

USW Locals 7884 and 9346 v. Teck Coal Ltd. (Fording River and Elkview Operations) – Random Drug and Alcohol Testing Grievances – Decision of January 23, 2018

By Rob Campagne, Legal Counsel, USW

KEY POINTS

- Random drug and alcohol testing policy struck down at Fording River and Elkview with immediate effect (pursuant to agreements between Teck, USW Local 7284 and the IUOE, also struck down at Coal Mountain and Line Creek)
- Arbitration decision consistent with the Canadian arbitral consensus on drug and alcohol testing, which recognizes the importance of employee privacy rights and imposes a high bar on an employer to justify random testing
- Arbitrator held that in justifying random testing an employer must establish a workplace safety problem arising from employee drug and alcohol use that is sufficient to warrant the intrusion of random testing on employee privacy
- Arbitrator found that Teck's random testing policy constituted a very invasive intrusion on employee privacy, both in terms of the extraction of bodily fluids/breath and in the collection and use of highly sensitive personal and health information
- While the arbitration dealt with whether random testing was reasonable at Fording River and Elkview, the arbitrator accepted, as relevant, evidence respecting drug and alcohol use/problems at all 5 of Teck's Elk Valley coal mines, including evidence respecting non-bargaining employees and the employees of contractors
- Arbitrator accepted, as relevant, evidence of drug and alcohol use and drug and alcohol testing results arising after the implementation of random testing in December 2012
- Arbitrator rejected Teck's argument that the management of theoretical safety risk arising from employee drug and alcohol use justified random testing and required Teck to demonstrate real evidence of a real problem due to drug and alcohol use
- Having regard largely to drug and alcohol testing statistics and Teck's safety record, the arbitrator found that Teck had failed to demonstrate a workplace problem with drug and alcohol use sufficient to justify random testing
- Arbitrator found Teck's random testing policy included disciplinary elements
- Arbitrator found that the expert evidence did not establish the effectiveness of random testing in improving workplace safety; while there was some evidence random testing deterred Teck employee's use of drugs and alcohol, the evidence did not establish that the deterrence of drug and alcohol use in fact reduced accidents or injuries
- Arbitrator found that the safety benefits arising from random testing were limited and were not proportional to the significant harms to employee privacy
- Arbitrator found that, at the time of the implementation of random testing in December 2012, Teck's Fording River and Elkview operations were already safe operations with respect to employee drug and alcohol use

The following is a detailed summary of the decision.

The Test for Analyzing the Reasonableness of a Unilaterally Introduced Random Drug & Alcohol Testing Policy

Having reviewed the *KVP* principles, the Canadian arbitral and court jurisprudence on drug and alcohol testing, and some early US Supreme Court case law on drug testing, Arbitrator Kinzie adopted a three part test for analyzing the reasonableness of a unilaterally introduced random drug and alcohol testing policy.

First, does the evidence establish that employee privacy rights have been infringed by random testing and, if so, to what extent? Second, has the employer established evidence of a workplace safety problem with drug and alcohol use sufficient - on a balancing of safety and privacy interests - to justify the need for random testing and its associated intrusions on employee privacy? For the purposes of this assessment, Kinzie adopted the principle that the more serious the intrusion upon employee privacy, the heavier the burden on the employer to establish a safety-related need or problem arising from drug and alcohol use which justified the privacy intrusion.

Third, in the event the employer establishes a safety-related need or problem sufficient to warrant random testing, is random testing an appropriate and proportional response/solution to the safety-related need/problem? Assessing the effectiveness of random testing in meeting an employer's need to improve workplace safety is central to this proportionality analysis.

Kinzie held that this analytical approach proceeds in stages. Depending on the arbitrator's determinations at an earlier analytical stage, it may not be necessary for an arbitrator to proceed further with their analysis of the reasonableness of a unilaterally introduced random testing policy.

In adopting this three step test, Kinzie rejected USW's argument that the decision of the Supreme Court of Canada in *Irving Pulp & Paper* established a test or threshold (i.e. employers must establish a significant workplace problem with drugs and alcohol, as well demonstrate a causal connection between drug and alcohol use and workplace accidents) which bound arbitrators in their determinations of the reasonableness of random testing policies. Kinzie accepted Teck's arguments that the *Irving Pulp & Paper* decision at the Supreme Court simply determined that the *Irving* arbitrator's decision fell within a range of reasonable outcomes in light of the Canadian arbitral consensus on drug and alcohol testing.

