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Drug Use Testing: The Canadian Scene

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ABSTRACT: Mandatory drug testing became a public issue in Canada during the summer of 1986 as a result of action taken in the United States. Initial reactions were emotional and polarized. Of prime concern currently are the employment-related issues; there is emphasis on facilitating access to employee assistance programs for workers having alcohol or drug abuse problems. There is no legal prohibition of testing, but there have been demands for such legislation. Testing of railway workers for alcohol and drugs has been proposed, subject to strict conditions, for employees in designated positions (where public safety is at risk), for cause and after an accident. Public reaction will be taken into account before these proposals are implemented.

KEYWORDS: toxicology, workshop, drug use testing, Canada

Mandatory testing of employees for drug use became a public issue in Canada in the summer of 1986, largely as a result of action taken in the United States. Before the publicity surrounding the new direction of the war against illegal drug use in the United States and the proposal to seek out users of illegal drugs in government employment by means of mandatory urine testing, there was comparatively little interest or discussion in Canada about drug use in the workplace. Only when lifestyle preferences impinge upon the safety of others, or when alcohol or drug use results in obvious intoxication in the workplace, is there seen to be a need for action.

Many collective bargaining agreements in Canada contain provisions for referral to employee assistance programs, and this route is often preferred to disciplinary action.

There was some concern in Canada that, because some large U.S. companies were requiring their U.S. workforces to provide urine samples for analysis for drugs, there would be such demands made also in branch plants operating in Canada.

Predictably, the initial reactions were emotional and polarized. The general tone was that such testing implied snooping into lifestyles, that it was an affront to personal dignity and privacy, and that it had no place in the workplace because it should not be the concern of the employer. Indeed, the possible imposition of mandatory testing was seen as a threat to existing labor-management arrangements for seeking discrete help for employees having alcohol, drug, or other personal problems through employee assistance programs.

This is not to indicate that there were not the more general concerns in Canada about

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the criminal aspects of illegal drugs and the illegal use of drugs or the use of drugs by athletes to enhance performance. In the workplace, however, the concerns were about the impact of testing programs on labor relations and separately, about the implications of alcohol or drug use on individuals and on public safety. A third concern, that attracted much poorly informed comment, related to the perceived problems associated with the actual tests, particularly the procedures, analytical methods, and interpretation of results.

Background

The effects of alcohol and of many drugs on a person's ability to perform a variety of functions are well recognized. What is not known, however, is the extent to which the use of alcohol, or drugs of any kind, by workers adversely affects job performance. There are no statistics, only anecdotal comments and perceptions.

As a result of statements made to the Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, that use of alcohol and drugs by miners is a factor contributing to accidents, some effort was made to seek information about the relationship between alcohol and drugs and accidents in the workplace. Shain [1], in a report to the Commission, discussed various estimates and concluded that, in addition to the 10 to 20% of the employed population who may be problem drinkers, there are another 1 to 5%, probably younger in age, who misuse drugs and whose workplace performance is thereby affected. In its report dated 1981, the Commission [2] recommended that a study be undertaken to determine the extent of the relationship between alcohol and drug use and accidents in some of the mining operations in Ontario, but the inherent practical difficulties of doing this do not seem to have been recognized. The Commission noted the sensitivity of management in the metal mining industry in Ontario to problems associated with alcohol and drug abuse and stressed the value of employee assistance programs. Note also that the incidence of alcohol- and drug-related accidents in the mining industry is no greater than in industry generally.

The purpose of this paper is to identify and discuss the issues raised in Canada, and more particularly in Ontario, since the summer of 1986. A brief review of the jurisdictional issues will precede consideration of the drug testing issue in the context of the relevant legislation and, more particularly, the employment-related concerns.

Issues Raised

Terminology

"Drug use testing" and "mandatory drug testing in the workplace" are terms that have been used, somewhat loosely, to describe the analysis of a urine sample for evidence of drug use. The implication usually is that a "drug" is "bad," but there is no consistency in terminology and often the reader is left to guess at the nature or identity of the "drug" of interest. The public debate, as reflected by media coverage, has been confused; there appears to be a lack of knowledge or a lack of understanding of the facts. This is no surprise to anyone who has ever worked in the drug field, since the use of language and the terminology used to describe drug use, misuse, abuse, and dependence is not always consistent. Indeed, it is often difficult for professionals to define the conditions resulting, for example, alcoholism or drug dependence, and the criteria against which to assess an individual case. When one adds the threat to invade personal privacy and the challenge associated with revelations of lifestyle preferences and introduces the idea of the employer as a policeman, an already sensitive issue is escalated into an inflammatory situation.

