PRB 07-51E

Library of Parliament Bibliothèque du Parlement

DRUG TESTING IN THE WORKPLACE

Nancy Holmes
Karine Richer
Law and Government Division

28 February 2008

PARLIAMENTARY INFORMATION AND RESEARCH SERVICE
SERVICE D'INFORMATION ET DE RECHERCHE PARLEMENTAIRES

TABLE OF CONTENTS

Page

CANADA
LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

DRUG TESTING IN THE WORKPLACE[1]

INTRODUCTION

The debate over compulsory employee drug testing as a means of ensuring that workplaces are drug and alcohol free continues in this country, particularly in safety-sensitive sectors, and largely as a result of influence from the United States, where such testing is much more prevalent.

Those in favour of mandatory drug testing in the workplace generally rely heavily on arguments regarding safety, security and productivity. It is asserted, for example, that people who test positively for drugs and alcohol in the workplace have higher rates of absenteeism and poorer job performance than other employees and that they pose a threat to workplace, and sometimes even public, safety. On the other hand, those who firmly oppose drug testing believe that, while the goal of a healthy, safe and productive working environment is laudable, mandatory testing exacts too great a social cost. Particular emphasis is placed on the fact that drug testing is an infringement of an individual's bodily integrity and his or her right to privacy. It is also asserted that drug testing programs discriminate against individuals on the basis of an actual or perceived disability. The question then arises as to whether a balance can be struck between the concern for public and workplace safety and the concern for individual privacy and human rights. However, this question presupposes that a significant work-related drug and alcohol problem exists in this country and that drug testing is the best means of combating it.

The purpose of this paper is to provide an overview of the legal framework for compulsory employee drug and alcohol testing in Canada and, to a lesser degree, in the United States; particular emphasis is given to evolving jurisprudence, and some of the more contentious issues related to such testing are highlighted.

---

(1) Parts of this paper were originally published as a Current Issue Review entitled "Drug Testing: Legal Implications," April 1990.

THE TECHNOLOGY

Drug testing involves the chemical analysis of biological material taken from an individual. Urinalysis is the main technology used to test for the presence of certain drugs, although it has been the subject of much criticism. On the one hand, “false positives” may be obtained from the urine sample of an employee who has, for example, consumed innocuous substances such as poppy seeds, over-the-counter cold medications, or herbal teas. On the other hand, “false negatives” can be obtained when urine samples are altered with common substances such as salt, vinegar, eye drops or bleach.

Another concern relates to the highly personal information that can be gleaned from these tests. A urine specimen can be analyzed to reveal whether an employee is pregnant, is using prescription or other legitimate medications, or is being treated for conditions such as heart disease, bipolar disorder, epilepsy, diabetes or schizophrenia. It has been suggested that employers could potentially use these tests for genetic screening to exclude individuals with any condition deemed likely to diminish work performance.

Finally, perhaps the greatest drawback to the use of urinalysis as a means of drug testing is its inability to confirm whether or not an employee is actually impaired. Urinalysis indicates only whether a person has consumed a drug in the recent past (in the case of marijuana, for example, trace amounts can be detected in urine up to four weeks after use). It cannot demonstrate present drug use or present or past impairment. Nor can the test determine the quantity consumed of any drug that it detects.

Hair analysis is being promoted in some quarters as less intrusive and more reliable than urinalysis. Traces of drugs that have been circulating in the body can be detected in hair months or even years later (depending on the length of the hair sample). However, like urinalysis, hair testing is not always reliable. At best, it can detect only that a given substance has been in someone’s body; it provides no evidence of whether the person has actually been impaired on the job. Moreover, results can be skewed when hair has been bleached or dyed. There have also been suggestions that hair testing may be unfairly biased against people with coarse black hair, which contains high melanin levels, since drugs bind with melanin in the hair. Finally, because hair testing is more expensive than urinalysis, cost may be a barrier to the acceptance of this drug-testing technique.

Saliva analysis is the latest technique being promoted to test for the presence of illegal drugs. Collection of the sample is easier and less intrusive than urine collection; analysis can be conducted immediately at the scene; and the results can indicate whether drugs were

taken recently – unlike urine testing, which may reveal drugs ingested hours earlier. Saliva analysis devices can detect marijuana, cocaine, opiates and methamphetamines. Saliva testing is already being used widely in the United States and is gaining favour in Canada.

THE AMERICAN INFLUENCE

In the mid-1980s, the United States began to extend compulsory drug testing programs in the workplace to all public and private organizations, whether domestic or foreign. The imposition of drug testing programs in the United States was largely a product of the "war on drugs" conducted by the administrations of Ronald Reagan and George Bush Sr., and stemmed principally from the March 1986 report of the President's Commission on Organized Crime, which recommended that the heads of all federal agencies be directed to formulate policy statements and to implement guidelines and suitable drug testing programs to show the "utter unacceptability of drug abuse by federal employees." This recommendation led to President Reagan's Executive Order 12564 of September 1986, which made employee drug testing a government-wide policy.

At the federal level, the *Drug-Free Workplace Act of 1988*[(2)] was adopted, requiring some federal contractors and all federal grantees to agree that they would provide drug-free workplaces in order to be eligible for contracts or grants from federal agencies. Although the *Drug-Free Workplace Act of 1988* does not require drug testing, certain federal agencies (including the departments of Defense and Energy, the Nuclear Regulatory Commission and the National Aeronautics and Space Administration) put regulations in place requiring contractors, grantees and licensees to have fitness-for-duty requirements or drug-free workplace programs that include drug testing. Drug-free workplace and/or drug-testing laws have also been enacted at the state level, and some states have legislation that provide workers' compensation insurance premium discounts to companies with drug-free workplace programs that meet certain criteria.

In the area of transportation, the *Omnibus Transportation Employee Testing Act of 1991* requires transportation industry employers who have employees in "safety-sensitive" positions, such as commercial drivers, to have drug-free workplace programs in place that include both drug and alcohol testing. The US Department of Transportation is responsible for implementing and enforcing these regulations, which cover approximately six million employees.

---

(2) 41 USC 701.

Following the government's lead, the private sector rapidly expanded drug testing programs in the late 1980s and early 1990s, although pre-employment drug testing was more prevalent than random drug testing. Currently, non-unionized private sector companies can require applicants and/or employees to take drug tests. Employers can test for a variety of substances, although only a few have established testing protocols. In unionized workforces, the implementation of testing programs must be negotiated. Even when testing is required by federal regulations, the disciplinary consequences of a positive test result are subject to collective bargaining.

A. Drug Testing and the United States Supreme Court

In spite of the many concerns raised by scientists, unions and legal experts, the United States Supreme Court has shown itself to be generally supportive of drug testing programs.

