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]llegal 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.”)
Drug Testing

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-manda-
tory testing, unannounced testing, prescheduled testing, random testing, periodic testing,
systematic testing, blanket testing, blind testing, control testing, targeted testing, inci-
dent-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

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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.15 Workplace drug testing is, in a phrase, a “booming business”.16

Employee drug testing first became a major legal and public policy question in the early 1980s.17 This issue was given heightened importance, in relation to the Federal workplace, by the issue on 15 September 1986 of Executive Order No 12,56418 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)19 and requires executive branch agencies to adopt regulations creating a “drug-free workplace”.20 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.21 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)\textsuperscript{22} right to privacy.\textsuperscript{23} A significant number of states have adopted drug testing statutes in recent years, but the approaches differ as to when EDT is permitted.\textsuperscript{24} 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.\textsuperscript{25} 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\textsuperscript{26} 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.\textsuperscript{27} In addition to these state drug testing statutes,

\textsuperscript{22} See, eg, \textit{Hennessey v Coastal Eagle Point Oil Company}, 609 A 2d 11, 17–18 (NJ 1992) (implied rights to privacy under Article I, 1 of the New Jersey Constitution which reads "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.")

\textsuperscript{23} See the Constitutions of Alaska (Article I, 22), Arizona (Article II, 8), California (Article I, 1), Florida (Article I, 12), Hawaii (Article I, 6), Illinois (Article I, 6 and I, 12), Louisiana (Article I, 5), Montana (Article I, 10), South Carolina (Article I, 10), and Washington (Article I, 7). However, unlike the Constitution of California, not all of these constitutional provisions apply to private as well as government entities.


\textsuperscript{25} Montana, Rhode Island and Vermont prohibit random testing under all circumstances, except when such testing is mandated by federal law or regulation. Connecticut and Minnesota prohibit random testing generally, except when employees work in safety-sensitive positions. Iowa prohibits random testing generally but permits pre-employment random testing of correctional officers. Maine permits random testing only where the employee "works in a position the nature of which would create an unreasonable threat to the health or safety of the public or the employee's co-workers if the employee were under the influence of a substance of abuse" or pursuant to a collective bargaining agreement.

\textsuperscript{26} The Maine statute distinguishes between job applicants and current employees. The "probable cause" standard applies to the latter. The former may be tested if the applicant has offered a position with the employer or has been offered a position on a roster of eligibility from which employees will be chosen. See Bell, above, note 8, 153–154.

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 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

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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 F3d 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 (1988). 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}

**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 *Railways, Inc and United Transportation Union Local 1648, 88 Lab Arb* (BNA) 1073, 1080 (1987) arbitrator Goodman observed: “An 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, Kornblut & Porter, above, note 11, 634n666 in 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.
Drug Testing

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, 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 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”. Instead, when a search “serves special governmental needs, beyond the normal need for law enforcement”, a court must balance the privacy expectations of the individual against the promotion of legitimate governmental interests “to determine whether it is practical to require a warrant or some level of individualized suspicion in the particular context”. 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. Probable cause “is not invariably required”. Although “some quantum of individualized suspicion is “usually required”, the courts have emphasized that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable”. 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 Amendment. It has also been held that the Fourteenth Amendment extends the Fourth Amendment guarantees to searches and seizures by state officers.

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50 Ibid. See also Bluestein v Skinner, 908 F 2d 451, 455 (9th Cir 1990).
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); Capua v City of Plainfield, above, note 1; Carns 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).
54 National Treasury Employees Union v Von Raab, above, note 5, 665.
56 Vernonia School District 47J v Acton, above, note 51, 4.
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).
59 Vernonia School District 47J v Acton, ibid, 4.
60 Skinner v Railway Labor Executives’ Association, above, note 32, 624.
61 Ibid.
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, *arguedo 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".
Drug Testing

positions”⁶⁹ and that the Government’s interest in regulating the conduct of railroad employees to ensure safety presented “‘special needs’ beyond normal law enforcement”⁷⁰ 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”.⁷¹ The Court found that “the intrusion occasioned by a blood test is not significant”⁷² and that the breath tests were “even less intrusive than ... blood tests”.⁷³

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:⁷⁴

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.⁷⁵

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”⁷⁶ in two respects: by the fact that the samples were not to be furnished “under the direct observation of a monitor”,⁷⁷ and by providing that the test be conducted in a medical environment.⁷⁸ The Court added:⁷⁹

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”.⁸⁰ 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.” The Court likewise emphasized that the FRA’s programme was aimed as much at deterrence as it was as at detection.

