

# **Employment Related Drug Testing: The Legal Implications for Employers**

**Anthony N. Bota**



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## FOREWORD

The Industrial Relations Centre is pleased to include this study, Employment Related Drug Testing: The Legal Implications for Employers, in its publication series School of Industrial Relations Research Essay Series. The series is intended to give wider circulation to selected student research essays, chosen for both their academic merit and their interest to industrial relations practitioners and policy makers.

A substantial research essay is a major requirement of the Master's Program in Industrial Relations at Queen's. The essay may be an evaluation of a policy oriented issue; a limited empirical project; or a critical analysis of theory, policy, or the related literature in a particular area of industrial relations.

The author of the essay, Tony Bota, graduated from the School of Industrial Relations in October 1988.

I would like to express my appreciation to the author for granting permission to publish this excellent study.

D.D. Carter, Director  
Industrial Relations Centre and  
School of Industrial Relations  
Queen's University

January 1989

## **ABSTRACT**

Employment related drug testing has become a contentious issue in Canada. While some employers have implemented some form of drug testing and many more are still considering it, the extent of its legality has yet to be determined by the human rights commissions, arbitrators and the courts. This essay examines the legal implications of employment related drug testing in Canada by analyzing relevant human rights legislation, arbitral jurisprudence, and the Canadian Charter of Rights and Freedoms. In carrying out this analysis some reference is made to the legal developments in the United States.

The major conclusions of this essay are that employers considering a drug testing program should avoid pre-employment drug testing for most jobs and should only test existing employees in most jobs upon a reasonable suspicion of drug use. Employers must also take all reasonable precautions in drug testing so as to ensure accurate test results and limit the extent of invasion into employees' privacy. Finally, employers would also be wise to assist or accommodate employees who test positive prior to considering any disciplinary action.

## I. INTRODUCTION

Employment related drug testing has become one of the most controversial issues in the Canadian workplace. Much of the controversy concerns the extent to which employers may require their employees or prospective employees to submit to some form of drug testing. To place this issue in focus it is necessary to first understand the various methods of drug analysis now being used to determine drug use.

### i. Methods of Drug Analysis

The term 'drug testing' can refer to urinalysis, blood testing, or the use of a breathalyzer to detect drug ingestion.

The most frequently used method is urinalysis. One of the reasons this method is used is because blood testing is considered to be more intrusive. In the U.S. case of Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court characterized blood testing as a potential violation of "fundamental human interests" as it involves "intrusions beyond the body's surface." Since urinalysis has become the most frequently used method of employment related drug testing, this paper will only deal with this form of drug testing.

Toxicology laboratories commonly use the following methods in drug testing urine.

- 1) Radioimmunoassays (RIA)
- 2) Enzyme immunoassay (EMIT)
- 3) Chromatographic methods
  - a) thin layer chromatography (TLC)
  - b) gas chromatography/mass spectrometry (GC-MS)
  - c) liquid chromatography (HPLC)

Both the RIA and EMIT are advantageous in that both are easy to perform. Less highly- trained technologists are required. (Addiction Research Foundation (ARF) background reading 1987 9) Moreover, the screening can be done in a physician's office or in a workplace, after a few hours of training. (Canadian Centre for Occupational Safety (CCOHS) Workshop 1987 9) Both the RIA and EMIT can also be automated and are relatively inexpensive. For example, screening ten samples costs \$6/drug/sample. Assuming three drugs (cannabis, cocaine and morphine) are tested for, the total cost would be \$180. If tests are done on an individual sample basis or in smaller batches, the cost would be much more expensive. Another advantage of both tests is that they are highly specific for cocaine and cannabis. (CCOHS workshop 1987 10) However, the tests are not highly specific for morphine. For example, testing for morphine can give a positive result if codeine is present in the sample. Both tests are accurate 95 to 98% of the time (ARF background reading 1987 11) which may be considered a drawback because confirmation of a positive result is needed by another testing method. Another disadvantage is that only a single drug can be tested for a one time.

The GC-MS test is known as the 'gold standard test' because of its near 100% accuracy. (ARF background reading 1987 13) Another advantage of this test is that it can screen for a large number of drugs at the

same time. Its major disadvantages are that it is labour intensive, requires specially trained staff, and is expensive. (ARF background reading 1987 13) GC-MS equipment costs between \$70,000 to \$150,000 depending on the degree of automation and computer capabilities. (ARF background reading 1987 14) The cost, however, for an individual sample is \$300 if three drugs are tested for. (extrapolated from the CCOHS workshop 1987 11)

The EMIT is by far the most widely used drug test. (Rust 1986 51) This test is probably most commonly used because it is relatively cheap to administer, and (as stated above) it gives results which are correct in 95%-98% of cases. From a practical standpoint, employers considering drug testing are best to employ the less expensive and fairly accurate EMIT first and then use the more accurate and expensive GC-MS test to confirm positive test results. This combination is less costly than automatically employing the GC-MS test and moreover is more likely to withstand legal challenges because of its high reliability compared to simply employing the EMIT without a confirmatory test.

## **ii. Management Perspective of Drug Testing**

Employers have focused on drug testing to detect drug use because, unlike the relative ease of detecting the use of alcohol, it is difficult to observe the physical signs of drug dependency or impairment. To justify employment related drug testing, employers state that drug testing is needed to reduce costs associated with accidents, absenteeism, turnover and tardiness and to improve product quality and productivity. Another important reason cited is that drug testing is required to reduce the threat of serious safety hazards to employees, coworkers, and the public.

### **Drug testing as a deterrent and a means to reduce costs**

Although no statistics are available in Canada on the magnitude of drug use in the workplace and the cost of such use, the U.S. findings may be of some value. A recent Wall Street Journal survey showed the magnitude of drug use in the U.S. workplace. (quoted in the CORPUS conference 1987) The survey indicated that one in eight workers (12%) between age twenty-six and thirty-five appear to be using drugs in the workplace. In the same survey, a total of twenty percent of those aged eighteen through twenty-five appear to use drugs while on the job. Another group, the Research Triangle Institute, a business-sponsored research organization in North Carolina, estimates "drug abuse cost the United States \$60 billion in 1983, up 30 percent more than the \$47 billion estimated for 1980." (quoted in Bickerton 1986 27)

Given the magnitude of drug use in the U.S. workplace and the estimated costs involved, many U.S. employers have turned to drug testing to reduce the costs. Employers feel drug testing may serve as a deterrent to drug use and thus reduce employer costs associated with drug use. For example, at the recent CORPUS conference, the Personnel Manager of Edison Electric Company in New Jersey presented data showing that since they have started a drug testing program, they have not found anybody using drugs in their workplace. Before the program, they could detect 5% to 10% use. (CORPUS conference 1987)

### **Drug testing as a means to ensure product quality and productivity**

Employers have concerns that they may lose their competitive position in the market if their products have poor workmanship or if production is inefficient. Employees with drug problems are perceived to be poor performers and the fact they are likely to be absent more from work may cause disruptions in production. Employers feel drug testing, especially pre-employment, is a means to avoid hiring such troublesome employees. For example, Alan McPhee, director of Public Relations at American Motors Company defends his company's decision to test applicants stating that \$60 million was spent on training alone and therefore, they should have the right to protect such an investment by hiring the best available applicants. (quoted in Elie 1987 56)

### **Drug testing as a means to decrease the potential of safety hazards**

In many industries, safety is of utmost importance because accidents can result in serious harm to employees, co-workers, and the public. Moreover, employers have an obligation under the Occupational Health and Safety Act to provide a safe workplace. Thus, many employers feel that drug testing is required to reduce the additional safety threat caused by employees who are drug impaired at the workplace.

