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EMPLOYEE DRUG TESTING: ORWELLIAN VISION OR PRAGMATIC APPROACH TO PROBLEMS IN THE WORKFORCE

JULIE A. GODKIN

I. INTRODUCTION

Mandatory drug testing of employees in the workplace is not a new issue in labour and employment law. A contentious debate has been vocally waged for the past two decades since the beginning of the much publicized “war on drugs” of the Reagan Administration in the early 1980s, and a rippling concern for substance abuse that crossed the Canadian border and into management offices of both private and public employers. Until very recently, there has been no case law considering the legitimacy of employee drug testing under *Human Rights* legislation or the permissibility of drug testing policies and what they should stipulate. In light of two relatively recent cases, *Entrop v. Imperial Oil*¹ and *Toronto-Dominion Bank v. Canadian Human Rights Commission and Canadian Civil Liberties Association*,² a re-examination of the legitimacy of employee drug testing is warranted, along with the arguments concerning what the policies should target and how they should be implemented. Furthermore, the EDT jurisprudence exemplifies the discrepancies in the human rights framework, as articulated by the Supreme Court this past fall in *British Columbia Government [Public Service Employee Relations Commission] v. B.C.G.S.E.U.*³. The Ontario Court of Appeal heard *Entrop* prior to the release of the recent Supreme Court pronouncements on a revised human rights analytical framework, thus providing a further impetus to examine how EDT can justifiably be implemented according to traditional human rights principles embraced in the new “unified approach.”

¹ (1995), 24 C.C.E.L. 87 (Ont. Bd. of Inquiry) aff’d *Imperial Oil v. Ontario (Human Rights Commission) (re. Entrop)*, (1998), 108 O.A.C. 81 (Div. Ct.), leave to appeal to C.A. granted, [1998] O.J. No. 1927, online: QL (CJ) [hereinafter *Entrop*, cited to C.C.E.L.].

² [1998] 4 F.C. 205. (A.D.) [hereinafter *T-D Bank*].

³ [1999] 176 D.L.R. (4th) 1 (S.C.C.) [hereinafter *B.C.G.S.E.U.*].

Courts should consider employee drug testing to be a practicable and legitimate employment rule that strives to maintain workplace safety and integrity. This conclusion will be reached after examining the viable concerns over substance abuse, the various issues that are raised by employee drug testing, the role of human rights and Charter jurisprudence, and the preciseness of the polices' language. The present pending appeal before the Ontario Court of Appeal in *Entrop* presents a unique opportunity for the judiciary to set out guidelines as to the permissible means of drug testing, the responsibilities of employers and employees, and how testing can be legally upheld under statutory and common law. Employee drug testing is unquestionably an invasion of employees' privacy. But it is also a proactive approach to a pressing issue that confronts the workplace and society at large. Employee assistance programs are a valuable component in an employer's strategy to maintaining a healthy workforce and a safe work environment. But these programs alone are simply not sufficient to combat the danger of substance abuse in the workplace. Unions and management must work together to implement testing policies that meet the changing virtues and vices of contemporary Canadian society in order to accommodate employees' needs.

II. THE CONTROVERSY BEHIND EMPLOYEE DRUG TESTING

1. Why Employers Are Turning to EDT

Substance abuse⁴ is undeniably a pressing concern in modern Western society. And the notion of employee drug testing⁵ provokes a contentious debate because it raises the issues of privacy rights, the prevalence of drug use in the workplace and the duty of employers and employees to maintain a safe workplace for all. Drug testing is controversial because one's actions away from the workplace can affect one's employment. Consequently, it is not just an employee's actions *on the job* that face scrutiny.

⁴ In this paper, substance abuse refers to the abuse of alcohol and drugs. Drug abuse is deemed to encompass the abuse of illicit and licit substances.

⁵ Hereinafter EDT.

Employer anxiety over substance use and abuse in the workplace is a natural reaction to lifestyle choices in today's fast-paced society where there is a prevalence of substance abuse, often related to the stresses employees face at work and at home. Dr. Martin Shain has illustrated several factors as to why one should be concerned about the presence of drugs in the workplace: (1) the workplace is a site of consumption and distribution; (2) the workplace is a site of consequences; (3) the workplace is a system for delivery of information, programs and services that may be directed toward the prevention and management of substance abuse; (4) the workplace is a system of influence.⁶

Unlike other forms of workplace surveillance, drug testing can detect the use of licit and illicit substances before problems occur, thereby enabling employers to make proactive decisions in ensuring the safety of the work environment, rather than forcing upon them a passive reaction to accidents which have already occurred. This is important when considering the merits of drug testing, for employers and employees must recognize that licit drugs can compromise the safety and integrity of the workplace just as much as illicit substances. Drug testing is commonly perceived as an attempt by management to intrude into the private lives of employees, and gather information so as to be able to dismiss employees for just cause. But this is a misconception, for while drug testing does attempt to tackle illicit drug use, it can also address safety concerns posed by employees' use of licit drugs. "Both illicit and licit drugs have the capacity to impair job performance, but the greater prevalence of licit drug use, both in terms of frequency and amounts, make it by far the greater threat."⁷ Shain further argues that the prevention and management of licit drug abuse should be the employer's priority for three reasons:

first, licit drug use is more common and just as hazardous as illicit drug use; second, licit drug use is more obviously associated with conditions in the workplace that employers should concern themselves about, namely, superfluous stress; third, licit drug users have profiles that suggest they are basically good employees who are under a lot of pressure from the domestic sphere, the job front and from their own bodies.⁸

⁶ M. Shain, "The Extent and Nature of Drug-Related Problems in the Canadian Workplace"(1994) 2 Can Lab. L.J. 291 at 292-3.

⁷ *Ibid.* at 308.

⁸ *Ibid.* at 309.

It is undeniable that licit substances are usually obtained in order to help people cope with anxiety, sleeplessness, pain or other common maladies, but they can be used or misused in ways that impair job performance. Additionally, EDT results that raise questions about licit use of drugs do not necessarily pose a threat to employees' job security. Rather, the results can capture employers' attention regarding workplace conditions and their effect on employees, thereby engendering changes to the work environment. "For example, if large numbers of people are found to be using tranquilizers in a certain workplace, this fact may signal the presence of problems in the organization and design of work that need to be addressed."⁹ Thus, drug testing can assist in identifying workplace problems, as well as stress and health concerns of employees which would otherwise never come to light, consequently enabling employers to take a proactive stance in creating a safe workplace that will ultimately increase employee satisfaction.

2. Labour Opposition

Not surprisingly, labour groups have vociferously lobbied to prevent the implementation of EDT. As will be seen however, the crux of labour's concerns about EDT can arguably be satisfied by the proper implementation of EDT, thereby accommodating workers' main worries, rather than discarding the policy altogether.

i. A precarious balancing act: business interests and employees' privacy rights

While the question of the prevalence of licit and illicit substances in the workplace commands great attention in this debate, the matter of the privacy rights of employees also provokes controversy. D. Isbister has argued that "the right to privacy is subject to a precarious act of balancing competing individual and societal interests."¹⁰ How this balancing act is managed, is the source of controversy.

Advocates of EDT frequently conceptualize the balancing as between good business management that is faced with a pressing social

⁹ *Ibid.* at 297.

¹⁰ D. Isbister, "Justifying Employee Drug Testing: Privacy Rights Versus Business Interests" (1996) 5 Dal. J. Leg. Studies 255 at 265.

issue, and employee privacy. Isbister advocates that in the matter of drug testing, employees' rights must give way to the concerns of the workplace for he characterizes the implementation of a drug-testing program as "a business decision, motivated by business factors."¹¹ While refraining from such a commerce-oriented analysis, S. Lanyon also advocates the implementation of EDT, arguing that the legitimate business interests of employers should outweigh both the privacy concerns of employees and the right of those employees to be free from unreasonable searches.¹²

Arbitrators have addressed the issue of drug testing more than any other adjudicative body in Canada, and have signaled to employers that they must be cautious in implementing EDT, so to ensure that privacy rights of employees are not unnecessarily intruded upon. In *Re. Labatt Ontario Breweries [Toronto Brewery] and Brewery, General & Professional Workers Union, Local 304*¹³ Arbitrator Brandt emphasized the privacy rights of employees where drug use is suspected. He stated that Charter principles of "unreasonableness" are not disassociated with arbitral balancing acts between employer prerogatives and concerns for the workplace, and employee fears of unnecessary incursions into their

¹¹ *Ibid.*

¹² S. Lanyon, "Controlling Drugs in the Workplace and Employee Privacy: The Balancing of Interest" (April 1992) 2 E.L.L.R. 3 at 3.

It should be noted, however, that arbitrators have consistently held that subjecting employees to random and speculative drug testing is not considered to be a legitimate business purpose of an employer and is seen as encroaching on the privacy and dignity of employees. See S. Ray, "Alcohol and Drug Testing in Canada: Defining the Reasonable Limits" (June 1997) 7 E.L.L.R. 28 at 29. An exception to this occurs where an employee's promise to remain alcohol or drug-free is a reasonable condition of employment imposed in a "last chance" agreement. Where these agreements are reviewed, arbitrators have often upheld random testing, and determined it to be reasonable in light of the countervailing circumstances surrounding the individual employee. Where the individual is an alcoholic, "last chance" agreements have been deemed valid if the agreement is determined to be a final element in the employer's attempts to accommodate the person to the point of undue hardship. See for example, *Re. Toronto District School Board and C.U.P.E.* (1999), 79 L.A.C. (4th) 365 at 387. In this case, drug testing was not explicitly part of the last chance agreement, but in light of the onerous conditions imposed on the employee, I would posit that drug testing would be consistent with the other invasive demands made on the employee, and in these circumstances, would be deemed reasonable. Furthermore, in *Re. Uniroyal Goodrich Canada and U.S.W.A.* (1999), 79 L.A.C. (4th) 129 at 165-66, the Union argued that drug testing should be part of the employer's final effort to fulfill the reasonable duty to accommodate an alcoholic employee whose handicap the employer had been trying to accommodate for many years.

¹³ (1994), 42 L.A.C. (4th) 151.

privacy.¹⁴ In the pivotal case of *Re. Canadian National Railway & U.T.U.*¹⁵, M.G. Picher enunciated what would become a well-accepted principle regarding EDT:

the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such, it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.¹⁶

Demonstrable justification for intrusions on employee privacy has been subject to many different interpretations in the years since this arbitral decision, as arbitrators have striven to balance the interests of privacy against employers' legitimate concerns regarding health, safety and public protection. Certain principles however, are clear: arbitrators agree that the greater the invasion of privacy, the more explicit the language should be,¹⁷ and that in formulating rules, the employer must avoid capriciousness and discrimination.

Opponents of EDT have discussed drug testing as a highly intrusive "solution" to a comparatively minor problem, for they view it simply as the mandatory removal of a substance from a person's body to identify perceived misconduct.¹⁸ Resistance to EDT often focuses on past interpretations of the role of privacy in a modern democracy. In *R. v. Dyment*, LaForest J. stated that privacy was "the heart of liberty in the modern state", arguing that "privacy is essential for the well-being of individuals."¹⁹ Opponents of drug testing have picked up on this pronouncement and challenged EDT as an unwarranted encroachment on the principles of democracy and human security. David Flaherty opposes workplace surveillance, seeing it as the modern embodiment of, and even exceeding, "George Orwell's capacious imagination."²⁰

¹⁴ *Ibid.* at 162-3.

¹⁵ (1989), 6 L.A.C. (4th) 381.

¹⁶ *Ibid.* at 387.

