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Working Paper
on

DRUG AND ALCOHOL TESTING IN THE WORKPLACE:
MORAL, ETHICAL AND LEGAL ISSUES

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This paper on drug and alcohol testing in the workplace: moral, ethical and legal issues has been prepared for discussion at the "International Tripartite Experts Meeting on Drug and Alcohol Testing in the Workplace" (Oslo, Norway; 10-14 May, 1993). The goals of the meeting include: (1) reviewing the need, rationale, and current experience with workplace alcohol and drug testing; (2) developing principles, guidelines, and pre-conditions to be followed if testing programmes are initiated; (3) suggesting specific rules and regulations to ensure the integrity of testing procedures; and (4) drafting a consensus statement on alcohol and drug testing in the workplace.

The following papers have also been prepared for more in-depth examination of various aspects of drug and alcohol testing in the workplace:

- "Overview and Perspectives on Drug and Alcohol Testing in the Workplace", by Meredith Hanson;
- "Types of Testing Programmes in the Workplace", by Jorg Moreland;
- "Drug Testing Methods and Clinical Interpretation of Results", by Bhushan Kapur;
- "Current Practice and Experience on Drug and Alcohol Testing in the Workplace", by Craig Zwerling.

This paper is to serve as a catalyst for discussion and debate among the experts. Its main points are highlighted in the Executive Summary, page vi.
EXECUTIVE SUMMARY

This paper discusses the moral, legal and ethical implications of testing for the presence of alcohol or drugs as a condition of on-going employment or as a component of the pre-employment medical screen.

It should be understood that there is absolutely no argument concerning the desirability of removing drug and alcohol abuse from the workplace. The debate arises concerning the means used to justify what all agree to be highly desirable ends.

The proponents of drug and alcohol testing advance several safety and productivity arguments in support of their position. It is asserted that persons who test positively for drug and alcohol at the workplace experience higher levels of absenteeism and use sick leave to a much greater extent than non-users. Moreover, it is claimed that they have levels of productivity from 10 per cent to 60 per cent lower than persons who do not test positively for drugs or alcohol. However, perhaps the greatest argument advanced by those in favour of testing is the safety element. Persons who abuse drugs or who consume alcohol to excess are involved in significantly more accidents than those who test negatively. In other words, proponents take the position that persons who test positively for the presence of drugs or alcohol form a category of individuals and that being in this category is grounds to label them as problematic employees. Moreover, so the reasoning goes, the only way to find out if an employee is a member of the category of drug or alcohol users is to test.

Opponents of alcohol testing feel that the goal of ensuring a drug and alcohol free workplace is reached at too high a social cost and that the testing process constitutes an unwarranted invasion of the privacy of the individual. The provision of urine for analysis is a search, which, if conducted without consent or reason, would constitute an assault. Some opponents to testing feel that the real motivation for testing is controlling employee behaviour. Enterprises impose behavioural constraints on employees which may extend to off-duty times. Moreover, it is advanced that the testing process itself humilitating to many people. In order to obtain a sample for testing, the person being tested must urinate in the presence of an attendant or supervisor. Often, medical standards are not used. Another moral issue is the implication of discrimination as a result of drug or alcohol testing. Perhaps the greatest concern is the systemic discrimination against disabled persons, AIDS victims, visible minorities and pregnant women which testing may engender. Again, different countries have addressed the discrimination issue in varying ways. Finally, opponents to drug and alcohol testing question the need to test. It is asserted that all testing shows is that at some point in time, the person being tested ingested the screened substance. The testing process can not show whether employees are impaired in their ability to perform job duties, which is all the employer is justified in knowing.

The privacy issue is closely related to the ability of employers to impose behavioural codes of conduct during off-duty periods. This issue has been the object of extensive debate in the U.S., where historical imperatives have tended to allow the imposition of such policies. This, in turn, has facilitated the introduction of drug testing, especially random testing.
Apart from the ethical arguments cited above, the issue of testing raises additional moral questions relating to the confidentiality of medical examinations as well as the consequences for the employee if management is informed of the test results. In those countries where confidentiality is not assured, there have been reports of significant consequences.

Legal systems vary. However, apart from the United States, there is almost no legislation or regulation specifically concerning drug or alcohol testing. That said, the issue is dealt with by inference in many of the labour laws of the countries profiled.

The majority of drug and alcohol testing is at the pre-employment phase. This raises a number of ethical issues concerning fairness and discrimination, as well as confidentiality. What is society's responsibility to those individuals who have tested positive for drugs or alcohol before starting a job? Should they be refused employment without further explanation? Is such an approach discriminatory? What happens if the confidentiality of pre-employment drug and alcohol screens is not assured?

There is a basic difference between the way in which drug and alcohol testing is viewed from a moral and ethical perspective as reflected by society. This is largely due to the controversy surrounding the accuracy of urinalysis. However, underlying this is the basic tenet that alcohol consumption is legal whereas illicit drug use or possession is not. For example, U.S. legislation and corporate practices are concerned with testing for illegal drugs; testing for the presence of alcohol and tobacco has not been as great a concern, notwithstanding the preponderance of workplace problems related to these substances. Similar differences are noted in the United Kingdom and Netherlands, to cite two other States.

The moral, ethical and legal issues concerning drug and alcohol testing are universal in scope. However, the amount of and the type of testing conducted vary greatly from country to country. In addition, how the moral, legal and ethical issues are approached must be seen in the context of overall labour relations and the emotional impact of the drug and alcohol issue on national life. However, it is a concern that certain national policies exert an influence on other States, and these policies have have also been carried abroad by trans-national corporations.

Outside the United States, there is very little drug testing. Except for certain specific employers, it can be said that random drug testing does not occur at all. This can be largely attributed to greatly lower levels of drug consumption, coupled with policies that place whatever testing that does occur in most countries within the ambit of the workplace medical examination. These examinations, conducted by occupational physicians seek to determine if an employee is fit to perform job duties. Testing that does take place is usually in high risk occupations, or in the transportation sector where there is an association with U.S. commerce, as a response to American Department of Transportation regulations mandating drug testing for safety-sensitive workers. In addition, the national subsidiaries of U.S. companies have, in some cases, encouraged the adoption of testing.
The drug issue is not seen to be problematic. However, workplace alcohol abuse is the subject of great concern and the social partners are seeking preventative strategies.

The overview of national perspectives demonstrates that while the legal, moral and ethical issues are the same, no one country has a universally applicable approach to drug and alcohol testing. Testing methodologies, specific safeguards concerning privacy and the types of workplace medical examinations have developed along unique national lines and it is important to be sensitive to these differences.

Employers largely view the substance abusing employee as disabled, and the emphasis is on rehabilitation. That said, management concerns appear to be related to the efficiency and productivity of the organization, whereas union preoccupations are related to employee rights and humanitarian issues.

Enterprises do have varying responses, based upon such issues as size and corporate culture. However, anti-discrimination and other protective legislation, including the requirement to "reasonably accommodate" employees who are substance abusers, greatly constrain the way in which enterprises respond to this issue.

There is no right or wrong answer; everything depends upon the perspective of the individual or enterprise, as well as the national context in which testing takes place. In order to provide for greater fairness, it is appropriate to consider issuing guidelines on certain elements of the testing process. Efforts should be made to define risk, impairment, as well as to set parameters when employers can impose behavioural constraints on employees, especially during off-duty hours. Thought should be given to standardizing definitions of disability in protective legislation, whereby drug and alcohol dependency is specifically included. Finally, the issues surrounding the confidentiality of workplace employment medical examinations must be dealt with, as this goes to the heart of the testing issue.
1. INTRODUCTION

This paper discusses the legal, moral and ethical implications of testing for the presence of alcohol or drugs as a condition of on-going employment or as a component of the pre-employment medical screening for job candidates. This paper is not technical in nature. The focus is strictly limited to the moral, ethical and legal (including discrimination) issues such testing engenders.

In order to fully explore these questions, one must first begin by considering what is meant by moral and ethical issues. In this regard, the perspectives of both proponents and opponents of drug and alcohol testing are presented. Drug and alcohol testing has implications on the issue of workplace discrimination. How the testing process may result in discrimination and what persons or groups might be subjected to discrimination by the testing process are examined.

States have responded differently to these moral and ethical issues, based on national conditions, although they have been influenced by certain national policies and enterprise efforts to export them. The situation in the U.S., Canada and several European countries is discussed. In this context, the views of various stakeholders concerning the testing issue are presented. Drug and alcohol screening is a form of medical testing. The privacy and discrimination issues relating to workplace medical examinations are examined, in terms of medical ethics. Finally, moral and ethical issues are codified in law. The paper examines, in the context of national conditions, how the issue of drug and alcohol testing is dealt with in the labour legislation of selected countries.

Drug and Alcohol abuse and dependency is increasingly viewed as a disability, even though it is not always defined as such in anti-discrimination and other protective legislation. The paper briefly examines the employer's responses to abusing and dependent employees, including a discussion on the obligation to "reasonably accommodate" from a moral and ethical perspective in addition to legal and cost considerations.