Kinzie also rejected Teck's proposed analytical approach - which consisted of a one-step balancing and proportionality analysis, which invited arbitrators to "holistically" consider a number of factors in determining the reasonableness of random testing, including: the invasiveness of random testing, the consequences to employees of testing positive, the dangerousness of the workplace, the purposes/objectives of the employer's random testing program, the efficacy of random testing in meeting the employer's purposes, the extent of any workplace problem with drugs and alcohol, the impact of the random testing program on employees and the workplace, and whether alternative means of addressing safety concerns arising from drug and alcohol use were attempted.

Privacy and the Intrusiveness of Random Testing

Under Arbitrator Kinzie's adopted 3-part analytical framework, the first step is consideration of the degree of infringement on employee privacy wrought by Teck's random testing policy. Kinzie rejected Teck's arguments that employees working in safety sensitive workplaces such as its coal mines have an inherently diminished expectation of privacy and that the safety sensitive nature of workplaces itself justifies invasive intrusions upon employee privacy. Kinzie noted that the Supreme Court in *Irving Pulp & Paper* had expressly rejected the argument that the safety-sensitive nature and inherent dangerousness of a workplace alone justified random testing.

Kinzie rejected Teck's argument that the expectations of privacy of employees facing workplace random testing were analogous to the lower expectations of privacy of individuals involved in state administrative and regulatory matters. Citing the BC *Labour Relations Code*, collective agreement rights, the Canadian arbitral jurisprudence on privacy, BC's *Personal Information Protection Act* and the lack of statutory authorization in BC for random testing, Kinzie held that privacy rights and expectations of privacy of employees in the employment context were different than in the administrative/regulatory context and that employees were entitled to a reasonable (and not lower) expectation of privacy.

Kinzie rejected Teck's argument that employees did not have a reasonable expectation of privacy with respect to their use of illegal drugs, holding that the right to protection from unreasonable search and seizure was not dependent on the subject matter of the searches. Kinzie rejected Teck's argument that its stated purposes in implementing random testing - improving safety and assisting in the treatment of addicted employees - meant that random testing did not constitute an unreasonable search and seizure.

Relying on Supreme Court of Canada precedent and Canadian arbitral jurisprudence, Kinzie held that employee privacy rights were significant rights. Kinzie rejected Teck's argument that its random testing policy was minimally intrusive, finding that Teck's random testing policy intruded on employee privacy in a "very invasive manner."

In considering the extent of the intrusion on employee privacy under Teck's random testing policy, Kinzie found that that the policy mandated not only the extraction of bodily fluids and breath from employees, but also the collection and use, without effective consent, of information about employee's off-duty conduct, as well as highly sensitive personal health information. Relying on the Supreme Court of Canada decision in *R v. Cole*, Kinzie held that the information gleaned about employees by Teck's random testing policy went to the "biographical core" of employees' lives and elevated employees' reasonable expectations of privacy. Kinzie noted the absence of legislative or contractual provisions authorizing random testing, as well as his conclusion that the collection and use of employee personal information under Teck's random testing policy was *prima facie* contrary to BC's *Personal Information Protection Act*. Finally, with regard to the evidence of the USW's bargaining unit witnesses, Kinzie found that Teck's random testing policy, caused employees embarrassment and loss of privacy and dignity.

Evidence of a Safety-Related Need or Problem Sufficient to Justify Random Testing

Having found that Teck's random testing policy was very invasive of employee privacy, Kinzie went on to the second step of his adopted analytical framework to assess whether Teck had established sufficient cause in terms of safety-related needs or problems to override employees' significant privacy interests. Kinzie held that, as the intrusions on employee privacy were significant, Teck had an obligation to demonstrate commensurate safety concerns arising from employee drug and alcohol use in order to justify the imposition of random testing.

Evidentiary Issues

In assessing whether Teck had established a safety-related need or problem sufficient to justify random testing, Kinzie made a number of determinations about the relevance and admissibility of certain evidence, as well as the weight to be given to the relevant evidence.

Kinzie rejected USW's argument that evidence of a workplace drug and alcohol problem should be restricted to evidence arising from employees in the USW's bargaining unit at Fording River and Elkview. Kinzie agreed with Teck that evidence from employees at its other Elk Valley mines was not only relevant to the consideration of whether random testing was justified at Fording River and Elkview, but that it was entitled to considerable weight. In so finding, Kinzie relied on the fact that employees at Teck's 5 Elk Valley mines came from, and lived in, common communities, were hired through a centralized hiring process, and were managed under the same policies and procedures.

