DRUG TESTING
THE SPORTING EXPERIENCE:
THE EMPLOYMENT POSSIBILITY

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Drug Testing: A Sample of the Canadian Experience

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Introduction

Let me begin by thanking the Legal Research Foundation for the opportunity to participate today. I thought I had blotted my copybook with Justice Robertson due to earlier correspondence. In my ignorance I addressed him as “My Lord” instead of “Your Honour”. Better to err on the side of elevation than demotion. At least I did not make the mistake of one Canadian accused who on a first appearance before the bench addressed the presiding judge as “Your Holiness”. In any event, Justice Robertson and of course Jane Kilgour have shown me every kindness. I thank them.

Among others, I have two aspirations. I would like to do well enough in an athletic contest to merit drug testing. As I grow older, the likelihood of this is receding faster than my hairline. And I would like to enjoy the stature—or perhaps it is the notoriety—of today’s other speakers and need as little introduction as do they. When I saw the draft program, and the length it went to identify me, I made the humble suggestion to Justice Robertson that less might be said. When he told he had cut three words for the final version, I was at least gratified to see that they were not my name.

I speak of “meriting” sport drug testing advisedly. It will come as no surprise that I firmly believe that a well-executed anti-doping campaign, including testing athletes for banned substances, is good for sport and sportsmen and women. (If only there were such deterrents to address ruinous behaviour by sport administrators, selectors, coaches and trainers.) I will leave it to others to make the case for sport drug testing in this country, if this is still required.

Drug testing in sport and other contexts

Since drug testing in sport has been a point of departure in both Canada and New Zealand, it is worth considering the extent to which the sporting context makes drug testing unique. Banned substances are used in sport to enhance performance. In most other areas, use or abuse of drugs is detrimental, inhibiting performance often in situations where the well-being of third parties is at stake. Obvious examples include law enforcement and

* I am grateful to Sir Graham Speight, Chairman, and Graeme Steel, Executive Director of the New Zealand Sports Drug Agency for introducing me to Mr Justice Robertson and encouraging this presentation. I would like to thank my secretary Vivien Taylor for retrieving and sending me much of the material discussed in this paper, and my wife Veronica for her usual and cogent review of the draft. The opinions I express are my own and not those of the Canadian Department of Justice or the Canadian Centre for Drug-free Sport.
transportation. In the sporting world, the use of most banned substances is penalized by sport related sanctions, such as the loss of the right to participate. In most other contexts, the use or abuse of drugs can lead to criminal penalties and/or professional discipline including the loss of livelihood. But it was suggested as early as 1989, in the Annual Report of the Privacy Commissioner of Canada, that sport drug testing would set a precedent enabling employers to justify like intrusions into the privacy of employees and potential employees.¹ Can the lessons of sport drug testing apply in other circumstances?

I think so. Underlying questions of necessity, efficacy and reliability, among others, are universal. In both the sporting and non-sporting worlds, it must be shown that drug testing is needed, that it is effective and that its results are reliable. Regardless of the motivation for drug abuse and testing for it, and regardless of the consequences of drug abuse and being “caught”, the legal aspects of drug testing involve common inquiries. Are the test protocols suitable and properly drafted? Are the testers governed or regulated appropriately? Are there safeguards to prevent arbitrary and capricious targeting of individuals for testing or their harassment by testing? Are there suitable means of challenging testing and test results?²

I do not propose to give one Canadian’s views on these questions. Rather, I would like to review for you what a number of Canadian courts and administrative tribunals have determined about such basic issues. The views of judges and tribunal members are of course always the preoccupation of a litigator or barrister. But what I hope this audience can take away from this presentation is an idea of what might be needed to support—or to attack—a program of drug testing before a neutral arbiter such as a judge; or even before those with a direct stake in such a programme, whether they are to be tested or to be protected by testing.

My description of the Canadian experience cannot be comprehensive. The delights of your country that I have just spent four and a half months experiencing—beaches, glaciers, volcanoes, glow worm caves not to mention the odd vineyard—are far from my office and library. I am happy to report that my luggage contains more in the way of running shoes than law reports. Because I am a federal public servant, I have chosen examples from three environments that concern my clients and my department: federally funded sport; federally administered penitentiaries; and federally regulated financial institutions.

In reviewing these decisions, I will not dwell on the nature of the legal challenge in each case. It seems to me that for today’s purposes, the peculiarities of Canadian constitutional and administrative law ought to be avoided. If I could claim any knowledge of your Bill of Rights or Privacy Act I would attempt comparisons of possible legal grounds for attacking drug testing in our two countries. But I can’t so I won’t.

² These sorts of questions have been posed for some time by, for example, the Privacy Commissioner of Canada: see Dubin Report 1989–1990, ibid, p 22.
I do hold the view that those hearing and deciding on legal challenges to drug testing are likely to require satisfaction that drug testing “makes sense”, regardless of the technical legal requirements of each type of attack: such as standing to commence proceedings; burdens of proof; jurisdiction of the court or tribunal to grant the relief sought; and the like. More importantly, those to be subject to drug testing must be given a rational and comprehensive case for drug testing so they will understand if not fully accept it.

Is drug testing necessary?

The Correctional Service of Canada was given the power to require urine samples for drug testing in May, 1985. In August, 1986, more than two years before Ben Johnson’s positive test in Seoul, the Quebec Superior Court ruled that drug testing of federal inmates was unconstitutional: Re Dion. The authorizing legislation gave corrections officers the authority to demand and test a sample from any inmate. A positive test result would be proof that an inmate had committed a disciplinary offence of consuming an intoxicant while incarcerated. Inmates in the Cowansville Penitentiary in Quebec sought a declaration that the legislation violated a number of constitutional rights. They succeeded.

At the end of the day what troubled Mr Justice Galipeau was the lack of objective criteria governing the exercise of the power to require a sample. More on that later. He did, however, accept the evidence that the consumption of drugs was “very widespread” in the institution and he accepted the evidence that the consequences were “disastrous”, endangering the life, security and property of drug users, other inmates and penitentiary authorities. He agreed that legislators had the right if not the duty to address the problem. Drug testing itself was not criticized, only the manner in which it was implemented.

Unfortunately, the evidence of the necessity of drug testing and other fundamental matters is not described in the reported decision. It may have been rather thin. A similar and contemporaneous challenge to the same drug testing scheme was initiated by inmates of the Joyceville Penitentiary in Ontario: Jackson v Joyceville Penitentiary. For various reasons, that case did not come to trial until early 1989. At trial, it would appear that substantially more evidence was led about the need for drug testing than had been led before Mr Justice Galipeau. In Jackson, Mr Justice MacKay of the Federal Court Trial Division heard a number of Correctional Service of Canada and expert witnesses.

3 By amendments to ss 2, 39(i.1) and 41.1 of the Penitentiary Service Regulations, CRC 1978, c 1251: SOR/85–412, ss 1 and 3; and SOR/85–640.
4 (1986) 30 CCC (3d) 108 (Que SC).
5 “Experience has shown that serious breaches of discipline, which are generally translated into assaults, brawls, thefts, refusals to obey orders, misconduct, blackmail, threats against inmates, or on the outside, against family or friends of inmates with a view to forcing them to traffic in drugs” (translation) (1986) 30 CCC (3d) 108, 118.
7 [1990] 3 FC 55 (TD).
8 I understand that the Dion decision has been appealed but the appeal has not yet been heard. In defending this action initiated by Jackson counsel for the Attorney-General of Canada seeks to ensure that evidence be fully considered, including sociological evidence, important in his view in assessing the constitutional issues. Counsel suggests that such evidence was not submitted to Mr Justice Galipeau in Dion.” Jackson v Joyceville Penitentiary [1990] 3 FC 55, 70 (TD).
9 Ibid, pp 73–74 (TD).
Relating to perceptions of the impact of compulsory urinalysis, to violence in the prison setting, to the relationship of drugs to violence, to living conditions and supervision arrangements within the penitentiary system, and also about the testing arrangements including technical aspects of testing which were introduced at Joyceville and about comparable conditions, arrangements and experience within the federal penal system in the United States. This was intended to assist in resolution of the constitutional issues raised in this matter by putting into full context the system of testing adopted, the reasons for it and comparable arrangements in other jurisdictions.

Like Mr Justice Galipeau, Mr Justice MacKay accepted the evidence before him that intoxicants in prisons create very serious problems including a greater risk and level of violence. However, he too concluded that the impugned programme of drug testing was fatally deficient due to a lack of objective criteria governing its application to individual inmates, a matter to which I shall return.

The evidence of the need for drug testing has been accepted with even greater enthusiasm in Canada. The Dubin Commission was established in the wake of Ben Johnson’s positive test result in Seoul. Then a member of the Ontario Court of Appeal, now the Chief Justice of Ontario, Mr Justice Dubin heard 119 witnesses in the course of public hearings over nine months. His Commission staff also conducted their own investigations and research. As is well known in international sport, and consistent with the evolving anti-doping programmes of sport governing bodies at all levels, Mr Justice Dubin concluded that drug testing, particularly random, unannounced, out-of-competition testing, is “the one effective deterrent” to the abuse of banned drugs in sport.

Most telling was the evidence he heard from athletes themselves and the weight he attached to it in concluding that the need for drug testing is unquestionable:

The overwhelming majority of athletes not only agree to be tested but consider testing to be protection against unfair competition by others and proof that they themselves obey the rules.

... Even those athletes who have used drugs testified that they would welcome an effective testing program which would eliminate drug use by all athletes and thus ensure a level playing field.

Nevertheless, one Canadian academic who is no fan of athlete drug testing has noted, tongue-in-cheek, that Canadian prison inmates appear to have more legal protection than Canadian athletes. But then again, he came to us from Australia.

More recently, a Human Rights Tribunal has rejected the case for the need for drug testing

12 Ibid, p xxii.
13 Ibid, p 430.
14 Ibid, pp 490–491
15 John Barnes, author of Sports and the Law in Canada (2d, Toronto, 1988), in private conversation with the author.
of bank recruits or employees: *Ontario Civil Liberties Assoc and Canadian Human Rights Commission v Toronto-Dominion Bank.*\(^\text{16}\) In this case, a tribunal established under the Canadian Human Rights Act\(^\text{17}\) considered a complaint that the Bank’s drug testing policy was discriminatory by depriving an individual or class of individual of employment on the grounds of a disability.\(^\text{18}\) The Act defines “disability” to include a dependence on alcohol or a drug.\(^\text{19}\)

The Canadian Human Rights Commission and the Ontario Civil Liberties Association pursued the complaint—in the absence of any complaint from a bank employee or employment applicant—because of the larger issues raised. The Commission’s *Annual Report 1993* canvasses its concerns:\(^\text{20}\)

> We believe there is no sustainable argument to support across-the-board testing of entire industries or broad categories of employees. This position is based upon three facts: first, there is no evidence to suggest that Canadian society has a serious drug problem; second, there is even less indication of such a problem among those with full or part-time employment; and, finally, drug tests are not a reliable indicator of safe performance in the here-and-now—at best they show only that an employee may have used a particular drug at some point in the past, perhaps several weeks before. Better supervision would be more efficient and more effective in ensuring that employees are not under the influence of drugs while on the job, rather than seeking will-o’-the wisps evidence of potential drug dependency.

In the course of dismissing the complaint against the Toronto-Dominion Bank for other reasons, the Human Rights Tribunal considered evidence advanced by the Bank to justify the need for drug testing of its employees. Three main justifications were advanced.

The first was that with over 30,000 employees, the Bank regarded its work-force as a microcosm of Canadian society likely to contain a proportionate number of individuals abusing illicit drugs. The Tribunal commented:\(^\text{21}\)

> The Tribunal is of the view that the bank acted on some very impressionistic assumptions. There is no substantive evidence to show that the Bank employees constitute a microcosm of Canadian society. If you look at factors such as education, gender distribution, career motivation, age, etc you might well find that the Bank employee population differs substantially from the general population. There is no evidence that the Bank employees approximate a statistically valid sample of the greater population.

A second rationale advanced by the Bank had to do with contact of employees with criminals. If employees were using illicit drugs, it followed that they obtained them from lawbreakers. The Bank led evidence to indicate that both in Canada and the United States people in conflict with the law had a high incidence of illicit drug use.

\(^{16}\) TD December 1994, decision rendered August 16, 1994.  
\(^{17}\) RSC 1985, c H-6.  
\(^{18}\) Section 10.  
\(^{19}\) Section 5.  
The Tribunal was not impressed: 22

Furthermore, while there is some evidence that people in treatment for drug abuse (Canada) and people arrested (USA) demonstrated a correlation between crime and drug use, no causal relationship was established. In fact, only one case was mentioned, in evidence, of theft by a Bank employee who was drug dependent and that person was a management employee who would not have been subject to this policy.

The Bank also advanced a concern about the impact of illicit drug use on job performance. Again, it failed to substantiate this concern, relying as it did on expert evidence that was not sufficiently tied to the business of banking and the employees of the Bank. 23 The Tribunal concluded that the Bank “did not act upon evidence of a problem but upon impressions and some evidence from other sources, much of it from the United States bearing little relevance to the actual circumstances in the Bank”. 24

Is drug testing effective?

Even if the case can be made for requiring drug testing, a programme may be savaged if it appears to be ineffective.

This was a major point made by the Dubin Report, coming as it did at a time when drug testing of athletes, if done at all, was largely confined to competition venues. Mr Justice Dubin was scathing in his criticism of the lack of unannounced and out-of-competition drug testing. He described this as “the fallacy of in-competition testing”: sole reliance on an ineffective form of drug testing in the face of suspected and known abuse substances, notably anabolic steroids. 25 Because they are only useful as part of training regimes long since completed by the time of competition, in-competition testing is next to useless in combating them.

The question of the effectiveness of inmate drug testing has also arisen in the courts. In the wake of the Dion and Jackson decisions, the federal penal legislation was overhauled. The changes added criteria found lacking. 26 The legislation expanded the scope of the Correctional Service of Canada’s drug testing program to include random testing. This was challenged in 1993 by inmates in the Kent Institution in British Columbia as being unconstitutional. However, they were unsuccessful: Fieldhouse v The Queen. 27

In relatively brief reasons (considering the case took a week to argue), Mr Justice Collver displays enormous sympathy for corrections officers and little for inmates. He ruled (with virtually no discussion) that the legislative mandate of the Correctional Service of Canada to be responsible for “the care and custody of inmates” 28 justifies the “zero tolerance”

22 Ibid, p 32.
23 Ibid, p 33.
24 Ibid, p 35.
26 Corrections and Conditional Release Act, SC 1992, c 20, especially s 54.
27 Supreme Court of British Columbia, Vancouver Registry No CC931616, unreported decision of Collver J, dated July 24 1994.
28 Corrections and Conditional Release Act, SC 1992, c 20, s 5(a),
Drug Testing

approach the Warden of the Kent Institution adopted towards drug use. He brushed aside objections to the rigorousness of the drug testing procedure, commenting:

[C]riticism of the universal applicability of the program does not advance the plaintiffs' contention that s 7 and s 8 [of the Canadian Charter of Rights and Freedoms] rights have been infringed. Surely, the efficacy of the program must depend upon keeping inmates guessing as to who is going to be randomly targeted. Indeed, universal application becomes the program's strength, particularly since involvement arises solely from computer-driven selection of inmates' names. Although urination in the presence of an observer (of the same sex) is also unusual, the need to ensure that the sample is not tampered with seems obvious, and the fact of observation does not, by itself, make the collection process unreasonable.

On the other hand, features of the Toronto-Dominion Bank's drug testing programme rendered it less than effective in the eyes of the Human Rights Tribunal. Apparently the programme applied differently as between management and non-management employees. It also distinguished between new and returning employees, on one hand, and current employees on the other. The Tribunal could not reconcile such disparities in treatment with the Bank's avowed motivation for drug testing; the Bank's apparent half-heartedness seemed to undermine exactly what it sought to achieve. Reading the decision, one has the sense that even if the Tribunal had been satisfied that the Bank needed to drug test its employees, it would have rejected the impugned programme as ineffective.

Is drug testing open to abuse?

Those who advocate drug testing must be prepared to demonstrate that the answer to this question is a clear "no". The Correctional Service of Canada's inability to do so was its downfall in Dion and in Jackson.

In the former case, Mr Justice Galipeau articulated his concerns about the lack of objective criteria for requesting a sample in terms of the potential for abuse:

One can consider it necessary to require a urine sample when the inmate in question exhibits all the signs of a drug user. But, one can also out of malice, a spirit of vengeance, or simple ignorance, submit an innocent person to harassment, the bother, the torment, the insult, or the humiliation, of suffering one or multiple requests for urine samples, which will always give negative results.

Mr Justice Galipeau compared the unfettered discretion of the corrections officer with the authority of a police officer to demand a breath sample only with "reasonable and probable grounds". In the absence of provisions establishing the circumstances in which

29 Fieldhouse v The Queen, Supreme Court of British Columbia, Vancouver Registry No CC931616, unreported decision of Collver J, dated July 24, 1994, p 14.
30 Ibid, p 17. These conclusions were reached in the context of a then recent decision of the Supreme Court of Canada ruling that federal inmates could not hold a reasonable expectation of privacy while incarcerated with respect to necessary prison surveillance, searching and scrutiny: Conway v Canada (Attorney-General) (1993) 83 CCC (3d) 1.
31 Above, n 21, pp 33–35.
32 (1986) 30 CCC (3d) 108, 119
33 Ibid, p(+) 120-123
a urine sample might properly be required of an inmate, circumstances that could be judged objectively, he found the impugned legislation entirely subjective and arbitrary.

In *Jackson*, Mr Justice MacKay reached the same conclusion, albeit in more dispassionate terms:

> Here the absence of criteria for requiring a specimen, while it may not lead to abuse by reasonable staff members, provides no standards for determining when abuse arises, it is not tied to reasonable and probable cause even when there is a basis on which the requirement is ordered, or to any other standard or circumstance that would reasonably support the requirement in light of its explained purposes. No provision is made for advising the inmate why the specimen is required, or for the inmate, in circumstances such as those relied upon here where a staff member believes or suspects the inmate has consumed an intoxicant, to explain his conduct or action before a decision is finally made to require the specimen.

In other words, the drug testers must be answerable for the exercise of their authority, even in a penitentiary where there is the greatest imaginable control being exercised by authorities.

No such concerns appear in the *Dubin Report*. One likely reason is that the responsibility for drug testing in Canada was not and still is not concentrated in any one body’s hands. Sport Canada, a branch of the federal government, the Canadian Centre for Drug-free Sport, and its predecessors, and national sport governing bodies all have roles to play in the drug testing program. This dispersal of authority makes it difficult for any one player to exceed its authority. At present, the conduct of drug testing resides largely with the Centre, an organization managed and funded independently of the sport organizations and athletes it serves. The Centre is well-placed to act as a brake on drug testing sought, for example, by a sport organization for improper purposes or without foundation. In turn, the Centre’s conduct is policed by a sophisticated series of challenge and appeal mechanisms including recourse to the courts.

**Conclusion**

There are of course other fundamental questions which come to mind with respect to drug testing. For example: are less intrusive means of dealing with drug abuse available? what is the nature of the informed consent required before one can be said to “volunteer” to be tested? are the laboratory analyses and test results sufficiently conclusive to meet civil or criminal burdens of proof? is the drug abuse tested for a “strict liability” offence for which

34 *Jackson*, above, n 8, p 103.
35 For example, s 3.3.4 of the Canadian Centre for Drug-free Sport’s current *Doping Control–Standard Operating Procedures* (April, 1994), provides that it is the responsibility of the Centre’s Doping Control Review Panel (as established by its Board of Directors) to identify and select athletes, teams, training venues and/or events for unannounced “target” testing requested by any of the Centre’s own staff, international or national sport federations, major games associations, an International Olympic Committee accredited laboratory of the general sport community.
36 Ibid, ss 8–11.
there can be no excuse or defence?37 I have no doubt that courts and tribunals in both our countries will have ample opportunity to address such questions in the future. In the meantime, I look forward to the rest of the afternoon’s proceedings and learning of New Zealand perspectives on drug testing in and out of sport, and the link between the two.

37 This issue came to the fore in the aftermath of the 1994 Commonwealth Games. Canadian weight lifter Jim Dan Corbett tested positive for three banned stimulants. He forfeited three medals. He was using a nutritional supplement with the knowledge of team and federation doctors. Subsequent laboratory analysis indicated that, contrary to the labelling information, the supplement contained the three banned substances. Corbett’s suspension was lifted without further penalty, however, his medals were not returned as the rules of the Commonwealth Games Federation and the Canadian sporting community permit consideration of such explanations for inadvertent use only with respect to the severity of the sanction and not the fact of the doping infraction itself. See Canadian Centre for Drug-free Sport, “Media Release”, November 14, 1994.
The Scientific Reliability of the Processes

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Introduction

Sports Drug Testing (SDT) and Workplace Drug Testing (WDT) both fall into the medicolegal type of drug testing in that the results must be able to withstand legal challenge whether it be via the sporting organizations’ hearings or employment courts. The results must therefore be absolute accurate, provide irrefutable evidence of proof of the presence of a drug or its metabolite and accurately quantitate that substance if such data is relevant. The consequences of a positive test can be very serious.

- Sport: banned from competition from three months to two years for the first offence and for life after a second offence for some drugs.
- Workplace: an individual’s likelihood of obtaining or retaining employment may be determined by the result of a drug test. Most employers would refer their employees to an EAP drug treatment programme after the initial positive but the employee would be required to undergo regular tests to make sure he/she is staying clean”.

Consequently SDT and WDT must be conducted by the best possible processes available.

Steps in reliable process

There are a number of very important steps all of which must be strictly adhered to, in order to ensure the outcome is accurate. These are:

1. sample collection
2. transportation and laboratory receipt
3. screening
4. confirmation
5. quantitation
6. interpretation
7. reporting.

If any of these steps is not conducted to the protocols and standards which have been established, then the results can justifiably be challenged.

Standards

1. Sports drug testing
   • IOC Medical Commission (IOC-MC) (1994)
   • College of American Pharmacologist (CAP)
The IOC-MC lists the selected classes of “Pharmacological Agents” and doping methods that are banned or subject to certain restrictions. All possibilities are covered by listing a few examples of drugs in each class and then adding “related substances”, for example:

Class C. Anabolic agents. 1 Anabolic androgenic steroids

clostebol fluoxymesterone
metandienone metenolone
nandrolone oxandrolone
stanozolol testosterone

... and related substances.

Also with the exception of caffeine and testosterone, any amount of any of the banned substances present in the urine constitutes a positive result. For caffeine the concentration may not exceed 12 micrograms per millilitre and for testosterone, the presence of a testosterone (T) to Epitestosterone (E) ratio greater than six to one constitutes an offence unless there is evidence that this ratio is due to a physiological or pathological condition.

Therefore, for SDT a positive is not only determined by the laboratory’s ability to accurately identify a substance but also the sensitivity of the instruments and its ability to detect a substance at minute levels. As instrument become more sophisticated obviously the limits of detection are lowered. Also, different laboratories will be able to detect drugs to different levels depending on their ability to keep abreast of the “state of the art” technology.

The IOC-MC accreditation programme is very strict and laboratories become suspended or lose their accreditation unless they demonstrate 100% accuracy in the regular quality control programmes.

2 Workplace drug testing

• USA: “Mandatory Guidelines for Federal Workplace Drug testing Programmes” Department of Health and Human Services (DHHS) (June 1994). These were originally known as the NIDA guidelines.

• Australian Standards for testing for Drugs of Abuse in Urine (April, 1995).

These standards have been established to combat the many “cheap” inferior quality and worrying inaccurate testing services which are offered by entrepreneurs seeking to make a quick buck by offering inadequate screening services or “do-it-yourself” kits.

They require the use of the best available technology for ensuring the full reliability and accuracy of drug tests and strict procedures for governing the chain of custody of specimens collected.

They also list the “performance impairing” substances which are recommended for testing and the “cut-off” levels for both the screening and confirmatory analytical phases. Below these cut-offs a test is deemed to be negative so passive inhalation of cannabis, for example, would not give a positive response at these testing cut-offs.
In Australia and New Zealand the recommended suite of drugs is

- Cannabinoids
- Opiates
- Cocaine
- Amphetamines
- Benzodiazepines.
- Alcohol (optional)

Sample collection

The collection of the sample is a very important part of the process since if the sample is not collected properly the integrity of the sample is in question. Trained personnel are required to supervise this process.

The donor must be able to be identified in some way.

The procedure requires the collection of a urine sample which is non-invasive and the simplest sample to collect. The options for providing the sample are “witnessed” or “unwitnessed”. Collection of samples for SDT is always witnessed whereas most employers opt for the unwitnessed option for obvious reasons and the collector is required to carry out the following practices to ensure the urine sample is not diluted or a blank sample is not smuggled in as a substitute.

- Colouring agent is added to the toilet cistern.
- Faucets are taped up.
- The donor washes hands prior to sampling.
- Bags, coats, etc, are removed from donor.
- The urine sample is examined visually for possible contamination or dilution.

