DRUG TESTING

AND PRIVACY

The Privacy Commissioner
Of Canada

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Cat. No. IP34-2/1990
ISBN 0-662-57569-5

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INTRODUCTION

"When the current spasm of anxiety about drugs has run its course, we will be left with an array of bureaucracies and technologies that will find other justifications for their continued existence, with serious and long-lasting implications for freedom and privacy.... The history of technology is the history of the invention of hammers and the subsequent search for heads to bang with them."[1]

"Between lie detector tests and drug tests, you wonder how anybody can get any work done."[2]

"There has to be some consideration for individual rights. We can't be running around testing anybody at any time."[3]

During the 1980's a confusion of forces pushed drug testing to the forefront of workplace issues. The globalization of the world's economy put ever increasing pressure on employers to reduce their costs of doing business and fuelled their search for the "perfect" employee. Rising levels of drug-related urban crime intensified the "war on drugs", particularly in the United States, a "war" whose focus shifted somewhat from attacking supply to attacking demand. Public safety seemed to be increasingly at risk as the spectre of on-the-job impairment – particularly in the transportation sector – was raised. Finally, as the decade came to a close, the Ben Johnson affair raised new concerns about drugs. Amidst all this emerged the attitude that testing of "everyone but me" was the solution to these ills.

We have used the term "confusion of forces" because quite different problems gave rise to them. In some cases it was illegal drug use, in some it was performance impairment and, with athletes, it was performance enhancement. Curiously, workplace drug testing through urinalysis seemed to offer the quickest fix to many of these problems. Curious, because urinalysis cannot measure impairment. Yet, apart from the desire to attack the demand side of the illegal drug trade, almost all forces calling for testing stem from concerns about on-the-job performance impairment. Curious, too, because drug testing is extremely intrusive of one of our most fundamental rights – the right to privacy. It is especially intrusive when imposed randomly, without "reasonable suspicion" safeguards, as many testing proponents advocate.

To understand just how intrusive drug testing is, a brief discussion of the mechanism of drug testing may be helpful. It is found in Part I.

The prevailing testing method of choice is urinalysis. One person's account of urinalysis illustrates graphically just how degrading the experience might be:

"I was not informed of the test until I was walking down the hall towards the bathroom with the attendant. I thought

no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was led into a very small room with a toilet, sink and a desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did. I pulled down my pants, put the container in place - as she bent down to watch - gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar - and that is exactly what it is. . . . I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt."[4]

Not only the testing method is intrusive. Testing results in the collection of highly sensitive personal information. It tells whether a person may have consumed the drug or drugs being tested for during the recent (and even not-so-recent) past. Related tests on urine collected to identify drug use through urinalysis may identify medical conditions, such as epilepsy or pregnancy, formerly known only (or even unknown) to the person being tested.

Test subjects could be required to disclose use of other legitimate drugs (prescription drugs and over-the-counter inhalants, for example) that could, themselves, cause a positive result. Subjects could also have to disclose certain eating habits, such as the consumption of poppy seeds.

Despite its intrusiveness, urinalysis has been embraced with enthusiasm by private firms and governments alike in the United States. A 1987 survey reported that 58 per cent of the largest U.S. employers then had drug testing programs. In 1986, Ronald Reagan issued an executive order entitled "Drug-free Federal Workplace". It requires the head of each executive agency to establish a drug testing program to detect illegal drug use by federal employees in sensitive positions. The executive order also authorizes testing for anyone applying to work in an executive agency. The U.S. Department of Transport has issued regulations requiring drug testing for transportation workers. As discussed later, this has direct implications for Canadian drug testing policy in the transportation sector.

The private sector in Canada appears equally enthusiastic about workplace urinalysis. A recently-reported Arthur Anderson and Co. survey stated that 48 per cent of Canadian small business executives favour drug testing for their employees. However, reliable numbers are not available on the number of Canadian firms which have actually adopted drug testing programs.

The government of Canada, while initially showing great restraint in the face of drug testing pressures, now appears willing to embrace the process in a range of situations. Urinalysis programs involving inmates, parolees, members of the Canadian Forces and (indirectly) athletes have been in operation for varying periods. Is the announcement in March of two new and broad-ranging testing programs by Transport Canada and the

Department of National Defence a signal of the intention of the government to expand urinalysis programs dramatically? This document argues that many elements of these present and expanded drug testing programs can be characterized as unnecessary "overkill".

The growing pressures in society and government for drug testing programs and the intrusiveness of both testing procedures and their results on personal privacy led the Privacy Commissioner to undertake a review of federal government drug testing policy and practice.

While there is no doubt that drug testing infringes personal privacy in a profound sense, one must not be blind to the need to protect the public interest. R.I.D.E. programs, for example, are seen as justifiable intrusions on private rights to safeguard the public good, even in light of the *Charter of Rights*.

The recommendations contained in this report are offered as a contribution to the ongoing debate and a guide to government. The development of drug testing policies and practices which respect the requirements of the *Privacy Act* and which keep in appropriate balance public and private rights will be a unique and difficult challenge.

Seeking to find an appropriate balance, one might bear in mind a chilling comment eloquently stated by the editor of *Harper's Magazine* in a recent essay entitled: "A Political Opiate". Lewis Lapham analyzes a preoccupation with the problem of drugs in society as follows:

> *"But the war on drugs also serves the interests of the state, which, under the pretext of rescuing people from incalculable peril, claims for itself enormously enhanced powers of repression and control.*
>
> *For the sake of a vindictive policeman's dream of a quiet and orderly heaven, the country risks losing its constitutional right to its soul."*

Widespread drug testing is enormously attractive as a simple, quick fix to a complex social problem. Are the really tough issues – workplace stress, ignorance, inadequate employee counselling and the continuing failure to treat substance abuse as a health problem rather than a social deviance – so threatening that we must pursue a course which undermines many of our hard-won fundamental liberties?

Few would accept a "war on drugs" strategy which permitted employers or the state to intrude into our homes without reasonable suspicion, no matter how helpful such intrusions might be in addressing the drug problem. Yet governments, apparently with some public support, find drug testing so attractive that they propose to authorize intrusions into our bodies.

The burden of proof now rests on the shoulders of government to demonstrate that, in authorizing such intrusions, our "constitutional soul" has not been sacrificed.

ENDNOTES

(1) Dr. Matthew P. Dumont, then assistant commissioner of mental health in Massachusetts, July 1973 (quoted in the *Privacy Journal,* July, 1987).

(2) Bryant Gumbel, the *Today Show*, March 12, 1986 (quoted in the *Privacy Journal*, March, 1986).

(3) Pat Bowlen, owner of the Denver Broncos, who admitted that as an NFL owner he was "blaspheming" (quoted in the *Privacy Journal,* April, 1988).

(4) B. Feldthusen, "Urinalysis Drug Testing: Just Say No", [1988] Canadian Human Rights Yearbook 81 at 84.

(5) David F. Linowes, *Privacy in America: Is Your Private Life in the Public Eye?* (1989) 37. The University of Illinois conducted the survey.

PART I
VARIABLES IN THE DRUG TESTING PROCESS

Drug testing can take many forms and involve many variables, among them the following:

(a) the justifications for testing: for example, personal or public safety, reducing the demand for illegal drugs, enhancing employee productivity, reducing the likelihood of employee theft to support drug habits;

(b) what types of drugs are being tested for and the "threshold" concentration of each drug that will lead to calling a test result positive;

(c) who should be tested: job applicants, employees, workers in industries regulated by government, athletes, members of the public applying for benefits, and in what circumstances: pre-employment, post-accident, with cause to suspect impairment, without cause, at random, or some combination of these;

(d) the testing method: blood, urine, hair, saliva, psychological, breath, and the variety of testing protocols that may be used under each category;

(e) what testing seeks to identify: present use, present use and present impairment, past use, or past use and past impairment; and

(f) the intended uses of the test results: dismissal, treatment, discipline, prosecution, refusal of benefits, denial of eligibility to participate in sporting events.

An informed understanding of the scientific limitations of the testing method and a careful delineation of the precise goals of the testing program are prerequisites to any decision as to the effectiveness of a drug testing program. Legal considerations – including the *Privacy Act*, the *Canadian Human Rights Act* and the *Charter* – must also be incorporated into the analysis.

For example, a testing program that does not confirm positive results from screening tests will be unacceptable because it generates many false positives. Urinalysis to confirm impairment would not be useful, even with the proper confirmatory tests, since urinalysis can show past use only. It cannot show either present use or present or past impairment. Finally, even a properly designed test intended to confirm drug use may nonetheless be unacceptable because of *Charter* guarantees of "liberty" and protections against unreasonable search and seizure.

In what follows, several variables that may be involved in drug testing are explored in greater detail.

(a) The Justifications for Testing

Proponents of drug testing advance any of several justifications.[1] Some are more relevant to certain environments (the workplace, for example) than others. Much of the following material describing the justifications for testing is based on an analysis of American literature and surveys, given the limited Canadian material and surveys on the subject.

(i) Reducing the demand for illicit drugs

Testing reflects society's concern about the "pervasive" use of illicit drugs and reduces the demand for them. This is clearly an important, if not the most important, justification behind President Reagan's 1986 executive order.[2] The executive order calls for a drug free federal workplace in the United States and focusses on illegal drugs.

The threat of a drug test which might jeopardize one's livelihood may deter a person from using illegal drugs. Thus, it is argued, drug testing can reduce the demand for illicit drugs[3] and complement attempts to reduce the supply of drugs. Drug testing programs aimed at reducing demand would focus only on *illicit* drugs – those that are banned outright or that have been obtained through illegal acts (such as the doctoring of prescriptions).

Private employers may argue that, by testing for illicit drugs, they too are doing what they can to reduce the demand for illicit drugs. One recent American survey suggests that 10 per cent of one sample group of large American corporations with testing programs justified them as a means to curb illegal drug traffic.[4] However, enhancing workplace performance (through reducing accidents, protecting a safe work record and improving productivity), appears more often to be the goal of private sector testing.[5]

Almost any group – government, sporting or business – could rely on the justification of reducing drug demand for testing. That justification could in fact support testing an entire population.

(ii) Health and safety

Protecting health and promoting safety are often put forth as objectives of testing programs. These objectives have four aspects:

(a) protecting the *safety of persons being tested* when these persons might be injured through impairment (examples might include impaired driving or operating machinery in a factory).[6] Testing drivers for blood alcohol under the *Criminal Code* is perhaps the best known example of drug testing premised (in part) on this objective;

(b) protecting the *safety of co-workers* by detecting an impaired worker who might cause injury or death. Mine workers, nuclear industry workers, military personnel, police officers, firefighters, train and aircraft crews are examples of those who could be endangered by impaired colleagues;

(c) protecting the *public safety* by detecting impairment, or risk of impairment, in anyone whose impairment could harm the public – for example, a truck driver, pilot, train engineer or person operating a

nuclear facility. Testing to detect blood alcohol levels is often justified using the public safety argument. Similarly, parole authorities might justify drug testing as a condition of parole by arguing that it will enhance safety in the parolee's community by reducing the risk of the parolee committing aggressive, anti-social acts while under the influence of drugs or to obtain money for drugs. This justification has been identified as the rationale for the government of Canada's consideration of testing;

(d) protecting the *health of the person being tested* in the short run, long run, or both. Test results could signal the need to help the person who tested positive. The use of certain drugs (nicotine, alcohol, cocaine, for example) can cause health problems - some minor, and some grave.

The health and safety justification can be used to justify workplace testing and testing wholly apart from workplace considerations. This type of testing program would not distinguish between licit and illicit drugs.

(iii) Efficiency, economy and honesty

Drug testing may be justified as a technique to develop more productive workers, reduce health care costs, verify employee honesty and reduce liability for damage caused by impaired workers.

(a) promoting efficiency. Employees who are not impaired by drugs (or, indeed, by other factors, such as lack of sleep) will be more productive. They will also be less likely to damage the employer's property. To be consistent, a testing program derived from this justification would not distinguish between licit and illicit drugs. It would focus on any drug that caused or might cause impairment.

(b) reducing health care costs. A reduction in drug use, both licit and illicit, may result in lower health care costs. Both government and the private sector might rely on this justification for testing.

(c) verifying honesty. Persons who possess and use illicit drugs are breaking the law. If they break the law in this manner, they might be willing to do so in other circumstances (for example, by defrauding their employers or government agencies which provide benefits). As well, the high cost of illicit drugs may force some persons to commit crimes, including work-related crimes.

Testing may also be used to ensure the integrity of those in drug law enforcement (police, customs officers, prosecutors, judges). Those whose duties involve suppressing the trade in illicit drugs should be beyond any suspicion that they are improperly implicated in the trade. Their involvement in any way could compromise drug law enforcement and the safety of colleagues.

Testing to verify honesty would generally lead to tests for illegal drugs only. Testing to improve the integrity of sports and to ensure that athletes have no unfair competitive advantage,

however, could focus on any banned substance, legal or illegal, that *enhances* performance.

(d) avoiding liability for employees who may injure or kill others while impaired. In the United States, the concept of "negligent hiring" has persuaded some employers to test. Employers who hire (or continue to employ) a person who uses drugs may fear liability if the person becomes impaired and causes harm while on the job.

(iv) Harmonization with requirements established by other countries

In the Canadian context, this justification for testing is especially important. The United States government and private sector have both strongly advocated testing for illicit drug use. American policy reaches into Canada through American transportation regulations and the imposition by American parent companies of testing programs on their Canadian subsidiaries. Canadian owned and domiciled companies could decide to test their own employees to retain access to the U.S. market. The Canadian testing programs that may flow from these political and economic realities will be shaped in part by the nature of the testing programs in the United States. The drugs attacked by the United States Department of Transport regulations, for example, are those, we now know, for which Canada feels the pressure to test.[7]

Similarly, pressures from international sports bodies – the International Olympic Committee and international sports federations – will shape Canadian athlete testing policies.

(v) Comment

Most drug testing programs are based on a hybrid justification. An employer's desire to have productive employees and at the same time to discourage illegal activity may both be used to justify one program. Vetting employee honesty and reducing unsafe work practices may be used to justify another.

President Reagan's 1986 executive order[8] offered several justifications for testing for the use of illegal drugs: to prevent lost productivity, to prevent the funding of organized crime through the drug trade, to promote public trust in federal employees, to increase reliability and good judgment and to prevent irresponsible behaviour which could pose a threat to national security.

The drug testing strategies announced in March, 1990 by Transport Canada and the Department of National Defence justify testing as a means to enhance safety, both public and "on-the-job". The Department of National Defence strategy also relies on other justifications – operational effectiveness and a substance abuse-free Canadian Forces among them. There is continuing debate, however, about the extent to which testing programs can contribute to accomplishing the goals identified above.

(b) Which Drugs to Test for

The drugs being tested for will vary with the purpose of the test and with the bias of those calling for testing. If, for example, an organization wanted to identify drug use which could result in impairment, it should test for legal drugs (alcohol and

over-the-counter drugs), prescription drugs and illegal drugs that can cause impairment. If it wished only to identify illicit drug use, it obviously need not test for legal drugs.

The testing program instituted under President Reagan's executive order focusses on the *use* of illegal drugs only. It appears only peripherally interested in *impairment* by illegal drugs. It does not address testing for the use of or impairment by legal drugs (such as alcohol). The executive order calls for testing for illegal drugs as defined in Schedule I or II of the *Controlled Substances Act* (CSA). Hundreds of drugs are included in those schedules.[9] At a minimum, tests must search for cocaine and marijuana.

The Department of National Defence and Transport Canada testing policies, however, are not limited to testing for illegal drugs. They include testing for alcohol. The Transport Canada policy also addresses the use of other legal drugs, for example, over-the-counter and prescription drugs which may impair.

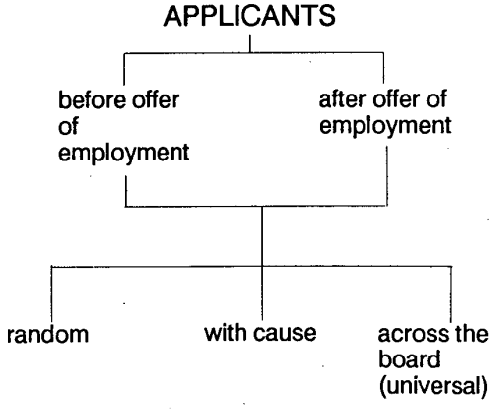
After deciding what drugs to test for, those testing must decide the level of concentration of the metabolized by-products ("metabolites") of a drug in a person's urine that will lead to a "positive" test result. There is general agreement that a certain concentration of a substance – a metabolite of cocaine, for example – must be found before a test is declared "positive". Threshold levels must be set for each drug.

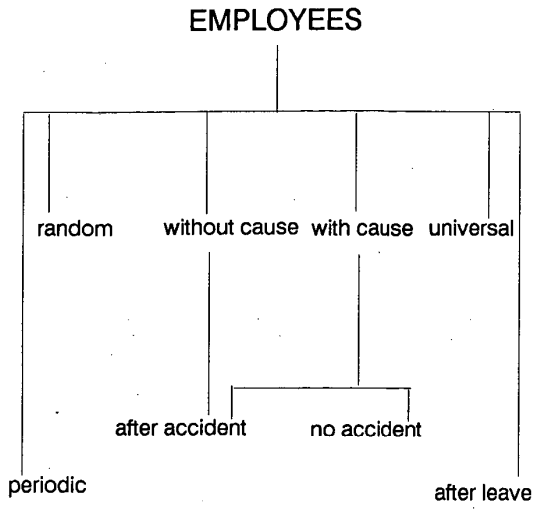
(c) Who Should be Tested and in What Circumstances

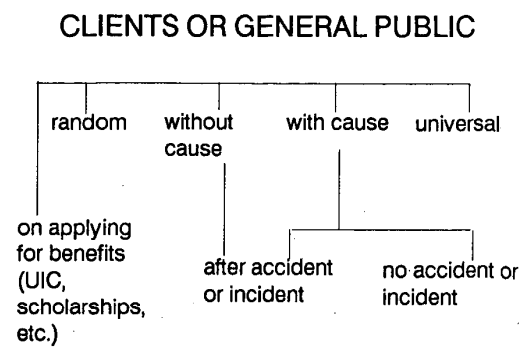
Any organization contemplating testing must consider who to test and what circumstances should trigger testing. An employer may want to test an employee after he or she is involved in an accident. Another employer might test simply on suspicion of drug use. Still another might test only where an employee has been involved in an accident and where drug use and impairment are suspected as a cause of the accident. Employers must decide whether to test all employees, senior management, unionized employees, employees whose duties could affect safety, or some combination of these. When coupled with the range of drugs that can be tested for, this creates an enormous and complex array of testing options.