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.”

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

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:

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” of the intrusions on worker privacy posed by the FRA’s testing programme, as compared to its “blind acceptance” 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

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81 Ibid, 621.
82 Ibid, 630.
83 Ibid, 629n9 (collecting cases). See also, Vernonia School District 47J vActon, 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.\(^8^8\) Marshall J concluded that the majority of the Court had been:\(^8^9\)

[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”.\(^9^0\) 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”.\(^9^1\) In relation to third category of employees—employees handling classified information—the Court “readily agree[d]”\(^9^2\) that the Government has a compelling interest in protecting “truly sensitive information”,\(^9^3\) 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”.\(^9^4\) 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:\(^9^5\)

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

\(^8^8\) Ibid, 652–654.
\(^8^9\) Ibid, 654–655.
\(^9^0\) National Treasury Employees Union v Von Raab, above, note 5, 679.
\(^9^1\) Ibid, 670.
\(^9^2\) Ibid, 677.
\(^9^3\) Ibid.
\(^9^4\) Ibid.
\(^9^5\) 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”.

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.

The Court noted that drug abuse is a “pervasive social problem” and stressed that the testing program 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.”

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 accepting approach to EDT. Justice Scalia (with whom Justices Stevens, Marshall and Brennan joined) wrote:

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.
Drug Testing

The Commissioner of Customs himself has stated that "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: 101

... 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: 102

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. 103

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: 104

Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal. 105

This point is made strongly in Skinner in the dissenting opinion of Marshall J, in whose opinion Brennan J concurred. Marshall J wrote: 106

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

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].

As Marshall J and Scalia J predicted in their dissenting opinions in *Skinner* and *Von Raab*, 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, random drug testing of commercial vehicle operators, random urinalysis of certain employees in state jail, the Department of Transportation’s urinalysis plan, random testing of mass transit employees, random drug testing of Army employees working with chemical weapons, the Department of Justice’s random drug testing plan for employees holding top secret national security clearances, random drug testing of Boston Police Department employees required to carry firearms or involved in drug interdiction, a program for random drug testing of employees, suspicionless urinalysis-drug-testing of Army-employed civilian air traffic controllers, pilots, aviation mechanics, aircraft attendants, police, and guards, 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.

The courts have particularly invoked the deterrence rationale which underpins *Skinner*.
and *Von Raab* to justify random testing programmes. In *Bluestein v Skinner*, for example, the Court wrote: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"123 to the invasion of privacy side of the Fourth Amendment balance, it was "insufficient to tip the scales"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"125 and that although a "relevant factor",126 it "would tip the scales" only "in a particularly close case".127

In *Railway Labor Executives’ Association v Skinner* ("*Skinner II*"),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".129 The Court observed: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*.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”.132 Faced with this submission, the Court accepted, with little difficulty, that the Secretary’s view clearly justified random testing.133

121 Ibid, note 50.
122 Ibid, 457.
123 Ibid, 456.
125 *International Brotherhood of Electrical Workers, Local 1245 v Skinner*, above, note 118, 1463.
126 *National Treasury Employees Union v United States Customs Service*, 27 F.3d 623, 629 (DC Cir 1994).
127 Ibid, citing *Harmon v Thornburgh*, above, note 58, 489.
128 934 F.2d 1096 (9th Cir 1991).
129 Ibid, 1099.
130 Ibid.
131 Ibid.
132 Ibid.
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.
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.
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.
Drug Testing

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.\(^{140}\)

... 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).\(^ {141}\)

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

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...\(^ {144}\)

In \textit{Barr}, a new programme proposed by the Federal Bureau of Prisons,\(^ {145}\) similar to but "somewhat narrowed"\(^ {146}\) 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:\(^ {147}\)