In *Skinner* v. *Railway Labour Executives' Association*,(3) a majority of the Supreme Court held that drug and alcohol testing of railroad employees was reasonable under the Fourth Amendment, which protects citizens against unreasonable searches and seizures; even though there was no requirement for a warrant or for a reasonable suspicion that any particular employee may be impaired, testing was deemed by the Court to be warranted because the compelling governmental interests served by the regulations outweighed the employees' privacy concerns. Then, in *National Treasury Employees Union* v. *Von Raab*,(4) a majority of the Supreme Court upheld the constitutionality of a drug testing program for customs employees, noting that, in an administrative context, the requirement of "probable cause" (i.e., circumstances suggesting that the person to be searched has violated the law) might be unhelpful and that, given the government's compelling need to deter drug use in the Customs Service, the requirement of "individual suspicion" could also be dispensed with. As a result, the employees' right to privacy might be reduced in the context of the workplace, particularly in the case of front-line enforcement government employees.

(3) 489 US 602 (1989).

(4) 109 S. Ct. 1384 (1989).

In *Veronia School District* v. *Acton*,[5] a majority of the Supreme Court upheld the reasonableness and the constitutionality of random urinalysis drug testing of high school athletes. In reaching its decision, the court considered the decreased expectation of privacy among student athletes, the relative unobtrusiveness of the search at issue, and the severity of the drug problem in the school district. The court outlined its view that children at school, and thus in the temporary custody of the state, enjoy a lower expectation of privacy than members of the general public. Student athletes have even less expectation of privacy because they voluntarily subject themselves to a higher degree of regulation than other students by choosing to sign up for a team. Further, it was argued that physical examinations and an element of communal undress are inherent parts of athletic participation. Finally, the court took note of the national importance of deterring drug use by schoolchildren. It found that a school district drug problem, fuelled largely by the "role model" effect of athletes' drug use and presenting a particular danger to athletes themselves, can reasonably be dealt with by a policy designed to ensure that athletes do not use drugs.

Seven years later, in *Board of Education of Independent School District No. 92 of Pottawatomie County* v. *Earls*,[6] the Supreme Court revisited the issue of drug testing programs in the school and upheld a drug testing policy that applied to all students involved in extracurricular activities, rather than only student athletes. Justice Thomas, delivering the opinion of the majority, applied the principles set out in *Veronia* and held that this policy "reasonably serves the School District's important interest in detecting and preventing drug use among its students" and was thus constitutional.

These decisions have had an important influence on subsequent court rulings in the lower courts in the United States. It will be interesting to see what impact, if any, these cases will have on Canada's developing jurisprudence in this area.

THE LEGAL FRAMEWORK IN CANADA

Although at present there is no Canadian law requiring mandatory drug testing of employees, some private sector companies have put drug testing policies in place, and the federal government has implemented testing programs for federal prisoners and military personnel.

(5) 515 US 646 (1995).

(6) 536 US 822 (2002).

Opinions differ on the desirability of introducing legislation on this issue, not to mention on the direction such legislation should take, and the current legislative vacuum in this area has left private sector companies to develop policies whose standards for testing may vary significantly. Indeed, one expert has referred to the situation in the oil and gas industry as the "Wild West" of drug testing. In the absence of specific legislation on drug testing, the legality of these programs has so far been challenged mostly under human rights legislation on the grounds that they discriminate on the basis of an actual or perceived disability. However, drug testing policies in the workplace are also susceptible to review under employment standards and privacy legislation, and in the case of government workplaces, the Canadian Charter of Rights and Freedoms (the "Charter").(7)

A. The *Canadian Charter of Rights and Freedoms*

Challenges to government mandatory drug testing programs would likely be based on sections 7, 8 and/or 15 of the Charter. Section 7 sets out the right to security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. Security of the person includes liberty from physical constraint, privacy (see section A.1 of this paper), and freedom from state intrusion into personal matters. Section 8 guarantees the right to be secure against unreasonable search and seizure. It is also possible that a challenge could be made under section 15 of the Charter, which guarantees the right to equality.

The application of these constitutional rights is limited by section 1 of the Charter, which permits reasonable restrictions as long as they are prescribed by law and can be shown to be demonstrably justified in a free and democratic society.

Another important consideration in relation to the Charter is its applicability. The Charter, as per section 32, applies only to Parliament and to provincial legislatures, as well as to the federal and provincial governments. Thus, it does not generally apply to private actions of individuals or corporations, although it may do so, for example, through judicial extension of its guarantees to human rights codes. Therefore, if a mandatory drug testing program is established by legislation, any employee would have the right to challenge the law under the Charter. If,

(7) Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

however, a federally regulated corporation implemented such a program as its own policy, an employee would have recourse only under human rights legislation.

1. Section 7

The constitutionality of mandatory drug or alcohol testing has been considered in a number of court decisions, which have held that taking an individual's bodily fluids without his or her consent infringes the security of the person.(8) However, these cases involved drug testing regulations in penitentiaries and in provincial legislation on impaired driving, not in an employment context.

In *Dion* and *Jackson*, both the Federal Court of Canada and the Quebec Court of Appeal found that the requirement for inmates to provide a urine sample on the sole basis of the subjective determination of a Correctional Service employee failed to meet the standard of "fundamental justice" required by section 7 of the Charter when there is an intrusion into the privacy of an individual. In *Jackson*, the Federal Court of Canada pointed to the lack of any standards or criteria limiting the authority to test inmates; for essentially the same reasons, the Court went on to find that this requirement contravened section 8 of the Charter by providing for an unreasonable search. It is interesting that the Quebec Court of Appeal in *Dion* held that the word "liberty" in section 7 encompasses the right of the individual to consume, on occasion, certain intoxicants without being subject to an obligation to provide a urine sample to detect their presence in his or her body. In *Jackson*, on the other hand, the Court considered the question of "liberty" from the perspective of prisoner incarceration.

Also worthy of note are cases involving the seizure of bodily substances for DNA analysis. Although these cases arose in the criminal law context, their relevance to mandatory drug and/or alcohol testing may be significant. In *R.* v. *Stillman*,(9) police took hair samples and teeth impressions from an accused person under threat of force, despite the fact that his lawyer had advised the police that no consent was being given to the provision of any bodily samples. As well, a tissue used by the accused to blow his nose was seized by an officer for DNA testing. The Supreme Court of Canada, in considering the admission of the DNA test results, made it clear that the taking of bodily substances is a violation of one's right to liberty and security of the

(8) See, for example *R.* v. *Chatham* (1987), 23 C.R.R. 344; *R.* v. *Racette* (1988), 48 D.L.R. (4th) 412; *R.* v. *Dion*, unreported C.A.Q., rendered 31 May 1990; and *Jackson* v. *Joyceville Penitentiary* [1990] 3 F.C. 55 (T.D.).

