

SUBMISSIONS TO:

The Toronto Police Services Board

FROM:

Canadian Civil Liberties Association  
per Alexi Nicole Wood, Policy Analyst

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## Workplace Drug Testing

The Canadian Civil Liberties Association (CCLA) is a national organization dedicated to the protection and promotion of civil liberties. It is easy to see how the protection of dignity and privacy of the individual would fall into our mandate.

The provision of urine specimens is inherently intrusive of both dignity and privacy. The CCLA has long stated, and continues to believe, 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.”<sup>1</sup> Moreover, this affront to dignity could be compounded by the fact that, in order to prevent interference with the sample, the process of furnishing the test might be monitored. Urine tests also invade a person’s privacy because they could yield medical information, including kidney disease, diabetes, and even pregnancy.

Therefore, any employer conditioning job advancement on a drug test must provide valid justification for such an encroachment. In the opinion of the CCLA, the Toronto Police Service has yet to provide such justification.

## The Ferguson Report

In 2001, then police Chief Julian Fantino retained retired judge George Ferguson to review and provide recommendations on issues arising from several high profile police corruption allegations. One of the recommendations stated that “as a condition of promotion or reassignment to a sensitive or high-risk area (e.g. drug squads, major crime units, Emergency Task Force, Intelligence Services, Mobile Support Unit, Professional Standards, Internal Affairs, etc.), members shall be required to submit to a drug testing program.”<sup>2</sup>

By way of a rationale for this recommendation, the report states that the police service “must do everything possible to ensure that no officer is on duty while under the influence of alcohol, non-prescriptive drugs or other substances that may adversely

effect his or her performance or conduct.” The Report further states that “addiction to alcohol or drugs has the very real potential to constitute the slippery slope leading to corrupt practice.”<sup>3</sup>

While the CCLA agrees that officers may pose a risk to themselves and others if they are impaired while on the job, a drug testing regime for officers transferring into certain high risk divisions will not meet that objective.

### Drug Testing

A positive drug test indicates only that at *some* point in the recent *past*, an individual has been exposed to certain drugs. The test does not indicate when the person has been exposed, how much might have been involved, and, more importantly, the test cannot show whether there is current impairment.<sup>4</sup> At the moment, urine tests merely detect drug metabolites in a person’s system.<sup>5</sup> Moreover, recent studies have failed to show a connection between drug exposure and “deleterious effects ... on safety and other job performance indicators.”<sup>6</sup>

The Police Service may be justified in implementing a programme of testing that actually goes to current impairment (such as hand-eye coordination) and increased training of supervisors to detect signs of impairment in officers.

In addition, the recommended testing might be validly subject to a *Charter* challenge. In *Entrop v. Imperial Oil Ltd*, the Ontario Court of Appeal struck down a similar drug testing provision; it found that the proposed scheme could not be considered a bona fide occupational requirement, even though the testing was limited to genuinely safety sensitive positions.<sup>7</sup> The Court drew a distinction between alcohol and drug tests, mainly because drug tests, unlike breathalyser readings, do not show current impairment.<sup>8</sup>

### Conclusion

An employer who wishes to condition career advancement on a regime that is inherently degrading and invasive should be required to justify that intrusion. The Ferguson Report and the Toronto Police Service have failed to provide such justification. Therefore, the CCLA recommends that the Board reject this recommendation from the Ferguson Report.

## ENDNOTES

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<sup>1</sup> Canadian Civil Liberties Association (“CCLA”) Brief, *Mandatory Drug Testing in the Workplace* (Toronto, 1992) at 1.

<sup>2</sup> Ontario, *Review and Recommendations Concerning Various Aspects Of Police Misconduct* (Toronto: Queen’s Printer, 2003) [hereafter *Ferguson Report*], vol. 1 at 32.

<sup>3</sup> Id. at 30.

<sup>4</sup> American Civil Liberties Union (“ACLU”), *Drug Testing: A Bad Investment* (ACLU Publishing, NYC: 1999) [hereafter *ACLU Report*] at 9; Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing* (Toronto: Queen’s Printer, 2000) at 4. The same is not true of breathalyser tests, because blood alcohol levels are linked to impairment. In addition, there is less of an invasion of privacy in a breathalyser test than in a urine test. Therefore, a breathalyser test is easier to justify.

<sup>5</sup> ACLU report at 9.

<sup>6</sup> Id. at 8.

<sup>7</sup> 50 O.R. (3d) 18.

<sup>8</sup> Id. at ¶ 86.