. Thus, the test's main purpose must be to detect violators of the Policy and to deter drug use.

28 The Board held that the compelled surrender of bodily substances, absent contractual or statutory consent or reasonable cause, violated Article 3.02 of the collective agreement, the requirement to treat employees with respect and dignity (at para. 126). Even absent that article, the testing was not authorized under the collective agreement for the following reason:

> In our view, given the wide acceptance of the established arbitral jurisprudence, at this point in time it would require clear and unequivocal contractual language to cause a board of arbitration to conclude that employees, through their union, have consented to random and speculative drug testing of their bodily fluids at the will of their employer. That is clearly not the case on the evidence before us. (at para. 126)

The Board then reviewed the evidence showing that there was no apparent problem of drug use in the plant or the local community that would justify the testing (at para. 127).

The Partial Dissent

29 The Company Nominee dissented in part, finding that random drug testing is permissible under the collective agreement for two reasons. First, random alcohol testing is not in dispute in the proceeding. Given the union's acquiescence to random alcohol testing, randomness is eliminated as a basis for challenge. In his view, there is no qualitative difference between an alcohol test by breathalyser and a drug test by taking an oral fluid sample. Oral fluid testing is reliable and minimally intrusive and shows impairment. It is a reasonable and appropriate means to reduce risk and promote workplace safety.

30 Second, the oral fluid test is permissible under the Code. Therefore, it cannot violate the "respect and dignity" clause in the collective agreement (Application Record, pp. 84-85).

The Issues

31 The Company submits that the Board committed reviewable error by amending or failing to apply the collective agreement, by making and relying on findings of fact when there was no evidence before it to support those findings, and by disregarding the Code in its interpretation of the collective agreement.

The Standard of Review

32 It is well established in Ontario that the standard of review applicable to a board of arbitration's interpretation of a collective agreement is patent unreasonableness (*Teamsters, Local 938 v. Lakeport Beverages* (2005), 77 O.R. (3d) 543 (Ont. C.A.) at para. 33). A decision will be patently unreasonable if it is "clearly irrational, that is to say evidently not in accordance with reason" (*Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) at pp. 963-4).

Analysis

Did the Board alter or amend the collective agreement?

33 The Company submits that the Board amended or failed to apply the collective agreement, contrary to Article 7.05. To do so was patently unreasonable (*Hamilton (City) v. C.U.P.E., Local 167* (1997), 33 O.R. (3d) 5 (Ont. C.A.) at para. 29).

34 In the Company's submission, the Board purported to apply the "Canadian model" to the collective agreement between the parties and in so doing, it altered the collective agreement and imposed its own scheme on the parties. According to the Board's award, the "Canadian model" prohibits random alcohol and drug testing except as part of an agreed rehabilitative program or where there is reasonable cause. However, in its Preliminary Award, the Board had recognized that the parties' collective agreement permits random alcohol testing. Therefore, the Board erred in not taking this acceptance of random testing into account when determining whether the collective agreement permitted random drug testing.

35 In my view, the Board did not alter or amend the collective agreement of the parties. There is no express language in the collective agreement permitting random alcohol or drug testing. Therefore, the task for the Board was to determine whether the Policy of random drug testing was a reasonable exercise of management rights under the collective agreement (*Metropolitan Toronto (Municipality) v. C.U.P.E.* (1990), 74 O.R. (2d) 239 (Ont. C.A.) at p. 258).

36 The Board did not err in its treatment of its Preliminary Award. The Board was clear in that award that it was not determining the merits of the grievance (Application Record, p. 8). Moreover, its determination in that award was that the Union had waived its right to object to random alcohol testing and had effectively accepted that such testing was permissible under the collective agreement. However, the Board found no such acquiescence with respect to random drug testing (Majority Award, para. 102). That finding is entitled to deference from this Court.

37 In its award on the merits, the Board considered the language of the collective agreement in light of the well-established arbitral jurisprudence in Canada — the "Canadian model". It applied the balancing of interests test from that

jurisprudence and weighed the Company's interest in providing a safe workplace through the deterrence from random drug testing against the employees' privacy interest. That was a perfectly reasonable approach to take in interpreting the scope of the management rights clause of this collective agreement and the language of Articles 3.02 and 19.02.

38 The Board also concluded that the drug test was not analogous to breathalyser testing, given that the buccal swab test does not provide an immediate reading of impairment (at para. 113). Moreover, the Board held that testing of employees by a buccal swab test is inconsistent with the arbitral jurisprudence, which holds that an employer can require such a test only if there is reasonable and probable cause to test. This conclusion was reinforced by the express requirement in Article 3.02 that individuals be treated with respect and dignity (para. 114).

39 The Board here is neither amending nor altering the parties' collective agreement. Rather, it is interpreting their agreement in light of the arbitral jurisprudence, the parties' own language and the evidence before it. Therefore, I would not give effect to this first ground of review.

Did the Board make and rely on unsupported findings of fact?

40 The Company also submitted that the Board improperly relied on evidence that was not before it in making its findings, and thereby committed reviewable error.