¹⁷ Lanyon, *supra* note 12.

¹⁸ See E. Oscapella, "Drug Testing and Privacy 'Are You Now, or Have You Ever Been A Member of the Communist Party' McCarthyism, Early 1950s 'Are You Now, or Have You Ever Been, A User of Illicit Drugs?' Chemical McCarthyism, 1990s" (1994) 2 Can Lab. L.J. 325.

¹⁹ [1988] 2 S.C.R. 410 at 427.

²⁰ D. H. Flaherty, "Workplace Surveillance: The Emerging Reality" (1992) Lab. Arb. Y.B. 189 at 192.

While refraining from the evocation of images that compare EDT to a tool of Big Brother's thought police, others argue that drug testing invades an employee's "information privacy" because it cannot be used to adequately distinguish between drug use at work and that at home.²¹ Labour groups have stressed that EDT is an unwarranted invasion of employees' privacy in three different ways: it violates the right to protection against physical intrusions, the right to protection from surveillance and the right to control information about oneself.²² These concerns are ultimately based on trepidation about the implementation of adequate procedures following the test and overarching suspicions about what employers will do with the test results.²³ While arguments focusing on privacy form the foundation for Labour opposition to EDT, suspicion as to what employers' motives are in implementing EDT also provide a forum for debate in challenging the place for EDT in Canadian work environments.

ii. The Causal Connection

One of labour's frequent arguments in supporting their portrayal of EDT as an unwarranted invasion into the workplace and their privacy is the contention that substance abuse does not have a causal link to workplace accidents. In contrast, Dr. Shain states that it has been "observed repeatedly in the literature that excessive users of alcohol and of drugs have between two and three times the accident rates of other employees."²⁴ Thus, this casual connection has been hotly contested, as scientific evidence abounds back and forth between opponents and proponents of drug testing as to the impact of EDT on workplace safety:

²¹ S. MacDonald, M. Shain, S. Wells, "Assessing the Justifiability of Workplace Interventions: The Case of Drug Testing" (1998) 6 C.L.E.L.J. 369 at 375.

An example of this situation arose in *Re. Canadian Pacific & U.T.U.* (1987) 31 L.A.C. (3d)179 where the grievor was dismissed following a R.C.M.P. search at his residence which revealed a large marijuana crop. The union stressed that the conduct for which he was discharged related entirely to his actions while off duty and off company premises. The arbitrator disagreed, holding that having regard to the grievor's prior criminal record, his refusal to submit to a drug test and the safety issues concerned with his position, it was impossible to conclude that the grievor had been candid with the employer or that he was innocent in the production and possession of marijuana at his home. In light of these circumstances, the grievor's dismissal was upheld and the union's complaint was dismissed.

²² Oscapella, *supra* note 18 at 334.

²³ *Ibid.* at 332.

²⁴ Shain, *supra* note 6 at 298.

“as yet, evaluative studies of alcohol and drug testing programs have not conclusively shown that they reduce work accidents.”²⁵ One scholar challenges the causal connection:

the test cannot measure impairment; it identifies only the past use of a drug. It cannot tell precisely when the drug was used, how much of the drug was used or whether the person became impaired at the time of use. Most importantly, it cannot identify present impairment.²⁶

As will be seen, this has been the basis for findings that drug policies are disallowed under collective agreements and human rights legislation, because scientific proof has failed to convince decisions makers of the exactness of the testing procedures.²⁷

Opponents of EDT often assert that while substance abuse is not causally linked to workplace safety, there is a causal connection between testing and an unproductive workplace. It has been alleged that there is a causal link between EDT and “unanticipated consequences; [those that] reduce employee morale which could translate into lower productivity levels, undermine labour-management relations, impede employee recruitment and produce litigation problems.”²⁸ Just as there is questionable veracity in the science supporting the need for EDT, this causal connection is also disputable. Morale is an important concern for management, but one cannot assume that employees would necessarily prefer to work in an unsafe environment than in a safe workplace. Moreover, morale can be accommodated by the means of executing an EDT policy, notably through union – management relations and a commitment to work together for the benefit of all employees. Thus, the issues and possible problems raised in both the privacy and causal connection argument can be addressed and resolved by the proper implementation of EDT.

²⁵ MacDonald, *supra* note 21 at 377.

²⁶ Oscapella, *supra* note 18 at 339.

²⁷ This was also the OLRB’s foundation for finding that EDT violated the collective agreement and the relevant human rights provisions in *Re. Sarnia Crane*, [1999] O.L.R.D. No. 1282, (4 May, 1999) online: QL (OLRB).

²⁸ MacDonald, *supra* note 21 at 377-78.

iii. Employee drug testing as the McCarthy witch hunt of the twenty-first century

Labour groups further oppose EDT because they view it as a conspiratorial tool of employers to harness more control in the workplace at the expense of the private lives of workers. Opponents often characterize it as a continuation of a “Reaganomics approach” to issues in industrial relations. Furthermore, it has been alleged that the implementation of EDT is just another attempt to impose and to protect the moral values of the dominant culture, rather than combat a workplace threat.²⁹ Labour has asserted that EDT would not be used to foster constructive improvements to the workplace, rather it would target suspected users, certain racial or ethnic minorities or employees who are disliked.³⁰ Many assert that the employer’s possession of a urine sample offers a tempting opportunity for employers to explore other health conditions, unrelated to drug use, that an employer may wish to inquire into for its own economic benefit.³¹ Oscapella also argues that the employer has an unsupervised discretion as to what can be done with EDT results, since “the employer can share the results of a drug test with whomever it pleases, thus the power that employers can exert on the personal life of employees is allegedly immense.”³²

Interestingly, viewing EDT as a “Republican-inspired” plot has also stimulated the analogy to “chemical McCarthyism”: many assert that EDT poses the same kinds of risks to a democratic society as did the late Senator’s hunt for Communist enemies of the state.³³ Consequently, instead of challenging EDT within a strict legal framework, a cultural Marxist interpretation has been assumed, and the debate focuses on the incursions into workers’ cultural preferences in order to protect employers’ property interests in a productive workplace. Furthermore, it has been asserted that because drug testing is usually aimed at monitoring illicit drugs, it “reflects the cultural bias against the drugs deemed illicit in our society, and perhaps the implicit purpose of eliminating socially undesirable workers from the workplace.”³⁴

²⁹ See J. Weir, “Drug Testing: A Labour Perspective” (1994) 2 Can. Lab. L.J. 451.

³⁰ S. Charlton, “Trade Union Concerns About Substance Abuse in the Workplace” (1994) 2 Can. Lab. L.J. 439 at 442.

³¹ Weir, *supra* note 29 at 455.

³² Oscapella, *supra* note 18 at 333.

³³ Weir, *supra* note 29 at 452.

³⁴ *Ibid.* at 455.

This is arguably a less persuasive line of reasoning for attacking EDT. Negligible evidence has been adduced to substantiate these charges of cultural and class discrimination, and the arguments rest more on pleas to passion, rather than legal principles. The allegations that illicit drugs are the target and a means of ridding “undesirable” workers could also be aptly disputed by Shain’s evidence that it is licit drugs that pose the greatest threat. It is also important to remember that the use of licit and illicit drugs does not necessarily match specific occupations and cultures.³⁵

iv. Conclusion on the merits of arguments used in opposition to EDT

While labour has achieved considerable success with arbitration awards and human rights hearings, it is arguable as to whether their arguments can be sustained in the long run. Additionally, recent arbitral jurisprudence would suggest that unions are recognizing the merits of EDT for their members and are not diametrically opposed to it, if it can be perceived as contributing to the employee’s long term employment relationship and the benefits that accompany that relationship.³⁶ Thus, one could infer that labour may be willing to have EDT as a component of workplace assistance programs, if it is properly implemented and union officials have a defined role to play in the practice. At the crux of the labour opposition is a critique of the procedures behind drug testing. While other arguments alleging a cultural bias against workers and a moral superiority of employers who support EDT still abound, these arguments do not hold much persuasive authority in the legal framework. Thus, in examining the arguments behind labour opposition, it must be recognized that while EDT undeniably encroaches on employees’ privacy rights, much of the controversy in EDT could be overcome by employers giving labour due recognition of their concerns and thereby implementing specific procedural safeguards in the manner of EDT.

³⁵ See Shain, *supra* note 6 who discusses the prevalence of different types of drugs in various workplaces.

³⁶ In *Re. Uniroyal Goodrich Canada*, *supra* note 12 at 165-55, the union alleged that frequent drug testing of an alcoholic employee should have been part of the Company’s accommodation to this particular employee.

IV. IMPLEMENTING EMPLOYEE DRUG TESTING IN THE WORKPLACE — OBSTACLES, CONSIDERATIONS AND CONCERNS

1. Role of the Charter

Many opponents of EDT see the Canadian *Charter of Rights and Freedoms* as the best way to challenge the implementation of EDT in the workplace. But there has been little written on the applicability of the Charter to EDT as the focus of the debate has been on the human rights issues. Thus, this paper will briefly survey issues that will arise in the context of a Charter claim. The greatest hurdle for an employee to overcome in alleging discrimination due to EDT is the *application* of the Charter. An employee must first prove that the Charter applies, which is governed by s. 32(1):

32(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament, including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.³⁷

The Supreme Court of Canada has concluded that the Charter only applies where there is government action of some kind, thus the Charter does not directly regulate the activities of private employers.³⁸ Therefore, EDT must be mandated under a form of government action for the Charter to apply.³⁹

³⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11.

³⁸ See *R.W.D.S.U. v. Dolphin Delivery* (1986), 33 D.L.R. (4th) 174 at 198 (S.C.C.). In light of this decision, “the Charter should therefore apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws and regulations or other creatures of Parliament and the legislatures.”

³⁹ Note that the Canadian government has continued to “take the general position that workplace drug and alcohol testing is unwarranted and consequently, has refused to introduce any legislation which addresses the issue of mandatory cases. Ray, *supra* note 12 at 28.

It is well established that any EDT program adopted under permissive legislation must conform to Charter values.⁴⁰ The problem rests in deciding when an employer is subject to the Charter and when it is not. In *Lavigne v. O.P.S.E.U.*⁴¹, where the debate focussed on provisions in the collective agreement, the Supreme Court held that the Charter only applied because the employer was part of the executive or administrative branch of government:

the court appeared to conclude that, if the employer had not been part of government, then the collective agreement and the clause providing for deduction of union dues would simply be private acts to which the Charter would not have applied.... In light of *Lavigne*, the mere fact that legislation authorizes drug testing in certain circumstances would not cause the Charter to apply to a testing program adopted by a private employer.⁴²

It is consequently apparent that the Charter could, but not necessarily would, apply to private employers if EDT was implemented by an employer under substantial government control or established pursuant to a mandate supported by the government.⁴³ I would posit however, that following the reasoning of the Supreme Court in *Eldridge v. British Columbia (Attorney General)*⁴⁴, a strong argument could also be made for Charter applicability to more “private” bodies if the employer were considered to be a government actor. This could be determined by the employer’s role and policies in society, and by the implementation of a program under the authority of government legislation.

If a Charter challenge were brought as a result of government action, or if an employer were interpreted to be a government actor, the sections that would be used to challenge EDT would most likely be ss.7, 8 and 15. The argument that EDT unreasonably interferes with the liberty and security of employees would invoke the application of s.7, so long as the deprivation is not in accordance with principles of

⁴⁰ B. Hovius, S.R. Usprich & R.M. Solomon, “Employee Drug Testing and the Charter” (1994) 2 Can. Lab. L.J. 345 at 349. The authors make specific reference to the Ontario Law Reform Commission’s acceptance of the Charter’s application to EDT implemented by way of permissive statutory authority.

