

A MOVING TARGET:
A STUDY OF THE DEVELOPMENT, EVOLUTION, AND DEMISE
OF TRANSPORT CANADA'S *STRATEGY ON SUBSTANCE*
USE IN SAFETY-SENSITIVE POSITIONS IN CANADIAN TRANSPORTATION

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A Moving Target: A Study of the Development, Evolution, and
Demise of Transport Canada's Strategy on Substance Use in Safety-
Sensitive Positions in Canadian Transportation

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ABSTRACT

On March 16, 1990 the Canadian government tabled its *Strategy on Substance Use in Safety-Sensitive Positions in Canadian Transportation*. This policy package was controversial from the outset for a number of reasons, not the least of which was the fact that it included a drug and alcohol testing regime. This thesis provides a critical analysis of the considerable debate engendered by the *Strategy*, and examines the events surrounding the development, evolution, and eventual demise of the initiative, with a particular focus on its application to the Canadian trucking industry.

The backdrop against which substance testing policies in the United States and Canada emerged is outlined. It was found that the stimulus for the development of such programs in the Canadian trucking industry originated with former U.S. President Reagan's 1986 "War on Drugs," and culminated with the development of U.S. drug testing rules that are applicable to both American and Canadian transportation workers.

A review of the primary and secondary literature on drug and alcohol testing revealed that the proponents generally contend that the testing of employees in safety-sensitive positions is essential for the protection of public health and safety. In contrast, opponents question the magnitude of the perceived problem, and underscore the unreliability of urinalysis, the violation of civil liberties, the tenuous legality of such programs, and the negative response from organized labour.

An analysis of the data collected for this thesis - including both documentary sources and semi-structured interviews with 12 key participants and commentators - indicated that, despite clear

evidence that the *Strategy*'s underlying rationale is questionable, and despite the recent decision by Transport Canada not to proceed with enabling legislation, support for the development of drug and alcohol testing programs for Canadian truckers remains strong among trucking industry representatives and government insiders.

Overall, the analysis embodied in this thesis reveals the underlying political, social, and economic context within which the Canadian government's *Strategy* emerged and evolved, and in so doing it contributes to our general understanding of the underpinnings, influences, and conflicts inherent in any exercise of socio-legal control.

DEDICATION

For

my parents

Jim and Carol McNally

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CHAPTER I

INTRODUCTION

On March 16, 1990 the Government of Canada tabled, in the House of Commons, a comprehensive policy package with respect to a strategy on substance use in the Canadian transportation industries. The policy encompassed, as a category, employees in safety-sensitive positions in the air, marine, and surface (commercial trucks and buses) modes of transportation. The stated purpose of the proposed strategy was to provide for amended or new regulations to prohibit workplace-related substance use, including alcohol, in all safety-sensitive positions throughout the Canadian transportation industries (Transport Canada, 1990:4).

The policy package had evolved over a period of time between 1987 and 1990. A number of events had taken place during this four year period that provided the impetus for the policy, and dictated the form that it would take. These occurrences included a revitalized War on Drugs ignited by former American President Ronald Reagan in 1986, the importation of this "new" War on Drugs into Canada by the Mulroney government, the institution of drug testing rules - that were also applicable to foreign transportation carriers - for American transportation workers, and the 1986 fatal train accident in Hinton, Alberta. In response to these happenings, a series of incidences took place within the Canadian government that culminated in the March 16, 1990 announcement of Transport Canada's *Strategy on Substance Use in Safety-Sensitive Positions in Canadian Transportation*.

Between 1990 and 1994, however, little progress was made with respect to the proposed *Strategy*, and it became stalled in the political process. A new Liberal government was elected in the fall of 1993, usurping the Mulroney legislative agenda. By the fall of 1994, the Chretien government had distanced itself from the *Strategy*. Subsequently, in late December of that year, the Minister of Transport, Douglas Young, declared that the government would not proceed with enabling legislation in support of the policy, leaving a number of unresolved issues in the wake of his announcement. Most important is the fact that although the federal government will no longer mandate drug and alcohol testing for Canadian transportation workers, the American drug testing rules dictate that such programs be developed for Canadian transportation carriers wishing to operate on U.S. highways. Consequently, a substance use policy is currently being developed by transportation industry representatives.

From the outset the Transport Canada *Strategy* had been controversial for a number of reasons, not the least of which is the fact that, in addition to education and employee assistance program (EAP) elements, the *Strategy* included a drug and alcohol testing¹ component. Not only had the chosen testing method - urinalysis - been criticized on the grounds that it is an unreliable and inappropriate technology for identifying impaired workers, but it also raised questions concerning the intrusive nature of the process itself, and the rights of workers to be free from state interference in

¹ Within the context of this thesis, the terms 'drugs', 'drugs and alcohol', and 'substance' testing are used interchangeably. These terms should be considered to denote those psychoactive drugs, including alcohol (except where only 'drug' testing is referred to), that act on the central nervous system to change or affect the way a person thinks, feels, or acts. Substances of concern in the workplace include Central Nervous System Depressants, Central Nervous System Stimulants, Hallucinogens, Phencyclidine, Narcotic Analgesics, and Cannabis (see Butler, 1993:1-6).

their private lives. Other controversies surrounding the *Strategy* included the genesis of the policy package, the nature and magnitude of substance use among Canadian transportation workers, the legality of drug testing itself, and the reaction of organized labour to the proposed testing of their members.

In light of the timing of the introduction of proposed drug and alcohol testing rules for Canadian transportation workers by the Government of Canada, and the considerable debate engendered by the proposal, what is needed is an evaluation of the antecedents to the proposed *Strategy*; an analysis of the debate surrounding drug testing issues generally, and the impact of this debate on the evolution of the Transport Canada proposal specifically; and an examination of the implications stemming from the decision of the Government of Canada not to proceed with a legislative mandate for the substance testing of transportation workers. The purpose of this thesis is to address these issues utilizing a multi-layered analysis in order to move beyond the immediate circumstances surrounding the development of the *Strategy*, and to examine the broader political, social, and economic context in which it emerged, evolved, and ultimately succumbed to the political process.

During the last 20 years, criminologists, sociologists, and legal scholars who have studied the origins and process of law-making have endeavoured to place specific laws, regulations, and the general administration of justice into a social context.² Such research is meant to increase our general

² See for example Boyd, Neil, *The Social Dimensions of Law*, Prentice-Hall Inc., 1986; Brodie, Janine, Shelley A.M. Gavigan, and Jane Jenson, *The Politics of Abortion*, Oxford University Press, 1992; Burtch, Brian, *The Sociology of Law: Critical Approaches to Social Control*, Harcourt Brace Jovanovich Canada Inc., 1992; Lacombe, Dany, *Blue Politics: Pornography and the Law in the Age of Feminism*, University of Toronto Press, 1994.

knowledge of the social underpinnings and influences on legal process, and how legal process influences social values and behaviour (Burtch, 1992:1-2). Following from the tradition established by these scholars, this thesis examines the ways in which substance use among Canadian truck drivers came to be defined as a social problem in need of a legal remedy, and how resistance to this form of socio-legal control manifested itself, and, in turn, influenced the evolution of the regulatory initiative.

The focus of this thesis will be limited to an examination of the issues as they apply to the Canadian trucking industry. Although other modes of transportation also fall within the scope of the proposed *Strategy*, the largest number of employees to be affected by the implementation of drug and alcohol testing rules will be within the trucking sector. Moreover, because heavy trucks constitute a large proportion of vehicles using the highways, and sometimes contain hazardous cargo, the safe operation of these vehicles is considered to be of major public concern (Haas and Donelson, 1982:58). This concern is often justified on the basis of statistics that recount the number of fatal traffic accidents involving heavy trucks (Flemming, 1985:18). Not surprisingly, due to the safety issues involved, substance use by truckers and related drug and alcohol testing programs have become important and controversial topics in the trucking industry and, as noted above, the subject of considerable public policy debate.

The principal research questions that are discussed in this thesis include: (1) Where did the impetus for the policy originate?; (2) What forces were most influential in shaping the policy?; (3) Why did substance abuse in the transportation sector emerge as an issue of immediate political concern during the time period being examined?; (4) Does the nature and extent of drug and alcohol

use in the trucking industry justify state mandated testing programs?; (5) Whose interests would be served by the implementation of such a policy?; (6) What are the arguments made in favour of workplace drug and alcohol testing programs?; (7) In what arenas are drug and alcohol testing regimes challenged, by whom, and why?; (8) How did criticism directed at the *Strategy* impact its evolution?; and (9) What will be the aftermath of the decision by the federal government not to proceed with legislation in support of the *Strategy*?

In Chapter 2 of this thesis, the historical backdrop against which workplace drug and alcohol testing policies in the United States and Canada emerged is outlined. Questions concerning the genesis of the Transport Canada *Strategy* will be addressed. It is argued that the single most important impetus behind the proliferation of workplace drug testing regimes since the mid-1980s originated with former U.S. President Reagan's 1986 "War on Drugs." The discussion in Chapter 2 also reveals that the passage of American drug testing rules for U.S. transportation workers, and the applicability of these rules to the Canadian transportation industry, provided the stimulus for the development of a similar strategy in Canada.

Chapter 2 further provides an overview of the time-line of the development of the Canadian government's *Strategy on Substance Use in Safety-sensitive Positions in Canadian Transportation*. Questions concerning the evolution of the proposed *Strategy* will be addressed. Events in the Canadian railway industry, Transport Canada's research in support of the proposed initiative, the contents of the *Strategy* paper, and the subsequent response from the Standing Committee on Transportation regarding the proposal are discussed within the context of the evolution of the

proposed policy, and its recent demise.

Chapter 3 sets out the general issues around workplace drug and alcohol testing regimes. Questions concerning the various perspectives of the proponents and opponents of workplace testing programs are considered. The discussion reveals that a number of challenges have been posed by the opponents of workplace testing, including the magnitude of the perceived problem, the unreliability of urinalysis, the violation of civil liberties, the legality of workplace testing, and the response from organized labour.

Chapter 4 explores the issues identified in the previous two chapters through semi-structured interviews and documentary analysis, with a view toward drawing inferences concerning the antecedents to the *Strategy*, the factors that had an impact on the subsequent evolution of the initiative, and the reactions to the recent decision by the federal government not to proceed with legislation in support of its proposed policy. Research questions concerning urinalysis, legal challenges, civil liberties, organized labour, and the political economy of trucking are also addressed.

The final Chapter provides a review of the main findings of the thesis, and offers some thoughts on its implications. It is postulated that pressure from the American government was the impetus behind the emergence of the *Strategy* in 1990, that the nature and magnitude of substance use in the Canadian trucking industry do not warrant the implementation of workplace testing, and that urinalysis is an unreliable and inappropriate testing method for the purposes envisaged in the federal initiative. Political expediency, economic concerns, and the resurgence of the War on Drugs are all found to have contributed to the both the development and evolution of the *Strategy*. Further,

it is argued that political considerations likely advanced the recent demise of the government initiative, while economic interests - couched in the rhetoric of public health and safety concerns - have forced the issue into the realm of the private sector.

CHAPTER II

THE EVOLUTION OF WORKPLACE DRUG AND ALCOHOL TESTING POLICIES IN THE UNITED STATES AND CANADA

The New "War on Drugs" - American Style

The single most important impetus behind the implementation of drug testing programs in the workplace originated from former U.S. President Reagan's 1986 "War on Drugs" (Feldthusen, 1988:93). As Jensen et al. (1991:651) have noted, the use of illicit drugs has periodically been rediscovered as a social problem in the United States for more than one hundred years. While the analyses of earlier campaigns focus mainly on individual moral entrepreneurs or organizational interests (Jensen et al., 1991:651), recent analyses of the 1986 War on Drugs emphasize the conservative political climate of the 1980s, the role of the media, public perceptions of drug consumption, and changes in the War on Drugs rhetoric (Jensen et al., 1991; Blackwell, 1994).

Jensen et al. (1991:656-659) comment on a number of precipitating factors involved in the social construction of a "new" War on Drugs in 1986. First, they note that the 1986 War on Drugs can be seen in the context of a conservative mood that permeated the political climate in the United States in terms of both fiscal policies and certain social issues. For example, during the early 1980s drinking and driving became a favourite issue with politicians of all parties, with Republicans and Democrats competing with each other to be seen as the toughest on drunk drivers. Raising the drinking age to 21, implementing widespread drug testing programs, and instituting capital

punishment for certain drug-related crimes were all strategies discussed as possible additions to the arsenal in the new War on Drugs (Jensen et al., 1991: 656-657).

A second precipitating factor was the anti-drug campaign of former First Lady, Nancy Reagan (Jensen et al., 1991:657). In an effort to change her public image, Reagan adopted the drug abuse issue with her "Just Say No" campaign, which received extensive media coverage and "provided an underpinning for the creation of the drug problem in 1986" (Jensen et al., 1991:657).

The role of the news media in shaping images of social issues is the final precipitating factor identified by Jensen et al. (1991:657-659). Drug use and abuse had attracted much media attention from the late 1970s through the first half of the 1980s. The increased coverage of illicit drugs in the print media in the late 1970s, the use of steroids by athletes, the drug-related death of John Belushi, the trial of John DeLorean on cocaine charges in the early 1980s, and the emergence of cocaine as the new drug of concern all served to focus media attention on drug use and abuse issues. During the spring and late summer of 1986, widespread publicity concerning the "crack epidemic" and the cocaine-related deaths of two well-known athletes, Len Bias and Don Rogers, contributed to an increase in publicity surrounding illicit drug use (Jensen et al., 1991:659).

In Judith Blackwell's (1994) analysis of the 1986 War on Drugs she argues that two important changes in drug war rhetoric during the 1980s help explain how the stage was set for the introduction of drug screening into the workplace. First, she notes that there are two fundamental approaches to drug control policy. Measures that are designed to limit the *supply* of illicit drugs have dominated North American drug control policy for almost a century and are characterized by legislative

prohibition, criminalization of the user, and strict law enforcement initiatives (1994:320). In contrast, drug control policies intended to reduce *demand* for illicit drugs have concentrated on education, treatment of drug users, and the amelioration of the social conditions in which drug use and abuse flourish. The implementation of workplace drug screening programs is considered to be a demand-reduction measure because it will force people to choose between illicit drug use and keeping their jobs (1994:320). Blackwell (1994:322) argues that the first major change in drug war rhetoric during the 1980s occurred when the demand-side advocate's agenda was appropriated by the more strident supply-side prohibitionists when they began to include the control of demand in their agenda.

The second major change in drug war rhetoric occurred when citizen's groups redefined the drug problem to include all illicit drug users, not just those who were causing harm to themselves or others (Blackwell, 1994:322). The rapid growth of private-sector drug treatment programs based on the "tough love" philosophy, and the public repudiation of the "recreational use" of drugs in a 1984 statement by President Reagan, paved the way for an atmosphere of "zero tolerance" towards all forms of illicit drug use, from the "crack addict" to the occasional marijuana smoker (Blackwell, 1994:323-325). Consequently, the net of concern over drug abuse widened to include users as well as abusers. According to Blackwell (1994:322), these two major changes in the 1980s drug war rhetoric "prepared the way for identifying workplace drug impairment as a major cause of North America's economic woes and the loss of U.S. competitiveness on the international market."

The new campaign against drugs actually began in earnest in 1984 with the publication the *1984 National Strategy for Prevention of Drug Abuse and Drug Trafficking* in which President

Reagan was quoted as follows:

No longer do we think of so-called hard drugs as bad and so-called soft drugs as being acceptable. Research tells us there are no such categories; that the phrase "responsible use" does not apply to drug experimentation by America's youth. And so far as the "recreational use" of drugs is concerned, I've never in my life heard a more self-serving euphemism by those who support drug use (at page 35 cited in Blackwell, 1994:323).