Objectives of Testing

Many commentators seemed to assume that testing was to be for illegal drugs and presumably, therefore, that the objective was to pass moral judgement on the individual, though there were no explicit references to crime or criminal behavior.

Quality of Analyses

Others referred to "cheap tests" and fuelled anxiety that action against individuals would be based on unreliable test results. There was rarely any mention, at least in the press reports, of the need to ensure that basic forensic-science standards were met. The option to pursue civil redress, for action taken against an individual because of false test data, was not seen as a realistic option for most workers because of the legal costs of initiating litigation and the time required for resolution of a claim.

Implications

Some commentators identified infringement of human rights as a major issue and were appalled particularly about the indignity and affront to privacy implied by supervision of urine specimen collection.

Public Commentary in Canada

The Premier of Ontario was quoted [3] as saying that there would be no drug tests for workers, that mandatory testing of provincial employees would be a very substantial invasion into people's privacy, and that compulsory testing (for anybody) was not being considered.

By November 1986 it was reported in various publications [4] that drug testing was being carried out in Canada in the armed forces and on prison inmates and that testing was required of job applicants by Air Canada and American Motors (Canada). Several other companies were reported to have drug testing schemes under consideration at that time. Reactions from organized labor were hostile. The Canadian Labour Congress policy statement indicated its opposition to mandatory drug testing or employment-related drug screening for members and job applicants as a clear violation of basic human rights and urged action to expand education, rehabilitation, counselling, and identification of workplace and social stressors. The Canadian Autoworkers Union and the Ontario Federation of Labour reacted similarly, and there were demands for legislation to prohibit employers from imposing a test requirement on employees.

The Ontario Racing Commission implemented a policy that required exercise riders to submit to random tests for cocaine and marijuana; some 18 months earlier, it had introduced breath tests for alcohol [5].

At the end of November 1986, Ministers from all jurisdictions in Canada responsible for labor issues and occupational health and safety collectively agreed to consider the problems and the options available [6].

At a meeting in February 1987, the Canadian Bar Association passed an interim motion expressing opposition to compulsory testing without appropriate legislative safeguards; there was some doubt expressed about whether or not it violated the Canadian Charter of Rights and Freedoms [7]. A report was released in July 1987 [8].

In October 1987, the Ontario Human Rights Commission [9] issued a policy document concerning the use of drugs and alcohol testing by employees at the interview stage and during employment. This was widely reported [10]. Shortly afterwards, an all-party Committee of the House of Commons released a report [11] that recommended that employers not introduce mass or random drug screening of either job applicants or employees. The

Committee defined seven conditions that should be met for screening of employees for drug use, when such use constituted a real risk to safety. It recommended that a policy containing the specified safeguards be developed and implemented for all employees of the federal government, its Crown Corporations, its agencies, boards, and commissions and that the Government of Canada should consider legislation to limit and control mandatory screening in the private sector.

Newspaper reports [12] of a conference of police chiefs in Toronto quoted the medical director of General Motors of Canada as having dealt with 3000 cases of substance abuse in the past seven years at the Oshawa (Ontario) plant, from which it was estimated that 10 to 15% of the 2000 workers at the plant have a problem with some type of drug abuse. At the same conference, the experience of drug testing of applicants at Canadian-Pacific (CP) Rail (June to November 1987) was that 17 to 20% of applicants showed evidence of marijuana use. Some 15 corporations were said to conduct some type of drug testing.

In December, with ever growing opposition to drug testing, Chrysler Canada Ltd, which had taken over the plant previously operated by American Motors (Canada) where testing was required of job applicants, announced that the practice of requiring tests had been discontinued [13]. This brought the Canadian operations of Chrysler into conformity with the practice in other plants.