(i) Employees and job applicants

Testing programs for employees and job applicants could take any of the following forms:







Note: The definition of "with cause" could be designed to include any of the following situations:

- with (reasonable) cause to suspect (or believe) drug use on the job or at any time;
- with (reasonable) cause to suspect (or believe) drug use on the job or at any time *and* resulting impairment;
- with (reasonable) cause to suspect (or believe) drug use on the job or at any time *and* impairment that may cause or contribute to an accident or incident or that may have caused or contributed to an accident or incident.

(ii) Clients of government and the general public

Testing programs for government clients (parolees or inmates, for example) or members of the general public (public assistance applicants, students on scholarship, athletes) might take any of the following forms:

(d) The Testing Method

Added to the range of options listed above are several relating to the mechanics of testing. Among the types of drug tests now available or contemplated are urinalysis, breathalyzer, blood, hair and psychological profile.

(i) Urinalysis

In Canada the most commonly used test for drugs other than alcohol is urinalysis. Subjects are required to give a urine sample. The test seeks to locate in the urine the drug or metabolites of the drug being tested for. Apart from breathalyzer and blood testing for blood alcohol levels, urinalysis appears to be the sole drug testing method used by the federal government. Several federal institutions, including Correctional Service Canada, the National Parole Board and Department of National Defence, currently use urinalysis. Urinalysis will also be a key component of the testing strategies announced by Transport Canada and the Department of National Defence. All these programs are explained in Appendix A.

Urinalysis itself, however, does not consist of a single, well-defined process. It may involve any of several different "screening" and "confirmatory" tests. The type of drug being sought will often determine which method of urinalysis is to be used. Some are better at identifying certain drugs than others. Other factors affecting the testing method are the relative costs of various methods of urinalysis and the degree of expertise needed to conduct a given test procedure.

(ii) Other forms of drug testing

The *Criminal Code* breathalyzer test detects the presence and concentration of alcohol in the breath, which can be correlated with blood alcohol levels. A level of impairment is legislatively presumed from this information. When a breath sample cannot be obtained, the Code sometimes permits taking a blood sample. Breathalyzer testing cannot identify the use of or impairment by other drugs.

Some proponents of testing have explored psychological testing to determine the propensity to use illicit drugs. This method, however, fares poorly as a device to identify present or future drug users.[10]

Another test analyses hair strands. Like the rings on a tree, strands of hair can record past events – in this case, drug use. A five-centimeter strand of hair might allow the tester to identify what drugs its owner had ingested over the last three months. This test, however, could not detect recent use (within the last three to five days). Still, it could be combined with other tests (urinalysis, for example) to develop a complete picture of drug use in the immediate and more distant past.

Hair analysis has not yet been shown to be a viable means of identifying past drug use. Even so, it has the potential to become a valid testing procedure. In one sense, obtaining a hair strand is less intrusive than getting a urine sample; a strand can simply be snipped from a person's head. In another sense, it may be much more intrusive, allowing the tester to probe much deeper into the subject's past.

This paper does not deal with the mechanics of all possible forms of drug testing. For example, it does not discuss saliva testing. Instead, it concentrates on the method most widely used or considered for use today – urinalysis. Much of the analysis contained here, however, could apply to other testing methods.

(e) What Testing Seeks to Identify

(i) Distinguishing among past and present impairment, and past and present use of a drug

Urinalysis can indicate only that a person has consumed a drug within the recent past (how far into the recent past will vary according to the drug being tested for). It cannot tell whether a person who has been tested is now using the drug.

At best, a person who tests "positive" for drug use may have been impaired at some past time. One cannot, however, confirm that the person was impaired. Nor can a positive urinalysis confirm that a person was impaired when the test was taken.

Urinalysis cannot determine precisely when the drug was used, (although it can generally tell that it has been used within the last few days).[11] Nor can it identify the quantity of the drug ingested.

To summarize:

- urinalysis can detect past use of a drug;
- urinalysis cannot confirm present impairment;
- urinalysis cannot confirm past impairment;
- urinalysis cannot confirm present use; and
- urinalysis cannot determine the quantity of the drug consumed.

Accordingly, the limited information provided by urinalysis is in fact of little use in many situations where employers and others are anxious to test. At best, testing may deter drug use, but this effect has not been conclusively shown.

(ii) The meaning of a positive urinalysis result

A positive test result means that the test has detected the drug or a metabolite of the drug being tested for. There may be any of several explanations for the positive result. It may mean that the person being tested:

- is a chronic user of the drug;
- has used the drug intermittently;
- is addicted to the drug;
- is under the influence of the drug; or
- is taking the drug under a physician's order.

False positives do occur, most often after screening tests, and to a much lesser extent after confirmatory testing. Some licit substances (poppy seeds, some asthma inhalants, for example) may produce positive test results.[13]

Urinalysis technology, if administered properly (screening tests coupled with appropriate confirmatory testing and the elimination of other possible substances that may cause a false positive), is acceptably accurate. Human error, however, may cause unacceptable levels of false results.[14]

(iii) The meaning of a negative urinalysis result

A negative test result may mean that the person who has been tested:

- is not using the drug being tested for;
- has taken the drug to be detected by the test but
- is not taking a large enough dose for it to be detected;
- is not taking the drug frequently enough for it to be detected;
- the sample was collected too long after the use of the drug; any drug metabolites have passed already through the person's system, or
- the sample has been diluted or tampered with.

(f) Intended Uses of Test Results

Test results can be used for a range of purposes. Employers testing job applicants might refuse to hire those who test positive (although federal and provincial human rights codes may prohibit this). Current employees may be dismissed, denied promotion, ordered to undertake treatment or relieved of certain job duties. A positive test result may interest investigative bodies which perform security clearances for federal government agencies. A positive test result may prevent a person from obtaining positions of trust in the future.[15]

Outside the workplace, the uses made of results may be equally varied. Athletes who test positive may lose their funding, be stripped of awards or records and banned from competition. Parolees who test positive may see their parole revoked. Inmates who test positive may face discipline.

We are aware of no cases where positive test results have been reported to law enforcement authorities (except for breathalyzer or blood tests administered by or through the police). In any event, criminal charges would not result simply from a positive urinalysis. Existing criminal law does not punish the simple use of a drug.[16] It focusses instead on possession, manufacturing and trafficking, none of which can be proved in law by a positive test result.

ENDNOTES

1. A 1988 Gallup survey of several hundred large American companies with drug testing programs identified the desire to curb illegal drug traffic as the main justification for starting a drug testing program in 10 per cent of the cases. A significantly higher percentage (54 per cent) started programs primarily to protect their safe work record or reduce the number of accidents: The Gallup Organization, *Drug Testing at Work: A Survey of American Corporations* (1988) at 17-18.

Professor David Linowes reported the results of a survey conducted at the University of Illinois to determine the extent to which the largest industrial corporations of America have policies safeguarding the personal information they collect and maintain about their employees, former employees and applicants for employment. The survey sampled 275 companies from among the Fortune 500 corporations. Slightly less than half responded.

Over half (58 per cent) of those that responded had a drug testing program in operation. Among the reasons they gave for introducing drug testing were the following: incidents or drug use on the job, or both (69 per cent), general concern for the safety of employees (97 per cent), government regulations (10 per cent), to follow the lead of other organizations (21 per cent), to try to keep health care costs down (51 per cent), to allow enforcement of company drug policies (40 per cent) and to improve the company's public image (22 per cent): David Linowes, *Privacy in America: Is Your Private Life in the Public Eye?* (1989) at 40, 52-53.

2. Executive Order No. 12564, 51 Fed. Reg. 32,889 (1986).

3. Although some suggest that users of illicit drugs will simply change drugs - to drugs that are not being screened for in the tests. For example, a heroin user threatened by the prospect of a urine test for illegal drugs might simply switch to alcohol as the drug of choice in the circumstances. This may reduce the demand for illicit drugs, but it will not remedy the social consequences of drug taking.

4. Gallup survey, *supra* note 1.

5. *Ibid.* at 18.

6. The results of the Gallup survey, *supra* note 1, suggest that most large companies began drug testing mainly to protect their safe work record or reduce the number of accidents.

7. Transport Canada advised this office that the U.S. Department of Transportation has now publicly recognized that it will be possible to develop an approach to drugs in the transportation industry that will be mutually acceptable between Canada and the U.S.. It remains to be seen just how such a mutually acceptable approach would be structured. This may become a moot issue in any event with the proposed introduction in Canada of a testing strategy that is broadly similar to that operating in the United States.

8. *Ibid.*.

9. It would be impractical to test for all these drugs. The U.S. *Federal Register* (Vol. 58, No. 69, Monday, April 11, 1989) sets out which of these drugs agencies must and may test for:

> "2.1(a)(1) Federal agency applicant and random drug testing programs shall at a minimum test for marijuana and cocaine;
>
> (2) Federal agency applicant and random drug testing programs are also authorized to test for opiates, amphetamines and phencyclidine; and
>
> (3) When conducting reasonable suspicion, accident, or unsafe practice testing, a Federal agency may test for any drug listed in Schedule I or II of the CSA.
>
> . . .
>
> 2.1(1)(d) These Guidelines are not intended to limit any agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees or employees in its regulated industries."

10. Presentation by William G. Harris to the American Society for Industrial Security (ASIS), Tampa, Florida, December 6, 1989. A paper accompanying the presentation suggests that psychological testing to predict drug use is deficient for several reasons: a dearth of prediction research, the cost of the process (time consuming, labour intensive and open to legal challenges) and the likelihood that such testing may screen out a large number of likely good employees.

11. Metabolites of fat-soluble drugs, such as marijuana, may appear in the urine up to several weeks after use.

12. The Department of National Defence acknowledged in correspondence to this office that the deterrent effect of urinalysis has not be conclusively shown. It added, however, that evidence strongly supports that conclusion, particularly the experience of the U.S. military.

13. Technically, a positive test result stemming from a person's consumption of over-the-counter inhalants or poppy seeds is not a false positive. If the testing program is aimed at identifying illicit drugs, however, the result is effectively false in that context.

14. See Part II, (b): *The Objections to Drug Testing.*

15. Paragraph 8(2)(e) of the *Privacy Act* permits government institutions to disclose personal information to investigative bodies specified in the *Privacy Regulations,* on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifics the purpose and describes the information to be disclosed.

16. The use of a drug in conjunction with some activities, of course, can result in a criminal offence (for example, impaired driving, flying or boating). Still, the *use* of the drug itself is not criminal.

PART II
DRUG TESTING AND GENERAL PRIVACY ISSUES

(a) Introduction

Part I outlined several justifications for drug testing and discussed the variables involved in the process. Part II addresses privacy issues arising from drug testing. It argues that drug testing is intrusive and should be strictly circumscribed. Privacy considerations, however, are not the only arguments favouring limits on drug testing. Several general arguments (some interwoven with privacy arguments) are also set out here.

(b) The Objections to Drug Testing

Among the arguments advanced against testing are the following:

- the inability of most current tests to measure present or past impairment or detect current use. Most drug tests, including urinalysis and hair analysis, can measure only the past use of a drug. They cannot measure past or present impairment or present use. As one research paper states, there is virtual unanimity in literature that urinalysis cannot be used to make accurate inferences about the extent of impairment at the time a drug is consumed. Nor can urinalysis give rise to an inference of the "hangover" effects of drug consumption.[1] Thus is the value of the test severely limited. In short, a highly intrusive process – urinalysis – produces little useful information.

  Some argue that if "supervisors supervised and managers managed", there would be almost no need for drug tests. As one organization has argued:

  "How can an employer identify such an individual [one impaired by drugs or alcohol]? By having an awareness of the signs of alcohol or other drug impairment and by using that awareness in performance monitoring.... The supervisor's awareness, coupled with active monitoring and documentation allow for early identification.

  This method of identifying alcohol/drug troubled individuals is known as the performance model. Its focus is limited to productivity and safety in the workplace; it does not deal with the issue of use away from work unless that use affects the job. The value of the model is that it allows management to intervene on the basis of legitimate performance expectations and to maintain union support in doing so." [2]

- incomplete coverage and the need for repeat testing. Urinalysis, for example, can identify cocaine, benzodiazepine (tranquilizer) or amphetamine (stimulant) use within the preceding few days only. A person may have used drugs a week before a test, but would still test negative. Hence, urinalysis could identify only some of those who may have used drugs within the relatively recent past. It cannot therefore be used to make definitive statements about the person's

long term drug-free status (hair analysis can assess drug use over a longer period, but is not yet acceptably accurate).

To be even reasonably sure of continuing drug-free status among employees or clients, frequent re-testing would be needed. This would compound both the number of intrusions and the expense of the process.

Repeat testing may encourage in persons a grudging, but unwise, tolerance of intrusions into their personal lives. Do Canadians wish themselves to become conditioned to such intrusions? Complacency could lead to the further acceptance of what should be unacceptable intrusions. As one commentator argues:

"Drug testing is just one of a long list of training procedures that operate in the disciplinary technology of power to inculcate automatic docility in the work force. Because it is relatively recent, this part of the drill has engendered public debate. Newer or more intrusive procedures, such as blood tests for the AIDS virus or lie-detector tests, are even more controversial. Many other training procedures, such as punching a time clock or taking various sorts of aptitude or skill-verifying tests, have become so habitual that they are no longer questioned or even noticed. When giving a urine sample becomes as routine as divulging one's marital status or social security number on a form, it will be fully integrated into the drill that creates automatic docility." [3]

- the impact of drug testing on organizational morale. Obliging employees and job applicants to submit to drug testing may cause deep resentment (some employees, however, may welcome drug testing programs that might enhance their own safety by detecting potentially impaired co-workers). Employer-employee relations do not need the additional strains that drug testing will bring.[4] This may particularly be the case when the test searches, not for on-the-job impairment, but (as most tests can only do) simply for drug use. Such testing often delves into the activities of employees outside working hours.

- the danger of inaccuracies creeping into the process. Drug testing is a highly technical process. It requires highly skilled personnel to perform repetitive tasks. Simple boredom may result in unacceptable levels of error. Add to this the expense associated with confirmatory testing (an especially important consideration in the private sector[5]), and the result may be a recipe for mediocrity in testing.

  To confirm that a person has ingested the drug being tested for, two tests are necessary. The first is a screening test - commonly the EMIT (Enzyme Multiplied Immunoassay Technique). If the screening test produces a positive result, a confirmatory test must be performed. Several confirmatory tests are available, but the GC/MS (gas chromatography with mass spectrometry) appears to be the most reliable.

Even with confirmatory testing, however, drug-free employees may find themselves placed under suspicion or have their careers ruined on the basis of the initial screening test. David Linowes reports in *Privacy in America: Is Your Private Life in the Public Eye?:*[6]

"In his book ***The Great Drug War*** *(1987), Dr. Arnold Trebach . . . says that "approximately 5 million people were tested this year in America" for drug use. He further states that while drug-testing companies, such as Syva Company of Palo Alto — makers of the EMIT test — claim a 95 percent accuracy rate, the rate would be more like 90 percent when the tests are performed by people other than Syva's own technicians. According to Trebach, 'If there were a false reading rate of 10 percent, with half false positives and half false negatives, this could mean that approximately 5 percent of the approximately 5 million people tested this year in America were accused improperly of being drug users. Thus, there is a good chance that 250,000 employees were placed under suspicion or had their careers ruined for no reason."*

Confirmatory testing, such as the GC/MS, has the theoretical capacity for virtually perfect accuracy. GC/MS testing could clear up the mis-labelling that occurs with false positives determined through the EMIT screening test. Theory and practice, however, may not coincide. As the British Columbia Civil Liberties Association has noted:

"There is nearly unanimous consensus that if one is willing to spend the money to acquire the appropriate technology, train and motivate the operators, and to ensure meticulous record keeping, specimen handling and chain of custody and reporting, accurate and specific identification of drug metabolites can be achieved."

. . .

"Though the potential for virtually perfect accuracy is admitted (using GC/MS and given flawless conditions, adequate time and funds, and strictest adherence to all procedures), one U.S. Court has held that even confirmation by GC/MS is insufficient because of the possibility of human error."

. . .

"Dull, repetitive work that nonetheless requires highly skilled technicians [as GC/MS testing does] is a fertile breeding ground for human error - most tests will be negative, punctuated by the occasional, more interesting, positives. The livelihoods of those being tested rest upon extreme diligence in routine tasks such as cleaning glassware, affixing and recording labels, reading meters, transcribing numbers, key punching and filing. Testing labs vigorously claim to have solved this problem, but nothing in the published error rates to date justifies these claims. Research on similar work conditions elsewhere would lead one to suspect that the error rates will continue to be unacceptably high."[7]

- testing methodologies must be developed and procedures established to ensure that samples will not be adulterated or mixed with other samples (the "chain of custody" issue). Sophisticated per-

sonnel must be hired and trained to collect samples and perform tests. Threshold concentrations must be set. Officials must decide what drugs to test for, and what to do with the results. They must ensure the reliability of the testing facilities - a time consuming and expensive process in itself. Storage facilities will be needed to keep samples in case of challenge. Litigation will inevitably result from the imposition of testing programs. The resulting information - an indication of past drug use - may often not be sufficiently useful to warrant the problems and costs associated with the testing process in the first place.

- urinalysis is highly intrusive. It not only requires the surrender of a body fluid, but, to prevent the subject adulterating or substituting the sample, it may be necessary to observe the subject's genitals as he or she urinates. The disposal of body wastes is generally considered a highly personal act. Urinalysis may expose this act to close visual scrutiny. Such observation is intrusive and humiliating. Indeed, for urinalysis, it could be necessary for the subject to be nude while urinating (and possibly under direct observation as well).[8] Adulterating substances could otherwise be hidden in clothing.

  Technology may one day provide a test that will avoid direct observation of this highly personal act. Perhaps hair analysis will achieve suitable credibility so that only a single strand of hair will be required. Still, any process of acquiring personal information from a person's biochemistry is intrusive. Privacy considerations outweigh all but the most powerful justifications for testing. As Mr. Justice La Forest stated in a 1988 Supreme Court of Canada decision, *R. v. Dyment: "[T]he use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity".*[9]

  The intrusiveness of testing does not end with the surrender of a body substance and the possibility of direct observation. Test subjects may be required to disclose their use of other drugs (prescription drugs and over-the-counter inhalants, for example) that could cause a positive test result. This in turn may disclose information about the health of the person.

  Other tests (not connected to drug testing) could be performed on urine provided for drug testing, identifying conditions that the subject does not want to disclose (diabetes or pregnancy, for example) or does not even know about.