As discussed above, media coverage of the drug-related deaths of two well-known American athletes and the looming "crack epidemic" served to focus the political agenda on the issue of drug use and abuse during 1986. In March of that year, the President's Commission on Organized Crime issued its final report, including the following recommendation:

The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, *including suitable drug testing programs*, expressing the utter unacceptability of drug abuse by Federal employees ... Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing.

Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such testing programs (cited in Walsh and Trimble, 1991:34, emphasis added).

In August of 1986, in an attempt to gather support for mandatory drug testing of federal employees, President Reagan handed over a urine specimen for analysis. Vice President George Bush also agreed to be tested. Washington D.C. columnist William Safire commented that Bush's urinalysis indicated that he had "neither a drug addiction nor a mind of his own" (cited in Nesbit, 1989:84).

On September 15, 1986, President Reagan issued Executive Order 12564³, entitled the *Drug-Free Federal Workplace*, requiring all federal agencies to establish mandatory drug testing programs for federal employees in "sensitive" positions. The Executive Order was concerned with the use of illegal drugs only, and testing for licit drug or alcohol use was not considered originally in the Order (Ontario Law Reform Commission, 1992:2). Several justifications for the implementation of drug testing programs in U.S. federal agencies were offered in Executive Order 12564, including: to prevent lost productivity, to prevent the funding of organized crime through the drug trade, to promote public trust in federal employees, to increase reliability and good judgment, and to prevent irresponsible behaviour which could pose a threat to national security (discussed in The Privacy Commission, 1990:8). The U.S. government's perspective on illegal drug use among federal employees is clearly enunciated in Section 1 of Executive Order 12564:

Sec. 1. Drug-Free Workplace

- (a) Federal employees are required to refrain from the use of illegal drugs.
- (b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
- (c) Persons who use illegal drugs are not suitable for Federal employment (cited in the Privacy Commission, 1990:76).

Significantly, the use of illegal drugs *on or off* the job is considered to be inconsistent with employment by the federal government (Butler, 1993:82).

³ Executive Order No. 12564, 51 Fed. Reg. 32,889 (1986).

Mandatory drug testing programs were already in place in the U.S. military, and the Executive Order now extended drug testing programs to civilian federal employees in over 150 federal agencies, including transportation, the judiciary, corrections, the Department of Justice, the FBI, CIA, and customs, among others (Butler, 1993:82).

Within a few years, mandatory testing for illegal drugs had been implemented by more than 40 U.S. federal agencies (VanRensburg, 1989:9). The War on Drugs was also taken up enthusiastically by private sector employers who did not want to be viewed as a safe haven for drug users avoiding public sector testing (Feldthusen, 1988:93). By 1989 nearly one half of the Fortune 500 list of major American companies had implemented mandatory drug testing programs for employees (VanRensburg, 1989:9).

The *Drug Free Workplace Act*⁴ was passed in March of 1989 by the U.S. Congress. It stipulated that all federal government contractors and grant recipients with contracts in excess of \$25,000, provide a "drug-free workplace" by informing employees in writing of the policy; by establishing a drug awareness program in the workplace; and by agreeing to report any instances of employee workplace drug-related convictions to the federal contracting agency (Petersen and Massengill, 1991:144). Although the *Drug Free Workplace Act* did not mandate drug testing, it was viewed by many as providing the impetus to employers who had been contemplating drug testing programs (Walsh and Trimble, 1991:43).

⁴ (41 U.S.C. 701, 5151).

The extensive use of mandatory drug testing programs in both the public and private sectors in the United States has largely been rationalized on the grounds of concerns about safety in the workplace, and the "costs" associated with alcohol and drug problems. It has been argued that despite the current popularity of drug testing in the United States, the cost-effectiveness has not been proven and there is no evidence that an improvement in safety, health or performance has resulted (Henriksson, 1991:184). These issues will be explored in Chapter 3 of this thesis.

The 1986 "Made in Canada" War on Drugs

The Canadian government, recognizing the popularity of the American drug policy, began a similar "War on Drugs" in Canada in 1986. In fact, within a few days of President Reagan's announcement of a "new" War on Drugs, Prime Minister Mulroney made an unexpected addition to a prepared speech when he stated: "Drug abuse has become an epidemic that undermines our economic as well as our social fabric" (cited in Erickson, 1992:248). Mulroney's foray into the War on Drugs rhetoric apparently surprised even his own government officials. One high-ranking official in Health and Welfare Canada at that time described the bureaucracy's reaction as follows: "when he [the PM] made that statement, then *we* had to make it a *problem*" (cited in Erickson, 1992:248, original emphasis).

Jensen and Gerber (1993:454-455) contend that the return of drug issues to the social and political agenda was prompted by Mulroney's declining popularity in the polls. In less than two years since winning the September 1984 federal election, Mulroney and his party had lost nearly one-half

of their post-election support and had slipped into second place behind the Liberals in the public approval ratings. Patricia Erickson (1992:254) also notes that another key influence on the renewed War on Drugs in Canada at that time was the image of the drug problem, as imported to Canadians by the American media, of cocaine and crack as the new 'demon drug'. She states: "This 'secondhand' or 'borrowed' drug panic about cocaine and crack was imported from the United States as part of a larger cultural infiltration, with its highly negative evaluations of illicit drug use and users" (1994:254).

The bureaucracy responded to Mulroney's renewed War on Drugs effort by developing the *National Drug Strategy* which was launched on May 27, 1987. In response to sceptical reactions from drug experts, and political observers, the war rhetoric was softened with the more neutral term "drug strategy" replacing terms such as "epidemic" and "war" (Jensen and Gerber 1993:458). Moreover, unlike the American drug policy, the Canadian drug strategy now included alcohol abuse as a major focus, after the findings of the Standing Committee on National Health and Welfare (1987:1) concluded that alcohol was the most widely abused drug in Canada. Jensen and Gerber (1993:458) argue that, "The inclusion of alcohol also appears to have been an attempt to legitimate Mulroney's claim making activities."

As stated in the Government of Canada's *Action on Drug Abuse: Making a Difference* (1988:6), the overall objective of the *National Drug Strategy* is to "...reduce the harm to individuals, families and communities from the abuse of alcohol and other drugs through a balanced approach that is acceptable to Canadians." The Department of National Health and Welfare is responsible for the

overall co-ordination of the strategy.

Similar to the change in rhetoric discussed by Blackwell (1994:322) in reference to the American War on Drugs, the Canadian drug strategy also emphasized a move towards addressing the demand-side of drug use and abuse, as can be seen in the following comments attributed to Prime Minister Mulroney:

We are continuing our commitment to interdiction and enforcement, recognizing however, that these activities must be coupled with concerted efforts to *reduce demand*. Knowledge, attitude and social perception are the keys to changing behaviour. *All Canadians* have a role to play in creating an overall climate where substance abuse is no longer acceptable: our actions can make a difference (Action on Drug Abuse: Making a Difference, 1989:1, emphasis added).

The issue of mandatory drug testing in the workplace was not originally a focus of the *National Drug Strategy*; however, it became a concern of the Standing Committee on National Health and Welfare in their preparation of a report to the House of Commons on reducing substance abuse in Canada. In their review of mandatory drug testing programs the Standing Committee (1987:25) concluded the following:

The issue of mandatory employee drug testing is a public health and safety issue *only* and must be so treated.

It is the responsibility of the employer to weigh carefully the employment suitability of probationary employees, including the careful monitoring of behaviour which may indicate the need for drug testing. Mass or random screening of job applicants, however, is neither sensible nor acceptable (original emphasis).

The Standing Committee (1987:25) recommended that employers not introduce mass or random screening of employees unless it was in the "exceptional" case in which drug use by employees constituted a real risk to safety; and then testing should be allowed only for "cause"

where the employee must have shown evidence of impairment or of performance difficulties. Furthermore, the Standing Committee (1987:26) recommended that the federal government consider legislation to limit and control mandatory drug screening in the private sector.

At around the same time as the Standing Committee on National Health and Welfare was preparing its report for the House of Commons on reducing substance abuse in Canada, the Mulroney government had contracted with the Niagara Institute⁵ to conduct a national consultation on substance abuse and the workplace. The Niagara Institute held a number of workshops around the country with various members of interested groups including drug abuse experts, government officials, labour officials, and employers. Prior to the workshops, 103 individuals were interviewed with respect to the issues that should be raised. From these workshops, the Niagara Institute (1988:7) noted four themes that emerged for discussion:

...that alcohol was the primary substance abuse problem in the Canadian workplace; that use of legal and illegal drugs and poly-addiction was growing; that Employee Assistance Program (EAP) practices were valid but needed to be strengthened and extended in coverage; *and that Canada should not take its policy lead on drug testing from the U.S., but rather develop a Canadian solution to a Canadian problem* (emphasis added).

The identification of a "made in Canada solution" to drug testing in the workplace as a major theme by the Niagara Institute represents the first time this sentiment is discussed in official government documents. This theme would become important in the evolution of Transport Canada's

⁵ According to the Niagara Institute (1988:3), its mission is to convene Canadian leaders in ways that promote greater understanding on issues of common concern. The 1988, *A Report of the National Consultation on Substance Abuse and the Workplace*, was prepared by the Niagara Institute as part of its role as a neutral, third party assisting Health and Welfare Canada with the nationwide consultation process.

substance use strategy in the transportation industry, and will be explored in more detail below, and revisited again in Chapter 4.

The members of the workshops reviewed a number of issues and reached consensus on most. The following represents a summary of their findings (Niagara Institute, 1988:7-8):

Identification of the Problem. Workshop participants agreed that the scale of the problem was significant; that the problem affected individuals in every occupation and level of the organization; and that it was costly and painful for the organization, workers and their families. Workshop participants did not agree on the impact of substance abuse on public safety or the urgency of that particular issue.

Causes of Substance Abuse. Most workshop participants agreed that hazardous and stressful working conditions and ineffective human resource policies may contribute to increased rates of substance abuse in the workplace.

Availability of Information. Workshop participants agreed that information is scarce on the extent and impact of substance abuse in the Canadian workplace.

Directions for Action. Workshop participants strongly supported prevention techniques, including jointly-sponsored EAPs for the entire workforce.

According to the Niagara Institute report (1988:8), it was the issue of drug testing that became the basis for the most serious disagreements among workshop participants:

Public safety took preeminence for a few employers, particularly those in transportation and the military. They cited studies which described substance abuse by those in safety-critical jobs, and the link between substance abuse and accidents involving the public. Protection of individual rights took preeminence for many

participants, including labour, who argued that there were inadequate data to demonstrate a significant connection between abuse and accidents. Data collection, labour believed, was invasive and often used against the workers.

Participants recommended steps to make progress on disagreements over drug testing. In the meantime, all underscored the necessity to find effective alternatives to drug testing.

This tension between labour and employers, between the protection of civil liberties and the protection of public safety, is at the heart of the controversy surrounding workplace drug testing initiatives in Canada and will be discussed at length in Chapters 3 and 4.

In March of 1988, the Government of Canada officially responded to the report of the Standing Committee on National and Welfare on reducing substance abuse in Canada. Noting the Standing Committee objections to mandatory drug testing and the findings of the Niagara Institute national consultation, the federal government report concluded that, "across-the-board, mandatory drug testing will not constitute part of the National Drug Strategy" (Government of Canada, 1988:8). However, the Mulroney government did leave the door open to mandatory drug testing programs in the Canadian workplace with the following statement: "The federal government recognizes, however, that there may be exceptional circumstances where overriding public safety concerns may necessitate consideration of testing" (Government of Canada, 1988:8). It was on the basis of this statement that Transport Canada, Corrections Canada and the Department of National Defence continued with their development of substance use programs, including drug testing regimes (Butler, 1993:62).

In 1990 the *National Drug Strategy* was renamed *Canada's Drug Strategy* and funding has

recently been renewed until 1997 (Butler, 1993:60). However, for Brian Mulroney, his attempt to revive his popularity by using drug abuse as a political issue was not as successful as it had been for President Reagan. Jensen and Gerber (1993:459-460) note four major reasons for the dissimilar outcome. First, the Canadian public appeared to realize that the cocaine and 'crack epidemic' as portrayed in the American media was not as prevalent at home. Second, in contrast to Americans, Canadian have more liberal attitudes towards drug policies that grew out of the tolerance of the late 1960s and 1970s. Third, President Reagan, although not at the height of his popularity in 1986, still had more popular support than did Brian Mulroney when Mulroney declared a new War on Drugs in Canada. As Jensen and Gerber note (1993:460), "In short, the Mulroney government did not have the credibility to engage in successful claims making on such a questionable national issue." Finally, the War on Drugs cause was championed by politicians of both political parties in the United States, whereas in Canada, the Liberals and New Democrats were critical of the Mulroney initiative.

Although the 1986 Mulroney War on Drugs may not have had the same support and legitimation as the American policy, it most definitely had an impact on Canadian drug policies. As Erickson (1992:249) points out, criminal sanctions and law enforcement responses have become more zealous since the development of the *Canada's Drug Strategy*. Following the pronouncements of a new War on Drugs in Canada in 1986, a number of legislative initiatives were passed. In 1988 Bill C-264 was enacted, banning the sale of drug paraphernalia. In 1989 Bill C-61 was passed which gave the police new powers to seize and the courts to forfeit the assets of drug and other offenders. In 1992, as a consequence of Canadian athlete, Ben Johnson, testing positive for steroid use at the 1988

Olympics, steroids were moved to Section G of the *Food and Drugs Act* which includes barbiturates and amphetamines and provides for more severe penalties for trafficking. Erickson (1993:249) argues that as a consequence of the manifestation of a "renewed spirit of prohibitionism" under Canada's

Drug Strategy:

... the net of criminalization widened to include drug pipes, literature, and steroid dealers; more of the assets of those suspected of profiting from drug selling were confiscated.

Proposals to increase the surveillance and detection of drug users or sellers and to restrict their liberty became more common. Workplace drug testing and zero tolerance at the border were undoubtedly influenced by American example.

The Impact of the 1986 War on Drugs on the U.S. Transportation Sector

The influence of the War on Drugs rhetoric on the evolution of drug testing rules in the American transportation sector is apparent in the following remarks made to a trucking industry drug symposium by then U.S. Secretary of Transportation, Samuel K. Skinner, on December 7, 1989:

This morning as I watched television and reflected upon what's going on in Columbia - the tremendous tragedy that has occurred there over the last several days, the bombing of an airliner and now a major bombing of a building - it was brought to home to me that the people of Columbia, and the President of Columbia, who is leading his nation, are engaged in a most important fight against drugs.

Just as clearly they are sending the message that this fight...must be fought everywhere. Here in America, we must do something about the reduction on the demand side for drugs.

I believe the Department of Transportation's regulations as they relate to drug testing are a major step in the war against drugs ...

If we're really going to win the war, we're going to win it on the battlefields all over the world, not only in Columbia, Peru and the Far East. We're going to win it right

here in the United States. You are, your companies are, and your employees are really soldiers in that war... (cited in Canadian Conference of Teamsters, 1990: 21-22).

Although the U.S. transportation sector was brought into the realm of drug testing by virtue of the laws and regulations passed in the aftermath of the 1986 War on Drugs, the United States Department of Transportation (DOT) had been exploring the use of drugs and alcohol in their industries since the early 1970s. During that decade the National Transportation Safety Board (NTSB) began documenting the use of alcohol and other drugs in its investigation of transportation accidents, especially in railway accidents (Kolstad, 1992:178). In 1983, after a series of catastrophic railroad accidents in which alcohol or other drugs were considered to have been contributing factors, the NTSB recommended that DOT issue rules to ban the use of prohibited substances in the railroad industry. In 1985 DOT issued a final rule on drug and alcohol use in the railway sector (Kolstad 1992:178).