At a one-day conference (3 Dec. 1987) organized by the Canadian Centre for Occupational Health and Safety (CCOHS), a speaker from a drug testing laboratory was quoted as saying that the number of drug screening tests in Ontario and western Canada might reach 10 000 this year, in contrast with some U.S. laboratories which perform as many as 1000 per day. At the same meeting, a professor of law said that he had concluded that under current law, an employer does have the right to make workers undergo drug testing. The employer is granted the prerogative to expect peak productivity in support of a demand for mandatory testing. However, calls for drug testing were referred to by speakers at the meeting as "a red herring" and "a moral crusade" [14].

Analysis

Much of the apparent confusion may be attributed to the major assumptions made by many of those who have joined in the public debate. Some fundamental questions have neither been posed nor answered:

1. What is the objective of testing?
2. What drug(s)/substance(s) are under consideration?
3. Are all drugs necessarily bad?
4. Will testing of urine specimens assist in achieving the objectives?

The public debate has been confused further by a number of additional factors:

- (1) terminology, relating both to drug use and to testing for drug use;
- (2) lack of valid statistics, coupled with the problem of convincing lay persons that the use of a questionnaire approach is not a panacea in assessing the extent of drug use in the population;
- (3) the lack of a clearly defined objective for testing;
- (4) the lack of a strategy to develop objectives and process for testing where testing is seen to be desirable;
- (5) the implied threat of the invasion of personal privacy to pass judgment on life-styles;
- (6) the poor recognition of the health implications of drug use, including the benefits as well as the deficits of drug use;
- (7) the greater emphasis on social rather than medical implications of drug use;
- (8) the threat that the employer may assume the role of policeman in detecting drug use;

(9) other employment-related issues, for example, implications for the ability to perform work or the implications of handicap while using drugs; and

(10) the lack of information about testing procedures, sensitivity, reliability, precision, and the proper collection of specimens and interpretation of results.

The key issue, in my view, is to determine whether the underlying concern relates to illegal drug use in society or to detection of drug-induced impairment of performance at work. If the former, then, it would become relevant to test only for illegal drugs. However, it is not clear why the government would expect or require employers to become part of the process and to bear the cost of testing programs.

The more important issue appears to be the public safety aspect of the detection of drug-induced impairment of performance of work. If this were the true objective, then random testing of urine specimens will rarely provide suitable evidence to corroborate an allegation of impaired function. Indeed many of the considerations that apply to the evaluation of alcohol- or drug-induced impairment or both and the ability to drive motor vehicles on the highway would become relevant to the workplace.

The Canadian Workforce

There are approximately 20 million Canadians 15 years of age and over, with more females than males. The corresponding figure for Ontario, which is the most industrialized of the provinces, is 7.3 million.

Federal and Provincial Jurisdiction

Responsibility for employment-related legislation, including occupational health and safety, falls primarily within provincial jurisdiction. The federal government, however, has responsibility for its own employees and for workers involved in interprovincial communications and transportation and in some other limited undertakings that have been declared for the benefit of Canada.

In Ontario, approximately 3.5 million workers are covered by provincial occupational health and safety legislation; agricultural workers are excluded (approximately 150 000), as are those subject to federal law (interprovincial transportation, communications, federal government employees, and so forth). The Canadian workforce is approximately 37.6% unionized; the corresponding proportion in Ontario is 31.5% (non-agricultural, end of 1986).

Legislation

The Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* governs relationships between government and individuals. In a ruling made in December 1986 by the Supreme Court of Canada, the *Charter* applies to the legislative, executive, and administrative branches of the government and thus appears to afford the protection of the *Charter* to any public servant.

Several sections are relevant to the drug testing issues but, as yet, many of the provisions have not been tested in the courts. The *Charter* guarantees life, liberty, and security of the person (Section 7), protection against unreasonable search and seizure (Section 8), protection from cruel or unusual treatment or punishment (Section 12), and protection against self-incrimination (Section 13). The individual has the right to equal protection and benefit under the law without discrimination (for example, on handicap).

Section 7 of the *Charter* provides that

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In a decided case, the concept of “the security of the person” includes protection of a person’s bodily substances. It would appear that requiring provision of a specimen of urine or blood may violate the right to security of the person.