(9) [1997] 1 S.C.R. 607.

person under section 7 of the Charter. When this is done without authority or consent, an accused is forced to give self-incriminating evidence whose admission would bring the administration of justice into disrepute. The court went on to find that, while the taking of the mucus sample from the tissue used by the accused violated his Charter rights, the seizure did not interfere with his bodily integrity or cause him any loss of dignity. This particular piece of evidence was therefore held to be admissible.

Finally, in *Blencoe* v. *British Columbia*,(10) Justice Bastarache, writing for a majority of the Supreme Court of Canada, asserted that the notion of liberty in section 7 was "no longer restricted to mere freedom from physical restraint," as demonstrated by previous jurisprudence, but rather applied whenever the law prevented a person from making "fundamental personal choices."

2. Section 8

The Supreme Court of Canada has held that section 8 of the Charter (guarantee against unreasonable search and seizure) provides for the protection of personal privacy,(11) and has held that the taking of bodily substances constitutes a seizure within the meaning of that section.(12) With respect to the reasonableness of the seizure, the Supreme Court's decision in *R.* v. *Collins*,(13) which dealt with breathalyser testing in relation to section 8, provides a useful framework within which to analyze drug testing. The first requirement for reasonableness is some form of legal authorization. It would then be necessary to consider whether the drug testing measure itself was reasonable. The Court in *Dyment* seemed to suggest that the "reasonableness" test in section 8 would require an objective precondition to mandatory drug testing, such as reasonable and probable grounds to suspect an employee of breaching a proscription against the use of alcohol or drugs while in charge of public transport. Persuasive evidence on the nature of the problem to be addressed through drug testing might have to be presented to the courts in order to determine the reasonableness of the program. Lastly, the manner in which the mandatory drug testing was carried out would have to be considered

(10) [2000] 2 S.C.R. 307.

(11) See *Hunter* v. *Southam Inc.* (1984), 2 S.C.R. 145.

(12) See *R.* v. *Dyment* (1988), 2 S.C.R. 417.

(13) (1987), 33 C.C.C. (3d) 1.

reasonable. This would ensure that the drug testing program was performed in a scientific and accurate manner, always bearing in mind the privacy concerns of the individual involved.

The courts in this country have, however, indicated a willingness to drop the stringent standard of reasonableness required under section 8 when they are dealing in administrative or regulatory contexts as opposed to an area of criminal law. It has been held that a less strenuous and more flexible standard of reasonableness may be appropriate in such cases. For instance, in the case of *R.* v. *McKinlay Transport*,(14) the Supreme Court held that random monitoring may be the only way to maintain the integrity of the tax system.(15) Thus, the degree of privacy that an individual can reasonably expect may vary according to the nature of the activity involved. Similar reasoning was also applied in situations where travellers cross international borders and are understood to have a diminished expectation of privacy.(16)

The level of one's privacy protection may also depend on the context in which the right to privacy is challenged. For example, the Supreme Court in *R.* v. *M. (M.R.)*,(17) held that a reasonable expectation of privacy is lower for students attending school than for others, because students know that teachers and school authorities are responsible for maintaining order and discipline and thereby ensuring a safe school environment. The court concluded that this reduced expectation of privacy, coupled with the need to protect students and provide a positive atmosphere for learning, clearly suggests that there should be a more lenient and flexible approach to searches conducted by teachers and principals than to searches conducted by the police.

3. Section 15

Section 15 provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination on the basis of such grounds as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada in the case of *Andrews* v. *Law Society of British Columbia*(18) made it clear that, in order to avail oneself of the equality guarantees in section 15, it must be demonstrated that a law imposes a burden, obligation or disadvantage on the

(14) (1990), 68 D.L.R. (4th) 568.

(15) See also *R.* v. *Jarvis*, [2002] 3 S.C.R. 757.

(16) *R.* v. *Simmons*, [1988] 2 S.C.R. 495, *R.* v. *Monney*, [1999] 1 S.C.R. 652.

(17) [1998] 3 S.C.R. 393.

(18) (1989), 56 D.L.R. (4th) 1.

individual on the basis of one of the grounds expressly listed in that section or on one that is analogous. In other words, not every distinction, classification or unfairness can be subjected to a successful section 15 challenge.(19)

A drug testing program would likely impose a burden or disadvantage in the form of disciplinary action (such as being fired) resulting from a refusal to submit to a drug test or from a positive test result. The basis for an allegation of discriminatory treatment would likely be "mental or physical disability." In determining whether drug addiction or dependency falls within the ambit of section 15 disability, the courts would likely look to the fact that the *Canadian Human Rights Act* specifically defines disability to include any previous or existing drug or alcohol dependency. The court would also likely consider the decisions rendered by lower courts based on the *Canadian Human Rights Act* and provincial equivalents that have recognized drug and alcohol dependency as a disability (see next section of this paper).

The term "disability" has generally been given a broad and purposive interpretation by both human rights tribunals and the courts. For example, the Supreme Court of Canada in *Commission des droits de la personne et des droits de la jeunesse* v. *Montreal (Ville)*(20) found that, in human rights law, a "handicap" or a "disability" is not definable solely on the basis of biomedical criteria but, rather, involves an analysis of the combined effect of the nature of a limitation or ailment, its social "construct" and its perception in the mind of the allegedly discriminating party.

In *Eaton* v. *Brant Co. Board of Education*,(21) the Supreme Court distinguished between disability and other enumerated grounds that are not characterized by individual differences, ruling that one of the purposes of section 15 in disability cases involves the recognition and accommodation of the *actual* characteristics of persons with disabilities.

4. Section 1

Section 1 provides that constitutional rights are subject to reasonable limits prescribed by law, if these limits can be shown to be justified in a free and democratic society. A law that infringed the Charter rights would have to be analyzed to determine whether the

(19) For more on section 15, see Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, BP-402E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, March 2007.

(20) [2000] 1 S.C.R. 665.

(21) [1997] 1 S.C.R. 241.

limitations it imposed met the reasonableness test, first established by the Supreme Court of Canada in *R.* v. *Oakes*.[22] The government would have to demonstrate that the objectives of the drug testing program related to an important, pressing and substantial concern and that the means chosen were proportional or appropriate to the ends. In other words, the drug testing must be rationally connected to the objective and must impair constitutional rights as little as possible, while the importance of the objective would have to outweigh the infringement of these rights. Accordingly, a drug testing program should arguably be premised on solid evidence of a serious problem of drug use occurring in a particular sector and that could not be dealt with by less intrusive means.

