

1-1-1996

## Justifying Employee Drug Testing: Privacy Rights Versus Business Interests

Douglas Isbister

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](#).

---

### Recommended Citation

Douglas Isbister, "Justifying Employee Drug Testing: Privacy Rights Versus Business Interests" (1996) 5 Dal J Leg Stud 255.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

# JUSTIFYING EMPLOYEE DRUG TESTING: PRIVACY RIGHTS VERSUS BUSINESS INTERESTS

DOUGLAS ISBISTER<sup>†</sup>

## INTRODUCTION

The right to privacy is at the core of Western society. The political philosophy from which our modern political institutions have been created was predicated on a belief that in democracies, individuals can expect a certain zone of privacy into which the state cannot venture. From this principle, a number of legal norms, both codified and uncoded, have been developed. Of course, in all contexts the right to privacy is not an absolute right. Like all other rights, particularly in Canada, the right to privacy is subject to a precarious act of balancing competing individual and societal interests.

It is against this backdrop that the issue of privacy rights in the workplace must be analyzed. Employees, like all members of society, have grown to expect significant amounts of privacy in all aspects of their lives. The workplace, some argue, should be no different. Others argue that employers have a myriad of legitimate concerns which motivate them to monitor the actions of their employees in ways which employees consider to be an unnecessary invasion of privacy. This monitoring takes place in any number of ways. The focus of this paper is to explore employer monitoring of employees in the form of mandatory drug testing in employment situations.

Generally, within the labour movement, there is little to no support for the practice of mandatory drug testing. One commentator recently referred to employment drug testing as

---

<sup>†</sup> B.A., M.A. (Wilfrid Laurier), LL.B. anticipated 1996 (Dalhousie).

chemical McCarthyism.<sup>1</sup> The motivation behind this position is fairly straightforward. Drug testing is generally seen as being an inappropriate and unwarranted violation of employees' basic privacy rights.<sup>2</sup> At the other end of the spectrum, employers argue that they have a valid interest in maintaining a drug-free workplace, and that this form of monitoring is one way of achieving that goal. As McLain argues, "[d]rug testing may be the only effective way to prevent drug abuse among employees. The claims that alternative methods such as employer training. . . will work as effectively as testing are pure theory."<sup>3</sup> Proponents of drug testing would acknowledge that an invasion of privacy is occurring. They believe, however, that such a violation is justifiable.

Mandatory drug testing in the workplace as a form of employee monitoring raises numerous questions. This paper will explore the extent to which employees can claim a right to privacy in employment situations. This will be followed by an exploration into the legal framework in which drug testing programs may be implemented. Finally, the paper will consider the competing interests of employers and employees with respect to drug testing. In the end, it will be argued that mandatory drug testing in the workplace is a justifiable form of monitoring employees, and that attempts to ban its use at this point in time are shortsighted.

Before proceeding, however, it would be useful to set out the parameters of the paper. For example, there will be no attempt to analyze the issue in the context of public sector employees. The paper will focus solely on the private sector. This decision is primarily motivated by a desire to avoid opening the Pandora's Box of Charter analysis. Furthermore, it is important to consider what substances are being included in any discussion about drug testing. Typically, literature on the subject interprets drug testing as testing for drugs, both licit and illicit, as well as alcohol. For ease of reference, this interpretation will be adopted for the balance of this paper. Finally, the paper will focus on forms of employment in which safety concerns are particularly relevant. While the general

---

<sup>1</sup> E. Oscapella, "Drug Testing and Privacy" (1994) 2 Can. Lab. L.J. 324.

<sup>2</sup> See S. Charlton, "Trade Union Concerns about Substance Abuse in the Workplace" (1994) 2 Can. Lab. L.J. 439 at 440.

<sup>3</sup> R.S. McClain, "The Expanding Spectrum of Permissible Public Employee Drug Testing" (1990) 3 Detroit College of L. Rev. 727 at 765.

argument being advanced is applicable to all forms of employment, it is clear that drug testing is more appropriate, and therefore more easily justified, in certain employment situations, specifically where public and worker safety would be jeopardized by the existence of drugs in the workplace. Such employment situations would include all aspects of the transportation industry, as well as any occupation involving heavy machinery, production line equipment, and product manufacturing.