⁴¹ (1991), 81 D.L.R. (4th) 545 (S.C.C.).

⁴² Hovius, *supra* note 40 at 350.

⁴³ See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Douglas / Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570.

⁴⁴ [1997] 3 S.C.R. 624.

fundamental justice.⁴⁵ The case of the infringement of privacy rights would certainly provoke a s. 8 challenge, in which EDT would be argued to be an unwarranted and unreasonable search and seizure.⁴⁶ Section 15 could also be raised, as allegations of cultural, racial and class bias against workers through EDT have been submitted to challenge the validity and legality of testing.⁴⁷

If a complainant can meet the initial threshold in a Charter challenge and demonstrate the Charter's applicability, problems may still lie ahead in a claim. The onus is on the complainant to prove that the particular EDT program being challenged infringes a right or freedom guaranteed by the Charter. Even if an employee can make a strong argument, the testing may still be upheld as reasonable and justifiable in a free and democratic society due to employers' concerns over workplace safety, security and productivity. The *Oakes* analysis⁴⁸ is intrinsically connected to many elements of the unified approach taken by the Supreme Court this past fall in *B.C.G.S.E.U.*, thus the human rights analysis has many overtones that are indicative of how a s. 1 analysis may be done. This was noted in *T-D* by MacDonal J.A. who discussed the proportionality test as per Dickson, C.J.: "first, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective."⁴⁹ Furthermore, the proportionality stage of the analysis would likely be influenced by the accommodation analysis in a human

⁴⁵ For a thorough analysis on the applicability of s.7, see Hovius, *supra* note 40 at 355.

⁴⁶ See S. Lanyon, "Controlling Drugs in the Workplace and Employee Privacy: The Balancing of Interest" (May 1992) 2 E.L.L.R. 13 at 15, where he makes a compelling argument that supports employee privacy rights, by arguing that Charter principles should apply, and furthermore, that evidence taken from EDT should be subject to an analysis similar to that under s. 24(2) for disputed evidence in the employment relations field: "[f]irst, if the right to privacy can be violated to obtain evidence then where does a right to privacy exist? Second, such a process has the potential to bring the administration of industrial relations into dispute, if employers are allowed to violate basic human rights in order to obtain evidence in order to discipline or fire employees."

⁴⁷ See Hovius, *supra* note 40 at 381-83 for how s. 15 could be triggered through an analysis of discrimination and disability.

⁴⁸ [1986] 1 S.C.R. 103.

⁴⁹ *T-D Bank*, *supra* note 2 at 289.

rights approach, as alternative, less intrusive means are often the subject of great debate.⁵⁰

There is no denial that EDT is an intrusive policy. But whether or not the Charter will apply to private employers' policies, is a question still under debate. Employers should take note, that regardless of Charter application, the values underlying the Charter are applicable to the implementation of EDT in the workplace, and integral to an acceptance of any testing program by employees. EDT that is in accordance with Charter principles would denote an attempt by an employer to address employee concerns, and accommodate their interests so that the principles of natural justice are not arbitrarily discarded.

2. Arbitral Approaches: The Effect of a Collective Agreement on EDT

One way employers could give employees due recognition of their concerns about EDT is through specific clauses in the collective agreement which would speak to policies mandating a program such as this. This is an important consideration, because before an employer can consider the merits of EDT in the workplace, appropriate attention must be paid to how the employer will legally justify the implementation of this policy. "The fundamental question is whether the employers in these cases derive the authority to obtain medical information from their employees by virtue of a collective agreement provision or a statutory regime governing the particular industry."⁵¹ The wording of collective agreements and permissive rules in statutory regimes has proven to be a contentious source of arbitration, but this has also served to illuminate important aspects of this debate and should guide employers in the appropriate directions in the implementation of EDT.

Tribunals' analysis of the effect of collective agreements on EDT has generally focused on how employers are restricted in their implementation of EDT. Management rights clauses have long been a source of contentious interpretation, and a frequently encountered

⁵⁰ See for example, *Re. Sarnia Crane* *supra* note 27 at para. 44; *Entrop* *supra* note 1 [Bd. Of Inquiry] at 158-9.

⁵¹ C. Wedge, "Limitations on Alcohol and Drug Testing in Collective Bargaining Relationships" (1994) 2 Can. Lab. L.J. 461 at 475.

problem associated with this issue is the unilateral implementation of EDT by an employer, notwithstanding union opposition. Where the EDT policy carries with it disciplinary consequences, many arbitrators have referred to the general principles enunciated by Robinson in *Re. Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*:

A rule unilaterally introduced by the company [that carries disciplinary action upon its violation], and not subsequently agreed to by the union must satisfy the following requisites for it to be deemed “reasonable”:

1. it must not be inconsistent with the collective agreement
2. it must not be unreasonable
3. it must be clear and unequivocal
4. it must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.⁵²

An example of a unilaterally imposed EDT policy arose in *Re. Provincial-American Transporters & Teamsters*⁵³, where the company did not discuss drug testing with the union before announcing it to the drivers. The union took the position that mandatory drug testing is a unilaterally imposed policy of management that is unreasonable, contrary to the collective agreement, public policy and Canadian law, and which in any event, is contrary to established principles concerning the way mandatory drug testing should be implemented.⁵⁴ The arbitrator added to the *KVP* test in the EDT context, holding that “if mandatory universal drug testing is to be justified, absent a specific term allowing it, then there should be at least evidence of a drug and/or alcohol problem in the workplace which cannot be combated in some less invasive way.”⁵⁵

⁵² (1965), 16 L.A.C. 73 at 83.

⁵³ (1991), 18 L.A.C. (4th) 412.

⁵⁴ *Ibid.* at 418.

⁵⁵ *Ibid.* at 425. Note that in deciding whether the policy was reasonably justified, the Arbitrator considered the evidence of actual substance abuse, evidence of whether existing

As to what an employer can rely on as justification for an EDT policy, it was held in *Re. Metropol Security* that there “must be something more to the employer’s justification [than a customer request]; there must be some basis for the rule which relates to the type of work being performed.”⁵⁶ In this particular case, because the employer lacked justification for the policy beside mere customer demand, the policy was found to be unreasonable. Further limiting an employer’s position is Lanyon’s argument that in interpreting the provisions of collective agreements,

the farther the exercise of a purported right lies from the traditional care of management functions, and the more it intrudes into the personal and private lives of individuals, the less it can be said to lie within a reasonable interpretation of the management rights clause.⁵⁷

Additionally, in *Re. C.H. Heist Ltd* it was stated that

“there may well be circumstances in [this] industry where the employer has justification to request a drug test. In my opinion, such a requirement for testing can be justified only by an express or implied term of the collective agreement contemplating such a procedure or on reasonable and probable grounds of the existence of a drug problem or drug abuse in the workplace.”⁵⁸

It is consequently apparent, much to labour’s satisfaction, that the justification an employer must provide in order to implement EDT is not a light burden that must be bore.

In the recent case of *Re. Esso Petroleum*, the issues were whether the unilateral implementation of the employer’s alcohol and drug policy contravened the collective agreement, exceeded management rights under the collective agreement and if it constituted rules and regulations within the agreement.⁵⁹ The arbitrator in this case instituted a two-step test to measure whether an EDT policy was properly implemented. First,

performance measures or less invasive monitoring processes were inadequate, and whether testing was required by statute or regulation.

⁵⁶ *Re. Metropol Security, a Division of Barnes Security Systems Ltd and U.S.W.A., Loc. 5296* (1998), 69 L.A.C. (4th) 399 at 408.

⁵⁷ Lanyon, *supra* note 46 at 15.

⁵⁸ (1991) 20 L.A.C. (4th) 112 at 121-22. Note that this logic was given serious weight in *Re. Sarnia Crane* *supra* note 27.

⁵⁹ (1994), 56 L.A.C. (4th) 440. In this case, the policy against drugs and alcohol was implemented after the crash of the Exxon tanker Valdez, whose Captain was intoxicated. The policy provided for random urine testing for drugs, random breathalyzers for alcohol in jobs

the employer had to pass the test of justification or adequate cause – was there evidence of a drug and /or alcohol problem in the workplace and was there a need for management’s policy? Second, the employer had to pass a test of reasonableness, which included a consideration of the alternatives available and whether the problem in the workplace could be combated in a less invasive way.⁶⁰ The arbitrator held that anything requiring employees to inform management of medicines, past problems, past convictions, lengthy rehabilitative periods, random testing other than in the context of rehabilitation or mandatory medical examinations by the employer’s doctor was unacceptable.⁶¹

One of the most thorough examinations of the law governing the permissibility of EDT under a collective agreement was the recent decision of the Ontario Labour Relations Board in *International Union of Operating Engineers, Local 793, v. Sarnia Cranes Ltd.*⁶² In this decision, the Board assesses whether the drug and alcohol testing policy enacted by the employer at the request of its client Imperial Oil, violated its collective agreement with the applicant union. Management representatives went through an extensive process to determine how this program would be established, and consulted with union representatives in the months leading up to its implementation. Management testified that many employees “reacted positively to the implementation of the [testing] regime”,⁶³ but the official union opinion that was later released stated its opposition to this intrusive policy. The union thereby launched this grievance when the employer unilaterally introduced the EDT policy, challenging the policy as unreasonable, arbitrary, discriminatory and in violation of the Provincial Collective Agreement.⁶⁴

The OLRB received substantial expert testimony in this hearing, and most of the experts were leaders in the area of EDT – which highly influenced the Board’s decision that the policy violated the collective

designated “safety sensitive”, mandatory periodic medical examinations and blood testing to detect chemical dependency in those employees. Those same employees were under an obligation of self-disclosure as to present or past substance abuse problems and listed medical conditions, and subject to searches and drug/ alcohol testing for reasonable cause after a significant work accident.

⁶⁰ *Ibid.* at 447.

⁶¹ *Ibid.*

⁶² *Supra* note 27.

⁶³ *Ibid.* at para. 38.

⁶⁴ *Ibid.* at para. 40.

agreement. The Board also surveyed the existing jurisprudence concerning unilaterally imposed rules and stated that at the very least, they must be reasonable.⁶⁵ In light of these findings, the Board discussed at length why the imposition of EDT violated the collective agreement.

The Board emphasized the fact that expert evidence persuaded them that a drug test performed on the urine of a donor cannot measure the degree to which the donor was impaired at the time of providing the sample.⁶⁶ Hence, the Board found that the very premise for establishing EDT – that drug testing will identify impairment – was false. The Board also noted that management failed to meet the reasonableness requirement because the cutoff levels in the tests for impairment were arbitrary⁶⁷ and could consequently produce inconsistent results. Furthermore, the Board stated that the rule was ambiguous and unequivocal, it was not adequately brought to the attention of affected employees before the employers acted on it and maintained that the employees were not given satisfactory notice that breach of the rule could result in their discharge.⁶⁸ The Board was also troubled by the fact that a refusal to submit to a test would be viewed as equivalent to a positive test result for the purposes of Sarnia Crane's dealings with Imperial,⁶⁹ as there are no medical facts that can support this conclusion.

What is important about this decision is that the O.L.R.B. has identified many hindrances to the successful implementation of an EDT policy. One can interpret the decision as setting out future guidelines as to how management can unilaterally implement a policy that will be deemed reasonable. Employers must remember that the collective agreement analysis is intrinsically tied to the human rights framework, for the steps management must perform to justify the policy within the confines of the collective agreement are comparable to the justificatory steps that must be taken to satisfy the new unified approach in human rights cases. Additionally, it must also be noted that where a policy is found to violate human rights legislation, it will be found to violate the collective agreement where there is the [typical] clause requiring all

⁶⁵ *Ibid.* at para. 172.