The paper concludes with a discussion of possible issues requiring further attention.

1.1 Moral and ethical issues: What do we mean?

What exactly is meant by "moral and ethical" issues? The Oxford Dictionary defines moral as "conditions to be satisfied by any right course of action." In the context of drug and alcohol testing, the objective factors such as privacy, employer control of employee behaviour, confidentiality and issues of responsibility to society (safety) constitute the moral issues that must be considered. Ethical, on the other hand, is a subjective concept and refers to the "correct and honourable" way in which objective moral issues are dealt with.
So, the ethical approaches to the moral issues are varied. And, as will be seen in this paper, the way they are dealt with varies according to national circumstances. Moreover, the moral and ethical considerations form the basis of whether drug and alcohol screening programmes are seen to be acceptable. The moral and ethical issues of drug and alcohol testing in the workplace address the competing values of the protection of collective rights of society and enterprise versus individual rights. No one is opposed to measures that would rid drug and alcohol abuse from the workplace. However, the essential controversy about drug and alcohol testing is whether these laudable goals justify the means taken that claim to achieve them.

In the next two sections, the ethical arguments of those who are in favour of drug and alcohol testing as well as those opposed are presented.

2. ETHICAL ARGUMENTS FAVOURING DRUG AND ALCOHOL TESTING

2.1 Productivity and safety

Productivity and safety issues are invoked by proponents of drug and alcohol testing. Various studies have claimed that drug and alcohol users experience higher levels of absenteeism, use significantly more sick leave benefits and have much higher levels of accidents (Weincek, 1981; Veglahn, 1988). Walsh and Gust (1986) also report the results of a study indicating rates of absenteeism amongst current users of cocaine and marijuana to be 50 per cent higher than non users (Walsh and Gust, 1986, pp. 237-238).

In the United States, the reported cost of drug abuse in 1980 was claimed to be US$46.9 billion with productivity being 55 per cent of that figure (National Institute on Drug Abuse, undated, p. 1). By 1986, this amount had risen to US$100 billion. Another important incentive for testing is the drug users' health insurance costs (Information and Privacy Commissioner of Ontario, 1992, p. 18; Walsh and Gust, 1986, p. 237).

In other countries, the emphasis is on alcohol abuse, rather than drugs. In the Netherlands, for example, research has shown that, among problem drinkers, there is considerably greater absenteeism and that employees with alcohol problems are involved in accidents 2 - 4 times more often than other employees. In addition, problem drinkers exhibit levels of productivity 10 to 60 per cent lower than non-drinkers (Geers and Gevers, 1992).

2.2 Employer liability

Drug and alcohol testing is being justified on the basis that more and more employers are being held responsible for the actions of their employees. The subject of recent U.S. litigation has ranged from negligence during pre-employment screening, to failing to send home an intoxicated employee, who subsequently became involved in an automobile accident (Lehr and Middlebrooks, 1985-86, p. 408).
2.3 Public safety

Related to the liability argument is the moral issue of safety. Several jurisdictions have legislation requiring enterprises to maintain a safe work environment (Ontario Law Reform Commission, 1992, p. 5; Chatterjee, 1991, p. 34; Working Conditions Act, 1990, pp. 31-35, 46). Ethical arguments favouring testing as a deterrence on the grounds that it promotes the safety of co-workers and the general public who may be injured by an impaired worker. In this regard, the safety issue, especially the safety of third parties, is seen as a justifiable reason to test. Often, the provisions of legislation are cited to buttress this rationale.

2.4 Deterrence

Further to the public safety issue, the use of drug screening, especially random or mandatory testing, has been advanced as a deterrence factor. "The non-user is in the same relationship to testing as the non-drinking driver who is stopped at a border checkpoint, the honest taxpayer who is audited ... or the honest traveller who has to go through a metal detector to get on an airplane. In each of these cases the only way to ensure the safety of the entire enterprise is to subject everyone to a test. Once exceptions are made ... the entire system of prevention breaks down" (Bensinger, Dupont and Associates, 1990, p. 6). In this line of reasoning, the fact that the employee may have consumed the drugs during off-duty hours does not matter; what is important is that the drug is still present in the body, that the active ingredient in the drug could inhibit the employee's ability to perform safely (Flannery, 1987, p. 57).

It follows from the above approach, that the exercise of professions such as airline pilots, railroad engineers, truck drivers, construction workers, etc. calls for standards of behaviour that limit an employee's privacy by constraining the freedom to place the employee in situations that would cause risk to others (Dalphy, 1991, p. 9; Transport Canada, 1992, p. 9). Justification comes from the assertion that impairment is not always physically evident. For example, Bensinger (1988) cites flight simulator studies that demonstrate that airplane pilots who inhaled marijuana 24 hours previously, and who otherwise were well rested, still deviated significantly from the runway in landing tests (Bensinger, 1988, p. 48).

To summarize, the proponents of testing assert that persons who test positively for the presence of alcohol and drugs form a category of individuals and that being in that category is grounds to label them as problematic for the enterprise and for society as a whole. Moreover, so the reasoning goes, the only way to find out if an employee is a member of the category of alcohol and drug users is to test.

3. ETHICAL ARGUMENTS OF THE OPPONENTS TO DRUG AND ALCOHOL TESTING

3.1. The inability to demonstrate impairment

A drug screen can detect the presence of drugs or alcohol, but there is unanimity in the literature that a positive urine test does not show impairment and does not allow any inferences about any carry-over effects at a later date,
or whether the individual is a safety threat (Beyerstein et al, 1989, p. 9; Ontario Law Reform Commission, 1992, p. 7; Tyson and Vaughn, 1987, p. 34). The ability to predict whether an individual can perform specific tasks is minimal; impairment is dose-dependent and depends upon psychological and physiological factors (Walsh and Gust, 1986, p. 238). Alvi (1992) reports that research indicates some individuals can actually increase their productivity while remaining dependent on alcohol or drugs and notes there are difficulties with the notion that drug use is causally related to poor performance (Alvi, 1992, p. 11). Finally, a positive drug test does not mean the individual is a chronic user or is alcohol dependent (Ameille, 1991).

3.2 The issue of privacy

The major argument advanced by those opposed to drug testing is that the goal of ensuring a drug and alcohol free workplace is reached at too high a social cost; that the process constitutes an unwarranted invasion of the privacy of the individual (Ontario Law Reform Commission, 1992, p. 6). For the provision of a urine sample for analysis is basically a "search" of an individual that, conducted without consent, would be considered an assault or trespass. Requiring an employee to either submit to an urinalysis or be disciplined or dismissed infringes on what otherwise would be considered the ordinary civil liberties of an employee (Beyerstein et al, 1989, p. 1). "At issue in the dispute over drug testing is nothing less than whether workers may be subjected to 'police state' tactics in the workplace, whereby their bodies may be seized and ransacked through the compelled extraction and analysis of bodily fluids in order to determine not on the job impairment or drug use, but prior exposure to drugs which could have occurred days or weeks before the test while the worker was off duty" (Chen, Kim and True, 1990, pp. 651-652).

Beyerstein et al (1989), have opined that the real motivation for testing is the identification of deviant behaviour (p. 22). In this regard, it is reported that some U.S. corporations encourage employees to anonymously report co-workers. "These anonymous tips are then relied upon to select candidates for urinalysis. With these methods there is no protection for employees who may have been openly critical of company safety or product standards. They can easily be 'hotlined' anonymously" (The Privacy Bulletin, 1988, p. 1). The Privacy Commissioner of Canada has indicated the practice of drug and alcohol testing, especially in situations where work performance is not otherwise impaired, as a form of Big Brotherhood (Privacy Commissioner of Canada, 1990, pp. 16, 20).

Apart from the above noted considerations, the other main privacy issue in testing revolves around the physical act of obtaining the bodily sample. Put bluntly, employees who are tested may be required to urinate while being observed in order to ensure the origin of the sample and to prevent tampering with or replacement of the sample. The result, according to opponents, is a highly intrusive, degrading and embarrassing procedure, no matter how courteously and clinically conducted (Heshizer and Muczyk, 1988, p. 345). The loss of "self" as well as the dehumanisation of the process is graphically illustrated by noting how individual employees relate to urinalysis. The following example is illustrative:

"The nurses made me stand in the middle of the bathroom with one hand in the air, with my pants around my ankles with a bottle between my legs. She walked real close to me and leaned over. I was scared she was going to touch me. When she came back around I took my right hand down and got the bottle
because my hand was soaking wet. I handed it to her. She screamed at me that I had not followed the procedure and I was going to have to do it again. Well, needless to say, I did not do it again and I will never, if it means that I will never have a job again, I will never eat. I will never do that again..." (Privacy Committee, 1988, p.4).

