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## Drug and alcohol testing in the workplace: moral, ethical and legal issues

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## Drug and alcohol testing in the workplace: moral, ethical and legal issues

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#### ABSTRACT

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 to 60 per cent lower than persons who do not test

positively for drugs or alcohol. Perhaps the greatest argument advanced by those in favour of testing, however, 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 for labelling 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 that may extend to off-duty times. Moreover, it is advanced that the testing process itself is humiliating 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, persons with acquired immunodeficiency syndrome (AIDS), visible minorities and pregnant women that 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 cannot show whether employees are impaired in their ability to perform job duties, which is all the employer is justified in knowing.

The overview of national perspectives demonstrates that, while the legal, moral and ethical issues are the same, no single 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 those differences.

## Introduction

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

In order to fully -explore these questions, it is necessary to consider 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 work- place 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 Canada, the United States of America 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 are. increasingly being viewed as a disability, even though they are not always defined as such in anti-discrimination and other protective legislation. The paper briefly examines

employers' 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 present paper concludes with a discussion of possible issues requiring further attention.

## What Is Meant By "Moral And Ethical Issues"

What exactly is meant by "moral and ethical issues"? The "Moral" refers to the 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.

Thus, the ethical approaches to the moral issues are varied. And, as shown in this paper, the way that 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 are related to 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. The essential controversy about drug and alcohol testing, however is whether these laudable goals justify the means taken that claim to achieve them.

In the next two sections, the ethical arguments of the proponents and opponents of drug and alcohol testing are presented.

## I. Ethical Arguments Favouring Drug And Alcohol Testing

### A. Productivity and safety

Productivity and safety issues are invoked by proponents of drug and alcohol testing. Various studies have claimed that, among drug and alcohol users, absenteeism is greater, significantly more sick-leave benefits are used and accident levels are much higher [79] , [84] . Walsh and Gust ([82] , pp. 237-238) also report the results of a study indicating rates of absenteeism among current users of cocaine and marijuana to be 50 per cent higher than among non-users.

In the United States, the reported cost of drug abuse in 1980 was claimed to be 46.9 billion United States dollars (the cost in terms of productivity accounting for 55 per cent of that figure) ([49] , p. 1). By 1986, that figure had risen to US\$ 100 billion. Another important incentive for testing is the health insurance costs of drug users ([45] , p. 18; [82] , 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 10-60 per cent lower than non-drinkers [41] .

### B. Employer liability

Drug and alcohol testing is being justified on the grounds that more and more employers are being held responsible for the action of their employees. The subject of recent litigation in the United States has ranged from negligence during pre-employment screening to failing to send home an intoxicated employee who subsequently became involved in an automobile accident ([46] , p. 408).

### C. 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 ([19] , p. 5; [23] , p. 34; [52] , pp. 31-35 and 46). Ethical arguments favour testing as a deterrence on the grounds that it promotes the safety of co-workers and the

general public, who might otherwise be injured by impaired workers. 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.

#### D. 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" ([7] , p. 6). According to 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 ([34] , p. 57).

It follows from the approach described above that, in carrying out their professional duties, there is a need for standards of behaviour that limit the privacy of employees such as airline pilots, railroad engineers, truck drivers and construction workers by constraining the freedom to place them in situations that would cause risk to others ([16] , p. 9; [27] , p. 9). Justification comes from the assertion that impairment is not always physically evident. For example, Bensinger ([6] , p. 48) cites flight simulator studies that demonstrate that aeroplane pilots who inhaled marijuana 24 hours previously, and who otherwise were well rested, still deviated significantly from the runway in landing tests.

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 for labelling them as problematic for their 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

## II. Ethical Arguments Of Opponents To Drug And Alcohol Testing

### A. 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 about whether the individual is a safety threat ([8] , p. 9; [19] , p. 7; [69] , p. 34). The ability to predict whether an individual can perform specific tasks is minimal; impairment depends on the dosage and on other psychological and physiological factors ([82] , p. 238). Alvi has noted that, according to research, some individuals can actually increase their productivity while remaining dependent on alcohol or drugs and that there are difficulties with the notion that drug use is causally related to poor performance ([2] , p. 11). Finally, a positive drug test does not mean that the individual is a chronic user or is alcohol-dependent [3] .

### B. 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 ([19] , p. 6). 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 either to submit to a urinalysis or to be disciplined or dismissed infringes on what otherwise would be considered the ordinary civil liberties of an employee ([8] , 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" ([24] , pp. 651-652).

Beyerstein and others have opined that the real motivation for testing is the identification of deviant behaviour ([8] , p. 22). In this regard, it is reported that some United States 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" ([61] , 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 ([60] , pp. 16 and 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, an employee who is to be 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 ([44] , p. 345). The loss of "self" as well as the dehumanization 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 do that again ...' ([61] ; p. 4).

