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SUBMISSIONS OF THE
POWER WORKERS' UNION ON THE DRAFT
REGULATORY DOCUMENT 2.2.4
TO THE CANADIAN NUCLEAR
SAFETY COMMISSION**

VOLUME 3

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Fitness for Duty**

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Chris Dassios
General Counsel
Power Workers' Union
244 Eglinton Ave. East
Toronto ON M4P 1K2
T: 416-322-2444
F: 416-322-2436
E: dassiosc@pwu.ca

Emily Lawrence
External Counsel
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th fl.
Toronto, ON M5V 3H1
T: 416-646-7475
F: 416-646-4301
E: Emily.Lawrence@paliareroland.com

Richard Stephenson
External Counsel
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th fl.
Toronto, ON M5V 3H1
T: 416-646-4325
F: 416-646-4301
E: Richard.Stephenson@paliareroland.com

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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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March 2012



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

Canada

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Canadian Nuclear Safety Commission
280 Slater Street
P.O. Box 1046, Station B
Ottawa, Ontario K1P 5S9
CANADA

Tel.: 613-995-5894 or 1-800-668-5284 (in Canada only)
Facsimile: 613-995-5086
Email: info@cnsccsn.gc.ca
Web site: nuclearsafety.gc.ca

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.
- 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
- 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 Connaissance*) [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 Connaissanceur* 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 Public 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 Connaissance [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 tampered 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.

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List of Acronyms

ATU	Amalgamated Transit Union
BAC	Blood alcohol content
BAT	Breath alcohol technician
B.C.	British Columbia
BFOR	<i>Bona fide</i> 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- <i>N</i> -Ethylamphetamine
MDMA	3,4-Methylenedioxymethamphetamine (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)*	Confirmation Test Levels (ng/ml)
	DHHS 2004	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	<p>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.</p> <p>Meetings with U.S. DOT to discuss intended approach and implications for Canada.</p>
1988-89	<p>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.</p> <p>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.</p> <p>Compliance for motor carriers – large companies December 1989; smaller companies December 1990.</p> <p>Final regulations on testing procedures (part 40) published December 1989 (collection, labs, Medical Review Officers).</p> <p>Canadian studies initiated leading to:</p> <ul style="list-style-type: none"> • 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.	<p>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.</p> <p>Series of amendments and interpretations issued to various rules.</p> <p>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.</p> <p>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.</p>
1990-94 Canada	<p>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.</p> <p>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.</p> <p>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.</p>
December 1994	<p>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.</p> <p>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.</p>

DATE	ACTIVITY
September 1995	<p>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.</p> <p>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.</p> <p>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.).</p>
Intervening years	<p>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.</p> <p>In other modes:</p> <ul style="list-style-type: none"> • 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. <p>April 1998 Standards Council of Canada moved out of lab accreditation; U.S. Department of Health and Human Services accredits Canadian labs directly.</p> <p>August 2001 Part 40 technical requirements significantly modified and reissued covering all modes of transportation (including Canadian operations).</p>

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	<p>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.</p> <p>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)</p>

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&rqn=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]

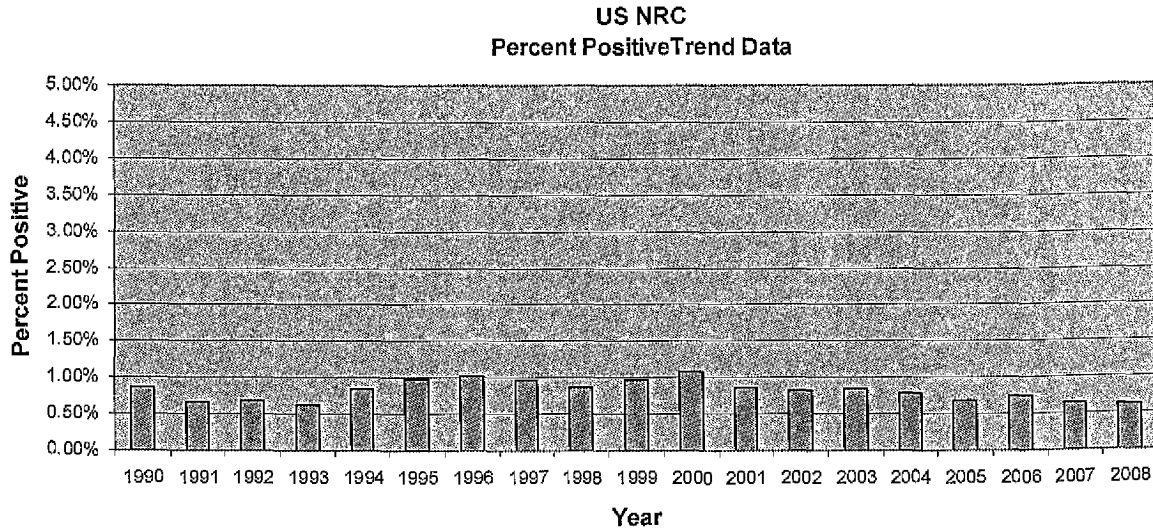


Figure A4.1. U.S. NRC percent positive test results from 1990 to 2008. Workers tested include direct licensee employees, long term contractors, and short term contractors with unescorted access to a nuclear facility in the USA.

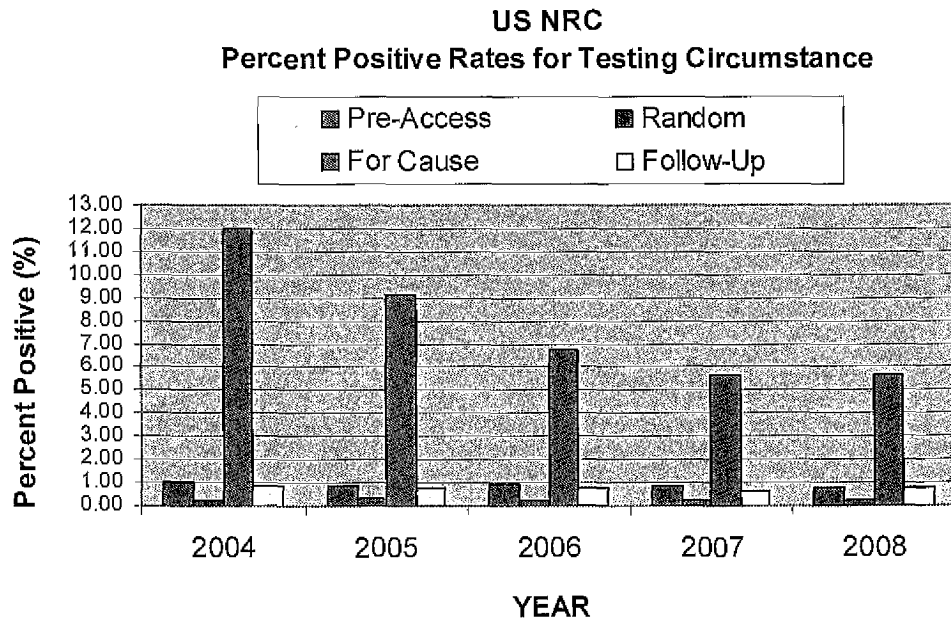


Figure A4.2. U.S. NRC percent positive drug tests broken down by testing circumstance from 2004 to 2008.

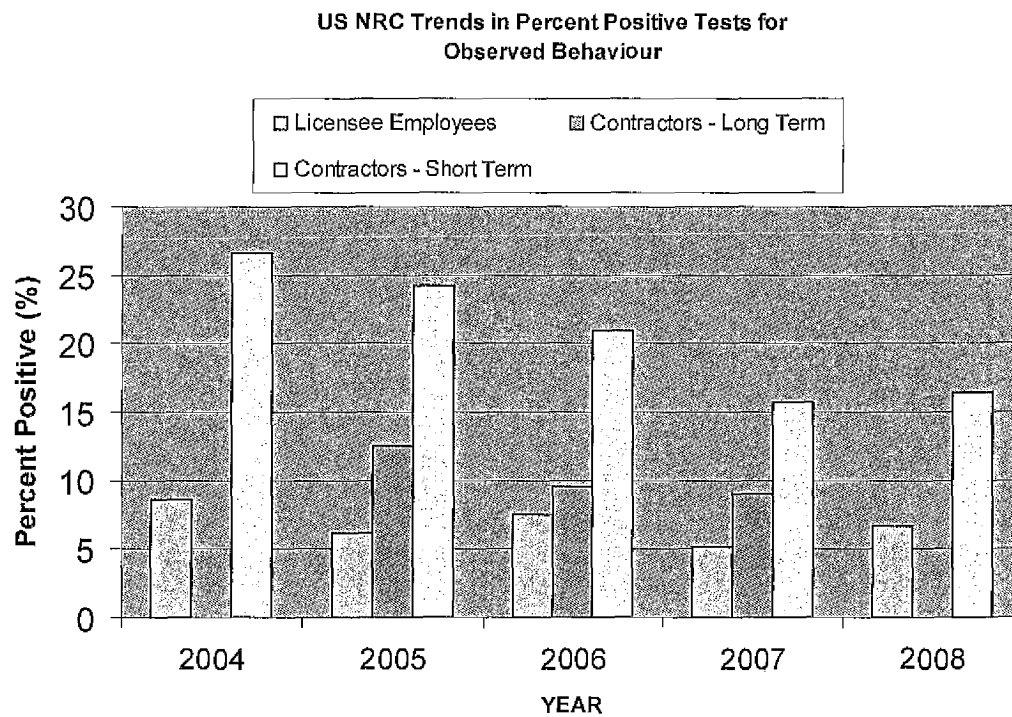


Figure A4.3. U.S. NRC percent positive drug tests broken down by worker category. No positive tests were reported for long term contractors in 2004 and 2008.

Appendix 5: Drug Use Survey Results

Percentage of U.S. and Canadian Residents Reporting Lifetime Use of Illicit Drugs, 2004

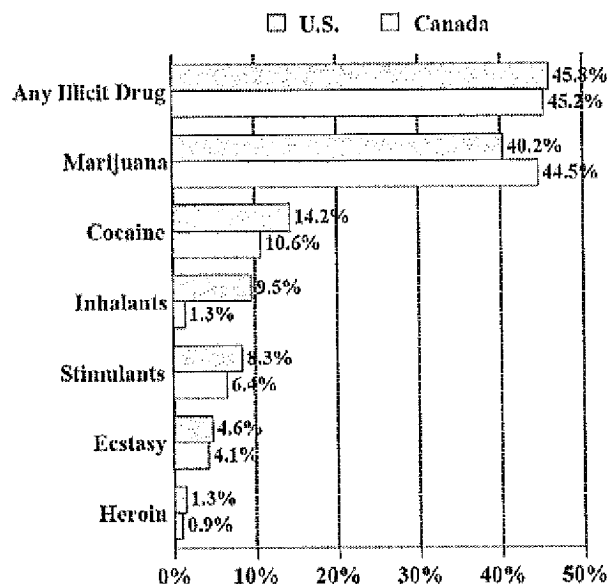


Figure A5.1. Adapted survey comparison results, from CESAR FAX, between American and Canadian residents reporting lifetime use of illicit drugs. The Canadian survey was a telephone survey of household residents ages 15 and older conducted between December 2003 and April 2004. The U.S. survey was a face-to-face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

Driver Check - Number of Test and Positives by CANADIAN Workforce Category

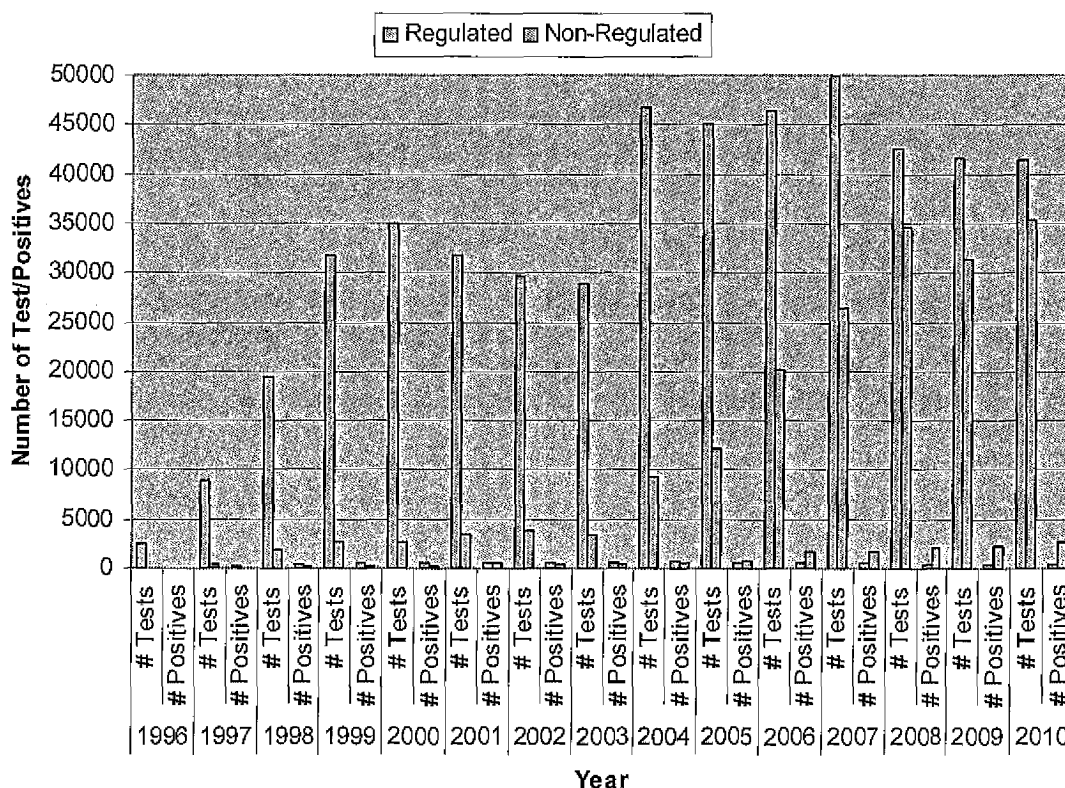


Figure A6.1. Driver Check - Number of tests vs. number of positive drug tests broken down by regulated (DOT) and non-regulated (non-DOT) workers in **Canada**

Quest Diagnostics – Annual Positivity Rates

Urine Drug Test for Combined **AMERICAN** Workforce

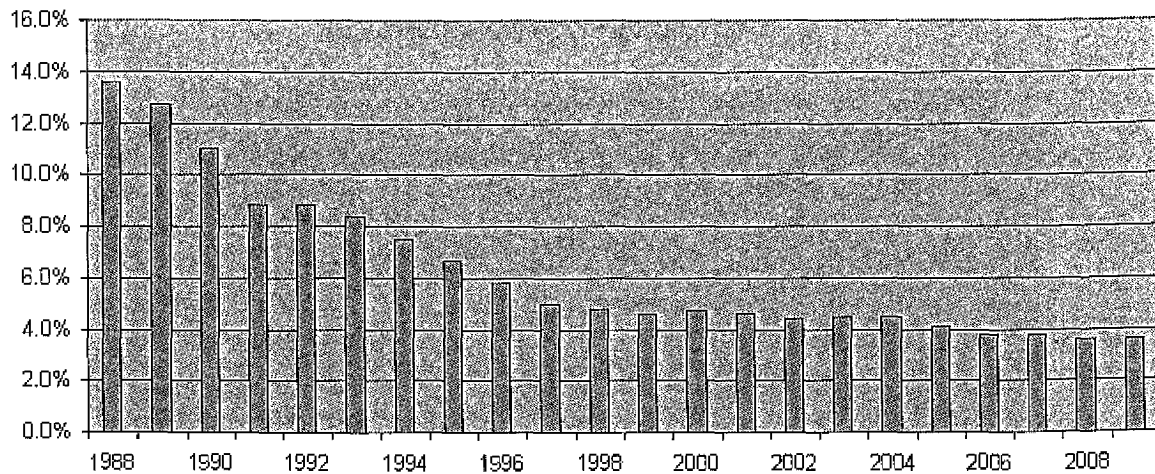


Figure A6.2. Quest Diagnostics – Annual percent positive drug tests for **American** workers for combined workforce (regulated safety-sensitive and non-regulated).

Driver Check - Annual Positivity Rates

Urine Drug Test for Combined **Canadian** Workforce

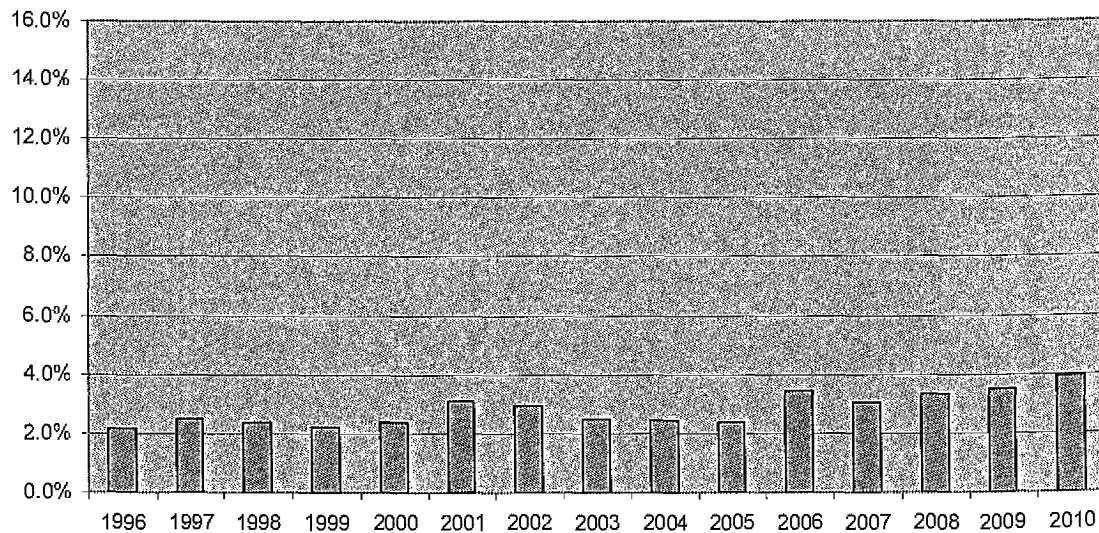


Figure A6.3. Driver Check – Annual percent positive drug tests for **Canadian** workers for combined workforce (regulated, U.S. DOT and non-regulated, non- U.S. DOT).

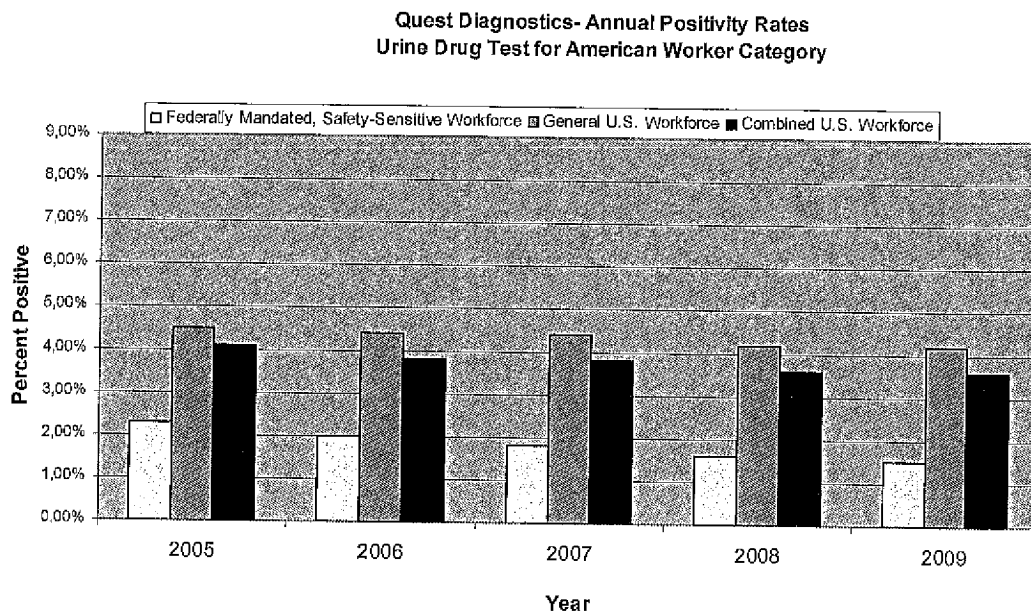


Figure A6.4. Quest Diagnostics – Annual percent positive rates for **American** workers broken down by workforce category.

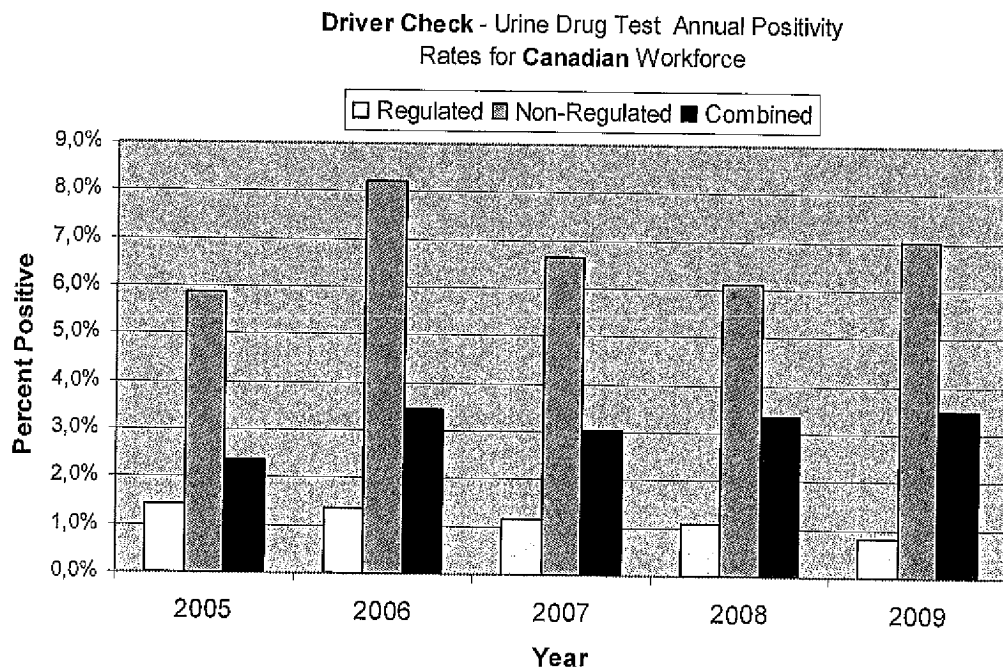


Figure A6.5. Driver Check – Annual percent positive rates for **Canadian** workers broken down by workforce category.

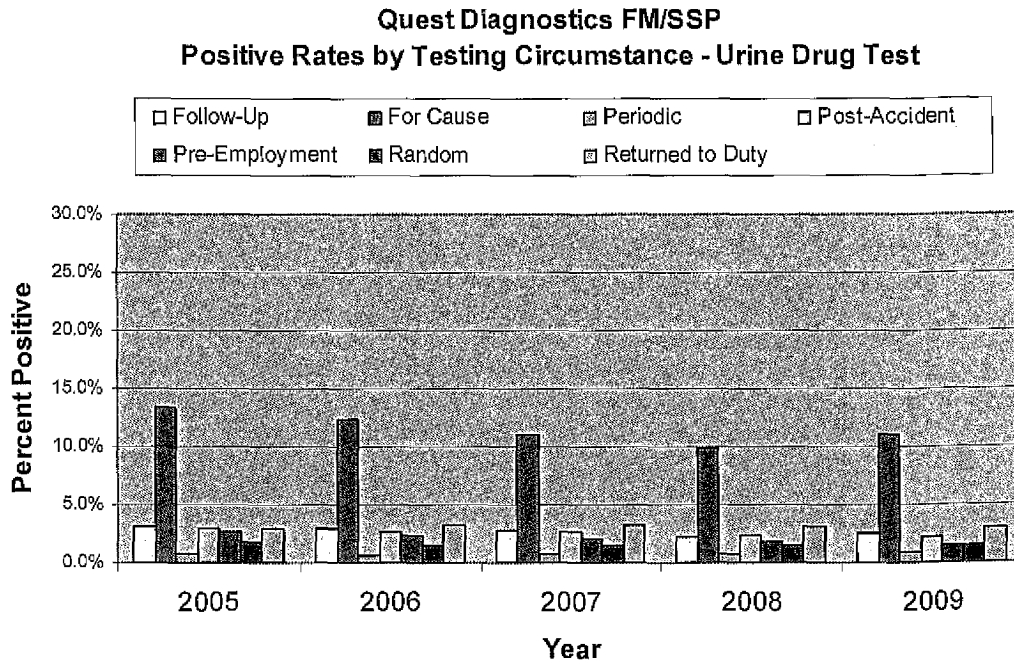


Figure A6.6. Quest Diagnostics – Regulated **American** workers percent positive drug tests broken down by testing circumstance

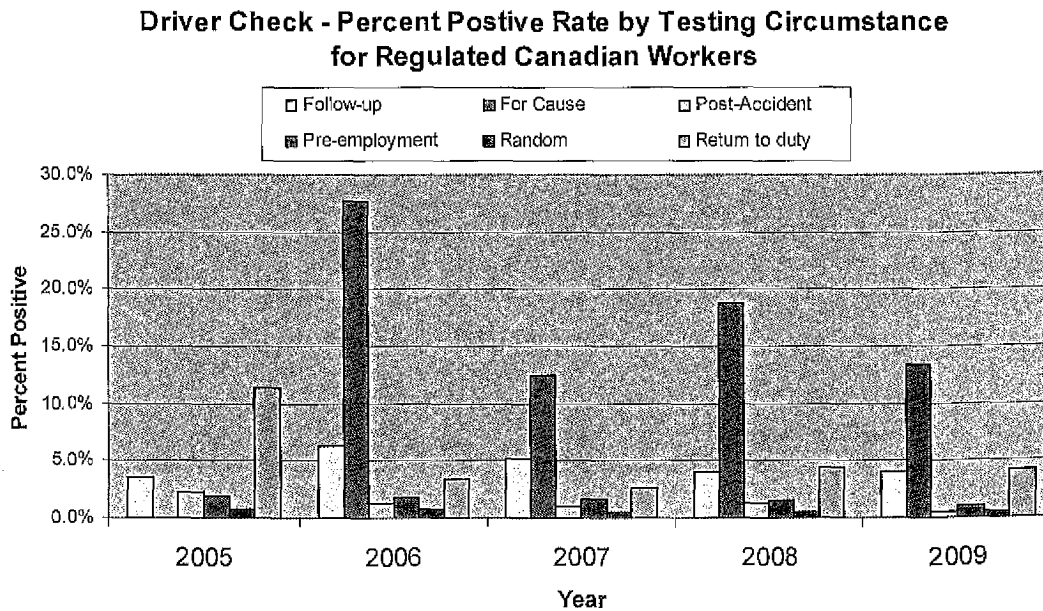


Figure A6.7. Driver Check – Regulated **Canadian** workers (DOT) percent positive drug tests broken down by testing circumstance. In the 2005 calendar year, no positive test results were reported in the *For Cause* testing circumstance. In 2005, only 6 tests were conducted.

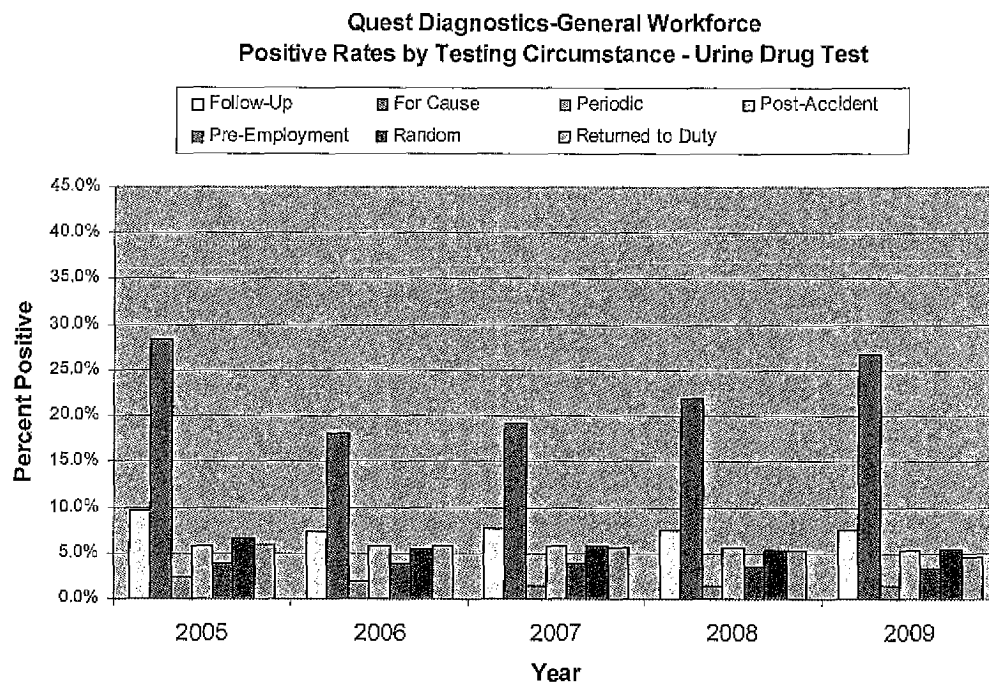


Figure A6.8. Quest Diagnostics – Non-regulated **American** workers percent positive drug tests broken down by testing circumstance

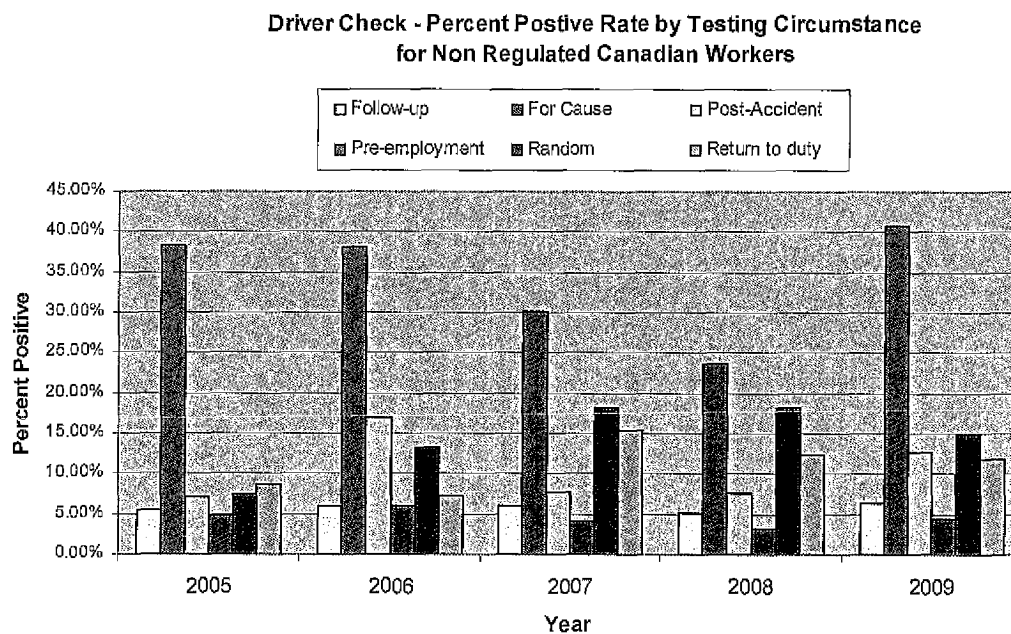


Figure A6.9. Driver Check – Non-regulated Canadian workers (non-DOT) percent positive drug tests broken down by testing circumstance

Quest Diagnostics-2009 Non-Negative Rates By Drug/SVT - Urine Drug Tests

(Federally Mandated, SSW as % of all non-negatives)

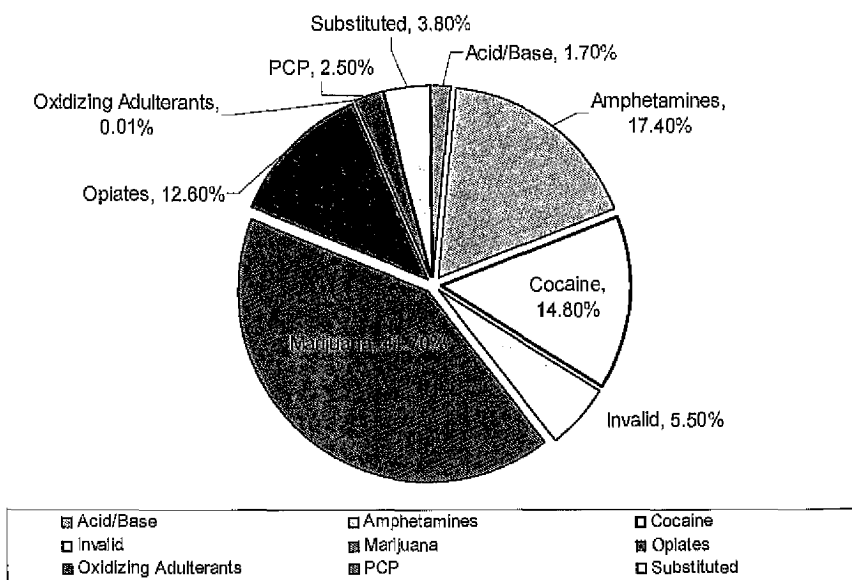


Figure A6.10. Quest Diagnostics – Regulated **American** workers positive drug tests broken down by drug class as a percentage of total number of positive drug tests

Driver Check DOT %Positive Test from Each Drug Class of Total Test

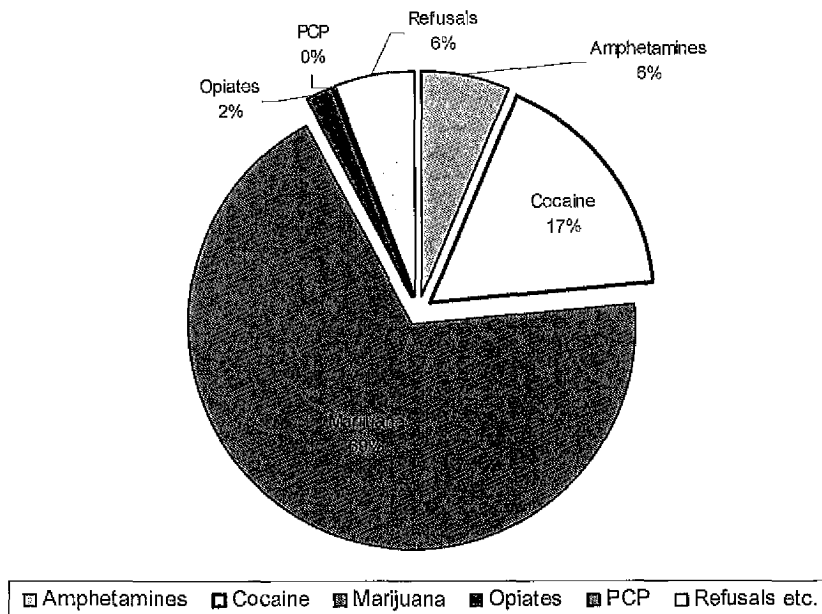


Figure A6.11. Driver Check 2010 – Regulated **Canadian** workers (DOT) positive drug tests broken down by drug class as a percentage of total number of positive tests

**Quest Diagnostics-2009 Non-Negative Rates By Drug/SVT -
Urine Drug Tests**
(For General U.S. Workforce, as a Percentage of All Non-Negatives)

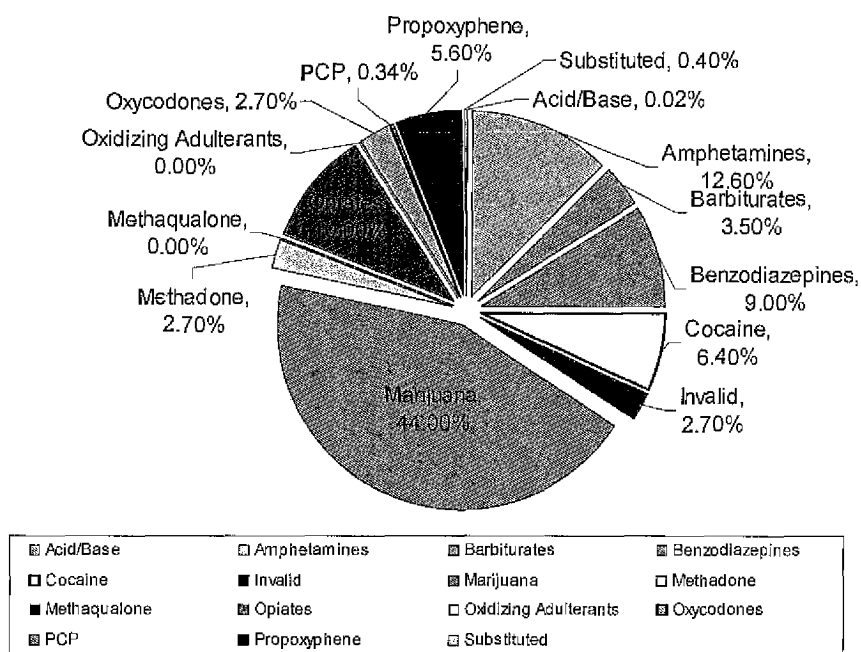


Figure A6.12. Quest Diagnostics – Non-regulated **American** workers positive drug tests broken down by drug class as a percentage of total number of positive tests

Driver Check NON-DOT
% Positive Test from Each Drug Class of Total Test

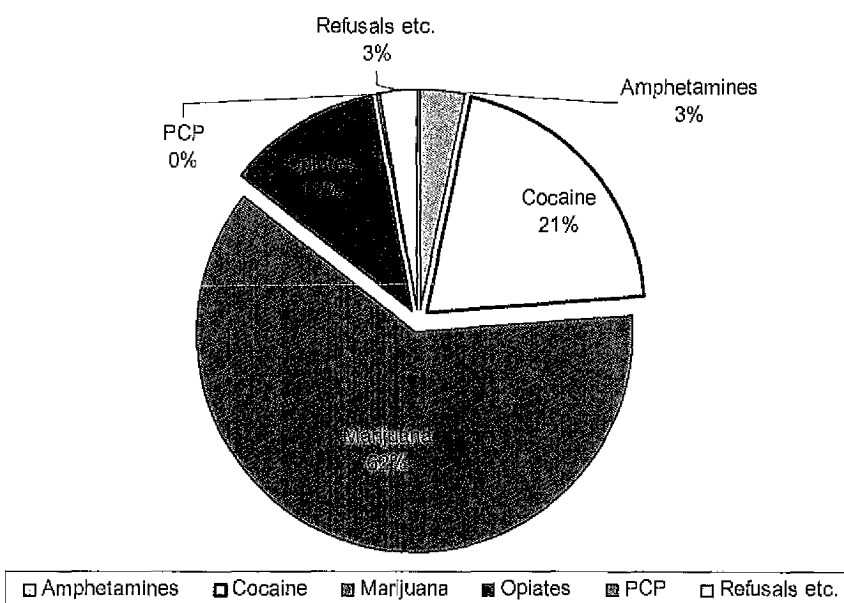


Figure A6.13. Driver Check 2010 – Non-regulated **Canadian** workers (non-DOT) positive drug tests broken down by drug class as a percentage of total number of positive drug tests

Tab 29

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Ontario
Law Reform
Commission

To The Honourable Howard Hampton
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on Drug and Alcohol Testing
in the Workplace*.

Richard E.B. Simeon
Acting Chair

Earl A. Cherniak
Commissioner

John D. McCamus
Commissioner

Margaret A. Ross
Commissioner

September 9, 1992

The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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Richard E.B. Simeon, PhD, *Acting Chair*

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John D. McCamus, MA, LLM

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Counsel

J.J. Morrison, BA (Hon), LLB, LLM

Ronda F. Bessner, BA (Hon), BCL, LLB, LLM

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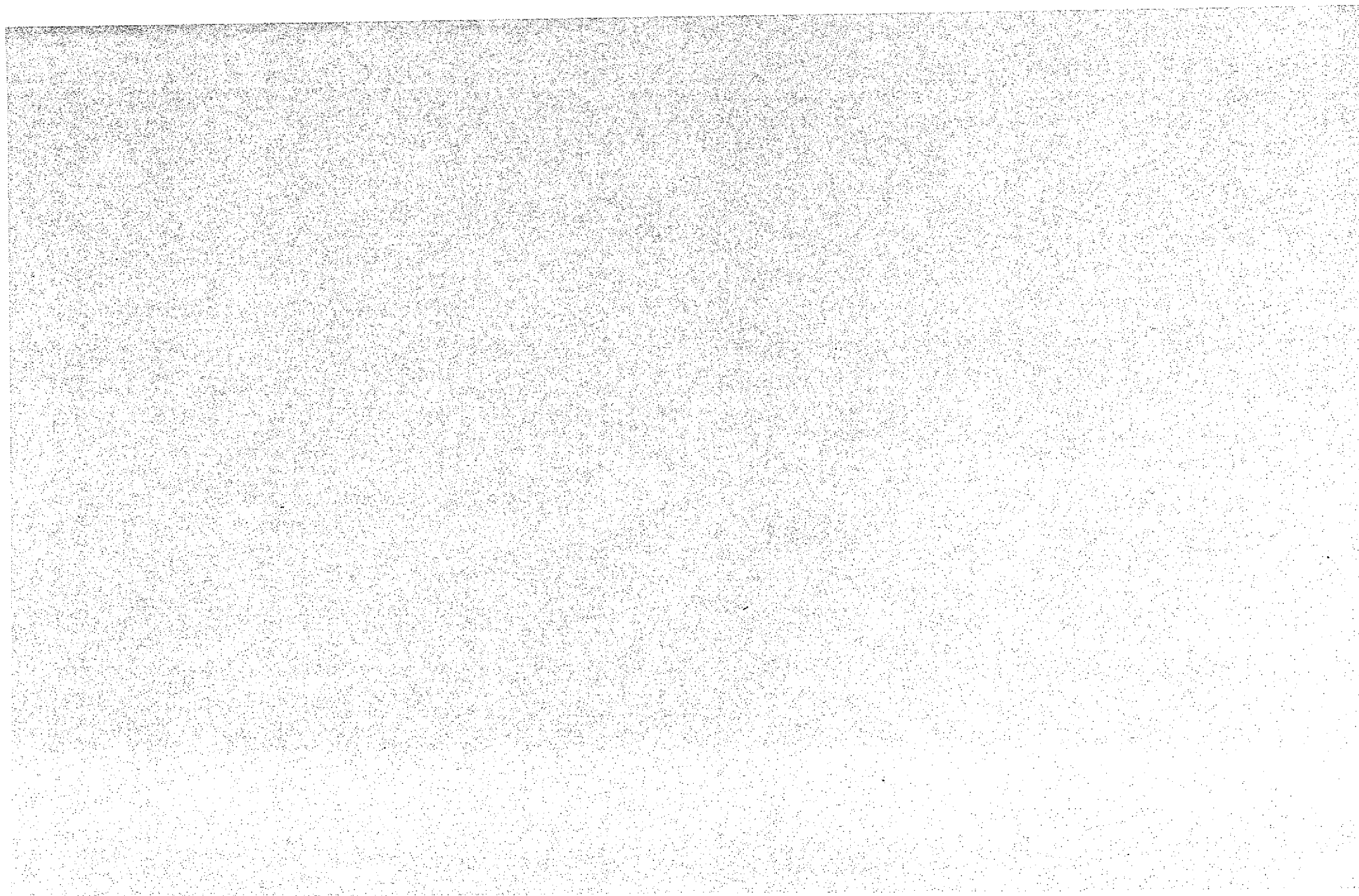
Mary Lasica, BAA

The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1. Telephone (416) 326-4200. FAX (416) 326-4693.

**REPORT
ON
DRUG AND ALCOHOL TESTING IN THE WORKPLACE**

ONTARIO LAW REFORM COMMISSION





**REPORT
ON
DRUG AND ALCOHOL TESTING IN THE WORKPLACE**

ONTARIO LAW REFORM COMMISSION



freedom from physical intrusion to which employees are generally entitled by law. As such, it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.

One year later, it was held in *Re Canadian National Railway Co. and U.T.U.*,⁵⁸ that the condition in *KVP Co. Ltd.*⁵⁹ requiring management to publish and clearly communicate unilateral rules to its employees, was not satisfied. In the particular facts of this case, it was not clearly communicated to the grievor that a breach of the United States Federal Railroad Administration Regulations on alcohol and drug testing (applicable to Canadian National Railway Co. as it operated in the United States) could result in discharge from employment.⁶⁰ It is important to note that the arbitration award was highly critical of the significance attributed to urine drug testing. In unequivocal language, the Board stated that urine tests are not capable of indicating whether an employee is impaired or under the influence of drugs at the time the sample is collected.⁶¹

The presumption of impairment, invoked in the American regulation by a positive urine test, has no basis in logic or in science. It is admitted that this test demonstrates only the use of a drug during the 60 days prior to the taking of the sample. It provides no precise information concerning when, where or in what quantity the drug was taken. Therefore, the presumption of impairment is a legal construction decreed for the particular purposes of the American regulation.

In the recent award *Re Provincial-American Truck Transporters*,⁶² the Ontario arbitration board concluded that the company policy of universal drug testing was unenforceable. The company is in the business of transporting trucks within Canada. Although the drivers spend most of their working hours on the road unsupervised, a company spotter would randomly stop the truckers in order to assess whether they were impaired.

Citing *Re Canadian Pacific Ltd.*,⁶³ the Board stated that the company did not demonstrate that it had reasonable grounds to believe its drivers were impaired while on duty.⁶⁴ According to the Board, a policy of

⁵⁸ (1990), 11 L.A.C. (4th) 364 (Can.), at 367 (hereinafter referred to as "*Re Canadian National Railway Co. (No. 2)*").

⁵⁹ *Supra*, note 3.

⁶⁰ *Re Canadian National Railway Co. (No. 2)*, *supra*, note 58, at 367.

⁶¹ *Ibid.*, at 368.

⁶² *Supra*, note 16.

⁶³ *Supra*, note 34.

⁶⁴ *Re Provincial-American Truck Transporters*, *supra*, note 16, at 423, 425.

mandatory universal testing will not be upheld unless an employer can establish that:⁶⁵

1. a substance abuse problem exists in the workplace; and
2. that alternate, less invasive means do not adequately address the problem.

Applying the above principles to the particular facts, the Board concluded that: (1) there was no evidence that any possible substance abuse problems of individuals in its workplace were having an adverse impact on the company's operations; and, (2) there was no evidence that the existing company rules and required physical examinations did not satisfactorily deal with employees who had substance abuse problems.⁶⁶ The Board also noted that the practice of submitting employees to urine drug tests had never been accepted by the union.⁶⁷

In the Board's view, privacy rights are infringed when employees are compelled to submit to urine testing. According to the Board, "the public good does not necessarily require a wholesale disregard for personal liberty".⁶⁸ Citing the principles articulated in *Re Lomex Mining Corporation Ltd.*,⁶⁹ the Board stated that testing urine for alcohol and drugs compromises the privacy of an individual in a manner similar to a personal search.⁷⁰ However, it was observed that testing urine specimens is more invasive than a personal search as urinalysis has the effect of regulating the off-duty behaviour of employees.⁷¹

There is a further aspect to the privacy argument in that, even assuming that the urine specimen is not used to determine anything other than whether there has been any past ingestion of alcohol and/or drugs, such testing necessarily involves the employer into an inquiry into what an employee is doing in his/her off-duty hours. Most reasonable people would probably consider that it was none of their employer's business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours. Therefore, what one would expect, absent some term in the collective agreement, is an arbitral response to drug testing which is similar to that taken to employee searches and to employer interests in off-duty conduct.

⁶⁵ *Ibid.*, at 425.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, at 424.

⁶⁹ *Supra*, note 16.

⁷⁰ *Re Provincial-American Truck Transporters*, *supra*, note 16, at 421-22.

⁷¹ *Ibid.*, at 422.

The Board suggested that the following concerns ought to be addressed by employers who wish to introduce into evidence the results of a bodily fluid test:⁷² (1) management must demonstrate that the particular testing technique is reliable; (2) a proper chain of custody must exist; and (3) procedures must be in place to ensure that the confidential information of employees is being safeguarded.

It is interesting to observe that arbitration awards such as *Re Provincial-American Truck Transporters*⁷³ use an analytical approach similar to judgments rendered pursuant to challenges under the *Canadian Charter of Rights and Freedoms*.⁷⁴ In fact, it was stated in *Re Doman Forest Products Ltd. and I.W.A., Local 1-357*⁷⁵ that while the *Charter* does not regulate private party disputes, arbitrators must interpret collective agreements and employment relationships in accordance with the value system imposed by the *Charter*. The issue in *Re Doman Forest Products Ltd.* was the admissibility of videotaped and visual observations of an employee by a private investigator who had been hired by the employer. The arbitration board cited the standard in *Hunter, Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc.*⁷⁶ with respect to the search and seizure provision in section 8 of the *Charter* and stated that the company must demonstrate that it had reasonable grounds to violate the privacy of the worker.⁷⁷ Moreover, as in an analysis under section 1 of the *Charter*, the arbitration board held that management must establish that less invasive methods were not available to the company to obtain the particular evidence.⁷⁸

It is important to note that arbitrators in Ontario have imposed drug and alcohol testing on employees as a condition of reinstatement.⁷⁹ For

⁷² *Ibid.*, at 426.

⁷³ *Ibid.*

⁷⁴ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as "*Charter*"). For general comments, see Feldthusen, *supra*, note 5, at 105.

⁷⁵ (1990), 13 L.A.C. (4th) 275 (B.C.), at 279, 281 (hereinafter referred to as "*Re Doman Forest Products Ltd.*").

⁷⁶ [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

⁷⁷ *Re Doman Forest Products Ltd.*, *supra*, note 75, at 279, 282.

⁷⁸ *Ibid.*, at 282.

⁷⁹ *Re Fibreglas Canada Inc. and A.C.T.W.U., Local 1305* (1989), 5 L.A.C. (4th) 302 (Ont.); *Re Shell Canada Products Co. and Energy & Chemical Workers Union, Local 848*, *supra*, note 45; *Re Steinberg Inc., Miracle Food Mart Division and Teamsters Union, Local 419* (1986), 23 L.A.C. (3d) 193 (Ont.); and *Re McMillan Bathurst Inc. and I.W.A., Local 242*, *supra*, note 45.

legislation.²⁶ The Minister retains direct and substantial control over the college. The college is a delegate of the government and performs acts of the government.²⁷ Consequently, any dealings which the college has with its employees constitute government action within the meaning of section 32 of the *Charter*.²⁸

Similarly, the Court held in *Lavigne v. Ontario Public Service Employees Union*²⁹ that the *Charter* applied to the collective agreement entered into by the community college. It was stated that the Council of Regents, who on behalf of the board of governors had entered into a collective agreement with the union, constituted "government" for the purposes of section 32. The college is a Crown agent whose activities are controlled by the Minister of Colleges and Universities.³⁰ The Minister is responsible for the collective bargaining of the college with its employees who are Crown employees.

The above Supreme Court decisions demonstrate that the majority's approach to the *Charter* application issue is *ad hoc*. This is in contrast to the principled approach of Wilson J., set out at length in her dissent in *McKinney*.³¹ Wilson J. delineated a three-part test to be used to determine whether a body constitutes "government" for the purposes of section 32 of the *Charter*.³²

1. whether the institution performs a function pursuant to statutory authority on behalf of the government in furtherance of a governmental purpose;
2. whether there is government control of the institution as for example, its governing structure, its policies, its funding; and
3. whether the institution performs a government function.

Wilson J. emphasized that each of the above factors is to be analyzed in relation to the others; fulfilment of a single factor does not necessarily imply that the institution is "governmental" for the purposes of section 32.³³ After examining these factors in *McKinney*,³⁴ *Stoffman*,³⁵ *Harrison v. University*

²⁶ *Ibid.*, at 584.

²⁷ *Ibid.*

²⁸ *Ibid.*, at 584-85.

²⁹ *Supra*, note 10.

³⁰ *Ibid.*, at 241-42.

³¹ *Supra*, note 6, at 320 *et seq.*

³² *Ibid.*, at 358-71.

³³ *Ibid.*, at 358-59.

³⁴ *Supra*, note 6.

of *British Columbia*³⁶ and *Douglas College*,³⁷ Wilson J. concluded that the *Charter* applies to universities, hospitals and community colleges.

Wilson J.'s disapproval of the majority's lack of a principled approach to section 32 is evident in her judgments. As she states in *Lavigne v. Ontario Public Service Employees Union*:³⁸

I fully appreciate that in *McKinney* and the appeals which were heard along with it only two of my colleagues endorsed my test for determining whether or not a body is a government actor for purposes of s. 32(1) of the *Charter*. On the other hand, I am unable to find a different test of general application enunciated in the reasons of the majority. Those reasons appear to me to reflect an *ad hoc* approach to the status of each entity brought before the Court in order to determine whether or not it forms 'part of the apparatus of government' so as to be subject to *Charter* review. This being so, I do not feel as constrained by precedent as I otherwise might. Indeed, I am unchastened in the view that this Court has a duty to take a structured approach to this issue and establish appropriate criteria if at all possible for distinguishing those bodies which are subject to *Charter* constraint from those which are not. In any event, whether I am right or wrong on this, I believe that the *ad hoc* approach would yield the same result in this particular case.

The above discussion demonstrates that it is difficult to predict with any certainty whether or not *Charter* principles will apply to particular bodies or institutions. The Supreme Court has held that the *Charter* applies to community colleges but not to universities or hospitals. It is uncertain whether other entities such as many Crown corporations or municipalities will fall within the ambit of section 32 of the *Charter*.

3. UNREASONABLE SEARCH AND SEIZURE: SECTION 8 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In this section, the Commission addresses the issue of whether workplace testing programs contravene the guarantee against unreasonable search and seizure in section 8 of the *Charter*. Section 8 provides:

8. Everyone has the right to be secure against unreasonable search or seizure.

³⁵ *Supra*, note 4.

³⁶ *Supra*, note 8.

³⁷ *Supra*, note 9.

³⁸ *Supra*, note 10, at 239.

(a) THE REASONABLE EXPECTATION OF PRIVACY

*Hunter, Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc.*³⁹ is the seminal case on the interpretation of section 8 of the *Charter*. The Supreme Court stated in unequivocal language that section 8 "guarantees a broad and general right to be secure from unreasonable search and seizure"⁴⁰ and that the purpose of section 8 is to protect individuals from unjustified state intrusions upon their privacy. The Court stated that the *Charter* protection is limited to searches or seizures that intrude upon an individual's reasonable expectation of privacy. As Dickson J. (as he then was) wrote:⁴¹

The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

Further, Dickson J. states:⁴²

[A]n assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search and the seizure, and not simply on its rationality in furthering some valid government objective.

In *R. v. Dyment*,⁴³ the Supreme Court affirmed the proposition in *Hunter v. Southam*⁴⁴ that a major purpose of section 8 is the protection of the privacy of an individual and that this *Charter* guarantee is not restricted to the protection of property. As La Forest J. states:⁴⁵

From the earliest stage of *Charter* interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at

³⁹ [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 (subsequent references are to [1984] 2 S.C.R.) (hereinafter referred to as "*Hunter v. Southam*").

⁴⁰ *Ibid.*, at 158.

⁴¹ *Ibid.*, at 159-60.

⁴² *Ibid.*, at 157.

⁴³ [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503 (subsequent references are to [1988] 2 S.C.R.).

⁴⁴ *Supra*, note 39, at 159-60.

⁴⁵ *R. v. Dyment*, *supra*, note 43, at 426.

p. 344. The function of the *Charter*, in the words of the present Chief Justice, then Dickson J., in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, 'is to provide ... for the unremitting protection of individual rights and liberties'. It is a purposive document and must be so construed. That case dealt specifically with s. 8. It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual: see especially pp. 159-60. And that right, like other *Charter* rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.

La Forest J. also emphasizes that individual privacy "is at the heart of liberty in a modern state".⁴⁶ He writes the following:⁴⁷

Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

It was stated in *R. v. Dyment* that section 8 of the *Charter* is intended to protect three zones of privacy: (1) territorial or spatial privacy; (2) privacy of the person; and (3) informational privacy.⁴⁸ Territorial privacy is essentially the protection of an individual's property.⁴⁹ Privacy of the person, according to the Supreme Court, offers protection not only against the physical search of the person but also as against the indignity of the search, its invasion of the person in a moral sense.⁵⁰ The Court cited *R. v. Pohoretsky*⁵¹ for the proposition that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home".⁵² As La Forest J. states:⁵³

[t]he constitution does not tolerate a 'low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of

⁴⁶ *Ibid.*, at 427.

⁴⁷ *Ibid.*, at 427-48.

⁴⁸ *Ibid.*, at 428-30.

⁴⁹ *Ibid.*, at 428.

⁵⁰ *Ibid.*, at 429, quoting *Privacy and Computers* (report of the Task Force established by the Department of Communications and the Department of Justice) (1972), at 13.

⁵¹ [1987] 1 S.C.R. 945, at 949, 39 D.L.R. (4th) 699, at 702.

⁵² *R. v. Dyment*, *supra*, note 43, at 439.

⁵³ *Ibid.*, at 438.

considerable latitude' (*Hunter v. Southam Inc.*, *supra*, at p. 167); if anything, when the search and seizure relates to the integrity of the body rather than the home, for example, the standard is even higher than usual.

The third zone of privacy, as described in *R. v. Dymont*,⁵⁴ is privacy in relation to information. As the Court states, "this notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit".⁵⁵ In other words, this zone of privacy protects an individual from being compelled to disclose sensitive information about himself. The Court observed that particularly in modern society, retention of information about oneself is extremely important and must be jealously safeguarded.⁵⁶ It noted that governments at both the federal and provincial levels have promulgated privacy legislation to protect these interests.⁵⁷

Applying these principles to drug and alcohol testing, a convincing argument could be made that workplace testing intrudes upon an individual's reasonable expectation of privacy contrary to section 8 of the *Charter*. In particular, testing may be held by the courts to violate privacy of the person as well as informational privacy. In other words, it could be argued that testing constitutes a serious affront to human dignity as described in *R. v. Dymont* and *R. v. Pohoretsky* and, as well, obliges an individual to disclose personal information to his employer concerning his lifestyle and medical status. As the Court states in *R. v. Duarte*,⁵⁸ privacy may be defined as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself".

(b) THE MINIMUM CONTENT OF THE CONSTITUTIONAL GUARANTEE IN SECTION 8

It was stated in *Hunter v. Southam*⁵⁹ that once section 8 of the *Charter* is implicated by a reasonable expectation of privacy, it must be established that the state obtained prior authorization, such as a warrant, before it conducted a search. As Dickson J. explains:⁶⁰

⁵⁴ *Ibid.*, at 429-30.

⁵⁵ *Ibid.*, at 429, quoting *Privacy and Computers*, *supra*, note 50, at 13.

⁵⁶ *R. v. Dymont*, *supra*, note 43, at 430.

⁵⁷ *Ibid.*

⁵⁸ [1990] 1 S.C.R. 30, at 46, 65 D.L.R. (4th) 240, at 252.

⁵⁹ *Supra*, note 39.

⁶⁰ *Ibid.*, at 161-62.

itself contains no standards, criteria, or circumstances relating to its application, for the guidance of staff or inmates, which would ensure that application is not unreasonable within the meaning of section 8".¹⁰³ The Federal Court was critical of the regulation for subjecting inmates "to the whim of any officer" "whether or not the officer had any reason to believe that the inmate was under the influence of an intoxicant".¹⁰⁴ The key factor which led to the striking down of section 41.1 was the presence of a discretionary power not constrained by any ascertainable criteria. Although the Court in *Jackson v. Joyceville Penitentiary*¹⁰⁵ did not specify the type of criteria necessary to satisfy section 8, it did state that the decision would not affect a scheme of random testing or testing of high risk groups provided it was governed by some criteria.

The flexibility of the probable cause requirement in Canadian constitutional law remains a subject of speculation. In light of the possibility that there will be a sliding scale of "cause" that is contingent upon the nature of the privacy interest being intruded upon, it is difficult to apply the administrative inspection decisions to drug and alcohol testing. There may be little objection to compelling the production of business documents when a state official subjectively determines that the production is necessary to facilitate the regulatory objectives; however, the provision of a urine, blood or breath sample more directly implicates the right of an individual to be left alone than the provision of business records, and it is this distinctive privacy interest that suggests that the state may be barred from intruding in the absence of some threshold level of cause.

4. SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

(a) INTRODUCTION

The Commission will now examine the issue of whether workplace drug and alcohol testing programs violate section 7 of the *Charter*. Section 7 provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹⁰³ *Jackson v. Joyceville Penitentiary*, *supra*, note 101, at 98.

¹⁰⁴ *Ibid.*, at 74.

¹⁰⁵ *Ibid.*

testing cases rendered by the United States Supreme Court are controversial because the Court did not simply modify the probable cause requirement by lowering it to reasonable suspicion; it abandoned it in its entirety.¹⁰⁰ Although Canadian judges have stated that they are prepared to take a contextual approach to section 8 of the *Charter*, it is uncertain whether our courts will abandon the probable cause or other analogous standards with respect to mandatory testing.

*Jackson v. Joyceville Penitentiary*¹⁰¹ is the sole Canadian decision that considers the constitutionality under section 8 of the *Charter* of mandatory drug testing. The issue before the Federal Court was the constitutionality of section 41.1 of the Penitentiary Service Regulations¹⁰² pursuant to which penitentiary inmates were required to provide urine samples. The relevant provisions are as follows:

39. Every inmate is guilty of a disciplinary offence who

(a) disobeys or fails to obey a lawful order of a penitentiary officer,

....

(i.1) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant.

41.1.(1) Where a member considers the requirement of a urine sample necessary to detect the presence of an intoxicant in the body of an inmate, he may require that inmate to provide, as soon as possible, such a sample as is necessary to enable a technician to make a proper analysis of the inmate's urine using an approved instrument.

(2) In any hearing in relation to a contravention of paragraph 39(i.1), evidence that a sample of urine taken and analysed in the manner referred to in subsection (1) contains an intoxicant establishes, in the absence of evidence to the contrary or in the absence of a reasonable explanation of the presence of the intoxicant, that the inmate who provided the sample has contravened paragraph 39(i.1).

Although the Court acknowledged that a reduced expectation of privacy exists in a prison environment, it nonetheless held that section 41.1 authorizes an unreasonable search and seizure in violation of section 8 of the *Charter*. The constitutional infirmity was found in the fact that the "regulation

¹⁰⁰ *Skinner v. Railway Labor Executives Associations*, *supra*, note 67; and *National Treasury Employees Union v. Von Raab*, *supra*, note 67.

¹⁰¹ [1990] 3 F.C. 55, 75 C.R. (3d) 174 (T.D.) (subsequent references are to [1990] 3 F.C.).

¹⁰² C.R.C. 1978, c. 1251, s. 39(a), (i.1), as amended by SOR/85-412, Schedule, item 2; SOR 85/640, Schedule, item 4(1), and s. 41.1, as enacted by SOR/85-412, Schedule, item 3.

(c) PROPORTIONALITY TEST

(i) The Accuracy and Effectiveness of Testing - A Rational Connection?

