Canada's Nuclear Regulator

Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry

A report by Barbara Butler and Associates Inc. on the recent changes in arbitrational and legal jurisprudence of workplace policies and testing in Canada

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Preface

This report was commissioned by the Canadian Nuclear Safety Commission (CNSC) in order to gain more clarity on both the arbitrational and court rulings related to alcohol and drug policies in Canada. At the CNSC's request, Barb Butler and Associates Inc. produced this report with the purpose to provide CSNC staff and stakeholders with a review of the latest legal decisions surrounding alcohol and drug policies and testing in Canada, as well as provide information on industry best practices. Please note that the views expressed here do not necessarily reflect the opinions of the CNSC.

Alcohol and Drug Policies in Canada
Executive Summary

The Canadian Nuclear Safety Commission (CNSC) commissioned this report as it was examining issues surrounding fitness for duty in the nuclear industry. At the CNSC's request, the report addresses one specific aspect of fitness for duty: alcohol and drug policies. It provides context for reviewing policy approaches, starting with general background on alcohol and drug issues in the workplace, performance impacts and recent survey data on use patterns.

Companies in several industry sectors across the country have introduced employee drug and alcohol policies over the past 20 years. Trends in the transportation, oil and gas and mining sectors are provided, along with information on contractor requirements set by the owner sites. Also included is an overview of some of the legal issues that employers face, including occupational health and safety and Criminal Code requirements, as well as jurisprudence around accountability for the actions of anyone operating a company vehicle, social host liabilities and searches. These issues also include obligations under federal and provincial human rights laws, which prohibit discrimination on the basis of a disability — including current or former alcohol or drug dependence. The report also addresses direction from the Supreme Court regarding justification for introducing a policy (establishing that there is a *bona fide* occupational requirement).

Examples of why organizations may initiate policies are provided, and the process for policy development and consultation with stakeholders, including unions, are explained. Next, a review of suggested best practices in the policy statement is discussed, including: the importance of employee assistance programs, communication/education, training of supervisors regarding their responsibilities, and finally, establishment of a range of investigation tools to help meet the policy's overall objective. The strengths and limitations of the various policy components are reviewed, with the conclusion that each organization needs to identify the best mix of programs to meet its objectives. Some background on the concept of deterrence and how this plays a role in workplace policies is also reviewed.

Statistics have been provided on the results of existing testing programs in Canada and the U.S., along with background information on testing infrastructure. Some details on the technical process of alcohol and drug testing are provided. Additionally, strong recommendations are provided for any organization that considers testing. In order to ensure that a fair and accurate process is implemented it is strongly encouraged that workplaces which are considering substance testing, contract these services to qualified service providers. There have been several key rulings in this area, and summaries of human rights, arbitration and court rulings are provided, but should not be relied on as legal advice. At this point, there has been no government regulation or direction for employers when it comes to introducing workplace policies and testing requirements, so employers need to be guided by these rulings when considering policy decisions. Again, as a word of caution this report is a summary of the jurisprudence related to workplace drug and alcohol testing and should not be taken as legal advice.

Overall, any program introduced in the nuclear industry should be seen as a reasonable and responsible response to identified needs, which strikes an appropriate balance between health and safety (due diligence) and respect for individual rights and privacy. This means finding a balance between measures to control or deter use (clear standards, investigation tools and consequences/discipline) and prevention measures (education, training, and employee assistance).

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Recent Alcohol and Drug Workplace Policies in Canada – Considerations for the Nuclear Industry

1.0 Background

The impact of alcohol and other drug use in conjunction with work can be significant in terms of employee health, workplace and public safety, and operational productivity. Employers in higher-risk industries, including the motor carrier sector, oil and gas, utilities, construction and mining, are understandably concerned about the liabilities associated with not taking appropriate action to prevent incidents. At the same time, employers are encouraging employees to get assistance before their substance use patterns affect performance or may lead to an alcohol or drug dependency.

Many Canadian organizations in a wide variety of industry sectors have taken steps to deal with employees who may be unfit for work due to alcohol or other drug use. Many have provided assistance programs to help those with current or emerging alcohol or drug problems. Some have work rules around alcohol and drug use, while others may have some reference to "fitness for duty" requirements within a health and safety policy. However, employers have increasingly recognized that this may not be proactive enough to minimize safety risks and associated liabilities. They are therefore implementing comprehensive policies and supplementing their approach with alcohol and drug testing under certain circumstances.

When making decisions about their approach to addressing alcohol and drug issues, employers must consider various potential legal issues. These can include liabilities associated with negligence surrounding the actions of employees at work; in particular, those who operate vehicles or equipment where their actions can affect others in the workplace or the public. Due diligence, responsibility around workplace safety, actions in response to possession or trafficking of illicit drugs, and appropriate accommodation provisions for those with a chemical dependency are also key factors in these decisions.

Each company must decide what will work best for it; there is no model policy. Programs need to be tailored to meet the specific needs of the workplace and should be seen as a reasonable and responsible response to those stated needs. The result should be an appropriate balance between health and safety (due diligence) and respect for individual privacy. This means finding a balance between measures to control or deter use (standards, investigation tools and discipline) and prevention measures (education, training, and assistance) appropriate to the nature and size of the business.

1.1 Impacts of Alcohol and Other Drugs on Performance

Psychoactive drugs, including alcohol, act on the central nervous system, altering the way a person thinks, feels, and acts. Substances of concern in the workplace are those that prevent an employee from performing his or her job safely and productively. The use of some of these substances is socially and legally acceptable, while others are illegal. However, whether legal or illegal, their use can result in a variety of impacts on motor coordination, perceptual abilities, and physical and mental capacity, which can all be of concern in a workplace setting.

Individuals are affected by drugs in different ways and to varying degrees. The impacts of a drug are influenced by many variables, including age, weight, sex, state of health, level of fatigue, and experience and tolerance to the substance's effects [1]. Even at low levels, the use of alcohol and other drugs can impair performance. Potential impacts on job performance include decreases in accuracy, efficiency, productivity, worker safety and job satisfaction. At higher doses, these effects may be more significant. Withdrawal and hangover effects, as well as chronic use can lead to increased tolerance, and have also been shown to affect an individual's ability to perform. As more complex demands are made on individuals — both in their work and beyond — the behavioural impact of recent and chronic drug use becomes increasingly important. The concerns are even more significant when placed in the context of performing critical tasks in a high-risk work setting.

1.1.1 Alcohol Use

Alcohol use in conjunction with work can create safety problems and affect productivity. Individuals under the influence of alcohol will be unfit for duty and place co-workers and others at increased risk. Alcohol use can lead to increases in accidents, absenteeism and tardiness, and problems associated with unreliability and declining performance.

Quite often, supervisors and co-workers feel they need to see the obvious effects of alcohol consumption, (e.g., inappropriate behaviour or motor impairment), in order to determine if an individual is too drunk to drive or do his or her job. However, there may be other behavioural factors that are not visibly evident and can lower an individual's ability to operate safely. In fact, certain elements of alcohol-related impairment can go unnoticed even by experienced drinkers, leading to problems or circumstances they cannot predict or control.

Any ingestion of alcohol can result in a decline in the body's ability to perform to its full potential. The general performance impacts associated with each blood alcohol content (BAC) ranges are as follows:

- Below 0.015 % BAC: Performance of cognitive tasks can begin to decrease.
- Between0.015% and 0.04% BAC: Sensory and cognitive performance is reduced, and perception, visual field, tracking, information processing and performance of multiple tasks are affected
- Between 0.015% and 0.04% BAC: Sensory and cognitive performance is reduced, and perception, visual field, tracking, information processing and performance of multiple tasks are affected.
- Higher than 0.04% BAC: The probability of causing an accident is increased, all skills are almost universally seriously impaired and psychomotor skills (coordination, balance, visual acuity) are impaired for most individuals.

At 0.04% BAC, virtually all people experience decreased cognitive performance (decision-making/information processing, as opposed to motor skills). Because of the increased level of risk associated with driving or performing other functions, policies generally identify 0.04% BAC as the "cut-off" level for an alcohol test; at or above this level, individuals are considered to have violated the policy and are deemed unfit to operate safely. However, in high-risk workplace situations, many companies have standards to remove a worker from duty at BAC levels between 0.02% and 0.039%, due to potential safety risks.

These actions are reinforced through research published by the U.S. National Highway Traffic Safety Administration (NHTSA) [2], which examined the impacts of alcohol on driving skills at BAC levels from 0.00% to 0.10% for a wide range of subjects (varying ages, drinking practice and gender). The NHTSA concluded that:

- Alcohol impairs driving-related skills at 0.02% BAC, the lowest tested level.
- The magnitude of impairment increased consistently at BACs through 0.10%, the highest level tested.
- By 0.04% BAC, all statistically significant measures of impairment were in the direction of degraded performance
- Even greater impairment would be expected from drivers during alcohol consumption and absorption when BACs are rising.
- There were no significant impairment differences based on age, gender or drinking practices; differences in subjects were solely determined by BAC levels.

Research on the effects of low BAC levels on skills performance continues around the world. Further research by the authors of the above study have reconfirmed that certain skills essential for safe driving are affected at lowest BAC levels and that the average driver will not likely be aware of changes in his/her driving abilities, despite performance impairment [3].

1.1.2 Marijuana Use

Marijuana use contributes to decreased attention, impairs the user's ability to divide attention between two tasks, adversely affects short-term memory, hinders long term memory, reduces learning ability and increases the time needed to make decisions.

Psychomotor performance is impaired by marijuana use, as demonstrated repeatedly in simulated driving and flying experiments. Marijuana can impair or reduce short term memory, alter sense of time, and reduce the ability to do things that require concentration, swift reactions and coordination, such as driving or operating machinery. When marijuana is used in combination with alcohol, the risk of accidents is greatly increased.

As with alcohol, there are clear hangover effects experienced as a result of marijuana use. These are greatest immediately after smoking and decline slowly over a period of hours, although reports vary on the time period over which there is continued evidence of impairment. After studying marijuana use by pilots, one group of researchers confirmed that complex human performance involving machines may be impaired as long as 24 hours after smoking a moderate social dose of marijuana (low THC values), and that the user may be unaware of the drug's influence [4].

Researchers looking at marijuana and driving ability have concluded that marijuana is a real but secondary (to alcohol) safety risk, but "any situation where safety depends on alertness and capability of control of man-machine interactions precludes the use of marijuana" [5]. Finally, studies of alcohol and cannabis used in combination show a dose-related impairment on performance of specific tasks, and that the combined effect is additive [6].

The impacts of marijuana use will also depend on the amount used and the strength of the drug. At the time when most of the research on performance impacts was undertaken, the level of THC in the marijuana was around 3.5%. Marijuana producers have developed crops with significantly higher levels of THC, with some seizures at 20%. The average THC level for cannabis seized in 2008 was 11% [7]. There is no research available on the impacts of these higher THC levels on performance, or how long the direct effects and "hangover" effects would last.

1.1.3 Other Drugs

There is considerable research now available on the immediate and long-term impacts of other substances, including both illicit drugs and prescribed or over-the-counter medication, on performance. Examples of some of the conclusions with respect to impacts include the following:

- **Cocaine** effects depend on how the drug is taken, the dose and the individual, but can include restlessness, irritability, anxiety and sleeplessness in low doses, and paranoia or loss of touch with reality at higher doses, with potential for hallucination. The overestimation of one's abilities occurs even at low doses, dangerously increasing the potential for risk taking.

- **Opiates** can interfere with work performance due to mood changes, decreased activity, drowsiness and slowed motor function; the effects can alternate between alertness and drowsiness, and result in slowed reflexes and driving risk.

- **Hallucinogens** can affect sensation and perception and can make the operation of motor vehicles and other machinery dangerous; In particular, phencyclidine (PCP) alters how individuals see their own bodies and the things around them, leading to drowsiness, convulsions and coma.

- **Amphetamines** lead to increased alertness and physical activity (often used to counter the drowsiness caused by alcohol or sleeping pills), but can result in loss of coordination, dizziness, sleeplessness and anxiety, and even physical collapse; regular use can cause chronic sleep problems, anxiety and tension, depression, irritability and appetite suppression.

- **Other stimulants** can increase a subject's risk-taking and can impair judgment and decision making. Ecstasy leaves after-effects of drowsiness, fatigue, depression (1–2 days), concentration difficulties, anxiety and irritability; long-term cognitive impacts and effects on the central nervous system are under research.

- Although **over-the-counter and prescription drugs** are used primarily for their beneficial effects, the therapeutic action of the drug may occasionally create undesirable effects. Errors in dosage may magnify this, and drugs taken in combination may lead to further problems. These therapeutic effects or adverse reactions could interfere with job performance and create a safety hazard.

In its 2010 report [7], the International Narcotics Control Board states that Canada remains one of the world's primary source countries for illicitly manufactured synthetic drugs, particularly MDMA (ecstasy) and methamphetamine, and a significant supplier of high-potency cannabis. Cannabis remains the main illicit drug produced in Canada, the majority of which is cultivated indoors, allowing the potency to be higher. Cannabis that is illicitly produced in Canada supplies the domestic market, but a significant amount is also shipped to the United States, often in exchange for cocaine and other contraband, such as firearms and tobacco. Cocaine shipped through Mexico and the United States is sold in Canada or shipped overseas, as Canada is also used as a transit country. Methamphetamine and MDMA (ecstasy) illicitly manufactured in Canada account for a significant share of these drugs found in illicit markets in other countries.

1.2 Alcohol and Drug Use Patterns

Among the general population, overall substance use is at levels that lead to unacceptable impacts on health and safety, resulting in high social and financial costs to Canadians. More Canadians than Americans are classified as current drinkers. A comparison of general population surveys published in 2005 found the overall rates of illicit drug use were similar in Canada and the United States; just over 45% of adults in both countries had used illicit drugs in their lifetime (see Appendix 5). Levels of cocaine and stimulant use were slightly higher for Americans, while marijuana use was slightly lower. Trends presented in 2009 survey data suggest the same comparison can still be made; however, current American marijuana use has gone up slightly over time, whereas it has fallen slightly among Canadians.

The Canadian Addiction Survey, published in 2009, provides the most recent survey information on alcohol and drug use patterns for Canadian adults age 15 or older [8]. The following highlights are of interest:

- 76.5% of Canadian adults are current drinkers, down from 80% in 2004, primarily driven by a reduction in use by females and youth (aged 15–24).

- A significantly higher proportion of males than females (80% of males vs. 73% of females) reported alcohol use in the past year.

- A significantly higher percentage of males (7.9% of males vs. 2.6% of females) reported heavy frequent drinking, which is defined as drinking one or more times per week on average in a year, and usually five or more drinks on each occasion.

- 10.6% of Canadians aged 15 or older reported being current cannabis users (down slightly from 2008, but much lower than the 14.1% that was reported in 2004).

- Twice as many men as women are current users (14.4% vs. 7.2%).

- Reported use levels were fairly consistent across the country.

- 11% of respondents reported use of at least one of six drugs in the past year (cannabis, cocaine or crack, speed, ecstasy, hallucinogens or heroin); with the number of male users almost double that of female users (14.7% vs. 7.6%) and prevalence more than three times higher among youth (27.3%).

2.0 Trends in Program Development

A review of anecdotal data has demonstrated that a significant number of employers in all industry sectors (i.e., both regulated and non-regulated) are introducing alcohol and drug policies focused on fitness for work and on minimizing risk of accidents and injuries (see Appendix 6, Figure A6.1). Court and arbitration decisions have confirmed employers do not need "proof" of a problem before taking proactive steps in this area to ensure workplace and public safety (although it has been suggested that proof of a problem would be one factor in introducing random testing in a unionized setting, this issue is currently under review by the New Brunswick Court of Appeal).

Unlike the United States and some European countries, the Canadian government has not issued regulations requiring policies or testing programs, nor has it provided guidance on how to deal appropriately with workplace drug use. There are some resources available through the Canadian Centre on Substance Abuse and the Alberta Alcohol and Drug Abuse Commission, but there is otherwise limited guidance on appropriate policies and programs or Canadian standards or procedures for the testing process. Although federal and provincial governments have remained "neutral" on the issue, human rights commissions, civil liberties associations, privacy commissions, and many labour organizations have taken strong positions to support assessment, treatment and accommodation for individuals who may have an addiction.

There has been increasing guidance available through these organizations and through legal decisions on the need for assessment and appropriate accommodation for individuals who have a dependency; although a finite point of "undue hardship" remains unclear. Some of these organizations have also taken positions against workplace testing programs in general or testing under certain circumstances, and some are legally challenging their implementation. Much of the direction for Canadian policies and testing programs has been drawn from interpretation of various legal decisions.

With its close proximity to the United States, Canadian industry has been significantly influenced by the very strong American anti-drug stance and acceptance of testing as one solution to workplace drug problems. U.S. law requires Canadian commercial motor vehicle drivers and certain positions associated with the railroads that operate into the U.S. to be subject to testing programs as a condition of entry. U.S. companies are increasingly demanding Canadian workers on their sites to undergo testing as a condition of contract. Others are requiring Canadian subsidiaries to implement testing programs similar to those of the parent company, but these must still comply with Canadian law. One result of these U.S. requirements is that Canadian companies have implemented comprehensive policies to meet their business needs, including assessment and assistance provisions. A second result is that the testing procedures that have been adopted mirror those developed in the U.S., for the most part, and that Canadian laboratories are accredited directly by the U.S. Department of Health and Human Services for employee testing programs.

The most common circumstances for testing are to determine whether a specific individual employee is violating company policy on alcohol and drug use. This may be:

- Where there are reasonable grounds to believe the employee is unfit for duty due to alcohol or other drug use.
- As part of a full accident investigation.
- As a condition of continued employment after a policy violation.

Testing is also being increasingly used as a monitoring tool after an individual has undergone treatment for an alcohol or drug problem to support continued recovery. As well, many Canadian employers are requiring applicants to pass a drug test as a final condition of job offer for "certification" into a risk- or safety-sensitive position. Random testing is in place in regulated truck and bus companies, and it has been introduced in some non-regulated companies in the highest-risk sectors of their operations.

2.1 Transportation Sector

Appendix 2 contains a chart that outlines the initiatives that Transport Canada and the U.S. Department of Transport have taken to address alcohol and drug issues in transportation. A summary follows.

In the mid- to late-1980s the U.S. Department of Transportation issued regulations for its own industry that would also affect motor carrier, rail, marine, aviation and pipeline operations entering U.S. territory. The requirements were put on hold while the Canadian government agreed to examine its own direction in this area.

After extensive research and consultation, Transport Canada developed draft legislation requiring policies, assistance programs and testing for the federally regulated transportation sector (airports, aviation, extra-provincial truck and bus, rail and marine industries). The intent was to respond to the U.S. government's initiative by legislating an appropriate approach for Canadian industry and to seek a mutual recognition of each country's requirements even if they ultimately differed. However, in December 1995, the Government of Canada reversed direction and decided not to introduce legislation, leaving companies to their own devices to set policies and programs.

In July 1996, in the absence of Canadian legislation, the U.S. government made its regulations covering cross-border operations apply to motor carriers transporting people or products into the United States; smaller carriers had until July 1997 to comply. Requirements were then extended to rail operations, and application to other transportation sectors was put on hold.

Companies affected by the regulations were obliged to have comprehensive alcohol and drug policies and testing programs (including pre-employment and random testing) in place as a condition of operating into the United States. Most felt obliged for health and safety reasons to extend their policies to all employees and to implement appropriate policy standards for "Canada-only" drivers (who had identical duties as those crossing the border) as well as to other employees. However, the legality of requiring "Canada-only" drivers to be subject to a random testing program was unclear. Many companies at the time decided to exclude these drivers (those whose operations were restricted to Canada) from the random testing population.

A recent legal case (Autocar Connaisseur) [9], along with changes to the Federal Human Rights Commission's direction in this area, has caused some companies to reconsider maintaining this differentiation. The most recent policy of the Federal Human Rights Commission [10] allows for testing in all situations; in particular, it permits random alcohol and drug testing for truck and bus drivers, regardless of whether testing is regulated by the U.S. government. It also notes that a case could be made for random testing of other safety-sensitive positions, as long as a *bona fide* occupational requirement (BFOR) can be established. As a result, further work was done in

2010 to develop or expand company policies in the motor carrier sector, and an increase in testing activity occurred, including companies not regulated by the U.S. government (see Appendix 6, Figure A6.1).

Through this process, companies in other sectors (e.g., manufacturing, food and beverage, utilities, oil and gas, and retail) with a distribution arm were also affected by American testing regulations if they transported their product into the U.S.. Many put standards and procedures in place for all employees at the same time as they met their regulatory obligations. This resulted in a movement to introduce policies in other industry sectors — although initially triggered by the cross-border obligations.

Regardless of whether they are regulated, most company programs use the U.S. regulations as a base and meet the same technical standards for testing. All large Canadian truck and bus companies have testing policies, as do most railroads, airlines, and several airports and passenger ferry services. Most have issued alcohol and drug policies that include testing in situations of reasonable cause, post incident, return to duty and follow-up (post treatment/violation). Many companies in this sector require applicants to pass a drug test as a final condition of qualification for a safety-sensitive position, and some have introduced random testing for positions not subject to U.S. regulations (e.g., larger bus and truck companies, but not airlines).

2.2 Oil and Gas Sector

After the Exxon Valdez incident in the late 1980s, many companies in the oil and gas sector began to introduce comprehensive policies that are triggered under a number of circumstances.

The Exxon subsidiary in Canada (Imperial Oil) was the first to implement a Canada-wide policy and introduced random testing, but it was not widely embraced by the rest of the industry. Most companies in this sector had programs by the mid-1990s, and many have recently reviewed and updated these programs as the legal situation around testing continues to become clearer.

Policy development and testing programs are playing a major role in this sector across Canada, and in particular, in the east coast's offshore industry and in northern Alberta. Extensive expansion of the oil sands resource in northern Alberta has resulted in massive construction and extraction projects. With thousands of employees and contract workers moving into the area for short or longer periods of time, there is a target demographic for drug or heavy alcohol use (young males, high income earners, and shift workers in remote locations throughout the region).

These sites have been designated as high-risk sites, and the large oil and gas companies and major contractors are setting strong policies to address their safety risks. The employers are setting rules around use and possession, are requiring reasonable cause and post-incident testing, and have clear return to work conditions if a worker violates site policies. If allowed back on a project, workers will be expected to get help for any problems they may have and will normally be subject to unannounced testing. Pre-site access testing is also becoming a norm in northern Alberta, although not significantly found elsewhere in the country. The industry in northern Alberta is also looking at a pilot random testing program (see following text).

2.3 Mining Sector

There has been considerable activity in the mining sector to implement policies that include testing in certain situations. This sector is subject to regulations under most provincial occupational health and safety legislation, which requires employers to address alcohol and drug issues to varying degrees.

For example, in Saskatchewan, the *Mines Regulations*, 2003 [11] require the following under the title "Substance Impairment Prohibited":

(21) *An employer or contractor must take all reasonable steps to ensure that no person whose ability to work safely is impaired by alcohol, any drug or any other substance is allowed to work at a mine.*

The Ontario regulations take a similar approach. Section 15 of O. Reg. 854, made under the *Occupational Health and Safety Act* states the following:

(15) (1) *No person under the influence of, or carrying, intoxicating liquor, shall enter or knowingly be permitted to enter a mine or mining plant. R.R.O. 1990. Reg. 854, s. 15 (1).*

(2) *Subject to subsection (3), no person under the influence of, or carrying, a drug or narcotic substance shall enter or knowingly be permitted to enter a mine or mining plant. R.R.O. 1990, Reg. 854, s. 15 (2).*

(3) *A person required to use a prescription drug and able to perform his or her work may enter a mine or mining plant upon establishing medical proof thereof. R.R.O. 1990, Reg 854, s.15 (3).*

In light of these regulatory obligations and recognizing that many locations have residential facilities, companies have designated their operations as "dry sites" and many have implemented comprehensive alcohol and drug policies to reinforce their dry site rules and regulatory obligations. Most limit testing to job applicants, situations of reasonable cause and post-incident, return to work and follow-up (unannounced post treatment/post violation). Some sites (non-unionized) have introduced random testing when there were significant concerns about alcohol and drugs on site.

2.4 Other Sectors

Employers in other industry sectors are also concerned about health and safety. Relatively high levels of alcohol use, the ready availability and use of high potency illicit drugs, as well as the increasing use of performance-impacting medications (including their illegal use) are all of concern. To improve safety for employees and others and to minimize liabilities, Canadian employers in many other sectors are implementing alcohol and drug policies that establish: appropriate standards around possession and use; offer education, training and access to assistance; provide methods to investigate policy violations; and set out consequences for violation.

Alcohol and drug testing is one investigative tool that many are using for detection and deterrence. The most active areas are in higher-risk industries, including forestry, construction, manufacturing and warehousing, other transportation (not affected by the cross-border requirements), utilities and construction. Some municipalities, health care facilities and retail/warehousing operations are also beginning to address the issue.

2.5 Contract Workers

The courts have made it clear that occupational health and safety obligations extend to contractors. Although earlier policies also referenced application to contractors, many were unclear about specific obligations and enforcement was sporadic. During the mid- to late-1990s, many companies in various industry sectors that had their own comprehensive policies developed more specific expectations and required their contractors to introduce workplace policies as a condition of contract. In many cases, this included the ability to trigger alcohol and drug testing — primarily in post-incident and reasonable cause situations.