Following President Reagan's 1986 Executive Order, the DOT was one of the first U.S. departments to implement drug abuse programs, including drug testing, for their own employees in safety-sensitive positions (Butler, 1993:83). They extended their requirements to the transportation industry private sector in November of 1988 by issuing a series of regulations, known as "rules". The rules are applicable to private sector employees in six modes of transportation, including motor carriers, marine, pipeline, rail, aviation, and mass transit (Butler 1993:83). As Butler (1993:83) points out, "Although each rule has requirements for education programs, supervisor training and access to assistance, the major focus is the establishment of drug testing programs."

The DOT drug testing rules affect more than 7.4 million persons working in safety-sensitive occupations in all areas of the transportation industry (Richman, 1994:50), with the major group of transportation employees affected by the policy being long-haul or tractor-trailer truck drivers (McCullough, 1991:110). It has been estimated that over 6.6 million commercial truck drivers⁶ will be subject to mandatory drug testing programs (Richman, 1994:50). The original drug testing rules mandated drug testing for a variety of illegal drugs including marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP) (Kolstad, 1992:178).

The *Omnibus Transportation Employee Testing Act*⁷ was introduced in the U.S. Senate in 1991. This Act establishes a *statutory* mandate for the drug testing rules issued by DOT in the transportation sector, thus possibly making the specific drug testing requirements more difficult to amend over time than the existing rules and regulations (Butler, 1993:88). The catalyst behind the movement toward providing a statutory mandate for drug testing rules in the transportation industries was a Conrail train accident that occurred in Chase, Maryland, in which 16 people were killed. The engineer of the Conrail train was found to have been smoking marijuana prior to the crash (Traffic World, February 14, 1994:12).

Of particular interest is the fact that, unlike previous U.S. rules and regulations, the *Omnibus Employee Testing Act* now mandates that safety-sensitive transportation workers will be tested for

⁶ The drug testing rules are applicable to U.S. commercial vehicle drivers of trucks weighing more than 26,000 pounds.

⁷ *Pub. L. No. 1023-143.*

alcohol use in addition to illegal drugs. Another fatal accident proved to be the impetus behind the inclusion of alcohol in the *Act*. In 1991, a subway accident in New York killed five persons, and the motorman was later convicted of manslaughter. Reportedly, the motorman was found to have had a 0.21 blood alcohol level when he was tested post-accident (Traffic World, February 14, 1994:12).

Unlike the rules governing the use of illicit drugs - which is prohibited for safety-sensitive transportation workers *on or off duty* - safety-sensitive workers are prohibited from *specific* alcohol-related conduct including: (1) operating while having a breath alcohol concentration of 0.04 percent or greater; (2) operating while using alcohol; (3) operating within four hours after using alcohol; (4) refusing to submit to an alcohol test; and (5) using alcohol within eight hours after an accident or until tested (U.S. Department of Transportation, 1994:3-4).

There has been some controversy in the United States over the addition of alcohol to the drug testing rules. The American Trucking Association (ATA) has disputed DOT statistics that have been used as a basis for the new alcohol use policy. American Transportation Secretary, Federico Pena, has stated that over 13,000 crashes each year involve truckers who have been drinking (Traffic World, February 14, 1994:12). A spokesperson for the ATA argued that DOT was using statistics that were, "... astronomical and way out of line with anything we've ever seen. We looked at their source material, and it turns out that 13,000 figure includes pickup trucks ... They're using a false premise to show there's some sort of huge problem" (cited in Traffic World, February 14, 1994:14). In addition, the spokesperson cited a DOT survey of four states completed in 1993 that showed fewer than 0.2 percent of 64,000 commercial drivers tested positive in random alcohol tests (Traffic World,

February 14, 1994:12). Despite opposition from the ATA over the new alcohol testing rules and over the costs of implementation - which are estimated to be much higher than for drug testing because of the use of breathalysers - the majority of the alcohol testing rules came into effect in early 1995 for companies with 50 or more safety-sensitive employees (Highway & Vehicle Safety Report, 1994:5). However, in response to intense lobbying by the ATA, DOT has granted a four month extension before pre-employment alcohol testing rules are to be applicable. According to DOT, the extension has been allowed because of "a particularly high turnover rate" in the trucking industry, with some carriers facing 200 percent turnover rates annually (Traffic World, January 9, 1995:26).

The new U.S. drug and alcohol testing rules for the American trucking industry have best been summarized by Barry Holmes writing for *Motor Truck* (February 1995:8), a Canadian trucking industry trade journal, as follows:

Drug and alcohol testing is required for (1) pre-employment; (2) reasonable cause; (3) random (50% of drivers annually provide urine sample for drug testing; 25% submit to breathalyser test or provide saliva for alcohol analysis); (4) post accident (for accidents involving a fatality or chargeable offence).

The post-accident test must be done whenever a driver is involved in a fatal accident or is cited for a moving violation in a DOT reportable accident. Tests must be conducted by the motor carrier with federal testing procedures within 32 hours of the accident.

Medical review officers (MROs) must notify the carrier in writing of the test results within three business days. MROs must also make copies of test results and other documents related to a carrier's drug testing program available to appropriate government agencies.

Employers must provide drivers with educational materials that explain the expanded drug testing rules and the companies' related policies and procedures.

State and local testing requirements inconsistent with FHWA/DOT rules are preempted.

To meet random test requirements, owner/operators must join a consortium that includes at least two drivers.

A split sample urine specimen must be collected and subdivided into two containers for every drug test conducted. The MRO must advise drivers that they can request the split sample be tested within 72 hours after being notified of a verified positive with the primary sample was tested.

Effective Sept. 1, 1994, the cutoff level for the initial screen for marijuana use has been lowered from 100 to 50 nanograms per millilitre of THC (delta-9-tetrahydrocannabinol).

Testing for drugs during the medical exam required when a driver renews his commercial driver's license has been dropped on the basis that most drivers, being aware that their urine is to be tested, would refrain from consuming drugs or alcohol prior to visiting the doctor.

The passage of the 1991 *Omnibus Transportation Employee Testing Act* is of particular interest to the Canadian trucking industry for two major reasons: first, the list of substances to be tested for has been expanded to include alcohol; and second, according to Butler (1993:88), the *Act* would clearly cover Canadian transportation employees operating cross-border or who provide contracted services to American companies. The potential applicability of the substance testing rules of the American DOT is one of the core issues in the controversy surrounding Canada's response to drug and alcohol use in the trucking industry.

Application of American Drug and Alcohol Testing Rules to Canadian Truckers

The American government has made the argument that mandatory drug and alcohol testing programs should be applicable "extra-territorially"⁸ - that is, that all truck drivers travelling on American roadways ought to be tested for substance use.⁹ The rules regarding drug use and testing as they apply to foreign-based drivers were to have come into effect for Canadian truck drivers on January 1, 1990. However, the American DOT delayed the effective date of drug testing requirements for foreign-based employees of foreign-based motor carriers (namely Canadian motor carriers) on four occasions prior to 1995. The extension has now been delayed until the spring of 1996 in light of the passage of the *Omnibus Transportation Employee Testing Act*, which now adds alcohol testing to the rules (United States Department of Transportation, Federal Highways Administration, FHWA Docket No. MC-93-3:3). The implicit threat made by the American government is that if the Canadian government does not implement a similar substance abuse program in the trucking industry, Canadian carriers will be denied entry into the United States until they can prove they are drug-free (Foster, 1990:31; Holmes, 1990:20). Despite possible jurisdictional disputes, the American government continues to demand that the Canadian government subject

⁸ James Zimmerman (1992:160) notes that "extra territoriality generally refers to the operation or application of the law of a state or country outside its physical territorial boundaries." Justification for the extraterritoriality of U.S. laws and regulations is often made on several policy grounds ranging from protecting national security interests to regulating domestic industry.

⁹ Interviews conducted in 1992 with members of the Steering Committee for the British Columbia Trucking Association's Safe and Substance Free Transportation Pilot Project.

Canadian truckers entering the United States to similar substance testing programs (Selick, 1990:44).

The United States maintains that their drug and alcohol testing rules for foreign carriers are applicable to Canadian carriers and mandated in law as noted in a publication of the U.S. DOT (United States Department of Transportation, Federal Highways Administration, FHWA Docket No. MC-93-3:3-4):

The Omnibus Act applies to foreign-based motor carriers and drivers on its face, with the proviso that the new rules be "consistent with the international obligations of the United States, and ... take into consideration any applicable laws and regulations of foreign countries." ... Thus, foreign-based drivers are required to be covered by the statute, but the Secretary is granted the authority to deem the requirement satisfied by the testing laws of foreign nations.

Other regulatory mechanisms may also have had some effect on the ability of the U.S. government to place pressure on the Canadian government to develop drug and alcohol testing programs for its truckers. One possibility is that in light of the passage of the Free Trade agreement and North American Free-Trade Agreement (NAFTA), the U.S. government has assumed greater jurisdictional power with respect to surface travel between Canada and the United States. In fact, in November of 1993 the U.S. Senate approved a non-binding resolution urging that U.S. federal truck safety regulations not be compromised following the passage of NAFTA (Journal of Commerce, November 23, 1993: 2). The Senate may have been concerned about the harmonization of trucking regulations between the U.S., Canada, and Mexico as they specifically cited the U.S. drug and alcohol testing requirements in the resolution.

Also, the deregulation of the U.S. trucking industry in the early 1980's has had some impact on the regulation of transportation between Canada and the U.S. Under the *American Motor Carrier*

Act of 1980, the Interstate Commerce Commission was directed to deregulate some aspects of the entry, exit, and rates rules for the commercial trucking sector. However, under the U.S. regulations, the Interstate Commerce Commission still continues to regulate transportation between one state and another, and between Canada and the U.S. (Kahn, 1987:202).

Moreover, the U.S. government has been pressured by the American trucking industry, most notably the ATA, to ensure that foreign-based drivers will be subject to the same drug and alcohol testing rules as U.S. drivers. They argue that the equal application of rules will assure safety on the highways and fair competition in the industry (BCTA, June 9, 1994:1). The issue of fair competition between the trucking industries of both countries has been raised by other U.S. trucking industry observers (see United States Department of Transportation, Federal Highways Administration, FHWA Docket No. MC-93-3:5), who argue that Canadian trucking firms have a competitive advantage over American firms because they need not incur the substantial cost of testing their drivers or maintaining a drug education program.

Recently the Federal Highway Administration (FHWA) - a department of the U.S. DOT - requested comments from stakeholders on the issue of the applicability of U.S. drug and alcohol use and testing rules to foreign-based motor carriers. They received a number of submissions from interested Canadian groups, including the Canadian Owner-Operator Drivers Association (COODA) who argued that it was discriminatory to require testing of Canadian drivers as Canada has, at present, no laws authorizing such testing (Peluso, 1993:5). In addition, the Canadian International Brotherhood of Teamsters responded by arguing that the testing of Canadian drivers was a violation

of Canadian sovereignty, and unnecessary due to the absence of a demonstrated substance abuse problem in the Canadian trucking industry (United States Department of Transportation, Federal Highways Administration, FHWA Docket No. MC-93-3:5). In their response to the arguments put forth by COODA and the Teamsters, among others, the FHWA once again, in no uncertain terms, reaffirmed the U.S. government's position that the American drug and alcohol rules will be applicable to Canadian truck drivers:

The FHWA disagrees with the notion that requiring foreign-based drivers to be drug and alcohol tested as a condition of operating in the United States is a violation of the sovereignty of Canada, or any other nation. Foreign drivers only need be tested insofar as they operated in the United States. In no way is it being suggested that transportation occurring solely outside the borders of the United States, or that part of a cross border movement taking place on foreign soil, be subject to drug testing rules ... Drug and alcohol testing is merely one of the many Federal requirements with which foreign, and domestic, drivers and motor carriers are obliged to comply while operating in the United States. That another sovereignty does not place such requirements on motor carriers and drivers is immaterial ... In other words, United States national standards might be different from those in other countries, but they are applied evenly across the board to all carriers and drivers operating in the United States. Because of this equality of national treatment, there is no discrimination against foreign carriers or drivers (United States Department of Transportation, Federal Highways Administration, FHWA Docket No. MC-93-3:6-7).

As can be seen from the above discussion, the issue of the foreign-applicability of U.S. drug and alcohol testing rules to Canadian truck drivers is a contentious one and is central to the discussion of the evolution of Transport Canada's substance use strategy. This issue will be revisited in Chapter 4 of this thesis.

The Evolution of Transport Canada's Strategy

Background

It should be noted from the outset that in Canadian law there already exist a number of specific laws and regulations that prohibit the use of alcohol or drugs in the transportation sector. There are four major sections of the *Criminal Code of Canada* under which a person may be charged with a drinking-driving or drugged-driving offence: (1) Operation while impaired is specified in Section 253 of the *Criminal Code*. Under this Section an individual commits an offence if his or her ability to operate a vehicle is impaired by alcohol *or a drug*, or s/he has consumed alcohol in such a quantity that the concentration exceeds eighty milligrams of alcohol in one hundred millilitres of blood; (2) Failure or refusal to provide a breath sample is specified in Section 254 of the *Criminal Code*; and (3) In December of 1985, Bill C-18 created two other major impaired driving offences, namely, impaired operation causing bodily harm (Section 255(2) *Code*) and impaired operation causing death (Section 255(3) *Code*).

In addition to the impaired driving laws in the *Criminal Code*, other legislation, specific to the transportation industry, prohibits the use of alcohol or drugs by transportation workers. These statutes include the *Railway Safety Act*, the *Aeronautics Act*, the *Canada Shipping Act*, and the *Pilotage Act* (Butler, 1993:68).

Despite the existing legislation and regulations that prohibit alcohol and drug use in the transportation section, by 1988 the federal government had concluded that these measures were not sufficiently effective to ensure public safety (Butler, 1993:69). According to Butler (1993:67-68),

"Pressure for specific government involvement in this area originated with the Canadian railways in 1986, and was triggered by the Hinton rail disaster which brought attention to problems associated with drug and alcohol use in that industry."

What follows is a chronology of events that culminated in the development, and subsequent evolution of, Transport Canada's policy package with respect to a strategy on substance use in safety-sensitive positions in Canadian trucking industry.

Events in the Railway Industry

On February 8, 1986, a westbound Canadian National (CN) Rail freight train collided head-on with an eastbound VIA Rail passenger train, killing 23 people, and injuring 71 others. The accident occurred on the CN main line approximately 11 miles east of Hinton, Alberta. Among the dead were seven CN employees (including the engineers from both trains), and 16 passengers. This was a catastrophic accident; in addition to the injuries and loss of life, property damage sustained in the incident was estimated to exceed \$30 million (Foisy, 1986:3, 15).

Within two days of the crash, the federal government appointed Mr. Justice Rene P. Foisy of the Court of Queen's Bench of Alberta to a Commission of Inquiry into the events surrounding the Hinton crash. Justice Foisy held 48 days of public hearings, and recorded evidence from a total of 150 witnesses (Foisy, 1986:3).

In his report released in December of 1986, Justice Foisy found that neither drug nor alcohol use had contributed to the accident, although this perception had been widely reported in the media.