The collection kit is packaged in a heat sealed plastic bag and consists of the following components:

- sealed container with a temperature strip which ensures the sample is at body temperature;
- specimen label with a unique identification number;
- sample security seal with same unique number;
- tamper-proof bag with same unique number;
- mailing box with tamper-proof seal.

After voiding the specimen must remain within the sight of both the donor and collector at all times until properly sealed.

The documentation covers details and signatures as listed:

- date
Drug Testing

- donor and company/sporting event
- collecting supervisor
- witness (SDT)
- testing options
- medication: last two weeks
- chain of custody
- specimen receipt at laboratory.

Analysis: screening

1 Workplace

The analysis at the laboratory has a two-tiered approach. Initially screening for the menu of drugs of interest at and above the predetermined cut-off levels is carried out by trained science technicians. Typically immunoassay methods are used and we use the SYVA EMIT systems since SYVA have specifically focused on urine substance abuse when designing their products. Standards and control samples are analysed with each batch of samples.

The screening tests will either give a negative response which results in the sample being reported negative, or a positive response. However a positive response after screening is in no way sufficient evidence of proof of the presence of that drug since there are a number of legitimate substances which can interfere with the screening tests and result in positive responses.

A positive response after screening must therefore be subjected to confirmation and quantitation. It is also important to mention that the “do-it-yourself” or “on-the-spot” screening practices are not acceptable by these standards.

2 Sports

Chromatography

Because of the much bigger range of drugs and metabolites being tested for and also because of the requirement for the screening to be as sensitive as possible, SDT mainly uses automated chromatographic instruments interfaced to a variety of detectors selected for their sensitivity to the substances of interest. These instruments are:

- Gas Chromatograph (GC)
- High Performance Liquid Chromatograph (HPLC).

Some drugs, ie, Anabolic Steroids, require even more sophisticated instrumentation for this screening phase and Gas Chromatography/Mass Spectrometry (GCMS) is used.

The primary function of a GC or HPLC is to separate the components of a mixture. Hence the extract from a urine sample is injected onto the top of a chromatographic column. With the assistance of gas or liquid the various components of the extract will pass along that column at different rates depending on the packing inside the column, the programmed external environment the column is subjected to and the chemical make-up of the
components. The time at which the individual components are detected at the end of the column is reproducible for a set of conditions but it is possible for two or more different substances to pass through the column at indistinguishable rates. Therefore whilst this Retention Time (RT) can provide a very good indication of what substances are present, it is not an absolute identification.

**Analysis: confirmation/mass spectrometry**

The samples giving a positive screen result are referred to a qualified scientist for confirmation and quantitation. These samples are first extracted by liquid/liquid or solid phase methods. Controls and accurately measured amounts of a range of standards are simultaneously extracted. Wherever possible we use deuterated analogues of the drug in question as internal standards for very accurate quantitation.

The concentrated extract is subjected to derivatization to enhance the sensitivity, specificity and chromatographability. Gas Chromatography/Mass Spectrometry (GCMS) is then carried out and this sophisticated method provides a chemical fingerprint of the drug or metabolite of interest. A positive result from MS is irrefutable evidence of the presence of a substance in the sample and this is the only result which will withstand legal challenge.

**Quantitation**

In SDT accurate quantitation is critical for determining whether caffeine is greater than 12 microgrammes per millilitre or whether the T/E ratio is greater than six. It can also be important for interpretation of results, for example, whether a positive morphine is due to codeine or morphine ingestion since morphine is a metabolite of codeine and codeine is not a banned substance for either SDT or WDT.

For WDT since a positive can only be reported if the substance is present above the predetermined level it is essential that the methodology is designed so that the accuracy around that cut-off level is beyond question.

The most accurate quantitation methods use GCMS and utilize deuterated analogues of the drugs as internal standards.

**Interpretation and reporting**

It is the scientist’s role to ensure that the most accurate and precise results are delivered to the sporting body or workplace and to make sure that procedures have been enforced to protect the integrity of the sample. The responsibility then lies in the hands of trained medical personnel to determine the meaning of these results when related back to the individual.

In WDT this responsibility lies in the hands of a Medical Review Officer (MRO) who will interview the donor to determine whether there is any legitimate reason for the drug to be present before the result is reported to the employer.

The sporting bodies similarly have medical experts skilled in playing this interpretative and advisory role.
Conclusion

Both SDT and WDT must only be carried out by laboratories who are able to perform to the international standards dictated by the recognized authorities. SDT laboratories must be accredited by the IOC or CAP. For WDT, North America laboratories should be either NIDA or CAP accredited. In Australia and New Zealand such a specialist accreditation system is not available at this stage but the members of Australian/New Zealand Standards committee will be addressing this gap over the next 12 months. In the meantime there is one laboratory in New Zealand (ESR) and a few in Australia observing the international standards.

If results of a test can determine the future of an athlete’s sporting career or an individual’s working career, they must be absolutely accurate.
The Sporting Participant’s Perspective

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During the 1970s, when East Germany reigned as the world’s most successful sporting nation, a number of athletes and officials debated the reliability of international drug testing procedures. The athletes of Eastern bloc countries, particularly the female swimmers and track and field athletes of East Germany, became almost invincible. Their extraordinary performances were so remarkable that many world records set during those days still stand unchallenged as a reminder of the outstanding combination of sporting talent and performance enhancement by science. However, the revelations of the last decade have now confirmed that East German sport was administered by an unscrupulous regime which saw the use of drugs as a legitimate means of sport enhancement.

An East German programme of drug taking, scientifically regulated and clinically controlled, was politically endorsed for almost two decades. During this time, young athletes were carefully selected, expertly trained and chemically modified to set dozens of world records and win unprecedented numbers of Olympic medals. By so doing, the politicians and scientists of the Communist Bloc identified feats of such athleticism as the means to win the admiration and respect of the rest of the world.

Twenty years on and with images of East German sporting dominance still fresh in the minds of many, another sporting nation seems set to follow a parallel course of competitive drug misuse. Despite proclamations that there was more than just a passing coincidence between the events of the 70s and current trends, little official action has been spontaneously taken by international sports federations. There are no prizes for guessing that China has assumed the mantle of the world’s most drug-boosted sports nation. China’s swimmers won a sackful of gold medals at the 1995 World Championships in Rome where over 150 tests were conducted under the auspices of the International Swimming Federation (FINA). Members of the FINA Medical Committee ensured that these tests were carried out in accordance with IOC regulations but clever masking procedures ensured that all Chinese competitors were clean. Despite the concerns voiced by the international swimming coaches present in Rome and clinical features in the Chinese women which were reminiscent of their former East German counterparts, no further inquiry was undertaken by FINA.

In the intervening two months, as China prepared its athletes for the Asian Games in Hiroshima, an unexpected out-of-competition test was carried out and ten Chinese athletes including gold medallists and world record-holders from Rome returned positive results. As a result, the combined opinion of Canada, USA, New Zealand and Australia has denied China from competing at the Pan-Pacific Swimming Meet in Atlanta later this year. The future of China’s participation in the 1996 Centennial Olympic Games must surely rest in the balance.
It is clear that current testing procedures, although reliable for the majority of substances identified as performance enhancing, are still deficient in cases where sophisticated masking techniques and the new generation of peptide hormones are used in competition. The most effective deterrent to drug misuse is the simple act of out-of-competition testing. Without notification, any competitive athlete must expect to be tested. There can be no room for complaints of intrusion or invasion of privacy. Above all else, athletes demand an even playing field, and this is the personal price they must pay to ensure that cheating is eradicated.

When Ben Johnson returned home in disgrace from the 1988 Olympics in Seoul, the uninitiated were made aware that organised drug misuse was present at the very top. Johnson was part of a triad which included his coach Charlie Francis and physician Jamie Astaphan, both of whom stood to gain from the success of their protégé. To be effective, any system of judgement must acknowledge that there are often other guilty parties. To provide sufficient deterrent, all those complicit with the misuse of drugs in sport must be penalised.

The monitoring of drug misuse presents sports administrators with their greatest dilemma. From the perspective of the participant, any protocol for testing must be both consistent and reliable. Only then will the sports arena be maintained as a venue for athletes to match their physical prowess rather than a scientific forum for biochemists to compare their skills.
The New Zealand Model at Work

Graeme Steel

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Introduction

The purpose of this presentation is not to attempt to justify the existence of a drug testing programme. Such programmes have a high level of support from sporting communities both internationally and in New Zealand. It was, perhaps, surprising how few submissions to the Select Committee challenged the fundamental concept of an anti-doping programme. The purpose is to represent the experience of the Agency under an Act of Parliament which uniquely, in New Zealand, provides for the operation of a drug testing programme.

Background

While the New Zealand Sports Drug Agency Act 1994 technically came into effect on January 5, 1995, a sports drug testing programme has existed in New Zealand for a number of years.

Following the 1988 Seoul Olympic Games and the Ben Johnson affair, the New Zealand Olympic and Commonwealth Games Association decided to introduce a programme in the lead up to the 1990 Auckland Commonwealth Games. The programme continued and expanded following those games, with the financial support of the Hillary Commission, with a view to the 1992 Barcelona Olympics and in fact grew beyond just Olympic sports.

In 1991 a Task Force which had been set up by the Hillary Commission recommended that an agency, independent of sport, should be established, by Act of Parliament, to prevent the misuse of drugs in sport. In 1993 an Interim Agency was set up in Auckland and operated according to the draft of the Bill as it was modified and eventually passed through Parliament in July 1994.

Legislation versus status quo

The point to emphasize therefore, is that prior to the Act coming into force, a successful programme had been operating for some time with a high level of acceptance by the sporting community. There are also examples of agencies in other parts of the world, for example Canada and Norway, operating effective and respected programmes without the benefit of legislation.

Given the above, we need to realistically assess whether or not the Act enhances the effectiveness of an existing programme or, as is undoubtedly a possibility, whether it actually hinders the programme by weighing it down with bureaucracy and curbing its ability to respond to external changes.

It was generally considered that legislation would be of benefit by bringing greater certainty as to the legality of the procedures being applied and, in so doing, reduce
considerably the possibility of successful challenges to doping infractions on the basis of legal interpretations (rather than fact). In addition, and just as significantly, the legislation would spell out clearly the rights of competitors and the protections they could expect.

The legislation was based closely on the model which had been operating in Australia for a number of years—the “Australian Sports Drug Agency Act 1990”. The New Zealand Act, however, differs in at least one important respect in that it requires only “substantial compliance” with the provisions of the regulations. Without such a provision the Australians had, in one instance, been required to spend in excess of A$300,000 to defend an entry made on its register. In that case an athlete admitted using anabolic steroids but claimed that when the Canadians tested him on behalf of the Australian Sports Drug Agency, strict compliance with the Act was required and the Canadian paperwork used was not permissible. The NZSDA Act makes some provision and allowance for such circumstances.

The experience
Following are a few examples of how issues that have historically proved problematic and/or came under particular scrutiny from outside, during the development of the legislation, have been dealt with.

1 The right to test

The “right” to test competitors has previously been assigned to the Agency by national sporting organizations drawing on anti-doping provisions within their own constitution and rules. While advice was available from a variety of quarters to assist sports ensure that their positions were legally sound, it would be fair to say that many constitutions dealt less than perfectly with this issue, and probably provided fertile ground for challenge.

The NZSDA Act has done two things in this regard; it has established clearly that the Agency has a right to drug test sporting competitors irrespective of the rules of sports. There remains, however, a crucial reliance on those sports to follow up a determination of the Agency by hearing cases and applying sanctions as appropriate. The second key factor is that the Act has pointed very specifically to requirements which the drug testing process places on sports, and prompted many of them to review and update their constitutions and rules accordingly. A large number of sports have seen this as a good opportunity to go further and refurbish their constitutions in total which has been of major benefit.

2 Service of notice

The ability of the Agency to verify that proper notice of the requirement to attend a test, had been served in a manner that could stand up legally, always provided some potential for question. The difficulties which reliance on telephone notification provided were quite publicly aired at one point. The Act is now quite explicit as to what is required in order to serve notice or deem notice to have been served. While this has required the Agency to rethink and adjust some of its procedures, the result is that there is undoubtedly more certainty in the process of serving all notices and the possibility of avoiding service is consequently reduced.
3 Definition of a “competitor”

The Agency saw this as being a crucial issue because if the definition was too narrow, credibility could easily be lost if groups on the fringe of, but outside, the definition were seen to be doping but the Agency was unable to intervene. The Privacy Commissioner, in particular, sought a closely defined and relatively narrow approach.

The Agency was very satisfied with what emerged as it includes, to all intents and purposes, all people participating in sport. Clear steps have been taken, however, to ensure that this leeway is not abused and the spectre of dawn raids on the homes of elderly women bowlers may exist in the imagination of a few, but not in reality. For reasons of both practicality and limited resources, testing occurs almost exclusively in the domain of “elite” sport and considerable effort is expended to ensure those being tested have information well in advance which enables them to understand the requirements.

4 Positive tests

An issue which has been dealt with less satisfactorily, in my view, is that of what is a “positive test”. The Act assumes that a single test can always give a definitive result in terms of providing evidence that a competitor has taken a banned substance. This is true in the vast majority of cases, but not so in a small but significant category—notably when measuring levels of naturally occurring hormones and their metabolites. In such cases it is more relevant to consider fluctuations of levels over a series of tests rather than decide on the basis of a single elevated level.

As the lab is unable to report levels below what is arbitrarily deemed positive, the Agency loses the potential to receive invaluable clues as to which athletes may be doping by taking additional quantities of, in particular, testosterone.

5 Competitors’ rights and protections.

While the Agency has always endeavoured to ensure that competitors are treated fairly and reasonably, the Act now spells out precisely the requirements to ensure this situation remains. In addition, the provision for appeal to the District Court gives an important and previously unavailable opportunity for competitors to get an independent consideration of their case.

Nevertheless, an academic rather than practical approach to some issues, has required the inclusion of some administratively burdensome “safeguards” which are unused and unwanted by the competitors themselves and seem unnecessary. Indeed while the Act has required relatively few fundamental changes to the way the Agency operates, it has certainly increased significantly the volume of paper which surrounds the process.

The future

These are, of course, just a few of the many elements of the legislation which command both legal and practical scrutiny. A key test for the legislation will also be its ability to respond appropriately to what is a rapidly changing field. The current experimentation with blood testing overseas will almost certainly require a response in New Zealand at some point. The growth of overtly “professional” sports will also provide a challenge, not least in relation to the departure from traditional sporting jurisdictions.
Summary

It is undoubtedly too early to make any final assessment of the NZSDA Act either in relation to the detail of its format and drafting or its effectiveness as a total package tool to prevent doping in sport. There is no doubt that the Agency takes considerable comfort from the relative certainty it provides to a number of potentially contentious areas of its operation. It is expected that the opportunities for successful “frivolous” challenges are remote but only time will reveal that. To date things have been relatively straightforward. There is no doubt that the Agency has been frustrated by some aspects of the Act which require cumbersome administrative procedures, or significantly constrain its ability to meet its goals.

In the anti-doping campaign, as with most things, there is no absolutely right or wrong method only a requirement that one good one is selected and followed through properly. The legislative path is undoubtedly a good method and while experience to date suggests that it can be made to work well, to the benefit of New Zealand sport and society, in the parlance of this group, the jury is still out.
Drug Testing in the Workplace and the Bill of Rights

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We would be appalled at the spectre of police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person’s off-duty activities just as surely as someone had been present and watching. It is George Orwell’s “Big Brother” Society come to life.1

[I]Illegal drugs exact an enormous toll on the health and continued economic vitality of this nation. The Government has in fact declared a war on drugs and is vigorously prosecuting all drug offences. The Court does not accept plaintiff’s invitation to shield their use by creating amorphous legal rights. On the contrary, it sanctions the efforts of the private sector to combat drug use through policies which reasonably balance the interest of the employer and the country with the legitimate privacy concerns of the prospective employee.2

Introduction

The issue of employee drug testing (“EDT”) is a volatile and complex one. It raises a minefield of legal, social, moral, philosophical, scientific, and empirical problems. Few people would dispute the enormous potential, both social and personal, that drug abuse has for devastating effects, misery and death. Weighty public safety, public security, and public health reasons and sound business reasons can be advanced in support of EDT. Drug use in the workplace may certainly impair one’s reflexes and judgment, significantly increasing the likelihood of accidents, and of causing genuine threats to the safety of oneself and of others. Drug use may compromise security imperatives, particularly in relation to highly classified information. It has clear public health costs and consequences, and conflicts with societal goals of prevention, treatment and rehabilitation. It may also affect business profitability and productivity, resulting in lost production and a high incidence of worker unreliability, absenteeism, medical and state benefit claims and employee theft.

And yet, the moment that the prospect of mass drug testing of employees is raised many people become decidedly concerned. Drug testing is a form of biological surveillance. The prospect of mass drug testing inevitably conjures up an Orwellian world of mass surveillance and control.3 The implications of EDT are seen to be far reaching. If it is accepted, what will be next? Acceptance of EDT raises the spectre of integrity testing, aptitude testing, intelligence testing, pupillary reaction testing, DNA testing, genetic

1 Capua v City of Plainfield, 643 F Supp 1507, 1511 (DNJ 1986).
3 See, eg, Capua v City of Plainfield, above, note 1, 1511, 1522; American Federation of Government Employees, AFL-CIO v Roberts, 9 F 3d 1464, 1468 (9th Cir 1993) (“No one would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens.”)
testing, and a variety of employee "surveillance" techniques—including "dusting for dope", a new technique recently introduced into some American and Canadian workplaces. As technology advances, so these forms of surveillance appear to expand and intrude exponentially.

EDT can be employed in a wide range of circumstances. In the United States and Canada, for example, the range of testing procedures and circumstances includes pre-employment screening, suspicion-based testing, suspicionless testing, mandatory testing, non-mandatory testing, unannounced testing, prescheduled testing, random testing, periodic testing, systematic testing, blanket testing, blind testing, control testing, targeted testing, incident-related testing, event-based testing, return-to-duty testing, confirmatory testing, follow-up testing, extra testing, and for cause testing.

Ultimately, society is called upon to confront the difficult and complex issues of balancing the individual's right to privacy, dignity, autonomy, and the right to be left alone, and the countervailing right of society to protect its mores and values and the rights, interests and freedoms of others.

In this paper, I do not propose to embark upon a discussion of the wider social, philosophical, and moral issues raised by EDT. My focus is a narrow one confined essentially to legal matters. I offer some initial observations on the legal implications of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") for EDT. Given the novelty of the issue, these are necessarily preliminary observations. I particularly focus on EDT programmes which utilize urinalysis testing since this is the most common workplace testing procedure employed at the present time. My principal object is to provide an analytical framework within which EDT can be assessed in terms of Bill of Rights guarantees. I adopt a comparative approach. The paper commences with an examination of laws of, and jurisprudence from, the United States of America and Canada where EDT is more prevalent than in New Zealand. An examination of the approaches in these jurisdictions yields some limited guidance as to the approach which the New Zealand Bill of Rights requires in respect of EDT.

The balance of the paper focuses on a number of central provisions in the Bill of Rights which are implicated by EDT. I examine, in particular, ss 3, 11, 21 and 5 of the Bill of Rights. The scope and reach of those provisions are considered, and I explore the extent to which they proscribe the circumstances in which EDT may lawfully occur. I conclude that the Bill of Rights, where it applies, imposes strict and severe limits on the right of an employer to require an employee or a job applicant to undergo workplace drug testing. I should emphasize that the paper does not purport to canvass all issues arising under the Bill of Rights. Thus, issues arising under s 27 of the Bill of Rights relating to due process (including specimen collection procedures, laboratory analysis procedures, quality

4 See Canadian Privacy Commissioner, Annual Report, 1994–1995 (1995), 17–18. This technique uses a kit which 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 returned for analysis. The test does not confirm that the person used drugs; it merely shows contact with traces of a drug which could be completely innocent. Contact with other drug users could leave a residue sufficient to generate positive results. Ibid.
assurance and quality control, reporting and review of results, protection of employee records and certification issues) are only discussed tangentially. Nor do I explore the extent to which EDT may trigger the guarantees found in ss 9, 22 and 23(5) of the Bill of Rights, or the general issue of remedies for breach of the Bill’s guarantees. It is also beyond the scope of the present paper to consider the interrelationship between the guarantees in the Bill of Rights and other statutory regimes, including the requirements of the Privacy Act 1993.

United States of America

In the United States, workplace drug testing has become widespread and routine. Undoubtedly, this has been, in large part, in response to societal acceptance that illicit drug use outside the workplace is a major and “pervasive social problem” in the United States. Americans consume approximately 60% of the world’s production of illegal drugs. It is estimated that 22 million Americans use marijuana regularly, and 15 million use cocaine. One survey by the National Institute on Drug Abuse found that between 10% and 23% of all workers use drugs at work. Moreover, 90% of those using cocaine do so during work hours, and about half of those buy and sell cocaine at work. Workplace drug testing is seen as an indispensable adjunct in support of the wider war against illicit drugs. It has been noted that in 1988 employers tested an estimated eight million Americans for the use of illegal drugs. By 1992 this figure was estimated to swell to 22 million. Approximately half of the Fortune 500 companies have testing programmes of some kind applying both to job applicants and present employees. As of 1990, 46% of private employers with 250 or more employees had some type of drug testing programme. This figure was up from 32% in 1988. For private employers with between 50 to 249 employees, the figure grew from 14% to 26% over the same period. It has been suggested that in certain industries, 80% of all companies are conducting drug testing. In some industries, such as the defence industry, applicant drug screening has become

5 National Treasury Employees Union v Von Raab, 489 US 656, 674 (1989). The Supreme Court earlier described illicit drugs as “one of the greatest problems affecting the health and welfare of our population” (ibid, 668) and stressed “the veritable national crisis in law enforcement caused by smuggling of illicit narcotics”. Ibid.


7 Ibid.


9 Ibid.


13 Ibid.

14 New Zealand Listener, 22 October 1994.
Drug Testing

routine. Public opinion polls show overwhelming public support for EDT, even in companies with no security or safety function. Employee drug testing first became a major legal and public policy question in the early 1980s. This issue was given heightened importance, in relation to the Federal workplace, by the issue on 15 September 1986 of Executive Order No 12,564 by the President, requiring all Federal agencies to adopt programmes that will eliminate drugs from the Federal workplace. The Order declared that the “Federal government, as the largest employer in the Nation, can and should show the way toward achieving drug-free workplaces” through programmes of rehabilitation and that “drug use will not be tolerated in the Federal workplace”. The Order mandates the drug testing of Federal employees in “sensitive positions” (a term which is widely defined) and requires executive branch agencies to adopt regulations creating a “drug-free workplace”. This Order is the linchpin of the much publicized “war on drugs”, which has been waged by successive administrations with crusading vigour since the mid- to late -80s. Inevitably, the effects of the Order have been strongly felt. It has helped create and sustain a climate of strong community and judicial support for employee drug testing programmes. As will be seen below, it has exerted considerable influence on legal decision-making at the Federal constitutional level. And its effects beyond the Federal workplace, in the private sector, have been equally far reaching.

State and Federal Law

In the United States, there exists a complex web of statutory, regulatory, constitutional—at both state and Federal level—and common law rules applicable to EDT. At the state level, various protections exist under state constitutions. Most state constitutions contain a guarantee against unreasonable searches and seizures. Some go further and include an

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19 “Sensitive positions” include not only those where employees have access to classified information, but also those involving “other functions requiring a high degree of trust and confidence”. 3 CFR 229.  
20 Ibid.  
21 Only the states of Arizona, Maryland, North Carolina, Vermont, Virginia and Washington do not employ the notion of unreasonable search and seizure (or a variation thereof) in their Constitutions, although the Vermont Constitution (Article I, 11) refers to being “free from searches or seizures” and the Washington Constitution (Article I, 7) provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The remaining state constitutions employ the phrase “unreasonable searches and seizures”, or a close variant as in the Constitutions of Massachusetts (“unreasonable searches, and seizures”); Kentucky and New Mexico (“unreasonable search and seizure”); Connecticut and Oklahoma (“unreasonable searches or seizures”); Indiana and Oregon (“unreasonable search, or seizure”); Hawaii (“unreasonable searches, seizures and invasions of privacy”); Illinois (“unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means”); California, Iowa and Nevada (“unreasonable seizures and searches”); Texas (“unreasonable seizures or searches”); and Mississippi (“unreasonable seizure or search”).
express (or implied) right to privacy. A significant number of states have adopted drug testing statutes in recent years, but the approaches differ as to when EDT is permitted. With the exception of Utah, all of the state statutes prohibit random drug testing of employees to a significant degree and limit the circumstances in which drug testing may be conducted. The level of suspicion required before testing is permitted varies from state to state, but, excluding Utah, all states require some level of individualized suspicion. The Iowa, Vermont and Maine statutes, for example, enact a “probable cause” standard. In Connecticut and Minnesota the standard is “reasonable suspicion”, and in Montana and Rhode Island the standards are “reason to believe” and “reasonable grounds to believe” respectively. These normative requirements for the conduct of testing are subject to strictly limited exceptions. In addition to these state drug testing statutes,
Drug Testing

various states have enacted handicap discrimination laws which may provide protection from or in relation to EDT to some categories of employees. Various common law actions may also be available, depending on state law, including actions for wrongful discharge, invasion of privacy, defamation, and intentional and negligent infliction of emotional distress.