The courts will not permit a legislature to combat a recognized social evil by a method that is flawed and tenuously related to its overall objective. In this regard, there have been a number of claims that have been made with respect to the effectiveness of current testing technologies and, in particular, urinalysis, as it is the most pervasively used testing technique in the North American workplace.¹⁶⁶

The first claim relates to the accuracy of testing. It is argued that testing techniques, such as urinalysis, result in an unacceptably high number of false positives. Although certain types of testing, for instance the EMIT screening test, will produce high false positives, a urine sample that is subjected to the confirmatory procedure of gas chromatography/mass spectrometry is capable of yielding reliable results. Nonetheless, GC/MS is labour intensive and although the possibility of technological error is minimized, the possibility of human error is increased.¹⁶⁷ In order to ensure that urine samples produce accurate results, it is incumbent on the state to promulgate legislation that addresses such matters as chain of custody, and the licensing and certification of laboratories. Furthermore, it should be understood that the practice of mass random testing produces the greatest accuracy problems – the greater the number of samples that are tested, the greater the likelihood of error.

A far more significant problem with respect to efficiency is found in the interpretation of tests that can otherwise be assumed to be accurate. As discussed in detail in chapter 2, there is no scientific connection between a positive drug test and current employee impairment. Current testing techniques, such as urine, blood and saliva testing, are not capable of establishing drug impairment of an individual. Therefore, drug testing cannot perform its designated function of identifying employees who are impaired on the job. A positive test cannot indicate current impairment nor can it

¹⁶⁶ S. Chapnik, *supra*, note 156, at 103; and Addiction Research Foundation, *Issues Related to Drug Screening in the Workplace*, by S. Macdonald, S. Wells, and R. Fry (March 1992) (draft manuscript), at 11-12; T.E. Ullrich, "A Drug-free American Workplace and the Virginia Employer" (1989), 15 Va. B.A.J. 5; Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990); Ontario, Information and Privacy Commissioner, *Workplace Privacy[:] A Consultation Paper* (Toronto: June 1992); A. Abbey and C. Redel, "Drug Testing in the Workplace: Public and Private Sector Employers and the Courts" (1991), Lab. L.J. 239, at 240; and S.S. Cairns and C.V. Grady, "Drug Testing in the Workplace: A Reasoned Approach for Private Employers" (1990), 12 Geo. Mason U.L. Rev. 491, at 495.

¹⁶⁷ D.G. Evans, *Drug Testing Law Technology and Practice* (New York: Clark/Boardman/Callaghan, 1990, looseleaf), §5.01, at 9-10.

establish whether the employee is a chronic or casual user of drugs.¹⁶⁸ It is difficult to imagine a court upholding a *Charter* violation as a reasonable limit under section 1 when the impugned violation does not rationally address the social problem in question.

(ii) The Least Restrictive Means

The next matter that must be addressed under the proportionality test is whether drug and alcohol testing constitutes the least restrictive means of achieving the legislative objective. As the Supreme Court has stated in *R. v. Oakes*, it is incumbent upon lawmakers to choose a statutory scheme that intrudes the least upon the constitutional rights of an individual.¹⁶⁹

A review of the Supreme Court decisions rendered in the past few years demonstrates that the minimal impairment test articulated in *R. v. Oakes* may not be applied strictly in certain circumstances. As La Forest J. states in *Black v. Law Society of Alberta*:¹⁷⁰

The legislature must be given sufficient scope to achieve its objective. As I noted in *R. v. Edwards Books and Art Ltd.*, at p. 795, in struggling with questions of social policy and attempting to deal with conflicting pressures, 'a legislature must be given reasonable room to manoeuvre ...'. The term 'reasonable limit' is used in s. 1 and must be given meaning. Inherent in the word 'reasonable' is the notion of flexibility. Section 1 does not advocate perfection.

The Supreme Court of Canada in *Irwin Toy Ltd.*¹⁷¹ attempted to delineate the circumstances in which the judiciary ought to apply a less stringent minimal impairment test. The Court stated that the meaning to be attributed to "as little as possible" will... vary depending on the government objective and on the means available to achieve it".¹⁷² A distinction was made in *Irwin Toy* between socio-economic or regulatory areas where the government is mediating between competing groups, and cases where the dynamic is clearly the government vis-à-vis the individual whose rights are

¹⁶⁸ See discussion in ch. 2 of this Report.

¹⁶⁹ *Supra*, note 152.

¹⁷⁰ [1989] 1 S.C.R. 591, at 627-28, 58 D.L.R. (4th) 317, at 348. In *Black*, the Court considered whether particular rules of the Law Society of Alberta, which violated s. 6 of the *Charter*, were justified under s. 1 of the *Charter*. It is noteworthy that despite La Forest J.'s *dicta* on the minimal impairment test, he decided that the impugned rules were not justified under s. 1, in part, because of the availability of less intrusive ways in which the Law Society's objectives could be met. See Stratas, *supra*, note 90, §6:08, at 6-19.

¹⁷¹ *Supra*, note 130.

¹⁷² *Ibid.*, at 993.

As the Report demonstrates, the Ontario *Human Rights Code*⁵ does not adequately address the issue of workplace testing. The Canadian Civil Liberties Association is likewise of the opinion that:⁶

[T]he [Ontario Human Rights] Code ... provides inadequate redress. There, the issue is whether the particular program involves discrimination on the basis of handicap.... [T]he issue of discrimination, while valid, is really beside the point. Universal and random urine tests represent a gratuitous invasion of privacy and dignity. That is the central issue.

Furthermore, although an employee may successfully convince a court that a testing program imposed by management violates section 7 or section 8 of the *Canadian Charter of Rights and Freedoms*,⁷ section 32 precludes the application of *Charter* principles to a significant proportion of the Ontario workforce.⁸

The Commission takes the position that the testing legislation that is promulgated by the Ontario government ought to apply to private sector and public sector employees, to unionized as well as to non-unionized workers, and to job applicants and current employees. Statutory provisions specifically directed to workplace testing will substantially reduce the uncertainty that persists respecting the appropriateness of testing employees in this province. This in turn will reduce the costs associated with instituting labour arbitration grievances, human rights actions, constitutional challenges and other legal actions.

The Commission recommends that a legislative ban ought to exist on the testing of bodily samples of all current and prospective employees in Ontario. The Commission makes this recommendation for several reasons. First, the techniques currently used to analyze the bodily fluids of employees for substance abuse are incapable of detecting impairment. Aside from the legal and ethical issues that emanate from chemical testing, "testing does not tell you anything about the present physical or mental condition of the

⁵ R.S.O. 1990, c. H.19.

⁶ Canadian Civil Liberties Association, submission to R. MacKenzie, Minister of Labour for Ontario, on Mandatory Drug Testing in the Workplace (February 21, 1992), at 5.

⁷ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "*Charter*").

⁸ C. Trethewey, "Compulsory Drug-Testing and the Employee's Civil Rights" (1986), 3 Bus. & L. 89.

person tested" and thus bears no rational relation to employee performance.⁹ As Imwinkelried states:¹⁰

In short, today's drug-testing programs are founded on questionable assumptions. Employers who rely solely on immunoassay tests may be punishing workers who are guilty of no wrongdoing whatsoever. Those who bother to confirm positive immunoassay results, but who consider any trace of a drug-related metabolite a sure sign of guilt, may be punishing workers whose only offense was to attend the wrong party or sit in the wrong car. And even those who manage to demonstrate wilful ingestion of a drug may still lack anything approaching scientific proof that the employee was impaired at work.

The Canadian Civil Liberties Association¹¹ and the Canadian Bar Association-Ontario¹² have also taken the position that testing the bodily fluids of employees should be prohibited. In its submission to the Ontario Ministry of Labour on February 21, 1992, the Canadian Civil Liberties Association states:¹³

In the opinion of the Canadian Civil Liberties Association, there is simply no excuse for employees or prospective employees in this province to be required, on a universal or random basis as a condition of employment, to share their urine with strangers. In the first place, such fluids are an intimate part of the body. In the second place, the need to ensure the integrity of a specimen could well lead to an insistence that the production of the specimen be witnessed. It is not hard to understand how urinary surveillance could be seen as an indignity. In the third place, urinalysis reveals a lot about a person's health and lifestyle but virtually nothing that is job-relevant.

The most that a positive test could reveal is some exposure to an impugned drug within the few days preceding the test. There is no reason to believe that more than a small minority of those in contact with such drugs have developed a dependency on them. Since tests cannot determine the amount involved, they cannot sustain even an educated guess as to the likelihood of past or current impairment. A drug test does not reveal whether there was intentional consumption or accidental exposure; it does not indicate whether the contact

⁹ S.J. Wisotsky, "The Ideology of Drug Testing" (1987), 11 Nova L. Rev. 763, at 764; K.W. Yeam, "Involuntary Random Post-Employment Drug Testing in the Public and Private Sectors" (1986), 20 Beverley Hills B.J. 168, at 170; S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 104; and E.M. Chen, P.T. Kim and J.M. True, "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12 Geo. Mason U.L. Rev. 651, at 692.

¹⁰ E.J. Imwinkelried, "False Positive[?]: Shoddy Drug Testing Is Jeopardizing the Jobs of Millions" (1987), 27 The Sciences 22, at 28.

¹¹ *Supra*, note 6, at 2.

¹² *Report of the Canadian Bar Association-Ontario, Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 4.

¹³ *Supra*, note 6, at 2-3.

occurred at work or at home, on the job or at play. There is no way to know from the test whether the subject is a frequent, addicted, occasional, or a rare user - if, indeed, it could be assumed that the subject is a user at all. Thus, the test cannot determine whether the contact produced impairment, enhancement, or anything relevant.

Another important reason to prohibit chemical testing in the workplace is that such testing constitutes a significant invasion of the privacy rights of employees in this province. In a recent publication entitled *Drug Testing: Legal Implications*, the Research Branch of the Library of Parliament makes the following statement:¹⁴

As compulsory drug testing involves the taking of bodily substances, it constitutes the most intrusive infringement of the sanctity of the human body and thus the right to privacy.

As this Report emphasizes, chemical testing reveals confidential information respecting an individual's lifestyle that is unrelated to legitimate employer concerns. In the words of the federal Privacy Commissioner:¹⁵

Testing supposes an employer's (or government agency's) right to exercise substantial control over individuals and to intrude into some of the deepest recesses of their lives. The technology of drug testing is being allowed to shape the limits of human privacy and dignity.

The situation should be the other way around. Notions of respect for individual privacy and autonomy should place limits on the intrusions which technology will be permitted to make into personal lives. In other words, the uses of technology should not limit human rights; human rights should limit the uses of technology.

A further reason for a ban on drug testing is that there is no empirical evidence to support the proposition that drug abuse has become a significant problem in the Ontario workforce.¹⁶ According to studies that have been conducted, drug use in Canada has not increased since the 1970s.¹⁷ As

¹⁴ N. Holmes, Law and Government Division (Ottawa: April 20, 1990; rev'd January 2, 1992), at 1. The Research Branch of the Library of Parliament works exclusively for Parliament conducting research and providing information for Committees, members of the Senate and the House of Commons.

¹⁵ Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990), at 20.

¹⁶ According to B. H. Cunningham, Senior Program Consultant at the Addiction Research Foundation, alcohol and drug use in Ontario peaked in the late 1970s and has been stable or in decline since then; see "Substance Abuse - The Hidden Brain Drain", presentation on substance abuse in the workplace at Insight Seminar on *Drugs and Alcohol in the Workplace*[:] *Creating and Implementing Effective Corporate Policy* (Toronto: May 28, 1992); and "Jar Wars", editorial, *The Toronto Star* (September 25, 1990) A16.

¹⁷ Chapnik, *supra*, note 9, at 103.

stated by the the federal Privacy Commissioner,¹⁸ drug testing may be a "solution" to a problem that has been exaggerated. It is also noteworthy that it has not been demonstrated that improvements in safety, health or performance have occurred as a result of the millions of dollars expended on testing the bodily samples of employees in North America.¹⁹ As the Addiction Research Foundation asserts, "[t]oo few studies have examined the impact of drug screening programs on industrial accidents and those that do exist lack scientific rigor".²⁰

Although alcohol and other drugs have been targeted as threats to work performance, research in human physiology is calling attention to what may be a more imminent hazard—pervasive fatigue, caused predominantly by excessively long shifts or erratically scheduled work periods.²¹ As Denenberg and Denenberg comment:²²

Environmental factors are often more convincing than drug test results as explanations for accidents or bad performance. Poor equipment or working conditions, as well as vague instructions, may more plausibly account for mishaps than the drug test evidence.

Nevertheless, workplace drug and alcohol testing programs are increasing and legislation is pending for mandatory screening of employees in federally regulated transportation companies.

In addition to the reasons articulated above, a convincing argument could be made that testing the bodily samples of employees violates section 7 and section 8 of the *Charter*. A further legal obstacle to the implementation of a mandatory testing program is the Ontario *Human Rights Code*.²³ In addition, a program that does not satisfy the principles articulated in such awards as *Re Canadian Pacific Ltd. and United Transportation Union*²⁴ and

¹⁸ *Supra*, note 15, at 19.

¹⁹ L.E. Henriksson, "The Unconvincing Case for Drug Testing" (1991), 17 Can. Pub. Pol'y 184.

²⁰ Addiction Research Foundation, *Issues Related to Drug Screening in the Workplace* by S. Macdonald, S. Wells and R. Fry (March 1992) (draft manuscript), at 18.

²¹ *Cornell/Smithers Report on Workplace Substance Abuse Policy* (Ithica, N.Y.: Smithers Institute, Cornell University, January 1992), vol. 1. See, also, A.A. Borovoy, "Stop Random Drug Tests", *Ottawa Citizen* (March 22, 1992).

²² T.S. Denenberg and R.V. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (2nd ed.) (Washington, D.C.: Bureau of National Affairs, Inc., March 26, 1990) (draft manuscript), ch. D, at 27.

²³ *Supra*, note 5.

²⁴ (1987), 31 L.A.C. (3d) 179 (Can.).

*Re Provincial-American Truck Transporters and Teamsters Union, Local 880*²⁵ will likely not be upheld by a labour arbitration board.

The Ontario Law Reform Commission is of the view that alternate measures can be introduced by management that do not involve the complex legal and ethical dilemmas posed by workplace drug and alcohol testing. It is our view that the following recommendations are more effective in addressing the concerns of management with respect to the safety of work performed by employees who have substance abuse problems and at the same time safeguard the privacy rights of employees.

Employers often eschew the effectiveness of traditional tools of supervision and behavioural evaluation in detecting early problems that may indicate alcohol or drug abuse.²⁶ An established method for identifying substance abuse problems is to monitor and evaluate the work performed by employees.²⁷ As the British Columbia Civil Liberties Association asserts, "[f]or the overwhelming majority of jobs, behavioral evidence of impairment is sufficient for the employer".²⁸ Similarly, Wisotsky is of the opinion that:²⁹

The way to measure performance is to measure performance. Rather than testing the typist's urine for drug traces, why not test the typing?

Thus, training supervisors to evaluate the work and behaviour of employees is an effective method of discerning substance abuse problems of members of the workforce.

Employee assistance programs (EAP) are also considered to be an extremely effective mechanism with which to combat drug and alcohol abuse in the workplace. An EAP is a cooperative effort between management and labour to solve drug, alcohol, stress and other problems affecting employees. It is built upon trust between labour and management.³⁰ An EAP may be

²⁵ (1991), 18 L.A.C. (4th) 412 (Ont.).

²⁶ Chen, Kim and True, *supra*, note 9, at 690.

²⁷ Addiction Research Foundation, *supra*, note 20, at 22.

²⁸ B. Beyerstein, M. Jackson and D. Beyerstein, *Drug Testing in the Workplace* (position paper of the British Columbia Civil Liberties Association) (1989), at 22.

²⁹ *Supra*, note 9, at 776.

³⁰ K.B. Zeese, "Drug Testing Here to Stay?" (1990), 12 Geo. Mason U. L. Rev. 545, at 550.

operated as a department within a company or it may be contracted out with an outside organization.³¹

EAPs are viewed as not only an efficient but also a cost-effective vehicle for addressing the addiction problems of employees.³² Rehabilitation is often less costly than the expense of recruiting, hiring and training new employees. Furthermore, the success of EAPs in the rehabilitation of alcoholics as well as drug abusers is well documented.³³ As is stated in "Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace," EAPs "are a proven and potent alternative for combating the drug hysteria currently sweeping the American workplace".³⁴ Denenberg and Denenberg, who also subscribe to the view that chemical surveillance ought to be replaced with closer supervision coupled with referral to an EAP when necessary, state:³⁵

Given the ample evidence that Employment Assistance Programs result in fewer accidents, absenteeism and medical costs, it is far from evident that chemical surveillance, coupled with punishment, is the only response to drug abuse or even the most effective one.

Both the Addiction Research Foundation³⁶ and the Ontario Human Rights Commission³⁷ highly endorse EAPs in addressing drug or alcohol addiction/dependency of employees. It is also interesting to note that many human resource experts believe that drug and alcohol testing actually undermines traditional workplace tools such as EAPs as testing destroys the

³¹ J.L. Goff, "Corporate Responsibilities to the Addicted Employee: A Look at Practical, Legal, and Ethical Issues" (1990), 41 Lab. L.J. 214, at 220; and A. Sanders, "Intoxication and the Law: Drug Testing in the Workplace", [1987] Ann. Surv. Am. L. 167, at 192.

³² Goff, *supra*, note 31, at 216; T. Tremayne-Lloyd, "Drug and Alcohol Abuse in the Workplace—Transport Canada's Response" (1991), 8 Bus. & L. 20, at 22; and D.J. Morikawa, P.J. Hurtgen, T.G. Connor and J.J. Costello, "Implementation of Drug and Alcohol Testing in the Unionized Workplace" (1987), 11 Nova L. Rev. 653, at 656.

³³ Addiction Research Foundation, *supra*, note 20, at 22; M.R. O'Donnell, "Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard" (1988), 74 Va. L. Rev. 969, at 998; M.A. Rothstein, "Screening Workers for Drugs: A Legal and Ethical Framework" (1985-86), 11 Empl. Rel. L.J. 422, at 434; R.S. Schottenfeld, "Drug and Alcohol Testing in the Workplace—Objectives, Pitfalls, and Guidelines" (1989), 15 Am. J. Drug Alcohol Abuse 413, at 426; and J.T. Wrich, "Beyond Testing: Coping with Drugs at Work" (1988), 1 Harv. Bus. Rev. 120, at 124.

³⁴ W.J. Sonnenstuhl, H.M. Trice, W.J. Straudenmeir, Jr. and P. Steele, (1987), 11 Nova L. Rev. 709, at 728.

³⁵ *Supra*, note 22, ch. A, at 46.

³⁶ *Supra*, note 20, at 22.

³⁷ *Policy Statement on Drugs and Alcohol Testing* (November 1990), at 3.

trust between labour and management that is essential to the effectiveness of such programs.³⁸

The Commission is of the view that behavioural evaluation of the impairment of employees in conjunction with employee assistance programs constitute very effective methods of detecting and rehabilitating workers who have substance abuse problems. However, the Commission takes the position that in jobs in which the *physical* safety of the employee, co-workers or the public is at risk, an impairment test may be imposed on the employee. For example, pilots, train engineers and individuals operating nuclear plants may be subjected to such a test. The Commission's endorsement of impairment or performance testing seeks to address the safety concerns of management and at the same time safeguard the privacy rights of employees.

Fitness or performance testing measures the psychomotor performance of employees. This type of testing, which takes the form of computer programs and other mechanical aptitude tests, evaluates the visual perception, fine-motor control and neuro-muscular response of employees. It is commonly accepted that safety-sensitive jobs or positions which have the greatest impact on the physical safety of the public involve the use of psychomotor skills.³⁹

The Commission endorses performance testing for several reasons. First, in contrast to current testing techniques, such as urinalysis, blood or hair testing, performance testing actually measures impairment. In addition,

³⁸ Chen, Kim and True, *supra*, note 9, at 690; Henriksson, *supra*, note 19, at 189; and Zeese, *supra*, note 30, at 550.

³⁹ M.G. McCourt, "Performance Testing Makes Sense", E.A.P. Digest (January/February 1992) 18.

A computer-based test designed to measure the psychomotor performance of employees in safety-sensitive positions is FACTOR 1000. Using a control knob, the employee must keep a randomly moving pointer centered between two boundary points on the computer screen. As the test proceeds, the movement of the pointer speeds up and becomes more difficult to control. When the individual's ability to compensate for the pointer's unstable movement is exceeded, the pointer carries beyond a boundary point which automatically ends the test. A sophisticated mathematical algorithm then calculates the individual's current hand-eye coordination. FACTOR 1000 compares the individual's current level of psychomotor coordination against his or her previously established baseline; it does not use a universal standard of measurement. However, it is fundamental to understand that the test has built-in safeguards which prevent an employee from establishing a baseline that is either too high or too low. It is also noteworthy that the cost for an employee to perform the test is less than one dollar, which is substantially less than the price of conducting a blood or urine test. Seaboard Transport, a trucking company which hauls oil and petroleum, is the first Canadian company to introduce FACTOR 1000 into its workplace. See McCourt, *ibid.*; "Seaboard Transport first to use computer to test impairment", *The Burnside News* (September 1991) 40; and J. Hamilton, "A Video Game That Tells If Employees Are Fit For Work", *Business Week* (June 3, 1991) 4.

performance testing detects impairment from *any* source, not simply drugs or alcohol, and thus "provides a much more sweeping safety check than a screen for a necessarily finite number of chemicals".⁴⁰ An employee who would be a safety hazard on any given day because of illness, lack of sleep, or personal stress will be identified.⁴¹ Moreover, unlike chemical testing, performance testing provides immediate feedback—it gives supervisors a real assessment of the ability of the employee to perform his/her job on a particular day.⁴² Unlike blood, urine and hair testing, the employer need not wait for laboratory results.⁴³ Thus, by identifying impaired employees *before* they begin their work, accidents, injuries and errors can be prevented, and the safety of the public and of other workers is enhanced.

A further reason for the Commission's endorsement of performance testing is that because this procedure does not involve the collection of bodily fluids, performance testing does not intrude upon an employee's "life-off-the-job".⁴⁴ Thus, fitness or performance testing is likely to survive legal challenges under the *Charter* and *Human Rights Code*.⁴⁵

Performance testing was developed in the 1960s and has been utilized by the National Aeronautics and Space Administration (NASA) to evaluate the manner in which astronauts function under environmental stress. The United States Air Force has also used the technique to measure a pilot's ability to control an unstable aircraft.⁴⁶ Likewise, some commercial pilots are tested on flight simulators which evaluate the pilot's driving skills, coordination, balance and reflex time.⁴⁷ As Zeese explains, not only does a flight simulator serve to prohibit drug-impaired pilots from flying, it also prevents pilots with any other type of impairment from operating an airplane.⁴⁸ It is also noteworthy that the American National Highway Safety Administration has used the test to detect fatigue and intoxication of truck

⁴⁰ Denenberg and Denenberg, *supra*, note 22, ch. A, at 44.

⁴¹ *Ibid.*, at 44-45.

⁴² McCourt, *supra*, note 39.

⁴³ Many of the computer programs require less than one minute to conduct the test.

⁴⁴ Denenberg and Denenberg, *supra*, note 22, ch. A, at 44; W.K. Stevens, "Measuring Workplace Impairment", *The New York Times* (March 6, 1990) C1; "Video 'Game' May Aid Worker Safety—Computer System Answers Objections to Present Methods of Drug Testing", *The Seattle Times* (July 17, 1990) A2.

⁴⁵ *Supra*, note 5.

⁴⁶ McCourt, *supra*, note 39.

⁴⁷ Denenberg and Denenberg, *supra*, note 22, ch. A, at 44.

⁴⁸ K.B. Zeese, "Drug Hysteria Causing Use Of Useless Urine Tests" (1987), 11 Nova L. Rev. 815, at 822.

drivers.⁴⁹ Therefore, computer tests and other types of motor coordination tests have been useful in ascertaining whether or not an employee is fit to perform a "safety-sensitive" task. Both the Addiction Research Foundation and the Canadian Civil Liberties Association endorse computer software packages or mechanical aptitude tests that measure impairment of employees holding safety-sensitive positions.⁵⁰

It is the view of the Commission that these recommendations recognize the legitimate interests of employers and the public in workplace safety and at the same time protect the privacy interests of employees who earn their livelihood in Ontario. Moreover, these proposals are likely to survive constitutional, human rights and other legal challenges.

⁴⁹ McCourt, *supra*, note 39.

⁵⁰ Canadian Civil Liberties Association, *supra*, note 6, at 4; and Addiction Research Foundation, *supra*, note 20, at 22. The American Civil Liberties Association likewise endorses performance testing. See "From the Subway Smoke: Questions", (editorial) *The New York Times* (August 29, 1991), A28. See, also, Borovoy, *supra*, note 21.

Tab 30

EMPLOYEE ASSISTANCE PROGRAMS

BARBARA BUTLER & ASSOCIATES INC.

Employee Assistance Programs (EAPs) are 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. Many times immediate family members can also access services, and the programs are titled Employee and Family Assistance Programs or EFAPs.

Corporations and small businesses are turning increasingly to EAPs to deal with employees' substance abuse and other personal problems. All sizes and types of employers have instituted EAPs because an EAP can help save money in terms of less absenteeism, fewer accidents, decreased use of medical and insurance benefits, savings in workers' compensation claims, fewer grievances and arbitrations, and fewer employee replacement costs. An EAP reinforces three important ideas:

1. Employees are a vital part of a business and valuable members of the team.
2. It is better to offer assistance to employees experiencing personal problems than to discipline or fire them.
3. Recovering employees become productive and effective members of the work force.

Almost any company can provide EAP services for its employees. Many companies, unions, and other organizations have established their own programs at the worksite. Some organizations may find it easier to contract for EAP services from an outside EAP provider. Smaller companies may join with other companies in a consortium or cooperative arrangement, or work with a local business or trade association to start an EAP for its membership.

Types of EAPs

Internal or In-House Programs: These are most often found in large companies with substantial resources. The EAP staff is employed by the organization and works on-site with employees.

Fixed-Fee Contracts: Employers contract directly with an EAP provider for a variety of services, e.g., counseling, employee assessment, and educational

programs. Fees are usually based on the number of employees and remain the same regardless of how many employees use the EAP.

Fee-for-Service Contracts: Employers contract directly with an EAP provider, but pay only when employees use the services. Because this system requires employers to make individual referrals (rather than employees self-referring), care must be taken to protect employee confidentiality.

Consortia: An EAP consortium generally consists of smaller employers who join together to contract with an EAP service provider. The consortium approach helps to lower the cost per employee.

Peer-Based Programs: Less common than conventional EAPs, peer--or coworker-based EAPs have been put in place in a number of unionized workplaces; trained volunteers give education and training, and assist troubled employees to find appropriate resources for their problem. This type of program requires considerable education and training for employees.

Key Questions and Answers about EAP/EFAPs

What is an EAP? An Employee Assistance Program (EAP or EFAP) is an employer-sponsored benefit that provides confidential, professional counselling and advisory services for employees and their immediate family members. EAP provide access to services provided by a variety of professionals including psychologists, social workers, and addiction specialists. This highly confidential service is designed to assist employees who are experiencing personal difficulties that often affect work performance.

What Benefits do EAPs provide? EAPs are important tools in the development and maintenance of a healthy and productive workforce, and add value to the organization. An EAP assists employees by acting as a prevention and treatment resource for individuals who are experiencing personal difficulties. It is commonly accepted that individuals suffering from stress related to personal problems can have a negative impact on the workplace.

The EAP provides an opportunity for troubled individuals to seek confidential professional assistance before problems escalate to the point where the individual's performance declines and before he/she impacts workplace productivity and safety. Moreover, a workforce of psychologically and emotionally stable employees can result in less absenteeism, turnover, disability claims, and worker's compensation claims while improving employee morale.

How does an EAP work? Normally employees can access assistance whenever they want -- 7 days a week, 24 hours a day by telephone. This call will be answered by a professional Intake Counsellor who will ask for some basic information, discuss the individual's concerns, and match

him/her to a qualified counsellor in the community. If the nature of the call is deemed to be urgent, immediate telephone counselling will ensue.

Employee Assistance professionals are also trained to guide workplace supervisors and other key personnel in assisting a distressed employee. An added feature of the EAP is the availability of trauma response services in the event of a workplace critical incident.

What kind of problems are covered?

- couple and marital relationships
- work-related and career issues
- depression
- misuse of alcohol and drugs
- family matters
- stress and anxiety
- bereavement
- critical incident stress debriefing

EMPLOYEE ASSISTANCE PROGRAMS – FEATURES AND BENEFITS

Interest Group	Feature	Benefit
Employee	Early identification of problems.	Reduces the impact of chronic illness and increases chance of recovery.
	Provides comprehensive referral services for alcoholism, alcohol and substance abuse, emotional problems, as well as secondary problems, mental illness and other problems.	Increases chance that the primary problems as well as secondary problems will be addressed.
	Provides for referral to EAP based on deteriorating job performance.	Increases access to program services delivered by trained staff thereby discourages management and labor from diagnosing.
	Insures confidential handling of personal problems.	Decreases chances that stigmatizing will occur and lessens chances of negative impact on future promotions and job security.
	Promotes health-cost containment.	Intervention at the earliest stage of an illness promotes family

		health.
	Makes self-referral available to families and employees who wish to take advantage of the program on their own.	Intervention at the earliest stage of an illness promotes family health.

Employer	Reduces absenteeism.	Additional employee hours available for production.
	Improves quality of work.	Increases chance of producing higher quality and more marketable products.
	Eliminates inappropriate utilization of health care benefits.	Reduces cost of benefits.
	Complements existing health services.	Increases scope of health services without increasing costs.
	Reduces number of accidents.	Reduces sickness, injuries and workers' compensation costs.
	Demonstrates employers' commitment to employees.	Improves morale.

Union	Reduces absenteeism, accidents and health care cost.	More dollars for member salaries and benefits.
	Increases quality of work.	More job protection.
	Provides for early intervention and access to appropriate treatment.	Increases health of members and families.
	Reduces need for employee discipline.	Reduces the costs of arbitration.
	Incorporates a mechanism for union participation.	Increases involvement of unions in representing members.

Society	Increases chances of identifying and treating primary and secondary problems by early intervention and family involvement.	Reduces the cost of alcohol, substance abuse and other problems to society by identifying the real problem and providing treatment earlier.
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Drug testing in the workplace

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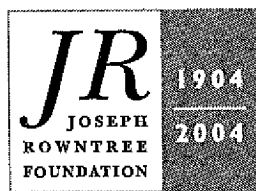
The Report of the Independent Inquiry into Drug Testing at Work

Independent Inquiry into Drug Testing at Work

INDEPENDENT INQUIRY INTO
**Drug Testing
at Work**



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The **Joseph Rowntree Foundation** has supported this project as part of its programme of research and innovative development projects, which it hopes will be of value to policy makers, practitioners and service users. The facts presented and views expressed in this report are, however, those of the Independent Inquiry into Drug Testing at Work and not necessarily those of the Foundation, NEF or Drugscope.

Joseph Rowntree Foundation, The Homestead, 40 Water End, York YO30 6WP Website: www.jrf.org.uk

The Independent Inquiry into Drug Testing at Work

Chair: Ruth Evans

Director: Yolande Burgin

Inquiry Co-ordinator: Vanna De Rosas

Report prepared by: Marcus Roberts

Commissioners

Lord Adebowale CBE, Chief Executive of Turning Point

Tom Bentley, Director of Demos

Pamela Carr, London Chamber of Commerce, Occupational Health Line Manager

Professor Simon Deakin, Robert Monks Professor of Corporate Governance, University of Cambridge

Professor Anthony Dickenson, Professor of Neuropharmacology, University College, London

Dr Clare Gerada, General Practitioner and Council Member of the Royal College of General Practitioners and Director of Primary Care for the National Clinical Governance Support Team

Professor A.C. Grayling, Reader in Philosophy, Birkbeck College

Carole Hassan, Chief Executive of Trafford Metropolitan Borough Council

Jacqueline Jeynes, Chair of HSR UK Policy Group, Federation of Small Businesses

Professor Mike Kelly, Director of Research and Information, NHS Health Development Agency

Tom Mellish, Health and Safety Policy Officer, TUC

Kate Nash, Director of the Royal Association for Disability and Rehabilitation

Brian Pomeroy, Chair of the National Lottery Commission

Richard Reeves, Business expert and journalist

Rowena Young, Chief Executive of the School for Social Entrepreneurs

John Wadham, former Director of Liberty, resigned in July 2003 to become Deputy Chair of the Police Complaints Commission

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Online documents

Other key documents considered by the Independent Inquiry into Drug Testing at Work (IIDTW) are publicly available online on the DrugScope website at www.drugscope.org.uk

These documents are listed below

Results of the MORI poll for the Independent Inquiry into Drug Testing at Work

Results of the CBI Survey for the Independent Inquiry into Drug Testing at Work

Ross Coomber (University of Plymouth), Literature review for the Independent Inquiry into Drug Testing at Work

Peter Francis, Natalia Hanley and David Wray (Northumbria University), Literature review for the Independent Inquiry into Drug Testing at Work

Simon Deakin (University of Cambridge), A discussion of the legal issues raised by drug testing at work

Gillian Ferguson (Matrix Chambers), Report prepared for the Independent Inquiry into Drug Testing at Work

Michael Ford, Legal opinion for the Independent Inquiry into Drug Testing at Work

A.C. Grayling (Birkbeck College), Comment on the ethical position on drug testing at work

Chair's introduction

In 2002, I accepted an invitation to Chair an Inquiry into the issue of drug testing at work. I felt that this was a hugely challenging and timely project. There was a growing awareness of the problems associated with drugs and alcohol. The use of drug testing was expanding in the criminal justice system and sports. There had been a widespread and rapid increase in the use of drug testing at work in the United States over a relatively short period. There was growing anecdotal evidence of an increase in the numbers of organisations promoting drug-testing services to British businesses. I was aware that some people were starting to express concerns that drug testing at work could become an accepted part of life in Britain without proper scrutiny of the evidence or public debate.

Drug testing is a complex issue, which has scientific, legal, ethical, social and economic dimensions. It was clear from the beginning that, if an Inquiry was to get to grips with all the evidence and argument, it would need to be conducted by a group of specialists from many fields of expertise. It has been an enlightening experience to have spent the past 18 months working with leaders from the voluntary and community sector, social policy specialists, clinicians, academics, lawyers, trade unionists and representatives from employers' groups. I would like to thank all of these Commissioners for their contribution. I would particularly like to thank Brian Pomeroy and Simon Deakin who advised me beyond the call of duty.

I am immensely grateful to Yolande Burgin, the Director of the Inquiry, without whom it would not have taken place. She was responsible for setting up and running the Inquiry, gathering evidence, arranging for

hearings and stimulating our policy discussions. We also owe a huge debt to Vanna De Rosas, the Inquiry Co-ordinator, for providing the Secretariat support, and to Marcus Roberts without whom the report would not have been written and published. DrugScope had the idea in the first place and the Joseph Rowntree Foundation provided the funding. Both these organisations have been supportive without being intrusive, ensuring that our work remained independent of outside influence. I would like to thank Frank Warburton and Charlie Lloyd who gave me invaluable personal support in the latter stages of our work, and Roger Howard for all his encouragement and support earlier on. I am also grateful to Harriet Hall for advising me on the regulation of drug testing. Finally, of course, I would like to thank everybody who gave evidence to the Inquiry. We have heard from employers and employees, trade unions and business organisations, insurers and police officers, occupational health physicians and health and safety specialists, natural and social scientists, lawyers, philosophers and experts in every aspect of drug-testing policy.

The Inquiry concludes that it is inappropriate to drug test as a means of policing the private behaviour of employees or improving productivity. While drug testing has a role in safety-critical industries it is no substitute for investment in management training and systems.

It has been a fascinating 18 months. This Inquiry has, I believe, conducted the most detailed investigation of this issue that has ever been undertaken in Britain. I am delighted to be writing the introduction to what I am confident will be an agenda-setting report and a landmark

in the debate about drug testing at work. The evidence that we have considered has often resulted in controversy and debate among the Commissioners, but this is a consensus report with a substantive set of recommendations. We hope it will clarify understanding and stimulate a wider debate about a public policy issue that could have profound implications for everyone living in Britain today.

Ruth Evans
May 2004

Executive summary

The Independent Inquiry on Drug Testing at Work (IIDTW) was chaired by Ruth Evans, former Director of the National Consumer Council, with an independent Director, Yolande Burgin. The Chair, Director and a group of 16 Commissioners have examined written and oral evidence over an 18-month period.

Chapter 1 The background and context

The basics

The term 'drug testing' refers to the analysis of biological material to detect drugs or their metabolites in the body. Urine tests are most common in the UK, but saliva, sweat and hair can be tested. For alcohol, breath tests are most common.

Drug testing at work takes a variety of forms, including pre-employment testing, random testing of employees and post-accident testing.

The arguments *for* drug testing at work are that there are benefits for safety, efficiency, an organisation's reputation and employee welfare. The arguments are strongest with respect to safety-critical occupations, where drug-induced intoxication can increase the risk of accident.

The arguments *against* drug testing are that it does not have the benefits that are claimed for it, is excessively invasive, may damage relations between employers and employees, and could hamper the recruitment and retention of good staff.

The science

Drug tests can detect if a drug has been used in a given time period, but, generally, do not directly measure the effects of drugs and alcohol in the form of intoxication or impairment. They

may reveal that drugs were used weeks or months previously, and cannot distinguish one-off users from people with serious dependency problems. Legally available drugs can produce a positive test for illicit substances (e.g. codeine – which is available in over-the-counter painkillers – for opiates). Drug testing is not infallible. But the science is sufficiently sophisticated to enable employers to find out a great deal of information about drug use among staff and prospective staff. Tests may also reveal other information, such as the use of prescription drugs to treat medical conditions.

The law

Until recently, there has been little legal constraint on the use of drug testing by employers. But the situation is changing.

It is still unlikely that an employer would face a legal challenge for refusing to employ an applicant who tested positive for drugs or refused a test. Similarly, an employment tribunal would be unlikely to take the view that an existing employee who had been sacked in these circumstances was 'unfairly dismissed'.

Provisions included in health and safety laws may encourage employers in safety-critical industries to drug test. Under Section 8 of the Misuse of Drugs Act 1971, an employer who knowingly permits drugs to be used in the workplace could be vulnerable to prosecution.

An employer could also be liable to prosecution under anti-discrimination laws for targeting drug testing at a particular group or for implementing drug testing in a discriminatory way.

Two recent Acts place even tighter limits on the scope for drug testing at work, although their interpretation is a matter of uncertainty.

The Human Rights Act 1998 incorporated the European Convention on Human Rights into domestic law. Article 8 states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The right to private life could have implications for the legality of drug testing at work. Article 3 protects the individual from cruel and degrading treatment, but this article is unlikely to be triggered in any but the most exceptional circumstances.

The Data Protection Act 1998 places limits on the processing of personal data. Recent guidance from the Information Commissioner – responsible for implementation of data protection laws – states that 'other than in most safety critical areas, regular drug testing is unlikely to be justified unless there is a reasonable suspicion of drug use that has an impact on safety'.

New laws are limiting the room for managerial manoeuvre on drug testing, but it is not yet clear how the courts will interpret the relevant human rights instruments or the data protection legislation.

The ethics

Drug testing at work may be difficult to reconcile with fundamental social and political values.

There is a presumption in liberal-democratic societies against invasion of private life unless this is necessary to protect others from harm. While drug use is illegal, it would be a departure from social norms to empower employers to *actively* investigate whether staff are acting illegally outside work.

Employees have a responsibility to turn up in a fit state to work, but employers cannot

expect people to live in such a way as to be maximally productive at work. Performance, after all, can be affected by a whole range of factors that are not the legitimate concern of employers, including late nights and child-care responsibilities, stress, fatigue, anxiety and bereavement.

The social issues

The use of illicit drugs is increasingly widespread in modern Britain. Employers need to take this into account in developing their policies.

There is anecdotal evidence to suggest that the demands of some work environments can contribute to drug and alcohol problems. Employment policies need to address the causes of drug and alcohol use – for example, by promoting a sensible work–life balance.

If people are excluded from work as a result of their drug and alcohol use, this will result in loss of income, difficulty in obtaining future employment and significant costs in social benefits.

Chapter 2 The evidence: trends and trajectories

Extent of drug testing in Britain

The use of drug testing by employers is increasing in the UK.

A survey of businesses by the Chartered Management Institute in 2003 found 16 per cent were randomly testing and 14 per cent were screening as part of their recruitment processes.

A MORI poll was conducted on behalf of the IIDTW in 2003. Over 200 companies were surveyed, of which 4 per cent conducted drug tests and 9 per cent said they were likely to

introduce tests in the next year. Seventy-eight per cent said they would be more likely to test if they believed that drug or alcohol use was affecting performance or productivity.

The CBI also distributed a questionnaire to its Health and Safety Panel on behalf of the IIDTW. There were 50 responses from approximately 100 members. Nearly one-third (30 per cent) of companies tested their staff for drugs and alcohol. A further 12 per cent intended to introduce drug testing in the near future (but only one company was planning to alcohol test).

Overall numbers might seem comparatively low on the MORI findings, but this is misleading. Even if only 4 per cent of businesses are drug testing, this affects hundreds of thousands of employees. If the 9 per cent of businesses that told MORI that they were likely to introduce drug testing in the next year were to do so, this would treble the proportion of UK businesses testing over a 12-month period.

Pressures for expansion

The IIDTW concludes that a major expansion of drug testing at work, while far from inevitable, is a genuine possibility. The North American experience shows how rapidly drug testing at work can expand. There is evidence that increasing numbers of British employers are identifying drug and alcohol use as a problem for them, including many companies outside of the safety-critical sector. There are commercial incentives for expansion for organisations offering drug and alcohol services. Over the past 15 years, drug testing has grown into a multi-billion-dollar industry in the United States.

Chapter 3 The evidence: costs and benefits

Drug testing and safety-critical environments

Overall, the IIDTW was able to find no conclusive evidence for a link between drug use and workplace accidents, except for alcohol. A literature review conducted by the Health and Safety Executive reports that 'five studies have found some association between drug use and work place accidents, whereas seven others have found little or no evidence'.

The evidence is inconclusive.

Aside from this the IIDTW makes four key points about drug use and safety at work.

First, it is unacceptable for employees in safety-critical roles to be intoxicated at work. There are also legitimate grounds for concern about drug and alcohol use in other professions where there are issues of public confidence, and a reasonable expectation of high levels of probity, such as the police and prison services.

Second, safety concerns do not neatly map onto wider perceptions of the relative harmfulness, legality or acceptability of different substances (for example, alcohol may be a greater safety threat than cannabis or cocaine).

Third, intoxication will be a risk factor in safety-critical environments, but it is not the only source of risk, and should not receive disproportionate attention and investment (other risk factors include noise, dirty equipment and machinery, conflicts at work and sleeping problems).

Fourth, while drug testing may have a role in some industries, it is no substitute for good management and, where reliable – and otherwise acceptable – methods are available, it will generally be preferable to test staff in

safety-critical occupations directly for impairment (fitness for work) rather than to conduct drug tests.

The message from industry

The IIDTW heard evidence from nuclear generation, coal mining, quarrying, electricity supply and distribution, water supply and distribution, the underground railway system, aerospace, engineering, bus and coach operators, caterers, telecommunications, the entertainment industry and financial services.

Four key messages emerged from the oral evidence to the IIDTW from organisations working in safety-critical industries.

First, the majority of employers who gave evidence did not believe that drug misuse was a serious or widespread problem for them.

Second, employers in safety-critical industries stressed the importance of implementing drug testing in a fair and transparent way.

Third, employers said that, even in safety-critical environments, drug testing could be divisive and counterproductive if it was clumsily handled.

Fourth, a number of employers emphasised the need for welfare and support services for staff with alcohol and drug problems.

Drug testing, productivity and performance

Employers have a legitimate interest in staff performance. But a range of questions arise about the extent to which employers should be involved in regulating the private lives of employees. The research evidence is not supportive of drug testing as a means of enhancing performance.

- *Absenteeism*: there is some evidence that a weak relationship exists between drug use and absenteeism, but it is inconclusive.
- *Turnover*: there is some evidence that illicit drug users are more likely to leave a job or to be dismissed, but it is inconclusive.
- *Performance and productivity*: the evidence concerning the relationship between drug use and performance has been variously described as 'conflicting', 'insufficient' and 'inconclusive'. The common assumption that drug and alcohol use has a major impact on productivity and performance at work is not conclusively supported by the evidence.
- *Reputation*: the impact of drug use among employees on a company's reputation is almost impossible to assess.

The evidence does not provide much support for alarmist claims about the impact of drug use on absenteeism, turnover, productivity or reputation. Nor has it been demonstrated that drug testing has a significant deterrent effect, or is the most appropriate way of identifying and engaging with staff whose drug use is affecting their work.

The costs of drug testing

There is a lack of reliable data on the cost-effectiveness of drug testing. There are three principal costs.

First, there are the financial costs of drug testing.

Second, there is the impact on staff morale and workplace relationships. A number of businesses told the IIDTW that drug testing had damaged relations with employees.

Third, there are recruitment and human resource costs. The exclusion of illicit drug users from jobs may constitute a substantial cost for organisations. Most recreational drug users are otherwise responsible people who do not have serious drug problems and have scarce skills to offer to employers.

The Inquiry identified some less obvious costs. For example, it heard some evidence that testing could prevent staff in safety-critical industries from reporting minor incidents, increasing the risk of serious accident later.

Chapter 4 Conclusions and recommendations

Drug testing at work is a complex topic and often defies common assumptions and preconceptions. Some of the conclusions and recommendations of the IIDTW are summarised below.

- 1 It is important to keep matters in perspective. Overall, the evidence does not suggest that drug and alcohol use is having a serious and widespread impact on the workplace. The IIDTW recommends that further research is undertaken on the impact of drug and alcohol use on performance and safety at work.
- 2 The IIDTW concludes that employers have a legitimate interest in drug and alcohol use among their employees in a restricted set of circumstances only. These circumstances are where:
 - employees are engaging in illegal activities in the workplace
 - employees are actually intoxicated in work hours
 - drug or alcohol use is (otherwise) having a demonstrable impact on employees' performance that goes beyond a threshold of acceptability
 - the nature of the work is such that any responsible employer would be expected to take all reasonable steps to minimise the risk of accident
 - the nature of the work is such that the public is entitled to expect a higher than average standard of behaviour from employees and/or there is a risk of corruption (for example, in the police or prison service).
- 3 The IIDTW concludes that employers have no *direct* interest in the private behaviour of employees and prospective employees, and that investigation of an employee's private life simply *for its own sake* is an invasion of personal liberty.
- 4 The legality of different drugs is not directly relevant to their impact in the workplace, as the recently published draft code from the Information Commissioner (who oversees the implementation of the Data Protection Act 1998) states, drug testing should only ever be used to 'detect impairment at work rather than illegal use of substances in a worker's private life'.
- 5 The IIDTW does not accept the argument that drug testing is a private, contractual matter between employers and employees. Not only is there an inequality in bargaining positions, but a significant expansion in drug testing could have profound economic and social implications for society at large.

- 6 The IIDTW believes that the legal position on drug testing at work is somewhat confusing, largely because there is no direct legislation and important legal questions hinge on interpretation of a whole range of legal provisions in health and safety, employment, human rights and data protection law. The IIDTW calls on the Government to produce clear and definitive guidance on the legal and other issues around drug testing, and to finance a major communication initiative to ensure that this information is available to all employers and employees.
- 7 The present accreditation mechanism covers only a small part of the drug-testing industry, with many companies not subject to accreditation. The results of drug tests can have a profound impact on the rights of individuals. Substandard laboratories and procedures are not acceptable. The IIDTW concludes that a more rigorous system of accreditation is needed. If an effective system of self-regulation is not developed by the industry within the next three years, the Government should act to introduce a legal requirement to ensure that all companies providing drug-testing services are operating to the very highest standards.
- 8 The IIDTW believes that there is a useful role for drug testing in safety-critical industries. However, direct testing of impairment is better suited to health and safety purposes than drug testing, which is an indirect and unreliable measure of impairment. With the development of more effective forms of impairment testing, the case for drug testing in safety-critical industries would become much weaker.
- 9 The key to the successful implementation of a drug and alcohol policy is that it is conceived as a component of health and welfare policy and not – at least, not primarily – as a disciplinary matter. A drug and alcohol policy will be effective only if it is negotiated with and accepted by staff across the organisation. The IIDTW concludes that drug testing at work should not be introduced in the absence of proper consultation and involvement of trade unions and/or other staff representatives.
- 10 The IIDTW found that drug testing, while it can have a useful role in some industries, is no substitute for good management practice.

One of the strongest themes to emerge from the evidence heard by the IIDTW over an 18-month period is that good all-round management is the most effective method for achieving higher productivity, enhanced safety, low absentee rates, low staff turnover and a reliable and responsible workforce. For the majority of businesses, investment in management training and systems is likely to have a more beneficial impact on safety, performance and productivity than the introduction of drug testing at work.

**REPORT OF THE INDEPENDENT INQUIRY
INTO DRUG TESTING AT WORK**

Introduction

Are there reliable ways of testing people for drugs use? Is it appropriate for employers to test staff for drugs or alcohol? If so, in what circumstances? Should applicants be turned down for jobs on the basis of a positive test? What is the law relating to drug testing? What is the extent of drug testing in the UK at present, and how is that projected to change? Do British industries have sufficiently rigorous alcohol and drug policies to ensure that the public is not exposed to an unacceptable level of risk? What is testing expected to accomplish? Is it successful in that aim? In what circumstances, if any, should an employer discipline or dismiss staff for using drugs and alcohol? Does business have a legitimate interest in what people do in their own time? Where staff develop substance misuse problems, do employers have a responsibility to offer help? What is the law?

These are important questions that raise complex issues. But they have received surprisingly little detailed attention or independent analysis in the UK. The aim of this report from the Independent Inquiry on Drug Testing at Work (IIDTW) is to fill this gap. It provides a detailed and impartial review of the arguments around drug testing at work and seeks to put the whole issue into perspective at a time when private drug-testing companies are looking to expand.

The IIDTW's report is concerned with both illicit drugs *and* alcohol, and, unless otherwise stated, the term 'drug testing' should be taken to encompass alcohol testing too.

An important issue

The issue of drug testing at work is beginning to gain a much higher profile. The growing

political concern was evinced by the publication of a report from the All-Party Parliamentary Drug Misuse Group (APDMG), *Drug Testing on Trial*, in July 2003. This report concluded that 'at present there is no real consensus or clarity about what the aim of drug testing in the workplace is or should be'. The APDMG concluded by welcoming the work of the IIDTW, commenting on the need for an 'in-depth review of this whole issue'.

There are a number of reasons for the rise in political and public interest in drug testing in the workplace.

First, there is growing public and political awareness of the extent of drug and alcohol use in contemporary Britain. The *British Crime Survey 2002-03* found that 12 per cent of 16 to 59 year olds had used illicit drugs in the previous year and that 3 per cent had used Class A drugs. The figures were substantially higher for people in their late teens and early twenties; 50 per cent of 16 to 29 year olds had used drugs at some time, over a quarter (28 per cent) of 16 to 24 year olds had used an illicit drug in the last year and 8 per cent said that they had used Class A substances in the last year (Condon and Smith, 2003). A Home Office study, published in December 2003, found that 79 per cent of young club-goers had used drugs at some time (Deehan and Saville, 2003). Another recent Home Office research report concludes, on the basis of an analysis of the findings of the *Youth Lifestyles Survey*, that over a third (39 per cent) of 18 to 24 year olds can be classified as binge drinkers.¹

Second, while the public debate about drug and alcohol misuse has tended to focus on the link with crime, disorder and anti-social behaviour, it is a reasonable extrapolation from

what we know about the prevalence of drug misuse and problem drinking that it will affect significant numbers of people at work – as well as many others who are in training and education or are available for work. Drugs impact on the lives of the socially included as well as the socially excluded. For example, a recent research study by Howard Parker and colleagues at Manchester University concludes that there is increasing use of Class A substances among ‘primarily educated, employed young citizens with otherwise conforming profiles ... [who] ... see their substance misuse as de-stressing, chilling out activity, whereby intoxicated weekends and going out to “get out of it” is the antidote to the working week’.²

Third, it is generally assumed that the use of psycho-active substances could, in some circumstances, affect the productivity and performance of people at work, and, in some industries, could result in accidents and mortalities. A number of striking claims have recently been made about the costs of alcohol and drug use at work. A report from the National Treatment Agency claims that the cost to industry from illegal drug use is £800 million each year. And the Government’s *Alcohol Harm Reduction Strategy for England* (Prime Minister’s Strategy Unit, 2004) says that ‘alcohol misuse among employees costs up to £6.4 billion in lost productivity through increased absenteeism, unemployment and premature death’. Such claims may appear to strengthen the case for drug testing at work. But it is unclear how some of these figures are arrived at, how reliable they are and what difference, if any, drug and alcohol testing would make.

Fourth, there is greater public awareness and concern about drug testing, as its use in other

areas of social life has expanded in recent years – particularly in sport, but also within the criminal justice system.³ There have been proposals to introduce drug testing in the police force.⁴ More recently, the level of public and political interest in, and concern about, drug testing was shown by the response to the Prime Minister, Tony Blair’s, comments in an interview with the *News of the World* in February 2004, in which he appeared to offer some encouragement to the use of drug testing in schools. Before this, the expansion of drug testing by police, prisons and other criminal justice agencies had already begun to raise important public policy questions, which are equally relevant to the issue of drug testing at work. For example, questions about the balance between public interest and individual rights, the responsibility to provide support and treatment, the relation between drug and alcohol use and drug and alcohol dependency, and the deterrent effect of drug-testing regimes. Some similar issues were raised by recent cases involving high-profile sports people, including the tennis player Greg Rusedski and the footballer Rio Ferdinand. These cases have also raised public awareness of the technical issues about the reliability of drug tests, which would be of much wider concern if the use of drug tests by employers was significantly extended.

Fifth, there is concern about the increasingly sophisticated marketing of drug testing by commercial organisations. The technology of drug testing is not well understood. The companies that produce this equipment and conduct tests have a business interest in promoting testing to employers and opening up new markets. But it is important that an independent assessment of the value and limits of drug testing in the work place is available to

inform wider discussion of an issue that touches on serious matters.

Sixth, there has been anecdotal evidence for an increase of drug testing in some high-profile firms, particularly in the financial sector, where there are no obvious health or safety justifications for testing. In the past, other than in the rail industry, routine drug testing was introduced into the UK by North American firms insisting that their subsidiaries, or those doing business with them, institute drug testing. Since the mid-1980s, drug testing in the United States has grown exponentially into a multi-billion-dollar industry, thus showing how rapidly a pervasive drug-testing culture can take root.

A complex issue

The issue of drug testing at work raises a wide range of important questions. In a crowded and confused legislative framework where case law is mixed, there has been no strong guidance to date. This is a complex, multi-faceted issue with a number of aspects that cut across traditional disciplinary and organisational boundaries – for example, it has scientific, legal, ethical and economic dimensions, and it is an area of concern for a number of government departments, notably the Home Office, Department of Health and Department of Trade and Industry. That is why the APDMG's report stressed the need for an 'in-depth review'.

Five key dimensions are examined in this report.

- 1 *The science*: how do the various forms of drug testing work? What can they detect and what can't they detect? How reliable are the results?
- 2 *The ethics*: how is the balance to be struck between promoting the public good and respecting individual rights? Where do the legitimate interests of employers end and the private lives of individuals begin? What responsibilities do employers have, if any, to promote the health and welfare of the people who work for them? Do employers have a role in policing the activities of their staff outside work time, and especially where they are acting illegally? What about the responsibility of employees to be in a fit and proper state to work? How do these questions relate to other impairment-producing factors such as stress, fatigue, anxiety and bereavement?
- 3 *The law*: what is the current legal position on drug testing? What are the legal requirements on employers in storing and processing test results? Are there any circumstances in which an employee who was dismissed following a drugs test could claim that this constituted 'unfair dismissal'? What forms of consent are required and what are the implications for the drafting of contracts of employment? What about human rights? What about data protection?
- 4 *The social dimension*: is it the role of employers to address drug use in society? To what extent, if any, can the demands of the modern workplace contribute to drug and alcohol problems? What, if anything, should employers do about informing and educating their workforce about drugs and alcohol? What, if anything, is the role of the employer in minimising social exclusion?

- 5 *The business case:* is drug testing worth the investment? Is drug testing an effective tool in performance management and measurement? Does it help to reduce absenteeism? Does it affect accidents at work? What are the human resource costs to businesses of refusing employment to promising candidates who fail drug tests? What is the effect on workplace performance? What is the effect on relationships at work? What are the costs of dismissing staff for drug or alcohol use? Is it cost-effective for businesses to help staff with problems to access treatment and support services? Is there evidence that testing deters drug use?

The answers to these questions will not always be clear and unambiguous. The term 'drug testing at work' does not refer to a single homogeneous issue, but designates a range of different practices that vary depending on:

- the form of drug testing
- the point at which drug testing takes place
- the rationale for drug testing
- which drugs are being tested for
- who is being tested
- the type of work that is involved.

The purpose and scope of the Inquiry

Background

The IIDTW is the first Inquiry of its kind in the UK. Its remit is to address the spectrum of complex and far-reaching issues surrounding drug testing in the workplace. The lack of

detailed analysis of this subject – and concerns about the pace of technological change and its commercial exploitation – prompted the formation of the Inquiry in 2002. It was facilitated by DrugScope and funded by the Joseph Rowntree Foundation and the Network of European Foundations (NEF). Throughout its work, the IIDTW has rigorously examined these controversial issues, while maintaining its independence from all interest groups, including the facilitator and funders. It has striven to remain wholly impartial throughout its inquiry.

Aims

The aims of the Inquiry were to examine:

- the nature and extent of workplace drug testing
- the science of testing
- the consequences and implications of drug testing in the workplace
- the legal and statutory framework, and
- to reach conclusions and make recommendations.

Underlying this whole prospectus was a fundamental concern about the lack of good practice, evidence or professional consensus to assist employers in their decisions on whether, how and in what circumstances they should test for drugs and the lack of any 'accepted protocols relating to testing in the workplace'.

The IIDTW's work was guided from the outset by two clear principles.

- That the Inquiry, while rigorously examining the issues, would at all times remain impartial, and maintain its independence from all interest groups.

- That the Inquiry would work to be open and transparent in all of its endeavours, while protecting the privacy of individuals where necessary. In incidences where sources were kept confidential, those sources would be thoroughly checked. The IIDTW has sought verification for all quotations.

Methodology

The IIDTW has considered both written and oral evidence.

- 1 *Literature reviews:* the IIDTW began by identifying and scrutinising the existing evidence on drug testing at work and commissioned a series of literature reviews. Reviews were conducted by Ross Coomber, Principal Lecturer in Sociology at the University of Plymouth; Peter Francis, Natalia Hanley and David Wray of the Sociology and Criminology Division, Northumbria University; and the Inquiry benefited from the pre-existing work of Johanna Beswick and colleagues at the Health and Safety Laboratory.
- 2 *Expert advice:* the IIDTW's deliberations were informed by a number of specially prepared written submissions from experts – including Commissioners – on the science, sociology, ethics and law of drug testing. It heard extensive evidence from a wide range of individuals and agencies – including employees and employers, trade unions and business organisations, drug-testing companies and regulatory authorities, scientific experts, lawyers, philosophers and social scientists. The Inquiry has been reliant on the advice it has received from lawyers on some difficult legal issues. A report was commissioned by the IIDTW from Gillian Ferguson of the Matrix Research Panel at Matrix Chambers. The Inquiry also received expert legal opinion from Michael Ford, a leading barrister with expertise on drug testing. In addition, the Commissioners benefited from the evidence provided by a number of leading legal practitioners working in England and Wales.
- 3 *Polls and research:* the IIDTW was responsible for initiating new research that has helped to fill in some of the gaps in the available evidence base. In particular, the Inquiry commissioned a MORI poll on employers' attitudes to drug and alcohol policy in general, and drug testing in particular. Questionnaires were also distributed on the Inquiry's behalf by the Confederation of British Industry (CBI), the Federation of Small Businesses (FSB) and the Trades Union Congress (TUC). The clubbers' magazine *Mixmag* included questions on behalf of the Inquiry in its annual drugs survey and the IIDTW further benefited from new research on drug testing in the UK published by the Chartered Management Institute.
- 4 *Hearings:* the IIDTW heard oral evidence from a wide spectrum of organisations, including employers, drug-testing providers and representatives from the relevant statutory and regulatory bodies. The IIDTW also spoke to a number of employees about their experiences of drug and alcohol use.⁵
- 5 *Round-table discussions:* the IIDTW set up a number of round-table discussions. A Health Round Table at the Royal College of Practitioners was attended by people

working across the National Health Service; a round-table discussion for Occupational Health and Human Resources Practitioners took place at the London Chamber of Commerce; and a Round Table discussion on the legal and ethical issues was the subject of the Industrial Law Society's Plenary Session on 12 September 2003.

Conclusion

Drug testing at work, then, is a complex issue, and this 18-month Inquiry has heard evidence from experts across a wide range of disciplines, as well as employers, employees and the industries supplying drug-testing equipment and services. But the questions that the issue of drug testing at work raises are not simply technical ones that can be left to the relevant experts.

Ultimately, this issue raises some profound questions for all of us: questions about the rapidly changing nature of work and leisure in the modern world; questions about health and welfare in the workplace; questions about the balance between corporate responsibilities and individual privacy; questions about risk, risk management and the 'nanny state'; questions about responsible behaviour at work; questions about stress in the workplace; and questions about the relationship between market imperatives and the development of humane and effective approaches to drug and alcohol misuse among staff where this is a genuine concern for organisations.

The IIDTW believes that these are important issues. This report reaches definite conclusions and puts forward specific recommendations. It is intended that it should also provide a clear introduction to the issues, an accessible and

comprehensive survey of the evidence and a detailed evaluation of the case for and against drug testing at work.

The remainder of the report is divided into four chapters.

Chapter 1 answers the obvious questions 'what is drug testing?' and 'how does it operate in the workplace?'. It outlines the principal arguments for and against testing at work. It then examines the scientific issues, the relevant legal instruments (including the Human Rights Act 1998 and the Data Protection Act 1998), the ethics of drug testing and the wider social implications.

The following two chapters review the evidence that has been presented to the IIDTW over the 18 months that it has been sitting, both in its oral hearings and in the form of written submissions.

Chapter 2 is concerned with the prevalence of drug use in modern Britain, the attitudes of employers and employees, the extent of drug testing in the workplace and the potential for future expansion. It presents fresh evidence on employers' attitudes to drug testing, notably the results of a MORI poll and a CBI survey, both conducted on behalf of the IIDTW.

Chapter 3 reviews the evidence on the costs and benefits of drug testing, with particular attention to: health and safety issues, absenteeism and staff turnover, performance and productivity, and the reputations of organisations. It also assesses the costs to organisations of drug testing, including not only the financial investment but also the potential damage to industrial relations and the possible recruitment and human resource costs.

Finally, Chapter 4 of the report summarises the IIDTW's conclusions and sets out the Commissioners' recommendations.

1 The background and context

This chapter sets the scene for the discussion of the specific findings and recommendations of the IIDTW that follow. It examines the broader context for the debate about drug testing in the UK and looks at some of the key issues in greater detail. It is particularly concerned to set out the broader scientific, ethical, legal and social issues.¹

1.1 'Drug testing at work'? The basics

1.1.1 What is drug testing?

The term 'drug testing' refers to the analysis of biological material to detect the presence or absence of drugs and/or their metabolites within the human body. Metabolites are the substances into which drugs, including alcohol, are converted by the human body. The presence of metabolites shows that the relevant substances have been used in the recent past.