B. The *Canadian Human Rights Act*

Given that the Charter applies only to government actions and legislation, a non-legislated drug testing program in a private sector company would have to be challenged under either the *Canadian Human Rights Act*[23] ("the Act") or provincial human rights legislation, depending on whether it pertains to a federally or a provincially regulated industry. The federal Act applies to all federal government departments and agencies, to Crown corporations, and to businesses and industries under federal jurisdiction, such as banks, airlines and railway companies. In the same way, the provinces and territories have developed their own human rights legislation, which applies to their respective provincial government departments, agencies and Crown corporations, and to business and industry under provincial jurisdiction. The Act, and its provincial equivalents, protects individuals against discrimination on the basis of disability. A number of cases involving drug testing programs have been challenged under human rights legislation on the ground that such programs discriminate on the basis of disability.

The Act contains several provisions prohibiting discrimination in relation to employment. One basis of discrimination is "disability," which is defined as including any previous or existing dependence on alcohol or a drug. The Act also provides defences that a federal employer may plead against a charge of discriminatory practice. The bona fide occupational requirement (BFOR) is the most common defence raised in cases of employment discrimination. Amendments made in 1998 to the Act incorporated into this defence the duty of the employer to accommodate the employee, up to the point of undue hardship. Consequently,

(22) (1986), 1 S.C.R. 103.

(23) R.S.C. 1985, c. H-6.

an employer who is the subject of a complaint of discrimination cannot make use of the BFOR defence unless it is possible to demonstrate that the needs of the complainant could not be met without undue hardship on the part of the employer.

In 1999, the Supreme Court of Canada set out a three-step test for determining whether an employer has established, on a balance of probabilities, that a prima facie discriminatory standard is a BFOR, a test that has been used by courts in subsequent drug testing cases.(24) First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard in question, but rather on the validity of its more general purpose. Second, the employer must establish that it adopted the standard believing honestly and in good faith that it was necessary to the fulfilment of a legitimate work-related purpose. Third, the employer must establish that the standard is *reasonably* necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees who share the characteristics of the claimant without imposing undue hardship upon the employer.

In 2002, the Canadian Human Rights Commission's 1988 Policy on Alcohol and Drug Testing was revised to reflect recent jurisprudence. The policy now states that the following types of testing are not acceptable: (1) pre-employment drug or alcohol testing, (2) random drug testing, and (3) random alcohol testing of employees who are not in safety-sensitive positions. When an employer can demonstrate the existence of BFOR, the following types of testing may be included in a workplace drug and alcohol testing program: (1) random alcohol testing of employees in safety-sensitive positions; (2) drug or alcohol testing for reasonable cause or after an accident; (3) periodic or random testing after disclosure of a current drug or alcohol dependency or abuse problem, if such testing is tailored to individual circumstances and forms part of a broader program of monitoring and support; and (4) mandatory disclosure of present or past drug or alcohol dependency or abuse for employees holding safety-sensitive positions, within certain limits and in concert with accommodation measures. Employers would be relieved of the duty to accommodate an employee where they can show that: (1) the cost of accommodation would alter the nature or affect the viability of the enterprise; or (2) accommodation efforts notwithstanding, the health and safety risks to workers or members of the public are so serious that they outweigh the benefits of providing individualized accommodation or consideration. This policy is currently under review.

---

(24) *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3.

C. Employment Standards Legislation and Collective Agreements

The federal government has enacted legislation concerning employment standards, such as the *Canada Labour Code*.[25] These standards mandate certain elements of the employment relationship between employers and employees that are subject to federal jurisdiction. It has been suggested that if the federal government should decide to regulate drug testing, this legislation would be the most appropriate place to do so. The Code's grievance procedure might provide an avenue by which a drug testing program could be challenged to protect employees against possible abuse.

In a unionized workplace, it is possible for employees to grieve the right of management to introduce a drug testing program if such program is believed to violate the collective agreement. It is also possible for the union to grieve any action taken by the company pursuant to such a policy on behalf of an individual member. As a result, many decisions have been rendered by arbitrators appointed to hear disputes under collective agreements since drug testing programs first appeared in the workplace.

Based on the arbitration jurisprudence regarding the ability of an employer to unilaterally impose a new management rule, a drug testing policy would be enforceable only if it satisfied the following conditions: (1) it is clear, unequivocal and consistently enforced by the company from the time it is introduced; (2) it is not unreasonable or inconsistent with the collective agreement, and; (3) it is brought to the attention of the employees with clear explanations as to the consequences of a breach of the rules.[26] Most of the cases have focused on the "reasonableness" criterion; this is determined through a "balance of interests" test, which implies balancing the right of an employee to privacy against the right and responsibility of an employer to ensure the safety of employees and the general public. For a recent decision on whether a company's drug testing policy complies with the collective agreement in place, see the discussion of Arbitrator Picher's decision in the 2006 Imperial Oil case (in section B.1 of the discussion of evolving jurisprudence, below).

D. The *Privacy Act*

In 1990, the Privacy Commissioner of Canada undertook to study federal government drug testing policies and practices. On 1 June 1990, the Commissioner released a report containing recommendations on drug testing based on the requirements of the *Privacy Act*,[27] which pertains to the collection of personal information by federal government

(25) R.S.C. 1985, c. L-2.

(26) *Lumber & Sawmill Workers' Union, Local 2537* v. *KVP Co.* (1965), 16 L.A.C. 73 (Ont. Arb. Bd.).

(27) R.S.C. 1985, c. P-21.

institutions and sets out principles of fair information practices. Among the obligations it imposes on government institutions are the following requirements: to collect only the personal information needed to operate their programs; to collect the information from the individual concerned, whenever possible; to inform the individual how the information will be used; to keep the information long enough to ensure individual access; and to take all reasonable steps to ensure the information's accuracy and completeness.

The Commissioner's report took a position strongly against drug testing. It recommended that any government institution seek parliamentary authority before collecting personal information through mandatory drug testing. It also recommended that drug testing be used only in exceptional cases where drug use or impairment poses a substantial threat to public or co-worker safety, where there are reasonable grounds to believe that drug testing can significantly reduce this threat, and where there is no other practical and less intrusive means of reducing the safety risk. The report also recommended procedures for the collection, handling, retention and disposal of testing samples to facilitate compliance with the requirements of the *Privacy Act*.

In his 1999–2000 Annual Report to Parliament, the Commissioner reiterated that "drug testing is a serious privacy intrusion that is justified neither by the problem it purports to address nor by any evidence of its effectiveness" and that "[e]ducation, support, and treatment are the most effective approaches to drug abuse."