There has been almost no systematic investigation concerning the psychological impact of the testing experiences. Coombs and Coombs ([26] , pp. 982-985) 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". Of the students polled, however, 33.5 per cent reported anxieties and 38.9 per cent indicated that 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.

### C. Management style

Opponents assert that testing encourages a -management style that implies that 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" ([45] , p. 19).

### III. 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 United States employers to check on the home morals of employees. Those whose behaviour was below company standards would often be fired ([24] , 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 United States employment law. Only one state (Montana) has legislation that imposes "just cause" employment standards, other than for statutory discrimination [54] . 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 is jeopardized or when it harms the reputation

of the company ([46] , p. 415; [66] , p. 28).

It must be noted, however, that there have been conflicting trends in this regard. United States 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 ([42] , pp. 770-771). On the other hand, in the United States there has recently been a "philosophical turn" 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" ([46] , 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. Random and systematic mandatory testing, however, 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 inquire into matters outside the workplace ([58] , p. 55).

The issue of random drug testing has evoked a reaction from the United States labour movement. The American Federation of Labor and Congress of Industrial Organizations questions the usefulness of random testing, noting that it often results in the firing of competent employees. The organization calls for restriction of 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 ([4] , pp. 3-4).

#### IV. 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 Canada, the United Kingdom of Great Britain and Northern Ireland and the United States, 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 those countries assert that physicians should maintain confidentiality and release only information needed for an employer to determine an individual's capacity to perform the work required by the job in question there is a legislative void concerning confidentiality. 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; failure to respect that principle could result in a court imposing damages ([65] , pp. 16-18). In Canada, for example, certain members of the employer community reportedly exert pressure at times on industrial physicians to divulge test results; however, that pressure is usually successfully resisted. Some occupational physicians may mistakenly believe that their being in the employ of the enterprise implies consent to provide test results to management ([5] , p. 24; [10] , pp. 19, 22, 47 and 182; [55] , para. 1.14).\*

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 and is subjected to codified confidentiality standards. In France, what testing does take place occurs as a function of high-risk occupations, but in the context of periodic

employment medical examinations. The industrial physician must advise the enterprise on 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 [37] .

Similarly, in the Netherlands, testing, when performed, is considered to be an integral part of the pre-employment or periodic employment medical examination and is performed by a medical doctor. The testing falls under the code of ethics of the medical officer and the results are not revealed to anyone except the person under examination ([9] , p. 2).<sup>\*</sup> 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 those data are necessary for the 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. NVAB has expressed great concern with reference to the privacy rights of employees. Revealing results of medical examinations including drug or alcohol screens, to third parties, is only permitted with the patient's permission ([50] , pp. 7-9).

<sup>\*</sup>And interviews conducted in 1992 with T. Boadway, Director of Health Policy, Ontario Medical Association, Toronto, and with Robert Solomon, Professor, Faculty of Law, University of Western Ontario, London, Ontario.

While it may be policy in many organizations to keep confidential the results of workplace drug and alcohol screening, the experience reported in the United States is that such safeguards are not always set out in formal policies and that, when they do exist, they are difficult to enforce ([24] , p. 675).. Failure to keep the results confidential may have significant consequences for the employee. There have been instances reported in the United States in which dismissals based on positive test results were "announced" or companies provided results to others, either directly or through intermediaries ([12] , p. 13).

## V. Implications Relating To Discrimination In The Workplace

### A. Ethical considerations

Apart from privacy and confidentiality issues, another major ethical implication of drug and alcohol testing is related to discrimination -in the workplace. Discrimination on the grounds of sex, national origin, disability, age etc. is prohibited in many jurisdictions. It is conceivable that a policy of mandatory drug testing might 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 that a "positive" result has been obtained or that a person has refused 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 ([57] , 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 a certain race or national origin, or persons of a certain age group, if the penalty for drug usage is dismissal from or denial of employment. Random drug screening might not be applied in a "random" manner if the goal is to surreptitiously discriminate. Moreover, 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.

<sup>\*</sup>And an interview conducted in 1992 with W. J. Bouwers, Stichting Alcohol Consultancy Nederland, Zeist, Netherlands.

The first two forms of discrimination are hopefully rarely encountered. Mandatory drug testing could, however, have widespread implications for the third form of discrimination, adverse impact or systemic discrimination. Adverse impact discrimination is the application of prima facie neutral policies or practices that have an

adverse effect on minority group members as compared to majority group members' ([57] pp 4-7). Although drug testing samples are only supposed to be used to test for the presence of illegal substances, such samples may be used to test for pregnancy, thus having an adverse effect on women. Also, the presence of medication to combat other diseases and disabilities, including acquired immunodeficiency syndrome (AIDS), may be discovered during the testing procedures. The results could be employment decisions that discriminate against the persons being tested. Research has shown that -most consumers of illicit drugs are in the 18-29 age group. Drug testing could have an adverse effect on persons in that age group, such as termination of employment or non-recruitment of large numbers of persons in that age group.. Finally, drug testing could have an adverse effect on certain racial minorities that have higher levels of the skin pigment melanin, since it is chemically similar to marijuana [15] .