The rapid demand for contractor policies and testing programs in northern Alberta's oil and gas industries led to a joint industry–labour initiative. Specifically, the Construction Owners Association of Alberta, in conjunction with contractors and unions, created a model to guide contractors in setting their own policies in this area [12]. The model sets out core standards around fitness for work and alcohol and other drug use and possession, as

well as provisions for reasonable cause and post-incident testing, and is supported through education and training. Additionally, it provides an opportunity for members in contravention of the rules to get assistance for a problem and be reassigned to the site. Reference to site access and random testing is in the most recent version of the model. Further revisions in 2010 reflect the expanded U.S. government drug slate for testing and adjustments in cut-off levels, and allow for oral fluid testing.

For the most part, construction unions have not agreed with the introduction of mandatory random testing. In its current version, "lawful" random testing would be allowed provided that:

- Each employee is covered by an employee assistance program (EAP).
- The U.S. Department of Transportation (DOT) procedures are followed for random selection.
- Written notice is provided to all affected employees and their bargaining agent.
- All companies and employees at the work site are covered.

As more and more of the site owners have required site access testing before a contract worker can begin a job; sites in northern Alberta have been experiencing delays in getting people on the job. As a result, the Rapid Site Access Program was developed to cover members of the Construction Owners Association and the building trades used by contractor members [13]. It does not take the place of the model, but supplements it, and is a voluntary program through which a worker can pass a drug test and be put in a random "pool" through which he or she can be tested at any time. Owners that have accepted the program will waive the site access requirement, provided the worker's status remains "active".

Should someone refuse or fail a test, he or she would be sent for an assessment to determine if there is a dependency. The worker would be expected to comply with any recommended treatment and would be subject to a monitoring program for a specific period of time upon returning to active status. Many building trades unions have now agreed to participate in the program since the testing methodology was moved to oral fluid. However, the number of voluntary participants remains low.

A pilot program that would implement mandatory random testing on a more extensive basis is under development for these northern Alberta sites, with the support of the provincial government. Contractor organizations, trade unions and owners are all involved in the development of a Drug and Alcohol Risk Reduction Pilot Project. As of early 2011, the overall guideline has been developed, however there continues to be discussion regarding appropriate implementation.

These initiatives in the construction industry are being examined in other provinces, some of which have taken a similar direction (e.g., The Construction Labour Relations of British Columbia and the Saskatchewan Construction Opportunities Development Council).

2.6 Safety-Sensitive Work

The development of the concept of safety-sensitive work (SSW) has received considerable attention as programs have expanded in Canada. When the U.S. regulations affecting motor carriers were implemented, the requirements for policies and testing focused on truck and bus drivers. Although commercial drivers were not designated as "safety-sensitive positions" in the regulations, it was clear that drivers were performing safety-sensitive functions and would be removed from performing those functions for any rule violation. Many motor carriers put alcohol and drug policies in place for all employees, and designated the driving positions to be "safety sensitive".

Although all employees are expected to be fit for duty and comply with the policy standards, drivers are held to higher standards because of the greater risk they would present if they were under the influence of alcohol or other drugs while working. In particular, drivers must pass a drug test to qualify for cross border driving duties, are subject to random alcohol and drug testing, and may not consume alcohol within four hours before going on duty, and at any time when on duty.

Employers in other sectors have also introduced the concept of "safety-sensitive" positions (SSPs) in their policies for the same reason. They have examined the nature of the work performed in various job categories and determined that certain positions present greater risk, should someone be under the influence of alcohol or other drugs on the job. Therefore, anyone employed in a safety-sensitive position would justifiably be held to a higher standard with regard to alcohol and drug use as it affects the workplace. The Canadian Human Rights Commission recognized this concept in its 2009 Policy on Testing and allowed the testing of employees in a number of situations. However, they limited applicant and random testing to truck and bus drivers, and to any other position where a *bona fide* occupational requirement could be established to justify why the position is held to a higher standard. This concept was also addressed in the Ontario Court of Appeal ruling in Imperial Oil's case and by the Federal Human Rights Tribunal in Autocar Connaisseur [9], both of which are explained in Section 11.

The practice of identifying certain positions as safety sensitive has also been a key argument made in a number of arbitration rulings. In a comprehensive decision by Michel Picher in 2000 [14], he ruled that reasonable cause and post-incident testing should only be applied to individuals holding safety-sensitive positions. He also ruled that testing could be a condition of qualification for a safety-sensitive position. A series of arbitrators since then have made this same distinction. In 2010, this issue was still a matter of dispute at CN Rail, and arbitrator Picher provided the following direction [15]:

The term risk or safety-sensitive:

> *… is meant to refer to an employee whose normal duties and responsibilities, having regard to such factors as the location and environment of work performed, the tools, equipment, vehicles or premises utilized are such that any physical impairment of the employee would risk causing significant damage to property or injury to the employee, to fellow employees or to the public*.

There appears to be a trend in some sectors to examine whether an entire job site may legitimately be designated as safety-sensitive. This trend has developed due to the overall recognition of the dangers of the site itself. Therefore, certain organizations have required that anyone, regardless of position, working on these sites or having unescorted access through the facility should not be under the influence of alcohol or other drugs at any time when on the job. Holding them to higher standards (e.g., no use of alcohol or other drugs in conjunction with work, and testing under specific circumstances) would be justified for all individuals, as opposed to a designated few.

3.0 The Legal Context for Taking Action

Canadian companies are recognizing that a variety of potential legal issues may be best addressed through consistent implementation of clear and reasonable policy, and can include liabilities associated with the actions of impaired employees at work: due diligence responsibility around workplace safety; actions in response to possession or trafficking of illicit drugs; and the duty to accommodate those with a chemical dependency in accordance with human rights provisions.

The Court stated that this fuller legal framework must be considered when a company's requirements are being assessed. All of these issues come into play in the development and the implementation of a company policy.

3.1 Occupational Health and Safety Legislation/Criminal Code

Occupational Health and Safety Legislation and the Criminal Code place the onus on employers to ensure the health, safety and welfare of employees; employers must prove diligence in minimizing or eliminating all potential safety risks, including those associated with independent contractors. Organizations can be liable for any negligent or wrongful acts committed by an employee acting within the scope or course of employment, which could include negligence in allowing an alcohol- or drug-impaired employee on the worksite or on a public highway once declared unfit to work.

These can also include negligence when returning someone to a risk-sensitive job after treatment or after a policy violation where sufficient monitoring mechanisms are not in place and a substance-related incident results. The company policy should have provisions to address these responsibilities.

The courts have clarified that occupational health and safety responsibilities can extend to contracted workers and sub-contractors. As a result, increasingly companies are not only introducing policies for employees, but are also introducing requirements for contractors (generally by issuing a statement of expectations for contractors).

Bill C-45 [16] — which was tabled in 2003 and came into force on March 31, 2004 under the Criminal Code — reinforces these safety obligations by establishing rules for attributing criminal liability to organizations and their representatives, including corporations, for failure to ensure workplace safety. Under this bill, there is a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public. There is no change in the current law regarding personal liability of directors, officers and employees; the new Act deals with the criminal liability of organizations.

In essence, occupational health and safety criminal negligence is established where the organization or individual — in doing anything or in omitting to do anything that is its/his/her legal duty to do — shows wanton or reckless disregard for the lives or safety of others. There have been no cases at this point, but it is expected that this legislation will affect how organizations deal with substance abuse issues.

3.2 Driver Liability

Driver liability makes the owner of a vehicle accountable for any injuries or damages caused by a person driving the vehicle with the owner's consent. This is why the policy standards must apply when someone is operating a company vehicle (including on personal time) and/or operating a vehicle on behalf of the company. It is also why the policy should address reporting, and the consequences of receiving, an impaired driving charge in these situations.

3.3 Social Hosting Liabilities

Social hosting liabilities associated with the provision of alcohol to others or hosting alcohol-related events can include the provider of the alcohol, the occupier of the premises where the problem occurred, and the sponsor of the event. Responsibilities can extend to any injuries to the person who drank and to any third party he or she may injure. This is why companies should have clear rules around both social and business hosting where alcohol use may be involved. There should also be procedures in place to minimize the possibility that someone may leave in a state that could result in injury to themselves or a third party.

3.4 Federal and Provincial Human Rights Legislation

Human rights legislation prohibits discrimination on the basis of a disability. Current or former dependence on drugs or alcohol is considered a disability under federal law and has been interpreted in the same manner at the provincial level. Issues around reasonable accommodation and establishing a BFOR for treating someone differently need to be addressed.

Prevention initiatives that include access to assessment, assistance, treatment and follow-up services, as well as modifying hours or duties in certain circumstances would all contribute to meeting accommodation responsibilities.

3.5 Jurisprudence around Searches

Employers can perform searches of company property, including those that lead to the identification of a banned substance in the workplace, but they should conduct them with caution. There is no absolute right of an employer to search personal effects and the ability to do so will vary with each case. Generally, companies need to give adequate notice that they intend to conduct searches (through their policy statement) and outline the circumstances under which they will be conducted. Many companies are now establishing separate procedures for conducting searches for contraband, including alcohol and illicit drugs, on their premises.

3.6 Balancing Human Rights and Safety Obligations

One key decision looked specifically at this issue. In June 2002 the Court of Appeal for British Columbia issued a decision that examined an employer's obligation for accommodation under human rights legislation. The Court stated [17]:

> *The value of human rights legislation is great and the courts accord more than usual deference to decisions of human rights tribunals. Human rights legislation, however, fits within the entire legal framework within which enterprises must function. That framework includes other standards that also reflect deep values of the community such as those established by workers' compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the standards of the law of negligence, for example the standard that applies to Oak Bay Marina Ltd. for its clients. Even as full adherence must be given to the standards of human rights, a human rights tribunal must be mindful of the fuller legal framework regulating an enterprise when it assesses the occupational requirements asserted by that enterprise, and decide in a fashion harmonious with that framework in order not to force non-compliance with some legal obligations in exchange for compliance with the human rights legislation.*

This would suggest that when developing a policy regarding alcohol and drug use, that the program needs to be balanced in meeting obligations for both safety and human rights.

4.0 Establishing a Rationale for the Company Policy

There are many reasons why companies may initiate a process to develop a policy. Normally, the overriding objective is around health and safety in the workplace and that is consistent across industries. However, there are often very specific concerns or events that trigger employer action; for example:

- U.S. regulatory requirements (e.g., cross-border truck/bus) caused many motor carriers to introduce programs not just for cross-border drivers, but for other parts of their organizations.

- General Canadian regulations around reporting under the influence or possessing alcohol or other drugs suggest the need for more proactive policies and programs (e.g., provincial mining regulations, federal transportation regulations).

- A company's U.S. parent may have requirements to implement a program.

- A U.S. company moving into Canada may want to have a policy as part of its overall health and safety program.

- There may be general concerns about alcohol and drug use in the community.

- Companies may recognize that others in their industry or community have strong programs, leading to safety and liability concerns associated with having nothing in place.

- There has been an alcohol- or drug-related incident and the company realizes it needs procedures to investigate the situation and provide for consistent handling of referral for assistance and/or discipline.

- There are specific concerns of continued problems, despite having an EAP and general ban on alcohol and drug use, leading to the need for something more proactive, particularly in a risk- or safety-sensitive working environment.

- There is an increasing focus on occupational health and safety and criminal code obligations to be proactive with respect to all safety issues (expanded below).

- There is a need to formalize and communicate procedures around assistance, assessment, accommodation and discipline to comply with human rights laws and ensure fair and equitable treatment of employees.

Certainly, very public incidents where alcohol and drug involvement may have been a factor can cause a broader industry sector to look at their approach to the problem.

Once a decision is made to move forward, the next step is to establish a company-specific rationale for introducing a workplace policy that then justifies the policy decisions that are made. There are some valid reasons why many companies take this two-step process. The courts/arbitrators/ human rights tribunals have found that the **reasons** for establishing the policy (the thought patterns that go behind it) are just as important as the policy components themselves.

4.1 Supreme Court Direction

Based on two British Columbia decisions [18, 19], the Supreme Court of Canada confirmed that to establish a work standard as acceptable when it may be considered discriminatory by some individuals (e.g., no alcohol use during the day, or subjecting individuals to testing under certain circumstances), companies must meet the following tests:

1. The employer must show that the standard was adopted for a purpose rationally connected to performance of the job.

2. The employer must establish that the standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose.

3. The employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose; it must demonstrate it is impossible to accommodate individual employees without imposing undue hardship on the employer.

The focus in the first step is not the particular rule or standard, but its underlying purpose. If there is no relation between the purpose and the job in question, then the analysis ends there and the rule or standard is a violation of human rights legislation. In the case of workplace policies, this step is usually based on ensuring workplace safety by seeking to eliminate any negative impacts of alcohol or other drugs.

The second step looks at the particular standard to determine if the employer had a legitimate reason to believe it was necessary for the job. This is where the process of developing the policy is so important — to ensure the policy results from an assessment of the organization's specific requirements and responds to those requirements.

The third step looks at whether the particular standard or requirement is indeed reasonably necessary to do the job. Although an employer may genuinely believe its rule is reasonably necessary, a court may find it is not. To satisfy this stage of the test, it must be shown that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

It is argued that if an employer can satisfy all three stages of the inquiry, then the rule or standard in question would be considered a BFOR. These tests were used by the Ontario Court of Appeal to review the Imperial Oil policy in Entrop [20] and the Autocar Connaisseur decision [9] of the Federal Human Rights Tribunal, as well as in subsequent arbitration and human rights decisions.

4.2 Steps to Meet the Court's Direction

Most major employers recognize human rights law and acknowledge through their policy development process that they are establishing a BFOR for introducing their policy. As well, these organizations are introducing certain requirements (e.g., testing) or setting higher standards for safety-sensitive or other designated positions. Although smaller employers may not be as aware of this standard, they still move forward with programs focused on an overall safety objective.

Based on the considerable data available on the impact of alcohol and other drugs on performance and their overall assessment of operational risk should a worker be under the influence, most Canadian policies meet the first step with their focus on safety. The best approach to meet the second step would be to ensure the policy decisions result from an assessment of the organization's specific requirements and responds to those requirements. This would include:

- Identifying all current practices, policies and services, including provisions in occupational health and safety manuals, the collective agreement, employee benefit programs etc.
- Ensuring the policy builds from this base.
- Identifying gaps or missing pieces.
- Determining what can be improved and ensuring the policy addresses this (i.e., why was the process initiated in the first place?).
- Assessing the extent of risk in the operations, identifying any past problems or incidents.
- Looking at external factors including recent legal decisions, trends and practices of others in the industry, general information on use patterns, impacts and effective solutions.
- Identifying likely stakeholder expectations and how conflicting expectations will be handled.
- Setting out overall objectives for the program, which will be a foundation for the policy itself, and its communication and implementation.

The third step would involve ensuring the policy requirements are fair and reasonable and tie back to the overall (safety) objective. The overall result should be a balance between prevention and deterrence to ensure employees and other stakeholders see the program as both reasonable and responsible under the circumstances.

It is strongly recommended that the results of this preliminary assessment of need be documented and maintained by the program administrator in case of any legal hearing in the future.

5.0 Processes for Establishing Policy Decisions

5.1 Getting Started

Generally, in larger companies someone "champions" the initiative, which is most often triggered through safety, security, human resources, or the medical group. In smaller companies it may be the owner or safety officer, or the human resources advisor who initiates the process.

Larger companies usually have a policy development committee identified with representatives of key parts of the organization (e.g., stakeholders) involved. Their first step is to get a common understanding of the issues. They then develop a rationale for moving forward (as noted above), look at what others have done and get advice from policy or legal experts on their options. A draft policy is developed, reviewed by key stakeholders and management and finalized, and an implementation plan is put into place. Consultation is key at the draft stage both for ultimate acceptance, as well as to ensure that practical issues have been addressed. Someone must be designated as Program Administrator to lead the implementation and manage the program on an ongoing basis. Between the times the program is announced and becomes effective, steps should be taken to communicate with all employees, contract for required services, and train supervisors.

Although a similar process is followed in smaller companies, the assembly of a formal committee may not be required.

5.2 Stakeholder Consultation

Depending on the size of the organization, there may be many stakeholders interested in the direction the company is taking on the issue. Although it may not be possible to have them all represented on the development team, some of the stakeholders who may have input as a draft is produced include senior management, health and safety, HR, occupational health, and legal services.

In a unionized situation, most companies notify the union that a policy is being developed. In some situations, a union representative may be involved as a committee member, but this has been rare in recent years. Rather, a draft is developed, provided to the union(s) for review, the issues are discussed, and adjustments are made as appropriate before the document is finalized for implementation.

Alcohol and drug policies are not normally subject to collective bargaining in Canada. This question has been raised in arbitration hearings and the conclusion has been that consultation with the union before finalizing a policy is an important step, but that bargaining is not required unless there is a specific clause in the collective agreement setting out that requirement. Some of the key rulings follow.

In Arbitrator Michel Picher's comprehensive review of CN Rail's policy, the Canadian Auto Workers Union argued there must be statutory authority or consent (i.e., union agreement) to testing in order for it to be introduced. In the alternative, the company argued it should be reviewed from a balancing-of-interests perspective.

The Arbitrator supported the Company's position, noting there had been no award that has adopted the strict approach set out by the union [21]. In his decision, he concluded that the policy was not a subject for collective bargaining, but instead found the following:

> *In the result I am taken back to the contest between an employer's right to manage and an employee's right to individual privacy that is dealt with in the drug and alcohol testing awards that are cited herein. Simply put, absent express language in the collective agreement, both the employee's right to individual privacy (with all that that entails) and the employer's right to make rules for the purpose of furthering its business objectives (with all that that entails) are accepted as legitimate and valued, albeit sometimes competing rights. In circumstances where these rights are competing, such that employees may be disciplined for non-compliance, resolution is achieved by weighing or balancing the competing impacts. In respect of drug and alcohol testing of employees the balance has been struck in favour of protecting individual privacy rights, except where reasonable and probable grounds exist to suspect the drug and alcohol impairment or addiction of an employee in the workplace and except where there is no less intrusive means of confirming the suspicion. Conversely, the balance has been struck in favour of management's right (as part of its general right to manage) to require drug or alcohol testing, where the two aforementioned conditions exist. It follows that each case must be decided on its own facts.*

In Arbitrator Pam Picher's comprehensive review of DuPont Canada's policy, the Communication, Energy and Paperworkers Union argued that there was no contractual basis for introduction of the policy and testing component. The Arbitrator noted there had been an offer of participation and found the fact that the union was not consulted did not breach any provision of the collective agreement; the Company was entitled to make rules respecting operation of the business, including those to further safety. The rules were to simply abide by the standard of reasonableness as set out in KVP Co, Ltd. [22] and be consistent with any law of general application such as the Human Rights Code. She also found there did not need to be express authorization in the collective agreement for a policy that involves testing, and referenced other prior decisions [23].

In the comprehensive review of the Greater Toronto Airport Authority policy (GTAA), the Pubic Service Alliance of Canada argued the GTAA breached the collective agreement and the Canada Labour Code by failing to involve employees in the development of the policy or consult with the union prior to implementation. They said the GTAA was aware of the union's concerns and did not address them, and argued the policy should be null and void. The company countered there was no reference to this complaint in the grievance, and that they were compliant in any event.

Arbitrator Jane Devlin disagreed with the union's position and said there was no requirement in the management rights clause of the collective agreement to consult with the union prior to implementing the policy. Moreover, she found there had been consultation and an opportunity for the union to provide further comments. Following a meeting held to brief the union, the policy remained as a draft document for three months until the final amendments were made [24].

6.0 Best Practices in Policy Development and Implementation

Given all the company-specific issues an employer needs to address, it is clear that a "ready-made" policy provided through a third party would not be successful. If the steps to establish the need for a program are followed, each policy will reflect the unique corporate culture and values of the company, the fundamental aspects of the business it is in, the regulatory environment within which it must operate, and most importantly, the organization's specific program needs. However, there are a number of key areas that policies must cover, and several difficult decisions that need to be addressed.

6.1 Cornerstones

There are four cornerstones that underlie the various policy details:

1. Awareness and education programs, both at "roll-out" and ongoing.

2. Access to assistance, through a contracted employee assistance program, or as appropriate, community resources.

3. Training for supervisors on their role under the policy, including both performance management for early identification of potential problems, and the appropriate steps required to investigate a possible policy violation.

4. A variety of tools to investigate if someone may be in violation of the policy.

6.2 Policy Statement

The policy statement itself should:

- Be written down and broadly communicated to all employees.

- Provide clear direction on the objective and application (who is covered and under what circumstances, and supported by core definitions).

- Outline the applicable rules and responsibilities around alcohol or drug use and possession, fitness for work obligations, responsible use of medications and reporting requirements regarding modified work, and actions to take if a co-worker, contract worker or visitor may not be in compliance with the rules.

- Set out higher standards for risk- or safety-sensitive positions as required/appropriate.

- Clarify avenues to access assistance (often through contracted employee assistance services, or available community resources), reinforce the importance of obtaining assistance for a problem before it impacts the workplace, and outline conditions for return to duty, including aftercare provisions on a case-by-case basis.

- Establish the capability for a mandatory assessment of an alcohol or drug problem through a substance abuse professional (SAP) (see below).

- Reinforce performance management obligations of supervisors and support them through training.

- Set out the procedures that will be followed to investigate a possible policy violation, (e.g., investigation and escort procedures if someone is unfit for work, incident investigation, impaired driving situations, searches, alcohol and drug testing).

- Establish specific policies around the social use of alcohol, at company functions or in the course of doing work (e.g., hosting others).

- Set out consequences for a policy violation and any conditions for continued employment, including provisions for a substance abuse professional's assessment to determine whether the individual has a problem in need of accommodation.

- Determine what policy standards can reasonably be expected of contractors, and how this will be communicated, monitored and enforced.

6.3 Performance Management

This process is important regardless of whether an alcohol and drug policy is in place. However, in conjunction with the policy, supervisors should be reminded to monitor performance (objectively observe, document observations) and to hold a meeting with an employee who is exhibiting declining performance, in order to get agreement for corrective action. Supervisors should also be cautioned not to diagnose a potential alcohol or drug problem and then act on their assumptions; the focus should be on performance or behaviour on the job. A meeting focused on performance expectations may result in the individual seeking help for a personal problem, including a problem with alcohol or other drugs, which would affect his or her job. It may also lead to the employee specifically requesting help for an alcohol or drug problem, or suggesting that alcohol or drug use may be impacting his or her work.

6.4 Access to Assistance and Assessment Services

There are two separate components in company policies, with equal importance: The first is voluntary access to confidential assistance/counseling services for any personal problem, and the second is mandatory referral for assessment of a substance dependency. Generally, this is required when there is a specific request for help through the company or in a post-violation situation.

Assessment, counseling, and treatment services have been available through a variety of private and public agencies across the country, although availability — particularly treatment beds — varies with the funding support they are able to obtain. Employee assistance programs, provided either internally or externally contracted, have also been available for many years, and have usually been offered as an employee benefit in larger organizations. As more and more companies of all sizes have been putting policies in place in recent years, they have recognized the need to provide broad, confidential assistance programs, so the demand for EAP counseling services has increased.

Most EAPs provide access to services provided by a variety of professionals, including psychologists, social workers, and addiction specialists. Although these services are not limited to treating addictions, they can be one of the most effective ways to deal with alcohol and other drug problems in the workplace. An effective EAP provides confidential assistance with problems that interfere with an employee's ability to function on the job efficiently and safely through prevention, identification, assessment and referral, and follow-up services. It is normally accessed on a voluntary basis, although suggested referrals during the performance management process may also be triggered.

A more formalized approach to assessment services has emerged and has become part of many Canadian policies. When the U.S. government regulated Canadian cross-border motor carriers, the requirement for a SAP assessment after a rule violation was introduced. Any driver found to be in violation of the regulations must complete an assessment and a return-to-duty process or cannot continue operating into the United States [25]. Although there have been professionals working in the field of substance abuse for many years, the concept of a SAP was formalized through these regulations, confirming that SAP services are entirely separate and different from counselling services provided by an EAP.

Beyond the regulations that affect Canadian truck and bus drivers, the SAP role became even more specific in the context of Canadian workplace policies — in light of human rights rulings that direct employers to accommodate the problems of employees who test positive and are identified as having a dependency; refer to the Autocar Connaisseur [9] and Chiasson decisions, and the Federal and Alberta Human Rights Policies [26]. The SAP is the independent resource to determine whether there is a dependency in need of accommodation.

A SAP referral is normally triggered under a company alcohol and drug policy when an employee violates stated rules regarding alcohol or drug use (e.g., use on the job, a positive test result, etc.) and is subject to discipline. The SAP must have knowledge of and clinical experience in diagnosing and treating alcohol- and

drug-related disorders. Because of human rights obligations to accommodate an individual with a drug or alcohol dependency, the SAPs role is to:

- Assess whether the individual has a problem.
- Make recommendations regarding education and treatment.
- Confirm that the recommended program had been or was being followed.
- Recommend a return-to-duty monitoring program to support someone's continued recovery and return to work, which often includes unannounced testing, particularly in higher-risk situations.

A more recent trend is to not wait until a policy violation occurs to trigger a SAP referral. Because of the greater obligation to address potential safety risk, increasingly employers are making directed referrals for a SAP assessment in a performance management situation where the employee specifically says he or she may have a problem with alcohol or other drugs. In this case, and especially in situations where the individual's work is risk- or safety-sensitive, employers cannot ignore the situation. This is an opportunity to trigger an assessment and assistance for their problem. Failure to do so could present a safety risk to the individual and those they work with.