In fact, Justice Foisy (1986:5) concluded that the Hinton crash “resulted from a lack of alertness and a failure to follow established railway operating rules on the part on the CN employees involved in the operations of [the freight train], and from a failure on the part of CN to install the superior safety devices in the lead locomotive...” The fatigue experienced by the crew members of the freight train was attributed to the fact that, at that time, railway running crews were exempt from regulatory limits on hours of work. In addition, during the mid-1980s, CN was involved in a long term program of replacing the traditional “deadman’s pedal” with the more effective and tamper-proof “reset safety control”; both of which operate to stop a train automatically should the engineer become incapacitated. In the case of the Hinton crash, it was suspected that the “deadman’s pedal” - which had yet to be replaced by CN - had been disabled by the crew prior to the incident (Foisy, 1986:2-9).

Overall, Justice Foisy (1986:7-8) found that the ‘railroader culture’ had contributed to the disaster:

Notwithstanding the fact that crew members and union spokesmen who testified before the Commission stated that they appreciated the fundamental importance of the rules to the safe operations of trains, examinations by a [Canadian Transport Commission] official of the statements and testimony of only those running crews involved in the movement of trains in the region of the collision on the morning of 8 February revealed 19 different possible rule violations. Many of these occurred in a way that was visible to other employees, but that did not seem to raise any concern...

This disregard for safety is a reflection of the railroader culture. Within this culture, great value is placed on loyalty, on endurance, and on productivity. An employee gains standing by being willing to work very long hours regardless of fatigue; he would lose standing by claiming a rest period. He gains standing by “protecting” a fellow employee by failing to report rules violations or health or other problems that could adversely affect performance; he would lose standing by drawing such elements to the attention of management and demanding help or support for his co-worker.

In light of the fact that the CN engineer - who was killed in the accident - reportedly had a long history of alcoholism, Justice Foisy examined the existing Employee Assistance Program available to CN employees. After his evaluation, Justice Foisy (1986:116) recommended that the program be improved to ensure that it adequately provided for a high level of effective monitoring, and that steps be taken to ensure that management officers did not treat the EAP as a substitute for normal managerial vigilance. Interestingly, no recommendations were put forth by Justice Foisy concerning the creation of drug and alcohol testing programs for railway workers.

Notably, in their response to Justice Foisy's report, the railway industry did acknowledge a need to improve industry-wide EAPs; however, they also requested that the Minister of Transport introduce legislation mandating drug and alcohol testing for railroad workers. The Minister responded by commissioning a special committee to look into the issue (Butler, 1993:68).

The *Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry* was formed and comprised representatives from railways, unions, the Canadian Transport Commission, and members of the federal Departments of Transportation and Health (Transport Canada, 1988:1). The *Task Force* conducted a survey of persons employed in safety-sensitive positions in the railway industry. A sample of 1,060 workers were contacted by telephone and were asked questions concerning the use of alcohol and drugs in their workplace (Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry, 1987:iii). The interviews were confidential; however, it should be noted that the names of the employees (a total sample of 3,000) were provided by the employers, during a time of labour unrest in the industry.

Results of the survey indicated that reported levels of alcohol use for railway employees surveyed were higher than for those of the general population in Canada, and that while the use of drugs by employees was comparatively small (3.8%), most of those consuming illicit drugs were doing so virtually every day (Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry, 1987:i).

The Task Force recommended that in addition to strengthening EAPs in the industry, alcohol and drug testing be mandated for safety-sensitive employees in the railway industry in the following scenarios: pre-employment screening; testing following an accident; testing for "reasonable cause"; and testing along with medical examinations (Transport Canada, 1988:2). They did not endorse random testing. The *Task Force* further recommended that, "... the rights of the individual and human dignity should be preserved as a first priority, except where preservation of those rights conflicts with measures to protect public safety" (cited in Transport Canada, 1988:2).

Following the release of the *Task Force* report, the federal government referred the issue to the Standing Committee on Transportation (SCOT) who at that time were reviewing the *Railway Safety Act*. After considering the issue, SCOT recommended to the government that they provide a policy for drug and alcohol testing of transportation industry workers for reasonable cause and in post-accident situations (Butler, 1993:69). The government responded to the SCOT report by declaring that due to legal and human rights issues, and the technical implications of urinalysis testing, they would undertake studies to assess the nature of any substance use problems in other modes of transportation, in addition to the railways. The government indicated that a national transportation

policy on safety had to extend to all federally regulated jurisdictions (Butler, 1993:69). According to Butler (1993:70), "It was on this basis that the government's interest in workplace substance abuse, which started in the railway industry, was extended to all modes of transportation."

Transport Canada Research

The federal government asked Transport Canada to undertake a variety of studies to ascertain the nature and extent of drug and alcohol use in all modes of the transportation industry. Nine separate studies were conducted, including: four modal specific studies of substance use; two separate reviews of the literature concerning substance abuse in transportation and implications for transportation safety; a report on the incidence and role of alcohol and drugs in fatal accidents in Canada; a review of studies on the validity of substance users' self-reports; and a report on the nature and extent of EAP's and drug screening programs in the transportation sector (Heffring Research Group, 1990:8-9). The modal specific studies comprised a survey of over 18,000 employees in safety-sensitive positions in the air, marine, and truck/bus modes of transportation, and surveyed the respondents on a variety of substance use issues, including self-report use, characteristics of the employees' job which may lead to substance use, and reactions to and support for possible treatment programs and testing regimes (Heffring Research Group, 1990:5).

A marketing research and consulting group, the Heffring Research Group, was contracted by Transport Canada to provide an integrated report of the information available from the above-noted research projects. The stated purpose of the report was to "... provide Transport Canada with a

better appreciation of the nature and extent of self-reported use of alcohol and other drugs by employees in safety-sensitive positions in the Canadian transportation sector" (Heffring Research Group, 1990:4). This document is important to the evolution of Transport Canada's proposed policy because it provides an overview of the tenets upon which Transport Canada based its strategy paper released in March of 1990.

What follows is a summary of the conclusions reached in the integrated report (Heffring Research Group, 1990:15-16):

General Alcohol and Drug Use

Overall, it can be concluded that the percentage of people using alcohol or specific drugs in these modes is similar to figures found in broader population surveys.

There is a small group of people (no different than in the general population) who are heavier alcohol users. They usually represent less than 5% in any occupational group studied. Their heavier use and propensity to multi-substance use puts them and others at a substantially higher risk than lighter drinkers. This is magnified by the fact that many assume that it takes much higher levels of consumption before they become personally impaired.

Substance Use in the Workplace

There is a relatively small (in most cases less than 5%) group of people in each occupation studied who report using alcohol or drugs while at work or just prior to work. The marine mode reports slightly higher percentages. Alcohol and medications are the substances reported to be used most often.

In the modal studies, people were asked about safety related negative effects of their substance use as well as those due to hangovers. More safety related negative effects were self-reported for hangovers than for on the job drinking and other drug use.

Overall, alcohol is clearly the substance that shows the highest reportage usage and safety related negative effects. Furthermore, the combined effects of multi-substance use should not be ignored, since research has shown that heavier alcohol users also

tend to be users of many other drugs.

Accidents, Dangerous Situations and Fatalities

With regard to fatalities in the transportation sector involving the presence of alcohol or drugs; the majority of post accident testing has been for alcohol, not drugs. For alcohol, there has been a trend towards a steady decline in the numbers of drivers/operators who have been drinking and driving; but a steady increase in the blood alcohol levels of those that have been drinking and driving

In the modal studies, the use of alcohol was more frequently reported as a contributor to accidents and dangerous situations than street drugs or medications.

Overall, the percentage of workers reporting accidents (in the past 12 months) due to the use of alcohol or drugs was 1% or less. The range was 0-3% for other dangerous situations that didn't result in accidents. The highest percentages for dangerous situations were reported by some key positions: air traffic controllers (2%) and other navigation personnel (aviation) (2.9%). Although alcohol is cited as being involved more often, medications and street drugs were cited with relatively high frequency as contributing to accidents and dangerous situations in proportion to their levels of self-reported use.

The small group of heavier drinkers reported a higher incidence of accidents and dangerous situations, however, these types of situations were also reported by a small group of lighter drinkers as well. The profile of both groups will need to be analyzed in more detail.

Self Perceived Safety Risk

When workers were asked to give their opinions about the importance of alcohol and drug use relative to other things, in contributing to safety risk, almost half in most occupations surveyed felt it was a little or much more important. Because only one question was asked in this area, further study is needed to probe the reasons for these opinions.

Transport Canada's Strategy Paper: Strategy on Substance Use in Safety-Sensitive Positions in Canadian Transportation

On March 16, 1990, Transport Minister Doug Lewis tabled in the House of Commons a

strategy paper on substance use in safety-sensitive position in Canadian transportation industries. In Transport Canada's "Information" release (March 16, 1990:1), Minister Lewis is quoted as saying, "The strategy introduced today is a comprehensive and balanced approach to maintaining and enhancing transportation safety in dealing with substance. It addresses education, employee assistance and problem identification."

The articulated rationale for the development of the *Strategy* is found in the following passage of the strategy paper (Transport Canada, 1990:1):

Safety in the transportation industry is of paramount importance to Canadians. It is also apparent, however, that substance use and abuse is a problem which unfortunately exists in Canadian society - a problem which the transportation workplace has not escaped entirely.

Clearly, no one condones workplace-related use of drugs or alcohol by workers employed in safety-sensitive positions in the transportation industry. At the same time, Canadians are concerned about treating people with problems of substance use in a fair and humane way.

Consistent with the National Drug Strategy announced in 1987, the strategy provides an enhanced preventive and remedial approach for government, industry and employee representatives to use on a co-operative basis.

The applicability of the *Strategy* to the transportation sector, and the articulated intent of the *Strategy*, are stated as follows (Transport Canada, 1990:3-4):

Under the strategy, the Minister of Transport is acting as the regulator of public transportation safety in the federal jurisdiction and, therefore, the proposed strategy applies to all positions in the federal transportation sector which are considered to be safety-sensitive. The strategy covers services or operations performed by Canadian transportation entities. ...

The purpose of the strategy is to establish a comprehensive series of measures to prevent and remedy substance use in safety-sensitive positions in transportation.

More specifically, the strategy seeks to prevent and deal with substance use in safety-sensitive transportation jobs in a way that is consistent with and supportive of the government's National Drug Strategy.

The specific measures of the *Strategy* are outlined in the paper as follows (Transport Canada, 1990:10-11):

- 1) Under an expanded definition of what constitutes a safety-sensitive position, provide for amended or new regulations to prohibit employees in safety-sensitive positions from using, being under the influence of or impaired by a substance while on duty and from using alcohol within 8 hours before work. Use of prescribed and "over-the-counter" drugs will be permitted under given conditions;
- 2) Require transportation employers to provide education to employees in safety-sensitive positions on the effects of drugs and alcohol and the requirement of federal policy and regulations intended to prevent use in the workplace;
- 3) Require that employees in safety-sensitive positions have access to an Employee Assistance Program;
- 4) Require training for supervisory personnel in the transportation safety environment on recognizing signs of substance use and encourage education programs in kind for all employees in safety-sensitive positions;
- 5) Require substance testing after an accident, as part of a required medical examination, as a condition of confirming a new or transferred employee in a safety-sensitive position, and "for cause" and under a program having a random element in the workplace;
- 6) Require removal of employees from safety-sensitive positions where an individual has been confirmed as having tested positively for alcohol or drugs. Reinstatement will only be possible on the recommendation of a counsellor or health professional to whom the employee was referred under the employer's EAP;
- 7) Prevent a person having a positive test result from being confirmed in safety-sensitive positions.

The *Strategy* paper does not deal directly with legal, civil liberties, or technical issues around

drug and alcohol testing regimes; however, reference to the possible controversies are noted in the following passage (Transport Canada, 1990:8):

It is essential to balance the need for substance testing against a desire to respect the rights of individuals and to treat people with substance use difficulties in a fair and humane manner. All testing will be designed in a way which minimizes intrusion and the infringement of rights to the greatest possible extent.

Reaction to the announced *Strategy* from the trucking industry was swift and bitter. Cecil Foster reporting in an industry trade journal (*Traffic World*, April 2, 1990:30) noted that, "Howls of protest from transportation workers, their unions and employers have greeted a Canadian government proposal to impose a drug and alcohol testing program that mirrors U.S. Department of Transportation rules." The *Strategy* was condemned: by government critics who claimed the federal government was rushing too quickly to copy the U.S. program; by civil libertarians who claimed that random drug testing is an abuse of fundamental civil rights; by unions who questioned the validity of the tests; and by transportation companies who claimed they did not want to be responsible for policing their workers for drug use (Foster, April 2, 1990:30). Writing in the industry trade journal, *Motor Truck*, Barry Holmes complained (1990:20):

Simply put, the Americans have served notice that either Canada adopts a drug screening program for truck drivers, flight and rail crews operating in the U.S. or else keep out.

On the other hand, if such a drug screening program contains one or more provisions that are deemed to infringe on the Canadian Charter or the human rights codes, Canadian carriers could be caught with unenviable options. They could have to either set up an illegal drug testing program, shut down their international operations, or employ just Americans, who are subject to U.S. rules.

In addition, many groups complained that Transport Minister Doug Lewis did not consult

with them or prepare them for the announcement of the strategy paper (Foster, April 2, 1990:30). The transportation unions, along with other stakeholders, had been consulted while the Transport Canada studies were being conducted - and in fact, as noted above, had provided the names of their members for the modal specific surveys - however, the unions claimed that Transport Canada had promised that they would be consulted prior to the development of the strategy, and that this did not occur (Holmes, 1990:20)

After tabling the strategy paper in the House of Commons, Minister Lewis then referred the *Strategy* to the Standing Committee on Transport for review. The transportation industry, and other interested stakeholders, were invited to make representations to the Standing Committee.

Standing Committee on Transport Review of Transport Canada's Strategy

The Standing Committee on Transport tabled in the House of Commons its review of the *Strategy on Substance Use in Safety-Sensitive Positions in Canadian Transportation* on June 12, 1990. During the time period in which the Committee held hearings, numerous stakeholders appeared before the Committee, including the then Deputy Minister of Transport, Glen Shortliffe, delegates from a variety of unions, representatives from a variety of transportation companies, spokespersons from the Canadian Trucking Association and other provincial trucking associations, an envoy from the U.S. DOT, and the Chief Commissioner of the Canadian Human Rights Commission, among others.

The Committee's report to the House of Commons endorsed both the education and the

rehabilitation components (through the development of EAPs) of the strategy paper. However, the Committee did raise four main issues with which they were concerned. First, reservations were expressed regarding certain aspects of the alcohol and drug testing component of the *Strategy*. In reference to their review of the Transport Canada's surveys and studies (discussed above), and evidence submitted before them during the hearings, the Committee stated (SCOT, 1990:46-6):

Indeed, nowhere in these surveys or studies, or in the evidence submitted during the hearings, was it demonstrated that there is any significant or serious risk to safety as a result of substance use in the transportation industry. Certainly, in our review, we have not been able to identify any significant major drug or alcohol related safety risk in the Canadian transportation system. Therefore, we are not persuaded that at the present time, a substance use problem exists.

Secondly, it immediately became apparent to the Committee during the hearings on drug and alcohol testing that the fundamental question was, at what point should individual rights give way to the public interest. The dilemma that the Committee faced was trying to find the right balance between individual freedom and the paramount concern for public safety. It is against this background that the Committee will assess the various types of drug testing suggested in the strategy.