- the substitution effect. Persons likely to be tested for the use of one substance (for example, marijuana) may simply switch to an equally harmful drug that is not being tested for. Testing for illicit but not licit drugs encourages this type of behaviour. Users of illicit drugs may simply switch to alcohol. If the object of the testing program is to reduce the use of illicit drugs, this result is appropriate. If, however, the object is to reduce impairment by any drug or to reduce safety or health risks, the substitution effect may create a more serious problem than existed before testing began.[10]

- creation of an underclass of chronic unemployables. Employees or applicants who test positive may become unemployable, even though they can safely and competently perform their job duties, and even if they have ceased using the drugs in question. Their past may haunt them long after they have "gone straight".

- creation of a false sense of security. By focussing on drug use, government and employers may overlook other causes of incidents or accidents. Accident investigators who find impairment by drugs as a possible cause, for example, may be tempted to ignore other causal factors and perpetuate the danger. They will have found an easy scapegoat. A 1988 Canadian Labour Congress submission to the Standing Committee of Transport on Bill C-105 stressed this point:

  "Drug testing is a 'red herring' and is designed explicitly to draw attention away from other causes of health and safety hazards that cause accidents. It is an attempt to shift the burden of responsibility for safety problems onto employees and to hide employer failure to ensure safe and healthy workplaces."

  "Alcohol and drug testing takes the employer and the government off the hook. It gives the appearance that they are doing 'something' about safety." [11]

- drug testing may be the "solution" to a problem that has been exaggerated. This argument has two dimensions. First, is there a problem that needs a solution? Second, if there is, will drug testing help to solve it?

  Alcohol abuse is implicated in thousands of traffic deaths yearly. Is there evidence that other drugs are causing significant problems relating to job performance, on-the-job safety or public safety? In the absence of such evidence, are there other problems caused by drug use? If the answer is no, why test?

  Even if the answer is yes – that there are problems caused by drug use – will testing contribute to solving them?

- lack of procedural safeguards. Some forms of drug testing are as intrusive as the exercise of law enforcement powers by the state. Yet they are subject to few of the safeguards available to protect people from the exercise of other investigative powers by the state. An employer might randomly test employees without any reasonable "individualized" suspicion that they use or are impaired by drugs. When such a power has been exercised by government institutions in Canada or the United States, it has often been challenged as unconstitutional. As yet, however, the Supreme Court of Canada has not considered the constitutionality of urinalysis. It has, however, spoken in support of the integrity of the person in the face of law enforcement actions by the state.[12]

  Private sector testing has the potential to be even more intrusive; few laws, apart from human rights codes, govern private sector testing and how the resulting information is used. The dangers of "free-form" private sector testing – testing with no or few controls

to safeguard those being tested and with a lack of concern for human dignity – are real.

- The impact on personal autonomy. Drug testing coerces conformity – abstention from consuming psychoactive substances, both legal and illegal, for example. It restricts autonomy. To what extent should governments or employers be permitted to use the coercive power of drug tests to restrict the consumption of substances? Is it sometimes right to coerce (to prevent impaired driving, for example), and sometimes wrong (to regulate the simple consumption of substances away from the workplace in situations that create no danger for others)?

(c) Conclusion

Testing imports an aura of oppression and Big-Brotherhood. Some forms of testing – breathalyzer tests to detect impaired driving or operation of vessels or aircraft, for example – have broad public support. But would a knowledgeable public accept testing in circumstances that may do little to enhance public safety?

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

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

ENDNOTES

1. B. Beyerstein, M. Jackson, D. Beyerstein, "Drug Testing in the Workplace: A position paper of the British Columbia Civil Liberties Association" (1989) at 9.

2. The Association of Labor/Management Consultants on Alcoholism, quoted in "Drug Testing in the Workplace", *supra* note 1 at 17.

3. F.A. Hanson, "Some Social Implications of Drug Testing", 36 U. Kan. L.R. 899 at 917 (1988).

4. The potential for employer-union conflict can be seen from the strong objections of some organized labour groups to testing. On March 10, 1986, the Canadian Labour Congress presented a submission to the Standing Committee on Transport on Bill C-105, *The Railway Safety Act*. "The CLC is strongly opposed to any form of workplace alcohol and drug testing - be it mandatory, pre-employment, just-cause, medical monitoring, medical-testing, or after an accident" (at 3).

5. Private sector employers might be tempted to rely on the less expensive route of performing a screening test only, and base their decisions on the results. The unacceptably high false positive rate stemming from screening tests means that many persons may be falsely accused of using drugs and penalized as a result.

6. (1989) at 36.

7. *Supra* note 1 at 6-7.

8. The explanatory pamphlet accompanying the Sport Canada testing policy sent to this office depicts a male, wearing nothing but socks, urinating while being directly observed by another male.

9. [1988] 2 S.C.R. 417 at 431-32.

10. See, for example, B. Beyerstein, M. Jackson, D. Beyerstein, "Drug Testing in the Workplace", *supra* note 1 at 21. There, the authors seem to suggest that pre-employment urine screening (for drugs other than alcohol) will do nothing to solve the alcohol problem and may in fact make it more serious.

11. *Supra* note 4 at 9.

12. See *R. v. Dyment, supra* note 9.

PART III
DRUG TESTING AND THE PRIVACY ACT

(a) Introduction

The *Privacy Act* was enacted in 1983, setting out principles of "fair information practices". Among other obligations, it requires government institutions to:

- collect only the personal information needed to operate its programs;
- collect the information directly from the individual concerned, whenever possible;
- tell the individual how it will be used;
- keep the information long enough to ensure an individual access; and
- take all reasonable steps to ensure its accuracy and completeness.

The *Privacy Act* generally does not compel collection, use or disclosure (except disclosure to meet access requirements) of personal information; it merely permits it.

The Act defines "government institution" as any department, ministry of state, body or office of the Government of Canada listed in the schedule to the Act. Currently, the Act covers some 150 institutions. It does not apply to the private sector.

(b) Specific elements of the *Privacy Act* and their application to drug testing

(i) Personal information

The Act applies only to "personal information". Section 3 defines personal information as:

> *"information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing, . . . information relating to the . . . medical, criminal or employment history of the individual ...".*

In the context of drug testing the Act covers the following personal information:

- test results;
- the fact of taking the test, being advised, asked or ordered to take the test, asking to be tested, or refusing to be tested, and any discussions about the test;
- peripheral information such as medical or physical conditions that may influence test results, and other medications or substances used or ingested by the test subject;
- information suggesting cause for testing (for example, the apparent impairment of a person while on duty, the fact of

being charged with possession of an illicit drug, or disclosure of drug use by the person to a co-worker);

- any treatment programs relating to drugs that the person may have entered, been advised or ordered to enter, or refused to enter; and any disciplinary measures or criminal charges relating to drugs.

(ii) Collection of personal information

Section 4 of the Act states:

> *"No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution."*

An institution wanting to test cannot, by simply creating a testing program, comply with section 4. Implicit in section 4 is the requirement that no such information is to be collected unless (1) the collection is part of an activity or program falling within the statutory mandate of the institution and (2) the collection is a necessary element of a mandated program or activity. Even if the test subject consents, the collection of information by testing will not be valid unless it meets these two conditions.

Specific statutory authority for an institution to conduct drug testing of employees or clients will, of course, ensure compliance with section 4.

Despite the fact that section 4 does not require specific statutory authority for any form of information collection, the additional safeguard of Parliamentary approval is highly desirable for highly intrusive forms, such as urinalysis. Indeed, it is our view that elected officials should be given the opportunity to carefully weigh the evidence as to whether the public interest in detecting drug use through mandatory drug testing outweighs, in specific cases, individual privacy rights. This view is consistent with our previous recommendation in *AIDS and the Privacy Act* that mandatory HIV antibody tests be permitted only with Parliamentary authority.

Without specific statutory authority to collect personal information through drug testing, determining compliance with section 4 becomes more difficult. It involves assessing the necessity principle and weighing the public interest in collection against the privacy intrusion involved.

Assessing the justifiability of intrusions caused by testing programs

The principal privacy issue flowing from drug testing is not whether testing is intrusive. It is. Urinalysis is particularly intrusive, requiring as it may either a pre-test physical search, the direct observation of an intimate bodily function, or both.[1] The principal issue is in what circumstances the intrusions occasioned by testing are justified.

Despite the limited inferences that can be drawn from test results and despite the intrusiveness of drug testing, the *Privacy Act* does not prohibit all drug testing. However, we have concluded – as did the Standing Committee on National Health and Welfare – that only in exceptional cases in which drug use constitutes a real risk to safety is drug testing justifiable.

The following justifications alone are **not** sufficient under section 4 of the *Privacy Act* to legitimize drug testing: the desire to promote efficiency, economy and honesty, the desire to reduce the demand for illicit drugs and the desire to comply with foreign testing requirements.[2] Although specific legislation could permit or require testing in these circumstances, such legislation would not be appropriate. Nor would it likely comply with the *Charter.*

Collecting personal information by mandatory drug testing, without cause to suspect drug use by or impairment of a person or within a group, and with no evidence to suggest that drug use or impairment poses a threat to public safety, would infringe section 4 of the *Privacy Act.* Such testing would violate the privacy of everyone in the group ordered to take the test. It presumes guilt without setting any threshold standard of reasonable belief or suspicion before the test is taken. It subjects the majority who are not using drugs to invasive procedures designed to single out the minority. Such testing is a fishing expedition, not a justifiable search. Moreover, few meaningful conclusions can be drawn from the test results. Yet those testing positive can suffer significant detriment.

At the other end of the continuum is testing where there is reason (or "cause") to believe that a person is impaired by legal or illegal drugs, the impairment poses a threat to public safety and there is no other effective means of reducing the threat (for example, it may not be possible to supervise the person closely). This testing is the easiest to justify (although urinalysis is still deficient, since it cannot measure present drug use or impairment). It is not a fishing expedition. It is aimed at a person whose behaviour suggests impairment. It therefore does not subject large numbers of people to testing. Instead, it relies on specific evidence to identify a limited number of persons. Testing programs at this end of the continuum could more easily be brought into accord with section 4 of the *Privacy Act.*

Under the following circumstances, drug testing would be justifiable under the *Privacy Act:*

(1) Testing because of group behaviour as a whole:

A reliable survey or other method of monitoring may have identified that a given group (police officers, pilots or inmates, for example) has a drug-related problem. It may be impractical to counter the problem through a testing program based on reasonable suspicion about an individual (perhaps because individual activities cannot be adequately supervised or because the visible impairment caused by the drug use in question is too subtle to observe). In this case, the only (and still imperfect) course of action may be to test randomly.

The collection of personal information through random mandatory testing of group members on the basis of the behaviour patterns of the group as a whole may be justifiable, but only if the following conditions are met:

- there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;

- the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;
- the behaviour of individuals in the group cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

(2) Testing because of individual behaviour:

Most groups will not exhibit drug-related safety problems to the extent that would warrant random testing of group members. However, individual group members may still pose a safety risk if they are impaired by drugs. In such cases, it should be possible to collect personal information through mandatory testing when there is reasonable suspicion. A person might appropriately be tested if the following conditions are met:

- there are reasonable grounds to believe that the person is using or is impaired by drugs;
- the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;
- the person's behaviour cannot otherwise be adequately supervised;
- there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and
- no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.

Recommendation 1

Government institutions should seek Parliamentary authority before collecting personal information through mandatory testing.

Recommendation 2

The collection of personal information through random mandatory testing of members of a group on the basis of the behaviour patterns of the group as a whole may be justifiable only if the following conditions are met:

- **there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;**
- **the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;**
- **the behaviour of individuals in the group cannot otherwise be adequately supervised;**
- **there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and**

- **no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.**

Recommendation 3

A person who is not a member of a group which exhibits drug-related problem behaviour might appropriately be tested if the following conditions are met:

- **there are reasonable grounds to believe that the person is using or is impaired by drugs;**
- **the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;**
- **the person's behaviour cannot otherwise be adequately supervised;**
- **there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and**
- **no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.**

Recommendation 4

Since drug testing programs designed primarily to promote efficiency, economy or honesty, or to reduce the demand for illicit drugs, would not satisfy recommendations 2 or 3, such programs would violate the *Privacy Act*.

...

Because public safety should be the principal consideration behind drug testing, tests should not distinguish between legal and illegal drugs. The focus instead should be on the harm caused by any substance that impairs.

Recommendation 5

Testing programs should not distinguish between legal and illegal drugs that can impair.

...

Direct collection and the duty to inform: section 5: Section 4 of the Act permits government institutions to collect personal information in defined circumstances only. Section 5 imposes additional limits on collection. These are the duty to collect information directly and to inform about the purpose of the collection.

Subsection 5(1) addresses direct collection. It states:

> *"5(1) A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2)."*

The duty to collect directly in subsection 5(1) is not absolute. There are four exceptions. Subsection 5(1) permits indirect collection when direct collection is not possible or when the person to whom the information relates authorizes another form of collection. As well, the collection need not be direct if the personal information being sought may be disclosed to the institution under subsection 8(2). That subsection sets out several circumstances where a government

institution holding personal information may disclose the information, including disclosure to another institution. Finally, the collection need not be direct if it would result in the collection of inaccurate information or would defeat the purpose or prejudice the use for which the information is collected (subsection 5(3)).

Using information "for an administrative purpose" simply means using the information in a decision making process that directly affects the individual (section 3). Thus, a government institution relying on information about a person's drug use to decide a person's suitability for employment would be using the information for an administrative purpose.

Subsection 5(1) is, in our view, a legalistic way of saying, "If you want to learn something about a person, ask the person", unless the law authorizes another mode of collection. The section clearly contemplates having the individual volunteer his or her personal information to the fullest extent possible.

The collection of information through drug testing would only be considered direct collection under subsection 5(1) if the test subject truly volunteered to be tested. Mandatory drug testing therefore would be considered an indirect collection and would only comply with section 5 if it fell within one of the exceptions identified by the section.

Recommendation 6

Government institutions must wherever possible collect personal information used for an administrative purpose and relating to drug use or impairment directly from the individual (that is, if the person volunteers). Collection may be indirect (that is, from other sources or without the person's consent) in the following circumstances:

- **when it is not possible to collect the information directly;**
- **when the person to whom the information relates consents to another method of collection;**
- **when the personal information may be disclosed to the institution under subsection 8(2) of the *Privacy Act*; or**
- **when direct collection might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.**

Informing about the purpose of the collection: Subsection 5(2) of the Act imposes the duty to inform a person from whom personal information is being collected of the purpose of the collection:

> *"5(2) A government institution shall inform any individual from whom the institution collects personal information about the individual of the purpose for which the information is being collected."*

The institution is required to inform of the purpose only where the information is collected directly (voluntarily, in the case of drug tests) from that individual. If the personal information is not collected directly, subsection 5(2) imposes no duty to inform. Nor is it necessary to inform a person from whom information is collected

of the purpose if informing might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which information is collected (subsection 5(3)). We recommend as a matter of policy, however, that even when information is collected indirectly, test subjects be informed of the purpose of the collection unless it would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.

Recommendation 7

Even when subsection 5(2) of the *Privacy Act* imposes no duty on a government institution to inform about the purpose of the collection, test subjects should as a matter of policy be informed. Only if informing the test subject would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected should the purpose of the collection be withheld from the person.

...

(iii) Retention and disposal of personal information

When personal information is used for an administrative purpose, the Act sets out retention requirements. Once a urine, hair or other sample is taken from a person and identified as belonging to that person (normally by labelling a container holding the substance) it becomes personal information. Accordingly, the sample (and other personal information) used for an administrative purpose must be retained for a specified period. Subsection 6(1) reads:

> *"6(1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information."*

Subsection 4(1) of the *Privacy Regulations*[3] states:

> *"4(1) Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution*
>
> *(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and*
>
> *(b) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act."*

Consequently, a two year minimum applies for the retention of urine samples and the information relating to the samples.

A more troubling issue is the maximum period of retention. The appropriate maximum period may vary from case to case. However, positive test results retained by government should not be allowed to haunt persons many years after the test. It would be inappropriate for a government institution even to speculate that a person is a current drug user because of a positive test result from several years past. If the conditions for

testing (set out in Recommendations 2 and 3) are met, the person could be retested to determine current use. If the conditions are not met, the person should not be retested.

Recommendation 8

Body samples and the personal information derived from those samples should be retained for the period prescribed by the *Privacy Regulations*, and be disposed of as soon as possible after the retention period has expired.

...

Subsection 6(3) imposes a duty to dispose of personal information in a certain way:

> *"6(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of such information."*

Some personal information is more sensitive than other such information. A diagnosis of AIDS, for example, could have catastrophic consequences for the person affected if the information were released to the community. Information about a person's drug using habits, while perhaps not as sensitive as AIDS-related personal information, still merits strict safeguards. The release of the information could seriously impair a person's chance to obtain or hold employment. It could affect his relationship with co-workers or others in the general community. Given contemporary attitudes about drug use, discrimination is bound to flow from disclosure.

Even peripheral information – other "legitimate" drug use associated with a medical condition that had to be reported to clarify the results of a drug test, for example – could harm a person if released improperly. At the very least, it would be an entirely unwarranted disclosure of information which the person has a right to keep private.

Handling and disposal procedures should take into account the sensitivity of information related to drug testing. The *Security Policy and Standards of the Government of Canada* recognizes the sensitivity of personal information collected under the *Privacy Act*. Such information is considered "designated information" warranting enhanced protection.

Under section 5.7 (Appendix D), the Security Organization and Administration Standards, particularly sensitive designated information requires special security measures. Included is information concerning medical, psychiatric or psychological descriptions and information concerning a person's lifestyle. To identify particularly sensitive personal information, the Security Policy establishes an "injury" test. The information will be considered particularly sensitive if its disclosure, removal, modification or loss could reasonably be presumed to cause an invasion of privacy.

Using this injury test, information from drug tests or information suggesting drug use could easily be seen as particularly sensitive personal information. Among the special security measures that must apply to such information are those dealing with storage, processing, transmittal and destruction.

Those responsible for the handling and disposal of such information must comply with the *Security Policy and Standards of the Government of Canada.*

Recommendation 9

Procedures for the handling and disposal of personal information collected under the *Privacy Act* should reflect the sensitivity of the information. At a minimum, personal information relating to drug tests should be accorded physical protection at level B, as defined in the *Security Policy and Standards of the Government of Canada.*

...

(iv) Accuracy, currency and completeness of personal information

The *Privacy Act* imposes quality control standards on the personal information used by government institutions. Subsection 6(2) states:

> *"6(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible."*

Note that subsection 6(2) does not require perfection. The obligation is to take *all reasonable steps* to ensure that the information collected is as accurate, up-to-date and complete *as possible.*

As accurate as possible: Ensuring that information relating to drug testing is as accurate as possible has two dimensions. First, the testing procedure should correctly identify those who have or have not used drugs in the "window of detection" period to which the test applies. Second, urinalysis results should be understood to refer to past use only, not present use or past or present impairment. Nor can urinalysis results be used to measure the quantity of the drug consumed.