Paul Tuz, Better Business Bureau President, views drug testing as "... nothing more than a safety measure." (quoted in Stroud 1987 101) Commenting on the fact that fifty-five percent of the top one hundred heavy-industry companies in the U.S. screen potential employees for drug use, Mr. Tuz states that such a pattern is appropriate because in this sector there is a greater chance of worker injury. He reasons that workers who drive or operate heavy machinery, deal with molten metal or metal working, or who work in an assembly line are more prone to accidents.

### **iii. Union Perspective of Drug Testing**

The majority of the union movement is opposed to any sort of drug testing. Unions cite numerous well-founded reasons in support of their position. Some of the reasons are that drug testing is an intrusion into the private lives of employees, drug testing methods are inaccurate, there are other more sensitive ways to deal with problem employees, and drug testing may be seen as undermining the union's role.

#### **Drug testing as an intrusion into employees' privacy**

Drug testing can be seen as an intrusion into employees' privacy in several ways. The first and most obvious is that the physical act of producing a urine sample in the presence of an unfamiliar person is considered a degrading act by many and an unjustifiable invasion of a person's private parts.

Secondly, the fact that a drug testing sample can be tested for more than drug use can result in employer abuse of the test. Unions fear that employers will misuse drug testing samples by testing for more than drug use. If employers test for more than drugs and test for diseases, pregnancy etc. then drug testing can be seen as a serious intrusion into employees' private lives. For example, Jim Kennedy of the Canadian Auto Workers' union feared that employers might misuse drug testing samples for pregnancy or for the presence of toxic workplace chemicals without telling the employee. (CORPUS conference 1987 session 8 p.1)

Finally, drug testing can be seen as an intrusion into employees' private lives because drug tests do not indicate when the drug was consumed. For example, the drug may have been consumed several days prior to the drug test and long after the effects of the drug have subsided, yet the drug test may give a positive result. Since the drug may have been consumed on the employees own free time away from work, disciplinary action based on a positive test result may be punishment for an act beyond the scope of the employment relationship.

### **The inaccuracy of drug testing**

Drug tests can be considered inaccurate in several ways. First, the fact that common 'over the counter' drugs such as Dristan and Midol can show a positive result (Atherley and Lampert 1986 70,504) may lead to incorrect conclusions about drug use. Thus, unions fear employees will be falsely accused of drug use and even punished for it.

Unions are also concerned by the fact that drug tests are not one hundred percent accurate especially when confirmatory tests are not done. The United Food and Commercial Workers' union feels that companies may attempt to by-pass the confirmation of any positive test result because the confirmation of tests is very expensive and given that there is a large pool of applicants available, it is not cost effective from management's perspective. (Menapace 1986 12)

Furthermore, the inaccuracy of laboratories performing drug tests also worries unions. For example, the U.S. Center for Disease Control of the Department of Health and Human Services completed a nine year study of thirteen laboratories to determine the reliability of evidence of drug use and concluded that the testing showed remarkably high error rates. (cited in Rothstein 1987 427) Given this chance of human error in handling samples, unions again fear that the employee may be falsely accused and disciplined.

### **Alternative means to deal with drugs in the workplace**

Unions believe that drug testing does not deal with the real causes of employee drug use. In fact, unions contend that workplace stress and boredom are partially responsible for employee drug use. As alternatives to drug testing, unions suggest employee assistance programs. Such programs give employees a chance at rehabilitation before disciplinary action is taken.

### **Drug testing as a means to undermine the union role**

One of the roles of unions is to negotiate terms and conditions of employment with the employer through collective bargaining. Because drug testing can affect the terms and conditions of employment, employers that unilaterally implement drug testing programs may be seen as undermining the union's role as bargaining agent. Thus, unions suggest that the best forum for balancing the interests of employers and the needs of employees is at the bargaining table. (Menapace 1986 12)

Moreover, unions see their role of promoting safety in the workplace being undermined. For example, a recent Canadian Labour Congress statement on drug testing "finds it ironic that those same employers who say 'no' to health and safety demands in collective bargaining, now say they are concerned with the safety of the workers and of the public." (Canadian Labour Congress 1988 8) In other words, unions view

employer health and safety justifications of drug testing as an attempt to deflect the blame of workplace accidents on employees.

## II. LEGAL IMPLICATIONS

### i. The Effect of the Human Rights Legislation

Human rights legislation restricts the testing of employees and prospective employees for substance abuse, as well as circumscribing an employer's response where employees fail such tests.

#### **Overview of the Human Rights Commissions' positions on employment related drug testing.**

Both the Canadian Human Rights Commission (the federal Commission) and the Ontario Human Rights Commission (the Ontario Commission) have recently published policy statements on employment - related drug testing to help guide employers considering drug testing policies. Basically, both Commissions view drug testing as potentially discriminatory, interpreting their respective pieces of legislation so that drug dependency is included as a 'disability' or 'handicap' which in turn, makes it a prohibited ground of discrimination.

Employers considering pre-employment drug testing must decide when drug testing will be administered during the recruitment process and they must also know how to determine whether a candidate is able to perform a particular job. On this particular issue the Ontario Commission has stated

- 1) All employment-related medicals as part of the initial application process are prohibited.
- 2) Employment related medicals will be considered reasonable and bona fide as per section 10(1)(a) of the Code only if conducted under the following circumstances.
  - a) after a written offer of employment;
  - b) where the specific physical abilities required to perform the essential duties of the position have been identified; i.e. the essence of the business would be undermined or the safe performance of duties threatened by persons who lack these specific abilities;
  - c) where the medical examination is limited to determining the person's ability to perform the essential duties of the position;
  - d) reasonable accommodation for those failing to pass the test is included as part of the process.

The key implications in the above statement are that drug testing cannot be done on a mass basis for all initial applicants and that employers must assess individuals one by one and ascertain whether they are able to perform the particular job in question.

On the issue of drug testing existing employees, the Ontario Commission published the following guidelines employers should consider:

- 1) is there an objective basis to believe that job performance would be adversely affected by the disability?
- 2) is there an objective basis to believe unscheduled absences from work are related to alcoholism/drug dependence?
- 3) is there an objective basis to believe the worker's own safety or the safety of co-workers and the public may be adversely affected by this dependence?

The key point stressed in all three guidelines is that there must be objective evidence either confirming the belief that drug dependence will adversely affect job performance or linking absences to drug dependence or supporting the belief that drug dependence will cause a safety treat. Despite the policy statements of the Commissions, a closer analysis of the legislation is warranted because the Commissions' policy statements constitute their own interpretation of the law.

### **Is drug dependency a 'disability' under human rights legislation?**

The issue of whether drug dependency will be included in the definition of a 'disability' under the Canada Human Rights Act (the Act) or a 'handicap' under the Ontario Human Rights Code (the Code) is the starting point in determining the legality of employment related drug testing from a human rights perspective. Section 20 of the federal Act explicitly defines 'disability' to include "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug." On its face section 20 appears to suggest that drug dependency would be considered a disability and thus, also a prohibited ground of discrimination since section 3 of the Act includes disability as a prohibited ground of discrimination.

One way in which drug dependency may fall outside the protection of the Act is if the word 'drug' in section 20 is interpreted narrowly to only include prescription drugs and not illegal drugs. According to Russell Juriansz, former General Counsel to the Canadian Human Rights Commission, "there is nothing in the context of the Act to indicate that the word 'drug' should be so limited to and its juxtaposition with 'alcohol' would seem to imply an unhealthy dependence [on any kind of drug.] [Thus], the Act contemplates dependence on illegal drugs as well as prescribed drugs." (Dossier March 1987 3)

The Ontario Code is much less explicit than the federal Act on the issue of whether drug dependency will be considered a 'handicap'. Section 9(b) of the Code states 'because of handicap' includes for the reason that the person has or has had or is believed to have or have had,

- i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device

The relevant part of section 9(b) in a drug testing context, is whether drug dependency will be considered an illness.