The drug testing policies of federally regulated private sector companies may be subject to the *Personal Information Protection and Electronic Documents Act*,[28] (PIPEDA), a federal law also overseen by the Privacy Commissioner. PIPEDA sets out ground rules for how private sector organizations can collect, use, and disclose personal information in the course of commercial activities.[29]

THE EVOLVING POLICY AND JURISPRUDENCE IN CANADA

A. The Transportation Sector

Currently, federal motor carrier safety regulations have been extended to Canadian trucking companies that send drivers into the United States. These regulations provide that an employer must have in place a workplace drug and alcohol policy and program that

(28) S.C. 2000, c. 5.

(29) For more on PIPEDA, see David Johansen and Nancy Holmes, *Protection of Personal Information in the Private Sector*, TIPS-102E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 October 2007.

includes, among other things, pre-employment drug testing, post-accident testing, reasonable suspicion testing, return-to-duty testing and follow-up testing, as well as random drug and alcohol testing at a minimum rate of 25% of the driver pool for alcohol and 50% for drugs. These regulations have applied to American trucking companies since 1990; however, an exemption was provided for foreign carriers and drivers because it was anticipated that Canadian law would provide for the prevention of substance use in the transportation industry along much the same lines as its US counterpart. When the Government of Canada announced in December 1994 that it would not be proceeding with such legislation, the foreign carrier exemption was lifted from the regulations.

The requirements under the regulations are extensive. For instance, drivers are prohibited from using alcohol for four hours before being on duty and from having a blood alcohol concentration (BAC) of 0.02 (20 mg/100 ml) or greater while on duty. Employers are subject to the following requirements: to provide education for supervisors and access to assistance for employees; on hiring any driver, to obtain from previous employers, with the driver's consent, the drug testing history for the past two years; to remove from duty any driver who has violated the rules; and to prepare and maintain specified records. Employers or drivers who violate the requirements may be subject to penalties, which include being declared out of service and being fined up to $10,000 per violation. Enforcement is carried out by means of random company audits.

Canadian trucking companies that wish to conduct business in the United States have had to develop drug and alcohol testing policies that comply with the regulations. These policies must, however, also abide by Canadian human rights laws.

The Canadian Human Rights Commission addressed this issue in its 2002 Policy on Alcohol and Drug Testing, in which it was recognized that "for trucking and bus businesses that operate exclusively or predominantly between Canada and the US, not being banned from driving in the US may be a bona fide occupational requirement." However, drivers who are denied employment opportunity or face disciplinary consequences in Canada "as a result of the imposition of US rules" maintain the right to file a complaint before the commission. It is also specified in the policy that drivers who are proven to be substance-dependent must be accommodated by their employers up to the point of undue hardship. Moreover, a driver who has tested positive for drug or alcohol but is determined not to be substance-dependent "should be returned to his or her position, if possible, and appropriate disciplinary action may be taken." Termination of employment in the latter situation will be justified only "where there is just cause

and appropriate disciplinary steps have been taken." In light of the decision of the Canadian Human Rights Tribunal in *Milazzo* v. *Autocar Connaisseur Inc*. (see section A.1, below), it is expected that some changes will be made to this section of the policy when the new version is released.

Although regulations in other portions of the transportation sector prohibit the use of drugs and alcohol in the workplace, they do not provide for mandatory drug testing. The *Aeronautics Act*, the *Canada Shipping Act*, the *Pilotage Act*, and the *Railway Safety Act* all prohibit the use of intoxicants by employees on duty, but they do not have substance testing provisions.(30) Amending legislation would be needed to extend the scope of these statutes to authorize mandatory drug testing. Such a recommendation was made by the Special Senate Committee on Transportation and Security in its January 1999 Interim Report. The Committee, which was appointed on 18 June 1998 to examine and report upon the state of transportation safety and security in Canada, recommended that the federal government permit the transportation industry to apply mandatory random drug and alcohol testing similar to that in the United States. The committee was also mandated to complete a comparative review of technical issues and legal and regulatory structures with a view to ensuring that Canadian transportation safety and security are of sufficient quality to meet the needs of Canadians in the 21st century. However, the committee was dissolved without having issued a final report, and no such review was ever undertaken.

1. *Milazzo* v. *Autocar Connaisseur Inc.*

In *Milazzo and Canadian Human Rights Commission* v. *Autocar Connaisseur Inc. and Motor Coach Canada*,(31) the Canadian Human Rights Tribunal considered the case of a bus driver whose employment was terminated after he tested positive for cannabis use. The test was not administered because of any suspicion on the part of the company, but simply because the company realized that the applicant had not undergone the pre-employment drug test that was mandated by company policy in light of the fact that its drivers travelled to the United States. He challenged his dismissal under the *Canadian Human Rights Act*. There was no evidence before the Tribunal as to the frequency of Mr. Milazzo's cannabis use, and expert testimony failed to

(30) *Aeronautics Act*, R.S.C. 1985, c. A-2; *Canada Shipping Act*, R.S.C. 1985, c. S-9; *Pilotage Act*, R.S.C. 1985, c. P-14; *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.).

(31) [2003] C.H.R.D. No. 24, 2003 C.H.R.T. 37.

establish that recreational drug users had a disability per se. Although it found that the employer's testing policy was prima facie discriminatory, the Tribunal concluded that the evidence did not establish that the employer perceived the applicant to be disabled, because no one had suspicions he was using drugs or had "ever turned their mind to the issue." The Tribunal found, therefore, that Mr. Milazzo was not discriminated against by his employer. The importance of this case rests on the Tribunal's view that recreational drug use, to be distinguished from an addiction to drugs, does not constitute a disability and therefore does not entitle employees to protection against discrimination under the Act.

B. Other Private Sector Employers

1. *Entrop* v. *Imperial Oil Ltd.*

The influence of the American "war on drugs" has also been felt by Canadian subsidiaries of American firms. In November 1991, the Canadian Civil Liberties Association filed a complaint with the Ontario Human Rights Commission on behalf of four employees of Imperial Oil Limited. The basis of the complaint was that Imperial Oil's drug testing program, which commenced in January 1992, discriminated on the basis of "handicap" under the Ontario *Human Rights Code*.(32) Imperial Oil was the first private company in Canada to institute a comprehensive drug testing policy that included random drug testing and a requirement to disclose previous substance abuse problems. Apparently, the development of this policy was the result of advice received from Imperial Oil's major share-holder, Exxon Corporation, an American company.

