Current Issue Review **90-1E**

DRUG TESTING: LEGAL IMPLICATIONS

Nancy Holmes
Law and Government Division

Revised 10 November 1999

Library of Parliament

Bibliothèque du Parlement

Parliamentary Research Branch

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

N.B. Any substantive changes in this publication which have been made since the preceding issue are indicated in **bold print**.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

PAGE

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

DRUG TESTING: LEGAL IMPLICATIONS*

ISSUE DEFINITION

The debate over compulsory employee drug testing is increasing in this country as more and more consideration is being given to using this practice as a means of ensuring a drug- and alcohol-free workplace. Those in favour of mandatory drug testing in the workplace generally rely heavily on safety, security and productivity arguments. It is asserted, for example, that persons who test positively for drugs and alcohol in the workplace demonstrate greater absenteeism and decreased ability to perform their job and pose the greatest threat to workplace, and sometimes even public, safety. On the other hand, those who oppose drug testing firmly believe that, by using such methods, the goal of a healthy, safe and productive working environment, while laudable, is achieved at too great a social cost. Particular emphasis is placed on the fact that drug testing constitutes the most intrusive infringement of the sanctity of the human body and thus the right to privacy. The question then arises as to whether a balance can be found between the concern for safety and the concern for individual privacy. This question, however, presupposes that it has been determined that a significant work-related drug and alcohol problem exists in this country and that drug testing is the only method of combatting it.

The purpose of this paper is to highlight some of the more contentious issues related to mandatory drug testing in the workplace and to examine the legality of this practice, particularly with regard to employees' rights to privacy under the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, the *Privacy Act* and federal employment standards legislation (the *Canada Labour Code*).

---

* The original version of this Current Issue Review was published in April 1990; the paper has been regularly updated since that time.

BACKGROUND AND ANALYSIS

A. The American Influence

In the mid 1980s, the United States began extending compulsory drug testing programs in the workplace to all public and private bodies, domestic and foreign. It was estimated that eventually between one-third and one-half of all American federal employees would have to undergo some kind of drug testing. Many giant corporations, such as IBM, Ford, DuPont, Exxon and the New York Times Corporation, started testing job applicants and employees suspected of using drugs. Approximately 25% of the 500 largest American corporations planned to discharge employees on the basis of positive tests.

The imposition of drug testing programs in the United States was largely a product of the Reagan and Bush administrations' declaration of war on drugs. It stemmed principally from the March 1986 report of the Commission on Organized Crime which recommended that the President direct the heads of all federal agencies to formulate policy statements and implement guidelines and suitable drug testing programs to show the "utter unacceptability of drug abuse by federal employees." This recommendation led to President Reagan's Executive Order 12564 of September 1986, which made drug testing a government-wide policy.

Following the government's lead, drug testing programs in the private sector escalated rapidly in the late 1980s and early 1990s. According to the American Management Association's annual surveys of American firms that conduct drug testing, such testing increased 250% between 1987 and 1992. There have been some recent turnarounds, however. Studies by the United States government have found that about 30% of the companies that were testing for drugs in 1988 had stopped doing so by 1990. Reasons given were: employers realized that a positive drug test was not necessarily relevant to an employee's job performance; inaccurate test results exposed employers to potential legal liability; and testing programs, especially random testing, were not at all cost-effective. As well, there has been a general decline in positive test results in those workplaces that are still drug testing. While proponents of drug testing point to this decline as evidence that testing works, others argue that there are fewer positive test results because the drugs most abused today (alcohol and prescription drugs) are not those being tested for (marijuana, cocaine and heroin). Drug testing is still being heavily promoted by the federal government. **In October 1998, Congress appropriated $10 million for the *Drug-Free***

Workplace Act of 1998 **to encourage small companies to establish testing programs.** Even so, it seems the final chapter on drug testing programs in the American workplace has yet to be written.

Urinalysis is the current technology used for drug testing, with the most frequently used test in the United States being the enzyme multiplied immunoassay technique (EMIT). This test costs between $4.50 to $25 US per person tested, while the necessary equipment costs approximately $5,000 US. It is the cheapest existing test, no specialized personnel are needed to perform it, and results are available within minutes. Gas chromatography/mass spectrometry (GC/MS) has been described as "the most reliable, most definitive, forensic quality procedure" but, with costs from $100 to $200 US per person tested, it is also the most expensive.

The accuracy of the EMIT is often questioned in the United States. Studies show that the EMIT test used alone may show a 25% inaccuracy rate. Inaccurate results ("false positives") may be produced from the urine of an employee who has consumed either poppy seeds or common cold medications, such as Sudafed or Sucrets, or even herbal tea. A recent concern was that the birth control pill could cause false positive results for athletes. On the other hand, "false negatives" can be obtained by the introduction of certain substances, such as salt, vinegar, Visine or bleach into the urine samples. In order to eliminate such tampering, American agencies have adopted stringent regulations which force subjects to strip and submit to a search, and to give their samples in bare rooms in the presence of an observer.

Some U.S. courts have even decided not to allow EMIT test results to be introduced as evidence unless they are confirmed by a positive result from an alternative method of analysis. The GC/MS is now generally used as an independent confirmation of positive EMIT results.

Another concern raised in the United States is the collection of the highly personal information that can be obtained from these tests. A urine specimen can be analyzed to reveal whether an employee is pregnant, is using licit medications, or is being treated for a heart condition, manic-depression, epilepsy, diabetes or schizophrenia. It has been suggested that employers could potentially use these tests for genetic screening of employees in order to exclude an individual with any condition that might be considered as diminishing work performance.

Finally, perhaps the greatest drawback to the use of urinalysis as a means of drug testing is its inability to confirm whether or not an employee is actually impaired. Urinalysis can indicate only that a person has consumed a drug within the recent past (in the case of marijuana, for example, trace amounts can be detected in urine up to four weeks after use). It cannot show present

drug use or present or past impairment. Nor can the test determine the quantity consumed of any drug that it detects.