There are several factors that appear to suggest that drug dependence will likely be considered an illness by the courts. The fact that the federal Act explicitly defines disability to include dependence on a drug makes it more likely that the courts would interpret section 9(b) of the Ontario Code in a similar fashion. Moreover, given that arbitrators generally consider alcoholism as an illness and given the similarities between alcohol and drugs, the courts are again likely to interpret the Code to include drug dependence as an illness and in turn, a 'handicap'. Finally, both the Canadian and Ontario Human Rights Commissions

have published policy statements on drug testing that indicate the Commissions interpret the applicable legislation to include drug dependency as a prohibited ground of discrimination.

### **Are casual drug users protected under the human rights legislation?**

The issue of whether casual users of drugs are protected under the human rights legislation is important in a drug testing context because drug tests cannot distinguish between drug dependence and mere casual use. Thus, where an individual tests positive and is only a casual user as opposed to being drug dependent, the individual's protection under human rights legislation is uncertain because neither the federal Act nor the Ontario Code make reference to casual drug use. In fact, the wording of section 20 of the federal Act only refers to drug dependence as being a disability, which may imply that casual users of drugs are excluded from the Act's protection.

The Ontario Code, however, may provide some basis for protecting casual drug users because section 9(b) defines handicap to mean "... for the reason that the person has or has had, or is believed to have or have had an illness..." Therefore, a casual user who tests positive and is denied an employment opportunity may argue that the employer believed or perceived the individual to have an illness and thus, discriminated on a prohibited ground contrary to the Code.

Both the federal and Ontario Human Rights Commissions have come out in favour of protecting casual drug users in their policy statements on employment related drug testing. The federal Commission's statement reads

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.

Similarly, the Ontario Commission policy statement reads

where an individual is perceived by an employer as having an illness due to .. drug use. Such a perception could be held by an employer without in fact being true. For example, an employer may interpret a positive test of a casual user to mean that the individual has a drug dependency. If the employer were to act upon this inaccurate perception, the individual may be able to bring a successful complaint under the Code.

In other words, both Commissions state that when an individual fails a drug test and this results in adverse action against the person, then it could be presumed that the employer perceived the individual to be drug dependent. Such a perception according to both Commissions is grounds to bring a complaint under the respective legislations.

Given that the Commissions' policy statements do not have the force of law, the sweeping positions taken by both Commissions on this issue may be legally challenged in the courts. The effect of the Commissions' positions is that casual drug users are given status as a handicapped group under the legislation. This means, for example, in a pre-employment drug testing situation that an individual who tests positive for drugs and is a casual user cannot be denied employment on this ground.

The central argument of an employer who contests this aspect of the policy statements would be that an employer has a right to refuse casual users because they cannot reasonably be given handicapped status under the legislations. An employer could contend that to interpret the legislations as the Commissions have is unreasonable because then casual users of alcohol could also be given similar protection under the legislations (ie. casual users of alcohol would be considered handicapped persons). Since a large portion of society casually uses alcohol, such a result seems absurd. Thus, a strong case could be made that neither the protection of casual users of drugs or alcohol could have been the intention of the legislators and therefore, employers may not be contravening the human rights legislation by refusing to employ casual drug users who test positive.

### **Is employment related drug testing a discriminatory practice?**

Section 7 of the federal Act states

it is a discriminatory practice, directly or indirectly a) to refuse to employ or continue to employ any individual, or b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited grounds of discrimination.

Assuming drug dependency is a prohibited grounds of discrimination, the key words in determining whether employment-related drug testing is a discriminatory practice are 'to differentiate adversely'. That is, can it be said that drug testing by itself results in adverse differentiation against drug dependent persons.

Similarly, section 4(1) of the Ontario Code states

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Along the same lines of section 7 of the federal Act, can it be said that drug testing violates this protection to equal treatment, with respect to employment without discrimination, because of one's handicap?

One could argue that both section 7 of the federal Act and section 4(1) of the Ontario Code are violated by a drug testing policy because to drug test an employee or prospective employee automatically shows that an employer wants to determine which individuals use drugs so that some action based on this information can be taken. Thus, a drug test may inherently result in adverse differentiation because it singles out those disabled by drug addiction for adverse treatment by an employer. Therefore, drug-dependent persons may have grounds to refuse a drug test and bring a complaint forward to the proper Commission claiming that his/her employer is violating the legislation.

It is also possible that non-users of drugs may have grounds to refuse a drug test and complain of improper discrimination. The present policy and case law of the federal Commission treats as improper discrimination an action taken because an individual is perceived to be disabled even though the individual is not in fact disabled. (CORPUS conference 1987 3) Thus, a non-user of drugs who is

requested to submit to a drug test may bring a complaint forward arguing that s/he has been perceived as disabled.

Human rights legislations also prohibit what is known as constructive discrimination. For example, section 10 of the Ontario Code states

A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member...

In other words, the Code also prohibits the imposition of a rule that on its face is not discriminatory but does have a discriminatory effect on a group protected by the Code. For example, if an employer drug tests all employees and prospective employees, such a practice may appear neutral on its face (ie. all employees are drug tested) but still have the adverse effect of denying employment opportunities to drug dependent individuals. Such a practice would then be considered constructive discrimination because of its adverse effect on drug dependent individuals.

### **Employer defences of drug testing**

One situation where drug testing may be allowed under the human rights legislation is where the employer uses drug testing results with the intention of enrolling such employees in rehabilitation programs. Employers may argue that such drug testing programs do not violate the human rights legislation because there is no adverse differentiation. In the words of the former general counsel to the federal Commission, "[s]uch a program would not seem to contravene the Act unless the testing itself or the enrolment in the rehabilitation program could be seen to have adverse consequences for the employees." (quoted in Dossier March 1987 3)

From an industrial relations point of view a drug testing program with such an intention (ie. to rehabilitate employees) would have several advantages. Firstly, such a program may complement an existing employee assistance program and secondly, union opposition to the program would likely diminish, especially if the nature of the jobs involve safety hazards. In fact, a task force led by the Addiction Research Foundation included in its recommendations that if drug screening is instituted, employees with confirmed positive test results be referred to an employee assistance program for assessment and, if needed, counselling and rehabilitation. (Best Advice, Addiction Research Foundation 1987 p.4)

The only problem with integrating a drug testing program with an existing EAP is that most EAPs are voluntary. A drug testing program that calls for mandatory referral to an existing EAP runs the risk of disrupting the existing EAP. This is so as EAPs are built on the fact that the program is voluntary and confidential. Combining drug testing and an existing EAP may result in negative perceptions of an EAP and the destruction of an otherwise trusting relationship between employers and employees. A simple solution to this potential problem is to keep a drug testing rehabilitation program separate from an existing EAP.

The most common means employers will likely use to defend drug testing will be through establishing a bona fide occupational requirement or qualification (BFOR) or (BFOQ). Section 14 of the federal Act provides that it is not a discriminatory practice if

- a) any refusal, exclusion, expulsion, suspension, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.

Similarly, section 16(1) of the Ontario Code states:

- s.16(1) A right of a person under this Act is not infringed for the reason only,
- b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

In other words, a BFOR can be established where an employer can show that a drug addict or perhaps even a casual user of drugs cannot perform the essential duties of the job.