When it comes to best practices, employers should ensure they engage qualified and experienced SAPs, who are independent of a treatment facility and can provide an objective assessment of the situation. Normally the third-party administrator delivering the testing component of a policy can provide guidance on qualified SAPs in the community.

6.5 Investigative Tools

Once an organization has set out specific rules and expectations, it needs to activate investigative tools to help ensure those requirements are being met. Policies cannot be vague in this area. There are a variety of investigative tools to consider including in a policy beyond alcohol and drug testing, including:

- **Unfit for duty investigations**: Supervisors should also be trained to deal with situations where an employee, contract worker or visitor appears to be unfit in the workplace. This should include appropriate escort procedures, and would also include steps to investigate and take action on the findings. Actions could include transport to a hospital or clinic for medical attention, modified duties or removal from duty, or an alcohol and drug test depending on the situation and policy requirements.
- **Impaired driving**: If reporting and remaining fit for duty is a requirement, it should extend to any situation when an employee operates a vehicle in the course of work. Employees should be required to report receipt of an impaired driving charge or administrative licence sanction, and an investigation into the circumstances should be undertaken (recognizing the associated liabilities should an incident have occurred).
- **Searches**: If possession of certain substances is banned under the policy, the company or organization should reserve the right to investigate situations where there are grounds to believe someone is in violation of that rule, consistent with legal precedence on searches.
- **Alcohol and drug testing**: Employers cannot simply implement a testing program and assume it will be found acceptable by employees or by the courts. Any testing that is introduced should be within the context of the company's overall approach to health and safety, and its specific requirements with respect to alcohol and drug issues.

6.6 Alcohol and Drug Testing as One Policy Component

Many employers across Canada are considering whether they should introduce alcohol and drug testing requirements for their employees and contract workers. They are faced with increasing responsibilities for the actions of their employees and those they contract with. Additionally, employers are becoming more aware of current alcohol and drug use patterns, and have been faced with the possibility of decriminalization of marijuana. Therefore, organizations are looking at testing as a way to deter use and to identify those who may be placing their co-workers and others at risk. As a result, in recent years a number of employers, particularly those in higher-risk industries, have included testing in certain circumstances as part of their company policies.

In order to take this step, companies need to make a careful assessment of whether alcohol and drug testing should be included in the overall policy; in other words, they should be able to explain how it contributes to the company's overall safety objectives. The introduction of testing in any workplace is a controversial decision that should be made with full understanding of the role it can play and consideration of whether it is justified for certain employee groups. Decisions are needed on who is subject to testing, under what circumstances, for what substances, using what technology, and the consequence of failing a test or refusing to be tested.

Circumstances for testing can include the following. The strengths and limitations of each situation are addressed later in this report.

- A final condition of qualification for a position, for job applicants (normally for safety-sensitive positions).
- Pre-assignment/certification (e.g., to a risk- or safety-sensitive position).
- Prior to assignment to a specific task or job site (e.g., site access testing, primarily focused on contract workers).
- After a significant accident or incident as part of a full investigation.
- With reasonable cause (i.e., to believe someone is unfit due to alcohol or drug use) as part of an investigation.
- On a purely random basis at a specified rate per year.
- As a condition of return to duty after treatment or a policy violation.
- As a condition of continued employment after a policy violation (e.g., last chance agreement).
- As part of a monitoring agreement after treatment.

Some companies have concluded that testing will not play a role in the implementation of their policy. Others have concluded that testing should be triggered for all employees under certain circumstances, or for certain groups of employees (e.g., high risk) under other circumstances. Each policy must be absolutely clear on when testing applies and the procedures that will be used. The company should also have documented justification for why testing was introduced. Alcohol and drug testing has become a core component of company policies in transportation, mining, oil and gas and utilities industries, and it is increasingly being introduced in other industries.

6.7 Implementation

Once policy decisions have been made, planning for their implementation needs to take place. A number of tasks need to be addressed **before** the policy is announced and its implementation starts. These include:

- Designating someone to be in charge of the implementation program.
- Identifying a specific program administrator if there is a testing component.
- Identifying all positions within the safety- or risk-sensitive job categories, as required.
- Notifying contractors of policy expectations.
- Making any changes in the benefits or insurance coverage that may result from the policy decisions.
- Contracting for external services where required (e.g., testing, Employee Assistance Program, training, SAPs).
- Advising the existing Employee Assistance Program of the new policy and any implications for their services.
- Consulting legal counsel.
- Finalizing the communications and training strategy.

When contracting for external services, companies/organizations should be extremely clear in assessing and identifying their program needs and those qualified to deliver what they need. They should not procure products or a long-term service delivery contracts that do not meet their specific requirements or provide the necessary level of quality in the most cost-effective manner. This is a particular priority when contracting for supervisor training, EAP and SAP services, and for any testing component of the program.

6.8 Communications and Training

A policy is of little value if it is not effectively communicated. In fact, with a subject matter as controversial as an alcohol and drug policy, how the policy is communicated is probably just as important as the message being conveyed. It is crucial that communication is clear and consistent throughout the organization and that the policy is seen to have the support of top management.

Companies should develop a communication strategy that informs everyone who needs to know about the policy and procedures. The strategy should identify the most controversial components, where opposition to them may lie, and make sure the communicators are prepared to respond to issues likely to be raised. Communication about alcohol and drug issues should not end with policy rollout. Information about the drug and alcohol policy should be easily accessible to employees on an ongoing basis and communicated as appropriate at safety meetings and through other venues.

All employees responsible for directing the work of others have a legal obligation to ensure it is done safely (Bill C-45 Criminal Code amendment). Supervisors should be provided with training and supporting written (hard copy or electronic) procedures to help them meet their obligations. This includes:

- Performance management (as noted previously, in Section 6.3).
- Investigating unfit for work situations.
- Investigating incident situations.
- Making decisions on alcohol and drug testing that may result from the investigation.

- Following appropriate procedures if they believe that banned substances are on company premises.

Although union members performing the role of foreman or lead hand would not normally be involved in performance management or testing decisions, they still have a legal obligation to identify safety concerns and appropriately notify an out-of-scope supervisor or manager so that the situation can be investigated. Therefore, they also need training to support their actions and obligations.

6.9 Contract Workers

Employers have a legal obligation to ensure those they contract are operating safely when on their premises or doing their work. In the case of alcohol and drug issues, normally the contractor is provided with a separate statement of expectations that must be communicated to all representatives. As already noted, company policies provide direction on assistance and accommodation provisions. They also set out discipline and return-to-work conditions after a violation. Contract workers are not employees of the company, and therefore it is essential to keep that employment relationship separate. Assistance, accommodation and discipline are between the worker and his/her employer, and these lines should be distinctly maintained.

The statement of contractor requirements would set out overall objectives, set parallel rules regarding alcohol and drug use and possession, confirm investigation procedures, including testing should it be required, and the consequences for violating the employer's policy. Although some employers invoke a permanent ban for workers that violate the statement of contractor requirements, most employers have set conditions that must be met before that worker can be reassigned to any site under the employer's jurisdiction.

7.0 Strengths and Limitations of Policy Components & Cornerstones

No one element on its own will necessarily be effective in meeting overall health and safety objectives. As well, no single element is necessarily an alternative to testing; each plays a separate and distinct role in a policy. Companies must decide to what degree and in which way each component has a place in their company policy. This decision should be based on their assessment of risk and the role that each component can be expected to play in meeting health and safety objectives.

A company needs to consider how best to bring each of these elements together when looking at ways to ensure that individual employees change inappropriate habits or behaviours, or that they seek out assistance before a problem may affect workplace performance and safety.

7.1 Employee Education

Education and awareness programs are an important part of any prevention effort. Typically, programs vary in scope and intensity; however, the overall objective of any program should be to create an informed workplace where employees can take advantage of available assistance in a confidential manner. Another objective would be that workers are prepared to exert a powerful peer influence on troubled employees to get the help they need. A sense of responsibility should be fostered in each employee to deal with and solve a substance abuse problem before it affects performance, their safety and the safety of others.

Generally, when first introducing a company policy, communications will focus primarily on alcohol and drug issues, providing specific information about chemical dependency and the dangers and consequences of use, misuse or abuse. As well, information on the corporate policy in this area and the services available within the company and the community for counseling and treatment should be readily available.

Limitations of Employee Education

Education programs alone and employee assistance programs that depend solely on voluntary self-referrals resulting from employee education may not be entirely effective in resolving workplace substance abuse problems, nor may they guarantee that health and safety objectives will be met.

For some alcohol or drug users, it will not matter how comprehensive the education program is; some people that choose to drink or use drugs will continue to do so until there is a strong reason to stop. That reason may turn out to be personal involvement in a serious accident. It may also be financial, family, or social impacts resulting from their alcohol or drug use. And for some people, it may need to be the threat of loss of job.

If the consequences of a policy violation are unclear or not firm enough, there may be no incentive to change behaviour, and their continued inappropriate use of the substance may place themselves or others at risk. Finally, those with a current or emerging dependency have a further obstacle to changing behaviour: denial of a problem.

Denial is a principal characteristic of substance abuse. The individual is convinced his or her substance use pattern is normal and that other problems (social, family, work) are not related to the dependency. Denial results in greater difficulty to change behaviour at an early stage, as it prevents individuals from acknowledging the existence of a problem on their own and accepting objective observations from others. Without acknowledgment on the individual's part, diagnosis is difficult, treatment does not occur, and the potential for eventual success in recovery is reduced.

Although education is an important part of a workplace prevention program, there are some limitations to relying solely on education and awareness around alcohol and drug issues to address all associated health and safety concerns.

7.2 Peer Prevention

In peer prevention programs, the employees themselves provide assistance and support for co-workers who have personal problems that may affect their effectiveness or efficiency at work.

The process recognizes that co-workers are frequent companions, and may be in a better position to identify impairment or behaviours that may lead to a problem at an earlier stage. Trained peers may be able to intervene prior to either chemical tests or supervisor identification in the context of performance management duties. Effective programs tend to be those where incentive plays a role in motivating substance-dependent employees to address their problem. An incentive often used is the threat of job loss or the necessary employment accreditation, particularly in highly safety-sensitive industries where individuals must maintain their certification to keep their jobs.

Just as no two company alcohol and drug policies are identical, peer prevention programs vary widely as they respond to specific corporate needs and culture, employee interest and creativity. In general, they have either one or both of the following characteristics for the identification of distressed individuals:

- A network of trained advisers who, when approached by an individual with a problem, know where and how to refer them to professional assistance.

- A more proactive identification system of individuals or teams with an intervention role that brings the distressed worker's problem out into the open and offers assistance.

Both components are based on awareness and education programs used to heighten understanding of dependency and other problems, and they utilize frequent, informal, constructive discussions aimed to encourage an employee to deal with his or her problem.

Limitations of Peer Prevention

Dependence on employee involvement and commitment can not happen overnight; it evolves with a growing level of trust between management and employees, and with interest generated at the "grass roots" level. Unfortunately, participation is often limited as employees assume it means "snitching on their brother", advocating prohibition or operating as vigilantes.

In addition, it is very difficult to turn around a cultural norm (e.g., drinking buddies or covering up); there often needs to be a strong consequence tied to **not** taking action to overcome these norms — the intervention of peers may not be sufficient.

Enabling is also a factor in the effectiveness of peer intervention programs. Enabling is the term for the often well-meant efforts to help someone with an alcohol or drug problem, but which actually assists them to continue their destructive behavior by allowing them to avoid the consequences of their actions. This creates an environment in which the substance-dependent person can comfortably continue their harmful behavior with no need or pressure to change, which serves to perpetuate the problem. Overcoming the tendency of co-workers or supervisors to enable is a fundamental problem to the effectiveness of peer prevention.

Peer prevention has the potential to change cultural norms at the grass roots level, but can not be simply "implemented" in the same way a company can contract for employee assistance or other services. It takes many years to build an effective program that can overcome trust issues and enabling tendencies. Although peer intervention can be an important component of a comprehensive workplace program, depending solely on peers to act cannot take the place of other components operating in combination.

7.3 Supervisor Training

Supervisors have always had responsibility for performance management and ensuring the company's health and safety standards are met. Their role in contributing to the success of any company alcohol and drug policy is an extension of this performance management responsibility. Through early intervention, trained supervisors can confront an employee with evidence of declining or unsatisfactory work behaviour and performance, and encourage them to get assistance; they can also address the immediate problem of an impaired individual on the job.

Increasingly supervisors are also expected to monitor performance and assess an individual's immediate ability to perform their job. While possible impairment by alcohol and other drugs is an issue in all job situations, it is of particular concern where there is a risk that the substance can affect job skills that affect safety. Therefore, training programs need to:

- Supplement performance management skill development and appropriate confrontation techniques.
- Provide guidance on identification of and dealing with "unfit for duty" situations.
- Set out procedures for determining whether there are grounds for a reasonable cause or post-incident test.
- The supervisor is not expected to identify the substance involved, or determine whether the employee has an alcohol or drug problem; they are simply taking appropriate steps under the company policy to ensure safe operations, and investigate a possible policy violation.

Limitations:

There are a number of reasons supervisors may not take action. The same issues associated with peer "enabling" can affect the degree to which a supervisor will intervene to address workplace problems. Even when supervisors have good intentions to take action, it is very difficult to identify an individual who may be unfit on the job. There are many barriers that leave supervisors reluctant to engage in the identification and referral process. These can include:

- Basic inability to identify potential impairment due to alcohol or other drugs — this is not their primary job or area of expertise, and even the experts contend they are not always successful (in many cases, alcohol and drug users learn to compensate such that there are limited outward signs that they are impaired).
- Ignorance of the company's assistance programs or their effectiveness.
- Attempts by supervisors to solve workers' problems themselves.
- The perception that referring employees might reflect poorly on the referring supervisor.
- Fear of harming the employee and his/her family.
- Attitudes about the supervisor's role.
- Belief they are acting as informants.
- Fear of confrontation, becoming involved in personal lives, the paperwork involved, and the possibility of having to testify in grievance procedures.
- Concern that referral resulting in a drug test could be challenged immediately by the employee or later by the union.
- Belief that it is not their responsibility to confront an impaired employee.

The National Research Council's comprehensive study on drugs and the American workforce concluded that the use of behavioural indicators to indirectly identify users of alcohol and other drugs is a growing field. However, it has serious limitations associated with both enabling and the inability to identify performance decrements at the early stages [27].

Impaired individuals who are experienced in using alcohol or drugs may be able to "cover up" or compensate for signs of impairment and thereby avoid detection. Because of the difficulties of identifying employees under the influence of alcohol, supervisors may use the criterion of "overwhelming" evidence before they tackle the problem. In addition, it is far more likely that a supervisor will have experience in witnessing someone under the influence of alcohol (from social settings, for example) than of other drugs, making identification of an unfit employee even more difficult. Often, it is only when the circumstance is repeated many times or the situation is sufficiently blatant that the supervisor may act. This may be when the employee is significantly down the path of addiction or seriously unfit on the job.

As we understand more about the impairing effects of alcohol at lower BAC levels, it is apparent that it is very difficult to identify the outward signs of impairment — the person may not be staggering or showing outward signs of the alcohol effects, but yet still have some functional problems. In fact, studies have confirmed the inability of trained police officers to accurately identify alcohol presence, even under optimal conditions [28]. Despite all of the other mentioned barriers, it may simply not be possible for a supervisor to detect impairment

at lower levels. Yet that worker's ability to process information quickly and accurately when it is coming from various sources, or the ability to recall specific steps required to perform a specific task can all be affected. As well, their ability to judge appropriate response to an emergency, or determine whether it is actually an emergency situation will also be affected.

An even greater limitation to supervisor intervention is found in workplaces where there is limited or no supervision or where the front line supervisors are members of the union and may be less inclined to take action when a situation may justify investigation.

The inability to identify someone who may be unfit on the job, or the concern about reporting a fellow employee would suggest relying solely on supervisor actions, may not meet safety standards, particularly in a high-risk work environment. While supervisors play an important role in the implementation of a company policy, there is no training program that can guarantee a supervisor can always overcome enabling tendencies, or deal with situations that lack supervision because of the fundamental nature of the job. Despite these limitations, providing education, training and support to front line supervisors is an important part of any policy implementation.

7.4 Employee Assistance Programs

The opportunity to access assistance is an important component of an effective policy whether through a formal EAP, community resources or other counselling services; employees who are motivated to get assistance need to know how and where, and what services the company supports through the benefit plan. These programs:

- Are available to provide assistance to employees who may have personal problems affecting their workplace performance.
- Are voluntary.
- Are not limited to alcohol or drug problems, but extend to any problem that an employee may face (e.g., mental/emotional, family, health, or other personal problems).
- Can provide supervisors, managers, and union shop stewards with access to professional consultation in dealing with employees whose performance is affected by a range of personal problems, as well as an opportunity for employee self referral.
- Include clinical assessment of employee problems, referral to appropriate community resources, and follow-up of the employee once they return to work (to minimize potential for relapse).

Limitations of Employee Assistance Programs

For a number of reasons as noted previously, and in particular because of denial, there is no guarantee individuals will, in fact, access assistance before their problem impacts their performance at work. Furthermore, there is little research available on the overall effectiveness of EAPs, and to date, there is no definitive study of the impact of EAP participation on employee work performance, absenteeism or health claims. The majority of studies have design problems that limit a valid comparison of data.

Health Canada commissioned a study in 1992 on the effectiveness of alcohol and other drug prevention programs [29]. The researchers concluded that EAPs have rarely been evaluated in a comprehensive fashion and, as yet, have provided little evidence, through controlled evaluation studies, of program effectiveness in relation to alcohol consumption and alcohol-related problems. The conclusion to the study is specifically stated as follows:

> *Much lip-service has been paid to the potential of EAPs as a form of early intervention but there is little evidence to support this view ... Evaluations of EAPs have been made difficult by widely varying objectives and implementation strategies … Much of the evidence cited in favour of EAPs comes from rather limited evaluations of the treatment program or counselling service offered to the problem drinking employee ... This is quite different, however, from evaluating the EAP as a whole and the effectiveness of the various components* [29].

Despite the lack of concrete data on the effectiveness of EAPs, ensuring employees have access to assistance for a personal problem, either through a formal EAP or through community services, is an important part of a comprehensive and balanced approach to dealing with alcohol and drug issues.

7.5 Alcohol and Drug Testing

Testing issues are quickly coming to the forefront in Canadian workplaces as companies weigh the merits of including testing as a part of their overall alcohol and drug program. Testing in and of itself does not constitute an alcohol and drug policy. Programs should also include employee education, supervisor training and access to assistance services.

Testing is not always seen as an automatic requirement in a comprehensive program, and some companies have chosen not to conduct testing or have chosen to include it only under certain circumstances. In making decisions on whether to include testing as one component of an overall policy, companies must also determine which groups of employees will be subject to testing and under what circumstances. This requires weighing the benefits and limitations of each decision in their own immediate and unique circumstance and in light of recent case law.

The following set of testing circumstances discussed does not cover all possible situations, but provides some examples. The benefits and limitations of testing in individualized circumstances will vary from company to company depending on their unique values, objectives and the operating environment(s). Rather than listing objectives and limitations separately as in earlier sections, this section of the report provides information on both for each circumstance of testing.

7.5.1 Applicant Testing

In the situation of **applicant testing**, the requirement to pass a drug test as a final condition of offer provides a clear message about the company's position on drug use and may deter drug users from applying to that company or industry. On the other hand, committed users may be able to analyze the likely time required to clear a drug from their system and pass the test. Drug users may also get sufficient advance notice of the requirement to report on their own for the test, giving them a greater opportunity to provide cleansed samples by using substances or devices (masking agents or substitution mechanisms) to pass a test.

7.5.2 Post Incident Testing

In a **post-incident** situation, when testing is part of a complete investigation into the possible cause of an accident or incident, a negative test result can confirm that alcohol or the tested drugs were **not** a contributing factor, and a positive result can confirm a policy violation if use of these substances is banned. Although the presence of drugs does not necessarily prove that impairment was the cause of the incident, the fact that a test may be done can act as a deterrent to alcohol and drug use in conjunction with work.

7.5.3 Reasonable Cause Testing

In a **reasonable cause** situation, a test can be one tool to investigate the likely reason an individual is unfit, and a positive result confirms a policy violation if use of the substance is banned. However, a negative result does not necessarily indicate the supervisor was wrong in his/her fitness for duty assessment and referral action.

Note: Most programs are testing for five key drug groups and alcohol, while there are many other substances that can be used in conjunction with work and can cause evident or less evident impairment. Therefore, in both cases, the test is one part of an assessment of a policy violation, and the fact that the test may be done may also act as a deterrent.

7.5.4 Random Testing

In a **random** testing situation, the objective is to deter alcohol and drug use in contravention of company policy, generally focused on safety concerns. If used, random testing is usually limited to those who hold positions where performance, if affected by alcohol or drug use, would present "an immediate and significant safety risk" (e.g., safety-sensitive position).

Random testing has been considered by some to be intrusive, particularly for those who would never use drugs; others see it as an objective process in that it removes the possibility of singling out an individual or individuals because the selection process allows everyone to have an equal chance of being selected for testing. One limitation is that drug users may simply resort to using another drug group once they know the substances that they may be tested for.

As well, knowledge of the fact that workers are subject to random testing may cause supervisors to be less diligent in performance management and identification of "unfit for duty" situations. However some believe that in situations of limited supervision, random testing is a useful tool to reinforce adherence to the company policy. Generally, random testing is seen to act as a deterrent and can provide confirmation of a policy violation. Generally, it is not used to investigate fitness for duty at the time the sample is collected.

7.5.5 Follow-Up Testing

Return to duty and unannounced follow-up testing is intended to deter alcohol and drug use in contravention of either an agreed-to treatment program or a "last chance" agreement after a policy violation. Normally, the individual would be required to pass a test prior to return to work and then be subject to unannounced testing over a specific period of time. In a post-treatment situation, the program recognizes that relapse is a function of drug or alcohol dependency, and the objective is to support ongoing recovery. In a post-violation situation, testing is normally part of a continuing employment agreement to act as a deterrent from using alcohol or drugs in conjunction with work.

Failure to have a strong monitoring program in either situation could present serious safety risks if the known user were to use again in conjunction with work and cause a serious accident or incident. The agreement would be tailored to the individual's circumstances regarding specific requirements and duration.

8.0 Deterrence and Workplace Policies

There is considerable research in the area of deterrence theory. The basic premise is that it is possible to dissuade people from committing a particular act if they perceive that there is a high likelihood of being identified, and a clear consequence for their actions. At the heart of this premise is the notion that people evaluate their actions prior to committing them, and if they have sufficient cause to believe there is a strong potential for the negative impact to outweigh the positive benefits, then they will refrain from committing the action. The concept is an important component in the introduction of a workplace alcohol and drug policy and/or an agreement covering an individual's continuing employment where alcohol or other drug issues have been a factor.

The basic justification for the use of the deterrence theory in controlling impairment when operating a vehicle or equipment or performing duties that could impact the safety of oneself or others is that programs both:

- Operate as a form of primary intervention by deterring potential drinking or drug using workers.

- Have an impact as a secondary intervention, by reducing accidents through enabling the detection and apprehension of alcohol/drug users already on the road or in the workplace.

These two concepts underlie the direction company policies are taking: to deter potential policy violators from engaging in an unacceptable action, and to identify those that choose to violate the policy in full knowledge of the rules. Deterrence measures and prevention/education programs are separate components that can and do work together in the workplace. The objective of the preventative components (training, education, awareness programs, and good communication of the policy or expectations) is to encourage compliance through the development of employees' personal values in support of the rules.

However, for some people, no amount of compliance will occur unless they also recognize the direct threat of sanctions (methods within the program to identify those in violation and the consequences for confirmed violations). In this way, a clear policy that communicates to employees the increased potential for being identified in a violation and the associated consequences can in many instances:

- Provide the vehicle for employees to change potentially unsafe work habits.

- Help individuals overcome denial and obtain assistance for a current or emerging problem.

- Help co-workers to take on more of a role in overcoming enabling and encouraging the individual to change habits or get help for a problem before it impacts their job performance.

- Help supervisors overcome enabling and respond to performance problems before they reach crisis proportions and require serious disciplinary consequences.

The proactive approach to safety is no different in workplaces than on our roadways. Programs have been established in many countries to deter drivers from operating vehicles when under the influence of alcohol or other drugs; by setting clear rules, having methods to identify those that do, and by administering sanctions for those found in violation of the road safety rules.

For example, many countries have:

- Reduced the alcohol level at which an individual will be allowed to drive (with either criminal or administrative sanctions if exceeded);

- Increased the likelihood of identification (e.g., random testing in Australia); and/or

- Increased the penalties for impaired driving (e.g., 90-day administrative licence sanction in most Canadian provinces).

Many countries have also followed the example of the United States in introducing variations of the Drug Evaluation and Classification program to identify and test drivers who may be under the influence of other substances. Some have gone further and introduced roadside drug testing programs, thereby recognizing the impact drug-impaired drivers can have on public safety. Recent amendments to Canada's Criminal Code [30] have introduced a program through which impaired driving due to drugs will be investigated, and drivers believed to be under the influence of drugs other than alcohol will be tested and charged criminally if they test positive.

The same principles of minimizing the risk of impaired driving through roadside sanctions could be argued in support of an employer's decision to set out clear requirements for employees and other workers. In order to minimize risk in the workplace, companies may establish policies and investigative tools that allow the company to enforce the various components of each policy.

Supervisors play a key role in enforcing the policy standards through performance management and by triggering appropriate investigations when an employee appears unfit in the workplace and when they are involved in an accident or incident. This is where testing is often initiated.