⁶⁶ *Ibid.* at para. 173.

⁶⁷ *Ibid.* at para. 178.

⁶⁸ *Ibid.* at para. 179.

⁶⁹ *Ibid.* at para. 181.

rules and regulations imposed by management to be in accordance with all human rights legislation.⁷⁰

It is clear that provisions in the collective agreement pose a substantial hurdle that an employer must overcome in a justifiable and legally permissible implementation of EDT. But collective agreements also present an opportunity for employers and employees to reach consensus and clarity as to the terms and procedures of EDT. A clear collective agreement that includes express provisions on the process for implementing an EDT program could prove to be a useful, proactive approach to employers maintaining a safe workplace. More importantly, it would also serve as a source of influence for employees, rather than a threatening tool of employer encroachment.

3. Occupational Health and Safety Legislation as a Justificatory Tool

In conjunction with providing for EDT in an explicit clause in a collective agreement, another way to implement drug testing is to develop policies pursuant to government regulation. Beside specific legislative provisions, one way to facilitate government justification of EDT is under the provisions of the *Occupational Health and Safety Act*.⁷¹ This *Act* is founded on the ‘Internal Responsibility System’, whereby employers are responsible for the health and safety of persons at the workplace and assume responsibility for creating and maintaining a safe and healthy workplace to the extent of their authority and ability to do so.⁷² Pursuant to this objective and in accordance with the employers’ precautions and duties found in s. 13 of the *Act*, an argument could be made that EDT relates to occupational health and safety. The relevant parts of the *Act* for EDT are as follows:

s. 13

- (1) every employer shall take every precaution that is reasonable in the circumstances to
 - (a) ensure the health and safety of persons at or near the workplace;
 - (c) provide such... facilities as are necessary to the health or safety of the employees;

⁷⁰ See for example, *Re. Sarnia Crane*, *supra* note 27 at para. 206.

⁷¹ S.N.S. 1996, c.7.

⁷² *Ibid.* at ss. 2(a)(i) and (b).

- (d) ensure that the employees... are made familiar with any health or safety hazards that may be met by them at the workplace;
 - (f) conduct the employer's undertaking so that employees are not exposed to health or safety hazards as a result of the undertaking.
- (2) Every employer shall
- (a) consult and co-operate with the joint occupational health and safety committee, where such a committee has been established at the workplace or the health and safety representative, where one has been selected at the workplace;
 - (g) where an occupational health and safety policy or occupational health and safety program is required pursuant to this Act or the regulations, establish the program.

The applicability of the *Occupational Health and Safety Act* to EDT has been well established in both the literature and arbitration hearings. Barbara Butler, one of the leading Canadian consultants on the implementation of EDT by employers, noted that employers may not only justify EDT as a workplace safety measure, but also that

failure to take such steps [as required under the *Act*] may lead to convictions and the imposition of significant penalties. The penalties are now such that the costs of implementing enhanced safety programs may not only be legally required, but also financially necessary.⁷³

Workplace health and safety matters are often the subjects of specific clauses in the collective agreement in unionized workplaces. And the fact that arbitrators have impliedly recognized that EDT can fall within the scope of these clauses, subject to their meaning, signals the recognition of EDT as a viable method of employer compliance with the *Act*.

In *Re. Canadian National Railway & C.A.W* the union asserted that the employer could not implement a policy concerning alcohol and drugs, because this was contrary to the collective agreement, which stated that matters of "safety and health" must be discussed by the

⁷³ B. Butler, "Developing a Company Alcohol and Drug Policy" (1994) 2 Can. Lab. L.J. 485 at 509.

master committee, on which the union's members sit.⁷⁴ The employer argued that there is latent ambiguity in the concept of "safety and health", an argument with which the arbitrator concurred, but the arbitrator also held that due to the history of collective bargaining on this issue, substance abuse was an entirely separate issue.⁷⁵ Thus, employers must be cautious as to the wording of health and safety clauses, and also with what negotiations on these clauses might be seen to comprise. It is clear that substance abuse must be historically attached to occupational health and safety matters, if an employer is to justifiably implement a policy under this umbrella.

The most convincing argument in favour of EDT being covered by *Occupational Health and Safety* legislation came in the recent arbitration of *Re. National Gypsum & IUOE* where the employer maintained that the legislation imposed a positive duty on employers to operate a safe workplace and that EDT was a logical means of meeting this statutory duty.⁷⁶ The employer submitted that this was an onerous legislative burden, one which could not be met if the employer suspected an employee of utilizing drugs and did not take appropriate action to prevent possible accidents.⁷⁷ Although the grievor succeeded in this case, this result is arguably due to the employer's failure to conduct the testing procedures according to the collective agreement, not because the workplace's drug testing procedures were invalid or illegal. It is the implicit recognition, however, that EDT can be implemented pursuant to a collective agreement as part of the employer's occupational health and safety responsibilities which makes this case important and relevant to the cause of supporting EDT in the workplace.

EDT aids employers' obligations under the *Occupational Health and Safety Act*, and this legislation can also serve to ensure there is employee input on policies, because health and safety committees as a rule comprise management and employees. Thus, implementation of EDT in accordance with this legislation would be another method of combating labour opposition and ensuring a just and procedurally safe implementation of EDT.

⁷⁴ (1997), 67 L.A.C. (4th) 1.

⁷⁵ *Ibid.* at 17. Note that this decision was reached because workplace health and safety issues were always treated as a separate matter from substance abuse issues in collective bargaining.

⁷⁶ (1997), 67 L.A.C. (4th) 360.

⁷⁷ *Ibid.* at 375.

4. The Dominant Influence of Human Rights Legislation

While arguments about how human rights legislation would apply to EDT have speculated on the discriminatory impact of EDT policies, it has only been in the past three years that we have had judicial pronouncements on this matter. The Supreme Court of Canada recently revised its approach for assessing human rights claims in the contentious case of *B.C. (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*,⁷⁸ by abandoning the conventional distinction between adverse effect and direct discrimination. This paper will survey the traditional approach to human rights claims before examining the new unified approach of the court, because the analysis used prior to *B.C.G.S.E.U.* is still relevant in establishing a prohibited ground of discrimination, a prohibited practice and the employer's justification for these infringements. More importantly, the existing human rights jurisprudence, which addresses EDT used this older analytical framework, so to better understand these cases, the traditional regime still merits attention.

i. Making a claim under Human Rights legislation

In claiming that an EDT policy violates human rights legislation, a complainant must first establish a prohibited ground of discrimination and show that EDT constitutes a prohibited practice. As will be seen, EDT triggers human rights provisions because alcoholism and drug dependency are viewed to fall under the definition of handicap or disability.⁷⁹ In *Entrop*, it was firmly established that alcoholism falls under the definition of handicap.⁸⁰ Having established the prohibited

⁷⁸ *Supra* note 3.

⁷⁹ Subject to the terms of each Act. Note that in Nova Scotia, the *Human Rights Act* provides only for past dependence: R.S.N.S. 1989, c. 214, s.3(1)(vii).

⁸⁰ *Entrop*, *supra* note 1 (Bd. of Inquiry) at 98-100. See also *Cindy Cameron v. Nelgor Castle Nursing Home and Marlene Nelson* (1984), 5 C.H.R.R. D/2170 (decision 371) for a further interpretation of handicap.

In a recent arbitral decision regarding the appropriate discipline for an alcoholic employee, Arbitrator Knopf did a detailed analysis of the human rights and arbitral jurisprudence concerning alcoholism as a disability under human rights legislation. He stated that "the evidence in this arbitration convinces me that it is appropriate to draw the comparison between alcohol dependence and other chronic diseases such as cancer, diabetes or multiple sclerosis. They are all chronic diseases.... they are treatable but they may not be curable..." [*Re. Uniroyal Goodrich Canada Inc.*, *supra* note 12 at 183-4.]

grounds of discrimination, the prohibited practice would be the implementation of a policy [EDT] that discriminates against employees based on enumerated grounds.

Under the conventional approach, once a *prima facie* case of discrimination is made out, the burden of proof shifts to the employer who must establish a defence. Where the alleged discrimination is direct, the employer generally must establish a defence based on the discriminatory practice being a *bona fide* occupational requirement,⁸¹ where available under the relevant statute.

The Supreme Court first addressed the matter of defining discrimination in *Andrews v. Law Society of British Columbia* where it was argued that

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.⁸²

In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, the Supreme Court elaborated on the definition in *Andrews*, and established how to determine a finding of direct discrimination in a human rights claim:

the essence of direct discrimination in employment is the making of a rule that generalizes about a person's ability to perform a job based on membership in a group sharing a common personal attribute such as age, sex, religion etc. The ideal of human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments.⁸³

The case of *Ontario Human Rights Commission et al. v. Borough of Etobicoke*, enunciated certain principles on how an employer would justify a policy as a *bfor*; after the direct discrimination is established:

⁸¹ Hereinafter '*bfor*.'

⁸² [1989] 1 S.C.R. 143 at 174.

⁸³ [1990] 2 S.C.R. 489 at 514.

to be a *bona fide* occupational qualification and requirement, a [policy] ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.⁸⁴

Thus, under the traditional framework, to justify EDT as a *bfor* against an allegation of direct discrimination, the employer must lead evidence to justify its conclusion that there is a safety risk in employing persons who are drug dependent. This evidence must show that the risk of having drug dependent employees in the workplace is sufficient to warrant blanket application of a mandatory drug testing policy in all relevant positions. Of particular concern to the employer is the further requirement that the evidence adduced must be scientific in nature, rather than merely impressionistic. Therefore, expert evidence will play a large role in establishing the possible safety risks in the workplace caused by substance abuse. The employer must also provide substantial evidence of a causational relationship between an employee's physical or mental condition and a negative impact on job performance⁸⁵

Furthermore, if the alleged discrimination is found to be adverse effect, then the *bfor* defence does not apply and the employer must show that the adversely affected employee was accommodated short of undue hardship. In *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd. et al* the Supreme Court first addressed the matter of adverse effect discrimination:

the concept of adverse effect discrimination... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties

⁸⁴ [1982] 1 S.C.R. 202 at 208.

⁸⁵ *Entrop, supra* note 1 (Bd. of Inquiry) at 111.

or restrictive conditions not imposed on other members of the work force... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.⁸⁶

In *Central Alberta Dairy Pool*, Wilson J. elaborated on the comments from *O'Malley* to define adverse effect as:

[a] rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case, the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant. In these situations, the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship.⁸⁷

After a claim of adverse effect discrimination, a rule will remain enforceable if the employer makes reasonable efforts to accommodate those who are adversely affected by it. The test for reasonable accommodation as set out by Wilson J. in *Central Alberta Dairy Pool* stipulates two necessary components: the policy must be rationally related to job performance and the employer must accommodate the employee up to the point of undue hardship.⁸⁸

The parties in *B.C.G.S.E.U.* invited the Supreme Court to adopt a "new model of analysis that avoids the threshold distinction between direct discrimination and adverse effect discrimination and integrates the concept of accommodation within the *bfor* defence."⁸⁹ The Court revised its framework because of seven difficulties that it identified with the conventional approach. These seven reasons can be summarized as follows:

- (a) the artificiality of the distinction between direct and adverse effect discrimination;
- (b) the different remedies, depending on method of discrimination;
- (c) the questionable assumption that adversely affected group is always a numerical minority;

⁸⁶ [1985] 2 S.C.R. 536 at 551 [hereinafter *O'Malley*].

