Employment drug testing – a tale of two neighbours

By Eugene Oscapella

WHILE US BUSINESSES have greeted drug testing with open arms, their counterparts north of the border have taken a more cautious approach to this privacy sensitive issue.

Many major American corporations have embraced drug testing. The American Management Association conducts an annual survey of companies on workplace surveillance and medical testing. In 2000, almost 80 per cent of manufacturers tested "new hires", and 42 per cent tested current employees (the corresponding figures for the US financial services sector were 36 per cent for new hires and 19 per cent for current employees). Although employee drug testing was at its lowest level in a decade, almost half the companies surveyed in 2000 tested their employees. A 1998 study by Le Moyne University in Syracuse, NY, estimated that the United States spends $1 billion annually to test 20 million employees.

In June, the US Supreme Court also decided that school officials can require students who participate in extracurricular activities to undergo regular or random drug tests, even if there is no evidence of a drug problem at the school. The *New York Times* reported surveys showing that about 5 per cent of schools across the US have performed drug tests on student athletes and an additional 2 per cent have been testing students involved in other extracurricular activities. The US Supreme Court decision now opens the door to more extensive testing of students.

The situation in Canada is radically different. Although good statistics on employment drug testing is lacking, employment drug testing is largely viewed as an unwarranted privacy intrusion. There appears to be no school-based drug testing in Canada (although young athletes may be subject to testing by national sports bodies.).

The legal and policy climate has also militated against drug testing in employment. Canadian courts have strictly limited attempts by employers to impose drug testing. In 1990, then-Privacy Commissioner of Canada, John Grace, spoke out strongly against drug testing in all but the most restricted circumstances.

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The Canadian Human Rights Commission reached a similar conclusion in August 2002. It found that because they cannot be established as bona fide occupational requirements, the following types of workplace drug testing are not acceptable: pre-employment drug and alcohol testing, random drug testing, and random alcohol testing of employees in non-safety-sensitive positions.

The Commission saw certain other types of testing of employees in safety sensitive positions as permissible, but only if an employer can demonstrate that testing is a bona fide occupational requirement. The types of testing envisaged here were: random alcohol testing of employees in safety sensitive positions, drug or alcohol testing for "reasonable cause" or "post-accident," periodic or random testing following disclosure of a current drug or alcohol dependency or abuse.

Canada's strict limits on employment drug testing are, however, subject to two external pressures (three, if one counts the pressure from drug testing companies anxious to sell their services). The first comes from American parent companies that use drug testing extensively on their US-based employees and want their Canadian subsidiaries to do the same (Canadian law often prevents such testing). The second pressure stems from US transportation testing requirements. Canadian trucking and bus companies wishing their drivers to travel into the US may be required to develop drug- and alcohol-testing programs to comply with US regulations. The Canadian Human Rights Commission acknowledges that for trucking and bus businesses operating exclusively or predominantly between Canada and the US, not being banned from driving in the U.S. may be a bona fide occupational requirement.

For further information on drug testing visit:
www.chrc-ccdp.ca/Legis&Poli/DrgTPol_PolSLDrg/DrgPol_PolDrg.asp?l=e