8.1 Effectiveness of Workplace Programs

There has been limited research concerning the effectiveness of workplace policies that include testing. The committee that chaired a review on drugs and the American workforce in 1994 noted that the preventative effects of drug testing programs have never been adequately demonstrated [27]. This is not to say that the programs are not effective, but rather that there has been insufficient research to prove or disprove that they work.

The committee recommended that "longitudinal research should be conducted to determine whether drug-testing programs have deterrent effects", and despite this lack of data, it stated, "drug testing for safety-sensitive positions may still be justified in the interest of public safety [27]". The study director recently confirmed that the situation has not changed since the early 1990s, and although the fact still remains that studies may be poorly designed or not supportive of program effectiveness, they do not negate a program's potential usefulness either.

One study, in 1993, did examine pre-employment, post accident and reasonable cause testing situations [31]. After examining objective data from the Occupational Safety and Health Administration's recordable accident and illness rate data, in conjunction with surveys confirming which businesses in the same geographic area had policies with testing programs, the researchers concluded:

- Using pre-employment testing on its own would not result in a significant reduction in occupational accidents, particularly when there is only limited hiring; it is a one-time screen and unless there is a program for ongoing testing of job incumbents, drug usage can start at any time after employment commences without any deterrence from drug testing.

- Post-accident testing was found effective in reducing workplace accident rates.

- Reasonable cause testing did not have a significant impact on reducing accident rates, possibly because of the subjective nature (supervisors make judgment calls based on signs of impairment and may overlook casual drug use); the nature of the work environment (supervisor may have limited contact with employees and less opportunity to monitor their behaviour); and a continuation of drug use by employees convinced that they can hide it from their employers.

In a more recent study (2009) [32], the authors note in their overview that the introduction of mandatory testing programs for motor carrier drivers (commercial motor vehicles) in 1995 had not been adequately evaluated, which was the rationale for their study. This did not consider police roadside testing, but it evaluated effectiveness of employer testing programs mandated by the Federal Highways Administration. The study involved a large sample of motor carrier drivers subject to their employers' policies, as well as a parallel sample of drivers who did not operate motor carriers. The study spanned twenty-five years; thirteen years prior to implementation of the workplace policies, and twelve years post implementation. Their data was taken from the Fatality Analysis Reporting System, which is a census of fatal traffic crashes occurring in the United States.

The overall reported findings, were that for drivers involved in fatal multi-vehicle crashes, 2.7% of the motor carrier drivers and 19.4% of the non-motor-carrier drivers had positive BACs. This is a substantial difference. In addition, the prevalence of alcohol involvement in fatal crashes decreased by 80% among motor carrier drivers and only 41% for other drivers between the period prior to the introduction of programs and the period after introduction. The researchers concluded that implementation of the mandatory alcohol testing programs was associated with a 23% reduced risk of alcohol involvement in fatal crashes by motor carrier drivers, and may have contributed to a significant reduction in alcohol involvement in fatal motor carrier crashes.

8.2 Testing Statistics

8.2.1 DriverCheck

DriverCheck is one of the largest third-party administrators in Canada; it has been audited by the U.S. Department of Transportation and its programs and practices were found to be fully compliant with Part 40 regulatory requirements. It has been maintaining the results of its drug testing program since 1996 and has provided statistics up to 2010 (see Appendix 6). No other third-party administrator in Canada maintains these kinds of records or is prepared to make them available, but given the large testing base reported, it is unlikely the results would be statistically different. Unfortunately, statistics on alcohol test positive rates are not currently available.

The DriverCheck report covers U.S. regulated programs in Canada (cross-border truck and bus industry) and other programs (non-regulated truck and bus, other transportation, mining, oil and gas etc.). The results reported are final after Medical Review Officer (MRO) review, and not just lab results (as the MRO may overturn a lab result for legitimate medical reasons). The following is a summary of the findings.

In truck/bus programs regulated by the U.S. Department of Transportation, drivers are subject to testing in all situations including pre-employment and random testing had the following results:

- Less than 1% of the tests in 2010 were positive for all categories of drugs and testing situations (0.87% of samples collected). This was similar to 2009 (0.83%), but down from 2000 (1.80%).

- There is a legal requirement to do reasonable cause testing, and supervisors must be trained under the regulations; however, there were only six tests completed in 2010 and no positive tests were reported.

- Again, with a legal requirement for post-incident testing, the number of tests was 235 and 2.13% were positive.

- Pre-employment and random testing are the most frequent reasons to test drivers; of those who knew they would be tested, 1.23% of applicants tested positive; and 0.42% of drivers tested positive in the random program.

- The percentage of pre-employment and random positive tests has declined on an annual basis since 2000.

- Return-to-duty and follow-up testing remained just over 4% for the last few years.

In the non-DOT programs and the associated workplace categories, some employees are subject to random testing that may be conducted using urine or oral fluid. However, the vast majority of tests are for job applicants.

- 7.53% of the non-DOT tests completed in 2010 were positive; this was up from 2009 (7.02%), but down from 2000 (10.24%).

- The reasonable cause testing rate for non-regulated programs is generally much higher than DOT regulated programs; in 2010, of 420 tests done, 39.76% were positive.

- In general, a substantially higher number of workers involved in incidents were tested with a much higher percent positive rate compared to DOT regulated workers; in 2010, 2,662 post-incident tests were conducted and of those, 11.83% were positive.

- There was a higher percent positive rate of pre-employment testing for non-DOT applicants, and 5% of those tested were positive (knowing they had to pass a test).

- Although far fewer non-regulated employees are subject to random testing compared to DOT regulated workers , the positive rate in 2010 was 15.25%, the highest level recorded with the exception of 2008 (18.26%).

- Return to duty and follow-up testing has been substantially higher for non-regulated workers in the years since 2000.

Refusal to test includes any refusal to complete the testing process as well as a confirmed tempered or adulterated sample. The numbers are relatively low at 23 for DOT and 87 for non-DOT; however, the non-DOT refusal occurrences have continued to rise over the years. Also, this would not recognize the tampering at the collection site that is not caught, or the increased use of test cups for site access and reasonable cause/post incident testing, which have a reduced ability to identify tampering, compared to samples collected on-site at the lab.

For all testing, the highest positive rate continuously reported is marijuana (2010 DOT 0.65% and non-DOT 5.34%). Cocaine is the second highest (2010 DOT 0.16% and non-DOT 1.74 %).

For more information on the statistics developed from DriverCheck's data, refer to Appendix 6.

8.2.2 Quest Diagnostics

Quest Diagnostics has published laboratory results for U.S. regulated and non-regulated workers since 1988, including transportation and nuclear workers. The positive test results reported by Quest Diagnostics are prior to review by a MRO. Its recently released report covering up to 2009 found the following [33]:

- The total drug positive rate has shown a continual decline from 13.6% in 1988 to 3.6% of 5.5 million tests done in 2009.

- Similar to Canadian results reported by DriverCheck, the positive rate for federally regulated employees in 2009 was 1.5% compared to 4.2% for the general U.S. workforce; and

- In 2009 for both regulated and non-regulated sectors, the positive rates for reasonable cause testing were highest (11.1% regulated vs. 26.8% non-regulated).

- On the standard testing panel, marijuana was the most commonly identified drug (0.69% regulated vs. 2.0% non-regulated).

Many non-regulated companies have expanded their list of drugs tested, and oxycodone positive results have increased every year since 2005, and are now the second most commonly identified drug; in 2009, 2.1% of the 20,000 post-incident tests were positive for oxycodone.

For more information on the statistics from Quest Diagnostics, refer to Appendix 6.

9.0 Technology Issues

9.1 Background

Canadian companies are increasingly including alcohol and drug testing as one component of their company policies, particularly in what would be considered risk- or safety-sensitive industries or activities. However, there is no research to confirm the prevalence of each type of testing beyond third-party administrator statistics (see Appendix 6). As a result of the U.S. regulatory requirements and increasing demand for testing services, an infrastructure has been established to support the introduction of testing programs. Companies exploring the option of including testing under their policy can be assured of reliable and accurate results, provided they use qualified and experienced service providers. As in any field, there are also many unqualified providers offering quick and cheap solutions for testing, so companies must be knowledgeable about their options and the qualifications they should seek to meet them.

The Canadian infrastructure that has developed includes:

- A comprehensive network of trained and experienced collection services across the country.
- Certification of Canadian laboratories by the U.S. Department of Health and Human Services (DHHS) to enable them to provide fully accurate testing services for Canadian companies [34].
- Establishment of a network of Canadian occupational health physicians certified as Medical Review Officers - an essential part of any workplace testing program.
- The presence of a number of experienced third-party administrators who can provide guidance and a “turn-key” program for regulated and non-regulated companies.
- A network of trained Substance Abuse Professionals, who meet the U.S. Department of Transportation standards under regulation and who, in the case of a positive test or other violation, can assess whether the employee has a problem in need of accommodation.

Because the Canadian government has not set standards for employee testing programs, there is no Canadian system requiring use of the highest and most reliable standards. Therefore, it has been a “buyer beware” situation when it comes to contracting for services, and the wisest move has been to contract with those providers already qualified to administer the DHHS and U.S. DOT standards for testing programs. Equivalent standards have been upheld and/or accepted within the Canadian legal system.

Non-regulated employers are not obliged to follow all details of the DOT program — and many should not, as some standards and requirements would be inappropriate for their operational needs. However, in terms of contracting service providers, this ensures companies have qualified people administering their programs**.**

The U.S. government issued a Notice of Proposed Rulemaking in 2004, in which scientific and technical guidelines were established for the testing of hair, sweat, and oral fluid specimens in addition to urine, as well as for on-site urine testing. Submissions were received, but the government has not issued final regulations on alternative technologies [35].

Instead, it has issued final regulation for parts of the package, including direction to labs for additional adulteration testing, specifications for instrumented initial test facilities (mini labs for screening), the change in the test panel (see below), observed collection requirements in return to duty and follow-up testing situations, and additional standards for people involved in the testing process (collectors, labs, MROs).

9.2 Drug Classes

Existing technology has developed methods to accurately test for the presence of a wide range of drugs. Workplace testing programs authorized through the United States DHHS and followed throughout North America focus on six specific drug groups most commonly associated with drug abuse in the general population.

The standard testing panel is marijuana, opiates, amphetamines, PCP, cocaine, and alcohol. Under certain circumstances, testing programs may also include any or all of the following: barbiturates, benzodiazepines, methaqualone, methadone and propoxyphene (usually triggered on reasonable cause and after an accident). On a case-by-case basis, protocols can be set up to test for other drugs as required under the circumstances (e.g., for a follow-up testing program or in special client circumstances). Employers need to assess their specific needs and contract for an appropriate drug "slate" that meets those needs.

The DHHS amended the test panel in October 2010 for all regulated operations (cross border). This new panel has been adopted by non-regulated Canadian companies and is the standard panel used by the Canadian certified laboratories. However, because of extensive concerns about the use of prescription opiates and oxycontin in particular, many Canadian companies are adding this to the opiate class of drugs in the panel.

9.3 Urine Analysis for Drug Presence

The most commonly used testing procedure for North American workplace programs is urine analysis. The process consists of three stages: sample collection, laboratory analysis, and medical review and reporting of results. All three stages have been set out in regulation for all U.S. programs subject to government regulation. Canadian motor carriers must comply with these regulations, and non-regulated companies on both sides of the border are guided by these standards, as they have been upheld as reliable and accurate in legal settings.

9.3.1 Collection

Urine specimens are collected under highly controlled conditions at a designated collection site by trained and authorized personnel who ensure privacy during collection, security, and integrity of the sample. Chain of custody documentation follows the sample throughout the process, noting everyone who handles it (with every effort made to minimize the number of persons handling specimens). This is normally accomplished through externally contracted collectors, and in limited situations site medics have been trained to do the collection at remote locations.

Collection is normally **not** observed. Procedures to minimize the possibility of tampering with or diluting the sample are followed, and a temperature strip on the collection cup is checked to confirm that the sample is within the normal human body temperature range. The custody and control form is completed and signed by the donor and collector, and the sample(s) is/are secured for transportation with the lab's copy of the custody and control form. The lab's form does not have the donor's name, which ensures the donor is not identified to the lab. The donor keeps a copy for his/her records, and the MRO receives a copy, with the donor's name and phone number, in case contact with the donor or collector is required.

9.3.2 Laboratory Analysis

Qualified laboratories must meet established scientific and technical guidelines for all drug testing programs, and therefore, only laboratories certified by the U.S. Department of Health and Human Services should be used. These certified laboratories are subject to an ongoing proficiency program that includes regular inspections and the handling of "blind" specimens to provide an ongoing assessment of their procedures and the accuracy of their results.

After the specimen has been properly collected and forwarded to the laboratory, it is analyzed for the presence of drugs using two steps. In the first step that involves an immunoassay test, a screen is used to determine if a drug is present at or above an established cut-off level. The second step is a confirmation test using highly technical and accurate procedures and equipment called gas chromatography/mass spectrometry (GC/MS).

A sample will only be identified by the lab as positive if the presence of a particular drug is at or exceeds the cut-off level. Although laboratory equipment is sufficiently sophisticated to enable the identification of even minute traces of many drugs, higher cut-off levels are established to ensure accuracy and consistency in drug identification, and to eliminate side issues, for example second hand marijuana smoke. The test result indicates recent use of the drug, but does not necessarily indicate impairment as there are too many variables that come in to play (when the drug was taken, strength, dose, combination with alcohol, other drugs, fatigue etc.).

If the results of the initial test are negative, the lab will advise the company or its MRO that the test was negative and no additional tests on the specimen will be done. If the results of the test are at or exceed the cut-off level on the initial test, the GC/MS confirmation test is performed; specimens that are confirmed positive on the second test, or that are identified as having shown a problem with the sample (e.g., dilute, adulterated etc.) are reported to the MRO for review and verification.

9.3.3 On-Site Testing Devices

Devices for on-site testing (point of collection test or POCT) are becoming increasingly available and are particularly of interest for companies with remote operations where laboratory turn-around time could be longer because of distances. The test device is a "screen" in that it can screen out negative results. However, any result indicated by the screen as "not negative" must be forwarded to a lab for confirmation using the same chain of custody procedure, and a lab positive must be reviewed by an MRO before any employment action is taken.

In addition, companies should only use devices that have adulteration checks; otherwise, tampered samples could never be identified for further analysis at the lab. The U.S. government has approved the use of "mini labs" to do the screening step, but has not yet finalized approval for test cups.

For the most part in Canadian programs, test cups are being used in reasonable cause and post incident testing situations. Normally split sample urine testing is being used for all other testing situations except random. In non-regulated random testing situations, oral fluid is typically collected for analysis in the lab. Some programs in northern Alberta are allowing POCT for site access testing when large numbers of people must have negative test results before getting on a site, and the laboratory process can not turn the volumes around quickly.

9.3.4 Test Cut-Off Levels

On October 1, 2010 the DHHS panel for urine drug testing reduced the cut-off levels for detection of some of the drugs (cocaine and amphetamines) and added three amphetamine-based drugs. All of the labs were required to move to this panel for the regulated programs, and non-regulated employers have followed. Test cups for point of collection screening are also available. In addition, many Canadian companies are including

oxycontin under the opiate category for non-regulated programs. A chart of urine drug test cut-off levels is in Appendix 1.

9.4 Oral Fluid Testing for Drug Presence

An alternative technology now available for workplace testing programs is oral fluid (Saliva) testing, which provides a reasonable alternative to urine testing. It is considered to be less invasive and collection can be observed, lowering the potential for tampering. Science suggests that the cut-off levels set out for oral fluid testing represent a tighter window on recent use, and likely impairment when examined in conjunction with studies available on the impact and duration of the effects of drugs on performance.

9.4.1 Collection

A collection device is placed in the mouth. The device contains a cotton pad and citrate to stimulate the secretion of fluid. After several minutes, the cotton pad is placed in a preservative, sealed and shipped to the laboratory for analysis. The same chain of custody procedure is used as is used for urine testing.

9.4.2 Laboratory Analysis

Cut-off levels for many U.S. programs have been set such that detection times are close to those observed in urine. However, cut-offs can be set in a way to shorten the detection time such that a positive result would indicate very recent use and therefore be a better signal for possible impairment. The lab analyzes the sample against the designated cut-off level using GC/MS technology and reports the result to the MRO.

9.4.3 *Test Cut-Off Levels*

In 2004, the DHHS proposed specifications for oral fluid drug testing. A chart of proposed drug test cut-off levels is in Appendix 1. For regulated companies, oral fluid testing is not yet allowed by the U.S. government. However, because of certain legal rulings in Canada, it is being used for non-regulated random testing programs, and some companies have started using oral fluid for reasonable cause and post-incident situations. For the most part, program cut-off levels are fairly consistently applied. A number of Canadian programs use the proposed DHHS levels. Others have made some adjustments. Oxycontin is confirmed at 40 or 50 ng/ml depending on the program. THC parent is confirmed at either the DHHS cut-off level or, for a number of programs, at higher levels of 4 or 10 ng/ml.

9.4.4 Point of Collection (on site) Oral Fluid Testing

The only accurate testing devices are those that collect samples for analysis in the laboratory. That is also the system that the DHHS is proposing in its regulations. There have been scientific studies undertaken over the past 6 to 8 years looking for devices that are specific enough to detect the drugs in oral fluid [36]. These studies are being done to support the drugged driving legislation around the world, including under our Criminal Code. To date, the researchers have not found a point of collection oral fluid device that is sufficiently accurate for use in these programs, and therefore none they would recommend for roadside or workplace programs.

9.5 Hair Testing for Drug Presence

Trace amounts of drug molecules that have circulated through the blood stream will be found in the follicle of the hair and remain there as it grows. Hair specimens can be used to identify past history of drug use over months or even years with a high level of accuracy. Detection of drug use cannot be avoided by abstaining from use or attempting to adulterate the sample, and collection is considered less invasive than some other methods. Although not a preferred option for workplace programs (limited connection to the immediate job), hair testing has been used with success in other situations, including treatment, child welfare and prison systems. This would not meet any kind of impairment standard.

9.6 Medical Review of Results

The MRO is an essential part of the testing process, and in most testing programs, the lab results are sent directly to the MRO. This is a licensed and specifically trained physician responsible for receiving laboratory results generated by a company's drug testing program [37]. The MRO performs the same function for urine testing and for oral fluid testing, and is required to discuss the lab result with the donor and report a negative or verified positive or adulterated sample to the company's program administrator.

MROs have knowledge of substance abuse disorders and appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information. The qualifications for an MRO are highly specific and not normally held by company doctors or GPs. The MRO contacts the employee to discuss the situation and help determine if there is an alternative medical reason for the result. Only when satisfied that it is a true positive result or an adulterated sample will the MRO notify the company of this conclusion; otherwise, it will be reported as negative. In other words, it is the MRO who makes the final decision on whether a positive result reported by the lab will be reported as positive or negative to the company's program administrator or designate, based on the results of the discussion.

This step is essential in the process in order to eliminate any "false positive" results. The result from the certified lab will be accurate, but must be overturned if there is a legitimate medical explanation for the result. If employees disagree with the MRO's conclusion on their test results, they can have their samples retested, or in a "split sample" situation, direct the second sealed portion of their samples to be tested at the lab or sent to another certified lab for analysis. If the result is positive, the company will be advised accordingly. If the result fails to confirm the first finding, the test is reported as cancelled.

9.7 Testing Accuracy and Tampering

Drug testing is based on solid science, provided the process is handled by trained collectors, there is no break in the chain of custody, a screen positive is confirmed by GC/MS analysis and a qualified MRO reviews all non-negative lab results with the employee. Although there has been some discussion about false positive test results (where a sample is reported to contain a drug that is not actually present above the cut-off level), any possible error in the sample analysis is eliminated through the two-stage screening process and medical review of lab results.

To avoid any problem, companies should only contract with labs that meet the highest possible standards and are certified by the U.S. Department of Health and Human Services, with trained and qualified collectors, and with an experienced MRO who is fully independent of the laboratory. Normally all components of the process are provided by the third-party administrator.

There are hundreds of products available in North America designed to help individuals who want to try to "beat" drug tests. These are available through magazines, head shops, novelty shops, dietary supplement retailers and Web sites. The products include dilution products, cleansing products, adulteration additives, and substituted urine (devices, reservoir, and catheter).

Tampering is more likely to take place when a person knows in advance that he/she will be asked to provide a sample (e.g., more often in pre-employment/assignment or follow-up testing situations). Collection agencies and labs are aware of most, if not all, of the methods used to tamper with a sample (e.g., dilute it to move the drug level below the cut-off, use additives to mask the drug, substitute other samples or substances) and take appropriate steps to minimize or eliminate this possibility through the collection procedures and analysis checks. Therefore, there is no requirement for observed collection; however, in the event of confirmed tampering, some companies exercise the option to require observed collection on the next test.

9.8 Breath Alcohol Testing Procedures

Breath analysis for alcohol use is a widely used and accepted technology, primarily because breath is the most easily obtained bodily substance and the results are known within minutes of testing. Current-generation breath-alcohol analyzers have excellent accuracy, precision, sensitivity and selectivity or specificity for ethanol in breath specimens.

The concentration of alcohol in end-expiratory breath accurately reflects the alcohol in the blood and can appropriately interpret the presence and likely degree of intoxication or impairment at the time the sample is taken.

9.8.1 Collection

Specific training and quality control measures are needed to ensure proper administration of the procedure and calibration of the device. Test results are displayed and printed using an evidential breath testing device. Collection is handled by a trained breath alcohol technician, generally through an external collection agency; a company representative can be trained to operate the equipment if necessary in the case of unusual circumstances.

9.8.2 Cut-Off Levels

A consistent practice for Canadian workplace programs has been to set 0.04% BAC as the level at or above which would be a policy violation. This level has been upheld in court and arbitration decisions. Because of the safety risk they can present, many company policies require individuals who hold safety-sensitive positions to be removed from duty if their alcohol test result is between 0.02 and 0.039% BAC. This is consistent with the U.S. requirements for drivers; generally the person is held out for a minimum period of time, and there may be discipline for repeat occurrences.

9.8.3 Accuracy

The process to collect and analyze breath alcohol samples is accurate provided an Evidential Breath Testing Device is used by a fully trained breath alcohol technician (BAT).

9.9 Urine Alcohol Testing Procedures

In certain situations when a breath analyzer is not immediately available for sample collection, a second urine sample may be collected for analysis at a certified laboratory. This collection is usually preceded by a saliva test to screen out negative results and only if the saliva screen is not negative would a urine sample be collected. That second urine sample would be sealed in the same way as the sample for a drug test and forwarded to the same laboratory. Because the concentration of urine is different than blood, appropriate calculations must be done to determine an approximate blood alcohol content equivalent for company action. This back-up option should only be used with caution; careful steps are needed in the collection stage, and conversion of result is needed in order to reflect blood-equivalent levels. If breath collection is possible, that is the technology that should be used.

9.10 Costs of Testing Programs

The information in Table 9.1 is from one of the largest Canadian providers, but these always are subject to project-specific requests, requirements and volumes. Collection costs assume a fixed collection location; there are additional charges for mobile collection or after-hours situations. There are no differences for test situations (e.g., applicant vs. reasonable cause).

Table 9.1 – Cost of testing programs; related collection, lab analysis, follow up procedures.

Testing Situation	Cost (one provider)	Cost (a second provider)
Alcohol test; breath analyzer	$45	$20
Point of collection urine drug test	$85	$87
Lab confirmation of POCT urine drug test	$105	$130.50
Regular split sample lab test	$80	$65
Split sample to another lab at employee's request	$300	n/a
Oral fluid through lab	$80	n/a
MRO costs	$45 per quarter hour	included
Random selection program	$1.75/employee/month or arranged fee	n/a
Individualized follow-up testing program	$50 annual	n/a
No show	Depends on site charge: may be $25	$25 if cancelled more than 1 hr before
Refusal or other collection problems	No charge	$45

n/a = not available

10.0 The Legal Situation on Employee Testing

The following summary refers to a number of key cases affecting private-sector employers. Some provide direction at the federal level, some at the provincial level, and there are a series of arbitration rulings from transportation and other sectors that have set Canadian direction on workplace policies and employee testing [38].

At this point, no cases dealing with alcohol and drug policies have been heard by the Supreme Court of Canada. In addition, no alcohol and drug testing programs have been reviewed in light of the Charter of Rights and Freedoms. However the Amalgamated Transit Union (ATU) has grieved the Toronto Transit Commission (TTC) Fitness for Duty Policy and issued a Notice of Constitutional Question on January 26, 2011 stating:

- The TTC constitutes a "government" within the meaning of s. 32(1)(b) of the *Charter* by virtue of the degree of government control exercised over it by the City of Toronto.

- The policy's testing provisions in post incident, certification (applicant), post treatment, post violation and reasonable cause situations (and random if introduced) violate the ATU members' right to be secure against unreasonable search and seizure under s. 8 of the *Charter*. This is invasive testing in the absence of reasonable and probable grounds to believe a violation of the Policy has occurred, and invasive testing in the absence of prior authorization by a neutral and impartial arbiter.

- These violations cannot be demonstrably justified as reasonable limits prescribed by law in a free and democratic society under s. 1 of the Charter.

This matter will be heard before an arbitrator beginning in March 2011.

In a non-unionized workplace, the most common route leading to examination of an alcohol and drug policy and testing program has been as a result of an individual's complaint to the federal or a provincial human rights commission. In this case, the complainant (employee or applicant) would take the position that he or she had faced discrimination under human rights law because of a real or perceived alcohol or drug dependence. Depending on the province, commission staff would examine the merits of the case and if it meets certain standards, it would be eligible for mediation. In other provinces, cases are eligible for mediation automatically after an application is made.