At the Federal level, EDT raises issues under the Federal Constitution, particularly in relation to the Fourth, Fifth and Fourteenth Amendments. Where applicable, the Federal Constitution generally only applies to drug testing of public employees. It does not generally apply to private employees “unless the private party acted as an instrument of or agent of the Government”. A number of Federal statutes and regulations authorize and regulate EDT in the Federal workplace. These include Executive Order No 12,564, the Drug-Free Workplace Act of 1988, and the drug-testing regulations of the Federal Department of Transportation, Federal Aviation Administration, Federal Transit Administration, Research and Special Programs Administration, Department of Defense, and the Nuclear Regulatory Commission. In respect of unionized labour, there are further standards concerning unfair labour practices laid down in the National Labor Relations Act. A union may also have grounds to challenge EDT on the basis that

28 See Morgan, Lewis & Bockius, ibid.
30 Non due process Fifth Amendment claims have been rejected on the basis that the test results constitute non-testimonial evidence and, accordingly, the Fifth Amendment privilege is not triggered: see National Treasury Employees Union v Von Raab, above, note 11, 181; Amalgamated Transit Union, Local 1277 v Sunline Transit Agency, 663 F Supp 1560, 1571 (D Cal 1987); Rushion v Nebraska Public Power District, 653 F Supp 1510, 1527-1528 (D Neb 1987); Lucero v Gunter, 17 F 3d 1347, 1350 (10th Cir 1994). See also, Rawlings v Police Department of New Jersey, 627 A 2d 602, 608 (NJ 1993). See generally, Fogel, Kornblut & Porter, ibid, 583-586; CM Ayers, “Constitutional Issues Implicated by Public Employee Drug Testing”, 14 Wm Mitchell L Rev 356, 358 (1998). This author also notes that other public employee drug testing cases have argued First, Eighth and Ninth Amendment claims, but that none have achieved any serious consideration in court decisions. Ibid.
31 See generally, Fogel, Kornblut & Porter, ibid, 594-609.
33 See generally, Abcarian and Donaldson, above, note 27, 203-210; Morgan, Lewis & Bockius, above, note 27, 189.
34 Above, note 18.
35 Pub L No 100-690, 102 Stat 4304.
it violates a collective bargaining agreement.\textsuperscript{43} The impact of the Americans with Disabilities Act\textsuperscript{44} should also be mentioned. The Act applies to public and private employers employing 15 or more employees. It confers rights and protections upon job applicants and employees who are covered by the concept of “disability” under the Act. Current illegal drug users fall outside the Act. However, former drug users who have successfully rehabilitated or who are currently participating in a supervised drug rehabilitation programme are considered individuals with a disability and are entitled to the protections of the Act.\textsuperscript{45} Finally, it should be noted that the state and Federal regimes do not necessarily operate independently of one another. In some instances, there may be considerable overlap between these regimes.\textsuperscript{46}

To ensure that this paper remains within manageable proportions, the focus of discussion will centre on decisions of the courts under the Fourth Amendment of the Federal Constitution—even though it is clear that employees frequently enjoy much broader protection at the state level in respect of EDT.\textsuperscript{47}

\textbf{Fourth Amendment}

The Fourth Amendment to the Federal Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purview of the Fourth Amendment’s guarantees generally applies only to actions of the Federal government. Its reach beyond such governmental actions is limited. It has been held to have application to those acting as “an instrument or agent of the Government”\textsuperscript{48} in circumstances where there are sufficiently clear indicia of government compulsion, encouragement, endorsement and/or participation in the activities of a private party.\textsuperscript{49} Thus, drug testing performed by private employers under compulsion of government regulations constitute governmental action controlled by the Fourth Amend-

\textsuperscript{43} There is a substantial body of arbitral case law in this domain which provides comparatively strong protection for unionized employees. For example, in Trailways, Inc and United Transportation Union Local 1648, 88 Lab Arb (BNA) 1073, 1080 (1987) arbitrator Goodman observed: [A]n individual, by signing on to an employment relationship, does not generally expect his or her private life to be scrutinized by the employer, nor does the existence of an employment relationship automatically entitle an employers to reach beyond the workplace and dictate, by discipline, the private lifestyles, morals, and behavior of its employees. For discussion, see the articles referred to in the previous note.

\textsuperscript{44} 42 USC §§12101-12123 (1993).


\textsuperscript{46} See Morgan, Lewis & Bockius, above, note 27, 190.

\textsuperscript{47} See Fogel, Komblut & Porter, above, note 11, 634n666 in \textit{fine}.

\textsuperscript{48} See Skinner v Railway Labor Executives’ Association, above, note 32, 614. (“Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government’s participation in the private party’s activities, a question that can only be resolved ‘in light of all the circumstances’”) (internal citations omitted). Ibid.

\textsuperscript{49} Ibid, 615–616.
ment.\textsuperscript{50} It has also been held that the Fourteenth Amendment extends the Fourth Amendment guarantees to searches and seizures by state officers.\textsuperscript{51}

There has been controversy over the precise requirements of the Fourth Amendment when applied to the drug testing context. A key issue has been whether—and, if so, in what circumstances—the warrant, probable cause and/or individualized suspicion requirements must be met. In a significant departure from established precedent,\textsuperscript{52} the courts have held that these standards do not necessarily apply in the drug testing context. Emphasizing that the ultimate measure of the constitutionality of a governmental search is reasonableness judged in all the circumstances\textsuperscript{53} the courts have ruled that “neither a warrant, nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance”.\textsuperscript{54} Instead, when a search “serves special governmental needs, beyond the normal need for law enforcement”,\textsuperscript{55} a court must balance the privacy expectations of the individual against the promotion of legitimate governmental interests\textsuperscript{56} “to determine whether it is practical to require a warrant or some level of individualized suspicion in the particular context”.\textsuperscript{57} Generally, the courts have eschewed laying down any bright line rule for determining the constitutionality of workplace drug testing, preferring the issue to be decided on a case-by-case basis, by reference to an open-ended balancing test.\textsuperscript{58} Probable cause “is not invariably required”.\textsuperscript{59} Although “some quantum of individualized suspicion\textsuperscript{60} is “usually required”,61 the courts have emphasized that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable”.\textsuperscript{62} Thus, suspicionless workplace drug testing will pass constitutional muster in cases where “special governmental needs” exist and where, upon a balancing of competing interests, governmental interests are seen to outweigh the privacy interests of the individual.

United States courts have had no difficulty concluding that the collection and subsequent analysis of blood and urine samples constitute “searches” for the purposes of the Fourth

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\textsuperscript{50} Ibid. See also Bluestein v Skinner, 908 F 2d 451, 455 (9th Cir 1990).
\textsuperscript{52} See, eg, National Federation of Federal Employees v Weinberger, 818 F 2d 935 (D C Cir 1987); Felician v City of Cleveland, 661 F Supp 578 (N D Ohio 1987); American Federation of Government Employees v Weinberger, 651 F Supp 726 (S D Ga 1986); Penny v Kennedy, 648 F Supp 815 (E D Tenn 1986); Lovvorn v City of Chattanooga, 647 F Supp 875 (E D Tenn 1986); Caputa v City of Plainfield, above, note 1; Carnos v Ward, 506 N Y S 2d 789 238 (N Y Sup Ct 1986), aff'd 2 IER Cases 1057 (N Y App Div 1987); Fraternal Order of Police, Newark Lodge 12 v City of Newark, 524 A 2d 430 (N J Super AD 1987).
\textsuperscript{53} Vernonia School District 47J v Acton, above, note 51, 4.
\textsuperscript{54} National Treasury Employees Union v Von Raab, above, note 5, 665.
\textsuperscript{55} Ibid. Accord, Skinner v Railway Labor Executives' Association, above, note 32, 619.
\textsuperscript{56} Vernonia School District 47J v Acton, above, note 51, 4.
\textsuperscript{57} National Treasury Employees Union v Von Raab, above, note 5, 665. Accord, Skinner v Railway Labor Executives' Association, above, note 32, 619-620.
\textsuperscript{58} Harmon v Thornburgh, 878 F 2d 484, 490n9 (DC Cir 1989); Vernonia School District 47J v Acton, above, note 51, 14 (per O'Connor J dissenting).
\textsuperscript{59} Vernonia School District 47J v Acton, ibid, 4.
\textsuperscript{60} Skinner v Railway Labor Executives' Association, above, note 32, 624.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid. See also Vernonia School District 47J v Acton, above, note 51, 4. (The Fourth Amendment “imposes no irreducible requirement” of individualized suspicion).
Amendment. This is because the testing process “intrudes upon expectations of privacy that society has long recognized as reasonable”.

The Supreme Court has left open whether such intrusions can also be categorized as Fourth Amendment “seizures”. Accordingly, governmental drug testing programmes “must meet the reasonableness requirements of the Fourth Amendment”.

The leading Supreme Court decisions in relation to workplace drug testing under the Fourth Amendment are *Skinner v Railway Labor Executives’ Association* [“Skinner”] and *National Treasury Employees Union v Von Raab* [“Von Raab”]. Both cases upheld drug testing programmes which included testing without any level of individualized suspicion.

In *Skinner*, the Federal Railroad Administration (“FRA”) had promulgated regulations mandating or authorizing alcohol and drug tests of railroad employees. The regulations were based upon documented evidence indicating that alcohol and drug abuse by FRA employees posed a serious threat to public safety.

Three aspects of the FRA regulations were challenged:

(1) mandatory suspicionless blood and urine tests after certain train accidents, fatal incidents and rule violations;

(2) breath and urine tests on “reasonable suspicion” that an employee had caused an accident; and

(3) breath tests on “reasonable suspicion” that an employee was under the influence of drugs or alcohol.

The Supreme Court held that despite the regulations’ failure to require individualized suspicion that any covered employee was impaired by the use of alcohol or drugs, the regulations were reasonable and did not violate the Fourth Amendment guarantees. It emphasized that the covered railroad employees were engaged in “safety-sensitive

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63 *Skinner v Railway Labor Executives’ Association*, above, note 32, 617, 618 (the intrusions “must be deemed Fourth Amendment searches”). See also, *National Treasury Employees Union v Von Raab*, above, note 5, 665; *Vernonia School District 47 J v Acton*, above, note 51, 4.

64 *Skinner v Railway Labor Executives’ Association*, ibid, 617n4. The majority noted: Taking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the employee’s possessory interest in his bodily fluids. [Citations omitted]. It is not necessary to our analysis in this case, however, to characterize the taking of blood or urine samples as a seizure of those bodily fluids, for the privacy expectations protected by this characterization are adequately taken into account by our conclusion that such intrusions are searches.

65 See *National Treasury Employees Union v Von Raab*, above, note 5, 665. See also, *Skinner v Railway Labor Executives’ Association*, ibid, 617.

66 Above, note 32.

67 Above, note 5.

68 As recognized by O’Connor J in *Vernonia School District 47J v Acton*, above, note 51, 15, *arguendo contra*, it could be “plausibly argued that the fact that testing occurred only after train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use”.

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Drug Testing

positions" and that the Government’s interest in regulating the conduct of railroad employees to ensure safety presented “special needs” beyond normal law enforcement sufficient to justify an assessment and balancing of the competing governmental and individual interests involved. The Court first examined the intrusions on individual privacy interests. The Court found that neither blood testing nor breath testing implicated “significant privacy concerns”.

The Court found that “the intrusion occasioned by a blood test is not significant” and that the breath tests were “even less intrusive than ...

The Court acknowledged that urine testing raised more difficult issues. It cited with approval the observations of the Court of Appeals for the Ninth Circuit in National Treasury Employees Union v Von Raab:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. While individuals may choose not to urinate in private but instead to use public toilet facilities, they make this choice themselves.

However, this was not decisive. In the Court’s view the degree of intrusiveness was diminished by the fact that the regulations endeavoured to “reduce the intrusiveness of the collection process” in two respects: by the fact that the samples were not to be furnished “under the direct observation of a monitor”, and by providing that the test be conducted in a medical environment.

More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.

In contrast, the Court’s assessment of the governmental interests in favour of testing without individualized suspicion was “compelling”. The Court observed that the “governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs

69 Skinner v Railway Labor Executives’ Association, above, note 32, 630.
70 Ibid, 620.
71 Ibid, 626.
72 Ibid, 625.
73 Ibid.
74 Above, note 11, 175. Earlier, the Skinner Court had noted that (489 US at 617):

Chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

75 Skinner v Railway Labor Executives’ Association, above, note 32, 617.
76 Ibid, 626.
77 Ibid.
78 Ibid.
79 Ibid, 627.
80 Ibid, 628.
on duty, or while subject to being called for duty”.81 The Court likewise emphasized that the FRA’s programme was aimed as much at deterrence as it was as at detection:82

By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct.

Finally, the Court firmly rejected the notion that the Fourth Amendment required the government to adopt the “least intrusive” means of addressing its legitimate governmental concerns, noting, “We have repeatedly stated ... that [t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.”83

Justice Marshall, joined by Justice Brennan, in dissent, strongly attacked the principal rationale underlying the majority’s decision:84

The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government’s deployment in that war of a particularly draconian weapon—the compulsory collection and chemical testing of railroad workers’ blood and urine—comports with the Fourth Amendment. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.

Marshall J continued:85

The majority purports to limit its decision to postaccident testing of workers in “safety-sensitive” jobs, [citation omitted] much as it limits its holding in the companion case [Von Raab] to the testing of transferees to jobs involving drug interdiction or the use of firearms. [Citation omitted] But the damage done to the Fourth Amendment is not so easily cabined. The majority’s acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens.

Marshall J criticized the majority’s “trivialization”86 of the intrusions on worker privacy posed by the FRA’s testing programme, as compared to its “blind acceptance”?7 of the Government’s assertion of “special needs” and “compelling Government interests” that testing will act as a deterrent to employee alcohol and substance abuse, and provide a

81 Ibid, 621.
82 Ibid, 630.
83 Ibid, 629n9 (collecting cases). See also, Vernonia School District 47J v Acton, above, note 51, 9 (“We have repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”); Illinois State Board of Elections v Socialist Workers Party, 440 US 173, 188 (per Blackmun J) (“A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation”).
84 Skinner v Railway Labor Executives’ Association, ibid, 635.
85 Ibid, 636.
86 Ibid, 652.
87 Ibid.
source of valuable information about causes of major accidents. Marshall J concluded that the majority of the Court had been:

[S]wept away by society’s obsession with stopping the scourge of illegal drugs.... The immediate victims of the majority’s constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today’s decision will reduce the privacy all citizens may enjoy....

In *Von Raab*, the Customs Service initiated a programme of testing employees for drugs as a condition of employment in positions that met any one of three criteria: (1) direct involvement in drug interdiction or enforcement of related laws; (2) a requirement that the incumbent carry a firearm; or (3) a requirement that the incumbent handle “classified” material. A sharply-divided Supreme Court upheld the testing programme as applied to the first two categories of employees listed, and remanded as to the third category (employees handling classified information) on the basis that the record was insufficiently clear to enable assessment of the extent of the Government’s interest in testing this category of employees, and to clarify the scope of this category.

After concluding that the testing programme invaded reasonable expectations of privacy and that the tests were motivated by special needs other than law enforcement, the Court balanced the private and governmental interests at stake, and decided that the balance justified the testing programme. The Court reasoned that the Government’s compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of the nation’s borders or the life of the citizenry outweighed the privacy interests of those who sought promotion to these positions, who enjoyed a diminished expectation of privacy by virtue of “the special, and obvious, physical and ethical demands of those positions”. The Court also referred to the Government’s “compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment”. In relation to third category of employees—employees handling classified information—the Court “readily agree[d]” that the Government has a compelling interest in protecting “truly sensitive information”, and that “employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service’s screening program”. In remanding this aspect of the case back to the Court of Appeals to clarify the scope of employees covered by the notion of “truly sensitive” information, the Court observed:

Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this

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90 *National Treasury Employees Union v Von Raab*, above, note 5, 679.
91 Ibid, 670.
92 Ibid, 677.
93 Ibid.
94 Ibid.
95 Ibid, 678.
rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

The majority referred to six factors which, taken together, "significantly minimize[d] the intrusiveness of the Service's drug-screening program".96

(1) a narrow class of persons only are to be tested, and applicants know at the outset that a drug test is a requirement;
(2) they receive advance notice of the scheduled sample collection;
(3) there is no direct observation of the act of urination;
(4) samples are examined only for specified drugs;
(5) the use of a second confirmatory test enhances accuracy; and
(6) disclosure of personal medical information by the employee is not required unless the test is positive.97

The Court noted that drug abuse is a "pervasive social problem",98 and stressed that the testing programme was based primarily on a policy of deterrence. The Court wrote that "[i]n light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable".99

Although the Service's testing scheme was not implemented in response to any perceived drug problem among Service employees, and there was evidence that only five employees of 3,600 had tested positive, the majority rejected the argument that this evidence was insufficient to establish a substantial governmental need, because of the deterrent purposes and the potential for serious harm.

The dissenting Justices took issue with the majority's broadly acceptingapproach to EDT. Justice Scalia (with whom Justices Stevens, Marshall and Brennan joined) wrote:100

I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

... What is absent in the Government's justifications—notably absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

96 Ibid., 672n2.
97 Ibid.
98 See above, note 5 and accompanying text.
99 National Treasury Employees Union v Von Raab, above, note 5, 674.
The Commissioner of Customs himself has stated that he “believe[s] that Customs is largely drug-free,” that “[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program”... According to the Service’s counsel, out of 3,600 employees tested, no more than 5 tested positive for drugs.

Justice Scalia also criticized the potentially vast reach of the majority’s reasoning:  

... in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. A similarly broad scope attaches to the Court’s approval of drug testing for those with access to “sensitive information”. Since this category is not limited to Service employees with drug interdiction duties, nor to “sensitive information” specifically relating to drug traffic, today’s holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart.

Justice Scalia concluded by referring to the Government’s “war on drugs”, and how that unexpressed purpose underlay the majority’s approach. Scalia J commented:  

I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

One of the most significant aspects of the two Supreme Court decisions was the decision of the Court to jettison the probable cause/individualized suspicion standard as a Fourth Amendment categorical in an expansive range of EDT cases.  

Prior to these decisions, except where minimal expectations of privacy were implicated, a requirement of probable cause/individualized suspicion had been an integral part of the notion of reasonableness. As was stated by the Supreme Court in *New Jersey v TLO*:  

Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal.

This point is made strongly in *Skinner* in the dissenting opinion of Marshall J, in whose opinion Brennan J concurred. Marshall J wrote:  

The Court today takes its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment.

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100 Ibid, 681-684. (Emphasis in original).
102 Ibid, 687.
103 See text accompanying notes 58-62.
105 Ibid, 342n8.
Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. [Citations omitted]. Only where the Government action in question had a “substantially less intrusive” impact on privacy, [citation omitted] and thus clearly fell short of a full-scale search, did we relax the probable-cause standard. [Citations and internal quotation omitted]. Even in this class of cases, we almost always required the Government to show some individualized suspicion to justify the search. [Footnote omitted]. The few searches which we upheld in the absence of individualized justification were routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person. [Footnote omitted].107

As Marshall J and Scalia J predicted in their dissenting opinions in *Skinner*108 and *Von Raab*109 respectively, both *Skinner* and *Von Raab* have had a major impact on subsequent workplace drug testing cases across-the-board. In particular, their principles have been repeatedly held to be applicable to random drug testing regulations, procedures and practices, even though the facts of these two cases did not involve random drug testing. Subsequent cases have, for example, upheld random, unannounced testing of half of the airline industry workforce each year,110 random drug testing of commercial vehicle operators,111 random urinalysis of certain employees in state jail,112 the Department of Transportation’s urinalysis plan,113 random testing of mass transit employees,114 random drug testing of Army employees working with chemical weapons,115 the Department of Justice’s random drug testing plan for employees holding top secret national security clearances,116 random drug testing of Boston Police Department employees required to carry firearms or involved in drug interdiction,117 a program for random drug testing of employees,118 suspicionless urinalysis-drug-testing of Army-employed civilian air traffic controllers, pilots, aviation mechanics, aircraft attendants, police, and guards,119 and random drug testing of “scrub techs” in public hospitals, whose duties include bringing patients to the operating room, setting up the sterile field, laying out the proper instruments, and assisting during surgery.120

The courts have particularly invoked the deterrence rationale which underpins *Skinner*


108 *Skinner v Railway Labor Executives’ Association*, ibid, 655.

109 *National Treasury Employees Union v Von Raab*, above, note 5, 685-686.


111 *International Brotherhood of Teamsters v Department of Transportation*, 932 F 2d 1292 (9th Cir 1991).

112 *Taylor v O’Grady*, 888 F 2d 1189, 1198-99 (7th Cir 1989).


114 *Transport Workers’ Union v Southeastern Pennsylvania Transportation Authority*, 884 F 2d 709, 713 (3rd Cir 1989).


117 *Guiney v Roache*, 873 F 2d 1557, 1558 (1st Cir 1989).

118 *International Brotherhood of Electrical Workers, Local 1245 v Skinner*, 913 F 2d 1454, 1462 (9th Cir 1990). ("the concern for public safety animates the general acceptance of drug testing by courts"). Ibid.


120 *Kemp v Claiborne County Hospital*, 763 F Supp 1362, 1364, 1367 (SD Miss 1991).
and Von Raab to justify random testing programmes. In Bluestein v Skinner,121 for example, the Court wrote:\textsuperscript{122}

We do not believe that [the random] aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in Von Raab.... [R]andom testing without advance notice will prove to be a greater deterrent than testing with advance notice.

The Bluestein Court added that while randomness added “some weight”\textsuperscript{123} to the invasion of privacy side of the Fourth Amendment balance, it was “insufficient to tip the scales”\textsuperscript{124} against such drug testing programmes. Other courts have observed that “[r]andom drug testing, as compared to other forms of testing, offers the best potential deterrent to drug use”\textsuperscript{125} and that although a “relevant factor”,\textsuperscript{126} it “would tip the scales” only “in a particularly close case”.\textsuperscript{127}

In Railway Labor Executives’ Association v Skinner (“Skinner II”),\textsuperscript{128} the Court considered the constitutionality of recently-promulgated random drug testing regulations, under which one half of the relevant workforce was to be randomly tested each year. According to the Court, the Federal Railroad Administration “purposely adopted the more intrusive random testing regulations to provide a greater deterrent to drug and alcohol use”.\textsuperscript{129} The Court observed:\textsuperscript{130}

The new regulations infringe upon fourth amendment rights more than the regulations in [Skinner I]. Instead of authorizing bodily fluid searches only after the relatively rare occurrence of an accident or safety rule violation, the new regulations ensure that every employee apprehends the threat of testing each working day.

The Court went on to uphold the regulations in the face of a Fourth Amendment challenge. The Court rejected RLEA’s submission that a safety-related triggering event was required (as in Skinner I), since no such event had been required in Von Raab.\textsuperscript{131} In the Court’s view, the constitutionality of the random testing regulations turned simply on the question whether the employees’ interests under random testing outweigh governmental interests. The Secretary of Transportation argued that testing was “necessary because limiting drug testing to triggering events has not reduced accidents enough”.\textsuperscript{132} Faced with this submission, the Court accepted, with little difficulty, that the Secretary’s view clearly justified random testing.\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{121} Above, note 50.
  \item \textsuperscript{122} Ibid, 457.
  \item \textsuperscript{123} Ibid, 456.
  \item \textsuperscript{124} Ibid, 456–457.
  \item \textsuperscript{125} International Brotherhood of Electrical Workers, Local 1245 v Skinner, above, note 118, 1463.
  \item \textsuperscript{126} National Treasury Employees Union v United States Customs Service, 27 F 3d 623, 629 (DC Cir 1994).
  \item \textsuperscript{127} Ibid, citing Harmon v Thornburgh, above, note 58, 489.
  \item \textsuperscript{128} 934 F 2d 1096 (9th Cir 1991).
  \item \textsuperscript{129} Ibid, 1099.
  \item \textsuperscript{130} Ibid.
  \item \textsuperscript{131} Ibid.
  \item \textsuperscript{132} Ibid.
  \item \textsuperscript{133} The Court stated: “Bound by the Supreme Court’s decisions in [Skinner I] and Von Raab and our previous decision in Bluestein, we conclude that the FRA’s random drug testing regulations do not unconstitutionally infringe upon the privacy interests of employees.” Ibid, 1100.
\end{itemize}
To be sure, there are a number of decisions where random drug testing in the workplace has not been upheld or has at least been questioned. Some of these are collected in *University of Colorado v Derdeyn*\(^{134}\) (a case involving drug testing in sports), where the Court noted:\(^{135}\)

At the same time, courts have found insufficient governmental interests to uphold suspicionless urinalysis-drug-testing of high-school students who participate in extracurricular activities, *Brooks*, 730 F Supp. at 764–66; United States Department of Justice employees who are prosecutors in criminal cases and other employees who have access to grand jury proceedings, *Harmon*, 878 F 2d at 496; county correctional employees who have no reasonable opportunity to smuggle narcotics to prisoners and no access to firearms, *Taylor*, 888 F 2d at 1201; civilian laboratory workers at the Army's forensic Drug Testing Laboratories, *Cheney*, 884 F 2d at 613, 615; civilian employees in the chain of custody process for biochemical testing at the Army's forensic Drug Testing Laboratories, id; and water meter readers who must enter customers' homes in order to read the meters, *O'Keefe*, 602 A 2d at 764. In addition, courts have questioned the propriety of suspicionless testing of secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear facilities, *Cheney*, 884 F 2d at 611; police department personnel who do not carry firearms or participate in drug interdiction efforts, *Guiney*, 873 F 2d at 1558; heads of purchasing departments in hospitals who have "vital and important responsibility essential to the proper supply of medical materials," *Kemp v Claiborne County Hospital*, 763 F Supp. 1362, 1367 (SD Miss. 1991); and United States Customs Service employees who are required to handle classified material, *Von Raab*, 489 US at 677, 109 S Ct at 1396.