There has been almost no systematic investigation concerning the psychological impact of the testing experiences. However, Coombs and Coombs (1991) report, following the mandatory urine testing of 500 college athletes, that 71.4 per cent of those tested regarded the experience as "no big deal." However, 33.5 per cent of the students polled reported anxieties and 38.9 per cent indicated their morale was affected. Moreover, 47.2 per cent reported being embarrassed and another 36.8 per cent felt humiliated. The authors indicate that the "worst experience" was reported by a woman who had previously been drug tested. (Coombs and Coombs, 1991, pp. 982-985).

3.3 Management style

Opponents assert that testing encourages a management style that implies employees cannot be trusted on their own to follow company policies and directives and that they must be monitored. Privacy advocates acknowledge that employers have a right to protect their property but contend that "... since the values, needs and intelligence of people do not change when they enter the workplace, there is no reason why the rights and responsibilities they enjoy as citizens should be withheld from them in their role as workers" (Information and Privacy Commissioner of Ontario, 1992, p. 19).

4. EMPLOYER CONTROL AND DRUG TESTING

The privacy debate is closely related to the right of employers to impose codes of conduct, especially during off-duty periods. This issue has received close attention in the United States. Many years ago, it was a common practice of U.S. employers to check on the home morals of employees. Those whose behaviour was below company standards would often be fired (Chen, Kim and True, 1990, p. 651). In fact, the principle of "at-will" employment, in which employees serve at the pleasure of their bosses, is the heart and soul of American employment law. Only one State (Montana) has legislation that imposes "just cause" employment standards, other than for statutory discrimination (Noble, 1992). Flowing from the concept of at-will employment, employers in the United States have the right to publish a code of conduct holding employees responsible for their conduct during non-working time and off the premises of the enterprise. Even where there is no code of conduct, disciplinary measures may be taken when the behaviour is directly contrary to the employer's business purpose or the employee's responsibilities, when the safety of other employees are jeopardized or when it harms the reputation of the company (Lehr and Middlebrooks, 1985-86, p. 415; Stritar, 1986, p. 28).

It must be noted, however, that there have been conflicting trends in this regard. U.S. court and arbitration decisions are now linking off-premises conduct to situations where there is an impact on job performance, mitigating the right of at-will employment (Hartsfield, 1986, pp. 770-771). On the other
hand, in the U.S. there has recently been a "philosophical turn" in the workplace back to the idea that employees represent their employer 24 hours a day, seven days a week and that "consequently, an employer should hold employees accountable for their conduct during non working hours (Lehr and Middlebrooks, 1985-86, p. 408).

The ability of employers to impose behavioural constraints has greatly facilitated the introduction of drug testing. There are three main types of drug testing methodologies in place in the United States: probable cause testing, systematic mandatory testing and random testing. Little controversy with reference to privacy issues has occurred concerning probable cause testing, as it is instituted in the face of an observable safety, conduct or performance problem at work. However, random and systematic mandatory testing have generated heated debate with reference to invasion of personal privacy. The argument pits those who contend that such testing is necessary to ensure a drug-free environment against those who say that such testing is an unwarranted intrusion in the personal lives of employees, and that employers have no right to enquire into matters outside the workplace (Preer, 1989, p. 55).

The issue of random drug testing has evoked a reaction from the U.S. labour movement. The AFL-CIO questions the usefulness of random testing, noting it often results in the firing of competent employees. The organization calls for placing limits on the use of tests for alcohol and drugs, focusing only on workers who exhibit job dysfunction, the establishment of safeguards, including rights to privacy and confidentiality, and the provision of non-punitive employer responses to those employees who are unable to perform their jobs as a result of alcoholism or drug addiction (AFL-CIO, undated, pp. 3-4).

5. THE ISSUE OF CONFIDENTIALITY OF TEST RESULTS AND WORKPLACE MEDICAL EXAMINATIONS

The issue of confidentiality of drug and alcohol test results is closely related to the other privacy considerations alluded to. Here, there are two issues; the ability of the employer to obtain the results of the drug or alcohol screen, and what the employer does with the results, if they are released.

Drug and alcohol tests are medical procedures. In this regard, States have different approaches to the issue of the confidentiality of workplace medical examinations and by implication, drug and alcohol screening.

In the United States, Canada and the United Kingdom, employment medical examinations are not subject to codified privacy protection relating to patient-doctor relationships, or workplace confidentiality. Although the various codes of ethics promulgated by the medical associations in these countries assert that physicians should maintain confidentiality and release only information needed for the employer to determine the individual's capacity to perform the work required by the job, there is a legislative void concerning confidentiality. That said, there is a moral and legal principle of common law to assume confidentiality unless consent is granted by the person concerned to divulge diagnosis to the employer; the failure to respect this could result in a court imposing damages (Solomon, 1992, pp. 16-18). In Canada, for example, certain members of the employer community, at times, do exert pressure on industrial physicians to divulge the test results. However, this pressure is reportedly usually successfully resisted. In this regard, some occupational
physicians may mistakenly believe that their being in the employ of the enterprise implies consent to provide test results to management (Boadway, 1992; British Medical Association, 1988, pp. 19, 22, 47, 182; American Medical Association, 1989, p.24; Occupational Medical Association of Canada, 1988, para. 1.14; Solomon, 1992).

The situation is different in France and the Netherlands, where drug and alcohol testing, when it occurs, is a part of the workplace medical examination subjected to codified confidentiality standards. In France, what testing that does take place occurs as a function of high risk occupations, but in the context of periodic employment medical examinations. The industrial physician must provide the enterprise advice as to the fitness of the employee to perform the job, but the diagnosis, including any screening results, remains part of the patient's medical record, and is not transmitted to the employer (Décret No. 88-1198, organisation et Fonctionnement des Services medicaux du travail, 1988, articles R.241-48.I, R.241-49, R.241-56, R.241.57)

Similarly, in the Netherlands, testing, when performed, is considered to be an integral part of the pre-employment or periodic employment medical examination and performed by a medical doctor. These fall under the code of ethics of the medical officer, and the results are not revealed to anyone except the person under examination (Bouwers, 1992; Bijl, 1992, p. 2). In this regard, the Netherlands Association of Labour and Enterprise Medicine (NVAB) has issued binding guidelines to its physician-members that collecting information about alcohol and drug use during a medical examination will only be permitted if these data are necessary for provision of individual health care. Pre-employment medical examinations, including a drug or alcohol screen component, can only be permitted if the position entails "great third party risks." The Association has expressed great concerns with reference to the privacy rights of employees. Revealing results of medical examinations, including drug or alcohol screens, to third parties will only be permitted with the patient's permission (pp. 7-9).

While it may be policy in many organizations to keep confidential the results of workplace drug and alcohol screening, the experience reported in the U.S. is that such safeguards are not always set out in formal policies, and when they do exist they are difficult to enforce (Chen, Kim and True, 1990, p. 675). The failure to keep the results confidential may have significant consequences for the employee. Instances have been reported in the United States that firings based on positive test results were "announced" and that some enterprises would provide results to other companies, either directly or through intermediaries (Canadian Bar Association-Ontario, 1987, p. 13).

6. IMPLICATIONS RELATING TO DISCRIMINATION IN THE WORKPLACE

6.1 Ethical considerations

Privacy and confidentiality issues aside, the other major ethical implication of drug and alcohol testing concerns discrimination in the workplace.

Discrimination on the grounds of sex, national origin, disability, age, etc., is prohibited in many jurisdictions. That said, the presence of mandatory drug testing policies may be used as a tool to facilitate the utilization of discriminatory practices, however illegal, depending upon the penalties adopted by a specific enterprise or organization in the event a "positive" result is obtained or in the case of refusing to be tested.
Modern human rights practice recognizes three forms of discrimination; evil motive or overt discrimination, adverse differential treatment (treating one group differently than another, deliberately or inadvertently) and adverse impact or systemic discrimination (Pentney, 1990, pp. 4-7). It is conceivable that selective use of drug testing procedures could be used to deny employment or continuing employment to, say, persons of certain races or national origins, or persons of certain age groups, if the penalty for drug usage is dismissal/denial of employment. Random drug screening might not be applied in a "random" manner if the goal was to surreptitiously discriminate. Or, drug testing could have an impact on selective categories of employees. For example, if all employees were tested, only men or only members of a certain race might be disciplined in the case of positive results.

The first two forms of discrimination would hopefully be rarely encountered. However, mandatory drug testing would have widespread implications when considering the third form, adverse impact or systemic discrimination. Adverse impact discrimination is the application of facially neutral policies or practices that "has an adverse effect on minority group members as compared to majority group members" (Pentney, 1990, pp. 4-7). Although drug testing is only supposed to test for the presence of illegal substances, samples may be used to test for pregnancy and thus adversely impact on women. Also, the presence of medication to combat other diseases and disabilities, including AIDS, may be discovered during the testing procedures. The results could be discriminatory employment decisions for such persons. Research has shown that most consumers of illicit drugs are in the 18 to 29 age category. Drug testing could result in an adverse effect on this age group, as the resulting termination of employment or non-recruitment of large numbers of the category. Finally, drug testing could have an adverse impact on certain racial minorities that have higher levels of the skin pigment melanin, since it is chemically similar to marijuana (Canadian Human Rights Commission, Policy on Drug Testing, 1987).