Over time, drug tests will improve with changes in technology. Whatever the technology, drug testing should aim for the following:

- the greatest likelihood that a person who has not taken a drug during the test window period will test negative (the test must be highly "specific") and
- the greatest likelihood that a person who has taken a drug during the test window period will test positive (the test must be highly "sensitive").

In practice, there is a tradeoff between sensitivity and specificity. A highly sensitive test may result in a large number of false positives. A highly specific test may result in a large number of false negatives.

Urinalysis, today's preferred testing method, requires two tests to confirm positivity – a screening test and a confirmatory test. A screening test is highly sensitive. It may have an unacceptably high level of false positives if used alone. Accordingly, a positive screening test should never be used for an administrative purpose other than to suggest the need for a confirmatory test. National Health and Welfare should identify the appropriate screening and confirmatory tests to be used.

A negative screening test result, however, need not be confirmed before it is used for an administrative purpose as defined in the *Privacy Act.*

It might be argued that a negative urinalysis result should be recorded as indicating any of the following: that the person has not taken the drug being tested for, that the person took the drug, but not sufficiently often or in sufficient amounts to test positive, or that the person took the drug, but the sample was taken after the drug or its metabolites had passed from the person's system.

The ambiguity inherent in negative test results may lead those relying on the record to infer that the person in fact was a drug user, but escaped detection for one of the reasons set out above. Thus, a large number of persons who tested negative simply because they did not take the drug in question might be unfairly judged. By whatever means a government institution records negative test results, it should seek to ensure that the user of the information will be aware of the danger of making an improper inference about the meaning of a negative test result. Otherwise, anyone who takes a drug test could fall under a cloud of suspicion, whether the result is positive or negative.

Recommendation 10

Government institutions should not use positive urinalysis results for an administrative purpose unless the results have been supported by confirmatory testing according to accepted scientific/ medical protocols approved by National Health and Welfare.

Government institutions may use negative screening test results for an administrative purpose without conducting confirmatory testing where the screening test has been conducted according to acceptable scientific/medical protocols which are approved by National Health and Welfare from time to time.

Recommendation 11

Government institutions should seek to ensure that those interpreting negative test results do not go beyond the inferences scientifically supported by the test.

...

Because of the complexity of the testing process – be it urinalysis or some other test – a government-wide testing protocol should be developed. National Health and Welfare is currently developing such a protocol, but it has not yet made it public.

Recommendation 12

Because of the complexity of the testing process – be it urinalysis or some other process – a government-wide testing protocol should be developed. At a minimum, the protocol should establish procedures for the following:

- **sample collection, including procedures to permit the giving of samples in private, wherever possible;**
- **the appropriate screening and confirmatory tests to use for each drug being sought;**
- **threshold concentrations for each drug test (to determine when a result is "positive");**
- **chain of custody procedures to prevent tampering with or exchange (deliberate or accidental) of samples;**
- **standards for testing laboratories;**
- **the meaning of positive or negative test results; and**

- **security procedures governing the personal information relating to drug testing.**

...

The need for repeat testing to ensure accuracy: Urinalysis can address only the past use of a drug during the "window of detection" period. Repeat testing would be necessary even to be reasonably certain that a person has remained drug free or is continuing to use drugs; it could be necessary to test several times a month, depending on the drug. Even then, the test would not reveal drug consumption in preceding hours, as the metabolites to which urine tests react may not yet have entered the urine.

As complete as possible: Institutions should take reasonable steps to ensure that personal information is as complete as possible. In the context of drug testing, a positive test result which may have caused by a substance other than the drug being tested for should always be reported with the test result. Any information indicating that legitimate substances may have caused the positive result should be included with the test result. In these circumstances, the test result should not be relied on as indicating use of the drug being tested for.

Recommendation 13

When a person tested for a given drug may have consumed other substances which could lead to a positive test result for that drug, such information should accompany the test result. The test result should not in such circumstances be accepted as indicating that the person has used the drug being tested for.

As up-to-date as possible: A urinalysis result indicating that a person has in the past used the drug tested for can be considered "as up-to-date as possible" if the information is used only to confirm past consumption. The institution using the positive urinalysis result should understand that the result indicates past drug use, not present use. To ensure the currency of information about drug use, the institution may need to re-test the person. Re-testing should occur, however, only if the conditions contained in Recommendations 2 or 3 are met.

Recommendation 14

An institution using urinalysis results for an administrative purpose should ensure that those using the results understand their meaning. A positive urinalysis result should not be used to identify present use, or past or present impairment by a drug. The institution should also ensure that those using the results understand that urinalysis cannot measure the quantity of the drug consumed.

(v) Use of information relating to drug testing

Section 7 of the Act governs the use of personal information under the control of a government institution:

> *"7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except*
>
> *(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or*

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2)."

The relationship between subsections 7(b) and 8(2) requires explanation. Subsection 8(2) permits government institutions to disclose information for certain purposes. Subsection 7(b) permits the institution receiving the disclosed information to use it for those purposes.

Specific legislation may permit inconsistent uses. For example, legislation might permit the use of test results that determined a person's suitability to operate an aircraft as a foundation for criminal charges. (Such legislation might violate the *Canadian Charter of Rights and Freedoms*, but it would not offend the *Privacy Act.*)

Restrictions on use: Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- for the use for which the information was obtained or compiled (to assist in performing drug tests or analyzing test results);
- for a use consistent with that purpose; or
- for a purpose for which the information may be disclosed to the institution under subsection 8(2).

The government institution seeking the consent of the individual to additional uses should fully explain the consequences of the additional uses. It might tell the person about the consequences of consenting or refusing, but it should not coerce the person to consent.

The test itself may generate information that is not relevant to identifying drug use. That information should not be used for an administrative purpose and should be disposed of immediately.

Recommendation 15

Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- **for the purpose for which the information was obtained or compiled by the institution;**
- **for a use consistent with that purpose; or**
- **for a purpose for which the information may be disclosed to the institution under subsection 8(2).**

The government institution seeking the consent of the individual for additional uses should fully explain the consequences of the additional uses. It should avoid coercing the person to consent.

...

(vi) Disclosure of personal information

Section 8 of the Act describes when government institutions may disclose personal information under their control. Generally, persons must consent to the disclosure of their personal information. Subsection 8(1) states:

"8(1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section."

Subsection 8(2) lists approximately 13 exceptions to the general rule requiring the person's consent. In these circumstances, the institution may but is not obliged to disclose. The exceptions listed in subsection 8(2) include the following:

- disclosure for the purpose for which the information was obtained or for a consistent purpose;
- disclosure to comply with an Act of Parliament or any regulation made under the Act;
- disclosure to an investigative body specified in the regulations to the *Privacy Act;*
- disclosure to the Attorney General of Canada for certain legal proceedings; and
- disclosure in certain cases involving the public interest.

In two cases where subsection 8(2) permits disclosure (disclosure to a person or body for research or statistical purposes and disclosure in the public interest), the head of the institution holding the information must consent to its disclosure.

Subsection 8(2) also states that other federal laws override these disclosure provisions. The subsection 8(2) disclosure provisions are "[s]ubject to any other Act of Parliament". In other words, other federal legislation may permit disclosure of certain personal information in a wider range of circumstances than permitted by the *Privacy Act*. It may also impose greater restrictions on disclosure than does the Act.

The scheme for disclosure under subsection 8(2) can be summarized as follows:

- the individual can consent to any form of disclosure of personal information;
- if the individual refuses disclosure (or is not asked to consent to disclosure), the institution may disclose in some 13 circumstances set out in section 8(2); in two of those cases, the consent of the head of the institution is required;
- other federal laws may expand or restrict the right to disclose personal information; these laws take precedence over the disclosure provisions of the *Privacy Act*; and
- the *Canadian Charter of Rights and Freedoms* may restrict the disclosure provisions of the *Privacy Act* or other federal legislation or policies.

Government institutions seeking to disclose personal information under paragraphs 8(2)(f) to (m) should first seek the subject's consent. There would be no need to seek prior consent to disclosure under paragraphs 8(2)(a) to (e).

Even without consent, the disclosure provisions are sufficiently broad to permit a government institution to disclose information relating to drug tests in many circumstances. Subsection 8(2), however, is

permissive. It does not force government institutions to disclose. Accordingly, every government institution should focus first on the extent of the disclosure that should occur.

We recommend adding an additional safeguard to the permissive wording of subsection 8(2). In deciding whether to disclose personal information under paragraphs 8(2)(f) to (m), government institutions should consider the following factors:

- why the disclosure is necessary;
- the potential adverse consequences of the disclosure for the person to whom the information relates;
- the likelihood that the requester can and will maintain the confidentiality of the information; and
- the likelihood that the requester will use it only for the purpose for which it was originally sought.

We also recommend that government institutions which disclose personal information relating to drug tests or drug use maintain an audit trail to permit tracking the uses and further disclosures of the information. This is not a requirement of the *Privacy Act*. It may, however, help later in deciding whether the use and disclosure of such information should be restricted further.

In the workplace, what information should supervisors receive about test results? In our view, supervisors should be informed about test results only when disclosure is essential for public safety. In practice, this would mean disclosing only positive test results and, even then, in limited circumstances – for example, when the employee's drug use or impairment poses an immediate threat to safety.

Supervisors should generally be informed of positive results only after the result is confirmed and the employee has had the chance to discuss or dispute the test result with a physician. There may be rare situations of immediate risk to safety, however, that would warrant informing the supervisor before confirmatory testing is completed. The supervisor should be told of the possible unreliability of the test and should be immediately informed of the results of confirmatory testing. If the confirmatory test result is negative, the supervisor should be made to understand that the screening test result was almost certainly inaccurate and that the employee must not be penalized as a result.

Supervisors need not normally be informed about a positive test result if, for example, the employee leaves his or her position to undergo a drug rehabilitation program.

This procedure would differ somewhat for breathalyzer or blood testing for blood alcohol levels under the *Criminal Code*. The Code has established a clear set of conditions that must be met before testing occurs. The results may lead to a public criminal trial. Because the information is then public, there should be no restrictions on the supervisor acquiring this information at any time, as long as the information relates directly to an operating program or activity of the institution (section 4 of the *Privacy Act*). If, for example, the person were employed by Transport Canada

as a pilot, it may be appropriate for a supervisor to acquire information about convictions for operating a vehicle, aircraft or vessel while impaired.

Recommendation 16

Government institutions seeking to disclose personal information relating to drug testing under paragraphs 8(2)(f) to (m) should first seek the consent of the individual to whom the information relates. Government institutions need not seek the consent of the individual for disclosures under paragraphs 8(2)(a) to (e).

Recommendation 17

Where consent to the release of information cannot be or is not obtained, the conditions under which personal information can be released under paragraphs 8(2)(f) to (m) of the *Privacy Act* should be considered minimum conditions only. Government institutions considering the disclosure of personal information relating to drug testing without consent of the person involved should assess the following before deciding:

- **why the disclosure is necessary;**
- **the potential adverse consequences of the disclosure for the person to whom the information relates;**
- **the likelihood that the requester can and will maintain the confidentiality of the information; and**
- **the likelihood that the requester will use it only for the purpose for which it was originally sought.**

Recommendation 18

Government institutions disclosing personal information relating to drug tests or drug use should maintain an audit trail to permit tracking the uses and further disclosures of the information.

...

Disclosure to law enforcement agencies: Law enforcement and prosecuting agencies may be interested in drug test results. A positive test result for an illegal drug generally indicates that the person at one time possessed the drug – a possible criminal offence. This may provide agencies with leads for future investigations or prosecutions.

Law enforcement agencies should generally not be allowed access to information suggesting that a person has used illegal drugs. This would be an entirely inappropriate use of drug testing information acquired (as we recommend) only to promote safety. Only if the disclosure were authorized by specific legislation aimed at reducing safety risks should the information be disclosed to such agencies.

Testing for the simple use of or impairment by illegal drugs may one day be authorized by criminal law, as blood alcohol testing now is in relation to operating a vehicle, aircraft or vessel. If so, testing should occur only when accompanied by procedures to safeguard the interests of potential accused persons.

Recommendation 19

Information indicating that a person has used an illegal drug should not be made available to investigative or prosecuting agencies to assist in criminal investigations

or prosecutions relating to illegal drugs unless specifically authorized by legislation aimed at reducing safety risks.

...

(vii) Access to personal information kept by government institutions

Section 12 of the *Privacy Act* sets out rights of access to one's personal information kept in government files or controlled by government institutions. It also sets out procedures for requesting notations or corrections to the information.

Subsection 12(1) gives every individual who is a Canadian citizen or a permanent resident the right of access to the following:

- any personal information about the individual contained in a personal information bank (paragraph 12(1)(a); and
- any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution (paragraph 12(1)(b)).

Subsection 12(3) permits the Governor in Council to extend these access rights to individuals not referred to in subsection 12(1). In June 1983 these rights were extended to inmates of federal penitentiaries who are not Canadian citizens or permanent residents.[4]

Several sections limit individuals' rights of access in specific cases. For example, section 19 restricts access to personal information obtained in confidence from other levels of government. Information provided in confidence by a provincial government to a federal government institution cannot be disclosed.

A person granted access under paragraph 12(1)(a) to personal information that has been used, is being used or is available for use for an administrative purpose, is entitled to do the following:

- request correction of the personal information if the individual believes there is an error or omission therein (paragraph 12(2)(a));
- require that a notation be attached to the information reflecting any correction requested but not made (paragraph 12(2)(b)); and
- require that any person or body to whom such information has been disclosed for use for an administrative purpose within two years prior to the time a correction is requested or a notation is required under subsection 12(2) in respect of that information
- be notified of the correction or notation; and
- where the disclosure is to a government institution, the institution make the correction or notation on any copy of the information under its control (paragraph 12(2)(c)).

The right to request correction or require notation applies only to personal information contained in a personal information

bank (subsection 12(2)). It does not extend to personal information described in paragraph 12(1)(b).

Recommendation 8 called for retaining for a prescribed period the body samples on which drug testing is performed. At issue is whether subsection 12(2) can be interpreted to grant a person the right to have a body sample retested. Without this right, the right to request a correction or require a notation to be attached to personal information is almost meaningless; it will be the person's objection, without any technical supporting information, against the results of a "scientific" drug test.

Even if subsection 12(2) cannot be interpreted to permit a person to challenge a test result by having a sample retested, we recommend that any testing protocols developed by government permit this option.[5] Government should bear the cost of retesting.

Recommendation 20

Government testing protocols should permit the retesting of a sample if the person tested so requests. Government should bear the costs of retesting.

ENDNOTES

1. The Correctional Service Canada testing policy, for example, requires the subject to urinate while being directly observed by a member of the same sex. See Appendix A. It is also conceivable that subjects be required to remove most or all of their clothing when providing the sample, even under direct observation. A pamphlet explaining Sport Canada's testing policy, for example, depicts an almost (except for his socks) nude athlete providing a urine sample under the direct observation of another male.

2. We acknowledge, however, that there will always be claims made for exceptions. Because of the violence associated with the prison drug trade, demand reduction (for all drugs prohibited in prison) through random drug testing is arguably one way to resolve the problem. Testing, coupled with penalties, might reduce the demand for these drugs and improve the safety of the prison environment. One could also try to justify a prison testing program under the "public safety" rubric.

3. SOR/83-508.

4. SOR/83-553.

5. Correctional Service Canada, however, considers that giving an inmate a right to have a sample re-tested would make any testing program it contemplated unworkable.

PART IV
COMPLIANCE OF GOVERNMENT TESTING POLICIES WITH THE PRIVACY ACT

Introduction

Appendix A describes several drug testing programs which government institutions now operate or propose to introduce. Based on information received during this study, we have concluded that the testing policies of the Department of National Defence, Transport Canada, Correctional Service Canada and Sport Canada do not entirely satisfy the recommendations set out in this paper. Without modification, these testing policies would contravene the *Privacy Act.*

Transport Canada

In March 1990, Transport Canada produced a strategy document, *Strategy on Substance Abuse in Safety-sensitive Positions in Canadian Transportation* (the "Strategy Paper"). The document describes the department's plan to reduce substance use in the transportation sector (See Appendix A for a detailed description of the drug testing component of the strategy). The strategy was premised in part on the results of a 1989 survey conducted for the department on substance use in transportation. The department proposes to introduce legislation to implement the strategy after hearings before the Standing Committee on Transport.

The proposed testing program is wide-ranging. For positions it defines as "safety-sensitive", Transport Canada recommends random testing, testing for cause, post-accident testing (for cause), periodic testing (during medicals) and pre-employment testing. In short, it accepts almost every type of testing program.

While the *Privacy Act* does not stand in the way of all drug testing, the strategy proposed by Transport Canada extends well beyond acceptable limits. It is of course open to Parliament to override the Act. We hope, however, that Parliament will not do so, for such action might overlook the important privacy considerations involved. In addition, were Parliament to enshrine the Transport Canada policy in law, there would undoubtedly be a challenge under the *Canadian Charter of Rights and Freedoms.*

The drug testing program proposed in the Strategy Paper fails to satisfy several of the conditions identified as necessary for testing to comply with the *Privacy Act.* This conclusion is based on the following reasons:

(a) Transport Canada has not demonstrated that there is a significant prevalence of workplace drug use or impairment among those in safety-sensitive positions (recommendation 2). The Strategy Paper makes two statements about use levels, but fails to establish that a significant problem exists:

"[S]ubstance use and abuse is a problem which unfortunately exists in Canadian society - a problem which the transportation workplace has not escaped entirely." (at 1)

"The survey [of 18,000 employees in safety-sensitive positions] found that general substance use patterns are similar to those in the Canadian population overall. A small percentage of employees in safety-sensitive jobs were sometimes under the influence of alcohol or a drug while at work." (at 3)

The survey accompanying the Strategy Paper identified alcohol and hangovers as being reported to contribute most to negative effects on workers' ability to do their jobs safely. Medications (cough, cold, allergy, for example) were next in line. Street drugs were reported to be the least used of all substances at work.

(b) insufficient evidence is presented that the drug use or impairment poses a substantial threat to the health or safety of the public or other members of the group (recommendation 2).

(c) insufficient evidence is presented that the behaviour of members of the group cannot otherwise be adequately supervised to identify drug or alcohol-related impairment (recommendation 2).

(d) insufficient evidence is presented that drug testing programs can significantly reduce safety risks (recommendation 2).