A mandatory and random testing program for federal penitentiary inmates has been held to violate this section of the *Charter*. The decision is under appeal. It appears that, had there been grounds for reasonable suspicion of drug use, a different decision might have been reached.

Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. The section requires that an assessment be made to determine whether, in a particular situation, the public interest in noninterference by government must give way to intrusion of privacy in order to advance the objectives of government. The apparent intent of the *Charter* was to avoid unjustified intrusion by the state on the rights of the individual.

On the basis of very limited jurisprudence, it appears that mandatory drug testing programs could be held to violate Section 8 of the *Charter*, whereas a selective program based upon reasonable cause might not be so held. There is, however, an overriding clause (Section 1) that guarantees certain rights and freedoms “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Human Rights Legislation

Public Sector

Any drug testing program implemented by the Government of Canada would have to comply with the Canadian Human Rights Act. This Act does not deal specifically with the issue of drug testing, but the Chief Commissioner of the Canadian Human Rights Commission has concluded that

I cannot say that the Act provides a blanket prohibition against substance testing. For example, it might be argued that substance testing, if it is used to provide assistance to employees with a drug or alcohol problem rather than to dismiss employees and if it results from observed on-the-job deficiencies, is not contrary to the Act . . . Just as clearly, however, the general application of drug and alcohol testing that results in the dismissal of individuals who test positive will be seen as potentially discriminatory and therefore contrary to the Canadian Human Rights Act [15].

Disability is a prohibited ground of discrimination under the *Canadian Human Rights Act* (Section 20) and the definition of disabled (Section 7) includes previous or existing dependency on alcohol or drugs. In another section (7) it is implied that refusal to hire or to dismiss an employee on the grounds that the person is dependent on alcohol or drugs would be considered to be discriminatory practice.

Any provincial government wishing to implement drug-testing programs would have to comply with provincial human rights legislation. This does not go so far as to define disability to include dependency upon drugs. There is no jurisprudence.

Private Sector

In the private sector, the employee is not generally protected by the provisions of the *Charter*, unless a program is authorized by legislation, when the legislation may be

challenged by invoking the *Charter*. The *Charter* will not directly apply to drug testing programs in the private sector, but human rights legislation (federal or provincial) will be applicable.

Any drug testing program in a private sector unionized workplace will have to comply with the provisions of the collective agreement, provisions contained in the relevant human rights legislation, the common law, and the *Criminal Code of Canada*. It is thought that, where a collective agreement is silent in respect of drug testing, an employer could not impose a program.

In the private sector, where the workforce is not unionized, the employer wishing to impose testing must take account of human rights legislation and the provisions of the *Criminal Code*.

Job applicants may be required to submit to medical tests, and these may include drug testing. Human rights legislation may provide some protection to the individual particularly where drug use (abuse or dependence) may be seen to amount to a disability or handicap.

The Ontario Human Rights Commission has developed a policy in relation to pre-employment medical examinations [9]. All employment-related medicals are prohibited until after a written offer of employment has been made, when the medical examination is limited to tests required to assess the person's ability to perform the essential duties of the job.

There is a large body of common law on privacy, rights to privacy, trespass, assault to the person, wrongful dismissal, and damage cases that may be relevant to development of policies relating to drug use testing. There is substantial protection for employees under labor laws in Canada in relation to requirements for drug testing and the consequences of disciplinary action.

Safety Issue

The remaining issue is if or to what extent alcohol and drug use, misuse abuse, or dependence in the workplace may compromise public safety or the safety of others. Although a mandatory or random urine testing program might be seen as a deterrent, such an approach is not likely to assist workers to obtain help with a medical problem and is unlikely to be supported by the workforce. There is some sympathy, however, for facilitating the referral of persons having problems with alcohol or drug use, to appropriate counselling, diagnostic, or treatment programs.

In Ontario, the *Occupational Health and Safety Act* contains some general provisions that, *inter alia*, require an employer to "take every precaution reasonable in the circumstances for the protection of a worker," for a supervisor to advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware, and for a worker to report to his employer or supervisor the existence of any hazard of which he knows. The 1981 Federal-Provincial Inquiry Commission, referred to previously, urged unions to urge their members to use this section in the Act in relation to workers who report for work "under the influence" or who consume drugs while on duty.

