Drug Testing: A Sample of the Canadian Experience

*Joseph de Pencier**
Counsel, Civil Litigation Section, Department of Justice, Ottawa, Canada
Member, Expert Advisory Committee on Doping Control, Canadian Centre for Drug-free Sport

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.

1 Privacy Commissioner, *Annual Report 1988–1989* (Ottawa, 1989) p 17. In his report on the use of banned substances in sport, and the Ben Johnson positive test at the 1988 Seoul Olympics, Mr Justice Dubin summarily dismissed the legal basis the Privacy Commissioner then articulated for his concerns about sport drug testing: *Report of the Commission of Inquiry into the Use of Banned Practices Intended to Increase Athletic Performance* (Ottawa, 1990), ("*Dubin Report*")pp 492–493.

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[3]. 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*[4] 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.[5] He agreed that legislators had the right if not the duty to address the problem.[6] 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*.[7] 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.[8] In *Jackson*, Mr Justice MacKay of the Federal Court Trial Division heard a number of Correctional Service of Canada and expert witnesses:[9]

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.

6 (1986) 30 CCC (3d) 108, 119.

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).

> [R]elating 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.[10] 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.[11] His Commission staff also conducted their own investigations and research.[12] 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.[13]

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:[14]

> 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.[15] 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

10 Ibid, pp 106–109 (TD).
11 *Dubin Report*, pp xxi–xxii.
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.*[16] In this case, a tribunal established under the Canadian Human Rights Act[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.[18] The Act defines "disability" to include a dependence on alcohol or a drug.[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:[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 wisp 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:[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.
20 Canadian Human Rights Commission, *Annual Report 1993* (Ottawa, 1994), pp 35–36.
21 *Ontario Civil Liberties Association and Canadian Human Rights Commission v Toronto-Dominion Bank*, TD December 1994, decision rendered August 16, 1994, p 32.

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.
25 *Dubin Report,* ch 20.
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),

approach the Warden of the Kent Institution adopted towards drug use.[29] He brushed aside objections to the rigorousness of the drug testing procedure, commenting:[30]

> [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.[31] 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:[32]

> 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".[33] 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:[34]

> 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.[35] In turn, the Centre's conduct is policed by a sophisticated series of challenge and appeal mechanisms including recourse to the courts.[36]

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.