(e) insufficient evidence is presented to discount relying on other less intrusive programs, such as regular medicals, education, counselling, or some combination of these, instead of drug testing, to resolve drug and alcohol-related problems in safety-sensitive positions (recommendation 2).

We are also concerned about Transport Canada's assurances that testing will be done in a way that minimizes intrusions. The Strategy Paper assures the reader of respect for the dignity of the individual being tested:

"It is essential to balance the need for substance testing against a desire to respect the rights of individuals and to treat people with substance use difficulties in a fair and humane manner. All testing will be designed in a way which minimizes intrusion and the infringement of rights to the greatest possible extent." (at 8)

"[The strategy] addresses the issue [of substance abuse in transportation] with an understanding of the paramount importance of transportation safety to Canadians and their interest in treating people fairly and minimizing intrusion in their lives." (at 10)

There can be little dignity in urinalysis as long as the subject may be required to urinate under direct observation or in private, after a thorough physical search. Transport Canada too easily glosses over the inherent intrusiveness of testing by speaking of "minimizing intrusions".

The statements contained in the Strategy Paper about the information generated by drug testing also raise concerns. The paper (p. 9) states: "*'For cause' testing in the workplace will be carried out to verify any on-the-job use [of drugs].*" Urinalysis cannot verify on-the-job use or on-the-job impairment. An accurate positive urinalysis simply indicates past use of a drug. Urinalysis cannot identify precisely when the drug was used, how much was used or what impairment, if any, flowed from the use. [1] The Strategy Paper makes the same misleading statement earlier on: "*Another way to identify on-the-job substance use is to test for the presence of drugs or alcohol in the individual.*" (p. 7)

These statements are misleading, however unintentional this may be. They seem to give urinalysis a legitimacy not borne out by scientific evidence. If urinalysis *could* detect on-the-job use (and, more important, on-the-job impairment), its utility might more easily outweigh privacy considerations. But such is not the case.

It should be emphasized that the *Privacy Act* does not stand in the way of all forms of drug testing by Transport Canada. Recommendations 2 and 3 make that clear. The need is to justify the serious intrusions represented by drug testing.

Government should not allow itself to be led into accepting such intrusions without the strongest possible evidence to justify them. It is also important that the government not allow itself to be stampeded by the wide-ranging acceptance in the United States of drug testing in government and in the transportation sector. Canada's federal government generally took a humane approach to HIV/AIDS testing, despite the influence of the United States. There is no reason why Canada should be less humane when it comes to drug testing.

In light of the lack of evidence of drug-related safety problems in safety-sensitive transportation positions and the inadequate canvassing of other less intrusive alternatives before adopting drug testing, Transport Canada has cast the net too widely. Reasonable suspicion and post-accident testing should be the focus of a revised drug testing policy in transportation.

Department of National Defence

The Department of National Defence (DND) testing policy raises several concerns. Most of these relate to whether there is in fact a problem which requires mandatory random drug testing.

The first issue is the extent of the drug problem which testing is intended to tackle. Recommendation 2 suggests that testing should occur only if there is a significant prevalence of drug use or impairment within the test group. Is there a significant prevalence within the Canadian Forces?

The DND document, *A Comprehensive Strategy on Alcohol and Drug Use Control in the Canadian Forces,* refers to studies indicating a decline in alcohol and drug use in the CF. Drug use appears to occur at only half the level of Canadian society in general. One must question, on the basis of DND's own figures, whether there is a significant prevalence of drug use or impairment within the CF.

Second, does the drug use or impairment pose a substantial threat to public safety or to the safety of CF members (recommendation 2)? The strategy document states that drug use poses a significant threat to public safety and to that of CF personnel. What evidence is there to support this statement? The Department of National Defence may perceive a threat, but government should require concrete evidence of the extent of the threat.

Is it possible to supervise adequately the behaviour of members of the CF without drug testing (recommendation 2)? If behaviour can be supervised other than by drug testing, drug testing should be rejected. Similarly, unless there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety (recommendation 2), testing should not be undertaken.

Finally, can a less intrusive program significantly reduce the risk to safety (recommendation 2)? If it can, drug testing should not be used.

There must also be concern about the variety of justifications advanced for the DND drug strategy. Public safety remains the only valid reason for implementing testing programs. Operational effectiveness and the (perhaps unattainable) goal of a substance-abuse free CF are not, in the absence of significant public safety concerns, sufficient justifications under the *Privacy Act* for drug testing.

As noted in comments about Transport Canada's policy, the *Privacy Act* does not stand in the way of all forms of drug testing. But there is, again, the need to justify the serious intrusions represented by drug testing. Government should not allow itself to be led into accepting such intrusions without the strongest possible evidence to justify them. The fact that such testing occurs in the United States military does not in itself justify testing in the CF.

Reasonable suspicion and post-accident testing should be the focus of a revised drug testing policy in the CF. If the Department of National Defence can meet the conditions set out in recommendations 2 or 3, testing would be permitted under the *Privacy Act*. Specific statutory authority for the testing should still, however, be sought.

One final comment: as with Transport Canada's testing policy, the DND strategy document assures the reader that mandatory drug testing with random elements will be introduced "with full regard for privacy and individual rights". These assurances, welcome as they are, cannot hide the fact that urinalysis is so intrusive there can therefore be little real "regard for privacy and individual rights" under such testing regimes. The strategy document too easily glosses over the inherent intrusiveness of testing.

Correctional Service Canada

The testing program instituted under section 41.1 of the *Penitentiary Regulations* has now been held by the Federal Court of Canada, Trial Division, to violate the Charter. In *Jackson v. A.G. Canada,*[2] the Court held that section 41.1 violated sections 7 and 8 of the Charter. Section 41.1 was not saved by the Charter override

provision – section 1.[3] Mr. Justice MacKay, however, restricted his conclusions to the section 41.1 testing program:

> *"My conclusion does not relate directly to the other situations that would have been included in the overall plan of the Correctional Service for urinalysis testing if that plan were implemented, i.e., random testing, testing of those with a history of involvement with drugs, and testing of those involved in community programs that provide significant contact opportunities with outsiders."* [4]

Accordingly, there is no judicial direction on the validity of other CSC testing programs.

There is reported to be substantial drug use in prisons and the trade in drugs in prisons is said to exacerbate the violence and coercion associated with an institution's atmosphere. However, we have not been made aware of conclusive evidence that the drug use or impairment pose a substantial threat to the safety of prisoners, prison staff or the public. Is it otherwise impossible to supervise prisoners adequately? Are there reasonable grounds to believe that drug testing can significantly reduce the risk to safety? Is there a practical, less intrusive alternative or combination of alternatives that would significantly reduce the risk to safety?

If, indeed, a substantial threat to safety could be demonstrated and the answers to the above questions are "no", random mandatory testing of inmates would not violate the *Privacy Act*. However, firm evidence is needed to support these answers. As well, statutory authority to test should be sought before random mandatory testing is introduced (recommendation 1).

One problem with the CSC random testing policy is its proposed restriction on the right of inmates to have their samples retested. Recommendation 20 proposes that persons be permitted to have body samples retested. Authority is found in section 12 of the *Privacy Act*. A policy which does not permit retesting violates the Act.

Other CSC testing programs may fare better under the *Privacy Act*. Testing for reasonable cause and as a condition of release for a community program might be acceptable under the *Privacy Act*, but only if the other conditions in recommendation 2 are met.

National Parole Board

Among existing drug testing programs, that of the NPB is the most easily justified as respecting the recommendations described in this document. Its testing program is not random, but based on evidence supporting a reasonable belief that the offender's history of substance abuse (which has been linked to previous offences) may continue without special monitoring. That special monitoring not only includes periodic urinalysis but may include a special condition to abstain from the use of certain intoxicants and to participate in treatment programs.

Moreover, urinalysis will only be required when necessary to reduce or manage the risk that the offender would otherwise represent and only when it is the least restrictive measure available.

While it would be desirable for NPB to obtain specific Parliamentary authority for the imposition of drug testing, section 16 of the *Parole Act* provides authority for the NPB's program and the Board should be applauded for exercising its authority in this matter with restraint and sensitivity.

Only one matter remains of some concern: the extent of the discretion left to parole officers to determine the number and timing of drug tests after the Board has authorized testing. This is a matter that we will continue to follow with the Board.

Fitness and Amateur Sport

The Office of the Privacy Commissioner has followed closely the proceedings of the Dubin Commission. It was both surprising and disappointing to note that the government's position – as expressed to Dubin by senior officials of Sport Canada – was that federally-funded athletes should be subjected to random, mandatory and unannounced urinalysis for banned substances. Testing should not, in Sport Canada's view, be confined to athletic events, but should include testing at training venues.

This position was surprising because of the government policy rejecting drug testing in the employment setting except in circumstances where there are overriding public safety concerns. It was disappointing because it appeared to accept that Canadians' offended national pride over the Ben Johnson affair was sufficient reason to trample upon the basic right to a reasonable expectation of privacy which athletes share with other Canadians.

One can hope that Mr. Justice Dubin will recognize that athletes should not be forced to abandon their *Charter* rights at the locker room door – no matter how many may be willing to do precisely that in order to compete in their sport. *Charter* rights also apply to federally-funded athletes. Like other employees, these athletes receive monthly cheques from the government for their efforts. The federal government dictates athlete drug testing policy. If those policies fail to measure up to *Charter* requirements, they will be subject to challenge even if a non-governmental agency actually conducts the tests.

Few would disagree that, should such a challenge be launched, random mandatory drug testing of athletes would be found to violate sections 7 or 8, or both, of the *Charter*. The sole matter for real debate would be whether such testing constitutes a reasonable limit on *Charter* rights "as can be demonstrably justified in a free and democratic society".

In addressing this latter question, the courts should canvass the factors contained in recommendation 2 of this report. On almost all counts, random mandatory testing of athletes would fail to measure up. Thus, not only would such a program fail to comply with the *Charter,* it would, if conducted by Sport Canada, be a violation of the *Privacy Act.*

Of particular concern is the apparent failure of the government and sport governing bodies to canvass less intrusive means of addressing the admittedly real problem of drug use in sports. For example, there has been relatively little effort to change behaviour by education. Failure to provide adequate education about the adverse health effects of some performance-enhancing substances was among the reasons why the California Supreme Court, in 1988, struck down the NCAA drug testing program.

Perhaps more important, there has been little general leadership in fostering the principle, "It's not whether you win or lose, it's how you play the game". When only the winners get the real money and the real glory, is it any wonder that athletes feel pressured to do whatever it takes to "get the edge"? Where is the virtue in attaining a drug-free sports arena by sacrificing our athletes' right to privacy? And, unless there is a virtue in it – since public safety is certainly not at risk – surely public policy should not support the quick-fix of mandatory athlete urinalysis, especially at training venues.

ENDNOTES

1. To be clear, breathalyzer testing for alcohol can indicate a level of impairment -- albeit a level of impairment presumed by law, not one confirmed by scientific evidence.

2. February 16, 1990 (unreported), at 55.

3. *Ibid.* at 55.

4. *Ibid.* at 38.

PART V
SUMMARY OF RECOMMENDATIONS

Recommendation 1

Government institutions should seek Parliamentary authority before collecting personal information through mandatory testing.

Recommendation 2

The collection of personal information through random mandatory testing of members of a group on the basis of the behaviour patterns of the group as a whole may be justifiable only if the following conditions are met:

- **there are reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group;**
- **the drug use or impairment poses a substantial threat to the safety of the public or other members of the group;**
- **the behaviour of individuals in the group cannot otherwise be adequately supervised;**
- **there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and**
- **no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.**

Recommendation 3

A person who is not a member of a group which exhibits drug-related problem behaviour might appropriately be tested if the following conditions are met:

- **there are reasonable grounds to believe that the person is using or is impaired by drugs;**
- **the drug use or impairment poses a substantial threat to the safety of those affected by the person's actions;**
- **the person's behaviour cannot otherwise be adequately supervised;**
- **there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and**
- **no practical, less intrusive alternative, such as regular medicals, education, counselling or some combination of these, would significantly reduce the risk to safety.**

Recommendation 4

Since drug testing programs designed primarily to promote efficiency, economy or honesty, or to reduce the demand for illicit drugs, would not satisfy recommendations 2 or 3, such programs would violate the *Privacy Act*.

Recommendation 5

Testing programs should not distinguish between legal and illegal drugs that can impair.

Recommendation 6

Government institutions must wherever possible collect personal information used for an administrative purpose and relating to drug use or impairment directly from the individual (that is, if the person volunteers). Collection may be in direct (that is, from other sources or without the person's consent) in the following circumstances:

- **when it is not possible to collect the information directly;**
- **when the person to whom the information relates consents to another method of collection;**
- **when the personal information may be disclosed to the institution under subsection 8(2) of the *Privacy Act*; or**
- **when direct collection might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.**

Recommendation 7

Even when subsection 5(2) of the *Privacy Act* imposes no duty on a government institution to inform about the purpose of the collection, test subjects should as a matter of policy be informed. Only if informing the test subject would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected should the purpose of the collection be withheld from the person.

Recommendation 8

Body samples and the personal information derived from those samples should be retained for the period prescribed by the *Privacy Regulations,* and be disposed of as soon as possible after the retention period has expired.

Recommendation 9

Procedures for the handling and disposal of personal information collected under the *Privacy Act* should reflect the sensitivity of the information. At a minimum, personal information relating to drug tests should be accorded physical protection at level B, as defined in the *Security Policy and Standards of the Government of Canada.*

Recommendation 10

Government institutions should not use positive urinalysis results for an administrative purpose unless the results have been supported by confirmatory testing according to accepted scientific/ medical protocols approved by National Health and Welfare.

Government institutions may use negative screening test results for an administrative purpose without conducting confirmatory testing where the screening test has been conducted according to acceptable scientific/medical protocols which are approved by National Health and Welfare from time to time.

Recommendation 11

Government institutions should seek to ensure that those interpreting negative test results do not go beyond the inferences scientifically supported by the test.

Recommendation 12

Because of the complexity of the testing process – be it urinalysis or some other process – a government-wide testing protocol should be developed. At a minimum, the protocol should establish procedures for the following:

- **sample collection, including procedures to permit the giving of samples in private, wherever possible;**
- **the appropriate screening and confirmatory tests to use for each drug being sought;**
- **threshold concentrations for each drug test (to determine when a result is "positive");**
- **chain of custody procedures to prevent tampering with or exchange (deliberate or accidental) of samples;**
- **standards for testing laboratories;**
- **the meaning of positive or negative test results; and**
- **security procedures governing the personal information relating to drug testing.**

Recommendation 13

When a person tested for a given drug may have consumed other substances which could lead to a positive test result for that drug, such information should accompany the test result. The test result should not in such circumstances be accepted as indicating that the person has used the drug being tested for.

Recommendation 14

An institution using urinalysis results for an administrative purpose should ensure that those using the results understand their meaning. A positive urinalysis result should not be used to identify present use, or past or present impairment by a drug. The institution should also ensure that those using the results understand that urinalysis cannot measure the quantity of the drug consumed.

Recommendation 15

Information generated by or relating to drug tests should be used for three purposes only, unless the person to whom the information relates consents otherwise:

- **for the purpose for which the information was obtained or compiled by the institution;**
- **for a use consistent with that purpose; or**
- **for a purpose for which the information may be disclosed to the institution under subsection 8(2).**

The government institution seeking the consent of the individual for additional uses should fully explain the consequences of the additional uses. It should avoid coercing the person to consent.

Recommendation 16

Government institutions seeking to disclose personal information relating to drug testing under paragraphs 8(2)(f) to (m) should first seek the consent of the individual to whom the information relates. Government institutions need not seek the consent of the individual for disclosures under paragraphs 8(2)(a) to (e).

Recommendation 17

Where consent to the release of information cannot be or is not obtained, the conditions under which personal information can be released under paragraphs 8(2)(f) to (m) of the *Privacy Act* should be considered minimum conditions only. Government institutions considering the disclosure of personal information relating to drug testing without consent of the person involved should assess the following before deciding:

- **why the disclosure is necessary;**
- **the potential adverse consequences of the disclosure for the person to whom the information relates;**
- **the likelihood that the requester can and will maintain the confidentiality of the information; and**
- **the likelihood that the requester will use it only for the purpose for which it was originally sought.**

Recommendation 18

Government institutions disclosing personal information relating to drug tests or drug use should maintain an audit trail to permit tracking the uses and further disclosures of the information.

Recommendation 19

Information indicating that a person has used an illegal drug should not be made available to investigative or prosecuting agencies to assist in criminal investigations or prosecutions relating to illegal drugs unless specifically authorized by legislation aimed at reducing safety risks.

Recommendation 20

Government testing protocols should permit the retesting of a sample if the person tested so requests. Government should bear the costs of retesting.

APPENDIX A
GOVERNMENT AND DEPARTMENTAL POLICIES ON DRUG TESTING

(a) Federal Government Statements on Drug Testing

Prior to the recently announced Transport Canada and Department of National Defence drug testing strategies, the government of Canada had issued two significant statements dealing with drug testing as part of its overall approach to drug use in Canada.

One statement responded to recommendations of the Report of the Standing Committee on National Health and Welfare, *Booze, Pills and Dope: Reducing Substance Abuse in Canada.*[1] The Standing Committee had examined several aspects of drug abuse in Canada. Among them was the issue of employee and job applicant drug testing. The Standing Committee would accept only one justification for drug testing:

> *"The issue of mandatory employee drug testing is a public health and safety issue **only** and must be so treated.*
>
> *It is the responsibility of the employer to weigh carefully the employment suitability of probationary employees, including careful monitoring of behaviour which may indicate the need for drug testing. Mass or random screening of job applicants, however, is neither sensible nor acceptable."*[2]

The Report made the following recommendations relating to employee and job applicant testing:

"Recommendation 15

The Standing Committee recommends that employers not introduce mass or random drug screening of either job applicants or employees. Only in exceptional cases in which drug use by employees constitutes a real risk to safety, the Standing Committee recommends that drug screening may be introduced under the following conditions:

(i) there must be cause, i.e., the employee must have shown evidence of impairment or of performance difficulties;

(ii) the testing procedure must provide a secure chain of evidence to ensure samples have not been tampered with or unintentionally altered;

(iii) the specimen must be collected in a manner which protects the privacy and dignity of the individual;

(iv) all positive test results must be confirmed by gas chromatography/ mass spectrometry, or tests of equal precision and specificity;

(v) testing must be used to assist the employee in seeking appropriate treatment for drug abuse where warranted; test results should not be used as evidence in criminal proceedings;

(vi) results of positive tests and confirmations should be conveyed to a licensed medical practitioner acceptable to both the employee and the employer. The employee will be given the opportunity to meet with the medical practitioner or to present evidence with regard to the positive finding before the medical practitioner recommends a course of action to the employee and the employer;

(vii) any limited drug testing which may be introduced must include screening for alcohol abuse.

