

SUBMISSIONS TO:

The Honourable Bob Mackenzie
Minister of Labour for Ontario

RE:

Mandatory Drug Testing
in the Workplace

FROM:

Canadian Civil Liberties Association
(CCLA)

DELEGATION:

Walter Pitman
(Former CCLA President,
Retired college president)

John McCamus
(CCLA Board Chairman,
Former Osgoode Hall
Law Dean)

Lois Wilson
(CCLA Vice-President,
Former Moderator,
United Church of Canada)

Terry Meagher
(CCLA Secretary,
Former Secretary-Treasurer,
Ontario Federation of Labour)

Michael DePencier
(CCLA Board Member,
Business Executive)

Cliff Pilkey
(CCLA Board Member,
Former President,
Ontario Federation of Labour)

A. Alan Borovoy
(CCLA General Counsel)

Catherine Gilbert
(CCLA Projects Director)

Carla Adams
(CCLA Research Associate)

Introduction

The Canadian Civil Liberties Association (CCLA) is a national organization with 8 affiliated chapters across the country, more than 7000 paid individual supporters, and more than 50 groups which themselves represent several thousands of additional people. The roster of support includes people from a wide variety of occupations, callings, and interests: writers, lawyers, broadcasters, trade unionists, homemakers, ethnic minorities, etc.

Among the objectives which inspire the activities of the Canadian Civil Liberties Association is the protection of the dignity and privacy of the individual. It is not hard to appreciate the relationship between this goal and the issue of mandatory drug tests in the workplace. It is clear that, to condition people's right to a job on their willingness to provide urine specimens to their employers, represents a significant encroachment on their privacy and dignity. At the same time, a number of employers have argued that such testing serves overriding public and business interests.

The ensuing submissions are designed to determine which of the contesting values raised by this practice ought to prevail and by how much.

The Current Issue and the Proposed Remedy

According to a recent announcement, Imperial Oil Limited is about to launch a new substance testing program. This program appears to be the latest in a growing number of similar efforts that have been

undertaken by Ontario employers¹. At Imperial Oil, the plan is to require all newly-hired employees to provide urine specimens in order to be confirmed in their new jobs. Those transferring to safety sensitive jobs will have to do likewise. Those occupying safety sensitive jobs will be subject to random urine tests without advance notice. A failure to provide the requisite urine specimen, a refusal to provide it, or a positive test could subject the employee to discipline or discharge. Employees have been warned that, if they test positive, they cannot avoid discipline by requesting counselling or assistance at that stage².

In the opinion of the Canadian Civil Liberties Association, there is simply no excuse for employees or prospective employees in this province to be required, on a universal or random basis as a condition of employment, to share their urine with strangers. In the first place, such fluids are an intimate part of the body. In the second place, the need to ensure the integrity of a specimen could well lead to an insistence that the production of the specimen be witnessed. It is not hard to understand how urinary surveillance could be seen as an indignity. In the third place, urinalysis reveals a lot about a person's health and lifestyle but virtually nothing that is job-relevant.

The most that a positive test could reveal is some exposure to an

¹ According to the Canadian Bar Association-Ontario's Report on Mandatory Drug Testing, July 1987, p.7:

"Mandatory drug testing in the workplace is fast becoming one of the most significant and contentious issues in management/labour relations in Canada ... Canada is particularly vulnerable to such proposals due to the presence of Canadian subsidiaries of American parent companies who have initiated drug testing policies."

Other examples, where such programs, in varying degrees, have been introduced, include: Reichhold Limited; ADM Agri-Industries Ltd.; Waste Management Incorporated.

² Imperial Oil Limited Alcohol and Drug Policy. October 1991, pp.3,6.

impugned drug within the few days preceding the test³. There is no reason to believe that more than a small minority of those in contact with such drugs have developed a dependency on them⁴. Since tests cannot determine the amount involved, they cannot sustain even an educated guess as to the likelihood of past or current impairment. A drug test does not reveal whether there was intentional consumption or accidental exposure; it does not indicate whether the contact occurred at work or at home, on the job or at play. There is no way to know from the test whether the subject is a frequent, addicted, occasional, or a rare user - if, indeed, it could be assumed that the subject is a user at all. Thus, the test cannot determine whether the contact produced impairment, enhancement, or anything relevant.