41 As examples, counsel pointed to passages where the Board referred to the experience in other safety-sensitive industries and employer responses to the Canadian model — in particular, paragraphs 104 and 122 of the award. For example, the Board made reference to the fact that reported jurisprudence was devoid of any serious incidents or accidents attributed to workplace drug use, and other employers in safety-sensitive industries have founded their alcohol and drug testing policies on reasonable cause and "have functioned well and have operated safely without apparent difficulty". The Company also took issue with paragraph 120, where the Board was discussing the intrusiveness of the buccal swab test. There, the Board stated that "the results available to the holder of a sample can be highly intrusive, to the extent that they can open the door to the entire DNA mapping of the individual concerned".

42 On first reading such passages in the award, it appears that the Board is referring to evidence that was not presented by the parties. However, a closer reading leads to the conclusion that the Board is not making findings of fact based on evidence that was not properly before it. Rather, the Board is drawing the material relied upon from the decided arbitration cases and from a decision of the Supreme Court of Canada discussing DNA testing (*R. v. C. (R.)*, [2005] 3 S.C.R. 99 (S.C.C.)) upon which the parties had made submissions, and is using it in reply to certain of the Company's submissions.

43 When one reads the award as a whole, the essence of the Board's analysis is found at paragraphs 124 through 128. That analysis turns on the evidence presented before the Board during the hearing, the established arbitral jurisprudence and the language of the parties' collective agreement. There is nothing unreasonable in the Board's approach, its analysis or its ultimate conclusion on this issue, as shown by the following excerpts from the reasons:

> [124] As reflected in the authorities reviewed above, any drug testing of an employee is a highly extraordinary measure which, even in a safety sensitive environment, can only be resorted to where justification is established. In the case at hand the justification cannot be characterized as the immediate prevention of impaired employees working in the refinery. As explained above, the manner in which the test is taken and analysed over a period of days is such that the impaired employee is not in fact detected as impaired at the moment of the test, as would be the case with a breathalyser test. The employer interest that is served, therefore, has more to do with detecting violators of the policy after the fact, in addition to overall deterrence, rather than with immediate safety.
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> [126] Nor are we persuaded by analogies made with respect to camera surveillance or the periodic search of the personal effects or lunch boxes of employees. With the greatest respect to the argument made by counsel for the Company, we view the surrender of bodily substances, whether by breath, urine, oral fluids or otherwise, as a

> far more serious matter. In this area, absent contractual or statutory consent or reasonable cause, an individual's expectation of privacy should be respected. Failing to accord such respect goes to the dignity of the person. In our view, that aspect of the Company's policy which subjects employees to mandatory random, unannounced drug testing, in circumstances which have nothing to do with reasonable cause, cannot be squared with the undertaking in article 3.02 "to treat employees with respect and dignity." Nor can it be justified, even absent the language of article 3.02 of the collective agreement, on a responsible application of the balancing of interests approach in a safety sensitive environment that has carefully evolved over the decades within the arbitral jurisprudence in Canada. In our view, given the wide acceptance of the established arbitral jurisprudence, at this point in time, it would require clear and unequivocal contractual language to cause a board of arbitration to conclude that employees, through their union, have consented to random and speculative drug testing of their bodily fluids at the will of their employer. That is clearly not the case on the evidence before us.

Did the Board err in disregarding the Code?

44 The Company also submits that the Board reached a patently unreasonable interpretation of the collective agreement when it determined that random drug testing violated Article 3.02, the provision that requires employees to be treated with respect and dignity. The current Policy on random drug testing, in the Company's submission, is consistent with the Court of Appeal's decision in *Entrop*, *supra* and therefore, in compliance with the Code. Given that the Code is a quasi-constitutional law, which aims to protect the dignity of individuals, the Board is said to have erred in finding the random drug testing violated Article 3.02.

45 The Board concluded that the random drug testing under the Policy invaded employees' privacy to such a degree that it violated their right to be treated with respect and dignity. In coming to this conclusion, the Board was required to interpret the language of Article 3.02 of the collective agreement. There is nothing in the language of that provision that ties it to the grounds of discrimination in the Code or the jurisprudence under the Code.

46 The Board explained why it found the testing to be an invasion of privacy and an infringement of the rights under the collective agreement. As a result of its interpretation, employees under the parties' collective agreement receive greater protection than they would have under the Code because of their unionized status. Such an interpretation is not inconsistent with the Code, which provides minimum standards for those covered by it. However, the Code does not provide an exhaustive guide as to the meaning of dignity and respect in the workplace generally.

47 In my view, the Board's interpretation of Article 3.02 of the collective agreement was reasonable. There was no error in the failure to refer to the Code in interpreting Article 3.02, as the Board's task was to interpret the language of the collective agreement, not apply the Code.

48 In any event, even if the Board erred in interpreting Article 3.02 (an argument that I do not accept), the Board clearly went on to conclude that random drug testing was not authorized under the collective agreement, regardless of the language in that article. For the reasons set out earlier, that conclusion was not patently unreasonable.

Conclusion

49 The application for judicial review is dismissed. As agreed by the parties, costs are payable to the Union in the amount of $7,500.00.