⁸⁷ *Supra* note 83 at 514-15.

⁸⁸ *Ibid.* at 520.

⁸⁹ *B.C.G.S.E.U.*, *supra* note 3 at 13.

- (d) the difficulties in practical application of employers' defences;
- (e) legitimizing systemic discrimination;
- (f) the dissonance between conventional analysis and express purpose and terms of *Human Rights Code*;
- (g) the dissonance between *Human Rights* analysis and *Charter* analysis.⁹⁰

McLachlin J.[as she then was], on behalf of the Court, stated that this new approach is beneficial because it avoids the problematic distinction between direct and adverse effect discrimination, it requires employers to accommodate as much as reasonably possible the characteristics of individual employees when establishing the workplace standard and it takes a strict approach to exemptions from the duty to not discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.⁹¹ The Court then proposes a three-step test for determining whether a *prima facie* discriminatory standard qualifies as a *bfor*. The employer may have the prohibited practice upheld by establishing that:

- (1) the employer adopted the standard for a purpose rationally connected with the performance of the job;
- (2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁹²

The Court proceeded to elaborate on these three steps by illustrating what an employer may do to fit within the framework's parameters. Step One – "Standard Rationally Connected With the Job" – does not impose a high standard and the starting point with this analysis is to determine the general purpose of the impugned practice and ask whether it is

⁹⁰ *Ibid.* at 13-23 for the intricacies of each of these seven reasons and McLachlin's survey of the case law and academic writings which encouraged the Court to embark on this new approach.

⁹¹ *Ibid.* at 23.

⁹² *Ibid.* at 25.

rationally connected to the performance of the job, with the focus of the analysis being the validity of the general purpose behind the practice, not the validity of the practice itself. The Court noted that “the ability to work safely and efficiently is the purpose most often mentioned in the cases”⁹³ and that “there are innumerable possible reasons that an employer might seek to impose a standard on its employees.”⁹⁴ For the purposes of this analysis, it is pertinent to further note that the Court stressed that “[w]here the general purpose of the standard is to ensure the safe and efficient performance of the job... it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.”⁹⁵

Upon demonstrating the validity of the employer’s general purpose behind a practice, the employer must meet the criteria of the second step by establishing that the particular practice was adopted with an honest and good faith belief in its necessity for the attainment of that purpose, without any intention of discrimination toward individual employees. The Court stresses that “the analysis lifts at this stage from the general purpose of the standard to the particular standard itself.”⁹⁶ Finally, step three requires the employer to demonstrate first that the challenged practice is reasonably necessary for the employer to accomplish its purpose, and second that the employer cannot accommodate the claimant employee and others adversely affected by the practice without experiencing undue hardship. It is at this stage of the analysis that the Court’s prior consideration of undue hardship and accommodation is particularly relevant, as McLachlin J. specifically refers to the Court’s previous decisions in *Central Alberta Dairy Pool* and *Renaud* in the Court’s discussion of this step.⁹⁷

iv. Application of the [conventional] Human Rights jurisprudence in the EDT context

In *Entrop v. Imperial Oil*, Martin Entrop filed a complaint with the Ontario Human Rights Commission, alleging that his right to equal treatment with respect to employment had been infringed because of his

⁹³ *Ibid.* at 25.

⁹⁴ *Ibid.* at 26.

⁹⁵ *Ibid.* at 26.

⁹⁶ *Ibid.* at 27.

⁹⁷ *Ibid.* at 27.

handicap, and perceived handicap contrary to ss. 4(1) and 8 of the *Ontario Human Rights Code*.⁹⁸ His complaint challenged various aspects of his employer's 'Alcohol and Drug Policy.'

The objective of the Policy was to "minimize the risk of impaired performance due to substance abuse", and it sought to meet this objective by prohibiting the use, possession, distribution, or offering for sale of illicit drugs while on company business or premises.⁹⁹ Drug testing constituted an important component of the Policy. Additionally, the Policy subjected those employees working in "safety-sensitive" and "specified executive" positions to bi-annual medical examinations to determine if alcohol and drug use were present; these tests were administered in conjunction with a review process, and unannounced, random drug testing. The Policy also required individuals to disclose past or present substance abuse problems, and those persons who disclosed such information were removed from their safety-sensitive positions and reassigned. Violation of any provisions of the Policy could result in progressive discipline up to and including termination. Refusal on the part of an employee to submit to a drug test was also grounds for disciplinary action.¹⁰⁰

In the primary assessment of Entrop's allegations, the Board of Inquiry considered extensive evidence in accepting that alcoholism was a handicap as defined by the *Ontario Human Rights Act*, and that this statutory definition included persons "who had had" a handicap.¹⁰¹ Thus, Entrop's claim proceeded to determine if the Policy was discriminatory.

In response to Entrop's claim, Imperial Oil argued that the testing provisions were not designed to catch alcohol and drug users, but to deter substance abuse; the tests were utilized to prove the absence of drug and alcohol abuse in the workforce, rather than the presence of substance abuse.¹⁰² The Board of Inquiry did find that Imperial Oil had the right to attempt to ensure that employees in safety sensitive positions were not impaired by alcohol, and that freedom from impairment by alcohol is a *hfor* for such jobs.¹⁰³ But, the Board also found on a *prima*

⁹⁸ R.S.O. 1990, c. H-19.

⁹⁹ *Supra* note 1 (Bd. of Inquiry) at 125.

¹⁰⁰ *Ibid* (Bd. of Inquiry) at 124-28 for a detailed explanation of the policy provisions.

¹⁰¹ *Ibid*. (Bd. of Inquiry) at 100.

¹⁰² *Ibid*. (Bd. of Inquiry) at 133.

¹⁰³ *Ibid*. (Bd. of Inquiry) at 134.

facie basis, three violations of s. 5 of the Code because the Policy directly discriminated against employees with alcohol and drug problems. The violations were found in the obligation to self-disclose one's problems, removal from the job for those in safety-sensitive positions, and a reinstatement process requiring ongoing controls.¹⁰⁴

As direct discrimination was found, Imperial Oil could rely on the *bfor* defence in s. 17(1), if it could prove with convincing and scientific evidence that the Policy's provisions were directly connected to job performance. Thus, the Board had to be convinced that freedom from impairment by drugs was a *bfor* in Imperial's workplace.

The employer was obligated to prove that its testing provisions under the Policy were necessary to determine "incapability" under s. 17(1) of the Code. The data collected did indicate that substance abuse was causing "some problems in this particular workplace"¹⁰⁵ and credence was given to the employer's claim that drug testing was a viable deterrent to substance abuse. But the Board found that Imperial failed to establish that drug testing was relevant in determining whether an individual had the capacity to perform the essential components of the job safely, efficiently and reliably.¹⁰⁶

In assessing the subjective and objective elements of the defence, the Board found – in its examination of whether the policy was subjectively implemented in good faith – that there were "mixed motives" involved. And where that is the case, all motives must be justifiable in good faith.¹⁰⁷ In *Entrop*, the Board was satisfied that this component was met by the employer. In the second part of the test, though, Imperial Oil failed because it could not sufficiently prove that the differential treatment of Entrop was objectively justified as reasonably necessary.¹⁰⁸

In its decision, which was upheld by the Ontario Div. Ct., the Board found that the provisions relating to disclosure, reassignment and reinstatement were not justified by the employer because they were too restrictive, given the objective of the Policy. Additionally, the Board determined that the "sweeping" definition of substance abuse included

¹⁰⁴ *Ibid.* (Bd. of Inquiry) at 104.

¹⁰⁵ *Ibid.* (Bd. of Inquiry) at 145.

¹⁰⁶ *Ibid.* (Bd. of Inquiry) at 158.

¹⁰⁷ *Ibid.* (Bd. of Inquiry) at 106.

¹⁰⁸ *Ibid.* (Bd. of Inquiry) at 114.

in the Policy was overly broad, as it included anyone who had ever participated in treatment for any drug abuse. The Board found that, according to the expert evidence presented, it was possible to be completely rehabilitated from some forms of drug dependence, thus, there was no justification for such a sweeping rule of disclosure. The Policy's provisions which permitted pre-employment and random drug testing were also found to be unlawful due to the fact that Imperial Oil failed to demonstrate that a positive test result was correlated with impairment. The Board did find however, that testing which occurred "for cause", "post-incident" upon "certification for safety-sensitive positions", and "post reinstatement" may be permitted if the employer could establish that testing was necessary as part of a larger process for assessing substance abuse. The provisions which called for random alcohol testing were also deemed unlawful because Imperial failed to prove that this screening was reasonably necessary to deter alcohol abuse on the job. But, the Board did admit that testing for alcohol could be permitted in the same circumstances as for drug testing, if proven to be part of a larger process of assessing alcohol abuse.

On appeal, Imperial argued that:

the broad wording of s. 5 of the *Human Rights Code* must be read so that actions which might be perceived as discrimination but that are relevant, such as reasonable work rules involving the issue of public safety did not violate s. 5 and that it was not necessary for them to consider the provisions of s. 17 of the Code dealing with incapability to perform essential duties because of a handicap.¹⁰⁹

In dismissing the appeal, the Court asserted that Imperial's argument rendered s. 17 meaningless, for "the provisions of s. 17 are directed to the very concern the appellant raises and that is, that if for reasons of the safety of the property of Imperial Oil and for public safety, the person is incapable because of the handicap, then the discrimination is excused."¹¹⁰ Imperial Oil appealed the decision to the Ontario Court of

¹⁰⁹ *Ibid.* (Div. Ct) at 87.

¹¹⁰ *Ibid.* (Div. Ct) at 87. Note that in *Re. Sarnia Crane*, *supra* note 27, the OLRB relied heavily on this analysis to support its finding that the employer failed to establish a *hfor*, due to the similarity in the facts surrounding the policy and the policy itself. The "sticking point" for the OLRB was unequivocally the fact that while *Sarnia Crane* had the right to ensure their machinery was safely handled, drug and alcohol tests could not establish impairment at the time the test was taken [*Supra* note 27 at para. 204]. Hence, in the board's opinion, because some persons captured by the policy may not have been incapable of performing the essential job requirements, the *hfor* could not be established.

Appeal, where the matter was heard last year, prior to the release of the Supreme Court decision in *B.C.G.S.E.U.*, thus it is possible that a further appeal may occur upon the release of the Court of Appeal's decision. There is no Supreme Court pronouncement on EDT as of yet, and the facts of *Entrop* present an opportunity for the Court to examine this divisive issue.

In *Canada v. Toronto-Dominion Bank*, the principal issue raised was whether the Bank's policy discriminated against drug dependent persons. The Policy was initially implemented in response to a request from the Government of Canada which required financial institutions to review their security policies due to concerns about money laundering. As a result of this request and because of internal concerns about increasing societal problems relating to substance abuse, the Toronto-Dominion Bank developed a policy relating to substance abuse. The Policy was implemented with the objective of remaining

consistent with the Bank's commitment to maintain a safe, healthy and productive workplace for all employees, to safeguard the Bank and customer funds and information, and to protect the Bank's reputation....[and] to provide a work environment that is free from both alcohol abuse and illegal drug use.¹¹¹

The contentious parts of the Policy are as follows:

[the Policy provided] for drug testing of new employees, full time, part-time, contract and students upon acceptance of employment, and that would include all former T-D employees rehired after an absence of three months or more.... Present employees will be referred for a Health Assessment which may or may not include a drug test in situations where there are strong grounds to believe that poor job performance, unusual personal behaviour, serious errors in judgement or violations of the "Guidelines of Conduct" are related to alcohol abuse or illegal drug use.¹¹²

Thus, it was clear that the policy applied to all employees, even though it was mandatory for only some.