The commonest form of testing for illicit drugs is the analysis of urine samples. For alcohol, breath tests are more common, and these are often followed up by blood tests for confirmation. In addition, oral fluid, hair and sweat can be tested.

1.1.2 Drug testing in the workplace

The term 'drug testing at work' refers to all kinds of employment-related drug testing. The principal forms of testing at work are identified below.

- 1 *Pre-employment testing* (also often referred to as 'screening'): this is testing conducted as part of the screening and selection process for job applicants.
- 2 *Routine medicals*: drug testing as part of routine medicals for staff, usually as part of a pre-employment process.

- 3 *Transfer testing*: testing when employees move to a new job within a company or are promoted.
- 4 *Mandatory random testing*: where employees are required to submit to tests as a matter of course, either regularly or irregularly. Typically, National Insurance numbers are used to generate a random sample of a pre-agreed percentage of the workforce.
- 5 *Post-accident testing*: testing may take place as part of the procedure for investigating and dealing with workplace accidents.
- 6 *'For cause' testing*: employees are tested where an employer or manager believes that there is reasonable suspicion of drug use at work.
- 7 *Post-treatment or follow-up testing*: this covers the testing of employees who are known to have used drugs, including those who have previously tested positive and may be in treatment.
- 8 *Voluntary testing*: employees volunteer to be tested.

These eight forms of testing are not exhaustive of all the possibilities, and they may be used either independently or in a whole variety of different combinations. Drug-testing regimes within the workplace can also vary in other ways – for example, depending on whether employees are or are not given notice that random drug tests will be conducted on a particular date. Or, to take another example, an organisation may decide to drug test only those staff who could pose a significant safety risk, or it may test all staff – or, at least, a random cross-section of staff. In some organisations, everyone

may be tested from senior management downwards.

1.1.3 Why test?

There are four fundamental reasons for drug testing at work.

- 1 *Safety*: there is concern that an individual who is impaired by alcohol or drugs is an increased safety risk to him or herself, co-workers and/or the public. This may be of particular concern where employees have safety-critical functions. This is true, for example, of air traffic controllers, train drivers, ambulance drivers, pilots, bus drivers, miners and quarry workers.
- 2 *Organisational efficiency*: it is believed that the use of alcohol and drugs can be a cause of low productivity, absenteeism and high staff turnover. It is further assumed that drug testing can reduce the number of working days that are lost through staff absence, increase productivity and reduce the costs of recruiting and training new employees.
- 3 *Reputational risk*: some employers are concerned about the damage that they believe can be caused to the reputations of their organisation as a result of alcohol and drug use among their workforce. The use of illegal drugs by employees will be a particularly sensitive issue in some professions, such as the police force and the prison service.²
- 4 *Employee welfare*: it has been suggested that drug testing can help to improve the health and welfare of the workforce by deterring drug use and by helping to identify staff

who have problems. These individuals can be encouraged to seek help by their employers and supported in their efforts to address their substance misuse problems.

It is not only existing employees who are drug tested. Potential employees may be asked to take drug tests as a part of the recruitment processes of organisations. It is believed that such pre-employment testing (or 'screening') can help to ensure that staff whose drug use could compromise safety or performance or the employer's reputation are not being recruited.

In addition to these rationales for drug testing at work, some employers may simply be reluctant to take on job applicants or to retain in employment people who have taken illegal drugs, regardless of whether or not this affects their capacity to do the job in question. Some employers may see themselves as having a quasi-policing role with respect to the workforce, and view drug testing as a means of discouraging socially unacceptable and illegal forms of behaviour. Finally, a stigma can attach to people who have a history of drug and/or alcohol problems, including those in treatment, and this may affect employers' attitudes.

1.1.4 Against drug testing

Aside from doubts that drug testing has the benefits that are claimed, there are several arguments against drug testing at work.

- 1 *What is being identified?* It is suggested that, as a drug test does not identify impairment, but merely the presence of metabolites that indicate past use, this is not useful or appropriate information for an employer.

- 2 *Breakdown of trust:* a workforce, believing itself to be under surveillance, may no longer trust the employer and withdraw goodwill.
- 3 *Inability to recruit qualified people or the loss of key staff:* it is suggested that some people might prefer not to work for employers who test for drugs. In addition, it is argued that, by dismissing an employee after a positive drug test, a member of staff, in whom a long-term investment might have been made, is lost to the organisation.

1.1.5 The key questions

It is actually misleading to talk about *the* issue of drug testing at work. The reality is that the pertinent arguments will vary significantly depending on what type of drug testing is under consideration and for what purpose. For example, the use of random drug tests as a means of detecting and deterring the use of drugs or alcohol on a building site or at a quarry will raise different questions to the use of pre-employment screening to exclude prospective employees because of a general reluctance to offer employment to candidates who have used illicit drugs in the past. Similarly, the information that someone is intoxicated at work has a different significance for employers than the information that someone may have used drugs at some time in the past few months. In short, there are a whole range of issues involved in 'drug testing at work' depending on the *type* of testing, the *purpose* of testing and the *context* for testing.

Drug testing: what happens?

For the most part, the companies that gave evidence to the Inquiry and carried out drug testing did so by taking urine samples. At the pre-employment screening stage, the most common approach was to use a presumptive test kit (for example, a dipstick) and make a decision about a job applicant based on this result. Testing may be part of the general medical examination that is carried out as part of the recruitment process and people may be offered a job pending the result from the laboratory.

When existing employees are tested, the companies that gave evidence to the IIDTW either, as a first step, used a presumptive testing kit and, as a follow-up, sent the sample to a testing laboratory for confirmation or else they sent samples directly to a testing laboratory. Typically, a laboratory or testing agency will be contracted to perform this task and will collect two samples: the first is analysed by the laboratory, the other is frozen. If the veracity of the first result is challenged then the frozen sample can be sent to another laboratory.

Some companies set aside a specific room where people were required to give a sample. If this is a toilet, then taps may be sealed and something may be added to the water to avoid tampering with the sample. Other companies will send people to a medical centre or hospital to have a sample taken. The IIDTW heard of

(continued overleaf)

incidents of people being asked to strip down before giving their sample, but this is rare. Nor is it normal for someone to be present to supervise the production of samples, although this is common practice in the army.

The result of a drug test is legally defensible only if it can be proven that a correct chain of custody procedure³ has been followed in sending the sample to the laboratory, to ensure that it could not have been tampered with or mixed up with another sample.

1.2 How do drugs affect people at work? The science

Why should employers be concerned if people are actually turning up for work under the influence of drugs?

Drug use can affect the individual's capacity to perform a whole range of work-related tasks and functions.

The obvious example is drink driving. Where people are driving under the influence of alcohol, this impacts on their perception, motor skills, decision making, attitudes to risk and so forth. Similarly, people put themselves and others at risk when they drive or operate machinery at work under the influence of alcohol or other, illicit, drugs with similar psycho-active properties.

Where an individual is under the influence of alcohol or drugs, this may affect productivity and the capacity to deal with colleagues and the public.

So, in one sense, the answer to this question is obvious: it is a bad thing if people are

intoxicated at work. In addition, ability to perform at work may be negatively affected by the after-effects of drugs and alcohol – including hangovers and the 'come down' experience that can follow the use of illicit drugs, as well as experience of withdrawal symptoms.

Nonetheless, the issues are not entirely straightforward. Three points in particular should be noted.

- 1 Different drugs have different effects. Some drugs may be used in the belief that they *enhance* performance. For example, amphetamines may reduce fatigue in the short term and enable people to 'keep going' (for example, there is evidence of their use among long-distance lorry drivers and by the armed forces in specific circumstances).
- 2 The grounds for concern about drug use at work do not neatly map on to the legal-illegal distinction. Alcohol may impair performance at work to the same – or even a greater degree – than cocaine or amphetamines. Many prescription and over-the-counter drugs have side effects. Licit drugs can be a source of impairment too.⁴
- 3 People who are undergoing treatment for drug use may be prescribed substitutes, such as methadone, which may show up in drug tests, and could impact on performance.

While the general reasons for worrying about the impact of drug use at work are straightforward, there are some complexities. Different psycho-active substances (licit and illicit) will have different effects and there is

much that is unknown about the impact of psycho-active substances on productivity and safety at work.

1.3 Does it work? The science

To begin with, it is necessary to address some obvious practical questions about drug tests. How are they carried out? Has a 'chain of custody' (ensuring that a sample is intact and could not have been tampered with – see note 3, this chapter) been strictly adhered to? Do drug tests work? How reliable are test results? What do they tell us? What don't they tell us? The answers to these questions will, of course, vary depending on the kind of testing that is under consideration.

1.3.1 What drug tests do

Drug tests can indicate whether a drug or metabolite is present in the body of the subject.

A drug test will generally reveal only the presence or absence of the particular substance that is being tested for. It will be possible to detect whether a drug has been used over a limited time period only. This 'detection period' will vary depending on the nature of the substance that is being tested for and the type of testing.

1.3.2 What drug tests don't do

For the most part, drug tests can indicate only that a drug or its metabolite is present, and cannot provide a direct measure of impairment or intoxication. The main exception to this rule is breath tests for alcohol. By contrast, other forms of testing pick up different information. The testing of human hair for the presence of cocaine or heroin may reveal the presence of

drugs that were taken months – or even years – previously, while failing to pick up evidence of use over the previous few days.

Drug tests are not a reliable indicator of levels of intoxication and impairment. For the most part, a drug test will not prove that its subject was intoxicated at a particular time, nor provide a reliable guide to the degree of impairment that exists where drugs are used. Another limitation of most drug testing is that it provides little information on an individual's pattern of drug use – that is, whether he or she is an addict, a regular user, irregular user or one-off user.

1.3.3 How reliable are the results? Cut-off levels

Testing equipment can be sensitive enough to detect very low levels of substances that have found their way into the body other than through illicit drug use. In other words, drug tests may be too sensitive. The use of over-the-counter drugs can produce a positive test for illicit substances – for example, the use of codeine (which is available in over-the-counter painkillers) can result in a positive test for opiates.

This problem has led to some bitter controversies about the reliability of positive test results for sports personalities and there is presently a debate about appropriate 'cut-off' points for recording a positive or negative reading in the workplace.⁵

One way to deal with this problem is to identify cut-off points so that detection of low concentrations of substances are not recorded as a positive result for the purposes of determining whether the subject has used an illicit drug.

But this is not unproblematic.

If cut-off points are set too high, then the concentration levels of opiates within the body will fall rapidly below the cut-off level following consumption, and the 'window of opportunity' for getting a positive test for a drug like heroin will be extremely narrow.

If the cut-off is high, someone who tests positive for an opiate on Tuesday may test negative by Wednesday. On the second day, there will still be significant traces of opiates in the body, but they may fall short of an excessively high cut-off point.

An interesting, and related, point is that surprisingly little is known about the impact on behaviour of given quantities of drugs. Thus, A.C. Grayling – a Commissioner on the Inquiry – comments in his evidence that many of the ethical issues concerning drug testing would be clearer 'if medical evidence suggests that some residual trace of a given substance marks a limit below which no adverse affects can be expected'. But, in fact, the science in this area is underdeveloped. The precise relationship between the levels of drugs present in the human body and the impact on behaviour is not well understood, and will vary a great deal depending on the substance. This was confirmed for the IIDTW by a witness from the drug-testing company Tricho-Tech, who explained that 'the level of drugs present can be measured in external agents like saliva, urine, hair and blood. But we cannot measure the quantity that needs to be present in the brain to induce a particular status. The relation between the level in percentage of a certain drug and its effect is therefore not clear'. Indeed, the effective doses of different drugs can vary by several hundred or thousand fold, so that the level of detection that is set for one drug may be wholly unsuitable for another.

1.3.4 How reliable are the results? More on false positives

The term 'false positive' is used to describe a situation in which someone tests positive for a drug, but has not consumed that drug over the relevant time period.

As indicated in the previous section, there are a number of potential sources of 'false positive' results.

- 1 *The cut-off concentration levels are too low:* for example, someone who has eaten a bread roll sprinkled with poppy seeds tests positive for heroin.
- 2 *The subject of the test has consumed licit drugs that invalidate the result:* over-the-counter or prescribed drugs may produce positive results for illicit drugs. For example, occasional users of the American version of a Vicks Nasal Inhaler have tested positive for amphetamines or methamphetamines.⁶
- 3 *Passive consumption:* as the debate about passive smoking has highlighted, a positive test could, in theory, result from the passive inhalation of substances. For example, somebody who has recently been in a room where cannabis has been smoked could, in theory, test positive for cannabis.

Of course, the possibility of false positives does not invalidate drug tests, although it does mean that their results need to be treated with a degree of caution. It should be noted that these problems are by no means unique to drug testing, but are equally applicable to other forms of screening – for example, for cancer and other diseases – which are not infallible either. The issues that drug testing raises can be illuminated by considering the wider debate on the science and ethics of screening.

In recent years, better scientific knowledge and improvements in testing techniques and protocols have significantly reduced the likelihood of 'false positive' results.

Where an initial oral fluid or urine test shows up positive in a cup or vial by a change in colour, it is now widely recognised that such positive test results need to be followed up by a full, more costly laboratory test in order to be relied upon. There may be an alternative – and 'innocent' – explanation for the presence of an illicit drug. This may emerge only after review of a pre-test interview, in which subjects are asked whether they have taken any over-the-counter or prescribed medications. There are documented cases of people giving wildly improbable explanations for the presence of drugs in their bodies, which have turned out on further examination to be true.

1.3.5 How reliable are the results? False negatives

The term 'false negative' is used to refer to a situation in which someone tests negative for a particular drug, but has in fact consumed that drug in the relevant time period of concern to the tester.

For the most part, the causes of 'false negatives' are simply the corollaries of 'false positives'.

- 1 If cut-off concentration levels are set too low in order to deal with false positives, this will result in positive results being dismissed as unreliable in some cases where the subject has consumed illicit drugs.
- 2 The 'window of opportunity' for detecting drugs in the human body will vary depending on the type of test, the particular

substance that is being tested for and the level at which the relevant cut-off has been set. For example, heroin will leave the body much more quickly than cannabis and a urine test for cocaine or heroin will be reliable for a period of two to three days, whereas a hair test may be able to detect these drugs in the human body over a period of several months (see Table 1).

- 3 There are masking agents and adulterants that can be used to corrupt test results. Increasingly, these substances may be tested for as well as the drugs themselves.

The results of drug tests need to be treated with some caution, as testing procedures are fallible. It is also important to be clear what particular drug tests can and cannot do. A test that can reveal the presence of heroin that was taken by one person months previously may not detect that another subject was actually on heroin at the time the test was taken. Another type of test may pick this up, but will not be able to detect that the subject used cocaine or heroin a few days earlier. It is important to be aware of these limitations.

But, at the same time, drug-testing methods and technologies are getting increasingly sophisticated. For the most part, and within these limitations, it is possible to be reasonably confident about test results, so long as the proper procedures are followed. But the detection of drugs or their metabolites in the human body will often tell us little or nothing of value about impairment or the impact on performance. It is another question, of course, whether 'tests work' in the sense that they are an effective means to the ends of employers, including reducing accidents, cutting

Drugs testing in the workplace

Table 1 Drug testing, detection times and reliability

Type of test	Urine	Saliva	Sweat	Blood	Hair
Detection time	2/3 days	24 hours	24 hours to 2/3 days	Up to 31 hours	1 week to 18 months
Reliability	Most researched. Has been around for 20 years. Best test for cannabis use. Sample needs to be stored and preserved properly. Most open to fraud (substitution of samples). On-site positive result needs lab confirmation.	Good for recent drug use (cannabis and opiates in particular) but a mouth wash would adulterate on-site test. Samples need refrigeration. Dipsticks can be used for on-site results (e.g. can test saliva at the road side), positives need confirmation.	Drug patches used mainly for monitoring. Detect up to a week while worn. Drug swipes up to 24 hours but not very reliable. Police have tried but doesn't work efficiently.	Open to fraud, sample needs careful storage and preservation, needs lab analysis. Not done for on-site results.	Cannot detect alcohol. Not appropriate to detect recent use, needs lab analysis.
Drug/drug type	Drug detection times				
Alcohol	6 hours to 1 day				
Amphetamines	1 to 4 days				
Benzodiazepines	Short-term therapeutic use: 3 days Long-term chronic use: 4 to 6 weeks				
Cocaine	2 to 5 days				
LSD	1 to 4 days				
Marijuana	Casual use: up to 7 days. Chronic use: up to 30 days or longer				
MDMA	1 to 4 days				
Mescaline	1 to 4 days				
Methadone	1 to 7 days				
Methamphetamines	1 to 4 days				
Nicotine	1 to 2 days				
Opiates (including heroin)	1 to 4 days				
Propoxyphene	1 to 7 days				
Psilocybin (Mushrooms)	1 to 3 days				
Steroids (Anabolic)	Oral: 2 to 3 weeks. Injected: 1 to 3 months. Nandrolone: up to 9 months				
Tricyclic Antidepressants	1 to 9 days				

Source: this table is reproduced from a Factsheet that appeared in *DrugLink*, Vol. 19, No. 2, March/April 2004.

absenteeism, increasing productivity and enhancing the reputation of the organisation. These important issues will be examined in detail later in this report, when the principal findings of the IIDTW are set out and discussed.

1.4 The law

Drug-testing technologies are not infallible. However, it is possible, within strict limits, to find out a great deal about people's alcohol and drug use by testing. It can be done, but should it be done? Is it permissible for employers to drug test their staff – and, if so, in what circumstances? Is it ever encouraged or required? What are the rights and responsibilities of employers and employees in this area? The answers to these sorts of questions will vary significantly depending, for example, on whether testing is about safety and performance at work or behaviour outside the workplace that has no demonstrable implications in terms of impairment at work.

To summarise, there are a number of aspects of drug testing that raise ethical and legal issues. In particular:

- employees taking illicit drugs are engaging in an illegal activity
- employers have health and safety responsibilities to their employees and to the public at large
- employees may lose their livelihoods, face other disciplinary action or be stigmatised where they test positive for drugs
- testing may be perceived as a violation of the integrity and privacy of the individual, particularly in the absence of consent

- drug testing can reveal sensitive information about people that should not be used in inappropriate ways.

This section takes a close look at the legal status of drug testing in the UK, while the following section discusses the wider ethical questions.⁷

1.4.1 An emerging issue for jurisprudence

In his evidence to the IIDTW, leading barrister Michael Ford explained that drug testing at work had been 'a matter for unconstrained management prerogative' for years, but that this 'is now less so'. So what has changed? Of most significance, two landmark pieces of legislation were passed by the UK Parliament in 1998: the Human Rights Act and the Data Protection Act. Both have considerable potential relevance to the legality or otherwise of different forms of drug testing.

However, as a number of witnesses to the IIDTW stressed, the precise significance of these legal instruments is unclear. As Michael Ford explains 'there has been little case law on the Human Rights Act and the Data Protection Act in relation to the issue of drug testing ... quite how extensive an incursion the legislation will make into management prerogative in this area remains a matter of considerable uncertainty'. He proceeds to note that any discussion of the law on drug testing is bound to 'venture into uncharted territory'.

What is clear is that drug testing raises fundamental issues for law and ethics. As Gillian Ferguson, from Matrix Chambers, explains in her evidence to the IIDTW, this is a legally and ethically controversial area, which is likely to generate many future cases for the

consideration of employment tribunals and law courts because of the tensions between the interests of employers and employees. 'From an employer's perspective', she comments, 'key reasons for testing include compliance with health and safety laws, enhanced productivity and the promotion of public confidence. Standing in potential conflict with these are the employees' interests in privacy, dignity and bodily integrity.'

This is a controversial area of law.

1.4.2 'Unconstrained managerial prerogative'

Leaving aside anti-discrimination provisions (see below), UK employment law has had little to say about drug testing at work. To paraphrase Michael Ford, the reality is that employers have been able to do pretty well as they choose.

1 *Pre-employment*

Outside of anti-discrimination law, an employer is highly unlikely to be open to legal challenge for refusing to employ a candidate who tests positive for drugs, or who refuses to take a test, or who has lost a job in the past because of an alcohol or drug problem. This has traditionally been treated as a matter of freedom of contract – if the employer chooses not to enter into an agreement with a prospective employee, for whatever reason, then that is, literally, his or her business.

2 *Assault and consent*

Employers cannot physically compel their staff to submit to drug tests. An employer who attempted to take, say, hair or blood by force would be committing a crime. In practice, however, this legal prohibition on assault will

place little or no restriction on the employer's ability to drug test staff and/or potential employees. For the most part, potential employees will consent to drug testing if they know that the alternative is to be no work or a damaged career. Subsequently, if refusal to take a test is treated as a positive result, an employee has little real choice.

In organisations that do testing, it is common for employers to make it an express term of contract that an employee submit to a drug test if required. In addition, there is an implied condition in employment contracts that an employer will not act in ways that will damage relationships of trust without good reason.⁸ The IIDTW was advised that 'so long as an employer can point to some possible reason for justifying drug testing of an employee – which might simply be the effect on its reputation if its employees are known to be taking drugs – testing is unlikely to breach the implied term'.

Employers cannot force anyone to take a drug test, but, under employment law, they can refuse to employ anybody who says 'no'. And they can treat refusal to submit in the same way as they would treat a positive test.

3 *Dismissal*

Generally speaking, employers have wide discretion, as a matter of contract, to determine what kind of matters will result in disciplinary action and what the sanctions will be. However, if an employer sacks somebody, this brings another area of employment law into play. Employees, so long as they have been in their current jobs for at least 12 months, are protected against 'unfair dismissal' by the Employment Rights Act 1996.⁹

Legal experts told the IIDTW that it was highly unlikely that an employment tribunal would feel that a dismissal was unfair if there was evidence that drug or alcohol use affected performance at work – and particularly not if there were health and safety considerations.

For a dismissal in these circumstances to be judged 'fair', however, it will probably be necessary to demonstrate *some* link between an employee's drug and alcohol consumption and their work. The IIDTW heard that employment tribunals have tended in the past to accept whatever employers have told them about what will and will not affect work. It has been common for tribunals to accept justifications for dismissal that gesture towards some general and rather vague claims about the adverse effects of drug use on the organisation's reputation. But this may be starting to change. Leading barrister Michael Ford told the IIDTW 'it is probably true that tribunals nowadays increasingly tend to expect some stronger links between drugs and performance at work' and are not so ready to settle for 'vague claims' about reputation.

Employers may also run into trouble if proper procedures have not been followed in cases resulting in the dismissal of staff. An employment tribunal may want to know, for example, whether employees were warned of the consequences of drug use and whether the employer followed its own internal rules in the case in question.¹⁰

Unfair dismissal cases

Racal Services v. Flockhart EAT 701/00

The Employment Appeal Tribunal ruled that the dismissal of a safety-critical trackside worker who tested positive for cannabis had been 'fair', and this was the only conclusion open to an employment tribunal. In addition, on-duty consumption of drugs or present impairment is likely to constitute a legitimate ground for dismissal even when there are not these kinds of safety considerations.

Mathewson v. R.B. Wilson Dental Laboratory [1998] IRLR 512

A dental technician purchased some cannabis during his lunch hour for his personal use and was arrested and later fined. He admitted the offence to his employers immediately and was summarily dismissed. There was no suggestion that the employee took cannabis while at work. The tribunal held that nevertheless his dismissal was fair because it fell within the band of reasonable responses and this decision was upheld on appeal. Relevant considerations included the skilled work performed by the employee and the possible influence on younger members of staff.

Booth v. Southampton Airport Ltd, EAT Case NO 39214/81, IDS Brief, December 2002

An air traffic controller was dismissed for off-duty cannabis use. This was held to be a fair dismissal even though there was no

(continued overleaf)

evidence it affected his work in any way. The employer justified the dismissal by referring to the importance of preserving public confidence in the service.

Norfolk v. Bernard [1979] IRLR 220

A drama teacher was dismissed following his conviction for the possession and cultivation of cannabis. In the absence of any evidence that the drug conviction or drug use had affected or would affect his work or the employer's reputation, an employment tribunal found that the dismissal was unfair and this decision was subsequently upheld by the Employment Appeals Tribunal.

4 References

Where an employee is dismissed for failing a drugs test, it may be very difficult to get another job. An employer who had dismissed an employee for a positive drug test would be likely to pass this information on to a prospective new employer – not least because failing to provide this information could leave the previous employer open to legal action if drug or alcohol use by the employee subsequently led to serious problems in the new job.¹¹

1.4.3 The responsibilities of employers

Is there anything that employers are legally required to do about drugs at work? After all, if they fail to take effective action to prevent their employees working under the influence of alcohol or drugs then this could result in accident and mortality.

Three key legal instruments are of relevance here.

- 1 *The Health and Safety at Work Act 1974*: employers have a duty to protect their employees' health, safety and welfare in the workplace. They are also legally responsible for the welfare of third parties.¹²
- 2 *The Management of Health and Safety at Work Regulations 1999*: these regulations oblige employers to conduct assessments of health and safety risk to their employees and third parties.¹³
- 3 *The Transport and Works Act 1992*: it is a criminal offence for certain workers – including drivers and conductors on buses or trains – to work under the influence of alcohol or drugs.¹⁴ Under these circumstances, if the employer has not exercised 'due diligence' in ensuring that the employee is not under the influence of alcohol or drugs, he or she is also guilty of a criminal offence. The avoidance of criminal liability, alongside the obvious safety concerns, has led many to introduce drug-testing programmes.¹⁵

Although these legal instruments do not expressly require employers in the relevant safety-critical industries to have drug-testing programmes, they have provided them with an incentive to do so.

The issue of drug testing is moving up the health and safety agenda in a society where problematic forms of alcohol and drug use are increasing among the working population. The Health and Safety Executive (HSE) has identified drug misuse as an important workplace issue. In a recent guidance document, *Drug Misuse at Work*, the HSE concludes that drug testing is a sensitive area,

and will be embraced by staff only as part of a wider occupational health strategy that has clearly been designed to minimise risk (Health and Safety Executive, 1999).

There is no direct legal requirement for employers to test employees (or prospective employees). In so far as drug testing is currently one means of meeting a legal obligation in the UK, it is because of health and safety law.

There is a qualification to this, however. Illicit drugs are illegal. In certain circumstances, employers who knowingly allow drugs to be used on their premises may be vulnerable to prosecution under Section 8 of the Misuse of Drugs Act 1971.

1.4.4 Legal protection for employees

Employees are entitled to protection of their health and safety at work. This is the basis of a strong argument for drug and alcohol testing. But people may also need legal protection to ensure they are not subjected to workplace procedures that violate their rights, invade privacy without good reason or are insufficiently respectful of their dignity as human beings. People cannot be physically compelled to submit to drug tests, as this would constitute criminal assault. But what other legal protections apply to drug testing at work?

1 *Discrimination*

An employer should not target alcohol or drug testing disproportionately at, say, young black men – or, indeed, at young men. It is also important to ensure that the way that drug testing is actually conducted takes proper account of ethnic, cultural and religious differences and sensibilities. Employers who discriminate against job applicants, staff or

contract workers on the basis of race, sex or disability (or, indeed, because they are members of trade unions) are likely to face action under anti-discrimination legislation.¹⁶

These laws also place limits on what employers can do with the information that is obtained from a drug test. For example, a test may (incidentally) reveal that somebody is taking prescription medication.¹⁷ An employer would be in breach of discrimination law if he or she declined to offer a job applicant employment on these grounds – or discriminated in other ways, such as turning someone down for a promotion or an internal transfer. This area of law may receive greater attention as prescription drugs containing cannabis become available for the treatment of some disabilities.

It might be argued that an alcoholic or someone with a drug dependency is 'disabled'. This is not the legal position. The Disability Discrimination (Meaning of Disability) Regulations 1996 state that dependency on drugs and alcohol is not a 'disability' for the purposes of the Disability Discrimination Act 1995. There is a significant exception to this, however. Where someone has developed a mental health problem as a result of taking prescribed drugs, or undergoing medical treatment, this could potentially qualify as a 'disability'.¹⁸

2 *Privacy*

Human rights

Individuals are entitled to a private life, outside of the workplace.

This right is recognised by the European Convention on Human Rights (ECHR), which was incorporated into domestic law by the Human Rights Act 1998.

Article 8 of the ECHR declares that 'everyone has the right to respect for his private and family life, his home and his correspondence'.

This protects bodily integrity and requires free and informed consent to drug testing.¹⁹ Of course, it is unlikely that any employer would physically force someone to take a drug test. However, bodily integrity would also be violated if a blood or other sample was taken under another pretext and subsequently used for drug-testing purposes without the consent of the individual.

Other than this, the IIDTW was told that the impact of both human rights and data protection legislation was still a matter of 'considerable uncertainty'.²⁰

What can be said with confidence is that Article 8 *could* have implications for the way the law deals with drug testing at work. Leading barrister Michael Ford told the IIDTW that 'in view of changing attitudes to drug use and the growing evidence of widespread use of recreational drugs, it is plausible that in future drug use may be seen as an aspect of private life'.

However, even if drug use did come to be seen as an essentially private matter, the right to private life could still be overridden under Article 8 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

This is another significant hurdle to Article 8 being invoked to limit the power of employers.²¹

With this in mind, Michael Ford comments in his evidence to the IIDTW that the indications

are that 'courts and tribunals will be slow in departing from their traditional approach, in which the right to private life in the context of work relationship has hardly figured at all'. He adds, however, that 'the long term trend is less clear'.²²

There is a further, and very significant, restriction.

Under the Human Rights Act 1998, the rights contained in the ECHR can be invoked directly only against a 'public authority'. The applicability of the right to privacy will depend not only on correct interpretation of Article 8, but also on whether or not the employer in question is a 'public authority'.²³

Pressure from the labour movement

In the longer term, a range of external factors are likely to have a significant impact on the interpretation of Article 8. For example, organisations that represent the interests of the workforce will want to influence the development of drug testing at work, notably the trade union movement – as, of course, will employers' bodies.

The International Labour Organization (ILO) adopted a set of guiding principles on alcohol and drug testing in the workplace in the early 1990s.²⁴ These principles could influence the way that Article 8 is interpreted by tribunals and courts in the UK, particularly given the role that British trade unions play in representing employees in unfair dismissal – and other relevant – cases.

Where an employer is testing, the ILO guidelines state that:

- there should be a formal written policy on testing

- methods of testing should be of the highest quality and reliability
- the objective of testing should be clearly defined and articulated
- it must be clearly demonstrated that testing can reasonably be expected to achieve its intended goals
- the substances to be tested for should be identified
- the test results should be kept confidential.

The Guidance states that ‘workers should have the right to make informed decisions about whether or not to comply with requests for testing’. It continues:

Rights of workers to privacy and confidentiality, autonomy and fairness, and integrity of their bodies must be respected, in harmony with national and international laws and jurisprudence, norms and values. Employees who refuse to be tested should not be presumed to be drug or alcohol users. The need for testing should be evaluated with regard to the nature of the jobs involved. With some jobs, the privacy issues may be determined to outweigh the need to test.

The substantive issues raised by this statement of principle are discussed elsewhere in this report. It should be noted here only that the development of drug-testing policy, and the interpretation of Article 8, is not only a matter for dispassionate deliberation in the law courts. This is an area where there is a potential for divergence between the interests of employers and employees, and some of the key issues are open to political contestation. It is against this

background that the relevant human rights instruments will be interpreted and implemented.

Data protection

Drug testing is a means of obtaining information. This information can be used in a variety of ways.

The Data Protection Act 1998 – which itself draws on Article 8 of the ECHR – sets out a series of legal requirements for obtaining, recording, processing, holding, using or disclosing information.

The first three data-processing principles are of particular significance to drug testing at work. They are:

- 1 personal data must be processed fairly and lawfully
- 2 personal data must only be processed for a specified lawful purpose
- 3 personal data must be adequate, relevant and not excessive in relation to the purpose for which it was processed.

The experts who advised the IIDTW felt that these principles placed real constraints on the scope of employers. Gillian Ferguson, of Matrix Chambers, argued that ‘Data Protection Act compliant drug testing will have to be carefully tailored to specific purposes ... unreasoned and unnecessary testing will not be acceptable’.

Michael Ford agreed: ‘plainly, the application of these principles will have a significant effect on drug testing by employers: in general terms employers will have to be much clearer as to the purpose of drug testing and be able to justify that testing in the light of how it affects their workers and their right to respect for private

life'. He added that 'it may also prove difficult for them to rely on blanket "consents" obtained through clauses written into contracts of employment to which individuals have little choice but to agree'.

In addition, the Data Protection Act places strict controls on the handling of sensitive data obtained from a drug test – such as the information that the subject has committed a criminal offence by using an illicit substance or is taking a prescription drug.

To summarise: employment law appears to strongly favour the employer. However, it appears that other emerging areas of law are starting to provide a counterbalance to 'unconstrained managerial prerogative', notably the Human Rights Act and the Data Protection Act. However, this all remains uncharted – and politically contested – territory. It is not yet clear precisely how the courts will interpret Article 8 or the data protection legislation.

More pressure for a health and safety focus?

The precise application of the data protection principles to drug testing will depend on what is and what is not considered to be a good reason for processing this information. Here, as elsewhere, there are indications that the acceptability of testing may hinge on whether it has a legitimate health and safety purpose.

The impact of the Data Protection Act on employment practice has so far been limited, perhaps because its full implications have not yet become clear to employers. To date, there has been very little litigation, in part because there is not much scope for it.²⁵

The issue has recently been clarified with the publication in November 2003 by the Information Commissioner of the consultation draft of Part 4 of the *Employment Practices Data*

Protection Code (this document is on the Information Commissioner's website at www.informationcommissioner.gov.uk).

According to the draft Code, the legitimacy of drug testing depends on showing that there are health and safety concerns and providing evidence of real (not assumed) impairment of performance; it also casts doubt on the legitimacy of the practice of random testing in all but safety-critical industries. Thus it suggests that 'the collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons'²⁶ and recommends that employers should 'confine testing to those workers whose activities actually have a significant impact on the health and safety of others'.²⁷ Even in safety-critical industries, 'workers in different jobs will pose different safety risks', so that '[t]esting of all workers in a business will not be justified if in fact it is only workers engaged in particular activities that pose a risk'.²⁸

The Code recommends that the purpose of testing should be to 'detect impairment at work rather than illegal use of substances in a worker's private life'. Testing for illegal use may, however, be justified, according to the Code, where such use would 'breach the worker's contract of employment, conditions of employment or disciplinary rules, and cause substantial damage to the employer's business, e.g. by seriously undermining public confidence in the integrity of a law enforcement agency'.²⁹

The *Supplementary Guidance* issued along with the Code urges employers to '[t]ake particular care when carrying out an assessment of whether drug testing is justified on health and safety grounds', and to bear in mind that 'other than in the most safety-critical areas,

regular drug testing is unlikely to be justified unless there is reasonable suspicion of drug use that has an impact on safety'.³⁰ It suggests that employers should employ drug testing only if it provides significantly better evidence of a health and safety danger than the available alternatives, such as tests of cognitive ability, and recommends that employers should therefore use tests that are designed to detect recent exposure.³¹

Such a health and safety emphasis is common to many jurisdictions. In Canada, for example, workplace drug testing constitutes a 'bona fide occupational requirement' only if it is conducted for a purpose that is 'rationally connected to the performance of the job'. Or, again, France directly authorises alcohol testing *only* of employees who are employed in particular safety-sensitive positions. Similarly, drug testing is permitted in the Netherlands if there is a major risk to the safety of the employee, co-workers or third parties. The United States may seem to provide an exception to this general rule. However, while extensive drug testing in the United States was initially motivated by concerns about crime and productivity, the justificatory emphasis has since shifted to health and safety.

Data protection: quality assurance and procedural matters relating to tests

The Information Commissioner's draft guidelines referred to in the previous paragraphs also advise employers that they must justify and communicate the criteria on which those to be tested are selected. Covert testing should not be used. Drug and alcohol testing should be of sufficient quality to support decisions made on the basis of the tests and should be conducted and interpreted by a

person suitably qualified and competent in the field of drug testing.

A note on consent

If the legitimacy of drug testing is increasingly thought to depend on the purpose for which it is conducted, then this implies that less importance is attached to the issue of consent.

Of course, to test someone without their consent is against the law, so consent is legally significant in this respect. But, if a drug test serves no legitimate purpose, then the consent of the employee is not obviously going to be sufficient to legitimise it. Thus, in the conclusion to her research paper, Gillian Ferguson of Matrix Chambers comments that 'employee consent is increasingly regarded [by the law] as a spurious basis on which to conduct tests'. This is because it is recognised that there is a substantial inequality in bargaining power between employees and employers – and between job applicants and prospective employers. Bluntly, it is hard to say no.

3 Dignity

Even where drug testing is permitted, encouraged or required by the law, there could still be a possible legal challenge if the way it was conducted was inappropriate. In particular, Article 3 of the ECHR protects the individual from cruel and degrading treatment. For example, the courts have held that a lack of privacy in prison toilet facilities can contribute to 'degrading treatment' of prisoners.

This article might be invoked if testing was conducted in a particularly brutal and insensitive manner. For example, a representative of Amicus, the UK's largest manufacturing trade union, told the ILO of one case in which a bald staff member was

required to provide a sample for a hair test. He was told that a sample – approximately the size of a pencil in circumference – would be taken from his underarm hair or pubic hair. When he declined to take the test, he was dismissed for refusing to comply with a 'reasonable request'.³² This sort of practice is a matter for some concern. But it would probably be overstating the case to say that it constituted degrading treatment for the purposes of Article 3.

The lawyer's evidence

The IIDTW wrote to 136 lawyers across England and Wales who specialised in employment law, inviting them to give evidence. The majority did not believe they had much to contribute to the IIDTW's inquiry, as, significantly, they had not been involved in cases where alcohol or drug testing was an issue. None of the lawyers who the Commissioners spoke to felt that alcohol and drug use in the workplace was a significant problem for the businesses that they represented.

A lawyer from a leading firm of UK solicitors, who mainly represents corporate and multi-national clients from the United States, reported that 20 per cent of these clients did some form of drug testing, and numbers were increasing. He told the IIDTW that some employers are aware that cannabis metabolises slowly and can show up in a test long after it has ceased to impact on performance, but that there is still a tendency to deal with all drug use as a disciplinary matter. For many companies, a positive test will result

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in dismissal in the absence of any evidence of an effect on performance. This witness expressed concerns that a minority of managers might be tempted to abuse drug testing to 'manage out' unwanted employees. He also commented:

I have known one company that had a 'snorting room' in the City. People turn a blind eye with regard to drugs and alcohol – but also with a range of other behaviours – because they don't want to lose a key employee ... someone who can make a lot of money.

A representative from Thompsons Solicitors – the largest firm of trade union solicitors in the country – had a number of concerns about the legal status of drug testing. He commented that an Employment Tribunal is likely to consider dismissal for drug use as being within the 'band of reasonable responses' to 'gross misconduct'. He believed that this gave employers too much latitude to act in a discriminatory way, and he argued that a positive drug test should not be a justification for dismissal in the absence of evidence of impaired performance. Random drug testing for an entire workforce could seldom if ever be justified, he thought, and there should be safeguards where staff are tested – for example, committing organisations to support the rehabilitation of staff with drug or alcohol problems.

A partner in a large regional practice, which is the solicitor for a number of safety-critical industries, reported that the

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most common reason for introducing testing was pressure from a parent or partner company in the United States. She reported that almost all US companies want drug testing introduced if they are to do business with organisations in the United Kingdom and claimed that all Fortune 500 companies³³ have pre-employment tests and random testing. She commented on the problems that small and medium-sized companies can have in developing the infrastructure to enable them to drug test and the general reluctance of employers in the UK to 'police society'. It was her view that the firm's client base was cutting back on drug testing – primarily because of the expense – and that, for the most part, businesses in the UK do not see alcohol and drugs as a big problem for them.

1.5 More on the rights and wrongs of drug testing: ethics

Discussion of the legal position on drug testing directs our attention to some of the broader moral questions. It is helpful to identify five issues in particular.

1.5.1 Private life, public life

A distinction between the public sphere and private sphere has been fundamental for liberal societies like the UK.³⁴ For a society that is committed to the values of toleration and autonomy, the mere fact that an action is disapproved of – or is harmful to the individual involved – does not, in itself, provide a compelling justification for interference with

personal choice and private life. Indeed, 'toleration' has been defined as 'the deliberate choice not to prohibit, hinder or interfere with conduct of which one disapproves, where one has both the requisite power and the knowledge'.³⁵

Perhaps the best known statement of this principle is found in J.S. Mill's *Essay on Liberty* (1859). Mill writes that:

... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

It can be argued that the state is sometimes justified in acting, paternalistically, to protect individuals from the harmful consequences of their own actions. This is epitomised, for example, in the UK's drug laws. Nonetheless, there is, in general, a strong presumption against interfering with individual freedom, which can usually be overridden only by demonstrating that this is necessary to protect others from harm.

In his evidence to the IIDTW, the philosopher A.C. Grayling – a Commissioner for the Inquiry – argued that liberal societies accord a special moral weight to the rights and freedoms of individuals, but that these freedoms can be limited where third parties are affected or harmed. He comments, therefore, that:

... there is surely widespread agreement that [drug] use by people whose work affects the well-being, and even lives, of others must be a matter of special interest. No one would wish to be a passenger in an aeroplane flown by someone drunk or in a state of heroin-induced euphoria.

A.C. Grayling adds that employers are also justified in requiring their employees not to turn up for work in a condition where their intoxication, while not a threat to safety, is 'an embarrassment or a nuisance' (say, affecting an assistant in a retail outlet). In such cases, A.C. Grayling concludes that 'for cause' testing may be justified, but that random testing 'is, by the principle, unethical'. There are, A.C. Grayling argues, no grounds at all for workplace testing in all those cases where an individual's use of psychotropic substances affects nobody else. In such cases, drug testing at work offends against some of the fundamental principles that undergird a liberal-democratic society.

1.5.2 Privacy, liberty and law enforcement

If employees or prospective employees are taking cannabis or cocaine, then they are committing a criminal offence. On the face of it, this would seem to be of considerable importance to the arguments for and against drug testing at work. On closer inspection, however, it is of doubtful relevance. Of course, employers can have a legitimate interest in knowing whether the people who work for them have broken the law (hence the arrangements for disclosure of criminal records), but this is a different matter from permitting employers to test as a means of *actively* investigating employees and potential employees.

Nobody seriously argues that organisations should be granted the power to search the houses of job applicants, or to monitor the bank transactions of their staff, or to acquire stop and search powers. It is doubtful that there are better reasons why employers should have drug-testing powers simply *as a means to* check that employees are not breaking the law.

Furthermore, while employers do have an interest in activities of staff that impact on their capacity to work, there is no general obligation on employees to order their leisure time in such a way as to *maximise* productivity at work. It would be inappropriate for employers to have a say in what time their staff went to bed or the amount of exercise they get on weekends, although this could significantly affect performance. The fact that, say, having a drink in the evening can affect productivity the next day is not – in and of itself – sufficient to demonstrate that employers can legitimately concern themselves with the out-of-work activities of the people who work for them.

In his evidence, A.C. Grayling comments that:

... random testing which uncovers the subject's own-time private activities introduces a questionable grey area. Principally, it raises questions about the degree to which, in the absence of express agreement and definition, an employer can exercise influence over employees' private lives. Since these are a fundamental individual privilege, only the most careful mutual arrangements between individuals and those who employ them in safety-critical situations can be regarded as ethically sound.

A.C. Grayling proceeds to argue that, in all other employment situations, 'there can be no justification for invasion of privacy by an employer of this or any cognate kind'.

1.5.3 Purposes and outcomes

Implicit in much of the evidence presented to the IIDTW was an acceptance that drug testing at work did constitute an invasion of privacy and that there needs to be a compelling reason for

overriding this right. Many witnesses felt that the case for drug testing was strongest where the employer's *purpose* was to promote health and safety, or was about enhancing staff performance in some other way. But, it might be thought, what ultimately matters is not the *motivations* of employers, but the *outcomes* of drug-testing regimes. If drug tests do not improve safety or enhance performance, then the case for testing is weakened significantly. Does drug testing actually achieve its objectives? Is it an effective measure of impairment? Does it deter people from using drugs and alcohol at work? Does drug testing reduce absenteeism or increase productivity? These issues are examined in detail elsewhere in this report.

Even where there are good arguments for drug testing at work, there will also be ethical questions about the *type* of testing that is used. As a general principle, there is a clear case for saying that employers should adopt the least invasive drug-testing regime that is consistent with realising their ends. While drug testing will rarely – if ever – constitute 'degrading' treatment in the sense required to invoke Article 3 of the ECHR, it may be experienced as humiliating, uncomfortable or embarrassing.

1.5.4 Fairness

Testing should not be discriminatory. This is not simply a matter of avoiding discrimination on the basis of gender, race or disability, but also of making sure that *no* employee is ever 'selected' for testing without good reason. This effectively means that workplace drug testing – if it is not voluntary – should either be 'for cause', 'post-accident' or random, and within a transparent and agreed policy.

It is also important that any disciplinary

action taken against workers who test positive is fair and proportionate. There is the wider moral issue of whether an employee who is found to have a serious drug problem should be disciplined (for example, suspended or dismissed) or helped. To discipline staff simply for *use* of illicit drugs might be seen to constitute an arrogation of a law-enforcement role by the employer. This would imply that any disciplinary action should be focused on the consequences of impairment for performance at work rather than the consumption of a drug as such – otherwise loss of employment would effectively act as a sort of quasi-judicial sanction for breaking the criminal law.³⁶

But nor should the responsibilities of employees be neglected. Society takes a dim view of people who drive under the influence of alcohol. It is also wrong for people to turn up at work in a state of intoxication that makes them unfit for their work and that might put their colleagues or members of the public at risk.

1.5.5 Welfare

It is increasingly accepted that employers have a wider responsibility for the welfare of their staff than simply to protect them from accident and injury at work. Generally, employers would be thought to have ethical obligations, alongside any legal responsibilities, to deal in a sensitive and appropriate way with staff who, for example, develop significant health or mental health problems. In part, this is because depriving employees of work is likely to exacerbate such problems as people become increasingly reliant on workplace relationships for support and structure in their lives. Similar considerations will apply to staff with drug and alcohol dependency problems.

It is also arguable that employers have an ethical responsibility to ensure that the pressures of work are not so excessive as to increase significantly the chances that staff will turn to damaging forms of alcohol or drug use – for example, by ensuring work loads do not become unmanageable and by taking firm action to tackle bullying at work.

1.6 Social problems and social responsibilities

The issue of drug testing at work also needs to be placed in a wider social context. Work has a broad social significance. For many people, it is a source not only of income but also – and increasingly – of self-esteem, a structured life and social support and friendship networks. This means that the way that employers approach drug testing at work has wide repercussions for society as a whole. For example, if organisations refuse work to anybody with a history of drug or alcohol dependency – including people who are in, or have recently completed, treatment – then this will tend to exacerbate social exclusion. Similarly, if staff who fail drug tests are dismissed, then this could, in some cases, precipitate a downward spiral of exclusion and substance misuse.

There are obvious and strict limits to the extent that society can reasonably expect employers to shoulder responsibility for social problems. But it is important that these wider issues are not ignored in the debate about drug testing at work.

1.6.1 Drugs and social exclusion

Excluding people who use drugs from work will have a number of negative outcomes. These include:

- loss of income for individuals and their families
- potential exclusion from future employment
- potential loss of home and family relationships
- creating a net drain on, rather than a net contribution to, society.

1.6.2 The pressures of work

People do not develop alcohol and drug problems independently of everything else that is happening and it is important to be aware of the wider causes and contexts of problematic substance use. The problematic use of psycho-active substances can be a response to the problems of daily life. The workplace itself contributes to these pressures. There is a growing body of anecdotal evidence that the demands of work are greater than ever before, and that some people come to depend on alcohol and drugs as a way of dealing with these pressures.

The IIDTW heard from a number of employees who said that their drug or alcohol use was, in part, an antidote to the demands of the workplace. For example, one management consultant in his mid-twenties told the Inquiry about his experiences of working for an international consultancy firm. He explained that ‘people worked incredibly hard and very long hours ... the whole environment was pressure ... big stress – big pressure’. A woman in her late-twenties, working in telecommunications,

claimed that 'in a time-deprived, working life, smoking cannabis is crucial to me to cope with the workload and hours'. It would be a mistake to attach too much significance to the remarks of one or two witnesses to the Inquiry, but these comments are suggestive and resonate with the experience of many. At the very least, it is evident that employment policies should ideally address the causes of problematic drug and alcohol use – for example, by recognising the need for a sensible work-life balance.

1.7 Conclusion

The issue of drug testing at work raises important questions about the legal obligations of employers and their wider social responsibilities. Most employers recognise that these sorts of considerations are a source of significant constraints on their employment policies. But their first concern must be for the efficiency of their organisations. When employers are developing drug and alcohol policies, they are – quite rightly – interested in the costs and benefits to them. A number of the points made in this detailed discussion of the scientific, legal, ethical and social issues raised by drug testing also have business implications, and will impact on the efficiency and productivity of organisations.

For example, there are the human resource costs of refusing employment to talented people, or of dismissing highly trained staff, for what may be a one-off or recreational and non-problematic drug experience. Particularly in a culture where experimental drug use is widespread, an ill-considered drug-testing regime may also have a negative impact on industrial relations if there is no clear rationale for testing. In addition, employers could be vulnerable to legal challenge, notably under the Data Protection Act.

How do employers hope that they will benefit from investment in drug testing and would any benefits offset these costs? In safety-critical industries, this is about health and safety obligations and a desire to reduce the incidence of accident, injury and mortality. Elsewhere, they may believe that testing can improve efficiency and productivity. The IIDTW has talked to many British employers about their attitudes to drug testing, and has conducted a thorough review of all the evidence on safety, productivity, reputation and efficiency. This evidence is examined in Chapter 3 of this report, which also takes a more detailed view of the costs. First, however, it is necessary to say more about the extent of drug testing at work in contemporary Britain.

2 The evidence: trends and trajectories

Many people have had no direct experience of drug or alcohol testing in their working lives, and may doubt that this is a significant problem for them or a particularly salient issue for public debate. Is drug and alcohol use at work a major problem? How widespread is drug testing? Are there good reasons to think that drug testing is becoming more widespread in Britain, or is likely to become so in the foreseeable future? This chapter addresses these questions and, in particular, asks whether there are genuine grounds for concern about alcohol and drug use at work or about the use of drug testing in the UK. It also presents new evidence commissioned by the IIDTW, including the results of a MORI poll.

2.1 Drugs and alcohol at work – is there a problem?

2.1.1 Prevalence and cultural change

In an article in the magazine *Safer Society*, Peter Martin, Chief Executive of the charity Addaction, recently commented that 'there has been a massive social change in the last 20 to 30 years, with drug use more commonplace than ever before ... we have to direct our strategy to recognise that we are living with a drug culture'.¹ As noted earlier, Howard Parker and his colleagues at Manchester University have recently concluded that employed young people are no longer 'maturing out' of binge drinking and recreational drug use in their mid-twenties. On the contrary, a growing number of young adults view 'substance use as a de-stressing – chilling out – activity, whereby intoxicating weekends and going out to "get out of it" is the antidote to the working week'.² The Government's *Alcohol Harm Reduction Strategy*

for England, published in March 2004 (Prime Minister's Strategy Unit, 2004), confirms that binge drinking is widespread among the working population.

The use of psycho-active substances is widespread in British society, as is confirmed by the official data on prevalence. This is not to condone the use of illicit drugs. But it is something that employers need to take into account in developing drug and alcohol policies. A business that refuses to employ anyone who tests positive for drugs will exclude large numbers of talented and otherwise law-abiding young people. Moreover, where recreational drug use is widespread, it may be seen as unfair if a few staff each year face disciplinary action as a result of random drug tests. In addition, while recreational drug use is widespread in contemporary Britain, it is young people at the margins of society who are the most likely to have experience of drugs, particularly Class A drugs.³ If a history of drug use were to become a major barrier to employment, then this would impact disproportionately on some of the most disadvantaged young people.

2.1.2 The impact on work

Over a third of respondents to the *British Crime Survey 2002–2003* reported that they had used an illicit drug. More than a quarter of 16 to 24 year olds said that they had done so in the previous year. These are striking findings. But do they show that drug misuse is having a significant impact in the workplace and should therefore be a matter of serious concern to employers?

This is certainly the message that is coming from some leading providers of drug-testing services. In a presentation to the IIDTW, Altrix

placed a great deal of emphasis on the scale of the drug problem in the UK, telling the Inquiry that its message to employers was that they could no longer ignore evidence for a high prevalence of illicit drug use.⁴

Studies like the *British Crime Survey* are of limited value in assessing the real impact of drugs in the workplace. It does not follow because somebody has used an illicit drug at some time in their lives – or in the previous year or month – that this will have had a discernible impact on their work. After all, for most people who experiment with illicit drug use, this is no more than a brief adolescent flirtation, which is anyway indulged outside of work hours.

What is relevant is not so much general prevalence data as finer-grained research that can show the extent to which alcohol and drug use is *directly* impacting on performance at work in the UK – for example, evidence on intoxication at work or the relation to absenteeism. In fact, the available research, such as it is, tends to show only that some employers *perceive* alcohol and drug use to be a significant problem.

Employers' perceptions will not be groundless, of course, and this sort of research is illuminating. For example, UK-based research conducted by Alcohol Concern, DrugScope and *Personnel Today* concludes that the majority of employers do view alcohol and drug use as a major cause of absenteeism. Indeed, around one-third of employers questioned for this 2001 survey said that they would actively consider introducing drug testing because of concerns about the impact of drug and alcohol use in the workplace.⁵ Similarly, research conducted by the Chartered Management Institute in 2003 concludes that there is a widespread perception

among employers that alcohol and drug use has increased and that this is a source of problems for their organisations.⁶

As Ross Coomber, Professor of Sociology at the University of Plymouth, concludes in his literature review for the IIDTW:

... the evidence for clear-cut deleterious effects of drug use on business is equivocal. What is less so is the belief by the business sector of the harm that drug use, and alcohol consumption in particular, causes to British industry.

This is not to say that there is no direct evidence of drug and alcohol use impacting on performance at work. Evidence to the IIDTW suggests that some sectors of industry have higher levels of substance use than others.⁷

Two small-scale surveys, conducted for the IIDTW, suggest that drug and alcohol use is having an impact. Of nearly 250 respondents to a questionnaire in the Trade Union Congress's (TUC's) online magazine, *Hazards*:

- 71 per cent said that they or someone they knew had worked under the influence of drugs or drink
- 58 per cent felt that they or someone they knew had performed less effectively because of drugs or drink.⁸

In 2003, the IIDTW also placed a range of questions on drug use at work in a survey of drug use ('The world's biggest drug survey') that appeared in *MixMag*, which describes itself as 'the world's biggest clubbing and dance music magazine'. Of 1,134 respondents, 22.9 per cent said consumption of alcohol had made a difference to their performance at work, 63.9 per cent said that illicit drugs had done so.

Both the TUC and *MixMag* surveys were based on small, self-selecting samples, whose responses to other questions suggest that they were not representative of the working population as a whole. But these findings are interesting nonetheless.

It would be difficult for an organisation to justify investment in a drug-testing programme on the basis of evidence that a minority of staff are sometimes less productive at work because they have a hangover, or that there are a handful of absences each year due to illicit drug use. There are also questions about the effectiveness of drug testing as a means of deterring drug and alcohol use, and reducing absenteeism. These are examined in detail in the next chapter of this report.

But, first, it is necessary to say more about the extensiveness of drug testing in the workplace in modern Britain and to identify some of the pressures that could potentially drive future expansion.

Drugs and alcohol at work: personal testimonies

The IIDTW was unable to talk to large numbers of employees. However, the commissioners felt it was important to hear the voices of some employees in the course of the Inquiry. Their evidence is anecdotal, and there is no reason to assume that their experiences are typical. But this testimony was greatly appreciated by the Commissioners. It provides an insight into what is happening in some workplaces and adds some texture to the research data. (All names have been changed to protect the identities of witnesses.)

(continued)

James

James is a management consultant in his mid-twenties. Asked about the use of drugs in a City environment, he said:

... from my experience, dope is mainstream, although it is still a minority who take drugs. People are aware who's using various drugs – out of 20 friends from work, about five or six take drugs. But they all perform at work. It shouldn't be about drugs, but about whether they perform. I have friends in banking, where it's mainly coke. I have never seen heroin. I have seen it at parties ... people in suits doing lines of coke.

Ian

Ian has worked for London Underground for five-and-a-half years. In the past, he has drunk heavily at work and used drugs. He is now undergoing treatment for drug and alcohol abuse. Did he think that his alcohol and drug use had an impact on his performance? 'I tended to work hard to cover up', he said, 'maybe sometimes my reactions were not as good as they could be ... [but] it never impacted on my performance, that was never called into question, but my attendance suffered. I would take the odd day off after a heavy session – probably not more than eight or nine days over four years.'

John

John is a relatively high-profile chef in a well-known restaurant. He told the Inquiry that, in kitchens, 'it seems socially acceptable to take Class A drugs – cocaine, ecstasy and ketamine – although they [i.e. young people] use less alcohol than we did'.

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Janine

A successful young woman in her late-twenties told the IIDTW:

I can't fall asleep until an impractically late hour which would decrease my performance at work the next day. Smoking [cannabis] shortens the de-stress process ... smoking is crucial to me to cope with all the workload and hours.

2.2 Drug testing at work: prevalence and employers' attitudes

How widespread is workplace drug testing in the UK?

Is there any evidence that organisations that are not currently testing are likely to introduce programmes in the future?

2.2.1 The background

Over the past 25 years, there has been a massive expansion of drug testing in the United States. The Reagan administration promoted the use of drug testing in the mid-1980s as part of its 'war on drugs' crusade, legally requiring federal employers to test their staff.⁹ By the mid-1990s, testing had spread to become 'common organisational practise' in North America.¹⁰ In Europe, it has been a different story. In part, this is because concern about drugs at work has tended to focus more on health and welfare, and testing in the workplace has not generally been viewed as a crime-reduction measure.

It has been argued that, in terms of the *extent* of drug testing at work, Europe lags behind the United States by some ten to 15 years.¹¹ But, in the view of the IIDTW, this wrongly assumes that there is some sort of inevitability that Europe will take the same path as North

America. It also ignores the evidence that enthusiasm for testing at work may already be on the wane on the other side of the Atlantic. This said, the exponential growth of drug testing in the United States does show how rapidly this practice can take root and expand. Drug testing has already migrated beyond the workplace into many North American schools, and has done so to such an extent that it has been claimed that it is now 'nearly a universal experience for American youth' (Caulkins *et al.*, 2002). Home-testing kits are also widely available. Public opinion polls in the United States indicate that there is widespread support for drug-testing programmes. There are indications that this momentum is gathering pace in the UK too. At the end of February 2004, for example, Tony Blair announced plans to empower head teachers to drug test children in schools in the UK.

It has been claimed by some commentators that drug testing at work is much more widespread in the UK than in most other European countries. In 2001, Dr Alain Verstraete – from the Laboratory of Clinical Biology-Toxicology at Ghent University Hospital, Belgium – and Dr Anya Pierce – from Beaumont Hospital, Dublin, Ireland – estimated that anywhere between 220,000 and 330,000 drug tests are carried out in Britain each year – 35 per cent in prisons, 40 per cent in the military and 25 per cent by employers. They also report that these tests are being handled by two major laboratories and three smaller ones operating across the UK (Verstraete and Pierce, 2001). A study published by the Chartered Management Institute in 2003, *Managing the Effects of Drug and Alcohol in the Workplace*, found that 16 per cent of all organisations made use of random testing and

14 per cent of pre-employment testing as part of their recruitment process. This rose to 59 per cent for the uniformed and emergency services, and 53 per cent in transport industries.¹² This study was based on self-completion questionnaires that were sent out to a nationally representative sample of 4,000 CMI members in September 2002. This sample was drawn from all management levels, sectors and sizes of organisation. The CMI received 670 completed questionnaires, a response rate of 17 per cent.

Ross Coomber concludes, in his literature review for the IIDTW, that 'drug testing may be (slowly) on the increase in the UK' (and 'this appears to be coinciding with a period where drug testing in the United States has shown slight declines').

As the findings of the Chartered Management Institute survey suggest, drug testing in the UK has been overwhelmingly concentrated in safety-critical industries. This largely reflects the legal requirements of the Transport and Works Act 1992, and employers' concerns about their health and safety responsibilities. The IIDTW spoke to a large number of organisations running drug-testing programmes; the overwhelming majority did so for health and safety reasons (see box).

A sample of the evidence from British companies testing for drugs and alcohol

The Inquiry heard evidence from a number of British companies that use drug testing. They are predominantly in the 'safety-critical' category.

- *British Energy* is testing pre-employment, 'for cause' and on an unannounced random basis.

(continued)

- *UK Coal* is testing at pre-employment stage and intends to introduce testing post-incident.
- *Foster Yeoman* – a large quarrying business – is testing pre-employment, 'for cause', post-incident, random and 'follow up' (i.e. after an employee has requested help).
- *Seaboard plc* is testing pre-employment and 'for cause', and safety-critical staff are tested post-incident.
- *Southern Water* is testing pre-employment and 'for cause'.
- *Transco* retains the right to screen applicants pre-employment, but has never done so in practice.
- *London Underground* tests pre-employment, on promotion and where an employee is transferred from one area to another, and randomly for safety-critical roles.
- *Rolls-Royce plc* tests pre-employment and 'for cause', and conducts random testing if required for the Federal Aviation Authority or Ministry of Defence.
- *The United Kingdom Atomic Energy Authority* tests pre-employment, 'for cause' and random.
- *Stagecoach* – the bus and coach operators – tests both pre-employment and at random.
- *BT* tests only people working trackside on the railways, before they are deployed trackside and then on a random basis. This is a tiny proportion of its workforce.
- *Citigroup* states in employees' contracts that they can be tested at any time.

2.2.2 The MORI poll

The IIDTW commissioned a MORI poll in April 2003 to get a better overview of the current situation and to find out about employers' attitudes.

MORI conducted telephone interviews with over 200 UK companies.¹³ The person with overall responsibility for human resources issues was interviewed.

The overall message from the MORI research was that testing at work remains the exception in the UK, but that a significant proportion of businesses would consider drug testing if they were persuaded of its benefits.

Three-fifths of the businesses interviewed did not believe that drug and alcohol testing was an issue for their sector, compared with only one-fifth who said that it was. The remainder were either non-committal or unable to give an answer.

The majority of businesses had a drug and alcohol policy, but:

- only 4 per cent said that they conducted drug tests
- a further 9 per cent said that they were likely to introduce testing in the next year (2 per cent said that this was 'very likely' and 7 per cent that it was 'fairly likely')
- 87 per cent said that they were unlikely to consider testing in the coming year (31 per cent said 'not very likely' and 56 per cent 'not at all likely').

The most common reason given for not conducting tests was that employers didn't think that drug or alcohol consumption at work was a problem for their staff (mentioned by 60 per cent) or it was not considered relevant to their line of work because there were no serious

health and safety concerns (mentioned by 20 per cent). Other reasons given for not considering testing included: costs, lack of knowledge on how to go about it and a belief that it impinges on employees' human rights.

Only 1 per cent of the businesses said they had been approached by organisations promoting drug- and/or alcohol-testing products in the previous year.

The vast majority of businesses interviewed for this MORI poll were not testing for drugs and/or alcohol, nor did the majority of interviewees think that their organisations were likely to introduce testing in the near future. But it would be wrong to conclude that this poll rules out a significant expansion of drug testing in the UK over the next five to ten years.