Kinzie questioned the relevance of evidence from Teck's employees at Cardinal River – given its location in a community outside the Elk Valley - and was not prepared to give such evidence much weight. As for the employees of Teck's contractors, Kinzie found that evidence related to them was also relevant evidence as these employees worked alongside bargaining unit employees under Teck's control and direction. But he held that evidence respecting employees of contractors would not be overly persuasive as those employees were primarily the responsibility of their own employers.

Kinzie also rejected USW's argument that an employer seeking to justify random testing must proffer evidence that drug and alcohol use caused or contributed to accidents or injuries at Fording River and Elkview. Kinzie found no such requirement in the law, and rather found that the presence or absence of such evidence would go the question of the weight to be given to the evidence. Evidence linking drug or alcohol use to workplace accidents or injuries would be given more weight, and be more persuasive, than evidence of drug and alcohol use without evidence of a causal link to accidents or injuries. Finally, Kinzie rejected USW's argument that Teck should not be allowed to rely on evidence of drug and alcohol use and drug and alcohol testing results which arose following the December 2012 implementation of random testing at Fording River and Elkview. Kinzie held that he was obliged to consider all the circumstances of the case up to the date the arbitration hearing was concluded.

Evidence of Safety Related Needs or Problems Arising from Employee Drug and Alcohol Use

Again, relying on the Supreme Court's decision in *Irving Pulp & Paper*, Kinzie held – contrary to Teck's arguments - that the safety sensitive nature of Teck's Fording River and Elkview operations was alone insufficient to establish a need or problem justifying random testing. Kinzie held that Teck had to demonstrate a workplace problem related to employee drug and alcohol use at its BC coal mining operations.

According to the evidence of its witnesses, Teck's justification for its implementation of random testing rested centrally on its stated need to manage safety risks related to employee drug and alcohol use across its coal mining operations. Teck's evidence was that its desire to implement random testing did not originate with specific problems with drugs and alcohol at its coal mines in the Elk Valley and in Alberta, but rather with its need to eliminate or reduce safety risks from employees' use of drugs and alcohol at its safety sensitive operations. Kinzie found that, in effect, Teck's risk management argument

could be distilled down to an argument that random testing was justified by the safety sensitive nature of its workplaces – all of which involve safety risks. Kinzie noted that this argument had already been rejected by the Supreme Court in *Irving Pulp & Paper* and was inconsistent with the arbitral jurisprudence.

Finding that Teck's concerns about risk were speculative, Kinzie held that Teck had to demonstrate "real evidence of a real problem" arising from employee drug and alcohol use. Distinguishing between a problem (that is, an actual state of affairs which is difficult to control or unruly) and a risk (that is, the chance of something happening), Kinzie rejected Teck's argument that the possibility of a problem emerging from employee use of drugs and alcohol was a sufficient justification for random testing. Kinzie held that the arbitral jurisprudence required a demonstrated problem with drug and alcohol use and not just a risk arising from such use. He held that where significant privacy rights were in play, managing risk was an insufficient justification for random testing and that a higher degree of safety concern had to be established in order to justify a significant intrusion on employee privacy.

Turning to the evidence tendered by Teck regarding safety-related needs/problems arising from employee use of drugs and alcohol in the 2008-2012 period, Kinzie found as follows:

- The genesis of Teck's random testing policy was not its concern about a specific workplace problem with drugs and alcohol at any of Teck's coal mines, but rather a need to manage safety risk arising from employee drug and alcohol use
- There was no evidence tying any particular accident or injury in any Elk Valley coal mine to an employee under the influence of drugs or alcohol
- Positive post-incident tests in the 5 year period (2008-2012) prior to the implementation of random testing in Teck's Elk Valley coal mines averaged 3% – a rate not much different from the rate across a broad spectrum of workplaces as determined by the expert evidence – and were not significant in demonstrating a workplace problem with drugs and alcohol
- In the period 2008-2012, Teck's Elk Valley mines were experiencing significant reductions in their rates of accidents involving medical treatment or lost time
- Positive post incident test rates and accident statistics between 2008-2012 did not demonstrate a workplace problem with drugs and alcohol, or safety in general
- At Fording River and Elkview positive post-incident test rates were relatively low, averaging 1 and 2 per year respectively between 2008-2012
- Teck Coal experienced declining premiums for WorkSafe BC coverage between 2008-2012 demonstrating improving safety
- While there was evidence (largely anecdotal) that Teck Coal employees in the Elk Valley took part in a "work hard, play hard culture," there was little evidence that this differed from other resource town communities; there was no hard evidence that between 2008-2012 this culture contributed to or was linked to an increase in accidents or injuries at Teck's Elk Valley coal mines, or that it was linked to a higher number of positive post-incident and reasonable cause tests; this evidence did not demonstrate evidence of a pervasive social problem with drugs and alcohol and was speculative as far as Teck's safety concerns
- Testimony from employees at Teck's Elk Valley coal mines that they had issues with drugs and alcohol did not rise to the level of a general problem amongst the workforce as a whole
- A systemic problem with drugs and alcohol did not exist at Fording River and Elkview in late 2012, prior to the implementation of random testing