The Canadian Human Rights Commission and the Canadian Civil Liberties Association challenged the Bank's Policy on the ground that it constituted a discriminatory practice within s. 10 of the *Canadian*

¹¹¹ *Supra* note 2 at 220.

¹¹² *Ibid.* at 220-21.

Human Rights Act. They argued that the Policy deprived, or tended to deprive, an individual or class of individuals of employment on a prohibited ground of discrimination, namely disability. The Federal Court did find discrimination in the Bank's Policy, but the Majority differed as to if it was direct or adverse effect. The Dissent, meanwhile, found that there was reasonable accommodation that permitted the adverse effect discrimination imposed by the Policy. I would assert that the Dissent is a more reasonable decision, for it recognizes that employers must have some leeway in implementing EDT and that reasonable accommodation doesn't mean employers must unduly suffer in attempts to aid employees.

The Majority decision found that the Bank's Policy contravened the *Human Rights Act* and could not be justified under the *Act*, but the two separate judgements differed as to why. Robertson J.A. found that the Policy constituted a *prima facie* discriminatory practice because it raised the likelihood of drug dependent employees losing their employment. It was ruled that the Policy discriminated directly, because it was designed to eliminate illegal drug use in the workplace, and therefore, would have an immediate or direct effect on drug dependent persons.¹¹³ Robertson J.A. further found that the *bfor* defence was not available to the bank for several reasons: there was no evidence of a drug problem within the Bank's workforce, there was no causal relationship between illegal drug use and crime and the Policy was not reasonably necessary to assure job performance.¹¹⁴ Robertson J.A. also stipulated that the Policy would only qualify as reasonable if the Bank could demonstrate a serious threat to the Bank's other employees and the public, which it did not do.

MacDonald J.A. also found there to be a discriminatory practice in the Policy, but contrary to Robertson J.A., he ruled the Policy constituted adverse effect discrimination. This was found because the Policy impacted adversely on those employees who are dependent on drugs; it was designed to catch all drug users – not merely drug dependent users.¹¹⁵ He further found that the Policy was not rationally connected to job performance and that the Bank had not reasonably

¹¹³ *Ibid.* at 266.

¹¹⁴ *Ibid.* at 271-72.

¹¹⁵ *Ibid.* at 279-80.

accommodated those affected by the Policy. His conclusions differ from Robertson J.A.'s alternative conclusion, that the Policy constituted indirect discrimination, and that while the Bank had reasonably accommodated adversely affected employees, it was not rationally connected to job performance. Thus, within the Majority, we have a disagreement as to what type of discrimination the EDT policy imposes and in the case of adverse effect discrimination, whether there is reasonable accommodation to the affected employees.

Chief Justice Isaac's dissent is preferable because he looks at this allegation of discrimination within the context of the entire *Human Rights Act*, the *Act's* impact on societal expectations of propriety, and how the duties imposed on employers and employees inter-relate within the *Act* when it is viewed in its entirety. In particular, he emphasizes s. 2 of the *Canadian Human Rights Act* which requires that an employer act "consistent[ly] with his or her duties and obligations as a member of society."¹¹⁶ Isaac C.J. goes on to find that the Tribunal was correct in its finding that the Bank's Policy is not direct discrimination because it does not, on its face, prevent anyone from gaining or maintaining employment with the bank; employees who test positive for drug use and continue to participate in rehabilitation programs will not be terminated for that reason alone. Isaac J.A. focuses on the intent of the Policy, as well as its scope: the Policy prohibits the consumption, possession, sale or distribution of illegal drugs while on the appellant's premises or during working hours.¹¹⁷ At the same time, the policy is concerned with treating employees with a drug abuse problem in a fair manner and in ways which respects their right to privacy and dignity: "the intent of the policy is clearly rehabilitative, not punitive."¹¹⁸ Concurrently, Isaac J.A. draws on the fact that the banking industry is founded upon principles of honesty, integrity and trust, all of which are fostered and protected by EDT.

In viewing the scope of the Policy, Isaac commented:

the policy applies to prohibit any continued use of illegal drugs regardless of the reason for that use. Employees who test positive for drugs are not dismissed for drug use. Rather, those employees who

¹¹⁶ *Ibid.* at 228.

¹¹⁷ *Ibid.* at 238.

¹¹⁸ *Ibid.* at 238.

persist in using drugs and who test positive on three occasions risk dismissal if they do not participate in rehabilitation or comply with the other requirements of the policy.¹¹⁹

Furthermore, Isaac J.A. justified his interpretation of the standard of reasonable accommodation on the grounds that “the Commission’s own published policy statement on drug testing, is that the duty to accommodate does not extend beyond offering employees an opportunity to rehabilitate.”¹²⁰ Reasonable accommodation was found to render the policy non-discriminatory for several reasons: the Policy’s focus was on rehabilitation, the employee remains employed throughout the testing and rehabilitative period, and only after treatment and follow up positive tests does dismissal occur.¹²¹

T-D demonstrates, within an EDT context, why there was such a strong impetus for the Supreme Court to revise its human rights analysis in light of the discrepant characterizations of discrimination and conclusions reached by the Federal Court of Appeal. In *Sarnia Crane*, it was remarked that

the individual decisions of the judges highlight the considerable difficulty in determining whether drug and alcohol testing is discriminatory at all, and if it is, whether it is direct discrimination or indirect discrimination, and in those circumstances, whether the entity imposing the policy has established a bfor or has reasonably accommodated its employees, as the case may be.¹²²

In light of the fact that both *T-D* and *Entrop* were argued prior to *B.C.G.S.E.U.*, it is constructive to re-assess these cases using the new unified approach to determine how one might justify EDT in the human rights framework. In applying the new framework, the inconsistencies, errors in judgment and imprecision by which these decisions were reached come to light and reveal with greater clarity, the burdens on employers and employees in the legally justifiable implementation of EDT.

¹¹⁹ *Ibid.* at 240.

¹²⁰ *Ibid.* at 247.

¹²¹ *Ibid.* at 249.

¹²² *Supra* note 27 at para. 196.

iii. Applying the Unified Approach to Entrop and T-D

In both cases, it was clear that a *prima facie* case of discrimination had been demonstrated, hence the preliminary burden on the plaintiff is immaterial for our purposes here. What is of relevance, is an assessment of how the Supreme Court's reformed approach may be interpreted in the facts presented by *Entrop* and *T-D*.

In *Entrop*, Imperial Oil must first overcome the burden of establishing that the standards related to EDT and all of the Policy's practices were adopted for a purpose rationally connected with job performance. The Court stated that where "the general purpose of the standard is to ensure the safe and efficient performance on the job – essential elements of all occupations – it will likely not be necessary to spend much time at this stage."¹²³ It is obvious that safety was a primary issue for Imperial Oil and substance abuse on and off the job posed a threat to a safe and productive work environment. Identification of substance abuse and those afflicted with it is a laudable goal and it is clear that there is a rational connection between safe and healthy workers and a safe and efficient workplace. Thus, the first stage of the three-part test merits little attention, as most would concede this would not be the focus on a further appeal.

The second step of the inquiry requires the employer to demonstrate that the particular standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose. At the Board of Inquiry, Backhouse found that the new policy was inspired by a renewed "corporate focus on 'operations integrity' which began in the 1980s and in part as a response to the tragic environmental devastation caused by the Exxon Valdez tanker spill."¹²⁴ Backhouse went on to find that the policy was implemented in good faith:

the cross-border influence of Exxon and the financial component, while clearly present, represented specific factors which were weighed in the overall assessment of risk management. ..Searching for ways to reduce costly accidents is directly related to the need to remain financially secure within a highly competitive industry. These are not motives, which tainted the policy development process, but legitimate

¹²³ *B.C.G.S.E.U. supra* note 3 at 26.

¹²⁴ *Supra* note 1 (Bd. of Inquiry) at 106.

aspects of a good faith appraisal of measures to enhance workplace safety. Imperial Oil devoted significant time, effort and expense to create a Policy which the corporation believed would result in a substantial reduction in accidents due to impairment.¹²⁵

Thus, it is persuasive that the original finder of fact on this issue declared that Imperial had subjectively instituted this Policy in good faith. It would be difficult to argue otherwise, in light of the strong evidence establishing the events that precipitated the corporate motivation for a drug policy and a safer work environment.

The third stage in the unified approach will undoubtedly pose the greatest hurdle to Imperial Oil's claim, for in using the conventional analysis, the Board of Inquiry found that the employer failed to meet the burden under the objective component of the *bfor* defence. In the reformed analysis, Imperial must again demonstrate that the standard is reasonably necessary for the accomplishment of the work-related purpose. But to satisfy that requirement, Imperial has the onerous task of proving that in adopting its Policy, it could not accommodate individual or group differences without experiencing undue hardship.

At the Board of Inquiry, Imperial adduced substantial proof that its workplace intervention was objectively justified – by way of a drug and alcohol policy – because freedom from alcohol impairment was an essential requirement of safety-sensitive jobs.¹²⁶ Thus, accommodating the individual employee, who in Mr. Entrop's case happened to be a person with a past alcohol abuse problem, becomes a much more tenuous burden for Imperial to meet. Imperial is faced with circumstances similar to that faced by the British Columbia government in *B.C.G.S.E.U.*, where the Supreme Court rejected their test standards, medical and scientific evidence, and noted that evidence was lacking as to the cost of accommodation for individuals such as Ms. Meiorin.¹²⁷ In *B.C.G.S.E.U.*, the Supreme Court put little faith in the scientific evidence adduced, which suggests that for Imperial and other employers, there is a high burden imposed on the type of scientific evidence, on the type of statistics that can be relied on by the employer

¹²⁵ *Ibid.* (Bd. of Inquiry) at 108 addressing specifically, the alcohol components of the policy.

¹²⁶ *Ibid.* (Bd. of Inquiry) at 110.

¹²⁷ *B.C.G.S.E.U.*, *supra* note 3 at 32-33.

and on the overall quality of the evidence produced by management. Moreover, it appears the previous expectation of scientific evidence rather than impressionistic evidence has been heightened by an enhanced scrutiny of the scientific proof adduced. Science is clearly going under the Court's microscope in these cases. In light of the Court's skepticism toward the B.C. Government's evidence, it is doubtful that they would find Imperial Oil's background information, expert opinions and testing standards sufficient to pass this stage. Furthermore, the fact that the Board of Inquiry accepted expert testimony to the effect that the Policy's standards were "excessive" for its objective undermines Imperial's position. Adding to the difficulties Imperial faces, the Board found that even if it had found Imperial's objectives to be justified under s. 17(1), Imperial still would not have passed the standards imposed by s. 17(2) relating to accommodation up to undue hardship.

There are, however, a few aspects of the Board's reasons that can be contested if Imperial wishes to establish that they had met their accommodation burden. One could argue that there was more accommodation by Imperial than the Board was willing to recognize. In fact, it is clear that the burden on the employers has been raised past "undue hardship" to a disproportionate level which seems impossible to overcome, as both the Supreme Court in *B.S.C.G.S.E.U.* and the Ont. Div. Court in *Entrop* have placed overly stringent standards on the type of scientific proof which must be presented. In applying the new unified approach to the facts in *Entrop*, the following factors lead to a finding that Imperial has provided accommodation, and that any further attempts at adapting the workplace for affected individuals would impose undue costs.¹²⁸

¹²⁸ These factors are construed from the six "important questions" that the Supreme Court advised may be asked in the analysis: (a) has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard? (b) if alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented? (c) is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established? (d) is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose? (e) is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies? (f) have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? [*B.S.G.E.U.*, *supra* note 3 at 28].