Recommendation 16

The Standing Committee recommends:

(i) that the policy proposed in recommendation 15 be immediately implemented by appropriate methods for all employees of the federal government, its Crown corporations, its agencies boards and commissions; and

(ii) that the Government of Canada consider legislation to limit and control mandatory drug screening in the private sector." [3]

The Report did not address the issue of testing government clients or the general public.

The government of Canada response to the Report's recommendations on drug screening was issued in March, 1988:

"The federal government has concluded that across-the-board, mandatory drug testing will not constitute part of the National Drug Strategy.

The federal government recognizes, however, that there may be exceptional circumstances where overriding public safety concerns may necessitate consideration of testing." [4]

These statements were made in response to the Standing Committee's recommendations on employee or job applicant testing. Whether they were intended to address testing of government "clients" (inmates, parolees, athletes, other recipients of government benefits) we do not know. In this matter, the position of the federal government needs further development.

The federal government's response continued:

"In February [1988], the Department of National Health and Welfare sponsored a nationwide Consultation on Substance Abuse and the Workplace involving participation from management, labour, the health professions and other interested parties.

...

Some participants in the Consultation expressed an interest in, or had instituted, drug testing in the workplace. Those who advocated testing cited public safety concerns and problems with identifying a core group of substance abusers.

Many participants had either serious concerns about drug testing, or were completely opposed to it. They emphasized the importance of maintaining management-labour trust in the workplace, the intrusiveness of drug testing, the lack of evidence connecting substance abuse with safety, the risks to human rights, the potential for abuse of testing procedures and the availability of other strategies to protect workplace and public safety.

Participants at the Consultation went on to emphasize the importance of joint management-labour efforts to reduce substance abuse in the workplace. They were generally optimistic about the potential for building upon the foundation of existing employee assistance programs and extending them to provide benefits to the employee's family and the community as a whole." [5]

On July 20, 1988, the Minister of National Health and Welfare announced the federal government's intention to strengthen employee assistance programs (EAPs) in workplaces under federal jurisdiction. This policy would address further the problem of alcohol and drug abuse in the workplace. The Minister made the announcement in response to the February consultation mentioned above.

The announcement stressed the government's position that drug testing in the workplace, unless voluntary, was unwarranted. The Minister said, "We are pursuing solutions through prevention, treatment and rehabilitation programs to the problems associated with workplace substance abuse. The government favours this approach over drug testing which would not generally be appropriate for Canadian workers."

The announcement, however, did leave the door partly ajar. It stated that "[t]here may be exceptional circumstances where overriding public safety concerns may necessitate consideration of testing".[6] The announcement referred to a study of substance abuse being undertaken by the Minister of Transport to determine whether a problem exists in the transportation sector and to identify appropriate steps to take.[7] Indeed, since then, the door has been pushed wide open with the announcement of testing strategies by Transport Canada and the Department of National Defence that go significantly beyond the previous government policy and Standing Committee recommendations.

(b) Approaches by Government Institutions to Drug Testing

In preparing the present discussion paper, this office consulted several departments and agencies about their positions on drug testing.

Some institutions were consulted because of reports that they were considering testing (Transport Canada); others because they appeared most likely (because of the nature of their mandate) to have considered drug testing. Those in the latter group included the Canadian Security Intelligence Service (CSIS) (because of the national security implications), the Department of National Defence (because of national security and public safety considerations), Correctional Service Canada and the National Parole Board (because of the inmate clients, some

of whom may be or may have been in prison because of drug-related crimes), and the Royal Canadian Mounted Police and Customs and Excise (because of the possibility of corruption by drug traffickers).

Treasury Board was also consulted. As the public service employer, Treasury Board would be an important player in any process that involves or rejects the testing of public servants. Finally, the Canadian Human Rights Commission and the Department of Justice were consulted to understand better other legal and human rights aspects of the testing issue.

Some institutions had contemplated drug testing, but dismissed it as unnecessary or inappropriate. Others were considering limited or widespread testing.

In still others, however, there was not only an interest in testing, but also the actual occurrence of testing – the Canadian Forces, the National Parole Board and Correctional Service Canada. And, of course, Transport Canada and the Department of National Defence both unveiled their wide-ranging testing strategies in March. The policy of Sport Canada encourages drug testing of athletes, although Sport Canada itself does not supervise or conduct tests.

Outlined below are the various departmental drug testing policies and procedures as explained to this office.

Department of National Defence

(i) Canadian Forces (CF)

The use of weapons, heavy vehicles, explosives and aircraft by CF members impaired by drugs could pose a threat to individual or public safety. The CF looks at drug testing as a deterrent. According to CF representatives, testing in the U.S. military has promoted a remarkable reduction in illicit drug use.

The CF is concerned about the possible imposition by the United States of drug testing requirements (the United States has already imposed HIV testing requirements for Canadians taking certain military training in the U.S.).[8] This would affect integrated operations and might also affect CF personnel taking courses in the United States. The CF is also concerned that testing requirements might be imposed by the European Community and the UN. The CF had over 6,000 personnel stationed in 40 countries as of the end of September, 1989.

Before adopting its current testing strategy, the Department of National Defence did not have a forces-wide testing policy. It has, however, operated a limited testing program of long standing within Air Command. The program operates exclusively in support of flight safety and applies only to military members, not to civilian personnel.

Under this program, testing is performed on service personnel involved in an accident or "aeromedical" occurrence. Testing is also undertaken when there are reasonable and probable grounds to believe that a service member involved in flying operations is using drugs.

This testing aims at identifying any abnormal biochemical or toxicological compounds and normally includes testing for alcohol and the common drugs of abuse. The department recognizes that, except for alcohol testing, there is no reliable means of establishing impairment by drugs on the basis of a forensic test.

Testing procedures are set out in Canadian Forces Medical Orders and in an Air Command Order. Sampling is conducted using Base Hospital facilities, and is a normal part of a Board of Inquiry or investigation into an accident or incident involving flight safety. Where necessary, forensic laboratory assistance is available from the Defence and Civil Institute of Environmental Medicine.

Correspondence from the department assured this office that "*[a]ppropriate attention is paid to all the general and legal rules on privacy*" (the letter did not expand on this statement). Urine samples are collected under the same conditions as those required for a medical procedure. Information concerning the identity of the donor and results of tests are protected.

Test results are used, with other evidence, to establish causes of accidents or incidents in flying operations. Positive test results may be used in administrative or disciplinary proceedings, in accordance with prevailing legal advice. Test results are disclosed only on a need-to-know basis when staff action is required.

Few problems have been experienced with testing. If a service member objects, legal advice is sought before proceeding. Each case is dealt with on an individual basis.

Any military member who believes he or she has been subjected to unfair treatment has the right to appeal through established "redress of grievance" proceedings. This process allows a member to press a grievance through increasingly higher levels of review within the Canadian Forces, then to the Minister and finally to the Governor in Council. Members are granted access to their own information as requested under section 12 of the *Privacy Act.*

Evolving Testing Strategy: In 1986 the Canadian Forces announced a three-point program to deal with drug abuse. The program had as its aims: to improve education on drug abuse, to enhance drug enforcement and deterrence and to "look at" the introduction of mandatory drug testing with random elements.

In March 1990, the Minister of National Defence announced a comprehensive strategy on alcohol and drug use control in the Canadian Forces. The Minister indicated his intention to implement mandatory urinalysis within the next few months as a necessary element in the overall program designed to reduce drug abuse in the CF. Unlike the Transport Canada testing strategy, there is no intention to seek supporting legislation or Parliamentary approval for the Canadian Forces testing program. A document, *A Comprehensive Strategy on Alcohol and Drug Use Control in the Canadian Forces* (called the "1990 Strategy Document" here), described the strategy, including elements such as education and rehabilitation, in some detail.

The Department of National Defence has carried out a number of internal studies in recent years on alcohol and drug use. A 1989 survey indicated that alcohol and drug use are on the decline in the CF. Heavy drinkers – those who have on average three or more drinks a day – declined from 28 per cent in 1982 to 11 per cent in 1989. Members who consumed more than five drinks per day declined from 11 per cent to 3 per cent. The same survey reported that 6.4 per cent of service members reported using "drugs" (whether this meant legal or illegal drugs is not clear, although the Minister's announcement of the strategy referred to "illicit" drugs) in the past year (1990 Strategy Document at pp. 4-5). A document containing questions and answers relating to the drug strategy stated that "our best estimate, based on several studies, is that the number of illegal drug users [in the CF] is about 3-7 per cent".

The strategy announced by the Minister describes itself as being based on the following principles: safety, operational effectiveness, individual rights and privacy and a substance-abuse free Canadian Forces. About drug testing, the strategy document states:

> *"[M]andatory drug testing with random elements will be introduced in the Canadian Forces, with full regard for privacy and individual rights. Testing will be weighted towards personnel in operational and safety-sensitive positions. DND will also be testing for:*
>
> - *cause;*
> - *post-accident investigation; and*
> - *anonymous testing for data collection purposes.*
>
> *The bottom line is safety, and drug testing will help the Canadian Forces create a substance-abuse free environment for CF personnel to carry out their often difficult and demanding duties." (at 6)*

The Minister's March 28 statement identified similar situations where testing will occur:

- for cause;
- as part of an accident or incident investigation;
- during a period of probation following a positive drug test [this type of testing program was not mentioned in the Strategy Document]; and
- for the purposes of anonymous samples for data collection.

All ranks and occupations, including full-time reservists, may be subject to random testing. Random testing, however, will be weighted towards service members engaged in safety-sensitive occupations or in trades in occupational units such as ships, air squadrons or army field units. It appears that other forms of testing (for example, post-accident) will not be weighted in such a fashion. They will apply to all segments of the CF.

The Minister's March statement also referred to privacy protection: *"My Department will ensure the rights and privacy of its members are given the utmost consideration."* Later in the statement, the Minister said: *"[W]e will ensure it [drug*

testing] is a balanced program which will be introduced in a sensitive and humane way so as to respect individual rights and privacy."

(ii) Department of National Defence

There is no compulsory testing program for civilian Department of National Defence employees. While they would generally be dealt with like other public servants, security considerations may come into play in deciding whether to test.

Transport Canada

As noted and discussed earlier, the Minister of Transport released a strategy paper in March 1990 on substance use in safety-sensitive positions in the federal transportation sector (including the federally-regulated private sector). Until then, the official policy of the federal government concerning workplace testing guided Transport Canada. No urinalysis testing of Transport Canada employees took place (although testing for impairment might have occurred under the *Criminal Code).*

The paper, *Strategy on Substance Use in Safety-sensitive positions in Canadian Transportation* (the Strategy Paper here), has been referred to the Standing Committee on Transport for review. The Minister of Transport intends to introduce legislation to implement the strategy.

The Strategy Paper justified the introduction of testing and other measures designed to reduce substance use as follows:

"[S]ubstance use and abuse is a problem which unfortunately exists in Canadian society - a problem which the transportation workplace has not escaped entirely. (at 1)

"The survey [of 18,000 employees in safety-sensitive positions] found that general substance use patterns are similar to those in the Canadian population overall. A small percentage of employees in safety-sensitive jobs were sometimes under the influence of alcohol or a drug while at work. The most widely used substances were alcohol, followed by medications prescribed by a physician or sold over the counter. Considerably lower rates of use were reported for illicit drugs, the most widely used being cannabis." (at 3)

The Strategy Paper addresses the use of legal and illegal substances:

"Under the strategy, there are various circumstances in which employers will be required to test employees in safety-sensitive positions:

(1) Post Accident Testing

Testing will be mandatory where a person in a safety-sensitive position has caused or contributed to an accident causing death, injury or significant damage to property or the environment. It is in the interest of the public and the transportation industry to establish the possible contributing role of alcohol or drugs, if any, in such accidents.

(2) Periodic Testing

Testing will be added to the medical examinations required now for many employees in safety-sensitive positions with physicians designated to perform the exams making use of the employer's testing procedures and facilities. In this way, usage that might not be discovered in routine examination procedures will be identified.

(3) Pre-Employment Testing

Testing before employment begins will be made a condition of an employer's confirming either a new or a transferred employee in a safety-sensitive position. Tests, therefore, will not be administered to all job applicants or candidates for transfer, but only to those who have received a job offer, subject to the test result. Over time, this testing will help to secure a workforce in the transportation safety sector which is as free as possible of problems associated with substance use or abuse.

(4) "For Cause" Testing

"For cause" testing in the workplace will be carried out to verify any on-the-job use. The grounds for testing will differ from case to case but will generally pertain to an individual's behaviour or performance at the time. At least two people (one of whom is the supervisor) will need to conclude that there is sufficient reason to test.

(5) Random

Tests having a random element will also be carried out, with all employees in safety-sensitive positions facing an equal probability of being chosen for a test at any time while on duty. This form of testing will provide a strong deterrent against use because employees who are required to have a test will not have advance notice of it.

In summary, under the strategy legislative authority will be sought for mandatory testing after an accident, as part of a required medical examination, as a condition of confirming a new or transferred employee in a safety-sensitive position, "for cause" and under a program having a random element in the workplace. This approach will expose existing use in the transportation safety environment because suspected use can be confirmed by a positive test result. Additionally, the testing program can deter future use because all employees will know that the chances of identification are high."

The Strategy Paper would require employees in safety-sensitive positions who test positive for alcohol or drugs to be removed from those positions. Reinstatement would only be possible on the recommendation of a counsellor or health professional to whom the employee was referred under the employer's EAP. Persons who test positive would be prevented from being confirmed in safety-sensitive positions.

The Strategy Paper defines "safety-sensitive positions in transportation" as follows:

"Positions considered in the surveys of substance use carried out for Transport Canada to have direct impact on either the health, safety or security of the public or of persons who work in the transportation industry, where there is a potential risk of loss of life, injury or property damage. Direct impact was considered to mean engagement in the operation, navigation, repair or inspection of vehicles, and security control."

It identifies the following positions as "safety-sensitive":

Aviation
- *flight crews*
- *flight attendants*
- *aircraft maintenance engineers, mechanics and technicians*
- *inspectors and examiners*
- *operations managers/dispatchers*

Airports
- *airside drivers*
- *security screeners*
- *security guards*

Marine
- *ships crews*
- *shore-based*

Surface
- *truck drivers (minimum 12,000 kg. weight and/or three axle)*
- *bus drivers (excluding municipal, school bus drivers)*
- *railway operation/maintenance employees*
- *maintenance inspectors.*

The Strategy Paper states that the dignity of the individual being tested will be respected:

"It is essential to balance the need for substance testing against a desire to respect the rights of individuals and to treat people with substance use difficulties in a fair and humane manner. All testing will be designed in a way which minimizes intrusion and the infringement of rights to the greatest possible extent." (at 8)

"[The strategy] addresses the issue [of substance abuse in transportation] with an understanding of the paramount importance of transportation safety to Canadians and their interest in treating people fairly and minimizing intrusion in their lives." (at 10)

The Transport Canada testing strategy is similar to a United States transportation testing program. Nowhere, however, does the Strategy Paper indicate if the decision to adopt testing programs was influenced by the American model.

The Impact on Canada of U.S. Department of Transportation Regulations

Under the United States Drug Strategy, the U.S. Department of Transportation has begun a program to drug test all its employees in so-called safety-sensitive positions. It has now introduced regulations to require private sector companies to institute similar programs for their own employees. The "Final Rules" requiring drug testing for the motor carrier, rail, marine, aviation and pipeline industries could apply, in varying degrees, to Canadian companies operating in the United States. Some companies

servicing American transportation companies in Canada, such as aviation maintenance companies, could also be affected.

Application of United States laws to Canadian industry has always concerned the Canadian government. The application of the U.S. Final Rules is not extraterritorial as such. The practical application, however, is extraterritorial: Canadian companies would have to implement parts of the U.S. program in Canada to do business in the United States or to do business with American carriers in Canada.

Several countries, including Canada, made representations to the United States concerning the impact of the Final Rules. The United States then amended them to clarify that they will not apply where compliance would violate foreign laws or policies. Foreign-based personnel (including Canadians) would be subject to testing beginning January 1, 1991. On December 27, 1989, the deadline was extended until January 2, 1992.

The U.S. Final Rules apply to different sectors of Canadian transportation as follows (Canadians would be responsible for implementing their own testing programs to comply.)

Aviation

The U.S. Final Rules will not apply to Canadian flight crews or attendants of Canadian civil aircraft operating into the United States. Also exempted are various forms of "specialty services" and general aviation.

Foreign government employees are not covered by the Final Rules. Accordingly, the Rules do not apply to Canadian dispatchers, air traffic controllers and flight service system or radio operators.

Canadian domiciled aviation maintenance companies conducting work on American carriers are subject to all forms of testing – random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty. Aviation security and screening personnel are also subject to all forms of testing.

Those involved in aircraft fuelling or manufacturing of aircraft and parts are not subject to the Rules. Companies that fuel or manufacture aircraft and also provide maintenance, however, are covered by the Rules. Emergency maintenance personnel are not covered.

Motor Carriers

Canadian truckers and bus companies operating into the United States would be subject to all forms of testing – random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty.

Marine

The Rules would affect three sectors of marine transportation: pilots, foreign vessels and mobile offshore drilling units (MODUs).

Canadian pilots on U.S. vessels in U.S. waters must comply with all drug and alcohol testing requirements. Canadian pilots on Canadian or foreign vessels

involved in accidents in U.S. waters are subject to post-accident drug and alcohol testing.

All crew members identified as having been involved in accidents relating to foreign vessels in United States waters will be subject to post-accident testing. Since the U.S. Department of Transport defines a mobile offshore drilling unit (MODU) as a vessel, the testing rules that apply to foreign vessels will also apply to foreign MODUs.

Canadians on U.S. MODUs in U.S. waters are subject to all forms of testing – random, for cause, pre-employment, post-accident, during periodic medicals and on return to duty. Canadian MODUs operating in Canadian waters would be subject to Canadian laws and practices.

Rail

The Rail Rule applies to "hours of service" employees operating into United States territory. Post-accident, reasonable cause and pre-employment testing already apply to Canadian rail operators in the United States. The current Rule would expand testing to include random and return to duty testing.

Pipeline

The Rules would cover Canadian employees operating into the United States.

National Parole Board

Section 16 of the *Parole Act* allows the National Parole Board (NPB) to impose any terms or conditions it considers reasonable when releasing a person on parole, including day parole. It may also impose any terms and conditions it considers reasonable in respect of an inmate subject to mandatory supervision.