Hair testing is the latest drug-testing technique being promoted in the United States. The contention is that hair testing is less intrusive and more reliable than urinalysis. Apparently, as human hair grows, it traps whatever is in the blood, so that traces of any drugs used by a person can be found in the hair months or even years later, depending on the length of the hair sample. While this technology is growing in popularity in the American private sector (including private schools), it has yet to gain acceptance within major public sector institutions. There also appears to be little support for such testing in Canada, despite the lobbying efforts of drug-testing companies. This lack of support is partly because, like urinalysis, hair testing does not always give reliable results. At best, hair testing can detect only that a given substance has been in someone's hair follicles and therefore in his or her system. There is no indication of whether that person was actually impaired on the job or not. Moreover, hair testing results can be skewed when hair has been bleached or dyed.

There have also been suggestions that hair testing may be unfairly biased against persons with coarse black hair (such as members of visible minorities) which contains high melanin levels. Drugs bind with melanin in the hair; thus, even if members of visible minorities have ingested the same amount of drugs as a person with lighter hair, their test results will suggest a higher concentration of drugs. Finally, cost may be a barrier to the acceptance of this drug-testing technique, since hair testing can cost as much as three times more than a urine test.

In March 1995, an American company launched a home drug testing kit called "Drug Alert." The kit contains a piece of pre-moistened cloth that can be wiped across doorknobs, desk-tops and clothing to pick up traces of illicit drugs. The cloth is then placed in a sealed envelope and sent for analysis. The company has promised that it can detect up to 30 kinds of illegal drugs. While principally intended for worried parents who fear that their children may be using drugs, the kit is also being promoted to employers; this method of testing can be carried out more surreptitiously than urinalysis, which obviously requires the knowledge and consent of the employee. According to the 1994-1995 *Annual Report* of the federal Privacy Commissioner, this new drug testing method is currently available in Canada. The chief concern of the Commissioner is that there is at present no federal law preventing such surveillance, although several provinces do

have statutory privacy torts and the Quebec *Civil Code* and *Charter of Human Rights and Freedoms* do protect citizens against being spied upon.

In spite of the many concerns raised by scientists, unions and legal experts, the U.S. Supreme Court has shown itself to be quite supportive of drug testing programs. For example, in the case of *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), the Commissioner of the U.S. Customs Service had made drug testing a condition of promotion to three kinds of positions: positions involving the carrying of a firearm; positions involving the handling of classified material; and positions subject to a drug interdiction. Employees who qualified for such positions would be advised by a letter that their final selection would be contingent upon their successfully passing the EMIT drug test. An applicant who tested positive would have to pass the GC/MS test. Any employee who tested positive on both tests would be subject to dismissal unless he or she was able to provide a satisfactory explanation.

A majority of the U.S. Supreme Court upheld the constitutionality of the drug testing program, except for the testing of employees applying for positions that involve the handling of classified material. They noted that in an administrative context the requirement of "probable cause" (i.e., circumstances suggesting that the person to be searched has violated the law) might be unhelpful and that, given the government's compelling need to deter drug use in the Customs Service, the requirement of "individual suspicion" could also be dispensed with. As a result, the employee's right to privacy might be reduced in the context of the workplace, particularly in the case of front-line enforcement government employees. The Court dismissed the argument that there was no need for such a program because only 5 of the 3,600 test results analyzed so far had been positive. The majority of the Court held that, even so, the need to prevent future occurrences of drug abuse by Customs employees was ample justification for the testing program.

In *Veronia School District* v. *Acton* 515 U.S. 646 (1995), the Supreme Court upheld the reasonableness and the constitutionality of random urinalysis drug testing of high school athletes. In reaching its decision, the Court considered the decreased expectation of privacy among student athletes, the relative unobtrusiveness of the search at issue, and the severity of the drug problem in the school district. The Court reiterated its view that children at school, and thus in the temporary custody of the State, enjoy a lesser expectation of privacy than members of the general public. Student athletes have even less expectation of privacy because they voluntarily subject themselves to a higher degree of regulation than other students by choosing to sign up for a team. As well, physical

examinations and an element of communal undress are inherent parts of athletic participation. The Court went on to find that any privacy interests compromised by the process of obtaining urine samples were in this case negligible, principally because the conditions of collection were nearly identical to usual conditions in public washrooms.

Finally, the Court took note of the national importance of deterring drug use by school children. It found that a school district drug problem, largely fuelled by the "role model" effect of athletes' drug use and particularly dangerous to athletes themselves, can be reasonably dealt with by a policy directed to ensuring that athletes do not use drugs. Despite arguments to the contrary, the Court was not prepared to accept that less intrusive methods of searching for drug use by student athletes would have solved the problem at issue, or that such methods were warranted under the Constitution.

These decisions have had a dramatic impact on subsequent court rulings in the U.S. Lower courts have upheld random testing of office workers, lawyers involved in drug prosecutions, virtually anyone carrying a gun and people driving any type of vehicle. It will be interesting to see what impact, if any, these cases will have when Canadian courts review the constitutionality of mandatory drug testing programs in the workplace.

B. The Canadian Context

1. The Current Situation

Though at present there is no Canadian legislation providing for mandatory drug testing of employees, companies doing business in the U.S. may be obliged to respect U.S. legislation and perform drug tests on their employees. Currently, U.S. federal motor carrier safety regulations have been extended to Canadian trucking companies that send drivers into the United States. As of 1 July 1996, any Canadian trucking company with 50 or more drivers assigned to operate commercial motor vehicles in North America must have in place a workplace drug and alcohol policy and program that includes, among other things, pre-employment drug testing as well as random drug and alcohol testing at a minimum annual rate of 25% of the driver pool for alcohol and 50% for drugs. By 1 July 1997, all carrier companies with drivers assigned to operate commercial motor vehicles in North America must comply with the U.S. regulations. These regulations have applied to American trucking companies since 1990; however, an exemption was provided for foreign carriers and drivers since it was anticipated that Canadian

law would provide for the prevention of substance use in the transportation industry along much the same lines as its U.S. counterpart. When the Government of Canada announced in December 1994 that it would not be proceeding with such legislation (see Parliamentary Action section of this paper), the foreign carrier exemption was lifted from the U.S. regulations.

The requirements under the U.S. regulations are extensive. For instance, drivers are prohibited from using alcohol for four hours prior to duty and from having a blood alcohol level of 0.02 or greater while on duty. Employers are required: to provide education for supervisors and access to assistance for employees; on hiring any driver, to obtain from previous employers, with the driver's consent, the drug testing history for the past two years; to remove from duty any driver who has violated the rules; and to prepare and maintain specified records. Employers or drivers who violate the requirements may be subject to enforcement actions including being declared out-of-service and being fined up to $10,000 per violation. Enforcement is carried out by means of random company audits.