### PRIVACY RIGHTS

While there are few certainties involved in any discussion of privacy rights, it is clear that privacy is a very elusive concept. Everyone will have an idea of what they consider to be their own privacy rights, but at least within the academic realm, a generally accepted definition has yet to be devised.<sup>4</sup> Logic would suggest, however, that before we can claim a violation of privacy rights, we must have a better idea of what privacy is.

Some have argued that this lack of a definition has facilitated the erosion of privacy rights.<sup>5</sup> However, the importance of privacy has been recognized for quite some time. In legal academe, the classic position on privacy was enunciated in an article entitled "The Right to Privacy," by Warren and Brandeis:

The intensity and complexity of life . . . have rendered necessary some retreat from the world, and man, under the refining influence of culture has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his

---

<sup>4</sup> R. Wacks, *Personal Information: Privacy and the Law*, (Oxford: Clarendon Press, 1989) at 13.

<sup>5</sup> See C. Cornish and D. Lourie, "Employee Drug Testing, Preventive Searches, and the Future of Privacy" (1991) 33 William and Mary L. Rev. 95 at 97:

Part of the reason privacy is being lost is that we, as a society, do not have a clear definition of what privacy is, and consequently there is no political consensus regarding a definitive value that social progress must follow.

privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>6</sup>

The concerns described by Warren and Brandeis led to a number of concrete changes in American law. Their article acted as a catalyst in the development by American courts of the tort of invasion of privacy.<sup>7</sup> The problem, of course, is that the words of Warren and Brandeis are of little practical use in determining the scope or true meaning of privacy rights. While we are able to explain why the right to privacy is important to our society, it brings us no closer to understanding what privacy is.

With this in mind, it is perhaps worthwhile acknowledging that privacy is not conducive to one all-encompassing definition. Mr. Justice La Forest of the Supreme Court of Canada referred to privacy as the "right of the individual to determine for himself when, how, and to what extent he will release personal information about himself."<sup>8</sup> While this provides us with a general guideline, it does not offer a specific standard which will be applicable in all situations. The individual's right to privacy must be examined on a case-by-case basis, within particular contexts. Furthermore, while it seems clear that we may not know exactly what privacy is, there are fairly clear indications of when privacy rights have been infringed.

It is also clear that the development of privacy rights in Western society has largely been characterized as dealing with the relationship between individuals and society, particularly the state. As Wacks notes, "[a]t the heart of the concern to protect privacy lies a conception of the individual and his or her relationship with society."<sup>9</sup> This conclusion is clearly demonstrated by the fact that privacy rights have developed by and large in the context of criminal law, most notably in the form of search and seizure law. Most protections associated with the privacy of citizens restrain the actions of government. While the *Charter* is one of the more recent examples, legal conventions have recognized certain privacy rights for generations.

---

<sup>6</sup> Warren and Brandeis, "The Right to Privacy" (1890), 4 Harvard L. Rev. 196.

<sup>7</sup> See A. Schafer, "Privacy: A Philosophical Overview" in *Aspects of Privacy Law* Gibson ed. (Toronto: Butterworths, 1990).

<sup>8</sup> *R. v. Duarte*, [1990] 1 S.C.R. 30 at 46.

<sup>9</sup> See Wacks, *supra* note 4 at 7.

This traditional focus on privacy with respect to the interaction between the state and the individual is understandable when one considers that participation in society is not entirely a voluntary thing in this day and age. Members of society effectively give up certain rights by interacting with society. In return, society grants individuals privacy rights, along with other benefits.

In contrast, unlike the relationship between individuals and society, the relationship between employer and employee is a voluntary relationship. Employees freely choose to enter into employment relationships, and employment contracts are much less ambiguous than the social contract of political philosophy. Because the relationship is voluntary, the argument can be made that the justification behind privacy rights in the broader political context does not exist in the employment context. It is important to bear in mind that the right to privacy is being discussed in a private rather than a public context.