The NPB may occasionally impose urinalysis as a condition of release on parole or mandatory supervision. This condition could be imposed with a condition to abstain from alcohol and non-prescribed drugs. The NPB states that, in many cases with a demonstrated history of substance abuse, this combination of conditions would greatly control the risk to society and aid the offender's reintegration. Correctional Service Canada supervises the actual testing.[9]

Those released on mandatory supervision, but not detained as dangerous inmates, are viewed by the NPB as among the most difficult offenders with which to deal. The NPB's statutory commitment to the assessment of risk and protection of society has resulted in parole being refused. These inmates have been kept in prison until the last possible moment. Drug testing may be one way of reducing the risk that they will commit offences (especially since as many as 60-70 per cent of those in prison were on intoxicants at the time of their offence).

The NPB representatives contacted by this office did not know how many times urinalysis had been imposed as a condition of release. Of the several thousand (perhaps 8,000-9,000) releases on parole annually, drug testing would be imposed in only a few cases. Some regions of the NPB seem to apply the condition more than others.

The NPB has developed guidelines on imposing urinalysis as a condition of release. Such a condition would normally be imposed only where necessary to reduce or manage the risk that the offender would otherwise represent, where it is the least restrictive measure available and where there is reason to believe that the offender's history of substance abuse which has been linked to previous offences may continue without this condition.

The NPB is concerned about the impact of the *Charter* on testing programs and is also looking for guidance from two cases involving Correctional Service Canada (*Jackson* and *Dion*) which are before the courts. (*Jackson* has since been decided).

One NPB representative suggested that it might be unwise for the NPB to set too many parameters on the type of testing – for example, random or weekly. This decision would best be left to the parole officer (but only if the NPB initially makes the order for testing). Positive test results would be reported to the NPB. The NPB would then determine whether to revoke parole or restructure the conditions of release.

NPB representatives suggested viewing testing in this light: testing may be the least restrictive option for dealing with the offender. The alternative, with parole and mandatory supervision, may be to keep the offender in custody.

Correctional Service Canada (CSC)

(i) CSC Employees

CSC does not test its employees and no testing program is contemplated.

(ii) Inmates

In 1985, the *Penitentiary Service Regulations* were amended.[10] Sections 39(i.1) and 41.1 were added to provide authority to CSC to conduct "for cause" urine tests. Testing could be ordered if a member of the service considered a urine sample necessary to confirm the suspected presence of an intoxicant in the body of an inmate. CSC intended to introduce the random testing program initially in two institutions – one in Quebec and one in Ontario.

Also in 1985, a random testing program was to begin. The program never started, as a Quebec inmate (the *Dion* case) obtained an injunction in 1985 that prevented the ordering of a urine sample. The Quebec Superior Court found that the program infringed the *Charter*. CSC is awaiting the outcome of an appeal before taking further action on the random testing program. It is also awaiting the decision in an Ontario case (*Jackson*) heard by the Federal Court, Trial Division in March, 1989 (a decision was rendered in the *Jackson* case on February 16, 1990).

The random testing program would test five per cent of the inmate population per month. The list of those to be tested would be generated by computer to avoid arbitrariness and the possibility of corrections officers using testing to harass certain inmates. Inmates who tested positive could be subjected to disciplinary measures – transfers or restrictions on family visits, for example.

Drugs pose a particular problem in prisons because of the concentration of drug traffickers. These traffickers already have established networks of supply. Adding to the problem is the large number of drug users in prison (about 70 per cent of inmates have used drugs within the past year, according to CSC officials) and the number of inmates prone to violence. Drug use within prisons therefore has a significantly different character than drug use in society in general.

One purpose of the CSC random testing program was to reduce the demand for drugs in the prison system, in turn reducing the incentive to market drugs and reducing the violence associated with the drug market. It would also reduce pressures on inmates to bring drugs into prisons when returning from community programs or leave. The random testing program would be directed at casual users – the majority of drug users within institutions.

The random testing program could also identify those who need treatment. Finally, it would ensure that Correctional Service Canada offered inmates and staff a safer environment in which to live or work.

While the random testing program does not operate at present, CSC does now operate three other testing programs:

Individualized suspicion: Testing will occur where it is suspected that an inmate is using drugs.

National Parole Board requests: CSC will test when requested to do so by the National Parole Board. CSC officials estimated that less than ten such tests had been conducted in a recent three month period.

Testing as a condition of access to community programs: Inmates who have a history of drug use may wish to take part in a community program. These inmates must give a clean urine sample each month for three months before starting the community program.

The mechanics of the CSC testing process were described to the Privacy Commissioner's office as follows:

> *"[I]nmates identified for testing are advised in writing of the requirement to submit a urine sample. An inmate is expected to provide a sample normally within two hours of notification, which time period may be extended if necessary. Inmates provide the urine sample in a room which affords a maximum of privacy. The voiding of urine is done under direct observation by staff of the same sex as the inmate. Direct observation is necessary in order to avoid falsification of the sample, such as*
>
> *(i) adding substances to the sample such as ammonia or bleach which may be hidden under an inmate's fingernails;*
>
> *(ii) substituting a drug free urine sample which is concealed in or on the inmate's body; and*

(iii) diluting or replacing the sample with another substance such as water, orange soda, tea or apple juice which has been hidden in or on the inmate's body.

In the experience of the CSC and others, direct observation is the most acceptable method of obtaining a valid sample. Other methods such as body cavity searches or strip searches could be used to prevent falsification but they are far more intrusive.

After voiding, the inmate gives the urine sample to the staff, who, in the inmate's presence, seals the urine container using a pre-numbered seal and immediately affixes a label which specifies the date and time of collection. The staff initials and records this information on a chain of custody form. The inmate is then asked to sign a consent form certifying it is his urine sample.

The sealed sample container is sent to the testing laboratory in a secured, sealed box. When the container is received at the laboratory, the condition of the seal is checked as well as the information on the form and label. An internal chain of custody form is then generated and signed by the technician initially handling the sample.

All the testing takes place in two rooms of the laboratory which are separated from the rest of the lab and which are secured by cipher locks. Only four authorized staff have access to these areas and when not occupied, [the areas] are protected by a motion detector. The initial screening test is carried out in one area and the confirmatory test in the other area. A locked refrigerator is used for storage of the samples during processing, and a locked freezer for the long term. The testing is done by qualified and designated laboratory personnel.

The internal laboratory procedures are designed to ensure that the sample received is properly sealed and identified, that the testing procedures and identification of the samples and sample results are properly recorded and reviewed. The identity of the inmate is never known to the laboratory.

The testing laboratory used by CSC has been evaluated by a group of experts.... In addition to evaluation, a quality assurance program for the lab has been established to ensure that it maintains the collection and testing standards."

CSC estimates that, if random testing is approved, about 95 per cent of all inmate drug testing will be random. The other five per cent will consist of testing in the three circumstances outlined above.

The testing procedures used by CSC for its own purposes and those used by CSC to test on behalf of the NPB are almost identical. CSC testing differs only in that the sample collection, labelling and packaging take place in the institution. Collection of samples of persons outside institutions (for example, parolees) is done by contract clinics across Canada. All samples are sent to the same laboratory for analysis. The same testing process is used for all samples. An EMIT screening test is used first. If the test

result is positive, a confirmatory test, the GC/MS, is used. A positive test result after confirmatory testing is considered valid.

Before inmate samples are sent to the laboratory, officials check with the institution hospital to determine if the inmate had been given medication that might affect test results.

Test results are sent to an institution's urinalysis coordinator. They are also placed in the inmate's medical and case file. Caseworkers and the institutional management team (correctional worker responsible for the inmate, a psychologist and the warden or deputy warden) all have access to the case file. Only health care personnel have access to the medical file.

Urine samples are frozen and kept up to one year to permit a challenge to the test results. There would be no procedure, however, for inmates tested under the random testing program to challenge test results.

Canadian Security Intelligence Service

The Canadian Security Intelligence Service (CSIS) has two concerns stemming from drug (and alcohol) use: long term security and suitability of the individual for work with CSIS.

CSIS does not conduct drug testing of applicants or employees. It has no plans to do so. This policy has been in effect since its recruiting and personnel standards were first established (late 1984 or early 1985) with the creation of CSIS.

CSIS senior management has a policy on drug use for applicants. It is explained to applicants during interviews.

The CSIS administration manual contains the following statement:

> *"SUBJECT: SUITABILITY FOR EMPLOYMENT: ABUSE OR ILLEGAL USE OF SUBSTANCES*
>
> *1. This bulletin contains guidelines for assessing applicants whose use of illegal or dependency-causing substances may affect their suitability for employment with the Service.*
>
> *2. An applicant is considered unsuitable for employment with the Service where there are reasonable grounds to believe the applicant will, after engagement by the Service, engage in either of the following:*
>
> *a. Illegal use or possession of any of the substances listed in the Narcotic Control Act or in Schedules G and H of the Food and Drugs Act.*
>
> *b. Use of substances that may have an adverse effect on his/her performance or conduct.*
>
> *3. The Resourcing Officer shall normally reject an application for employment if the applicant has engaged in frequent or habitual use of substances as described*

in 2.a. or 2.b. or has engaged in such use during the year preceding employment with the Service.

a. Exceptions to 3. above may be referred to the Director General, Personnel Services (DG/HPS) for decision."

Although CSIS has considered the drug testing of applicants, it rejected the program as unnecessary, given the thoroughness of the security and suitability investigations that precede employment. These investigations would likely uncover any unacceptable drug use.

Self-identification is the preferred method for CSIS to learn of drug use. If the applicant does not admit drug use, but the suitability investigation discloses drug use, this suggests dishonesty and unsuitability for employment with CSIS.

There is no written policy for current employees dealing specifically with drug use. There is, however, a discipline code which could apply.

If an allegation were made that an employee used illicit drugs (or had problems with legal drugs, such as alcohol), CSIS internal security would assess the seriousness of the problem and any threat to security. (As with applicants, there is no need to test, as CSIS has at its disposal an effective way to "surveil" employees. Other government departments and agencies may not.) The employee might be interviewed about the allegation. The primary concern of CSIS is to get an honest answer. A dishonest answer suggests the potential for further dishonesty. This in turn suggests a security risk or unsuitability for working with CSIS.

CSIS was aware of no cases of employee drug problems. Applicants with drug problems would not be hired in the first place. A number of applicants have been rejected because of long term drug use; others have been deferred for up to one year.

CSIS has identified some problems with alcohol use. CSIS has its own employee assistance program (EAP) to help employees with personal problems. It also contracts out part of this program because some employees resist the idea of an internal EAP program. They worry about information circulating within CSIS.

The FBI and the CIA both have drug testing programs. The FBI program has been in place since President Reagan issued his 1986 executive order requiring drug testing in the United States federal workplace. It was not known how long the CIA policy had been in place. CSIS is aware of no attempts by these agencies to press their counterparts in Canada to perform drug tests. According to CSIS, none of its personnel are sent to the United States for training. The issue of testing as a condition of being sent for training has therefore not arisen.

Canadian Human Rights Commission

In November 1987 the Canadian Human Rights Commission produced a policy on drug testing. The full text of the policy (except for footnotes) follows:

"Canadian Human Rights Commission Drug Testing Policy

I. INTRODUCTION

Employment related drug testing, recent to Canada, is giving rise to controversy on social, moral, legal and scientific levels. Such questions as whether drug testing should be done, what test should be used and what action should be taken as the results of the test are fundamental to this controversy.

While the debate resulting from this controversy often focuses on the effect of drug testing on drug dependent individuals, drug test samples may also be used to test for pregnancy or to test for disabilities other than drug dependency, such as epilepsy and diabetes. Drug testing, therefore, has the potential to affect more than just the drug dependent individual.

Drug testing has already been implemented in rail and other industries in Canada and the Commission has received complaints as a result of employees being treated adversely because of a "positive" drug test result. A policy on drug testing is therefore essential.

This paper examines, first, the grounds of discrimination that may be raised in complaints concerning drug testing and, second, the bona fide occupational requirement policy as it relates to the issue.

II. POTENTIAL GROUNDS OF DISCRIMINATION

Although the Canadian Human Rights Act does not specifically prohibit drug testing, the use of "positive" results from those tests may be considered a discriminatory practice.

The question that must be asked then is: on what grounds, if any, can these complaints be considered? This section considers the question.

a) Complaints Filed on the Ground of Disability

i) Drug Dependence

A disability, as defined in the Act, includes previous or existing dependence on alcohol or a drug. As there is no consensus in the occupational health field as to what constitutes drug dependence, the Commission believes that it is sufficient for the complainant to merely affirm drug dependency for a ground to be established.

ii) Perceived Drug Dependence

A complainant may, in fact, not be drug dependent and still file a complaint if there is an allegation that differential treatment resulted from the employer's presumption of drug dependency.

And, in the absence of compelling evidence to the contrary, when an individual is treated adversely as the result of a "positive" test, it may be presumed that the employer perceived the individual as drug dependent. This is because to do otherwise would be to seriously limit the application of the Act

to this issue and would be inconsistent with the Courts' instruction to interpret the Act broadly.

iii) Other Disabilities

Samples from drug tests might be used to test for conditions other than drug dependency, such as epilepsy, venereal disease, diabetes and various other mental and physical conditions. Such use may result in complaints of discrimination on the basis of disability.

b) Complaints Filed On The Ground Of Sex

Samples from drug tests may also be used to test for pregnancy. Such use may result in complaints of discrimination on the basis of sex.

c) Complaints Filed On The Ground Of Age

A 1984 Addiction Research Foundation Survey indicated the majority of drug users are between 18 to 29 years of age. Mandatory drug testing would have an adverse effect on this group as it would eliminate a large number of young candidates from employment, a group that is already suffering from high unemployment.

d) Complaints Filed On The Ground Of Race

Drug testing can have an adverse effect on visible minorities with higher levels of melanin pigment since it is chemically similar to the active ingredient in marijuana.

The Commission will deal with complaints where individuals allege discrimination on the basis of disability, sex, age or race as a result of a "positive" drug test.

III: THE BONA FIDE OCCUPATIONAL REQUIREMENT (BFOR)

a) Criteria For Establishing A BFOR

The Canadian Human Rights Act provides that a practice is not discriminatory if it is based on a bona fide occupational requirement. The Canadian Human Rights Commission has developed criteria setting out three requisite elements to establish a BFOR. These elements are:

1)the employer must establish that the practice is relevant in determining whether the individual has the capacity to perform the essential components of the job safely, efficiently and reliably;

2)the employer must validly, reliably and accurately assess the particular individual's capacity to perform safely, efficiently and reliably, and usually do so on an individual basis; and

3)the employer must, where reasonably possible, avoid any discriminatory effect on the individual (i.e. reasonably accommodate the individual).

All three elements must be present to establish the BFOR.

b) Applying The BFOR Criteria To Drug Testing

i)Criteria 1 - Capacity To Perform The Job

Testing must be based on the employer's ability to demonstrate objectively that a 'positive' result to the drug being

screened out indicates a decreased ability to perform the job safely, efficiently and reliably.

This standard may be difficult for the employer to meet. 'Positive' testing has no direct correlation to job performance. Testing positive does not indicate impairment, or dependency. In fact, it does not even reveal drug use. All a 'positive' test reveals is that at some time, which may have been days or even weeks before the day of testing, the individual was exposed, once, to a drug. The link between testing 'positive' and capacity to do the job is, therefore, tenuous.

On the other hand, there is some evidence to demonstrate that there is a link. Empirical evidence drawn from the American's experience with drug testing in the rail industry apparently shows that the monitoring of drug use does reduce accidents in the workplace. Some employers may use this or other evidence as indirectly showing the link between testing 'positive' and job performance.

The Commission accepts, in principle, the possibility of a link between testing 'positive' to a drug and job performance and will determine whether in fact a correlation exists in any particular situation based on the circumstances of that case.

ii) Criteria 2

A. Individual Assessment

The Commission's BFOR policy requires that assessments of capacity to perform should, where possible, be individualized. This implies that drug testing should normally occur only when on-the-job deficiencies are noted. An exception may be made where an employer cannot identify performance deficiencies, such as when there is minimal or no direct supervision, and where there is a significant safety risk. In any case, testing may be considered permissible only if there are no less discriminatory means of assessing the individual's capacity to perform the job.

B. Valid, Reliable and Accurate Testing

The BFOR policy requires that any testing procedure designed to determine an individual's capacity to perform the essential components of the job must be valid, reliable and accurate. As with other elements of the policy, it is the employer who bears the responsibility to ensure that testing procedures meet these standards, and that the procedures are upgraded to keep abreast of technological and scientific developments.

With reference to drug testing, there is widespread concern about the validity of the current standard testing procedure — the Enzyme Immunoassay Technique (EMIT).

Because of this, the Addiction Research Foundation has developed the following recommended procedures which it feels, at the present time, "guarantee valid, accurate and confidential" results:

- *samples should be collected by qualified staff under medical supervision and forwarded to a qualified laboratory;*
- *the individual being tested should have the right to provide and to have recorded a statement of current medical or other drug use;*
- *all positive results should be confirmed by* ***chromatography/mass spectrometry*** *and the laboratory should not forward positive results unless the results have been confirmed by this method;*
- *the laboratory should communicate test results only to the licensed medical practitioner who forwarded the test samples to the laboratory; and*
- *the practitioner should report back to the employer on the results of testing and his/her interpretation of same in accordance with standard medical ethics and any applicable company policies and agreements".*

The Commission considers the procedures outlined by the Addiction Research Foundation as being the current minimum standard required for tests to provide accurate, valid, and confidential results.

iii) Criteria 3 - Reasonable Accommodation

Even if the first two elements of the BFOR are established, the employer still has the duty to reasonably accommodate the employee.

Reasonable accommodation may include referring employees who test 'positive' to an employee assistance program (EAP) for assessment and, if needed, counselling and rehabilitation. An employer who does not and cannot offer an EAP might be required to provide employees who need assistance the same benefits as are provided to those suffering from other disabilities.

The duty to reasonably accommodate has limits, however. For example, if the employer sends an employee on a rehabilitation program and the employee does not overcome his or her dependency, no further accommodation may be required.

There may also be limits on the extent to which reasonable accommodation is required for job applicants.

The Commission will determine, in accordance with the facts of each case, the extent to which reasonable accommodation is required and whether a given action constitutes reasonable accommodation."

Revenue Canada – Customs and Excise

Customs and Excise first considered the issue of drug testing when asked by Transport Canada in mid-1989 to assist in a survey of drug use. Customs and Excise decided at that time that testing Customs

inspectors (there are approximately 4,000 directly engaged in customs work) was not necessary.