Currently there is no definition by either Commission of the phrase 'incapable of performing the essential duties or requirements' in relation to drug abuse or alcoholism. It is interesting to speculate whether the phrase includes a temporal dimension. Recently, Claude Foisey addressed this point. He stated "...given the fact that a handicap resulting from drug abuse resides in the fact that the employees affected cannot concentrate for long periods of time and are likely to be regularly absent from work, such an interpretation would in part deny them the protection of the law." (Canadian Labour Views conference proceedings 1988 13)

The leading case on what constitutes a bona fide occupational requirement is the Supreme Court of Canada (SCC) decision in Ontario Human Rights Commission v. The Borough of Etobicoke (1982) 1 S.C.R. 202. The SCC defined two tests which must be satisfied. The first test, a subjective one, is meant to determine whether the limitation was "imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons." In other words, an employer who introduces a rule must believe that the rule is necessary because of the nature of the job. In a drug testing context, the subjective test means that an employer cannot drug test simply to rid himself of employees that he believes are undesirable. The employer must have a sincere belief that the performance of the job is significantly affected by an employee or potential employee who uses drugs. (CORPUS conference 1987)

The second test, an objective one, requires that the limitation relate "to the performance of the employment in concern, in that it is reasonably necessary to assume the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." The objective test means that the employer must "[draw] a relation between scientific or empirical data or expert opinion and the effects of the particular substance involved on the ability of the individual to perform the actual essential duties of the job." (CORPUS conference 1987)

In a drug testing context, the objective test will likely prove extremely difficult to pass because scientific or expert evidence relating drug dependence to being unable to perform the essential duties of a job may be impossible to produce in some situations. For example, in the situation of assembly line workers who perform simple tasks, scientific evidence or expert testimony may have difficulty proving that the effects of being dependent on certain drugs will result in workers being unable to adequately perform the essential duties of their jobs. However, in jobs where there is a potential safety hazard such as those of a pilot or a truck driver, expert testimony and scientific evidence may be able to prove that the effects of a certain drug dependency will result in a loss of concentration and motorskills to a degree that would impair one's ability to safely drive a truck or fly an airplane.

In fact, several United States' courts have upheld mandatory drug testing where drug use is a safety hazard. Examples can be found in the nuclear and airline industries. From a human rights perspective, the safety considerations in the United States cases will also likely form the basis of most employers' defences of a drug testing policy in Canada because a safety hazard may be sufficient to establish a BFOR.

The above mentioned scenarios assume drug dependency but in an actual drug testing situation it will be difficult to assess the extent of a person's drug use, especially if only one test is taken. The fact that a test only detects drugs in the body at one point in time makes it nearly impossible to determine whether there is an abuse problem or if the finding is an isolated event. The issue then becomes whether the casual use of particular drugs will result in a worker being unable to adequately perform the essential duties of his/her job.

Employers will find that attempting to prove an employee cannot fulfil the essential job requirements because of casual drug use is more difficult than in the case of a drug dependent employee. However, in circumstances where there is little or no supervision on the job and/or where there is a large public safety risk, the casual use of drugs may be deemed an undue risk which incapacitates the individual. Examples of such positions may include pilots, bus drivers, truck drivers, and some nuclear and chemical plant workers.

### **The duty to accommodate**

Prior to an employer establishing a defence of a BFOR or BFOQ, there still remains a duty to accommodate to the point of undue hardship. (Ontario Human Rights Commission and O'Malley v. Simpson Sears (1985), 7 C.H.R.R. D/3102) In a drug testing context, the duty to accommodate may include transferring a drug dependent person to another job where the person can safely perform the essential duties of the job or authorizing a leave from work for medical treatment. Depending on the specific company situation, an employee assistance program may also fall within this duty.

The Ontario Commission's recent policy statement on drug testing outlines several considerations that may serve as useful guidelines in determining what constitutes reasonable accommodation. One consideration is the cost. For example, a small operation may not be able to afford the salary of an individual who is absent during treatment and an employee assistance program may not be financially viable in a small company. The size of the employer is also a consideration as a small employer may not be able to find a temporary replacement for an employee in a key position whereas a larger employer

may be able to adjust to the absence of a key employee. The attitude of the employee is also a consideration because there is little an employer can do when the employee involved refuses to accept assistance.

### **The application of the Canadian Charter of Rights and Freedoms**

The Charter of Rights and Freedoms (the Charter) will have varying degrees of impact on the legality of employment related drug testing depending on whether the employer is in the public or private sector. The Charter could have a direct impact for public sector employers in that, its substantive provisions might be examined to determine the legality of drug testing. For private sector employers, the Charter's substantive provisions will likely not directly apply to determining the legality of drug testing but the Charter may have an indirect impact.

Section 32 of the Charter limits the application of the Charter to the relationship between government and individuals. In other words, "the Charter is designed to restrain governmental action and not action between private individuals." (Rolph and Shouldice 1987 39) In the Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd. case, [1986] 2 S.C.R. 573, the Supreme Court of Canada made a ruling involving section 32. The court held that the Charter does not apply to private litigation. Therefore, the Charter's substantive provisions will likely only apply directly to employment related drug testing "where the employer can in some way be connected to 'government' or if legislation is proclaimed permitting employers to test employees for drugs." (Rolph and Shouldice 1987 40)

### **The application of the Charter to public employers**

Examples of relevant sections of the Charter, in a drug testing context, include sections 7 and 8. Section 8 states that "everyone has the right to be secure against unreasonable search and seizure." If the United States example is followed, the Canadian courts will ultimately decide that drug testing does constitute a 'search' under the Charter. Therefore, public employers must be concerned whether such searches are reasonable given the particular situation. As will be discussed later, much will depend on whether the drug testing is done on a random basis or upon a reasonable suspicion.

Section 7 states "everyone has the right to ... security ... in accordance with the principles of fundamental justice." This section has implications for the process by which drug testing and any disciplinary action that follows is carried out. For example, given that there is a possibility of false positives, employers may be violating the principle of fundamental justice if disciplinary action is taken without the employee having an opportunity to explain how the drug trace got into the body.

### **The application of the Charter to private employers**

Although the Charter's substantive provisions will likely not apply directly to private sector employers, the Charter may still affect private sector employers indirectly. According to section 52 of the Charter, any law that is inconsistent with the Charter, to the extent of the inconsistency, is of no force or effect. This section may result in courts and human rights agencies interpreting the human rights legislation in light of the Charter and in a manner that is consistent with the Charter.

For example, section 15 of the Charter grants equal treatment under the law without discrimination based on disability. Such a Charter guarantee may influence the courts to interpret the human rights legislation in favour of rejecting testing in some circumstances because such testing may be seen as contrary to the Charter. If the human rights legislation is interpreted in favour of allowing testing despite being contrary to the Charter, then section 52 of the Charter could be invoked to nullify such human rights legislation. Thus, private sector employers may be indirectly subject to the provisions of the Charter if courts interpret other pieces of legislation (eg. human rights legislation) that affect the legality of drug testing in light of the Charter.

## **ii. Arbitral Jurisprudence -- Drug Testing in the Unionized Environment**

Currently, it is likely that there are no drug testing provisions in most collective agreements unless they are part of an employee assistance program for workers dependent on drugs. This raises the question whether employers can unilaterally implement mandatory drug testing for employees and whether boards of arbitration will accept such action. Grievances that are brought to arbitration over employer unilateral drug testing policies are likely to take the form of policy grievances but may also arise as a result of disciplinary action taken by an employer against an employee who refuses to submit to a drug test or fails a drug test.