In particular, the majority of employers said that they would be more likely to consider the introduction of drug testing if certain conditions were met:

- 78 per cent said that they would be more likely to test if they believed that the use of drugs or alcohol was affecting staff performance/productivity
- 72 per cent if they believed drug and alcohol use was prevalent within the workforce
- 61 per cent if they believed it was prevalent in their sector or industry
- 89 per cent if it affected health and safety
- 94 per cent if it was an insurance requirement
- 96 per cent if it was a legal requirement (that is, 100 per cent of companies that were not *already* drug testing).

It is not, of course, surprising that employers are concerned about legal requirements; but these findings also suggest that they are open to persuasion and that they might change their minds on testing. If only one in a hundred businesses had been approached by drug-testing companies in the previous year, then this leaves a large potential market of businesses that would consider drug testing if they were to be persuaded both that drugs and alcohol abuse is a problem for them and that drug testing would enhance their productivity.

2.2.3 The CBI survey

The Confederation of British Industry (CBI) distributed a questionnaire on behalf of the IIDTW in 2003, to approximately 100 members of its Health and Safety Panel (HSP), which was completed and returned by 50 companies. The HSP provides strategic direction for CBI staff on the full range of health and safety issues. Membership is by invitation only, and will tend to comprise companies that have a particular interest in health and safety issues. Over three-quarters of respondents who completed and returned the CBI questionnaire were from safety-critical industries.¹⁴ Four out of five of these organisations (80 per cent) said that they had a drug and alcohol policy. Nearly a third (30 per cent) tested for drugs and alcohol. A further 12 per cent reported that they intended to introduce drug testing in the future, but only one company said that it was planning to introduce alcohol testing.

Of the 15 companies that tested for drugs:

- all 15 tested pre-employment
- four tested systematically throughout employment

- eight tested randomly
- seven tested voluntarily.

Of the 15 companies that tested for alcohol:

- ten tested pre-employment
- three tested systematically
- six tested randomly
- six tested voluntarily.

As regards motivation for testing: 15 companies mentioned health and safety, ten referred to performance at work, two to their insurance requirements and four to the legal requirements.

With regard to insurance requirements, the Association of British Insurers (ABI) told the IIDTW that there were no insurance companies with a formal underwriting policy on drug testing and that a failure to drug test would not affect the insurance premiums of British companies. Representatives from the ABI told the Commissioners that 'insurers would never say to the businesses they insure "we would change your premium if you introduced a drug and alcohol policy" ... premiums go up because a firm has accidents and claims ... [it is] impossible to link price reductions with the implementation of a substance misuse policy'. Pointedly, these witnesses explained that 'insurers have far more claims that result from simple and obvious failures on the part of the employer to manage, train and provide safety equipment to their workforce than for any other reason. There is no evidence of a trend of claims for drug and alcohol abuse'.

2.2.4 Small business – the dog that didn't bark

The IIDTW was advised that small businesses often had very different attitudes and experiences to larger organisations, and that this was likely to be true of drug testing also. The Inquiry arranged for a questionnaire to be sent out to all members of the Federation of Small Businesses (FSB). This elicited no replies. The FSB reassured the Commissioners that a low response rate was not unusual because small businesses tend to be preoccupied with day-to-day management, and have very little time or capacity to devote to wider issues like drug testing. The IIDTW feels that the lack of any responses to the FSB questionnaire is a significant finding in its own right. It suggests that small businesses do not regard drug use among their employees as a serious problem, or see drug testing as a priority for them.

2.2.5 Conclusion

Overall, the picture is somewhat confusing.

The 2003 MORI poll for the IIDTW found that 4 per cent of businesses were testing for drugs and alcohol. The CBI Survey says 30 per cent. And research for the Chartered Management Institute (CMI), also conducted in 2003, found that 16 per cent of organisations were conducting random testing and 14 per cent were doing pre-employment testing. To further confuse matters, no fewer than 41 per cent of respondents to the MixMag survey said that they had been tested at work, including 24 per cent who said that they had been tested as part of the selection procedure for their current job. And 48 per cent of respondents to the TUC online survey said that their employers tested for drugs or alcohol, with 14 per cent saying

that they – or someone they knew – had lost their job as a result of a drug test.

The high incidence of testing reported by respondents to the *MixMag* and the TUC surveys is not all that difficult to explain. The samples were self-selecting, and it is a reasonable supposition that people with direct experience of drug testing are much more likely to take the time to complete a questionnaire. But these findings should not be dismissed entirely. First, they confirm that there are significant numbers of people who have first-hand experience of drug testing in the workplace. Second, they suggest that drug testing at work is a concern for employees – at least, to the extent that a significant number will take the time to respond voluntarily to these kind of survey questions. Nonetheless, it is clear from looking at these two sets of findings that the respondents are not representative.

There is also an obvious explanation for the fact that both the CBI survey and the CMI research found a significantly higher proportion of organisations drug testing than the MORI poll did. Companies that were drug testing – or were considering doing so – would be more likely to respond to the CBI survey than those that were not doing so. In addition, and relatedly, no fewer than three-quarters of respondents to the CBI survey were working in safety-critical areas. A similar point applies to the research by the CMI. A high proportion of respondents were from the uniformed, emergency and transport services. In these safety-critical professions, the incidence of testing will be much higher than in other businesses.

All in all, these surveys suggest that a significant number of UK businesses in *safety-critical sectors* are testing for drugs and/or

alcohol. But *overall* the proportion might nonetheless seem quite low – at least on the MORI poll sample. However, even if only 4 per cent of all businesses are drug testing, then this is affecting hundreds of thousands of employees. Many organisations that are testing are exceptionally large businesses with lots of employees. Furthermore, if the 9 per cent of respondents who told the MORI researchers that they were likely to introduce drug tests in the next year were to do so, this would *treble* the proportion of businesses conducting tests in a single 12-month period, bringing the total to more than one in ten of all businesses. Ultimately, however, the reality is that there is a shortage of reliable data on drug testing at work, and that further research and monitoring will be needed to measure these trends.

2.3 What kinds of tests are used by UK employers?

The IIDTW found that, where UK employers do test for alcohol or drugs, they do so for a variety of reasons and in a variety of ways. Some test pre-employment, others ‘for cause’ and others at random. These different kinds of drug test can be combined in a variety of ways.

Organisations also differ in the way that drug testing is implemented – for example, who is tested – and in their protocols for dealing with test results. Of particular importance, there is a distinction between the use of drug testing in safety-critical industries on the one hand, and testing in environments in which there are not the same health and safety concerns on the other.

The IIDTW was told, for example, that some organisations that drug test prospective

employees as part of their recruitment procedures will *not* inform candidates that testing for drugs will be part of the pre-employment medical. But other organisations, such as Rolls-Royce plc, will inform applicants that drug testing is part of the recruitment process in advance, in order to ‘give them an opportunity to behave responsibly’. Different organisations may also deal with a positive result at the pre-employment stage in different ways. Most organisations will not employ an applicant who tests positive because of a general concern about ‘drug users’. But the IIDTW heard from UK Coal that it allows an applicant who tests positive to reapply six months later.

Similarly, the IIDTW heard from a number of companies that said that they test ‘for cause’ in cases where an employee’s behaviour gives rise to a suspicion that they are under the influence of alcohol or drugs. But other organisations explained that they regarded unsatisfactory behaviour or poor performance, whatever its cause, as a management issue to be dealt with through normal disciplinary process, rather than an occasion for drug testing.

The IIDTW talked to companies that test on a random basis. But, again, this form of testing is implemented in a variety of ways. An organisation may decide to test 1 per cent, 5 per cent or even 25 per cent of its workforce. Quarrying and some offshore drilling companies told the IIDTW that they conduct random drug tests on *all* staff, regardless of seniority or the safety-critical nature of their role.¹⁵ But other organisations – for example, London Underground – test only those who are involved in ‘safety-critical’ work (as they define it).

In addition, different organisations test for different substances. The IIDTW found that most organisations that undertake drug testing will test for cannabis, amphetamines, ecstasy, cocaine and opiates. But there are important differences from industry to industry. The bus and coach operator Stagecoach, for example, told the Inquiry that it invariably screens for cannabis, but that every employee is also asked to take a second test 'blind', which screens for one other commonly used substance. A minority of organisations – particularly in the transport industry – also use breathalysers to test for alcohol. But the IIDTW found that this is uncommon in other sectors – in part, because employers feel that they can recognise whether employees are working under the influence of alcohol or not, without resorting to testing.

Finally, the IIDTW has revealed some significant differences in the way that different organisations respond to those employees who declare that they have a drug or alcohol problem. Some larger organisations provided a range of services to staff who came forward in this way. Employees with drug or alcohol problems might, for example, be taken off safety-critical work and given other things to do. Some organisations can also arrange for employees to have a comprehensive needs assessment and counselling (either in-house or bought-in), and may even support staff through treatment, including residential programmes. Generally speaking, employees who subsequently come back to work will be regularly and (relatively) frequently tested for a period of time.

Typically, the policies of these organisations state that, if employees come forward, they will not be victimised. Staff whose drug use is

uncovered as a result of a positive drug test may be dealt with less sympathetically. But this is not invariably so. In particular, British Energy told the IIDTW that an employee who tested positive would be likely to be removed from safety-critical work and subjected to close monitoring with support on an ongoing basis, but would not necessarily face dismissal.¹⁶

It is important, then, to be aware of the wide variety of drug-testing regimes that are operated by employers, as well as simply the extent of drug testing in the UK.

2.4 Pressures for expansion

To conclude this section, the IIDTW believes that the polling evidence shows that a major expansion of drug testing at work in the UK – while far from inevitable – is a genuine possibility.

The signs are there.

First, while the social and political situation in the UK today is, of course, very different from that in the United States back in the 1980s and 1990s, the American experience does show how rapidly drug testing at work can expand. Strongly promoted by the Reagan administration from the mid-1980s as part and parcel of its 'war against drugs' – but also as a response to a number of high-profile accidents – workplace testing in the United States has extended from environments where safety is paramount to those with low safety concerns. Pre-employment testing has become routine in almost every occupational area. Peter Francis, Senior Lecturer in Criminology and Sociology at the University of Northumbria, has estimated that 40 to 50 per cent of all companies in the United States are now drug testing. A recent

review suggests that something like 15 million employees are tested annually in the United States.¹⁷

It is notable in this context that a number of UK companies that provided evidence to the IIDTW had introduced drug testing partly under the influence of developments in the United States. British Energy, a leading nuclear energy producer with over 5,000 employees, told the IIDTW that it had introduced unannounced testing after employees had visited and worked on American sites where it was compulsory. Rolls-Royce plc introduced drug and alcohol testing in the UK in the early 1990s to enable the company to continue its work with US Airfreight, because random drug testing is a requirement of the US Federal Aviation Authority.

Second, it is evident that more and more UK employers – including many outside of the safety-critical sector – are coming to see drug misuse as a serious issue for them. This is clear, for example, from evidence provided by senior figures in the business world to the All-Party Parliamentary Drug Misuse Group in July 2003.

Third, commercial incentives may also help to drive an expansion of drug testing in the UK. In the United States, drug testing is a multi-billion-dollar-a-year industry.¹⁸ In 1993, it was estimated that the manufacture of equipment and chemicals alone was worth annually \$300 million in the United States (Zwerling, 1993). In addition, large numbers of Americans are employed in drug testing – and related –

services providing everything from analysis of tests, to substance misuse programmes, to 'beat-the-test' services.¹⁹ Drug testing is big business.

Unsurprisingly, a growing number of companies are promoting drug testing at work to UK businesses. The IIDTW took evidence from several of these businesses. It was clear that many of them viewed the supply of drug and alcohol services in the workplace as a market with an enormous potential for growth.

The Inquiry's perception was that the active marketing efforts of the sector were beginning to encourage a rapid expansion in workplace testing.

The sector consists of a very disparate group of companies and individuals. Many of them are very responsible, working to high standards. However, the picture is mixed. On the issue of marketing, one or two of the companies that gave evidence to the Inquiry made what appeared to be inflated claims about both the extent of alcohol and drug problems in the workplace and the effectiveness of their own products. For example, one drug-testing company quoted the Health and Safety Executive (HSE) as saying that 'drug abuse is responsible for 13 per cent of workplace accidents and 64 per cent of deteriorating job performance'. The HSE assured the Inquiry that it had never produced such findings. The company which provided a substantial amount of useful material to the Inquiry, acknowledged that the figures were incorrect and have assured the Inquiry that they now give accurate figures.

3 The evidence: costs and benefits

If drug or alcohol use is having a significant impact on performance at work, then there will be a *prima facie* case for drug testing as far as employers are concerned. If testing prevents accidents at work, then that looks like a good argument in its favour in certain industries. Employers could also be favourably inclined to test if it raised productivity, improved performance, reduced absenteeism or enhanced the reputation of their company.

But *is* drug testing a good way of realising any of these ends?

How effective is it in reducing workplace accidents? Does it have a discernible effect on absenteeism? What about productivity? And what are the costs for employers?

Surprisingly, perhaps, the IIDTW could find no conclusive evidence for a link between drug use and accidents at work, other than for alcohol. Nor was there any reliable data on the cost effectiveness of testing. The companies that gave evidence to the Inquiry did not appear to have conducted cost-benefit analysis or looked in detail at the opportunity costs of testing, by comparing the costs with other potential health and safety investments. An exception was a witness from the Engineering Employers' Federation, who explained to the IIDTW that:

... testing is not high up on the Federation's agenda and won't be without evidence that drug testing has clear benefits. There is more detriment than good in pursuing drug testing rather than more positive drug and alcohol policies to help give employees a chance and rehabilitation.

Nor was the IIDTW presented with any conclusive evidence of the deterrent effect of testing. The Commissioners heard of three

instances when a follow-up random testing of the entire workforce on an oil installation in the North Sea conducted shortly afterwards produced a drop in positive results compared with the original testing. Elsewhere, however, there was a lack of compelling evidence to show that drug testing is an effective deterrent (although the Inquiry notes that this is very difficult to prove one way or another).

3.1 Drug testing and safety-critical environments

A key rationale for drug and alcohol testing in the workplace is the danger represented by intoxicated workers, who may place the physical safety and even the lives of themselves and others at risk. If drug testing is an effective way of reducing the risk of accident in the workplace, this is an argument in its favour. The IIDTW has reviewed the evidence on the relationship between testing and safety in the workplace. It has also heard testimony from industries where the safety of employees, and often the public too, is a matter of day-to-day concern – including transport, the nuclear industry, coal mining and quarrying.

The safety point was well made by a representative from a large quarrying business in his evidence to the Inquiry.¹ The IIDTW was told that quarrying operations would continue in all weather conditions – and often in darkness – using massive equipment and transportation. This witness told the IIDTW that 'it is a gut feeling that, not so much drugs, as alcohol has been one of the main contributing factors' to workplace accidents in the quarrying industry. The Inquiry was told that quarrying had been one of the most dangerous industries

up until about ten years ago, but a whole raft of safety features had been initiated, and serious injury and mortality have steeply declined. This demonstrates the importance of a holistic approach to health and safety in these kinds of industries. Drug testing can have – at most – only a subsidiary role, and it is extremely difficult to assess the incremental impact of testing where it is operating alongside a range of other health and safety measures.²

3.1.1 The relationship between drugs and safety at work

Common sense suggests that intoxication increases the risk of accident at work.

But the reality is more complicated.

Taken as a whole, the available research suggests that the relationship between drug use and workplace accident is more complex and less definite than is widely assumed.

In 1993, a review of the findings of a number of key research studies on alcohol consumption and injury at work came to a surprising conclusion (Zwerling, 1993). Unsurprisingly, the research found that alcohol use among drivers of heavy goods vehicles increased the risk of fatal accident. However, these studies did *not* show conclusively that drinking was associated with more occupational injury overall. Some of the studies could find little or no general relationship between drinking and non-fatal accidents.

The same study looked at the research on illicit drug use and occupational injury. Unfortunately, there is a shortage of reputable work in this area. This is partly because standard tests for drugs cannot show whether or not somebody was *actually intoxicated* at the time the test was conducted. However, the research that was available in the early 1990s suggested that

the use of illegal drugs was only weakly related to accidents at work. There was some evidence of a relationship between the use of stimulants (such as cocaine and amphetamines) and fatal accidents in the heavy trucking industry.³ But, when it came to non-fatal accidents, the author of this review concluded that 'there is little evidence of an association between drug use and non-fatal injuries' (Zwerling, 1993).

This conclusion was supported by the US National Academy of Sciences in 1994 in *Under the Influence? Drugs and the American Workforce*. This report found no 'clear evidence of the deleterious effects of drugs *other than alcohol* on safety and other job performance indicators' (Normand *et al.*, 1994).

3.1.2 A note of caution

This is a controversial area and the IIDTW has found it hard to get clear and definite answers from witnesses. A literature review by the Health and Safety Executive (HSE) reports that 'five studies have found some association between drug use and workplace accidents, whereas seven others have found little or no evidence'. Because of the paucity of good information, the HSE commissioned research by academics at Cardiff University, which was published while the IIDTW's report was in draft (see box at the end of this section). This research suggests only that 'recreational drug use *may* reduce performance, efficiency and safety at work'.

The evidence is inconclusive (Beswick *et al.*, 2002). Aside from this, the IIDTW would stress three key points.

- 1 It is not acceptable, as a general rule, for employees in safety-critical roles to be intoxicated at work. Nor is it acceptable for

employers to turn a blind eye if this is happening.

- 2 Safety concerns do not neatly map onto wider perceptions of the relative harmfulness or social acceptability of different psycho-active substances – or indeed to their legality. Alcohol may pose more threat to workplace safety in contemporary Britain than, say, cannabis or cocaine. Prescription and over-the-counter drugs may have problematic side effects too. Companies working in safety-critical environments need to be aware of the problems associated with licit drugs, as well as illicit ones. This point was explicitly made by Transco's Senior Medical Officer in his evidence. For Transco, he explained, any problems of impairment at work were more likely to be with alcohol or prescription drugs given the age profile of its workforce.⁴
- 3 Intoxication at work is a source of risk in safety-critical environments, but it is not the only source of risk. Policy makers should not become fixated on intoxication at work and neglect other factors. As one commentator argues: 'many job injuries stem directly from the workplace itself. Dangerous working conditions, noise and dirt on the job, and conflicts at work appear to be the greatest predictors of job injuries. Sleeping problems, which may be exacerbated by shift work, also seem likely to be another direct cause of job injuries ... Accident-prevention programmes might be more effective in focusing efforts on reducing the influence of these factors rather than illicit drug use' (MacDonald, 1995).

Drug and alcohol policy is *one* key aspect of good employment practice in safety-critical industries, but it is not the *only* aspect. As Ross Coomber explained in his review for the IIDTW:

... one point which most expert commentators, informed testing protagonists, labour organisations and unions agree on is that where drug and alcohol testing programmes are introduced or already exist they should form part of a comprehensive drug and alcohol policy or programme, not exist in isolation.

The latest research

In 2004, the Health and Safety Executive published a research report on the relationship between drug use and accidents in the workplace entitled *The Scale and Impact of Illicit Drug Use by Workers*. The research was conducted in South Wales and took the form of a community-based questionnaire survey and a cohort study of workers carrying out cognitive performance tasks. Overall, 30,000 individuals in Cardiff and Merthyr Tydfil were randomly selected to receive the questionnaire, with 7,979 people completing the survey, of whom 4,620 (58 per cent) were currently in employment. Data was also collected from Accident and Emergency Units across Wales and there was a survey of college students. In total, 54 people undertook to carry out the cognitive performance task, 44 participants had used drugs in the week of the study and ten had not done so.

(continued overleaf)

The principal findings are outlined below.

- Thirteen per cent of working respondents reported drug use in the previous year, including 29 per cent of those under 30.
- Drug use does have an impact on cognitive performance, but this varies depending on the type of drug or drugs used.
- There is an association between drugs and minor injuries among those who are also experiencing other minor injury risk factors.
- There was no association between drug use and workplace accidents, though associations did exist between (a) cannabis only use and work-related road traffic accidents among those also reporting higher levels of other associated risk factors, and (b) drug use and non-work accidents among those who are also experiencing high levels of other risk factors.
- The lack of association with work accidents may be because: no association exists; the number of accidents was too small for a significant association to be detected; accidents were not restricted to those resulting from the individual's own error; at work, individuals are in familiar situations, doing familiar tasks from which as much risk as possible has been eliminated and are less likely to be experiencing the acute effects of drug use.

(continued)

It is concluded that, 'overall, the present project has shown that recreational drug use may reduce performance efficiency and safety at work'.

(The Scale and Impact of Illegal Drug Use by Workers, by Andy Smith, Emma Wadsworth, Susanna Moss and Sharon Simpson of the Centre for Occupational and Health Psychology at Cardiff University, is available from the Health and Safety Executive, and is at www.hse.gov.uk/research)

3.1.3 The role of testing

Responsible employers should adopt sensible policies to minimise the risks to health and safety as a result of intoxication at work.

Employers who gave evidence to the IIDTW took their duty of care for the health and safety of their staff very seriously. According to the MORI poll conducted for the IIDTW, 89 per cent of employers who were not already testing for drugs said they would consider doing so if they believed that this would have a positive impact on the health and safety of employees. But is drug testing a good way of detecting and deterring employees from coming to work in a state of intoxication? And is this the *best* way of addressing this problem?

A literature review prepared for the IIDTW by Peter Francis and colleagues at Northumbria University (Francis *et al.*, 2003) stressed that 'too few empirical studies on the effectiveness of workforce alcohol and drug testing exist to conclude that it reduces employee health and safety problems'. Another recent review of evidence on links between drug testing and

workplace injury concludes that both mandatory random and 'for cause' testing have only 'very limited' impact on accidents at work.⁵ As Peter Francis and colleagues state:

... the majority of research studies fail to take account of the possible and actual effects of non-drug-testing factors (such as increased employee training, superior capital equipment and better management and supervisory arrangements) in reducing employee and employer risk.

Furthermore, it is possible that drug testing may have a negative impact on health and safety, at least at the margins and in some circumstances. For example, Southern Water told the IIDTW that it had found that the introduction of a strict policy of drug testing following any incident that resulted in one or more days off work had the unintended and perverse consequence that routine and more minor accidents were not being reported at all for fear of triggering testing procedures. Witnesses from Southern Water told the Commissioners that this had resulted in an instance of chronic ill-health (a back problem) not being identified and dealt with. Once this unexpected effect was identified, Southern Water changed the testing policy as soon as it could.

Nor does drug testing measure *impairment* as such. To repeat, drug tests – with the notable exception of alcohol breath tests – reveal only that a drug or its metabolite is present in an individual's body. Tests are unable to show whether or not someone is actually intoxicated, or to provide a reliable indication of impairment levels, or to reveal whether an individual is an addict or a regular, irregular or one-off user. This does not mean that drug and alcohol

testing cannot have a useful role in safety-critical industries. It does mean, however, that this role will be limited, and that organisations need to know how to interpret positive results and how to act appropriately.

It might be concluded that it would be better for safety purposes if it were possible to test *directly* for impairment (that is, fitness for work) rather than to do this *indirectly* by testing for the presence of drugs and metabolites in the human body – especially as this is a very unreliable guide to intoxication. Various methods of impairment testing are being developed (see box). Potentially, these tests could provide a more effective measure of impairment at work, while, at the same time, avoiding the invasiveness of traditional drug and alcohol tests. As one commentator has put the point, impairment testing looks directly at fitness to work – a legitimate concern for employers – and not at 'lifestyle'.

Impairment testing

It was outside the remit of the IIDTW to assess in any detail the effectiveness of impairment testing, but the Inquiry believes, at least in principle, that this could provide a possible alternative to drug and alcohol testing with a number of advantages. Ross Coomber, Principal Lecturer in Sociology at the University of Plymouth, provided the IIDTW with information on a number of approaches to impairment testing that are being pioneered elsewhere in the world.

Examples of three systems are described below.

(continued overleaf)

Daily Skill Test System

Factor 1000 is a new product that is being marketed in the United States as an alternative to urine testing and on the basis of what is perceived to be some increasingly negative views of drug-testing programmes. It is produced by Performance Factors, which argues that 'many employees and union leaders believe that it [i.e. traditional drug and alcohol testing] is inaccurate, costly and an invasion of privacy'. By comparison, it is claimed, 'Factor 1000 tests whether the worker is impaired at the time he or she is being asked to perform a job – it doesn't judge off-the-job behaviour', and it 'is also effective in detecting impairment from stress and fatigue'. Essentially, this system tests an employee's judgement and response time by looking at his or her ability to manipulate a cursor on a computer screen.

The Drug Impairment Detection System (DIDS)

Air traffic controllers in Oklahoma City in the United States have been trialling the DIDS system, which works in the following way.

- 1 The individual takes a 'FIT' test, when a controlled dose of normal light is administered to the eye and a number of measurements are made of the eye's reaction.
- 2 A baseline is established for each subject by (a) ensuring he or she is drug-free at the time that the baseline is set; and (b) taking multiple tests to establish the subject's 'PassPoint' profile.

(continued)

- 3 With the baseline established, the measurements from subsequent tests are compared to the 'PassPoint' profile.
- 4 If impairment is identified, 'PassPoint' can recommend a confirmatory test and suggest which drugs are tested for.

(For a more detailed discussion of DIDS, see *Details on FIT PassPoint Substance Abuse Monitor* at www.pmifit.com [PMI, 2003])

OSPAT

This impairment monitoring system is being tried out by coal miners in Australia. Again, workers are required to undertake a simple exercise on a computer before starting their shift. A series of exercises are undertaken by each worker when the system is installed to establish a base line against which reactions are subsequently measured.

3.1.4 The evidence of employers to the IIDTW

The IIDTW heard evidence from a number of UK employers working in safety-critical industries. These witnesses enabled the Inquiry to explore further some of the key themes from the literature.

Four points that emerged from the evidence of these employers are of particular relevance in this context.

First, the majority of employers in safety-critical industries who provided evidence to the IIDTW felt that drug misuse at work was not a serious or widespread problem for their companies.

For example, Rolls-Royce plc told the Inquiry that, in the early 1990s, they had

instituted pre-employment testing of all prospective employees applying for repair jobs and extensive random testing of existing employees involved in the repair of aircraft engines. This was done for business reasons, given Rolls-Royce plc's involvement with US companies.⁶ By 1998, Rolls-Royce plc had conducted approaching 1,000 tests. Not one of these was positive. It told the IIDTW that random testing is now only carried out when this is specifically required by the US Federal Aviation Authority or the Ministry of Defence. A witness from Rolls-Royce plc told the IIDTW 'we felt there wasn't enough evidence from the performance, health and safety aspects to actually say we wanted to introduce random testing for the whole workforce'.

The United Kingdom Atomic Energy Authority (UKAEA) had a very similar message for the IIDTW. A witness explained:

... we've now done getting on for three years [of testing] and we pretty well confirmed that we don't have a problem. We've done nearly 2,000 tests, 1,300 were pre-employment, and we are quite surprised at how few of these came up ... out of the 1,300 we've only had 11 positives ... and we've [also] done 407 tests on UKAEA staff and we've had two positives. All except for one of all of those has been for cannabis.

Similarly, the quarrying company, Foster Yeoman, told the Inquiry that it had introduced a comprehensive drug and alcohol policy in November 2001, with provision for drug testing pre-employment, for cause, post-accident, random and as a follow-up where an employer has come forward for help. In this time, there had been only 12 positive tests. Six were found to be a result of (licit) medication, five detected

cannabis and one detected cannabis and benzodiazepines.

One or two companies, it should be noted, were more concerned about drugs, with this often relating to wider economic, social and demographic trends. A witness from UK Coal felt that there was likely to be illicit drug use among some employees, as some of the mines were in areas that are renowned for drug problems. This seems to have been borne out by the company's experience of testing. Between March and November 2003, the Inquiry was told that UK Coal had carried out 171 pre-employment tests. Over 5 per cent were positive even though applicants were told that they would be screened for drugs and alcohol as part of the recruitment process. But this appears to be the exception not the rule.

Second, many of the UK employers in safety-critical industries who took the time to provide evidence to the IIDTW stressed the importance of fairness and transparency.

An obvious issue here is whether or not testing should be restricted to staff whose role has a direct and obvious health and safety aspect or whether it should be carried out more widely within these industries. For example, British Energy told the IIDTW that all employees at every level of seniority within the organisation are tested as part of the pre-employment selection process, and could be subject to random testing as employees. This was at the request of the trade unions, but it was also believed to be a good way of demonstrating to staff that the company took the responsibility of managers for staff welfare seriously. A witness from British Energy explained: 'everyone can be tested, including administrative staff. Because ... they're all

contributing to the safety of the whole.'

Third, even in safety-critical environments, drug testing could be divisive and counterproductive if it was clumsily handled or inappropriate.

SeeBoard plc said that it had made the decision not to introduce random testing for all staff, in part because it feared that this would damage industrial relations. A witness from SeeBoard explained that 'testing is very unpleasant, and it's my job to look after the health and safety of staff, and not to police them'.⁷

Similarly, in its evidence, Southern Water told the IIDTW that it felt that it would be unlikely to test widely for drugs or alcohol in future, as 'it did that much harm, [we] would want very good evidence before carrying out any [further] testing'. The witness explained that those who had been drug tested by the company had reacted negatively, that it was expensive and that there was no added value to the company. He concluded that he would prefer to focus on good day-to-day management of staff than on drug testing.

This point was made by a number of witnesses from the safety-critical industries who provided evidence to the IIDTW. For example, a witness from Transco, the gas supplier, said that the majority of health and safety incidents were caused by a general failure of the application of management systems and that high quality management made drug testing less of an issue. 'Managers need to be trained in what testing can and can't do', he concluded.

Fourth, a number of safety-critical employers who gave evidence emphasised the need for welfare and support services for staff with alcohol or drug problems.

For example, London Underground has a 'tough' policy on alcohol and drugs, not least because of concerns about the requirements of the Transport and Works Act 1992. Its policy is believed to be one of the most comprehensive and stringent in the UK.

It states that 'all employees are required not to consume or use illegal drugs at any time, whether on duty or not, so as to ensure they are not under their influence when reporting for duty, carrying out work for the company or when on company premises'. Employees are not allowed to buy alcohol while in uniform, and they are responsible for ensuring that their performance is not impaired by prescribed or over-the-counter medication.⁸

But London Underground stressed to the IIDTW that it has a strong commitment to staff welfare in this area. If an employee comes forward with an alcohol or drug problem, then he or she may be taken off duty, assessed for treatment and supported 'within reason'. The IIDTW spoke to one London Underground employee who had been taken off duty for nine months while he underwent a programme of treatment. (It is a different story if staff declare that they have a problem only when confronted with a test or testing positive. In these circumstances, they can face disciplinary action which is very likely to lead to immediate dismissal.)

The President of the Police Superintendents' Association also stressed the need for a supportive and welfare-orientated approach in his evidence to the IIDTW. He commented that the police force would tend to reflect:

... what goes on in society generally, given the age group we are recruiting from ... if there is

habitual use of recreational drugs by people outside the service ... [it simply flies in the face of reality to think that] drugs will suddenly disappear [inside the police service].

Police officers can be involved in a range of safety-critical tasks, including driving at high speeds through built-up areas and handling firearms. But there is also a special issue about the use of illegal drugs by police officers. The public will not have faith in police officers who are breaking the law, and 'where an officer ... is buying illegal substances, they ... [may be] ... vulnerable to corruption, because they can be blackmailed'. But, as he also proceeded to argue, drug and alcohol use among police officers is about workplace stress and health, as much as detection and discipline. 'Police personnel are put through some pretty stressful things and they are not given counselling on every occasion', he explained, 'the force has a responsibility to make sure they are looked after. It is not just a case of testing them and convicting them. [We are also proposing that] there are programmes there to help them and to treat them.'

These comments raise much wider issues about society's attitudes to people who develop serious substance misuse problems. The IIDTW heard from a number of employers who were committed to supporting employees with drug and alcohol problems. But lawyers working in the employment field told the Commissioners that employees could be extremely reluctant to come forward for help. Some fear that they may be victimised and some workplaces have a culture in which admitting to this kind of problem is regarded as a display of weakness. The IIDTW was told that, in reality, it is very rare for employees to come forward on a

voluntary basis. Where they come forward at all, this is almost always precipitated by a crisis – often because someone is convinced that their substance problem is about to be exposed anyway. This all raises some wider questions about contemporary working cultures and our attitudes to those who develop drug and alcohol problems.

The issues about the quality of management systems and the role of support and welfare services are considered in the conclusion to this chapter. But, first, what about the other justifications for drug and alcohol testing?

3.2 Other rationales for drug testing: the evidence

Ten of the 50 companies that took part in the CBI survey conducted for the IIDTW said that their principal motivation for drug testing was to enhance performance at work, compared to 15 who said that their primary concern was health and safety. Over three-quarters of businesses responding to the MORI poll said that their decisions about introducing drug and alcohol testing would be influenced if they believed that substance use was affecting staff performance or productivity.

Some serious questions can be raised about the effectiveness of drug and alcohol testing as a way of reducing injury and death in safety-critical environments. But nobody would question the legitimacy of these *ends* in themselves. In the safety-critical industries, there is a *prima facie* case for alcohol and drug testing, although much of the evidence presented to the IIDTW throws doubt on how substantial the real benefits are. Significantly, however, 50 per cent of employers responding

to the IIDTW's MORI Poll did *not* think that drug and alcohol testing should apply *only* to health-and-safety-critical organisations.⁹

Obviously, employers have a legitimate interest in staff performance, beyond health and safety. But a range of legal, ethical and social questions now arise about the extent to which organisations can and should regulate the private lives of employees. These issues have been examined in depth elsewhere in this report (see Chapter 2). This section looks at a number of more practical questions. Most importantly, does drug or alcohol use actually have a significant impact on performance at work? And, be this as it may, is there any evidence that drug testing is an effective way of improving performance?

3.2.1 Absenteeism

A number of empirical studies have found that problem drinkers and illicit drug users tend to be absent from work more often than their colleagues. In their evidence to the IIDTW, Peter Francis and colleagues at the University of Northumbria detail the findings of a long succession of research studies – mainly, but not exclusively, from the United States – that conclude that there is a discernible relationship between drug and alcohol use and absenteeism.

The literature review prepared for the IIDTW by Ross Coomber, Principal Lecturer in Sociology at University of Plymouth, casts doubt on the veracity of these findings.¹⁰ In particular, he points out that the research has often failed to take account of other relevant factors that might influence rates of absenteeism – such as age, gender, ethnicity and occupational stress.¹¹ He also notes that there are some other research studies that have

concluded that there is little difference between drug users and non-drug users in their rates of absenteeism.¹²

Coomber proceeds to discuss a major review that was conducted in the 1990s and found 'a small but noticeable proportion of work problems are associated with alcohol and/or drug use', but concluded that it was difficult 'to draw firm conclusions about either the extent of work-related problems associated with employee substance use or any causal role that substance use plays in the emergence of those problems' (Hanson, 1993). Another – contemporaneous – review concluded that there was 'a weak association between a positive employment drug screen and the adverse employment outcomes of absenteeism, injuries, accidents and turn-over', adding 'the evidence is strongest for absenteeism' (Zwerling and Ryan, 1992).

Significantly, some of the research suggests that rates of absenteeism may be higher for problem drinkers than for illicit drug users. A major review, conducted in the mid-1990s, looked at the international research, including studies from the United States, France, Sweden, Australia and the United Kingdom. It concluded that there was an association between high rates of absenteeism and alcohol consumption – and, in particular, that 'absenteeism seems to be a marked characteristic of problem drinkers'. The authors conclude that rates of absence for problem drinkers are anywhere between two and eight times as high as for non-problem drinkers, and argue that this finding is robust cross-nationally (Martin *et al.*, 1994). This is in line with the findings of a research study that was conducted in the 1960s.

There is reputable evidence that absence rates are higher among problem drinkers. Overall, however, the research on the links between drug use and absenteeism is inconclusive. Perhaps the most that can be said is that there is some evidence for a weak relationship.

3.2.2 Turnover

The IIDTW was told that there is some evidence from the United States for a relationship between illicit drug use on the one hand and, on the other, a higher risk of being dismissed from or voluntarily leaving a job.¹³ The Inquiry's view is that this evidence should be treated with caution, particularly given the probable impact of a range of other demographic variables on staff turnover. It is likely, for example, that young employees are more inclined *both* to use drugs *and* to move from job to job.

3.2.3 Performance and productivity

The story on performance is much the same as for absenteeism.

A report by the Health and Safety Laboratory at Sheffield explains that there is 'conflicting evidence about the effect of illicit drugs on productivity' (Beswick *et al.*, 2002). Another major review of the literature concludes that there is 'insufficient evidence that ... illicit drug consumption is responsible for lowering labour productivity and work performance'.¹⁴ And Peter Francis and his colleagues told the IIDTW that 'at best it can be suggested that there is conflicting evidence as to the relationship between alcohol and illicit drug use ... and performance'.

The recent report for the All-Party Parliamentary Drug Misuse Group, *Drug Testing*

on Trial (All-Party Parliamentary Drug Misuse Group, 2003), cites the 1996 annual survey of the American Management Association. This survey asked corporations that had introduced drug testing about its effectiveness in terms of absenteeism/illness, disability claims, accident rates, incidents of employee theft and incidents of employee violence. The All-Party Group reports that:

... none of the ... indicators had a percentage increase above single digits answering 'yes' and only eight per cent of companies performed any cost benefit analysis of their drug testing programmes.¹⁵

To summarise, and as in the case of absenteeism, the common assumption that drug and alcohol use will have a major impact on productivity and performance at work is not well supported by the evidence.

Furthermore, and yet again, if there are grounds for concern about performance, they do not necessarily relate to those drugs that are of greatest concern to society. For example, an important review of the literature could find no evidence that marijuana use has a negative impact on performance at work.¹⁶ But there is research that suggests that there is a significant relationship between declining productivity and alcohol use, especially alcohol abuse.¹⁷

3.2.4 Reputation

It is extremely difficult to assess the impact of drug and alcohol use among employees on a company's reputation. A recent review of the literature highlights the paucity of research on the impact of drug use on the 'broader realm of customer and consumer relations'. From a different perspective, a representative of the

entertainment industry told the IIDTW that, even though a ban on smoking had been instituted, it could not be talked about because it would damage the reputation of the organisation, 'If I tried to introduce testing, I would probably lose my job', he added. Different sectors clearly value different reputations!

3.2.5 Conclusion

The best available evidence provides little support for alarmist claims about the impact of alcohol and drug use on absenteeism, turnover, productivity and reputation.

The IIDTW heard some inflated claims about the impact of drug use on performance from one or two drug-testing companies. Occupational health professionals have a good understanding of drug and alcohol issues and will generally know when the claims that are being made for drug-testing services are unreliable or unsubstantiated. But the IIDTW was concerned that smaller organisations, without specially trained staff, could be persuaded to contract for services that they did not need, might be sub-standard and could damage relationships with their employees.

Given what is known about the effect of drugs on cognition,¹⁸ it is a reasonable assumption that intoxication will tend to affect performance at work.

Anybody who has ever *gone* to work with a hangover will know that this can affect performance. Anyone who has ever *not* gone to work with a hangover will know that it can cause absenteeism. The same will apply to the after-effects of many illicit drugs.

However, neither the research evidence nor the testimony of witnesses to the IIDTW suggests that this is actually a particularly big or

pressing issue for most organisations in the United Kingdom.

There is evidence of a weak association between alcohol and drug use and workplace performance, including absenteeism and productivity – which is strongest for alcohol.

But, in the view of the IIDTW, this is far from being a compelling argument for alcohol or drug testing, for at least four reasons.

- 1 *Effectiveness*: there is the issue of whether drug testing at work *works*. Does it *actually* reduce those forms of drug and alcohol use that could affect performance? In his literature review for the IIDTW, Ross Coomber argues that it is not clear from the evidence how effective drug testing is when it comes to reducing drug and alcohol use.
- 2 *Appropriateness*: even if drug and alcohol testing were effective in this sense, there would be the wider question of its appropriateness. The evidence suggests, for example, that problem drinking can have a greater impact on performance at work than illicit drug use. But is testing the *best and most appropriate* way to identify and engage staff who are developing serious alcohol problems?
- 3 *Ethical issues*: the leisure activities of employees can have a negative impact on performance at work. But employers are not entitled to expect staff to live in such a way that they will be *maximally* productive at work. As the previous Information Commissioner Elizabeth France has commented: 'employers are not enforcers of the drug laws and must respect an individual's right to a private life'.¹⁹ In this

context, the IIDTW was told that London Underground (LU) forbids its employees buying or consuming alcohol outside work hours if they are in LU uniform or are wearing any insignia identifying them as its employees. There is a genuine public confidence issue here, but this rule shows the difficulties of drawing appropriate boundaries between work and private life.

- 4 *Costs:* any performance benefits need to be weighed against costs. As Peter Francis and colleagues from Northumbria University point out: 'the introduction of workforce drug testing, far from addressing lowered employee productivity, may well further negatively affect the performance and productivity of employees. It may adversely affect employees' attitudes towards the organisation, damage industrial relations and, as a result, decrease productivity and cut profits.' For example, an employee whose relationship with her employer involves a high level of surveillance and control may be less inclined to work creatively and productively, and less committed to the organisation. In this way, a drug-testing regime could result in a diminution, rather than an enhancement, of productivity and performance.

The relevance of many of these points will depend on the particular *type* of drug testing that is under consideration.

A hair test as part of a pre-employment screening may indicate the presence of drugs that an applicant has used, some months – or even years – earlier. A breath test could show that a heavy goods vehicle driver has turned up for work under the influence of alcohol.

Random testing may be adopted as a general means of deterring staff from using drugs and alcohol. Post-accident testing may be more a matter of having proper procedures in place for investigating incidents at work and ensuring that the lessons are learnt. Unless the arguments are to become impossibly complicated and convoluted, it is difficult to avoid generalisations in identifying and evaluating the rationales for drug and alcohol testing. But it is important, nonetheless, to keep in mind that these *are* generalisations and that the applicability of many of the arguments varies from case to case.

3.3 More on costs

Outside of the safety-critical industries, the benefits of drug and alcohol testing are unclear. In addition, any benefits will need to be balanced against a whole range of cost factors. These include financial costs; impact on staff morale and industrial relations (including any negative effect of drug testing itself on productivity and discipline); and human resource costs (for example, where well-qualified and able candidates fail pre-employment drug tests).

3.3.1 Financial costs

The first, and most obvious, cost of drug testing at work to organisations is the financial cost.

Drug-testing companies have a legitimate business interest in seeking to persuade employers to drug test. In the United States, workplace testing grew, in the space of two decades, into a multi-billion-dollar industry.

The IIDTW heard evidence from a number of drug-testing companies that said that

workplace testing was a major area of expansion in the United Kingdom. For example, Tricho-Tech – a company that specialises in hair testing – has been conducting drug tests and analysing the results in the United Kingdom since 1993. While 80 per cent of Tricho-Tech's work still comes from the courts, a representative told the IIDTW that it had experienced a significant increase in demand for pre-employment screening and workplace drug testing. This is now the fastest growing area of Tricho-Tech's business. The IIDTW heard a similar story from LGC Ltd (formerly known as the Laboratory of the Government Chemist). Since the LGC was privatised in 1996, the Inquiry was told, the company as a whole has expanded from 200 to 600 employees and its total annual turnover is approximately £50 million. A dedicated team within the company carried out in excess of 175,000 workplace drug testing samples annually, with a significant proportion coming from military testing.

The cost of drug testing at work to organisations will vary depending on the type of testing, the numbers of employees who are being tested and the prices charged by a particular drug-testing company. For example, the drug testing company Altrix told the IIDTW that it charged between £30 and £35 for an initial screening or test, and an additional £52 for confirmation of a positive result.

It is important that employers know the *full* costs of *legally defensible* tests. A witness from the LGC explained to the Inquiry that drug testing is a more complicated business than many employers realise. For example, what is called 'presumptive testing' – where the initial body fluid sample shows positive by a change in colour on a dipstick – may be comparatively

cheap, but it is not legally defensible in isolation. Samples need to be sent on to a laboratory for proper scientific analysis following a positive result and this will add to the cost. The LGC witness emphasised that it is extremely important to ensure that drug-testing companies that are selling 'presumptive' products are explaining to prospective purchasers that they need to follow up on positive results.

A cognate issue is the accreditation of laboratories that are carrying out drug tests. The IIDTW heard evidence from the United Kingdom Accreditation Service (UKAS), which is the sole national accreditation body that is recognised by the Government for the assessment of laboratories, including those providing drug testing – and related – services.

Accreditation involves UKAS assessing adherence to European and International standards for testing laboratories (ISO 17025). These standards relate to testing laboratories in general and are not specific to those carrying out workplace drug tests. To fill this gap, Guidelines for Legally Enforceable Workplace Drug Testing have been developed by a steering group representing UK analytical laboratories and other interested parties. Laboratories undertaking workplace drug testing are advised to use the Guidelines as a template in applying for accreditation. The Guidelines go beyond questions of laboratory practices and quality assurance to cover matters such as the dignity of the employee from whom the sample is to be taken, recommended cut-off levels, below which the result of a test should be treated as negative, and a recommendation that tests should be performed only in the context of an established policy on drug testing agreed between the

employer and employees. Adherence to the Guidelines, however, is not a condition of accreditation. Although, as a set of rules voluntarily adhered to, these Guidelines are the beginning of a self-regulatory system, there is no mechanism for monitoring or for enforcing compliance.

In most sectors, adherence to European and international standards is voluntary, although legislation sometimes makes it a legal requirement. Companies that are accredited are permitted to advertise the fact to potential buyers of their services with the crown mark. This acts as a version of the 'kite mark'. Its efficacy in driving companies that are not accredited from the market rests on purchasers choosing only accredited companies. Companies are regularly inspected and subject to reaccreditation every four years.

UKAS has accredited approximately 1,500 laboratories, of which approximately 12 are involved in drug testing. It told the IIDTW that it was concerned about the number of non-accredited bodies that were providing drug-testing services, and that these concerns were shared by the Department of Trade and Industry. 'There are undoubtedly labs that are not accredited', the IIDTW was told, 'they might be very good but one cannot be sure. That is why we recommend that people use accredited labs.'

The IIDTW was also told that the financial cost of accreditation may be a barrier for some organisations. For a new applicant, the cost of initial assessment is as much as £750 per day, with the accreditation process possibly taking between five and seven days. Achieving accreditation can therefore cost in the region of £4,000 to £5,000. If successful, the laboratory is accredited for four years, with an annual visit to

ensure that it is maintaining its systems properly. The cost of these annual visits, and of the reassessment visit every four years, is charged at £524 per day, with a typical visit costing in the region of £2,000 to £3,000. The IIDTW believes that it is unlikely that laboratories will submit themselves to a voluntary accreditation process at all unless they are fairly confident that they will be successful, but failure to seek accreditation does not necessarily show that there is a problem with a laboratory, as this will often be purely a commercial decision.

However, UKAS told the IIDTW that customers were increasingly requiring laboratories to hold the relevant UKAS accreditation if they were to be awarded contracts to analyse samples from drug tests. It was claimed that the demand for accreditation was increasing as industry became more aware of the process and its benefits. This is recognised in the Health and Safety Executive's guidance document for employers, which clearly recommends that analysis should be subcontracted to UKAS-accredited laboratories.

3.3.2 Staff morale and industrial relations

A number of businesses that gave evidence to the IIDTW felt that drug testing had damaged relations with their employees. For example, Southern Water felt that testing had done 'more harm than good', explaining that staff had reacted negatively. The United Kingdom Atomic Energy Authority said that there had been resistance to testing at some of their sites, as 'some were more human rights conscious than others'. The Inquiry also heard from the trade union representative for Amicus²⁰ at a large French company operating in Ulster who felt

that the company's testing regime had had a very damaging impact on industrial relations, largely as a result of the high-handed manner in which he felt the testing programme had been implemented. The union was concerned that employees could be bullied, harassed and embarrassed by the operation of this policy, and feared that any accidents might be concealed from supervisors by staff who were anxious about drug tests.

As the manager of treatment services at London Underground explained to the Inquiry, 'no matter how good the service and the policy, if you don't have the buy in from the work force, it won't work'. If it doesn't work, then this will have significant cost implications for the organisation. Along similar lines, a witness from BT explained that it was difficult to reconcile drug testing with the organisation's values, which emphasised 'trustworthiness'. 'Trustworthiness goes both ways, so we have to trust our people – they're our interface with our customers', the witness explained, adding: 'to bring in something that shows we don't trust them questions their honesty. It would be counter-cultural for our organisation.'

The potential for tension between employers and employees is confirmed by the research. Peter Francis and his colleagues explained to the IIDTW that:

... the research literature suggests that difference in perspectives between employers and employees toward drug-testing programmes can be expressed as competing interests between the employer's right to a drug-free workplace and the employee's right to privacy. While employers who test their respective workforces for substance use see workforce drug testing as a

reasonable course of action, research indicates that some employee groups, worker organisations (including trade unions) and researchers tend to see workforce drug-testing programmes as intrusive and unnecessary.

Drug testing can affect the attitudes and behaviour of employees, producing negative attitudes towards the company and creating a climate of suspicion, resentment and mistrust. This will tend to have a negative impact on turnover, absenteeism and productivity – precisely those things that drug testing is intended to benefit. As London Underground explained in their evidence all drug testing systems can be subverted, and this will be a particular problem where they are resented by employees.

However, the message from research is that employees will tend to accept drug testing where it is introduced in the right way and for what they recognise as good reasons. Employees' attitudes vary significantly depending on their assessment of the fairness of particular drug-testing programmes.

In part, this is about procedural fairness and transparency. Drug-testing programmes are more likely to be acceptable to employees where trade unions – and other worker organisations – have been involved in their development and implementation. In its evidence to the IIDTW, for example, British Energy said that its policy had been generally well received by staff, and that it felt that this was due to its extensive consultation with employees over a long period.

Research shows that most employees will tend to be supportive of drug testing where they can see that there is a clear justification – and it is not simply about policing their behaviour. This is

particularly true for safety-sensitive areas of work. Reputable studies from the United States and Canada have shown, for example, that employees are much more favourably disposed to 'for cause' testing than random testing.²¹ The acceptability of testing to employees may also depend on how extensively it is carried out across the organisation – for example, if senior staff are not being tested, or a particular group of employees feel they are being 'singled out', this may be a source of resentment. (The CBI survey conducted for the IIDTW received responses from 15 companies that tested staff for drugs. The Inquiry was told that none of these companies had restricted testing to particular grades or levels of seniority and only five restricted testing to staff with specific trades or functions.)

Drug testing will be costly for organisations if it has a negative impact on staff morale, commitment and motivation. These costs are likely to be high if testing is introduced without proper involvement of employees, and particularly so where there is no clear justification for testing that is acceptable to staff themselves. As London Underground told the IIDTW:

... it is very difficult to do drug testing well ... you have to decide why you are doing it and what you are going to do with the results ... you have to explain to people what you are doing ... where are your policies? How can you defend what you are doing?

3.3.3 Recruitment and human resource costs

Pre-employment drug testing is a way of identifying candidates who have used illicit drugs, usually with the aim of *not* offering jobs to these applicants. Organisations that randomly test employees often dismiss staff

who fail tests. The assumption that lies behind the use of drug testing at work in these circumstances appears to be that organisations will perform better if they do not employ drug users.

Is this true?

On the contrary, the exclusion of illicit drug users may constitute a substantial *cost* for many organisations. Many recreational users are highly educated and trained people, and will often be put off from applying for jobs if they anticipate being tested for drugs.

Nearly three-quarters of the young people who responded to the *MixMag* survey said that they had used ecstasy in the last month (69.8 per cent), almost two-thirds cannabis (63.1 per cent) and approaching half cocaine (42.7 per cent). Of this group, 30 per cent said that they had 'A' levels, 9.2 per cent had City and Guild qualifications, 12 per cent diplomas, 21.4 per cent first degrees and 4.3 per cent a higher degree. These young people were also asked if they would be discouraged from applying for a job if the employer tested them for drugs. Over a quarter (28.3 per cent) said that they *would* be and over half of the remainder (41.2 per cent of the total) that they *might* be. Over half of these young clubbers said that, if their current employer introduced drug testing, then they would be more likely to look for work elsewhere.

The *MixMag* findings are supported by a body of international research evidence that shows that drug testing – especially pre-employment – can have a negative impact on recruitment. Recent developments in the United States are salutary for British employers who are considering testing. In 2000, the American Civil Liberties Union was openly complaining that testing made it harder for employers to

attract qualified candidates.²² This problem has been so serious in the United States that some firms are reported to have suspended pre-employment testing in tight labour markets.²³

Employers are within their rights in taking disciplinary action against staff who are intoxicated, and they have a legitimate interest in knowing whether job applicants have serious alcohol or drug problems that might affect their work. But, to repeat, drug tests are not an effective measure of impairment, and people who have used drugs months, or even years, earlier may fail pre-employment tests. With over a quarter of young people in Britain (28 per cent) telling the *British Crime Survey 2002–2003* that they had used illicit drugs in the last year, the wisdom of adopting expensive testing procedures in an attempt to exclude these illicit drug users from employment is doubtful, given the human resource that this represents for employers.

3.3.4 Other costs

If businesses are not careful in their approach to drug testing, they could also face legal action, and all the costs that this entails for the organisation – both financially and in terms of its reputation. As noted in an earlier section of this report, the application of data protection principles will have a significant effect on drug testing by employers who ‘will have to be much clearer as to the purpose of drug testing and be able to justify that testing in the light of how it affects their workers and their right to respect for private life’.

Other costs were less obvious. For example, many safety-critical industries test staff after any incident or accident. This seems reasonable as part of investigative procedures. But the

IIDTW heard some anecdotal evidence that this form of testing could be counterproductive, as it could prevent staff from reporting incidents. If there is no investigation, then this increases the risks of more serious accidents later on.

Many of these costs were explicitly acknowledged by businesses responding to the IIDTW’s MORI poll. Over a third (37 per cent) agreed that drug and alcohol testing in the workplace sent out the wrong messages to staff and nearly a third (32 per cent) felt that it impinged on employees’ human rights.²⁴

The employees

The evidence to the IIDTW from employees is no more than suggestive, as the Inquiry did not have the time or resources to talk to more than a small number of individual employees about their views and experiences. It is interesting, however, that those employees that the IIDTW did speak to consistently expressed resentment at what they viewed as intrusive drug testing that blurred the established boundaries between their professional and private lives. (All names have been changed.)

Janine

Janine is a successful and confident woman in her late-twenties who is working in the telecommunications industry. She told the IIDTW:

As long as you do your work ... are good at your work ... that should be the issue ... This would get employers involved in your private life, not just your work life. Personal recreational

(continued)

enjoyment shouldn't have anything to do with the company ... There are already enough rules about work, without invading my private time ... random testing, in particular, is blurring the line between work time and private time.

She continued:

If random testing was introduced, I would look elsewhere. I would definitely choose a job that did not drug test. If there was pre-employment testing, I would abstain, then take the test ... I would totally refuse random testing.

Bill

Bill is in his early thirties. He is a doctor who does not use drugs. He told the Inquiry that he 'wouldn't want to work in any environment that policed my lifestyle'. He agreed that his employers had a right to know if he was intoxicated in work hours, as he was 'renting out my body for so many hours a week', but thought testing would be acceptable to him 'if it could be only about the "now", rather than a lifestyle thing'.

3.4 Conclusion

There are organisational costs to drug testing and – at least, outside of safety-critical environments – its effectiveness and appropriateness are far from clear. Employers have a legitimate interest in knowing whether members of their staff are turning up for work unable to perform or regularly taking sick leave because of alcohol or drug problems. They then have the options of addressing this as a health or welfare matter, or as a straightforward disciplinary issue. But people's privacy should be respected by the organisations that employ them, and it is inappropriate for employers to arrogate investigative powers for their own sake and assume a law-enforcement role.

4 Conclusion and recommendations

Over an 18-month period, the IIDTW has heard extensive evidence from a wide range of individuals and agencies – including employees and employers, trade unions and business organisations, drug-testing companies and regulatory authorities, scientific experts, lawyers, philosophers and social scientists. Drug testing at work is a complex topic, and evidence heard by the Inquiry has often defied assumptions and preconceptions. The IIDTW believes that there can be a limited role for drug and alcohol testing in some circumstances. But drug testing at work is not a quick and easy fix. The Commissioners are deeply concerned about its unexamined expansion in Britain and about the potential for further growth in the future.

Overall, the IIDTW concludes that there is no justification for drug testing as a way of policing the behaviour of the workforce, nor is it an appropriate tool for dealing with most performance issues. Drug testing can have an important role in safety-critical and other occupations where the public is entitled to expect especially high levels of probity, safety and security. Even here it should be approached with caution and, if the technology is available, direct testing of impairment will generally be preferable to drug testing, and the importance of the culture of an organisation cannot be overstated. Nor are drug testing systems infallible. The technology is imperfect and there are ways of subverting them. One of the strongest themes to emerge from the evidence heard by the IIDTW over an 18-month period is that good all-round management is the most effective method for achieving higher productivity, enhanced safety, low absentee rates, low staff turnover and a reliable and responsible workforce. For the majority of businesses, investment in management training and systems

is likely to have more impact on safety, performance and productivity than the introduction of drug testing at work.

The principal conclusions and recommendations of the IIDTW are set out below.

1 Keeping things in perspective

The use of illicit drugs is widespread in Britain, as are unhealthy patterns of alcohol consumption. For example, the latest sweep of the *British Crime Survey* reported that over a quarter (28 per cent) of 16 to 24 year olds had used illicit drugs in the last year, and recent Home Office research reports that over a third (39 per cent) of 18 to 24 year olds could be classified as 'binge drinkers'. More recently, in March 2004, the Government published its long-awaited *Alcohol Harm Reduction Strategy for England* (Prime Minister's Strategy Unit, 2004), which claims that alcohol misuse is now costing £20 billion each year through crime and disorder, injuries and illness, and lost productivity in the workplace. There is legitimate cause for concern at the levels of drug and alcohol use by the population at large, but this becomes a problem for employers only if it is having an adverse effect in the workplace. There is no conclusive evidence that this is a significant problem at work.

The survey evidence considered by the IIDTW was mixed and equivocal. Over half (58 per cent) of nearly 250 respondents to a TUC questionnaire felt that someone they knew had performed less effectively at work because of drugs or drink. Twenty-three per cent of respondents to a self-responding *MixMag* survey said that alcohol had made a difference

to their performance at work and 63.9 per cent that illicit drugs had done so. The IIDTW also heard evidence that levels of drug and alcohol use are high in the catering and entertainment industries – with significant safety implications in the former case.

However, the majority of employers who gave evidence to the IIDTW about their experiences of drug and alcohol testing reported very low levels of positive results. The IIDTW is confident that the overwhelming majority of employees in safety-critical work are conscientious and behave responsibly.¹ The furthest that a recent research survey from the Health and Safety Executive (HSE) is prepared to go is to say that 'recreational drug use *may* reduce performance, efficiency and safety at work', and witnesses from the HSE told the Commissioners that 'incidents where people act outside of what would be normally competent behaviour are very, very, few' (adding that 'Health and Safety Inspectors do not find a massive problem with drug abuse in the workplace'). Similarly, Ross Coomber, Professor of Sociology at the University of Plymouth, concludes his literature review for the IIDTW by saying that:

... the evidence for clear-cut deleterious effects of drug use on business is equivocal. What is less so is the belief by the business sector of the harm that drug use, and alcohol consumption in particular, causes to British industry'.

Overall, there is a lack of evidence to suggest that drug and alcohol use is in fact having a serious and widespread effect on the workplace in modern Britain.

The IIDTW has not been able to determine to its own satisfaction the impact of drug use in

the workplace or trends in the development of drug testing as a practice among British employers, although it has considered evidence that gives a good indication of the current state of affairs. The IIDTW concludes that there is a need for continuing monitoring and analysis of trends, located within the Health and Safety Executive, and with the close involvement of the Confederation of British Industry, Federation of Small Businesses and Trade Union Congress.

The IIDTW would welcome the regular publication of an official statistical and research bulletin on health and safety at work that monitors the impact of drugs and alcohol in the workplace, the reporting of adverse events and the use of drug testing by employers, alongside other factors that can affect performance and safety. This work could be led by the Department of Health, working closely with other relevant government departments, including the Department of Trade and Industry.

The IIDTW notes that the Government is currently consulting on a strategy for public health that 'will involve working with a number of organisations within industry on how they can improve employees' health', and that a White Paper on Public Health is anticipated later this year. This provides an ideal opportunity to promote best practice in dealing with alcohol and drug issues in the workplace, and to ensure that this comes to be seen as a mainstream health and welfare matter, linked to other work-related public health issues (such as excessive hours and stress).

The IIDTW believes that a fruitful line of inquiry for future research is the relationship between drug and alcohol problems among employees and different management philosophies within organisations.

2 Performance at work

The IIDTW notes that a wide range of things can affect an individual's performance at work – including prescription drugs, moderate alcohol consumption, poor diet, late nights, tiredness and stress, child-care responsibilities, divorce and bereavement. Employees should not be required to live their lives in such a way as to be maximally productive at work. However, if an employee's private activities or problems have a sufficiently serious impact on work performance, then what are ordinarily private matters can become a legitimate concern for employers. The relevant thresholds are difficult to specify with precision and depend on both the *intensity* and *frequency* of the effect on performance. Paradoxically, if these thresholds are being exceeded then it is likely that the employee's problems will be sufficiently evident that there will be no need to resort to drug or alcohol testing.

The IIDTW concludes that employers have a legitimate interest in drug and alcohol use among their employees in a restricted set of circumstances only. These circumstances are where:

- 1 employees are engaging in illegal activities in the workplace
- 2 employees are actually intoxicated in work hours
- 3 drug or alcohol use is (otherwise) having a demonstrable impact on employees' performance that goes beyond a threshold of acceptability
- 4 the nature of the work is such that any responsible employer would be expected to take all reasonable steps to minimise the risk of accident
- 5 the nature of the work is such that the public is entitled to expect a higher than average standard of behaviour from employees and / or there is a risk of vulnerability to corruption (for example, in the police or prison service).

3 Employment and private life

Employers therefore have a legitimate interest in the private behaviour of their employees only where it is having a serious impact on their capacity to work, and then only in a limited and specific set of circumstances. A distinction between professional and private life is a fundamental value of our society and the IIDTW would be extremely concerned about any erosion of this boundary. The IIDTW is concerned that drug and alcohol testing at work could potentially transform businesses into quasi-law enforcement agencies and agents of a particularly virulent form of 'nanny statism'. There is a danger of slipping inadvertently into a situation where employers are routinely investigating the private lives of employees (and potential employees), and effectively imposing extra-judicial penalties for illegal – or undesirable – behaviour. The IIDTW found that the overwhelming majority of British employers who gave evidence have no desire to police the private lives of their staff.

The IIDTW concludes that employers have no direct interest in the private behaviour of employees and prospective employees as such and that investigation of an employee's private life simply for its own sake is a serious invasion of personal liberty.

This means that drug and alcohol testing can never be justified as a means of policing the

private behaviour of employees or potential employees and in the absence of legitimate safety or performance concerns (which include concerns about 'reputation' and 'probity' in some professions). This means, for example, that organisations should not be conducting pre-employment tests simply as a way of investigating the 'character' of applicants. Nor should people be turned down for jobs, dismissed or disciplined as a form of extrajudicial punishment for using drugs, and independently of any impact on performance at work.