In their review of the types of testing proposed by Transport Canada, the Committee endorsed post-accident testing, pre-employment testing, and "for cause" testing (although with some reservation), but they did not support random mandatory testing (SCOT, 1990:46:6-46:11). As stated in their report (SCOT, 1990:46-10):

The Committee recognizes the force of the argument of deterrence but is persuaded by the weight of the evidence that mandatory random testing should not be endorsed. To begin with, as we have noted, substance use is not a problem in the industry nor, apparently, is it causing a risk to safety. Certainly it is not a problem that would, in our view, justify such a draconian infringement of individual rights. We have endorsed all of the other forms of testing proposed in the strategy as well as enhanced education and rehabilitation programs. We believe that we have gone far enough in balancing the rights of the individual with the public interest in a safe transportation

system.

The second area of concern for the Committee involved the cost implications for small employers who are required under the *Strategy* to implement alcohol and drug programs in their businesses. The Committee stated (SCOT, 1990:46:13):

What concerns us here is the financial burden that small employers will inevitably face if required to implement a drug testing program. This will be particularly true of the trucking industry. Certainly we think the Minister should be very sensitive to this particular question in the development and application of the legislation. It may well be that the government will have to provide some financial assistance in order to make this program work fairly and effectively.

Third, the Committee was concerned with the perception among some of the witnesses that there was some question regarding the integrity and validity of the consultative process between industry representatives and Transport Canada on the questions of substance use and the development of the *Strategy*. Therefore, the Committee recommended (SCOT, 1990:46:14):

That the Minister of Transport immediately establish a formal, dedicated, tripartite, consultative process composed of representatives of government, industry and labour to advise and participate in the preparation and drafting of legislation and regulations on substance use in the transportation industry.

Finally, the Committee expressed deep concern about the "American Dimension" to the development of *Strategy*, and stated the following (SCOT, 1990:46:15):

Several witnesses stated categorically that they believe the reason for the Canadian strategy at this time, is because of the American threat of the extraterritorial application of their drug testing regime to Canada. Some saw it as nothing more than an attempt to appease the Americans and harmonize the two regimes. While they recognized that because we share the longest common border in the world and the United States is our largest trading partner this puts us in a more difficult position than other countries, they firmly believed that the substance use situation is different in our country and for that reason we should have a "Made in Canada" strategy. We

agree, and believe that the Canadian strategy should reflect the Canadian reality.

In summary, the Standing Committee on Transport endorsed, for the most part, Transport Canada's strategy paper on substance use in the Canadian transportation industries, with the exception of the provision for mandatory random substance testing. In addition, the Committee recommended that Transport Canada consider providing some financial assistance for the implementation of the strategy; improve the consultation process; and develop a "Made in Canada" solution for a problem the Committee states it doesn't believe exists.

There was some reaction from the trucking industry to the Committee report. Most notably, Rolf Lockwood (1990) writing for *Today's Trucking* disagreed with the Committee conclusion that drugs and alcohol were not a problem in the Canadian trucking industry. Lockwood (1990:26-27) cited a report from the Alliance for a Drug-Free Canada (a group formed largely by big corporations like Shell Canada, McCain Foods and the Bank of Nova Scotia) claiming that one Canadian in ten regularly buys illegal drugs, and a report from CP rail asserting that in their existing pre-employment screening program, 11% of new recruits test positive for substance use, mainly for marijuana. With reference to the Committee report, Lockwood stated (1990:39):

At the moment Transport Canada is out on a limb. It's getting no support at all from other federal departments, from the provinces (with the single exception of British Columbia), from the unions, or from the Human Rights Commission.

Transport Canada's Response to the Standing Committee on Transport's Recommendations

On November 7, 1990, Transport Minister Doug Lewis tabled in the House of Commons the government's official response to the recommendations made by the Standing Committee on

Transport on the proposed strategy on substance use in the federal transportation sector (Transport Canada, 1990:1). In response to a recommendation made by the Standing Committee, and possibly as a reaction to criticism from the industry, Transport Canada agreed to remove the requirement for mandatory *random* testing, while retaining the other scenarios for testing (Transport Canada, 1990:6). In Transport Canada's "Information" release accompanying the document, Minister Lewis is quoted as saying with respect to this issue (Transport Canada, 1990:1):

The majority of groups we consulted told us the random testing element of the strategy was unnecessary. The Government has decided to accept the Standing Committee's recommendation and to withdraw the random testing element. I believe we have a comprehensive policy that will help maintain and enhance transportation safety in Canada.

Regarding the Committee's recommendation to provide financial assistance to the industries for the implementation of the strategy, the federal government rejected the proposal and stated its position as follows (Transport Canada, 1990:8):

This issue has been considered and the Government will provide advice and guidance to assist with the development of comprehensive and effective programs. The Government does not consider the cost of complying with the Strategy to be onerous for industry. This expense should be treated as a cost of doing business.

In reference to the Standing Committee's recommendation for a more thorough consultation process with industry, the federal government accepted the recommendation in principle, and offered the following comment (Transport Canada, 1990:9):

The Government agrees with the need for full and extensive consultations with concerned parties. Consultations have been held this past summer with employer and employee representatives to canvass their views on the Strategy and SCOT's report. They took the form of separate modally-based sessions and were well received by industry. Accordingly, the Government will continue with this method of consultation

as legislation and regulations are developed.

In response to the Committee's concerns around the "American Dimension", the federal government stated the following (Transport Canada, 1990:10):

The Government's priority is to bring into effect measures for ensuring continued and enhanced transportation safety in Canada, based on considerations relevant to Canadian conditions and respect for policy and law in this country. The Strategy is consistent with the National Drug Strategy (NDS), introduced by the Government in 1987, and differs from rules in effect in the United States concerning use of illegal substances by transportation safety personnel in that country. The Government will continue to pursue this "Made in Canada" policy, consistent with the Standing Committee's recommendation...

The Government notes that this recommendation is based on the Standing Committee's concern regarding the stated intent of the U.S. Department of Transportation to apply its drug testing requirements to foreign companies domiciled outside the United States beginning January 2, 1992. The Government has made representations to the Government of the United States on this matter, with a view to protecting the rights of Canadians and preserving the ability of Canadian companies to do business in the U.S. ...

Draft Regulatory Proposals and the BCTA Pilot Project

In December of 1992 the Draft Regulatory Proposals were prepared by Transport Canada. In her book, *Alcohol and Drugs in the Workplace* (1993:73-76), Barbara Butler provides a comprehensive overview of the key aspects of the how the regulations will be applied in the transportation industry:

[The regulations]...will apply to public and private sector employees in the federally-regulated transportation sector; air, water, railway, truck and bus (the latter three involving the movement of people or goods extra-provincially - within or to/from Canada). The regulations will not be limited to transportation companies; any company that has a transportation arm, however small, will have to develop a comprehensive program for covered employees...

For the purposes of the *Act*, a safety sensitive job will be defined as "a duty or responsibility which, if improperly exercised, could reasonably be expected to result in a direct negative impact on public safety". It is expected that supervisors and senior managers who have the same duties or responsibilities directly associated with performance of a safety sensitive job...would also be covered.

Employees on or subject to duty would be prohibited from consuming or being under the influence of a substance which could negatively affect their ability to perform any physical, mental or other action. ...

Other components include:

- Access to Assistance Programs: Employers must provide access to an assistance program, which provides assessment, referral and follow-up resources for employees with problems concerning substance use. ... Information shared cannot be released without the consent of the employee, unless required by law.

- Supervisory Training: Employers must train individuals who directly supervise or manage covered employees on skills aimed at recognizing changes in work performance and identifying physical or behavioural indicators which may signal use of a substance. Supervisors cannot demand a for-cause drug test unless they have received this training.

- Education: Employers will be required to provide all covered employees and their direct supervisors with information on the requirements of the *Act* and regulations, the company's substance use prevention program, the known physical and psychological effects of substance use on work performance ... changes in performance and behaviour, physical, and psychological characteristics that may indicate the presence of a substance in a person's system, and on appropriate redress mechanisms available to employees who may object to the inappropriate use of for-cause testing referral requirements in the regulations.

- Reporting Drug Use: Covered employees can take a prescription drug or narcotic when it is prescribed in their names and used in accordance with the instructions ... The employee must advise the employer if he or she believes the substance will affect performance, and it is the employer's duty not to let the employee do their job if he or she agrees with this assessment. ...

- Testing: Employers must collect samples for analysis and reporting of results to

determine presence of cannabinoids, amphetamines, cocaine, opiates and alcohol ... Any employee refusing to provide a sample for testing will be considered to have tested positive, and face the same consequences.

Collection facilities must maintain required accreditation standards, and laboratories conducting the tests must be accredited under the Standards Council of Canada Laboratory Substance Abuse Testing Program and the review and reporting of positive results must be done by a physician certified under the Occupational Medical Association certification program for Medical Review Officers...

A pre-screen test for the presence of alcohol may be by saliva or breath, and if positive, two urine samples must be taken for the first screen and a confirmation: urine screening will be used for all other drugs. Test results will be retained for two years, and records for five years. ...

Alcohol and drug testing must be done in the following situations:

* Periodic testing will be done at the time of any medical examination for employees required by federal or provincial legislation as a condition of employment, at no greater frequency than every two years.

* Testing for cause must be documented ... and will be required in any situation, including after an accident, when an employer has reasonable grounds to believe that a person is using or is under the influence of a substance while on duty, based on specific personal and articulated observations concerning performance, physical appearance, odour, (including breath) behaviour, speech pattern or observed use of a substance.

* Pre-placement testing will be required for persons not currently employed and persons employed in a position which is not safety-sensitive, to whom an offer of employment in a safety-sensitive position has been made ... This can be waived by the employer if the individual has proof of a negative test not more than one-year-old.

* Where a person has tested positively for a substance or refused to take a test, and the employer wants to continue their employment in a safety-sensitive position ... the employee must be tested four times on an unannounced basis at reasonable intervals over two years from the date when the person was reinstated to [his or her] position.

- Action on a positive: The employee must be prohibited from performing duties in the safety-sensitive position while under the influence of a substance as confirmed by

a positive test result. There is no direction on whether the employer should not hire or should fire the individual, and no conditions are set out for reinstatement beyond the follow-up testing requirement. An employee with a positive result may request the sample be retested by an accredited laboratory of their choice, and must cover the costs of the second test if it is again positive.

- Enforcement: In certain areas, Transport Canada will enforce the *Act*, and in others, the government may also enter into agreements with provincial governments or other agencies to enforce the *Act*, likely in the truck and bus sectors...

- Employer Designated Representatives (EDR): is responsible for the administration of the Substance Use Prevention Program, and is either an employee or an external agent of the employer but where practical, not in a safety-sensitive position or directly supervising one. Their use is not mandatory under the legislation, and responsibilities would include but are not limited to receiving negative and verified positive results, reviewing chain of custody procedures for the negatives, liaison with the collector, laboratory and medical review officer, and keeping records.

The regulations would be applicable to operators of commercial truck drivers who fall within the following definition (Transport Canada, Draft Regulations, 1992:19): "35.1 Drivers operating trucks in extra-provincial service using commercial vehicles with a registered gross vehicle weight exceeding 4500 kilograms."

In her review of the Transport Canada requirements, Butler (1993:77) notes that the regulations represent only a skeleton program and leave a number of further decisions to employers, and that the onus for program development and implementation falls on the employer, including all costs.

In short, the proposed policy involves two separate components: the first involves an education and training curriculum for both supervisors and workers; the second comprises the mandatory drug testing program. A comprehensive discussion of all aspects of the *Strategy* are

beyond the scope of this thesis; however, it is important to make some general observations with respect to its different components.

The British Columbia Trucking Association undertook a pilot project in B.C. during 1992 in order to pre-test all aspects of the proposal and to prepare guidelines for employers. The *British Columbia Trucking Association Safe and Substance Free Transportation Pilot Project Employer's Guide* (1992) clearly sets out the goals of the program, and articulates the expectations to be placed upon the employer (BCTA, 1992:1-35).

A few observations with respect to the substance testing procedure itself are warranted. Many substance use programs have been criticized for the collection procedures enlisted in urinalysis testing (this issue will be discussed in detail in Chapter 3 of this thesis). Many drug testing programs require that the collector physically view the act of urination. The BCTA guidelines attempt to avoid the intrusive nature of this type of collection by requiring that the "donor" be allowed to provide the sample in private - that is, out of the view of the collector (BCTA, 1992:16). However, extensive rules are still in place in order to protect the "integrity" of the sample (BCTA, 1992:17-20). For example, collectors are required to be present in the room (usually outside of the stall), to "listen", and to measure the temperature of the urine as soon as provided in order to determine that it is indeed "fresh". If possible, the toilet bowls are to contain a blue disinfectant to discourage the donor from attempting to dilute the sample. These represent only a few of the regulations in place at the time of collection.

The guidelines contained in the BCTA pilot project provide that laboratory analysis of the

sample is to take place in two steps (BCTA, 1992:24-26). All samples are to be subject to a screening test using the immunoassay technique¹⁰. Cutoff levels have been determined for each prohibited substance. Only specimens containing a prohibited substance in a concentration above the cutoff level will be sent to the second stage of testing. The confirmation test will utilize a gas chromatography/mass spectrometry (GC/MS) technique¹¹. This type of test is considered to be more reliable than the screening method, and much more costly. Those employees who test positive in the confirmation test may request a retest; however, they are not allowed to provide a second sample (BCTA, 1992:39).

Finally, it should be noted that the BCTA drug testing guidelines mandate that a Medical Review Officer (MRO) review all findings of positive tests (BCTA, 1992:34-41). The guidelines include extensive rules and regulations regarding the hiring and qualifications of MROs, as well as an exhaustive list of all responsibilities the MRO has with respect to employees who test positive. The MRO plays an integral role in the final determination of the consequences for an employee who has tested positive for a prohibited substance. An employee who tests positive will be interviewed by the MRO and will be given the opportunity to explain the results. While there are rules with

¹⁰ This is an initial screening test which screens out samples that show no evidence of the drugs tested for, or samples that do not have enough of the drug present to meet the threshold detection levels. This is a relatively quick and inexpensive process and is based on the ability of antibodies to recognize specific drugs in biological fluids (Butler, 1993:224-225).

¹¹ This technique identifies the metabolic components of the target substances and matches them with known values; the result is a "fingerprint that is unique for each drug" (Butler, 1993:225).

respect to disclosure of medical information provided by the employee to the MRO, these rules are not as stringent as one might expect. Under the guidelines (BCTA, 1992:38) set out in the proposed program, an MRO must inform the employee that:

...if medical information disclosed by the Donor is considered by the MRO to represent a threat to public safety or security, at the discretion of the MRO it may be reported to the physician responsible for the Donor's medical qualification or to TC Medical Advisors.

The guidelines do not define the phrase "a threat to public safety or security", nor does it provide a list of possible medical conditions that may invoke the discretion of the MRO to report such findings.

Further Developments: 1993-1995

In the fall of 1993, a federal election was held and the ruling Conservative party - who had been instrumental in the formulation of the *Strategy* - were swept out of office. At the time of the election, the 1992 regulations and enabling legislation were scheduled to be included in the next legislative agenda. The new Liberal government did not include the transportation substance use program on their legislative agenda for that year; apparently the new government wanted to revisit the issue.

On another front, since the initial negative reaction of the provinces, transportation companies, and trucking associations, support for the initiative seemingly grew during the next few years. For example, in 1993, it was reported in the *Manitoba Highway News* that the provinces were expected to adopt mirror legislation to cover intraprovincial movements after the federal legislation

had been enacted (Milton, 1993:8).

However, despite increasing support from the provinces and transportation companies, and intensifying pressure from the national and provincial trucking associations, by December of 1994, the regulations and enabling legislation had still not been tabled in the House of Commons.

In December of 1994, the new Liberal Transport Minister, Doug Young, announced that the Canadian Government would not enact legislation requiring substance use testing programs in the federal transportation sector. The private sector will now be responsible for developing its own programs. Reaction by the transportation sector to this recent decision will be discussed in Chapter 4 of this thesis.