\(^{140}\) Ibid, 552.
\(^{141}\) Ibid.
\(^{142}\) Above, note 11.
\(^{143}\) \textit{American Federation of Government Employees, AFL-CIO, Council 33 v Meese}, above, note 136, 552-553 (footnotes omitted, emphasis in original).
\(^{144}\) Ibid, 554.
\(^{145}\) 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.
\(^{146}\) Ibid, 1469.
\(^{147}\) Ibid, 1469-1470.
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. 148

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. 149

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” 150 of those Bureau employees with extraordinary duties. 151

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”, 152 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. 153

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”\(^\text{153}\) and, further, “how slippery the slope ... has become”.\(^\text{154}\) 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”.\(^\text{155}\)

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”.\(^\text{156}\) The Federal courts are also reexamining the contours of other facets of the notion of “special needs”,\(^\text{157}\) including what is meant by “truly sensitive information”\(^\text{158}\) and “safety-sensitive”.\(^\text{159}\) 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.\(^\text{160}\)

**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:\(^\text{161}\)

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.


\(^\text{154}\) 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.”)

\(^\text{155}\) *National Treasury Employees Union v United States Customs Service*, above, note 126, 630 (per Wald, Circuit Judge, dissenting).

\(^\text{156}\) *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).

\(^\text{157}\) See, eg, the cases referred to in *O’Keefe v Passaic Valley Water Commission*, 624 A 2d 578, 582 (NJ 1993).

\(^\text{158}\) 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 sufficient damage could flow from a compromise of that information so as to warrant overriding the affected employee’s privacy interest.”)


\(^\text{160}\) 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. 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. 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. Canadian National Railways require some job applicants to submit to urinalysis to check for drug use. Some trucking companies in Ontario use drug testing on their employees. 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. Similar policies are in place at Flint Engineering & Construction Ltd which has locations throughout Western Canada.

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. 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”. Urinalysis was also intended to be a key component of testing strategies announced by Transport Canada and the Department of National Defence.” Members of the Canadian Forces are required to submit to a broad range of testing programmes (but not random testing since February 1995).

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. 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.

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

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.
164 Calgary Herald, 8 September 1994, B11. For more detailed discussion of this programme and its legality, see text accompanying notes 220-231.
165 Maclean’s, 29 September 1986, 36.
166 Toronto Star, 19 August 1994, C3.
168 Ibid.
170 Ibid, 10.
171 Ibid. See ibid, Appendix A where full details of these programmes are given.
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\(^\text{175}\) which had reported that “mass or random screening of job applicants ... is neither sensible nor acceptable”,\(^\text{176}\) and had recommended testing for “cause” only and “in exceptional cases in which drug use by employees constituted a real risk to safety”.\(^\text{177}\) Responding to this report, the Federal Government statement read in part:\(^\text{178}\)

> 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:\(^\text{179}\)

> 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”,\(^\text{180}\) but also testing for cause.\(^\text{181}\) This strategy was originally to be implemented without supporting legislation.\(^\text{182}\) Subsequently, an Order-in-Council was made in May 1992\(^\text{183}\) 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”\(^\text{184}\) seemingly on the basis that the Department’s own surveys had failed to demonstrate that its members had a serious drug problem.\(^\text{185}\)

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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, 54.

182 Ibid.

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

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).
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:

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*”. 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”. In explanation, the Commission stated:

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.

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

197 Ibid, 118–119 (footnotes omitted, emphasis in original).
198 Ibid, 121. In an interview given at the time of the release of the Commission’s report, one of the Commission’s lawyers confirmed: “We’re saying it should be prohibited in every circumstance.” Toronto Star, 9 September 1992, A1.
199 Above, note 169.
200 Ibid, 2.
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 of these, would significantly reduce the risk to safety.

**Recommendation 3**
A person who is not a member of a group which exhibits drug-related problem 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:

> 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, Federal or Provincial Privacy Acts, a host of labour standards statutes, collective bargaining agreements, and/or the common law.

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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:

> [I]t 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 search 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.