On 23 June 1995, an Ontario human rights Board of Inquiry rendered the first decision in that province in the area of substance abuse testing. Not only did the Board find for the first time that alcoholism constituted a "handicap" under the Ontario *Human Rights Code*, but, on 10 August 1995, it ordered Imperial Oil Ltd. to pay an unprecedented $20,000 award for damages to an employee. The company had forced the employee to reveal that he had once had an alcohol problem, had demoted him, and had made reprisal when he launched a human rights complaint. In the case of *Martin Entrop* v. *Imperial Oil Limited* (unreported), the board held that this treatment constituted discrimination on the basis of perceived handicap under the *Human Rights Code*. Imperial Oil appealed the board's decision to the Ontario Divisional Court, where it was dismissed.

---

(32) R.S.O. 1990, c. H.19.

On a further appeal before the Ontario Court of Appeal, the Board's decision was reversed in part (*Entrop* v. *Imperial Oil Ltd.*).[33] The Court recognized that minimizing the risk of impairment resulting from substance abuse, and thus ensuring a safe workplace, was a legitimate objective rationally connected to work performance and that Imperial Oil acted honestly and in good faith. However, the Court noted that blood tests for drugs did not indicate actual impairment and therefore were not a BFOR. On the other hand, breathalyzer tests for alcohol did indicate impairment and were thus a reasonable requirement for employees in safety-sensitive jobs. However, automatic dismissal of employees who failed the breathalyzer test was inconsistent with Imperial Oil's duty to accommodate employees. Therefore, alcohol testing was a BFOR, provided that sanctions were tailored to the employee's circumstances. Finally, the mandatory disclosure, reassignment and reinstatement provisions of the policy were discriminatory and were not BFORs because they were not reasonably necessary to ensure that employees in safety-sensitive jobs were unimpaired.

Imperial Oil resumed random drug testing for employees in safety-sensitive positions in July 2003 by means of saliva samples that were tested for marijuana. This led to a challenge by the union. In a 11 December 2006 award, the board of arbitration chaired by Michel Picher held that random drug testing was not a permissible exercise of management rights, even though saliva testing, unlike the previous urine testing program, could detect current cannabis impairment.[34] Imperial Oil, relying on the Court of Appeal decision in *Entrop*, argued that random drug testing with a method that could determine actual impairment should be permitted in the same way that breathalyser tests are permitted. Arbitrator Picher distinguished the *Entrop* decision on the basis that the Ontario Court of Appeal considered whether the drug testing program complied with the *Human Rights Code*, not whether it complied with a given collective agreement, which in this case expressly provides for the protection of the dignity of employees. He also noted that saliva testing could not be compared to a breathalyser test: since the sample must be sent to a lab for analysis, the test would not prevent an intoxicated employee from proceeding to work. Imperial Oil is currently seeking judicial review of this decision before the Ontario Superior Court of Justice (Divisional Court).

---

(33) (2000), 50 O.R. (3d) 18.

(34) *Imperial Oil Ltd.* and *Communications, Energy and Paperworkers Union of Canada, Loc. 900*, [2006] O.L.A.A. No. 721.

2. *Kootenay Boundary Regional Hospital* v. *B.C.N.U.*

In *Kootenay Boundary Regional Hospital* v. *B.C.N.U. (Bergen),*[35] a nurse was dismissed for opiate use, theft of drugs from the hospital and failure to adhere to a recovery program. The nurse in question had been dismissed for drug use and subsequently reinstated on two previous occasions. The nurse's union grieved the latest dismissal on the ground that it violated paragraph 13(1)(*a*) of the British Columbia Human Rights Code, prohibiting an employer from refusing to continue to employ a person because of physical or mental disability. The arbitrator concluded that the hospital's actions had been discriminatory, as it had failed to consider accommodating the nurse by placing him in a job where he would have no access to opiates. The hospital appealed to the British Columbia Court of Appeal. Although the Court found that the nurse had a disability and that he was adversely affected when his employment was terminated, it granted the appeal, holding that the arbitrator erred in concluding that the hospital failed to adequately accommodate the nurse. The Court instead noted that there was a duty on the part of the nurse to facilitate the accommodation process and to take some responsibility for his rehabilitation. Given the nurse's long-standing drug addiction and his two previous opportunities for rehabilitation, both parties must have understood that a condition of his employment was that he would comply with his recovery program. The court concluded that the nurse had failed to facilitate the accommodation process and that, therefore, the employer's duty was exhausted.

3. *Alberta* v. *Kellogg Brown & Root*

In *Alberta* v. *Kellogg Brown & Root,*[36] the Alberta Court of Queen's Bench allowed an appeal from a decision of a human rights panel. In this case, the company in question had instituted a pre-employment drug testing policy. A candidate was interviewed, provided a urine sample, and began employment on a probationary basis as a receiving inspector at the Syncrude plant in Fort McMurray. After nine days of work, his employer was informed that he had tested positive for cannabis. The employee confirmed that he was a recreational user, and his employment was terminated. The employee filed a complaint with the Alberta Human

(35) (2006) 264 D.L.R. (4th) 478.

(36) *Alberta (Human Rights and Citizenship Commission)* v. *Kellogg Brown & Root (Canada) Co.* (2006), 267 D.L.R. (4th) 639.

Rights and Citizenship Commission alleging discrimination in employment on the grounds of physical and mental disability contrary to the *Human Rights, Citizenship and Multiculturalism Act*.(37)

A human rights panel found that, although the drug testing policy was rationally related to the legitimate goals of workplace safety and efficiency and had been adopted in good faith, the employer had not shown that the policy was *reasonably* necessary to accomplish those goals because it did not contain any accommodation for those who failed the test. However, the panel concluded that, in this case, the employee had not established discrimination on a prohibited ground, as he claimed that his drug use was a matter of personal choice and not a disability. The panel, like the Tribunal in the *Milazzo* case (discussed above), found no "perceived" disability, since the employee's work was considered excellent and there was no suspicion of drug use on the part of the employer.

On appeal, the Alberta Court of Queen's Bench agreed with the panel that the employer's drug policy was prima facie discriminatory. By purpose and effect, it barred individuals from the workforce on an assumption that a positive drug test increased the chances that an individual might be impaired at work sometime in the future. Because urine tests detect only past usage, individuals were being screened on the basis of behaviour that took place off-site and before their employment began.

However, unlike the panel, the Court then adopted the approach of the Ontario Court of Appeal in *Entrop* to the effect that anyone who tests positive is entitled to the protection of the Act, whether or not the person admits to an addiction. Although the dismissed employee did not have a drug addiction, the employer treated him as if he did, by virtue of its policy of refusing to employ anyone who tested positive. Speaking to the issue of perceived disability, the Court rejected the reasoning of the Tribunal in *Milazzo*, stating that the focus should not be on whether particular employees had perceived the individual concerned to be drug dependent, but whether "by the plain reading and clear operation of the company policy, [Kellogg Brown & Root] assumes him to be." Accordingly, the Court found that the panel erred in concluding that the employer's treatment of the employee did not constitute discrimination on the basis of physical disability.