6.2 Anti-discrimination statutes and drug and alcohol testing

Title VII of the U.S. Civil Rights Act of 1964 forbids discrimination in employment on the grounds of race, colour, religion, sex or national origin. The legislation mandates the removal of barriers to employment when they "operate invidiously" to discriminate on the basis of racial or other grounds. An employment practice that has an adverse impact on a particular category of individuals, such as a racial minority, could be held to violate Title VII unless the employer demonstrates a genuine business need for the practice. (Susser, 1985, p. 49). As indicated in the general section on discrimination (above), disparate treatment could occur where non-drug test information is used by an employer to discriminate. For example, a urinalysis can detect if a woman is pregnant. Use of such information could create a liability for the employer (Heshizer and Muczyk, 1988, p. 352).

The Rehabilitation Act of 1973, which covers federal jurisdiction, prohibits discrimination in employment against "otherwise qualified handicapped persons." The Act defines "a handicapped person" as an individual who has a mental or physical impairment substantially limiting major life activities. Drug and alcohol dependent persons fall under the imbed of the legislation and may not be medically examined until a conditional job offer has been made. The application of a discriminatory drug or alcohol screen could be seen as a violation of Title VII. The statute specifically exempts drug abusers whose drug use prevents satisfactory job performance or whose current use poses a
threat to property or safety. However, there have been successful discrimination cases in instances where drug dependent employees who otherwise had no job dysfunction admitted to their addiction, sought leave for treatment and were fired (Chatterjee, 1991, p. 36; Heshizer and Muczyk, 1988, p. 352; Susser, 1985, p. 50).

The new Americans With Disabilities Act of 1990 (ADA) applies to all employers with more than 15 employees (Section 101(5)). It bans discrimination in employment and requires employers to "reasonably accommodate" disabled persons (Sections 102(a), 102(5)(A)). However, the legislation makes a clear differentiation between those individuals who currently use illegal drugs from those persons who have completed a drug rehabilitation programme, who no longer use illegal drugs or who have been erroneously perceived as illegal drug users. The former are specifically removed from the protection of the legislation (Section 510(a)). "Illegal drug users" and "alcoholics" may be held to the same job performance and behaviour "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee" (Section 104(c)(4)). Finally, the legislation amends the 1973 Rehabilitation Act by redefining the term "individual with handicaps" by excluding "an individual who is currently engaged in the illegal use of drugs, when a covered entity acts on the basis of such use" (Section 512).

In Canada, the Canadian Human Rights Act prohibits discrimination in employment as well as discriminatory employment practices and policies on 10 grounds (age, sex, marital status, family status, religion, race, colour, national or ethnic origin, pardoned conviction and disability). It functions in a manner similar to Title VII of the U.S. Civil Rights Act as relating to drug and/or alcohol screening having a discriminatory effect, or as to disparate treatment on a particular class of individuals. The Act firmly places drug and alcohol dependency under the imbed of the disability provisions of the legislation. Section 25 of the Act defines disability as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug". (Canadian Human Rights Act, 1976-77, Section 25). However, contrary to U.S. practice, the legislation does not exempt from protection individuals such as persons who continue to engage in illegal drug usage.

In France, the Labour Code was amended in 1990 to provide anti-discrimination protection in the case of disability. Section L.122-45 of the Code in part states that "No employee may be disciplined or dismissed by reason of ... state of health or handicap except where the inaptitude is determined by the industrial physician ...".

In the United Kingdom there are no legal provisions that are directed towards employee rights or anti-discrimination measures relating to drug testing (Daintith, 1992). In the Netherlands, an employee may be dismissed for excessive use of alcohol at work, but cannot be terminated for alcohol dependency, unless he or she becomes dysfunctional (Gevers, 1992).

7. LEGAL ISSUES SURROUNDING DRUG TESTING

The legal issues surrounding drug and alcohol testing are considered separately from discrimination factors, due to their larger scope. The situation varies in the five countries profiled.
7.1 The United States

In 1986, President Reagan issued Executive Order 12564, requiring all federal agencies to establish standards and procedures to ensure a drug-free workplace. The thrust of the Order is twofold; prevention, deterrence and control, as well as rehabilitation and counselling. It requires federal employees to refrain from drug usage, declaring that those who use illegal drugs are not fit for federal employment. Drug testing was established in sensitive positions, for persons where there is a reasonable suspicion of use, following an accident and for job applicants. Employees using illegal drugs were to be referred to counselling. Disciplinary action, including dismissal, was provided for those who refuse counselling and rehabilitation. This Executive Order was followed by legislation in 1988 that compelled all employers that contracted with U.S. government agencies in amounts exceeding $25,000 as well as all grant recipients to certify that they provided a drug free workplace (Executive Order 12564, 1986; Chatterjee, 1991, pp. 35-41). Apart from federal initiatives, various State governments have instituted varying programmes of drug testing.

U.S. regulation has also influenced other countries. The "final rules" of the Department of Transport requires drug testing for private sector safety-sensitive positions in the motor carrier, rail, marine, aviation and pipeline industries. Depending upon circumstances, certain foreign-based personnel are subject to drug testing (Privacy Commissioner of Canada, 1990, p. 56; U.S. Federal Register, Vol. 54, No. 230, 1989; Vol. 56, No. 130, 1991).

Drug testing as a function of the workplace medical examination has been the object of considerable litigation. Statutory restrictions are few; usually what is required is that the employer pay for the examination, that the person concerned be provided a copy of the results and that the employer maintains the report in confidence. Rather, it is incumbent upon the employer to justify such measures as job related, or needed to protect the safety of others. On the other hand, if employers cannot show that business need for the examination, they may be held liable civilly for invasion of privacy, outrageous conduct, intentional infliction of emotional distress, negligent conduct of a physical examination and wrongful discharge. Moreover, if the examination (including drug or alcohol screen) was performed without consent or under coerced threat of loss of employment, it could be viewed as assault and battery (Hartsfield, 1985-86, pp. 769, 769). For example, in the Washington, D.C. area alone, there were 97 such actions between 1985 and 1987, with awards averaging US$316,000 (Hoerr et al, 1988).

However, in 1989, the United States Supreme Court, in two landmark decisions upheld the federal regulations authorizing mandatory drug testing in situations without individualized suspicion of drug use. The court also held that urine analysis, although a search, constituted a "reasonable search", in that the "government interest in testing without a showing of individualized suspicion is compelling." The Court has also allowed to stand lower court decisions upholding various forms of random drug testing (Walsh and Trumble, 1991, pp. 44-45; National Treasury Employees Union v. Von Raab, 86-1879, U.S. Supreme Court, March 21, 1989; Railway Labor Executives Association v. Skinner, 87-1555, U.S. Supreme Court, March 21, 1989). The preceding aside, the new Americans with Disabilities Act (1990) bans pre-employment and employment medical examinations and enquiries, other than those that seek to determine the ability of an applicant to perform the job. (Sections 102(2)(A), 102(2)(B), 104(A)). However, drug tests are not considered to be a medical examination (Section 104(d)). It is too early to tell what the impact of this legislation will be on drug and alcohol testing litigation.
7.2 Canada

There is no legislation in Canada specifically addressing drug and alcohol testing. Enterprises are free to test if they wish. However, organizations that do test must ensure that the testing procedures and rationale are in conformity with Canada's anti-discrimination legislation, or risk the possibility of responding to a complaint of discrimination.

However, the anti-discrimination legislation places limitations upon the enquiries made by employers, if such enquiries tend to discriminate on a prohibited ground (Canadian Human Rights Act, 1976-77, Section 8). An enquiry is any written or oral enquiry and would include pre-employment and employment medical examinations. The only exception to this is when the enquiry (i.e. medical examination, including drug or alcohol screen) is a "bona-fide occupation requirement" (BFOR) (Canadian Human Rights Act, 1976-77, Section 15). Such an enquiry would be seen to be a BFOR if it were honestly imposed in good faith and if it were reasonably necessary to perform the job in a safe, efficient and economical manner without endangering the employee, co-workers or the general public. Also, blanket assessments are not permitted; an individual assessment of an employee's ability to perform the job was required (Fairweather, 1987, pp. 5-6; Ontario Human Rights Commission v. Borough of Etobicoke, 1982, Supreme Court of Canada).

Pursuant to the BFOR requirements of the legislation, the Canadian Human Rights Commission Drug Testing Policy (1987) stipulates that testing must be based on the employer's ability to demonstrate objectively that a 'positive' result to the drug being screened out indicates a decreased ability to perform the job safely, efficiently and reliably, that the assessment be individualized and that employees found "positive" must be reasonably accommodated by such measures as rehabilitation or through employee assistance programmes, or provided benefits similar to those employees with other types of disabilities (Canadian Human Rights Commission, Drug Testing Policy, 1987, pp. 5-10).

