MEMO

To: Saskatchewan Provincial Building & Construction Trades Council
Date: August 10, 2012
Re: **Intervening in the Supreme Court of Canada drug and alcohol testing case**

This winter the Supreme Court of Canada will hear a case about drug and alcohol testing in dangerous workplaces. The Council is considering whether to "intervene" in the case. This memo addresses three questions:

1. What does being an intervener at the Supreme Court of Canada mean?
2. What is the case about?
3. Why is the case important?

Being an Intervener

The Supreme Court of Canada ("SCC") is the highest court in the country. The SCC's decisions must be followed by all the courts, arbitrators and labour boards in every province.

The SCC hears appeals from provincial courts. The SCC chooses which cases to decide and only a small number are chosen each year. Cases are chosen for their importance. The SCC is concerned about setting the law out for everyone in Canada to follow.

Usually cases only involve the two parties to the dispute. However, at the SCC, where cases are chosen for their importance, the SCC can allow "interveners" to join the case. An intervener is a group that demonstrates two things to the court:

a) The group has an interest in the legal question the SCC will decide in that case;
b) The group's argument will be useful and different from any arguments made by the 2 people involved in the dispute or any other interveners.

Once the SCC allows an intervener to join the case, the intervener gives the court a 10 page argument about the law. The judges will consider that argument when deciding the case. Very rarely the intervener gets permission to speak at the in-person hearing of the case in Ottawa.

What the Case is About

The case is between CEP and Irving Pulp and Paper. The dispute started at a mill in New Brunswick. The workplace is very dangerous. Irving introduced a drug and alcohol policy. Part of the policy required random breathalyzer tests for a small percentage of employees whose names were arbitrarily picked by a computer. There were no grounds to suspect the workers tested were impaired at work

CEP grieved the policy and won at arbitration. The arbitrator said the random breathalyzer tests were unreasonable because the policy didn't fairly balance employees' privacy rights against safety concerns. Irving hadn't proven there was any alcohol problem at work and hadn't proven their policy prevented accidents.

Irving took the arbitrator's decision to the courts. The highest court in New Brunswick overruled the arbitrator and said the mill was an ultra-dangerous workplace and that was enough to justify random breathalyzer tests. The court thought the breathalyzer tests did not infringe workers' privacy very much.

The SCC will now decide who was right: the arbitrator or the court.

The Ontario Federation of Labour has applied to be an intervener in the case. The deadline for applying is Monday August 13, but the SCC does allow late applications if there's a legitimate reason for being late and adding the intervener won't delay the hearing.

Why the Case is Important

This case is the first time the highest court in Canada considers drug and alcohol testing at work. The court will discuss what employers must prove before a random alcohol test is reasonable. The court will talk about the "Canadian model" of testing that's followed across the country. Whatever the SCC says will affect the law in Saskatchewan and will be followed by Saskatchewan arbitrators, boards and courts.

A construction site is an "ultra-dangerous" workplace like a pulp mill. If the SCC decides that pulp employers can bring in random breathalyzers only because the mill's dangerous, owners and site managers in construction will be able to implement that testing in Saskatchewan. The SCC may also leave the door open for random drug testing, through urinalysis or swabs.