## B. Anti-discrimination statutes and drug and alcohol testing

In the United States, Title VII of the Civil Rights Act of 1964 [79] 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 [67] . As indicated above, disparate treatment could occur if 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 ([44] , p. 352).

The Federal Rehabilitation Act of 1973 [80], 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. According to that legislation, drug- and alcohol- dependent persons 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. There have, however, been successful discrimination cases in which drug- dependent employees who otherwise had no job dysfunction admitted their addiction, sought leave for treatment and were fired ([23] , p. 36; [44] , p. 352; [67] , p. 50).

The new Americans with Disabilities Act of 1990 [71] 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)). The legislation makes a clear differentiation, however, between persons currently using illegal drugs and 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 Federal Rehabilitation Act [78] 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).

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 United States 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 Canadian Human Rights Act firmly places drug and alcohol dependency under the disability provisions of the legislation. Section 25 of the Canadian Human Rights 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" ([11] , sect. 25). However, contrary to United States practice, the Canadian 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.\* 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.\*\*

## VI. 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.

### A. 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 so must ensure that the testing procedures and rationale are in conformity with Canadian anti-discrimination legislation, or risk the possibility of having to respond to a complaint of discrimination.

The anti-discrimination legislation places limitations upon the inquiries made by employers if such inquiries tend to discriminate on a prohibited ground ([14] , sect. 8). An inquiry is any written or oral inquiry and would include pre-employment and employment medical examinations. The only exception to this is when the inquiry (i.e. medical examination, including drug or alcohol screen) is a "bona fide occupation requirement" ([14] , sect. 15). Such an inquiry would be seen to be a bona fide occupation requirement 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 is required ([17] ; [33] , pp-5-6).

\*Interview conducted in 1992 with T. Daintith, Head, Institute of Advanced Legal Studies, University of London.

\*\*Interview conducted in 1992 with J. Gevers, Professor of Health Law, Institute of Social Medicine, Amsterdam.

Pursuant to the bona fide occupation requirement of the legislation, the Canadian Human Rights Commission drug-testing policy stipulates that testing must be based on the employer's ability to demonstrate objectively that a "positive" result to the drug being screened indicates a decreased ability to perform the job safely, efficiently and reliably, that the assessment is individualized and that employees found "positive" must be reasonably Accommodated by such measures as rehabilitation or by employee assistance programmes, or be provided benefits similar to those of employees with other types of disabilities ([15] , 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" ([11] , part IV, sect. 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 Government of the Province of Ontario has proposed a total ban on testing the bodily samples of current and prospective employees because of privacy concerns. It has recommended instead that, in cases where impairment poses a risk, performance testing of the employee is justified. It is significant that the stated position of the Commission is that "even in the case of safety-sensitive positions, the taking of bodily samples is not justified". [19] , pp. 111-121).

## B. France

In France, consultations that 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 *Ministre du travail, de l'emploi et de la formation professionnelle* (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 inquiries (medical, testing, questioning etc.) of candidates to issues directly related to their ability to perform the job [35] , [36] .

It was recognized 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. Drug and alcohol testing, however, 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 that the industrial physician might draw with reference to medical fitness to perform the essential elements of the job. The decision about who establishes the positions with security and risk elements is uncertain, leaving the testing door ajar ([29] ; [56] , p. 21).\*

## C. Netherlands

There is no legislation in the Netherlands that specifically addresses the issue of drug or alcohol testing in the workplace. But there are several statutes that govern the relationships between employees and employers and that deal with the issue by inference. In the Netherlands, workers can use the courts to complain of infringements of privacy. Moreover, article 11 of the Constitution provides for the right of the integrity of the mind and body. This 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 civil code of the Netherlands imposes an obligation on employers to act judiciously and an obligation 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, and sailors on ships in waters of the Netherlands) to be sober at work. "When you say that the workers must be sober, you incorporate the idea of testing" ([23] ,p. 16).\*\*

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 work to avoid danger to their own safety or health and that of others" [52] . Sections 3 and 4 oblige employers to organize the work in such a way as to reduce to a minimum health and safety risks ([52] , pp. 31-35 and 46). This legislation has implications for the manner in which corporate policies concerning workplace testing and the use of drugs and alcohol could be perceived [41] .

\*And an interview conducted in 1992 with D. Mizzi, *Minist6re du travail, de l'emploi et de la formation professionnelle*, Paris.

\*\*And an interview conducted in 1992 with Veronica Kooij, Occupational Health and Safety Officer, Ministry of

Social Affairs and Employment, The Hague.