First, Imperial did not impose EDT in isolation – it was part of a comprehensive workplace strategy that included peer support and review, employee assistance plans and on-site medical facilities, as well as extensive programs made available off the premises. Thus, alternative approaches were not only investigated, they were *incorporated* in the Policy adopted. Furthermore, it is well documented in this paper that the problems which the Board of Inquiry and the Court had with Imperial’s Policy was its breadth – as both supported the broader initiatives Imperial had taken, as set out above. I would assert that a court should focus more on accommodation in light of the entire context within which EDT resides, and assess whether EDT plays a more complementary role to all of the approaches taken within that framework, rather than scrutinizing it in isolation.

Second, a single standard of zero-tolerance for substance abuse at work in safety-sensitive positions is readily understandable and courts should not underestimate the value of this objective in assessing employers’ accommodation duties. The Board of Inquiry was troubled with the fact that the Policy does not mandate reassignment to comparable positions in every case.¹²⁹ There was, however, evidence that no employee who filed a self-declaration has ever been involuntarily terminated from their job.¹³⁰ Imperial argued that individuals who self-declare their problems are not fired from their jobs, but reassigned, usually to alternative and comparable positions at no loss in pay for five years. Where such individuals follow approved treatment programs, disability benefits are paid for any time lost from work. Furthermore, at Imperial one is not disqualified from work due to a substance abuse problem – they are merely not permitted to work in safety-sensitive positions until their reinstatement can be safely allowed. To impose more stringent expectations on Imperial regarding their placement of employees supplants management’s judgment with that of the court, and there is nothing in these facts which indicate a need for the court to second guess Imperial’s management approaches with respect to employee reinstatement in safety-sensitive positions and the time lapse involved in this process.

¹²⁹ *Supra* note 1 (Bd. of Inquiry) at 137.

¹³⁰ *Ibid.* note 1 (Bd. of Inquiry) at 137.

Thirdly, there is also evidence that Mr. Entrop did not do as much as he could to overcome his disability, as he did not complete his out-patient therapy and his long-term prognosis was poor.¹³¹ In *Alcan* it was noted that alcoholism cannot be effectively treated without recognition and effort by the afflicted person and that the duty of the employer to the alcoholic should be one of facilitating treatment and obtaining the support necessary to achieve and maintain sobriety:

it would be unreasonable and an undue burden, to add to all that the employer has done and endured... a requirement that it now endure repeated future relapses, with all the attendant risks and disruption. This is so whether the grievor was capable of abstinence but made insufficient commitment, as I have found, or he was incapable of abstinence and will inevitably relapse, as the union asserts. In either event, and having regard to the consequences of relapse, at the time his employment was terminated the grievor was simply not capable of meeting the requirements of his job, particularly the essential safety requirement that he be reliably unimpaired when working. However much this incapacity was a result of his alcoholism, the consequences could not be accommodated by the employer any further without undue hardship.¹³²

This analysis is also in accordance with the Supreme Court's adoption of Sopinka J.'s analysis in *Renaud*, where he stated: "how to accommodate individual differences may also place burdens on the employee."¹³³ Additionally, in *Re. Uniroyal Goodrich Canada and U.S.W.A.*, the arbitrator noted that because the grievor had not done all that was medically recommended and necessary to aid his rehabilitation, and because the employer had made many forms of treatment available, expecting a Company to do more [in light of the grievor's actions] would "amount to undue hardship."¹³⁴ Although the facts surrounding *Entrop*, *Alcan* and *Goodrich* differ, the notion that there is a burden on the afflicted employee to become reasonably productive demonstrates that evidence to the effect that an employee has not taken all medically necessary, or at least suggested steps for recovery, could diminish the burden on the employer to accommodate. And the Board of Inquiry did

¹³¹ *Ibid.* note 1 (Bd. of Inquiry) at 115. The decision also notes that Mr. Entrop did not keep the Occupational Health and Safety Department apprised of his alcoholic rehabilitation.

¹³² *Alcan Rolled Products Co. and U.S.W.A., Loc. 343* (1996), 56 L.A.C. (4th) 187 at 235.

¹³³ *B.C.G.S.E.U.*, *supra* note 3 at 29.

¹³⁴ *Re. Goodrich*, *supra* note 12 at 186.

not give enough weight to Mr. Entrop's role in accommodating himself. This is part of a more general problem underlying the Board of Inquiry and the Divisional Court's finding that mandatory self-disclosure is discriminatory and not justified. The Board's decision inadequately reflects the fact that accommodation is not a singular act and that it involves the willingness of all parties. While the employee has the right to be accommodated, he or she also bears the onus of disclosing his or her needs, providing relevant medical information and facilitating the overall process. This challenges the Courts' findings – if one should not be forced to disclose the characteristics of their disability, how can one expect the employer to then do everything possible to accommodate that individual, without knowing the true extent of the medical condition? If Courts and Boards of Inquiry are going to treat substance abuse as a disability on par with other handicaps, they should not be able to impose a less onerous burden on the employee with regards to their disclosure and convalescence responsibilities, while simultaneously imposing a more onerous burden on the employer regarding accommodation.

Accommodation must be viewed through a wider lens, which considers the entire policy and all of the accommodation measures taken by employers to determine if it is realistically feasible for an employer to do more. Surely one must admit that, on the facts, there is little more Imperial could have done. If the factors that tribunals as set out in *Central Alberta Dairy Pool* are recalled¹³⁵, one must recognize that Imperial has identified these problems in their Policy and sought to grapple with them in a conducive way, while not shifting the hardship onto other employees who are unaffected by the Policy. This view is not discordant with the Supreme Court's decision in *B.C.G.S.E.U.*, where it emphasized the overall procedure behind a standard, and how this should weigh in a court or tribunal's decision:

[n]otwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first the *procedures*, if any, which were adopted to assess the issue of accommodation, and second, the *substantive* content of either a more

¹³⁵ *Central Alberta Dairy Pool*, *supra* note 83 at 521. The factors which tribunals could consider in assessing undue hardship were financial cost; disruption of a collective agreement; problems of moral of other employees; interchangeability of work force and facilities; size of employers' organization; and safety, including the magnitude of risk and who will bear it.

accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard.¹³⁶

Courts and tribunals have not given enough weight to the procedures and have allowed certain aspects of their substantive content to supercede all other elements in the overall framework. I would suggest a re-evaluation of this approach in light of the new human rights analysis. Furthermore, if a policy is flexible enough to tailor a program to fit an individual's needs regarding EDT, this should meet the Court's standards of individual accommodation without disrupting the work force and inducing morale problems. It is clear that the Supreme Court is sending a message to employers that they must prove the unfeasibility of accommodation to individuals without imposing undue hardship on themselves. I submit that Imperial Oil's Policy has flexibility to meet different individuals' needs, but that this has been given insufficient weight in the decisions thus far.

As mentioned previously, the divergent outcomes in *Toronto-Dominion* present a perfect scenario to apply the Supreme Court's new approach and fully benefit from the unified analysis. While there has been no further appeal from the Federal Court of Appeal's decision, it is still useful to examine briefly the case's facts under the new framework.

Unlike *Entrop*, all three stages in the unified analysis provoke debate in light of the three different decisions reached by the Majority and the Minority in *T-D*. Under the unified approach, the differences in opinion as to whether the practice is adverse effect or direct discrimination are no longer a point of contention. Indeed, this case illustrates the futility in the prior distinction. The argument will thus focus on the three-step test.

T-D must demonstrate that there is a rational connection between the Policy's general purpose and the job's objective requirements. In his alternative finding, Robertson J.A. agreed with the Tribunal's finding that there was no rational connection between the two because of the inadequacies of the test results in relation to job performance. MacDonald J.A. found that there was no rational connection because the policy was under-inclusive and because T-D did not address the reasons for its implementations in economic or business terms. The fact that the

¹³⁶ *B.C.G.S.E.U.*, *supra* note 3 at 28 [emphasis in original].

test was pre-employment and was so under-inclusive formed the basis of his finding that there was no rational connection.¹³⁷ Issac C.J. determined that there was a rational connection by approaching the analysis with a view to the greater context of the *Human Rights Act* and the fact that employees have duties under this *Act* as well, namely consistency with one's duties and obligations as a member of society pursuant to section 2.

This author asserts that the Policy should easily pass the first stage, as adopting EDT in accordance with its stated objective establishes that there was a rational connection to the job specifications. Security in Canada's financial institutions is a grave concern and to test new employees for substances is a purpose rationally connected to the high expectations of job performance that clients and members of society have of banking institutions.

The second stage of the inquiry requires employers to demonstrate that their Policy was implemented in good faith and with an honest belief that it was necessary for the proper fulfillment of the job's purposes. T-D's policy was implemented in response to governmental concerns about security within financial institutions, and an overlapping concern about the prevalence of substance abuse among the general public. It applied to all, although it was mandatory for only some employees.¹³⁸ As noted in the *Entrop* analysis, it is hard to contest the subjective good faith of T-D when it is apparent that the overarching concerns were the safe and healthy fulfillment of job requirements. There was no evidence of any bad faith or ill-inspired motives on the part of the Bank.

Thirdly, T-D must establish that the Policy is reasonably necessary to accomplish the work-related purpose of a secure and drug-free workforce, and that it is impossible to accommodate employees with characteristics of discrimination without experiencing undue hardship. As was the case in *Entrop*, accommodation will be the sticking point in this case. Ample accommodation toward employees who are discriminated against because of this Policy is evinced in the facts, and to impose any further burdens on T-D would lead to undue hardship. As discussed above, this leads to several reasons for the conclusion that

¹³⁷ *T-D Bank*, *supra* note 2 at 290.

¹³⁸ *Ibid.* at 221.

Isaac C.J.'s decision is preferable, especially when applying the unified human rights analysis. First, in the testing procedures, the Policy targets specific substances and depending on the existence of these substances in a sample, more tests may be required.¹³⁹ If positive results repeatedly appear, then treatment programs are prescribed. Only after an appropriate rehabilitation program and no change in the employee's condition, will dismissal arise as a potential consequence of the employee's actions. It should be noted that an unwillingness to pursue rehabilitation is viewed as a breach of an employment condition and can render the individual susceptible to dismissal.¹⁴⁰ These background facts along with the general procedure in T-D's Policy, demonstrate that an appropriate burden is placed on the employee, commensurate with the onus on the employer to accommodate by way of the treatment programs put at the employee's disposal. Isaac C.J. did not disrupt the earlier finding that accommodation to the point of undue hardship was established. MacDonald J.A. also found that the rehabilitative program of the Policy conformed with the reasonable accommodation requirement, and that to impose a further burden on the employer would be to challenge the finding in *Renaud* that an employee cannot expect a "perfect solution", which is essentially what would be imposed on the employer if further accommodation was sought.¹⁴¹ Therefore, it is readily apparent that there is sufficient accommodation in this Policy, to satisfy courts' exigent standards with regards to accommodation burdens. There is little more that T-D could have done, than to give employees apposite opportunities to rehabilitate themselves, keep their work performance record in good order and adjusting the workplace to suit individual needs. This Policy was designed with serious thought given to the needs of the employer and the employees, and the concern for all is readily apparent in the Policy's provisions.