The IIDTW notes that many drug tests do not measure current impairment or intoxication at all, but that they do reveal that somebody used drugs days, weeks or months previously. This information is unlikely to have a direct bearing on performance or safety at work and this sort of testing is therefore rarely appropriate.

4 Legality is not the key issue

It is natural to assume that the legal status of different drugs will have an important bearing on arguments about drug testing at work. Employers have a legitimate interest in whether their staff are breaking the law in the workplace, and this is a particular concern in professions that have a law-enforcement role. More generally, where staff are using illicit drugs at work, their employers could face criminal proceedings if they were to turn a blind eye. This aside, however, the distinction between licit and illicit substances is largely beside the point for the debate about drug testing at work. What matters is impairment, performance and safety. The Code from the Information

Commissioner (who oversees the implementation of the Data Protection Act), published in November 2003, states that testing should be used only to 'detect impairment at work rather than illegal use of substances in a worker's private life'.

Relatedly, the experience of the IIDTW was that many witnesses with managerial and occupational health responsibilities accepted that alcohol was more of a problem than drugs if the question was explicitly posed by the Commissioners. However, most of these witnesses proceeded to focus on illicit drugs in presenting their evidence. Aside from its legal status, what appears to be a more tolerant attitude to alcohol probably reflects the fact that managers are more familiar with, and therefore less anxious about, alcohol use, and that they are confident in their ability to recognise and respond to alcohol-related problems without recourse to drug testing or to formal disciplinary procedures. As a witness from the company NORCAS, which provides a range of drug and alcohol services to organisations, explained:

... employers can be of an older generation and, whereas they think they can deal with alcohol as an issue, because they know the effects of alcohol for themselves, they don't know how to deal with drugs.

Some of the evidence presented to the IIDTW suggests that alcohol consumption is a greater cause for concern than illicit drug use. The Commissioners also note that the Alcohol Harm Reduction Strategy, published in March 2004, claims that alcohol misuse is a cause of increased absenteeism, early retirement and premature death that costs the UK economy up

to £6.4 billion a year in lost earnings for individuals, lost profit for employers and lost productivity for the country. The IIDTW believes that there should be further investigation of public behaviour and attitudes with regard to drinking at work as part of the Alcohol Harm Reduction Strategy.

5 A private matter

It has been suggested by some people that the use of drug testing at work is a private, contractual matter between employee and employer, and is not the state's business. The IIDTW rejects this argument for two reasons. First, the inequality in the bargaining positions of employers and employees will often mean that 'consent' to drug testing at work is merely nominal. Second, the IIDTW has been impressed by the evidence that a significant expansion of drug testing at work could have profound economic and social costs for the community at large (for example, by effectively barring people from productive employment). Drug testing by business is everybody's business.

The IIDTW is persuaded that drug testing at work cannot be dismissed as a 'private', contractual matter between individuals and organisations, but should be viewed as a public policy issue and subject to a full public debate and to appropriate regulation by the state.

6 Drug testing and the law

The IIDTW found the legal position on drug testing at work somewhat confused, largely because there is no direct legislation, and important legal questions hinge on interpretation

of a whole range of legal provisions in health and safety, employment, human rights and data protection law. If the IIDTW found the legal situation unclear, despite the considerable legal expertise at its disposal, it is unlikely that the law is well understood by many employers, employees or the public at large.

The principles behind the legal or self-regulatory provisions that exist appear to be as follows:

- that people are entitled to a private life
- that employers are required to look to the safety of those affected by the work of their employees, both other employees and members of the public
- that people are entitled to dignity
- that people are entitled to proper quality standards for evidence used against them in court or disciplinary proceedings.

We heard that recent developments in data protection law appear to have created a more secure framework to ensure these rights. Thus the combination of the first three data protection principles and the draft guidelines issued by the Information Commissioner (Part 4 of the *Employment Practices Data Protection Code* on health information of employees) cover the right to private life and the right to safety at work. In addition, the guidelines lay down procedural requirements to ensure proper standards of evidence where testing is justified.

The Information Commissioner's guidance, however, while welcome, remains just that. The final result of the consultation on the draft guidelines is due out in July 2004. We do not know that it will remain as drafted. If, after its

publication, there remained any ambiguity, the IIDTW would welcome greater certainty about the law and in particular a confirmation from the Government that drug testing outside safety-critical occupations and those where there are other special confidence issues is not legal. In addition, the IIDTW believes it should be made clear that data processed in breach of the requirements of the Act (as interpreted by the Information Commissioner's guidelines) is not admissible in disciplinary proceedings or court proceedings for dismissal.

In respect of ensuring the quality of evidence, the Information Commissioner's guidelines appear to overlap with the safeguards provided by the use of an accredited laboratory that also abides by the Guidelines on Legally Enforceable Workplace Drug Testing. However, the accreditation system that applies to drug laboratories covers only a very small part of the industry. Only around a dozen laboratories are accredited. And the Guidelines for Legally Defensible Workplace Drug Testing is an unsatisfactory attempt at self-regulation. Although the IIDTW welcomes the rules in the Guidelines themselves, which flesh out the Information Commissioner's guidelines, there are no monitoring or enforcement mechanisms.

The IIDTW does not believe that this situation is satisfactory. Since the results of tests can have a significant effect on the rights of individuals whose results are found positive (refusal or loss of employment or disciplinary proceedings), substandard laboratories are not acceptable. Those laboratories that are not accredited should be given three years either to bring themselves up to UKAS-accredited standards or to form an equivalent self-regulatory system that ensures: adherence to the

requirement that tests are based on reliable scientific evidence; that specimens are collected and kept under proper conditions; and that test results are interpreted only by qualified and experienced staff.

The effectiveness of such a scheme should be reviewed after three years and, if it is not working satisfactorily to ensure employers and employees are protected from unscrupulous or substandard service providers, the Government should act to introduce a legal requirement that all laboratories and testing systems meet the standards set by the UKAS accreditation system and equivalent standards to those set by the Guidelines for Legally Enforceable Workplace Drug Testing.

In the meantime, the Steering Group that developed the Guidelines for Legally Enforceable Drug Testing should consider the feasibility of setting up an inspection system for laboratories that claim to adhere to the Guidelines or means of incorporating them within a European and/or international accreditation system.

The IIDTW also calls on the Government to produce clear and definitive guidance on the legal and other issues around drug testing at work, and to finance a major communication initiative to ensure that this information is accessible to all employers and employees. This information should include a recommendation that companies that carry out drug testing that is justified under the Data Protection Act should ensure that workplace tests that are relied on in disciplinary or dismissal proceedings are robust in quality and should promote the use of accredited laboratories.

In addition, the Commissioners strongly support the call from the All-Party Parliamentary

Drug Misuse Group for more general government guidance for employers on drug and alcohol policies backed up by a new National Support Service. The IIDTW notes that official guidance is not always accessible or fit for purpose, and would welcome the production of a set of user-friendly resources for organisations, including a decision tree for employers who are contemplating the use of drug testing.

The IIDTW notes that the recently published Alcohol Harm Reduction Strategy for England (Prime Minister's Strategy Unit, 2004) states that the Department of Health will set up by the first quarter of 2005 a website for employers to provide advice on the warning signs of alcohol misuse and how to handle employees with an alcohol problem. The IIDTW feels that this site would be a natural vehicle for providing employers with balanced information on both drug and alcohol testing.

The IIDTW also welcomes the pledge in the Alcohol Harm Reduction Strategy to extend the Home Office's National Workplace Initiative, which trains company representatives on handling drug use in the workplace, to include alcohol. However, the IIDTW is concerned about mixed messages if this initiative is led by the Home Office, as there is a danger that this will result in the issue being seen as a law enforcement and not a health and safety matter.

7 Safety-critical industries

The role of drug and alcohol testing in safety-critical industries is rarely questioned. In fact, the evidence presented to the IIDTW by representatives from safety-critical industries often raised some genuine questions about the usefulness or appropriateness of testing even in

these environments. In most industries, accident rates were 'virtually zero' and – with one or two exceptions – those organisations that were drug testing their employees reported very low numbers of positive results.

Drug and alcohol testing is not a quick fix. But the IIDTW was nonetheless satisfied that it *can* have a role to play in safety-critical environments. First, it is apparent, from what we know about the psychological effects of various drugs, that intoxication can impair performance, with serious health and safety implications, and it is also a reasonable supposition that testing could deter and detect drug use in some circumstances. Second, even if this deterrent effect is extremely marginal, the IIDTW is acutely conscious that, in some occupations, the consequences of a single error could be very grave indeed. Third, the IIDTW has been advised that it is difficult – if not impossible – to prove a deterrent effect anyway due to the very wide range of variables acting on a situation (so, it is unlikely that any deterrent effect will ever be conclusively established one way or another by the research evidence).² And, finally, while some of the evidence presented to the IIDTW suggests that drug testing in safety-critical industries is more about maintaining public confidence than having a demonstrable impact on behaviour, the Commissioners recognise that the confidence of the public is an entirely valid consideration in its own right.

The IIDTW accepts that there is a case for drug testing in safety-critical industries. But direct testing of impairment is better suited to health and safety purposes than drug testing – which is an indirect and unreliable measure of impairment. The further development of impairment-testing techniques – and, in

particular, testing that can target only those forms of impairment that are relevant to a particular task or job – could potentially undermine the arguments for drug testing in safety-critical occupations. The IIDTW heard that there is ongoing research into impairment testing, but no conclusive evidence that it will necessarily improve sufficiently. If this form of testing is successfully developed, a review conducted in five or ten years may struggle to make a case for drug testing even for safety-critical workers.

The IIDTW also notes that testing in safety-critical industries should be one part of a comprehensive drug and alcohol policy. Furthermore, a focus on drugs and alcohol should not divert attention or investment from other health and safety priorities – for example, poor working practice, communication failures, stress and excessive tiredness. Any guidance or advice for employers should also present alternatives to drug testing and provide objective criteria for assessing their relative merits.

8 Implementation issues

If the benefits of drug testing are uncertain, then the costs should not be underestimated either. Some employers from safety-critical industries who provided evidence to the IIDTW said that testing had been divisive and damaging to industrial relations. There can also be a large disparity between the good intentions behind a drug-testing policy and the implementational reality on the ground. The IIDTW heard of cases where testing procedures that appeared to be more or less foolproof had been subverted. In particular, the IIDTW heard evidence of managers and staff colluding to subvert testing

systems out of friendship or a sense of loyalty to colleagues, to avoid losing a trained employee or because a positive test could reflect badly on their team or part of the business. The Inquiry also heard of cases where employees had not reported incidents, with possibly serious health and safety implications, for fear of triggering drug testing and disciplinary procedures against themselves or colleagues.

The majority of witnesses to the IIDTW saw drug and alcohol issues as a health and welfare matter, and not simply – or primarily – as a disciplinary issue. This is surely right. It follows that organisations should not be drug testing unless they have appropriate systems to deal with staff identified as having drug or alcohol problems.

Thus, BT explained to the IIDTW that ‘as with any problem, [we] ... support the individual in dealing with it’ (i.e. a drug or alcohol problem). And Rolls-Royce plc told the IIDTW that it had issued all its managers with a guide to mental health that clearly stated that alcohol and drug abuse should be treated as a health problem, and addressed by providing appropriate support and counselling to employees. As noted earlier, while London Underground takes a ‘tough’ line when staff test positive for drugs and alcohol, it also offers plenty of support to staff who proactively come forward with problems.

The arguments for treating drug and alcohol misuse as essentially a health and welfare issue are not only ethical ones, there is also a strong business case for supporting staff who develop problems. Failure to do so can mean losing trained and able staff, it can be divisive, may be open to legal challenge and could have a negative impact on the company’s reputation

with employees, potential employees and customers.

The IIDTW believes that the key to successful implementation of a drug and alcohol policy is that it is conceived as an aspect of health and welfare policy and not exclusively as a disciplinary matter. A drug and alcohol policy will be effective only if it is accepted and owned by staff across the organisation (although the IIDTW acknowledges that, in some occupations, working while intoxicated by drugs or alcohol is highly irresponsible behaviour and is a serious disciplinary matter).

The IIDTW concludes that drug testing at work should be introduced only in specific circumstances where there is a demonstrable benefit, and should not be introduced in the absence of proper consultation and involvement of trade unions and/or other staff representatives.

The acceptability of testing is also about the approach that is taken to alcohol and drug problems among staff.

The IIDTW believes that, where staff in safety-critical roles are found to have drug or alcohol problems, this is a health and welfare issue and should not be a basis for automatic dismissal or for automatically triggering disciplinary procedures. Wherever possible, employees with safety-critical functions should be redeployed in other roles and given appropriate help and support. Aside from the welfare arguments, if a drug policy including testing is clearly a health and welfare initiative, it is far less likely to be undermined and subverted, and will fulfil its safety function far more effectively.

The IIDTW accepts that, if companies do drug test staff, there is a good case for restricting

testing to staff in safety-critical industries who have a direct safety-critical role, but notes that this is a very difficult line to draw. The IIDTW also notes that many individuals will have safety-critical jobs although they are not employed in safety-critical industries, and this needs to be recognised in developing policy and guidance.

The IIDTW is concerned that responsibility for safety in the workplace is not 'downwardly delegated'. The decisions of senior staff can have as great a consequence for public safety as the actions of, say, a train driver or a miner. Drug and alcohol policy should not be something that is imposed on employees by managers – for example, through unnecessarily invasive testing regimes – but must be even-handed and non-discriminatory. The IIDTW believes that it is unacceptable, for example, if an organisation is drug testing junior staff where senior management are themselves involved in a culture of drinking in working hours. All those affected by drug policy need to be involved in its formation. If policy is not seen to be fair, then drug testing will be a source of conflict and an 'us' and 'them' mentality, which will undermine the effectiveness of any workplace drug and alcohol policy.

9 Drug testing in its place

The IIDTW would emphasise that management structures should *routinely* pick up on staff who are not performing at work or are frequently on sick leave *anyway*. For the most part, it is unclear that anything can be achieved through drug and alcohol testing that could not be done better through other managerial and supervisory processes.

Precisely this point was made by a number of businesses that gave evidence to the IIDTW. Southern Water told us that drug testing had added little value, and that, in future, they would deal with drug and alcohol issues by good routine management. Transco told us that good, high quality management made drug testing less of an issue. And a representative from the Engineering Employers' Federation said that drug and alcohol use was a basic management issue:

... do you raise the fact that someone is under-performing and instead of dealing with it in a sensible 'people management skill' way – by asking questions such as 'what is happening?', 'how are you doing?' – go down the route of drug testing and just say 'we are thinking of drug testing you'.

This point was made with force and clarity in a personal written submission to the Inquiry from Andrew May, Chair of the Chartered Management Institute Working Party on Drug and Alcohol Abuse in the Workplace. He commented:

... a relationship based on trust and open communication between managers and staff is essential to identify and cope with abuse problems. It is equally important for dealing with staff problems arising from family problems (illness, divorce) or other addiction problems (gambling, eating disorders). It is not just drug abuse that affects performance, and over-emphasising this abuse risks ignoring others with equally serious consequences ... Early recognition and supportive policies minimise the adverse effects of abuse to the benefit of individuals and the organisation.

The Commissioners fully endorse these comments.³ Where testing is carried out in house, it will generally be the responsibility of occupational health departments. The London Chamber of Commerce convened a round-table discussion for the IIDTW in 2003 at which it was made clear to Commissioners that some occupational health managers fear that the relationship of trust with staff may be damaged by their involvement in drug testing.

The IIDTW finds that drug testing is no alternative to good management practice, and, if not sensitively handled, can damage relations of trust between managers and staff.

The IIDTW notes that an unhealthy and/or excessively stressful work environment can contribute to substance problems, and that all organisations have a responsibility to address the causes as well as the consequences of drug use.

10 The responsibilities of employees

While the evidence presented to the IIDTW suggests that the majority of staff behave responsibly in Britain, it would be wrong to conclude this report without a reference to the responsibilities of employees. It is unacceptable for anyone to arrive at work in a state of intoxication that could place their colleagues, members of the public or the reputations of organisations at risk, or – in general – means they are unfit to do the work that they have been employed to do.

Notes

Introduction

- 1 Richardson, A., Budd, T., Engineer, R., Phillips, A., Thompson, J. and Nicholls, J., *Drinking, Crime and Disorder*, Findings 185, Home Office, London, 2003.
- 2 Parker, H., Williams, L. and Aldridge, J. 'The normalisation of "sensible" recreational drug use: further evidence from the North West England longitudinal study', *Sociology*, Vol. 36, No. 4, 2002. Additional material from 'Young make drugs part of everyday life', *The Guardian*, 25 November 2002. The issue of alcohol and drug misuse at work has also been highlighted by a succession of big media stories, such as the dismissal last year by London Underground of five track workers after a large quantity of alcohol was allegedly found in a mess room at Farringdon station (see, for example, 'Tube strike threat after staff sacked over alcohol', *The Guardian*, 3 December 2003). Or the recent investigative newspaper report that claimed that 'soaring stress levels among commercial airline pilots are leading to an alarming rise in drinking problems' ('Stressed pilots turn to drink', *The Observer*, 28 December 2003). Media stories of sports men and women, actors and actresses and other celebrities seeking help for drug and alcohol problems are routine, and it is a reasonable assumption that these problems are not peculiar to these professions.
- 3 Since 1997, there has been a massive extension in the use of testing by the police, prisons and other criminal justice agencies. A new system of mandatory and voluntary drug testing operates throughout the prison

estate. A new community sentence, the Drug Treatment and Testing Order was introduced by Sections 61 to 64 of the Crime and Disorder Act 1998. The Criminal Justice and Court Services Act 2000 gives the police the power to drug test detainees in police custody and courts the power to order drug testing of offenders under the supervision of the probation service.

- 4 See, for example, 'Plan for drug tests on police', *The Guardian*, 6 September 2003.
- 5 There are obvious difficulties in getting employees to discuss substance use at work 'on the record' and a detailed and systematic investigation was beyond the scope and budget of the IIDTW. While interviews of employees were comparatively small in number and not necessarily representative, they were at least suggestive of what is happening on the ground.

Chapter 1

- 1 The IIDTW is grateful to a number of people who prepared reviews and other evidence for the Inquiry, which have informed the discussion of these key issues in this – and subsequent – chapters.
- 2 Thus, Kevin Morris, President of the Police Superintendents' Association, claimed that police officers were 'ethically bound' to accept random drug testing in the service, because of their role as enforcers of drug laws. He commented: 'we owe it to the public to show it quite clearly and categorically that the police do not take illicit drugs' (quoted in 'Plan for drug tests

- for police', *The Guardian*, 6 September 2003). More recently, it was reported in the magazine *DrugLink* that 'In October, Home Secretary David Blunkett was handed guidance by the Police Advisory Board (PAB) recommending drug tests for all new recruits, for those entering specialist jobs and as a response to specific incidents and behaviour. Already four forces – Merseyside, Greater Manchester, West Midlands and Grampian – have tested officers. But this could be the thin end of the wedge which some experts predict would have a disastrous effect on recruitment and officers' morale and health. The PAB wants the Home Secretary to consider random testing of all Britain's 130,000 officers in late 2005, a policy which has the strong backing of the Association of Chief Police Officers (ACPO) and the Police Superintendents' Association (PSA)' (Max Daly, 'Passing out parade', *DrugLink*, Vol. 19, No. 1, January / February 2004).
- 3 'Chain of custody is a legal term that refers to the ability to guarantee the identity and integrity of the specimen from collection through to reporting of the test results. It is a process used to maintain and document the chronological history of the specimen. (Documents should include name or initials of the individual collecting the specimen, each person or entity subsequently having custody of it, the date the specimen was collected or transferred, employer or agency, specimen number, patient's or employee's name and a brief description of the specimen.) A secure chain of custody, together with the analytical techniques used by the Regional Laboratory for Toxicology to confirm the identity of drugs present in a specimen, leads to the production of a legally defensible report' (www.toxlab.co.uk/coc.htm).
 - 4 Indeed, one witness pointed out to the Inquiry that for some drug users – including those being treated with substitutes like methadone – *not* using drugs could impair performance (this would obviously apply to many prescription drugs too, and – arguably – to nicotine).
 - 5 In sport, this issue is further complicated by the fact that some of the substances that athletes are prohibited from taking are derivatives of substances that are produced naturally in the human body and the extent to which the body produces these substances varies significantly from one person to another. Paradoxically, the exertion of sporting activity itself can push naturally produced testosterone and nandrolone levels up close to – or sometimes beyond – prohibited levels.
 - 6 For example, skier Alain Baxter had an Olympic bronze medal from the 2002 Salt Lake City Winter Olympics withheld when he failed a drugs test. He later explained 'they had found traces of what appeared to be the banned substance methamphetamine in my urine sample, so were going to take my medal away. Eventually, we worked out that the positive test was caused by a Vicks Nasal Inhaler I had bought in the US and was using to clear my sinuses. I had always used the same decongestant in the UK and assumed it was safe. But the American

- version contained a tiny amount of levamfetamine, a mild form of the banned substance' ('Triumph and despair', *The Observer*, 18 January 2004).
- 7 In what follows, the IIDTW is particularly grateful for the detailed, considered and illuminating discussion of the legal issues provided in 'An expert legal opinion for leading barrister Michael Ford', which was submitted to the IIDTW in November 2003 and a report entitled 'Drug testing at work: a legal perspective', which was prepared for the Inquiry by Gillian Ferguson LLB (Hons), LLM (Cantab.) of Matrix Chambers. These reports will be made available to the public in due course. The Commission would also like to thank the practising lawyers with particular expertise in employment law from legal practices across England and Wales who gave evidence to the Inquiry, and participants in the Plenary Session at the Industrial Law Society on 12 September 2003 on 'Drug testing at work: legal and ethical issues'.
- 8 To be more precise, there is an implied term in every relationship that an employer will not 'without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'. As Michael Ford pointed out to the IIDTW, leaving aside the interpretation of this implied term '[it] will not override express terms ... including, in the present context, express terms of contract which give the employer the right to require its employees to undertake drug testing'.
- 9 If a case for unfair dismissal is successful, then an employee is entitled to an award to compensate for financial loss (the maximum award is currently set at £52,600). Significantly, this award may be reduced if the 'blameworthy conduct' of the employee is judged to have caused or contributed to his or her dismissal.
- 10 But, if adopting a fair procedure would have led to dismissal in any event, the compensatory award is likely to be restricted to the period it would have taken for a fair procedure to take its course – normally no more than a few weeks.
- 11 Where the use of illicit drugs has given rise to a criminal record, the disclosure of this information is subject to a set of statutory rules, notably under the Rehabilitation of Offenders Act 1974.
- 12 See, in particular, Section 2 and Section 3(1) of the Health and Safety at Work Act.
- 13 The Management of Health and Safety at Work Regulations are SI 1999/3242. See, in particular, Regulation 3.
- 14 See Sections 27 and 28, Transport and Works Act.
- 15 Concerns about compliance with the Transport and Works Act apparently played an important part in London Underground's decision to include drug testing provisions in its substance abuse policy. For an illuminating discussion, see Palmer, M., 'Workplace monitoring: taking the drink and drugs high ground?', *Employment Law Journal*, No. 20, May, 2001, pp. 22–4.

- 16 Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995. The prohibition on discrimination on the basis of trade union membership is contained in the Trade Union and Labour Relations (Consolidation) Act 1992.
- 17 The fact that drugs may mask or remove the disability is not relevant to assessing whether someone is disabled or not. The effects of any treatment are factored out in assessing disability.
- 18 The exclusion of drug and alcohol dependency in the Disability Discrimination Act 1996 obviously does not apply to health problems that are the result of past substance use – for example, where heavy alcohol use has resulted in liver damage.
- 19 On this matter, see *X v. Commission of the European Communities* [1995] IRLR 320.
- 20 In his evidence, leading barrister Michael Ford notes, for example, that the adoption of a 'reasonable expectation of privacy' test in the USA 'has largely left management prerogative unscathed in the sphere of drug use and testing'. By contrast, in France, where there is a right to private life at work, the courts have required much more stringent justification of drug and alcohol testing – holding, for example, that only health and safety reasons are sufficient to justify tests.
- 21 It is worth noting that a recent Employment Appeal Tribunal ruling, while rejecting an argument based on Article 8, did express concerns that a company's drug policy effectively meant that 'no drugs having certain persistent detectable characteristics could be taken by employees in their private time without probably jeopardising employment' (*O'Flynn v. Airlinks*, EAT / 0269 / 01).
- 22 He continues: 'For what they are worth, my views are that O'Flynn and Whitefield (*Whitefield v GMC* [2003] IRLR 62) accord too little importance to the impact of drug testing on private life; that testing for prescription drugs which therefore reveals information about an individual's health will require particularly compelling justifications; and that in future tribunals are likely to demand a clearer link between off-duty drug use and performance at work than the traditional approach has demanded (though they will probably tend to find a link more readily if drugs are criminalised)'.
- 23 In her evidence to the Inquiry, Gillian Ferguson of Matrix Chambers explains: 'it is clear that certain public sector employers, such as government departments or the police, are public authorities. These types of bodies are pure public authorities and all acts of such bodies, including workplace drug testing, are caught by the Human Rights Act. However, the position is less clear in relation to bodies that have a combination of public and private functions, such as a privatised utility with mixed commercial and regulatory functions or a professional association with a regulatory role. These types of bodies are sometimes termed "hybrid public authorities". It is only those acts of hybrid public authorities that are of a public nature, which are caught by the Human Rights Act.

Since drug testing is arguably a private act within the inherently private employment relationship, workplace drug testing by a hybrid public authority is likely to fall outside the scope of the Human Rights Act. However, where the functions that render an employer a "public authority" relate to health and safety, drug testing is arguably a public act and therefore covered by the Human Rights Act.'

- 24 See the ILO Inter-regional Tripartite Experts' Meeting on Drugs and Alcohol Testing in the Workplace, 10-14 May 1993, Oslo.
- 25 This is because the principal remedies of the Act are administrative, not criminal.
- 26 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health*, 2003, at para. 3.4.1.
- 27 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health*, 2003, at para. 3.4.4.
- 28 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health*, 2003, at para. 3.4.4.
- 29 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health*, 2003, at para. 3.4.6.
- 30 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health. Supplementary Guidance*, 2003, para. 3.4.1.
- 31 Information Commissioner, *The Employment Practices Data Protection Code: Part 4: Information about Workers' Health. Supplementary Guidance*, 2003, para. 3.4.2.
- 32 Amicus-AEEU told the IIDTW that an action was being pursued in the civil court.
- 33 The *Fortune* magazine ranks the largest companies in the United States in an annual Fortune 500 list. Essentially, *Fortune* magazine lists the US-based corporations with the largest revenue in the past year. Fortune 500 companies are among the biggest, most profitable and most powerful companies in America.
- 34 One of the employees who spoke to the IIDTW – a young woman working in the telecommunications field – made the point about the distinction between private and work life with particular force and clarity. 'As long as you do your work ... that should be the issue', she argued. 'Drug testing would get employers involved in your private life. Personal recreational enjoyment shouldn't have anything to do with the company ... random testing, in particular, is blurring the line between work time and private time ... if they insist on random testing, I'd query their motives. It is just too invasive. I'm contracted to work between 9.00 and 5.30 – that is the time I put in. Any other time is my own.'
- 35 Miller, D. (ed.), *The Blackwell Encyclopedia of Political Thought*, Blackwell, Oxford, 2004.
- 36 Although, incidentally, as a matter of fact, it is the *possession* of drugs and not their use as such that is legally prohibited under the Misuse of Drugs Act 1971.

Chapter 2

- 1 Martin, P., 'Tackling drug related crime – from warfare to welfare', interview in *Safer Society*, No. 14, Autumn 2002.
- 2 Parker, H., Williams, L. and Aldridge, J., 'The normalisation of "sensible" recreational drug use: further evidence from the North West England longitudinal study', *Sociology* Vol. 36, No. 4, 2002. See also, Parker, H., Aldridge, J. and Measham, F., *Illegal Leisure: The Normalisation of Adolescent Recreational Drug Use*, Routledge, London, 1998.
- 3 See, in particular, Goulden, C. and Sondhi, A., *At the Margins: Drug Use by Vulnerable Young People in the 1998/1999 Youth Lifestyles Survey*, Research Study 228, Home Office, London, 2001.
- 4 Altrix is a drug-testing service that was established in 1998. The Altrix laboratories analyse approximately 200,000 samples a year, involving over 1,000,000 individual tests. Altrix is now the largest specialist oral fluid drug-testing laboratory in Europe, providing services mainly to the drug rehabilitation and criminal justice sectors and also to a number of commercial organisations. It told the IIDTW that workplace testing was as an area for future expansion.
- 5 See DrugScope (2001), 'Charity launches service to ease industry's £2.8 billion drug and drink habit' (press release), which is available at www.drugscope.org.uk.
- 6 Chartered Management Institute, *Managing the Effects of Drugs and Alcohol in the Workplace*, CMI, London, 2003.
- 7 There have been some illuminating studies of specific industries. For example, the *Caterer and Hotelkeeping Magazine* published the results of a survey of catering workers on 9 October 2003. While the results of this survey should be treated with caution, its findings are striking nonetheless: over 97 per cent of those workers who participated in the survey considered drug and alcohol use at work to be a problem; 24 per cent reported having personally drunk to excess at work; 12 per cent admitted using illegal drugs at work; 59 per cent said they had witnessed other employees drinking to excess during working hours; and 40 per cent had witnessed other employees taking illegal drugs during working hours (*Catering and Hotel Magazine*, 9 October 2003).
- 8 The questionnaire was included in *Hazard* magazine, No. 100, 5 April 2004 and the results were analysed by the TUC on behalf of the Independent Inquiry.
- 9 In 1986, President Reagan issued an Executive Order requiring federal agencies to introduce urine testing in order to create 'drug free federal workplaces'. The Drug Free Workplace Act 1988 prohibits the manufacture, distribution, possession and use of controlled substances in the workplace.
- 10 Greenburg, E.R., Canzoneri, C. and Straker, T., *1994 AMA Survey on Workplace Drug Testing and Drug Abuse Policies*, American Management Association, New York, 1994.

- 11 Dalen, P., Beck, O., Bkorklov, P., Finer, D., Garle, M. and Sjoqvist, F., 'Workplace drug testing likely to increase in Europe', *European Journal of Clinical Pharmacology*, Vol. 56, 2000, p. 103.
- 12 Chartered Management Institute, *Managing the Effects of Drugs and Alcohol in the Workplace*, CMI, London, 2003.
- 13 The study was restricted to companies with at least ten employees.
- 14 The breakdown of the number of respondents to the CBI questionnaire by industry is as follows: finance (3), chemical (11), gas (2), utility (10), engineering (11) postal/courier (2), education/research (2), mining/quarrying (2), communications (2), retail (2) and transport (2).
- 15 The Inquiry was told that some offshore drilling companies conduct random tests on all staff, while others reserve random testing for safety-critical workers only.
- 16 Although it was a different story for contractors, who were viewed as a source of a greater potential substance misuse problem, and would generally face immediate dismissal.
- 17 All-Party Parliamentary Drug Misuse Group, *Drug Testing on Trial*, July 2003. Williams, J., 'Tinker, tailor, soldier, smackhead: doctors on heroin, nurses on pills, executives on coke. How serious is drug taking at work', *The Big Issue*, 9–15 February 1998.
- 18 Williams, J., 'Tinker, tailor, soldier, smackhead: doctors on heroin, nurses on pills, executives on coke. How serious is drug taking at work', *The Big Issue*, 9–15 February 1998.
- 19 Discussed in Moore, D. and Haggerty, K., 'Bring it on home: home drug testing and the relocation of the war on drugs', *Social and Legal Studies*, Vol. 10, No. 3, 2001, pp. 377–95.

Chapter 3

- 1 Until recently, the quarrying industry had the highest rates of industrial accident in the UK. Disturbingly, the IIDTW was told that, if somebody worked for 40 years as a quarryman, they would have a one in ten chance of being killed or seriously injured. This is a working environment that is potentially very dangerous and totally unforgiving of carelessness and mistakes.
- 2 This witness told us that this 'gut feeling' could not be backed up by solid evidence, as, in the past, the industry had not had effective alcohol and drug policies, which would have ensured that workplace accidents and their causes were properly investigated and monitored.
- 3 Although, in such cases, it was difficult to separate out impairment caused by the drug use from impairment due to the underlying fatigue.
- 4 Also, in its evidence, London Underground told the Inquiry that its drug and alcohol policy stated that, if employees were taking medication, then they had a responsibility to find out about side effects that might impair their work performance.

- 5 Kraus, J.F., 'The effects of certain drug-testing programs on injury reduction in the workplace: an evidence-based review', *International Journal of Occupational Environmental Health*, Vol. 7, No. 2, 2001, pp. 103-8.
- 6 'If we wanted the business', it explained to the Inquiry, 'we had to have the policy'.
- 7 Of two young applicants for jobs who tested positive for cannabis, this witness commented that 'it was really quite upsetting ... [and I] ... would not want to go through that again'.
- 8 The wording of the London Underground policy on medication is, as follows: 'all employees are required: when requiring medication, to find out if there may be side effects likely to impair their work performance and safety from the drug or other medication concerned, whether prescribed or available without prescription, and, where this is the case, to seek advice regarding alternatives; additionally to advise their manager when reporting for work'.
- 9 Compared to 30 per cent who did support such a restriction.
- 10 It was pointed out to the IIDTW that testing could even be a cause of absenteeism. People might not turn up for work if there was a risk that they would be drug tested and they had used a drug that could be detected. For example, someone who had taken cocaine at the weekend might not come to work on Monday morning.
- 11 It may be, for example, that young men are more likely to take days off work and more likely to be drug users than middle-aged women, and this will distort the results if all that is considered is the relationship between drug use and absenteeism.
- 12 See, for example, Register, C.A. and Williams, D.R., 'Labor market effects of marijuana and cocaine use among young men', *Industrial and Labour Relations Review*, Vol. 45, No. 3, 1992, pp. 419-34.
- 13 See, for example, Zwerling, C., Ryan, J. and Orav, E.J., 'The efficacy of pre-employment drug screening for marijuana and cocaine in predicting employment outcome', *Journal of the American Medical Association*, Vol. 264, 1990.
- 14 Francis, P. and Wynarczyk, P., 'Regulating the invisible? The case of workplace illicit drug use', in P. Davies, P. Francis and V. Jupp (eds), *Invisible Crimes: Their Victims and their Regulation*, Macmillan, London, 1999.
- 15 For further details of this survey, see 'Drug testing: a bad investment?', American Civil Liberties Online Archive, www.aclu.org/library/pbp5.html
- 16 Kaestner, R., 'New estimates on the effects of marijuana and cocaine use on wages', *Industrial and Labor Relations Review*, No. 47, 1994, pp. 454-70.
- 17 See, for example, Trice, H. and Roman, P., *Spirits and Demons at Work* (Second Edition), Cornell University, New York, 1978.
- 18 Which will, of course, vary depending on the type of drug under consideration and an individual's pattern of drug use.

- 19 In her evidence to the All-Parliamentary Drug Misuse Group.
- 20 Amicus-AEEU is the UK's largest manufacturing union, with 730,000 members in the public and private sectors.
- 21 The key references are Gilliom, J., *Surveillance, Privacy and the Law: Employee Drug Testing and the Politics of Social Control*, University of Michigan Press, 1994 and Butler, B., *Alcohol and Drug Testing in the Workplace*, Butterworths, Toronto, 1993.
- 22 Sullum, J., 'Pissing contest', *Reason*, January 2000.
- 23 See, for example, Spell, C.S. and Blum, T.C., 'Organisational adoption of pre-employment drug testing', *Journal of Occupational Health Psychology*, Vol. 6, No. 2, 2001, pp. 114-26.
- 24 In contrast, 49 per cent did not think it sent out the wrong message to staff and 50 per cent did not think it impinged on human rights.

Chapter 4

- 1 The IIDTW was able to speak directly only to a small number of employees who used drugs, and they will not necessarily be the best judges of the effects on their performance. However, it is interesting that these witnesses did not feel that their drug use had a significant impact on their work

and that some believed that they had worked harder than otherwise to cover up their drug use. In addition, the IIDTW heard evidence from employers that the level of positive results was extremely low, and there was no discernible relationship between the introduction of drug testing and a reduction in accident rates.

- 2 The IIDTW also notes that it has been demonstrated in other contexts that deterrence is linked to the perceived likelihood of discovery. Drug testing might have to be conducted on a regular and frequent basis (maybe weekly or daily) if it is to have any kind of deterrent effect.
- 3 Andrew May further commented: 'Managers have legal responsibilities for managing people, as well as commercial duties to their organisation. Penalties faced by managers who fail go far beyond loss of office, with imprisonment for corporate manslaughter now a reality. Techniques in risk assessment have been refined to help identify what constitutes risk, and one significant area of risk is employees who behave irrationally. A good "man-manager" minimises risk by knowing their staff and through monitoring their actions. Detecting change in behaviour or performance will spark enquiry into the cause. A manager will need to be able to pinpoint a cause through an awareness of the external signs of behaviour, which, of course, may have no connection with drug abuse.'

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Appendix

Organisations and individuals who gave evidence to the Inquiry

Transport

June Ashton, Human Resources Manager for UK Bus Division, Stagecoach

Lynne Beale, Group Risk Manager, Arriva Group

Dr Olivia Carlton, Head of Occupational Health, London Underground

Nigel Radcliffe, Senior Drug and Alcohol Counsellor, London Underground Support Services

Other Industries

Dr Ian Almond, Senior Medical Advisor, TRANSCO (utility company gas distributor)

John Corden, Head of Health, Safety, Emergency Planning and Security, Southern Water (utility company, water supply and waste)

Dr N.F. Davies, chief Medical Officer, Nuclear Power Generator, British Energy

Liz Eades, Occupational Health Advisor, Seeboard Plc (utility company, electricity distribution)

Paul Fairlamb, Group Safety Manager, UK Coal (independently owned coal mining company)

Rory Graham, Director, Health, Safety & Training, Foster Yeoman (quarrying industry)

Alison Jackson, Safety, Health and Environment Division, UKAEA (decommissioning of nuclear reactors, and other radioactive facilities)

Dr Sayeed Khan, Chief Medical Advisor, Engineering Employers' Federation

Dr I.J. Lawson, Chief Medical Officer, Rolls-Royce Plc (multinational, engineering production for civil aerospace, defence aerospace, the marine and energy sectors)

Dr Paul Litchfield, chief Medical Officer, and Head of Health and Safety, BT Group (telecommunications services)

Andrew May, (personal submission) Chair, Chartered Management Institute Working Party on Drugs and Alcohol in the Workplace

Jane McCourt, Occupational Health Advisor, Citigroup (banking/financial services)

Name withheld, Group Health and Safety Manager, Entertainment Industry

Name withheld, head chef and author, Catering Industry

Statutory Sector

Rob Bettinson, Development Manager, UKAS (United Kingdom Accreditation Service)

Iain Bourne, Strategic Policy Officer, Information Commissioner

Paul McCormack, Psychosocial Issues Unit, HSE (Health and Safety Executive)

Chris Rowe, Head of Psychosocial Issues, Policy Unit, HSE (Health and Safety Executive)

David Smith, Assistant Commissioner, Information Commissioner

Drugs testing in the workplace

Insurance

Phil Grace, Risk Manager, Casualty, Norwich Union (insurance company)

Tim Humphreys, Manager for Liability Department for GI, ABI (Association of British Insurers)

Lawyers

Richard Arthur, Employment Rights Unit, Thompsons Solicitors

James Davies, Partner, Employment Law, Lewis Silkin Solicitors

Gillian Ferguson, Research Panel, Matrix Chambers

Michael Ford, Senior Council, Old Square Chambers

Gillian Leach, Employment Law specialist, Blake Lapthorn Linnell

Daniel Naftalin, Mishcon de Reya Solicitors

Katie Swaine, Head of Legal Services, Release

Gabriella Wright, Employment & Pension Unit, Charles & Russell

Fraser YOUNSON, Head of Labour and Employment Group, London, Mcdermott Will and Emory

Laboratories/testing companies/policy providers/service providers

Matthew J. Atha, Principal Consultant IDMU (Independent Drug Monitoring Unit)

Keith Burns, Employment, Assistant Director, Promis Recovery Centre

Dr David Caughey, Senior Occupational Physician, Aon Health Solutions (Occupational Health Providers)

Julian Coe, CEO, Altrix Healthcare plc

Simon Floyd, Training and Consultancy, NORCAS

John Franklin-Webb, Principal Director, GSI Grosvenor International Services

Karl Graham, Business Unit Manager Workplace and Prison, Altrix Healthcare plc

Patricia Grant-Wilson, Centre Manager, GSI Grosvenor International Services

Lindsay Hadfield, Policy & Education Services, Medscreen Ltd

Alec Horner, Risk Management Consultant, 'Minimise Your Risk' (education and policy)

Steve Nurdin, Market Sector Manager, Altrix Healthcare plc

Roger Singer, Director, AVOIDD, DDE (drink driver education)

Chris Wakeham, Managing Director and Consultant, Hampton Knight

John Wicks, Managing Director, Tricho-Tech Ltd

Dr Keith Williams, Team Leader, Bioanalysis and Toxicology, LGC (Laboratory of the Government Chemist)

Police

Chief Superintendent Mike McAndrew, 'E' district Secretary, Police Superintendents' Association

Chief Superintendent Kevin Morris, President, Police Superintendents' Association

Social Researchers

Ross Coomber, Principal Lecturer in Sociology, University of Plymouth
Peter Francis, Sociology and Criminology division, University of Northumbria
Natalia Hanley, University of Northumbria
Neil Hunt, Lecturer in Addictive Behaviour, University of Kent at Canterbury
David Wray, University of Northumbria
Trinh Thu, Associate Director, MORI Social Research Institute

Roundtable – health issues

Dr Maureen Baker, Honorary Secretary, RCGP (Royal College of General Practitioners)
Dr Rosemary Field, Director of Primary Care, National Clinical Assessment Authority
David Harding-Price, Chair of Mental Health Practice, Royal College of Nursing
Lady Anne Parkinson, Changing Minds Campaign, D & A Misuse Working Group
Hugh Robertson, Head of Health and Safety Unit, UNISON
Dr David Saunders, Senior Member of College Counsel, RCA (Royal College of Anaesthetists)

Roundtable – occupational health

Bev Cornish, occupational health consultant
Jane McCourt, Occupational Health Advisor, Citigroup
Pauline Lepine, Occupational Health Advisor, John Lewis
Sheila Nursimbula, Occupational Health Advisor, Metropolitan Police
Hilary Philpot, Group Health and Safety Manager, Universal Music Operations Ltd
Mike J. Roberts, Occupational Health Advisor, Department of Transport
Jane Stanton-Humphreys, Corporate Health Services Manager, Citigroup

Roundtable – Industrial Law Society

Membership of the Industrial Law Society Conference, 12 September 2003

Trade Unions

Jim Doneghy, Union Official AMICUS-AEEU

Employees

Ben Goldacre, Journalist, Doctor, DJ
'James', Management Consultant
'Ian', London Underground employee
'P', forklift truck driver
'Janine', Telecommunications

Other Contributors

Transport

Dr Blair Chritchon, Deputy Head of Occupational Health, London Underground
Linda Harwood, Human Resources Policy Manager, London Underground
Dr Tim Norman, Policy Advisor, Department of Transport
Dr Lilley Read, Research Manager, Department of Transport
Mike Stallard, Business Services Manager, London Underground
Les Warneford, Managing Director, Stagecoach Bus and Coach Company

Statutory Sector

Dermot Broom, HSENI (Health and Safety Executive, Northern Ireland)
Adam Brett, Chairman, Northern Ireland Employment Lawyers Group
Trish Newton, Deputy Head of Job Seekers' Division, Jobcentre plus
Dr Delia Skan, Senior Employment Medical Advisor, HSENI (Health and Safety Executive, Northern Ireland)

Prison and Probation Service

Steve Limpkin, Head of Probation Service, National Probation Directorate
John Marsh, Head of Personnel Management Group, Prison Service
Clive Peckover, Head of Personnel Policies, Custody to Work

Research, information and service providers

Dr Angela Gorta, Research Consultant, Police Integrity Commission (Sydney, Australia)
Christine Hayhurst, Director, Public and Professional Affairs, Chartered Management Institute
Anusha Kurunathan, Sales, Frost and Sullivan (international market consultant on emerging high-technology and industrial markets)
William Shone, Head of Marketing, Euromed Limited (diagnostic services provider)
Tony Wallwork, Grendonstar, (training and drug and alcohol policies)
Helen Vangikar, Toxicology Manager, Quest Diagnostic
Alex Wong, Research Analyst, Healthcare, Frost and Sullivan

Tab 32

DRUG TESTING AND PRIVACY



**The Privacy Commissioner
of Canada**

The Privacy Commissioner of Canada 112 Kent Street
Ottawa, Ontario
K1A 1H3
(613) 995-2410, 1-800-267-0441

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INTRODUCTION

"When the current spasm of anxiety about drugs has run its course, we will be left with an army of bureaucracies and technologies that will find other justifications for their continued existence, with serious and long-lasting implications for freedom and privacy.... The history of technology is the history of the invention of hammers and the subsequent search for heads to bang with them."¹

"Between lie detector tests and drug tests, you wonder how anybody can get any work done."²

"There has to be some consideration for individual rights. We can't be running around testing anybody at any time."³

During the 1980's a confusion of forces pushed drug testing to the forefront of workplace issues. The globalization of the world's economy put ever increasing pressure on employers to reduce their costs of doing business and fuelled their search for the "perfect" employee. Rising levels of drug-related urban crime intensified the "war on drugs", particularly in the United States, a "war" whose focus shifted somewhat from attacking supply to attacking demand. Public safety seemed to be increasingly at risk as the spectre of on-the-job impairment—particularly in the transportation sector—was raised. Finally, as the decade came to a close, the Ben Johnson affair raised new concerns about drugs. Amidst all this emerged the attitude that testing of "everyone but me" was the solution to these ills.

We have used the term "confusion of forces" because quite different problems gave rise to them. In some cases it was illegal drug use, in some it was performance impairment and, with athletes, it was performance enhancement. Curiously, workplace drug testing through urinalysis seemed to offer the quickest fix to many of these problems. Curious, because urinalysis cannot measure impairment. Yet, apart from the desire to attack the demand side of the illegal drug trade, almost all forces calling for testing stem from concerns about on-the-job performance impairment. Curious, too, because drug testing is extremely intrusive of one of our most fundamental rights—the right to privacy. It is especially intrusive when imposed randomly, without "reasonable suspicion" safeguards, as many testing proponents advocate.

To understand just how intrusive drug testing is, a brief discussion of the mechanism of drug testing may be helpful. It is found in Part I.

The prevailing testing method of choice is urinalysis. One person's account of urinalysis illustrates graphically just how degrading the experience might be:

"I was not informed of the test until I was walking down the hall towards the bathroom with the attendant. I thought no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was led into a very small room with a toilet, sink and a desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did. I pulled down my pants, put the container in place—as she bent down to watch—gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar—and that is exactly what it is.... I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the

*humiliation, degradation and mortification I felt."*⁴

Not only is the testing method intrusive. Testing results in the collection of highly sensitive personal information. It tells whether a person may have consumed the drug or drugs being tested for during the recent (and even not-so-recent) past. Related tests on urine collected to identify drug use through urinalysis may identify medical conditions, such as epilepsy or pregnancy, formerly known only (or even unknown) to the person being tested.

Test subjects could be required to disclose use of other legitimate drugs (prescription drugs and over-the-counter inhalants, for example) that could, themselves, cause a positive result. Subjects could also have to disclose certain eating habits, such as the consumption of poppy seeds.

Despite its intrusiveness, urinalysis has been embraced with enthusiasm by private firms and governments alike in the United States. A 1987 survey reported that 58 per cent of the largest U.S. employers then had drug testing programs. In 1986, Ronald Reagan issued an executive order entitled "Drug-free Federal Workplace". It requires the head of each executive agency to establish a drug testing program to detect illegal drug use by federal employees in sensitive positions. The executive order also authorizes testing for anyone applying to work in an executive agency. The U.S. Department of Transport has issued regulations requiring drug testing for transportation workers. As discussed later, this has direct implications for Canadian drug testing policy in the transportation sector.

The private sector in Canada appears equally enthusiastic about workplace urinalysis. A recently-reported Arthur Anderson and Co. survey stated that 48 per cent of Canadian small business executives favour drug testing for their employees. However, reliable numbers are not available on the number of Canadian firms which have actually adopted drug testing programs.

The government of Canada, while initially showing great restraint in the face of drug testing pressures, now appears willing to embrace the process in a range of situations. Urinalysis programs involving inmates, parolees, members of the Canadian Forces and (indirectly) athletes have been in operation for varying periods. Is the announcement in March of two new and broad-ranging testing programs by Transport Canada and the Department of National Defence a signal of the intention of the government to expand urinalysis programs dramatically? This document argues that many elements of these present and expanded drug testing programs can be characterized as unnecessary "overkill".

The growing pressures in society and government for drug testing programs and the intrusiveness of both testing procedures and their results on personal privacy led the Privacy Commissioner to undertake a review of federal government drug testing policy and practice.

While there is no doubt that drug testing infringes personal privacy in a profound sense, one must not be blind to the need to protect the public interest. R.I.D.E. programs, for example, are seen as justifiable intrusions on private rights to safeguard the public good, even in light of the *Charter of Rights*.

The recommendations contained in this report are offered as a contribution to the ongoing debate and a guide to government. The development of drug testing policies and practices which respect the requirements of the *Privacy Act* and which keep in appropriate balance public and private rights will be a unique and difficult challenge.

Seeking to find an appropriate balance, one might bear in mind a chilling comment eloquently stated by the editor of *Harper's Magazine* in a recent essay entitled: "A Political Opiate". Lewis Lapham analyzes a preoccupation with the problem of drugs in society as follows:

"But the war on drugs also serves the interests of the state, which, under the pretext of rescuing people from incalculable peril, claims for itself enormously enhanced powers of repression and control.

*For the sake of a vindictive policeman's dream of a quiet and orderly heaven, the country risks losing its constitutional right to its soul."*⁵

Widespread drug testing is enormously attractive as a simple, quick fix to a complex social problem. Are the really tough issues—workplace stress, ignorance, inadequate employee counselling and the continuing failure to treat substance abuse as a health problem rather than a social deviance—so threatening that we must pursue a course which undermines many of our hard-won fundamental liberties?

Few would accept a "war on drugs" strategy which permitted employers or the state to intrude into our homes without reasonable suspicion, no matter how helpful such intrusions might be in addressing the drug problem. Yet governments, apparently with some public support, find drug testing so attractive that they propose to authorize intrusions into our bodies.

The burden of proof now rests on the shoulders of government to demonstrate that, in authorizing such intrusions, our "constitutional soul" has not been sacrificed.

PART I

VARIABLES IN THE DRUG TESTING PROCESS

Drug testing can take many forms and involve many variables, among them the following:

- (a) the justifications for testing: for example, personal or public safety, reducing the demand for illegal drugs, enhancing employee productivity, reducing the likelihood of employee theft to support drug habits;
- (b) what types of drugs are being tested for and the "threshold" concentration of each drug that will lead to calling a test result positive;
- (c) who should be tested: job applicants, employees, workers in industries regulated by government, athletes, members of the public applying for benefits, and in what circumstances: pre-employment, post-accident, with cause to suspect impairment, without cause, at random, or some combination of these;
- (d) the testing method: blood, urine, hair, saliva, psychological, breath, and the variety of testing protocols that may be used under each category;
- (e) what testing seeks to identify: present use, present use and present impairment, past use, or past use and past impairment; and
- (f) the intended uses of the test results: dismissal, treatment, discipline, prosecution, refusal of benefits, denial of eligibility to participate in sporting events.

An informed understanding of the scientific limitations of the testing method and a careful delineation of the precise goals of the testing program are prerequisites to any decision as to the effectiveness of a drug testing program. Legal considerations—including the *Privacy Act*, the *Canadian Human Rights Act* and the *Charter*—must also be incorporated into the analysis.

For example, a testing program that does not confirm positive results from screening tests will be unacceptable because it generates many false positives. Urinalysis to confirm impairment would not be useful, even with the proper confirmatory tests, since urinalysis can show past use only. It cannot show either present use or present or past impairment. Finally, even a properly designed test intended to confirm drug use may nonetheless be unacceptable because of *Charter* guarantees of "liberty" and protections against unreasonable search and seizure.

In what follows, several variables that may be involved in drug testing are explored in greater detail.

(a) The Justifications for Testing

Proponents of drug testing advance any of several justifications.⁶ Some are more relevant to certain environments (the workplace, for example) than others. Much of the following material describing the justifications for testing is based on an analysis of American literature and surveys, given the limited Canadian material and surveys on the subject.

(i) Reducing the demand for illicit drugs

Testing reflects society's concern about the "pervasive" use of illicit drugs and reduces the demand for them. This is clearly an important, if not the most important, justification behind President Reagan's 1986 executive order.⁷

The executive order calls for a drug free federal workplace in the United States and focusses on illegal drugs.

The threat of a drug test which might jeopardize one's livelihood may deter a person from using illegal drugs. Thus, it is argued, drug testing can reduce the demand for illicit drugs⁸ and complement attempts to reduce the supply of drugs. Drug testing programs aimed at reducing demand would focus only on *illicit* drugs—those that are banned outright or that have been obtained through illegal acts (such as the doctoring of prescriptions).

Private employers may argue that, by testing for illicit drugs, they too are doing what they can to reduce the demand for illicit drugs. One recent American survey suggests that 10 per cent of one sample group of large American corporations with testing programs justified them as a means to curb illegal drug traffic.⁹ However, enhancing workplace performance (through reducing accidents, protecting a safe work record and improving productivity), appears more often to be the goal of private sector testing.¹⁰

Almost any group—government, sporting or business—could rely on the justification of reducing drug demand for testing. That justification could in fact support testing an entire population.

(ii) Health and safety

Protecting health and promoting safety are often put forth as objectives of testing programs. These objectives have four aspects:

- (a) protecting the *safety of persons being tested* when these persons might be injured through impairment (examples might include impaired driving or operating machinery in a factory).¹¹ Testing drivers for blood alcohol under the *Criminal Code* is perhaps the best known example of drug testing premised (in part) on this objective;
- (b) protecting the *safety of co-workers* by detecting an impaired worker who might cause injury or death. Mine workers, nuclear industry workers, military personnel, police officers, firefighters, train and aircraft crews are examples of those who could be endangered by impaired colleagues;
- (c) protecting the *public safety* by detecting impairment, or risk of impairment, in anyone whose impairment could harm the public—for example, a truck driver, pilot, train engineer or person operating a nuclear facility. Testing to detect blood alcohol levels is often justified using the public safety argument. Similarly, parole authorities might justify drug testing as a condition of parole by arguing that it will enhance safety in the parolee's community by reducing the risk of the parolee committing aggressive, anti-social acts while under the influence of drugs or to obtain money for drugs. This justification has been identified as the rationale for the government of Canada's consideration of testing;
- (d) protecting the *health of the person being tested* in the short run, long run, or both. Test results could signal the need to help the person who tested positive. The use of certain drugs (nicotine,

alcohol, cocaine, for example) can cause health problems—some minor, and some grave.

The health and safety justification can be used to justify workplace testing and testing wholly apart from workplace considerations. This type of testing program would not distinguish between licit and illicit drugs.

(iii) Efficiency, economy and honesty

Drug testing may be justified as a technique to develop more productive workers, reduce health care costs, verify employee honesty and reduce liability for damage caused by impaired workers.

(a) promoting efficiency. Employees who are not impaired by drugs (or, indeed, by other factors, such as lack of sleep) will be more productive. They will also be less likely to damage the employer's property. To be consistent, a testing program derived from this justification would not distinguish between licit and illicit drugs. It would focus on any drug that caused or might cause impairment.

(b) reducing health care costs. A reduction in drug use, both licit and illicit, may result in lower health care costs. Both government and the private sector might rely on this justification for testing.

(c) verifying honesty. Persons who possess and use illicit drugs are breaking the law. If they break the law in this manner, they might be willing to do so in other circumstances (for example, by defrauding their employers or government agencies which provide benefits). As well, the high cost of illicit drugs may force some persons to commit crimes, including work-related crimes.

Testing may also be used to ensure the integrity of those in drug law enforcement (police, customs officers, prosecutors, judges). Those whose duties involve suppressing the trade in illicit drugs should be beyond any suspicion that they are improperly implicated in the trade. Their involvement in any way could compromise drug law enforcement and the safety of colleagues.

Testing to verify honesty would generally lead to tests for illegal drugs only. Testing to improve the integrity of sports and to ensure that athletes have no unfair competitive advantage, however, could focus on any banned substance, legal or illegal, that *enhances* performance.

(d) avoiding liability for employees who may injure or kill others while impaired. In the United States, the concept of "negligent hiring" has persuaded some employers to test. Employers who hire (or continue to employ) a person who uses drugs may fear liability if the person becomes impaired and causes harm while on the job.

(iv) Harmonization with requirements established by other countries

In the Canadian context, this justification for testing is especially important. The United States government and private sector have both strongly advocated testing for illicit drug use. American policy reaches into Canada through American transportation regulations and the imposition by American parent companies of testing programs on their Canadian subsidiaries. Canadian owned and domiciled companies could decide to test their own employees to retain access to the U.S. market. The Canadian testing programs that may flow from these political and economic realities

will be shaped in part by the nature of the testing programs in the United States. The drugs attacked by the United States Department of Transport regulations, for example, are those, we now know, for which Canada feels the pressure to test.¹²

Similarly, pressures from international sports bodies—the International Olympic Committee and international sports federations—will shape Canadian athlete testing policies.

(v) Comment

Most drug testing programs are based on a hybrid justification. An employer's desire to have productive employees and at the same time to discourage illegal activity may both be used to justify one program. Vetting employee honesty and reducing unsafe work practices may be used to justify another.

President Reagan's 1986 executive order¹³ offered several justifications for testing for the use of illegal drugs: to prevent lost productivity, to prevent the funding of organized crime through the drug trade, to promote public trust in federal employees, to increase reliability and good judgment and to prevent irresponsible behaviour which could pose a threat to national security.

The drug testing strategies announced in March, 1990 by Transport Canada and the Department of National Defence justify testing as a means to enhance safety, both public and "on-the-job". The Department of National Defence strategy also relies on other justifications—operational effectiveness and a substance abuse-free Canadian Forces among them. There is continuing debate, however, about the extent to which testing programs can contribute to accomplishing the goals identified above.

(b) Which Drugs to Test for

The drugs being tested for will vary with—the purpose of the test and with the bias of those calling for testing. If, for example, an organization wanted to identify drug use which could result in impairment, it should test for legal drugs (alcohol and over-the-counter drugs), prescription drugs and illegal drugs that can cause impairment. If it wished only to identify illicit drug use, it obviously need not test for legal drugs.

The testing program instituted under President Reagan's executive order focusses on the *use* of illegal drugs only. It appears only peripherally interested in *impairment* by illegal drugs. It does not address testing for the use of or impairment by legal drugs (such as alcohol). The executive order calls for testing for illegal drugs as defined in Schedule I or II of the *Controlled Substances Act* (CSA). Hundreds of drugs are included in those schedules.¹⁴

At a minimum, tests must search for cocaine and marijuana.

The Department of National Defence and Transport Canada testing policies, however, are not limited to testing for illegal drugs. They include testing for alcohol. The Transport Canada policy also addresses the use of other legal drugs, for example, over-the-counter and prescription drugs which may impair.

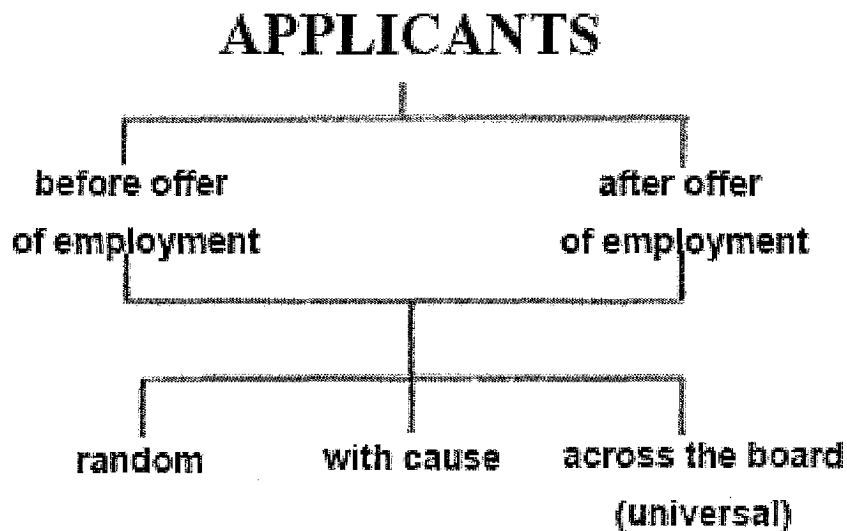
After deciding what drugs to test for, those testing must decide the level of concentration of the metabolized by-products ("metabolites") of a drug in a person's urine that will lead to a "positive" test result. There is general agreement that a certain concentration of a substance—a metabolite of cocaine, for example—must be found before a test is declared "positive". Threshold levels must be set for each drug.

(c) Who Should be Tested and in What Circumstances

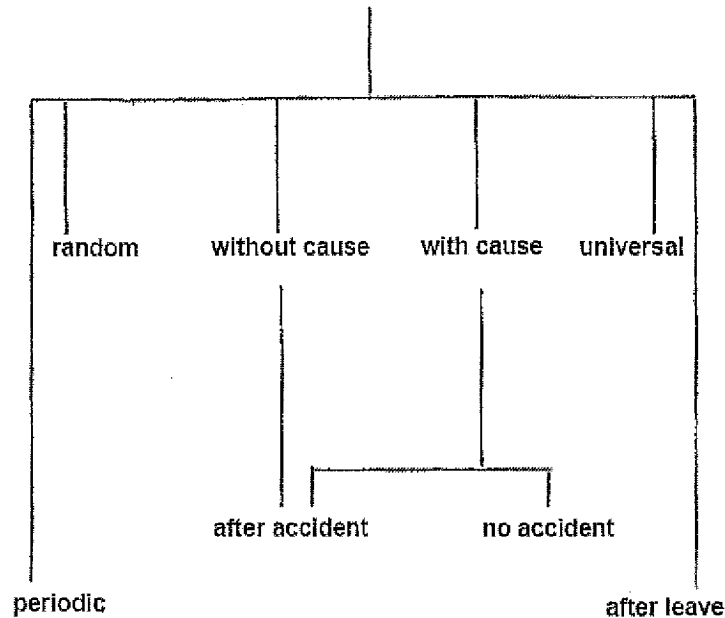
Any organization contemplating testing must consider who to test and what circumstances should trigger testing. An employer may want to test an employee after he or she is involved in an accident. Another employer might test simply on suspicion of drug use. Still another might test only where an employee has been involved in an accident and where drug use and impairment are suspected as a cause of the accident. Employers must decide whether to test all employees, senior management, unionized employees, employees whose duties could affect safety, or some combination of these. When coupled with the range of drugs that can be tested for, this creates an enormous and complex array of testing options.