The control of substance abuse in the Netherlands is based more on practice than regulatory considerations ([23] , p. 17). In the Netherlands, companies with more than 35 employees must establish a works council (labour-management committee) in order to provide for worker consultations "in the interest of sound functioning of the enterprise" ([53] , sect. 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" ([52] , p. 34). The establishment of company policies relating to drugs and alcohol would require consultations with the works council [41] .

#### D. United Kingdom of Great Britain and Northern Ireland

There is no legislation in the United Kingdom concerning drug or alcohol testing. But drug and alcohol-testing issues are dealt with indirectly via several statutes. Under the Misuse of Drugs Act 1971, 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. The industrial tribunals have been 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 have acted responsibly at all times; it upheld the dismissal. In another case, a nurse who had been discovered using a controlled substance was dismissed. Again, the industrial tribunal upheld the dismissal on the grounds that she was working with vulnerable people and was a safety risk ([231, pp. 32-33]).\*

Finally, under the Health and Safety at Work etc. Act 1974, an employer is criminally liable for failure to maintain safety at work. In view of the provisions of the Act, an employer has the obligation to ensure that an alcohol-dependent employee does not cause any foreseeable risks to others ([123], p. 34).

\*And an interview conducted in 1992 with John Marsden, Research Manager, Turning Point Treatment Centre, London.

#### E. United States of America

In 1986, United States President Ronald 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: (a) prevention, deterrence and control; and (b) 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. It has established drug testing in sensitive positions, for persons for whom there is a reasonable suspicion of use, following an accident and for job applicants. Employees using illegal drugs are to be referred to counselling. Disciplinary action, including dismissal, is to be provided for those refusing counselling and rehabilitation. The Order was followed by legislation in 1988 that compels all employers that contract with United States government agencies in amounts exceeding US\$ 25,000 and all grant recipients to certify that they provide a drug-free workplace ([23] , pp. 35-41; [74] ). Apart from federal initiatives, state governments have instituted varying programmes of drug testing.

Regulation in the United States has also influenced regulation in other countries. The "final rules" of the United States Department of Transportation require 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 ([60] , p. 56; [72] ; [76] ).

Drug testing as a function of the workplace medical examination has been the object of considerable litigation.

Statutory restrictions are few; requirements usually entail the employer paying for the examination, the person concerned being provided a copy of the results and the employer maintaining the report in confidence. It is incumbent upon the employer to justify such measures as job-related, or necessary to protect the safety of others. If employers cannot demonstrate any business-related need for the examination, they may be held liable for invasion of privacy, outrageous conduct, intentional infliction of emotional distress, negligent conduct of a physical examination and/or 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 ([42] , p. 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 [59] .

In 1989, however, 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 Supreme 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 Supreme Court has also decided in favour of lower court decisions upholding various forms of random drug testing ([75] ; [77] ; [78] ; [83] , pp. 44-45). The new Americans with Disabilities Act (1990) [71] bans pre-employment and employment medical examinations and inquiries, except for 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 medical examinations (section 104(d)). It is too early to tell what the impact of this legislation will be on drug- and alcohol-testing litigation.

## VII. 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 ([30] , p. 718); however, such practices raise ethical issues concerning fairness and discrimination, as well as confidentiality.

### A. Fairness and discrimination

The fairness and discrimination issues relate both to society as a whole and to the individual being tested. For society, the question is whether it is right that people who test drug - or alcohol -positive and who may be dependent should be refused a job without being helped and should be sent on their way, their situation to be dealt with either by another employer or not at all ([8] , 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. It is necessary to question the basic justice in making such a presumption if there has been no evidence adduced to support it. In Canada, for example, if an individual is 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 ([15] , p. 3). If an enterprise is determined to engage in pre-employment testing, then perhaps a more equitable approach would be 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 [68] .\*

\*And an interview conducted in 1992 with Isla Raven, Manager, Employee Relations Policy, Toronto-Dominion Bank, Toronto.

### B. Confidentiality

The other aspect of pre-employment testing relates to confidentiality. As indicated above, enterprises have reportedly 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, the Privacy

Commissioner of Canada has expressed the fear that testing may create among applicants an underclass of chronic unemployables, whose "past may haunt them long after they have gone straight" ([60] , p. 19). In France, a workers' organization representative expressed concerns that certain industrial physicians might, contrary to the law, invade a candidate's privacy by looking into his or her drug- and/or alcohol-consumption patterns during pre-employment testing.\*

### VIII. 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 ([19] , p. 13; [28] , p. 2). The literature on the subject is full of controversy contesting the accuracy of urinalysis tests ([3] , p. 21; [8] , pp. 3-4; [19] , p. 16; [30] , p. 719; [60] , p. 29). 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 the alcohol 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 stigmatized.\*\* 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'.\* In the United States legislation and corporate practice have been 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 those substances ([24] , p. 681).