Apart from anti-discrimination laws, testing is dealt with by inference in Part IV of the Canada Labour Code. Section 81 requires persons carrying out a federal work to ensure that it is done in a manner that will not endanger safety and health. Employers are enjoined "to carry out reasonable procedures and techniques designed or intended to reduce the risk of employment injury in the operation or carrying out of the undertaking or business" (Canada Labour Code, part IV, Section 81). Similar legislation exists at the provincial level. Employers have used such statutes as rationale to test.

In a recent report the Ontario Law Reform Commission, a legal research arm of the Province of Ontario Government has proposed a total ban on testing the bodily samples of current and prospective employees because of privacy concerns. It recommends, instead, that in cases where impairment poses a risk, performance testing of the employee is justified. It is significant that the Commission's stated position is that "even in the case of safety-sensitive positions, the taking of bodily samples is not justified" (Ontario Law Reform Commission, 1992, pp 111-121).

7.3 The United Kingdom

There is no legislation in the United Kingdom concerning drug or alcohol testing. That said, drug and alcohol testing issues are dealt with indirectly via several statutes. Under the Misuse of Drugs Act of 1974, it is an offence
for an occupier or manager to knowingly allow on premises the production or supply of a controlled drug, the preparation of opium or the smoking of cannabis. Furthermore, under both common law and the Employment Protection Consolidation Act 1978 an employer must give full contractual notice justifiable by sustainable grounds in order to terminate employment. Under the legislation, an employer must, if called to defend a dismissal before an industrial tribunal, be able to show that there was a fair reason to dismiss and that the employee was treated in a fair and reasonable manner. In this regard, courts have used the fairness doctrine to ensure that persons subject to a drug treatment programme are treated properly. However, the industrial tribunals have been very severe with drugs and children and safety. In one case, a school teacher was summarily dismissed after marijuana was found in his possession. The tribunal ruled that because he worked with children, he should act responsibly at all times and maintained the dismissal. In another case, a nurse who was discovered using a controlled substance was dismissed. Again, the industrial tribunal upheld the dismissal on the grounds that she worked with vulnerable people and was a safety risk (Chatterjee, 1991, pp. 32-33; Marsden, 1992).

Finally, under the Health and Safety at Work Act 1974, an employer is criminally liable for failure to maintain safety at work. In view of the provisions of this statute, an employer has the obligation to ensure that an alcohol dependent employee does not cause any foreseeable risks to others (Chatterjee, 1991, p. 34).

7.4 The Netherlands

There is no legislation in the Netherlands that specifically addresses the issue of drug or alcohol testing in the workplace. That said, there are several statutes that govern the relationships between employees and employers, which deal with the issue by inference. For example, Section 8 of the European Treaty on Human Rights guarantees the right to privacy. In the Netherlands, workers can use the courts to complain of infringements to privacy, as the relevant section of the European Treaty is incorporated into the Dutch Constitution. Moreover, Article 11 of the Constitution provides for the right of the integrity of the mind and body. This section would be applicable in situations where a company contemplated a drug or alcohol testing procedure and it would be up to a court of law to determine whether such a policy was offensive to constitutional guarantees of privacy.

The Netherlands Civil Code imposes an obligation on employers to act judiciously and on workers to behave like "good employees"; repeated drunkenness under the Code would be grounds for dismissal. Finally, while there is no legislation concerning testing per se, the government has adopted regulations requiring persons occupying certain positions (such as pilots, drivers, sailors on ship in Dutch waters) to be sober at work. "When you say that the workers must be sober, you incorporate the idea of testing" (De Kooij, 1992; Chatterjee, 1991, p. 16).

Moreover, the Working Conditions Act imposes joint obligations on both employers and workers in the occupational health and safety field. Section 12 of the Act imposes the duty on employees "to exercise the necessary care and caution in the work to avoid danger to their own safety or health and that of others." Sections 3 and 4 oblige employers to organise the work in such a way as to minimise health and safety risks (Working Conditions Act, 1990, pp. 31-35, 46). This legislation has implications in the manner in which corporate policies concerning workplace testing and the use of drugs and alcohol could be perceived (Geers and Gevers, 1992).
The control of substance abuse in the Netherlands is based more on practice than regulatory considerations (Chatterjee, 1992, p. 17). In this regard, in the Netherlands, companies with more than 35 employees must establish a works council in order to provide for worker consultations "in the interest of sound functioning of the enterprise" (Works Council Act, 1992, section 2). Under Section 4 of the Working Conditions Act, employers must hold consultations with the works council "in respect of the company policy, in so far as this can have a demonstrable effect on the safety, the health and the welfare of the employees in the company or establishment" (Working Conditions Act, 1990, p. 34). The establishment of company policies relating to drugs and alcohol would require consultations with the works council (Geers and Gevers, 1992).

7.5 France

Consultations which took place in 1990 with the employers' and workers' organizations concerning the legal, moral and ethical issues surrounding workplace drug testing resulted in a policy decision of the Ministry of Labour, Employment and Vocational Training to ban systematic drug testing of all employees of a given enterprise. This policy decision was based on French jurisprudence that limits the right of an employer to make enquiries (medical, testing, questioning, etc) of candidates to issues directly related to their ability to perform the job (Ministre du Travail c. Corona, 1980; Conseil d'État et Régie nationale des usines Renault, 1987).

It was recognised that certain positions that entail security and risk elements (especially risk to third parties), such as the operation of certain machines and vehicles can justify systematic drug or alcohol screening. However, drug and alcohol testing were seen to be two different procedures with two different objectives; the medical nature of drug testing necessitated that the procedure be performed by a physician. Moreover, the testing procedure must provide guarantees to the person being tested concerning the nature of the test, as well as the possible conclusions the industrial physician might draw with reference to medical fitness to perform the essential elements of the job. However, the decision as to who establishes the positions with security and risk elements is uncertain, and leaves the testing door ajar (discussed below) (Mizzi, 1992; Dutheillet de LaMothe, 1990; Partenariat, 1990, p. 21).

8. THE ISSUE OF PRE-EMPLOYMENT DRUG AND ALCOHOL SCREENING

Most testing is carried out at the pre-employment stage and is intended to screen out potential drug users before they join the enterprise (Sonnenstuhl et al, 1987, p. 718). However, such practices raise ethical issues concerning fairness and discrimination as well as confidentiality.

8.1 Fairness and discrimination

The fairness and discrimination issues relate both to society as a whole and to the individual being tested. For society, one must question whether it is right that people who test drug/alcohol positive and who may be dependent should be merely be refused a job without being helped and sent on their way, their situation to be dealt with either by another employer or not at all (Beyerstein et al, 1989, p. 16).
For the individual, in instances where it is policy not to hire on the basis of a positive test, a perception is created that the person would be a "problem" employee, even though positive tests do not establish the existence of dependency. One must question the basic justice in making such a presumption where there has been no evidence adduced to support this. In Canada, for example, if an individual was refused a job on the basis of a pre-employment drug or alcohol test, a complaint could be lodged with the human rights commission alleging discrimination on the basis of a perceived disability on the basis of the employer's presumption of drug dependence (Canadian Human Rights Commission, Policy on Drug Testing, 1987, p. 3). If an enterprise is determined to engage in pre-employment testing, then perhaps a policy where screening occurs only after an employment offer is made and provides for counselling and rehabilitation as opposed to simply not hiring the person who tests positive is a more equitable approach (Raven, 1992; Toronto-Dominion Bank, Alcoholism and Substance Abuse Policy, 1990).

8.2 Confidentiality

The other aspect of pre-employment testing relates to confidentiality. As indicated in section 5, it has been reported that enterprises have shared the identities of persons who test positive. This is especially problematic in jurisdictions where legislation is silent concerning workplace medical examinations. In this regard, Canada's Privacy Commissioner has expressed the fear that testing may create amongst applicants an underclass of chronic unemployables: "their past may haunt them long after they have gone straight" (Privacy Commissioner of Canada, 1990, p. 19). In France, a workers' organization representative expressed concerns that certain industrial physicians might, contrary to the law, invade privacy by looking into a candidate's drug and/or alcohol consumption patterns during pre-employment testing (Hofman, 1992; Conte, 1992; Surun, 1992).

9. DIFFERENCES BETWEEN DRUG AND ALCOHOL TESTING

Although both are designed to detect substance abuse, the "legality" issue and the social acceptance of alcohol make drug and alcohol testing two different things.