Obviously, Canadian trucking companies who wish to do business in the United States will have to develop drug and alcohol testing policies that comply with the U.S. regulations. These policies will, however, also have to abide by Canadian human rights laws. Meeting both of these requirements may not be easy. The Canadian Human Rights Commission has received complaints against the mandatory drug testing policies of trucking companies. **The Commission's position is, however, that testing programs, to the extent that they are instituted to comply with American requirements, will remain permissible until Canadian law on testing becomes clearer. The Commission points out, however, that this partial exemption does not remove the duty on the employer to accommodate employees who test positive (see B.2.b of this paper), nor will it apply to company drivers who operate only in Canada.**

While regulations in other portions of the transportation sector prohibit the use of drugs and alcohol in the workplace, they do not provide for mandatory drug testing. The *Aeronautics Act*, the *Canada Shipping Act*, the *Pilotage Act* and the *Railway Safety Act* all prohibit the use of intoxicants by employees on duty but they do not have substance testing provisions. Amending legislation would have to be introduced to extend the scope of these statutes to authorize mandatory drug testing. **Such a recommendation was made by the Special Senate Committee on Transportation and Security in its January 1999 Interim Report. The Committee, which was appointed on 18 June 1998 to examine and report upon the state of**

transportation safety and security in Canada, recommended that the federal government permit the transportation industry to apply mandatory random drug and alcohol testing similar to that in the United States. The Committee is currently mandated to complete a comparative review of technical issues and legal and regulatory structures with a view to ensuring that Canadian transportation safety and security are of a high enough quality to meet the needs of Canadians in the twenty-first century.

The American "war on drugs" influence has also been felt in cases where American firms have Canadian subsidiaries. In November 1991, the Canadian Civil Liberties Association filed a complaint with the Ontario Human Rights Commission on behalf of four employees of Imperial Oil Limited. The basis of the complaint was that Imperial Oil's drug testing program, which commenced 1 January 1992, discriminates on the basis of "handicap" under the Ontario *Human Rights Code*. Imperial Oil was the first private company in Canada to institute a comprehensive drug testing policy that included random drug testing. Apparently, the development of this policy was a result of advice from Imperial Oil's major share-holder, Exxon Corporation, an American company.

According to Imperial Oil's Alcohol and Drug Policy, all job applicants are subject to a urinalysis test for drugs as a condition of employment. Employees wishing to work in safety-sensitive positions will be required to undergo drug testing in order to be certified for such work. Once on the job, these employees, like certain designated executives who make important financial decisions, will be subject to random drug and alcohol testing for which a zero blood-alcohol count is mandatory. A blood-alcohol concentration of more than 0.04% is prohibited for all other employees. In addition to being tested, prospective and current employees in safety-sensitive positions must disclose to management whether they have, or have ever had, a substance abuse problem or have received treatment or counselling for such a problem. Violation of any provision of the Policy may result in progressive disciplinary measures. For example, a positive drug test result, a failure to take the test or a refusal to take the test will be grounds for disciplinary action, including termination. It is the position of the Canadian Civil Liberties Association that such disciplinary action would subject employees to adverse treatment on the basis of their presumed dependency on drugs, and would therefore be discriminatory.

On 23 June 1995, an Ontario human rights Board of Inquiry rendered the first decision in that province in the area of substance abuse testing. Not only did the Board find for the first time that alcoholism constitutes a "handicap" under the Ontario *Human Rights Code*, but, on 10

August 1995, it ordered Imperial Oil Ltd. to pay an unprecedented $20,000 award for damages to an employee. The company had forced him to reveal that he had once had an alcohol problem, demoted him and had taken reprisals when he launched a human rights complaint.

In the case of *Martin Entrop* v. *Imperial Oil Limited* (unreported), the Board held that this treatment constituted discrimination on the basis of perceived handicap under the *Human Rights Code.* The company's defence was that its policy was a *bona fide* occupational requirement; however, the Board found that, while Imperial Oil's aim to keep drinkers out of safety-sensitive jobs was valid, it went too far in Mr. Entrop's case. The company had not proven, on the balance of probabilities, that the risk associated with Mr. Entrop's past alcohol problem objectively justified differential treatment of him as an employee. Without having to do so, the Board further found that even if it had ruled that the treatment of Mr. Entrop was objectively justified, the company did not meet the burden of accommodation required under the Ontario human rights legislation. It could have employed other and less drastic measures than mandatory self-disclosure in its effort to detect alcohol impairment on the job.

In a further interim decision, released 12 September 1996, the Board went on to consider the Policy of Imperial Oil as it pertains to all employees. While it found that freedom from impairment by drugs and alcohol is a *bona fide* occupational requirement (see B.2. of this paper), Imperial Oil's Policy overreaches this legitimate goal in certain respects and is under-inclusive in others, in that it fails to uncover other categories of employees who may be equally impaired.

For example, the Board found those provisions unlawful that require employees in safety-sensitive positions to disclose to management any substance abuse problems whether current or past, on the grounds that the definition of "substance abuse problem" is too broad and unlimited in duration. The pre-employment and random drug testing provisions were also found unlawful because it has not been proved that a positive test is correlated with impairment; and the random alcohol testing provisions were found unlawful because it has not been proved that such screening is reasonably necessary to deter alcohol impairment on the job. Imperial Oil appealed the Board's decision to the Ontario Divisional Court, where it was dismissed. **The case is now on appeal before the Ontario Court of Appeal.**

In a related case (*Imperial Oil Ltd.* v. *Communications, Energy and Paperworkers Union of Canada, Local 614*, [1996] B.C.L.R.B.D. No. 257), the British Columbia Labour Relations Board recently rendered a decision pertaining to Imperial Oil's Alcohol and Drug

Policy as it applied to a refinery in Port Moody, British Columbia. The union had filed a grievance challenging the implementation of the Policy at this refinery. An arbitration board had found that, though some elements of the Policy (e.g., testing for cause and post-accident) were acceptable, random compulsory testing of employees in safety-sensitive positions was not. The arbitration board upheld the employer's right to require drug and alcohol testing during an employee's rehabilitation program, but reduced the period of rehabilitation testing from seven to two years. In response to an application for review by the employer, the Labour Relations Board upheld the decision of the arbitration board. The refinery at issue in this case has since been shut down, however, and the union has agreed to accept the implementation of the Alcohol and Drug Policy, including the random testing portions, at the remaining Imperial Oil site.