An indication of how far the United States courts have moved in response to *Skinner* and *Von Raab* can be seen by comparing the decisions in the cases of *American Federation of Government Employees, AFL-CIO, Council 33 v Meese* ("Meese")\(^{136}\) and *American Federation of Government Employees, Council 33 v Barr* ("Barr").\(^{137}\)

In *Meese*, prison employees' unions brought an action against the Federal Bureau of Prisons, challenging its proposed programme of mandatory random urine testing for all employees, including administrators, secretaries and other office workers.\(^{138}\) The programme would have forced the Bureau's employees, on two hours telephone notice, to submit to urinalysis testing even though not suspected of any drug use or other wrongdoing. This programme was held to violate the Fourth Amendment. In the course of his opinion, Weigel, District Judge, observed:\(^{139}\)

> Courts have found urinalysis testing highly intrusive, comparing it to body cavity searches [citations omitted], and insisting on careful scrutiny when urinalysis is to be used. [Citation omitted]. Moreover, when viewed in light of employees'

\(^{134}\) 863 P 2d 929 (Colo 1993).

\(^{135}\) Ibid, 945.

\(^{136}\) 688 F Supp 547 (ND Cal 1988).

\(^{137}\) 794 F Supp 1466 (ND Cal 1992).

\(^{138}\) Probationary and management employees would, according to the proposed programme, be subject to extra testing. Ibid, 549.

\(^{139}\) *American Federation of Government Employees, AFL-CIO, Council 33 v Meese*, above, note 136, 551.
legitimate privacy expectations ... both the specimen collections process and the subsequent laboratory analysis are definitely intrusive.

... Not only is specimen production upon demand inherently intrusive, but this procedure which treats innocent employees as suspects magnifies the intrusion.\textsuperscript{140}

... Laboratory analysis of an individual's urine is also highly intrusive. The information which laboratory analysis may reveal is very personal and justifies high expectations of privacy.

... The testing program therefore enables government surveillance of employees' private, off-duty lives. This type of chemical surveillance represents a serious intrusion. "[S]uch tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." \textit{Jones v McKenzie}, 833 F 2d 335, 339 (DC Cir. 1987).\textsuperscript{141}

Distinguishing the decision of the Court of Appeals for the Fifth Circuit in \textit{Von Raab},\textsuperscript{142} the District Judge wrote:\textsuperscript{143}

The government seeks to make each and every one of the Bureau's 13,000 employees subject to random testing, regardless of job function. Of the numerous decisions by federal courts concerning Fourth Amendment challenges to mandatory urinalysis testing, \textit{none} upholds a testing program as sweeping as that here at issue.

The government bears a heavy burden in attempting to justify at its inception mass urinalysis testing of employees as to whom there is no reasonable suspicion of drug use. [Internal quotation omitted]. The intrusiveness of urinalysis is far from minimal.

... It must be remembered that what is sought to be deterred by the Program is not general drug use, but drug use as it affects work performance. The Bureau in this case is an employer, not a law enforcer. The government may certainly take an interest in deterring drug use throughout society, but that interest cannot justify random testing. Otherwise, mass testing of the entire population of the nation would be justified. And that would be the beginning of a police state....\textsuperscript{144}

In \textit{Barr}, a new programme proposed by the Federal Bureau of Prisons,\textsuperscript{145} similar to but "somewhat narrowed"\textsuperscript{146} compared to the programme considered by the Court in \textit{Meese}, came before Weigel, District Judge on a Fourth Amendment challenge. Speaking of his earlier judgment in \textit{Meese}, District Judge Weigel stated:\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{140} Ibid, 552.
\item \textsuperscript{141} Ibid.
\item \textsuperscript{142} Above, note 11.
\item \textsuperscript{143} \textit{American Federation of Government Employees, AFL-CIO, Council 33 v Meese}, above, note 136, 552-553 (footnotes omitted, emphasis in original).
\item \textsuperscript{144} Ibid, 554.
\item \textsuperscript{145} In the course of his opinion the District Judge observed that the new programme might even include Bureau chaplains, who could have the opportunity to smuggle drugs to inmates: \textit{American Federal of Government Employees, Council 33 v Barr}, above, note 137, 1476.
\item \textsuperscript{146} Ibid, 1469.
\item \textsuperscript{147} Ibid, 1469-1470.
\end{itemize}
This Court found urinalysis—the Bureau’s proposed testing method—to be highly intrusive. [Citation omitted]. Since that finding, the Supreme Court has rejected the notion that urinalysis is always a substantial privacy invasion. *Von Raab*, 489 US at 671, 109 S Ct at 1393. That Court has also identified a number of factors that may reduce privacy expectations and thus the intrusiveness of the testing. These factors include prior notice, see id at 672–73 n 2, 109 S Ct at 1394 n 2; limited discretion in choosing the tested employees, *see Skinner*, 489 US at 634, 109 S Ct at 1422; and the particular employment context, see id. at 627–28, 109 S Ct at 1418–19; *Von Raab*, 489 US at 677, 109 S Ct at 1396–97. These same factors minimize the privacy expectations of at least certain Bureau employees under the testing program proposed here.

... 

This Court therefore has no choice but to find that random urinalysis of employees working at Bureau institutions implicates diminished privacy interests, given the already substantially reduced privacy expectation of these employees and the binding authority upholding urinalysis testing under methods identical to those proposed here.148

The Court examined three government interests relied on to support drug testing without individualized suspicion: (1) promotion of the public safety; (2) protection of truly sensitive information; and (3) maintenance of employee integrity. After carefully examining these three interests, the Court came to the conclusion that the government had established that its “compelling interest in detecting and deterring off-duty drug use or impairment outweighs the privacy interests”149 of those Bureau employees with extraordinary duties.150

There is no doubt that the response of the United States courts to EDT has been fundamentally conditioned by the scale and pervasiveness of the drug problem in US society today, and by the Federal government’s declared “war on drugs”, not only in the workplace, but in society at large. A critical feature of the Fourth Amendment case law on EDT has been the abandonment of any requirement of individualized suspicion in a wide range of cases. Following a deterrence rationale, the courts have frequently upheld suspicionless drug testing of public employees in “safety-sensitive, security-sensitive, or public integrity-sensitive jobs”, 151 without ever closely defining the reach and range of these amorphous and malleable categories. The deterrence rationale has also enabled random drug testing to be upheld on a wide and regular basis.

The position reached by the Federal courts interpreting the Fourth Amendment guarantee is in notable contrast to the approach taken at the state level. There, with one exception, legislatures have required evidence ranging from “reasonable suspicion” to “probable cause” before EDT of private employees will be permitted.152

148 Ibid, 1471.
149 Ibid, 1478.
150 Referring to the concept of “reasonable suspicion”, in the course of its opinion the Court observed: “Reasonable suspicion ... must be supported by (1) evidence of specific, personal observations concerning job performance, appearance, behavior, speech, or bodily odors of the employee; or, if based on hearsay evidence, (2) corroborative evidence from a manager or supervisor with training and experience in the evaluation of drug-induced impairment.” Ibid, 1479.
151 International Brotherhood of Electrical Workers, Local 1245 v Skinner, above, note 118, 1463.
152 See text accompanying notes 24–27
The Federal courts recognize that they are on a “slippery slope”153 and, further, “how slippery the slope ... has become”.154 As one Court of Appeals Circuit Judge recently wrote: “Caught in the cross-fire of our nation’s ‘war on drugs’, the Fourth Amendment is in a precarious position today”.155

There is some evidence of reassessment on some points. It appears that the courts are increasingly rejecting the “integrity of the work force” rationale unless the government is able to demonstrate a “clear, direct nexus ... between the nature of the employee’s duty and the nature of the feared violation”.156 The Federal courts are also reexamining the contours of other facets of the notion of “special needs”,157 including what is meant by “truly sensitive information”158 and “safety-sensitive”.159 However, for the time being, the prevailing approach of the US Federal courts is to permit EDT without individualized suspicion if this is considered reasonable on considered policy grounds.160

Canada

Workplace drug testing in Canada is nowhere near as extensive as in the United States. However, it is currently utilized in a number of industries, particularly as a pre-employment screening device, and appears destined to become a major issue in the near future. According to the Ontario Law Reform Commission reporting in 1992, workplace drug and alcohol testing programmes are increasing. The Commission reported that:161

Since 1986, the number of Canadian companies which have instituted mandatory drug and alcohol testing has significantly increased in both the private and public sectors. Air Canada, Imperial Oil, the Ontario Racing Commission, the Toronto-Dominion Bank, Canadian National Railway, Canadian Pacific, and American Motors (Canada), are some of the employers who have introduced testing programs in their respective workplaces.

153 International Brotherhood of Electrical Workers, Local 1245 v United States Nuclear Regulatory Commission, 966 F 2d 521, 527 (9th Cir 1992).
154 Ibid. See also, ibid, 528 (“it must be said that the courts have not yet become entirely insouciant about the Fourth Amendment rights of American workers. Still, the constant dripping of exceptions on the rock of those rights cannot help but have an effect.”)
155 National Treasury Employees Union v United States Customs Service, above, note 126,630 (per Wald, Circuit Judge, dissenting).
156 Harmon v Thornburgh, above, note 58, 490; See also, International Brotherhood of Electrical Workers, Local 1245 v United States Nuclear Regulatory Commission, above, note 153, 525 (“This rationale has almost uniformly been rejected by the courts as insufficient to justify drug testing of employees”), 528; Georgia Association of Educators v Harris, 749 F Supp 1110, 1114--1115 (ND Ga 1990).
157 See, eg, the cases referred to in O’Keefe v Passaic Valley Water Commission, 624 A 2d 578, 582 (NJ 1993).
158 See also, National Treasury Employees Union v United States Customs Service, above, note 126, 627, 628 (“A general governmental desire for secrecy does not warrant the intrusion inherent in a drug testing program; instead, the Government must demonstrate that significant damage could flow from a compromise of that information so as to warrant overriding the affected employee’s privacy interest.”)
160 For the most recent discussion of these issues, see the decision of the Supreme Court in Vernonia School District 47J v Acton, above, note 51.
Job applicants at Air Canada are tested for drug use as part of a medical examination required before they are hired.\textsuperscript{162} Imperial Oil Ltd requires urine specimens from all new employees, from those transferring to safety-sensitive jobs and, on a random basis, from those occupying safety-sensitive jobs.\textsuperscript{163} The Toronto-Dominion Bank conducts mandatory urine tests on newly-hired and rehired employees. These employees must agree to such a test within two days of receiving a job offer. If they do not, they lose the job offer. About 10,000 of the bank’s 30,000 employees have been tested since the policy was implemented in 1990. The Toronto-Dominion Bank argues that the policy is needed to improve employee performance and ensure bank security.\textsuperscript{164} Canadian National Railways require some job applicants to submit to urinalysis to check for drug use.\textsuperscript{165} Some trucking companies in Ontario use drug testing on their employees.\textsuperscript{166} Unocal Canada Ltd has had a “chemical dependence program” for almost ten years for its 350 employees which includes mandatory pre-employment testing and a programme for self-referral and incident screening when problems are encountered.\textsuperscript{167} Similar policies are in place at Flint Engineering & Construction Ltd which has locations throughout Western Canada.\textsuperscript{168}

The Privacy Commissioner of Canada has observed that urinalysis programmes involving inmates, parolees and members of the Canadian Forces have been in operation for varying periods.\textsuperscript{169} The Commissioner also noted that “[s]everal federal institutions, including Correctional Service Canada, the National Parole Board and Department of National Defence, currently use urinalysis”.\textsuperscript{170} Urinalysis was also intended to be a key component of testing strategies announced by Transport Canada and the Department of National Defence.”\textsuperscript{171} Members of the Canadian Forces are required to submit to a broad range of testing programmes (but not random testing since February 1995).\textsuperscript{172}

A 1991 Mercer survey found that more than two-thirds of the 600 chief executive officers of Canadian companies who responded favour drug testing, especially where safety is a concern.\textsuperscript{173} The only Gallup survey done on the issue of drug and alcohol testing in the workplace was in November 1986, when 64 percent of Canadians thought that mandatory testing should be done on people with “special responsibilities”, such as politicians or teachers.\textsuperscript{174}

The attitude of the competent authorities in Canada appears to be rather less sanguine and less favourably disposed to workplace drug testing.

\textsuperscript{162}Toronto Star, 19 August 1994, C3.

\textsuperscript{163}Ottawa Citizen, 17 August 1994, D8. This policy, which came into force on 1 January 1992, was estimated to affect approximately 7% of the company’s 11,400 employees. See Vancouver Sun, 4 October 1991, D4.

\textsuperscript{164}Calgary Herald, 8 September 1994, B11. For more detailed discussion of this programme and its legality, see text accompanying notes 220–231.

\textsuperscript{165}Maclean’s, 29 September 1986, 36.

\textsuperscript{166}Toronto Star, 19 August 1994, C3.

\textsuperscript{167}Calgary Herald, 4 October 1991, E1.

\textsuperscript{168}Ibid.

\textsuperscript{169}Privacy Commissioner of Canada, Drug Testing and Privacy (1990), 2.

\textsuperscript{170}Ibid, 10.

\textsuperscript{171}Ibid. See ibid, Appendix A where full details of these programmes are given.


\textsuperscript{173}Calgary Herald, 4 October 1991, E1.

\textsuperscript{174}Toronto Star, 9 September 1992, A1.
The Federal Government has issued two statements and initiated two strategies on the issue. The first statement, in March 1988, was in response to a report of the Standing Committee on National Health and Welfare which had reported that "[m]ass or random screening of job applicants ... is neither sensible nor acceptable", and had recommended testing for "cause" only and "in exceptional cases in which drug use by employees constituted a real risk to safety". Responding to this report, the Federal Government statement read in part:

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.

A second statement, made in July 1988, observed that the government was 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.

Two Federal initiatives were announced in 1990. In March 1990, the Minister of National Defence announced a comprehensive strategy on alcohol and drug use control in the Canadian Forces, involving "mandatory drug testing with random elements", but also testing for cause. This strategy was originally to be implemented without supporting legislation. Subsequently, an Order-in-Council was made in May 1992 authorizing the Department of Defence to conduct a broad range of testing programmes which included random testing for deterrence, accident and incident related testing, testing of members in safety-sensitive positions, control testing, blind testing, and for cause testing. In February 1995, the random testing component of the programme was "indefinitely suspended" seemingly on the basis that the Department's own surveys had failed to demonstrate that its members had a serious drug problem.

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176 Ibid, 25.
177 Ibid. For extracts from the Standing Committee Report, see Privacy Commissioner Report, above, note 169, 49–50.
178 Reproduced in Privacy Commissioner Report, ibid, 50.
179 Ibid, 51.
180 Ibid.
181 Ibid.
182 Ibid, 53. Details of this strategy are set out in Privacy Commissioner Report, ibid, 53–55. See also, Ottawa Citizen, 7 July 1991, A4 noting, under the byline "Make Water, not War", that testing was to be restricted to accident cases, data collection, and for members of the forces in "operational safety-sensitive positions".
183 PC 1992–1103, 21 May 1992. Made pursuant to s 12(1) of the National Defence Act, and published as Chapter 20 of the Queen's Regulations and Orders for the Canadian Forces under the title "Canadian Forces Drug Control Program".
185 Ibid. In 1993, drug testing of 5500 of Force members resulted in positive tests in less than 1% of cases. Ottawa Citizen, 17 August 1994, D8.
Also in March 1990, the Minister of Transport released a strategy paper which proposed the introduction of testing approximately 18,000 Federal transportation employees involved in safety-sensitive positions. Under the strategy, legislative authority was to be sought for testing which featured post-accident mandatory testing, pre-employment and transferring employee testing, “for cause” testing, and random testing of employees in “safety-sensitive positions in transportation”. These proposals were later modified and updated in December 1992. However, for political reasons, the Federal government has not yet enacted legislation giving effect to this proposal, although the impact on Canada of US Department of Transportation regulations which require drug testing for the aviation, motor carrier, marine and pipeline industries is apparently placing the Federal government under some pressure.

During the past several years, urine testing in the workplace has been criticized by the Ontario Law Reform Commission, the Privacy Commissioner of Canada, the Canadian Human Rights Commission, the Ontario Human Rights Commission, the Addiction Research Foundation, the Canadian Bar Association, and the Canadian Civil Liberties Association.

The Ontario Law Reform Commission in its *Report on Alcohol and Drug Testing in the Workplace* took a strong position against workplace drug testing. It called for a legislative ban on EDT. Arguments which found favour with the Commission included the following:

> Urinalysis is ... considered to be extremely intrusive because of its capacity to reveal a wealth of information about an individual’s private life. The chemical testing of bodily fluids extracts a whole host of physiological information about an employee’s lifestyle, personal habits and mental and physical health. As previously mentioned, by analyzing the chemical compounds in urine, the employer can learn of various medical conditions of an employee, such as heart disease, epilepsy, schizophrenia and arthritis. A urine sample also reveals whether an employee is pregnant. A related privacy concern is the compelled disclosure of personal

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186 This was defined in the strategy paper 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.

The paper identified 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, and maintenance inspectors). Ibid, 57.


188 For discussion, see Belich and Shewchuk, ibid, 518–519; Privacy Commissioner Report, above, note, 169, 57–59.


192 Ibid, 30–31 (footnotes omitted).
Drug Testing

medical information. In order to minimize cross-reactions and the distortion of laboratory results, employees are generally required to reveal the prescription and non-prescription drugs that they have recently ingested. For instance, employees are required to disclose the medication they take for high blood pressure, diabetes, birth control and depression. As Denenberg and Denenberg state, "[b]ecause it reaches into areas of life beyond the workplace, drug testing implies an unprecedented degree of control over non-work related activity".

In other words, ... urinalysis opens a “chemical-window” to off-the-job conduct.

Workplace testing for alcohol and drugs also raises serious questions about the confidentiality of test results. A person’s reputation in the workplace as well as in the larger community can undoubtedly be damaged by the careless or malicious use of testing data.

The Commission criticized (and later, in its recommendations rejected) the position which the United States Supreme Court has adopted in *Skinner* and *Von Raab*. It stated:193

United States jurisprudence has recognized that the probable cause standard mandated in the Fourth Amendment may be modified to take into account special needs and the reduced expectation of privacy. The drug testing cases rendered by the United States Supreme Court are controversial because the Court did not simply modify the probable cause requirement by lowering it to reasonable suspicion; it abandoned it in its entirety. Although Canadian judges have stated that they are prepared to take a contextual approach to s 8 of the *Charter*, it is uncertain whether our courts will abandon the probable cause or other analogous standards with respect to mandatory testing.

The Commission, for itself, took the view that “a convincing argument could be made that testing the bodily samples of employees violates s 7 and s 8 of the *Charter*”.194

Among the recommendations made by the Commission, two are of particular significance for present purposes. The first called for a “legislative ban ... on drug and alcohol testing of bodily samples by employers of all current and prospective employees in Ontario”.195 In explanation, the Commission stated:196

The Commission makes this recommendation for several reasons. First, the techniques currently used to analyze the bodily fluids of employees for substance abuse are incapable of detecting impairment. Aside from the legal and ethical issues that emanate from chemical testing, “testing does not tell you anything about the present physical or mental condition of the person tested” and thus bears no rational relation to employee performance.

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193 Ontario Law Reform Commission, above, note 190, 79-80 (footnote omitted). The Commission also observed: “[T]he drug testing cases recently rendered by the United States Supreme Court represent a dramatic departure from previous decisions as the Court abandoned the requirement of individualized suspicion as a precondition to searches conducted in the workplace.” Ibid, 72 (footnote omitted).

194 Ibid, 115 (emphasis in original).

195 Ibid, 121.

Another important reason to prohibit chemical testing in the workplace is that such testing constitutes a significant invasion of the privacy rights of employees in this province. Chemical testing reveals confidential information respecting an individual’s lifestyle that is unrelated to legitimate employer concerns. In the words of the federal Privacy Commissioner:

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

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

A further reason for a ban on drug testing is that there is no empirical evidence to support the proposition that drug abuse has become a significant problem in the Ontario workforce. According to studies that have been conducted, drug use in Canada has not increased since the 1970s. As stated by the federal Privacy Commissioner, drug testing may be a “solution” to a problem that has been exaggerated. It is also noteworthy that it has not been demonstrated that improvements in safety, health or performance have occurred as a result of the millions of dollars expended on testing the bodily samples of employees in North America.

The Commission’s second recommendation endorsed “performance testing” as a preferred, efficacious, and less intrusive alternative to drug testing. In the Commission’s view:

[In contrast to current testing techniques, such as urinalysis, blood or hair testing, performance testing actually measures impairment. In addition, performance testing detects impairment from any source, not simply drugs or alcohol, and thus “provides a much more sweeping safety check than a screen for a necessarily finite number of chemicals”.

A further reason for the Commission’s endorsement of performance testing is that because this procedure does not involve the collection of bodily fluids, performance testing does not intrude upon an employee’s “life-off-the-job”.

Rejecting the approach of the United States Supreme Court, the Commission concluded its recommendations by expressing the view that “even in the case of safety-sensitive positions, the taking of bodily samples is not justified.”

The Privacy Commissioner of Canada, in his report entitled Drug Testing and Privacy has also expressed opposition to EDT.

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
Drug Testing

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.

... 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.\(^{201}\)

...

Testing may also be used to ensure the integrity of those in drug law enforcement (police, customs officers, prosecutors, judges).\(^{202}\)

The Privacy Commissioner took the view that “drug testing is intrusive and should be strictly circumscribed”,\(^{203}\) and that urinalysis is “highly intrusive”.\(^{204}\)

The Privacy Commissioner’s report contains a series of 20 recommendations to govern drug testing by government institutions.\(^{205}\) Recommendations 1–3 are significant for present purposes:\(^{206}\)

**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 or 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 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;

\(^{201}\) Ibid, 6.

\(^{202}\) Ibid, 7.

\(^{203}\) Ibid, 15.

\(^{204}\) Ibid, 18.

\(^{205}\) The Privacy Act, RSC 1985, c P-21 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. See Privacy Commissioner Report, above, note 169, 21.

\(^{206}\) Privacy Commissioner Report, ibid, 24–25 and 45.
the drug use or impairment poses a substantial threat to the safety of those affected by the person’s action;

- 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.

Similarly, the Canadian Human Rights Commission has expressed concern about EDT in its 1993 Annual Report:207

We believe there is no sustainable argument to support across-the-board testing of entire industries or broad categories of employees. This position is based upon three facts: first, there is no evidence to suggest that Canadian society has a serious drug problem; second, there is even less indication of such a problem among those with full or part-time employment; and, finally, drug tests are not a reliable indicator of safe performance in the here-and-now—at best they show only that an employee may have used a particular drug at some point in the past, perhaps several weeks before. Better supervision would be more efficient and more effective in ensuring that employees are not under the influence of drugs on the job, rather than seeking will-o’-the wisp evidence of potential drug dependency.

To date, the Federal Government has held back from enacting specific legislation relating to EDT. In these circumstances, the legality of workplace drug testing falls to be determined, depending on the circumstances, by reference to a range of laws including the Canadian Charter of Rights and Freedoms, Federal or provincial disability discrimination statutes,208 Federal209 or Provincial210 Privacy Acts, a host of labour standards statutes,211 collective bargaining agreements,212 and/or the common law.213

208 See, eg, Ontario Law Reform Commission, above, note 190, 101–110.
209 See generally, Privacy Commissioner Report, above, note 169.
211 See, eg, the Workplace Safety and Health Act, RSM 1987, c W210, ss 4–7;
212 It should be noted that the protections afforded to unionized workers under the body of arbitral jurisprudence in this domain are comparatively strong. In particular, arbitrators have ruled that random and speculative drug testing is impermissible, and that drug testing should be predicated on reasonable and probable grounds. In Re Canadian National Railway Co and UTU (1989) 11 LAC (4th) 364, 387 arbitrator Picher stated:
[T]he right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.
In Re Canadian Pacific Ltd and UTU (1987) 31 LAC (3d) 179, 187 arbitrator Picher 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. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.
See also, Re Provincial-American Truck Transporters and Teamsters Union, Local 880 (1991) 18 LAC (4th) 412 where arbitrator Brent observed:
As with my consideration of United States law, dictates of economy make it necessary to confine discussion on this occasion to the Canadian Charter, and specifically to s 8 of the Charter. It should be noted, however, that for those (workers and employers) who are not covered by the Charter—and, as will be seen, this may involve a very wide class of persons—the applicable law may, nevertheless, impose significant restrictions on the ability to test, closely circumscribe the conditions of a lawful test, or indeed, may in certain cases entirely proscribe EDT.