The results of breath tests for alcohol used to detect alcohol impairment are accepted at face value whereas a positive drug urinalysis screen requires a second confirmation. A breath sample can accurately measure both alcohol consumption and impairment (Ontario Law Reform Commission, 1992, p. 13; Dubowski, 1992, p. 2). On the other hand, the literature is full of controversy contesting the accuracy of urinalysis tests (Privacy Commissioner of Canada, 1990, p. 29; Ontario Law Reform Commission, 1992, p. 16; Sonnenstuhl et al, 1987, p 719; Beyerstein et al, 1989, pp. 3-4; Ameille, 1991, p. 21, etc.) However, the underlying reason for the difference relates to the social acceptability of alcohol consumption versus the illegality and "morality" aspect of drug consumption or possession. Because alcohol is legal, policy makers are not concerned about its presence; the issue is how much above the threshold impairment level is in the blood of the person tested.
For example, in the United Kingdom, most companies view the “legality” issue as important, and hence are more tolerant with regard to alcohol. This has been attributed to the prevalence and the aforementioned social acceptability of alcohol, coupled with the corporate perception, enhanced by the legal issue, that drug abusing persons are marginal, somehow “mysterious” and stigmatised (Marsden, 1992). In the Netherlands, alcohol problems in the workplace are more easily accepted than drugs. “It’s easier to find out about drug addicts and take sanctions, when the employee’s work is impaired” (Bouwers, 1992). In the U.S. legislation and corporate practices have concerned testing for illegal drugs; testing for the presence of alcohol and tobacco has not been as great a concern, notwithstanding the preponderance of workplace problems related to these substances (Chen, Kim and True, 1990, p. 681).


Moral principles are universal. However, the ethical issues surrounding drug and alcohol testing are addressed from varying perspectives, depending upon national conditions and the impact the drug and/or alcohol problem has in national life. In addition, national guidelines of one state may be exported via the policies of trans-national organizations.

10.1 The United States

Drug testing in the workplace is an issue that emerged in the mid-1980s, largely in response to initiatives occurring in the United States. Several transport accidents where controlled substances were found on the crew as well as reports and surveys of extensive workplace consumption and sale of drugs have served to be the catalysts for proceeding with workplace screening programmes (Gallup, 1989, p. 10; Walsh and Gust, 1986, pp. 237-238).

In response to the aforementioned 1986 Presidential Executive Order mandating a drug-free workplace, and subsequent legislation, screening for the presence of illegal drugs rapidly spread to private sector employers. By 1989, approximately 60 per cent of the largest American corporations (more than 5,000 employees) performed drug testing (Walsh and Trumble, 1991, pp. 27-45).

As noted in section 4., there has been a long-standing tradition in the U.S. sanctioning the imposition of off-hours codes of conduct. This U.S. approach towards rules of behaviour, coupled with the prevailing mood in response to the "drug crisis" and the regulations of the U.S. Department of Transportation (see section 7.1) has had a significant impact on the overseas subsidiaries of multinational corporations as witnessed by attempts to impose similar policies.

10.2 The situation outside the United States

Drug screening has achieved a profile higher than what might ordinarily be expected outside the U.S., given the much lower drug abuse problem, in response to the Department of Transportation requirements that mandate drug-free work
environments and pressure from the parent companies of U.S. subsidiaries abroad to institute testing. Testing, while not prevalent, is largely concentrated in the sectors of the economy where there are positions with high physical risks, such as transport and off-shore oil rigs, or risks to the safety of others (Privacy Commissioner of Canada, 1990, p. 57; Schoemakers, 1991, p. 12; Vienot, 1992; Santé et Bien-être social Canada, 1989, p. 15; Health and Welfare Canada, Canada's Health Promotion Survey, 1988, p. 55). It is instructive to examine how the moral and ethical issues involving drug and alcohol testing are dealt with outside the United States, in the context of an overview of national situations.

(i) Canada

In Canada, drug testing is not widespread. (Chapnik, 1989, p.103). This has been attributed to public doubts about the merits of such testing, coupled with a lack of enabling legislation, legal ramifications, employee resentment, lack of demonstrated effectiveness and human rights concerns about discrimination (Alvi, 1992, pp. 4-5, 18-19; Dalphy, 1991, p. 2). Moreover, in Canada, studies have not demonstrated that illegal drug abuse in the workplace is a significant problem, with one Alberta study indicating workplace usage around 0.5 per cent and less than one per cent of injuries attributed to impairment. Alcohol continues to be the most commonly abused substance (Alberta Alcohol and Drug Abuse Commission, 1992; Alvi, 1992, p. 2; Ontario Law Reform Commission, 1992, p. 3; Health and Welfare Canada, op. cit., 1988, p. 55).

No precise data exists as to how much drug or alcohol testing takes place in Canada. However, one survey for the Conference Board indicates that of 97 major corporations canvassed, 14 tested; 8 tested safety-sensitive positions, 3 cited testing for regulated jobs and 4 cited all positions (Alvi, 1992, pp. 6-7, 19; Alvi, 1992).

Although there is very little testing, several major institutions and enterprises, such as the Canadian Armed Forces and the Toronto-Dominion Bank, have or will embark on drug testing programmes. In this regard, it is noteworthy that the Armed Forces plan, which includes a random testing component, and the Bank's programme, which requires all new hires to be tested, but not current employees, both draw much of their rationale on the "illegal" nature of drug usage. For the Forces, "Drug use is illegal. The occasional drink is legal, even socially acceptable, whereas even the occasional marijuana joint involves committing a crime." As for the Bank, it notes that "illegal drug users may come into contact with organized crime or turn to theft to support their habit. These are unacceptable risks considering that many Bank employees often have access to large sums of money as well as privileged financial information." Both plans have rehabilitation components, but failed treatment may result in dismissal at the Bank and will lead to termination by the Forces (Dupille, 1992; Canadian Forces Drug Control Program, 1992; Raven, 1992; Toronto-Dominion Bank, Alcoholism and Substance Abuse Policy, 1990).

The Canadian Civil Liberties Association has reacted strongly against the Bank's programme. It filed a complaint alleging that the mandatory urine testing of new employees is discriminatory with the Canadian Human Rights Commission. The matter is to be dealt with by a tribunal under the Human Rights Act. "The Association says that employees who test positive could be unfairly perceived as being drug dependent which is considered a disability under the Canadian Human Rights Act" (Canadian Human Rights Commission, Communiqué, December 22, 1992).
With reference to the impact of U.S. regulations, the federal ministry responsible for regulating transport (Transport Canada) has proposed regulations banning the workplace use of non-medical drugs and alcohol in "safety-sensitive" positions. It further proposes to mandate negative test results as a condition of employment and that periodic screens as well as tests "for cause" as evidenced by factors such as deterioration in job performance, changes in behaviour or physical appearance of the employer, changes of speech patterns or use of a substance be put in place (Transport Canada, 1992, pp. 9-12). Critics have felt that the Transport Canada proposals, which have not as yet been adopted, have been proposed largely in response to U.S. transportation regulations.

The Government's proposed regulations have been sharply criticised by the Canadian Labour Congress (CLC), the nation's largest workers' organization. The CLC has labelled as unacceptable all forms of workplace drug and alcohol testing on human rights and privacy grounds and has remarked that Canadians "must not let themselves become infected with the mass hysteria surrounding the drug problem in the United States ... What is being proposed by Transport Canada echoes the American government's approach. In our opinion, Transport Canada's proposed program is designed to conform with the U.S. government's rules on drug testing. This is not acceptable for the working people of Canada" (Canadian Labour Congress, 1990, p. 4-5). Canada's Privacy Commissioner has noted that the U.S. rules in practice are extra-territorial and views the Transport Canada testing strategy as similar to the U.S. programme, however, "Nowhere ... does the Strategy Paper indicate if the decision to adopt testing programs was influenced by the American model" (Privacy Commissioner of Canada, 1990, pp. 57-58).

(ii) The United Kingdom

A treatment expert indicated that there was very little workplace drug or alcohol screening taking place in Britain, perhaps 250,000 employees are tested yearly throughout the country. Interest in drug testing in the United Kingdom has been heightened by several transportation accidents where the presence of drugs or alcohol was found. Moreover, whatever testing that does take place would occur in pre-employment situations, following an industrial accident or due to job dysfunction. Another impetus for testing comes from the marketing of drug testing technology by private enterprises (Marsden, 1992).

In the United Kingdom, recent surveys conducted by the Confederation of British Industries indicate that 35 per cent of their member corporations have policies concerning alcohol usage; this figure drops to 24 per cent for policies concerning drug usage. In this regard, the influence of foreign enterprises is seen in noting that companies that have drug policies and/or test tend to be found in high risk sectors (such as transportation or the oil industry), or those with American connections. In the same survey, it was also determined that 8 per cent conducted pre-employment screening for drugs and/or alcohol; the percentage dropped to 4.5 per cent (drugs) and 6 per cent (alcohol) for current employees. (Marsden, 1992; Harkness, 1992).