The Toronto-Dominion Bank is believed to be the only company in the federal sector outside the transportation industry to administer drug tests to all new employees and to employees returning after an absence of three months or more. Its program began on 1 October 1990 in Toronto. The Canadian Civil Liberties Association challenged the Bank's drug testing program by filing a complaint with the Canadian Human Rights Commission in December 1990. The Association alleged that the program is discriminatory on the basis of disability (see Part B.2 of this paper). According to the Bank, the policy is necessary to safeguard bank, customer and employee funds and information, as well as to protect the Bank's reputation.

In a decision rendered on 16 August 1994, the Canadian Human Rights Tribunal found that the drug testing policy of the Toronto Dominion Bank did not discriminate against drug dependent persons pursuant to the *Canadian Human Rights Act* (see *Canadian Civil Liberties Association* v. *Toronto Dominion Bank* (1994), 22 C.H.R.R. D/301). The Tribunal, however, made some strong statements on the invasive nature of drug testing and the general lack of support for its use in the banking industry. The Tribunal noted that, as a blanket policy, mandatory urinalysis represents a major invasion of privacy in the employment field. Such a method could be considered reasonably necessary only in the face of substantial evidence of a serious threat to other employees, bank customers and the public in general. The Tribunal failed to find any such evidence in support of the policy of the Toronto Dominion Bank. In fact, it noted that in support of drug testing, the Bank relied on its own impressions and on evidence from such other sources as the United States, which the Tribunal considered of little relevance here. The Tribunal even wondered if the method of observation used by the Bank with respect to its working employees would not suffice for monitoring new and returning employees.

On appeal by the Bank, the Federal Court of Appeal on 23 July 1998 held that the Bank's drug testing policy constitutes employment discrimination against drug-dependent persons. Although differing on the method for assessing whether the policy could still be justified on the basis of sound business reasons (the difficulties encountered by the Court in determining whether the drug testing policy amounts to direct or indirect discrimination have since been rectified by amendments to the *Canadian Human Rights Act* – see section B.2. of this paper), the majority of the Court found no justifiable connection between the drug testing policy and job performance by Bank employees. **The Bank chose not to appeal this decision and it has suspended its drug testing policy.**

Any Canadian legislation on mandatory drug testing exists principally in the criminal law field. Under the *Criminal Code*, someone can be tested to establish whether he or she is impaired by alcohol or drugs while operating a motor vehicle, railway equipment, a vessel or an aircraft (section 253). **Police powers for obtaining evidence of drug-related driving offences are quite limited, however, and, as a result of studies indicating the contributory role of drugs in fatal motor vehicle accidents, the House of Commons Standing Committee on Justice and Human Rights recommended in May 1999 that the Minister of Justice consult with the provinces and territories to develop legislative proposals for obtaining better evidence against drivers suspected of being drug-impaired. In response, the Minister of Justice has asked her officials to ask interested provinces and territories to participate in a working group to consider better ways of obtaining evidence in drug-involved driving cases.**

In response to the decisions in the *Dion* and *Jackson* cases (discussed under B.1.a. of this paper), the *Corrections and Conditional Release Act* was proclaimed into force on 1 November 1992. This Act permits drug and alcohol urinalysis testing by Correctional Services Canada in certain prescribed instances. For example, section 54 of the Act provides that an inmate may be tested within an institution where a staff member believes on reasonable grounds that the inmate has committed a disciplinary offence for which a urine sample is necessary to provide evidence. Such testing is permitted, however, only where prior authorization has been obtained from the institution's head. Section 55, permits urinalysis testing where the National Parole Board has made abstention from drugs or alcohol a condition of a temporary absence, work release, parole or other such statutory release. In all cases, the inmate or offender must be informed of the basis of the demand and the consequences of non-compliance. Moreover, he or she must be given a reasonable opportunity to make representations to the relevant official before submitting to the test.

A Charter challenge to the random drug testing provision of the *Corrections and Conditional Release Act* was dismissed by the British Columbia Supreme Court on 27 July 1994 in the case of *Fieldhouse* v. *Canada* (unreported). A number of inmates at Kent Institution in British Columbia claimed that section 54 of the Act, which permits the use of a prescribed non-individualized random selection urinalysis program, was contrary to sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*. Kent Institution was one of three prisons chosen as pilot projects for random urinalysis programs under the Act. Each month, 10 to 15 members of the prison's 240 to 280 population were randomly selected by computer in Ottawa to undergo drug testing. An inmate had to comply with a urinalysis demand within two hours; his refusal, or a positive test result, could have serious implications for his future transfer prospects, conditional release and participation in community programs.

The Court found that the connection between drugs and violence at Kent Institution was compelling. There is a serious problem of drug use in the institution and little in the way of alternative means to combat it effectively. Thus, as random urine testing is a deterrent to both prison drug use and associated violence, the Court held that it constitutes neither an unreasonable limit on inmate liberty nor an unreasonable invasion of privacy or integrity of the person under sections 7 and 8 of the Charter. An appeal of this decision was filed with the British Columbia Court of Appeal on 12 August 1994; however, the appeal was dismissed on 21 March 1995.

It would appear that the Solicitor General of Canada is currently conducting an internal review of drug and alcohol programs in the federal prison system as a result of in-house studies that showed extensive drug abuse by inmates. Apparently, urinalysis programs will be reassessed pursuant to this review, in order to evaluate their effectiveness.

Pursuant to the National Defence Drug Testing Policy announced in 1990, regulations respecting the Canadian Forces Drug Control Program were approved on 21 May 1992 by the Governor in Council as Chapter 20 of the *Queen's Regulations and Orders for the Canadian Forces*. Under this program, mandatory drug testing with random elements would be introduced, primarily for all military personnel in safety-sensitive positions. The program would apply only to uniformed personnel and not to the civilian staff of the Department of National Defence; however, given that all uniformed positions are considered to be safety-sensitive, the military drug-testing policy is considered to be fairly inclusive. The Department of National Defence is authorized to conduct 50,000 tests per year.