Section 8 of the Charter

Section 8 of the Charter provides that “Everyone has the right to be secure against unreasonable search or seizure.”

This provision is the one commonly viewed as having the best potential for success in a Charter challenge to EDT programmes.

A preliminary issue relates to the scope of application of the Charter. Section 32(1) of the Charter provides that its guarantees only apply to actions of the Federal and provincial governments. It reads:

32(1) This Charter applies
    (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
    (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Hovius, Usprich, and Solomon have suggested that the effect of this provision means that Charter guarantees “will not cover EDT programmes in the vast majority of employment situations”. The authors observe that the Charter only applies where there

Most reasonable people would probably consider that it was none of their employer’s business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours. Therefore, what one would expect, absent some term in the collective agreement, is an arbitral response to drug testing which is similar to that taken to employee searches and to employer interest in off-duty conduct [viz, a search is permissible only if supported by an implied or express term of the collective agreement or real and substantial suspicion of misconduct].


213 For discussion, see Ontario Law Reform Commission, ibid, 34–46.


215 Hovius, Usprich, & Solomon, ibid.

216 Ibid, 354 (footnote omitted).
is "government action of some kind" and that it does not "directly regulate the activities of private persons or organizations". Drawing on relevant Supreme Court case law, the authors conclude that EDT programmes may be subject to Charter scrutiny in three circumstances:

First, a programme mandated by federal, provincial or municipal legislation would clearly fall within s 32 whether the government or private-sector employers administer it. Second, a programme would be subject to the Charter if adopted by a government department or by an organization considered to be a Crown agent by virtue of a substantial degree of government control. This would be the case even if there was no legislation requiring the adoption of employee drug testing. Third, a programme implemented by an entity that could not be characterized as part of government may be subject to the Charter where the government is responsible for the programme's adoption. Although the bounds of this last category are uncertain...

To date, the only decision that has directly raised the issue of workplace drug testing under s 8 of the Charter is the decision of the Human Rights Tribunal in Canadian Civil Liberties Association v Toronto Dominion Bank. In that case, the Canadian Civil Liberties Association and the Canadian Human Rights Commission ("the complainants") challenged the Toronto Dominion Bank's employee drug testing programme. The programme, which applied to all newly-hired employees and employees rehired after an absence of three months, required them to undergo a urine test within 48 hours of being accepted (or reaccepted) for employment. If an employee refused to provide the requisite urine sample their employment with the bank was subject to immediate termination. In the event that such tests yielded positive results, the employee involved was required to participate in a special employee assistance programme, and to submit to a further drug test as part of that programme. At the conclusion of the programme, the employee was tested once again. The employee risked dismissal for either refusing to be tested or for testing positive.

217 Ibid, 348.
218 Ibid (footnote omitted).
220 Human Rights Tribunal, TD 12/94, decision of 16 August 1994. Throughout this case the name of the bank appears unhyphenated, although it is normally referred to as the Toronto-Dominion Bank. To avoid confusion, I have followed the mode of citation found in the case.
221 The bank has 901 branches and employs about 30,200 persons. Ibid, 3.
222 This was based on a policy worded as follows:
   Consistent with the Bank's commitment to maintain a safe, healthy and productive workplace for all employees, to safeguard Bank and customer funds and information, and to protect the Bank's reputation, the following measures have been adopted in an effort to provide a work environment that is free from both alcohol abuse and illegal drug use.
   Each senior executive is demonstrating support for the Bank's commitment to a drug-free workplace by submitting to a drug test as part of the annual medical examination.
   New employees, full-time, part-time, contract and students will be tested for drug use upon acceptance of employment. This will include all former TD employees rehired after an absence of three months or more.
   Present employees will be referred for a Health Assessment which may or may not include a drug test in situations where there are strong grounds to believe that poor job performance, unusual personal behaviour, serious errors in judgment, or violations of the "Guidelines of Conduct" are related to alcohol abuse or illegal drug use.
223 Ibid, 5.
The complainants alleged that Toronto Dominion Bank's drug testing programme was unlawful on two grounds. First, it was alleged that the programme discriminated on the basis of "disability" (viz perceived drug dependence) in breach of ss 10 and 25 of the Canadian Human Rights Act 1985. The Tribunal rejected this claim on the facts. It ruled that the bank's policy and practice did not constitute discrimination on a prohibited ground, since under the bank's testing programme "the ultimate dismissal is not based upon a perceived disability (drug dependence) but upon the persistent use of an illegal substance even though in some instances that may include a drug dependent person".

In the course of its ruling on this ground, the Tribunal did however make, obiter, some critical remarks about the reasonableness of the programme, stating:

In examining the reasonableness of the method chosen by the employer, this Tribunal finds that the method—namely mandatory urinalysis—is intrusive. As a blanket policy, it does represent a major step in the invasion of the privacy of many individuals in the employment field. This method could only be seen as reasonable in the face of substantial evidence of a serious threat to the Bank's other employees and the public, its customers.

Clearly, the evidence is not there to support this. The Bank did not act upon evidence of a problem but upon impressions and some evidence from other sources, much of it from the United States bearing little relevance to the actual circumstances in the Bank.

The second ground of complaint invoked s 8 of the Charter. A preliminary issue arose as to whether the Charter applied. The Tribunal ruled that the Charter did not apply to this case because of the effects of s 32(1) of the Charter. The Tribunal considered that the Charter did not apply because neither Parliament, the government, nor any agent thereof had any direct involvement with the present case. Rather, this was a "private sector" case. Counsel for one of the complainants had submitted that as the Tribunal is an agent of the state, any order which the Tribunal made triggered the application of the Charter. The Tribunal declined to read s 32(1) in this way. It considered that in the present case it was simply called upon to make a "neutral or objective finding with respect to the actions of a private individual" and that any order which it might have made would not, standing on its own, constitute an infringement of the Charter, or cause the Tribunal to

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224 Section 10 of the Canadian Human Rights Act 1985, as amended, provides:

It is discriminatory practice for an employer, employee organization or organization of employers
a) to establish or pursue a policy or practice, or
b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

"Disability" is a prohibited ground of discrimination under the Act, and is defined in s 25: "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

225 Ibid, 23.
226 Ibid, 35.
227 Ibid, 36.
228 Ibid.
229 Ibid, 37.
230 Ibid, 39.
become an agent of the government within the meaning of s 32. For these reasons, the Tribunal never reached s 8 issues, ruling that the Charter challenge must fail in limine. The Tribunal’s decision in this case has been appealed to the Federal Court.\textsuperscript{231}

The only other decisions which have raised the legality of drug testing programmes in terms of s 8 of the Charter are not workplace cases but are cases involving drug testing of prison inmates by the Correctional Service of Canada.

In \textit{Jackson v Joyceville Penitentiary}\textsuperscript{232} the issue before the Federal Court was the constitutionality of s 41.1 of the Penitentiary Service Regulations which required penitentiary inmates to provide mandatory urine samples. Whilst the Court acknowledged that there was reduced expectation of privacy in the prison environment,\textsuperscript{233} it nevertheless held that s 41.1 authorized an unreasonable search and seizure in violation of s 8 of the Charter. It did so on the narrow ground that the regulation failed to contain any criteria regulating the circumstances in which the urine testing was to take place other than that the officer “consider[ed] the requirement of a urine sample necessary”.\textsuperscript{234} The Federal Court was critical of the regulation for subjecting inmates “to the whim of any officer whether the latter had any special training or not and whether or not the officer had any reason to believe the inmate was under the influence of an intoxicant”.\textsuperscript{235} The Court concluded that s 8 was violated since the “regulation itself contains no standards, criteria, or circumstances relating to its application, for the guidance of staff or inmates, which would ensure that application is not unreasonable within the meaning of s 8”.\textsuperscript{236}

More recently, the Supreme Court of British Columbia rejected a s 8 challenge by prison inmates at a maximum security prison to the constitutionality of a random urinalysis programme adopted by the Correctional Service of Canada.\textsuperscript{237} The Court found that the testing programme was authorized by statute and, having regard to the circumstances, was reasonably justified and conducted in a reasonable manner. The Court held that the programme did not constitute an unreasonable diminution of inmates’ liberty interests, especially having regard to an amply-documented, serious drug problem in the institution where the inmates were incarcerated.\textsuperscript{238} The Court considered that there was a “compelling”\textsuperscript{239} connection between drugs and violence at the institution, and that this in itself provided justification for the random urinalysis programme. It also held that the manner in which testing and collecting occurred were reasonable.\textsuperscript{240} The Court gave short shrift to the challenge in so far as it focused on the randomness of the testing procedure:\textsuperscript{241

\begin{enumerate}
\item The appeal has not yet been heard. At the time that the Human Rights Tribunal decision was released, the Privacy Commissioner of Canada made a statement in which he commented, “This case illustrates how an unreasoned application of a new technology can work against the best interests of Canadians.” Calgary Herald, 18 August 1994, A7.
\item Above, note 214.
\item As to which see, \textit{Conway v Attorney-General of Canada} (1993) 83 CCC (3d) 1, 4 (SCC) (holding that penitentiary inmates have a “substantially reduced level of privacy”).
\item \textit{Jackson v Joyceville Penitentiary}, above, note 214, 79–80.
\item Ibid, 65.
\item Ibid, 84.
\item \textit{Fieldhouse v Canada} (1994) 91 CCC 3d 385 (BCSC).
\item Ibid, 388–390.
\item Ibid, 393.
\item Ibid, 395.
\item Ibid.
Criticism of the universal applicability of the program does not advance the plaintiffs’ contention that ss 7 and 8 [Charter] rights have been infringed. Surely, the efficacy of the program must depend upon keeping inmates guessing as to who is going to be randomly targeted. Indeed, universal application becomes the program’s strength, particularly since involvement arises solely from the computer-driven selection of inmates’ names.

This decision has now been affirmed by the British Columbia Court of Appeal in Fieldhouse v Kent Institution. In its judgment, the Court of Appeal examined the reasonableness of the programme. It emphasized the “magnitude and pervasiveness” of the drug problem at Kent Institution as compared to the “already limited privacy expectations of the inmates”. In these circumstances, the Court of Appeal had little difficulty concluding that the balance of reasonableness fell “heavily in favour of the societal interest”, notwithstanding the randomness of the drug testing programme. Accordingly, it held that the programme was not an unreasonable search or seizure in terms of s 8 of the Charter.

Upon analysis, the substantially reduced level of privacy accorded to prison inmates means that the prison cases yield only limited guidance on whether and, if so, in what circumstances, EDT will survive a s 8 Charter challenge.

Assuming the Charter applies to the particular testing programme, two questions arise. First is there a search or seizure and, second, is the search or seizure unreasonable?

Beginning with Hunter v Southam, the Supreme Court has repeatedly affirmed that s 8 enshrines a broad guarantee in relation to reasonable expectations of privacy, and the Court has accorded wide significance to the concepts of “search” and “seizure” in s 8 so as to reflect this underlying purpose. Writing for the majority in R v Colarusso, La Forest J encapsulated the approach taken by the Supreme Court in relation to s 8 in these words:

Hunter v Southam Inc [citations omitted] teaches us that s 8, like other Charter rights, must be broadly and liberally construed to effect its purpose. And that
purpose, it identified, is to secure the citizen’s right to a reasonable expectation of privacy against governmental encroachments. The need for privacy can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion. That physical integrity, including bodily fluids, ranks high among the matters receiving constitutional protection, there is no doubt.

In *R v Dyment*252 La Forest J, for the majority, stated, “As I see it, the essence of a seizure under s 8 is the taking of a thing from a person by a public authority without that person’s consent.”253 Applying this notion, the Supreme Court has held that the taking of a blood sample254 (and the taking possession of a blood sample)255 is a “seizure” within s 8 of the Charter. In *R v Colarusso*,256 the majority of the Court applied this notion of “seizure” to the obtaining of blood and urine samples from an accused without his consent following a fatal motor vehicle accident.

Although there are no judicial decisions dealing directly with the application of s 8 to EDT programmes, based on the Supreme Court’s jurisprudence, there can be no doubt that the Court would find urinalysis workplace drug testing to be a “seizure” under s 8. It may be noted that in *Fieldhouse v Canada (sub nom Fieldhouse v Kent Institution)*,257 both the Supreme Court and the Court of Appeal of British Columbia treated the random drug testing programme under challenge in that case as a “seizure” for the purposes of s 8.258

In deciding whether a seizure (or search) is “reasonable” under s 8 of the Charter, the Supreme Court has formulated a three-step test. As summarized in *Collins v The Queen*:259

A [seizure] will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.260

It is important to observe that the absence of any one of these criteria is sufficient to render the seizure unreasonable.

In the case of EDT, it follows that statutory authority is an indispensable pre-condition for validity. As observed by Lamer J in *R v Dyment*,261 “The fact that the seizure in this case was unlawful, in my view, ends the enquiry as to whether the search was an unreasonable one.”262

As to the issue whether “the law itself” is reasonable, this raises the same complex and delicate issues with which the United States courts have grappled under the Fourth

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252 Above, note 249.
253 Ibid, 257.
254 *R v Borden*, above, note 249.
255 *R v Dyment*, above, note 249.
256 Above, note 249.
257 Above, notes 237 and 214 respectively.
258 Cf *Jackson v Joyceville Penitentiary*, above, note 214, where the Federal Court proceeded on the basis that the challenged drug testing programme constituted a “search” for s 8 purposes.
261 Above, note 249.
262 Ibid, 249.
Amendment when balancing the privacy interests of the individual against the competing governmental interests.\textsuperscript{263}

Discussing this issue in a recent article, Hovius, Usprich and Solomon conclude that the Canadian courts are likely to follow the United States decisions of \textit{Skinner} and \textit{Von Raab} and abandon a probable cause/individualized suspicion standard for workplace drug testing of persons occupying safety-sensitive positions.\textsuperscript{264}

For myself, I consider it is far from certain that the Canadian courts, when they are seized of this issue, will blithely follow the path of \textit{Skinner} and \textit{Von Raab}. That is not to say that I expect the courts will strike down every legislatively-authorized initiative on EDT. Clearly, there are circumstances where one can confidently expect a programme to be upheld. But I do consider these instances will be considerably fewer than in the United States.

There are several reasons for holding this view. First, Canadian and United States public policy dictates in this area are sufficiently distinct as to require separate analysis and assessment of competing societal and individual interests. The drug problem in Canada falls far short of the crisis level confronting the United States. There is no evidence to suggest that Canadian society has a serious problem either in the workplace or in society at large. The absence of any national drug crisis in Canada or (in legal parlance) any “pressing and substantial”\textsuperscript{265} need should mean that the individual’s reasonable expectation of privacy from bodily invasion will continue to rank high among the matters receiving constitutional protection. Moreover, as illustrated by the reaction of the Federal government, the view of the competent authorities in Canada is that EDT would not generally be appropriate for Canadian workers. Rather, the government favours pursuing less intrusive strategies including prevention, treatment, and rehabilitation. Second, much of the jurisprudence of the Supreme Court under s 8 has been premised upon a requirement of “reasonable and probable” cause.\textsuperscript{266} This standard has been regarded as a “touchstone”\textsuperscript{267} of s 8 values. Although the Supreme Court has endorsed departures from this standard in some administrative or regulatory contexts,\textsuperscript{268} it does not follow that the Court will automatically lower the boom to allow EDT in the absence of probable cause or individualized suspicion, even in safety-sensitive positions. The Court will be aware that to do so will involve acceptance of the dangers of the slippery slope encountered by the American courts. The Court’s response is likely to be more measured than the position adopted in the United States. Third, s 1 of the Charter requires, as a matter of law, a stricter

\begin{footnotesize}
\begin{enumerate}
\item See text accompanying notes 52–62 and 66–160.
\item Hovius, Usprich and Solomon, above, note 214, 379.
\item \textit{R v Oakes} (1986) 24 CCC (3d) 321, 348 (per Dickson CJC).
\item See, eg, \textit{R v Bernshaw} (1995) 95 CCC (3d) 193, 217 (per Sopinka J) “The requirement ... that reasonable and probable grounds exist is ... a constitutional requirement as a precondition to a lawful search and seizure under s 8 of the \textit{Canadian Charter of Rights and Freedoms}. Section 8 requires that reasonable and probable grounds exist \textit{in fact} and not that their presence can be deemed to exist notwithstanding the evidence” (emphasis in original).
\item Ibid, 231 (per L’Heureux-Dubé J).
\item See, eg, \textit{Thompson Newspapers Ltd v Canada (Director of Investigation and Research and Restrictive Trade Practices Commission)} (1990) 54 CCC (3d) 417 (SCC); \textit{R v McKinlay Transport Ltd} (1990) 55 CCC (3d) 530 (SCC).
\end{enumerate}
\end{footnotesize}
approach to be taken to EDT. Under s 1, any limit on a guaranteed right must not only be a “reasonable” limit, but also “demonstrably justified” in a free and democratic society. The requirement of demonstrable justification may prove to be a most critical bulwark. It assuredly imposes a heavy onus on any party seeking to justify an EDT programme: “cogent and persuasive” evidence is generally required. It involves “a stringent standard of justification”. It requires nothing less than that before the individual’s guaranteed right to privacy may be trenched, the interests of the state must be shown to be demonstrably superior. It is to be noted that no such norm exists in United States law in this area. Further, in applying s 1 the Supreme Court has often insisted that the government must impair the right or freedom in question “as little as possible”. In other words, it has required the government to adopt the least restrictive means of interference consistent with vindication of the guaranteed right. This is contrary to the position adopted in the United States. This, too, should ensure that EDT, particularly random, suspicionless EDT, is upheld far less frequently by the courts in Canada; and only in circumstances where it is “demonstrably justified” in the public interest.

Finally, the courts will examine “the manner in which the [seizure] was carried out” to determine whether this was unreasonable. This involves consideration of “the totality of the circumstances” pertaining to the “manner” in which testing occurs, including the processes used for obtaining and collecting the sample, the procedures and safeguards relating to sample analysis, quality assurance, chain of control, determination, reporting and review of results, and related confidentiality issues.

New Zealand

Until recently when the Minister of Health floated the idea of introducing legislation allowing for mandatory drug testing in some industries, EDT had not figured prominently as an issue in the New Zealand workplace.

269 R v Oakes, above, note 265, 347 (per Dickson CJC).
270 Ibid, 346 (per Dickson CJC). See also, ibid “The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.”
271 See, eg, R v Oakes, ibid, 348 (per Dickson CJC); Re A Reference re Public Service Employee Relations Act [1987] 1 SCR 313, 373-374 (per Dickson CJC); Morgentaler, Smoling and Scott v The Queen (1988) 37 CCC (3d) 449, 479 (per Dickson CJC), 518-519 (per Beetz J), 561-564 (per Wilson J). Cf R v Chaulk (1990) 62 CCC (3d) 193, 220-221 (per Lamer CJC) (emphasis in original) “Recent judgments of this court (citations omitted), indicate that Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the ‘same’ objective or would achieve the same objective as effectively; Edwards Books and Art Ltd v The Queen [1986] 2 SCR 713, 772 (per Dickson CJC) “as little as is reasonably possible”.
272 See above, note 83 and accompanying text.
273 R v Collins, above, note 259, 14 (per Lamer J). See also, R v Debot above, note 260, 200 (per Lamer J) “The ‘manner’ in which the [seizure] is conducted relates to the physical way in which it is carried out and should not, in my view, be inclusive of restrictions of other rights that already receive the benefit of protection from the Charter.” Per contra, ibid, 218 (per Wilson J).
274 See R v Debot, ibid, 215 (per Wilson J) “the totality of the circumstances’ must meet the standard of reasonableness”.
275 Evening Post, 24 November 1994, 3. This announcement predictably produced mixed responses. Employers’ representatives welcomed the suggestion. The Privacy Commissioner issued a firm but measured public statement generally cautioning against the proposal.
It is difficult to accurately gauge the extent of EDT in New Zealand at the present time. There is an absence of reliable data. Anecdotal evidence suggests that EDT is carried out by a small number of employers—perhaps no more than 30 throughout the country—who utilize it mostly for screening job applicants. Air New Zealand, apparently, has such a programme.

Exceptionally, it is used on a wider basis by employers acting or purporting to act under statutory powers. Thus, random drug tests have been used throughout all levels of the defence service since 1992. The tests are regarded by the defence service as consistent with the Armed Forces Discipline Act 1974.

The Civil Aviation Authority also has reportedly conducted a small number of drug tests on “people intending to become commercial pilots” and also on pilots involved in accidents, but only on the basis of “reasonable suspicion” of drug taking.

It should also be noted that under s 82 of the State Sector Act 1988:

A chief executive may require any applicant for appointment to that Department, or any employee of the Department, to undergo a medical examination, at the expense of the Department, by a registered medical practitioner nominated by the Chief Executive.

Section 6(a) of the Health and Safety in Employment Act 1992 imposes a general duty on employers to ensure the safety of employees and, subject to Bill of Rights considerations, arguably might provide implied statutory authority for some employers to conduct workplace drug testing in some circumstances. It reads:

Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—

(a) Provide and maintain for employees a safe working environment;

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276 Evening Post, 23 November 1994, 1. See also, Evening Post, 29 November 1994, 24 reporting that several companies in the transport, shipping, oil and manufacturing industries were awaiting a consultant’s report on the legal ramifications of EDT.

277 Evening Post, 24 November 1994, 3. The claim of consistency is, to say the least, arguable. Section 72(1) of the Armed Forces Discipline Act 1974 reads:

72 Endangering the health of members of the Armed Forces—(1) Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding 2 years, who, without lawful excuse, refuses or fails to submit himself to medical, surgical, or dental treatment or procedures by a duly registered medical or dental practitioner, as the case may require, after being ordered to do so—

(a) By a medical or dental officer who is a duly registered medical or dental practitioner; or

(b) By a competent officer acting on the advice of any such medical or dental officer—

if any such treatment or procedure, whether preventive, protective, or curative, is stated by the medical or dental officer who gives the order or advice to be, in his opinion, essential in the interests of the health of other members of the Armed Forces, or to be such that refusal or failure to submit thereto would constitute a potential menace to the health of other members of the Armed Forces or would prejudice the operational efficiency of any part of the Armed Forces.

When this provision is read together with ss 6, 11 and 21 of the Bill of Rights, it is arguable that these powers do not confer a power to randomly test for drugs but that they require probable cause or some level of individualized suspicion. The counter-argument would be based on s 5 of the Bill of Rights.


279 A similarly-worded provision was first introduced by s 67 of the State Services Act 1962.
In a wider context, it is pertinent to note that, in the absence of consent, the New Zealand Police have no power to require or conduct a urine test on an individual. The statutory powers of the police to search for drugs set out in the Misuse of Drugs Act 1975 are limited, and Parliament has provided important protections to individuals in the case of warrantless searches. A warrantless search of the person for possession of illicit drugs by a police officer requires the officer to have "reasonable ground for believing" that the person is in possession of such drugs.

Only in the context of prisons has Parliament conferred an express right to obtain a urine specimen without consent. Section 36B(2) of the Penal Institutions Act 1954 provides that the Superintendent, or other officer authorized for the purpose by the Secretary "may direct that the inmate ... supply a urine specimen". But here, too, Parliament has provided the same important protection. The specimen can only be directed where the authorized prison official "believes on reasonable grounds" that the inmate is under the influence of drugs.

The critical point which emerges is that Parliament has required police and prison authorities' powers of warrantless search to be premised upon a degree of probable cause. It is, I believe, salutary to reflect on that fact when approaching and assessing the issue of workplace drug testing. The question which needs to be borne in mind is this. Can it be correct that employers possess greater rights of search and seizure to obtain urine samples than have been conferred upon the police or prison authorities?

**Bill of Rights**

Drug testing in the workplace implicates a number of Bill of Rights provisions. Amongst the Bill’s substantive guarantees ss 9, 11, 21 are implicated. Sections 3, 4, 5, 6 and 7 are also relevant. In this paper, I shall focus particularly on ss 3, 5, 11 and 21.

In approaching the Bill of Rights the courts have stressed that a “rights-centred” approach is required and that the Bill of Rights guarantees are to be generously construed, while limitations on those rights are to be restrictively interpreted.