\*Interviews conducted in 1992 with Pierre Conte, Assistant conf6d6ral, with P. Hofman, Seer6taire, and with Sylvie Surun, Assistante confdrale, all of Force ouvrire, Paris.

\*\*Interview conducted in 1992 with John Marsden.

### IX. The Situation In The United States Of America And The Impact Of The Export Of National Guidelines Via Corporate Practice

Moral principles are universal. The ethical issues surrounding drug and alcohol testing, however, have been dealt with from varying perspectives, depending upon national conditions and the impact the drug and/or alcohol problem has had on national life. In addition, national guidelines of one State may be exported via the policies of transnational organizations.

#### A. The situation in the United States of America

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 in which controlled substances were found on the crew, as well as reports and surveys of extensive workplace consumption and sale of drugs, have been catalysts for proceeding with workplace screening programmes ([40] , p. 10; [82] , 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 United States corporations (those with more than 5,000 employees) were per- forming drug testing ([83] , pp. 27-45).

As noted above, there has been a longstanding tradition in the United States sanctioning the imposition of

off-hour codes of conduct. This approach towards rules of behaviour, coupled with the prevailing mood in response to the 'drug crisis' and the above-mentioned regulations of the United States Department of Transportation, has had a significant impact on the overseas subsidiaries of multinational corporations as witnessed by attempts to impose similar policies.

\*Interview conducted in 1992 with W. J. Bouwers.

## B. The situation outside the United States of America

Drug screening has achieved a profile that is higher than what might ordinarily be expected outside the United States, given the much lower drug abuse problem, in response to the United States Department of Transportation requirements that mandate drug-free work environments and to pressure from the parent companies of United States 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 offshore oil rigs, or risks to the safety of others ([43] , p. 55; [60] , p. 57; [62] , p. 15; [64] , p. 12).<sup>\*</sup> 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.

### 1. Canada

In Canada, drug testing is not widespread ([22] , p. 103). This has been attributed to public doubts about the merits of such testing; a lack of enabling legislation; legal ramifications; employee resentment; a lack of demonstrated effectiveness; and human rights concerns about discrimination ([2] , pp. 4-5 and 18-19; [27] , p. 2). Moreover, in Canada, studies have not demonstrated that illegal drug abuse in the workplace is a significant problem; one Alberta study indicated that drug usage in the workplace was around 0.5 per cent and attributed less than 1 per cent of injuries to impairment. Alcohol continues to be the most commonly abused substance ([1] ; [2] , p. 2; [19] , p. 3; [43] , p. 55).

No precise data exist on how much drug or alcohol testing takes place in Canada. According to a survey conducted for the Conference Board of Canada, however, of the 97 major corporations canvassed, 14 tested; 8 tested for safety-sensitive positions, 3 cited testing for regulated jobs and 4 cited testing for all positions ([2] , pp. 6-7 and 19).<sup>\*\*</sup>

Although there is little testing, several major institutions and enterprises, such as the Canadian Armed Forces and a Toronto-based bank, have or will embark on drug-testing programmes. The Canadian Armed Forces plan, which includes a random -testing component, and the bank's programme, which requires all newly hired persons (but not current employees) to be tested, both draw much of their rationale on the 'illegal' nature of drug usage. For the Canadian Armed Forces, 'drug use is illegal. The occasional drink is legal, even socially acceptable, whereas even the occasional marijuana joint involves committing a crime' [13] . 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" [68] . Both plans have rehabilitation components, but failed treatment may result in dismissal at the bank and will lead to termination by the Canadian Armed Forces.<sup>\*</sup>

\*And an interview conducted in 1992 with P. Vienot, Directeur, Santé et environnement du travail, IBM France, Paris.

\*\*And an interview conducted in 1992 with Shahid Alvi, Compensation Research Centre, Conference Board of Canada, Ottawa.

The Canadian Civil Liberties Association has reacted strongly against the bank's programme. It filed a complaint with the Canadian Human Rights Commission, alleging that the mandatory urine testing of new employees was discriminatory. The matter is to be dealt with by a tribunal under the country's 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' [21] .

With reference to the impact of United States regulations, Transport Canada, the federal ministry in Canada responsible for regulating transport, has proposed regulations banning the workplace use of non-medical drugs and alcohol in "safety-sensitive" positions. It has also proposed to mandate negative test results as a condition of employment and to put in place 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 employee, changes of speech patterns or use of a substance ([16] , pp. 9-12). Critics have felt that the Transport Canada proposals, which have not yet been adopted, have been proposed largely in response to United States transportation regulations. The proposed regulations of the Canadian Government have been sharply criticized by the Canadian Labour Congress, the nation's largest workers' organization. The Canadian Labour Congress 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" ([20] , pp. 4-5). The Privacy Commissioner of Canada, noting that the United States rules in practice are extraterritorial, views the Transport Canada testing strategy as similar to the United States programme, adding: "Nowhere ... does the Strategy Paper indicate if the decision to adopt testing programs was influenced by the American model" ([60] , pp. 57-58).