In terms of the current legal framework for privacy rights in Canada, there is some question as to how much protection actually exists in private relationships. In private relationships generally, and in employment relationships in particular, the state of the law in Canada is not very well developed. The Supreme Court has clearly stated that privacy is an important value in our society. In *R. v. Dyment*, Mr. Justice La Forest refers to privacy as being "at the heart of liberty in the modern state." He goes on to note that "privacy is essential for the well-being of the individual."<sup>10</sup> However, in both *Dyment* and *Duarte*,<sup>11</sup> the Supreme Court was dealing with criminal search and seizure provisions. While constitutional privacy rights may be significant, they have limited applicability in situations where a government actor is not involved. General tort law, for example, has not developed a tort of invasion of privacy in Canada. While this cause of action is prominent in the United States, its application in Canada is very limited. Canadian law does not yet recognize a tort of invasion of privacy.<sup>12</sup> Even in

---

<sup>10</sup> *R. v. Dyment*, [1988] 2 S.C.R. at 427.

<sup>11</sup> *Supra* note 8.

<sup>12</sup> See L. Klar, *Tort Law* (Toronto: Carswell, 1991) at 56. However, Manitoba, Saskatchewan, and British Columbia do have statutes making the invasion of privacy actionable. See the *Privacy Act* in each province: R.S.M. 1988, c. P125; R.S.S. 1978, c. P-24; R.S.B.C. 1979, c.336.

the United States, invasion of privacy law has developed in a compartmentalized fashion which limits its applicability to employment situations.

Statutory rights to privacy do not provide individuals with much protection either. In the employment context, most employment standards legislation does not deal with privacy in any sort of comprehensive way. Human rights legislation does provide some degree of protection of privacy, albeit in an indirect way. However, human rights legislation is constrained by the fact that violations of privacy rights must be tied to discrimination. The discrimination must in turn be tied to a prohibited ground of discrimination. Not only does this limit the way in which employees can claim privacy violations, but it also provides employers with a *bona fide* occupational requirement defence. Finally, Privacy Acts exist both at the federal level and in three provincial jurisdictions.<sup>13</sup> The provincial Acts create a tort of privacy invasion, but are of course only applicable in their respective jurisdictions.<sup>14</sup> The federal *Privacy Act* provides little protection for workers as it concerns itself mainly with government control over personal information that relates to its citizens.<sup>15</sup>

Reasonable expectations of privacy may be very much limited in private relationships. Existing protections apply almost exclusively to interaction between the state and the individual. While privacy issues are extremely important to people in all contexts, there is little overt regulation of invasions of privacy in private contexts.<sup>16</sup> Furthermore, those protections which do exist are of questionable value. It is within this context that mandatory drug testing programs in the workplace must be analyzed.

---

<sup>13</sup> See *ibid.*

<sup>14</sup> Attempts to use the various Privacy Acts to provide a remedy for invasions of privacy in employment contexts have been unsuccessful. See *United Food and Commercial Workers (UFCW) Local 1400 v. Saskatoon Co-operative Association* [1992] S.J. No. 109 (Q.B.)(Q.L.) and *Findlay v. Molson Breweries B.C. Ltd.* [1993] B.C.J. No. 1642 (B.C.C.A.) (Q.L.).

<sup>15</sup> *Privacy Act*, R.S.C. 1985, c. P-21.

<sup>16</sup> See Oscapella, *supra* note 1 at 331.

## DRUG TESTING—THE LEGAL FRAMEWORK

The unclear status of privacy rights, as discussed above, seems to indicate that comprehensive standards have yet to be articulated. The same point can be made about the legitimacy of drug testing programs. There is nothing to definitively indicate that testing programs, as part of a larger drug-free workplace program, constitute a violation of an employee's privacy or human rights. Butler notes that "[t]here are, at present, no Canadian laws at the federal or provincial level that would specifically prohibit drug testing, and there has been minimal legal precedence to provide guidance."<sup>17</sup> This is not to suggest that there is legislation which advocates or permits testing. But in the absence of a prohibition, it would appear that drug testing in the private sector is allowable.