A rights-centred approach entails a particular orientation. It entails an orientation in which primacy is given to the protection, promotion and vindication of the rights which are guaranteed. All legal analysis proceeds on the basis that the “positive assurance of rights” is of primary importance. A generous approach to the scope of the right is

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280 Misuse of Drugs Act 1975, s 18(3).
281 Penal Institutions Act 1954, s 36(2).
282 See also, The Privacy Committee of New South Wales, Drug Testing in the Workplace (1992), 27 ("Society has not chosen to give the Police any general power to drug test people to see if they use prohibited drugs. Why then should an employer be permitted to exercise such a power?")
284 R v Flickinger [1991] 1 NZLR 439, 440 (CA); R v Goodwin, ibid, 168 (per Cooke P), 199 (per Hardie Boys J).
286 Ibid, 193.
likewise emphasized. Narrow and niggardly interpretations are to be eschewed. On the other hand, limitations on rights are to be narrowly and strictly interpreted. Those who seek to limit a guaranteed right have the stringent onus of establishing that the proposed limit is prescribed by law, reasonable, and demonstrably justified in a free and democratic society.

Section 3—application

Contrary to popular belief, the New Zealand Bill of Rights does not provide universal protection in relation to its guarantees. Its application is limited by the terms of s 3. Any person challenging workplace drug testing under the Bill of Rights must first establish that the Bill of Rights “applies” to the particular EDT programme. Section 3 of the Bill of Rights reads:

3 Application—This Bill of Rights applies only to acts done—
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The reach of this provision has not yet been fully determined and explored. For present purposes, it is clear that the Bill of Rights applies to EDT which emanates from, or is attributable to, an act of one of the branches of government. Thus, where legislation or regulations either require or permit EDT, the Bill of Rights guarantees apply. This will be so regardless of whether the EDT relates to public or private sector employees.

Section 3(b) significantly extends the range of entities and circumstances to which the Bill of Rights applies. Under this provision, the Bill of Rights applies to an employer—whether in the public or private sector—if that employer can be said to be acting in the performance of “any public function, power, or duty” by or pursuant to law.

In TV3 Network Ltd v Eveready New Zealand Ltd, Cooke P considered that it was arguable on the facts of that case that TV3 Network Ltd, a private company which was duly licensed as a television broadcaster under the Broadcasting Act 1989, came within the reach of s 3(b). In Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd, the High Court had to consider whether s 14 of the Bill of Rights applied to New Zealand Post Ltd (“NZP”), a State-Owned Enterprise (“SOE”). In his judgment, McGechan J made the following pertinent observations:

The threshold question is whether NZP falls within s 3. I would not necessarily regard it as part of the “executive” branch of the “government of New Zealand” within s 3(a), given the context provided by s 3(b). The question more naturally arises under s 3(b) itself. Clearly, NZP is a “person or body” (it is an incorporated company). Were its acts done “in the performance” of a “public function, power,

288 Ibid, 441.
289 Above, note, 285.
or duty conferred or imposed” on it “by or pursuant to law”? A case can be made that NZP is merely a private company, which carries out postal functions under contracts with private users, without such duty imposed. It was indeed submitted that there is a distinction between core “public” functions (within the Bill of Rights Act), and “additional” functions (such as RDS) which are not. I do not accept such narrow interpretations. The Bill of Rights is to be interpreted in a suitably generous and purposive way, consistent with its aims [citation omitted]. It would not be in that spirit to shut a major vehicle of communication out from obligations under s 14 as to freedom of expression. I have no difficulty regarding mail handling as a “public function”. It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown: a “State-Owned Enterprise”. For Bill of Rights purposes and as an ordinary use of language NZP can and should be regarded as exercising “public functions”. I do not encourage fine distinctions amongst those functions. Its public functions—mail handling, in the broadest sense—are both conferred and imposed by law. The genesis is found within the statutory assembly of the State-Owned Enterprises Act 1986, Companies Act 1955, and Postal Services Act 1987, plus on-flow of private contracts. NZP activity does not have its genesis in whim, or voluntary decision.

In *Television New Zealand Ltd v Newsmonitor Services Ltd*291 Blanchard J held that TVNZ’s trading activities and its control of its copyrights were not acts done by a “person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law” within the purview of s 3(b). The Judge observed:292

> Although TVNZ is a state enterprise under the State-Owned Enterprises Act 1986 and its internal workings are subject to scrutiny under the Official Information Act 1982, it is in all other respects a trading company just like Newsmonitor. As a state enterprise it has a principal objective to operate as a successful business as laid down by s 4 of the 1986 Act but acts done by it in pursuance of that objective are not acts done in performance of a “public function power or duty” so as to bring in to play the Bill of Rights.

The position which emerges is that a “functional” or “public nature” approach is required by s 3(b). The focus of attention is on the nature of the activities of the employer. As Lord Woolf has observed in a recent article which specifically discusses s 3(b):293

> It seems to me that it should be the nature of the activity and not the nature of the body which should be decisive in deciding whether those who would be affected by the activity should have the protection of public law.... Where ... the activities of a public nature are being performed, the body performing those duties should be required to conform to standards which public law requires in the performance of those duties.

This is not to rule out reference to other indicia which may link the employing entity closely with the state. Factors such as statutory creation and/or recognition, mode of

292 Ibid, 96.
appointments, Ministerial or Ministry involvement, sources of funding, ownership and control, etc will be relevant. However, the overriding determining factor is whether the activities of the employer are such that those who would be affected by the activities should have the protection of public law.

In this respect, the New Zealand Bill of Rights has a considerably wider application than the United States Bill of Rights and the Canadian Charter of Rights and Freedoms. It can be seen that the extent to which the Bill of Rights guarantees apply to the private sector employer will depend on whether the employer is exercising a statutory or regulatory power, or whether the employer is an entity who is performing activities of a public nature. Exactly which entities are caught under this second limb for EDT purposes remains unclear. It would seem, however, that most (if not all) SOEs—and perhaps their subsidiaries—come within the contemplation of s 3(b). This would include, for example, Airways Corporation, Electricity Corporation, Railways Corporation, New Zealand Post, Radio New Zealand, Television New Zealand, Trans Power New Zealand and Vehicle Testing New Zealand. But what about former SOEs like Air New Zealand, Petroleum Corporation, Post Office Bank, Telecom Corporation, Tourist Corporation, Shipping Corporation or New Zealand Liquid Fuels Investment? Does their complete privatization remove them from the reach of s 3(b)? I think not. Their functional status is unchanged. Similarly, in my view, the privatization of prisons would constitute a clear case for the application of the Bill of Rights, notwithstanding privatization. The issue reduces to one of substance over form. As Lord Woolf has observed:

The fact that a body ceases to be a public body and becomes a private corporation does not mean that an activity which was previously subject to public law ceases to be the subject of public law.

There remain many other “problem” entities, apart from SOEs and former SOEs which are now fully privatized. For example, what is the position of Energy Companies, Crown Health Enterprises, universities, polytechs and colleges of education? What is the position of purely private companies like Air Nelson and Eagle Air? In respect of all of these employing entities weighty functional arguments can be advanced that the Bill of Rights guarantees ought to apply.

Finally, it should be noted that even if the Bill of Rights was held not to apply in a particular case of EDT, Bill of Rights norms and values might, nevertheless, still be applied via the common law. It is well-established that the common law may need to be developed having regard to Bill of Rights norms and values. Indeed, in some circumstances, the common law may provide wider protection than the Bill of Rights against invasion of privacy and bodily integrity.

294 See text accompanying notes 48–51 and 215–219 respectively.
295 Lord Woolf of Barnes, above, note 293, 63. International law principles would require the same conclusion. A state cannot absolve itself from its international legal obligations simply by re-defining its domestic law or by re-categorizing entities for the purposes of domestic law.
296 See, eg, R v H [1994] 2 NZLR 143, 147 (CA); Simpson v Attorney-General [Baigent’s Case] [1994] 3 NZLR 667, 693 (per Hardie Boys J).
297 See R v B (1994) 1 HRNZ 1, 18 (per Cooke P), 23 (per Richardson J), 25–26 (per Hardie Boys J).
Section 11—right to refuse medical treatment

Section 11 of the Bill of Rights reads:

11 Right to refuse to undergo medical treatment—Everyone has the right to refuse to undergo any medical treatment.

In my view, EDT constitutes “medical treatment” for the purposes of s 11. In the context of a Bill of Rights, the concept of “medical treatment” has to be construed broadly and generously. Fine distinctions based, for example, on whether the “treatment” is therapeutic or non-therapeutic, whether the specimen or sample was taken by a registered medical practitioner, or whether or not the testing programme includes provision for rehabilitation have no place and, indeed, would defeat the underlying purposes of the s 11 guarantee.

To date, the case law on the ambit and scope of this guarantee is sparse. Such dicta as there is, however, points in the direction of a broad guarantee against non-consensual medical interventions and procedures. In Cairns v James and Cox, the High Court considered whether the taking of a blood sample for the purpose of determining paternity constituted medical treatment within the meaning of s 11. In the course of his judgment, Temm J, after noting that it was a “first principle of undeniable application” that no one can be compelled to submit to medical treatment except as required by law, observed:

Taking a blood sample from a patient is, after all, an assault, unless there is consent or some statutory authority. It may even be that the taking of a blood sample can be regarded as “medical treatment” in the widest sense. If that be so then clearly s 11 of the New Zealand Bill of Rights Act makes the point explicitly that anyone has the right to refuse to undergo the giving of a blood sample.

The decision of the Family Court in Re H provides instructive guidance as to the potential scope of s 11, although the case, in fact, arose under the Protection of Personal Property Rights Act 1988. The case involved an application by the mother of a severely intellectually disabled adult woman who had become pregnant, but who because of her disability could not have consented to sexual intercourse and wholly lacked the capacity to understand the nature, and to foresee the consequences, of decisions concerning her personal welfare and care. The applicant applied under the 1988 Act to be appointed welfare guardian. She also applied for Court directions relating to the exercise of her powers as welfare guardian to consent to termination of the pregnancy and sterilization.

In relation to sterilization, an issue arose as to the extent of the Family Court’s jurisdiction under s 10(1)(f) of the 1988 Act which empowers the Court to make a personal order “that the person be provided with medical advice or treatment of the kind specified in the order”. In short, was the sterilization envisaged by the application “medical treatment” for the purposes of s 10(1)(f)? Answering in the affirmative, Judge Inglis QC reasoned:

There has been some debate on whether the jurisdiction extends to ordering

298 [1990-92] 1 NZBORR 323.
299 Ibid, 327.
300 Ibid, 328.
301 (1993) NZFLR 225.
sterilization. It has been argued (D B Collins, *Medical Law in New Zealand* (1992), at p 117) that "medical treatment" in s 10(1)(f) is confined to "therapeutic and curative medical procedures" as distinct from "the application of medical and surgical services" including diagnostic and preventive procedures such as sterilization. The learned author relies in part on the different wording used in the Guardianship Act 1968, s 25(1) (minor may consent to "medical, surgical, or dental procedure") and the Armed Forces Discipline Act 1971, s 72 ("medical, surgical, or dental treatment or procedures ... whether preventive, protective, or curative"), and also on the nature of submissions made to Parliament's Justice and Law Reform Select Committee and the Committee's response to them.

For myself, applying the accepted principles of statutory interpretation, I find no ambiguity or obscurity in the words in s 10(1)(f), "medical treatment". The words "medical treatment" are clearly capable of being read as meaning the application of medical and surgical services, and there seems little sense in an interpretation of ss 10(1)(f) and 18(2) which would enable the Court to empower the welfare guardian to consent to sterilization when the Court itself has no power to make a personal order to that effect. The majority in *Marion's Case* (at p 232) found no difficulty in using the term "medical treatment" in a broad sense as including both therapeutic and non-therapeutic intervention. Undoubtedly the trend of modern authority leans towards intervention by the Court when such decisions have to be made. I can see no reason for reading "medical treatment" down so as to limit the Court's power to make personal orders only where a case is made out for "therapeutic" sterilization, while it is left open to the Court to authorize the welfare guardian to consent to "non-therapeutic" sterilization.

Having found jurisdiction, the further issue arose as to whether it was appropriate, in the circumstances of the case, to make an order for sterilization. The Judge held that it was not since it "cannot be said, in this case, that sterilization is ... the least restrictive intervention possible when there are other less invasive means of achieving the same objective." Judge Inglis QC continued:

> It is clearly necessary in H's interests that the welfare guardian be given power to consent to the administration to H by the K authorities of such contraceptive measures, short of sterilization, as may be medically appropriate. The Contraception, Sterilisation, and Abortion Act 1977, s 4, in any event provides the K Centre with the basic authority to provide appropriate contraceptive measures, though it would necessarily have to be read subject to the "least restrictive intervention" principle. The welfare guardian should also be empowered to authorize the K authorities to carry out or arrange for such medical treatment for H (short of sterilization or termination of pregnancy) as may be desirable in H's interests and which involve the least restrictive intervention possible in her life having regard to the degree of her incapacity. To avoid doubt the term "medical treatment" includes diagnostic and preventive procedures within the above limits.

It seems to me that the reasoning adopted by the Court in *Re H*, which itself draws on jurisprudence from other jurisdictions, heralds the correct approach to the interpretation of s 11. Under such approach, the notion of "treatment" yields a broad guarantee in

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304 Ibid.
relation to non-consensual medical\textsuperscript{305} interventions and procedures which extends beyond the therapeutic and curative to include diagnostic, protective and preventive practices as well.

Recently, in \textit{R v B}\textsuperscript{306} the Court of Appeal considered the impact of s 11 for the first time. In that case, an order was sought by an accused to compel an alleged sexual abuse complainant to submit to a non-therapeutic vaginal examination on the grounds that this was necessary to assure the accused’s rights to a fair trial under ss 24(d), 25(a) and 25(e) of the Bill of Rights. The order was refused on jurisdictional grounds. However, several of the judgments delivered by the Court left open the extent of the parameters of s 11. Interestingly, the judgments emphasized that, under the common law, the rights to privacy and bodily integrity were “more extensive”\textsuperscript{307} than the rights guaranteed by s 11 of the Bill of Rights, and that these common law rights were “fundamental”\textsuperscript{308} human rights.\textsuperscript{309}

The legal impact of s 11 on EDT programmes which are currently operating in the New Zealand workplace is not fully appreciated. One suspects that many of these programmes violate s 11 of the Bill of Rights and could not be justified either on the basis of valid consent or (in the absence of such consent) under s 5 of the Bill of Rights.

Section 11 encompasses all forms of employee drug testing of the person, whether of urine, blood or breath, and whether conducted in relation to job applicants or current employees. The section confers “the right to refuse” to undergo medical treatment. For this right to be effective in the present context, the employer would have to inform the employee/job applicant of his or her right to refuse to submit to the proposed drug test. One also assumes that to be effective, s 11 must be read as conferring a right to refuse a drug test without adverse consequences. An employer who sought to take any adverse action against an individual refusing to give consent to a drug test prima facie violates the guarantees in s 11. Viewed from this rights-centred orientation, s 11 imposes severe legal limits on workplace drug testing.

From the employer’s point of view, there are three situations where the s 11 guarantees might be overridden:

1. A statute may expressly or by necessary implication\textsuperscript{310} override the right to refuse to undergo a workplace drug test, or impose or enable the occurrence of adverse consequences;

2. The employee/job applicant may consent to waive his or her s 11 rights;

\textsuperscript{305} According to the White Paper Commentary on the Bill of Rights, “The word ‘medical’ is used in a comprehensive sense. It would certainly include surgical, psychiatric, dental, psychological and similar forms of treatment.” \textit{See A Bill of Rights for New Zealand—A White Paper} (Wellington: Government Printer, 1985), para 10.167.

\textsuperscript{306} Above, note 297.

\textsuperscript{307} Ibid, 25–26 (per Hardie Boys J).

\textsuperscript{308} Ibid, 23 (per Richardson J).

\textsuperscript{309} See also, ibid, 18 (per Cooke P).

\textsuperscript{310} Section 6 of the Bill of Rights prevents a court from reaching this result by ordinary implication.
(3) The employer may be able to justify a breach of s 11 by invoking the justified limitations clause of s 5 of the Bill of Rights.

There are a number of statutes which interfere with the right to refuse medical treatment. Those which expressly or by necessary implication override the right are, however, rare. Apart from s 72(1) of the Armed Forces Discipline Act 1974 which imposes adverse consequences in the form of criminal liability for refusal or failure to submit to medical treatment without lawful excuse, there does not appear to be a statute which would have such effect in the employment field.

The issue of consent is discussed more fully below. For present purposes, it suffices to say that valid employee consent is absolutely critical in order to comply with s 11. Obtaining valid consent may not be as straightforward as one might think. As I discuss below, the validity of any given consent can be contested. It may be challenged on the basis that consent was not informed, or that a pressured consent was given. Depending on the precise nature of the consent challenge, the employer may be forced to justify the circumstances in which consent was sought and obtained under public law principles relating to waiver of constitutional rights or, more broadly, under s 5 of the Bill of Rights.

If the employer was not successful in establishing valid consent, s 11 will have been violated and the employer would have to justify its testing, if it can, under s 5. In such a case, the employer would have to satisfy all of the strict requirements of s 5.

Section 5 of the Bill of Rights reads:

5 Justified Limitations—Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In R v B, Richardson J has observed that s 5 “provides a set of working principles” which require the weighing of

(1) The significance in the particular case of the values underlying the Bill of Rights Act;

311 See, eg, Alcoholism and Drug Addiction Act 1966, ss 9(5), 9(6), 9(7); Armed Forces Discipline Act 1971, s 72(1); Children, Young Persons and Their Families Act 1989, ss 96(1)(b), 98(a), 306(2)(b) and 319(b); Contraception, Sterilisation, and Abortion Act 1977, s 4(1); Criminal Justice Act, s 121(a); Guardianship Act 1968, s 25; Health Act 1956, ss 79(4), 88, 125(2), 126B(2); Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 9, 11 13, 29(1), 30(1), 40, 41, 58, 59(1), 59(2)(b), 62; Misuse of Drugs Act 1975, s 18A; Misuse of Drugs Amendment Act 1978, ss 13A–13M; New Zealand Sports Drug Agency Act 1994, ss 10, 13, 14, 17; Penal Institutions Act 1954, ss 36A, 36B, 36C and 36E; Social Security Act 1964, s 61(1)(b) proviso; Transport Act 1962, ss 58C, 58E(1)(b) and 58D; Tuberculosis Act 1948, s 9; War Pensions Act 1954, s 27. This list does not purport to be exhaustive.

312 Cf Transport Act 1962, s 58D.

313 See above, note 277.

314 See above, note 277.

315 Above, note 297.

316 Ibid, 4.
The importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

The limits sought to be placed on the application of the Act provision in the particular case; and

The effectiveness of the intrusion in protecting the interests put forward to justify those limits.317

In _MOT v Noort; Police v Curran_ ("Noort"),318 Richardson J drew attention to the fact that s 5 of the Bill of Rights is drawn largely from s 1 of the Canadian Charter, and that the Canadians in turn drew on the International Covenant of Civil and Political Rights and the European Convention on Human Rights for the purpose of formulating s 1 criteria. His Honour noted that reference to Canadian and international jurisprudence would be likely to provide "much useful guidance"319 as to "the principled bases on which Courts ought to proceed in making their assessments under s 5".320

The point about recourse to international and comparative jurisprudence is an important one. An essential purpose of the Bill of Rights is "[t]o affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights"321. To enable this to occur, s 5 must be given an interpretation which ensures consistency with New Zealand’s Covenant obligations.322 Thus, relevant international norms and standards relating to limitations clauses need to be consulted and applied.323 Under this jurisprudence,

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318 Ibid.
319 Ibid, 283.
320 Ibid.
321 Long Title, para (b).
322 There has been a suggestion that s 5 can be interpreted without reference to international jurisprudence relating to limitations clauses: see _Solicitor-General v Radio New Zealand_, above, note 285, 62–63 (FC) (referring to European Convention jurisprudence). With respect, this view is directly contrary to the foundational purposes of the Bill of Rights, and to para (b) of the Long Title. For further discussion, see notes 337 and 354–357 and accompanying text.
323 Attention is drawn to the set of principles known as the Siracusa Principles which were formulated with specific reference to the limitations provisions which are contained in the International Covenant on Civil and Political Rights. The following is an extract from these principles:

A. General Interpretative Principles relating to the Justification of Limitations

1 No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
2 The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
3 All limitation shall be interpreted strictly and in the favor of the rights at issue.
4 All limitations shall be interpreted in the light and context of the particular right concerned.
5 All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
6 No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7 No limitation shall be applied in an arbitrary manner.
8 Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9 No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10 Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:
   (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
limitations clauses must be “narrowly interpreted and the necessity for any restrictions must be convincingly established”, any interference with a guaranteed right must correspond to a “pressing social need”, “be proportionate to the legitimate aim pursued”, and be justified on grounds which are not merely “reasonable” but “relevant and sufficient”. These specific formulations, drawn from European Convention jurisprudence, are expressive of the corresponding Covenant norms.

In the course of his judgment in Noort, Richardson J cited the following passage from the judgment of Dickson CJC in Re A Reference re Public Service Employee Relations Act:

The constituent elements of any s 1 inquiry are as follows. First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitutionally guaranteed right: it must be related to ‘concerns which are pressing and substantial in a free and democratic society’. Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there

(b) responds to a pressing public or social need,
(c) pursues a legitimate aim, and
(d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.

The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding on the state.

The views and general comments of the Human Rights Committee will obviously need to be given close attention. See generally, R v Goodwin (No 2) [1993] 2 NZLR 390, 393 (CA); Simpson v Attorney-General [Baigent’s Case], above, note 296, 699 (per Hardie Boys J). For the latest compendium of the general comments of the Human Rights Committee, see UN Doc HRI/GEN/1/Rev 1 (29 July 1994).


See, eg, the Human Rights Committee’s general comment on article 18 of the International Covenant on Civil and Political Rights which refers, inter alia, to the following matters:

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant... Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed.... The Committee observes that [the relevant limitations are] to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.


Above, note 271, 373-374.
must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in questions; and, c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve.\textsuperscript{328}

While some modification of these principles would appear to be necessary to reflect the particular constitutional status of the New Zealand Bill of Rights Act under New Zealand law and to take into account local policy implications,\textsuperscript{329} it is, nevertheless, clear that these principles are indicative of the approach that s 5 requires.

These “stringent”\textsuperscript{330} requirements are designedly difficult to meet. Under s 5, the employer, as a party seeking to limit a guaranteed right in the Bill of Rights, has the onus of establishing, on the balance of probabilities, that the limit which it seeks to place on the employee’s s 11 right is (i) “prescribed by law”; (ii) a “reasonable limit”; and one which is (iii) “demonstrably justified in a free and democratic society”.

I examine these criteria seriatim.

(i) “prescribed by law”: The employer will have to be in a position to point to statutory authority to test the individuals whom it seeks to test. Without such statutory authority, testing would be unlawful\textsuperscript{331} since the “prescribed by law” requirement of s 5 could not be met.

(ii) “reasonable limits”: The employer will have to establish a legitimate purpose or objective for the testing programme. These might include public safety considerations (e.g., airline pilots), public health considerations (e.g., surgeons), national security considerations (e.g., some SIS employees). A generalized desire to “fight the war against drugs” would not be sufficient. In addition, the employer would need to establish that the legitimate interests being pursued were sufficiently pressing and substantial in the particular circumstances to override the right to refuse medical treatment.

(iii) “demonstrably justified”: The employer will have to establish a number of matters under this limb. There must be a rational connection between the testing programme and the needs of the particular employer to pursue the legitimate purpose(s) which have been identified. The employer will need to establish that the method chosen to implement the programme, and its testing procedures, are carefully tailored to produce the least possible intrusion on the right to refuse medical treatment while still protecting the legitimate needs of the employer. For example, if the employer has adopted a programme of random testing, the employer would have to establish that no other testing method which was less intrusive on the employee’s rights would suffice to satisfy the employer’s need to

\textsuperscript{328} MOT v Noort; Police v Curran, above, note 317, 283 (per Richardson J). See also, Zdrahal v Wellington City Council, above, note 285, 301 (per Greig J).

\textsuperscript{329} Ibid; R v B, above, note 297, 24 (per Richardson J).

\textsuperscript{330} R v B, ibid (per Richardson J).

\textsuperscript{331} That is, contrary to the New Zealand Bill of Rights Act 1990.
Drug Testing

The employer will also have to establish, in a wider sense, that the interference with the guaranteed right is, in all respects, proportionate to the intrusion which is taking place not only in terms of who is being tested, but what is being tested for, what is required to be done, how often, where, in front of whom, and the sanctions and penalties which can be imposed. In other words, all of the circumstances relating to the scope, manner and consequences of the programme will fall to be assessed in the light of the principle of proportionality.

In his judgment in Noort, Richardson J emphasized that the inquiry under s 5 “will properly involve consideration of all economic, administrative, and social implications” of the relevant measure. In R v B, his Honour further observed that the application of s 5 would need to reflect social, cultural, and constitutional values which shape New Zealand society. To these considerations, one must also add Covenant norms and obligations, which may not be violated.

Applying s 5 criteria by reference to these parameters, it can be expected that in exceptional circumstances some EDT programmes would survive s 5 assessment and scrutiny. However, it is likely that many EDT programmes presently operating in New Zealand would not be upheld under s 5 either because the reasons for testing in the first place were not sufficiently serious to warrant overriding s 11 guarantees, or because of their failure to be predicated upon a probable cause/individualized suspicion requirement, or, more generally, because the testing procedures, confidentiality safeguards, sanctions, and/or penalties are disproportionate in all the circumstances, or fail to comply with due process requirements.