Teck tendered evidence of positive random test results from the post-2012 implementation of random testing period in support of its arguments that it had need or cause to introduce random testing. In assessing the weight to be given to those statistics, Kinzie determined that the expert evidence did not establish that a .02 BAC test result was evidence that employees suffered from the acute and impairing effects of alcohol. With respect to positive drug tests arising from urinalysis, Kinzie determined, on the basis of expert evidence, that urinalysis did not test for the psychoactive components of drugs, only the inactive metabolites leftover after drug use, and that a positive test result was dispositive only of use, and not dispositive that an employee was suffering from the acute effects of drugs or was impaired at the time of the random test. Kinzie held that evidence of use of alcohol and drugs arising from random test results did not constitute evidence of a workplace problem with drugs and alcohol, especially when use was not shown to be causal or contributing factors in accidents and injuries.

Kinzie found that the rate of positive random tests was low, declining between 2013 and 2014 and rising again slightly in 2015. Finding that the rate of positive random tests was lower than the pre-implementation period rate of post-incident tests, Kinzie held that the differences in rates were not great and represented an incremental change/improvement and not a substantial drop. Kinzie held that higher post-incident test rates were to be expected because those tests took place in the context of an accident and not randomly. Kinzie found that positive random test rates were higher amongst the employees of contractors.

With respect to evidence that, following the implementation of random testing, a number of employees sought referrals to addiction specialists to address addictions, Kinzie found that this evidence dealt with only with a small number of employees and these small numbers were not indicative of a workplace problem with drugs and alcohol.

Kinzie held that the addiction diagnosis and treatment assistance offered to employees under Teck's random testing policies was not evidence of a safety-related need/problem which justified random testing. Kinzie rejected Teck's argument that it did not need to demonstrate reasonable cause for random testing because its stated purpose was not to punish individuals who test positive under random testing, but was rather to improve safety and assist addicted employees. While finding that Teck's random testing policy did in fact contain disciplinary elements, Kinzie held that the Teck's obligation to justify random testing arose not from whether or not the purpose of the policy was to discipline employees or to assist/treat them, but rather from the fact that the policy requires a suspicion-less search and seizure which impacted significantly on employee privacy rights.

Kinzie concluded that, in light of all the evidence, Teck had failed to make out a case of a general, demonstrated workplace problem with employees' use of drugs and alcohol so as to create a systemic safety concern at either Fording River or Elkview. He described the state of affairs facing Teck and its employees as "an improving situation on top of an already safe operation." He held that Teck did not have adequate cause or safety concerns in in December 2012, or thereafter, to justify the imposition of random testing and its significant intrusion on employee privacy and that, in the circumstances, a balancing of interests favoured privacy over safety.

Proportionality Analysis

Having found that Teck had failed to establish evidence of a workplace safety problem with drug and alcohol use sufficient to justify the need for random testing and its associated intrusions on employee privacy, Kinzie held that it was not strictly necessary for him to proceed to the third step in the

reasonableness analysis – that is, whether random testing was an appropriate and proportional response/solution to a safety-related need/problem. For completeness sake, he decided to analyze the proportionality issue anyways.

Kinzie addressed the issue of the effectiveness of random testing in addressing Teck's perceived need to improve safety as it related to employee drug and alcohol use. Kinzie found that the expert evidence on the effectiveness of random testing was divided and that more research was necessary before expert evidence could provide a clear answer on the issue.