Some have argued that testing programs, while not specifically prohibited, can be considered a violation of any number of statutes. The *Charter* could prove useful in challenging drug testing programs, although it would be of limited applicability. The biggest constraint associated with the *Charter* is that the employer must be, in the eyes of the law, a government actor.<sup>18</sup> The *Charter* could apply to private employers if the testing program was initiated in response to government regulation. In such a situation, sections 7 and 8 would be most applicable. The argument could be made that mandatory drug testing would create questions of liberty and security of the person (section 7) as well as unreasonable search and seizure (section 8).<sup>19</sup>

There are, however, significant problems with the *Charter* argument, even if the applicability threshold is overcome. The onus will be on the complainant to prove that the particular testing program infringes a guaranteed right or freedom. Furthermore, even if that hurdle can be passed, the program could still be judged

---

<sup>17</sup> B. Butler, *Alcohol and Drugs in the Workplace* (Toronto: Butterworths, 1993) at 241.

<sup>18</sup> *R. W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. See also B. Hovius, S. Usprich, and R. Solomon, "Employee Drug Testing and the Charter" (1994) 2 Can. Lab. L.J. 389: "although the distinction between government and the private sector is not always clear, the *Charter* guarantees will not be relevant to [drug testing] programmes in most situations. . . ."

<sup>19</sup> Hovius, *Ibid.* at 354.



to be reasonable in a free and democratic society.<sup>20</sup> Yet, at the same time, it would be unwise for employers in the private sector to completely ignore *Charter* evolution on this topic. The principles developed in *Charter* litigation are frequently incorporated into human rights legislation, the use of which is not limited to the public sector. As Butler notes, "employers should be guided by the general principles that have been established under the *Charter*, as they are often brought forward in human rights challenges."<sup>21</sup>

The *Privacy Act*,<sup>22</sup> and in particular the Privacy Commissioner, could have an impact in this area as well. While the Act does not specifically refer to drug testing, the issue was the subject of an investigation by the Commissioner in 1990. At that point, the Commissioner held that random testing could only be justified if the following conditions were present:

- 1) There are reasonable grounds to believe that there is a significant drug use or impairment problem;
- 2) The problem threatens the safety of the public or other employees;
- 3) The behaviour of the employee can not be otherwise adequately be supervised;
- 4) There are reasonable grounds to believe that testing will reduce the safety risk; and
- 5) There are no practical, less intrusive alternatives.<sup>23</sup>

However, as with the *Charter*, these findings are limited in application. Like the *Charter*, the "Act applies to government institutions; it does not apply to the private sector."<sup>24</sup> Furthermore, the issue of drug testing is not addressed directly in provincial Privacy Acts either. While jurisprudence under the *Privacy Act* may be useful in analyzing the issue, it is unlikely to provide the basis for a successful challenge to such a program in the private sector.

---

<sup>20</sup> *Ibid.* at 390.

<sup>21</sup> B. Butler, *supra* note 17 at 243.

<sup>22</sup> *Supra* note 15.

<sup>23</sup> Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: Supply and Services Canada, 1990) at 23-24.

<sup>24</sup> B. Butler, *supra* note 17 at 245.

Labour or employment standards legislation may be one forum for pursuing challenges to workplace drug-testing programs. This provincial legislation that applies directly to the private sector would be better suited for this sort of challenge. Without the application threshold problem, the program can be reviewed on its merits. However, under both the Nova Scotia<sup>25</sup> and Ontario<sup>26</sup> acts, privacy is not a protected right. While the legislative framework might provide a structure for mounting a challenge, the substantive rights guaranteed under the legislation do not include privacy. Until the legislation or regulations are amended to extend such protections, labour standards legislation will be of questionable value with respect to challenging drug testing programs.

Currently, the legislative framework which offers the greatest chance of challenging a testing program is human rights legislation. As with employment standards legislation, it applies directly to the private sector, both at the federal and provincial levels. Consequently, the main obstacles associated with the *Charter* and the *Privacy Act* are removed.

The Canadian Human Rights Commission addressed the issue of workplace drug testing with *Policy 88-1*.<sup>27</sup> The Commission's policy shifts the onus onto the employer to show that drug testing is necessary to determine if the employee can perform the job in a safe, efficient manner.<sup>28</sup> The employer "would have to identify a drug-free workplace as a *bona fide* occupational requirement, most likely through a link to safety."<sup>29</sup> Furthermore, the policy notes that testing should likely occur only after deficiencies have been noticed in the performance of the job.<sup>30</sup> The obvious implication of this criteria is a decreased acceptance rate of random testing procedures.