Moreover, the literature does not demonstrate a relationship between exposure to such drugs and generally impaired job performance. The material is too mixed to provide guidance. A recent study at a hospital in the United States, for example, tested about 180 employees and then monitored their job performance. Twelve percent of them tested positive. During the period of the study, 11 drug-negative employees were fired; no drug-positive employees were fired⁵. Another study found that there were a greater number of demotions among drug-negative than

³ Employee-Related Drug Screening: A Public Health and Safety Perspective, Addiction Research Foundation, March 1987, p.3. Drug Testing and Privacy, The Privacy Commissioner of Canada, (Supply and Services Canada), 1990, p.11.

⁴ Anglin, M.D. & Westland, C.A., "Drug Monitoring in the Workplace: Results From the California Commercial Laboratory Drug Testing Project", 1989, National Institute on Drug Abuse, Research Monograph 91, Drugs in the Workplace: Research and Evaluation Data; pp.81-96.

⁵ Parish, D. C., "Relationship of the pre-employment drug testing result to employment status: A one year follow-up.", 1989, Journal of General Internal Medicine 4:44-47.

among drug-positive employees⁶. This, of course, is not to suggest for a moment that consuming drugs assists job performance. It is only to impugn the proposition that exposure to drugs is any kind of reliable indicator of job impairment.

Suppose, for example, a Monday morning urine test could reveal that an employee had consumed three martinis within the past 72 hours. No sane employer would be prepared to inflict adverse job consequences upon an employee on the basis only of such evidence. Why, then, should an employee face adverse consequences for a positive urine test that revealed nothing more than exposure to marijuana or cocaine within the last 72 hours? In none of these cases, could such evidence support the conclusion that the employee had come to work impaired. In the absence of any demonstrated jeopardy to work performance, the employee's week-end activities should be none of the employer's business.

The Canadian Civil Liberties Association would not necessarily object to a narrowly focused test - for impairment - of safety sensitive job holders. At the U.S. Space Agency, for example, pilots and astronauts are required to undergo certain hand-eye coordination tests⁷. Computer games have been introduced to the market that are designed to check employee fitness⁸. Breathalyzer machines can also detect impairment from alcohol. A narrow test of fitness is one thing; a broad probe of lifestyle is something else entirely. According to reports, factors such as physical fatigue

⁶ Winkler, H. & Sheridan, J., "An examination of behavior related to drug use at Georgia Power Company", Paper presented at the National Institute on Drug Abuse conference on Drugs in the Workplace: Research and Evaluation Data, Bethesda, Md., September, 1989.

⁷ Drug Testing in the Workplace. American Civil Liberties Union Briefing Paper Number 5.

⁸ "A video game that tells if employees are fit for work", Business Week, June 3, 1991
"RE: Testing and Transportation Safety" Memorandum, Gene Guerrero and Lew Maltby, American Civil Liberties Union, September 24, 1991, pp.4,5.

have been identified as a major cause of certain serious accidents. Paradoxically, therefore, an employer, fixated on the drug issue, could inflict on the public a dangerously unfit employee who passed the urine test but was never even examined for impairment.

The Canadian Civil Liberties Association is currently assisting certain affected employees in processing complaints under the Ontario Human Rights Code. In our view, however, the Code provides inadequate redress. There, the issue is whether the particular program involves discrimination on the basis of handicap. It is well known that human rights investigations could take many months, perhaps even years, before a finding, let alone an order, is made. Moreover, the issue of discrimination, while valid, is really beside the point. Universal and random urine tests represent a gratuitous invasion of privacy and dignity. That is the central issue.

There is simply no excuse to permit employers to foist these gratuitous indignities on their employees. Whatever arguments there might be for permitting a urine test when there are reasonable grounds to suspect misconduct of a particular employee, there is no valid argument for requiring such tests on a universal or random basis. Accordingly, the Canadian Civil Liberties Association urges the Minister of Labour to introduce legislation, at the earliest convenience, that will prohibit employers outright from requiring their employees or prospective employees, on a universal or random basis, to provide urine samples or other bodily fluids as a test for drugs. If employers contend that their circumstances are so special that they ought to be exempt from such a prohibition, let them come forward and make their case. The legislative process, with its committee hearings, can readily accommodate exceptional situations. The need for a general prohibition, however, is clear. We ask the minister to take this important initiative.

Summary of Recommendations

The Canadian Civil Liberties Association urges the Minister of Labour to introduce legislation, at the earliest convenience, that will prohibit employers outright from requiring their employees or prospective employees, on a universal or random basis, to provide urine samples or other bodily fluids as a test for drugs.