The problem in the workplace, as with drinking and driving on the highway, is who "blows the whistle" and when and against what criteria. Is it realistic to expect workplace parties to be expected to identify intoxication and to report on impairment of job function through alcohol or drug use? If suspicions were not confirmed by subsequent medical examination, allegations of harassment could follow.

In Ontario, under the Regulations relating to the mining sector, crane operators and hoistmen are required to have medical certificates; these require that the person be certified to be physically and mentally fit to discharge the duties. The mining Regulations also contain the only explicit reference to alcohol or drugs:

14.—(1) No person under the influence of, or carrying, intoxicating liquor, shall enter or knowingly be permitted to enter a mine or mining plant.

(2) Subject to subsection 3, no person under the influence of, or carrying, a drug or narcotic substance shall enter or knowingly be permitted to enter a mine or mining plant.

(3) A person required to use a prescription drug and able to perform his work may enter a mine or mining plant upon establishing medical proof thereof.

Workplace accidents are investigated by workplace parties and by Ministry officials under the legislation. Police may be involved, at least until any criminal implications have been assessed. The prime focus is on the causative factors which should include personal factors as well as workplace conditions and procedures.

Policies and Policy Development in Canada

In November 1986, a Policy Statement by the Canadian Labour Congress (CLC) referred to intensifying concern over alcohol and drug abuse and the impact on the workplace. It stated that alcoholism and drug addiction are illnesses and a major health and social problem at all levels of society, both within and outside the workplace. The CLC had a long history of working to combat alcohol and drug abuse by means of education, prevention, rehabilitation, and in identifying contributing workplace and social factors that need to be changed or improved.

The CLC expressed opposition to mandatory drug testing or employment-related drug screening for members and job applicants as a clear violation of basic human rights. Testing procedures were said to be questionable and not a good measure of a worker's capabilities (some improve performance) and do not allow distinction of legal, illegal, or passively inhaled drugs or the frequency of use.

Drug testing was alleged to be directed towards disciplinary measures against workers without regard to performance of the job. If there is a reason to suspect drug use, the union should be contacted, with a view to assisting the worker to get help. The CLC expressed opposition to any and all such procedures and urged action to expand education, rehabilitation, counselling and the identification of workplace and social stressors.

An Interdivisional Task Group on Employment Related Drug Screening was established by the Addiction Research Foundation (ARF) in May 1986. The task was to investigate employment-related drug testing from the perspectives of public health and safety concerns, legal issues, and drug screening methods. The Task Force made seven recommendations in March 1987 which formed the basis of a "Best Advice" document entitled "Employment-Related Drug Screening" [16].

The recommendations were

- that random, indiscriminate testing of employees and job applicants should not be implemented;
- that drug screening be considered where there was some evidence of impairment on the job,
- that the decision to test should be made by a medical practitioner,
- that preemployment and on-going random screening should be considered only for employees in unsupervised safety-related jobs,
- that there be safeguards in the procedures for collection, analysis, and reporting of results,
- that confirmed positive results should result in referral of the employee to counseling or rehabilitation or both, and
- that a formal employment policy be developed where drug testing is to be introduced.

The Canadian Bar Association of Ontario (CBAO) prepared a Report on Mandatory Drug Testing in July 1987 [8]. It noted that

. . . organisations must be willing to commit time and resources to addressing employee drug and alcohol abuse. It is incumbent upon management, unions and health care officials, to begin to work together to develop definitive, comprehensive programs which concentrate on prevention by first identifying and then addressing the underlying causes for substance abuse.

The major components of a workplace effort to address this problem are employee education, intervention and rehabilitation.

The ultimate goal is the elimination of workplace and social stresses that create an environment which encourages abuse. . . .

After examining the human rights, ethical, public health and legal implications of mandatory drug testing, the CBAO is of the view that the disadvantages of mandatory drug testing outweigh its advantages. Accordingly, the CBAO is advocating a legislative prohibition on drug testing in the workplace. In conjunction with this, we suggest and propose enhancement of preventative, educational and rehabilitative programs to deal with the matter of employment-related substance abuse.

A resolution was passed at a meeting in July 1987 to the above effect.