Having regard to the experience at Teck's Elk Valley coal mines, Kinzie found that the design of Teck's policy logically suggested it would/should have a deterrent effect on employee drug and alcohol use, given that, with a low BAC cut-off of .02 and the use of urinalysis for drug testing, the likelihood of detection was substantial and that employees would be motivated to avoid detection and participation in post-positive testing protocols (such as addiction assessments, monitoring programs, etc.). Kinzie held that the decline in positive tests since the implementation of random testing in December 2012 supported the logical conclusion that Teck's random testing policy had a deterrent effect.

However, given Teck's other safety measures in effect, Kinzie held that it was difficult to assess the stand-alone effectiveness of random testing in deterring drug and alcohol use. Further, Kinzie held that Teck could not point to a specific drop in its accidents or injury rates linked to the introduction of random testing. Kinzie found that Teck's rates of accidents involving medical care were mixed since the introduction of random testing, and the rates of accidents related to lost time climbed after the introduction of random testing. While noting that it made logical sense that fewer employees coming to work with drugs and alcohol in their systems likely meant there would be fewer accidents or injuries, Kinzie concluded that the evidence did not establish that fewer accidents or injuries occurred because employee drug and alcohol use was deterred by Teck's random testing policy. Kinzie also concluded that he was not in a position – given the evidentiary record – to conclude that there was any less intrusive, but equally effective means of dealing with Teck's perceived safety concerns related to employee drug and alcohol use.

While noting that Teck was under no legal requirement to do so, Kinzie opined that, given USW's strong commitment to safety and its past support of Teck's safety initiatives, the situation facing Teck prior to the introduction of random testing would have benefitted from consultation with USW concerning Teck's perceived safety concerns and the best means to address those concerns.

Kinzie concluded that the safety benefits arising from the introduction of random testing were not proportional to the harm to employee privacy. While the introduction of random testing likely did have a deterrent effect on employee use of drugs and alcohol, the random testing policy was introduced on top of a record of low positive drug and alcohol tests, decreasing accident and injury rates, and declining WorkSafe BC insurance premiums. The evidence did not establish that the introduction of random testing made Teck's workplaces safer. While the number of positive random tests declined over time after the introduction of random testing, Kinzie found that those declines were modest and not substantial. Kinzie found that some accident and injury rates had increased since the introduction of random testing. Kinzie found that Teck's claim that random testing improved the health of its employees, and benefitted their families and communities, was speculative, other than for those employees who testified about the beneficial impact of Teck's random testing policy on them.

Kinzie concluded that the safety benefits arising from Teck's random testing policy were not proportional to the significant harm to employee privacy. Kinzie concluded that even if Teck had established a general workplace problem with drugs and alcohol, random testing in all of the circumstances was disproportional in terms of harm to employee privacy.

The Arbitrator's Conclusions and Orders

Kinzie concluded that even if he had been prepared to utilize Teck's proposed one-step holistic analytical framework for assessing the reasonableness of random testing, he would still have concluded that random testing was not justified in all the circumstances. The infringement on employee privacy was very intrusive. There was insufficient evidence of a general workplace problem with drugs and alcohol. While random testing likely acted as a deterrent to drug and alcohol use, Teck's safety concerns, including those arising from employee drug and alcohol use, were not of a degree requiring privacy-intruding deterrence measures. Kinzie concluded that when comparing the modest improvement to safety at Teck's Elk Valley mines to the significant infringement of employee privacy, the harms were sufficiently disproportionate to the benefits.

Kinzie rejected Teck's argument that it would be harmful and unreasonable to set aside random testing after employees had come to accept it and it was having beneficial effects on workplace health and safety, as well as on employees' families and communities. Having found that Teck's random testing policy had failed the reasonableness analysis arising out of *KVP*, it was unreasonable in Kinzie's view to shift the burden to USW to establish that it would not be harmful or unreasonable to eliminate random testing well after its implementation.

Concluding that Teck's coal mines in the Elk Valley were generally safe places to work and that neither Fording River nor Elkview had a workplace safety problem arising from employee drug and alcohol use which warranted the introduction of privacy-intruding random testing, Kinzie found that the introduction of random testing was an unreasonable exercise of management's rights and ordered that Teck's random testing policies as expressed in its drug and alcohol testing policies were null and void and must be set aside.