In order to mount a successful challenge to a drug testing program under human rights legislation, provincial or federal, a number of issues must be dealt with. First, the employee would have to put forward a ground of discrimination. This aspect of the argument is dependent on the grounds enumerated in the relevant

---

<sup>25</sup> *Labour Standards Act*, R.S.N.S. 1989, c. 246.

<sup>26</sup> *Employment Standards Act*, R.S.O. 1990, c. E-14.

<sup>27</sup> Canadian Human Rights Commission, *Policy 88-1: Drug Testing* (Ottawa: Self-published, 1988).

<sup>28</sup> B. Butler, *supra* note 17 at 247.

<sup>29</sup> *Ibid.*, at 247.

<sup>30</sup> *Ibid.*

legislation. However, more often than not, disability is a prohibited ground of discrimination. Generally, a disease is often treated as a disability. Furthermore, a drug or alcohol dependence is starting to be treated as a disease. Indeed, this reflects itself in the *Canadian Human Rights Act's* definition of "disability" which includes a past or present dependence on alcohol or drugs.<sup>31</sup> The employee, then, would have to demonstrate that the employer was discriminating on the basis of a disability. The employee would also have to show some act of discrimination, or adverse impact following a positive test result. While this adverse impact could reflect itself in various ways, the likely scenario is of an employee being terminated after a positive test.

However, it is worth noting that a recent Canadian Human Rights Tribunal did not accept this argument. *Canadian Civil Liberties Association v. Toronto Dominion Bank*<sup>32</sup> is one of the few examples of a drug testing program reaching adjudication. Under the Bank's program, all new and returning employees were required to undergo a drug test. All applicants were informed about the test, and were required to sign a Drug Screening Authorization Form.<sup>33</sup> While the Tribunal recognized that drug-dependent persons were protected from discrimination under the Act,<sup>34</sup> it held nevertheless that the complainant had failed to prove a *prima facie* case of discrimination.<sup>35</sup>

The outcome of the case might well have depended on the comprehensive drug-free workplace program which the Bank had instituted. In effect, drug testing was one aspect of a larger program, which included assessment, treatment, and rehabilitation programs. Furthermore, the employee would not be terminated until a third positive test result. The Tribunal held that "the ultimate dismissal is not based upon a perceived disability (drug dependence), but upon the persistent use of an illegal substance even though in some instances that may include a drug-dependent person."<sup>36</sup>

---

<sup>31</sup> R.S.C. 1985 c. H-6, s. 25.

<sup>32</sup> [1994] 6 C.C.E.L. (2d) 196.

<sup>33</sup> *Ibid.* at 196.

<sup>34</sup> *Ibid.* at 209.

<sup>35</sup> *Ibid.* at 212.

<sup>36</sup> *Ibid.* at 212.

Furthermore, the Tribunal held in the alternative that even if the Bank was shown to have discriminated, it made reasonable efforts to accommodate the employees who tested positive. It noted that the bank could not be expected to continue treatment programs for its employees indefinitely. The requirement of indefinite treatment programs was held to be unreasonable, and would create undue hardship for the employer.<sup>37</sup>

### EMPLOYER INTEREST IN DRUG TESTING OF EMPLOYEES

Up to this point, the most accurate way to describe drug testing programs would be as a legally permissible form of employee monitoring by employers. However, it is not adequate to stop at this point, largely because of the extensive literature that exists calling for legislative reforms prohibiting drug testing.<sup>38</sup> Such literature documents, typically in dramatic fashion, the extent of the privacy violation which occurs when drug testing is implemented. However, such literature rarely takes the time to examine the legitimate employer goals and interests associated with implementing a testing program. In short, any comprehensive review of the legitimacy of drug testing programs must consider both sides, and come to some sort of determination as to where the balancing of competing interests should take place. We must remember that while these programs are much more cost-effective than they used to be, a large organization will likely incur substantial costs in implementing such a program. To justify the expense, the employer will have to have more than just a passing curiosity in the lives of its employees. The implementation of a drug testing program is a business decision, motivated by business factors.