(i) Employees and job applicants

Testing programs for employees and job applicants could take any of the following forms:



EMPLOYEES



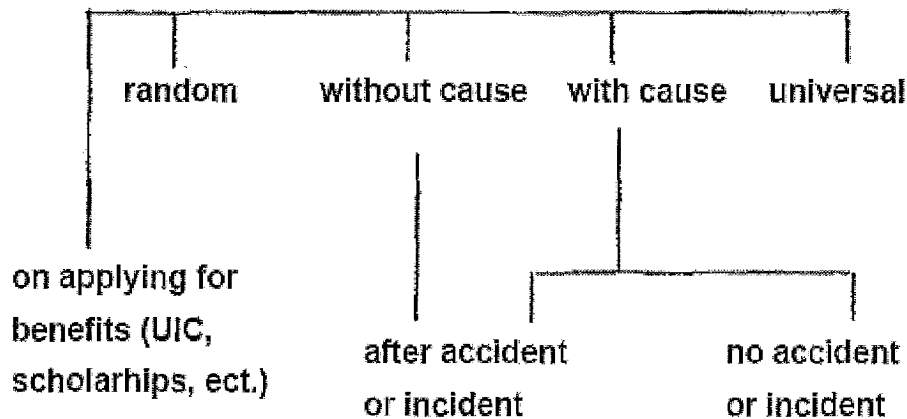
Note: The definition of "with cause" could be designed to include any of the following situations:

- with (reasonable) cause to suspect (or believe) drug use on the job or at any time;
- with (reasonable) cause to suspect (or believe) drug use on the job or at any time *and* resulting impairment;
- with (reasonable) cause to suspect (or believe) drug use on the job or at any time *and* impairment that may cause or contribute to an accident or incident or that may have caused or contributed to an accident or incident.

(ii) Clients of government and the general public

Testing programs for government clients (parolees or inmates, for example) or members of the general public (public assistance applicants, students on scholarship, athletes) might take any of the following forms:

CLIENT OR GENERAL PUBLIC



(d) The Testing Method

Added to the range of options listed above are several relating to the mechanics of testing. Among the types of drug tests now available or contemplated are urinalysis, breathalyzer, blood, hair and psychological profile.

(i) Urinalysis

In Canada the most commonly used test for drugs other than alcohol is urinalysis. Subjects are required to give a urine sample. The test seeks to locate in the urine the drug or metabolites of the drug being tested for. Apart from breathalyzer and blood testing for blood alcohol levels, urinalysis appears to be the sole drug testing method used by the federal government. Several federal institutions, including Correctional Service Canada, the National Parole Board and Department of National Defence, currently use urinalysis. Urinalysis will also be a key component of the testing strategies announced by Transport Canada and the Department of National Defence. All these programs are explained in Appendix A.

Urinalysis itself, however, does not consist of a single, well-defined process. It may involve any of several different "screening" and "confirmatory" tests. The type of drug being sought will often determine which method of urinalysis is to be used. Some are better at identifying certain drugs than others. Other factors affecting the testing method are the relative costs of various methods of urinalysis and the degree of expertise needed to conduct a given test procedure.

(ii) Other forms of drug testing

The *Criminal Code* breathalyzer test detects the presence and concentration of alcohol in the breath, which can be correlated with blood alcohol levels. A level of impairment is legislatively presumed from this information. When a breath sample cannot be obtained, the Code sometimes permits taking a blood sample. Breathalyzer testing cannot identify the use of or impairment by other drugs.

Some proponents of testing have explored psychological testing to determine the propensity to use illicit drugs. This method, however, fares poorly as a device to identify present or future drug users.¹⁵

Another test analyses hair strands. Like the rings on a tree, strands of hair can record past events—in this case, drug use. A five-centimeter strand of hair might allow the tester to identify what drugs its owner had ingested over the last three months. This test, however, could not detect recent use (within the last three to five days). Still, it could be combined with other tests (urinalysis, for example) to develop a complete picture of drug use in the immediate and more distant past.

Hair analysis has not yet been shown to be a viable means of identifying past drug use. Even so, it has the potential to become a valid testing procedure. In one sense, obtaining a hair strand is less intrusive than getting a urine sample; a strand can simply be snipped from a person's head. In another sense, it may be much more intrusive, allowing the tester to probe much deeper into the subject's past.

This paper does not deal with the mechanics of all possible forms of drug testing. For example, it does not discuss saliva testing. Instead, it concentrates on the method most widely used or considered for use today—urinalysis. Much of the analysis contained here, however, could apply to other testing methods.

(c) What Testing Seeks to Identify

(i) Distinguishing among past and present impairment, and past and present use of a drug

Urinalysis can indicate only that a person has consumed a drug within the recent past (how far into the recent past will vary according to the drug being tested for). It cannot tell whether a person who has been tested is now using the drug.

At best, a person who tests "positive" for drug use may have been impaired at some past time. One cannot, however, confirm that the person was impaired. Nor can a positive urinalysis confirm that a person was impaired when the test was taken.

Urinalysis cannot determine precisely when the drug was used, (although it can generally tell that it has been used within the last few days).

¹⁶ Nor can it identify the quantity of the drug ingested.

To summarize:

- urinalysis can detect past use of a drug;
- **urinalysis cannot confirm present impairment;**
- urinalysis cannot **confirm** past impairment;
- urinalysis **cannot confirm present use;** and
- urinalysis cannot determine the quantity of the drug consumed.

Accordingly, the limited information provided by urinalysis is in fact of little use in many situations where employers and others are anxious to test. At best, testing may deter drug use, but this effect has not been conclusively shown.¹⁷

(ii) The meaning of a positive urinalysis result

A positive test result means that the test has detected the drug or a metabolite of the drug being tested for. There may be any of several explanations for the positive result. It may mean that the person being tested:

- is a chronic user of the drug;
- has used the drug intermittently;
- is addicted to the drug;
- is under the influence of the drug; or
- is taking the drug under a physician's order.

False positives do occur, most often after screening tests, and to a much lesser extent after confirmatory testing. Some licit substances (poppy seeds, some asthma inhalants, for example) may produce positive test results.¹⁸

Urinalysis technology, if administered properly (screening tests coupled with appropriate confirmatory testing and the elimination of other possible substances that may cause a false positive), is acceptably accurate. Human error, however, may cause unacceptable levels of false results.¹⁹

(iii) The meaning of a negative urinalysis result

A negative test result may mean that the person who has been tested:

- is not using the drug being tested for;
- has taken the drug to be detected by the test but is not taking a large enough dose for it to be detected;
- is not taking the drug frequently enough for it to be detected;
- the sample was collected too long after the use of the drug; any drug metabolites have passed already through the person's system, or
- the sample has been diluted or tampered with.

(f) Intended Uses of Test Results

Test results can be used for a range of purposes. Employers testing job applicants might refuse to hire those who test positive (although federal and provincial human rights codes may prohibit this). Current employees may be dismissed, denied promotion, ordered to undertake treatment or relieved of certain job duties. A positive test result may interest investigative bodies which perform security clearances for federal government agencies. A positive test result may prevent a person from obtaining positions of trust in the future.²⁰

Outside the workplace, the uses made of results may be equally varied. Athletes who test positive may lose their funding, be stripped of awards or records and banned from competition. Parolees who test positive may see their parole revoked. Inmates who test positive may face discipline.

We are aware of no cases where positive test results have been reported to law enforcement authorities (except for breathalyzer or blood tests administered by or through the police). In any event, criminal charges would not result simply from a positive urinalysis. Existing criminal law does not punish the simple use of a drug.²¹ It focusses instead on possession, manufacturing and trafficking, none of which can be proved in law by a positive test result.

PART II

DRUG TESTING AND GENERAL PRIVACY ISSUES

(a) Introduction

Part I outlined several justifications for drug testing and discussed the variables involved in the process. Part II addresses privacy issues arising from drug testing. It argues that drug testing is intrusive and should be strictly circumscribed. Privacy considerations, however, are not the only arguments favouring limits on drug testing. Several general arguments (some interwoven with privacy arguments) are also set out here.

(b) The Objections to Drug Testing

Among the arguments advanced against testing are the following:

- the inability of most current tests to measure present or past impairment or detect current use. Most drug tests, including urinalysis and hair analysis, can measure only the past use of a drug. They cannot measure past or present impairment or present use. As one research paper states, there is virtual unanimity in literature that urinalysis cannot be used to make accurate inferences about the extent of impairment at the time a drug is consumed. Nor can urinalysis give rise to an inference of the "hangover" effects of drug consumption.²² Thus is the value of the test severely limited. In short, a highly intrusive process—urinalysis—produces little useful information.

Some argue that if "supervisors supervised and managers managed", there would be almost no need for drug tests. As one organization has argued:

"How can an employer identify such an individual [one impaired by drugs or alcohol]? By having an awareness of the signs of alcohol or other drug impairment and by using that awareness in performance monitoring.... The supervisor's awareness, coupled with active monitoring and documentation allow for early identification.

*This method of identifying alcohol/drug troubled individuals is known as the performance model. Its focus is limited to productivity and safety in the workplace; it does not deal with the issue of use away from work unless that use affects the job. The value of the model is that it allows management to intervene on the basis of legitimate performance expectations and to maintain union support in doing so."*²³

- incomplete coverage and the need for repeat testing. Urinalysis, for example, can identify cocaine, benzodiazepine (tranquilizer) or amphetamine (stimulant) use within the preceding few days only. A person may have used drugs a week before a test, but would still test negative. Hence, urinalysis could identify only some of those who may have used drugs within the relatively recent past. It cannot therefore be used to make definitive statements about the person's long term drug-free status (hair analysis can assess drug use over a longer period, but is not yet acceptably accurate).

To be even reasonably sure of continuing drug-free status among employees or clients, frequent re-testing would be needed. This would compound both the number of intrusions and the expense of the process.

Repeat testing may encourage in persons a grudging, but unwise, tolerance of intrusions into their personal lives. Do Canadians wish themselves to become conditioned to such intrusions? Complacency could lead to the further acceptance of what should be unacceptable intrusions. As one commentator argues:

"Drug testing is just one of a long list of training procedures that operate in the disciplinary technology of power to inculcate automatic docility in the work force. Because it is relatively recent, this part of the drill has engendered public debate. Newer or more intrusive procedures, such as blood tests for the AIDS virus or lie-detectortests, are even more controversial. Many other training procedures, such as punching a time clock or taking various sorts of aptitude or skill-verifying tests, have become so habitual that they are no longer questioned or even noticed. When giving a urine sample becomes as routine as divulging ones marital status or social security number on a farm, it will be fully integrated into the drill that creates automatic docility."²⁴

- the impact of drug testing on organizational morale. Obliging employees and job applicants to submit to drug testing may cause deep resentment (some employees, however, may welcome drug testing programs that might enhance their own safety by detecting potentially impaired co-workers). Employer-employee relations do not need the additional strains that drug testing will bring.²⁵ This may particularly be the case when the test searches, not for on-the-job impairment, but (as most tests can only do) simply for drug use. Such testing often delves into the activities of employees outside working hours.
- the danger of inaccuracies creeping into the process. Drug testing is a highly technical process. It requires highly skilled personnel to perform repetitive tasks. Simple boredom may result in unacceptable levels of error. Add to this the expense associated with confirmatory testing (an especially important consideration in the private sector²⁶), and the result may be a recipe for mediocrity in testing.

To confirm that a person has ingested the drug being tested for, two tests are necessary. The first is a screening test—commonly the EMIT (Enzyme Multiplied Immunoassay Technique). If the screening test produces a positive result, a confirmatory test must be performed. Several confirmatory tests are available, but the GC/MS (gas chromatography with mass spectrometry) appears to be the most reliable.

Even with confirmatory testing, however, drug-free employees may find themselves placed under suspicion or have their careers ruined on the basis of the initial screening test. David Linowes reports in *Privacy in America: Is Your Private Life in the Public Eye?*:²⁷

"In his book The Great Drug War (1987), Dr. Arnold Trebach... says that 'approximately 5 million people were tested this year in America' for drug use. He further states that while drug-testing companies, such as Syva Company of Palo Alto—makers of the EMIT test—claim a 95 percent accuracy rate, the rate would be more like 90 percent when the tests are performed by people other than Syva's own technicians. According to Trebach, 'If there were a false reading rate of 10 percent, with half false positives and half false negatives, this could mean that approximately 5 percent of the approximately 5 million people tested this year in America were accused improperly of being drug users. Thus, there is a good chance that 250,000 employees were placed under suspicion or had their careers ruined for no reason.'"

Confirmatory testing, such as the GC/MS, has the theoretical capacity for virtually perfect accuracy. GC/MS testing could clear up the mis-labelling that occurs with false positives determined through the EMIT screening test. Theory and practice, however, may not coincide. As the British Columbia Civil Liberties Association has noted:

"There is nearly unanimous consensus that if one is willing to spend the money to acquire the appropriate technology, train and motivate the operators, and to ensure meticulous record keeping, specimen handling and chain of custody and reporting, accurate and specific identification of drug metabolites can be achieved."

...

"Though the potential for virtually perfect accuracy is admitted (using GC/MS and given flawless conditions, adequate time and funds, and strictest adherence to all procedures), one U.S. Court has held that even confirmation by GC/MS is insufficient because of the possibility of human error."

...

"Dull, repetitive work that nonetheless requires highly skilled technicians [as GC/MS testing does] is a fertile breeding ground for human error—most tests will be negative, punctuated by the occasional, more interesting, positives. The livelihoods of those being tested rest upon extreme diligence in routine tasks such as cleaning glassware, affixing and recording labels, reading meters, transcribing numbers, key punching and filing. Testing labs vigorously claim to have solved this problem, but nothing in the published error rates to date justifies these claims. Research on similar work conditions elsewhere would lead one to suspect that the error rates will continue to be unacceptably high."²⁸

- testing methodologies must be developed and procedures established to ensure that samples will not be adulterated or mixed with other samples (the "chain of custody" issue). Sophisticated personnel must be hired and trained to collect samples and perform tests. Threshold concentrations must be set. Officials must decide what drugs to test for, and what to do with the results. They must ensure the reliability of the testing facilities—a time consuming and expensive process in itself. Storage facilities will be needed to keep samples in case of challenge. Litigation will inevitably result from the imposition of testing programs. The resulting information—an indication of past drug use—may often not be sufficiently useful to warrant the problems and costs associated with the testing process in the first place.
- urinalysis is highly intrusive. It not only requires the surrender of a body fluid, but, to prevent the subject adulterating or substituting the sample, it may be necessary to observe the subject's genitals as he or she urinates. The disposal of body wastes is generally considered a highly personal act. Urinalysis may expose this act to close visual scrutiny. Such observation is intrusive and humiliating. Indeed, for urinalysis, it could be necessary for the subject to be nude while urinating (and possibly under direct observation as well).²⁹ Adulterating substances could otherwise be hidden in clothing.

Technology may one day provide a test that will avoid direct observation of this highly personal act. Perhaps hair analysis will achieve suitable credibility so that only a single strand of hair will be required. Still, any process of acquiring personal information from a person's biochemistry is intrusive. Privacy considerations outweigh all but the most powerful justifications for testing. As

Mr. Justice La Forest stated in a 1988 Supreme Court of Canada decision, *R. v. Dyment*: "[T]he use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity".³⁰

The intrusiveness of testing does not end with the surrender of a body substance and the possibility of direct observation. Test subjects may be required to disclose their use of other drugs (prescription drugs and over-the-counter inhalants, for example) that could cause a positive test result. This in turn may disclose information about the health of the person.

Other tests (not connected to drug testing) could be performed on urine provided for drug testing, identifying conditions that the subject does not want to disclose (diabetes or pregnancy, for example) or does not even know about.

- the substitution effect. Persons likely to be tested for the use of one substance (for example, marijuana) may simply switch to an equally harmful drug that is not being tested for. Testing for illicit but not licit drugs encourages this type of behaviour. Users of illicit drugs may simply switch to alcohol. If the object of the testing program is to reduce the use of illicit drugs, this result is appropriate. If, however, the object is to reduce impairment by any drug or to reduce safety or health risks, the substitution effect may create a more serious problem than existed before testing began.³¹
- creation of an underclass of chronic unemployables. Employees or applicants who test positive may become unemployable, even though they can safely and competently perform their job duties, and even if they have ceased using the drugs in question. Their past may haunt them long after they have "gone straight".
- creation of a false sense of security. By focussing on drug use, government and employers may overlook other causes of incidents or accidents. Accident investigators who find impairment by drugs as a possible cause, for example, may be tempted to ignore other causal factors and perpetuate the danger. They will have found an easy scapegoat. A 1988 Canadian Labour Congress submission to the Standing Committee of Transport on Bill C-105 stressed this point:

"Drug testing is a 'red herring' and is designed explicitly to draw attention away from other causes of health and safety hazards that cause accidents. It is an attempt to shift the burden of responsibility for safety problems onto employees and to hide employer failure to ensure safe and healthy workplaces."

*"Alcohol and drug testing takes the employer and the government off the hook. It gives the appearance that they are doing 'something' about safety."*³²

- drug testing may be the "solution" to a problem that has been exaggerated. This argument has two dimensions. First, is there a problem that needs a solution? Second, if there is, will drug testing help to solve it?

Alcohol abuse is implicated in thousands of traffic deaths yearly. Is there evidence that other drugs are causing significant problems relating to job performance, on-the-job safety or public safety? In the absence of such evidence, are there other problems caused by drug use? If the answer is no, why test?

Even if the answer is yes—that there are problems caused by drug use—will testing contribute to solving them?

- lack of procedural safeguards. Some forms of drug testing are as intrusive as the exercise of law enforcement powers by the state. Yet they are subject to few of the safeguards available to protect people from the exercise of other investigative powers by the state. An employer might randomly test employees without any reasonable "individualized" suspicion that they use or are impaired by drugs. When such a power has been exercised by government institutions in Canada or the United States, it has often been challenged as unconstitutional. As yet, however, the Supreme Court of Canada has not considered the constitutionality of urinalysis. It has, however, spoken in support of the integrity of the person in the face of law enforcement actions by the state.³³

Private sector testing has the potential to be even more intrusive; few laws, apart from human rights codes, govern private sector testing and how the resulting information is used. The dangers of "free-form" private sector testing—testing with no or few controls to safeguard those being tested and with a lack of concern for human dignity—are real.

- The impact on personal autonomy. Drug testing coerces conformity—abstention from consuming psychoactive substances, both legal and illegal, for example. It restricts autonomy. To what extent should governments or employers be permitted to use the coercive power of drug tests to restrict the consumption of substances? Is it sometimes right to coerce (to prevent impaired driving, for example), and sometimes wrong (to regulate the simple consumption of substances away from the workplace in situations that create no danger for others)?

(c) Conclusion

Testing imports an aura of oppression and Big-Brotherhood. Some forms of testing—breathalyzer tests to detect impaired driving or operation of vessels or aircraft, for example—have broad public support. But would a knowledgeable public accept testing in circumstances that may do little to enhance public safety?

Testing supposes an employer's (or government agency's) right to exercise substantial control over individuals and to intrude into some of the deepest recesses of their lives. The technology of drug testing is being allowed to shape the limits of human privacy and dignity.

The situation should be the other way around. Notions of respect for individual privacy and autonomy should place limits on the intrusions which technology will be permitted to make into personal lives. In other words, the uses of technology should not limit human rights; human rights should limit the uses of technology.

PART III

DRUG TESTING AND THE PRIVACY ACT

(a) Introduction

The *Privacy Act* was enacted in 1983, setting out principles of "fair information practices". Among other obligations, it requires government institutions to:

- collect only the personal information needed to operate its programs;
- collect the information directly from the individual concerned, whenever possible;
- tell the individual how it will be used;
- keep the information long enough to ensure an individual access; and
- take all reasonable steps to ensure its accuracy and completeness.

The *Privacy Act* generally does not compel collection, use or disclosure (except disclosure to meet access requirements) of personal information; it merely permits it.

The Act defines "government institution" as any department, ministry of state, body or office of the Government of Canada listed in the schedule to the Act. Currently, the Act covers some 150 institutions. It does not apply to the private sector.

(b) Specific elements of the *Privacy Act* and their application to drug testing

(i) Personal information

The Act applies only to "personal information". Section 3 defines personal information as:

"information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing, ... information relating to the ... medical, criminal or employment history of the individual..."

In the context of drug testing the Act covers the following personal information:

- test results;
- the fact of taking the test, being advised, asked or ordered to take the test, asking to be tested, or refusing to be tested, and any discussions about the test;
- peripheral information such as medical or physical conditions that may influence test results, and other medications or substances used or ingested by the test subject;

- information suggesting cause for testing (for example, the apparent impairment of a person while on duty, the fact of being charged with possession of an illicit drug, or disclosure of drug use by the person to a co-worker);
- any treatment programs relating to drugs that the person may have entered, been advised or ordered to enter, or refused to enter; and any disciplinary measures or criminal charges relating to drugs.

(ii) Collection of personal information

Section 4 of the Act states:

"No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution."

An institution wanting to test cannot, by simply creating a testing program, comply with section 4. Implicit in section 4 is the requirement that no such information is to be collected unless (1) the collection is part of an activity or program falling within the statutory mandate of the institution and (2) the collection is a necessary element of a mandated program or activity. Even if the test subject consents, the collection of information by testing will not be valid unless it meets these two conditions.

Specific statutory authority for an institution to conduct drug testing of employees or clients will, of course, ensure compliance with section 4.

Despite the fact that section 4 does not require specific statutory authority for any form of information collection, the additional safeguard of Parliamentary approval is highly desirable for highly intrusive forms, such as urinalysis. Indeed, it is our view that elected officials should be given the opportunity to carefully weigh the evidence as to whether the public interest in detecting drug use through mandatory drug testing outweighs, in specific cases, individual privacy rights. This view is consistent with our previous recommendation in *AIDS and the Privacy Act* that mandatory HIV antibody tests be permitted only with Parliamentary authority.

Without specific statutory authority to collect personal information through drug testing, determining compliance with section 4 becomes more difficult. It involves assessing the necessity principle and weighing the public interest in collection against the privacy intrusion involved.

A) Assessing the justifiability of intrusions caused by testing programs

The principal privacy issue flowing from drug testing is not whether testing is intrusive. It is. Urinalysis is particularly intrusive, requiring as it may either a pre-test physical search, the direct observation of an intimate bodily function, or both.³⁴ The principal issue is in what circumstances the intrusions occasioned by testing are justified.

Despite the limited inferences that can be drawn from test results and despite the intrusiveness of drug testing, the *Privacy Act* does not prohibit all drug testing. However, we have concluded—as did the Standing Committee on National Health and Welfare—that only in exceptional cases in which drug use constitutes a real risk to safety is drug testing justifiable.

The following justifications alone are **not** sufficient under section 4 of the *Privacy Act* to legitimize drug testing: the desire to promote efficiency, economy and honesty, the desire to reduce the demand for illicit drugs and the desire to comply with foreign testing requirements.³⁵ Although specific legislation could permit or require testing in these circumstances, such legislation would not be appropriate. Nor would it likely comply with the *Charter*.

Collecting personal information by mandatory drug testing, without cause to suspect drug use by or impairment of a person or within a group, and with no evidence to suggest that drug use or impairment poses a threat to public safety, would infringe section 4 of the *Privacy Act*. Such testing would violate the privacy of everyone in the group ordered to take the test. It presumes guilt without setting any threshold standard of reasonable belief or suspicion before the test is taken. It subjects the majority who are not using drugs to invasive procedures designed to single out the minority. Such testing is a fishing expedition, not a justifiable search. Moreover, few meaningful conclusions can be drawn from the test results. Yet those testing positive can suffer significant detriment.

At the other end of the continuum is testing where there is reason (or "cause") to believe that a person is impaired by legal or illegal drugs, the impairment poses a threat to public safety and there is no other effective means of reducing the threat (for example, it may not be possible to supervise the person closely). This testing is the easiest to justify (although urinalysis is still deficient, since it cannot measure present drug use or impairment).

It is not a fishing expedition. It is aimed at a person whose behaviour suggests impairment. It therefore does not subject large numbers of people to testing. Instead, it relies on specific evidence to identify a limited number of persons. Testing programs at this end of the continuum could more easily be brought into accord with section 4 of the *Privacy Act*.

Under the following circumstances, drug testing would be justifiable under the *Privacy Act*:

(1) Testing because of group behaviour as a whole:

A reliable survey or other method of monitoring may have identified that a given group (police officers, pilots or inmates, for example) has a drug-related problem. It may be impractical to counter the problem through a testing program based on reasonable suspicion about an individual (perhaps because individual activities cannot be adequately supervised or because the visible impairment caused by the drug use in question is too subtle to observe). In this case, the only (and still imperfect) course of action may be to test randomly.

The collection of personal information through random mandatory testing of group members on the basis of the behaviour patterns of the group as a whole may be justifiable, but only if the following conditions are met:

- there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;
- the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;
- the behaviour of individuals in the group cannot otherwise be adequately supervised;

- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

(2) Testing because of individual behaviour:

Most groups will not exhibit drug-related safety problems to the extent that would warrant random testing of group members. However, individual group members may still pose a safety risk if they are impaired by drugs. In such cases, it should be possible to collect personal information through mandatory testing when there is reasonable suspicion. A person might appropriately be tested if the following conditions are met:

- there are reasonable grounds to believe that the person is using or is impaired by drugs;
- the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;
- the person's behaviour cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 1

Government institutions should seek Parliamentary authority before collecting personal information through mandatory testing.

Recommendation 2

The collection of personal information through random mandatory testing of members of a group on the basis of the behaviour patterns of the group as a whole may be justifiable only if the following conditions are met:

- there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;
- the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;
- the behaviour of individuals in the group cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and

- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 3

A person who is not a member of a group which exhibits drug-related problem behaviour might appropriately be tested if the following conditions are met:

- there are reasonable grounds to believe that the person is using or is impaired by drugs;
- the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;
- the person's behaviour cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 4

Since drug testing programs designed primarily to promote efficiency, economy or honesty, or to reduce the demand for illicit drugs, would not satisfy recommendations 2 or 3, such programs would violate the *Privacy Act*.

Because public safety should be the principal consideration behind drug testing, tests should not distinguish between legal and illegal drugs. The focus instead should be on the harm caused by any substance that impairs.

Recommendation 5

Testing programs should not distinguish between legal and illegal drugs that can impair.

Direct collection and the duty to inform: section 5: Section 4 of the Act permits government institutions to collect personal information in defined circumstances only. Section 5 imposes additional limits on collection. These are the duty to collect information directly and to inform about the purpose of the collection.

Subsection 5(1) addresses direct collection. It states:

"5(1) A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2)."

The duty to collect directly in subsection 5(1) is not absolute. There are four exceptions. Subsection 5(1) permits indirect collection when direct collection is not possible or when the person to whom the information relates authorizes another form of collection. As well, the collection need not be direct if the personal information being sought may be disclosed to the institution under subsection 8(2). That

subsection sets out several circumstances where a government institution holding personal information may disclose the information, including disclosure to another institution. Finally, the collection need not be direct if it would result in the collection of inaccurate information or would defeat the purpose or prejudice the use for which the information is collected (subsection 5(3)).

Using information "for an administrative purpose" simply means using the information in a decision making process that directly affects the individual (section 3). Thus, a government institution relying on information about a person's drug use to decide a person's suitability for employment would be using the information for an administrative purpose.

Subsection 5(1) is, in our view, a legalistic way of saying, "If you want to learn something about a person, ask the person", unless the law authorizes another mode of collection. The section clearly contemplates having the individual volunteer his or her personal information to the fullest extent possible.

The collection of information through drug testing would only be considered direct collection under subsection 5(1) if the test subject truly volunteered to be tested. Mandatory drug testing therefore would be considered an indirect collection and would only comply with section 5 if it fell within one of the exceptions identified by the section.

Recommendation 6

Government institutions must wherever possible collect personal information used for an administrative purpose and relating to drug use or impairment directly from the individual (that is, if the person volunteers). Collection may be indirect (that is, from other sources or without the person's consent) in the following circumstances:

- when it is not possible to collect the information directly;
- when the person to whom the information relates consents to another method of collection;
- when the personal information may be disclosed to the institution under subsection 8(2) of the *Privacy Act*; or
- when direct collection might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.

Informing about the purpose of the collection: Subsection 5(2) of the Act imposes the duty to inform a person from whom personal information is being collected of the purpose of the collection:

"5(2) A government institution shall inform any individual from whom the institution collects personal information about the individual of the purpose for which the information is being Collected."

The institution is required to inform of the purpose only where the information is collected directly (voluntarily, in the case of drug tests) from that individual. If the personal information is not collected directly, subsection 5(2) imposes no duty to inform. Nor is it necessary to inform a person from whom information is collected of the purpose if informing might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which information is collected (subsection 5(3)). We recommend as a matter of policy, however, that even when information is collected indirectly, test subjects be informed of the purpose of the collection unless it would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the

information is collected.

Recommendation 7

Even when subsection 5(2) of the *Privacy Act* imposes no duty on a government institution to inform about the purpose of the collection, test subjects should as a matter of policy be informed. Only if informing the test subject would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected should the purpose of the collection be withheld from the person.

...

(iii) Retention and disposal of personal information

When personal information is used for an administrative purpose, the Act sets out retention requirements. Once a urine, hair or other sample is taken from a person and identified as belonging to that person (normally by labelling a container holding the substance) it becomes personal information. Accordingly, the sample (and other personal information) used for an administrative purpose must be retained for a specified period. Subsection 6(1) reads:

"6(1) Personal information that has, been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information."

Subsection 4(1) of the *Privacy Regulations*³⁶ states:

"4(1) Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution

(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and

(b) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act."

Consequently, a two year minimum applies for the retention of urine samples and the information relating to the samples.

A more troubling issue is the maximum period of retention. The appropriate maximum period may vary from case to case. However, positive test results retained by government should not be allowed to haunt persons many years after the test. It would be inappropriate for a government institution even to speculate that a person is a current drug user because of a positive test result from several years past. If the conditions for testing (set out in Recommendations 2 and 3) are met, the person could be retested to determine current use. If the conditions are not met, the person should not be retested.

Recommendation 8

Body samples and the personal information derived from those samples should be retained for the period prescribed by the *Privacy Regulations*, and be disposed of as soon as possible after the retention period has expired.

Subsection 6(3) imposes a duty to dispose of personal information in a certain way:

"6(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of such information."

Some personal information is more sensitive than other such information. A diagnosis of AIDS, for example, could have catastrophic consequences for the person affected if the information were released to the community. Information about a person's drug using habits, while perhaps not as sensitive as AIDS-related personal information, still merits strict safeguards. The release of the information could seriously impair a person's chance to obtain or hold employment. It could affect his relationship with co-workers or others in the general community. Given contemporary attitudes about drug use, discrimination is bound to flow from disclosure.

Even peripheral information—other "legitimate" drug use associated with a medical condition that had to be reported to clarify the results of a drug test, for example—could harm a person if released improperly. At the very least, it would be an entirely unwarranted disclosure of information which the person has a right to keep private.

Handling and disposal procedures should take into account the sensitivity of information related to drug testing. The *Security Policy and Standards of the Government of Canada* recognizes the sensitivity of personal information collected under the *Privacy Act*. Such information is considered "designated information" warranting enhanced protection.

Under section 5.7 (Appendix D), the Security Organization and Administration Standards, particularly sensitive designated information requires special security measures. Included is information concerning medical, psychiatric or psychological descriptions and information concerning a person's lifestyle. To identify particularly sensitive personal information, the Security Policy establishes an "injury" test. The information will be considered particularly sensitive if its disclosure, removal, modification or loss could reasonably be presumed to cause an invasion of privacy.

Using this injury test, information from drug tests or information suggesting drug use could easily be seen as particularly sensitive personal information. Among the special security measures that must apply to such information are those dealing with storage, processing, transmittal and destruction.

Those responsible for the handling and disposal of such information must comply with the *Security Policy and Standards of the Government of Canada*.

Recommendation 9

Procedures for the handling and disposal of personal information collected under the *Privacy Act* should reflect the sensitivity of the information. At a minimum, personal information relating to drug tests should be accorded physical protection at level B, as defined in the *Security Policy and Standards of the Government of Canada*.

(iv) Accuracy, currency and completeness of personal information

The *Privacy Act* imposes quality control standards on the personal information used by government institutions. Subsection 6(2) states:

"6(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible."

Note that subsection 6(2) does not require perfection. The obligation is to take all reasonable steps to ensure that the information collected is as accurate, up-to-date and complete as possible.

As accurate as possible: Ensuring that information relating to drug testing is as accurate as possible has two dimensions. First, the testing procedure should correctly identify those who have or have not used drugs in the "window of detection" period to which the test applies. Second, urinalysis results should be understood to refer to past use only, not present use or past or present impairment. Nor can urinalysis results be used to measure the quantity of the drug consumed.

Over time, drug tests will improve with changes in technology. Whatever the technology, drug testing should aim for the following:

- the greatest likelihood that a person who has not taken a drug during the test window period will test negative (the test must be highly "specific") and
- the greatest likelihood that a person who has taken a drug during the test window period will test positive (the test must be highly "sensitive").

In practice, there is a tradeoff between sensitivity and specificity. A highly sensitive test may result in a large number of false positives. A highly specific test may result in a large number of false negatives.

Urinalysis, today's preferred testing method, requires two tests to confirm positivity—a screening test and a confirmatory test. A screening test is highly sensitive. It may have an unacceptably high level of false positives if used alone. Accordingly, a positive screening test should never be used for an administrative purpose other than to suggest the need for a confirmatory test. National Health and Welfare should identify the appropriate screening and confirmatory tests to be used.

A negative screening test result, however, need not be confirmed before it is used for an administrative purpose as defined in the *Privacy Act*.

It might be argued that a negative urinalysis result should be recorded as indicating any of the following: that the person has not taken the drug being tested for, that the person took the drug, but not sufficiently often or in sufficient amounts to test positive, or that the person took the drug, but the sample was taken after the drug or its metabolites had passed from the person's system.

The ambiguity inherent in negative test results may lead those relying on the record to infer that the person in fact was a drug user, but escaped detection for one of the reasons set out above. Thus, a large number of persons who tested negative simply because they did not take the drug in question might be unfairly judged. By whatever means a government institution records negative test results, it should seek to ensure that the user of the information will be aware of the danger of making an improper inference about the meaning of a negative test result. Otherwise, anyone who takes a drug test could

fall under a cloud of suspicion, whether the result is positive or negative.

Recommendation 10

Government institutions should not use positive urinalysis results for an administrative purpose unless the results have been supported by confirmatory testing according to accepted scientific/ medical protocols approved by National Health and Welfare.

Government institutions may use negative screening test results for an administrative purpose without conducting confirmatory testing where the screening test has been conducted according to acceptable scientific/medical protocols which are approved by National Health and Welfare from time to time.

Recommendation 11

Government institutions should seek to ensure that those interpreting negative test results do not go beyond the inferences scientifically supported by the test.

Because of the complexity of the testing process—be it urinalysis or some other test—a government-wide testing protocol should be developed. National Health and Welfare is currently developing such a protocol, but it has not yet made it public.

Recommendation 12

Because of the complexity of the testing process—be it urinalysis or some other process—a government-wide testing protocol should be developed. At a minimum, the protocol should establish procedures for the following:

- sample collection, including procedures to permit the giving of samples in private, wherever possible;
- the appropriate screening and confirmatory tests to use for each drug being sought;
- threshold concentrations for each drug test (to determine when a result is "positive");
- chain of custody procedures to prevent tampering with or exchange (deliberate or accidental) of samples;
- standards for testing laboratories;
- the meaning of positive or negative test results; and

- security procedures governing the personal information relating to drug testing.

The need for repeat testing to ensure accuracy: Urinalysis can address only the past use of a drug during the "window of detection" period. Repeat testing would be necessary even to be reasonably certain that a person has remained drug free or is continuing to use drugs; it could be necessary to test several times a month, depending on the drug. Even then, the test would not reveal drug consumption in preceding hours, as the metabolites to which urine tests react may not yet have entered the urine.

As complete as possible: Institutions should take reasonable steps to ensure that personal information is as complete as possible. In the context of drug testing, a positive test result which may have caused by a substance other than the drug being tested for should always be reported with the test result. Any information indicating that legitimate substances may have caused the positive result should be included with the test result. In these circumstances, the test result should not be relied on as indicating use of the drug being tested for.

Recommendation 13

When a person tested for a given drug may have consumed other substances which could lead to a positive test result for that drug, such information should accompany the test result. The test result should not in such circumstances be accepted as indicating that the person has used the drug being tested for.

As up-to-date as possible: A urinalysis result indicating that a person has in the past used the drug tested for can be considered "as up-to-date as possible" if the information is used only to confirm past consumption. The institution using the positive urinalysis result should understand that the result indicates past drug use, not present use. To ensure the currency of information about drug use, the institution may need to re-test the person. Re-testing should occur, however, only if the conditions contained in Recommendations 2 or 3 are met.

Recommendation 14

An institution using urinalysis results for an administrative purpose should ensure that those using the results understand their meaning. A positive urinalysis result should not be used to identify present use, or past or present impairment by a drug. The institution should also ensure that those using the results understand that urinalysis cannot measure the quantity of the drug consumed.

(v) Use of information relating to drug testing

Section 7 of the Act governs the use of personal information under the control of a government institution:

"7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2)."

The relationship between subsections 7(b) and 8(2) requires explanation. Subsection 8(2) permits government institutions to disclose information for certain purposes. Subsection 7(b) permits the institution receiving the disclosed information to use it for those purposes.

Specific legislation may permit inconsistent uses. For example, legislation might permit the use of test results that determined a person's suitability to operate an aircraft as a foundation for criminal charges. (Such legislation might violate the *Canadian Charter of Rights and Freedoms*, but it would not offend the *Privacy Act*.)

Restrictions on use: Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- for the use for which the information was obtained or compiled (to assist in performing drug tests or analyzing test results);
- for a use consistent with that purpose; or
- for a purpose for which the information may be disclosed to the institution under subsection 8(2).

The government institution seeking the consent of the individual to additional uses should fully explain the consequences of the additional uses. It might tell the person about the consequences of consenting or refusing, but it should not coerce the person to consent.

The test itself may generate information that is not relevant to identifying drug use. That information should not be used for an administrative purpose and should be disposed of immediately.

Recommendation 15

Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- for the purpose for which the information was obtained or compiled by the institution;
- for a use consistent with that purpose; or
- for a purpose for which the information may be disclosed to the institution under subsection 8(2).

The government institution seeking the consent of the individual for additional uses should fully explain the consequences of the additional uses. It should avoid coercing the person to consent.

(vi) Disclosure of personal information

Section 8 of the Act describes when government institutions may disclose personal information under their control. Generally, persons must consent to the disclosure of their personal information. Subsection 8(1) states:

"8(1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance

with this section."

Subsection 8(2) lists approximately 13 exceptions to the general rule requiring the person's consent. In these circumstances, the institution may but is not obliged to disclose. The exceptions listed in subsection 8(2) include the following:

- disclosure for the purpose for which the information was obtained or for a consistent purpose;
- disclosure to comply with an Act of Parliament or any regulation made under the Act;
- disclosure to an investigative body specified in the regulations to the *Privacy Act*;
- disclosure to the Attorney General of Canada for certain legal proceedings; and
- disclosure in certain cases involving the public interest.

In two cases where subsection 8(2) permits disclosure (disclosure to a person or body for research or statistical purposes and disclosure in the public interest), the head of the institution holding the information must consent to its disclosure.

Subsection 8(2) also states that other federal laws override these disclosure provisions. The subsection 8(2) disclosure provisions are "[s]ubject to any other Act of Parliament". In other words, other federal legislation may permit disclosure of certain personal information in a wider range of circumstances than permitted by the *Privacy Act*. It may also impose greater restrictions on disclosure than does the Act.

The scheme for disclosure under subsection 8(2) can be summarized as follows:

- the individual can consent to any form of disclosure of personal information;
- if the individual refuses disclosure (or is not asked to consent to disclosure), the institution may disclose in some 13 circumstances set out in section 8(2); in two of those cases, the consent of the head of the institution is required;
- other federal laws may expand or restrict the right to disclose personal information; these laws take precedence over the disclosure provisions of the *Privacy Act*; and
- the *Canadian Charter of Rights and Freedoms* may restrict the disclosure provisions of the *Privacy Act* or other federal legislation or policies.

Government institutions seeking to disclose personal information under paragraphs 8(2)(f) to (m) should first seek the subject's consent. There would be no need to seek prior consent to disclosure under paragraphs 8(2)(a) to (e).

Even without consent, the disclosure provisions are sufficiently broad to permit a government institution to disclose information relating to drug tests in many circumstances. Subsection 8(2), however, is permissive. It does not force government institutions to disclose. Accordingly, every

government institution should focus first on the extent of the disclosure that should occur.

We recommend adding an additional safeguard to the permissive wording of subsection 8(2). In deciding whether to disclose personal information under paragraphs 8(2)(f) to (m), government institutions should consider the following factors:

- why the disclosure is necessary;
- the potential adverse consequences of the disclosure for the person to whom the information relates;
- the likelihood that the requester can and will maintain the confidentiality of the information; and
- the likelihood that the requester will use it only for the purpose for which it was originally sought.

We also recommend that government institutions which disclose personal information relating to drug tests or drug use maintain an audit trail to permit tracking the uses and further disclosures of the information. This is not a requirement of the *Privacy Act*. It may, however, help later in deciding whether the use and disclosure of such information should be restricted further.

In the workplace, what information should supervisors receive about test results? In our view, supervisors should be informed about test results only when disclosure is essential for public safety. In practice, this would mean disclosing only positive test results and, even then, in limited circumstances—for example, when the employee's drug use or impairment poses an immediate threat to safety.

Supervisors should generally be informed of positive results only after the result is confirmed and the employee has had the chance to discuss or dispute the test result with a physician. There may be rare situations of immediate risk to safety, however, that would warrant informing the supervisor before confirmatory testing is completed. The supervisor should be told of the possible unreliability of the test and should be immediately informed of the results of confirmatory testing. If the confirmatory test result is negative, the supervisor should be made to understand that the screening test result was almost certainly inaccurate and that the employee must not be penalized as a result.

Supervisors need not normally be informed about a positive test result if, for example, the employee leaves his or her position to undergo a drug rehabilitation program,

This procedure would differ somewhat for breathalyzer or blood testing for blood alcohol levels under the *Criminal Code*. The Code has established a clear set of conditions that must be met before testing occurs. The results may lead to a public criminal trial. Because the information is then public, there should be no restrictions on the supervisor acquiring this information at any time, as long as the information relates directly to an operating program or activity of the institution (section 4 of the *Privacy Act*). If, for example, the person were employed by Transport Canada as a pilot, it may be appropriate for a supervisor to acquire information about convictions for operating a vehicle, aircraft or vessel while impaired.

Recommendation 16

Government institutions seeking to disclose personal information relating to drug testing under paragraphs 8(2)(f) to (m) should first seek the consent of the individual to whom the information relates. Government institutions need not seek the consent of the individual for disclosures under paragraphs 8(2)(a) to (e).

Recommendation 17

Where consent to the release of information cannot be or is not obtained, the conditions under which personal information can be released under paragraphs 8(2)(f) to (m) of the *Privacy Act* should be considered minimum conditions only. Government institutions considering the disclosure of personal information relating to drug testing without consent of the person involved should assess the following before deciding:

- why the disclosure is necessary;
- the potential adverse consequences of the disclosure for the person to whom the information relates;
- the likelihood that the requester can and will maintain the confidentiality of the information; and
- the likelihood that the requester will use it only for the purpose for which it was originally sought.

Recommendation 18

Government institutions disclosing personal information relating to drug tests or drug use should maintain an audit trail to permit tracking the uses and further disclosures of the information.

Disclosure to law enforcement agencies: Law enforcement and prosecuting agencies may be interested in drug test results. A positive test result for an illegal drug generally indicates that the person at one time possessed the drug—a possible criminal offence. This may provide agencies with leads for future investigations or prosecutions.

Law enforcement agencies should generally not be allowed access to information suggesting that a person has used illegal drugs. This would be an entirely inappropriate use of drug testing information acquired (as we recommend) only to promote safety. Only if the disclosure were authorized by specific legislation aimed at reducing safety risks should the information be disclosed to such agencies.

Testing for the simple use of or impairment by illegal drugs may one day be authorized by criminal law, as blood alcohol testing now is in relation to operating a vehicle, aircraft or vessel. If so, testing should occur only when accompanied by procedures to safeguard the interests of potential accused persons.

Recommendation 19

Information indicating that a person has used an illegal drug should not be made available to

investigative or prosecuting agencies to assist in criminal investigations or prosecutions relating to illegal drugs unless specifically authorized by legislation aimed at reducing safety risks.

(vii) Access to personal information kept by government institutions

Section 12 of the *Privacy Act* sets out rights of access to one's personal information kept in government files or controlled by government institutions. It also sets out procedures for requesting notations or corrections to the information.

Subsection 12(1) gives every individual who is a Canadian citizen or a permanent resident the right of access to the following:

- any personal information about the individual contained in a personal information bank (paragraph 12(1)(a); and
- any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution (paragraph 12(1)(b)).

Subsection 12(3) permits the Governor in Council to extend these access rights to individuals not referred to in subsection 12(1). In June 1983 these rights were extended to inmates of federal penitentiaries who are not Canadian citizens or permanent residents.³⁷

Several sections limit individuals' rights of access in specific cases. For example, section 19 restricts access to personal information obtained in confidence from other levels of government. Information provided in confidence by a provincial government to a federal government institution cannot be disclosed.

A person granted access under paragraph 12(1)(a) to personal information that has been used, is being used or is available for use for an administrative purpose, is entitled to do the following:

- request correction of the personal information if the individual believes there is an error or omission therein (paragraph 12(2)(a));
- require that a notation be attached to the information reflecting any correction requested but not made (paragraph 12(2)(b)); and
- require that any person or body to whom such information has been disclosed for use for an administrative purpose within two years prior to the time a correction is requested or a notation is required under subsection 12(2) in respect of that information
- be notified of the correction or notation; and
- where the disclosure is to a government institution, the institution make the correction or notation on any copy of the information under its control (paragraph 12(2)(c)).

The right to request correction or require notation applies only to personal information contained in personal information bank (subsection 12(2)). It does not extend to personal information

described in paragraph 12(1)(b).

Recommendation 8 called for retaining for a prescribed period the body samples on which drug testing is performed. At issue is whether subsection 12(2) can be interpreted to grant a person the right to have a body sample retested. Without this right, the right to request a correction or require a notation to be attached to personal information is almost meaningless; it will be the person's objection, without any technical supporting information, against the results of a "scientific" drug test.

Even if subsection 12(2) cannot be interpreted to permit a person to challenge a test result by having a sample retested, we recommend that any testing protocols developed by government permit this option.³⁸ Government should bear the cost of retesting.

Recommendation 20

Government testing protocols should permit the retesting of a sample if the person tested so requests. Government should bear the costs of retesting.

PART IV

COMPLIANCE OF GOVERNMENT TESTING POLICIES WITH THE PRIVACY ACT

Introduction

Appendix A describes several drug testing programs which government institutions now operate or propose to introduce. Based on information received during this study, we have concluded that the testing policies of the Department of National Defence, Transport Canada, Correctional Service Canada and Sport Canada do not entirely satisfy the recommendations set out in this paper. Without modification, these testing policies would contravene the *Privacy Act*.

Transport Canada

In March 1990, Transport Canada produced a strategy document, *Strategy on Substance Abuse in Safety-sensitive Positions in Canadian Transportation* (the "Strategy Paper"). The document describes the department's plan to reduce substance use in the transportation sector (See Appendix A for a detailed description of the drug testing component of the strategy). The strategy was premised in part on the results of a 1989 survey conducted for the department on substance use in transportation. The department proposes to introduce legislation to implement the strategy after hearings before the Standing Committee on Transport.

The proposed testing program is wide-ranging. For positions it defines as "safety-sensitive", Transport Canada recommends random testing, testing for cause, post-accident testing (for cause), periodic testing (during medicals) and pre-employment testing. In short, it accepts almost every type of testing program.

While the *Privacy Act* does not stand in the way of all drug testing, the strategy proposed by Transport Canada extends well beyond acceptable limits. It is of course open to Parliament to override the Act. We hope, however, that Parliament will not do so, for such action might overlook the important privacy considerations involved. In addition, were Parliament to enshrine the Transport Canada policy in law, there would undoubtedly be a challenge under the *Canadian Charter of Rights and Freedoms*.

The drug testing program proposed in the Strategy Paper fails to satisfy several of the conditions identified as necessary for testing to comply with the *Privacy Act*. This conclusion is based on the following reasons:

- (a) Transport Canada has not demonstrated that there is a significant prevalence of workplace drug use or impairment among those in safety-sensitive positions (recommendation 2). The Strategy Paper makes two statements about use levels, but fails to establish that a significant problem exists:

"[S]ubstance use and abuse is a problem which unfortunately exists in Canadian society—a problem which the transportation workplace has not escaped entirely." (at 1)

"The survey [of 18,000 employees in safety-sensitive positions] found that general substance use patterns are similar to those in the Canadian population overall. A small percentage of employees in

safety-sensitive jobs were sometimes under the influence of alcohol or a drug while at work." (at 3)

The survey accompanying the Strategy Paper identified alcohol and hangovers as being reported to contribute most to negative effects on workers' ability to do their jobs safely. Medications (cough, cold, allergy, for example) were next in line. Street drugs were reported to be the least used of all substances at work.

(b) insufficient evidence is presented that the drug use or impairment poses a substantial threat to the health or safety of the public or other members of the group (recommendation 2).

(c) insufficient evidence is presented that the behaviour of members of the group cannot otherwise be adequately supervised to identify drug or alcohol-related impairment (recommendation 2).

(d) insufficient evidence is presented that drug testing programs can significantly reduce safety risks (recommendation 2).

(e) insufficient evidence is presented to discount relying on other less intrusive programs, such as regular medicals, education, counselling, or some combination of these, instead of drug testing, to resolve drug and alcohol-related problems in safety-sensitive positions (recommendation 2).

We are also concerned about Transport Canada's assurances that testing will be done in a way that minimizes intrusions. The Strategy Paper assures the reader of respect for the dignity of the individual being tested:

"It is essential to balance the need for substance testing against a desire to respect the rights of individuals and to treat people with substance use difficulties in a fair and humane manner. All testing will be designed in a way which minimizes intrusion and the infringement of rights to the greatest possible extent." (at 8)

"[The strategy] addresses the issue [of substance abuse in transportation] with an understanding of the paramount importance of transportation safety to Canadians and their interest in treating people fairly and minimizing intrusion in their lives." (at 10)

There can be little dignity in urinalysis as long as the subject may be required to urinate under direct observation or in private, after a thorough physical search. Transport Canada too easily glosses over the inherent intrusiveness of testing by speaking of "minimizing intrusions".

The statements contained in the Strategy Paper about the information generated by drug testing also raise concerns. The paper (p. 9) states: "'For cause' testing in the workplace will be carried out to verify any on-the-job use [of drugs]." Urinalysis cannot verify on-the-job use or on-the-job impairment. An accurate positive urinalysis simply indicates past use of a drug. Urinalysis cannot identify precisely when the drug was used, how much was used or what impairment, if any, flowed from the use.³⁹ The Strategy Paper makes the same misleading statement earlier on: "Another way to identify on-the-job substance use is to test for the presence of drugs or alcohol in the individual." (p. 7)

These statements are misleading, however unintentional this may be. They seem to give urinalysis a legitimacy not borne out by scientific evidence. If urinalysis *could* detect on-the-job use (and, more

important, on-the-job impairment), its utility might more easily outweigh privacy considerations. But such is not the case.

It should be emphasized that the *Privacy Act* does not stand in the way of all forms of drug testing by Transport Canada. Recommendations 2 and 3 make that clear. The need is to justify the serious intrusions represented by drug testing.

Government should not allow itself to be led into accepting such intrusions without the strongest possible evidence to justify them. It is also important that the government not allow itself to be stampeded by the wide-ranging acceptance in the United States of drug testing in government and in the transportation sector. Canada's federal government generally took a humane approach to HIV/AIDS testing, despite the influence of the United States. There is no reason why Canada should be less humane when it comes to drug testing.

In light of the lack of evidence of drug-related safety problems in safety-sensitive transportation positions and the inadequate canvassing of other less intrusive alternatives before adopting drug testing, Transport Canada has cast the net too widely. Reasonable suspicion and post-accident testing should be the focus of a revised drug testing policy in transportation.

Department of National Defence

The Department of National Defence (DND) testing policy raises several concerns. Most of these relate to whether there is in fact a problem which requires mandatory random drug testing.

The first issue is the extent of the drug problem which testing is intended to tackle. Recommendation 2 suggests that testing should occur only if there is a significant prevalence of drug use or impairment within the test group. Is there a significant prevalence within the Canadian Forces?

The DND document, *A Comprehensive Strategy on Alcohol and Drug Use Control in the Canadian Forces*, refers to studies indicating a decline in alcohol and drug use in the CF. Drug use appears to occur at only half the level of Canadian society in general. One must question, on the basis of DND's own figures, whether there is a significant prevalence of drug use or impairment within the CF.

Second, does the drug use or impairment pose a substantial threat to public safety or to the safety of CF members (recommendation 2)? The strategy document states that drug use poses a significant threat to public safety and to that of CF personnel. What evidence is there to support this statement? The Department of National Defence may perceive a threat, but government should require concrete evidence of the extent of the threat.

Is it possible to supervise adequately the behaviour of members of the CF without drug testing (recommendation 2)? If behaviour can be supervised other than by drug testing, drug testing should be rejected. Similarly, unless there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety (recommendation 2), testing should not be undertaken.

Finally, can a less intrusive program significantly reduce the risk to safety (recommendation 2)? If it can, drug testing should not be used.

There must also be concern about the variety of justifications advanced for the DND drug strategy.

Public safety remains the only valid reason for implementing testing programs. Operational effectiveness and the (perhaps unattainable) goal of a substance-abuse free CF are not, in the absence of significant public safety concerns, sufficient justifications under the *Privacy Act* for drug testing.

As noted in comments about Transport Canada's policy, the *Privacy Act* does not stand in the way of all forms of drug testing. But there is, again, the need to justify the serious intrusions represented by drug testing. Government should not allow itself to be led into accepting such intrusions without the strongest possible evidence to justify them. The fact that such testing occurs in the United States military does not in itself justify testing in the CF.

Reasonable suspicion and post-accident testing should be the focus of a revised drug testing policy in the CF. If the Department of National Defence can meet the conditions set out in recommendations 2 or 3, testing would be permitted under the *Privacy Act*. Specific statutory authority for the testing should still, however, be sought.

One final comment: as with Transport Canada's testing policy, the DND strategy document assures the reader that mandatory drug testing with random elements will be introduced "with full regard for privacy and individual rights". These assurances, welcome as they are, cannot hide the fact that urinalysis is so intrusive there can therefore be little real "regard for privacy and individual rights" under such testing regimes. The strategy document too easily glosses over the inherent intrusiveness of testing.

Correctional Service Canada

The testing program instituted under section 41.1 of the *Penitentiary Regulations* has now been held by the Federal Court of Canada, Trial Division, to violate the Charter. In *Jackson v. A.G. Canada*,⁴⁰ the Court held that section 41.1 violated sections 7 and 8 of the Charter. Section was not saved by the Charter override provision—section 1.⁴¹ Mr. Justice MacKay, however, restricted his conclusions to the section 41.1 testing program:

*"My conclusion does not relate directly to the other situations that would have been included in the overall plan of the Correctional Service for urinalysis testing if that plan were implemented, i.e., random testing, testing of those with a history of involvement with drugs, and testing of those involved in community programs that provide significant contact opportunities with outsiders."*⁴²

Accordingly, there is no judicial direction on the validity of other CSC testing programs.

There is reported to be substantial drug use in prisons and the trade in drugs in prisons is said to exacerbate the violence and coercion associated with an institution's atmosphere. However, we have not been made aware of conclusive evidence that the drug use or impairment pose a substantial threat to the safety of prisoners, prison staff or the public. Is it otherwise impossible to supervise prisoners adequately? Are there reasonable grounds to believe that drug testing can significantly reduce the risk to safety? Is there a practical, less intrusive alternative or combination of alternatives that would significantly reduce the risk to safety?

If, indeed, a substantial threat to safety could be demonstrated and the answers to the above questions are "no", random mandatory testing of inmates would not violate the *Privacy Act*. However, firm evidence is needed to support these answers. As well, statutory authority to test should be sought before random mandatory testing is introduced (recommendation 1).

One problem with the CSC random testing policy is its proposed restriction on the right of inmates to have their samples retested. Recommendation 20 proposes that persons be permitted to have body samples retested. Authority is found in section 12 of the *Privacy Act*. A policy which does not permit retesting violates the Act.

Other CSC testing programs may fare better under the *Privacy Act*. Testing for reasonable cause and as a condition of release for a community program might be acceptable under the Privacy Act, but only if the other conditions in recommendation 2 are met.

National Parole Board

Among existing drug testing programs, that of the NPB is the most easily justified as respecting the recommendations described in this document. Its testing program is not random, but based on evidence supporting a reasonable belief that the offender's history of substance abuse (which has been linked to previous offences) may continue without special monitoring. That special monitoring not only includes periodic urinalysis but may include a special condition to abstain from the use of certain intoxicants and to participate in treatment programs.

Moreover, urinalysis will only be required when necessary to reduce or manage the risk that the offender would otherwise represent and only when it is the least restrictive measure available.

While it would be desirable for NPB to obtain specific Parliamentary authority for the imposition of drug testing, section 16 of the *Parole Act* provides authority for the NPB's program and the Board should be applauded for exercising its authority in this matter with restraint and sensitivity.

Only one matter remains of some concern: the extent of the discretion left to parole officers to determine the number and timing of drug tests after the Board has authorized testing. This is a matter that we will continue to follow with the Board.

Fitness and Amateur Sport

The Office of the Privacy Commissioner has followed closely the proceedings of the Dubin Commission. It was both surprising and disappointing to note that the government's position—as expressed to Dubin by senior officials of Sport Canada—was that federally-funded athletes should be subjected to random, mandatory and unannounced urinalysis for banned substances. Testing should not, in Sport Canada's view, be confined to athletic events, but should include testing at training venues.

This position was surprising because of the government policy rejecting drug testing in the employment setting except in circumstances where there are overriding public safety concerns. It was disappointing because it appeared to accept that Canadians' offended national pride over the Ben Johnson affair was sufficient reason to trample upon the basic right to a reasonable expectation of privacy which athletes share with other Canadians.

One can hope that Mr. Justice Dubin will recognize that athletes should not be forced to abandon their *Charter* rights at the locker room door—no matter how many may be willing to do precisely that in order to compete in their sport. *Charter* rights also apply to federally-funded athletes. Like other employees, these athletes receive monthly cheques from the government for their efforts. The federal government dictates athlete drug testing policy. If those policies fail to measure up to *Charter* requirements, they will

be subject to challenge even if a non-governmental agency actually conducts the tests.

Few would disagree that, should such a challenge be launched, random mandatory drug testing of athletes would be found to violate sections 7 or 8, or both, of the *Charter*. The sole matter for real debate would be whether such testing constitutes a reasonable limit on *Charter* rights "as can be demonstrably justified in a free and democratic society".

In addressing this latter question, the courts should canvass the factors contained in recommendation 2 of this report. On almost all counts, random mandatory testing of athletes would fail to measure up. Thus, not only would such a program fail to comply with the *Charter*, it would, if conducted by Sport Canada, be a violation of the *Privacy Act*.

Of particular concern is the apparent failure of the government and sport governing bodies to canvass less intrusive means of addressing the admittedly real problem of drug use in sports. For example, there has been relatively little effort to change behaviour by education. Failure to provide adequate education about the adverse health effects of some performance-enhancing substances was among the reasons why the California Supreme Court, in 1988, struck down the NCAA drug testing program.

Perhaps more important, there has been little general leadership in fostering the principle, "It's not whether you win or lose, it's how you play the game". When only the winners get the real money and the real glory, is it any wonder that athletes feel pressured to do whatever it takes to "get the edge"? Where is the virtue in attaining a drug-free sports arena by sacrificing our athletes' right to privacy? And, unless there is a virtue in it—since public safety is certainly not at risk—surely public policy should not support the quick-fix of mandatory athlete urinalysis, especially at training venues.

PART V

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Government institutions should seek Parliamentary authority before collecting personal information through mandatory testing.

Recommendation 2

The collection of personal information through random mandatory testing of members of a group on the basis of the behaviour patterns of the group as a whole may be justifiable only if the following conditions are met:

- there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;
- the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;
- the behaviour of individuals in the group cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 3

A person who is not a member of a group which exhibits drug-related problem behaviour might appropriately be tested if the following conditions are met:

- there are reasonable grounds to believe that the person is using or is impaired by drugs;
- the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;
- the person's behaviour cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 4

Since drug testing programs designed primarily to promote efficiency, economy or honesty, or to reduce the demand for illicit drugs, would not satisfy recommendations 2 or 3, such programs would violate the *Privacy Act*.

Recommendation 5

Testing programs should not distinguish between legal and illegal drugs that can impair.

Recommendation 6

Government institutions must wherever possible collect personal information used for an administrative purpose and relating to drug use or impairment directly from the individual (that is, if the person volunteers). Collection may be in direct (that is, from other sources or without the person's consent) in the following circumstances:

- when it is not possible to collect the information directly;
- when the person to whom the information relates consents to another method of collection;
- when the personal information may be disclosed to the institution under subsection 8(2) of the *Privacy Act*; or
- when direct collection might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.

Recommendation 7

Even when subsection 5(2) of the *Privacy Act* imposes no duty on a government institution to inform about the purpose of the collection, test subjects should as a matter of policy be informed. Only if informing the test subject would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected should the purpose of the collection be withheld from the person.

Recommendation 8

Body samples and the personal information derived from those samples should be retained for the period prescribed by the *Privacy Regulations*, and be disposed of as soon as possible after the retention period has expired.

Recommendation 9

Procedures for the handling and disposal of personal information collected under the *Privacy Act* should reflect the sensitivity of the information. At a minimum, personal information relating to drug tests should be accorded physical protection at level B, as defined in the *Security Policy and Standards of the Government of Canada*.

Recommendation 10

Government institutions should not use positive urinalysis results for an administrative purpose unless the results have been supported by confirmatory testing according to accepted scientific/medical protocols approved by National Health and Welfare.

Government institutions may use negative screening test results for an administrative purpose without conducting confirmatory testing where the screening test has been conducted according to

acceptable scientific/medical protocols which are approved by National Health and Welfare from time to time.

Recommendation 11

Government institutions should seek to ensure that those interpreting negative test results do not go beyond the inferences scientifically supported by the test.

Recommendation 12

Because of the complexity of the testing process—be it urinalysis or some other process—a government-wide testing protocol should be developed. At a minimum, the protocol should establish procedures for the following:

- sample collection, including procedures to permit the giving of samples in private, wherever possible;
- the appropriate screening and confirmatory tests to use for each drug being sought;
- threshold concentrations for each drug test (to determine when a result is "positive");
- chain of custody procedures to prevent tampering with or exchange (deliberate or accidental) of samples;
- standards for testing laboratories;
- the meaning of positive or negative test results; and
- security procedures governing the personal information relating to drug testing.

Recommendation 13

When a person tested for a given drug may have consumed other substances which could lead to a positive test result for that drug, such information should accompany the test result. The test result should not in such circumstances be accepted as indicating that the person has used the drug being tested for.

Recommendation 14

An institution using urinalysis results for an administrative purpose should ensure that those using the results understand their meaning. A positive urinalysis result should not be used to identify present use, or past or present impairment by a drug. The institution should also ensure that those using the results understand that urinalysis cannot measure the quantity of the drug consumed.