Recently, Rolph and Shouldice reviewed several arbitral jurisprudence principles that may be useful in analyzing whether employer unilateral action will be accepted by boards of arbitration. (Rolph and Shouldice 1987 6) The principles included that employers have a right to introduce reasonable rules, that employers have a right to search employees when there is a real and substantial suspicion, that employers have the right to discharge employees who fail to meet the qualifications of physical fitness, and that employers have a right to require medical examinations when there are reasonable and probable grounds to suspect an employee is not physically fit for employment.

### **Reasonable Rules**

It is a generally accepted principle that employers can introduce rules, subject to certain limitations. (see Re KVP Co. Ltd. (1965) 16 L.A.C. 73 (Robinson)) The limitations specified in the KVP decision are that such rules:

1. must not be inconsistent with the collective agreement;
2. must not be unreasonable;
3. must be clear and unequivocal;
4. must be brought to the attention of the employees affected before the company can act on it;
5. must be accompanied by notice to affected employees that a breach of this rule could result in their discharge;
6. must be consistently enforced.

The first limitation, that there is no inconsistency with the collective agreement, forces an arbitrator to compare the rule with any relevant provisions of the collective agreement to determine whether there is a violation of the collective agreement. A 'no discrimination' clause may be an example of a relevant

provision in a drug testing context. Such clauses are common in collective agreements and usually state 'there shall be no discrimination based on any factor that is not pertinent to the employment relationship'.

When considering the second limitation in the KVP case that the rule not be unreasonable, arbitrators generally assess the extent to which the rule is necessary to protect the employer's interest in carrying out its operations in a reasonably safe, efficient and orderly manner. When an employer imposed rule regulates the employee's personal, private life, the employer will be required to show that it had both legitimate and substantial reasons for doing so. (see Re C.B.C. (1973) 4 L.A.C. (2d) 263 (Shime).

Drug testing that involves urinalysis can be seen as an intrusion into the private lives of employees because such testing only indicates whether drugs are present in the body. Such testing, however, does not indicate when the drugs were consumed. Because urine retains traces of drugs for extended periods of time (Atherley and Lampert 1986 70,519), the actual consumption of the drugs may have occurred several days prior to the test. Moreover, by the time the test is taken the effects of the drug on the employee may well have subsided. Thus, there may be strong grounds to argue that an employer drug testing policy is an unreasonable intrusion into employees' private lives and thus, arbitrators may have reason to strike them down.

Another ground upon which arbitrators may strike down drug testing policies besides being unreasonable is that such testing may also be illegal. If the courts or even if arbitrators themselves rule that drug testing is contrary to human rights statutes, such employer policies will be rejected. In the case where an employee refuses to submit to a test or where s/he fails a test, any employer disciplinary action will also be deemed illegal.

However, if drug testing is accepted by the courts and arbitrators as not being contrary to human rights statutes, employers may argue that a drug testing policy is reasonable because there is a legitimate business interest at stake. In some circumstances an employer may have solid evidence to support drug abuse claims in the workplace. Such evidence, especially if linked to abnormally high accident rates, may be sufficient to establish a legitimate business interest. Other statistics showing the financial burden associated with high accident rates and property damage would also be useful in supporting the employer's position.

### **Employee Search Cases**

The 'search' of an employee through the analysis of his or her urine is similar to other physical searches of employees (eg. lunchboxes). Thus, arbitral principles arising from search cases may be useful in analyzing the legality of drug testing from a similar perspective.

Apart from the cases where some contractual provision expressly or by implication authorizes it, arbitrators have generally insisted that the employer's right to search an employee's person or personal effects must give way to the employee's right to his personal privacy unless there is a real and substantial suspicion of theft, and then, only so long as the search is conducted reasonably. (Brown and Beatty 1984 448-9) By analogy then, where an employer has a real and substantial suspicion of employee drug use, a drug test may be justified.

Other applicable principles are that some form of notice must be given to employees (see Re Johnson Matthey and Mallory Ltd. (1975) 10 L.A.C. (2d) 354 (Brown)) and that no employee is to be unnecessarily singled out or embarrassed. (see Re Inco Metals Co. (1978) 18 L.A.C. (2d) 420 (Weatherill)) These principles are not unique to search cases and in fact, are similar to the limitations on employers when unilateral rules are imposed. (see KVP Co. Ltd. supra) The implications of these principles are that employers should give employees reasonable notice prior to implementing a drug testing policy and that the policy not be used as a means for supervisors to penalize disliked employees.

### **Discharge On The Grounds Of Physical Fitness**

The general principle is that an employer may discharge or lay off an employee who ceases to meet the qualifications of fitness for employment. (see Re Falconbridge Nickel Mines Ltd. (1981) 1 L.A.C. (3d) 62 (Adams) " [This rule is justified on the basis] that the employer has a responsibility to the public and to the fellow employees to ensure a safe work place, and the products produced or services provided by the employees, are done so in a reasonably safe manner." (Rolph and Shouldice 1987 12)

In the Falconbridge case (supra), an employee had been discharged for poor eyesight in one eye. Arbitrator Adams upheld the discharge. He reasoned:

The work place is very hazardous. There is a great deal of movement involving heavy equipment, molten metal and fellow employees. In this type of work environment, the company reasonably concluded that the grievors limitation constituted a significant risk to himself and his fellow employees.

"...[T]he fact that an employer has the right to terminate or layoff the employee who is not physically able to carry out his or her job safely may imply in some circumstances the right to resort to drug testing in order to determine whether an employee is in fact fit." (Rolph and Shouldice 1987 14) This conclusion seems justified as employees under the influence of drugs may well pose a safety threat to themselves, co-workers and the public depending on the circumstances.

### **Employers' Right to Require Medical Examinations**

The drug testing implication drawn from the principle involving discharge on the grounds of physical fitness, however, is somewhat conflicting with the general principle involving an employer's right (or more suitably lack of a right) to require medical examinations. The general principle is that apart from statutory authority, an employer's right to require medical examinations must be either expressed or implied in the collective agreement. (Brown and Beatty 1984 p.380) The exception to this rule occurs when there are reasonable and probable grounds to suspect an employee is not physically fit for employment. The combined effect of the two principles is that an employer who adopts a drug testing policy should have reasonable and probable grounds to suspect drug use prior to requesting an employee to submit to a drug test.

In conclusion, upon applying the general principles behind reasonable rules, employee search cases, discharge on grounds of physical fitness, and an employer's right to require medical examinations to drug testing, one finds that an employer may have sufficient grounds to unilaterally implement a drug testing policy. The key factors that are likely going to determine when arbitrators will accept drug testing are: 1)

the extent of possible safety hazards in a particular job and 2) the extent to which there is objective evidence to support a reasonable suspicion of drug use. The rationale behind these factors is that when there is a safety hazard an employer may more easily show a legitimate business interest and when there is reasonable suspicion of drug use the intrusiveness of the drug test upon employee privacy will be lessened. Thus, when the competing interests between employers and employees are balanced by arbitrators, employers are more likely to succeed with the support of these two factors.

### **Arbitration Cases Involving Drug Testing**

The case involving Canadian Pacific (October 1987) Labour Arbitration News vol. 23 no. 10 p.1 (M.G. Picher) is the first and only case that directly involves an employer's right to require an employee to submit to a drug test. In the case, a train conductor had been charged by the police with cultivation of marijuana in his backyard and had a previous conviction of possession of marijuana. On these grounds CP requested that the conductor submit to a drug test. When the conductor failed to cooperate and refused the drug test CP discharged him.

In upholding the discharge, arbitrator Picher reasoned that an employer's right to require a drug test is an extension of the employer's right to require an employee to undergo a fitness examination. Picher stated

Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test.

Picher went on to state that a refusal to submit to a test could expose an employee to discipline and to an inference of impairment or involvement with drugs at the time of the refusal.