Over the past decade, the use of drug testing in major corporations in the United States has increased dramatically. It has been estimated that more than 80 per cent of major corporations have implemented such tests in one form or another.<sup>39</sup> Logic suggests that employers will not invest the time, energy and

---

<sup>37</sup> *Ibid.* at 214.

<sup>38</sup> See Oscapella, *supra* note 1, and Charlton, *supra* note 2 as examples.

<sup>39</sup> R. Willette, "Drug Testing Procedures" (1994) Can. Lab. L.J. 310 at 323.

expense of implementing and maintaining these programs solely to invade the privacy of their employees. Employers have a number of legitimate interests in maintaining a drug-free workplace. These interests are centered around three areas: employer duties, employer liability, and employer efficiency demands. Each of these categories will be analyzed below.

Dealing first with employer duties, while the law gives employers many rights, it also imposes a number of duties. These duties come in a variety of forms, but for the purposes of this paper, the relevant duties occur in the context of maintaining a safe work environment. For example, under occupational health and safety legislation, employers are typically required to ensure that the workplace is safe for both employees and the public in general. Section 9 of the Nova Scotia *Occupational Health and Safety Act* requires employers to take "every precaution that is reasonable in the circumstances to ensure the health and safety of persons at or near the workplace."<sup>40</sup> The same section goes on to place a positive obligation on employers to provide, among other things, such supervision as may be required to protect the health and safety of employees.<sup>41</sup>

The real question, then, is whether or not the implementation of drug testing programs increases the level of safety in the work place. The results of drug testing programs in the United States would seem to indicate that safety has been improved in the workplace. Moyer provides the results of three different corporate drug testing programs.<sup>42</sup> One company, IMC Fertilizer, reported a reduction of approximately 50% in the accident rate over the first several months of the testing program, with a further reduction of more than 40% five years after the start of the program.<sup>43</sup> Southern Pacific Railroad implemented an alcohol and drug testing program for all employees in "safety sensitive" positions. Over the five-year period following the beginning of the program, personal injuries decreased from 15.5 per 200,000 worker hours in 1983 to 5.8 per

---

<sup>40</sup> *Occupational Health and Safety Act*, R.S.N.S. 1989, c. 320 s. 9.

<sup>41</sup> *Ibid.*

<sup>42</sup> H. Moyer, "Ontario Law Reform Commission's Report on Drug and Alcohol Testing in the Workplace" (1994) 2 Can. Lab. L.J. 538 at 540.

<sup>43</sup> *Ibid.*, citing J. Wilcox, "Drug Screening: One Company's Obstacle-filled Road to a Successful Program" *Mining Engineering* (November 1987): 1003-06.

200,000 worker hours in 1988.<sup>44</sup> Finally, after Southern California Edison Co. implemented mandatory random testing in 1988, failure rates dropped from three per cent to under one per cent.<sup>45</sup>

Clearly, the drug testing programs must have had some impact on the safety levels of these workplaces. Given the highly successful results of these programs, one would have to question how an employer could be challenged for implementing them. While the studies may not be able to show a causal link between the testing and increased worker safety, the conclusions are nonetheless impressive. As we saw above, it is clear that employers are required to maintain a safe working environment. Furthermore, it is fair to conclude that, at least in certain situations, drug testing programs can improve the level of safety in the workplace. Drug testing programs, as Bell points out, "can be used to detect employees with drug abuse problems, thus avoiding the potential threat such employees pose to themselves, their co-workers, and the public at large."<sup>46</sup> Thus, it is submitted that compliance with the requirements of occupational health and safety legislation requires employers to implement drug testing programs.

While the strongest employer argument in favour of drug testing is grounded in public safety, issues of employer liability are clearly relevant as well. Employers may be held legally responsible for the actions of their employees while in the course of employment. It seems clear that in light of this common law principle, employers have an obvious interest in determining whether or not their employees are substance abusers. It has been demonstrated that drugs and alcohol can have a variety of effects on users, many of which will increase the likelihood of the employee having an accident, for which the employer will be liable.