Drug testing per se is perceived to be a viable policy option, on the grounds of safety (see legal issues). In this regard, medical examinations are routine for high risk occupations and British Rail has adopted a policy mandating tests for drug and alcohol abuse for drivers, crew, signal staff and managers (Chatterjee, 1991, p. 35). However, no random testing is taking place as yet in Britain, due to ethical (privacy) concerns. A forced random
test would be perceived as an assault (Marsden, 1992). "There is extreme sensitivity in the United Kingdom to bodily invasion by procedures such as random testing" (Daintith, 1992). That said, questions about drinking habits, life-style or drug consumption on employment or pre-employment medical examinations are a common practice (Chatterjee, 1991, p. 35). Finally, as a key informant from an employers' federation indicated, employers do not control employee behaviour 24 hours/day. Acts committed outside work should not ordinarily be subjected to discipline, if there is no impact on work performance (Harkness, 1992).

This same individual expressed the view that testing is a reasonable policy option, especially in sectors where the work entails a risk component, especially to third parties, although the organization has "not as yet elaborated a formal policy." Still, this informant was also highly sensitive to the assault on privacy screening procedures engender. "If you test for reasons other than privacy (such as productivity), then you cross the barrier into imposition on life-style." The employers' representative indicated that testing should not be an end in itself, but a first step in trying to help the employee. However, she indicated testing was an acceptable option if, in the case of a dysfunctional employee, there was no other way to determine the cause of the problems (Harkness, 1992).

A Workers' organization representative was categoric in his rejection of drug and alcohol screening as a viable policy for ethical reasons, except in a "post-incident" situation involving an accident. "Testing puts emphasis or blame on individuals and does not take into account the social environment of workers." For example, the finding of traces of alcohol or drug may obfuscate the working conditions which led the worker to take a drug in first place. Rather, he felt the emphasis should be on furthering occupational health and safety programmes, with increased worker involvement in the process. In this regard, he noted that there is an increased tendency for employees to become involved in the occupational health and safety policies of companies; that individuals must take personal responsibilities. "Society has voiced the right to expect public safety; this has been voiced in the transportation industry. The public expects transport workers to behave in a certain way." He noted that a transport driver must report to work sober and "if you got roaring drunk the night before, you must take the consequences", thus the personal link to occupational health and safety programmes is to encourage less drinking (Millish, 1992).

(iii) The Netherlands

Drug and alcohol testing in the Netherlands is not taking place to any great extent. A key informant indicates that testing occurs in no more than 10 to 20 large companies in the context of safety sensitive positions in such sectors as transportation and energy; this informant indicated that he felt, eventually, random alcohol screening via breath-analysis would come in about three to four years, in high-risk occupations. However, as in Britain, pre-employment medical tests which contain life-style questions about alcohol and drugs are common (Staal, 1992).

In the Netherlands, employers' and workers' organizations view problems associated with drug usage and testing at the workplace differently than concerns about alcohol abuse. Workplace alcohol abuse is seen to be a problem with behaviour patterns culturally reinforced. Efforts of the social partners are concentrated on removing workplace accessibility to alcohol as well as
elaborating prevention strategies (Ministry of Social Affairs and Employment, Less Sickness Equals Better Working, 1991, p. 17; Hutjens, 1992; Van Ostayen, 1992; Schoemakers, 1991; Staal, 1992). On the other hand, the problem of drug usage at work is at such a low level that the issue is confined to specific individual incidents and is otherwise not reported (Bouwers, 1992). One suggestion was that this is due to the historical openness in which Dutch society views drug usage, especially cannabis (Hutjens, 1992).

The foregoing aside, the issue of drug and alcohol testing is still (as of the fall-winter, 1992) under discussion amongst the social partners at the behest of the government, and a consensus has not as yet been reached. The focus of these consultations is on high risk occupations. In that context, the issue of random alcohol testing is being discussed as to whether such procedures would be considered appropriate, again in high risk occupations (Hutjens, 1992; Staal, 1992).

The ethical issues surrounding workplace alcohol screening are of great concern to both workers' and employers' organizations. An employers' representative indicated that the entire issue is impairment driven. "If the worker is not impaired, the company has no business getting involved in the private life of the individual." This informant considered alcohol testing as a viable option, but as a last resort in situations where an employee did not otherwise heed counselling and cease drinking. He felt, on the other hand, that dysfunctional employees and all employees in high-risk occupations should be tested on a regular basis to ensure that they are not working in conditions where they can cause damage to themselves or others. Random testing was rejected; "that's going too far" (Van Ostayen, 1992).

Workers' federation representatives felt that drug and/or alcohol testing should only be contemplated if it can be proven that there are no other means to help an individual overcome a substance abuse problem. Any such testing should take place only in the context of occupational health and safety programmes, respecting the confidentiality of the workplace medical examination. In that regard, pre-employment screening should be related to the requirements of the job and not as a basis of selection. Workers' federation representatives commented that they thought employers were seeking authority to random test on the basis of economic considerations and as a method to exercise control, since social controls do not work. It was their position that random testing is offensive to the privacy of the individual and reject its introduction. Moreover, workers' representatives rhetorically asked why social controls do not work and noted that companies should rather be looking to means to increase trust and help employees.

Following the Exxon-Valdez shipping accident off the Alaska coast, the U.S. parent company of Esso Netherlands decided to introduce random screening, for safety-sensitive personnel on board ship and at oil refineries at its subsidiary in the Netherlands, as part of a world-wide programme. The sensitivity, in the Netherlands, to privacy issues surrounding alcohol screening, including issues of consent, is well illustrated when considering the reaction this proposal engendered. Shoemakers (1991) reported the views of Limburg University Social Law Professor A.D. Geers, engaged to advise the Works Council (labour-management committee) at Esso, who noted that the problem was not with the policy of banning alcohol in the workplace, but with the manner in which the company wanted to enforce its rules. Geers noted that "For some functions an alcohol test appears justified, e.g. for a driver transporting flammable substances ... But, it remains important that there be informed consent ... The manner in which Esso wanted to conduct an alcohol and
drug policy is contrary to the right of privacy ..." (pp. 12-13). Geers' views are echoed by his colleague, Amsterdam Institute of Social Medicine Professor of Health Law J. Gevers, when he noted that "there is no proportionality between the interests of the employer and the massive infringement on the rights of privacy. This is why testing is only applicable to situations of high risk and safety" (Gevers, 1992).

In the face of objection from the company's Works Council, Esso's proposed policy of random drug testing was dropped. That said, the philosophical gulf between the company and the prevailing standards in the Netherlands is exemplified by a management spokesperson who noted "... We do not see why an enterprise, for certain critical functions, is not allowed to test for alcohol use. Besides, there has always been mention of giving tests on a voluntary basis" and a workers' federation president who stated, "How can one speak of voluntary testing when your name will be noted and sanctions will follow if one does not cooperate in such a test?" (Shoemakers, 1991, p. 15).

(iv) France

Workplace drug abuse is not seen to be a problem in France. Surveys show that the vast majority of drug abusers are not engaged in on-going remunerative employment; most occupational physicians qualify the issue as a "minor preoccupation in business" (Ameille, 1992, p. 20; Le Tron, 1992). However, the same is not the case for alcohol abuse. Here, the social partners recognize that there is a severe problem. Alcohol abuse at work is, as in the Netherlands, seen to be the result of cultural factors, including widespread availability on the job. A 1987 survey indicates that France leads all countries of the European Community in per capita alcohol consumption (Ministère des Affaires sociales et de la solidarité, Alcool et Santé, undated, p. 2). At the present time in France, a working group has been formed amongst the social partners to attempt to develop preventive strategies (Saux, 1992; Corman, 1992; Le Tron, 1992; Hofman, 1992).

In France, the marketing of drug testing technology by certain medical firms had resulted in pressure to test employees on a random or systematic basis.

A representative of an employers' organization felt that screening is necessary when there is a question as to the security of employees and third parties, but only in the context of the workplace medical examination, involving dysfuctioning employees. She indicated that the fears of employees of American subsidiaries in France are that efforts to institute random testing will be made, along with codes of conduct. She noted that in view of the procedures in place in France, the privacy factor was not really an issue (Corman, 1992).

Strikingly similar views were provided by one workers' organization representative, noting that the entire issue of testing was debated amongst the social partners two years ago (noted above), and the consensus reached that drug screening was not a good idea. With reference to privacy and consent, as related to drug and alcohol testing, this workers' representative was categoric that these matters were not at issue in France. Rather, the debate is how collectively, management and labour are going to reduce the level of alcohol abuse in the workplace; the question is not related to testing per se. He recalled that testing is strictly an affair between the company doctor and the employee. "It is absolutely out of the question that, in France, an employer could institute a drug and/or alcohol testing programme unilaterally" (Le Tron, 1992).
On the other hand, another workers' organization representative expressed concerns that in certain cases, the physician's code of conduct was not always respected, and that employers were, at times, notified of the results of medical tests, including urine or blood screens for drugs or alcohol. An incident was cited where, at the behest of management, industrial physicians were asked to perform systematic drug and/or alcohol screening on new employees who otherwise did not exhibit any job dysfunction. The workers' organization intervened and brought the situation to the attention of the ministry, as this was an "attack on the liberties and right of privacy of employees" (Hofman, 1992; Conte, 1992; Surun, 1992).