This case is the first of its kind but may well serve as a valuable precedent. The decision is solidly based on the arbitral principle that an employer has a right to require an employee to submit to a medical examination to determine physical fitness where there are reasonable and probable grounds. One of the key facts in the case was that the conductor was in a sensitive position where being under the influence of marijuana could cause a severe safety threat to himself, co-workers, passengers, and the general public. Other key facts were that the conductor was found with large quantities of marijuana, that he had a previous drug conviction, and that he was very uncooperative with company requests. These facts served as the basis to constitute reasonable and probable grounds for the employer to believe that the conductor was attending work under the influence of marijuana and therefore, the demand that the conductor submit to the drug test was reasonable.

Based on this case, employers who have similar reasonable and probable grounds to believe an employee is drug impaired or drug dependent may request that an employee submit to a drug test. When future cases of this nature are brought to arbitration, one avenue arbitrators may use to distinguish this case from others is the extent to which there is a legitimate business interest. In the CP case, "[the] employer [was] charged with the safe operation of a railroad, the Company [had] a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effect of drugs." Thus, one can readily see that in the CP case there was a legitimate business interest. The issue in

future cases will likely not be as clear. The question then becomes where does an employer draw the line. Who does he test and who does he not test?

For example, would an arbitrator have upheld the CP discharge if the employee involved was a mechanic responsible for repairing the brakes of trains instead of being a conductor? The employer could have similarly argued that the mechanic although not being directly responsible for the safe passage of the public to the extent of a conductor, was, nevertheless, in a safety sensitive position. That is, the failure to adequately repair the brakes of trains could lead to public disaster too. This is a grey area where employer rights to require employees to submit to drug tests will be challenged on a case by case method. Arbitrators will have to make decisions balancing the employer's right to protect legitimate business interests with the employee's right to privacy.

The above example can even be taken one step further. For example, would CP have the right to drug test sales clerks responsible for ticket sales upon reasonable and probable grounds? This is a situation where CP would have likely crossed the line in pursuing their business interests. In such a situation, the employees' rights to privacy would likely prevail over CP's business interest because the public safety issue is no longer at stake and there are no other dominant concerns that give reason to intrude on the employers' privacy.

### **Arbitration Cases Involving Drug Testing as a Condition of Re-instatement**

The two leading cases on drug testing as a condition of reinstatement are Re Shell Canada Products Co. (1986) 26 L.A.C. (3d) 271 (Barrett) and Re Steinberg Inc. (1986) 23 L.A.C. (3d) 193 (Springate).

In Re Shell Canada, the grievor was terminated for poor work performance caused by a heavy cocaine addiction. The board of arbitration concluded that the employer's decision to terminate the grievor was not unjust but it did decide to invoke its power under section 44(9) of the Ontario Labour Relations Act to substitute a lesser penalty. Given the employee's attempts at rehabilitation, the board re-instated the grievor on the condition that he submit to blood, urine or other tests for a period of two years. **The** grievor would have to submit to such tests whenever the employer's doctor reasonably deemed it necessary to assure that the grievor was abstaining from the use of non-prescription drugs.

In Re Steinberg Inc., the grievor was discharged on the grounds of absenteeism caused by a heavy addiction to marijuana. After the discharge, the grievor was involved with a rehabilitation program. Based on the grievor's success in the program, the board was of the opinion that the prospects for the grievor's regular attendance at work in the future were good. Therefore, the grievor was conditionally re-instated so long as:

- 1) his absenteeism be no worse than the average for employees in his department; 2) he continue in his rehabilitation program; and 3) the grievor refrain from using marijuana. The board also gave the company the right to request a urine sample of not more than once a month for up to a year to ensure that the grievor was refraining from the use of marijuana.

Both of these cases show that arbitrators view drug testing as reasonable in certain circumstances (ie. as a condition of reinstatement). However, the value of these cases as a means by which employers could justify drug testing is likely to be minimal. These cases benefit employers in the sense that employers are

reassured that drug testing is not considered as an intolerable invasion of employee privacy but their usefulness ends there. If anything these cases demonstrate to employers that a positive drug test result will simply be one element in a discharge case. Both cases show that if an employee's attempt at rehabilitation substantially increases his/her chances of attending work and performing effectively in the future, then, the arbitrator may be inclined to substitute a lesser penalty.

### **iii. Drug Testing in the United States**

#### **The Unionized Environment**

The first issue facing U.S. employers in unionized firms is whether they should unilaterally implement a drug testing program or whether they should negotiate a program through the collective bargaining process. The interpretation of section 8(d) of the National Labour Relations Act (NLRA) will determine whether employers may or may not unilaterally implement a drug testing program. Section 8(d) of the NLRA requires an employer and the representative of its employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The question then becomes whether drug testing can be considered to have a substantial effect on the 'terms and conditions' of work to the extent that it forces the employer to bargain with the union prior to implementation.

"Caselaw under section 8(d) indicates that an employment requirement is generally considered to be a 'condition of employment,' and thus a mandatory bargaining subject, if it is germane to the working environment and if its implementation is not considered to be a managerial decision lying at the core of entrepreneurial control of the employer's business." (Casey 1988 600) In a recent memorandum, the General Counsel to the National Labour Relations Board (NLRB) suggested that drug testing like polygraph testing will likely be found to have too profound an effect on the workplace and too remote a relationship to the core of the employer's control of its business to fit within this exception.(quoted in Casey 1988 601)

The General Counsel also stated at least where the drug testing program may lead to discipline or may effect job status-that it was a 'condition of employment'. "Moreover, the General Counsel concluded that the duty to bargain extends not only to the decision whether to institute drug testing, but also to the particulars of the testing procedures, the purposes for which test results will be used, and the severity of discipline imposed for positive test results or refusal to submit to testing in the first place." (quoted in Casey 1988 601)

The only exception to an employer not being able to unilaterally implement a drug testing program in the United States has occurred under the Railway Labour Act. In the case of Brotherhood of Maintenance of Way Employees v Burlington Northern R. R., 802 F.2d 1016 (8th Cir. 1986), the U.S. Court of Appeals for the Eighth Circuit concluded that the company's new drug testing program of incident related testing was not a substantial departure from the company's practice of testing upon probable cause. Thus, there was no reason to give rise to a duty to bargain.

Another issue U.S. private employers must deal with, even though they are not subject to the U.S. Constitution, is employee privacy rights. For example, in the Texas Utility Generating Company case,

84-1 ARB 8025 82 LA 6 (Edes, 1983), the grievor, an equipment operator, returned to work only to bring two fellow employees onto the company's premises. The grievor who was in possession of marijuana declined the company's request to take a drug test. Arbitrator Edes sustained the grievance and found that the company improperly required the grievor to submit to drug testing. He reasoned that although the employee was physically present on company property, he was not there as an employee. This case shows that U.S. private employers must be conscious of employee privacy rights as off duty activities such as possession of marijuana do not necessarily give an employer reason to request that an employee submit to a drug test.

Another situation where employers must take into account employee privacy rights involves off duty illegal drug charges. In City of Wilkes Barre, 74 LA 33 (Dunn 1980), the grievor, a city sweeper, had been discharged after a plea of guilty to a drug charge. The employer contended that the discharge was justified because of the uniquely sensitive public position of the employer. In rejecting this argument arbitrator Dunn reasoned: "The City does have certain unique qualities which must be upheld in its public dealings, but the Grievant does not fit into the group in which these qualities rest. [For example,] police officers should be free of criminal taint [and] firemen should be void of the tinge of pyromania." The gist of the arbitrator's reasoning is that for such a discharge to be upheld the outside activity must be directly related to the performance of the specific job in question. Such would be the case where a police officer committed a criminal act or where a fireman committed arson. However, in the case at hand, the link between the city sweeper's drug charge and his employment relationship with the city was not strong enough to justify discharge.