214 Other Charter provisions implicated by EDT include ss 7, 15, and 1. For discussion of the implications of s 7 of the Charter, see Hovius, Usprich & Solomon, “Employee Drug Testing and the Charter”, 2 Can Lab L J 345, 354-361 (1994); Ontario Law Reform Commission, ibid, 81-91. See also, Re Dion and The Queen (1986) 30 CCC (3d) 108 (Que SC); Jackson v Joyceville Penitentiary (1990) 55 CCC (3d) 50 (FC TD); Fieldhouse v Kent Institution (1995), Court File No CA019247 Vancouver Registry, 24 March 1995, LEXIS version: to be reported in 98 CCC (3d) 207 (BCCA). For discussion of s 15, see Hovius, Usprich, & Solomon, ibid, 379-385. For discussion of s 1, see Hovius, Usprich, & Solomon, ibid, 385-389; Ontario Law Reform Commission, ibid, 92-100.

215 Hovius, Usprich, & Solomon, ibid.

216 Ibid, 354 (footnote omitted).
is "government action of some kind"\textsuperscript{217} and that it does not "directly regulate the activities of private persons or organizations".\textsuperscript{218} Drawing on relevant Supreme Court case law, the authors conclude that EDT programmes may be subject to Charter scrutiny in three circumstances:\textsuperscript{219}

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... [a]lthough 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 \textit{Canadian Civil Liberties Association v Toronto Dominion Bank}.\textsuperscript{220} In that case, the Canadian Civil Liberties Association and the Canadian Human Rights Commission ("the complainants") challenged the Toronto Dominion Bank's\textsuperscript{221} employee drug testing programme.\textsuperscript{222} 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.\textsuperscript{223}

\begin{flushleft}
\textsuperscript{217} Ibid, 348.
\textsuperscript{218} Ibid (footnote omitted).
\textsuperscript{219} Ibid, 353–354 (footnote omitted).
\textsuperscript{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.
\textsuperscript{221} The bank has 901 branches and employs about 30,200 persons. Ibid, 3.
\textsuperscript{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.
\textsuperscript{223} Ibid, 5.
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\textsuperscript{220} Ibid, 7–10.
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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.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 Jackson v Joyceville Penitentiary232 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,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”.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”.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”.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.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.238 The Court considered that there was a “compelling”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.240 The Court gave short shrift to the challenge in so far as it focused on the randomness of the testing procedure:241

231 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.

232 Above, note 214.

233 As to which see, Conway v Attorney-General of Canada (1993) 83 CCC (3d) 1, 4 (SCC) (holding that penitentiary inmates have a “substantially reduced level of privacy”).


235 Ibid, 65.

236 Ibid, 84.


239 Ibid, 393.

240 Ibid, 395.

241 Ibid.
[C]riticim 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

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242 LEXIS version, above, note 214.
243 Ibid, para 25.
244 This included “management problems associated with drug-related assaults, intimidation, underground (the market-place) and overdoses leading to death; the power exerted by those who control the drug trade, the extent to which property and sexual favours are exchanged for drugs, tension for both staff and inmates; beatings, requests for transfers to protective custody, pressure on visiting family members to import drugs, younger and weaker inmates being converted to mules for transporting drugs. . . .” Ibid, para 16.
245 Ibid, para 25.
246 Ibid.
247 For discussion, see text accompanying notes 215–219.
249 For recent affirmations, see *R v Dyment* (1988) 45 CCC (3d) 244, 253-260 (per La Forest J); *R v Colarusso* (1994) 87 CCC (3d) 193, 214-218 (per La Forest J); *R v Borden* (1994) 92 CCC (3d) 404, 415 (per Iacobucci J).
250 Ibid.
251 Ibid, 214. In *R v Borden*, above, note 249, 415, Iacobucci J observed that “[t]he jurisprudence of this court indicates that a seizure occurs whenever there is a non-consensual taking of an item by the state in respect of which the citizen has a reasonable expectation of privacy....”
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 sample\(^{254} \) (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 \( Collins v The Queen \):\(^{259} \)

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

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

\(^{252} \) 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.
\(^{259} \) (1987) 33 CCC (3d) 1 (SCC).
\(^{260} \) Ibid, 14. See also, \( R v Debot \) (1989) 52 CCC (3d) 193, 199 (per Lamer J); \( R v Kokesch \) (1990) 61 CCC (3d) 207, 225 (per Sopinka J).
\(^{261} \) Above, note 249.
\(^{262} \) Ibid, 249.
Amendment when balancing the privacy interests of the individual against the competing governmental interests.  