If the mediation failed, a board or tribunal would be appointed to receive evidence from the parties and make a ruling. The board or tribunal may also allow for interveners to participate if they can establish that the decision has implications for them or their organization. The case may focus solely on the individual complaint, or the board or tribunal may feel the broader company policy needs attention. Should one of the parties disagree with the decision, they may be able to appeal it to the appropriate court in that jurisdiction. At that stage, if one of the parties disagrees with the court ruling, they can seek leave to appeal to an appeal court in that jurisdiction. The next stage, should one of the parties disagree, would be an appeal to the Supreme Court of Canada, which may or may not be heard by the Court.

In a unionized workplace, the most common route leading to examination of a policy is an individual grievance in which a worker is challenging how they were treated under the policy. Alternatively, a union may bring a policy grievance challenging the application of the policy. In either case, the union would be arguing that the company's actions are against the terms of the collective agreement, human rights legislation and/or arbitral precedence. Arbitrators are expected to take human rights law into account in their review of the case, which is why unionized workers normally take their complaints through the grievance process rather than to a human rights commission. Should either party decide to challenge the arbitrator's decision, it can be subject to judicial review. After that, it is the same process as for the non-unionized worker; i.e., seek leave to appeal to the appeal court in that jurisdiction, and ultimately an appeal to the Supreme Court of Canada.

10.1 Federal Human Rights Case – AutoCar Connaisseur and S. Milazzo

This case [9, 39], was the most significant Tribunal ruling since the TD Bank case [40] several years ago, and focused on a policy in a safety-sensitive industry involving motor coach drivers. The Human Rights Commission's former policy was in force at the time of Mr. Milazzo's dismissal for failing a "pre-employment" drug test to qualify for U.S. work. He had previously worked for the company and in fact had crossed the border, but had not been subject to the random testing program, placing the company in violation of U.S. regulations. The Commission requested that the Tribunal refer to its new policy, and Coach Canada (Autocar's parent company) requested that, in that case, the Tribunal refer to its new, more comprehensive company policy as well.

The Coach Canada policy, which was before the Tribunal for this case, covered all employees. Under the policy, all drivers and mechanics (who all have to road test the vehicles) are considered to hold safety-sensitive positions regardless of whether they operate into the U.S.. This includes transit and school bus drivers. The policy requires reasonable cause and post-incident testing for all employees; applicants to a safety-sensitive position must pass a drug test and are subsequently subject to random alcohol and drug testing.

Mr. Milazzo's complaint before the Tribunal was that he had been discriminated against because the company perceived he was substance dependent when they terminated his employment after a positive drug test result. The Tribunal concluded Mr. Milazzo did not meet his burden of proof to establish that he suffered from a disability, or that he was perceived to be disabled by Autocar, and his section 7 complaint was dismissed.

Regarding the company policy before the Tribunal at the time, the Tribunal ruled that Autocar's drug testing policy discriminated against employees who are drug dependent since anyone who tests positive is either not hired, or their employment is terminated, and some of those people will have a substance-related disability. They looked at whether the requirement not to have drug metabolites in one's system is a *bona fide* occupational requirement for bus drivers, in light of the Supreme Court's three tests and concluded:

- Since the purpose is prevention of employee impairment, the goal of Autocar to promote road safety by preventing driver impairment is rationally connected to the business of providing bus transport;

- The company more than satisfied the good faith requirement in the promulgation of its drug testing policy, given the lack of direction from Transport Canada, and the need to comply with U.S. requirements within the Canadian legislative framework;

- In terms of reasonable necessity, urine testing for the presence of cannabis metabolites does assist in identifying drivers who are at an elevated risk of accident, and the presence of a drug testing policy will serve to deter at least some employees from using alcohol or drugs in the workplace, in a manner that would put themselves or others in danger; but

- The employer has a duty to accommodate anyone who tests positive on a random or pre-employment test **and** has a problem, by referring the employee for assessment and accommodating the problem up to undue hardship.

The company revised the policy to allow for a substance abuse professional's assessment of anyone in violation of the policy and to accommodate an individual in this circumstance who was found to have a problem. Follow-up testing is a condition of continued employment for those who violate the company policy [9].

On January 28, 2005 the Tribunal issued a subsequent decision [39] confirming the following:

- It had in fact addressed the broader Coach Canada policy in its decision, which upheld pre-employment and random alcohol and drug testing for bus drivers in all categories working for the company, and not just those assigned to U.S. routes.

- The definition of "safety-sensitive position" did not need modification and can include mechanics who operate a bus from time to time to road test it (the Commission had requested that SSP only apply to drivers "not under regular supervision," which would mean mechanics could not be included).

- Because the scope of the case was limited to safety-sensitive positions, there was no ruling on whether testing of other employees is reasonably necessary.

- The provisions in a last-chance agreement after an individual has failed a test **and** is found to have a dependency need to leave the consequences of a second violation flexible and determined on facts specific to the case — the word "will" was changed to "may" when it comes to automatic job termination in this case. Termination may be warranted, but must be concluded on a case-specific basis.

- The concept of accommodation has its limits, and the employer is not subject to an endless rehabilitation process.

10.2 Federal Human Rights Commission Policy on Testing

Up until this case the Commission policy on testing (which would set the "guidance" on what employers could do until a court of law said otherwise) was that reasonable cause, post-incident and follow-up alcohol and drug

testing were found acceptable (subject to meeting the BFOR standard), as was random alcohol testing for safety-sensitive positions. At that time, the Commission policy did not find pre-employment or random drug testing acceptable.

It noted that those who test positive must be accommodated up to undue hardship. It also acknowledged that Canadian operators with U.S. bound drivers were required to comply with the U.S. regulations including random testing, but said that this could not be extended to Canadian drivers.

Subsequent to the Tribunal ruling, and in consideration of subsequent decisions, the Commission's 2002 policy [41] on workplace programs and testing was revised and reissued in October 2009 [10]. The Commission confirms this is not the law, but for federally regulated employers, the policy does provide the Commission's interpretation of the human rights limits on testing. It also confirms the obligation of employers to accommodate any applicant or current employee who tests positive and has an alcohol or drug dependency.

Briefly, the Commission's policy states that testing would be acceptable in the following situations provided it is part of a broader program of medical assessment, monitoring and support:

- Alcohol and drug testing for "reasonable cause" where an employee reports for work in an unfit state and there is evidence of substance abuse.

- Alcohol and drug testing after a significant incident or accident has occurred and there is evidence that an employee's acts or omissions may have contributed to the situation.

- Following treatment for drug or alcohol abuse, or disclosure of a current alcohol dependency or abuse (it notes that usually a physician or substance abuse professional will determine whether follow-up testing is necessary for a particular individual).

- On a random basis for alcohol, provided the employee holds a safety-sensitive position.

In addition, pre-employment and random alcohol and drug testing is acceptable for **commercial bus operators and truck drivers,** provided employees who are drug dependent are accommodated. Employers may be able to justify random and pre-employment testing for other safety-sensitive positions provided they establish that testing is a *bona fide* occupational requirement.

10.3 Chiasson v. Kellogg, Brown and Root (KBR) in the Alberta Human Rights System

This second case [42] was also relied on when the Commission reviewed its policy on testing. In the first human rights decision to reference the Milazzo ruling, KBR's decision to withdraw an offer of employment to an applicant for a high risk position on a client's site was upheld. The individual tested positive and had started working, but was in the probation period and the condition of hire included passing a medical and a drug test. The individual said he did not have a problem, and there was no evidence of perceived discrimination. He admitted to being a recreational user. The panel looked at the situation in light of the Supreme Court tests for a BFOR. Although the company's actions were supported, the panel ruled that had the applicant established evidence of a disability, real or perceived, the withdrawal of an employment offer would have been discriminatory and the third element of Meoirin [18] would not have been totally met.

Court of Queen's Bench Ruling [43]: This was appealed to the Court of Queen's Bench of Alberta, which reversed the ruling, stating that there are flaws in pre-employment testing deriving from "the fact that a positive test does not show future impairment, or even likely future impairment on the job, yet the applicant who tests positive is not hired." Further problems with the company program were that all applicants were subject to testing, not just those applying for safety-sensitive positions, and that the testing was not part of a larger process of assessment of alcohol or drug abuse (as set out in the Entrop decision [44]). The Court said prohibiting

impairment at work is a valid and compelling safety and security concern, and there is a "legitimate interest in prohibiting drug use at work because it is dangerous and exposes employees to increased risk of accident or injury." But there was no evidence accepted that pre-employment testing improved workplace safety.

The company was found to be contravening the Act, and was directed to "revise its policy to eliminate pre-employment drug testing, or in the alternative, if pre-employment drug testing is found to be reasonably necessary for deterring impairment on the job," the company was ordered to "offer a process of assessment or accommodation to individuals failing a pre-employment drug test." The Court noted these directions are specific to the KBR policy and left open the question of whether other policies would meet the BFOR standard.

Alberta Court of Appeal Review [45]: This decision was appealed to the Alberta Court of Appeal, which in a December 2007 ruling unanimously upheld the original decision made by the Human Rights Hearing Panel. Discrimination based on perception of a disability can be a violation of human rights legislation, but because there was no perception by the employer that Mr. Chiasson was drug-addicted, there was no basis to assert discrimination on the basis of a perceived disability. In addition, in looking at the operating environment of the company, the Court acknowledged the importance of safety in dangerous work environments, and observed that "Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic."

The court referred to evidence from the first hearing, which showed that the effects of cannabis use can sometimes linger for several days, potentially presenting a safety risk in an already high-risk operating environment. The court noted a clear connection between the policy and its purpose (safety) as it applied to recreational users of marijuana.

The court did not rule on the broader issues around accommodation of an applicant with a dependency, and narrowed its ruling to the specific facts of Mr. Chiasson's situation — that he was a recreational user and did not have a drug dependency. Therefore, if the job applicant tests positive and has an alcohol or drug dependency (a disability), there may still be a duty to accommodate, although direction on the employer's specific obligations to an applicant in this situation has not yet been provided.

Supreme Court: The Alberta Human Rights and Citizenship Commission sought leave to appeal this decision to the Supreme Court of Canada. The court dismissed the leave to appeal in the spring of 2008. Reasons for these decisions are never provided. As such the Court of Appeal ruling stands in this case.

10.4 Entrop v. Imperial Oil Ltd in the Ontario Human Rights System

This case [44] was the most comprehensive court decision on a workplace policy and testing program as of 2000, and formed the basis for the federal and several provincial human rights policies. It was also the first time the Supreme Court test was used in reviewing a workplace policy. The Ontario Court of Appeal upheld the company's right to set standards, and the right to trigger discipline, although it would not accept termination in every situation stating a case-by-case assessment of consequences was needed.

Alcohol testing was accepted in reasonable cause, post-incident, certification (to a safety-sensitive position), on a random basis after assignment, and in return to duty situations. Although the Court commented that drug testing would be acceptable in all but a pre-employment and random situation, it did not make a ruling (Entrop's complaint was against the alcohol testing part of the policy). In other words, it appears testing was acceptable consistent with the original Board of Inquiry decision in the following circumstances: reasonable cause, post incident and return to duty/follow-up testing situation. The court also agreed with testing as a condition of certification to a safety-sensitive position for new hires and existing transfers.
As part of the court's comment on random and pre-employment testing, it stated that because urinalysis does not prove impairment at the time the sample is taken, it does not meet the Supreme Court's BFOR test in these situations. Although not a ruling *per se*, this comment has led some employers to implement oral fluid testing for their random testing programs.

10.5 Lockerbie & Hole Industrial v. Alberta (Human Rights)

This recent ruling [46] confirms that for purposes of workplace alcohol and drug policies, a company that sets site rules and requires investigations into possible rule violations, including testing, is not considered "the employer" for purposes of human rights law and accommodation. In this case, the Human Rights Commission argued that because Syncrude had rules for all contractors and contract workers on their site, they were in fact the "employer" and thus obliged to accommodate any worker who may have a dependency. The Alberta Court of Appeal disagreed, and said this was not what was intended under the *Alberta Human Rights Act.*

10.6 Arbitration Trends

In the arbitration decisions dealing with testing programs, the trend among arbitrators is to make an attempt to find a reasonable balance between public safety issues and employee rights when discussing medical examinations and drug testing. A key consideration is whether the employer's actions would be considered reasonable under the circumstances. The issues are also often discussed within the context of human rights guidelines and principles.

These decisions are specific to the company policy being reviewed in each case. However in saying that, the general trend appears to be to allow for alcohol and drug testing for safety-sensitive positions and/or in a risk- or safety-sensitive working environment in a reasonable cause situation, and as part of a complete investigation into a serious accident or incident. It has also been accepted as a condition of assignment to a higher risk position, and on a case-by-case basis for return to duty after treatment for a problem, or as a condition of continued employment after a violation (as determined on a case-by-case basis). There has been no ruling on pre-employment testing because the arbitrators and unions have no jurisdiction given the applicant is not yet represented by the union.

To date, there have been numerous rulings in a number of industry settings which highlight findings in transportation decisions. The following are key decisions in transportation and other industries that have been determined to be of significant relevance to the nuclear industry:

Trimac Transportation and the Transportation Communications International Union [47]: The union challenged the policy of a subsidiary of Trimac, specifically, with respect to the random testing requirement for drivers who operate only in Canada. The bulk of Trimac's operations were subject to the full U.S.-regulated testing program, and the union did not challenge testing of cross-border drivers. In addition, it did not challenge the rest of Trimac's policy for drivers who only operated in Canada (including the reasonable cause/post-incident, return to duty, and follow-up testing requirements). The union attempted to challenge the company's pre-employment testing requirements, and the arbitrator confirmed he had no jurisdiction to make a ruling. However, random testing for the non-regulated drivers was found to be unenforceable.

The Arbitrator noted in his decision that when balancing competing interests (privacy and business requirements) the balance rests with privacy rights, except where reasonable and probable grounds exist to suspect the drug and alcohol impairment or addiction of an employee in the workplace and where there is no less intrusive means of confirming the suspicion. The balance is in favour of management rights where these two conditions exist.

CN Rail and the Canadian Autoworkers and United Transportation Union [48]: This grievance was against the entire CN alcohol and drug policy, including the testing requirements. The union argued there had to be statutory authority or consent (union agreement) in order for testing to be introduced in the CN workplace. Arbitrator Michel Picher disagreed, and with respect to the testing components of the policy, he upheld testing as a condition of assignment to a safety-sensitive position, as well as in reasonable cause and post-incident situations, provided it was limited to safety-sensitive positions. Unannounced testing can be a condition of reinstatement after a policy violation, but the bargaining agent should participate in setting the conditions. A cut-off for alcohol testing was acceptable at 0.04 BAC and supported in the science, but taking action for safety reasons if someone tested positive for alcohol at

lower levels was not. Requiring a drug test after leave of six months or more was not supported, nor was the requirement for testing in non-sensitive positions. The company does not conduct random testing except for cross-border operations, so the issue was not before the arbitrator.

It was in this decision that the arbitrator considered the concept of safety-sensitive work and stated the following:

> *In this Arbitrator's view that is the preferable framework for a fair and realistic consideration of the issue of drug and alcohol testing in the workplace generally, most especially in an enterprise which is highly safety-sensitive.*
>
> *While the time-honoured concept of the sovereignty of an individual over his or her own body endures as a vital first principle, there can be circumstances in which the interests of the individual must yield to competing interests, albeit only to the degree that is necessary. The balancing of interests has become an imperative of modern society: it is difficult to see upon what basis any individual charged with the responsibilities of monitoring a nuclear plant, piloting a commercial aircraft or operating a train carrying hazardous goods through densely populated areas can challenge the legitimate business interests of his or her employer in verifying the mental and physical fitness of the individual to perform the work assigned. Societal expectations and common sense demand nothing less.*

A 2008 ruling by the same arbitrator overturned termination for a positive post-incident test, suggesting the company should be using alternative technology to determine likely impairment. On the basis of that ruling, CN changed technology to use POCT tests in a reasonable cause and post-incident situation, and if not negative, an oral fluid sample is collected and sent to a laboratory. On this basis the arbitrator has upheld termination decisions, including a post-incident termination in 2009 [Unreported, 2008].

JD Irving (Sawmills Division) and Communication, Energy and Paperworkers: This grievance before Arbitrator Michel Picher was against key parts of the company policy and with very minor wording adjustments, the company's policy was upheld. Its programs of pre-employment drug testing and random alcohol testing were not contested by the union and no comments were made by the arbitrator. Its program of reasonable cause and post-incident testing was upheld for safety-sensitive positions, and the definition of "safety-sensitive" was expanded considerably, such that the degree of supervision was not seen as a factor limiting which positions would be in this category [Unreported, July 2002].

Weyerhaeuser and Industrial Wood and Allied Workers: This grievance had two stages. In the first, the union argued companies had to have proof of a problem to justify the introduction of policies and testing programs. Arbitrator Colin Taylor concluded on the basis of the rulings that preceded, in a safety-sensitive industry, prior proof of a problem is not a pre-condition to introducing a policy:

> *There does not need to be the potential for a catastrophe before an employer is justified in adopting a testing policy as a preventative safety measure, particularly where the policy is but one part of a comprehensive approach to safety, treatment, and accommodation and does not include random testing* [Unreported, April 2004].

In his follow-up decision, with minor modifications, he upheld the company's comprehensive policy which included assistance provisions, as well as testing in reasonable cause, post incident, post treatment/violation situations, and as a condition of certification to a safety-sensitive position. [Unreported, August 2004]

Superior Propane and Canadian Auto Workers: In January 2007 a comprehensive ruling was issued by Arbitrator Michel Picher on the Superior Propane policy which was substantially upheld as not being in violation of the collective agreement. Testing of individuals holding a safety-sensitive position in a reasonable cause of post incident situation was upheld. However random alcohol testing was not upheld without statutory authority or prior consent of the union. The arbitrator did not hear evidence on alcohol impacts at lower levels

and did not support the requirement to remove a propane tank truck driver from work at alcohol test levels below 0.04 BAC. [Unreported, 2007]

Pearson Airport and Public Service Alliance of Canada: In June, 2007 Arbitrator Jane Devlin issued a comprehensive ruling on the alcohol and drug policy for the GTAA-Toronto Pearson Airport. The primary challenge was against the testing component of the policy. The establishment of safety-sensitive positions at the airport was upheld, as was testing in a post incident and reasonable cause situation for these positions. Testing was also upheld as a condition of return to work after treatment, provided the union is involved. It was also upheld as a condition of return to work after a violation, when appropriate and negotiated between parties; the just cause provisions of the collective agreement would need to be met if termination was to be upheld for failure to comply with the agreement. Likewise discipline for refusal to be tested is justified subject to the just cause requirement of the collective agreement.

The arbitrator acknowledged having no jurisdiction regarding applicant testing, but did not uphold testing as a condition of transfer into a safety-sensitive position unless the offer was not automatically withdrawn for failure to pass a test. Consistent with the Court of Appeal ruling in Entrop, random alcohol testing was upheld for safety-sensitive positions as the GTAA had provided evidence of a problem through witness evidence. Random drug testing was not upheld primarily for the same reasons set out in the Entrop decision (inability to connect the test result to impairment at the time the sample was taken.) Other aspects of the policy were either upheld or not challenged. In particular, the employer's right to confirm the need for modified duties due to medication use was upheld. The policy provision that anyone in a safety-sensitive position with an alcohol test result of 0.02% BAC or higher is removed from duty for safety reasons was not challenged. [Unreported, 2007]

PetroCanada and Communications, Energy and Paperworkers Union: In August 2009, Arbitrator William Kaplan issued an arbitration award in a case where the union challenged the introduction of random alcohol testing for commercial motor vehicle drivers operating in Ontario.

The arbitrator noted although there had been incidents involving drivers related to alcohol at one of the other company locations, there had not been any alcohol-related incidents involving drivers at the terminal represented by this local. He concluded the introduction of random alcohol testing was unreasonable and unjustified, and violated the management rights provisions of the collective agreement. [Unreported, 2009]

10.7 Arbitration Rulings Appealed to the Court System

Goodyear Canada and Communications, Energy and Paperworkers Union [49]: In December 2007, the Quebec Court of Appeal ruled on an arbitration case that started as a grievance against the company's alcohol and drug policy, and in particular, the testing component. The Court specifically looked at the random testing requirements under the policy. In this case, individuals in safety-sensitive positions would be randomly selected, but unlike other programs, there would still need to be reasonable cause to believe someone was under the influence of alcohol or other drugs before testing could take place. The judge quoted from the Imperial Oil Entrop ruling and concluded that random testing was contrary to the Quebec Charter of Human Rights and Liberties.

Imperial Oil and Communication, Energy and Paperworkers [50]: A recent series of decisions started with a grievance against Imperial Oil's random testing program at one of their refineries. The arbitrator noted the precedence in certain human rights rulings, but concluded there are additional protections in a unionized environment. In his December 2006 decision, Arbitrator Picher confirmed a Canadian 'model' has developed regarding when testing is acceptable in a unionized setting. This would include testing in a reasonable cause and post incident situation in a safety-sensitive industry under a collective agreement, as well as testing under a rehabilitative continuing employment agreement. He concluded random drug testing, even when using a methodology indicative of impairment (which was oral fluid testing), was not acceptable in the context of the "fairness and dignity" provisions of that particular collective agreement.

He noted there would need to be prior union agreement or evidence of an out-of-control drug culture to introduce random drug testing in a unionized setting. Random alcohol testing was not before the arbitration panel for consideration. However a subsequent ruling by the same arbitrator in Superior Propane Inc. and the Canadian Auto Workers union (January 2007) struck down random alcohol testing in a unionized workplace for the same reasons (see above, Section 10.6).

This Imperial Oil Ltd (IOL) decision was appealed to the Divisional Court in Ontario. In January 2008 the Court upheld the arbitrator's decision. The case was appealed to the Ontario Court of Appeal, which focused on the wording of the collective agreement at the Nanticoke site, and concluded that it was reasonable for the board of arbitration to rule that IOL's random testing program violated specific terms of the agreement [51].

The focus of the case was not on the Human Rights Code, which was the subject of the earlier Entrop ruling. For a number of reasons, the Court concluded IOL's random drug testing program, absent reasonable cause, offended specific wording in the agreement regarding "respect and dignity". The Court also agreed with a number of key findings of the arbitrator, including the fact that current technology for oral fluid testing would not allow for an immediate test result as would be found using a breath analyzer. For total accuracy, the oral fluid sample must be analyzed in a laboratory, and the results of that analysis may not be available for a few days.

The Court did not address random alcohol testing, referring back to the earlier Entrop award which upheld it in a safety-sensitive workplace. The Court did acknowledge the arbitrator's finding that upheld testing in the "model" described earlier. The ruling was not appealed to the Supreme Court.

Irving Pulp and Paper Limited Communications, Energy and Paperworkers Union: In November 2009, Arbitrator Milton Veniot issued a ruling on a challenge of the random alcohol testing component of the company policy. Testing was required for employees holding safety-sensitive positions at the Kraft paper mill in Saint John, New Brunswick. The broader company policy is similar in other Irving operations, and similar to the programs at Imperial Oil, Pearson Airport and Petro Canada, in that it contains testing measures in a number of "investigative" circumstances [Unreported, 2009].

The arbitrator drew extensively from the previous rulings, and concluded that the mill, in normal operation, is a dangerous work environment. However, it does not have the same dangers poised by a chemical plant or other "ultra-dangerous" operations; there was also no evidence presented showing there was a significant problem with alcohol at the facility.

He concluded that there is "...a very low incremental risk of safety concerns based on alcohol-related impaired performance of job tasks at the site." He also concluded that the low annual selection rate (10%) would seldom if ever identify an employee with a blood alcohol concentration over the 0.04% cut-off limit and therefore saw no concrete advantage to a random testing program. As well, the impact on employee privacy is significant and out of proportion to any benefit gained from the program. Therefore, the random testing program does not meet the reasonable test set out in the KVP decision that forms the basis for arbitral review.

On September 17, 2010, the New Brunswick Court of Queen's Bench quashed this decision [52]. The Court ruled that a threshold exists — somewhere between a dangerous workplace such as the Irving mill and an office environment, for example — below which an employer must show a history of accidents to justify such a policy. The Court found it was not reasonable to limit that threshold to workplaces that are "ultra dangerous" stating it is an unreasonably high standard. The Court also found that the fact there is a risk that a catastrophic incident could occur at the plant would justify introducing a policy; there is in fact an advantage to be gained supporting safety.

The technology (breath testing) is minimally intrusive and limited to those holding safety-sensitive positions.

> *Prevention of one catastrophe in the lifetime of the plant would be enough to make it a reasonable policy in my view.*

The Communications, Energy and Paperworkers Union appealed the Court ruling to the New Brunswick Court of Appeal. The Court of Appeal's decision [53] issued on July 7, 2011 upheld the lower Court ruling. They found the core question to be:

> *Must an employer's decision to adopt a policy of mandatory random alcohol testing for employees holding safety-sensitive positions be supported by sufficient evidence of alcohol related incidents in the workplace?*

The Court reviewed the case law and disagreed that arbitrators have overwhelmingly rejected mandatory random alcohol testing. Once a workplace is identified as inherently dangerous, there is no need for the employer to establish existence of an alcohol problem in order to introduce random alcohol testing. The Court found the employer's and employee's rights are reasonably balanced when random alcohol testing is introduced to a workplace that is inherently dangerous, testing is done by breath analyzer, and it only applies to employees holding safety-sensitive positions. The Court of Appeal stated that as a matter of logic, one would think any legal reasoning applicable to random alcohol testing would apply equally to random drug testing; however, the jurisprudence dealing with drug testing has proven to be more problematic than cases dealing with random alcohol testing. While it is true that testing for both substances has a deterrent effect, drug testing cannot measure present impairment. A positive test simply means that the employee has taken drugs in the past. By contrast, alcohol testing is able to detect on the job impairment and minimize the risk of impaired performance. As well, alcohol testing by breathalyser has always been regarded as minimally intrusive when it comes to an employee's right to privacy and freedom from unreasonable searches.