### **The Public Sector**

Much of the discussion about drug testing in the U.S. public sector centers around the Fourth Amendment to the Constitution. The Fourth Amendment provides: "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated..." The first issue under the Fourth Amendment is whether drug testing can be considered a 'search'.

In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that taking a blood sample from a criminal defendant to determine whether he was intoxicated was a search within the meaning of the Fourth Amendment. Lower court decisions after Schmerber have recognized that requiring a urine sample is far less intrusive than extracting blood, but nonetheless concluded that these also are searches for purposes of the Fourth Amendment.(eg. Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga. 1985))

Having established that drug testing is a search under the Fourth Amendment, the next issue is whether drug testing is unreasonable. Generally, in deciding whether a search is unreasonable, courts balance the degree of intrusion of the search on the person's Fourth Amendment right of privacy against the need for the search to promote some legitimate government interest.(Katz v. United States, 389 U.S. 347, 351 (1967)) In a drug testing context, "this often depends on the nature of the search: who is searched, when the search is made, how it is made, and what is done with results." (Report of the Council on Scientific Affairs (CSA), 1987, p.3)

The criterion of who is searched basically refers to the nature of the jobs in question. (ie. what are the job duties and responsibilities of the individuals) The U.S. courts have been more willing to accept drug testing when those tested are in safety sensitive positions One of many examples is the Allen v. City of Marietta case, (supra) wherein the court upheld drug testing for employees working around high voltage power lines. A case where drug testing was not upheld because of the nature of the duties is Jones v. McKenzie, 629 F.Supp. 1500 (D.D.C. 1986). In this case the court struck down the drug test because the individual, a school bus attendant, only had the responsibility to assist students on the bus.

The criterion of when the person is searched is important because drug testing may occur at several stages in the employment relationship. (eg. periodically, after an accident, based on suspicion, or randomly) Periodic testing, especially when part of an overall medical evaluation of fitness, is likely to be upheld. (see Curry v. New York Transit Authority, 86 A.D. 2d 857, 450 N.Y.S. 2d 399 (App. Div.), aff'd 56 N.Y. 2d 798, 437 N.E. 2d 1158, 452 N.Y.S. 2d 401 (1982))

For other types of testing without a particularized or individualized need for testing, the courts are more inclined to find that testing is unnecessary and therefore, unreasonable. (CSA report 1987 p.11) Thus, random testing of correctional officers, McDonnell v. Hunter, 612 F.Supp. 1122 (S.D. Iowa 1985), police officers, Caruso v. Ward, 506 N.Y.S. 2d 789 (Sup. Ct. 1986), and firefighters, Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986), have been held unconstitutional. However, in some circumstances courts have considered random drug testing reasonable partially because it leaves no discretion to supervisors. The rationale behind such court decisions being that supervisory discretion may be tainted with discrimination or retaliation. (see Mulholland v. Department of the Army CIV. A. No. 87-0317 - A.)

Drug testing based on a 'reasonable suspicion' as opposed to testing based on the more stringent 'probable cause' standard has been widely accepted by the courts. (eg. McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) "The 'reasonable suspicion' test requires that to justify this intrusion, officials must point to specific, objective facts and rational inferences that they are entitled to draw from these facts in light of their experience." City of Palm Bay v. Bauman, 475 so. 2d 1322, 1326 (Fla. App. 1985)

The criterion of how the test is done refers to the testing procedures. In Jones v. McKenzie 628 F.Supp. 1500 (D.D.C. 1986), the court held that the use of an unconfirmed EMIT, which violated a specific regulation mandating confirmation, was arbitrary and capricious. Thus, confirmatory testing, such as the use of GC-MS to confirm an initial EMIT will increase the accuracy of the test and the likelihood of legality.

Furthermore, testing procedures must take caution to ensure strict control over the chain of custody of the specimen to eliminate the possibility of confusion, mishandling, or sabotage. In addition, it may be necessary to retain the sample to allow for independent confirmation of the results. For example, in Banks v. F.A.A. 687 F. 2d 789 (Sup. Ct. 1986), the discharges of air traffic controllers were set aside because the urine samples had been destroyed before they could be retested by an independent laboratory.

The final criterion in determining the reasonableness of drug testing is what is done with the test result. Ideally, employers should attempt to accommodate employees by means of an employee assistance

program. In Mulholland v. Department of the Army CIV. A. No. 87-0317-A., the court considered the reasonableness of the employer drug testing policy to drug test employees applying for critical jobs. When commenting on the consequences for the employee after testing positive, the court favourably noted:

The only possible adverse results following a confirmed positive urinalysis test or application withdrawal prior to testing are reassignment to an available, noncritical position for which the subject is qualified with no loss of pay or benefits; if no such noncritical positions are available, an employee/applicant will be offered a position at a lower grade level if such a position is available. Only if no noncritical positions are available will the employee be separated for failure to meet a condition of employment.

Additional factors that the court weighed in determining the reasonableness of drug testing in the Mulholland case, not previously mentioned, include the availability of alternative means to assess the suitability of the employee for a critical position and the effectiveness of the drug test in meeting its purpose (ie. deterrence).

On the first point, the court believed that the alternative information sources did not eradicate the need for urine testing. It stated: "Even though the Army in some cases has had the chance to observe the performance of employees while they were working in critical positions, this provides little basis on which to assess their illegal drug free reputation and reliability of applicants for sensitive positions." On the second point, in determining the effectiveness of drug testing as a deterrent, the court commented that "[a]lthough drug testing may not discover some drug users who abstain for a few days prior to the test, a user still exposes himself to the risk that the test would be positive... Thus, the risk of detection may thwart drug using employees/applicants from starting or continuing to use illicit drugs."

Because several criteria are used in determining the reasonableness of a drug testing program, each distinct set of circumstances can result in a different determination. The court's favourable regard for drug testing based on the above two criteria could easily have been regarded as unfavourable. That is, the alternative information sources may well have sufficed in predicting the reliability of the employees in sensitive positions. And the effectiveness of the drug testing program in meeting its purpose (that of deterrence) could also have been easily judged to be ineffective because, as the court itself recognized, an employee could simply abstain from drug use several days prior to the drug test. Thus, the deterrence to drug use is minimal.

### **Implications for Canada from the U.S. Experience**

The criteria used in determining the reasonableness of a drug testing program in the U.S. are likely to be taken into account by Canadian courts and arbitrators. Thus, employers would be wise to take notice of the criteria. In summary, the criteria include the nature of the job, the specific testing procedures, when the testing occurs, what's done with the result, alternative means to assess employees, and the effectiveness of drug testing in meeting its deterrence purpose.

These criteria flow from the Fourth Amendment to the U.S. Constitution, and thus, would likely be more relevant to drug testing cases that involve the Canadian Charter of Rights and Freedoms. But nonetheless,

they may be useful to Canadian arbitrators because the standard of reasonableness will also be used by Canadian arbitrators in cases where employers attempt to unilaterally implement drug testing programs. Thus, Canadian arbitrators can equally employ the criterion to analyze and determine the reasonableness of any particular drug testing program. Furthermore, the fact that these criteria have been applied in many drug testing contexts will be valuable for arbitrators, courts, and employers.

An issue that has yet to be addressed in Canada is when random testing as opposed to other testing such as testing based on a reasonable suspicion will be accepted. The majority of cases in the U.S. have not upheld random testing while testing based on a reasonable suspicion has been upheld frequently. One advantage of random testing is that it leaves no room for supervisory discretion and in this sense may be viewed as reasonable. However, the fact there is no basis for the drug test also makes it a greater invasion of employee privacy. This, in fact, is the basis on which most U.S. courts have been rejecting random drug testing.