Most military drug testing would be done through the random selection of units comprising five to 500 individuals. Testing would also take place for cause, for those who are undergoing rehabilitation for drug use, for post-accident investigations and for certain "super-sensitive" positions that are not covered by the random testing of military units. All testing would be conducted by means of urinalysis and any positive drug screen will be subject to a confirmatory analysis. Failure to comply with a request to submit to a drug test may result in disciplinary action.

According to the 1994-1995 *Annual Report* of the federal Privacy Commissioner, it would appear that the Department of National Defence has temporarily suspended the random portion of its drug testing policy. In February 1995, the then Chief of the Defence Staff, General de Chastelain, informed the Privacy Commissioner in writing that he had indefinitely suspended this component of the Forces Program; however, he still reserved the right to reopen the issue in the future should circumstances dictate its necessity. This letter was in response to the Commissioner's 1994 opposition to the widespread use of random testing of Forces members for the presence of illegal drugs, even though the Department of National Defence's own statistics had revealed that its members rarely used such substances. Indeed, the Department's own survey had revealed that the drug most widely used by its employees was alcohol, a drug not covered by the Forces Policy.

The use of urinalysis to test whether an employee has consumed drugs or alcohol is thus becoming an important issue in the context of employment in Canada. The legality of this practice has yet to be determined. Certainly, decisions based on the Charter in matters of breathalyser use and urinalysis in penitentiaries will be reviewed in challenges to the constitutionality of drug testing in the workplace.

2. Legal Framework

a. The *Canadian Charter of Rights and Freedoms*

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

The application of these constitutional rights is limited by section 1 of the Charter, which permits reasonable restrictions as long as they are prescribed by law and can be shown to be demonstrably justified in a free and democratic society. In other words, even if a mandatory drug testing program were to infringe the right to equality or security of the person, it might still be possible to justify the program under the "reasonableness" test of section 1.

Another important consideration in relation to the Charter is its applicability. Section 32 of the Charter states that it applies to the Parliament and government of Canada and to the legislature and government of each province. This means that the Charter applies only to government actions and legislation. If a mandatory drug testing program is established by legislation, any employee would have the right to challenge the law under the Charter. If, however, a federally regulated corporation implemented such a program as its own policy, an employee would have a recourse only under human rights legislation (discussed in Part B of this paper).

(i) Section 7 of the Charter

The constitutionality of mandatory drug and/or alcohol testing has been considered in a number of court decisions which held that the non-consensual taking of an individual's bodily fluids infringes the security of the person (see for example *R.* v. *Chatham* (1987), 23 C.R.R. 344; *R.* v. *Racette* (1988), 48 D.L.R. (4th) 412; *R.* v. *Dion*, unreported C.A.Q., rendered 31 May 1990; and *Jackson* v. *Joyceville Penitentiary* [1990] 3 F.C. 55 (T.D.)). However, these cases involved drug testing regulations in penitentiaries and in provincial impaired driving legislation, not in an employment context. In *Dion* and *Jackson*, both the Federal Court of Canada and the Quebec Court of Appeal struck down section 41.1 of the *Penitentiary Service Regulations* as violating section 7 of the Charter. The Courts found that the requirement for inmates to provide a urine sample demanded on the basis only of the subjective determination of a Correctional Service employee, failed to meet the standard of "fundamental justice" required by section 7 of the Charter when there is an intrusion into the privacy of an individual. In *Jackson*, the Federal Court, Trial Division, pointed to the lack of any standards or criteria limiting the authority to test inmates, and for essentially the same reasons, the Court went on to find that section 41.1 contravened section 8 of the Charter by providing for an unreasonable search.

It would therefore appear that drug testing of employees would be permitted only where there were reasonable and probable grounds to believe that an individual was or had been impaired while on the job. In other words, the courts will likely require an "objective element"

in a mandatory drug testing program. The objective element might take the form of prior authorization or the presence of reasonable grounds.

It is interesting to note that the Quebec Court in *Dion* held that the word "liberty" in section 7 encompasses the right of the individual to consume, on occasion, certain intoxicants without being subjected to an obligation to provide a urine sample to detect their presence in his or her body. The Court in *Jackson*, on the other hand, considered the question of "liberty" from the perspective of prisoner incarceration. It remains to be seen how section 7 of the Charter will ultimately be interpreted with respect to mandatory drug testing in the employment context.

Also worthy of note are recent cases involving the seizure of bodily substances for DNA analysis. While these cases arise in the criminal law context, their relevance to mandatory drug and/or alcohol testing may be significant. In *R.* v. *Stillman*, [1997] 1 S.C.R. 607, police took hair samples and teeth impressions from an accused under threat of force, despite the fact his lawyer had advised the police that no consent was being given to the provision of any bodily samples. As well, a tissue used by the accused to blow his nose was seized by an officer for DNA testing. The Supreme Court of Canada, in considering the admission of the DNA test results, made it clear that the taking of bodily substances is a violation of one's right to liberty and security of the person under section 7 of the Charter. When this is done without authority or consent, an accused is forced to give self-incriminating evidence whose admission would bring the administration of justice into disrepute. Interestingly, the Court went on to find that, while the taking of the mucous sample from the tissue used by the accused violated his Charter rights, the seizure did not interfere with his bodily integrity or cause him any loss of dignity. This particular piece of evidence was therefore held to be admissible.

(ii) Section 8 of the Charter

The Supreme Court of Canada has held that section 8 of the Charter (guarantee against unreasonable search and seizure) is there for the protection of personal privacy (see *Hunter* v. *Southam Inc.* (1984), 2 S.C.R. 145). The taking of bodily substances has been held to constitute a seizure within the meaning of that section (see *R.* v. *Dyment* (1988), 2 S.C.R. 417). In terms of the reasonableness of the seizure, the Supreme Court in *R.* v. *Collins* (1987), 33 C.C.C. (3d) 1, which dealt with breathalyser testing in relation to section 8, provides a useful framework within which to analyze drug testing. The first requirement for reasonableness is

some form of legal authorization. It would then be necessary to consider whether the drug testing measure itself was reasonable. The Court in *Dyment* seems to suggest that the "reasonableness" test in section 8 would require an objective precondition to mandatory drug testing, such as reasonable and probable grounds to suspect an employee of breaching a proscription against the use of alcohol or drugs, for example, while in charge of public transport. Persuasive evidence on the nature of the problem to be addressed through drug testing might have to be presented to the courts in order to determine the reasonableness of the program. Lastly, the manner in which the mandatory drug testing was carried out would have to be considered reasonable. This would ensure that the drug testing program was performed in a scientific and accurate manner, always bearing in mind the privacy concerns of the individual involved.