The case was overturned on appeal before the Alberta Court of Appeal. The Court of Appeal concluded that, on the basis of the evidence presented, the employee in question was not a drug addict, nor was his employment terminated on the basis of the

(37) R.S.A. 2000, c. H-14.

perception of the employer or fellow employees that he was addicted to drugs. The Court of Appeal also found that the purpose of Kellogg Brown & Root's hiring policy was to reduce workplace accidents by prohibiting workplace impairment. In light of the evidence disclosed that the effects of cannabis can sometime linger for several days after its use, thus raising concerns about the user's ability to function in a hazardous environment, there was a clear connection between the purpose of the policy and its application to recreational users of cannabis. As such, the policy was directed at the actual effects suffered by recreational cannabis users, and not the perceived effects suffered by cannabis addicts. Finally, on the issue of the application of the *Entrop* decision, the Court of Appeal concluded as follows:

> Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict. To the extent that this conclusion is at odds with the decision of the Ontario Court of Appeal in *Entrop* v. *Imperial Oil Ltd.* […] we decline to follow that decision.(38)

C. Criminal Law and Federal Penitentiaries

Canadian legislation on mandatory drug testing exists principally in the criminal law field. Under the *Criminal Code* ("the Code"),(39) someone can be tested to establish whether he or she is impaired by alcohol or drugs while operating a motor vehicle, railway equipment, a vessel or an aircraft. Section 253 of the Code states:

> 253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (*a*) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
>
> (*b*) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

(38) *Alberta (Human Rights and Citizenship Commission)* v. *Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 426, para. 33.

(39) R.S.C. 1985, c. C-46.

Provisions are also made in the Code to allow a peace officer who reasonably suspects that a person has alcohol in his or her body while operating, assisting in the operation of, or having the care and control of a motor vehicle, vessel, aircraft or railway equipment, to request that this person undergo a breathalyzer test or provide a blood sample for testing. It is an offence to refuse to comply with such a demand, without a reasonable excuse. Peace officers are also authorized to obtain a warrant for the taking of a blood sample where the person is unable to consent "by reason of any physical or mental condition of the person that resulted from the consumption of alcohol or a drug, the accident or any other occurrence related to or resulting from the accident."

In October 2007, the government introduced Bill C-2 (Tackling Violent Crime Act), to amend the *Criminal Code* and other Acts. This "omnibus" bill groups together five bills that had been introduced separately in the 1st Session of the 39th Parliament. One of those bills, introduced in November 2006, was Bill C-32, An Act to Amend the Criminal Code (Drugs and Impaired Driving), which proposed amendments to the *Criminal Code* and other Acts intended to strengthen the enforcement of drug-impaired driving offences in Canada. Bill C-2 expands drug enforcement capabilities by giving police the authority to demand physical sobriety tests and bodily fluid samples for section 253(*a*) investigations. It also increases penalties with respect to both alcohol- and drug-impaired driving under section 255(1) of the Code, and creates new offences with respect to impaired driving causing death or bodily harm. Finally, with specific reference to alcohol-impaired driving, Bill C-2 restricts challenges in court to the blood-alcohol concentration test result.

In response to the decisions in the *Dion* and *Jackson* cases (discussed above), the *Corrections and Conditional Release Act* (the "CCRA"),[40] was proclaimed in force on 1 November 1992. This Act permits drug and alcohol urinalysis testing by Correctional Service Canada in certain prescribed instances. For example, section 54 of the CCRA provides that an inmate may be tested within an institution where a staff member believes on reasonable grounds that the inmate has committed a disciplinary offence for which a urine sample is necessary to provide evidence. Such testing is permitted, however, only where previous authorization has been obtained from the institution's head. Urinalysis is also allowed under section 54 of the CCRA "as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for."

(40) S.C. 1992, c. 20.

Section 55 of the CCRA permits urinalysis testing where the National Parole Board has made abstention from drugs or alcohol a condition of a temporary absence, work release, parole or other such statutory release. In all cases, the inmate or offender must be informed of the basis of the demand and the consequences of non-compliance. Moreover, he or she must be given a reasonable opportunity to make representations to the relevant official before submitting to the test. Further details are provided in the Regulations on the requirement to provide a sample, the collection of samples, the testing of samples, the reporting of test results and the consequences of positive test results.

A Charter challenge to the random drug testing provision of the CCRA was dismissed by the British Columbia Supreme Court on 27 July 1994 in the case of *Fieldhouse* v. *Canada* (unreported). A number of inmates at Kent Institution in British Columbia claimed that section 54 of the CCRA, which permits the use of a prescribed non-individualized random selection urinalysis program, was contrary to sections 7 and 8 of the Charter. Kent Institution was one of three prisons chosen as pilot projects for random urinalysis programs under the CCRA. Each month, 10 to 15 members of the prison's total population of 240 to 280 were randomly selected by computer in Ottawa to undergo drug testing. An inmate had to comply with a urinalysis demand within two hours; his refusal, or a positive test result, could have serious implications for his future transfer prospects, conditional release and participation in community programs. The Court found that the connection between drugs and violence at Kent Institution was compelling. There was a serious problem of drug use in the institution and little in the way of an alternative means to combat it effectively. Thus, as random urine testing was a deterrent to both prison drug use and associated violence, the Court held that it constituted neither an unreasonable limit on inmate liberty nor an unreasonable invasion of privacy or integrity of the person under sections 7 and 8 of the Charter. An appeal of this decision was filed with the British Columbia Court of Appeal on 12 August 1994; however, the appeal was dismissed on 21 March 1995.

To help clarify the situation with respect to drug testing of inmates, the Commissioner of the Correctional Service of Canada issued two directives: Directive 566-10 – Urinalysis Testing in Institutions, and Directive 566-11 – Urinalysis Testing in the Community. The objective of these directives was to establish procedures for the collection, storage, shipment and testing of urine samples and to ensure that the urinalysis program was conducted in a fair and consistent manner. These directives were last amended in May 2007, in order to, among

other things, add a deadline for sending samples to the laboratory, add methadone to the list of intoxicants so that measures could be taken to counter its illicit use, and add a procedure and deadline for requests for review of positive test results in order to comply with a Federal Court decision.(41)

D. The Canadian Forces

Pursuant to the National Defence Drug Testing Policy announced in 1990, regulations respecting the Canadian Forces Drug Control Program were approved on 21 May 1992 by the Governor in Council as Chapter 20 of the *Queen's Regulations and Orders for the Canadian Forces*. Under this program, mandatory drug testing with random elements would be introduced, primarily for all military personnel in safety-sensitive positions. The program would apply only to uniformed personnel and not to the civilian staff of the Department of National Defence; however, given that all uniformed positions are considered to be safety-sensitive, the military drug-testing policy was considered to be fairly inclusive. Most military drug testing would be done through the random selection of units comprising 5 to 500 individuals. Testing would also take place for cause, for those who were undergoing rehabilitation for drug use, for post-accident investigations and for certain "super-sensitive" positions that were not covered by the random testing of military units. All testing would be conducted by means of urinalysis and any positive drug screen would be subject to a confirmatory analysis. Failure to comply with a request to submit to a drug test could result in disciplinary action.