The Standing Committee on Health and Welfare of the House of Commons released a report entitled "Booze, Pills and Dope: Reducing Substance Abuse in Canada" in October 1987 [11]. The Standing Committee recommended that employers not introduce mass or random screening of either job applicants or employees. It noted that only in exceptional circumstances in which drug (including alcohol) use by employees constitutes a real risk to safety should screening be introduced subject to a number of conditions. The latter included that there be evidence of impairment, a secure chain of evidence, confirmed test results, and medical supervision. The committee also made a recommendation that the Government of Canada consider legislation to limit and control mandatory drug screening in the private sector.

In January 1988, the (Canadian) Transport Minister released the report of a special committee on alcohol and drugs in the railway industry [17]. The issue was the control and prevention of the use of alcohol and drugs by railway employees whose impairment could threaten the safety of the general public.

The objectives were threefold:

- to improve the safety of Canadian railways,
- to recommend means to control and to prevent use of alcohol and drugs which affect performance in the workplace on Canadian railways, and
- to protect the human rights and dignity of railway employees.

The term *drug* was broadly defined to refer to any psychoactive or body-modifying substance capable of producing dependence and harm to the user. This included alcohol and solvents as well as prescription and over-the-counter drugs.

A nationwide survey of railway personnel in safety-related occupations revealed that

- some railway workers directly responsible for the movement of trains are operating under the influence of drugs or alcohol,
- 7% of those surveyed were aware of workers drinking alcoholic beverages during shifts,
- 52% said alcohol use by employees has compromised job safety, and
- 48% said mandatory drug testing of railway operating personnel is desirable but 43% disagreed. However, 77% agreed to mandatory drug testing if it was shown that alcohol and drug use was a problem for the railways.

The report describes strict conditions that must apply in testing employees for use of drugs and alcohol. The rights of the individual and human dignity should be preserved, except where preservation of those rights conflicts with measures to protect public safety.

The Committee recommended that tests be considered for designated positions (those

in which it has been determined that the incumbent must be free from alcohol and drugs) as follows:

- preemployment and
- employees—moving from a nondesignated to a designated position,
 - after an accident,
 - for cause, where the company has reason to believe that the employee is working under the influence of drugs or alcohol, and
 - at regular medical check-up.

Testing after return to work following a three-month or longer absence and random testing of employees not on duty were considered but were not recommended by the Committee.

There was emphasis on the importance of cooperative effort of management and unions with the support of health services in the institution of a balanced employee assistance program and drug-testing program. The committee recommended that legislation be introduced.

Public comments and reactions to the report have been invited, and further developments will take account of the responses received.

Current Situation in Canada

There is no legal prohibition to drug testing of workers. However, there have been calls for legislation to prohibit drug-testing procedures in a manner similar to the prohibition of the use of polygraphs under the *Employment Standards Act* in Ontario.

There is a social climate against the random use of testing; organized labor has been vocal on the issue. Drug testing is widely regarded as an invasion of privacy.

The *Canadian Charter of Rights and Freedoms* protects against “search and seizure,” but this provision has not been tested in relation to drug testing programs.

Human Rights issues have often dominated in discussions.

The objective(s) of testing are not well defined, the procedures are a problem (there is a need for medical supervision), the analytical procedures are an issue (there is a need for standards and quality control), and interpretation is a concern, perhaps because the objective is not defined and understood.

There is some sympathy for testing for cause where there is concern for public safety or the safety of other workers or obvious impairment. Subject to safeguards, drug-use testing may well have a place if under medical supervision.

There have been suggestions for prohibition of *all* testing, but this could impose an unnecessary constraint on a conscientious physician. Also, to define the limit of testing (that is, the specific substance to be tested for) places an unnecessary burden on the laboratory analyst.

The initial reaction in Canada in 1986 was to echo reaction in the United States. However, the focus of interest and debate turned rapidly to the employment-related issues. There has been considerable emphasis on facilitating access to employee assistance programs for workers having alcohol or drug abuse problems. The workplace is not seen as an appropriate setting in which to wage war on drug abuse in the population at large.

The recent report to the Minister of Transport for Canada relating to workers in the railway industry provides a good reflection and synthesis of the current concerns and attitudes of Canadians to drug use testing.

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