On the other hand, testing based on a reasonable suspicion has the advantage of being less intrusive. But its disadvantage is that supervisory discretion leaves it open to claims of discriminatory treatment. As stated already in City of Palm Bay v. Bauman (supra) reasonable suspicion means supervisors must point to objective facts and make rational inferences based on their experiences. As good as this may sound, there still remains the possibility of discriminatory actions and claims, especially given the difficulty in detecting the physical signs of drug use.

Despite the shortcomings of testing based on a reasonable suspicion, Canadian arbitrators are likely to follow the U.S. example and prefer it over random drug testing. This prediction is based mostly on the Canadian arbitral jurisprudence principle which gives the employer the right to require medical examinations when there are reasonable grounds for requiring the examination (ie. to determine physical fitness in hazardous jobs). In fact, this principle was employed by arbitrator Picher in the CP case (supra). Moreover, in the same case Picher makes the sweeping comment that "... it is not within the legitimate business purposes of an employer ... to encroach on the privacy and dignity of its employees by subjecting them to random and speculative testing." If the lead provided by Picher is followed by other arbitrators then indeed, random drug testing will fall by the wayside just as it appears to be doing in the majority of U.S. cases.

One of the exceptions in the U.S. where random drug testing has been accepted by the courts is the case of Shoemaker v. Handel 619 FSupp 1089 (DC-NJ, 1985). Both the trial court and Third Circuit rejected the argument that random mandatory testing of jockeys violated constitutional privacy rights. The trial court noted that the jockeys accepted employment as "licensed participants in an industry subject to strict oversight [and thus,] have a diminished expectation of privacy."

In my view, this 'diminished expectation of privacy' is a useful concept and could equally apply to several highly regulated industries in Canada. (eg. transportation, chemical, and nuclear industries) Employees doing critical jobs in these industries arguably may be said to have a 'diminished expectation of privacy' because of the potential for public safety hazards. Thus, random drug testing in these industries may be legally defensible upon considering the nature of the jobs, especially, when rationalized with the concept of a 'diminished expectation of privacy'.

Another issue that has yet to be addressed in Canada is whether drug testing of employees in non-hazardous jobs will be accepted. In at least one U.S. case, the court has criticized the use of random drug tests in non-critical jobs. In IBEW, Local 900 v. Potomac Electric a federal district court judge described a proposed random blood and urine testing program for non-critical utility employees as a "drastic" and "draconian" measure. (quoted in Todd 1987 835) Such testing would similarly not likely be accepted by arbitrators or human rights boards of inquiry in Canada as testing employees in non-critical jobs is likely to be determined an unwarranted intrusion into the privacy of employees or too unrelated to job performance.

### III. CONCLUSION

The legal challenges facing employers considering a drug testing program are formidable. The first hurdle is the human rights legislation. If the courts agree with the interpretation of the legislation given to it by the human rights Commissions, employers will be severely restricted in testing. According to the Commissions' policy statements, substance abusers will be included as a disabled group. Thus, the practice of drug testing itself may be discriminatory if it has the effect of singling out drug dependent persons for adverse treatment.

One way employers can attempt to get around this restriction is to design the drug testing policy so that employees who fail drug tests receive rehabilitation assistance. Based on the success or failure of the rehabilitation attempt, employers may then take necessary disciplinary action. Such a drug testing policy may not only be sufficient to establish the legality of the drug testing practice, but also may meet an employer's duty to accommodate under the legislation.

On the subject of pre-employment drug testing, the Ontario Commission has established restrictive steps for employers to follow but the Commission has not explicitly ruled against such testing. Again, the drug testing practice itself may be discriminatory if it has the effect of denying employment to substance abusers. An employer's only defence is to establish a bona fide occupational requirement that substance abusers cannot fulfil the essential job requirements. Because employers must assess disabled persons on an individual basis or in other words they cannot make blanket exclusions (ie. denying all drug dependent persons employment), pre-employment drug testing may be difficult to justify.

For example, in most jobs a certain degree of concentration is required. AS each drug dependent individual will have differing ability to concentrate, so will they have varying capacity to fulfil the essential job requirements. The only practical means to assess an individual's ability to perform a job may be by actually giving the person the opportunity to do the job. Thus, employers may be best to avoid pre-employment drug testing for most jobs. A few jobs where drug dependency may automatically signal a person is unable to perform the essential job requirements may include safety sensitive positions such as pilots, truck drivers, bus drivers, train conductors, and perhaps some jobs in chemical and nuclear plants.

One of the more controversial aspects of employment related drug testing is that testing cannot distinguish between casual use and drug dependency. Human Rights Commissions have come out in favour of protecting casual users when they are perceived to be substance abusers (ie. employers refuse to employ them based on a positive drug test). Employers may view casual users as undesirable employees and, generally speaking, an employer who refuses to hire a casual drug user is not violating human rights legislation because casual users are not explicitly protected under the legislation. Thus, employers with the intention of denying casual drug users employment are not prohibited from doing so, so long as they are not perceiving casual users as drug dependent.

Employers may attempt to refuse casual drug users employment simply by questioning such candidates after a positive drug test result. If the individual admits to casual drug use and not drug dependency, employers may have grounds to refuse employment. Of course, other problems may arise from such

tactics. Namely, there may be difficulty differentiating between casual use and drug dependency. Moreover, an individual is apt to lying and admitting casual drug use instead of drug dependency.

Although the human rights legislation does not grant individuals any privacy rights, employees employed by organized employers are afforded this protection. Several arbitral jurisprudence principles (eg. reasonable rules, employee searches, employer right to require medical examinations) take into account or balance employee privacy rights with employer business interests. Therefore, most organized employers considering a drug testing program should structure them so that the testing takes place upon a reasonable suspicion of drug dependency or impairment. Of course, any disciplinary action based on a positive drug test result must meet the requirement of just cause.

Comprehensive or random drug testing may be considered by employers where there are substantial safety risks to the employee, co-workers or the public. The U.S. idea of 'diminished expectation of privacy rights' may be applicable here. Those in critical positions are, or should be, aware of their responsibilities to their employers, co-workers and the public.

Regardless of whether an employer drug testing program is challenged by way of the human rights Commissions or the arbitration route, the procedures involved with drug testing must be reasonably carried out. The consequences of drug testing may severely impact on employees (eg. discipline, loss of employment, social stigma). Thus, all necessary precautions must be taken to ensure accurate results and that as little invasion into an individual's privacy as possible occurs.

Here, some of the U.S. cases may be valuable. For example, in Jones v. McKenzie (supra) an unconfirmed EMIT was ruled arbitrary and capricious. Other parts of the process such as the chain of custody of the sample and the line of communication of the results must also respect an employee's right to confidentiality and privacy.

Public sector employers may be especially concerned with the procedures in a drug testing policy because the Charter guarantees due process. The Charter may also have indirect affects on both private and public sector employers, as any other piece of legislation that conflicts with the Charter guarantees must give way to the Charter. Guarantees such as equal treatment under the law without discrimination based on disability may influence court decisions regarding similar provisions in human rights legislation.

In summary, the legality of any drug testing program will depend on each unique set of circumstances with special focus on the nature of the job, when the test occurs, the drug testing process itself, and what is done with the results. Thus, employers must structure drug testing programs with these factors in mind so as to limit the degree of intrusion into employees' private lives and to avoid violating protections for the disabled in human rights legislation.

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Industrial Relations Centre (IRC)  
Queen's University  
Kingston, ON K7L 3N6  
[irc.queensu.ca](http://irc.queensu.ca)



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