\*Interviews conducted in 1992 with Peter Dupille, Director, Drug Policy Review Project, Canadian Department of National Defence, Ottawa, and with Isla Raven.

## 2. France

Workplace drug abuse is not seen as a problem in France. Surveys show that the vast majority of drug abusers are not engaged in ongoing remunerative employment; most occupational physicians qualify the issue as a "minor preoccupation in business"([3] , p. 20).\* The same is not true for alcohol abuse, however. The social partners recognize that alcohol abuse is a severe problem. In France, as in the Netherlands, alcohol abuse at work is viewed as the result of cultural factors, such as the widespread availability of alcohol on the job. According to one survey, - in 1987, France led all countries in the European Economic Community in per capita alcohol consumption ([39] , p. 2). A -working group has been formed among the social partners in France to attempt to develop preventive strategies. \*\*

In France, the marketing of drug-testing technology by certain medical firms has resulted in pressure; to test employees on a random or systematic basis. A representative of an employers' organization felt that screening was necessary when there was a question as to the security of employees and third parties, but only in the context of the workplace medical examination, involving dysfunctioning employees. She indicated that the fears of employees of United States subsidiaries in France were that efforts to institute random testing would 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. \*\*\*

Strikingly similar views were provided by a workers' organization representative, who noted that the entire issue of testing had been debated among the social partners two years earlier and that a consensus had been reached that drug screening was not a good idea. With reference to privacy and consent as related to drug and alcohol testing, the workers' representative stated categorically that those matters were not at issue in France. Instead, the debate centred on how management and labour collectively were going to reduce the level of alcohol abuse in the workplace; the question was not related to testing per se. He noted that testing was strictly a matter 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". \*

\*And an interview conducted in 1992 with M. Le Tron, Confédération française démocratique du travail, Paris.

\*\*Interview conducted in 1992 with V. Corman, Chef du service hygiène et sécurité, Conseil national du patronat

français, Paris; with P. Hofman; with M. Le Tron; and with M. Saux, Chef du service de l'inspection médicale du travail et de la main-d'oeuvre, Ministère du travail, de l'emploi et de la formation professionnelle, Paris.

\*\*\*Interview conducted in 1992 with V. Corman.

Another workers organization representative expressed concern that in certain cases the physicians' 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 management had asked industrial physicians to perform systematic drug and/or alcohol screening on new employees who had not exhibited any job dysfunction. The workers organization intervened and brought the situation to the attention of the proper ministry, as it was an "attack on the liberties and right of privacy of employees".\*\*

In France, certain multinational companies, originating mainly in the United States, and mostly (but not only) in the transport and energy sector, are pressing to be allowed to systematically or randomly test their employees. Uncertainty concerning which jobs are high-risk have left the testing door ajar.

In 1989, the French subsidiary of an oil company based in the United States, as part of the parent company's worldwide policy, instituted a workplace alcohol- and drug-testing programme for the approximately 300 positions that were considered high-risk. Drug testing is conducted by the industrial medical doctor under the parameters of the annual medical examination. Results are not be provided to management. The alcohol testing programme, however, includes a random breath test that is conducted whether or not the employee exhibits job dysfunction. A key informant noted 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 had been linked to alcohol or drug use [32].\*\*\*

In contrast, the French subsidiary of a large computer company based in the United States has resisted strong encouragement from its head office to impose a drug- and alcohol-testing programme. A key informant has noted that officials from the head office have failed to appreciate that the levels of drug abuse in France and elsewhere in Europe have not compared with those in the United States. For that reason, the emphasis of the programme of the French subsidiary has been On Prevention and education.\*

\*Interview conducted in 1992 with M. Le Tron.

\*\*Interviews conducted in 1992 with Pierre Conte, P. Hofman and Sylvie Surun.

\*\*\*And an interview conducted in 1992 with P. Constant, Medical Manager, Esso France, Paris.

### 3. Netherlands

Drug and alcohol testing in the Netherlands is not taking place to any great extent. A key informant has indicated that testing occurs in no more than 10-20 large companies in the context of safety-sensitive positions in such sectors as transportation and energy; in the informant's opinion, eventually, random alcohol screening via breath analysis will be taking place in about 3-4 years, in high-risk occupations. In the Netherlands, however, as in Great Britain, pre -employment medical tests that contain lifestyle questions about alcohol and drugs are common.\*\*

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 culturally reinforced behaviour patterns. Efforts by the social partners are concentrated on removing workplace accessibility to alcohol and on elaborating prevention strategies ([53], p. 17; [64]).\*\*\* Drug usage at work is at such a low level that it is confined to isolated incidents and is otherwise not

reported. \*\*\*\* One informant has suggested that this is because the fact that historically Netherlands society has viewed the use of drugs, especially cannabis with considerable openness. \*\*\*\*\*

Near the end of 1992, the issue of drug and alcohol testing was still being discussed by the social partners at the behest of the Government and a consensus had not yet been reached. The focus of the consultations was on high-risk occupations. One of the questions raised was whether random alcohol testing would be considered appropriate in high-risk occupations+.