This case provides added support that pre-existing alcohol problems in the workplace would not be necessary to establish a mandatory random alcohol testing in the workplace for an ultra-dangerous or ultra-hazardous industry such as the workplace of a nuclear reactor. As for random drug testing in such workplace, the challenge remains to strike the proper balance between the right of an employer to adopt policies that promote safety in the workplace, and an employee's right to privacy or to freedom from discrimination as protected under human rights legislation.

10.8 Summary of Rulings

The legal direction on testing is becoming clearer on a number of fronts. There are currently no provincial or federal laws that would specifically prohibit drug testing, and there have been no Supreme Court decisions in this area. Companies must assess the implications of these varied decisions to help determine their appropriate approach. The human rights laws apply to all individuals, and decisions would accept testing in a number of situations, with the key limitation being the requirement for applicant and random testing only acceptable for safety-sensitive positions where a *bona fide* occupational requirement can be established. However a number of arbitrators have concluded there may need to be higher standards to meet in a unionized setting; leading the way to limiting reasonable cause and post incident testing to safety-sensitive positions or safety-sensitive working environments and putting strict conditions on the introduction of random testing.

Although each case has its own unique aspects, the trend has been to find testing acceptable:

- As part of an investigation in an unfit for duty (reasonable cause) situation where there is evidence that alcohol or drug use may be a contributing factor; (SSPs only in a unionized setting).

- As part of a full investigation into an accident/incident situation, without reasonable cause, provided testing is only for those whose acts or omissions contributed to the situation; (SSPs only in a unionized setting).

- As part of a monitoring program after treatment to support continued recovery, normally on the advice of a substance abuse professional or treatment program.

- On a case-by-case basis as a condition of return to duty after a policy violation and on an on-going follow-up basis.

- As a condition of "certification" or qualification to a higher risk position for new hires and existing employees transferring to the position.

- On a random basis for safety-sensitive positions in a non-union setting, provided a BFOR can be established.

- On a random basis in a unionized setting, provided the workplace is inherently dangerous, and it is an alcohol test using a breath analyzer for employees holding safety sensitive positions. (Note that random drug testing has not been upheld by the courts in this situation).

- If someone tests positive and has a dependency, there is a duty to accommodate, within the bounds of human rights law.

There is no clear direction on which testing technology is to be used. The Federal Commission allows for urine drug testing, while the Ontario Court of Appeal required another technology for random drug testing that would indicate on-the-job impairment, and one arbitrator has suggested that oral fluid should be used in other testing situations, not just random.

11.0 The Perspective from the Nuclear Industry

11.1 U.S. Nuclear Regulations

The regulations established by U.S. NRC set out fitness-for-duty program requirements for all licensees authorized to construct or operate nuclear power reactors. The focus is on alcohol and other drugs, and ensuring an environment that is free of drugs and their effects, supporting public health and safety. It is supported with testing requirements for applicants prior to receipt of unescorted access or assignment to activities covered by the rules. Personnel are subsequently subject to reasonable cause and post-incident testing, random testing, and testing on return to duty and unannounced for three years after reinstatement after a positive test. Employee assistance programs must be available, and the program must be supported through education for workers and training for supervisors making testing referrals (10CFR Parts 2 & 26, Nuclear Regulatory Commission).

A summary of the regulations is found in Appendix 3.

Additionally, a summary of substance testing statistics from U.S. NRC is provided in Appendix 4.

11.2 Senate Committee on Energy, the Environment and Natural Resources

This committee looked at the safety culture in the Canadian nuclear facilities and made the following interim recommendation in June 2001 [54]:

> *The Committee recommends that in the interests of public safety, the Government of Ontario and the Federal Government consider amendments to human rights legislation that would permit drug and alcohol testing of workers in areas critical to public safety. In the meantime, the Committee recommends that representatives of union and management at OPG give priority to establishing a program for alcohol and drug testing that does not contravene existing law.*

The committee noted that it was apparent that Ontario Power Generation (OPG) had made some progress toward establishing a safety culture at its nuclear power plants, but it is equally clear that efforts had to continue to achieve this vital goal. Another aspect of safety culture discussed during the committee's study was the question of a fitness-for-duty program. It would involve testing of people working in critical parts of the plant for drugs and alcohol to determine whether they are fit to carry out their duties. Evidence of substance use at the Pickering plant became public in 1996 when a citizen's group, using the Ontario *Freedom of Information Act*, obtained reports of five incidents in which empty beer cans, a liquor bottle, drug paraphernalia and marijuana were found inside the plant and were reported to the (then) Atomic Energy Control Board (now CNSC). No mandatory testing program was, or is now, in place at any Canadian nuclear power plant.

Representatives of the Power Workers Union told the committee that [54]:

> *… the union is in favour of drug and alcohol testing that conforms with the law in this regard. That is, testing that respects the privacy and human rights that employees (like all citizens) have and is part of a broader treatment program geared to dealing with actual problems in the workplace. It cannot legally support any policy that would violate human rights legislation.*

The union made reference to an Ontario Court of Appeal ruling in which the Court set out the legal prohibitions on drug testing in the workplace resulting from human rights legislation. The Union advised the Committee:

> *In the case of Entrop v. Imperial Oil, the Court of Appeal ruled that both pre-employment drug testing and random drug testing of employees constitute a violation of the Ontario Human Rights Code, which in this regard is not different from the Canadian Human Rights Act.*

The Senate Report said the Court held that (urine) drug testing did not necessarily measure current impairment, but could represent past use, while alcohol testing might be allowed if the consequences of a failed test did not include automatic dismissal and did include assistance for handicapped persons. The report concluded:

> *It is apparent that, despite the importance of fitness-for-duty testing, current laws put severe limitations on what can be done.*

Note:

Since this interim report, the Federal Human Rights Tribunal ruled on the Autocar Connaisseur case and its subsequent revision to their policy on testing makes it clear that amendments to the *Human Rights Act* would not be required to introduce testing, including random testing, in a safety-sensitive working environment. Both the case and policy have been described earlier in this report.

12.0 Conclusions and Recommendations

Any program developed to address alcohol and drug issues in the nuclear industry would be an important component of overall occupational health and safety and fitness-for-duty programs. The rulings have indicated that there is no requirement to establish proof of a problem as justification to move forward with policies in a safety-sensitive industry (except if random testing was considered in a unionized setting). Companies in risk-

sensitive operations in Canada have had policies in place for many years, including transportation, mining, oil and gas, utilities, construction, manufacturing and other sectors.

There is considerable research available on the impacts of alcohol and other drugs on performance of individuals in the workplace. Due diligence obligations around safety both for employees and contract workers suggest that employers should be clear on their expectations around use and possession of alcohol and other drugs. Changes in Criminal Code requirements (Bill C 45) now hold employers and their representatives responsible to be proactive in taking all responsible steps for workplace safety. At the same time, human rights laws and related court decisions confirm there is a duty to accommodate individuals with an alcohol or drug dependency, including those employees who test positive under the company policy. The British Columbia Court of Appeal in the Oak Bay decision reinforced the fact that programs must be balanced when it comes to meeting safety obligations and human rights obligations.

The best way to address these requirements is through a written and well-communicated policy that is supported with education for employees, access to assistance programs, training for supervisors in support of their role under the policy, a range of tools to identify a violation, and clear consequences for a confirmed violation. The process starts with an assessment of operational need, so that a policy and implementation program can be designed to respond to the identified needs of the organization.

Given that alcohol and drug testing has formed a policy component in other risk-sensitive industries, the nuclear industry should also review the current legal situation regarding testing, and assess whether and how it would play a role in their industry. If testing is to play a role, then the industry needs to determine who would be subject to testing and under what circumstances. Only the highest technical standards and procedures should be used for any testing program, and these have been well established in Canada.

Given the nature of the nuclear power reactor facilities across Canada, there would likely be many consistent components in these programs from site to site. However, there will likely be some differences reflecting the specific needs of each workplace. The resulting policy of each organization should be seen as a **reasonable** and **responsible** response to those stated needs and should represent an appropriate balance between health and safety (due diligence) and respect for individual rights and privacy. This means finding a balance between measures to control or deter use (clear standards, investigation tools and consequences/discipline) and prevention measures (education, training, and employee assistance). Alcohol and drug testing has been introduced in a significant number of workplaces in Canada and in particular in higher risk sectors, but these programs are only defensible if they are part of a more comprehensive approach, and the highest standards are used for the testing process.

References

1. Brands, B., Sproule, B., Marsham, J. (1998). Drugs and Drug Abuse: A Reference Text, 3rd Edition. Addiction Research Foundation (Centre for Addiction and Mental Health).

2. Moskowitz, H., Burns, M., Fiorentino, D., Smiley, A., Zador. P. (2000). Driver Characteristics and Impairment at Various BACs. U.S. Department of Transportation (US DOT), National Highway Traffic Safety Administration, DOT HS 809 075, August. http://www.nhtsa.gov/people/injury/research/pub/impaired_driving/BAC/index.html

3. Burns, M., Fiorentino, D. (2002). The Effects of Low BACs on Driving Performance; A Review of Experimental Studies of Low BAC Effects on Skills Performance. Southern California Research Institute. Proceedings of the 16th International Conference on Alcohol Drugs and Traffic Safety (ICADTS). http://www.icadts.org/coreports/TRBLowBACWorkshop.pdf#page=23

4. Leirer V.O., Yesavage J.A., Morrow D.G. (1991). Marijuana Carry-Over Effects on Aircraft Pilot Performance. Aviation, Space and Environmental Medicine. Vol. 62(3), March, p.221-227.

5. Moskowitz, H. (1985). Marijuana and driving. Accident Analysis and Prevention, Vol. 17(4), August, p. 323-345.

6. Ramaekers, J.G., Lamers, C.T.J, Robbe, H.W.J., O'Hanlon, J.F. (2000). Low doses of marijuana and alcohol severely impair driving when taken together. Experimental Psychopharmacology Unit, Brain, and Behaviour Institute, Maastricht University, Sponsored by the National Highway Traffic Safety Administration (NHTSA); published by International Counsel on Alcohol, Drugs and Traffic Safety, May. http://www.icadts.org/proceedings/2000/icadts2000-153.pdf

7. Report of the International Narcotics Control Board (2010). Analysis of the world situation, North America. Chapter III, p.62-72.

8. Health Canada (2010) Canadian Alcohol and Drug Use Monitoring Survey for 2009. http://www.hc-sc.gc.ca/hc-ps/drugs-drogues/stat/_2009/tables-tableaux-eng.php#t1

9. Canadian Human Rights Tribunal (2003). Between S. Milazzo and Canadian Human Rights Commission, and Autocar Connaisseur Inc. 2003 CHRT 37. November 6, 2003. http://onlinedb.lancasterhouse.com/images/up-CHRT_Milazzo.pdf

10. Canadian Human Rights Commission (2009). Canadian Human Rights Commission's Policy on Alcohol and Drug Testing. October. http://www.chrc-ccdp.ca/pdf/poldrgalceng.pdf

11. The Mines Regulations (2003). Chapter O-1.1 Reg 2 (effective July 16, 2003) of the Occupational Health and Safety Act, 1993. The Queens Printer, Regina, Saskatchewan. http://www.qp.gov.sk.ca/documents/english/Regulations/Regulations/O1-1r2.pdf

12. Construction Owners Association of Alberta (2010). Canadian Model for Providing a Safe Workplace: A Best Practice of the Construction Owners Association of Alberta. Version 2, October 1. http://www.coaa.ab.ca/LinkClick.aspx?fileticket=P5EVhKd7bUQ%3d&tabid=90

13. Construction Labour Relations Alberta and United Brotherhood of Carpenters and Joiners of America, Alberta Regional Council (2006). Rapid Site Access Program: Procedural Rules (A proposed alternative to site access testing). June 19, Amended February 5, 2009. http://www.clra.org/docs/rsap/RSAP%20Procedural%20Rules%20amended%20Feb-4-2009.pdf

14. CN Rail and Canadian Auto Workers and the United Transportation Union, before Arbitrator Michel Picher, July 18, 2000.

15. CN Rail and Canadian Auto Workers before Arbitrator Michel Picher, April 26, 2010 page 13.

16. Department of Justice, Canada (2009). Criminal Liability of Organizations: A Plain Language Guide (Bill C-45), Amendments to the Criminal Code Affecting the Criminal Liability of Organizations. http://www.justice.gc.ca/eng/dept-min/pub/c45/c45.pdf

    Additionally, the Canadian Centre for Occupational Health and Safety has provided an overview which is also helpful: http://www.ccohs.ca/oshanswers/legisl/billc45.html

17. British Columbia Court of Appeal (2002). Oak Bay Marina Ltd (Painter's Lodge) and B.C. Human Rights Tribunal and Robert Gordy. September 10. http://onlinedb.lancasterhouse.com/images/up-OakBayMarina_v_BC.pdf

18. British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employee's Union (BCGSEU) (1999): Meiorin. SCC file No. 26274, September 9. http://onlinedb.lancasterhouse.com/images/Decisions/1999/September/SCC-BCGSEU_v_BC.pdf

19. British Columbia superintendent of Motor Vehicles v. British Columbia Council of Human Rights (1999): Grismer. SCC file No. 26481, December 16. http://www.canlii.org/en/ca/scc/doc/1999/1999canlii646/1999canlii646.pdf

20. Ontario Court of Appeal (2000). Martin Entrop and the Ontario Human Rights Commission; and Imperial Oil Limited; and Canadian Civil Liberties Association. R.S.O 1990 c.h.19 - Docket: C29762, July 21. http://www.ontariocourts.on.ca/decisions/2000/july/entrop.htm

21. CN Rail and Canadian Auto Workers and the United Transportation Union, before Arbitrator Michel Picher, July 18, 2000.

22. Ontario Grievance Arbitration (1965). Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd: Robinson. 16 L.A.C. 73. May 30. http://onlinedb.lancasterhouse.com/images/up-Robinson_KVP.pdf

23. DuPont Canada Inc. Maitland site and Communication, Energy and Paperworkers Local 28-0, before Arbitrator Pam Picher, March 28, 2002.

24. Greater Toronto Airport Authority (GTAA) and the Public Service Alliance of Canada local 0004, before Arbitrator Jane Devlin, June 28, 2007.

25. United States Department of Transportation (US DOT) (2010). Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Rule 49 CFR Part 40, Subpart 0: Substance Abuse Professionals and the Return to Duty Process. October 1. p. 60-65. http://www.dot.gov/ost/dapc/NEW_DOCS/PART40.pdf

26. Alberta Human Rights and Citizenship Commission (2009). Drug and Alcohol Dependencies in Alberta Workplaces: Information Sheet. February. http://www.albertahumanrights.ab.ca/DrugAlcoholDependencies_PW.pdf

27. Normand, J., Lempert, R.O., O'Brien, C.P. (1994). Under the Influence? Drugs and the American Work Force. National Research Council/Institute of Medicine. http://www.nap.edu/openbook.php?isbn=0309048850

28. Moskowitz, H.A.; Burns, M.M.; and Ferguson, S.A. 1999. Police officers detection of breath odors from alcohol ingestion. Accident Analysis and Prevention, 31:175-80.

29. Eliany, M., Rush, B. (1992). How Effective are Alcohol and Other Drug Prevention and Treatment Programs? A Review of Evaluation Studies: A Canada's drug strategy baseline report. Health and Welfare Canada, Vol. 106, 1992, Pg. 36-37.

30. Barnett, L., MacKay, R., Valiquet, D. (2008). Bill C-2: An Act to amend the Criminal Code and to make Consequential Amendments to Other Acts. Library of Parliament, Parliamentary Information and Research Service; SOC. c.6, LS-565E, July 2. http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/39/2/c2-e.pdf

31. Feinauer, D.M., Havlovic, S.J. (1993). Drug Testing as a Strategy to Reduce Occupational Accidents: A Logitudinal Analysis. Journal of Safety Research, Vol 24 (1), p. 1-7.

32. Brady, J.E., Baker, S.P., DiMaggio, C., McCarthy, M.L., Rebok, G.W., Li, G. (2009). Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes. American Journal of Epidemiology, Vol.170(6): 775-782. http://aje.oxfordjournals.org/content/early/2009/08/19/aje.kwp202.full.pdf

33. Quest Diagnostics Incorporated (2009). Drug Testing Index. http://www.questdiagnostics.com/employersolutions/dti/2010_09/dti_index.html

34. Currently, there are two laboratories with DHHS certification that are being used for regulated and non-regulated programs in Canada: Maxxam Analytics Inc. in Mississauga, Ontario and Gamma-Dynacare Medical Laboratories in London, Ontario.

35. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (2004). Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs. Federal Register, Vol. 69, No. 71, Tuesday April 13, 2004/Notices pg. 19673.

36. Roadside Testing Assessment, Rosita-2. European Union Project. http://www.rosita.org/

    Also, refer to the European Integrated Project Driving under the Influence of Drugs, Alcohol and Medicines (DRUID). http://www.druid-project.eu/cln_007/sid_2157BA95B759BF2721EB2456B8803C76/Druid/EN/home/homepage__node.html?__nnn=true

37. United States Department of Transportation (US DOT) (2010). Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Rule 49 CFR Part 40. Subpart G Medical Review Officers and the Verification Process. http://www.dot.gov/ost/dapc/NEW_DOCS/part40.html

38. The information in this document is not a legal opinion; it is provided for information only and should not be relied on as legal advice.

39. Canadian Human Rights Tribunal (2005). Salvatore Milazzo v. Autocar Connaisseur Inc. and Motor Coach Canada 2005 CHRT 5 http://chrt-tcdp.gc.ca/aspinc/search/vhtml-eng.asp?doid=947&lg=_e&isruling=0

40. Canadian Human Rights Tribunal (1994). Toronto Dominion Bank v. Canadian Human Rights Commission et al. 163 D.L.R. (4th) 193. August 16.

41. The Canadian Human Rights Commission (2002). Canadian Human Rights Commission Policy on Alcohol and Drug Testing, June 11. http://www.chrc-ccdp.ca/pdf/poldrgalceng.pdf

42. Human Rights and Citizenship Commission (2005). John Chiasson v. Kellogg, Brown & Root (Canada) Company (Halliburton Group Canada Inc.). Human Rights Panel of Alberta, File No. N2002/10/0224. http://www.albertahumanrights.ab.ca/ChiassonJohn060705Pa.pdf

43. Court of Queen's Bench of Alberta (2007). Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner, ABQB 499. Docket: 0603 12633, July 30. http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2007/2007abqb0499.pdf

44. Court of Appeal for Ontario (2000). Entrop v. Imperial Oil Limited. Docket: C29762. July 21. http://www.ontariocourts.on.ca/decisions/2000/july/entrop.htm

45. The Court of Appeal of Alberta (2007). Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2007 ABCA 426. Docket**:** 0601-0281-AC, December, 28. http://onlinedb.lancasterhouse.com/images/up-ABCA_KelloggRoot.pdf

46. The Court of Appeal of Alberta (2011). Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3. Docket: 0903-0239-AC, January 11. http://www.albertacourts.ab.ca/jdb/2003-/ca/civil/2011/2011abca0003.pdf

47. Transportation Communications Union v. Trimac Transportation Services – Bulk Systems (1998), 74 L.A.C. (4th) 444 (Burkett).

48. CN Rail and Canadian Auto Workers and the United Transportation Union, before Arbitrator Michel Picher, July 18, 2000.

49. The Quebec Court of Appeal (2007). Section locale 143 du Syndicat canadien des communications, de l'énergie et du papier c. *Goodyear Canada Inc. [TRANSLATED TO] Local 143 of the Communications, Energy and Paperworkers Union of Canada v. Goodyear Canada Inc. before Arbitrator Denis Tremblay.* QCCA 1686, Montreal Registry No. 500-09-016696-064. Search for Goodyear on the html page under: http://www.jugements.qc.ca/php/resultat.php?liste=54904982

50. The Imperial Oil v. Communications, Energy and Paperworkers Union of Canada, Local 900 (2006). Before Arbitrator Michel G. Picher. http://www.lancasterhouse.com/decisions/2006/dec/Picher-ImperialOil.pdf

51. The Court of Appeal for Ontario (2009). Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900, 2009 ONCA 420. Docket: C49198, May 22. http://www.ontariocourts.on.ca/decisions/2009/may/2009ONCA0420.pdf

52. The Court of Queen's Bench New Brunswick (2010). Irving Pulp and Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada (Local 30) 2010 NBQB 294, September 17. http://www.canlii.org/en/nb/nbqb/doc/2010/2010nbqb294/2010nbqb294.html

53. The Court of Appeal of New Brunswick (2011). Communications, Energy and Paperworkers Union of Canada (Local 30) v. Irving Pulp & Paper Limited. 2011 NBCA 58, July 7. http://www.gnb.ca/cour/03COA1/Decisions/2011/July/20110707CUPEvIrving133-10-CA.pdf

54. The Standing Senate Committee on Energy, the Environment and Natural Resources (2001) "Canada's Nuclear Reactors: How much Safety is Enough? Interim Report, June. http://www.parl.gc.ca/Content/SEN/Committee/371/pdf/interim-enrg-e.pdf

55. U.S. Nuclear Regulatory Commission (2011). Fitness for Duty Programs: Performance Reports. http://www.nrc.gov/reactors/operating/ops-experience/fitness-for-duty-programs/performance-reports.html

List of Acronyms

ATU	Amalgamated Transit Union
BAC	Blood alcohol content
BAT	Breath alcohol technician
B.C.	British Columbia
BFOR	*Bona fide* occupational requirement
CFR	the Code of Federal Regulations of the United States Nuclear Regulatory Commission
CN	Canadian National
DHHS	Department of Health and Human Services
DOT	Department of Transportation of the United States
EAP	Employee assistance program
GC	Gas chromatography
GTAA	Greater Toronto Airport Authority
IOL	Imperial Oil Limited
KBR	Kellogg, Brown and Root (Oil & Gas Technology Company)
KVP	KVP Co. Ltd (1965)
MDA	3,4-Methylenedioxyamphetamine
MDEA	3,4-Methylenedioxy-*N*-Ethylamphetamine
MDMA	3,4-Methylenedioxmethamphetamine (ecstasy)
MRO	Medical Review Officer
MS	Mass spectrometry
ng/ml	Nanogram's per millilitre
NHTSA	National Highway Traffic Safety Administration of the United States
OPG	Ontario Power Generation

PCP	Phencyclidine
POCT	Point of collection test
SAP	Substance abuse professional
SSP	Safety-sensitive position
SSW	Safety-sensitive workers
SVT	Specimen validity testing
THC	Tetrahydrocannabinol
TTC	Toronto Transit Commission
U.S.	United States

Appendix 1: Drugs and Cut-off Levels for Urine Drug Testing

(As set out by the Department of Human Services for regulated programs)

Drug	Initial Test Levels (ng/ml)	Confirmation Test Levels (ng/ml)*
Marijuana	50	15
Cocaine	150	100
Opiates	2,000	
Morphine		2,000
Codeine		2,000
6-Acetylmorphine	10	10
Oxycontin**	300	300
Phencyclidine (PCP)	25	25
Amphetamines	500	250
Methamphetamine		250
MDMA	500	250
MDA		250
MDEA		250

* ng/ml = nanograms per millilitre (1 nanogram is one billionth of a gram); 1 mL is one thousandth of a litre

** Oxycontin is not in the current DHHS regulated program, but has been added by many non-regulated employers for their testing program.

Drugs and Cut-off Levels for Oral Fluid Drug Testing (As proposed by the Department of Human Services for regulated programs)**

Drug	Initial Test Levels (ng/ml)* DHHS 2004	Confirmation Test Levels (ng/ml) DHHS
THC parent	4	2
Cocaine	20	8
Opiates	40	
Morphine		40
Codeine		40
6-Acetylmorphine		4
Oxycontin		n/a
Phencyclidine (PCP)	10	10
Amphetamines	50	50
Methamphetamine	50	50
MDMA		50
MDA		50
MDEA		50

* ng/ml - nanograms per milliliter; 1 nanogram is one billionth of a gram; 1 mL = one thousandth of a litre.

** A number of Canadian companies have adopted this chart for their oral fluid testing programs. However, as these programs are not regulated, many companies have included additional drugs or used alternative cut-off levels, increasing or reducing the detection times.