In France, certain multinational companies, mainly of U.S. origin, and mostly (but not only) in the transport and energy sector, are pressing to be allowed to systematically or randomly test their employees. As noted, uncertainty concerning which jobs are high-risk have left the testing door ajar. In 1989, Esso France, as part of the company's aforementioned world-wide policy, instituted a workplace alcohol and drug testing programme for the approximately 300 positions considered high-risk. Drug testing is conducted by the industrial medical doctor under the parameters of the annual medical examination. Results would not be provided to management. However, the alcohol testing programme includes a random breath test, conducted whether or not the employee exhibits job dysfunction. A key informant recognised that, when implemented, the policy provoked a strong reaction, in view of the impact on the privacy rights and personal liberties of employees. There was a great deal of union resistance and calls for the company not to act as a policeman. The informant indicated that the policy was put in place due to the dysfunction of employees, which at times has been linked to alcohol or drugs (Constant, 1992; Esso France, 1991).

In Contrast, IBM France has resisted strong head office encouragements to impose a drug and alcohol testing programme. In this regard, a key informant noted that head office officials fail to appreciate that the levels of drug abuse in France and Europe do not compare to those found in the United States. Rather, the emphasis of the IBM France programme is on prevention and education (Vienot, 1992).

10.3 Observations concerning impact of U.S. national guidelines and corporate practices and national perspectives

Surely, no one country has the universally applicable approach to the issue of drug and alcohol testing. Ethical and legal responses developed in each country are along the lines of unique national circumstances. The above said, the export of U.S. government guidelines trans-national enterprises has, as noted, had a considerable impact with reference to policies in other countries. In this regard, there must be an attempt to develop a greater appreciation of the unique approaches by which different societies respond to the drug and alcohol testing issue. It is to be hoped that an increased recognition of the specificity of national conditions takes place in a spirit of mutual understanding, all the while acknowledging that the goal of eliminating drug and alcohol abuse from the workplace is indeed universal.
11. EMPLOYER'S RESPONSE TO THE SUBSTANCE ABUSING EMPLOYEE AND THE NEED TO REASONABLY ACCOMMODATE

This paper concludes with some brief thoughts concerning the issue of the employer response to the substance abusing employee.

Representatives of employers' and workers' organizations were interviewed and the literature reviewed gives a unanimous view that drug and alcohol abuse are disabilities and the proper enterprise response to a substance abusing employee is to try and help that person "rehabilitate." (Hutjens, 1992; Millish, 1992; Vienot, 1992; Constant, 1992; Hofman, 1992; Van Ostayen, 1992; Staal, 1992; Waltmeijer, 1992; Scanlon, 1986; AFL-CIO, undated; Toronto-Dominion Bank, 1990; Esso-France, 1991). However, while both employer and worker organizations share a common perspective concerning the need to rehabilitate, there are significant differences with reference to the ethical and moral motivations.

Corporate acceptance of employee assistance programmes is based on the management aims in the efficiency and productivity of the organization. Major motivators for unions, on the other hand, are employee rights, humanitarian issues and providing an alternative for the dismissal of problem employees (Macdonald and Albert, 1985, pp. 39-41; Scanlon, 1986, pp. 99-100).

The above comments do not mean that "business" has a uniform approach to the substance abusing employee. Certainly, the size of the company is an important factor on its ability to provide assistance services. Another is what can be styled "corporate culture." The Canadian Armed Forces, for example, while recognizing the need to rehabilitate, has nevertheless clearly drawn a distinction between alcohol and illegal drug consumption. It clearly judges the latter as a criminal act, and its policy of dismissing service personnel who fail treatment or who test positive more than once reflects a disciplinary approach. On the other hand, as Canadian and British surveys demonstrate, many companies have no formal position at all on the issue (Alvi, 1992, pp.6-7; Harkness, 1992).

However, enterprises are not free to develop their own distinctive responses to the substance abusing employee. Anti-discrimination laws and other protective labour legislation are compelling enterprises to "reasonably accommodate" employees.

Essentially, "reasonable accommodation" is the "tailoring of a work rule, practice, condition or requirement to the specific needs of an individual or group. At its core is some degree of differential treatment (Lepofsky, 1992, p. 3). In Canada, for example, employers are required to accommodate alcohol and drug dependent persons (defined as disabled), unless such an accommodation poses an "undue hardship" for the enterprise (Ontario Human Rights Commission, Guidelines for Assessing Accommodation Requirements for Persons with Disabilities, 1989, p. 8). This translates into taking such steps as referring drug and alcohol dependent persons for assessment, counselling and rehabilitation, if necessary. However, the need to reasonably accommodate has limits; if employees fail to overcome their dependency, no further accommodation may be necessary (Canadian Human Rights Commission, Policy on Drug Testing, 1987, p. 10).

Traditionally, the need for employers to reasonably accommodate employees in other types of disabilities has been premised on the employee asking for accommodation in the first instance. However, it is important for employers to realise that in drug and alcohol abuse, denial of the disability is a common feature. They must, in complying with moral and ethical, as well as legal obligations, take on a responsibility to reach out to the employee, often by non-traditional methods, such as EAPs (Erfurt and Foote, 1989, p. 1).
12. CONCLUSIONS AND ISSUES FOR FURTHER DISCUSSION

This paper has presented a brief discussion of the moral, ethical and legal issues surrounding workplace drug and alcohol testing as well as the way in which these issues are dealt with in five countries. There is no right or wrong approach to these issues; everything depends upon the perspectives of the individual at the enterprise, as well as the national context in which the testing takes place. The debate concerning these issues attempts to balance enterprise or societal collective concerns such as productivity, safety, control and deterrence with issues of privacy, confidentiality and discrimination that are manifestations of individual rights.

However, balancing these conflicting issues may have negative consequences, since this results in a subjective environment, open to abuse and worker-management confrontation. While it is not possible to standardize all the legal, moral and ethical aspects of the testing issue, it seems that codifying certain elements would be one way to create a more objective approach. This paper ends, then, with a consideration of gaps in some of the legal, moral and ethical issues that need to be addressed, in light of the goals of this conference.

There should be a definition of risk. In this regard, one should consider whether risk should be limited to physical injuries to self and others, or should it also encompass risk to profitability of the enterprise, including such factors as company reputation and customer trust?

When is one impaired? In Canada, the Criminal Code states that more than .08mg of blood alcohol is prima facie evidence of impaired driving; the level is .10mg in many parts of the United States. In examining a possible codification of workplace impairment, one should consider whether impairment should be job specific, or at a set threshold level for all occupational groups.

The issue of the ability of enterprises to impose policies that limit employee freedom of choice during off-duty hours goes to the heart of the privacy question. It is especially important, for trans-national enterprises. One way of creating a more objective approach might be to establish guidelines that relate the right of the employer to impose such policies to job duty-specific situations. Of course, what consists of a job specific situation is itself open to broad interpretation, and is closely related to notions of risk and impairment. One can easily imagine justifiable policies that require airline crews to abstain from alcohol consumption for a specified period before going on duty. However, if a financial officer has "one too many" the night before and then makes an error in judgement, there could be serious consequences. Should there be policies to cover these situations?

The other aspect of the privacy issue that must be addressed is the impact of the testing procedure itself on self-esteem. If testing is to take place, there must be a method found to make more humane the manner in which samples of body fluids are taken. Guidelines should be considered where such procedures only occur either in the course of a medical examination, or as a stand alone procedure that incorporates recognised medical ethics.

From the legal as well as moral perspective, there are wide variances in the way in which alcohol and drug dependent individuals are defined pursuant to the disability provisions of anti-discrimination legislation, labour codes and
corporate policies. Often, drug and alcohol dependency is left out entirely. Thought should be given to specifically including drug and alcohol dependency as a standard feature of any definition of disability. The moral dimension is included because illicit drug users who have not started treatment or have failed treatment are often not viewed as disabled persons. As noted elsewhere in this paper, the accent is often placed on the illegality of the act. The assumption in many anti-discrimination models places the onus on the disabled person to seek the "reasonable accommodation" in the workplace. However, such approaches do not recognise that substance dependency has denial as a major component. The question is whether a disabled person should be excluded from inclusion in protective legislation because of one of the recognized aspects of the disability?

An ethical issue that must be addressed is the confidentiality of drug and alcohol test results. In some jurisdictions, the drug and alcohol test is not considered part of the workplace medical examination. Or, the code of conduct for industrial physicians may not specifically prohibit furnishing the results to corporate management. This is of great concern, as revealing this information may impact on the continuity of employment. Divulging test results may not be warranted, if the employer's only concern is whether there are medical impediments to employees performing their work.

In a sense, the medical examination question brings the testing issue full circle, as it again begs the question, why test? This paper has demonstrated that there is for the most part a legislative and policy void concerning the testing issue. Surely, it is now time to consider an overall guideline, not only from the point of view of technical aspects of testing, but rather by exploring the moral, legal and ethical considerations, which in the final analysis are at the root of the issue.
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