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 *Skinner* and *Von Raab* and abandon a probable cause/individualized suspicion standard for workplace drug testing of persons occupying safety-sensitive positions.

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 *Skinner* and *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” 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. This standard has been regarded as a “touchstone” of s 8 values. Although the Supreme Court has endorsed departures from this standard in some administrative or regulatory contexts, 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

263 See text accompanying notes 52–62 and 66–160.
264 Hovius, Usprich and Solomon, above, note 214, 379.
266 See, eg, *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 *Canadian Charter of Rights and Freedoms*. Section 8 requires that reasonable and probable grounds exist in fact and not that their presence can be deemed to exist notwithstanding the evidence” (emphasis in original).
267 Ibid, 231 (per L’Heureux-Dubé J).
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”\textsuperscript{269} evidence is generally required. It involves “a stringent standard of justification”.\textsuperscript{270} 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”.\textsuperscript{271} 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.\textsuperscript{272} 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”\textsuperscript{273} to determine whether this was unreasonable. This involves consideration of “the totality of the circumstances”\textsuperscript{274} 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,\textsuperscript{275} EDT had not figured prominently as an issue in the New Zealand workplace.

\textsuperscript{269} \textit{R} \textit{v} \textit{Oakes}, above, note 265, 347 (per Dickson CJC).
\textsuperscript{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.”
\textsuperscript{271} See, eg, \textit{R} \textit{v} \textit{Oakes}, ibid, 348 (per Dickson CJC); \textit{Re A Reference re Public Service Employee Relations Act} [1987] 1 SCR 313, 373-374 (per Dickson CJC); \textit{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 \textit{R} \textit{v} \textit{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; \textit{Edwards Books and Art Ltd v The Queen} [1986] 2 SCR 713, 772 (per Dickson CJC) “as little as is reasonably possible”.
\textsuperscript{272} See above, note 83 and accompanying text.
\textsuperscript{273} \textit{R} \textit{v} \textit{Collins}, above, note 259, 14 (per Lamer J). See also, \textit{R} \textit{v} \textit{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.” \textit{Per contra}, ibid, 218 (per Wilson J).
\textsuperscript{274} See \textit{R} \textit{v} \textit{Debot}, ibid, 215 (per Wilson J) “the totality of the circumstances’ must meet the standard of reasonableness”.
\textsuperscript{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 viz belief on reasonable grounds. 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, 21-23 and 27 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

280 Misuse of Drugs Act 1975, s 18(3).
281 Penal Institutions Act 1954, s 36B(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*, 287 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). 288 In *Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd*, 289 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: 290

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,
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 Newmonitor 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.\(^{294}\)

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:\(^{295}\)

> 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.\(^{296}\) Indeed, in some circumstances, the common law may provide wider protection than the Bill of Rights against invasion of privacy and bodily integrity.\(^{297}\)

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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.
297 See \textit{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,298 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”299 that no one can be compelled to submit to medical treatment except as required by law, observed:300

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 H301 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:302

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

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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.... [T]he 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....”

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

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 ss 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 ss 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 ss 11 of the Bill of Rights, and that these common law rights were “fundamental”\textsuperscript{308} human rights.\textsuperscript{309}

The legal impact of ss 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 ss 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 ss 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, ss 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 ss 11. Viewed from this rights-centred orientation, ss 11 imposes severe legal limits on workplace drug testing.

From the employer’s point of view, there are three situations where the ss 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 ss 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.” See \textit{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.311 Those which expressly or by necessary implication override the right are, however, rare.312 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,313 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 11.314 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,315 Richardson J has observed that s 5 “provides a set of working principles”316 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 Semble, consent is required even where statutory authority authorizes EDT, unless the statute itself expressly overrides the necessity for consent.