Recommendation 15

Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- for the purpose for which the information was obtained or compiled by the institution;

- for a use consistent with that purpose; or
- for a purpose for which the information may be disclosed to the institution under subsection 8(2).

The government institution seeking the consent of the individual for additional uses should fully explain the consequences of the additional uses. It should avoid coercing the person to consent.

Recommendation 16

Government institutions seeking to disclose personal information relating to drug testing under paragraphs 8(2)(f) to (m) should first seek the consent of the individual to whom the information relates. Government institutions need not seek the consent of the individual for disclosures under paragraphs 8(2)(a) to (e).

Recommendation 17

Where consent to the release of information cannot be or is not obtained, the conditions under which personal information can be released under paragraphs 8(2)(f) to (m) of the *Privacy Act* should be considered minimum conditions only. Government institutions considering the disclosure of personal information relating to drug testing without consent of the person involved should assess the following before deciding:

- why the disclosure is necessary;
- the potential adverse consequences of the disclosure for the person to whom the information relates;
- the likelihood that the requester can and will maintain the confidentiality of the information; and
- the likelihood that the requester will use it only for the purpose for which it was originally sought.

Recommendation 18

Government institutions disclosing personal information relating to drug tests or drug use should maintain an audit trail to permit tracking the uses and further disclosures of the information.

Recommendation 19

Information indicating that a person has used an illegal drug should not be made available to investigative or prosecuting agencies to assist in criminal investigations or prosecutions relating to illegal drugs unless specifically authorized by legislation aimed at reducing safety risks.

Recommendation 20

Government testing protocols should permit the retesting of a sample if the person tested so requests. Government should bear the costs of retesting.

APPENDIX A

GOVERNMENT AND DEPARTMENTAL POLICIES ON DRUG TESTING

(a) Federal Government Statements on Drug Testing

Prior to the recently announced Transport Canada and Department of National Defence drug testing strategies, the government of Canada had issued two significant statements dealing with drug testing as part of its overall approach to drug use in Canada.

One statement responded to recommendations of the Report of the Standing Committee on National Health and Welfare, *Booze, Pills and Dope: Reducing Substance Abuse in Canada*.⁴³ The Standing Committee had examined several aspects of drug abuse in Canada. Among them was the issue of employee and job applicant drug testing. The Standing Committee would accept only one justification for drug testing:

"The issue of mandatory employee drug testing is a public health and safety issue only and must be so treated.

*It is the responsibility of the employer to weigh carefully the employment suitability of probationary employees, including careful monitoring of behaviour which may indicate the need for drug testing. Mass or random screening of job applicants, however, is neither sensible nor acceptable."*⁴⁴

The Report made the following recommendations relating to employee and job applicant testing:

Recommendation 15

The Standing Committee recommends that employers not introduce mass or random drug screening of either job applicants or employees. Only in exceptional cases in which drug use by employees constitutes a real risk to safety, the Standing Committee recommends that drug screening may be introduced under the following conditions:

- (i) there must be cause, i.e., the employee must have shown evidence of impairment or of performance difficulties;*
- (ii) the testing procedure must provide a secure chain of evidence to ensure samples have not been tampered with or unintentionally altered;*
- (iii) the specimen must be collected in a manner which protects the privacy and dignity of the individual;*
- (iv) all positive test results must be confirmed by gas chromatography/ mass spectrometry, or tests of equal precision and specificity;*
- (v) testing must be used to assist the employee in seeking appropriate treatment for drug abuse where warranted; test results should not be used as evidence in criminal proceedings;*

- (vi) *results of positive tests and confirmations should be conveyed to a licensed medical practitioner acceptable to both the employee and the employer. The employee will be given the opportunity to meet with the medical practitioner or to present evidence with regard to the positive finding before the medical practitioner recommends a course of action to the employee and the employer;*
- (vii) *any limited drug testing which may be introduced must include screening for alcohol abuse.*

Recommendation 16

The Standing Committee recommends:

- (i) *that the policy proposed in recommendation 15 be immediately implemented by appropriate methods for all employees of the federal government, its Crown corporations, its agencies boards and commissions; and*
- (ii) *that the Government of Canada consider legislation to limit and control mandatory drug screening in the private sector.*⁴⁵

The Report did not address the issue of testing government clients or the general public.

The government of Canada response to the Report's recommendations on drug screening was issued in March, 1988:

"The federal government has concluded that across-the-board, mandatory drug testing will not constitute part of the National Drug Strategy.

The federal government recognizes, however, that there may be exceptional circumstances where overriding public safety concerns may necessitate consideration of testing."⁴⁶

These statements were made in response to the Standing Committee's recommendations on employee or job applicant testing. Whether they were intended to address testing of government "clients" (inmates, parolees, athletes, other recipients of government benefits) we do not know. In this matter, the position of the federal government needs further development.

The federal government's response continued:

"In February [1988], the Department of National Health and Welfare sponsored a nationwide Consultation on Substance Abuse and the Workplace involving participation from management, labour, the health professions and other interested parties.

Some participants in the Consultation expressed an interest in, or had instituted, drug testing in the workplace. Those who advocated testing cited public safety concerns and problems with identifying a core group of substance abusers.

Many participants had either serious concerns about drug testing, or were completely opposed to it. They emphasized the importance of maintaining management-labour trust in the workplace, the intrusiveness of drug testing, the lack of evidence connecting substance abuse with safety, the risks to human rights, the potential for abuse of testing procedures and the availability of other strategies to protect workplace and public safety.

Participants at the Consultation went on to emphasize the importance of joint management-

labour efforts to reduce substance abuse in the workplace.

*They were generally optimistic about the potential for building upon the foundation of existing employee assistance programs and extending them to provide benefits to the employee family and the community as a whole."*⁴⁷

On July 20, 1988, the Minister of National Health and Welfare announced the federal government's intention to strengthen employee assistance programs (EAPs) in workplaces under federal jurisdiction. This policy would address further the problem of alcohol and drug abuse in the workplace. The Minister made the announcement in response to the February consultation mentioned above.

The announcement stressed the government's position that drug testing in the workplace, unless voluntary, was unwarranted. The Minister said, "We are pursuing solutions through prevention, treatment and rehabilitation programs to the problems associated with workplace substance abuse. The government favours this approach over drug testing which would not generally be appropriate for Canadian workers."

The announcement, however, did leave the door partly ajar. It stated that "[t]here may be exceptional circumstances where overriding public safety concerns may necessitate consideration of testing".⁴⁸ The announcement referred to a study of substance abuse being undertaken by the Minister of Transport to determine whether a problem exists in the transportation sector and to identify appropriate steps to take.⁴⁹ Indeed, since then, the door has been pushed wide open with the announcement of testing strategies by Transport Canada and the Department of National Defence that go significantly beyond the previous government policy and Standing Committee recommendations.

(b) Approaches by Government Institutions to Drug Testing

In preparing the present discussion paper, this office consulted several departments and agencies about their positions on drug testing.

Some institutions were consulted because of reports that they were considering testing (Transport Canada); others because they appeared most likely (because of the nature of their mandate) to have considered drug testing. Those in the latter group included the Canadian Security Intelligence Service (CSIS) (because of the national security implications), the Department of National Defence (because of national security and public safety considerations), Correctional Service Canada and the National Parole Board (because of the inmate clients, some of whom may be or may have been in prison because of drug-related crimes), and the Royal Canadian Mounted Police and Customs and Excise (because of the possibility of corruption by drug traffickers).

Treasury Board was also consulted. As the public service employer, Treasury Board would be an important player in any process that involves or rejects the testing of public servants. Finally, the Canadian Human Rights Commission and the Department of Justice were consulted to understand better other legal and human rights aspects of the testing issue.

Some institutions had contemplated drug testing, but dismissed it as unnecessary or inappropriate. Others were considering limited or widespread testing.

In still others, however, there was not only an interest in testing, but also the actual occurrence of testing—the Canadian Forces, the National Parole Board and Correctional Service Canada. And, of course, Transport Canada and the Department of National Defence both unveiled their wide-ranging testing strategies in March. The policy of Sport Canada encourages drug testing of athletes, although Sport Canada itself does not supervise or conduct tests.

Outlined below are the various departmental drug testing policies and procedures as explained to this office.

Department of National Defence

(i) Canadian Forces (CF)

The use of weapons, heavy vehicles, explosives and aircraft by CF members impaired by drugs could pose a threat to individual or public safety. The CF looks at drug testing as a deterrent. According to CF representatives, testing in the U.S. military has promoted a remarkable reduction in illicit drug use.

The CF is concerned about the possible imposition by the United States of drug testing requirements (the United States has already imposed HIV testing requirements for Canadians taking certain military training in the U.S.).⁵⁰ This would affect integrated operations and might also affect CF personnel taking courses in the United States. The CF is also concerned that testing requirements might be imposed by the European Community and the UN. The CF had over 6,000 personnel stationed in 40 countries as of the end of September, 1989.

Before adopting its current testing strategy, the Department of National Defence did not have a forces-wide testing policy. It has, however, operated a limited testing program of long standing within Air Command. The program operates exclusively in support of flight safety and applies only to military members, not to civilian personnel.

Under this program, testing is performed on service personnel involved in an accident or "aeromedical" occurrence. Testing is also undertaken when there are reasonable and probable grounds to believe that a service member involved in flying operations is using drugs.

This testing aims at identifying any abnormal biochemical or toxicological compounds and normally includes testing for alcohol and the common drugs of abuse. The department recognizes that, except for alcohol testing, there is no reliable means of establishing impairment by drugs on the basis of a forensic test.

Testing procedures are set out in Canadian Forces Medical Orders and in an Air Command Order. Sampling is conducted using Base Hospital facilities, and is a normal part of a Board of Inquiry or investigation into an accident or incident involving flight safety. Where necessary, forensic laboratory assistance is available from the Defence and Civil Institute of Environmental Medicine.

Correspondence from the department assured this office that "[a]ppropriate attention is paid to all the general and legal rules on privacy" (the letter did not expand on this statement). Urine samples

are collected under the same conditions as those required for a medical procedure. Information concerning the identity of the donor and results of tests are protected.

Test results are used, with other evidence, to establish causes of accidents or incidents in flying operations. Positive test results may be used in administrative or disciplinary proceedings, in accordance with prevailing legal advice. Test results are disclosed only on a need-to-know basis when staff action is required.

Few problems have been experienced with testing. If a service member objects, legal advice is sought before proceeding. Each case is dealt with on an individual basis.

Any military member who believes he or she has been subjected to unfair treatment has the right to appeal through established "redress of grievance" proceedings. This process allows a member to press a grievance through increasingly higher levels of review within the Canadian Forces, then to the Minister and finally to the Governor in Council. Members are granted access to their own information as requested under section 12 of the *Privacy Act*.

Evolving Testing Strategy: In 1986 the Canadian Forces announced a three-point program to deal with drug abuse. The program had as its aims: to improve education on drug abuse, to enhance drug enforcement and deterrence and to "look at" the introduction of mandatory drug testing with random elements.

In March 1990, the Minister of National Defence announced a comprehensive strategy on alcohol and drug use control in the Canadian Forces. The Minister indicated his intention to implement mandatory urinalysis within the next few months as a necessary element in the overall program designed to reduce drug abuse in the CF. Unlike the Transport Canada testing strategy, there is no intention to seek supporting legislation or Parliamentary approval for the Canadian Forces testing program. A document, *A Comprehensive Strategy on Alcohol and Drug Use Control in the Canadian Forces* (called the "1990 Strategy Document" here), described the strategy, including elements such as education and rehabilitation, in some detail.

The Department of National Defence has carried out a number of internal studies in recent years on alcohol and drug use. A 1989 survey indicated that alcohol and drug use are on the decline in the CF. Heavy drinkers—those who have on average three or more drinks a day—declined from 28 per cent in 1982 to 11 per cent in 1989. Members who consumed more than five drinks per day declined from 11 per cent to 3 per cent. The same survey reported that 6.4 per cent of service members reported using "drugs" (whether this meant legal or illegal drugs is not clear, although the Minister's announcement of the strategy referred to "illicit" drugs) in the past year (1990 Strategy Document at pp. 4-5). A document containing questions and answers relating to the drug strategy stated that "our best estimate, based on several studies, is that the number of illegal drug users [in the CF] is about 3-7 per cent".

The strategy announced by the Minister describes itself as being based on the following principles: safety, operational effectiveness, individual rights and privacy and a substance-abuse free Canadian Forces. About drug testing, the strategy document states:

"[M]andatory drug testing with random elements will be introduced in the Canadian Forces, with full

regard for privacy and individual rights. Testing will be weighted towards personnel in operational and safety-sensitive positions. DND will also be testing for:

- cause;
- post-accident investigation; and
- anonymous testing for data collection purposes.

The bottom line is safety, and drug testing will help the Canadian Forces create a substance-abuse free environment for CF personnel to carry out their often difficult and demanding duties." (at 6)

The Minister's March 28 statement identified similar situations where testing will occur:

- for cause;
- as part of an accident or incident investigation;
- during a period of probation following a positive drug test [this type of testing program was not mentioned in the Strategy Document]; and
- for the purposes of anonymous samples for data collection.

All ranks and occupations, including full-time reservists, may be subject to random testing. Random testing, however, will be weighted towards service members engaged in safety-sensitive occupations or in trades in occupational units such as ships, air squadrons or army field units. It appears that other forms of testing (for example, post-accident) will not be weighted in such a fashion. They will apply to all segments of the CF.

The Minister's March statement also referred to privacy protection: *"My Department will ensure the rights and privacy of its members are given the utmost consideration."* Later in the statement, the Minister said: *"[W]e will ensure it [drug testing] is a balanced program which will be introduced in a sensitive and humane way so as to respect individual rights and privacy."*

(ii) Department of National Defence

There is no compulsory testing program for civilian Department of National Defence employees. While they would generally be dealt with like other public servants, security considerations may come into play in deciding whether to test.

Transport Canada

As noted and discussed earlier, the Minister of Transport released a strategy paper in March 1990 on substance use in safety-sensitive positions in the federal transportation sector (including the federally-regulated private sector). Until then, the official policy of the federal government concerning workplace testing guided Transport Canada. No urinalysis testing of Transport Canada employees took place (although testing for impairment might have occurred under the *Criminal Code*).

The paper, *Strategy on Substance Use in Safety-sensitive positions in Canadian Transportation* (the Strategy Paper here), has been referred to the Standing Committee on Transport for review. The Minister of Transport intends to introduce legislation to implement the strategy.

The Strategy Paper justified the introduction of testing and other measures designed to reduce substance use as follows:

"[S]ubstance use and abuse is a problem which unfortunately exists in Canadian society—a problem which the transportation workplace has not escaped entirely. (at 1)

"The survey [of 18,000 employees in safety-sensitive positions] found that general substance use patterns are similar to those in the Canadian population overall. A small percentage of employees in safety-sensitive jobs were sometimes under the influence of alcohol or a drug while at work. The most widely used substances were alcohol, followed by medications prescribed by a physician or sold over the counter. Considerably lower rates of use were reported for illicit drugs, the most widely used being cannabis." (at 3)

The Strategy Paper addresses the use of legal and illegal substances:

"Under the strategy, there are various circumstances in which employers will be required to test employees in safety-sensitive positions:

(1) Post-Accident Testing

Testing will be mandatory where a person in a safety-sensitive position has caused or contributed to an accident causing death, injury or significant damage to property or the environment. It is in the interest of the public and the transportation industry to establish the possible contributing role of alcohol or drugs, if any, in such accidents.

(2) Periodic Testing

Testing will be added to the medical examinations required now for many employees in safety-sensitive positions with physicians designated to perform the exams making use of the employer's testing procedures and facilities. In this way, usage that might not be discovered in routine examination procedures will be identified.

(3) Pre-Employment Testing

Testing before employment begins will be made a condition of an employer's confirming either a new or a transferred employee in a safety-sensitive position. Tests, therefore, will not be administered to all job applicants or candidates for transfer, but only to those who have received a job offer, subject to the test result over time, this testing will help to secure a workforce in the transportation safety sector which is as free as possible of problems associated with substance use or abuse.

(4) "For Cause" Testing

"For cause" testing in the workplace will be carried out to verify any on-the-job use. The grounds for testing will differ from case to case but will generally pertain to an individual's

behaviour or performance at the time. At least two people (one of whom is the supervisor) will need to conclude that there is sufficient reason to test.

(5) Random

Tests having a random element will also be carried out, with all employees in safety-sensitive positions/facing an equal probability of being chosen for a test at any time while on duty. This form of testing will provide a strong deterrent against use because employees who are required to have a test will not have advance notice of it.

In summary, under the strategy legislative authority will be sought for mandatory testing after an accident, as part of a required medical examination, as a condition of confirming a new or transferred employee in a safety-sensitive position, "for cause" and under a program having a random element in the workplace. This approach will expose existing use in the transportation safety environment because suspected use can be confirmed by a positive test result. Additionally, the testing program can deter future use because all employees will know that the chances of identification are high."

The Strategy Paper would require employees in safety-sensitive positions who test positive for alcohol or drugs to be removed from those positions. Reinstatement would only be possible on the recommendation of a counsellor or health professional to whom the employee was referred under the employer's EAP. Persons who test positive would be prevented from being confirmed in safety-sensitive positions.

The Strategy Paper defines "safety-sensitive positions in transportation" as follows:

"Positions considered in the surveys of substance use carried out for Transport Canada to have direct impact on either the health, safety or security of the public or of persons who work in the transportation industry, where there is a potential risk of loss of life, injury or property damage. Direct impact was considered to mean engagement in the operation, navigation, repair or inspection of vehicles; and security control."

It identifies the following positions as "safety-sensitive":

Aviation

flight crews

flight attendants

aircraft maintenance engineers, mechanics and technicians

inspectors and examiners

operations managers/dispatchers

Airports

airside drivers

security screeners

security guards

Marine

ships crews
shore-based

Surface
truck drivers (minimum 12,000 kg. weight and/or three axle)
bus drivers (excluding municipal, school bus drivers)
railway operation/maintenance employees
maintenance inspectors.

The Strategy Paper states that the dignity of the individual being tested will be respected:

"It is essential to balance the need for substance testing against a desire to respect the rights of individuals and to treat people with substance use difficulties in a fair and humane manner. All testing will be designed in a way which minimizes intrusion and the infringement of rights to the greatest possible extent." (at 8)

"[The strategy] addresses the issue [of substance abuse in transportation] with an understanding of the paramount importance of transportation safety to Canadians and their interest in treating people fairly and minimizing intrusion in their lives." (at 10)

The Transport Canada testing strategy is similar to a United States transportation testing program. Nowhere, however, does the Strategy Paper indicate if the decision to adopt testing programs was influenced by the American model.

The Impact on Canada, of U.S. Department of Transportation Regulations

Under the United States Drug Strategy, the U.S. Department of Transportation has begun a program to drug test all its employees in so-called safety-sensitive positions. It has now introduced regulations to require private sector companies to institute similar programs for their own employees. The "Final Rules" requiring drug testing for the motor carrier, rail, marine, aviation and pipeline industries could apply, in varying degrees, to Canadian companies operating in the United States. Some companies servicing American transportation companies in Canada, such as aviation maintenance companies, could also be affected.

Application of United States laws to Canadian industry has always concerned the Canadian government. The application of the U.S. Final Rules is not extraterritorial as such. The practical application, however, is extraterritorial: Canadian companies would have to implement parts of the U.S. program in Canada to do business in the United States or to do business with American carriers in Canada.

Several countries, including Canada, made representations to the United States concerning the impact of the Final Rules. The United States then amended them to clarify that they will not apply where compliance would violate foreign laws or policies. Foreign-based personnel (including Canadians) would be subject to testing beginning January 1, 1991. On December 27, 1989, the deadline was extended until January 2, 1992.

The U.S. Final Rules apply to different sectors of Canadian transportation as follows (Canadians would be responsible for implementing their own testing programs to comply.)

Aviation

The U.S. Final Rules will not apply to Canadian flight crews or attendants of Canadian civil aircraft operating into the United States. Also exempted are various forms of "specialty services" and general aviation.

Foreign government employees are not covered by the Final Rules. Accordingly, the Rules do not apply to Canadian dispatchers, air traffic controllers and flight service system or radio operators.

Canadian domiciled aviation maintenance companies conducting work on American carriers are subject to all forms of testing - random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty. Aviation security and screening personnel are also subject to all forms of testing.

Those involved in aircraft fuelling or manufacturing of aircraft and parts are not subject to the Rules. Companies that fuel or manufacture aircraft and also provide maintenance, however, are covered by the Rules. Emergency maintenance personnel are not covered.

Motor Carriers

Canadian truckers and bus companies operating into the United States would be subject to all forms of testing—random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty.

Marine

The Rules would affect three sectors of marine transportation: pilots, foreign vessels and mobile offshore drilling units (MODUs).

Canadian pilots on U.S. vessels in U.S. waters must comply with all drug and alcohol testing requirements. Canadian pilots on Canadian or foreign vessels involved in accidents in U.S. waters are subject to post-accident drug and alcohol testing.

All crew members identified as having been involved in accidents relating to foreign vessels in United States waters will be subject to post-accident testing. Since the U.S. Department of Transport defines a mobile offshore drilling unit (MODU) as a vessel, the testing rules that apply to foreign vessels will also apply to foreign MODUs.

Canadians on U.S. MODUs in U.S. waters are subject to all forms of testing—random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty. Canadian MODUs operating in Canadian waters would be subject to Canadian laws and practices.

Rail

The Rail Rule applies to "hours of service" employees operating into United States territory. Post-accident, reasonable cause and pre-employment testing already apply to Canadian rail operators in the United States. The current Rule would expand testing to include random and return to duty testing.

Pipeline

The Rules would cover Canadian employees operating into the United States.

National Parole Board

Section 16 of the *Parole Act* allows the National Parole Board (NPB) to impose any terms or conditions it considers reasonable when releasing a person on parole, including day parole. It may also impose any terms and conditions it considers reasonable in respect of an inmate subject to mandatory supervision.

The NPB may occasionally impose urinalysis as a condition of release on parole or mandatory supervision. This condition could be imposed with a condition to abstain from alcohol and non-prescribed drugs. The NPB states that, in many cases with a demonstrated history of substance abuse, this combination of conditions would greatly control the risk to society and aid the offender's reintegration. Correctional Service Canada supervises the actual testing.⁵¹

Those released on mandatory supervision, but not detained as dangerous inmates, are viewed by the NPB as among the most difficult offenders with which to deal. The NPB's statutory commitment to the assessment of risk and protection of society has resulted in parole being refused. These inmates have been kept in prison until the last possible moment. Drug testing may be one way of reducing the risk that they will commit offences (especially since as many as 60-70 per cent of those in prison were on intoxicants at the time of their offence).

The NPB representatives contacted by this office did not know how many times urinalysis had been imposed as a condition of release. Of the several thousand (perhaps 8,000-9,000) releases on parole annually, drug testing would be imposed in only a few cases. Some regions of the NPB seem to apply the condition more than others.

The NPB has developed guidelines on imposing urinalysis as a condition of release. Such a condition would normally be imposed only where necessary to reduce or manage the risk that the offender would otherwise represent, where it is the least restrictive measure available and where there is reason to believe that the offender's history of substance abuse which has been linked to previous offences may continue without this condition.

The NPB is concerned about the impact of the *Charter* on testing programs and is also looking for guidance from two cases involving Correctional Service Canada (*Jackson* and *Dion*) which are before the courts. (*Jackson* has since been decided).

One NPB representative suggested that it might be unwise for the NPB to set too many parameters on the type of testing—for example, random or weekly. This decision would best be left to the parole officer (but only if the NPB initially makes the order for testing). Positive test results would be reported to the NPB. The NPB would then determine whether to revoke parole or restructure the conditions of release.

NPB representatives suggested viewing testing in this light: testing may be the least restrictive option for dealing with the offender. The alternative, with parole and mandatory supervision, may be to keep the offender in custody.

Correctional Service Canada (CSC)

(i) CSC Employees

CSC does not test its employees and no testing program is contemplated.

(ii) Inmates

In 1985, the *Penitentiary Service Regulations* were amended.⁵² Sections 39(i.1) and 41.1 were added to provide authority to CSC to conduct "for cause" urine tests. Testing could be ordered if a member of the service considered a urine sample necessary to confirm the suspected presence of an intoxicant in the body of an inmate. CSC intended to introduce the random testing program initially in two institutions—one in Quebec and one in Ontario.

Also in 1985, a random testing program was to begin. The program never started, as a Quebec inmate (the *Dion* case) obtained an injunction in 1985 that prevented the ordering of a urine sample. The Quebec Superior Court found that the program infringed the *Charter*. CSC is awaiting the outcome of an appeal before taking further action on the random testing program. It is also awaiting the decision in an Ontario case (*Jackson*) heard by the Federal Court, Trial Division in March, 1989 (a decision was rendered in the *Jackson* case on February 16, 1990).

The random testing program would test five per cent of the inmate population per month. The list of those to be tested would be generated by computer to avoid arbitrariness and the possibility of corrections officers using testing to harass certain inmates. Inmates who tested positive could be subjected to disciplinary measures—transfers or restrictions on family visits, for example.

Drugs pose a particular problem in prisons because of the concentration of drug traffickers. These traffickers already have established networks of supply. Adding to the problem is the large number of drug users in prison (about 70 per cent of inmates have used drugs within the past year, according to CSC officials) and the number of inmates prone to violence. Drug use within prisons therefore has a significantly different character than drug use in society in general.

One purpose of the CSC random testing program was to reduce the demand for drugs in the prison system, in turn reducing the incentive to market drugs and reducing the violence associated with the drug market. It would also reduce pressures on inmates to bring drugs into prisons when returning from community programs or leave. The random testing program would be directed at casual users—the majority of drug users within institutions.

The random testing program could also identify those who need treatment. Finally, it would ensure that Correctional Service Canada offered inmates and staff a safer environment in which to live or work.

While the random testing program does not operate at present, CSC does now operate three other testing programs:

Individualized suspicion: Testing will occur where it is suspected that an inmate is using drugs.

National Parole Board requests: CSC will test when requested to do so by the National Parole Board. CSC officials estimated that less than ten such tests had been conducted in a recent three month period.

Testing as a condition of access to community programs: Inmates who have a history of drug use may wish to take part in a community program. These inmates must give a

clean urine sample each month for three months before starting the community program.

The mechanics of the CSC testing process were described to the Privacy Commissioner's office as follows:

"[Inmates identified for testing are advised in writing of the requirement to submit a urine sample. An inmate is expected to provide a sample normally within two hours of notification, which time period may be extended if necessary. Inmates provide the urine sample in a room which affords a maximum of privacy. The voiding of urine is done under direct observation by staff of the same sex as the inmate. Direct observation is necessary in order to avoid falsification of the sample, such as

- (i) adding substances to the sample such as ammonia or bleach which may be hidden under an inmate's fingernails;*
- (ii) substituting a drug free urine sample which is concealed in or on the inmate's body; and*
- (iii) diluting or replacing the sample with another substance such as water, orange soda, tea or apple juice which has been hidden in or on the inmate body.*

In the experience of the CSC and others, direct observation is the most acceptable method of obtaining a valid sample. Other methods such as body cavity searches or strip searches could be used to prevent falsification but they are far more intrusive.

After voiding, the inmate gives the urine sample to the staff, who, in the inmate's presence, seals the urine container using a pre-numbered seal and immediately affixes a label which specifies the date and time of collection. The staff initials and records this information on a chain of custody form. The inmate is then asked to sign a consent form certifying it is his urine sample.

The sealed sample container is sent to the testing laboratory in a secured, sealed box. When the container is received at the laboratory, the condition of the seal is checked as well as the information on the form and label. An internal chain of custody form is then generated and signed by the technician initially handling the sample.

All the testing takes place in two rooms of the laboratory which are separated from the rest of the lab and which are secured by cipher locks. Only four authorized staff have access to these areas and when not occupied, [the areas] are protected by a motion detector. The initial screening test is carried out in one area and the confirmatory test in the other area. A locked refrigerator is used for storage of the samples during processing, and a locked freezer for the long term. The testing is done by qualified and designated laboratory personnel.

The internal laboratory procedures are designed to ensure that the sample received is properly sealed and identified, that the testing procedures and identification of the samples and sample results are properly recorded and reviewed. The identity of the inmate is never known to the laboratory.

The testing laboratory used by CSC has been evaluated by a group of experts.... In addition to evaluation, a quality assurance program for the lab has been established to ensure that it maintains the collection and testing standards. "

CSC estimates that, if random testing is approved, about 95 per cent of all inmate drug testing will be random. The other five per cent will consist of testing in the three circumstances outlined above.

The testing procedures used by CSC for its own purposes and those used by CSC to test on behalf of the NPB are almost identical. CSC testing differs only in that the sample collection, labelling and packaging take place in the institution. Collection of samples of persons outside institutions (for example, parolees) is done by contract clinics across Canada. All samples are sent to the same laboratory for analysis. The same testing process is used for all samples. An EMIT screening test is used first. If the test result is positive, a confirmatory test, the GC/MS, is used. A positive test result after confirmatory testing is considered valid.

Before inmate samples are sent to the laboratory, officials check with the institution hospital to determine if the inmate had been given medication that might affect test results.

Test results are sent to an institution's urinalysis coordinator. They are also placed in the inmate's medical and case file. Caseworkers and the institutional management team (correctional worker responsible for the inmate, a psychologist and the warden or deputy warden) all have access to the case file. Only health care personnel have access to the medical file.

Urine samples are frozen and kept up to one year to permit a challenge to the test results. There would be no procedure, however, for inmates tested under the random testing program to challenge test results.

Canadian Security Intelligence Service

The Canadian Security Intelligence Service (CSIS) has two concerns stemming from drug (and alcohol) use: long term security and suitability of the individual for work with CSIS.

CSIS does not conduct drug testing of applicants or employees. It has no plans to do so. This policy has been in effect since its recruiting and personnel standards were first established (late 1984 or early 1985) with the creation of CSIS.

CSIS senior management has a policy on drug use for applicants. It is explained to applicants during interviews.

The CSIS administration manual contains the following statement:

"SUBJECT: SUITABILITY FOR EMPLOYMENT: ABUSE OR ILLEGAL USE OF SUBSTANCES

- 1. This bulletin contains guidelines for assessing applicants whose use of illegal or dependency-causing substances may affect their suitability for employment with the Service.*

2. *An applicant is considered unsuitable for employment with the Service where there are reasonable grounds to believe the applicant will, after engagement by the Service, engage in either of the following:*
 - a. *Illegal use or possession of any of the substances listed in the Narcotic Control Act or in Schedules G and H of the Food and Drugs Act.*
 - b. *Use of substances that may have an adverse effect on his/her performance or conduct.*
3. *The Resourcing Officers shall normally reject an application for employment if the applicant has engaged infrequent or habitual use of substances as described in 2.a. or 2.b. or has engaged in such use during the year preceding employment with the Service.*
 - a. *Exceptions to 3. above may be referred to the Director General, Personnel Services (DG/HPS) for decision."*

Although CSIS has considered the drug testing of applicants, it rejected the program as unnecessary, given the thoroughness of the security and suitability investigations that precede employment. These investigations would likely uncover any unacceptable drug use.

Self-identification is the preferred method for CSIS to learn of drug use. If the applicant does not admit drug use, but the suitability investigation discloses drug use, this suggests dishonesty and unsuitability for employment with CSIS.

There is no written policy for current employees dealing specifically with drug use. There is, however, a discipline code which could apply.

If an allegation were made that an employee used illicit drugs (or had problems with legal drugs, such as alcohol), CSIS internal security would assess the seriousness of the problem and any threat to security. (As with applicants, there is no need to test, as CSIS has at its disposal an effective way to "surveil" employees. Other government departments and agencies may not.) The employee might be interviewed about the allegation. The primary concern of CSIS is to get an honest answer. A dishonest answer suggests the potential for further dishonesty. This in turn suggests a security risk or unsuitability for working with CSIS.

CSIS was aware of no cases of employee drug problems. Applicants with drug problems would not be hired in the first place. A number of applicants have been rejected because of long term drug use; others have been deferred for up to one year.

CSIS has identified some problems with alcohol use. CSIS has its own employee assistance program (EAP) to help employees with personal problems. It also contracts out part of this program because some employees resist the idea of an internal EAP program. They worry about information circulating within CSIS.

The FBI and the CIA both have drug testing programs. The FBI program has been in place since

President Reagan issued his 1986 executive order requiring drug testing in the United States federal workplace. It was not known how long the CIA policy had been in place. CSIS is aware of no attempts by these agencies to press their counterparts in Canada to perform drug tests. According to CSIS, none of its personnel are sent to the United States for training. The issue of testing as a condition of being sent for training has therefore not arisen.

Canadian Human Rights Commission

In November 1987 the Canadian Human Rights Commission produced a policy on drug testing. The full text of the policy (except for footnotes) follows:

Canadian Human Rights Commission Drug Testing Policy

I. INTRODUCTION

Employment related drug testing, recent to Canada, is giving rise to controversy on social, moral, legal and scientific levels. Such questions as whether drug testing should be done, what test should be used and what action should be taken as the results of the test are fundamental to this controversy.

While the debate resulting from this controversy often focuses on the effect of drug testing on drug dependent individuals, drug test samples may also be used to test for pregnancy or to test for disabilities other than drug dependency, such as epilepsy and diabetes. Drug testing, therefore, has the potential to affect more than just the drug dependent individual.

Drug testing has already been implemented in rail and other industries in Canada and the Commission has received complaints as a result of employees being treated adversely because of a "positive" drug test result. A policy on drug testing is therefore essential.

This paper examines, first, the grounds of discrimination that may be raised in complaints concerning drug testing and, second, the bona fide occupational requirement policy as it relates to the issue.

II. POTENTIAL GROUNDS OF DISCRIMINATION

Although the Canadian Human Rights Act does not specifically prohibit drug testing, the use of "positive" results from those tests may be considered a discriminatory practice.

The question that must be asked then is: on what grounds, if any, can these complaints be considered? This section considers the question.

a) Complaints Filed on the Ground of Disability

i) Drug Dependence

A disability, as defined in the Act, includes previous or existing dependence on alcohol or a drug. As there is no consensus in the occupational health field as to what constitutes drug dependence, the Commission believes that it is sufficient for the complainant to merely affirm drug dependency for a ground to be established.

ii) Perceived Drug Dependence

A complainant may, in fact, not be drug dependent and still file a complaint if there is an allegation that differential treatment resulted from the employer's presumption of drug dependency.

And, in the absence of compelling evidence to the contrary, when an individual is treated adversely as the result of a "positive" test, it may be presumed that the employer perceived the individual as drug dependent. This is because to do otherwise would be to seriously limit the application of the Act to this issue and would be inconsistent with the Courts' instruction to interpret the Act broadly.

iii) Other Disabilities

Samples from drug tests might be used to test for conditions other than drug dependency, such as epilepsy, venereal disease, diabetes and various other mental and physical conditions. Such use may result in complaints of discrimination on the basis of disability.

b) Complaints Filed On The Ground Of Sex

Samples from drug tests may also be used to test for pregnancy. Such use may result in complaints of discrimination on the basis of sex.

c) Complaints Filed On The Ground Of Age

A 1984 Addiction Research Foundation Survey indicated the majority of drug users are between 18 to 29 years of age. Mandatory drug testing would have an adverse effect on this group as it would eliminate a large number of young candidates from employment, a group that is already suffering from high unemployment.

d) Complaints Filed On The Ground Of Race

Drug testing can have an adverse effect on visible minorities with higher levels of melanin pigment since it is chemically similar to the active ingredient in marijuana.

The Commission will deal with complaints where individuals allege discrimination on the basis of disability, sex, age or race as a result of a "positive" drug test.

III: THE BONA FIDE OCCUPATIONAL REQUIREMENT (BFOR)

a) Criteria For Establishing A BFOR

The Canadian Human Rights Act provides that a practice is not discriminatory if it is based on a bona fide occupational requirement. The Canadian Human Rights Commission has developed criteria setting out three requisite elements to establish a BFOR. These elements are:

1) the employer must establish that the practice is relevant in determining whether the individual has the capacity to perform the essential components of the job safely, efficiently and reliably;

2) the employer must validly, reliably and accurately assess the particular individual's capacity to perform safely, efficiently and reliably, and usually do so on an individual basis; and

3) the employer must, where reasonably possible, avoid any discriminatory effect on the individual (i.e. reasonably accommodate the individual).

All three elements must be present to establish the BFOR.

b) Applying The BFOR Criteria To Drug Testing

i) Criteria 1—Capacity To Perform The Job

Testing must be based on the employer's ability to demonstrate objectively that a 'positive' result to the drug being screened out indicates a decreased ability to perform the job safely, efficiently and reliably.

This standard may be difficult for the employer to meet 'Positive' testing has no direct correlation to job performance. Testing positive does not indicate impairment, or dependency. In fact, it does not even reveal drug use. All a 'positive' test reveals is that at some time, which may have been days or even weeks before the day of testing, the individual was exposed, once, to a drug. The link between testing 'positive' and capacity to do the job is, therefore, tenuous.

On the other hand, there is some evidence to demonstrate that there is a link. Empirical evidence drawn from the American's experience with drug testing in the rail industry apparently shows that the monitoring of drug use does reduce accidents in the workplace. Some employers may use this or other evidence as indirectly showing the link between testing 'positive' and job performance.

The Commission accepts, in principle, the possibility of a link between testing 'positive' to a drug and job performance and will determine whether in fact a correlation exists in any particular situation based on the circumstances of that case.

ii) Criteria 2

A. Individual Assessment

The Commission's BFOR policy requires that assessments of capacity to perform should, where possible, be individualized. This implies that drug testing should normally occur only when on-the-job deficiencies are noted. An exception may be made where an employer cannot identify performance deficiencies, such as when there is minimal or no direct

supervision, and where there is a significant safety risk. In any case, testing may be considered permissible only if there are no less discriminatory means of assessing the individual's capacity to perform the job.

B. Valid, Reliable and Accurate Testing

The BFOR policy requires that any testing procedure designed to determine an individual's capacity to perform the essential components of the job must be valid, reliable and accurate. As with other elements of the policy, it is the employer who bears the responsibility to ensure that testing procedures meet these standards, and that the procedures are upgraded to keep abreast of technological and scientific developments.

With reference to drug testing, there is widespread concern about the validity of the current standard testing procedure the Enzyme Immunoassay Technique (EMIT).

Because of this, the Addiction Research Foundation has developed the following recommended procedures which it feels, at the present time, "guarantee valid, accurate and confidential" results:

- samples should be collected by qualified staff under medical supervision and forwarded to a qualified laboratory;*
- the individual being tested should have the right to provide and to have recorded a statement of current medical or other drug use;*
- all positive results should be confirmed by chromatography/mass spectrometry and the laboratory should not forward positive results unless the results have been confirmed by this method;*
- the laboratory should communicate test results only to the licensed medical practitioner who forwarded the test samples to the laboratory; and*
- the practitioner should report back to the employer on the results of testing and his/her interpretation of same in accordance with standard medical ethics and any applicable company policies and agreements".*

The Commission considers the procedures outlined by the Addiction Research Foundation as being the current minimum standard required for tests to provide accurate, valid, and confidential results.

iii) Criteria 3—Reasonable Accommodation

Even if the first two elements of the BFOR are established, the employer still has the duty to reasonably accommodate the employee.

Reasonable accommodation may include referring employees who test 'positive' to an employee assistance program (EAP) for assessment and, if needed, counselling and rehabilitation. An employer who does not and cannot offer an EAP might be required to provide employees who need assistance the same benefits as are provided to those suffering from other disabilities.

The duty to reasonably accommodate has limits, however. For example, if the employer sends an employee on a rehabilitation program and the employee does not overcome his or her dependency, no further accommodation may be required.

There may also be limits on the extent to which reasonable accommodation is required for job applicants.

The Commission will determine, in accordance with the facts of each case, the extent to which reasonable accommodation is required and whether a given action constitutes reasonable accommodation."

Revenue Canada—Customs and Excise

Customs and Excise first considered the issue of drug testing when asked by Transport Canada in mid-1989 to assist in a survey of drug use. Customs and Excise decided at that time that testing Customs inspectors (there are approximately 4,000 directly engaged in customs work) was not necessary.

Customs and Excise has identified only about a dozen smuggling cases (of any sort, not merely those involving drugs) in recent times which have involved Customs and Excise employees. Most smuggling has little to do with drugs. Testing therefore would be of little use.

Over the last five years, the Department has identified only a handful of Customs Inspectors who used illicit drugs. Illicit drug use is not a major problem among Customs Inspectors.

Customs and Excise officials report that Customs Inspectors are peace officers under the *Criminal Code*. Customs Inspectors frequently mix with other Customs Inspectors. It is believed that colleagues would quickly learn about another's illicit drug use and that employees who report to work under the influence of alcohol or drugs would be noticed. Employees experiencing health problems of this nature would be directed to seek help through the Customs and Excise Employee Assistance Program. As well, other police agencies would report illicit drug use to Customs and Excise. For these reasons, testing is seen as unnecessary.

There has never been cause to believe that the on-the-job performance of the Customs Inspectors, as individuals or as a group, has been impaired by drugs; consequently, there is no threat to public health or safety and, therefore, no need for drug testing.

In addition, drug testing would not address the issue of an individual Customs Inspector tempted to facilitate drug importation. Money, not drugs, would generally be used to attempt to corrupt Customs Inspectors to allow drug shipments into Canada. Testing in this circumstance would seem to be futile.

Those at Customs and Excise with whom this office spoke considered testing a witch hunt; testing assumed that people were guilty. The costs associated with testing and the need to establish and follow detailed testing procedures also concerned the department. There was no desire at the senior management level of Customs and Excise (Assistant Deputy Ministers or Deputy Ministers) to test. The introduction of testing would require drastic changes in intent and policy.

Treasury Board

Treasury Board, the public service employer, does not intend to introduce a broad program of drug testing

of employees or job applicants. In keeping with the government's policy as announced in the National Drug Strategy, however, ministers may bring forward exceptional cases where overriding public safety concerns in their view necessitate consideration of testing. To the knowledge of the Treasury Board Secretariat only Transport Canada and the Department of National Defence are currently considering drug testing for public safety reasons. Treasury Board is confident that Employee Assistance Programs are generally an adequate response to workplace drug use. Public Service departments have been required since 1977 by Treasury Board policy to have EAPs.

Treasury Board consults with all Public Service unions through the National Joint Council. At the Council there have been statements of resistance to drug testing by unions, but testing has not been a major issue to date.

National Health and Welfare

The Health Protection Branch of National Health and Welfare is developing urinalysis testing procedures. However, these procedures had not been finalized and made public in time for reference and assessment in this report.

Fitness and Amateur Sport

Doping control procedures are now a part of most major domestic and international competitions. They are used increasingly and are becoming more sophisticated. The procedures used at any international event are determined by the International Olympic Committee or by the appropriate international sport federation.

Among the substances used to improve athletic performance are the following (and their related compounds):

- narcotic analgesics (for example, morphine);
- anabolic steroids and hormones (for example, testosterone);
- stimulants (for example, amphetamines, caffeine);
- beta blockers;
- diuretics; and
- physiological manipulation (for example, blood doping).

A positive test results in disqualification from that competition. Further sanctions may be imposed by international, national or provincial sport federations.

In sports where banned drugs may be used to assist in training, athletes may be tested randomly in their home locale during the non-competition season.

In 1983, the federal government issued its first policy statement and action plan on doping in sport. The policy was revised in 1985. The policy was implemented in cooperation with the Sport Medicine Council of Canada.

The following is excerpted from *Drug Use and Doping Control in Sport: A Sport Canada Policy*:

"Position Statement

Sport Canada is unequivocally opposed to the use by Canadian athletes of any banned substance in contravention of the rules of the international sport federations and/or the International Olympic Committee, and is equally opposed to any encouragement of the use of such substances by individuals in positions of leadership in amateur sport ... or by athletes themselves.

Federal Government Plan of Action

Sport Canada will coordinate and provide consultation and financial support for the following measures in support of the above position statement.

Obligations of Athletes and National Sport Organizations

1. All national sport organizations will be required to develop a plan for their sport to eradicate improper drug use by Canadian athletes and support personnel. [Those sport organizations for whom the use of performance enhancing drugs is not an issue are required to state this in writing. They are not required to develop a plan.]

The plan must include the following terms:

(a) a statement of the organization's policy on drugs (including use, possession and other aspects considered appropriate by the organization); a procedure (including due process) for consideration of alleged drug infractions and penalties for such infractions (this statement must address the activities of athletes, coaches, medical and other support personnel);

(b) an operational plan for regular testing of Canadian athletes at major competitions and drug training periods with a view to eliminating the use of anabolics and related compounds, and the use of other substances on the list of banned drugs at or near the time of competition;

(c) an educational program;

(d) international lobbying activities which have as their objective the eradication of drug use in international sport.

2. All national sport organizations will be required ... to include a commitment to non-use and non-possession of banned substances by carded athletes in their contracts with said athletes. The only exceptions are possession and use of non-anabolic drugs where such use occurs under appropriate medical supervision and in non-competition situations.

3. All national sport organizations are required ... to include a commitment of non-encouragement of use, and non-possession of anabolics and related compounds, and adherence to the rules concerning other banned drugs, in their contracts with coaches, sport scientists, medical practitioners and other support personnel engaged by the national sport organization.

4. Athletes in receipt of federal sport benefits (including the Athlete Assistance Program and/or other direct or indirect funding programs such as travel to National Championships, access to National Coaches and High Performance Sport Centres, etc.) are required to make themselves available for both regularly scheduled and ad hoc random doping control test procedures as authorized by their national sport organization or the Sport Medicine Council of Canada's Committee on Doping in Amateur Sport. It is the responsibility of national sport organizations to ensure that athletes under their jurisdiction present themselves for such tests as requested by either of the two above-mentioned agencies.

5. National sport organizations are required to develop a list of drug-related infractions applying to coaches and medical, technical, administrative or other support personnel engaged on a voluntary or professional basis by the national sport organization or one of its affiliates. Such a list of infractions shall indicate clearly that national sport organizations do not condone encouragement by their support personnel of the use of drugs on the banned lists. Such persons proven through appropriate due process to have counselled athletes, coaches, medical or other support staff to use anabolics or related compounds or to use non-anabolic drugs on the banned lists in contravention of the rules of their respective national or international sport federations shall be withdrawn from eligibility for federal government sport programs and support provided either directly or indirectly via national sport organizations. Such withdrawal of eligibility shall be invoked from the moment of proof, through appropriate due process, of said infraction.

Violations and Sanctions

1(a) Any athlete who has been proven through appropriate due process to have used banned drugs in contravention of the rules of his/her respective national and/or international sport federation will be suspended forthwith from eligibility for Sport Canada's Athlete Assistance Program and any other financial or program support provided directly to athletes or indirectly by Sport Canada via national sport organizations (i.e., national championship funding, national team program support, etc.).

(b) Any athlete who has been proven through appropriate due process to have been in possession of anabolics or related compounds or to have supplied directly or indirectly, or to have counselled the use or administration of such drugs to others to whom this policy applies, shall be suspended forthwith from eligibility for benefits through Sport Canada as described above.

(c) The withdrawal of benefits as described in 1(a) and (b) above shall be invoked from the moment of proof of the said infraction by the appropriate authority. (In the case of positive results arising from doping control tests, the period of ineligibility for federal support takes effect at the time of the confirmation of the positive result of the "B" sample. Should an appeal subsequently overturn the finding of the positive result, benefits for the period between the initial announcement of the test result and the announcement of the result of the appeal will be reinstated.)

Individuals proven to have violated antidoping rules involving anabolic steroids and related compounds will be subject automatically to a lifetime withdrawal of eligibility for all federal government support programs or benefits.

Individuals proven to have violated antidoping rules involving drugs other than anabolic steroids and related compounds will be subject automatically to ineligibility for all federal government sport programs or benefits for a minimum period of one year or the duration of any suspension imposed by the respective international or national federation, whichever is longer. Second offences shall be punished by means of lifetime withdrawal of eligibility for federal government sport programs or benefits.

(d) Any athlete convicted of a criminal or civil offence involving a drug on the banned list of his/her respective national or international federation shall be similarly suspended (as outlined in 1(c)) from eligibility for the Athlete Assistance Program and other federal government support as described above.

(e) The only relief from life suspension is through direct appeal to the Minister of State, Fitness and Amateur Sport."

Royal Canadian Mounted Police

The RCMP has 16,000 members in 800 posts and detachments. In 1989, it planned to recruit 1200 new members.

The RCMP has no drug testing program and does not see the need for one. Its representatives suggested, however, that testing programs to ensure drug-free status could be justified as *bona fide* occupational requirements. This is particularly so, given the law enforcement role entrusted to the RCMP. Any testing under such a program would be done for cause only—suspect behaviour, for example—or as part of a follow-up to a rehabilitation program.

The RCMP constantly reviews its recruitment policies. The force has considered testing recruits, but thinks that its present practices serve it well. The current recruiting process involves extensive one-on-one interviews plus interviews with colleagues, neighbours, etc., who would know about the applicant's history of drug use. Extensive field enquiries are undertaken as well. These involve fingerprint, criminal record, credit bureau, employment, reference and schooling checks. Recent drug experimentation by applicants may result in their rejection or deferral. The RCMP will consider what type of drug was involved when making this decision.

No concern was expressed about the level of illegal drug use in the RCMP at present. Few cases have surfaced. The RCMP has various ways to monitor members; many of these are available to identify suspected drug abuse. The RCMP could conduct its own investigation or could press a criminal investigation. It could refer the member for a medical examination and, if necessary, to an assistance program. The supervisor could confront the member. Drug testing could be another option, although it was not considered appropriate by RCMP officials.

If a member used illegal drugs and the supervisor became aware of or suspected this, the supervisor would likely conduct an internal investigation. The member might feel pressured because of this and seek to enter the member assistance program. If the member refused rehabilitation, health services would generally conclude that the member had a condition incompatible with serving in the RCMP. In short, the behaviour of the member would dictate in large part what measures the RCMP would take in response.

If there were a major problem with drugs (there has been none identified), it would likely come to the attention of supervisors or RCMP health services. All members are medically examined periodically.

RCMP members can have their routine medical care done by an RCMP health services physician or by a private physician. A private physician reporting a medical condition would send a general letter to RCMP administration and a specific letter to RCMP health services.

The RCMP has a member assistance program (MAP) as part of the health services program. The force encourages members to seek help if they need it. Information available to the members assistance program is generally treated as medical information. It is generally not accessible by supervisors, only by health services. If, however, an RCMP member who assists another member in a member assistance program learns of that member's use of illegal drugs, RCMP regulations require this to be reported to superiors. A discipline investigation would then be initiated.

If a physician treated a member for an illegal drug problem, the physician would follow his or her professional ethics in deciding whether to disclose this to the member's supervisor. There is a conflict between the principle of medical confidentiality on one hand, and the safety of members of the force and colleagues, and national security interests, on the other.

Labour Canada

Labour Canada policy concerning the testing of its public servants will follow Treasury Board policy.

Labour Canada has been active in the National Drug Strategy (NDS), particularly in the area of workplace substance abuse. On the issue of drug testing the government has stated that "mandatory drug testing will not constitute part of the NDS". It has also stated that "drug testing is unwarranted at this time"; however, there may be "exceptional circumstances" where "overriding public safety concerns" may necessitate consideration of testing. Labour Canada participated in developing the government's response to the workplace testing recommendations in *Booze, Pills and Dope*, the Report of the Standing Committee on National Health and Welfare. This response was based in part on the results of the National Consultation on Substance Abuse and the Workplace which took place in February, 1988; Labour Canada was on the steering committee for these consultations.

Drug testing has been considered by the government in the context of public safety (transport) or national or international security (defence) and not in the context of workplace or employee safety.

In November 1986 the federal/provincial/territorial Ministers of Labour established an Ad Hoc Committee of Officials to review issues relating to substance use and the workplace, particularly drug testing, and to report back to them. This report has been prepared and will be available for Ministers to consider at their next meeting. This report contains no workplace drug use statistics as no appropriate Canadian information was available at the time.

Most unions have supported the National Drug Strategy, particularly its focus on prevention, education and treatment. Most unions, however, have opposed drug testing in the workplace. This

has become particularly clear since the announcement on March 16, 1990, of the Minister of Transport's *Strategy Paper on Substance Use in Safety-sensitive Positions in Canadian Transportation*.

In July 1988 the Ministers of Health and Welfare and Labour announced consultations with representatives of employers and employees in the federally regulated private sector on the advisability of requiring major federally regulated establishments to have Employee Assistance Programs (EAPs). These consultations have taken place, and a discussion paper was circulated to participants in February, 1990, just prior to final consultations in March, 1990. Drug testing was not part of the consultations since it was considered a separate issue. During the course of the consultations, it became apparent that there was opposition to the concept of mandatory EAPs. A consensus developed, however, that the government support private initiatives and that the government should undertake initiatives to promote comprehensive, joint labour/management administered EAPs within the federal jurisdiction.

APPENDIX B

THE POSITION OF THE GOVERNMENT OF THE UNITED STATES AND VARIOUS STATE GOVERNMENTS ON DRUG TESTING

(a) Executive Order 12564

On September 15, 1986, President Reagan issued an executive order entitled "Drug-Free Federal Workplace". The contrast in approaches between the American executive and the government of Canada towards drug testing are immediately evident. The following portions of the executive order encapsulate the American government approach to drug testing:

"Sec. 1. Drug-Free Workplace

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

- (1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;*
- (2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;*
- (3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;*
- (4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and*
- (5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.*

Sec. 3. Drug Testing Programs

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such

testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

- (1) When there is reasonable suspicion that any employee uses illegal drugs;*
- (2) In an examination authorized by the agency regarding an accident or unsafe practice; or*
- (3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.*

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use."

The executive order authorized the Secretary of Health and Human Services to promulgate scientific and technical guidelines for drug testing programs. Agencies were to conduct their testing programs in accordance with these guidelines.

On April 11, 1988, the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* were adopted.⁵³ The guidelines apply to the following: certain Executive agencies, the Uniformed Services (but not the Armed Forces as defined in legislation) and any other employing unit or authority of the Federal Government.

The guidelines do not apply to drug testing conducted under legal authority other than the executive order. The guidelines do not, for example, cover testing of persons in the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons or parolees.⁵⁴

The guidelines cover several matters. They set out detailed specimen collection procedures, laboratory certification procedures, mechanisms to protect employee records and access to results.

Several points should be noted about the American government policy in general:

- it provides for testing of government employees under a wide range of justifications;
- it provides for universal testing of applicants for government jobs;
- it obliges, not merely permits, government agencies to test for some drugs, and permits testing for others;
- the testing covers certain illegal drugs only; it does not apply to alcohol;
- the executive order and guidelines cover testing in the federal workplace only.

(b) State Laws Governing Drug Testing⁵⁵

As of September, 1988, eight states⁵⁶ had enacted employee or job applicant testing laws. These laws cover both government and private sector employers and employees. They extend the constitutional constraints imposed on American government employers to private employers.⁵⁷ Some of the statutes were patterned after a model bill drafted by the American Civil Liberties Union. No state has prohibited drug testing in the workplace.⁵⁸

Six of the eight states require an employer to have some form of either "probable cause" or a "reasonable suspicion" to test an employee for the presence of drugs.

Five of the eight states restrict pre-employment testing. Two states require a job offer before pre-employment testing is allowed.

Two states impose no restriction on random testing.⁵⁹ Minnesota permits random testing of employees in "safety sensitive" positions. Connecticut permits random testing if the employee is in a high-risk or safety sensitive job. Connecticut and Minnesota also permit random testing if federal law authorizes it. Iowa and Vermont permit random testing *only* if federal law authorizes it.⁶⁰

All eight state laws require confirmatory testing before a company can discharge or discipline an employee. Four states require that only laboratories licensed or regulated by the state conduct the tests.⁶¹ Five of the eight states require the employer to follow reliable chain of custody procedures.⁶²

Seven of the eight states require employers to keep test results confidential. Iowa, for example, requires an employer to delete references to tests or test results after an employee leaves employment *and* has successfully completed a treatment program for substance abuse.⁶³ Five of the eight prohibit the use of evidence of a positive result in a criminal proceeding against the employee.⁶⁴

Six of the eight states address collection procedures. Two states specifically prohibit direct observation while the person provides a test sample.⁶⁵ Utah requires that samples be collected "with due regard to the privacy of individuals".

Five states require employers to give the employee a chance to rebut or explain positive test results. Five states provide civil remedies for the employee if the employer fails to comply with statutory requirements. Four states make it a criminal misdemeanor to violate the testing statute.⁶⁶

ENDNOTES

¹ Dr. Matthew P. Dumont, then assistant commissioner of mental health in Massachusetts, July 1973 (quoted in *the Privacy Journal*, July, 1987).

² Bryant Gumbel, the *Today Show*, March 12, 1986 (quoted in *the Privacy Journal*, March, 1986).

³ Pat Bowlen, owner of the Denver Broncos, who admitted that as an NFL owner he was "blaspheming" (quoted in *the Privacy Journal*, April, 1988).

⁴ B. Feldthusen, "Urinalysis Drug Testing: Just Say No", [1988] Canadian Human Rights Yearbook 81 at 84.

⁵ David F. Linowes, *Privacy in America: Is Your Private Life in the Public Eye?* (1989) 37. The University of Illinois conducted the survey.

⁶ A 1988 Gallup survey of several hundred large American companies with drug testing programs identified the desire to curb illegal drug traffic as the main justification for starting a drug testing program in 10 per cent of the cases. A significantly higher percentage (54 per cent) started programs primarily to protect their safe work record or reduce the number of accidents. The Gallup Organization, *Drug Testing at Work: A Survey of American Corporations* (1988) at 17-18.

Professor David Linowes reported the results of a survey conducted at the University of Illinois to determine the extent to which the largest industrial corporations of America have policies safeguarding the personal information they collect and maintain about their employees, former employees and applicants for employment. The survey sampled 275 companies from among the Fortune 500 corporations. Slightly less than half responded.

Over half (58 per cent) of those that responded had a drug testing program in operation. Among the reasons they gave for introducing drug testing were the following: incidents or drug use on the job, or both (69 per cent), general concern for the safety of employees (97 per cent), government regulations (10 per cent), to follow the lead of other organizations (21 per cent), to try to keep health care costs down (51 per cent), to allow enforcement of company drug policies (40 per cent) and to improve the company's public image (22 per cent). David Linowes, *Privacy in America: Is Your Private Life in the Public Eye?* (1989) at 40, 52-53.

⁷ Executive Order No. 12564, 51 Fed. Reg. 32,889 (1986).

⁸ Although some suggest that users of illicit drugs will simply change drugs—to drugs that are not being screened for in the tests. For example, a heroin user threatened by the prospect of a urine test for illegal drugs might simply switch to alcohol as the drug of choice in the circumstances. This may reduce the demand for illicit drugs, but it will not remedy the social consequences of drug taking.

⁹ Gallup survey, *supra* note 1.

¹⁰ *Ibid.* at 18.

¹¹ The results of the Gallup survey, *supra* note 1, suggest that most large companies began drug testing mainly to protect their safe work record or reduce the number of accidents.

¹² Transport Canada advised this office that the U.S. Department of Transportation has now publicly recognized that it will be possible to develop an approach to drugs in the transportation industry that will be mutually acceptable between Canada and the U.S. It remains to be seen just how such a mutually acceptable approach would be structured. This may become a moot issue in any event with the proposed introduction in Canada of a testing strategy that is broadly similar to that operating in the United States.

¹³ *Ibid.*

¹⁴ It would be impractical to test for all these drugs. The U.S. *Federal Register* (Vol. 58, No. 69, Monday, April 11, 1989) sets out which of these drugs agencies must and may test for:

"2.1(a)(1) Federal agency applicant and random drug testing programs shall at a minimum test for marijuana and cocaine;

(2) Federal agency applicant and random drug testing programs are also authorized to test for opiates, amphetamines and phencyclidine; and

(3) When conducting reasonable suspicion, accident, or unsafe practice testing, a Federal agency may test for any drug listed in Schedule I or II of the CSA

2.1(l)(d) These Guidelines are not intended to limit any agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees or employees in its regulated industries."

¹⁵ Presentation by William G. Harris to the American Society for Industrial Security (ASIS), Tampa, Florida, December 6, 1989. A paper accompanying the presentation suggests that psychological testing to predict drug use is deficient for several reasons: a dearth of prediction research, the cost of the process (time consuming, labour intensive and open to legal challenges) and the likelihood that such testing may screen out a large number of likely good employees.

¹⁶ Metabolites of fat-soluble drugs, such as marijuana, may appear in the urine up to several weeks after use.

¹⁷ The Department of National Defence acknowledged in correspondence to this office that the deterrent effect of urinalysis has not been conclusively shown. It added, however, that evidence strongly supports that conclusion, particularly the experience of the U.S. military.

¹⁸ Technically, a positive test result stemming from a person's consumption of over-the-counter inhalants or poppy seeds is not a false positive. If the testing program is aimed at identifying illicit drugs, however, the result is effectively false in that context.

¹⁹ See Part II, (b): *The Objections to Drug Testing*.

²⁰ Paragraph 8(2)(e) of the *Privacy Act* permits government institutions to disclose personal information to investigative bodies specified in the *Privacy Regulations*, on the written request of the body, for the purpose of enforcing any law of Canada or a province

or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed.

²¹ The use of a drug in conjunction with some activities, of course, can result in a criminal offence (for example, impaired driving, flying or boating). Still, the use of the drug itself is not criminal.

²² B. Beyerstein, M. Jackson, D. Beyerstein, "Drug Testing in the Workplace: A position paper of the British Columbia Civil Liberties Association" (1989) at 9.

²³ The Association of Labor/Management Consultants on Alcoholism, quoted in "Drug Testing in the Workplace", *supra* note 1 at 17.

²⁴ FA Hanson, "Some Social Implications of Drug Testing", 36 U. Kan. L.R. 899 at 917 (1988).

²⁵ The potential for employer-union conflict can be seen from the strong objections of some organized labour groups to testing. On March 10, 1986, the Canadian Labour Congress presented a submission to the Standing Committee on Transport on Bill C-105, *The Railway Safety Act*. "The CLC is strongly opposed to any form of workplace alcohol and drug testing—be it mandatory, pre-employment, just-cause, medical monitoring, medical-testing, or after an accident" (at 3).

²⁶ Private sector employers might be tempted to rely on the less expensive route of performing a screening test only, and base their decisions on the results. The unacceptably high raise positive rate stemming from screening tests means that many persons may be falsely accused of using drugs and penalized as a result.

²⁷ (1989) at 36.

²⁸ *Supra* note 1 at 6-7.

²⁹ The explanatory pamphlet accompanying the Sport Canada testing policy sent to this office depicts a male, wearing nothing but socks, urinating while being directly observed by another male.

³⁰ [1988] 2 S.C.R. 417 at 431-32.

³¹ See, for example, B. Beyerstein, M. Jackson, D. Beyerstein, "Drug Testing in the Workplace", *supra* note 1 at 21. There, the authors seem to suggest that pre-employment urine screening (for drugs other than alcohol) will do nothing to solve the alcohol problem and may in fact make it more serious.

³² *Supra* note 4 at 9.

³³ See *R. v. Dyment*, *supra* note 9.

³⁴ The Correctional Service Canada testing policy, for example, requires the subject to urinate while being directly observed by a member of the same sex. See Appendix A. It is also conceivable that subjects be required to remove most or all of their clothing when providing the sample, even under direct observation. A pamphlet explaining Sport Canada's testing policy, for example, depicts an almost (except for his socks) nude athlete providing a urine sample under the direct observation of another male.