In response to Transport Canada's announcement, the Canadian motor carrier industry associations organized a working group to develop and implement a substance use testing program that will enable the carriers to meet Canadian standards while allowing those affected to comply with the U.S. requirements. The Canadian Trucking Association (CTA) has taken a lead role in the working group and is responsible for developing a policy framework and coordinating with the seven provincial trucking associations.

The Ontario Trucking Association (OTA) is responsible for the development of the program and program delivery mechanism. They have engaged a consultant to assist in the project.

The effective date for the application of U.S. rules to Canadian truck drivers had been delayed until January 1, 1996 in light of the addition of alcohol testing to the U.S. rules. Recently, the effective date for Canadian drivers has been extended further until the spring of 1996, given the

decision of Transport Canada not to proceed with the legislation and regulations.

Summary

In this Chapter, I have examined the historical backdrop against which a renewed interest in workplace drug and alcohol testing flourished during the mid-1980s. It was postulated that U.S. President Reagan's 1986 "War on Drugs" was the single most important impetus behind the move toward state mandated testing regimes. The importation of the War on Drugs rhetoric, combined with federal government efforts to stem the declining popularity of the Mulroney administration, proved to be the catalyst for the consideration of such programs in Canada.

The passage of the American *Omnibus Transportation Employee Testing Act* - which established a statutory mandate for the drug and alcohol testing of U.S. transportation workers - provided the spark for the development of a similar strategy in Canada. As the above discussion has revealed, the development and evolution of Transport Canada's *Strategy on Substance Use in Safety-Sensitive Positions in Canadian Transportation*, is a topic of some controversy. In addition to the debate surrounding the role played by the U.S. government in the development of the *Strategy*, other concerns regarding workplace testing have been briefly addressed in this Chapter. In Chapter 3 a number of these issues will be more thoroughly reviewed.

CHAPTER III

WORKPLACE DRUG AND ALCOHOL TESTING ISSUES

Introduction

In Chapter 2 I reviewed the roots of the workplace drug testing movement in the 1986 War on Drugs in both Canada and the United States; the impact of the War on Drugs on the transportation sector; and the evolution of transportation sector workplace substance testing programs in both countries. Throughout that discussion a number of issues with respect to workplace substance testing were raised, and will be discussed more systematically in this current Chapter, encompassing: (1) the prevalence of, and the costs associated with, the use of drugs and alcohol in the workplace; (2) the various strategies designed to detect and/or reduce substance use in the workplace; (3) the arguments generally made in favour of workplace testing; and (4) the challenges posed by the opponents to workplace testing, including the magnitude of the perceived problem, the unreliability of urinalysis, the violation of individual civil liberties, the legality of workplace testing, and the response of organized labour.

Prevalence of Use: Public Opinion

The *1989 National Alcohol and Other Drugs Survey* represents the most comprehensive Canadian general population survey conducted to date on a national scale (Butler, 1993:10); however, the survey did not focus specifically on alcohol and drug use in the workplace. Telephone

interviews were conducted in March of 1989 with 11,634 Canadians aged 15 or older and the response rate was 79% (Health and Welfare Canada, 1990:vii). What follows are highlights of the survey findings (Health and Welfare Canada, 1990:vii-x):

Alcohol Use

Approximately eight out of 10 (78%) adult Canadians are *current drinkers*, i.e. they reported consuming alcoholic beverages at least once in the 12 months prior to the survey. An additional 16% of the population are *former drinkers*, having consumed alcohol at some time earlier in their lives, while 7% report that they have never consumed an alcoholic beverage.

Fewer adult Canadians are drinking, more have stopped drinking, and those who are drinking are drinking less.

Current levels of consumption are also lower. Between 1978-79 and 1989, there has been an increase of 11 percentage points in *current drinkers* who report drinking less than once per month on average.

Seven percent report that drinking has affected their happiness at some time, 5% report that their drinking has harmed their financial position, 6% say that it has harmed their marriage or home life, and 4% say that it has caused harm to their work, employment or studies.

Illicit Drug Use

Cannabis (marijuana or hashish) is the most commonly used illicit drug in Canada: 23.2% of Canadians have used it at some time in their lives, and 6.5% are *current users*.

Cocaine or crack has been used by 3.5% of adult Canadians at some time in their lives, and 1.4% are *current users*.

LSD, speed or heroin have been used by 4.1% of adult Canadians at some time in their lives. Less than one-half percent (0.4%) of Canadians reported using these substances during the year preceding the survey.

For each category of illicit drug studied, the proportion of *former users* greatly

exceeds the proportion of *current users*.

Twenty-two percent of Canadians reported having had a friend with a drug [illicit and licit] problem, 14% a relative or family member with a drug problem, 11% a co-worker with a drug problem, and fewer than 1% said that their spouse or partner has had such a problem. (Emphasis in original).

What the *1989 National Alcohol and Other Drugs Survey* doesn't tell us is the *overall* extent of alcohol and drug use among employed persons in the Canadian workplace (studies that have specifically examined this issue with respect to truck drivers will be discussed in Chapter 4) or, moreover, the extent to which employees may be *impaired* by illicit or licit drugs in the workplace. As Macdonald et al. (1993:6-7) point out: "Little is known regarding the extent to which employees are impaired by drugs at work. Some research suggests that *illegal drug* use is not a significant problem in the workplace" (emphasis added).

As noted by Macdonald et al. (1993:8) most people would agree that alcohol is the number one safety problem in our society, due to its high usage and profound effects on psychomotor function. But what about the effects of psychoactive substances, other than alcohol, on job performance? There are several factors by which performance can be measured, including, gross motor function, fine motor function, sensory and perceptual ability, memory, planning and problem-solving skills, decision making, attention, concentration, mood, and motivation (Butler, 1993:3). Notably, many of the studies linking drug use with increased accidents and decreased job performance have been *inferred* from *laboratory* studies that examine the impairment of different types of drugs on motor coordination and perceptual abilities (Macdonald et al., 1993:7). A review of the literature with respect to the effects of drugs on motor coordination and cognitive skills as they relate to

workplace performance is beyond the scope of this thesis; however, it is important to note that in their review of this issue, Coombs and McAndrews (1994:94-95) conclude the following:

... a large number of psychoactive substances influence cognitive function, and these cognitive effects are central to drug use. Some individuals specifically take drugs to control their own thought processes and mental capacity. Thus, we should expect to find drugs in any situation in which they are perceived to have cognitive utility, including the workplace. It is most desirable for drug testing to emphasize the actual performance impairments produced by drugs. The large gaps that remain in our understanding of the effects of drugs on performance, however, need to be addressed. Without such knowledge, it is difficult or impossible to establish whether an employee is actually impaired by a particular drug. Future research on the effects of drugs on higher mental processes promises to enhance our understanding and use of the concept of safety-sensitive occupations.

Similar to the Canadian *1989 National Alcohol and Other Drugs Survey*, Martin et al. (1994) reviewed national survey data in the United States with a particular focus on employed respondents. They (1994:23-24) reported five general consumption patterns of drug and alcohol among workers: (1) more workers report consumption of alcohol than the use of illicit drugs; (2) more men than women drink heavily, use drugs, and experience negative consequences as a result; (3) younger workers (18-25 years of age) are more likely to report current use of marijuana and heavy drinking than older workers (aged 35 or older); (4) there are few differences in substance use and abuse patterns related to full-time or part-time employment status; and (5) differential use patterns of alcohol and drugs were evident across occupational status: workers in lower-status and blue-collar occupations were more likely to use marijuana in the workplace, and reported higher levels of overall marijuana use and alcohol consumption. Martin et al. conclude (1994:26):

To some extent the gap between actual substance abuse and detected substance abuse reflects a variety of pressures toward cover-up [in the workplace]. But this gap also

likely represents the *overestimation* of impairment created by employees' use and abuse of a variety of psychoactive substances. Indeed, it likely describes the integration of the supposed impacts of these on- and off-the-job behaviors in the flow of everyday work life (emphasis added).

While the evidence with respect to the extent of alcohol and drug use in the workplace is inconclusive, public support for workplace testing grew in the aftermath of the 1986 War on Drugs. A November 1986 Gallup Poll showed that 75% of Canadians believed there was a drug epidemic in Canada and over 65% endorsed mandatory drug testing programs (Glasbeek and McRobert, 1989:31). In their study designed to test the relationship between changes in media coverage and public perception of drug abuse, Shoemaker et al. (1989:79) conclude that, "The results show evidence in favour of the agenda-setting hypothesis: The more the mass media emphasize drugs, the more the public is concerned with drugs as a problem."

In 1986 Nesbit (1989:83) interviewed over 700 respondents in her study of public opinions toward drug testing. She found that citizen concerns about drug abuse are greatest with respect to the realms most removed from their daily experience; 96% of the respondents believed that drug abuse was the most serious or important problem in the country as a whole, but only 15% felt it was the most serious or important problem in their workplace. Nesbit (1989:88-89) found high levels of support for drug testing in the workplace for certain occupations such as pilots (85%), surgeons (85%), police officers (85%), athletes (74%), and government employees (72%). However, the high levels of support were found to be extremely unstable when the respondents were presented with information concerning the inaccuracies of urinalysis, or when told of the procedures for collecting urine samples. When first asked if they would submit to a drug test at work, 74% responded

positively, but the support dropped to 47% when respondents were told they would need to provide the urine sample while being observed (Nesbit, 1989:89).

The Costs of Drug and Alcohol Use in the Workplace

'Official' estimates of the costs of alcohol drug use and abuse in the workplace play an important role in the development of public policy (DiNardo, 1994:57). Projections of the "costs", both in economic and social terms, are sometimes used to justify the expansion of treatment programs and widespread implementation of substance use testing programs. The price of alcohol and drug problems in the workplace has been estimated in the billions of dollars; for example, an annual estimate of at least \$100 billion in lost productivity is frequently cited (Crow and Hartman, 1992:924). Other types of claims include estimates that drug users are almost four times as likely to be involved in industrial accidents, they are 2 1/2 times more likely to be absent from work, they are five times more likely to file workers' compensation claims, and receive on average three times more sick leave (discussed in Morgan, 1988:683).

In his review of this research, John Morgan (1988:683) argues that a sizeable portion of the studies employ questionable methodology, and that many of the claims made do not always accurately reflect the research upon which they are based. In other words, the results of the studies are likely inaccurate, and those inaccuracies are often exaggerated in published accounts of the cost estimates associated with the impact of alcohol and drug use in the workplace.

Crow and Hartman (1992:924) make an interesting point when they note that recent research

indicates that the workplace costs of alcohol and drug use are lower than expected, and that the "costs" of drug and alcohol use in the workplace may be less than the money spent by organizations for substance use programs. They reviewed four recent studies and found that: (1) although a positive test for illicit drugs in a pre-employment drug screening in one study was associated with increased turnover, absenteeism, discipline problems, and accidents, the outcomes were much lower than the claims and estimates; (2) in a study of two AT&T plants (one with a drug-screening program, and the other without), the company found no economic justification to implement drug testing on a wide scale in the company; and (3) two studies reviewing pre-employment drug screening and employee turnover revealed limited statistical evidence to support the contention that drug testing has predictive validity in determining job applicant suitability. Crow and Hartman conclude (1992:926):

Findings such as these suggest that claims of widespread drug problems in the workplace are exaggerated. Yet organizations continue to spend considerable amounts of money to combat drug problems through testing, training, and employee assistance programs. In fact organizations' willingness to do so is particularly notable in view of their traditional reluctance to spend money on human resources programs.

In fact, Macdonald et al. (1993:3) note that, according to recent reports, a large number of U.S. companies are discontinuing their drug screening programs. For example, in a survey of 145,000 U.S. firms that employed screening programs in 1988, only two thirds still maintained the programs by 1990. The threat of litigation and the high costs of programs are believed to have contributed to the decline.

Strategies for Reducing Drug and Alcohol Use in the Workplace

Employers are faced with a number of competing objectives and values in their efforts to achieve a drug free workplace. Walsh and Trimble (1991:25-26) argue that employers, on the one hand, have a corporate responsibility to provide a healthy and safe environment, to provide the best product/service to the customer, and to protect shareholders from losses due to drug use and abuse. On the other hand, they have an obligation to respect the individual rights and civil liberties of employees, to comply with the reasonable expectations of privacy and confidentiality, and to advise employees of the drug policy and the consequences of its violation. Efforts to achieve a "drug-free workplace" can take many forms, from simply furnishing employees with a written statement of drug use policy, to establishing extensive Employee Assistance Programs (EAPs), or to testing employees for drug and alcohol use. Many drug and alcohol workplace programs utilize a combination of methods.

Employee Assistance Programs

Rehabilitation of the problem employee is at the core of EAPs. EAPs provide opportunities for employees who are experiencing personal problems - either with or without substance abuse - to obtain help through clinical and other counselling programs. According to Martin Shain (1994:260) the major objectives of EAPs are to:

- restore health and well being
- restore job performance to optimal levels
- prevent further harm or loss to employees, fellow workers, employers, customers, the public, or shareholders

- reduce costs associated with harm and loss resulting from the effect of such problems
- help supervisors manage such employees with minimal disruption and cost to their employers.

During the last 15 years, the number of EAPs have increased dramatically both in Canada and the United States. In the U.S., more than half of all organizations with 500 or more employees have instituted some form of EAP program, and in Ontario, more than 32% of organizations with more than 50 employees have created similar programs (Shain, 1994:261).

In his review of studies measuring the effectiveness of EAPs, Shain (1994:261) found that there is little research available on the actual proportion of drug users accessing EAPs, and that there is a wide variation in findings. He argues (1994:261), however, that "EAPs have been able to demonstrate clearly that they are of relevance to the control of drug abuse in the workplace."

Arguably, EAPs (without an accompanying substance testing regime) represent the most benign and least intrusive means by which employers can address the issue of drug and alcohol use. However, even EAPs have come under fire from critics. The focus of Richard Weiss' 1986 book, *Managerial Ideology and the Social Control of Deviance in Organizations*, is on alcoholism in the workplace and the evolution of the corporate response to the alcoholic worker. Weiss contends that workplace EAPs simply represent another means by which an employer can exercise social control over his or her workforce. The central tenet of Weiss' argument (1986:237) is as follows:

In the guise of a healthcare benefit, and often using individuals who have suffered from alcohol problems and who wish only to help others, corporate alcoholism and employee "assistance" programs function in many cases to intimidate workers into

higher productivity. It is an illustration of what Sherril (1989) has called 'America's unique talent for combining ruthlessness and innocence'.

Drug and Alcohol Testing Programs

Drug screening or drug testing in the workplace can be defined as "...the process of obtaining bodily samples (e.g., urine, blood, hair or breath samples) from employees and conducting laboratory analyses to detect the presence of certain drugs, including alcohol, and their metabolites" (Macdonald et al., 1993:1). There are several types of drug testing programs (Macdonald et al., 1993:5):

- *pre-employment*, where job applicants are tested for drugs;
- *random basis*, where employees are unaware of when drug screening will take place until the day of the test;
- *periodic basis*, where employees are tested for drugs on a predetermined timetable, usually at a yearly medical check-up;
- *probable cause*, such as after a job accident or with obvious behavioural symptoms;
- *reasonable suspicion*, such as lateness or high absenteeism (ie., the grounds for tests for reasonable suspicion are less rigorous than for probable cause);
- *on return* from treatment or rehabilitation;
- when an employee is *transferred or promoted* to a new position; and,
- *voluntary*, where employees submit to screening but it is not a requirement of work.