**Section 21**

Section 21 of the Bill of Rights protects against unreasonable search and seizure and provides:

21 **Unreasonable search and seizure**—Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

The ambit of protection afforded by s 21 extends well beyond common law torts such as trespass and/or false imprisonment. This clearly emerges from the decision of the Court

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332 It might be thought that random testing of air pilots meets this requirement. Although it is of interest to note that the New Zealand Civil Aviation Authority has rejected the need for random testing in favour of the less intrusive method of requiring individual suspicion before a test will be carried out. See Sunday Star Times, 19 June 1994, A3 and text accompanying note 278.

333 See Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd, above, note 285, 396 (per McGechan J); Zdrahal v Wellington City Council, above, note 285, 301 (per Greig J).

334 MOT v Noort; Police v Curran, above, note 317, 283.

335 Above, note 297.


337 See MOT v Noort; Police v Curran, above, note 317, 270 per Cooke P “In approaching the Bill of Rights it is important to bear in mind its [international] antecedents”; Simpson v Attorney-General [Baigent’s Case], above, note 296, 691 per Casey J “The Act reflects Covenant rights”; 699 per Hardie Boys J “I would be most reluctant to conclude that the Act, which purports to affirm [New Zealand’s] commitment [to the Covenant], should be construed other than in a manner that gives effect to it.”
of Appeal in *R v Jefferies*\(^{338}\) where the Court emphasized that the guarantee is *not* restricted to the protection of property or confined to an association with the law of trespass, and that its protection goes at least as far as protecting privacy interests. As observed by Richardson J:\(^{339}\)

> the right of the citizen reflects an amalgam of values: property, personal freedom, privacy and dignity. A search of premises or the person is an invasion of property rights, a restraint on individual liberty, and intrusion on privacy and an affront to dignity.

More expansively, Thomas J referred to the rationale underlying s 21 in these words:\(^{340}\)

> Essentially, s 21 is concerned to protect those values or interests which make up the concept of privacy. Privacy connotes a variety of related values; the protection of one’s property against uninvited trespass, the security of one’s person and property, particularly against the might and power of the State; the preservation of personal liberty, freedom of conscience, the right of self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted, and recognition of the dignity and intrinsic importance of the individual. While necessarily phrased in terms of individual values, the community has a direct interest in the recognition and protection of this broad right to privacy. It is a valued right which is esteemed in modern democratic societies.

His Honour added:\(^{341}\)

> In a society which is increasingly complex and sophisticated, and yet dedicated to freedom of thought and action and notions of inviolate personality, human dignity, tolerance, private relationships and shared intimacies, the right to privacy is imperative. It embodies a basic respect and consideration for persons which is the unarticulated premise in much of our law.

These core instrumental values underpin s 21 and shape the ambit of its protective reach.

The Court of Appeal’s approach to s 21, as exemplified in the judgment of Richardson J in *R v Jefferies*, rests upon three primary considerations. First, the genesis of s 21 in the *Canadian Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights*, and the *United States Bill of Rights*. Second, approval of decisions of the United States and Canadian Supreme Courts adopting the notion of reasonable expectation of privacy as the touchstone of the guarantee. Third, acceptance of the view that determination of whether there is a reasonable expectation of privacy in any particular case requires “an assessment ... as to whether in a particular situation the public’s interest


\(^{339}\) Ibid, 302.

\(^{340}\) Ibid, 319.

\(^{341}\) Ibid. See also, *Hill v National Collegiate Athletic Association*, 865 P 2d 633 (Cal 1994) where the Supreme Court of California and individual opinions explore the parameters of the concept of privacy by reference to the notions of “informational privacy” (the interest in precluding the dissemination or misuse of sensitive and confidential information), “autonomy privacy” (the interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference), and “privacy’ properly so called” (the interest against the invasion of solitude, or the “right to be left alone”).
in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals...."  

In *R v A*  

Richardson J described the nature of the s 21 inquiry:  

The crux of the inquiry under s 21 is whether the intrusion was unreasonable.... [T]hat involves weighing all relevant public interest considerations and their application in the particular case.  

... The expectation of privacy is always important but it is not the only consideration in determining whether a search or seizure is unreasonable. Legitimate state interests ... are also relevant.

And in *R v Pratt* Richardson J observed:  

A search is unreasonable if the circumstances giving rise to it make the search itself unreasonable or if a breach which would otherwise be reasonable is carried out in an unreasonable manner. So, too, seizure. It follows that in assessing the reasonableness of a search or seizure it is important to consider both the subject-matter and the time, place and circumstance.

A first issue arising in relation to EDT is whether it involves a “search” or “seizure”. In my view, there can be no doubt EDT constitutes a search and a seizure within the meaning of s 21. In *R v A*, Richardson J observed that “[i]n broad terms a search is an examination of a person or property and a seizure is the taking of what is discovered.” This observation is wide enough to encompass EDT. It will be recalled that the United States courts have approached this issue on the basis that EDT is a “search” (leaving open the question whether it is also a “seizure”), while the Canadian courts have approached the taking of blood samples and bodily fluids as involving a “seizure” for Charter purposes.

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345 Ibid, 437.
348 Above, note 343.
349 Ibid, 433. His Honour’s description of a “seizure”—as “the taking of what is discovered”—may appear to predicate seizure upon the existence of a prior search. With respect, such a view appears unnecessarily restrictive. The guarantee in s 21 is against “unreasonable search or seizure”. The better view is that the s 21 guarantee extends to all seizures whether or not there has been a prior search of the person or thing seized. On the concept of “search”, the following passage from the judgment of Ayotte PCJ in *R v Enns* (1987) 85 AR 7, 9 (Alta Prov C) may be noted:

It appears to me that the key concepts which should be applied in any given situation to determine whether what has occurred is a “search”, where that issue may be in doubt, are “intrusion”, “examination” and “consent”... The word intrusion implies by its very definition a lack of consent and the word search connotes by its very definition an examination. (Citations and emphasis omitted).

350 In *R v Clarke* (1992) 8 CRNZ 528 the High Court proceeded on the basis that the taking of a blood sample under s 58D of the Transport Act 1962 from an unconscious hospitalized patient without consent was a “seizure”. See also, *Police v Smith and Herewini* [1994] 2 NZLR 306, 310 (per Cooke P).
351 See text accompanying notes 63–64.
352 See text accompanying notes 248–258.
As has been noted by Richardson J, “there may be some overlap between search and seizure protections”. For this reason, I do not consider it matters much, in the present context, which label or labels are used. In my view, what is clear is that either or both of these concepts are triggered by EDT.

In *R v Jefferies,* a majority of the Court of Appeal took the view that conformity with the law is *not* an indispensable precondition of reasonableness in every case, and that a search or seizure can be reasonable even in the absence of lawful authority. This view is contrary to the position taken by the Supreme Court of Canada under s 8 of the Charter and, in my view, requires reassessment since it is clearly contrary to New Zealand’s obligations under article 17 of the International Covenant on Civil and Political Rights, and to the principle of legality which is a fundamental premise of all of the Covenant guarantees.

More recently, the Court of Appeal has stressed that “the unlawfulness of a search and seizure will always be highly relevant” and that “[o]nly in rare cases” will absence

353 *R v A,* above, note 343, 433.
354 Above, note 338.
355 Ibid, 304-305 (per Richardson J), 311–312 (per Casey J), 315 (per Hardie Boys J), 315 (per Gault J), 323 (per Thomas J). *Per contra,* ibid, 295–296 (per Cooke P), 315–317 (per McKay J).
356 See text accompanying notes 259–262.
357 Article 17 of the International Covenant on Civil and Political Rights provides:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Surprisingly, in *R v Jefferies,* above, note 338, 304 Richardson J suggests that the Court’s view is supported by the language of the International Covenant on Civil and Political Rights. In speaking of “arbitrary or unlawful interference” article 17 recognizes that arbitrariness and unlawfulness are distinct if overlapping concepts; as does article 9(1), relating to deprivation of liberty, in dealing separately with the two concepts in successive sentences.

With respect, this analysis is flawed. It overlooks that article 17 expressly proscribes “unlawful” interferences with privacy, and that the Bill of Rights should be read to affirm this obligation. In its general comment on article 17 the Human Rights Committee has stressed that:

article 17 of the Covenant deals with protections against both unlawful and arbitrary interference.

The term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

See HRI/GEN/1/Rev 1 (29 July 1994), p 21 paras 2–3. Absence of lawfuleness also offends the overlapping guarantee against “arbitrary” interference with privacy in article 17. This is confirmed by the Human Rights Committee in its general comment on article 17 (“In the Committee’s view the expression ‘arbitrary interference’ can also extend to interference provided for under the law”), HRI/GEN/1/Rev 1 (29 July 1994), p 21 para 4, and in *Nicholas Toonen v Australia,* above, note 326, p 234 para 8.3:

the Committee recalls that pursuant to its general comment 16(32) on article 17, the “introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances”. The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. (Footnote omitted, Emphasis added).

The concept “reasonableness” in s 21 can and should be interpreted in the light of these Covenant obligations. In my view, the present position of the majority of the Court of Appeal fails to “affirm” New Zealand’s commitment to the Covenant in this respect.

358 *R v H,* above, note 296, 148 (per Richardson J).
359 *R v Pratt,* above, note 346, 24 (per Richardson J).
of lawful authority not render a search or seizure unreasonable. Summarizing the present position of the Court in *R v Wojcik*,

In our opinion, in the light of the judgments in *Jefferies*, despite the diversity of their reasoning, the proper approach, at least in a case where the alleged lawfulness of a search turns on consent (we are not now concerned with any other class of case), is that if the search is found not to have been lawful there is a prima facie presumption that it is unreasonable. Extreme circumstances are required to rebut that presumption.

Applying these observations to EDT, it seems clear that an employer who wishes to conduct EDT will have to be able to point to lawful authority to test. Without such authority, EDT prima facie violates s 21. An employer may find such authority in

1. A statute (either containing an express or discretionary power);
2. Regulations (if valid);
3. Employment contract (if valid);
4. Collective bargaining agreement (if valid);
5. Consent of employee/job applicant (if valid).

Where the employer can point to statutory or regulatory authority to test, the requirement of lawful authority will be met, although issues of consent, manner and mode of testing, penalties and sanctions, amongst others, remain as live issues and subject to s 21 (and other Bill of Rights) requirements.

Even where statutory or regulatory authority exists, the right to test is circumscribed by s 21. In the case of discretionary power, s 6 of the Bill of Rights requires that such authority must be read and interpreted consistently with s 21.

In *R v Laugalis*,

In *R v Laugalis* [citation omitted] this Court emphasized that the power to search without warrant under the Misuse of Drugs Act is an unusual power and must be exercised with due regard to the searchee’s rights under the Bill of Rights Act.

Generally, this exemplifies a desire to only infringe guaranteed rights in exceptional

361 Ibid, 465. See also, *Longley v Police* [1995] 1 NZLR 87, 88 (per Barker J) ("The prima facie presumption is that [an unlawful] search is unreasonable and that ‘extreme circumstances’ are required to rebut that presumption.")
363 Above, note 343.
circumstances, even in the presence of statutory authority. The implication for an employer seeking to conduct EDT is that an employer would need to establish a strong case for requiring an employee/job applicant to undergo EDT, even where statutory authority to test exists.

Absence of statutory or regulatory authority to test will make EDT highly susceptible to successful challenge under s 21. In such a case, the employer will be compelled to establish valid consent to EDT. Failure to establish valid consent will mean that EDT prima facie violates s 21.

Where there is a total absence of lawful authority, absent extreme circumstances, the tests will be “unreasonable” in terms of s 21. Nor can s 5 apply in such circumstances because that section requires authority which is “prescribed by law”.

Assuming lawful authority, the next question is what level of cause or suspicion, if any, is required before an employer may lawfully conduct EDT. In my view, s 21 requires, in principle, that an employer have probable cause before it can lawfully request an employee to undergo a drug test. This is consistent with the approach of the Court of Appeal in *R v Laugalis.* Any departure from this standard would have to be justified by reference to the stringent criteria of s 5. Such cases would be exceptional and rare. Although Richardson J mentioned in *R v Jeffries* that s 21 “does not specify a ‘probable cause’ standard”, in my view this concept must be considered a core requirement of the s 21 guarantee. In *Skinner,* Justice Marshall (dissenting) noted that historically probable cause had constituted “a yardstick against which official searches and seizures are to be measured”, and had been considered “an indispensable prerequisite for a full-scale search”. Marshall J went on to observe that the absence of a probable cause requirement would mean that the constitutional protection “lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to [the] supple term” of reasonableness. Similarly, in *Dunaway v New York* the Supreme Court observed:

The “long-prevailing standards” of probable cause embodied “the best compromise that has been found for accommodating [the] often opposing interests” in

365 The standard of “probable cause” is identical to the standard of “reasonable ground to believe”. See *Hunter v Southam,* above, note 248, 114–115. See also, *Dunaway v New York,* 442 US 200, 208n9 (collecting authorities) (“‘Probable cause exists where “the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed [by the person to be arrested].’”)
366 See text accompanying notes 362–364.
367 Above, note 338.
368 Ibid, 301.
369 Above, note 32.
370 Ibid, 637.
371 Ibid.
372 Ibid.
373 In *Vernonia School District 47J v Acton,* above, note 51, 14, O’Connor J described the resulting test as “an open-ended balancing test”.
374 Above, note 365.
375 Ibid, 208. Although *Dunaway* involved Fourth Amendment restrictions on arrests, the same principles apply to searches and seizures.
“safeguard[ing] citizens from rash and unreasonable interferences with privacy” and in “seek[ing] to give fair leeway for enforcing the law in the community’s protection.” [Citations omitted]. The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest “reasonable” under the Fourth Amendment.

In Canada, a similar approach to the search and seizure guarantee in the Canadian Charter has been taken by the Supreme Court which has referred to the reasonable and probable cause standard as a “touchstone” to s 8 values. In my view, failure to recognize a probable cause requirement would have serious consequences for the effectiveness of s 21 and would, borrowing Marshall J’s phrase, “portend[] ‘a dangerous weakening’” of the purposes of s 21. Further, where an employer relies on s 5 of the Bill of Rights, in my view, the Bill of Rights requires at least some quantum of individualized suspicion before EDT will meet s 5 criteria.

In applying s 21 to EDT the New Zealand courts will be called upon to make complex and difficult assessments, involving value judgments and social balances. It can be expected that the courts’ starting point will be rights-centred, and that the individual’s reasonable expectations of privacy from bodily invasion will be accorded a high degree of protection. Under s 21, the inquiry focuses on the question whether the search or seizure is “unreasonable” in all of the circumstances of the case. It addresses both the reasonableness of conducting a drug test and the reasonableness of the testing procedures, sanctions, and accompanying circumstances. Essentially, the guarantee involves a judicial balancing of the reasonable expectations of privacy of the employee weighed against the employer’s legitimate interests. Only where the employer’s interests demonstrably outweigh the need to protect the individual’s countervailing reasonable expectations of privacy, will the EDT programme be upheld.

Reasonableness is never an easy matter to assess or describe, especially in abstracto. As observed by Justice (now Chief Justice) Rehnquist in Bell v Wolfish:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Departures from a probable cause standard for testing will be rare and exceptional. They will have to be fully justified by reference to s 5 criteria. For reasons which I have fully canvassed when considering the position in Canada under the Canadian Charter, 381 I

376 See text accompanying notes 266–268.
378 In deciding the issue of “reasonableness”, it is important not to overlook the impact of other relevant Bill of Rights provisions. In particular, procedures for the collection, processing and notification of results of samples will need to comply with ss 9, 22, 23(5) and 27 of the Bill of Rights.
380 Ibid, 559.
381 See text accompanying notes 264–272.
consider it most unlikely that New Zealand courts will rush to embrace United States decisions which have abandoned any level of individualized suspicion for workplace drug testing of various categories of employees, including those occupying safety-sensitive positions. Mindful of the differing social, cultural and public policy values which prevail in New Zealand and of the “statutorily mandated” requirements of s 5 of the Bill of Rights, the New Zealand courts’ response will undoubtedly be more measured. As in Canada, the absence of any national drug crisis in New Zealand should mean that the courts will find mandatory suspicionless EDT contrary to s 21 save in extreme and exceptional circumstances where, having regard to the totality of the circumstances, the interests of the employer are established through cogent and persuasive evidence to be demonstrably superior to those of the employee/job applicant. This is likely to occur only in cases involving genuinely “safety-critical” positions, or security-critical positions, where public safety or security is a paramount and overwhelming issue in the particular case.

I turn finally to consider the issue of consent. In many situations, perhaps the vast majority of situations occurring in the workplace, the employer will be relying on consent of the employee/job applicant to the drug test. This raises difficult and complex questions as to the validity of such consent.

The precise circumstances in which consent has been sought and obtained will be crucial. By way of example:

(1) Job applicants and employees may have been asked to give their written consent in advance on an ad hoc basis;

(2) There may be a consent provision in an employment contract or collective bargaining agreement;

(3) Company policy, sometimes expressed in a Code of Conduct, may contain a specific anti-drugs policy statement, and refer to the availability of drug testing procedures in furtherance of that policy.

In each of these situations the critical question which needs to be determined is whether consent has been given and whether the consent is valid for public law purposes.

In Bill of Rights terms consent is akin to a waiver of rights. It is important to stress that Bill of Rights scrutiny is considerably more rigorous than under the common law of contracts. A valid waiver of constitutional rights is predicated on full knowledge and information enabling an informed choice, including awareness of the right to refuse and awareness of the potential consequences of giving consent, and the absence of any feelings of constraint. For Bill of Rights purposes, “a valid waiver requires a conscious choice that is both informed and voluntary and a valid waiver cannot be implied from silence.”

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382 R v B, above, note 297, 24 (per Richardson J).
383 Privacy Committee of New South Wales, above, note 282, 10.
In *R v Wojcik*, the High Court, in a criminal case arising under s 21 of the Bill of Rights, emphasized that it was necessary for the Crown to establish on the balance of probabilities that the consent given was “a genuine one” and that it will only be genuine “where the accused believed that he had a choice open to him”.

There is no reason to believe that this reasoning would not be applied in the context of EDT. The critical question which needs to be determined is whether the consent is a true consent. If the circumstances in which the consent was given did not give the job applicant/employee a real choice whether or not to decide to refuse, then it is likely that the Court would find that such “consent” was not valid.

Thus, the mere fact of signature on a consent form will not make an EDT programme safe in terms of the Bill of Rights. A programme based on presumed acquiescence to company policy is even more problematical. An employer relying on consent, if the validity of that consent is challenged, may have to establish that

1. the employee/job applicant had given a voluntary consent, was exercising a genuine choice and was told he or she had a right to refuse consent without adverse consequences;
2. it was the individual’s uncoerced will, not his or her poverty, that consented (this may be particularly applicable in the case of job applicants);
3. there was no harassment, coercion or inducement.

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385 Unreported, High Court, Wellington, T 111/93, 24 February 1994, Gallen J.
386 Ibid, 9.
387 Ibid. The relevant extracts are reproduced in *R v Wojcik*, above, note 360, 465.
388 In *University of Colorado v Derdeyn*, above, note 134, 937n16 the Supreme Court of Colorado emphasized that signature on a consent form did not ipso facto diminish the individual’s expectation of privacy or obviate the need to establish voluntary consent. The Court observed:

CU also asserts that student athletes have a diminished expectation of privacy with regard to the drug-testing program because they give their consent to the program by signing consent forms that give them full notice of the program. As the trial court found, however, such consents are not voluntary. We recognize that in *Schall*, 864 F.2d at 1319–20, the court reasoned that even if such a consent is not voluntary, the fact that a student signs a form giving consent significantly diminishes the subjective intrusiveness of urine testing, but we disagree with this analysis. In our view, once it has been determined that an individual’s consent to a drug-testing program is not voluntary for the purposes of the Fourth Amendment, the fact that the government has extracted consent from the individual does not demonstrate that the individual has a diminished expectation of privacy with regard to the program. On the contrary, it shows that the program intrudes on an individual's privacy interest.

389 See also Fleming, *The Law of Torts* (8th ed, 1992), 302 referring, in the context of voluntary assumption of risk, to the individual’s “poverty, not his will” that consented (citing *Thrussell v Handside* (1888) 20 QBD 359, 364 (per Hawkins J)). The learned author continues:

The modern view is that “for the purpose of this rule, if it be a rule, a man cannot be said to be truly ‘willing’ unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

Ibid, citing *Bowater v Rowley Regis Corporation* [1944] KB 476, 479 (per Scott LJ); *Standfield v Uhr* [1964] Qd R 66.
390 These are not the only potential grounds of challenge. Inequality of bargaining position might also be relied on, depending on the circumstances.
Given the realities of the employment workplace, it may prove difficult for an employer to establish a valid consent which would pass muster under the substantive provisions of the Bill of Rights. To be valid, consent must be given voluntarily and without coercion determined from the totality of the circumstances. A finding of valid consent may be more likely where consent forms part of an employment contract or collective bargaining agreement, but even in those contexts, voluntariness, coercion, and related issues will need to be addressed.

Failure to establish valid consent would leave the employer in the situation of having to justify the testing programme, if it can, by reference to s 5 of the Bill of Rights. In order to decide this question, the Court would have to examine the entire EDT as it relates to the employee/job applicant and consider whether it and the dispensing of valid consent can be justified in the light of the stringent s 5 criteria. It appears that in many cases an employer’s recourse to s 5 would fall at the first hurdle. It would have to be able to establish a limit “prescribed by law”. This may not be possible in respect of most EDT programmes presently operating in New Zealand.

Finally, it should be mentioned that in the United States it is well established that consent to an unconstitutional search or seizure will not be upheld as a valid consent. In McDonell v Hunter, the Court of Appeals for the 8th Circuit rejected an argument that because employees had signed consent forms they could no longer have a legitimate expectation to privacy in relation to searches of the person (including urinalysis) by their employer. The Court of Appeals observed that, “If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment.”

The Court agreed with the District Court of Iowa that “[a]dvance consent to future unreasonable searches is not a reasonable condition of employment.” Similarly, in Lovvorn v City of Chattanooga, the Court of Appeals for the 6th Circuit has stated:

"[A] search otherwise unreasonable does not become constitutionally palatable because it is attached as a condition of employment.... If the government could freely condition its many jobs and countless other benefits on the waiver of constitutional rights, then the promises of the Constitution would be largely hollow and symbolic. Such conditions must be recognized for what they are: constitution­ally unauthorized enlargements of government power.

The general principles articulated in these decisions appear relevant and applicable to the issue of consent under the New Zealand Bill of Rights.

Conclusion

The prospect of drug testing in the workplace raises many challenging and complex legal issues. It is generally recognized that the adoption of EDT has far reaching implications.
There is wide international consensus that it constitutes a significant intrusion upon the private life and autonomy of an individual. On the other hand, weighty reasons can be advanced to support drug testing on public health, public safety, and public security grounds. Drawing on a comparative analysis of responses to EDT in the United States and Canada, this paper has sought to explore the circumstances in which EDT may be lawfully upheld in the light of the guarantees and requirements of the New Zealand Bill of Rights Act 1990.

The Bill of Rights impacts significantly upon drug testing in the workplace. Where it applies, the Bill of Rights imposes strict and severe limits on the right of an employer to require an employee or job applicant to undergo EDT, and circumscribes the mode and manner of testing which can be conducted. In some circumstances, the effect of its provisions is to entirely proscribe EDT. This will be the case where testing is non-consensual and there is no statutory or regulatory authority to test. In all cases, the Bill of Rights prescribes normative standards of compliance which the manner and mode of testing must meet. Only in rare and exceptional circumstances will suspicionless EDT be able to be justified.

Although the Bill of Rights does not provide universal protection in relation to its guarantees, its impact is not limited to the public sector workforce. It also applies to the private sector in various situations. Thus, where legislation or regulations either require or permit EDT the Bill of Rights guarantees apply, regardless of whether EDT relates to the public or private sector. And in a significant extension of its application, s 3(b) of the Bill of Rights applies to EDT, whether in the public or private sector, where the employer can be said to be acting “in the performance of any public function, power, or duty” by or pursuant to law. In this respect, the New Zealand Bill of Rights has a considerably wider application than either the United States Bill of Rights or the Canadian Charter of Rights and Freedoms.

Aside from issues of application, workplace drug testing implicates a number of Bill of Rights provisions. In this paper I have focused on s 11 (right to refuse to undergo medical treatment), s 21 (unreasonable search and seizure) and s 5 (justified limitations). Upon analysis, each of these provisions has a pivotal impact upon the lawfulness of EDT in any particular case.

I have suggested that s 11 yields a broad guarantee in relation to non-consensual medical interventions and procedures which extend beyond the therapeutic and curative to include diagnostic, protective and preventive practices as well. On this approach, EDT constitutes “medical treatment” for the purposes of s 11.