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.\textsuperscript{317}

In \textit{MOT v Noort; Police v Curran} ("Noort"),\textsuperscript{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"\textsuperscript{319} as to "the principled bases on which Courts ought to proceed in making their assessments under s 5".\textsuperscript{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"\textsuperscript{321}. To enable this to occur, s 5 must be given an interpretation which ensures consistency with New Zealand’s Covenant obligations.\textsuperscript{322} Thus, relevant international norms and standards relating to limitations clauses need to be consulted and applied.\textsuperscript{323} Under this jurisprudence,


\textsuperscript{318} Ibid.

\textsuperscript{319} Ibid, 283.

\textsuperscript{320} Ibid.

\textsuperscript{321} Long Title, para (b).

\textsuperscript{322} There has been a suggestion that s 5 can be interpreted without reference to international jurisprudence relating to limitations clauses: see \textit{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.

\textsuperscript{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:

\textbf{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.

11 In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12 The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
13 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.
14 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] 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).

326 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.


327 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. 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, 329 it is, nevertheless, clear that these
principles are indicative of the approach that s 5 requires.

These “stringent” 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 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 considera-
tions (eg, airline pilots), public health considerations (eg, surgeons), national
security considerations (eg, 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 pro-
gramme 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

328 MOT v Noort; Police v Curran, above, note 317, 283 (per Richardson J). See also, Zdralah v
Wellington City Council, above, note 285, 301 (per Greig J).
329 Ibid; R v B, above, note 297, 24 (per Richardson J).
330 R v B, ibid (per Richardson J).
331 That is, contrary to the New Zealand Bill of Rights Act 1990.
test in the first place. 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

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, 270 per Cooke P.

335 Ibid, 24.

336 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 \textit{R v Jefferies}^{338} where the Court emphasized that the guarantee is \textit{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:\textsuperscript{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:\textsuperscript{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:\textsuperscript{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 \textit{R v Jefferies}, rests upon three primary considerations. First, the genesis of s 21 in the \textit{Canadian Charter of Rights and Freedoms}, the \textit{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

\begin{itemize}
  \item \textsuperscript{338} [1994] 1 NZLR 290.
  \item \textsuperscript{339} Ibid, 302.
  \item \textsuperscript{340} Ibid, 319.
  \item \textsuperscript{341} Ibid. See also, \textit{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”).
\end{itemize}
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* 343 Richardson J described the nature of the s 21 inquiry: 344

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. 345

And in *R v Pratt* 346 Richardson J observed: 347

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*, 348 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.” 349 This observation is wide enough to encompass EDT. 350 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”), 351 while the Canadian courts have approached the taking of blood samples and bodily fluids as involving a “seizure” for Charter purposes. 352

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 Ct) 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

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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 Gaunt 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 unlawfulness 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*, Cooke P observed:

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*, notwithstanding the fact that police officers had an express power to search without warrant under the Misuse of Drugs Act, the Court of Appeal held that resort to that power was constrained by s 21 guarantees. The exercise of that power could not take place in circumstances where it was reasonable for the officer to obtain a warrant in terms of s 21. As Richardson J has observed in *R v A*:

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

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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 Jefferies 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 Vernonria 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, I

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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.”

382 R v B, above, note 297, 24 (per Richardson J).
383 Privacy Committee of New South Wales, above, note 282, 10.
384 Police v Kohler [1993] 3 NZLR 129, 133 (CA). For further discussion, see R v Nielsen (1988) 43 CCC (3d) 548, 561-564 (per Bayda CJS); R v Wills (1992) 70 CCC (3d) 529, 539-548 (Ont CA).
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 *Schaill*, 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.

391 809 F 2d 1302 (8th Cir 1987).
392 Ibid, 1310. See also, *Pickering v Board of Education,* 391 US 563 (1964); *National Federation of Federal Employees v Weinberger,* 818 F 2d 935, 943 (DC Cir 1987) “[A] search otherwise reasonable cannot be redeemed by a public employer’s exaction of a ‘consent’ to the search as a condition of employment.”
393 Ibid. (Emphasis in original).
394 Above, note 52.
395 Ibid, 1548.
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 to 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.