Some employers utilize only one method of drug testing - for example, pre-employment screening - while many others test their employees in a variety of different situations. If a job applicant tests positive for a prohibited substance during pre-employment screening, he or she is generally not hired. If an employee tests positive as a consequence of a workplace drug testing

program, he or she is generally either fired or referred to an EAP (Macdonald et al., 1993:5).

Although opinion may vary regarding the objectives of the different forms of workplace testing, Shain (1994:259) offers the following account of the general rationale behind each of the programs:

The Objectives of Pre-employment Drug Screening

By requiring that some or all potential employees be screened for the use of certain substances before their contracts of employment are confirmed, pre-employment drug screening seeks to:

- exclude users of certain substances from the work force or from certain jobs;
- deter the use of such substances among applicants.

The Objectives of Random Drug Testing

By instilling in users and potential users of certain drugs the fear that their consumption will be discovered and that they will be subject to a variety of unpleasant consequences, random drug testing seeks to:

- deter the use of prohibited substances among employees;
- prevent and reduce harm or loss to the public, the employer, fellow employees, and employees themselves.

The Objective of Drug Testing for Cause

By requiring employees to provide urine samples when they are judged unfit to work on specific occasions and when such unfitness is thought to result from drug use, drug testing for cause seeks to:

- confirm or disconfirm the supervisor's or manager's suspicion that this causal relationship exists;
- deter the use of prohibited substances among employees.

The Objective of Routine Drug Testing for Employees in Safety-Sensitive Positions

By instilling in users and potential users of certain drugs the knowledge that their consumption of such substances will be monitored and that, if detected, such consumption will lead to their being judged unfit for work, drug testing for employees

in safety-sensitive positions seeks to:

- prevent harm or loss to the public, the employer, fellow employees and employees themselves;
- deter the use of prohibited substances.

As noted by Shain (1994:258), rehabilitation is not considered a part of the drug testing procedure itself, although employers often institute rehabilitative measures in the form of EAPs in conjunction with drug testing regimes.

Overall, drug testing programs are less prevalent in Canada than in the United States. However, two large Canadian companies have recently become active in testing their employees. Imperial Oil launched its program in January 1992. The testing regime encompasses pre-employment, post-incident, 'for cause' and, at least once per year, random testing for approximately 850 employees in both designated safety-sensitive and executive positions. Approximately 2,000 tests are conducted each year and recent results reveal that 0.4% of the samples tested positive for prohibited substances (Railway Safety Act Review Committee, 1994:135). The Toronto-Dominion bank has also implemented a pre-employment drug testing program. Recently, a tribunal of the Canadian Human Rights Commission conducted a hearing to determine if the T-D initiative violated the *Canadian Human Rights Act*. The tribunal found that the testing program was 'invasive', but legal under the *Act* (Railway Safety Act Review Committee, 1994:135).

Predictably, in light of the rising number of workplace drug and alcohol testing programs implemented in North America, there has been a corresponding proliferation of drug screening laboratories, particularly in the U.S. Coombs and West (1991:xvi) note that the sales of drug testing

equipment and supplies during the 1970s totalled \$25 million; however, by the mid-1980s sales had risen to \$73 million per annum. Imwinkelreid (1987:26) observes the same trend in the late 1980s, stating that urinalysis testing constituted a "booming ninety-million-dollar-a-year industry", with some laboratories recording growth rates of 300 or 400 per cent a year. He also highlights (1987:26) the competitive nature of the business, with patent battles over testing procedures being waged in the courts, and rival laboratories lowering their prices to attract large buyers.

What The Proponents Say: Arguments In Favour Of Workplace Testing

As noted in Chapter 2, a renewed interest in workplace substance testing programs really took hold in the aftermath of the "new" War on Drugs in 1986; however, the practice of testing people for drug use had begun in the United States in the early 1960s in support of methadone maintenance and drug rehabilitation programs (Ackerman, 1991:3). During the late 1960s the International Olympic Committee began testing athletes for performance-enhancing drugs, and the United States Department of Defence initiated tests for heroin use for military personnel returning from Vietnam. Drug testing was introduced into the prisons in the late 1970s, and by the early 1980s the first mass drug screening program was introduced by the U.S. military. As Ackerman (1991:3) notes, the U.S. military's mass drug screening program was facilitated by the development and refinement of low-cost, efficient techniques to detect a large number of drugs in a single urine specimen. By the late 1980s the American and Canadian governments - and at increasing pace, the private sector - began to introduce mass drug screening programs into their workforces.

Public debate on drug testing has focused on four central issues: public health and safety, accuracy, privacy and cost (Nesbit, 1989:81). As the above discussion has indicated, proponents of substance testing programs believe that drug and alcohol use is prevalent in the workplace, that it is costly to business and society, and that it can be reduced through mass screening programs. Arguments put forth by the proponents of workplace testing programs can generally be grouped into five categories.

First, drug and alcohol testing programs have been justified on the grounds that they promote health in the workplace. In particular, from this perspective, testing programs are thought to protect the health of the person being tested, and to reduce healthcare costs to the employer (discussed in The Privacy Commission of Canada, 1990:7).

Second, it has been pointed out by proponents that testing programs will reduce other problems in the workplace associated with low productivity, such as absenteeism, tardiness, and turnover of employees (discussed in Macdonald et al., 1993:4). From this viewpoint, testing programs will enhance not only labour productivity, but also public confidence in the companies that implement them (discussed in Ontario Law Reform Commission, 1992:5-6).

Third, advocates contend that workplace testing will ultimately suppress the demand for illicit drugs in society at large. Supporters believe that the threat of a drug test which might jeopardize an employee's livelihood may deter that person from using illegal drugs (discussed in The Privacy Commission of Canada, 1990:6). Also, from this perspective, it has been postulated that workplace testing will enhance workplace security because it will decrease the likelihood that employees will

engage in illegal activities, such as theft, to support their drug habits (discussed in Ontario Law Reform Commission, 1992:5).

Fourth, the need to harmonize regulations with the drug testing requirements established by other countries has been enlisted as a justification for testing programs. With particular reference to proposed Canadian drug testing regimes, the Privacy Commission of Canada stated (1990:8):

In the Canadian context, this justification for testing is especially important. The United States government and private sector have both strongly advocated testing for illicit drug use. American policy reaches into Canada through American transportation regulations and the imposition by American parent companies of testing programs on their Canadian subsidiaries. Canadian owned and domiciled companies could decide to test their own employees to retain access to the U.S. market. The Canadian testing programs that may flow from these political and economic realities will be shaped in part by the nature of the testing programs in the United States. The drugs attacked by the United States Department of Transport regulations, for example, are those, we now know, for which Canada feels the pressure to test.

The final, and perhaps the most persuasive argument put forward in support of workplace drug and alcohol testing programs, is the contention that the testing of employees in safety-sensitive positions is essential for the protection of public health and safety. As noted in Chapter 2, this rationalization was central to Transport Canada's official policy statements around the development of its *Strategy*. From this perspective employers are considered to have a moral obligation to protect public safety by detecting impaired employees - particularly those such as transportation workers, police officers, etc. - considered to be working in safety-sensitive positions. The case is made that if employers can identify a potential problem employee, and avoid placing him or her in a safety-sensitive position, then the number of accidents that may jeopardize co-workers or the public can be reduced or eliminated (The Privacy Commission of Canada, 1990:6).

Presumably, the overriding justification for workplace drug and alcohol testing programs implemented for any of the above noted reasons is the underlying belief that this type of testing is an effective deterrent to the use of prohibited substances in the workplace, and a competent method of identifying employees who may have a problem (Butler and Tranter, 1994:231). Notably, most drug testing programs are based on a hybrid justification. For example, an employer's goals to discourage illegal activity, and at the same time to enhance the productivity of his or her workforce, may both be used to justify any given program (The Privacy Commission of Canada, 1990:8). Arguably, Transport Canada's proposed *Strategy* was also based on a hybrid justification: the testing requirements of the American government would be satisfied, while at the same time, the federal government would be perceived as protecting the health and safety of 'ordinary Canadians'.

What The Opponents Say: Arguments Against Workplace Testing

Similar to the arguments put forth by the proponents, the challenges forwarded by the opponents of workplace testing programs can also be grouped into five general categories. These categories encompass questions around the magnitude of the problem, the reliability of urinalysis testing, the protection of civil liberties, the legality of workplace drug testing, and the response from organized labour. Each of these is enumerated below. These issues will be expanded more fully in Chapter 4 within the context of the development, evolution, and subsequent demise of the Transport Canada *Strategy* regarding substance use in the Canadian trucking industry.

Magnitude of the Problem

As will be described below, workplace drug testing programs have been, for the most part, rejected by labour, civil libertarians, and other interested observers. However, there is one important caveat to this negative response. Many opponents have maintained that drug testing should be allowed in the workplace only under special circumstances - that is, for employees working in positions where substance use or abuse is known to be a problem and it represents a clear safety risk to the public. However, no data presently exist that clearly link drug use in the workplace to accidents that may be harmful to other workers or the public (Morgan, 1988:691). In fact, Nesbit (1989:85) contends:

The need for drug testing in the workplace centers on the argument that such testing will protect public health and safety. No systematic studies have yet demonstrated that drug-impaired judgment in the workplace is a pervasive threat to public safety. Indeed, the current campaign for a drug-testing policy appears to be predicated on the sensational instances of drug-related accidents reported by the news media.

Perhaps the most controversial issues within the trucking industry itself are the questions of whether or not there exists a substance use problem among truck drivers, and, if so, to what extent substance use poses a risk to the Canadian public. The literature relevant to these issues will be addressed in Chapter 4 of this thesis; however, it is important to note here that, according to the available research, there are no conclusive answers to these questions.

A related issue is whether or not the use of psychoactive substances is causally related to the rate of traffic accidents among truck drivers. Once again, an evaluation of the vast array of studies

in this area reveals that this issue has yet to be adequately resolved.¹² A comprehensive review of this literature is beyond the scope of this thesis; however, it should be emphasized that most authors have assumed there does exist a drugged-driving problem, similar to that of the drunk-driving problem. However, many argue that merely asking about the effects of drugs on driving skills represents an oversimplification of the issue. As Janke (1990:2) states, the question that must be considered is:

...what drugs, in what dosages, taken how long ago, eliminated at what rate, and interacting with what other drugs, including alcohol, in the bodies of people with what degree of sensitivity to their effect?

The relationship between alcohol and driving behaviour is comparatively clear cut and well documented. However, the literature with respect to the relationship between drugs and driving skills is often contradictory and generally inconclusive. In her review of this literature, Janke (1990:2) concludes:

A probable causal nexus can be inferred in the case of some drugs taken under some conditions. But in marked contrast to the BAC as an indicator of alcohol impairment, there are as yet no widely accepted blood levels at which an individual can be said to be under the influence of other drugs. Moreover, no general dose-response relationships between the amounts of various drugs ingested, singly or in combination, and the degree of driving impairment have been discovered. It would thus be premature to set and attempt to enforce quantitative blood or urine levels as indicators of drug-related impairment; such impairment can better be detected through behavioral testing at the point of arrest.

Even if it could be established that drug use in the workplace represented a clear safety risk to the public, opponents of workplace testing programs argue strenuously that present testing

¹² For a comprehensive review of the literature see Janke, Mary K. (1990). *Drugs and Traffic Safety: Is There A Nexus?*, California Department of Motor Vehicle: Research and Development Section.

methods are not adequate, as discussed below.

Urinalysis

Both of the testing methods (immunoassay and GC/MS) proposed in the substance testing component of the Canadian government's *Strategy* have been criticized on the grounds that they are not reliable. The literature in this area is extensive and convincing.¹³ In short, it is argued that false positive and false negative test results will be produced by even the most sophisticated of testing procedures because human error can never be completely eliminated. The argument then follows that if urinalysis is unreliable, it should not be used for the purpose of identifying employees who may or may not be under the influence of a prohibited drug. Moreover, Imwinkelreid (1987:28) argues that urinalysis cannot detect the *actual drug* a person has been exposed to:

A urine sample may reveal the *metabolite* the drug engendered while inside the person's body, but the metabolite does not contain the intoxicating ingredient of the drug; it is merely a sign that the drug was present at *some* earlier time. Just when that was, how much of the drug was ingested, and what degree of impairment is caused cannot be determined from the urine sample (original emphasis).

Urinalysis testing is not an adequate means of measuring what the employer wants to know.

¹³ See for example Cornish, Craig M., *Drugs and Alcohol in the Workplace: Testing and Privacy*, Callaghan & Company, 1988; DeCresce, R. et al., *Drug Testing in the Workplace*, Chicago: ASCP Press, 1989; Feldthusen, Bruce, "Urinalysis Drug Testing: Just Say No", *Canadian Human Rights Yearbook*, Vol. 5, 1988; Glasbeek, H.J., McRobert, D., "Privatizing Discipline - The Case of Mandatory Drug Testing", *Windsor Yearbook of Access to Justice*, Vol. 9, 1989; Imwinkelreid, Edward J., "False Positive: Shoddy Drug Testing is Jeopardizing the Jobs of Millions", *The Sciences*, Sept/Oct 1987; Lundberg, George, "Mandatory Unindicated Urine Drug Screening Still Chemical McCarthyism", *JAMA, The Journal of the American Medical Association*, Vol. 9, 1989; Schachter, V., Geidt, T.E., *Drugs and Alcohol in the Workplace: Legal Developments and Management Strategies*, New York: Executive Enterprises Publications, 1990; VanRensburg, K., "Mandatory Drug and Alcohol Testing", *Business & The Law*, Vol. 6 (2), 1989.

Furthermore, urinalysis cannot show whether the presence of a drug constituted impairment of the individual, or whether the individual represented a potential danger to other people (Imwinkelreid, 1987:28). Glasbeek and McRobert (1989:42) provide the following summary of the arguments against the testing method when they state that urinalysis:

- (i) may show that a particular drug was present in a person's system;
- (ii) will not show, with any degree of precision, when or how a particular drug came to be in that person's system, that is, whether by inhalation, injection or ingestion;
- (iii) will not show whether the presence of the drugs in the person's body means that the person was ever impaired (in terms of work performance) and was, or is, a potential danger to other people;
- (iv) will not show whether the impairment, if any, was there at any particular time or that there will be a similar impairment at any future time;
- (v) will not show how much of that drug needs to be present in a particular individual to impair that person, as opposed to any other person who might use the particular drug; and
- (vi) will not eliminate the possibility that the positive test was the result of the intake of substances which give a similar reading, but which are not proscribed.

Notably, many of the above observations are not true of breathalysers and blood tests that measure the level of alcohol in an individual's body. Macdonald et al. (1993:11) state that, "Breathalysers and blood tests *for alcohol* are the only drug tests that correlate very closely with actual levels of impairment" (original emphasis). To reiterate, urinalysis testing reveals past use, it cannot measure the amount of any drug that is present, nor can it measure when the drug was used or the level of impairment of the user. The time frame of use becomes particularly important for certain banned substances such as cannabis. Cannabis may be detected in the body for up to several

weeks after use. It is possible then for an employee to be using cannabis on the weekend, and test positive for use on a workday.

In addition, arguments have been made against urinalysis on the grounds of the intrusive nature of the collection process itself (Feldthusen, 1988:82), as discussed in Chapter 2. Finally, opponents contend that urinalysis can divulge medical information to the employer that the employee may wish to keep private. For example, urinalysis can reveal that the employee is suffering from various diseases or conditions, such as arthritis, epilepsy, heart disease, depression, diabetes, pregnancy, venereal disease or schizophrenia (Feldthusen, 1988:94).