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." The representative regarded 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, however, 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 in which they can cause damage to themselves or others. Random testing was rejected: "That's going too far.\*

\*Interview conducted in 1992 with P. Vienot.

\*\*Interview conducted in 1992 with Harry Staal, Federatie Nederlandse Vakbeweging, Amsterdam.

\*\*\*And interviews conducted in 1992 with Harry Staal; with A. M. Hutjens, Secretary, Verbond van Nederlandse Ondernemingen, The Hague; and with P. Van Ostayen, Netherlands Christian Employers Organization, The Hague.

\*\*\*\*Interview conducted in 1992 with W. J. Bouwers.

\*\*\*\*\*Interview conducted in 1992 with A. M. Hutjens.

+Interviews conducted in 1992 with A. M. Hutjens and with Harry Staal.

Workers' federation representatives felt that drug and/or alcohol testing should only be contemplated if it could be proved that there were 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 work-place medical examination. 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 administer random tests on the basis of economic considerations and as a way of exercising control, since social controls did not work. They felt that random testing was offensive to the privacy of the individual and they rejected its introduction. Moreover, workers' representatives rhetorically asked why social controls did not work and noted that companies should instead be looking for ways to increase trust and help employees.

Following a recent oil shipping accident off the Alaskan coast, the United States oil company in question decided to introduce, as part of a worldwide programme, random screening for safety-sensitive personnel on board ship and at oil refineries at its subsidiary in the Netherlands. The sensitivity in the Netherlands to privacy issues surrounding alcohol screening, including issues of consent, is well illustrated by the reaction that the proposal engendered. Schoemakers [64] reported that A. D. Geers, a professor at Limburg University Social Law who had been engaged to advise the works council at the subsidiary, 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 [the oil company] wanted to conduct an alcohol and drug policy is contrary to the right of privacy ..." ([64] , pp. 12-13). Geers's views were echoed by his colleague, J. Gevers, who 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"\*

\*Interview conducted in 1992 with P. Van Ostayen.

In the face of objection from the oil company's works council, the proposed policy of random drug testing was dropped. The philosophical gap between the company and the prevailing standards in the Netherlands is exemplified by the statements of a management spokesperson ("... 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 ("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?") ([64] , p15) .

#### **4. The United Kingdom of Great Britain and Northern Ireland**

According to a treatment expert in the United Kingdom, there is little workplace drug or alcohol screening taking place in that country - perhaps 250,000 employees are tested yearly. Interest in drug testing in the United Kingdom has been heightened by several transportation accidents involving the use of drugs or alcohol. Moreover, whatever testing does take place occurs in pre -employment situations, following an industrial accident or as a result of job dysfunction. Another impetus for testing comes from the marketing of drug-testing technology by private enterprises.\*\*

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. The influence of foreign enterprises is evidenced by the fact 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 United States connections. In the same survey, it was also determined that 8 per cent of the member companies conducted pre-employment screening for drugs and/or alcohol; -for current employees, the figures dropped to 4.5 per cent (drug screening) and 6 per cent (alcohol screening).\*\*\*

Drug testing per se is perceived to be a viable policy option, on the grounds of safety (see the section above entitled "Legal issues surrounding drug issues"). 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 ([23] , p. 35). No random testing is taking place as yet in the United Kingdom, however, due to ethical (privacy) concerns. A forced random test would be perceived as an assault.\* "There is extreme sensitivity in the United Kingdom to bodily invasion by procedures such as random testing."\*\* Questions about drinking habits, lifestyle or drug consumption on employment or pre-employment medical examinations, however, are commonly asked ([23] , p. 35). Finally, as a key informant from an employers' federation indicated, employers do not control employee behaviour 24 hours a day. Acts committed outside work should not ordinarily be subjected to discipline if there is no impact on work performance.\*\*\*

\*Interview conducted in 1992 with J. Gevers.

\*\*Interview conducted in 1992 with John Marsden.

\*\*\*Interviews conducted in 1992 with Karen Harkness, Occupational Health and Safety Officer, Confederation of British Industries, London, and with John Marsden.

The same informant expressed the view that testing was a reasonable policy option, particularly in sectors where the work entailed a risk component, especially to third parties, although the organization had "not as yet elaborated a formal policy". Still, the informant was also highly sensitive to the assault on privacy that screening procedures engendered: "If you test for reasons other than privacy (such as productivity), then you cross the barrier into imposition on lifestyle.' The employers' representative indicated that testing should not

be an end in itself, but a first step in trying to help the employee. She added, however, that 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.\*\*\*\*

A workers' organization representative categorically rejected 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 drugs may obfuscate the working conditions that led the worker to take drugs in the first place. The representative felt that the emphasis should be on furthering occupational health and safety programmes, with increased worker involvement in the process. He noted that there was an increased tendency for employees to become involved in the occupational health and safety policies of companies and 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.\*

\*Interview conducted in 1992 with John Marsden.