Finding that, in Canada, random testing was an exceptional remedy because of its significant impact on employee privacy and was reserved for compelling circumstances only, Kinzie found that compelling circumstances did not exist in this case because of the strong commitment of Teck to safety and the success of its safety efforts – supported in most cases by USW. Kinzie noted that in assessing the evidence of Teck's US-based expert witnesses, he was mindful of the fact that these experts were steeped in the US jurisprudence on random testing which (unlike in the Canadian jurisprudence) accepts risk management as a justification for random testing, even in the absence of proof of an actual workplace problem with drugs and alcohol.

With respect to USW's argument that Teck's drug testing policy was not clear and unequivocal and therefore failed the *KVP* test, Kinzie found that it was not strictly necessary for him to address this issue in light of his finding that Teck's random testing policies were unreasonable. But for reasons of completeness, he did analyze the issue. Kinzie found that there was a contradiction between, on the one hand, the language found in Teck's drug testing policy and its representations over time to employees about the purposes of its policies, and, on the other hand, Teck's practical application of drug testing based on established cut-offs and the testimony of its management witnesses at the arbitration hearing about the purposes of its policies. In the case of the former, Kinzie held that Teck's intent

appeared to be the elimination of all drug use by employees, while, in the case of the latter, Teck's intent appeared to be to restrict only risky drug use by employees. In light of this confusion, Kinzie held that Teck's employees may be unclear about Teck's expectations about their use of drugs. Given this, Kinzie held that Teck's drug testing policy was not clear and unequivocal and failed the *KVP* test. As the confusion around Teck's intent in its drug testing policy affected not only random testing, but also reasonable cause and post-incident testing, Kinzie ordered that Teck's entire drug testing policy be set aside and recommended that the policy be amended to make clear Teck's intent.

Significance of the Decision

3,000 unionized employees in British Columbia coal mines no longer have to endure Teck's random testing regime, meaning: employees are no longer subject to humiliating/embarrassing testing and restrictions on their liberty; employees are no longer subject, if they test positive, to being put off work on reduced pay and sent to an addictions assessment (where they have to answer questions about their drug use, family history, medical history, etc.); and employees no longer have to agree, in order to return to work, to a 2-year monitoring program which requires them to be tested monthly for drugs/alcohol and requires them to agree to abstain from all alcohol and drugs for that time period (whether or not they are found to have an addiction). Significantly, Teck no longer gets to collect, use and disclose highly personal information about employees' off-duty lives acquired by suspicion-less, without-cause drug and alcohol testing.

Arbitrator Kinzie's decision is consistent with the Canadian arbitral consensus on drug and alcohol testing, which recognizes the importance of employee privacy rights and imposes a high bar on an employer to justify random testing.

The decision reinforces the findings of arbitrators and courts in Canada that random testing is a significant intrusion on employee privacy. The decision holds the line in preventing employers from trenching on employees' significant privacy rights without cogent evidence of a demonstrated workplace problem with drugs and alcohol. Perhaps most importantly, the decision represents a significant jurisprudential blow to attempts by employers to justify random testing on the basis of risk management and speculation about the safety-related effects of employee drug and alcohol use.

The decision makes it clear that safety concerns at Teck's Fording River and Elkview operations with respect to employee drug and alcohol use were being well-managed prior to Teck's implementation of random testing. The decision – and USW's 5 year long protracted and expensive legal battle against Teck's random testing policy - underscores the strong commitment and contribution of USW to dealing with safety concerns around employee drug and alcohol use. The decision vindicates USW's rejection of Teck's claim that the safety gains achieved by the imposition of random testing at Fording River and Elkview outweighed the harms to employees' rights.

A couple of recent bad court decisions against unions who were challenging random drug and alcohol testing policies (*Suncor v. Unifor* in Alberta, and *TTC v. ATU* in Ontario) have been heralded in the media as indicative of the current ascendancy of random drug and alcohol testing. But those media reports typically misunderstand the law and the legal process. In neither the *Suncor* nor *TTC* cases have arbitrators made a final decision about the reasonableness of random drug and alcohol testing policies. It remains the case that in Canada labour arbitrators have never to date upheld random drug testing, and that arbitrators have not been prepared to uphold the reasonableness of random testing without evidence of a demonstrated workplace safety problem with employee drug and alcohol use. The

resolution of USW's grievances against Teck by Arbitrator Kinzie's decision is part of the bulwark that the trade union movement has built to protect unionized employees from unreasonable intrusions upon their privacy, dignity and off-duty conduct. Far from being ascendant, unjustified random testing policies are properly and successfully under attack.