The courts in this country have, however, indicated a willingness to drop the stringent standard of reasonableness requirement under section 8 when they are dealing with an administrative or regulatory context, as opposed to an area of the criminal law. In the former cases, it has been held that a less strenuous and more flexible standard of reasonableness may be appropriate. For instance, in the case of *R.* v. *McKinlay Transport* (1990), 68 D.L.R. (4th) 568, the Supreme Court of Canada held that random monitoring may be the only way to maintain the integrity of the tax system. Thus, the degree of privacy that an individual can reasonably expect may vary depending on the nature of the activity involved.

The level of one's privacy protection may also be dependent upon the context within which the right to privacy is challenged. For example, the Supreme Court of Canada in *R.* v. *M. (M.R.)*, [1998] 3 S.C.R. 393 held that a reasonable expectation of privacy is lower for students attending school than for others, because students know that teachers and school authorities are responsible for maintaining order and discipline and thereby ensuring a safe school environment. The Court concluded that this reduced expectation of privacy, coupled with the need to protect students and provide a positive atmosphere for learning, clearly suggest that there should be a more lenient and flexible approach to searches conducted by teachers and principals than to searches conducted by the police.

(iii) Section 15 of the Charter

Section 15 provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination on the

basis of such grounds as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Supreme Court of Canada in the case of *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 made it clear that in order to avail oneself of the equality guarantees in section 15, it must be demonstrated that a law imposes a burden, obligation or disadvantage on the individual on the basis of one of the grounds expressly listed in that section or on one that is analogous. In other words, not every distinction, classification or unfairness can be subjected to a successful section 15 challenge.

A drug testing program would likely impose a burden or disadvantage in the form of disciplinary action (such as being fired) resulting from a refusal to submit to a drug test or from a positive test result. The basis for an allegation of discriminatory treatment would likely be "mental or physical disability." In determining whether drug addiction or dependency falls within the ambit of section 15 "disability," the courts would likely look to the fact that the *Canadian Human Rights Act* specifically defines "disability" to include any previous or existing drug- or alcohol-dependency. The recent Ontario Board of Inquiry decision in the *Entrop* case (see Part A of this section of the paper), which found that "handicap" under the Ontario *Human Rights Code* includes alcoholism and drug abuse, might also be taken into account.

(iv) Section 1 of the Charter

Section 1 provides that constitutional rights are subject to reasonable limits prescribed by law, if these limits can be shown to be justified in a free and democratic society. The law whereby the Charter rights were said to be infringed would have to be analyzed to determine whether the limitations it imposed on the rights met the reasonableness test established by the Supreme Court of Canada in *R.* v. *Oakes* ((1986), 1 S.C.R. 103). The government would have to demonstrate that the objectives of the drug testing program related to an important, pressing and substantial concern and that the means chosen were proportional or appropriate to the ends. In other words, the drug testing would have to be be rationally connected to the objective, and impair constitutional rights as little as possible, while the importance of the objective would have to outweigh the infringement of these rights. Accordingly, a drug testing program may need to be premised on solid evidence of a serious problem of drug usage in a particular sector that could not be dealt with by less intrusive means. (For a more complete analysis of the Charter issue related to privacy rights in general, please refer to the Current Issue Reviews, No. 91-6E, *Life, Liberty and*

Security of the Person under the Charter and No. 91-7E *Search, Seizure, Arrest and Detention under the Charter*.)

b. The *Canadian Human Rights Act*

As the Charter applies only to government actions and legislation, a non-legislated drug testing program in a private sector company under federal jurisdiction would have to be challenged under the *Canadian Human Rights Act*. The Act applies to all federal government departments, agencies, Crown corporations, and to business and industry under federal jurisdiction, such as banks, airlines and railway companies.

In 1988, the Canadian Human Rights Commission issued a policy statement on drug testing in which it suggested that using positive results from drug tests might be considered a discriminatory practice on the ground of disability. The Act, which contains several provisions forbidding discrimination in relation to employment, defines "disability" as including any previous or existing dependence on alcohol or a drug.

It is submitted that on the basis of sections 7, 8 and 10 of the *Canadian Human Rights Act*, which prohibit discriminatory employment practices, a federal employee disciplined for testing positive in a drug test might be able to file a complaint with the Commission alleging discrimination on the basis of disability. The case could be fairly easy to make since the Commission takes the position that the individual need not be required to prove drug dependency but rather "merely show that differential treatment resulted from the employer's presumption of drug dependency."

The Act also provides defences that a federal employer may plead against a charge of discriminatory practice. The *bona fide* occupational requirement (b.f.o.r.) is the most common defence raised in cases of employment discrimination. Amendments made in 1998 to the *Canadian Human Rights Act* (Bill S-5) incorporated into the b.f.o.r defence the duty of the employer to accommodate up to the point of undue hardship. Consequently, an employer that is the subject of a complaint of discrimination cannot avail itself of the b.f.o.r. defence unless it can demonstrate that it could not accommodate the needs of the complainant without suffering undue hardship. The duty to accommodate applies regardless of whether the discriminatory practice at issue is classified as direct or indirect. Previous to these amendments, the standard of judicial scrutiny and the type of remedial relief available often turned on how a particular discriminatory

practice was classified (see for example the decision of the Federal Court of Appeal in *Toronto-Dominion Bank* v. *Canadian Human Rights Commission* which is discussed above).