Non-consensual testing prima facie violates s 11 of the Bill of Rights but may be justified under s 5 if the employer can point to statutory or regulatory authority, and the reasons for and mode of testing satisfy the strict requirements of s 5.

Section 5 of the Bill of Rights imposes a number of stringent requirements which are designedly difficult to meet. Under s 5, the employer, as a party seeking to limit a guaranteed right in the Bill of Rights, has the onus of establishing, on the balance of probabilities, that the limit which it seeks to place on the employee’s s 11 right is (i)
“prescribed by law”; (ii) a “reasonable limit”; and one which is (iii) “demonstrably justified in a free and democratic society”.

Applying these criteria, I suggest that in exceptional circumstances some EDT programmes would survive s 5 assessment and scrutiny. However, it is likely that many EDT programmes presently operating in New Zealand would not be upheld under s 5 either because there is no statutory or regulatory authority for the programme, the reasons for testing are not sufficiently serious to warrant overriding s 11 guarantees, they are not predicated upon a probable cause/individualized suspicion requirement, or, more generally, because the testing procedures, confidentiality safeguards, sanctions, and/or penalties are disproportionate in all the circumstances.

Under s 21, the inquiry focuses on the broader question whether the search or seizure is “unreasonable” in all of the circumstances of the case. It addresses both the reasonableness of conducting a drug test and the reasonableness of the testing procedures, sanctions, and accompanying circumstances. Essentially, the guarantee involves a judicial balancing of the reasonable expectations of privacy of the employee weighed against the employer’s legitimate interests. Only where the employer’s interests demonstrably outweigh the need to protect the individual’s countervailing reasonable expectations of privacy, will the EDT programme be upheld.

Absent extreme circumstances, s 21 requires that an employer who wishes to conduct EDT will have to be able to point to lawful authority to test. Without such authority, and in the absence of consent, EDT prima facie violates s 21. Even where statutory or regulatory authority exists, the right to test is circumscribed by the concept of reasonableness within s 21. In my view, s 21 requires, in principle, that an employer have probable cause before it can lawfully request an employee to undergo a drug test. Failure to recognize a probable cause requirement would have serious consequences for the effectiveness of the s 21 guarantees. Any departure from this standard would have to be justified by reference s 5. Such cases would be exceptional and rare.

In applying s 21, I conclude that it is most unlikely that New Zealand courts will rush to embrace United States decisions which have abandoned any level of individualized suspicion for workplace drug testing of various categories of employees, including those occupying safety-sensitive positions. Mindful of the differing social, cultural and public policy values which prevail in New Zealand and of the “statutorily mandated” requirements of s 5 of the Bill of Rights, the New Zealand courts’ response can be expected to be more measured. As in Canada, the absence of any national drug crisis in New Zealand should mean that the courts will find mandatory suspicionless EDT contrary to s 21 save in extreme and exceptional circumstances where, having regard to the totality of the circumstances, the interests of the employer are established through cogent and persuasive evidence to be demonstrably superior to those of the employee/job applicant. This is likely to occur only in cases involving genuinely safety-critical positions, or security-critical positions, where public safety or security is a paramount and overwhelming issue in the particular case.

In many situations, perhaps the vast majority of situations occurring in the workplace, the employer will be relying on consent of the employee/job applicant to the drug test. This
raises difficult and complex questions as to the validity of such consent. The precise circumstances in which consent has been sought and obtained will be crucial. Thus, the mere fact of signature on a consent form will not make an EDT programme safe in terms of the Bill of Rights. The critical question which needs to be determined is whether the consent is a true consent. If the circumstances in which the consent was given were not predicated on full knowledge and information enabling an informed choice, including awareness of the right to refuse and awareness of the potential consequences of giving consent, and the absence of any feelings of constraint, then it is likely that the Court would find that such "consent" was not valid.

Given the realities of the employment workplace, it may prove difficult for an employer to establish a valid consent which would pass muster under the substantive provisions of the Bill of Rights. A finding of valid consent may be more likely where consent forms part of an employment contract or collective bargaining agreement, but even in those contexts, voluntariness, coercion, and related issues will need to be addressed. Failure to establish valid consent would leave the employer in the situation of having to justify the testing programme, if it can, by reference to s 5 of the Bill of Rights. This may not be possible in respect of most EDT programmes presently operating in New Zealand because of the absence of statutory or regulatory authority.
The Employers' Perspective

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Introduction

There are a number of situations where an employer may consider it desirable or necessary to test whether current and prospective employees are using or have used drugs. Such situations include:

- tests in order to screen job applicants for drug use
- to protect the safety of employees and others
- to assist in accident prevention
- to assist in accident investigation
- to ensure appropriate levels of performance and production are being maintained
- to ascertain whether there has been compliance with an employer's code of conduct or employment contract relating to drug use.

Testing may need to be of a particular individual as the result of a specific event, or of a class of employees or potential employees.

Whether such tests are lawfully able to be administered is yet to be judicially determined. The issues raised are undoubtedly important and will become increasingly so as employers become more pro-active in safety matters.

Employers will need to take great care with this issue as a response will be required to a positive drug test by an employee, whether this be a warning, a suspension, a dismissal or counselling. Based on overseas experience, the most likely situations which will give rise to judicial pronouncements on drug testing in the workplace will be:

- a challenge by employees to the introduction of a drug testing policy by the employer
- an alleged unjustified dismissal of a person who has been dismissed after testing positive for drugs
- an alleged unjustified dismissal of a person who has refused to undergo a drug test
- a claim by an employee that a provision in his or her employment contract relating to drug testing is harsh and oppressive (s 57 ECA).

A finding adverse to the employer in any of these circumstances will attract significant financial consequences.

Each scenario will raise a multitude of issues on its own. Some of these issues are raised in this paper. From an employer's perspective, it would be fair to say that however
necessary or desirable drug testing may seem to be, the issue should be approached with extreme care.

Technical data on drug testing in the workplace

1. **Drugs**
   
The term “drug” or “drugs”, as used in this paper includes alcohol, therapeutic drugs (prescription and over-the-counter drugs) and illicit drugs.

2. **Effects of drugs**
   
   It is well established and recognized that drugs can create at least three different categories of problems: perceptual, cognitive and judgment problems; deficiencies in motor coordination; and neuromuscular and psychomotor dysfunctions.

3. **Effects of drug abuse in the workplace**
   
   Employees who work under the influence of drugs cannot function as efficiently and safely as their sober colleagues. This is shown by many studies. Effects of drug use include an increased risk to the health and safety of the work-force and of the public, decreased performance, lower productivity, lower quality of product or of service, higher incidence of absenteeism and tardiness, and higher use of medical benefits. The most serious effect of all of drug abuse is the higher rate of job-related accidents.

4. **Drug testing**
   
   Drug testing involves not only the testing of body fluids (for example urine) for the presence of drugs or their metabolites, but also (and as importantly) the accurate interpretation and use of results. It is the responsibility of employers to ensure that the procedures and methods used for drug testing are accurate, reliable and legitimate.

Legal aspects of drug testing in the workplace

For the purpose of this paper there is a need to consider the application of the Health and Safety in Employment Act 1992, the Human Rights Act 1993, the Privacy Act 1993, the Employment Contracts Act 1991 and the Bill of Rights Act 1990.

1. **Health and safety in employment**
   
   The Health and Safety in Employment Act 1992 (HSEA) is of primary importance in this issue. It places an onus on employers to ensure the health and safety of their employees and others. Section 6 provides that: “Every employer shall take all practicable steps to ensure the safety of employees while at work...”. By virtue of s 15, “Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person”.

   In addition, employers have specific duties regarding hazards management (ss 7 to 10), information (s 11), training and supervision (s 13). Employers have a duty to ensure that employees have an opportunity to be involved in the development of procedures regarding hazards management (s 14).

   A corresponding duty is placed on employees to take all practicable steps to ensure their
safety while at work and that none of their action or inaction will cause harm to any other persons (s 19).

There is no clear direction in the HSEA with respect to drug use and safety. What is clear is that there is a legal burden on employers to be pro-active in assessing safety concerns and diligent in minimizing all potential safety risks. This has been emphasized by courts. Employers are obliged to take every reasonable precaution for the protection of employees and others. This has been strongly emphasized by the courts on many occasions.

We regard the employers’ statutory obligations mentioned above as including a duty to ensure that workers who are known or believed to be drug users will not harm co-workers and others.

The duties related to the management of hazards are particularly relevant to drug testing. The HSEA requires employers to identify and eliminate, isolate or minimize hazards. Hazard is defined in s 2 of the HSEA.

Whether drug use amounts to a hazard has not yet been considered by New Zealand courts. However, it is most likely that at least in some cases, drug use would come within the definition of hazard. For instance, it is arguable that a drug impaired worker working in a safety sensitive position\(^1\) would create a hazard for the worker and others.

Consequently, it is arguable that employers can have recourse to drug testing as a measure to prevent injuries to their employees and to the public. This is regarded as being implicit to the employers’ statutory obligations set out in the HSEA.

2 Human rights

There may be a number of issues which arise out of the Human Rights legislation in connection with drug testing. The main question relating to the Human Rights Act 1993 (hereinafter referred to as “HRA”), is whether the performance of drug testing and the use of test results by employers could lead to prohibited discrimination based on disability. This issue has not yet been dealt with by the relevant authorities in New Zealand.

(a) The concept of disability

The first issue to be considered is whether a drug user or abuser will be considered as having a disability under the HRA. The Act defines disability as being, amongst other things, physical disability or impairment, physical illness, psychiatric illness, and intellectual or psychological disability or impairment (s 21(1)(h) HRA). In view of this definition, it is obvious that where the use of alcohol or drugs constitutes an illness, drug use will come within the legal definition of disability.

Consequent issues which arise are:

* do social or casual users of drugs fall within the definition as well as addicted or dependent users?

\(^{1}\) “Safety sensitive position” means any position in which a health impaired condition, including being under the influence of a drug, would constitute a direct threat to the health and safety of the employee himself or herself, of fellow employees and of the public.
Drug Testing

• is a casual user of drugs who tests positive suffering from temporary impairment and thus protected by the HRA?

• does the HRA protect only people dependent on legal drugs or is protection extended to those dependent on illicit drugs?

These are issues that will probably require judicial consideration in the future.

(b) Discrimination under the HRA

Basically s 22 makes it unlawful for an employer to disadvantageously affect employment by reason of any of the prohibited grounds of discrimination, such as disability.

In addition, employers cannot make any enquiry about an applicant for employment which indicates or could reasonably indicate an intention to discriminate against the applicant (s 23 HRA).

Unlawful discrimination in the present context may thus occur at any stage of the employment process from recruitment to termination where the employer uses the disability (drug use) of the employee as the reason for making an employment-related decision about that employee. In other words, where there is an unlawful assumption by the employer that the employee cannot or should not do the job on account of his/her disability, unlawful discrimination will exist.

Employers cannot therefore test for drug use for the purpose of making an employment related decision unless one of the exceptions provided for in the HRA applies.

Exceptions

For the purpose of this paper the most important exceptions in relation to disability are those set out in s 29 HRA. The provision allows different treatment based on disability where:

(1) the duties of the position could be performed satisfactorily by the disabled employee only with the aid of special services and facilities and it is not reasonable to expect the employer to provide them; or

(2) the duties could be performed by the disabled employee only with a risk of harm to the employee or to others and it is not reasonable to take that risk, except if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

(c) Risk of harm

The latter exception pertaining to risk of harm is particularly relevant to this paper. It suggests that an employer may treat prospective or current employees affected by a disability such as drug dependency differently if the performance of their duties entailed a risk of harm to themselves or others and it was not reasonable to take the risk, unless the employer could take reasonable measures to reduce the risk to a normal level.

To meet the requirements set by s 29 and qualify for the exception therein, an employer would have to establish that employees who are drug users pose a greater risk to
themselves and normal individuals who are not users, and that the employer cannot reduce the risk to a normal level other than by refusing to hire drug users or taking other measures that may be contrary to s 22 of the HRA.

3 Privacy rights

The Privacy Act 1993 aims to promote individual privacy by establishing certain principles with respect to the collection, use and disclosure, by public and private sector agencies, of information relating to individuals, as well as access to information. Employers fall under the definition of agencies.

Where drug testing is to be used in employment, employers will need to ensure that information relating to employees’ drug use is obtained, retained and used in accordance with the 12 privacy principles.

Drug testing is not prohibited by the Act so long as the collection of the information about employees’ drug use is necessary for a lawful purpose connected with a function or activity of the agency (Privacy Principle 1). Safety of workers and others is a legitimate purpose connected with a function or activity of all employers, particularly in light of their obligations under the HSEA to ensure the safety of employees at work and to ensure that no action or inaction of any employee while at work harms any other person.

As well, drug testing requirements in cases of serious performance problems coupled with admissions of drug use or reasonable suspicion of drug use would probably fall within the meaning of “lawful purpose”. Proper performance of work may also be regarded as being connected with a function of all employers.

While the Privacy Act does not prevent drug testing per se, the manner in which drug testing is carried out and the information derived from the process will be governed by the various Privacy Principles.

4 Employment contracts

(a) Power to negotiate on drug testing

Section 18 of the Employment Contracts Act 1991 (“ECA”) provides that negotiation for an employment contract may include negotiation on any matter. Hence, anything that is not contrary to public policy and to law can become a working condition. There is no doubt that workplace rules relating to drug testing are subject to negotiation and can become part of an employment contract.

(b) Implied term

There may also be situations where the requirement that an employee undergo a drug test could constitute an implied term of the employment contract.

The requirement that an employee undergo a drug test was found to be implicit in the contract of employment in a Canadian decision in which it was found that where the employer is a public carrier, and the employee’s duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a
drug test. It was found that given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, in the absence of any express provision to the contrary.

In New Zealand, specific requirements have to be met for a term to be implied in a contract. The term must: be reasonable and equitable; be necessary to give business efficacy to the contract; be so obvious that it goes without saying; be capable of clear expression; not contradict the express terms of the contract.

These criteria were found to be applicable to employment contracts in Attorney-General v NZ Post Primary Teachers Assoc [1992] 1 ERNZ 1163 (CA).

There are certainly circumstances in which these criteria could be met. However, because of the uncertainty surrounding the question of whether the requirement to submit to a drug test constitutes an implied term of an employment contract in New Zealand, the most prudent approach for employers is to expressly incorporate the drug testing policy into the employment contracts.

(c) Management prerogative

It is also relevant in this paper to address the question of whether employers are entitled under the current law to exercise their management prerogative to introduce a drug testing policy.

“Management prerogative” and “the right to manage” which are used alternatively have for a long time been recognized by New Zealand courts. However, their scope and content have never been established in specific terms. Nevertheless, courts have consistently recognized that employers have the right to manage their business. This right has always been confined to matters that are not covered by employment contracts, or matters that are not inconsistent with the prevailing employment contracts. For instance, in New Zealand Electrical Workers v NZ Steel Ltd [1982] ACJ 179, 181, the Arbitration Court of New Zealand found that:

The employer always has the right to manage unless the collective agreement clearly specifies otherwise in any particular field or fields.

In Hale & Son Ltd v Caretakers IUW[1991] 1 NZLR 151, the Court of Appeal maintained that employers had the right to make management decisions and that the Labour Court could not substitute its own opinion as to the wisdom or expediency of the employer’s decision.

Up to 1994, the right to manage applied to most matters not dealt with in employment contracts. However, it could now be argued that the law has been modified by two recent decisions of the Employment Court involving the unilateral introduction of retirement policies by employers. Although the specific facts of each case related to a unilateral decision by the employer to terminate employment on the reaching of a particular age by employees, some general statements as to the law were made by the respective Judges in finding that in both cases the policies unilaterally introduced were not contractually binding upon the applicant employees.
In view of the recent findings of the Employment Court, a cautious approach dictates that the introduction of a drug testing policy should follow a process of consultation and agreement with employees and unions concerned. The best way to ensure that a drug testing policy will be binding upon the employees is to incorporate it into employment contracts with the consent of all employees and unions. The policy would then become a new contractual term enforceable by both parties.

5 Bill of Rights Act 1990

A further consideration for employers will be whether drug testing of current and prospective employees is constrained in any way by the Bill of Rights Act 1990.

Section 3 of the Act provides:

This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

That Act appears by virtue of s 3(b) to apply to entities in the performance of any public function, power or duty. To this extent, state employers and quasi state agencies which are set up by statute will be covered by the Act when performing a public function, power or duty. Such employers include SOE’s, government departments, universities, schools and polytechnics. Whether the negotiation of employment contracts and the introduction of policies applying to employees should be regarded as the performance of a public duty or function has not yet been considered by New Zealand courts. It is likely that each case will turn upon its own facts. However, it is our view that generally the Bill of Rights Act does not apply to employment contracts entered into by two or more private parties.²

It is doubtful that the application of the Bill of Rights to an employer would significantly alter the conclusions already reached. An employer to which the Bill of Rights Act applies will have to ensure that its drug testing policy or agreement conforms with ss 5, 8, 11 and 19(1) of the Act.

Conclusion

In view of the provisions of the Privacy and Human Rights Acts, and the law relating to employment contracts, it is doubtful that even in the absence of the application of the Bill of Rights Act, an employer could unilaterally force an employee to undergo a drug test. Matters relating to drug testing in the workplace are essentially governed by the applicable employment contract which itself is subject to any legislative constraints.

Drug testing will represent an acceptable intrusion upon workers’ statutory privacy rights and human rights if it is undertaken for safety reasons, or for performance reasons in some particular cases. If drug testing is based on other grounds, the invasion of workers’ rights may not be justifiable. Each case will turn on its own facts.

² Some years ago the Supreme Court of Canada held that the Canadian Charter of Rights and Freedoms, which contains a provision similar to s 3 of the Bill of Rights Act, does not apply to a collective agreement between two private parties when no exercise or reliance upon governmental action is involved.
The Privacy Implications

Bruce Slane

The New Zealand Privacy Commissioner, Auckland

An American worker who was subjected to drug testing by way of urine sample said this:

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.

Drug testing in any context, whether it be for law enforcement, competitive sport, medical or employment purposes, raises significant privacy issues. The issues are numerous and arise throughout the process from the very earliest decision to test an individual or a class of individuals through to the handling of the results.

Drug testing regimes involve requiring individuals to provide bodily substances to agencies so that those agencies can extract information about them. Except in the medical context, there is inevitably going to be an unequal power balance between the agency implementing a drug testing regime and the individual the agency seeks to drug test. In the employment and sports sphere the power balance will generally be so unequal that the test can, for all intents and purposes, be described as mandatory because of the negative consequences that may flow from a refusal to submit to testing. Unless there are no negative consequences flowing from a refusal to test, then it is a nonsense to talk about a “voluntary drug testing regime” or a “regime involving the consent of the participants”. Rather, what we are talking about will be a regime involving the violation of the physical autonomy and privacy of individuals.

Society will, every now and again, be called upon to decide between competing public interests. This may require society to accept that certain rights, or the rights of a certain group of people must be compromised to meet a greater or more pressing social need or interest. The New Zealand Drug Testing Agency Act is an example of an attempt to resolve competing public interests. Privacy rights of individuals might well be better served if there were no drug testing regime in sport. However, there are other public interests in addition to expectations of individual privacy. There are demands for fairness in sport. There are needs to comply with international agreements to ensure our athletes can compete internationally. There are concerns about the harmful effects of drugs on athletes.
In my submission to the select committee looking at the New Zealand Sports Drug Testing Bill, I noted my belief that it was for the promoters of the Bill to establish their case and show why the new law was needed. It was for the Committee to balance the need for the law against any losses of rights. Restrictions on rights, including the right to privacy, should be reduced only to the extent necessary to meet established need. Athletes should not be forced to abandon their fundamental rights at the locker room door, no matter how many sportspeople may be willing to do that to compete in their sport.

It was my view that the New Zealand Sports Drug Testing legislation contained no real limits on which competitors may be drug tested. Hundreds and thousands of ordinary New Zealanders involved in recreational, club and other low levels of competition could be required to provide a sample to the agency.

I am aware of the practicalities and I am aware of the New Zealand tendency for pragmatism and to say, “we know there are good jokers in charge of this. They are not interested in taking people’s rights away, they are not interested in doing any more than fighting an evil”. But when I consider these matters I have to look at it the legislation itself, not consider how good the people are who are going to be involved in administering it in its early years. Both in the preliminary discussions that we had with the Interim Agency, in which I hope we tried to be helpful, and in the submissions we made on the Bill, a lot of the points that were raised by me and Blair Stewart from my office, were taken aboard and I believe that the Bill was improved as a result. However, there was a feature introduced into the Bill that really caused me concern. The sample was defined to include any human biological tissue or fluid so providing the agency with the ability to require and test blood and tissue sample. Now in fact provisions of the Bill, also as it was altered provided that the blood sampling was only to take place in accordance with regulations. But it gave the executive the power to introduce by regulation an enormous extension of the Bill about which no submissions were made except possibly my own.

When the Bill was reported back there was no committee stage or debate. As was mentioned earlier it might have been a jolly good last sprint for the sports drug testing agency but I do not think it was good for the law that we reached a situation where the Bill was rushed through the House, if not in 24 hours in something very close to that. It was reported back as being a non-controversial measure and it was not even possible to read a copy of the amended Bill before it was passed. I simply did not know exactly what had been put in the Bill. So I was concerned about that part of the process and the failure to introduce limits on coverage.

I do not accept the arguments that because it is difficult to draw the boundary or because it is difficult to establish a system where the agency would work under certain criteria in applying its powers to non-elite competitors that we should not make an attempt. If we were to adopt that attitude generally then very few rights would be established because of the difficulty of drawing the boundary lines.

It should be made clear that I did not oppose the Bill; I did not oppose the concept of there being sports drug testing. I asked that the case be put for the legislation.

Drug testing involves the collection, storage and use of personal information. And of
Drug Testing

course that is what the Privacy Act is about. One has to look at the totality of the reality of consent in these situations when there is an unequal power as in the employment situation. It is also necessary to have a look at the means by which information is collected. If you are wanting to collect information about past drug use you really have got to have a look at principle 4 of the information privacy principles which says first of all, it shall not be collected by unlawful means, which raises the Bill of Rights Act, and secondly, by means that are in the circumstances of the case unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.

I think it is important when looking at the application of the Privacy Act to remember a little bit about what this testing is about. And there have been two good reports on drug testing and privacy: one by the Privacy Commissioner of Canada and one by the Privacy Committee of New South Wales. You would not be surprised that I tend to agree with the conclusions drawn in those reports.

But it is well just to remember exactly what you are learning when you are drug testing by urinalysis. At best it shows that the person who tests positive may have been impaired at some past time. A test cannot confirm that the person has been impaired. Nor can it confirm that a person was impaired when the test was taken. It cannot determine precisely when the drug was used. Nor can it identify the quantity of the drug ingested. So to summarize, urinalysis can detect past use, it cannot confirm present impairment, it cannot confirm past impairment, it cannot confirm present use and it cannot determine the quantity of the drug consumed. So the limited information provided is 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. In fact there is some suggestion of substitution of drugs. I think the New Zealand Navy found staff tended to move back to alcohol again.

A positive result means that the test has detected a drug or a metabolite of the drug being tested for and there can be a number of explanations. I am not going to go into those in detail now.

Those who are marketing these services tend to move pretty quickly from talking about drug use to drug abuse and it is an easy slip to make in the workplace situation to assume that because the person uses a drug that they abuse it. If that assumption were applied to alcohol use for employing staff it would be pretty hard to actually get a workforce together.

Yet that step of testing for alcohol in the workplace is obviously the first place to start. Not with the expensive processes presented by laboratories and the makers of chemicals as part of the drug abuse testing industry.

I think if you look at the situation regarding the use of alcohol in New Zealand it is the dominant problem. It can be dealt with by a breathalyser which produces a result with some link to the actual impairment of the individual concerned. So if employers are really being objective and impartial about what they are trying to achieve by testing, they will be looking at the alcohol situation to see how they can deal with that first.
It is interesting to see that when it comes to the recommendations that have been brought out in these reports. There is an acceptance that workplace drug testing should only take place when a person’s impairment would impose a substantial and demonstrable safety risk to that person or to other people and that there is reasonable cause to believe that the person to be tested may be impaired by drugs. The form of drug testing to be used must be capable of identifying the presence of a drug at concentrations which may be capable of causing impairment. That was the first New South Wales recommendation. And the second one was that it should be prohibited other than when a person’s impairment by drugs would impose a substantial and demonstrable safety risk to that person or to other people, there is reasonable cause to believe that the person to be tested may be impaired by drugs and that the form of drug testing to be used is capable of identifying the presence of a drug at concentrations which may be capable of causing impairment. The third one was that if it is permitted it should be subject to proper procedural standards in legislation.

In Canada the armed forces have had a policy of drug testing both for cause and at random. The Privacy Commissioner of Canada was informed in February this year that the Canadian Armed Forces had directed that the implementation of the random testing segment of the programme be indefinitely postponed.

I suggest to you that getting aboard the North American popular bandwagon and introducing extensive workplace drug testing may be just an expensive and costly effort by employers to achieve something that could really be achieved by other means and certainly the attempt should be made to do that first.