While there are obvious discrepancies at the Federal Court of Appeal as to the type of discrimination, and whether it is justified, it is apparent that under the unified analysis, Toronto-Dominion's Policy has a good chance of being upheld. The Federal Court has better addressed the limits of an employer's resources in attending to employee disabilities and afflictions, and more adequately illuminated the burden

¹³⁹ See *T-D Bank*, *ibid.* at 223 for specifics.

¹⁴⁰ *Ibid.* at 224.

¹⁴¹ *Ibid.* at 294-5.

on the employee to seek rehabilitation than the decision makers in *Entrop*. Thus, T-D serves as an excellent example of the failings of the conventional human rights analysis, and how the unified approach can dissipate the confusion between the different branches of the test so to assess the broader process and framework underlying EDT. This approach serves to better protect the interests of the employee and the employer, without unduly burdening either party.

iii. Conclusions reached in light of these decisions

What is most instructive about these decisions and the analysis applying the new unified approach, is the guidance that is provided to employers on how they must formulate policies mandating EDT. The Board in *Entrop* responded least favourably to the Policy's mandatory disclosure, as well as the mandatory seven-year waiting period after treatment for substance abuse.¹⁴² One should also note that the Board looked at credible alternatives to *mandatory disclosure, not EDT*, namely peer control in combination with supervisory assessment, random testing, post-incident testing, and testing for cause.¹⁴³ Thus, it is clear from the Board's decision, and the Ontario Court's finding of the reasonableness in the Board's conclusions, that EDT can and does form a permissible and constructive component of a workplace policy. What is also apparent, is that EDT must be implemented in a very cautious and the least intrusive means possible, if it is going to be upheld under human rights legislation. EDT itself is not employees' Achilles' heel in this debate. It is the onerous burdens that employers place on employees

¹⁴²The Board was struck with the fact that the Policy required a seven-year waiting period before returning employees to their positions, which was significantly longer than that for pilots, who could return after two years. See *supra* note 1 (Bd of Inquiry) at 137. While Backhouse condemns this aspect of Imperial's policy as unduly restrictive, one should consider the recent case of *Birchall v. Canadian Helicopter Ltd.*, [1998] B.C.J. No. 3231, (S.C.), online: QL (CJ), aff'd [1999] B.C.J. No. 2359, online: QL (CJ) where the employer's dismissal of a pilot following the failure of a random breathalyzer was upheld. Mackenzie J. in Chambers held there was just cause for dismissal and found that the rule was lawful and reasonable, the employee knew of the consequences of drinking within certain time period before a flight and the rule was clear and consistently enforced by the employer. More importantly, he held that the breach of the rule was sufficiently serious so to merit this reaction. Comparably, Imperial Oil's reinstatement period for a serious breach of the Policy does not seem so excessive.

¹⁴³*Supra* note 1 (Bd. of Inquiry) at 118.

on top of drug testing, which cause problems. And, arguably, these burdens could be addressed in a manner that would save EDT while still fostering a safe and open workplace.

While we are still awaiting the Ontario Court of Appeal's decision, a fairly convincing argument could be made on the basis of *T-D*, that employers have an obligation not only to their employees, but also to act consistently with their duties as a member of society. Surely, society expects that employees who can have an enormous impact on the public—whether through security matters or the generally safe operation of equipment—should be rehabilitated while other employees are deterred from falling into the pitfalls of substance abuse. In light of *T-D*, the Ontario Court of Appeal is presented with a unique opportunity to set out clear guidelines for employers as to how EDT may be justifiably implemented in accordance with human rights legislation, and how heavy their burdens should be in accommodating those employees with substance use and abuse problems. The fact that the Ontario Court of Appeal heard this matter prior to the release of the *B.C.G.S.E.U.* case also presents an ideal opportunity for the Supreme Court to hear the arguments on this unpredictable area of employment law, as management and labour alike are yet to have any decision from our highest court on this matter. This area is a highly contentious but also volatile area of the law, for it can have far-reaching and dangerous consequences if appropriate measures are not implemented for the benefit and protection of all. Academics and arbitrators have dominated this debate. What employees and employers require now is explicit guidance from the Courts—and hopefully the Ontario Court of Appeal will not waste this golden opportunity.

III. EMPLOYEE ASSISTANCE PROGRAMS ARE NOT ENOUGH: WHY EMPLOYERS SHOULD BE TAKING A PROACTIVE APPROACH TO COMBATING SUBSTANCE ABUSE

In light of the recent human rights jurisprudence and arbitration decisions on EDT, it is clear that there is room for EDT in the workplace. But how it is to be implemented will clearly be the main problem confronting employers. Instead of instituting EDT to combat workplace

problems, other approaches have been recommended by labour with a focus on prevention, education and rehabilitation. These solutions have been welcomed by employees because they are less intrusive to the individual and less destructive to the work environment.¹⁴⁴ But while those programs which focus on prevention and rehabilitation form constructive elements of employment policies, they are insufficient to meet the demands of workplace health and safety and are better implemented in conjunction with EDT. While EDT is vehemently opposed by labour groups, it is more the means of testing that are opposed, rather than the actual idea of EDT. Labour opposition can thus be accommodated.

Barbara Butler has recommended that employers take action with a well-communicated policy that is reasonably and consistently enforced.¹⁴⁵ It is clear from the case law, that it is often the element of surprise and the lack of employee input that provokes controversy in this matter. Proper communication of the policy is important not only at its inception, but also during its development, regarding the meaning of the provisions, the substances identified and the disciplinary procedures that accompany EDT – the entire policy must be developed in a manner that is accessible to all and equal in its scope. In searching for other ways to present EDT in a manner acceptable to employees, Susan Charlton advocates the least intrusive testing conditions: having the treating physician be the receiver of the test results, limiting the information available to the employer to whether the employee is complying with the treatment plan, and ensuring that an employee cannot be compelled to disclose medical information to the employer.¹⁴⁶ Furthermore, she stresses that addicted employees should only be confronted by persons with the skill and specific training to deal with this situation.¹⁴⁷

¹⁴⁴ Charlton, *supra* note 30 at 441.

¹⁴⁵ Butler, *supra* note 73 at 489-90.

¹⁴⁶ Charlton, *supra* note 30 at 444. Note that in *T-D Bank*, the Bank contracted with two private lab companies which operate the only two accredited substance abuse labs in Canada, and used a two-stage testing protocol, which the Panel found produced reliable results. Furthermore, several tests were conducted and any doubt was resolved in favour of the employees, and the information remained with the Health Centre and was confidential. *Supra* note 2 at 222-24.

¹⁴⁷ Charlton, *supra* note 30 at 446.

Note that there is also concern over the problem of the identification of test substances. False positives can occur when an employee has taken cough syrup, caffeine, asthma

Having reviewed the trends in arbitral decision and judicial approaches to EDT, it is conducive to synthesize the dominant concerns that employers should address in implementing EDT and the contentious aspects of a policy that could prove to be litigious. Employers must specifically state the objective of a policy and communicate this clearly with employees so that management cannot be accused of being under-inclusive or ambiguous in their approach to this issue. Employers must have a policy which specifically addresses problems in their particular workplace – decision makers are clearly unconvinced by evidence of the greater concerns posed by substance abuse beyond the workplace walls. Installing EDT *only* in the workplace does not qualify as developing an alcohol and drug policy. This is where many employers falter. Testing must be mandated as part of a comprehensive program that focuses on health promotion and education,¹⁴⁸ and it must be used to take a preventive and rehabilitative approach to workplace issues, rather than a punitive one. Substance abuse itself must have a specified definition so that this umbrella is not perceived as overly encompassing, thereby negating the overall merit of the policy. The testing procedures must have elaborate safeguards to protect employee privacy and to ensure the accuracy of the results. Furthermore, a single positive test should not result in employment repercussions for the employee – it should merely lead to another test to determine if there is a health problem with that individual. Employers must not view EDT as a disciplinary measure if they want to have a policy upheld, and thereby create a productive working environment. Any disciplinary measures that accompany the policy must be clearly communicated to all employees, so that there is no element of surprise as to the consequences of positive test results. In conjunction with discipline, reinstatement periods must be reasonable in comparison to similar professions – employers should provide documentation as to the justification for the length of the period and how the process will affect the employee. Mandatory self-disclosure should be addressed in the

medicine, herbal tea, poppy seeds or over the counter drugs. It is also possible to get a false negative by the addition of toilet soap or table salt to specimens, or by voiding at certain hours of the day. Lanyon, *supra* note 12 at 16.

¹⁴⁸ See Butler, *supra* note 73 at 503, and the (January 1993) E.L.L.R. for a summary on the Canadian Medical Association's policy which emphasizes the importance of education for employees.

context of the employee's obligation to participate in the accommodation process; the rehabilitative process is only fully realized with open lines of communication between the employer and the employee. Employees cannot expect employers to unduly burden themselves with rehabilitative programs for employees if they are unaware of the full parameters of the employee's situation. This can be accomplished in a variety of ways, and an employee should not be made to feel that management is scrutinizing their physical and mental well-being. EDT can be a viable component of last chance agreements, particularly if labour has an active role in the execution of these agreements and the drug testing that accompanies them. In conclusion, EDT and employee assistance programs are each insufficient. But together they create a proactive approach to a serious workplace issue that threatens the health and safety of management and employees alike.

IV. CONCLUSION

It is apparent from the present literature and jurisprudence on EDT that only with the imposition of the strictest standards for conducting these tests will Canadians accept drug testing in any form or setting.¹⁴⁹ This does not mean however that there is no place for EDT in a modern economy. EDT is an integral part of any workplace alcohol and drug policy: its implementation provides a commentary on substance abuse problems and on workplace conditions which can affect employee stress levels, as well as physical and mental well being. EDT can help determine the type of employee assistance program that best suits a workplace by pinpointing the type of substances that are being abused, thereby prompting a practical and conducive rehabilitative response. Barbara Butler has stressed that policies must "be in the context of the company's specific program needs and circumstances"¹⁵⁰ and EDT can assist in determining what these needs really are.

While there remains significant employee opposition to the imposition of EDT in the workplace, this analysis of the case law and arbitration decisions on EDT demonstrates that employers can

¹⁴⁹ See R. E. Willette, "Drug Testing Procedures" (1994) 2 Can. Lab. L.J. 311 at 324.

¹⁵⁰ Butler, *supra* note 73 at 508.

justifiably implement it as part of a comprehensive workplace program designed to improve the health and safety of all. If employers implement adequate procedural safeguards in an EDT policy, pay appropriate attention to this matter at collective bargaining with specific notice as to where EDT falls in a collective agreement, incorporate Charter values in the design of a program and give due recognition to the human rights position on this issue, EDT could justifiably be implemented. The Courts' pronouncements on EDT should not be construed as an obstacle to the implementation of EDT in the workplace. The problem with these decisions is that they have over-emphasized the idiosyncratic problems with specific policies, rather than highlighting EDT's positive attributes. Hence, employers should approach the decision of *Entrop* and *T-D* as guidelines which set out what to include in a policy and what to be wary of — not as a complete hindrance to the implementation of EDT. EDT is not a witch-hunt: it is a proactive solution to contemporary problems of substance abuse that are detrimentally affecting the workplace. Employers owe their employees a safe work environment, and EDT is a positive way of carrying through on this obligation. EDT is not interchangeable with employee assistance programs, educational seminars and other alternatives: EDT is part of a grander scheme that encompasses all of these approaches in combating substance abuse in the workplace. EDT is *not* a revisit to 'Nineteen Eighty-Four' — it simply meets the challenges of the modern workplace in a proactive and positive manner.