Thus, the *Canadian Human Rights Act* may be used to challenge the use of drug testing in the workplace. If it could be established that such testing is discriminatory, the onus would be on an employer to justify the testing.

c. Employment Standards Legislation

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

While some arbitral decisions have indicated that employers have only a limited right to insist on medical examinations and are not permitted to discipline employees for off-duty conduct, recent awards at arbitration have revealed that arbitrators are recognizing at least two possible roles for drug testing in the workplace. First, there is some acceptance that an employer can have a valid reason for asking an employee, following a particular incident, to submit to a drug test. This should happen, however, only where impairment is suspected. One arbitrator has stated that "it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing" *(Re Canadian Pacific Ltd. and United Transportation Union* (1987), 31 L.A.C. (3d) 179). Consideration has also been made of the significance of an employee's refusal to undergo a valid request for a drug test. It has been accepted, in at least two cases, that an employee's refusal allows the employer to draw a negative inference and thereby discipline or discharge the employee, bearing in mind the other circumstances of the case. As well, dismissal has been seen as justified where there are reasonable grounds for performing drug testing and an employee who has had a number of positive test results has refused to participate in available assistance programs.

A second emerging trend is the use of drug testing as a condition of reinstatement of an employee. In cases involving the reinstatement of an employee who has been terminated for poor attendance and/or other behavioural problems in the workplace, certain conditions have generally been set by arbitrators, all of which must be met by the employee for a period of 18 to 24

months following reinstatement. The most common conditions include not reporting to work under the influence of alcohol or non-prescription drugs, participation in various types of rehabilitation programs and maintaining a level of attendance no worse than the average in the plant or department. Recently, some conditional reinstatements have provided the employer with the right to require urine and/or blood samples in the future as proof that the employee remains free from alcohol or drugs. While it is accepted that random testing of the employee will not ensure that he or she remains drug free, the practice is viewed as a very strong inducement.

Therefore, while there exists labour opposition to drug testing in the workplace, it would appear that it has gained a foothold, at least as a restrained and purposive approach to dealing with individual problem employees.

d. Procedural Safeguards

In a working paper on investigative tests, the Law Reform Commission of Canada looked at existing legislation in other jurisdictions and discussed the procedural safeguards which may be required to ensure that a drug test is performed in a fair and reliable manner (Working Paper 34, *Investigative Tests*, 1984). In October 1987, the House of Commons Standing Committee on National Health and Welfare tabled its report on drug abuse in Canada. The report, entitled *Booze, Pills and Dope: Reducing Substance Abuse in Canada*, recommended that if testing must be used, it should only be done when grounds exist for suspecting the possible use of drugs or alcohol (i.e., where an employee has shown evidence of impairment or of performance difficulties). Drug screening should assist the employee in seeking appropriate treatment; it should not be used as evidence in criminal proceedings. The report also recommended that all positive test results should be confirmed by another test; that all results should be conveyed to a licensed medical practitioner acceptable to both the employee and the employer; and that no action be taken on the basis of positive results before the employee is given the opportunity to meet with the medical practitioner or to present contrary evidence.

The Privacy Commissioner undertook to study federal government drug testing policies and practices. On 1 June 1990, the Commissioner released a report containing recommendations on drug testing based on the requirements of the *Privacy Act*, which pertains to the collection of personal information by government institutions and sets out principles of fair information practices. Among other obligations, it requires government institutions to collect only the personal information needed to operate their programs; to collect the information from the

individual concerned, whenever possible; to inform the individual how the information will be used; to keep the information long enough to ensure individual access; and to take all reasonable steps to ensure the information's accuracy and completeness. The Act does not apply to the private sector.

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

In September 1992, the Ontario Law Reform Commission released its Report on Drug and Alcohol Testing in the Workplace. After extensively studying the various aspects of this issue, the Commission found that the current legal framework does not deal adequately with the complex problems posed by such testing. Therefore, the Commission recommended that the Government of Ontario introduce legislation that would ban employers from the drug and alcohol testing of bodily samples taken from all current and prospective employees in the province. The Commission proposed that this legislation should apply to all private and public sector workers, to unionized and non-unionized employees and to job applicants. Such specific legislation would have the effect of substantially reducing the current uncertainty in the province with respect to the appropriateness of employee testing.

The Commission based its recommendation on the fact that drug and alcohol testing constitutes a significant invasion of the privacy interests of employees. Moreover, the techniques currently used to analyze bodily fluids are incapable of detecting impairment and there is no empirical evidence to support the proposition that drug abuse has become a significant problem in Ontario. Instead, the Commission felt that employers could use alternative measures that do not involve the complex legal and ethical dilemmas posed by drug and alcohol testing. The Commission endorsed performance testing as the least intrusive and most effective method of measuring impairment and it recommended that such testing would be justified in cases where impairment on the job poses a risk of physical injury or death to the employee, co-workers or members of the general public. Thus, even in the case of safety-sensitive positions, the Commission is of the opinion that the taking of bodily samples is not justified.

3. Conclusion

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

Because there is virtually no legislation and little case law in this area, it is hard to know how these questions will ultimately be determined, and whether the determination will fall to the courts or to the federal or provincial legislatures. In any case, it must be recognized that drug testing can pose a serious threat to the individual's right to be protected against physical intrusion and surveillance and to control personal information. As the U.S. Supreme Court once stated:

> Experience should teach us to be on our guard to protect liberty when ... purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. (Mr. Justice Brandeis, *Olmstead* v. *United States*, (1928) 48 S. Ct. 564)

PARLIAMENTARY ACTION

No legislation or legislative proposals have yet been tabled. Several House of Commons Committees, however, have addressed the issue of drug testing.

In November 1987, the Standing Committee on National Health and Welfare, in its report on drug abuse, opposed mass or random testing in Canada and said that drug testing should be used only when cause or grounds for suspected use exist.

After its review of the *Railway Safety Act*, in April 1988, the Transport Committee recommended that the government legislate a drug testing program which would provide for the testing of transportation employees after an accident and for reasonable cause. On 16 March 1990, the Transport Minister released a strategy paper outlining proposals to establish a comprehensive series of measures to prevent the use of alcohol and drugs in the federal transportation sector. The strategy would deal with workplace-related use of alcohol or drugs by employees in safety-sensitive positions considered to have a direct impact on the health, safety or security of the public or of co-workers. The paper was referred to the House of Commons Standing Committee on Transport for review, consultations and recommendations.