In February 1995, the Chief of the Defence Staff informed the Privacy Commissioner in writing that the portion of the drug testing policy relating to random selection had been suspended; however, he still reserved the right to reopen the issue in the future should circumstances dictate its necessity. This letter was in response to the Commissioner's 1994 opposition to the widespread use of random testing of Canadian Forces members for the presence of illegal drugs, even though the Department of National Defence's own statistics had revealed that its members rarely used such substances. Indeed, the department's own survey had revealed that the intoxicant most widely used by its employees was alcohol, which was not covered by the Forces' policy.

---

(41) *Mymryk* v. *Canada (Attorney General)*, 2007 FC 32.

In 2006, the Canadian Forces instituted mandatory drug testing for soldiers to be deployed in Afghanistan. As reported on CBC News in September 2007, 250 soldiers were prevented from being deployed to Afghanistan during the past year because they tested positive for drug use. The military told CBC News that it had tested about 6,800 soldiers since mandatory drug testing of troops headed for Afghanistan began in September 2006. CBC News obtained the results of tests done between September 2006 and May 2007 through the *Access to Information Act*,(42) and the military then provided numbers from May until September. Test results showed that most soldiers who failed had tested positive for marijuana. It was also reported that there were plans to expand the drug testing program to include blind testing, which would encompass the entire Canadian Forces, not just soldiers slated for duty in Afghanistan.

CONCLUSION

It is obvious that a number of issues remain to be addressed with respect to the legality of drug testing in Canada. Chief among them is whether there is indeed a drug problem in the Canadian workplace that can be remedied only through the use of individual drug testing. Will the use of mandatory testing reduce the consumption of substances that threaten workplace health and safety, or could it lead to a shift to the consumption of drugs that cannot be detected either by the type of testing method being used or by current testing technology? Are there other workplace hazards, such as fatigue, stress, and illness, that are more prevalent than alcohol or drug use? What should be considered a proscribed drug (i.e., illicit drugs, licit drugs or both)? How effective are testing procedures in yielding relevant information about job performance? What happens in the case of positive results from trace amounts of drugs that could not affect an employee's ability to perform his or her work? Might someone test positive who had not actually consumed drugs but had absorbed traces from a secondary source (e.g., marijuana smoked by someone else in the same room)? What protection should be incorporated into the drug testing process to safeguard the rights of the employee? How can an employer be prevented from using or sharing (e.g., with insurers) personal information about employees obtained from or in relation to a drug test? What recourse would be open to employees who wanted to challenge a drug testing program? What remedies would be available to these employees?

---

(42) R.S.C. 1985, c. A-1.

Because there is virtually no legislation and still relatively little case law in this area, it is hard to know how these questions will be determined, and whether the determination will fall to the courts or to the federal or provincial legislatures.

SELECTED REFERENCES

Beaudoin, Christina C. "Random Drug Testing in the Workplace: All But Universally Rejected by Canadian Arbitrators." *Employment and Labour Law Reporter*, Vol. 16, No. 12, March 2007, pp. 101–6.

Benyekhlef, Karim. "Réflexions sur la légalité des tests de dépistage de drogues dans l'emploi." *Revue du Barreau*, 48-2, 1988, pp. 315–63.

Bota, Anthony A. *Employment-Related Drug Testing: The Legal Implications for Employers*. Industrial Relations Centre, Queen's University at Kingston, 1989.

Canadian Human Rights Commission. "Policy on Alcohol and Drug Testing." 2002.

Coombs, Robert and Louis Jolyon West, eds. *Drug Testing Issues and Options*. Oxford University Press, New York, 1991.

Health and Welfare Canada, Interdepartmental Secretariat on Drug Abuse. "Action on Drug Abuse." May 1987.

Henriksson, Lennart E. "The Unconvincing Case for Drug Testing." *Canadian Public Policy*, Vol. 17, No. 2, June 1991.

House of Commons Standing Committee on Justice and Human Rights. *Toward Eliminating Impaired Driving*. Ottawa, May 1999.

House of Commons Standing Committee on National Health and Welfare. *Booze, Pills and Dope: Reducing Substance Abuse in Canada*. Ottawa, 1987.

House of Commons Standing Committee on Transportation. *The Government's Strategy on Substance Use in Safety-Sensitive Positions in the Canadian Transportation Industry*. Ottawa, 1990.

Hurley, Mary C. *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*. BP-402E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, March 2007.

Klein, Kris and Vivian Gates. *Privacy in Employment: Control of Personal Information in the Workplace*. Thomson Canada Ltd., Toronto, 2005.

Law Reform Commission of Canada. "Investigative Tests." Working paper 34, 1984, 186.

MacInnis, Patricia. "Lone Ranger Takes on Canada's Drug Toting Cowboys." *Canadian Occupational Safety Magazine*, Vol. 44, Issue 1, January/February 2006, pp. 20–1.

McIsaac, Barbara, Rick Shields and Kris Klein. *The law of privacy in Canada*, 4th ed. Carswell, Scarborough, 2007.

Normand, Jacques *et al*. *Under the Influence? Drugs and the American Work Force*. National Academy of Sciences, 1994.

Privacy Commissioner. *Drug Testing and Privacy*. Ottawa, 1990.

Shain, Martin, et al. *Canadian Labour Law Journal*, Vol. 2, No. 3, Spring 1994.

Special Senate Committee on Transportation Safety and Security. *Interim Report*. Ottawa, January 1999.

Stencel, Sandra ed. "Drug Testing." *The CQ Researcher*, Vol. 8, No. 43, 20 November 1998.

Transport Canada. *Substance Use in Safety-Sensitive Positions in Canadian Transportation: Government Response to the Third Report of the Standing Committee on Transport*. Ottawa, 7 November 1990.

Zeese, Kevin B. *Drug Testing Legal Manual: Guidelines and Alternatives*. Clark Boardman, New York, 1988 (updated).