Customs and Excise has identified only about a dozen smuggling cases (of any sort, not merely those involving drugs) in recent times which have involved Customs and Excise employees. Most smuggling has little to do with drugs. Testing therefore would be of little use.

Over the last five years, the Department has identified only a handful of Customs Inspectors who used illicit drugs. Illicit drug use is not a major problem among Customs Inspectors.

Customs and Excise officials report that Customs Inspectors are peace officers under the *Criminal Code.* Customs Inspectors frequently mix with other Customs Inspectors. It is believed that colleagues would quickly learn about another's illicit drug use and that employees who report to work under the influence of alcohol or drugs would be noticed. Employees experiencing health problems of this nature would be directed to seek help through the Customs and Excise Employee Assistance Program. As well, other police agencies would report illicit drug use to Customs and Excise. For these reasons, testing is seen as unnecessary.

There has never been cause to believe that the on-the-job performance of the Customs Inspectors, as individuals or as a group, has been impaired by drugs; consequently, there is no threat to public health or safety and, therefore, no need for drug testing.

In addition, drug testing would not address the issue of an individual Customs Inspector tempted to facilitate drug importation. Money, not drugs, would generally be used to attempt to corrupt Customs Inspectors to allow drug shipments into Canada. Testing in this circumstance would seem to be futile.

Those at Customs and Excise with whom this office spoke considered testing a witch hunt; testing assumed that people were guilty. The costs associated with testing and the need to establish and follow detailed testing procedures also concerned the department. There was no desire at the senior management level of Customs and Excise (Assistant Deputy Ministers or Deputy Ministers) to test. The introduction of testing would require drastic changes in intent and policy.

Treasury Board

Treasury Board, the public service employer, does not intend to introduce a broad program of drug testing of employees or job applicants. In keeping with the government's policy as announced in the National Drug Strategy, however, ministers may bring forward exceptional cases where overriding public safety concerns in their view necessitate consideration of testing. To the knowledge of the Treasury Board Secretariat only Transport Canada and the Department of National Defence are currently considering drug testing for public safety reasons. Treasury Board is confident that Employee Assistance Programs are generally an adequate response to workplace drug use. Public Service departments have been required since 1977 by Treasury Board policy to have EAPs.

Treasury Board consults with all Public Service unions through the National Joint Council. At the Council there have been statements of resistance to drug testing by unions, but testing has not been a major issue to date.

National Health and Welfare

The Health Protection Branch of National Health and Welfare is developing urinalysis testing procedures. However, these procedures had not been finalized and made public in time for reference and assessment in this report.

Fitness and Amateur Sport

Doping control procedures are now a part of most major domestic and international competitions. They are used increasingly and are becoming more sophisticated. The procedures used at any international event are determined by the International Olympic Committee or by the appropriate international sport federation.

Among the substances used to improve athletic performance are the following (and their related compounds):

- narcotic analgesics (for example, morphine);
- anabolic steroids and hormones (for example, testosterone);
- stimulants (for example, amphetamines, caffeine);
- beta blockers;
- diuretics; and
- physiological manipulation (for example, blood doping).

A positive test results in disqualification from that competition. Further sanctions may be imposed by international, national or provincial sport federations.

In sports where banned drugs may be used to assist in training, athletes may be tested randomly in their home locale during the non-competition season.

In 1983, the federal government issued its first policy statement and action plan on doping in sport. The policy was revised in 1985. The policy was implemented in cooperation with the Sport Medicine Council of Canada.

The following is excerpted from *Drug Use and Doping Control in Sport: A Sport Canada Policy:*

"Position Statement

...

Sport Canada is unequivocally opposed to the use by Canadian athletes of any banned substance in contravention of the rules of the international sport federations and/or the International Olympic Committee, and is equally opposed to any encouragement of the use of such substances by individuals in positions of leadership in amateur sport ... or by athletes themselves.

...

Federal Government Plan of Action

Sport Canada will coordinate and provide consultation and financial support for the following measures in support of the above position statement.

Obligations of Athletes and National Sport Organizations

1. All national sport organizations will be required to develop a plan for their sport to eradicate improper drug use by Canadian athletes and support personnel. [Those sport organizations for whom the use of performance enhancing drugs is not an issue are required to state this in writing. They are not required to develop a plan.]

The plan must include the following terms:

(a) a statement of the organization's policy on drugs (including use, possession and other aspects considered appropriate by the organization); a procedure (including due process) for consideration of alleged drug infractions and penalties for such infractions (this statement must address the activities of athletes, coaches, medical and other support personnel);

(b) an operational plan for regular testing of Canadian athletes at major competitions and drug training periods with a view to eliminating the use of anabolics and related compounds, and the use of other substances on the list of banned drugs at or near the time of competition;

(c) an educational program;

(d) international lobbying activities which have as their objective the eradication of drug use in international sport.

...

2. All national sport organizations will be required . . . to include a commitment to non-use and non-possession of banned substances by carded athletes in their contracts with said athletes. The only exceptions are possession and use of non-anabolic drugs where such use occurs under appropriate medical supervision and in non-competition situations.

3. All national sport organizations are required . . . to include a commitment of non-encouragement of use, and non-possession of anabolics and related compounds, and adherence to the rules concerning other banned drugs, in their contracts with coaches, sport scientists, medical practitioners and other support personnel engaged by the national sport organization.

4. Athletes in receipt of federal sport benefits (including the Athlete Assistance Program and/or other direct or indirect funding programs such as travel to National Championships, access to National Coaches and High Performance Sport Centres, etc.) are required to make themselves available for both regularly scheduled and ad hoc random doping control test procedures as authorized by their national sport organization or the Sport Medicine Council of Canada's Committee on Doping in Amateur Sport. It is the responsibility of national sport organizations to ensure that athletes under their jurisdiction present

themselves for such tests as requested by either of the two above-mentioned agencies.

5. National sport organizations are required to develop a list of drug-related infractions applying to coaches and medical, technical, administrative or other support personnel engaged on a voluntary or professional basis by the national sport organization or one of its affiliates. Such a list of infractions shall indicate clearly that national sport organizations do not condone encouragement by their support personnel of the use of drugs on the banned lists. Such persons proven through appropriate due process to have counselled athletes, coaches, medical or other support staff to use anabolics or related compounds or to use non-anabolic drugs on the banned lists in contravention of the rules of their respective national or international sport federations shall be withdrawn from eligibility for federal government sport programs and support provided either directly or indirectly via national sport organizations. Such withdrawal of eligibility shall be invoked from the moment of proof, through appropriate due process, of said infraction.

Violations and Sanctions

1(a) Any athlete who has been proven through appropriate due process to have used banned drugs in contravention of the rules of his/her respective national and/or international sport federation will be suspended forthwith from eligibility for Sport Canada's Athlete Assistance Program and any other financial or program support provided directly to athletes or indirectly by Sport Canada via national sport organizations (i.e., national championship funding, national team program support, etc.).

(b) Any athlete who has been proven through appropriate due process to have been in possession of anabolics or related compounds or to have supplied directly or indirectly, or to have counselled the use or administration of such drugs to others to whom this policy applies, shall be suspended forthwith from eligibility for benefits through Sport Canada as described above.

(c) The withdrawal of benefits as described in 1(a) and (b) above shall be invoked from the moment of proof of the said infraction by the appropriate authority. (In the case of positive results arising from doping control tests, the period of ineligibility for federal support takes effect at the time of the confirmation of the positive result of the "B" sample. Should an appeal subsequently overturn the finding of the positive result, benefits for the period between the initial announcement of the test result and the announcement of the result of the appeal will be reinstated.)

Individuals proven to have violated antidoping rules involving anabolic steroids and related compounds will be subject automatically to a lifetime withdrawal of eligibility for all federal government support programs or benefits.

Individuals proven to have violated antidoping rules involving drugs other than anabolic steroids and related compounds will be subject automatically to ineligibility for all federal government sport programs or benefits for a minimum period of one year or the duration of any suspension imposed by the respective international or national federation, whichever is longer. Second offences shall be punished by means of lifetime withdrawal of eligibility for federal government sport programs or benefits.

(d) Any athlete convicted of a criminal or civil offence involving a drug on the banned list of his/her respective national or international federation shall be similarly suspended (as outlined in 1(c)) from eligibility for the Athlete Assistance Program and other federal government support as described above.

(e) The only relief from life suspension is through direct appeal to the Minister of State, Fitness and Amateur Sport."

Royal Canadian Mounted Police

The RCMP has 16,000 members in 800 posts and detachments. In 1989, it planned to recruit 1200 new members.

The RCMP has no drug testing program and does not see the need for one. Its representatives suggested, however, that testing programs to ensure drug-free status could be justified as *bona fide* occupational requirements. This is particularly so, given the law enforcement role entrusted to the RCMP. Any testing under such a program would be done for cause only – suspect behaviour, for example – or as part of a follow-up to a rehabilitation program.

The RCMP constantly reviews its recruitment policies. The force has considered testing recruits, but thinks that its present practices serve it well. The current recruiting process involves extensive one-on-one interviews plus interviews with colleagues, neighbours, etc., who would know about the applicant's history of drug use. Extensive field enquiries are undertaken as well. These involve fingerprint, criminal record, credit bureau, employment, reference and schooling checks. Recent drug experimentation by applicants may result in their rejection or deferral. The RCMP will consider what type of drug was involved when making this decision.

No concern was expressed about the level of illegal drug use in the RCMP at present. Few cases have surfaced. The RCMP has various ways to monitor members; many of these are available to identify suspected drug abuse. The RCMP could conduct its own investigation or could press a criminal investigation. It could refer the member for a medical examination and, if necessary, to an assistance program. The supervisor could confront the member. Drug testing could be another option, although it was not considered appropriate by RCMP officials.

If a member used illegal drugs and the supervisor became aware of or suspected this, the supervisor would likely conduct an internal investigation. The member might feel pressured because of this and seek to enter the member assistance program. If the member refused rehabilitation, health services would generally conclude that the

member had a condition incompatible with serving in the RCMP. In short, the behaviour of the member would dictate in large part what measures the RCMP would take in response.

If there were a major problem with drugs (there has been none identified), it would likely come to the attention of supervisors or RCMP health services. All members are medically examined periodically.

RCMP members can have their routine medical care done by an RCMP health services physician or by a private physician. A private physician reporting a medical condition would send a general letter to RCMP administration and a specific letter to RCMP health services.

The RCMP has a member assistance program (MAP) as part of the health services program. The force encourages members to seek help if they need it. Information available to the members assistance program is generally treated as medical information. It is generally not accessible by supervisors, only by health services. If, however, an RCMP member who assists another member in a member assistance program learns of that member's use of illegal drugs, RCMP regulations require this to be reported to superiors. A discipline investigation would then be initiated.

If a physician treated a member for an illegal drug problem, the physician would follow his or her professional ethics in deciding whether to disclose this to the member's supervisor. There is a conflict between the principle of medical confidentiality on one hand, and the safety of members of the force and colleagues, and national security interests, on the other.

Labour Canada

Labour Canada policy concerning the testing of its public servants will follow Treasury Board policy.

Labour Canada has been active in the National Drug Strategy (NDS), particularly in the area of workplace substance abuse. On the issue of drug testing the government has stated that "mandatory drug testing will not constitute part of the NDS". It has also stated that "drug testing is unwarranted at this time'; however, there may be "exceptional circumstances" where "overriding public safety concerns" may necessitate consideration of testing. Labour Canada participated in developing the government's response to the workplace testing recommendations in *Booze, Pills and Dope,* the Report of the Standing Committee on National Health and Welfare. This response was based in part on the results of the National Consultation on Substance Abuse and the Workplace which took place in February, 1988. Labour Canada was on the steering committee for these consultations.

Drug testing has been considered by the government in the context of public safety (transport) or national or international security (defence) and not in the context of workplace or employee safety.

In November 1986 the federal/provincial/territorial Ministers of Labour established an Ad Hoc Committee of Officials to review issues relating to substance use and the workplace, particularly drug testing,

and to report back to them. This report has been prepared and will be available for Ministers to consider at their next meeting. This report contains no workplace drug use statistics as no appropriate Canadian information was available at the time.

Most unions have supported the National Drug Strategy, particularly its focus on prevention, education and treatment. Most unions, however, have opposed drug testing in the workplace. This has become particularly clear since the announcement on March 16, 1990, of the Minister of Transport's *Strategy Paper on Substance Use in Safety-sensitive Positions in Canadian Transportation.*

In July 1988 the Ministers of Health and Welfare and Labour announced consultations with representatives of employers and employees in the federally regulated private sector on the advisability of requiring major federally regulated establishments to have Employee Assistance Programs (EAPs). These consultations have taken place, and a discussion paper was circulated to participants in February, 1990, just prior to final consultations in March, 1990. Drug testing was not part of the consultations since it was considered a separate issue. During the course of the consultations, it became apparent that there was opposition to the concept of mandatory EAPs. A consensus developed, however, that the government support private initiatives and that the government should undertake initiatives to promote comprehensive, joint labour/management administered EAPs within the federal jurisdiction.

ENDNOTES

1. Report of the Standing Committee on National Health and Welfare, *Booze, Pills and Dope: Reducing Substance Abuse in Canada* (October, 1987).

2. *Ibid.* at 25.

3. *Ibid.* at 25-26.

4. Government of Canada, *Government Response to the Report of the Standing Committee on "Booze, Pills and Dope": Reducing Substance Abuse in Canada* (1988) at 8.

5. *Ibid.*. See also, Government of Canada, *A Report of the National Consultation on Substance Abuse and the Workplace* (1988) at 32-34.

6. Government of Canada News Release, "Government Tackles Substance Abuse in the Workplace" (July 20, 1988).

7. *Ibid.*.

8. For a description of the HIV testing prerequisite imposed by the U.S. Department of Defense, see The Privacy Commissioner of Canada, *AIDS and the Privacy Act* (1989) at 38, 73.

9. There are three types of conditional release: parole (day or full), temporary absence and mandatory supervision. Mandatory supervision is a right stemming from earned remission. It can be for up to one third of the sentence. A person must generally be released on mandatory supervision unless he has been detained under the *Parole Act*, having been found to meet certain statutory criteria relating to dangerousness. Inmates may be granted full parole for up to two-thirds of their sentence.

10. SOR/85-412.

APPENDIX B

THE POSITION OF THE GOVERNMENT OF THE UNITED STATES AND VARIOUS STATE GOVERNMENTS ON DRUG TESTING

(a) Executive Order 12564

On September 15, 1986, President Reagan issued an executive order entitled "Drug-Free Federal Workplace". The contrast in approaches between the American executive and the government of Canada towards drug testing are immediately evident. The following portions of the executive order encapsulate the American government approach to drug testing:

"***Sec. 1. Drug-Free Workplace***

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use."

The executive order authorized the Secretary of Health and Human Services to promulgate scientific and technical guidelines for drug testing programs. Agencies were to conduct their testing programs in accordance with these guidelines.

On April 11, 1988, the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* were adopted.[1] The guidelines apply to the following: certain Executive agencies, the Uniformed Services (but not the Armed Forces as defined in legislation) and any other employing unit or authority of the Federal Government.

The guidelines do not apply to drug testing conducted under legal authority other than the executive order. The guidelines do not, for example, cover testing of persons in the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons or parolees. [2]

The guidelines cover several matters. They set out detailed specimen collection procedures, laboratory certification procedures, mechanisms to protect employee records and access to results.

Several points should be noted about the American government policy in general:

- it provides for testing of government employees under a wide range of justifications;
- it provides for universal testing of applicants for government jobs;
- it obliges, not merely permits, government agencies to test for some drugs, and permits testing for others;
- the testing covers certain illegal drugs only; it does not apply to alcohol;
- the executive order and guidelines cover testing in the federal workplace only.

(b) State Laws Governing Drug Testing[3]

As of September, 1988, eight states[4] had enacted employee or job applicant testing laws. These laws cover both government and private sector employers and employees. They extend the constitutional constraints imposed on American government employers to private employers.[5] Some of the statutes were patterned after a model bill drafted by the American Civil Liberties Union. No state has prohibited drug testing in the workplace.[6]

Six of the eight states require an employer to have some form of either "probable cause" or a "reasonable suspicion" to test an employee for the presence of drugs.

Five of the eight states restrict pre-employment testing. Two states require a job offer before pre-employment testing is allowed.

Two states impose no restriction on random testing.[7] Minnesota permits random testing of employees in "safety sensitive" positions. Connecticut permits random testing if the employee is in a high-risk or safety sensitive job. Connecticut and Minnesota also permit random testing if federal law authorizes it. Iowa and Vermont permit random testing *only* if federal law authorizes it.[8]

All eight state laws require confirmatory testing before a company can discharge or discipline an employee. Four states require that only laboratories licensed or regulated by the state conduct the tests.[9] Five of the eight states require the employer to follow reliable chain of custody procedures.[10]

Seven of the eight states require employers to keep test results confidential. Iowa, for example, requires an employer to delete references to tests or test results after an employee leaves employment *and* has successfully completed a treatment program for substance abuse.[11] Five of the eight prohibit the use of evidence of a positive result in a criminal proceeding against the employee.[12]

Six of the eight states address collection procedures. Two states specifically prohibit direct observation while the person provides a test sample.[13] Utah requires that samples be collected "with due regard to the privacy of individuals".

Five states require employers to give the employee a chance to rebut or explain positive test results. Five states provide civil remedies for the employee if the employer fails to comply with statutory requirements. Four states make it a criminal misdemeanor to violate the testing statute.[14]

ENDNOTES

1. Federal Register, Vol. 53, No. 69, Monday, April 11, 1988.

2. *Ibid.*, para. 2.1(e).

3. The substance of this section is drawn from R.T. Angarola and S.M. Rodriguez, "State Legislation: Effects on Drug Programs in Industry" in S.W. Gust and J.M. Walsh, ed., *National Institute on Drug Abuse, Research Monograph Series 91, Drugs in the Workplace: Research and Evaluation Data* (U.S. Department of Health and Human Services, Public Health Services (1989)) at 305.

4. Connecticut, Iowa, Louisiana, Minnesota, Montana, Rhode Island, Utah and Vermont. The author of the article indicated to this office that Maine enacted legislation in 1989. The Maine legislation imposes certification requirements for laboratories conducting

drug testing, but the government did not fund the certification system. As a result, drug testing is effectively prohibited in Maine at present, despite the existence of the legislation authorizing it.

5. *Supra* note 3 at 312.

6. *Ibid.* at 314.

7. Louisiana and Utah.

8. *Supra* note 3 at 309.

9. *Ibid.*.

10. *Ibid.*.

11. *Ibid.* at 310.

12. *Ibid.*.

13. Rhode Island and Connecticut.

14. *Supra* note 3 at 312.