On 28 March 1990, the Minister of National Defence also issued a strategy paper on the control of alcohol and drug use by departmental employees (see The Canadian Context/The Current Situation section of this paper).

On 12 June 1990, the Standing Committee on Transport tabled its report on the government's strategy paper on substance use in the transportation industry. The report concluded that Canadian studies on substance use in safety-sensitive positions in the industry demonstrate there is no serious threat to safety from this cause. "We have not been able to identify any significant major drug or alcohol related safety risk in the Canadian transportation system. Therefore, we are not persuaded that at the present time, a substance use problem exists" (page 46:7).

The Transport Committee assessed the various types of drug testing proposed in the strategy, and recommended post-accident testing, periodic testing (e.g., at the time of regular medical examinations), pre-employment testing, and "for cause" testing. The Committee felt "for cause" testing to be necessary to protect the travelling public and co-workers, but recognized that such testing requires strict regulations or guidelines because of the risk that it could be used to harass and discriminate against employees. Therefore, the Committee recommended that the "for

cause" guidelines include a "reasonable and probable grounds" element. The Committee did not recommend mandatory random testing be introduced in legislation affecting the transportation industry.

On 7 November 1990, Transport Minister Doug Lewis tabled the government's response to the report of the Standing Committee on Transport. Essentially, the government accepted all the Committee's recommendations. In particular, it decided to withdraw the random testing element from its transportation substance use policy. A proposed bill, entitled An Act for the prevention of substance use in a safe transportation system, was drafted early in 1993 and regulations to accompany the bill were also drafted and distributed to the major stakeholders for their comments. The bill was not tabled before Parliament was dissolved for the October election, however.

The current government does not intend to proceed with legislation preventing the use of alcohol and drugs in the transportation sector. Instead, the Department of Transport is working primarily with the motor carrier industry to develop a self-directed program to deal with U.S. drug testing requirements. **In its January 1999 Interim Report, the Special Senate Committee on Transportation Safety and Security recommended that Transport Canada reconsider its position on drug and alcohol testing in the transportation sector and permit mandatory random testing similar to such testing in the United States.**

CHRONOLOGY

March 1986 -	U.S. Commission on Organized Crime tabled its report recommending that federal employees be subject to compulsory drug testing.
September 1986 -	U.S. President issued Executive Order 12564 imposing mandatory drug testing as a government-wide policy.
25 May 1987 -	The federal government announced the National Drug Strategy to fight drug abuse in Canada.
2 November 1987 -	The Standing Committee on National Health and Welfare tabled its substance abuse report in the House of Commons.
January 1988 -	The Canadian Human Rights Commission issued a policy paper stating that the use of positive test results after a drug test might be considered a discriminatory practice.

21 April 1988 - The Standing Committee on Transport recommended that the government introduce legislation to implement drug testing programs.

December 1989 - The U.S. Supreme Court rendered two decisions upholding mandatory drug testing programs in the workplace and stating that these did not infringe on privacy rights protected by the Fourth Amendment.

16 March 1990 - The Minister of Transport released a strategy paper on the control of drug and alcohol use by employees in the federal transportation sector. The strategy proposed the enactment of legislation to provide for mandatory drug testing.

28 March 1990 - The Minister of National Defence announced a strategy on alcohol and drug use control in the Canadian Forces. The strategy could include mandatory drug testing with random elements.

12 June 1990 - The Standing Committee on Transport tabled its report on the strategy paper on substance use in the transportation industry.

1 October 1990 - TD Bank instituted a drug-testing program for all new employees and employees returning after an absence of three months or more. The validity of the program was upheld by the Canadian Human Rights Tribunal on 16 August 1994. On appeal to the Federal Court of Canada, the matter has been sent back to the Tribunal.

7 November 1990 - The government tabled its response to the Standing Committee on Transport report.

1 January 1992 - Imperial Oil Limited commenced a comprehensive drug-testing program that included random testing component.

21 May 1992 - The Governor in Council approved regulations respecting the Canadian Forces Drug Control Program, pursuant to section 12(1) of the *National Defence Act*.

1 November 1992 - The *Corrections and Conditional Release Act* was proclaimed into force. The constitutionality of section 54 of the Act, which provides for random urinalysis testing of inmates, has been upheld by the courts.

December 1992 - The Department of Transport released for comment the draft regulations proposed for use with a planned federal transportation sector bill entitled An Act for the prevention of substance use in a safe transportation system.

November 1994 - The Minister of Transport announced that his Department would not be pursuing legislation concerning the use of alcohol and drugs in the federal transportation sector.

June 1995 - An Ontario human rights Board of Inquiry held that Imperial Oil's program as it pertained to one employee was discriminatory. Imperial Oil is appealing this decision.

June 1995 - The United States Supreme Court upheld the constitutionality of random urinalysis drug-testing of high school athletes in *Veronia School District* v. *Acton* 515 U.S. 646 (1995).

July 1996 - U.S. federal motor carrier safety regulations were extended to Canadian trucking companies that send drivers across the border. The regulations include requirements for drug and alcohol testing.

January 1999 - The Special Senate Committee on Transportation Safety and Security recommended that the government permit mandatory random drug and alcohol testing in the transportation industry similar to the testing required under United States legislation.

May 1999 - The House of Commons Standing Committee on Justice and Human Rights proposed specific amendments to the *Criminal Code* and recommended that the Minister of Justice consult with the provinces and territories to develop legislative proposals for obtaining better evidence against drivers suspected of being drug-impaired.

June 1999 - It was revealed that the Solicitor General of Canada was conducting an internal review of its drug and alcohol programs in the federal prison system following internal studies that indicated extensive drug abuse by inmates.

SELECTED REFERENCES

Benyekhlef, Karim. "Réflexions sur la légalité des tests de dépistage de drogues dans l'emploi." *Revue du Barreau*, 48-2, 1988, 315-363.

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

Canadian Human Rights Commission. "Drug Testing." *Policy 88-1*, January 1988, p. 11.

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

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

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

House of Commons Standing Committee on Justice and Human Rights. *Toward Eliminating Impaired Driving.* Queen's Printer for Canada, May 1999.

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

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

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

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

Privacy Commissioner. *Drug Testing and Privacy*. Ministry of Supply and Services, Ottawa, 1990.

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

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

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

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

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