---

<sup>44</sup> Moyer, *ibid.*, citing R. Taggart, "Results of the Drug Testing Program at Southern Pacific Railroad" NIDA Research Monograph 91, *Drugs in the Workplace: Research and Evaluation Data*, Vol I (Washington: US Dept. of Health and Human Services, 1990).

<sup>45</sup> Moyer, *ibid.* citing C. Osborn and J. Sokolov, "Drug Use Trends in a Nuclear Power Facility: Data from a Random Screening Program" NIDA Research Monograph 100, *Drugs in the Workplace: Research and Evaluation Data*, Vol. II (Washington, US Dept. of Health and Human Services, 1990).

<sup>46</sup> S. Bell, "Drug Testing in the Non-unionized workplace: Search and Seizure, Procedural Due Process, and Maine's Drug Testing Statute" (1991) 43 Maine L. Rev. 129 at 130.

Furthermore, the issue of liability is even more significant when considered in conjunction with recent trends in the insurance industry. Increasingly, insurers are including blanket exemption clauses in insurance policies which relieve the insurer of liability if alcohol or drugs are found after an accident. Presumably, the insurer is going to use the same testing technology that an employer would use. Thus, not only will the employer be liable for the employee's actions, but steps taken by the employer to protect itself through the purchase of insurance will be of no use. In light of this, the desire of employers to institute drug testing programs is understandable.

As a result, in terms of risk management, employers might be well served by terminating employees who test positive for drugs or alcohol, even if such termination does not come after extensive employer-sponsored treatment. While such a course of action might be shown to violate human rights legislation, it is fair to suggest that potential employer liability under such legislation is a known quantity, and would never approach the potential staggering liability associated with a significant workplace accident. While this might seem to be a harsh approach, a cost-benefit analysis would indicate that violating human rights legislation is preferable to possibly facing significant liability at some point in the future. I would submit that most employers are likely to opt for short-term costs as opposed to long-term uncertainty.

Finally, employers have legitimate efficiency interests in ridding the workplace of drugs. While it is certainly fair to suggest drug use increases the likelihood of accidents in the workplace, there are similarly a number of other side-effects of drug use, including a variety of factors which have a negative impact on employee efficiency:

In other words, the workplace suffers some of the negative results of drug abuse in the form of injuries, lost productivity, inefficiencies of various kinds, absenteeism and property damage. There are even more insidious losses in the shape of poor morale and general frustration

resulting from the failure of organizations to handle the problem of drug abuse in effective ways.<sup>47</sup>

While the lengths to which employers should be allowed to go to achieve greater efficiency may be questionable, it is clear that the employer does have a legitimate interest in pursuing greater efficiency. Mandatory drug testing programs are one way of achieving the desired ends.

### CONCLUSION

Privacy is a valued right in our society, and its protection is very important. However, it is equally clear that in our society, no rights are absolute, including privacy rights. The scope of this paper would have been very different if employee privacy rights were considered in a purely theoretical sense, in a factual vacuum. However, the fact is that an employee's right to privacy has to be balanced against competing rights and interests. This already happens in other contexts, such as roadside breathalyzer tests and airport searches. In those situations, it is understood that the benefits to society of infringing privacy rights of individuals outweigh the costs associated with those violations.

The real question, then, is where this balancing of competing rights and interests should take place. With roadside tests and airport searches, it is clear that the dividing line has been drawn so as to protect public safety. At the very least, the public safety standard should be equally applicable in employment relations. However, in light of the voluntary nature of the employment relationship, the employer is justified in considering factors beyond just public safety when choosing to implement a drug testing program.

This paper is not arguing that all employers should implement mandatory employee drug-testing programs. Instead, this paper has argued that, in certain circumstances, largely motivated by the type of employment involved, employers will have a legitimate interest in maintaining a drug-free workplace. It has further been suggested that in the context of a broad program that includes counseling and

---

<sup>47</sup> M. Shain "The Extent and Nature of Drug-Related Problems in the Canadian Workplace" (1994) 2 Can. Lab. L.J. 291 at 292, 293.



therapy, drug testing can be an important factor in achieving a drug-free workplace. While such a course of action may indeed violate an employee's privacy rights or interests, the evidence indicates that such a violation is justified.