\*\*Interview conducted in 1992 with T. Daintith.

\*\*\*Interview conducted in 1992 with Karen Harkness.

\*\*\*\*Interview conducted in 1992 with Karen Harkness.

### C. Observations on the impact of United States national guidelines and corporate practices and national perspectives

Surely, no single country has a universally applicable approach to drug and alcohol testing. The ethical and legal responses in each country have developed along the lines of the unique national circumstances of that country. Nevertheless, the "export" of United States government guidelines for transnational enterprises has had a considerable impact on policies in other countries. There must be an attempt to develop a greater appreciation of the unique approaches by which different societies respond to the issue of drug and alcohol testing. It is hoped that there will be increased recognition and understanding of the specificity of national conditions. At the same time, it should be noted that the goal of eliminating drug and alcohol abuse from the workplace is indeed universal.

### X. Employers' Response To Substance-abusing Employees And The Need To Reasonably Accommodate

The representatives of employers' and workers' organizations that were interviewed and the literature on the subject unanimously agree that drug and alcohol abuse are disabilities and that the proper enterprise response to a substance-abusing employee is to try and help that person "rehabilitate" [4] , [32] , [63] , [68] .\*\* While both employers' and workers' organizations share a common perspective concerning the need to rehabilitate, there are significant differences in their ethical and moral motivation.

Corporate acceptance of employee assistance programmes is based on the management aims of improving the efficiency and productivity of the organization. The main motivation for unions lies in employee rights and humanitarian issues and in providing an alternative for the dismissal of problem employees ([48] , pp. 39-41; [63] , 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 determining its ability to provide

assistance services. Another is what can be referred to as "corporate culture". The Canadian Armed Forces, for example, while recognizing the need to rehabilitate, have clearly drawn a distinction between alcohol and illegal drug consumption. In the Canadian Armed Forces, the latter is considered a criminal act, and the policy of dismissing service personnel who fail treatment or who test positive more than once reflects a disciplinary approach. As Canadian and British surveys demonstrate, however, many companies have no formal position at all on the issue ([2] , pp. 6-7).\*

\*Interview conducted in 1992 with Thomas Mellish, P-quality and Social Policy Department, Trades Union Congress, London.

\*\*And interviews conducted in 1992 with P. Constant, P. Hofman, A. M. Hutjens, Thomas Mellish, Harry Staal, P. Van Ostayen, P. Vienot, and A. Woltmeijer, Christelijk Nationaal Vakverbond, The Hague.

Enterprises are nevertheless 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 ([47] , 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 ([18] , p. 8). This translates into taking such steps as referring drug- and alcohol-dependent persons for assessment, counselling and rehabilitation, if necessary. The need to reasonably accommodate has limits, however; if employees fail to overcome their dependency, no further accommodation may be necessary ([15] , 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 place. It is important for employers to realize, however, 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 employee assistance programmes ([31] , p. 1).

## XI. Issues For Further Discussion

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

\*And an interview conducted in 1992 with Karen Harkness.

Balancing those conflicting concerns may have negative consequences, however, since it may result 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.

There -should be a definition of risk. Consideration should be given to the question of whether risk should be limited to physical injuries or whether it should also encompass risk to the profitability of the enterprise, including such factors as company reputation and customer trust.

When is a person impaired? In Canada, the Criminal Code states that more than 0.08 mg of blood alcohol is

prima facie evidence of impaired driving; the level is 0.10 mg in many parts of the United States. In examining a possible codification of workplace impairment, consideration should be given to the question of 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 transnational 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- or duty-specific situations. Of course, what a job-specific situation consists of is itself open to broad interpretation and is closely related to notions of risk and impairment. It is easy to 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 "None too many" the night before and then makes an error in judgement, there could be serious consequences. Should there be policies to cover such situations?

Another 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, a more humane method of taking samples of body fluids must be found. 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 recognized medical ethics.

From a legal as well as a 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 emphasis is often placed on the illegality of the act. In many anti-discrimination models, it is assumed that the onus is on the disabled person to seek "reasonable accommodation" in the workplace. Such approaches do not recognize, however, that denial is a major component in substance dependency. 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 does not specifically prohibit furnishing the results to corporate management. This is of great concern, as revealing such information may have an 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?" The present paper has demonstrated that there is, for the most part, a legislative and policy void concerning the testing issue. It is time to consider an overall guideline, taking into account not only the technical aspects of testing, but also the moral, legal and ethical considerations, which in the final analysis are at the root of the issue.

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