Appendix 2: Chronology of Transport Canada & U.S. DOT Introduction of Alcohol and Drug Testing Requirement

DATE	ACTIVITY
Fall 1987	Multi-modal steering committee set up at Transport Canada to examine issues and appropriate approach to alcohol and drugs in transportation; one initiative under National Drug Strategy. Existing modal direction around use/possession in regulation but no requirement for policies or testing. Meetings with U.S. DOT to discuss intended approach and implications for Canada.
1988–89	Discussions with U.S. DOT regarding postponement of application of their regulations to Canadian transportation while Canadian government investigated its own approach to the issue. Final U.S. regulations published in 1988 (rail 1985) for aviation, marine, pipeline, motor carrier and mass transit modes; application to foreign operators identified, but postponed to January 1990. Regulations cover drug testing only. Compliance for motor carriers – large companies December 1989; smaller companies December 1990. Final regulations on testing procedures (part 40) published December 1989 (collection, labs, Medical Review Officers). Canadian studies initiated leading to: • report on alcohol and drugs in transportation accidents • research/report on employee assistance programs • public opinion research/focus groups • extensive communication with associations, companies and unions affected • surveys of employees in marine, aviation, airports and surface modes (rail previously completed) • multimodal overview and integrated reports analyzing key findings (all released 1990)

DATE	ACTIVITY
1989–94 U.S.	Further postponement of application of U.S. regulations to foreign operations issued in December 1989 and April 1991 to allow "ongoing discussions" between the two governments; July 1992 final decision to require testing of foreign operators no later than January 2, 1995. Series of amendments and interpretations issued to various rules. Amtrack and New York subway accidents led to passing of Omnibus Transportation Employee Testing Act of 1991; required carriers to introduce alcohol testing/ prevention programs similar to the existing antidrug programs. Notice of proposed rulemaking issued December 1992; public hearings; motor carrier final rules covering both alcohol and drug testing programs were effective January 1, 1995, for larger carriers and January 1, 1996, for smaller carriers. Postponement for foreign operations continued.
1990–94 Canada	Transport Minister tabled a comprehensive strategy for the prohibition and prevention of substance abuse in safety-sensitive positions in the transportation sector (March); referred to Standing Committee on Transport for review. Included EAP and testing requirements. Interested parties invited to provide briefs on their position re. TC proposals; Committee report issued June 1990. Government response in November, with commitment to introduce legislation, no random testing. Legislation and regulations developed over the next year, tabled at Cabinet, election called, House dissolved, initiative put on hold, although MRO training program undertaken and Standards Council of Canada accepted by U.S. government to provide lab accreditation for Canadian labs meeting DOT requirements.
December 1994	New Transport Minister released letter to industry associations stating government would not introduce legislation at that time, but would facilitate development of a satisfactory program to meet U.S. DOT requirements. Notified U.S. DOT. U.S. DOT received significant pressure from U.S. motor carrier industry to subject foreign based drivers to the same regulations as U.S. drivers when on U.S. highways.

DATE	ACTIVITY
September 1995	The U.S. Federal Highway Administration served notice that the regulations would be effective for large foreign motor carriers on July 1, 1996 and for smaller carriers, on July 1, 1997. Canadian industry complied with no support or assistance from Transport Canada. Federal and provincial motor carrier associations took the lead in setting up programs to assist members with compliance. Regulations are identical in U.S. and Canada, although agreement on practical application had to be found in a number of areas (e.g., separate random pools, location of triggering accidents, impaired charges, etc.).
Intervening years	Series of minor amendments to the motor carrier regulations, including reduction in random alcohol testing rate to 10% and exemption of vehicles called into the U.S. to assist with emergencies. In other modes: • Requirements for cross-border pipeline operations postponed indefinitely; U.S. based must comply. • Aviation examined by the International Civil Aviation Organization; agreement on guidelines; member countries implement as appropriate; requirements formally withdrawn January 2000 but noted can be reissued. • Coast Guard retains powers to board and investigate any ship in U.S. waters so requirements for employers to implement programs postponed indefinitely. • No cross-border mass transit exists; Windsor bus lines covered in motor carrier regulation. April 1998 Standards Council of Canada moved out of lab accreditation; U.S. Department of Health and Human Services accredits Canadian labs directly. August 2001 Part 40 technical requirements significantly modified and reissued covering all modes of transportation (including Canadian operations).

DATE	ACTIVITY
Intervening years (Continued)	**Rail operations** into the U.S. are covered by a regulation effective June 11, 2004; It exempts foreign workers from certain requirements provided they do not exceed 10 miles into U.S. territory, but requires continued compliance with "small railroad" rule requirements (general rules, reasonable cause/post incident testing). Otherwise the full regulation applies to Canadian railway organizations, including pre-employment and random testing, and having an EAP unless a waiver is approved.
Recent activity	A new rule, effective August 25, 2008 directed additional validity testing by the labs, provided greater direction on observed collection procedures, and made observed collection mandatory for return to duty and follow-up testing. A new rule, effective October 1, 2010 lowered the cut-off levels for amphetamines and cocaine, and added additional drugs for amphetamine testing (MDMA, MDA, MDEA)

Appendix 3: United States Nuclear Regulatory Commission 10 CFR Part 2 and Part 26 – Fitness for Duty Programs Final Rule and Statement of Policy Issued June 7, 1989

Goal and Intent

To ensure that all licensees authorized to construct or operate nuclear power reactors implement fitness-for-duty programs including early identification components so that all personnel are reliable, trustworthy and not under the influence of any substance, legal or illegal, or are mentally or physically impaired from any cause, which may adversely affects their ability to perform their duties to ensure public health and safety.

Similarly, the intent is to create an environment free of drugs and the effects of drugs to increase assurance of public health and safety. While recognizing the presence of drug metabolites does not necessarily relate to current impairment, their presence strongly suggest the likelihood of past, present or future impairment affecting job activities.

Coverage

All workers with unescorted access to the protected area of nuclear reactors under construction and operation, but not research reactors or other non-power reactors.

Does not include Nuclear Regulator Commission staff and representatives who need unfettered access, although if unescorted access were required, they should be subject to the provisions.

Licensees are responsible to cover all workers with unescorted access, whether employees, contractors or vendors which may be provided independently or in conjunction with existing contractor programs.

Includes licensees, vendors or contractor personnel required to physically report to a licensee's Technical Support Centre or Emergency Operations Facility.

Testing Requirements

Testing is required for five drugs groups and for alcohol, under the Federal Department of Health and Human Services guidelines. Licensees may include additional drugs subject to appropriate test protocols and cut-off levels. For-cause tests (post-accident) are not limited to a specified panel of substances and licensees may establish more stringent cut-off levels.

- **Pre-employment**: Within 60 days prior to the initial granting of unescorted access or assignment to activities covered by the rule.

- **Random**: For all covered employees at 50% of the workforce per year with administration on a nominal weekly frequency and at various times during the day.

- **Reasonable cause/Post incident**: As soon as possible following any observed behaviour indicating possible substance abuse or other involvement with drugs; after an accident if employee performance cannot be ruled out and resulting in personal injury, radiation exposure or release of radioactivity in excess of regulatory limits, or actual or potential substantial degradation of the level of safety in the plant if there is reasonable suspicion that the worker's behaviour contributed to the event. Also after receiving credible information that an individual is abusing drugs or alcohol.

- **Return to duty**: For employees whose access is reinstated following a positive test, unannounced testing will be done to verify abstention from the use of drugs or misuse of alcohol and other illicit drugs at least

once every three months for three years. In addition with heightened potential for recidivism during the first few months, follow-up test must be at least once every month during the first four months.

Employee Assistance Programs

Programs must be available offering assessment, short-term counselling, referral services and treatment monitoring; contractor employee assistance must meet the criteria of the licensee's program.

Education and Training

Educational information is required on the regulations, policy and procedures, and on the effects of alcohol and drug use on performance. Managerial personal who will identify performance problems and make reasonable cause referrals must have specific training.

Part 26: Fitness for Duty Programs: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=eca7e0370f73a18dff1919a570fc243d&tpl=/ecfrbrowse/Title10/10cfr26_main_02.tpl

Subpart B: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=eca7e0370f73a18dff1919a570fc243d&tpl=/ecfrbrowse/Title10/10cfr26_main_02.tpl

Subpart C: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=eca7e0370f73a18dff1919a570fc243d&rgn=div8&view=text&node=10:1.0.1.1.19.3.85.8&idno=10

Appendix 4: U.S. NRC Drug and Alcohol Testing Statistics Adapted from U.S. NRCs Website [55]

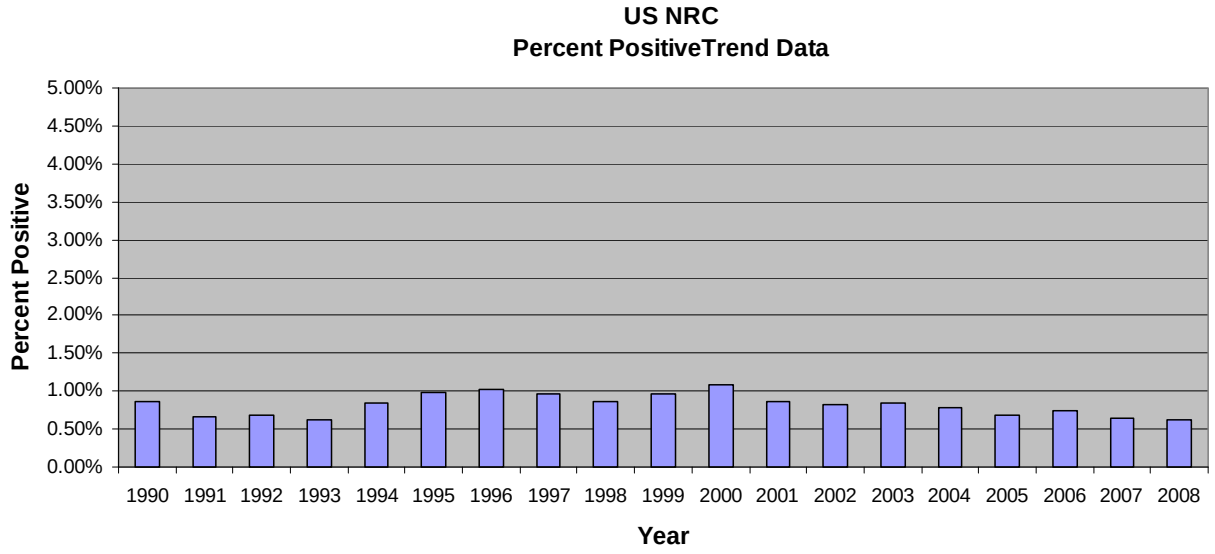

Figure A4.1. U.S. NRC percent positive test results from 1990 to 2008. Workers tested include direct licensee employees, long term contractors, and short term contractors with unescorted access to a nuclear facility in the USA.

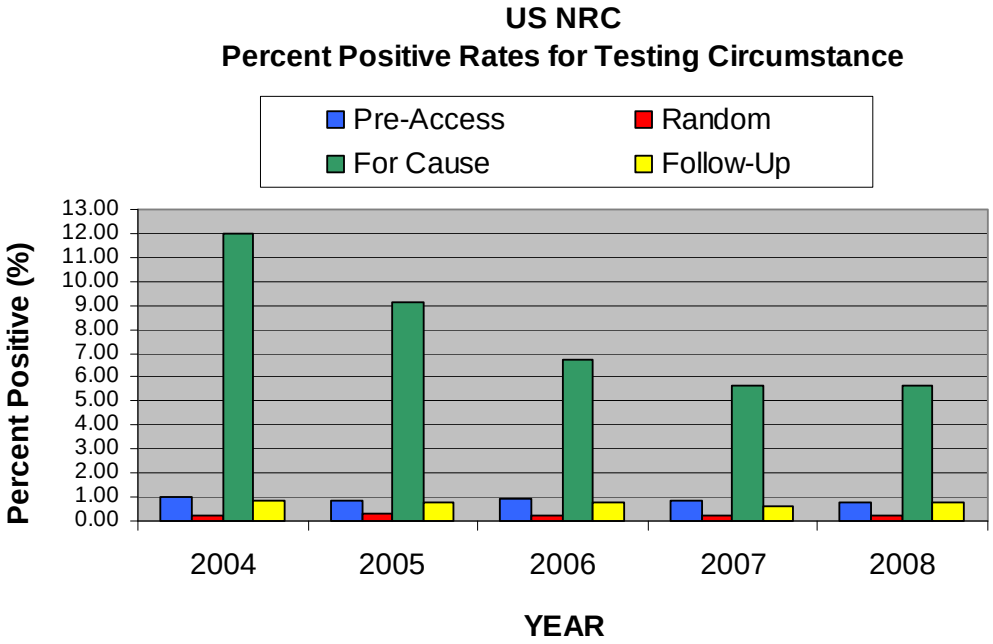

Figure A4.2. U.S. NRC percent positive drug tests broken down by testing circumstance from 2004 to 2008.

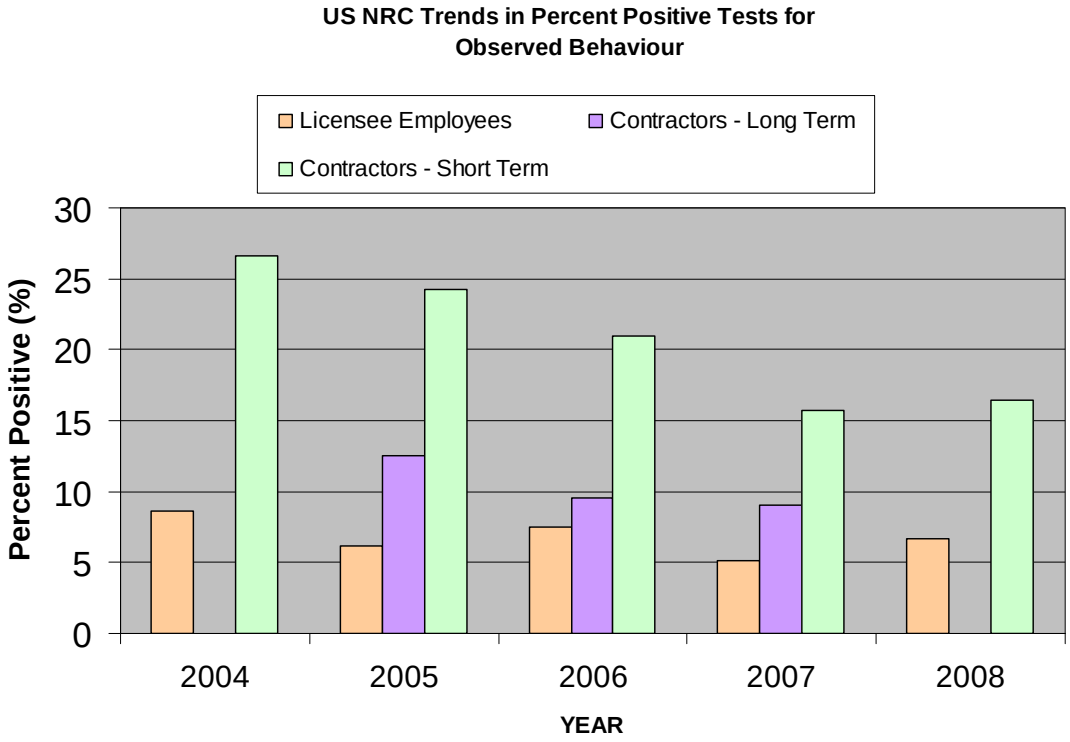

Figure A4.3. U.S. NRC percent positive drug tests broken down by worker category. No positive tests were reported for long term contractors in 2004 and 2008.

Appendix 5: Drug Use Survey Results

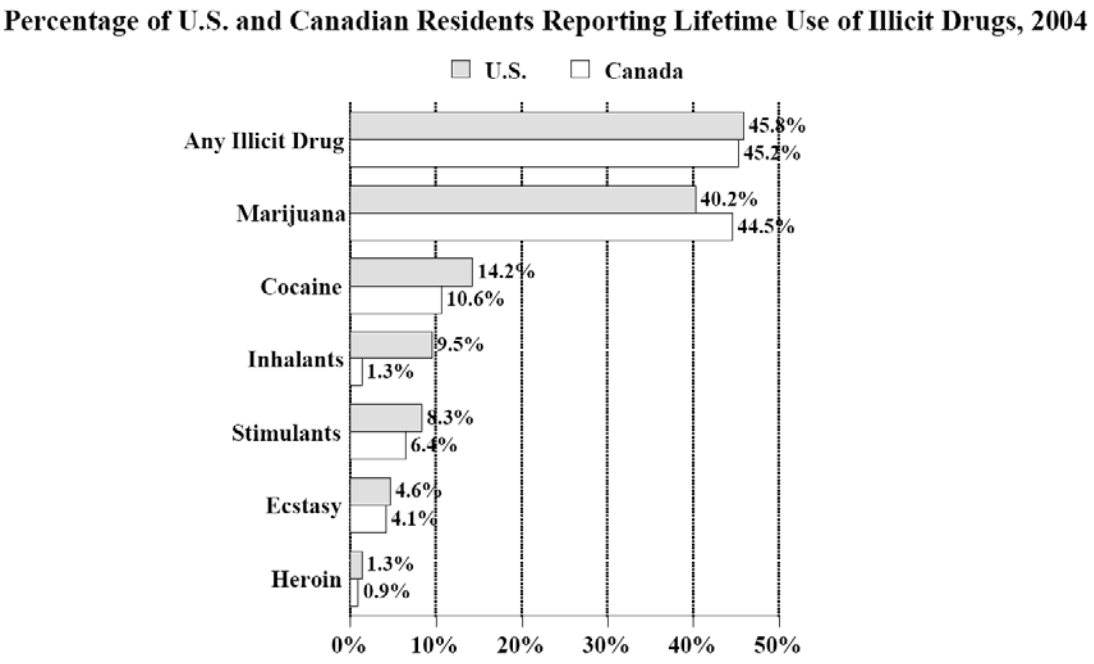

Figure A5.1. Adapted survey comparison results, from CESAR FAX, between American and Canadian residents reporting lifetime use of illicit drugs. The Canadian survey was a telephone survey of household residents ages 15 and older conducted between December 2003 and April 2004. The U.S. survey was a face-to-face survey of household residents ages 12 and older conducted between January and December 2004

Appendix 6: Drug Testing Statistics from Third Party Administrators (Positivity Rates –U.S. and Canada)

Note:

The following statistics are provided to give the reader a sense of the patterns of drug use in the workplace and allow for some general comparisons to be made between drug use in Canadian and American workplaces. It should be noted that no Medical Review Officer reviews the results presented for Quest Diagnostics. However, in a very small number of cases, legitimate medical reasons that could result in a positive test result being overturned by a Medical Review Officer are included in Quest Diagnostics percent positive rates.

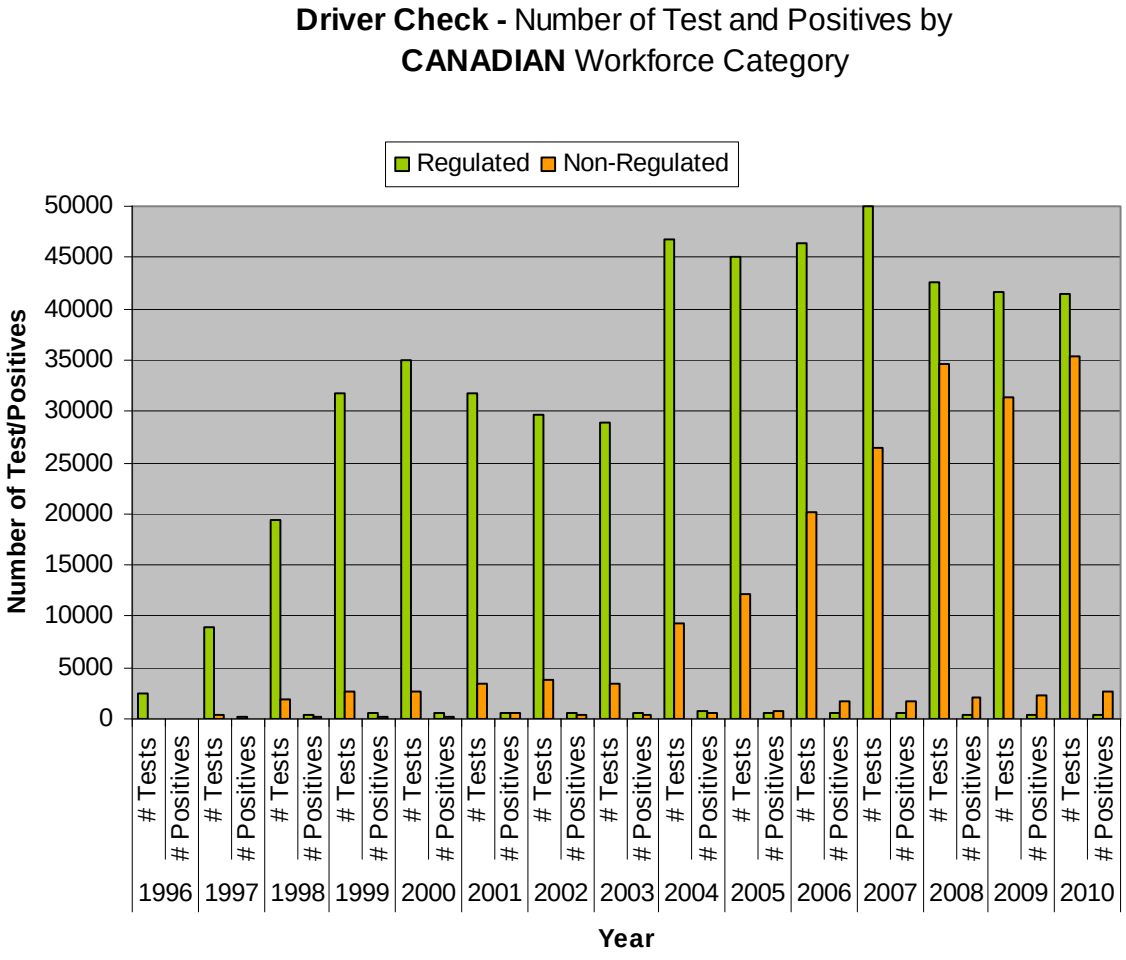

Figure A6.1. Driver Check - Number of tests vs. number of positive drug tests broken down by regulated (DOT) and non-regulated (non-DOT) workers in **Canada**

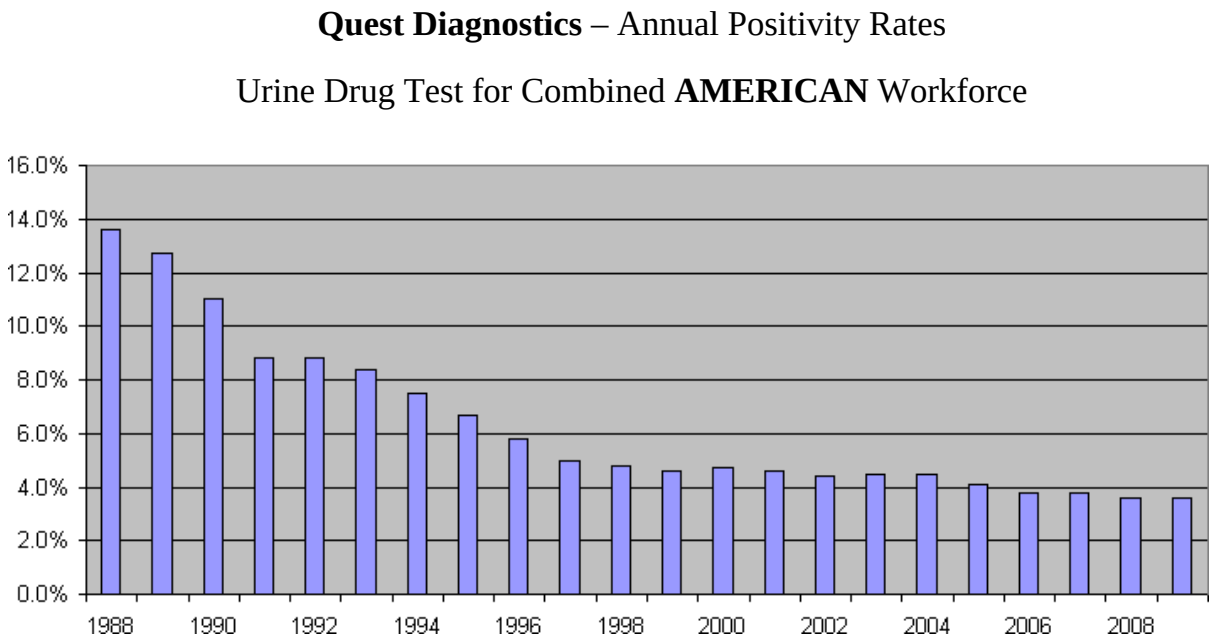

Figure A6.2. Quest Diagnostics – Annual percent positive drug tests for **American** workers for combined workforce (regulated safety-sensitive and non-regulated).