³⁵ We acknowledge, however, that there will always be claims made for exceptions. Because of the violence associated with the prison drug trade, demand reduction (for all drugs prohibited in prison) through random drug testing is arguably one way to resolve the problem. Testing, coupled with penalties, might reduce the demand for these drugs and improve the safety of the prison environment. One could also try to justify a prison testing program under the "public safety" rubric.

³⁶ SOR/83-508.

³⁷ SOR/83-553.

³⁸ Correctional Service Canada, however, considers that giving an inmate a right to have a sample re-tested would make any testing program it contemplated unworkable.

³⁹ To be clear, breathalyzer testing for alcohol can indicate a level of impairment—albeit a level of impairment presumed by law, not one confirmed by scientific evidence.

⁴⁰ February 16, 1990 (unreported), at 55.

⁴¹ *Ibid.* at 55.

⁴² *Ibid.* at 38.

⁴³ Report of the Standing Committee on National Health and Welfare, *Booze, Pills and Dope: Reducing Substance Abuse in Canada* (October, 1987).

⁴⁴ *Ibid.* at 25.

⁴⁵ *Ibid.* at 25-26.

⁴⁶ Government of Canada, *Government Response to the Report of the Standing Committee on "Booze, Pills and Dope": Reducing Substance Abuse in Canada* (1988) at 8.

⁴⁷ *Ibid.* See also, Government of Canada, *A Report of the National Consultation on Substance Abuse and the Workplace* (1988) at 32c34.

⁴⁸ Government of Canada News Release, "Government Tackles Substance Abuse in the Workplace" (July 20, 1988).

⁴⁹ *Ibid.*

⁵⁰ For a description of the HN testing prerequisite imposed by the U.S. Department of Defense, see The Privacy Commissioner of Canada, *AIDS and the Privacy Act* (1989) at 38, 73.

⁵¹ There are three types of conditional release: parole (day or full), temporary absence and mandatory supervision. Mandatory supervision is a right stemming from earned remission. It can be for up to one third of the sentence. A person must generally be released on mandatory supervision unless he has been detained under the *Parole Act*, having been found to meet certain statutory criteria relating to dangerousness. Inmates may be granted full parole for up to two-thirds of their sentence.

⁵² SOR/85-412.

⁵³ Federal Register, Vol. 53, No. 69, Monday, April 11, 1988.

⁵⁴ *Ibid.*, para. 2.1(e).

⁵⁵ The substance of this section is drawn from R.T. Angarola and S.M. Rodriguez, "State Legislation: Effects on Drug Programs in Industry" in S.W. Gust and J.M. Walsh, ed., *National Institute on Drug Abuse, Research Monograph Series 91, Drugs in the Workplace: Research and Evaluation Data* (U.S. Department of Health and Human Services, Public Health Services (1989)) at 305.

⁵⁶ Connecticut, Iowa, Louisiana, Minnesota, Montana, Rhode Island, Utah and Vermont. The author of the article indicated to this

office that Maine enacted legislation in 1989. The Maine legislation imposes certification requirements for laboratories conducting drug testing, but the government did not fund the certification system. As a result, drug testing is effectively prohibited in Maine at present, despite the existence of the legislation authorizing it.

³⁷ *Supra* note 3 at 312.

³⁸ *Ibid.* at 314.

³⁹ Louisiana and Utah.

⁶⁰ *Supra* note 3 at 309.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.* at 310.

⁶⁴ *Ibid.*

⁶⁵ Rhode Island and Connecticut.

⁶⁶ *Supra* note 3 at 312.

Tab 33



Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing

Discussion Paper DIS-12-03

April 2012



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

Canada

Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing
Discussion Paper DIS-12-03

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Canadian Nuclear Safety Commission
280 Slater Street
P.O. Box 1046, Station B
Ottawa, Ontario K1P 5S9
CANADA

Tel.: 613-995-5894 or 1-800-668-5284 (in Canada only)

Facsimile: 613-995-5086

Email: <mailto:info@cnsccsn.gc.ca>

Web site: nuclearsafety.gc.ca

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Preface

Discussion papers play an important role in the selection and development of the regulatory framework and regulatory program of the Canadian Nuclear Safety Commission (CNSC). They are used to solicit early public feedback on CNSC policies or approaches.

The use of discussion papers early in the regulatory process underlines the CNSC's commitment to a transparent consultation process. The CNSC analyzes and considers preliminary feedback when determining the type and nature of requirements and guidance to issue.

Discussion papers are made available for public comment for a specified period of time. At the end of the comment period, CNSC staff review all input, which is then posted on the CNSC Web site to allow stakeholders the opportunity to comment on the feedback received.

The CNSC considers all comments received from this consultation process in determining its regulatory approach.

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Executive Summary

Human performance is a key contributor to nuclear power plant safety. Recognizing this, the Canadian Nuclear Safety Commission (CNSC) requires nuclear power plants to implement and maintain human performance programs.

Fitness for duty (FFD) is one factor that affects human performance. An important element of being fit for duty is being free from the influence of alcohol, illicit drugs, or performance-altering medication (whether prescription or over-the-counter medication), while at work.

This paper presents the CNSC's proposals for alcohol and drug policies, programs, and testing requirements for Canada's nuclear power plant licensees. Although these proposals are currently limited to nuclear power plants, the CNSC is seeking feedback on expanding the scope to include other licensed nuclear facilities.

In this discussion paper, the CNSC proposes a three-pronged approach:

1. The CNSC proposes that nuclear power plant licensees take measures to prevent, deter, detect, and remediate potential alcohol and drug use. Nuclear power plant licensees would be required to take steps to prevent workers from:
 - bringing, keeping, or consuming alcohol, illicit drugs, illegal drugs or drug paraphernalia within the premises or on the grounds of a nuclear power plant
 - working at a nuclear power plant while under the influence of alcohol or any drug that impairs, or could impair, a worker's ability to perform his or her duties safely
2. The CNSC believes that nuclear power plant licensees should introduce supportive measures to address substance use. In particular, the CNSC's intent is to ensure that workers and supervisors understand their roles and responsibilities. To this end, the CNSC is considering requiring nuclear power plant licensees to have the following four program elements in place:
 - awareness and education programs for workers
 - access to assistance for workers
 - training for supervisors
 - investigative tools
3. The CNSC is proposing that every individual who is granted unescorted access to the protected areas of a nuclear power plant be subject to a comprehensive set of alcohol and drug tests, which would include random testing. Licensees would be required to develop and implement substance testing programs, and to report violations to the CNSC.

It is recognized that these proposals represent a major strengthening of existing fitness-for-duty requirements, as they relate to substance use. The CNSC believes in being proactive, in order to reduce the risk of impairment-related safety events at Canada's nuclear power plants.

Addressing the topic of substance use is a complex and sensitive issue. In order to provide reasonable assurance that nuclear facilities are safe and secure, consideration must be given to enhancing the CNSC's regulatory framework related to the adverse effects of substance use on the ability of workers to safely and competently perform their assigned duties. Regulators and organizations across Canada have approached this topic differently. The CNSC's primary objective for this discussion paper is to seek the views of the nuclear industry, the Canadian public and other stakeholders on the proposed path forward for regulating the FFD subset of substance use and abuse. The CNSC will very carefully consider the comments received before moving forward with any changes to the regulatory framework in this area.

1.0 Introduction

Human performance affects virtually every aspect of a nuclear power plant's safety. In modern, complex industries, research has shown that human error is a causal factor in approximately 80 percent of events [1, 2, 3, 4]. Given the high percentage of events where human and organizational factors are known to play a role, serious consideration must be given to all measures that can reduce the potential for human error.

One factor that affects human performance is fitness for duty (FFD), which is defined as:

A condition in which workers are physically, physiologically, and psychologically capable of performing the tasks of their assigned jobs within the required standards of safety, attendance, quality, efficiency and behaviour [5].

In safety-sensitive industries such as the nuclear industry, FFD programs should provide assurance that workers are free of any impairment that could hinder their ability to safely and competently perform the duties of their position. An important aspect of being fit for duty is being free from the influence of alcohol, illicit drugs, or performance-altering medication (whether prescription or over-the-counter medication), while at work.

2.0 Purpose

Clearly, substance use can and does significantly impair human performance. There is evidence of this in our daily lives; for example, on our roads. The potential safety consequences of alcohol- or drug-induced impairment in nuclear power plants are quite severe. Therefore, the CNSC takes this issue very seriously, and intends to proactively address substance use.

The purpose of this discussion paper is to:

- describe the concept of FFD, and why it is especially important to the nuclear industry
- highlight the necessity of addressing substance use and abuse, and present what has been done on this issue within and outside Canada, in the nuclear industry and elsewhere
- identify the current FFD-related requirements of nuclear power plant licensees and outline potential areas for improvements to the CNSC's regulatory framework – in order to prevent, deter, detect, and remediate substance use in Canada's nuclear power plants

Although the scope of these areas for improvement is currently limited to nuclear power plants, the CNSC is seeking feedback on expanding the scope to include other licensed nuclear facilities.

It is important to note that this initiative is a proactive first step in strengthening the CNSC's regulatory framework in support of FFD. This initiative is not in response to any evidence of

safety issues related to FFD or substance use in Canada's nuclear industry. However, over the last few years the topic of FFD has been raised several times during Commission Tribunal hearings and meetings, and the question as to whether or not the CNSC should do more in this area has been raised. Ultimately, these proposals should be viewed as part of the CNSC's ongoing process for continuous improvement of the regulatory oversight of its licensees.

Note: The terms "substance" and "alcohol and drug" are used interchangeably throughout this document. The term "biochemical" is used specifically in reference to substance testing.

3.0 What fitness for duty assessment means

The primary objective of any assessment of FFD is to ensure individuals have the capacity to effectively perform their job duties without risk to their own or others' health and safety, or to the safety of the nuclear facility, the Canadian public or the environment [6].

FFD can be assessed in a variety of ways at different times. Figure 1 shows the components used to assess FFD and the circumstances when assessments may be conducted. A worker's degree of fitness may be categorized across a range – from fit to unfit to perform the duties of his/her position. Biochemical substance testing is one of the components used to assess FFD.

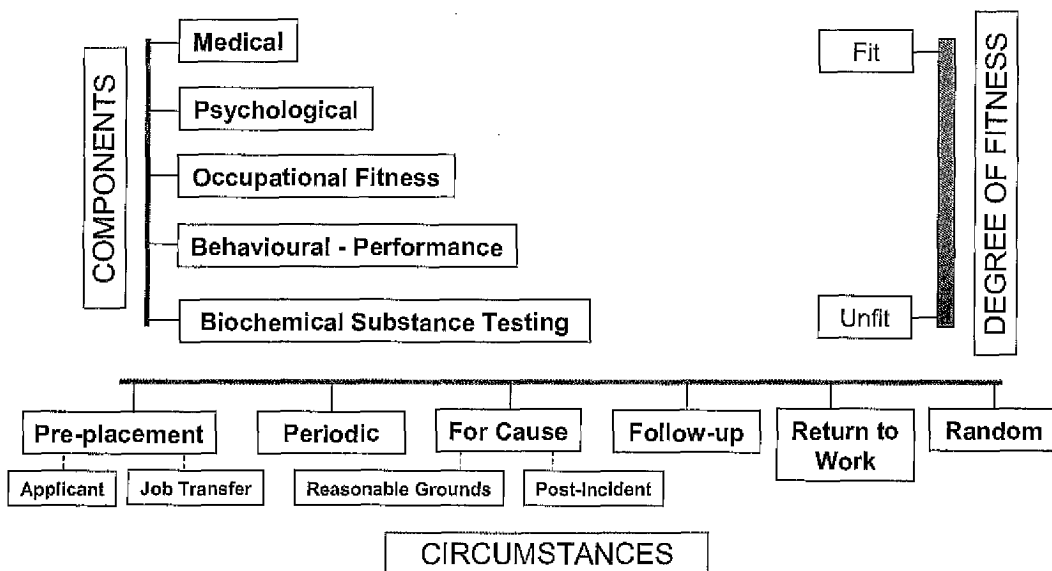


Figure 1: A conceptual framework of FFD showing the components used to assess FFD and the circumstances when assessments may be conducted. The worker's degree of fitness may be categorized across a range from fit to unfit to perform the duties of his/her position.

Components of fitness for duty – What to assess?

Medical, psychological, occupational fitness, behavioural-performance assessments or biochemical substance testing may be conducted to determine if a worker has the capacity to safely perform the duties of his or her assigned job. In biochemical substance testing, a determination of impairment due to the presence of alcohol and/or drugs is established using various tests and analytical methods. Drug- and alcohol-related impairment and associated disorders may also be screened through medical, psychological or behavioural-performance evaluations.

Circumstances of fitness for duty – When to assess?

FFD assessments may be completed under the following circumstances:

- during pre-placement exams
- on a periodic basis
- in a for-cause evaluation (if a supervisor, through observed behaviour, has reasonable grounds to believe a worker is unfit, or if the result of an investigation into an accident or event reveals that post-incident testing is warranted)
- as follow-up, to confirm abstinence after the completion of a treatment program for substance abuse or dependence
- on a random and unannounced basis

Safety-sensitive work – Who to assess?

When defining the population of workers and the parameters of the FFD assessment that these workers should be subject to, it is important to consider the safety and security consequences of impaired human performance. In Canada, some industries apply the same FFD requirements to everyone, whereas others apply more stringent standards to those working in positions designated as safety-sensitive. Some industries designate an entire site as safety-sensitive. This is the case for many oil and gas sites located in the Northern Alberta oil sands [7].

Job requirements – What to assess against?

Typically, FFD assessments evaluate a worker with respect to a specific job under specific working conditions [8]. When an employer in a safety-sensitive industry adopts standards or establishes requirements related to FFD, it is possible that the standard may be considered discriminatory under the *Canadian Human Rights Act* [9]. However, under the *Canadian Human Rights Act*, employers may implement standards or bona fide occupational requirements that are exclusionary, on the basis that the exclusionary worker qualification is legitimately required.

Degrees of fitness for duty – Outcome of a fitness-for-duty assessment

Following the completion of a FFD assessment, a qualified health professional will categorize the job applicant's or incumbent's fitness with respect to the qualifications needed for the position. The health professional will report that the applicant or incumbent worker is either fit,

unfit, or fit to perform with restrictions or conditions. These conditions may either be temporary or permanent.

4.0 Why fitness for duty is important

Nuclear power plants are designed, constructed and operated with safety first and foremost in mind. That is why the nuclear industry has embraced the concept of “defence in depth”, which preserves three basic safety functions (controlling the power, cooling the fuel, and containing the radioactive material) that underlie the safety technology of nuclear power. The various levels of defence in depth relate to protection against increasingly hazardous operational plant states [10]. Defence in depth is closely linked to the provision of successive physical barriers to prevent the release of radioactive material into the environment, but it also includes many other overlapping protection measures (e.g., quality assurance, personnel certification and training, procedures). If one level of defence in depth were to fail, the subsequent level comes into play, and this is repeated in a step-wise manner moving up through the levels. When properly applied, the concept of defence in depth ensures that no single equipment or human failure would lead to harm to the public or the environment, and that combinations of failures that would result in harm are only remotely probable [11].

Across the levels of defence in depth, nuclear power plant licensees are required to have complementary means of protection, including human performance programs, which consider the role of human factors in nuclear safety. Human performance programs aim to minimize the potential for human errors and/or failures during design, construction, operation, maintenance, refurbishment and decommissioning activities within Canada’s nuclear facilities.

The importance of FFD in relation to human errors and failures has been recognized internationally and within Canada’s safety-sensitive industries.

4.1 International leadership in the nuclear industry

At the international level, the International Atomic Energy Agency (IAEA) has pointed to the need for strong FFD programs. The IAEA develops nuclear safety standards to promote high levels of safety in nuclear energy applications. The IAEA’s framework that supports FFD is embedded in two safety requirement documents [12, 13] and in numerous safety guides.

For all nuclear facilities, the IAEA recommends that regulators inspect licensees’ FFD programs and evaluate their effectiveness [14]. Regulators are also to ensure nuclear facility operators have “guidelines on fitness for duty in relation to hours of work, health, and substance abuse” [15].

With respect to drugs and alcohol, the IAEA recommends that all nuclear facilities have guidelines on FFD related to substance use. Several recommendations directed to nuclear power plant licensees about substance use are equally relevant to all nuclear facilities. Licensees are to establish and implement a policy applicable to employees, contractors and visitors, which addresses “the illicit use of drugs or tobacco and alcohol abuse, in consonance with national regulations” [16]. Licensees are to have methods for identifying those with a tendency toward alcohol or drug abuse, and should establish administrative controls to allow FFD of shift

personnel to be observed, verified and controlled. As well, the IAEA also advises against employing those prone to alcohol or drug abuse in safety-related tasks [17].

Although the IAEA does not state a position on alcohol or drug testing, several countries conduct substance testing within their nuclear power plant facilities. Regulators in Finland and the United States require alcohol and drug testing at nuclear power plant sites. Furthermore, although not required by the nuclear regulator, it is common practice for nuclear power plant licensees in Sweden and the United Kingdom to conduct alcohol and drug testing.

4.2 Experience within other Canadian industries

Other industry sectors, such as transportation, petroleum and mining, have recognized and demonstrated the value of strong FFD programs aimed specifically at addressing substance use. Indeed, the policies and practices currently found in these sectors are more aggressive than those in Canada's nuclear industry.

Transport Canada (TC) has a substance use policy and related requirements that are documented in legislative requirements in acts and regulations and in regulatory standards and rules. TC has several provisions to prevent, deter, detect and remediate substance dependence in those holding safety-sensitive positions. Substance dependence is assessed during pre-placement and periodic medical examinations. As Canada's transportation regulator, TC has clear legislative requirements that prohibit working under the influence of alcohol or drugs in all modes of transport. It should be noted that TC does not have any formal legislative requirements that mandate alcohol or drug testing. However, follow-up substance testing is an expectation for pilots, seafarers and railway workers in order to have their medical certificate reinstated following substance abuse treatment.

The Transportation Safety Board (TSB) investigates accidents in the air, rail, marine and pipeline modes of transportation. TSB investigators have the authority to require a medical examination or autopsy that may include alcohol and/or drug testing. A medical examination can be required when there are reasonable grounds, including impairment where an exam "is, or may be, relevant to the investigation".

It is worth noting that, within the transportation industry, the practices in the area of alcohol and drug policy and testing far exceed the requirements established by the transportation regulator. While there may be a number of factors contributing to this phenomenon, it is clear that the transportation industry has placed high priority on safety and the prevention of impaired operation of a vessel, aircraft, railway equipment, or a motor vehicle. In addition, this industry undoubtedly recognizes the damaging impact that substance use can have on safety performance, as well as on worker productivity.

In addition to transportation, several other safety-sensitive industry sectors (e.g., petroleum, mining, and utilities) have implemented substance abuse policies and testing. According to one recent study, about 40 percent of work sites in transportation, construction or resource sectors have implemented drug testing programs [18].

In a sample of Canadian companies that have chosen to adopt a policy on substance use, reasonable cause, post-incident, and follow-up testing have been almost universally implemented. While a smaller percentage of companies performs pre-placement testing for job applicants, even fewer conduct random testing [7]. About three quarters of the companies in this sample have adopted pre-placement testing for job applicants. However, random testing is required by just under one fifth of these companies. A slightly higher percentage of companies in the transportation sector has adopted random testing compared to other sectors (mining, oil and gas, utilities).

5.0 Fitness for duty requirements in Canada's nuclear industry

Canada is a member of the IAEA and a signatory to the *Convention on Nuclear Safety*, adopted in 1994. Canada is, therefore, committed to ensuring "that the capabilities and limitations of human performance are taken into account throughout the life of a nuclear installation" (Article 12) [19].

The CNSC regulates human performance through the establishment of high-level regulatory requirements, in sections 12 and 17 of the *General Nuclear Safety and Control Regulations*. In addition, Canadian nuclear power plant licensees are required to have a management system that complies with Canadian Standards Association (CSA) N286-05, which states that "...to support safe operation, management is expected to define and implement practices that contribute to excellence in worker performance" [21].

The CNSC requires Canadian nuclear power plants to implement and maintain a human performance program. Guidance on the content of effective human performance programs is provided in a nuclear power plant's *Licence Conditions Handbook*. The CNSC recommends that human performance programs address and integrate the full range of human factors' considerations across all organizational functions and activities, to ensure that workers are fully supported in carrying out their work safely. In the near future, the CNSC intends to develop regulatory documents on the general topic of human performance, and separate documents covering broad FFD requirements, in addition to a specific document on hours of work and fatigue management. These documents will all be made available for public comment.

Several existing CNSC regulatory documents that address elements of FFD have been incorporated into power reactor operating licences or *Licence Conditions Handbooks* for each of Canada's nuclear power plants. These include:

- RD-204, *Certification of Persons Working at Nuclear Power Plants* [22]
- G-323, *Ensuring the Presence of Sufficient Number of Qualified Staff at Class I Facilities Minimum Staff Complement* [23]
- RD-363, *Nuclear Security Officer Medical, Physical and Psychological Fitness* [24]
- S-298, *Nuclear Security Response Force (Restricted access document)* [25]

As well, under the authority of the *Nuclear Security Regulations*, all nuclear facilities in Canada are required to have a supervisory awareness program “to ensure that its supervisors are trained to recognize behavioral changes in all personnel ... that could pose a risk to security at a facility”.

Canadian nuclear power plants are complying with current CNSC requirements respecting FFD. While licensees have various methods for assessing FFD, ranging from medical examinations to supervisory observation programs, provisions differ significantly between licensees. Most licensees have embedded the concept of safety-sensitive positions into their FFD programs, and have applied additional requirements for medical examinations.

Significantly, Canada’s nuclear power plants have clear rules against possessing or being under the influence of alcohol and drugs at work, and specify consequences for violations. Moreover, employees are expected to self-report any conditions that may affect their ability to perform safely, including the use of prescription or over-the-counter medication. In addition, licensees rely on peer-reporting and supervisory observation. Although biochemical substance testing is not explicitly required in Canada’s nuclear power plants, there is an exception: one site stipulates that a worker who has been treated for addiction to alcohol or drugs must submit to substance testing to confirm abstinence, as a condition of returning to work.

While the CNSC’s requirements are important, they currently do not explicitly require licensees to be proactive in the area of substance use.

Although the CNSC’s FFD requirements do not explicitly require licensees to address substance use, the CNSC is seeking feedback from the nuclear industry, the Canadian public and other stakeholders on the development of additional regulatory requirements that address substance use.

6.0 Proposals for strengthening alcohol and drug policy, programs and testing

The CNSC believes that current alcohol-and-drug-related program requirements need to be strengthened, to address potential substance use and abuse issues. The CNSC’s intent is to be proactive and to adopt a precautionary approach in this area. The CNSC recognizes a need for additional, stronger and more explicit requirements to address substance use in the Canadian nuclear industry.

In moving forward, the CNSC proposes to build upon the foundation of current requirements and guidance for FFD using a three-pronged strategy. Additional requirements for nuclear power plant licensees would be developed to ensure that licensees:

1. establish an appropriate policy framework
2. create supportive programs
3. introduce effective biochemical substance testing

6.1 Policy framework

The CNSC believes it is crucial to implement a consistent approach across nuclear power plant licensees. The CNSC intends to require that, at a minimum, all nuclear power plant licensees adopt the following policy requirements:

Licensees should implement a policy that strictly prohibits the use or possession of alcohol or drugs by workers while on duty. Under this policy, licensees should take steps to prevent workers from:

- i. bringing, keeping, or consuming alcohol, illicit drugs, illegal drugs or drug paraphernalia within the premises, or on the grounds of a nuclear facility
- ii. working at a nuclear facility while under the influence of alcohol or any drug (illicit, illegal, prescription, or over-the-counter medication) that impairs or has the potential to impair a worker's ability to perform duties safely

It is proposed that all persons with unescorted access to the protected areas of Canada's nuclear power plants be subject to these measures. In Canada's nuclear power plants, workers require specialized training to safely carry out their duties in the operation or maintenance of equipment that controls, cools, contains or carries radioactive substances. Given the hazardous nature of work performed in these facilities, the CNSC considers that the entire protected area of each nuclear power plant is a safety-sensitive site. Therefore, all stages of a nuclear power plant's lifecycle would need to be considered by licensees, including the construction, operation, refurbishment, and decommissioning stages.

Although the scope of this initiative is currently limited to nuclear power plants, the CNSC is seeking feedback on whether or not the proposed substance policy, program, and testing requirements should be expanded to other licensed nuclear facilities in Canada, including research reactors, mines, mills and processing facilities.

6.2 Support programs

To support these policies, it is proposed that nuclear power plant licensees be required to implement measures to ensure that workers and supervisors understand their roles and responsibilities. These program requirements would address several key areas, to ensure that workers remain free from the performance-altering effects of alcohol and drugs, while on duty. At a minimum, the CNSC considers the following four elements to be critical:

- **Awareness and education programs for workers**

To ensure that workers understand how to comply with the policy requirements, licensees would provide ongoing training to individuals who are granted unescorted access. An awareness and education program ought to include a description of the safety risks associated with substance

use and its potential performance impacts, and cover specific requirements or guidelines on issues, such as on-call and off-duty conduct.

- **Access to assistance**

Licensees would be required to provide workers with access to an employee assistance program (EAP). Typically, EAPs address a broad range of issues that workers may face, including mental, emotional, family, financial, health, and alcohol- or drug-related problems. Licensees would be required to ensure that the EAP could be accessed voluntarily by workers, or be required through supervisor referral. As well, licensees would be required to refer workers to a substance abuse professional as appropriate. Licensees would also be required to define expectations for self-reporting and peer-reporting.

- **Supervisory awareness programs**

Licensees would be required to ensure that the use of alcohol and drugs is specifically addressed in supervisory awareness programs. These programs are already required under sections 38 and 48 of the *Nuclear Security Regulations*. The programs would need to ensure that supervisors have the capability to recognize safety-significant behavioural changes related to alcohol or drug impairment.

- **Investigative tools**

If a licensee has reason to believe that a worker with unescorted access is unfit for duty or is in violation of the alcohol and drug policy, the licensee should investigate. Licensees would be required to develop and implement measures to investigate suspected workers, including unfit-for-duty investigations, searches, and escort procedures.

Although the policy and supportive program requirements outlined in this proposal address several key areas to ensure that workers remain free from alcohol and drugs while at work, the CNSC is seeking feedback on whether or not these measures are sufficient, or should be expanded to include biochemical substance testing requirements.

In addition to the measures outlined above, alcohol and drug testing is another investigative tool that is able to provide confirmation of alcohol impairment or likely drug impairment. This is discussed in more detail below.

6.3 Biochemical substance testing

The CNSC believes that biochemical substance testing is an option to consider in addressing potential substance use at Canada's nuclear power plants. Before describing the biochemical substance testing requirements that the CNSC is proposing, it is useful to briefly review the state of accepted drug and alcohol testing practices within Canadian workplaces.

In Canada, there are no provincial or federal level legislative requirements that define the parameters of substance testing in the workplace. Despite the lack of direction, "companies in

several industry sectors across the country have introduced employee drug and alcohol testing over the past 20 years” [7]. Although safety is universally recognized as the primary motivation for implementing these substance-testing policies, the following are some potential reasons why industry practices have evolved in the absence of legislative requirements: due diligence and employer obligations under the *Criminal Code* [27]; arbitration and court rulings on industry policies; major transportation accidents; union’s (Operation Redblock) [28] and industry worker association’s involvement (Airline Pilots Association) [29]; and cross-border requirements for motor carriers and rail imposed by the U.S. Department of Transportation.

In the absence of specific Canadian legislation on substance testing, decisions and precedents established in various legal rulings define the accepted substance testing practices in Canada [7]. As the jurisprudence continues to evolve, the courts have found alcohol and drug testing acceptable in the following circumstances:

- **pre-placement testing** of applicants or incumbents transferring to safety-sensitive positions
- **for cause:**
 - **reasonable grounds testing** of safety-sensitive positions;
 - **post-incident** testing of safety-sensitive positions;
- **follow-up testing** as a condition of returning to a safety-sensitive position, following treatment for a substance use disorder
- **random testing** (for alcohol only) of employees in safety-sensitive positions, in workplaces with inherent risks [7]

The Canadian Human Rights Commission’s most recent *Policy on Alcohol and Drug Testing* is in general agreement with the testing practices outlined above. With respect to random alcohol testing, the Canadian Human Rights Commission’s policy requires that the employers notify workers “that alcohol testing is a condition of employment” and that “the employer must meet the duty to accommodate the needs of those who test positive” [30].

A recent review of Canadian case law has generally shown that industries have developed policies that require substance testing after the occurrence of significant events involving alcohol or drugs in the workplace. The nuclear industry cannot afford to be reactive, given the potential impact of a nuclear accident.

Proposed biochemical substance testing requirements

Despite the present limitations inherent in current drug testing technology, established by the Canadian Human Rights Commission and in arbitral and legal jurisprudence, it is worth considering the balance of interest between individual privacy and the safety of a nuclear facility and its surrounding communities. Given the potential safety risks that an impaired worker poses to a nuclear facility, the CNSC believes that the balance of interest should favour the safety concerns of the public. The CNSC’s position is that licensees ought to consider all reasonable measures, including random alcohol and drug testing, to prevent, deter, detect and remediate any potential substance use at Canada’s nuclear power plants.

Moreover, the CNSC has concluded that limiting substance testing exclusively to individuals in safety-sensitive positions is insufficient, as individuals working in other positions can have an impact on nuclear safety. Consequently, the CNSC proposes that every individual who is granted unescorted access to the protected areas of nuclear power plants be subject to alcohol and drug testing.

Although substance testing is being proposed for all individuals with unescorted access to the protected areas of nuclear power plants, the CNSC is seeking feedback on the target population for testing. Some potential options include:

- **all individuals with unescorted access to the protected areas**
- **only those individuals designated in safety-sensitive positions, or**
- **all individuals that may impact the safety of a nuclear facility by virtue of their work, even if they do not have access to the nuclear site (e.g., vendors, design organizations etc.)**

In line with the CNSC's proposed approach, all individuals with unescorted access would be required to submit to alcohol and drug testing in the circumstances outlined below:

- **Pre-placement testing**

Before being granted unescorted access, every person would be required to submit to an alcohol and drug test. Additionally, an applicant or incumbent transferring to a position with unescorted access would be required to submit to a pre-placement alcohol and drug test. A substance test should not be used as an initial employment screening tool, and should not take place before determining the candidate has all other qualifications necessary to gain unescorted access.

- **For-cause testing**

For-cause testing has two elements: reasonable grounds and post-incident testing.

Under reasonable grounds testing, persons with unescorted access would be required to submit to for-cause testing when there is reasonable cause to believe that an individual is unfit to perform their duties, due to the adverse effects of alcohol or drug use while on duty. The grounds for reasonable cause must be independently verified through an evidence-based observation, and may include: breath odour, observed use or possession of a substance, speech patterns, physical appearance and behaviour, or an episode or events that suggest irrational/ reckless behaviour.

Under post-incident testing, a person with unescorted access would be required to submit to a test following an event where his/her involvement caused or contributed to an accident that led to death, injury, or significant damage to the environment or safety-related equipment. Near misses and associated rule violations should be considered in deciding whether to conduct a substance test.

- **Follow-up testing**

Workers that have been identified and diagnosed with a substance abuse or dependency disorder may be required to complete a treatment program, under the supervision of a substance abuse professional or an addiction medicine specialist. Upon the re-instatement of the worker to his or her duties and/or unescorted access, the individual would be required to submit to unannounced alcohol and drug testing, for a period of two years. The minimum frequency for unannounced testing would be once per quarter.

- **Random testing**

Workers with unescorted access would be required to submit to unannounced alcohol and drug testing. Random testing means that every worker in the testing pool, regardless of whether or not they have been tested previously, has an equal chance of being selected. The CNSC is considering setting the annual testing rate at 50% for both alcohol and drugs.

Although random alcohol and drug testing requirements are being considered in this proposal, the CNSC is seeking feedback on where the balance should be set between the individual privacy rights of workers and the safety of a nuclear facility and its surrounding communities.

Licensees would be required to develop and implement substance testing programs consistent with good practices, which must include the use of a qualified third-party administrator to collect and analyze samples, to perform medical reviews, and to report the test results to licensee program administrators [7]. Licensees would be required to test for illicit drugs and metabolites, as outlined in Appendix A of this document. Licensees would also be required to report any policy violations – including positive alcohol or drug test results – to the CNSC, through established reporting mechanisms.

7.0 Conclusions

FFD is a vital element of a human performance program within any safety-sensitive industry, and is currently required of all nuclear power plant licensees in Canada. The CNSC has obligations to protect the health and safety of persons and the environment, and to maintain national security. It is therefore imperative to consider all reasonable measures to minimize potential human performance issues due to alcohol or drugs.

Ensuring that Canada's nuclear workers remain free from the influence of alcohol and any performance-impairing drug while on duty is a priority of the CNSC. Consequently, the CNSC proposes to strengthen the regulatory requirements related to substance use policies, programs, and testing.

The CNSC is confident that the measures outlined in this discussion paper would ensure a consistent approach is taken by all licensees. These measures, if implemented, would also

provide greater assurance that licensees would take steps to prevent, deter, detect, and remediate any alcohol or drug use at Canada's nuclear power plants.

The CNSC actively encourages the nuclear industry, other stakeholders and the public to voice their views on these proposals.

Please send any comments or feedback to:

Canadian Nuclear Safety Commission
P. O. Box 1046, Station B
Ottawa, ON K1P 5S9
Fax: 613-995-5086
Email: consultation@cnsccsn.gc.ca

Appendix A: Illicit and Performance-Altering Drugs

Illicit drugs:

The CNSC is considering developing a list of illicit drugs or drug metabolites to be tested for, similar to that of the U.S. Nuclear Regulatory Commission. The panel of drugs that nuclear power plant licensees would be required to test its workers for, at a minimum, would include the following illicit drugs – based on the recent 2008 U.S. NRC comments provided to the U.S.

Department of Health and Human Services' *Mandatory Guidelines for Federal Workplace Drug Testing* (HHS Guidelines) [31]:

- marijuana metabolite
- cocaine metabolite
- opiates (codeine, morphine, 6-acetylmorphine)
- amphetamines (amphetamine, methamphetamine, methylenedioxymethamphetamine (MDMA), methylenedioxyamphetamine (MDA), methylenedioxyethylamphetamine (MDEA))
- phencyclidine (PCP)

Although the CNSC is considering developing a list of drugs to be tested and each drug's threshold for impairment, the CNSC is seeking feedback on whether or not the CNSC should pursue this.

Performance-altering medications:

The CNSC is considering developing requirements to ensure that workers at nuclear power plant licensees understand and are informed of their reporting obligations to management on their use of any performance-altering prescription drugs and over-the-counter medication, as specified in section 6.0. At a minimum, licensees should assess whether to temporarily restrict or modify the protected area access of workers who report for duty under the influence of the following drug categories. It is recognized that this list of drugs is not exhaustive, as there are numerous other prescription drugs and over-the-counter medication that, when taken, may negatively affect performance and potentially impact safety. In addition, the use of any prescription drug for which the worker does not possess or have a valid prescription should be prohibited, particularly when the drug is known to have an impact on human performance.

- anticonvulsants
- antihistamines
- anti-inflammatories
- barbiturates
- cold tablets and cough mixtures
- motion sickness drugs (e.g., Gravol, Antivert)
- muscle relaxants
- narcotic analgesics (e.g., Demerol, Darvon, codeine)
- stimulants (e.g., medications sold as diet pills, methylphenidate)

Glossary

behavioural-performance component:

An assessment of behaviour and performance either through subjective based observation or by the administration of more objective motor, perceptual or higher cognitive tests [32].

bona fide occupational requirement:

A condition of employment that is imposed in the belief that it is necessary for the safe, efficient, and reliable performance of the job and which is objectively, reasonably necessary for such performance (Canadian Human Rights Commission Web site). A standard or rule that is integral to carrying out the functions of a specific position.

illegal drug:

In addition to illicit drugs, the unauthorized use or possession of any drug listed in Schedule IV of the *Controlled Drugs and Substances Act* [33], for which the individual does not have a valid prescription acquired from a registered practitioner.

illicit drug:

Any drug listed in Schedule I, cannabis in Schedule II and amphetamines listed in Schedule III of the *Controlled Drugs and Substances Act* [33].

medical component:

An objective judgment of fitness rendered by a physician through a comparison of the working conditions and the associated health standards required for a specific job to the health and functional capabilities of a person determined from medical findings (history, examination, laboratory test) and clinical opinion [34].

occupational fitness component:

An assessment of physical fitness against criteria that are directly related to essential task elements of the specified job and in compliance with the established three step test for determining a bona fide occupational requirement.

psychological component:

An assessment completed by a psychiatrist or occupational psychologist, to determine the presence of sufficient psychiatric health to perform the specified duties of a position.

An evaluation completed by a psychiatrist or occupational psychologist to rule out the presence of any psychiatric impairment that could preclude work - that includes all mental and emotional disorders including substance abuse and dependence [5].

safety-sensitive position:

A position which the company determines has a role in the operation, where impaired performance could result in a significant incident affecting the health and safety of employees, customers, customers' employees, the public, property or the environment. This includes all

employees who are regularly required to rotate through or regularly relieve in safety sensitive positions.

Supervisors and managers who directly supervise the working level positions, or who may perform the same duties or exercise the same responsibilities as safety sensitive positions are deemed to hold safety sensitive positions [35].

As well, any determination of a safety-sensitive position should consider the work of the employee, the nature of equipment and material that he or she handles [35].

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Tab 34

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A Case Against Workplace Drug Testing

Debra R. Comer

228 Weller Hall, 134 Hofstra University, Hempstead, New York 11550

Abstract

Workplace drug testing, particularly urinalysis, has proliferated in the last few years. Despite widespread support for biological testing, research suggests that not all drug use diminishes performance and that testing may fail to deter the most potentially harmful substance abuse. There is no solid empirical evidence that drug testing is associated with enhanced organizational productivity and safety, and findings that persons who fail drug tests are inferior workers may be rooted in ethnic discrimination. Further, because drug testing detects exposure to a drug but cannot assess an individual's ability to perform, it is an inappropriate gauge for judging the suitability of employees or applicants. Drug tests may violate current and prospective employees' right to privacy and, according to a growing body of literature, may adversely affect their work attitudes and behaviors. Skills testing, which assesses employees' performance fitness less intrusively, is discussed as an alternative to biological testing.

(*Drug Testing; Privacy; Employee Attitudes*)

In 1957, Chris Argyris advocated a form of organization in which managers would provide opportunities for employee need fulfillment and creative expression. He believed respecting individuals and cultivating their talents and inputs would in turn benefit organizational goal attainment. Similarly, McGregor (1960) advised managers that, if employees were trusted to find and apply their own approach to doing work, they would strive responsibly to achieve organizational objectives without close monitoring and direction. Likert (1961, 1967), too, stressed the need for organizations to encourage, not squelch, individuals' initiatives and unique contributions.

A generation of theory and research in organizational behavior and human resources management has since been informed by this notion that appreciating employees is not just an employee entitlement, but a workable organizational strategy. In the last few years, however, individual needs have been increasingly com-

promised by workplace programs of testing for drug use, particularly urine testing for the use of illicit substances. Indeed, the American Management Association has reported that 63% of its surveyed members conduct some type of drug testing, a 200% increase since 1987 (Greenberg 1991).

This article argues against workplace drug testing. It identifies misconceptions about drug use and drug testing, underscores the technological limitations of testing, contests the moral appropriateness of biological testing, and reviews research on individuals' negative response to workplace drug testing. Performance testing is examined as an alternative to drug testing.

Problems with Drug Testing

1. We Do Not Have Conclusive Evidence That Drug Testing Enhances Organizational Effectiveness

Advocates of testing claim it can reduce absenteeism, theft, mistakes, accidents, and medical insurance expenses (see, e.g., Elliott 1989, Harwood et al. 1984). McDaniel (1988), using self-report data about the drug use of applicants for military service, observed that individuals who had never used any drugs before enlisting were less apt to have been discharged for unsatisfactory performance within four and a half years after their application. Moreover, early first use of a drug and frequent use of a drug during an individual's life both increased the likelihood of being discharged for performance reasons. In a different study, municipal workers who reported having used drugs in the last year or at any point in their lives were more likely than nonusers to report psychological and physical withdrawal from work and to have exhibited antagonistic job behaviors (Lehman and Simpson 1992).

However, hierarchical regression analyses reveal that, after control for the effects of personal and job factors, drug use uniquely contributes only a small portion of the variance in these behaviors. Also, self-reported use in the last year does not have a significant *beta* weight

in the regression equations for any of the criterion behaviors.¹ Economic analyses of data sampled from the 1984 National Longitudinal Survey of Youth, which also controlled for factors that could simultaneously affect one's decision to use drugs and one's employment, yielded some equally interesting findings: First, Gill and Michaels (1992) found that drug users earned higher wages than nonusers. Second, Register and Williams (1992) observed that although long-term as well as on-the-job use of marijuana had a negative effect on wages, use of marijuana in general (including short-term and nonwork use) had a positive effect on wages. (No significant relationship was found between cocaine use and wages.) The latter team of researchers noted that their findings "should at least give pause to those whose advocacy of drug testing rests wholly or largely on the argument that drug use harms productivity" (Register and Williams 1992, p. 447).

These findings alert us to the possibility that poor job performance may be related to certain social and/or individual factors in the lives of drug users rather than drug usage itself. Despite conventional wisdom, drug testing has not been definitively linked to organizational gains in safety or productivity (see Cropanzano and Konovsky 1993, Harris and Heft 1992, Hoffman and Lovler 1989, Morgan 1991, Thompson et al. 1991). Contributors to a monograph published by the National Institute for Drug Abuse associated drug testing with organizational benefits (Gust and Walsh 1989). However, Morgan's (1991) analysis of the data uncovered several methodological problems with their research, such as (1) an inflated rate of initial positives, (2) withheld information, and (3) competing factors.

Two studies of preemployment drug testing have been conducted with postal employees. Normand et al. (1990) reported that applicants at the U.S. Postal Service in Washington, D.C., who tested positive for illegal drug use (but were hired for the purposes of data collection) later had higher rates of absenteeism and involuntary turnover than applicants with negative drug test results. No significant relationships were detected between drug test results and employees' rate of injuries or accidents. Interestingly, 85% of the individuals testing positive had not been fired a year later, and hence were apparently doing their jobs at least adequately.

Zwerling et al. (1990) similarly followed Boston postal employees who had been screened for drug use. A little more than one year later, 6.4% of those testing negative for drug use had been terminated, versus 13.6% of those testing positive for marijuana and 7.3% of those testing positive for cocaine (the termination

rate for marijuana-positive employees was statistically significant). Absenteeism rates for employees with positive marijuana tests (7.1%) and those with positive cocaine tests (9.8%) were significantly higher than the rate for those with negative results (4.0%). Those testing positive for either drug were apt to be involved in accidents, injuries, and disciplinary actions earlier in their employment than those testing negative. The differences were statistically significant for employees with positive marijuana tests, but for those with positive cocaine tests the differences were significant only for injury risks. However, few of these problems occurred overall, and the researchers themselves noted that the differences they found were much smaller than those often claimed by advocates of applicant screening.²

2. Drug Testing Does Not Deter the Kind of Drug Abuse Most Detrimental to Organizations

Whether drug testing contributes to improved performance and effectiveness in organizations is not yet clear. Even if it could predict poor performance in the workplace, it would have to do so on a timely enough basis to safeguard individuals and organizations from the most harmful consequences of on-the-job drug impairment, namely major accidents.

Preemployment testing may help screen out addicts, who cannot suspend their drug use even temporarily, at the time they apply for work. Yet such testing cannot prevent workplace drug use by individuals who were hired before preemployment screening was adopted or those who develop serious drug habits after gaining employment. Workplace testing is likely to deter incumbents who decide to curb their infrequent, casual, off-hours drug use (which would not compromise their job performance) to avoid the repercussions of being detected. Thus, such testing may effectively reduce the kind of drug use that would affect work behavior minimally (if at all), but not the at-work drug abuse that could be most deleterious to organizational functioning.

It is bold optimism, if not wishful thinking, to expect current employees who imperil themselves and others by using performance-impairing drugs at work to be daunted by the risk of losing their jobs. Such employees may thwart detectors by altering their own urine or even substituting drug-free urine samples (Bearman 1988, Crown and Rosse 1991, Hanson 1988). But even if they do not tamper with their urine specimens, by the time their test results have been interpreted as positive, any drug-impaired behavior could already have had its negative effect.

3. The Relationship Between Positive Drug Test Results and Dismissal May Be Spurious, Actually Attributable to Each Variable's Relationship with Employee Ethnicity

The post office studies raise the question of possible ethnic discrimination in drug testing (Horgan 1991, Morgan 1991). In the Normand et al. (1990) study, a higher incidence of positive drug test results was observed for African-Americans than for other ethnic groups (but note that the authors did not control for demographic factors). Moreover, in the Zwerling et al. (1990) study, the positive test rate was twice as high for African-American postal workers (6% of the study) as it was for white workers. Despite having lower absenteeism, fewer injuries, and no more accidents, the African-American workers were 143% more likely to be terminated.

One explanation for these differences in outcomes is that biased post office supervisors might have been quicker to dismiss their African-American subordinates, who, despite testing positive for drug use, appear to have performed at least as well as their white coworkers according to objective measures (Horgan 1991, Morgan 1991). (The authors did not provide supervisors' subjective assessment of the postal employees' performance.) Experiments (Howitt and Owusu-Bempah 1990, McRae 1991) and surveys (Brown et al. 1991, Greenhaus et al. 1990, Mueller et al. 1989) suggest that African-Americans still receive biased performance appraisals. Possibly, African-Americans do have a higher incidence of drug use (see Blank and Fenton 1989, Newcomb 1988). However, if organizations are denying or terminating employment on the basis of drug tests that are not valid performance indicators, those tests are likely to discriminate against any group, such as African-Americans, in which drug use may be more prevalent than it is in other groups.

4. The Technology of Urinalysis Limits Its Usefulness for Ensuring Safety and Productivity in the Workplace

The failure of drug testing to promote organizational effectiveness is due partly to its technological limitations. One problem is that false positives for some drugs can result from eating certain foods or taking prescription or over-the-counter cold pills or painkillers (DeCresce et al. 1989). Yet some companies determine the fate of current and prospective employees solely on the basis of an immunoassay test, without seeking confirmation through the more expensive, but more specific and rigorous, gas chromatography/mass spectrometry method. A recent survey of employee drug

testing policies (Murphy and Thornton 1992) indicated that confirmatory testing of positive results is not universal (although some states require it). Overall, about two-thirds of the organizations sampled checked positive test results with a more rigorous second test, but retest rates were much lower in certain industries. Further, because false positives are possible even with gas chromatography/mass spectrometry (Abelson 1991), confirmed positives should be analyzed carefully to find the underlying cause.

Laboratory error also contributes to unreliable test results (Abbasi et al. 1988, Elliott 1989, Feit and Holosko 1990). Although the standards for laboratory certification set by the National Institute for Drug Abuse can promote appropriate handling of specimens and minimize human error, Brookler (1992) has reported that less than 7% of the nation's drug testing labs meet these standards. Consequently, some of the people who receive positive drug test results may be (potentially) competent performers who are mistakenly denied or dismissed from employment.

An even more disturbing aspect of drug testing technology is that a test can distinguish only between people who have been exposed to the drug being tested and those who have not. A positive result does not indicate *patterns* of drug use, abuse, or dependency (Morgan 1987). Metabolites can appear in an individual's urine long after the drug has ceased to affect his or her behavior, and differences in physiology can affect an individual's metabolism of a drug (Lundberger 1986). A urine test cannot ascertain the quantity of a drug consumed, the time of consumption, or its effect on the user. In short, it cannot demonstrate the very performance impairment its proponents seek to deter or detect for the sake of productivity and safety, and is therefore an inappropriate basis for assessing an employee's ability to perform.

5. Drug Testing Violates Individuals' Right to Privacy

Even if drug testing did enhance workplace effectiveness, it would have to be morally defensible. It is important not to confound the morality of drug testing with its legality; in fact, the courts have ruled in favor of the legitimacy of drug testing in many situations. Until 1989, the ability of government employers to conduct drug testing had been limited by the Fourth Amendment's prohibition of unreasonable search and seizure (Elliott 1989, Haas 1990). But the United States Supreme Court ruled that year that suspicionless testing is not unconstitutional in cases involving the special needs of public safety (see *Skinner v. Railway Labor*

Executives' Association 1989, allowing testing of train crew members after a serious accident, and *National Treasury Employees Union v. Von Raab* 1989, allowing testing of Customs Service agents seeking promotions to jobs involving drug interdiction or the use of firearms).

A few states have laws constraining the conditions under which employees can be tested for drugs (see Berlin 1991). However, because private sector organizations (other than those in highly regulated industries, such as transportation) may act as private individuals in establishing drug testing programs,³ private sector employees have usually turned to civil rights laws, union contracts, and tort suits for protection from drug testing (Abbasi et al. 1988, Yurow 1989). Nonetheless, "In general, unless a test violates state law, litigation challenging the right to test has favored the employer" (Blum 1991, p. 1).

Is legal drug testing morally right? A philosophical treatment of drug testing must consider individual rights as well as community welfare (safety). Whereas deontologists focus on whether an act *itself* is right or wrong, utilitarians consider the *consequences* of the act and judge it morally right if it results in the greatest good (Pojman 1990). A deontologist would argue against drug testing on the grounds that it is morally inappropriate to deprive an individual of the right to privacy. A utilitarian, in contrast, would contend that an organization is warranted in sacrificing the rights of some individuals to enhance the security of their co-workers and the public. Determining just what is best for the most is an ill-defined and formidable task, and utilitarian reasoning has been criticized for endorsing the use of immoral or unjust actions to achieve the greatest good (Pojman 1990, Rosen 1993).

Business ethicists have applied a deontological perspective to the question of drug testing. Their insistence on respecting and protecting employees' individual rights has led to their rejection of workplace testing. According to DesJardins and Duska (1987, p. 4):

An employee's right to privacy is violated whenever personal information is requested, collected and/or used by an employer in a way or for any purpose that is irrelevant to or in violation of the contractual relationship that exists between employer and employee.⁴

That is, employees are entitled *not* to disclose certain private information that is of no concern to their employers. Even if drug use does affect job performance, so long as employees can function satisfactorily such drug use is not germane to their employers.⁵

Caste (1992, p. 305) agrees: "The intrusion into the private lives of the employee that is occasioned by drug testing wrongly appropriates time which [sic] was not purchased." If an employee cannot perform adequately, Caste (1992) and DesJardins and Duska (1987) reason that an employer may rightfully exercise sanctions, but the cause of the problem performance is not job-relevant and therefore need not be revealed.

DesJardins and Duska (1987) acknowledge the potential of an employee's impaired behavior to endanger others. But they argue that employers must uphold individual rights and therefore must rely on procedures less invasive than drug tests to reduce such risks. Moore (1989) likewise emphasizes that organizations' responsibility for any harmful acts their employees commit while intoxicated in no way gives them *carte blanche* to control employees. She, too, asserts that organizations should take pains to identify impaired performance through means that protect employees' privacy rights.⁶

6. Many Employees Respond Negatively to Drug Testing

Do job applicants and current employees actually view drug testing as invasive and unjust? Crant and Bate-man (1989), applying the concepts of organizational justice, assert that individuals' perceptions of the fairness of both the process and outcomes of drug testing programs affect their attitudinal and behavioral responses to testing. These perceptions are influenced by such factors as the employees' assessment of the justifiability of having their privacy invaded.

Although the expansion of drug testing implies a failure of organizations to consider any negative effects of testing on employees, research undertaken in the last few years suggests that employees' perceptions of drug testing have an important impact on their attitudes and behaviors. Blue-collar employees at a manufacturing firm who read a hypothetical scenario in which employees with positive test results were fired viewed testing negatively, and less favorably than those who read a scenario in which such employees were placed in rehabilitation (Stone and Kotch 1989). Similarly, college students had negative attitudes toward terminating an employee for a positive test result, as well as toward random testing (Murphy et al. 1990). Drug testing was also opposed when it was not limited to individuals performing dangerous or safety-related jobs (Murphy et al. 1991). In another investigation, undergraduate business students generally deemed drug testing less appropriate as an employer's right than "normative" activities such as assigning work, but not so inappropriate as "intrusive" activities such as

inquiring about an employee's sexual preference or religious identification (Garland et al. 1989). Yet they viewed probing employees' off-the-job drug use as less acceptable than assessing their on-the-job use, although (as they were apparently unaware) urine testing cannot determine the time of drug use.

Some research has investigated employees' perceptions of the actual testing practices used by their own organizations. Hanson (1990) reported that railroad and chemical workers generally perceived testing as justifiable only for employees who seem to be under the influence. His respondents were especially opposed to being subjected to post-accident testing when the mishap clearly resulted from nonhuman error. Their comments also revealed that they viewed random or periodic testing without reasonable suspicion as a humiliating intrusion on their privacy, as well as a sign that managers distrusted them and discounted their years of good service. Additionally, some railroad employees feared that drug testing was being used to reduce the workforce.

Empirical evidence indicates that drug testing affects job applicants as well as current employees. Students who read a scenario about an organization that did not conduct drug testing had more positive attitudes toward the organization and reported greater intentions to apply for a job than did those who read about an organization that did test (Crant and Bateman 1990). In other research (Murphy et al. 1990), students viewed negatively the automatic rejection of a candidate with a positive drug test result. Stone and Bowden (1989) focused on how individuals' perceptions of hypothetical drug testing policies differ as a result of the timing of the test (before/after making a job offer) and the method of choosing the testees (testing all/randomly/on suspicion). It is notable that individuals had negative attitudes toward five of the combinations, and only barely above-average attitudes toward the sixth.

The studies cited suggest that drug testing programs not just for incumbents, but applicants too, may lead to negative attitudes and behaviors, especially when the process and/or outcome seems invasive and/or unfair (e.g., when testing seem(s) unnecessary or denial of or dismissal from employment is based on a positive test result). Such programs may cause some talented individuals to refrain, on principle, from applying to organizations that test for drug use. However, although most of the unionized public sector employees queried by Le Roy (1990) rejected random drug testing, most accepted other types of testing as long as certain procedures (e.g., maintaining confidentiality and carefully

handling and analyzing specimens) were followed (see also Konovsky and Cropanzano 1991, Verespej 1992).

The Performance Testing Alternative

The case argued here against drug testing is based on six points: (1) there is little evidence that drug testing increases organizational effectiveness, (2) drug testing may be least effective in deterring the kind of drug abuse that is most deleterious in the workplace, (3) the scant evidence linking positive test results with impaired performance may be due to ethnic bias, (4) the technology of urinalysis precludes it from ensuring workplace safety and productivity, (5) testing may compromise employees' rights, and (6) testing may evoke negative employee responses. An alternative to drug testing is therefore needed.

Performance testing is one alternative to (biological) drug testing as a way to minimize the substandard work that should ultimately concern managers, or to detect it before it occurs, while protecting employees' rights. For example, the computer-based critical tracking test is a video game in which employees apply the psychomotor skills required in their jobs (Frieden 1990, Maltby 1990). Test-takers manually try to keep an ever-moving, randomly careening cursor centered on their monitor, and their speed and accuracy scores on each daily trial are compared with their average performance on previous trials. The test is designed so that an employee cannot dupe the computer into establishing a low baseline (to pass the test later while impaired) because an unusual lack of progress on initial trials is detectable (Fine 1992).

Skills tests assess job-relevant reaction time and coordination, which can be affected by illness, sleep deprivation, or emotional preoccupation as well as by drug use. Hence, they are more informative about employees' job abilities than urine tests. Compared to urinalysis, the critical tracking test requires less data collection time and is less costly to administer and interpret: only \$100 or \$200 per employee per year rather than \$40 to \$60 per test per employee (Warshauer 1991). Moreover, it provides immediate results (Frieden 1990). Performance testing has even detected drug use that has eluded urinalysis (Maltby 1990). For example, cocaine will not show up in the urine of an employee who has just used it, but a performance test will demonstrate skill impairment. Organizations that use performance tests report them to be more effective and efficient than drug tests, and better received by employees (McGinley 1992).

The critical tracking test is typically recommended for employees whose mistakes of hand-eye coordination would be potentially life-threatening. Another computer-based test battery may have applications for a broader variety of occupations. This new means of testing performance can assay 25 skills, including decision-making, spatial relations, and psychomotor functioning (McGinley 1992).

Skills tests hold promise for employers who care more about their employees' fitness to perform on the job than what they do in their private time. However, because such tests have just recently been adapted for the workplace, their effectiveness must be evaluated systematically (Harris and Heft 1992). The critical tracking test may require some debugging, as evidenced by the experience of one transportation company that used but ultimately abandoned it. The company's general manager explained that test-taking anxiety impeded the performance of some of his older, less computer-literate employees. He also reported that for employees of all ages, the difficulty of "beating" the cursor varied dramatically from day to day. When the test was especially tough, many people failed it despite their apparent fitness for work. In contrast, when the test was easier, even a compromised performer could succeed. One evening when this manager thought he had drunk too much alcohol to risk driving home from a restaurant, he decided to satisfy his curiosity about the effectiveness of the critical tracking test. He asked his dinner companion to drive him to his office, where he sat in front of the video monitor and passed the test on his first attempt.

Ethical issues in the use of performance testing must also be resolved. For example, what happens when an employee fails several consecutive tests? One could argue that the employer of this hypothetical employee would not be entitled to inquire into the cause of these failures. Yet, some performance-testing organizations require such an employee to submit to a urine test, even though stress or illness, rather than drug use, may be the reason for the performance failure.

Conclusion

Workplace drug testing is proliferating. Yet we do not have compelling evidence linking it to organizational effectiveness; employees' perceptions of its invasiveness and unfairness may adversely affect their job-related attitudes and behavior; and performance testing, once fine-tuned, may be a more effective, efficient, and respectful alternative. Prasad et al. (1992) argue that organizations have endorsed drug testing for pur-

poses more symbolic than practical. They believe drug testing is used to create the impression that management is applying current scientific methods to control a perceived crisis.⁷ In reality, however, testing alone can hardly be expected to conquer drug abuse. Drug-dependent individuals are unlikely to recover without the benefit of education, counseling, and rehabilitation (Crown and Rosse 1991, Stevens et al. 1989, Wrich 1988).⁸ But less than half of the organizations surveyed by Murphy and Thornton (1992) provide such employee-centered services to persons who test positive for drug use.

Ironically, some of the very scholars who have warned of the undesirable consequences of employees' negative views of drug testing have apparently accepted testing as a given. They have identified which features of drug testing individuals deem least objectionable and have recommended designing programs that will meet the least employee resistance (see, e.g., Konovsky and Cropanzano 1991, Murphy et al. 1991, Stone and Kotch 1989). Before condoning or even tacitly allowing drug testing for job incumbents and applicants, organizational scientists should reexamine assumptions about the soundness and impact of testing. Moreover, we must be wary of the tendency to "so closely identify with the group that has power" that we downplay employees' interests, not to mention what makes sense (Brief and Dukerich 1991, p. 345). Workplace drug testing, instituted to foster the achievement of organizational goals, seems to signal a disregard for the individual respect championed by Argyris (1957), McGregor (1960), and Likert (1961, 1967). Even if drug testing could guarantee improved safety and productivity, employers should be obligated to reject it for depriving employees of their right to privacy. Instead of advising organizations as to which drug testing practices will least offend and unsettle their employees, we should be educating them about the failings of drug testing and recommending that they refine the potentially preferable technique of performance testing.⁹

Endnotes

¹Interpretation of Lehman and Simpson's (1992) findings about at-work drug use is obscured because their operationalization combined illicit drug use with alcohol use.

²As Horgan (1991) observes, the operationalizations of these problems seem odd. According to their coding scheme, the authors would have considered incurring a paper cut on one's first day on the job more incriminating than improperly sorting an entire neighborhood's mail six months later.

³*United States v. Jacobsen* (1984) rules that the Fourth Amendment does not apply to the actions of private individuals, and *Monroe v.*

Consolidated Freightways, Inc. (1987) specifically applied *Jacobsen* to private sector drug testing.

⁴This explanation is consistent with Stone and Stone's (1990) conceptualization of privacy as information control, regulation of interactions with others, and freedom from control by others.

⁵Further, drug tests can reveal medical conditions that individuals may prefer not to announce to their current or prospective employers. If an employee's use of a prescription medication has no negative impact on his or her work performance, the employee should not be required to discuss such use with an employer.

⁶Moreover, the (utilitarian) rationale, that sacrificing individuals' privacy rights by drug testing is necessary to maximize societal good, is based on fallacious assumptions. As discussed previously, workplace testing may not actually deter the most deleterious drug use or detect it in time to prevent it from jeopardizing safety.

⁷Likewise, Guthrie and Olian (1991) found that drug testing programs were twice as prevalent as alcohol testing programs among the *Fortune* 1,000 organizations in their sample, and that employees with positive results for alcohol were granted more leeway than those with positive results for drugs, even though workplace alcohol abuse is much more common and expensive than drug abuse. They concluded, "It appears that substance abuse testing programs are driven more by the strong anti-drug social/political climate and perhaps the illegality of drugs rather than productivity or cost concerns" (p. 230).

⁸Ironically, testing may actually aggravate an employee's drug problem, rather than deter or eliminate it. Urine testing can heighten job stress (Crant and Bateman 1989), which in turn has been linked to substance abuse (Sauter et al. 1990).

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Drug Testing as Symbolic Managerial Action: In Response to "A Case Against Workplace Drug Testing"

J. Michael Cavanaugh • Pushkala Prasad

School of Business, Fairfield University, Fairfield, Connecticut 06430

Faculty of Management, University of Calgary, Calgary, Canada T2N 1N4

(*Drugs; Workplace Drug Testing; Symbolism; Institutional Theory; Phenomenology*)

In contrast to much of the management and organizational literature supporting drug testing (Coombs and Coombs 1991, Cowan 1987, Harris and Heft 1992), Debra Comer's (1994) "A Case Against Workplace Drug Testing" presents a refreshing series of arguments against this practice. Comer (1994) carefully scrutinizes and summarizes a substantial body of empirical and conceptual literature on workplace drug testing, on the basis of which, she makes a compelling argument against it. Comer even suggests that frequently, drug testing can have adverse consequences for organizations in terms of hurting employee morale, productivity and performance.

For the most part, we are in agreement with Comer's findings. However, we suggest that her paper falls short of offering a convincing explanation for the continued use of drug testing in the workplace. Her case against drug testing is marshalled from two distinct vantage points: (1) normative, and (2) instrumental. Both are incomplete when it comes to explaining the prevalence

of workplace drug testing. In the remainder of this paper, we explain why we think these two perspectives are inadequate, and suggest an alternative way of looking at the phenomenon.

The Limitations of Normative and Instrumental Positions

First of all, Comer's case against drug testing is explicitly normative. That is, she questions the *morality* of drug testing by underscoring its violation of employee privacy rights. On account of these violations, she suggests that drug testing is "morally inappropriate" (Comer 1994, p.). We have no quarrel with this position, and in fact share her values concerning this issue. Nevertheless, we also suggest that this does not contain sufficient grounds to make a convincing case against drug testing.

For one thing, Comer's view represents just *one* moral or normative position. Other normative positions could conceivably view drug testing quite differently. For instance, one ethical stand might view drug use itself as morally wrong or sinful, and consequently see