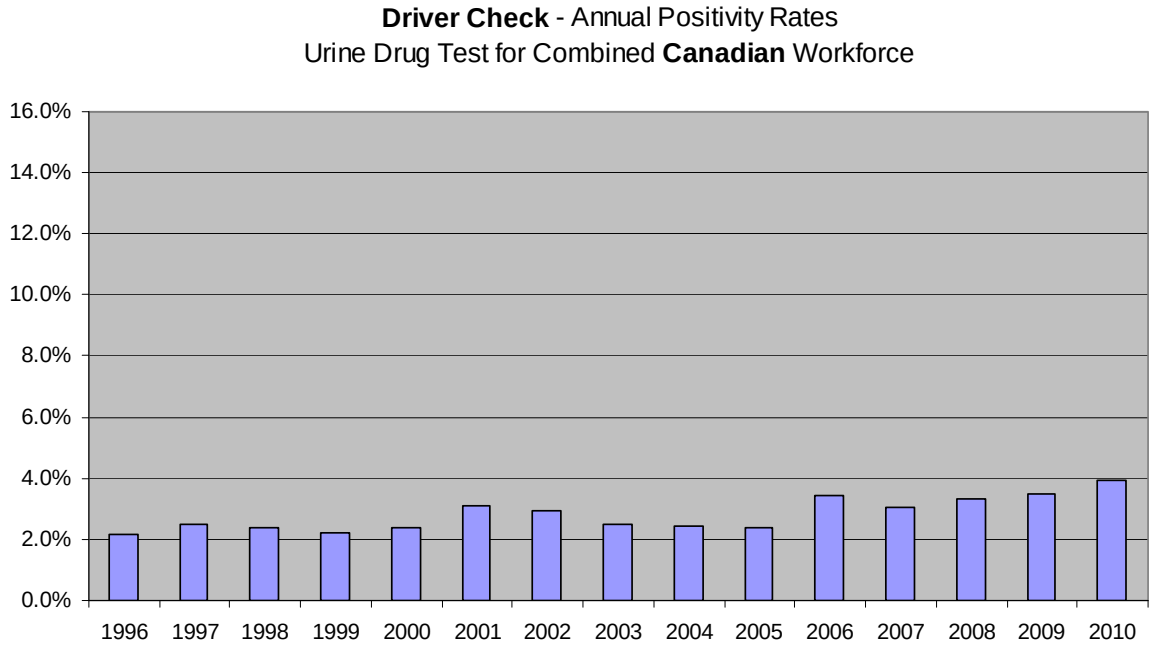

Figure A6.3. Driver Check – Annual percent positive drug tests for **Canadian** workers for combined workforce (regulated, U.S. DOT and non-regulated, non- U.S. DOT).

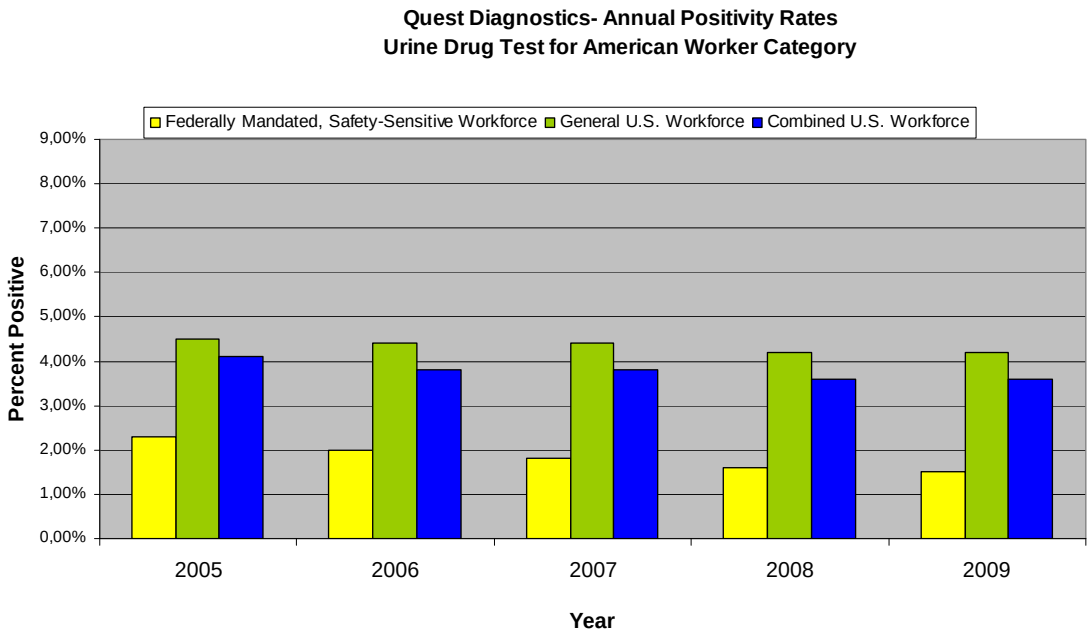

Figure A6.4. Quest Diagnostics – Annual percent positive rates for **American** workers broken down by workforce category.

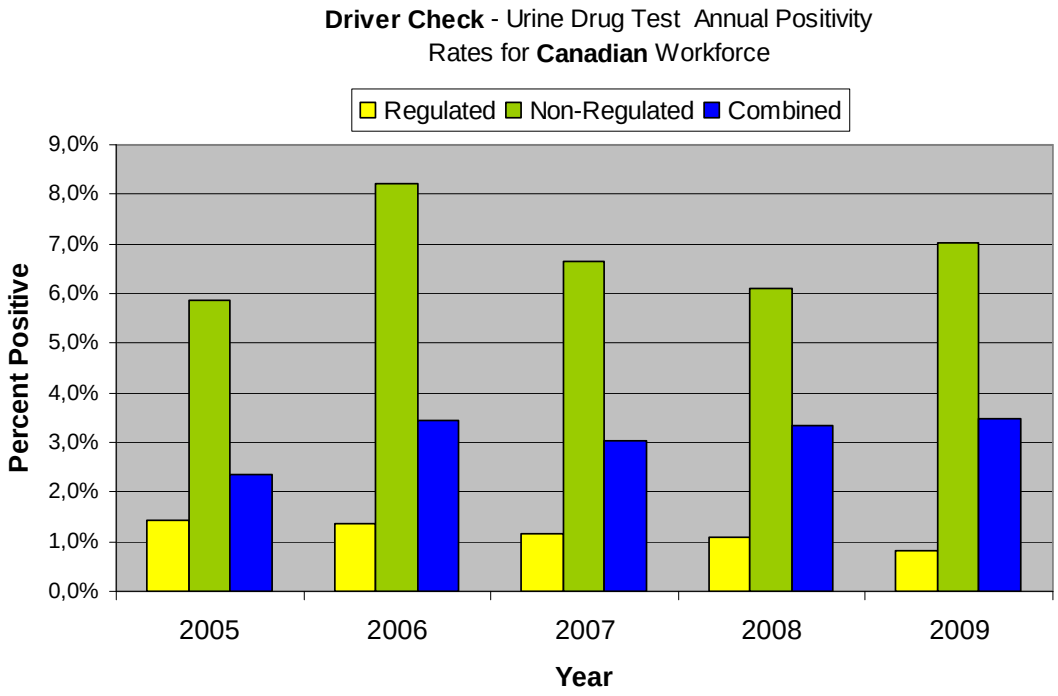

Figure A6.5. Driver Check – Annual percent positive rates for **Canadian** workers broken down by workforce category.

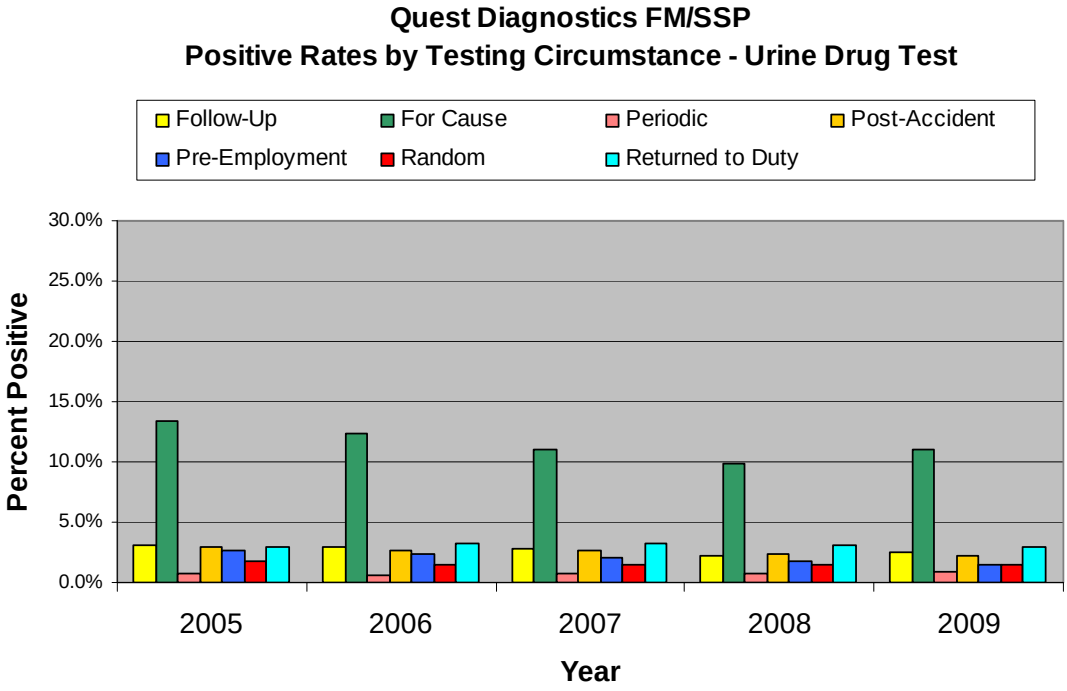

Figure A6.6. Quest Diagnostics – Regulated **American** workers percent positive drug tests broken down by testing circumstance

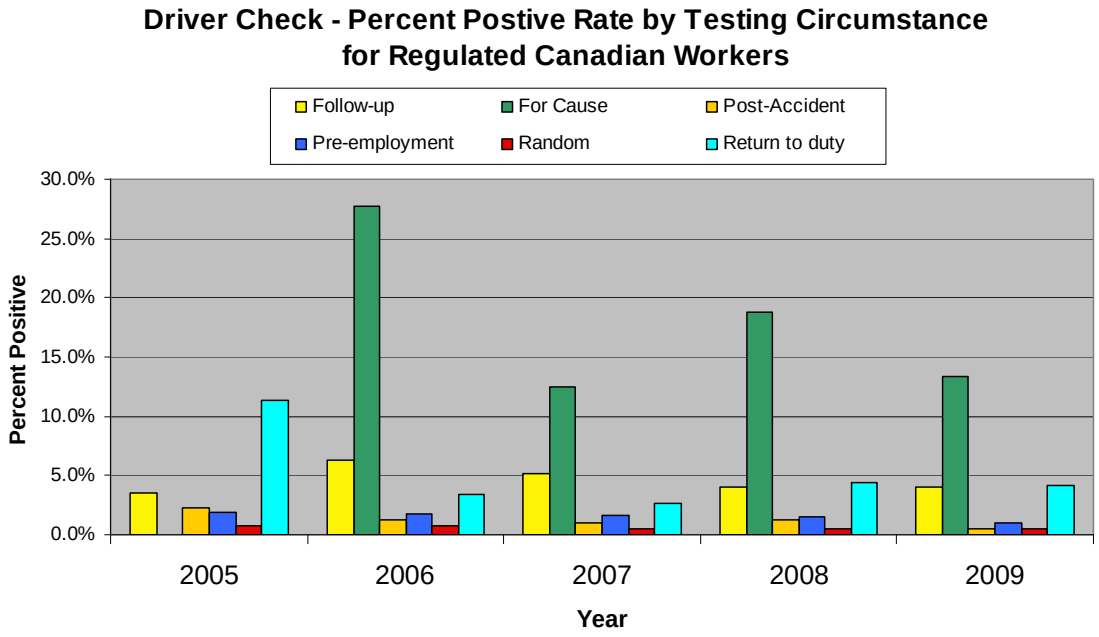

Figure A6.7. Driver Check – Regulated **Canadian** workers (DOT) percent positive drug tests broken down by testing circumstance. In the 2005 calendar year, no positive test results were reported in the *For Cause* testing circumstance. In 2005, only 6 tests were conducted.

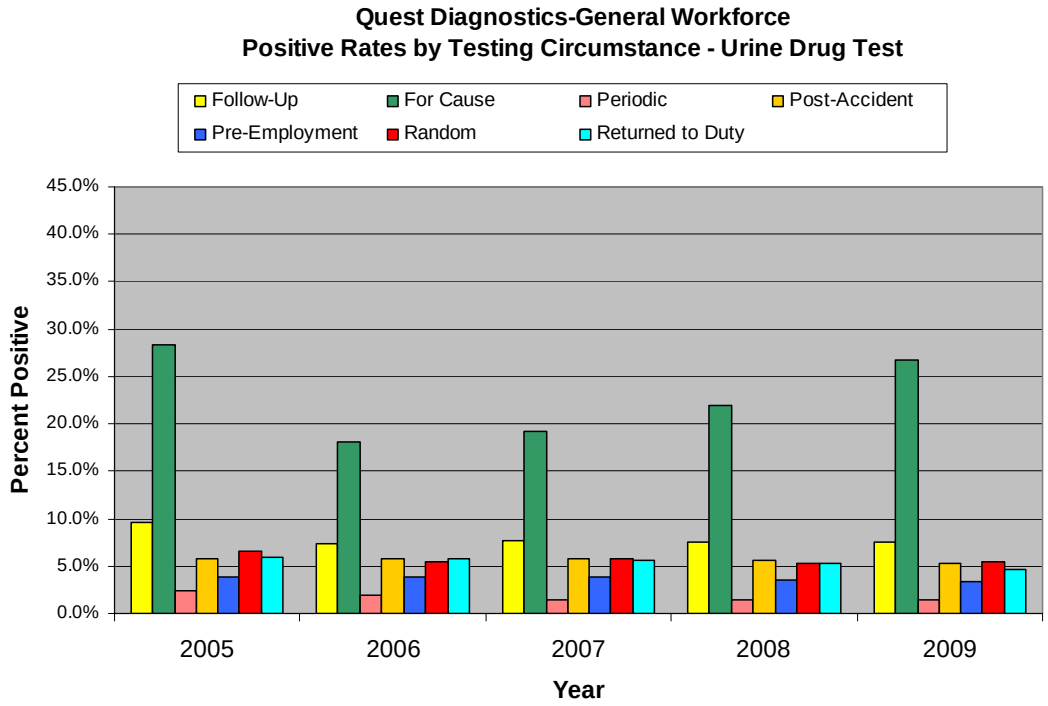

Figure A6.8. Quest Diagnostics – Non-regulated **American** workers percent positive drug tests broken down by testing circumstance

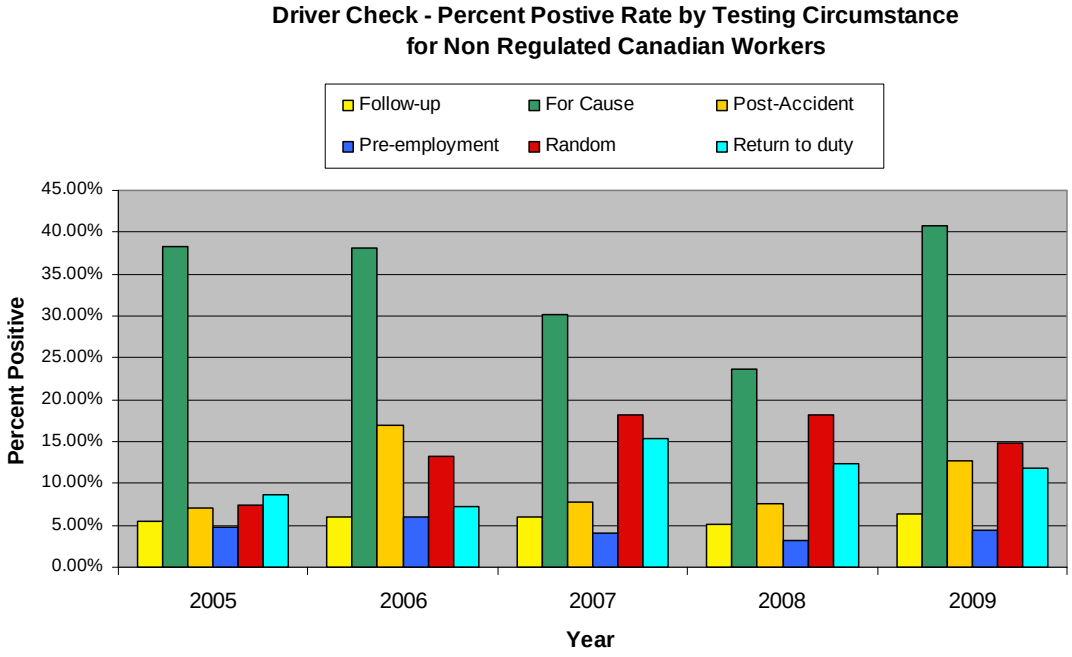

Figure A6.9. Driver Check – Non-regulated Canadian workers (non-DOT) percent positive drug tests broken down by testing circumstance

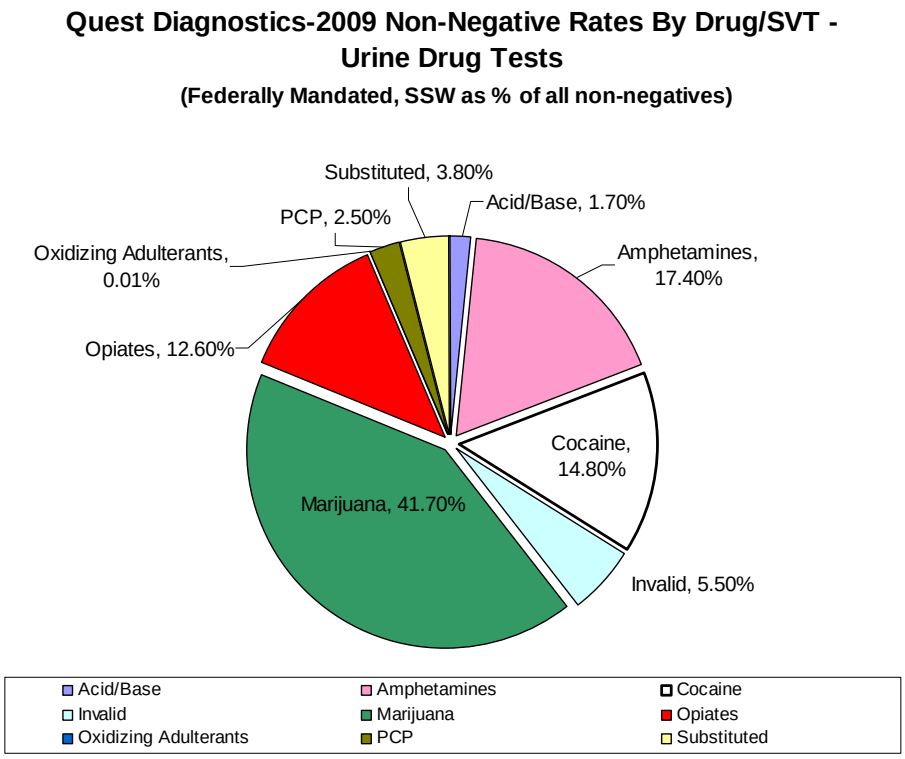

Figure A6.10. Quest Diagnostics – Regulated **American** workers positive drug tests broken down by drug class as a percentage of total number of positive drug tests

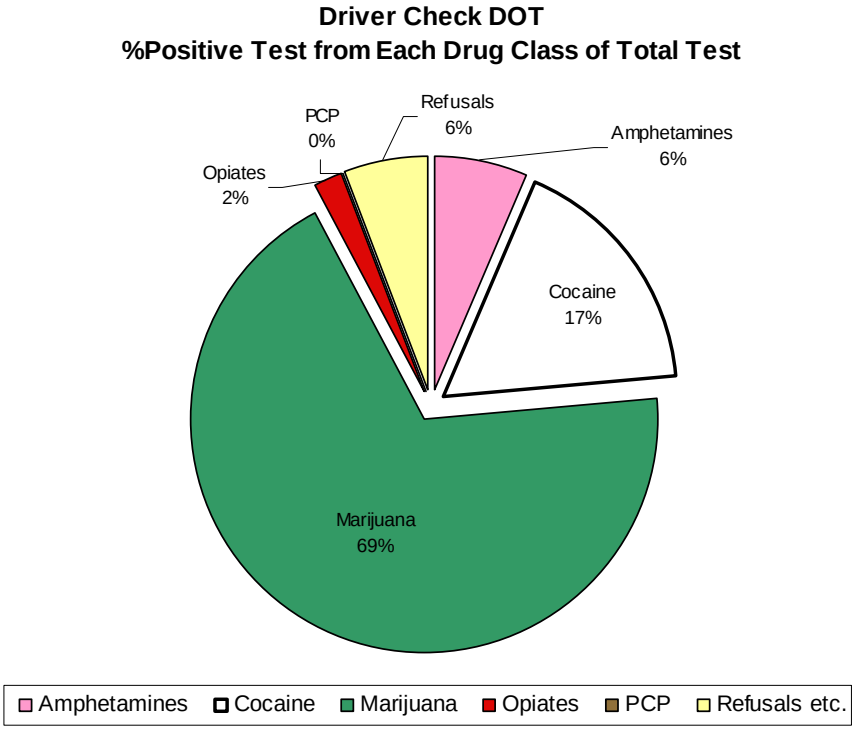

Figure A6.11. Driver Check 2010 – Regulated **Canadian** workers (DOT) positive drug tests broken down by drug class as a percentage of total number of positive tests

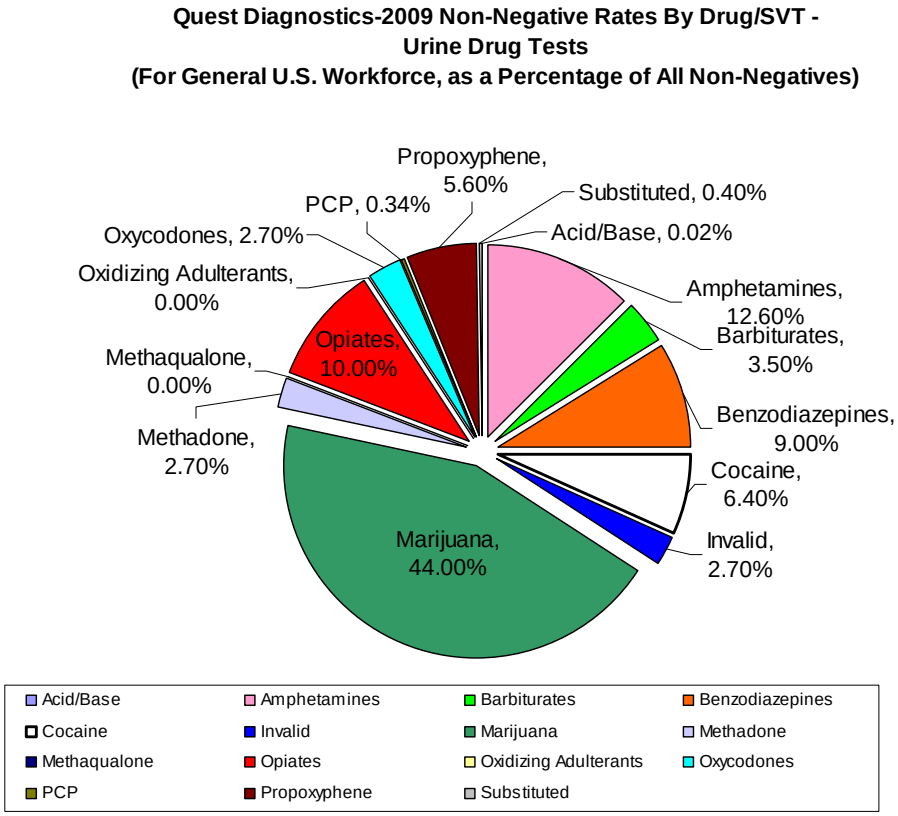

Figure A6.12. Quest Diagnostics – Non-regulated **American** workers positive drug tests broken down by drug class as a percentage of total number of positive tests

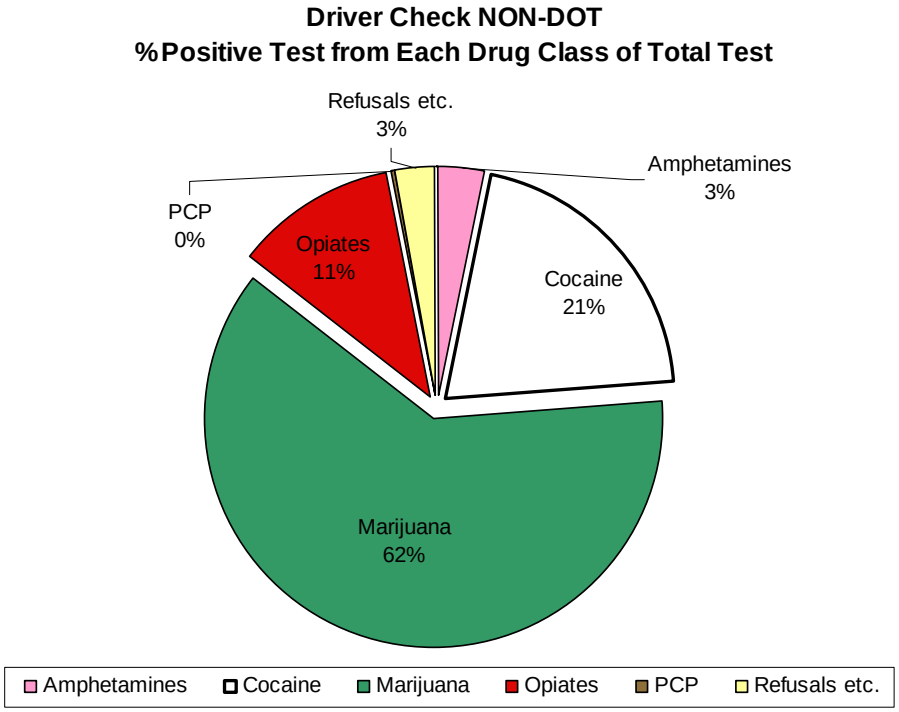

Figure A6.13. Driver Check 2010 – Non-regulated **Canadian** workers (non-DOT) positive drug tests broken down by drug class as a percentage of total number of positive drug tests