Civil Liberty Issues

Under the banner of "civil liberty" issues, arguments against drug testing regimes range from those of protecting the privacy of the individual from the intrusive nature of the processes involved in providing a urine sample, to the more sweeping arguments concerning the role of the state in violating the autonomy of workers. A comprehensive discussion of the intricacies of the debate surrounding these issues is beyond the scope of this thesis; however, what follows is an overview of recent opposition to workplace testing programs emanating from organized civil libertarian groups.

In the United States, the American Civil Liberties Union (ACLU) has been among the most vocal organizations actively lobbying against drug testing in the workplace (Walsh and Trimble, 1991:25). In addition to constitutional issues and concerns about the potential for managers to discriminate and harass workers, the focus of the ACLU attack has been on the inadequacy of a

positive urine test to prove intoxication or impairment of performance. In Briefing Paper No. 5 (1995), *Drug Testing in the Workplace*, the ACLU states its position as follows:

The American Civil Liberties Union opposes indiscriminate urine testing because the process is both unfair and unnecessary. It is unfair to force workers who are not even suspected of using drugs, and whose job performance is satisfactory, to "prove" their innocence through a degrading and uncertain procedure that violates personal privacy. Such tests are unnecessary because they cannot detect impairment and, thus, in no way enhance an employer's ability to evaluate or predict job performance.

The ACLU has been active in all 50 states, lobbying lawmakers to initiate legislation that would restrict or prohibit the use of workplace drug testing. The ACLU appears to have enjoyed some success on this front, noting in Briefing Paper No. 5 (1995) that eight states - including California, Montana, Iowa, Vermont, Rhode Island, Minnesota, Maine and Connecticut - have enacted protective legislation that restricts drug testing in the private workplace.

In Canada, many professional interest groups involved in the drug testing issue oppose most forms of drug and alcohol testing programs. The Ontario Bar Association has recommended outright prohibition of mandatory drug testing programs (cited in Henriksson, 1991:184). The Addiction Research Foundation and the Canadian Human Rights Commission have endorsed testing only under very specific and stringent guidelines (cited in Selick, 1990:44). In addition, the Canadian Centre for Occupational Health and Safety has concluded that mandatory or random testing in the workplace should not be approved, even for safety reasons (cited in Henriksson, 1991:184).

Perhaps the strongest and most visible opposition to the implementation of drug and alcohol testing in the Canadian workplace has come from The Privacy Commission of Canada, and the Ontario Law Reform Commission (OLRC).

The Privacy Commission of Canada published a review of the federal government's drug testing policy and practice in its 1990 report entitled *Drug Testing and Privacy*. As noted in the report, the *Privacy Act* was passed in 1983 and sets out the principles of "fair information practices" for government. The *Act* requires government institutions to: (1) collect only the personal information needed to operate its programs; (2) collect the information directly from the individual concerned whenever possible; (3) tell the individual how it will be used; (4) keep the information long enough to ensure an individual access; and (5) take all reasonable steps to ensure accuracy and completeness (The Privacy Commission, 1990:21). In light of the mandate of the *Privacy Act*, and the growing pressures on government to implement drug testing programs, the Commission felt that a review of federal government drug testing policy was warranted (The Privacy Commission, 1990:3).

In its review of the issues surrounding workplace drug testing, the Privacy Commission (1990:20) argued the following:

Testing imports an aura of oppression and Big-Brotherhood. Some forms of testing - breathalyzer tests to detect impaired driving or operation of vessels or aircraft for example - have broad public support. But would a knowledgeable public accept testing in circumstances that may do little to enhance public safety?

Testing supposes an employer's (or government agency's) right to exercise substantial control over individuals and to intrude into some of the deepest recesses of their lives. The technology of drug testing is being allowed to shape the limits of human privacy and dignity.

The situation should be the other way around. Notions of respect for individual privacy and autonomy should place limits on the intrusions which technology will be permitted to make into personal lives. In other words, the uses of technology should not limit human rights; human rights should limit the use of technology.

In assessing the justifiability of intrusions caused by testing programs, the Privacy Commission

(1990:22) stated, "The principal privacy issue flowing from drug testing is not whether testing is intrusive. It is. Urinalysis is particularly intrusive, requiring as it may either a pre-test physical search, the direct observation of an intimate bodily function, or both." However, the Commission concluded that the *Privacy Act* did not prohibit all forms of drug testing, and endorsed testing only in exceptional cases in which drug use constitutes a real risk to safety. The Privacy Commission looked specifically at Transport Canada's proposed *Strategy*, and its analysis of the program will be discussed in Chapter 4 of this thesis.

The Ontario Law Reform Commission also came out publicly against drug testing in the workplace in its 1992 publication, *Report on Drug and Alcohol Testing in the Workplace*. The OLRC (1992:1) cited the recent rise in the number of Canadian companies that had instituted mandatory drug and alcohol testing as the major impetus behind its examination of the issue. The Commission (1992:1) also observed that "[m]andatory testing of employees for drugs and alcohol became a public issue in Canada largely as a result of the policies and initiatives introduced by the United States."

The OLRC's arguments in opposition to workplace testing programs are similar to those discussed above - namely, there is no identifiable problem, urinalysis is unreliable and inadequate, and testing is intrusive and invades the privacy of the individual:

The growing reliance of employers on drug and alcohol testing has led to widespread debate respecting the legality and reliability of such testing. Unlike in the United States, there is no legislation in Ontario or in Canada that specifically addresses the issue of mandatory testing in the workplace. A view commonly shared is that the general statutes which govern the workplace, as well as the common law, fail to provide adequate protection to an employee who is compelled to submit to test. It

is argued that legislation is urgently needed to delineate the situations, if any, in which management is permitted to test its workforce (1992:9).

After reviewing the issues surrounding workplace drug and alcohol testing, the OLRC (1992:121) recommended the following:

The provincial government should promulgate legislation relating to drug and alcohol testing in the workplace. The legislation should have application to private and public sector workers, to unionized and non-unionized employees and to job applicants.

A legislative ban should exist on drug and alcohol testing of bodily samples by employers of all current and prospective employees in Ontario.

In cases where impairment on the job poses a risk of physical injury or death to the employee, to co-workers, or to members of the public, performance testing of the employee is justified. Performance testing evaluates the psychomotor skills of employees by means of mechanical aptitude tests and computer programs. It is the most effective and least intrusive means of measuring impairment. The Commission is therefore of the view that even in the case of safety-sensitive positions, the taking of bodily samples is not justified.

In other words, the OLRC rejected outright workplace drug and alcohol testing, recommended that the government pass legislation to ban drug and alcohol testing in Ontario, and endorsed the implementation of workplace performance testing instead of drug and alcohol testing for safety-sensitive positions. The issue of performance testing in lieu of drug and alcohol testing will be discussed further in Chapter 4.

The Legality of Substance Testing in the Workplace

As previously noted, the policy of widespread mandatory drug testing in the United States is a relatively new one; consequently, approximately 40 cases are pending in U.S. courts. Notably,

those cases regarding the legality of urinalysis testing decided in the lower courts have held that urinalysis constitutes "search" within the meaning of the Fourth Amendment (Feldthusen, 1988:97). In recent years the U.S. Supreme Court ruled on the legality of two federal mandatory testing programs. The legal issues involved in these cases were complex, but in his review of the decisions, Lennart Henriksson (1991:190) concluded:

The two clear principles that can be gleaned from these cases are that American employers can constitutionally require their workers to submit to drug tests if the jobs are sensitive in terms of public safety, security, and integrity; and that employees do have privacy interests that employers cannot violate without showing that legitimate governmental interests are served by drug testing.

The Canadian government, too, must contend with the issue of the legality of mandatory drug and alcohol testing programs in light of the passage of the *Canadian Charter of Rights and Freedoms* in 1982; the existence of federal and provincial human rights legislation; and, current collective bargaining and labour arbitration rules. It should be noted that currently there is no legislation or judicial authority in Canada to specifically prohibit or authorize workplace substance testing (VanRensburg, 1989:9).

Challenges under the Canadian Charter of Rights and Freedoms

The scope of the *Charter* is defined in Section 32 which provides that the *Charter* is applicable to the Parliament and government of Canada, and to the government of each province in respect of all matters within their authority (Pinsonneault, 1994:177). It is likely that substance testing programs established by legislation or formulated under the exercise of statutory power will be governed by the *Charter* (Bota, 1989:25).

Drug testing programs in Canada may be challenged on the basis of section 7 of the *Charter* which reads in part that "everyone has the right to...security of the person...in accordance with the principles of fundamental justice." Bota (1989:26) has argued that this section has implications for the process by which drug testing and any disciplinary action that follows are carried out, particularly in light of the proven unreliability of the testing procedure.

In 1986, the issue of urinalysis testing was considered by the Canadian courts in *Dion v Le Procureur General Du Canada*.¹⁴ In this case a prisoner was subjected to urinalysis testing after it was suspected that he had consumed alcoholic beverages. The prison rule that mandated the testing was struck down under section 7 of the *Charter*.

Arguably, section 8 of the *Charter* is the section most directly relevant to the issue at hand. It is expected that future challenges to workplace testing programs will most likely be launched on the basis of this section, which reads in part that "everyone has the right to be secure against unreasonable search and seizure." If the U.S. example is followed, Canadian courts will likely find that urinalysis testing does constitute "search" within the meaning of section 8 (Bota, 1989:26).

Whether or not the Canadian courts will ultimately find that substance testing constitutes an "unreasonable" search is difficult to predict. Even if employees are fully informed of the nature, purposes, and consequences of substance testing, and their permission obtained, Feldthusen (1988:98) contends that this may still constitute an unreasonable search given that employees may be coerced

¹⁴ [1986] R.J.Q. 2196.

into testing for the purposes of obtaining or keeping employment. Feldthusen (1988:101) predicts that, under section 8, testing for individualized cases is more likely to be found to be a reasonable search than is mass screen testing.

Some legal analysts have argued that if workplace testing programs are found to contravene the *Charter*, it is possible that they will not be saved by section 1¹⁵ (Feldthusen, 1988:102). The scope of this section has been established by the Supreme Court of Canada in *R. v. Oakes*¹⁶. Feldthusen maintains that a legislated screen testing program would most likely fail the three components of the proportionality test set out in *Oakes*. He states (1988:101-102):

First, the inaccuracies of testing suggest want of a rational connection to the safety objective, except in the case of testing with prior reasonable cause under strict conditions including confirming tests. Secondly, other means of detection which do not violate section 8 are generally available, so testing is not the response which interferes as little as possible with the right. Thirdly, screen testing will have a significant effect on the vast majority of test subjects who have not consumed or been suspected of consuming drugs, which is disproportionate to the object of testing.

However, Feldthusen (1988:101-102) does note that mass screening programs that test for 'cause', where a clear safety risk is established, are more likely to pass the scrutiny of the *Oakes* test.

Similarly, Pinsonneault (1994:182-183) has argued that drug testing programs - even if they are found to violate *Charter* rights - can be saved by section 1 and, in particular, pass the proportionality test set out in *Oakes*:

¹⁵ The question would be whether or not legislation mandating workplace testing could represent "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under section 1 (Pinsonneault, 1994:179).

¹⁶ (1986), 24 C.C.C. (3d) 348 (S.C.C.).

The first component of the test can be satisfied if drug testing can reasonably be expected to increase the health and safety of workers and to improve proper performance of work. With respect to the second component of the proportionality test, it is possible to say that drug testing would impair "as little as possible" the rights guaranteed by the Charter. This rests on two bases. The first is that there is no less intrusive measure than drug testing to achieve the objective (i.e., protecting health and safety by detecting drug use) with any likelihood...The second basis is that legislation would seek to circumscribe drug testing in order to avoid as much as possible intrusion into worker's [sic] fundamental rights. This could be done by prescribing clear requirements and specifications on when, by whom, how, and under what circumstances drug testing can be performed. For instance, legislation should provide that only some workers, such as those working or seeking work in safety-sensitive positions and other predetermined positions, can be tested for drugs in specific circumstances.

The third component of the proportionality test [is satisfied because] if the protection of the health and safety of workers and citizens was the primary objective of legislation on drug testing, it would outweigh restrictions caused by the measures (i.e. drug testing). This is because the protection of people's health and safety is guaranteed by the Charter under the right to security (section 7). Such protection is more important than one's right to freedom from drug testing in certain specific circumstances.

A recent decision by the Supreme Court of Canada in *R. v. Colarusso*¹⁷ further complicates the issue. In this case Mr. Colarusso appealed a conviction of impaired driving on the grounds that his rights under section 8 of the *Charter* had been violated after blood and urine samples taken at a hospital had been admitted as proof of impairment at his trial. The samples had been obtained from Colarusso following a traffic accident as part of a standard "Trauma Protocol Procedure" under section 16 (2) of the *Coroners Act*. The Supreme Court upheld the conviction; however, the Court was split on its reasons for doing so. The majority of the Court held that the appellant's right to be

¹⁷ (1994) 1 S.C.R. 20.

secure against unreasonable seizure had been violated; however, the Court also reasoned that the evidence gleaned from the blood and urine samples would almost certainly have been discovered absent the *Charter* violation, and that the offence occurred in such aggravating circumstances that the repute of the administration of justice would be negatively affected if the evidence were to be excluded. The minority ruling also upheld the conviction but found that the appellant's rights had not been contravened as the act of obtaining the samples did not constitute a seizure within the meaning of section 8 of the *Charter*. The fact that the Supreme Court was split on whether or not the appellant's section 8 rights had been violated is indicative of the uncertainty surrounding these issues.

In summary, legislated workplace testing programs in Canada would likely be challenged under various sections of the *Charter*, specifically sections 7 and 8. There is some debate among legal commentators concerning the potential success of such challenges, although there appears to be general consensus that workplace testing programs that clearly link testing to the issue of public health and safety are more likely to pass the scrutiny of the *Charter*.

In light of the recent decision made by the federal government not to proceed with legislation in support of its proposed *Strategy*, a discussion of *Charter* rights, as they apply to workplace testing, has most likely become moot. The *Charter* does not apply to collective agreements between two private parties, nor does it apply to private litigants such as private employers and their employees (Pinsonneault, 1994:177). Disputes between the Canadian trucking industry and Canadian truck drivers who become subject to testing through private agreements will most likely be resolved through human rights legislation and/or labour arbitration.

Challenges under Human Rights Legislation

The general philosophy underlying human rights legislation with respect to this issue is that individuals must not be discriminated against on the grounds that a handicap or disability will limit their ability to perform a particular job (Feldthusen, 1988:103). Regarding drug testing, the question then becomes whether or not the definition of disability or handicap includes persons who test positive for drug use.

Only federal human rights legislation mentions "previous or existing dependence on alcohol or drugs" in the definition of disability (Feldthusen, 1988:103). The inclusion of the word "dependence" may actually serve to protect the addict and eliminate protection of the occasional user. Provincial legislation does not mention drug or alcohol use in its provisions and therefore does not furnish a clear answer as to whether drug use constitutes a handicap (Pinsonneault, 1994:167); therefore, arguments for protection under this legislation may prove more difficult for the chronic abuser or occasional user (Feldthusen, 1988:103).

Canadian human rights legislation provides that discrimination in employment is unlawful, except when it is based on bona fide occupational requirement (Pinsonneault, 1994:167) which addresses the actual ability of employees to perform their duties without risk to themselves or others (Butler, 1993:112). The parameters of a bona fide occupational requirement have been established by the Supreme Court of Canada in a number of decisions. The Court held that it must "... be imposed honestly and in good faith and must be objectively related to the performance of a certain work or occupation, in the sense that it is reasonably necessary to assure the safe, efficient, and

economical performance of the job" (Pinsonneault, 1994:167-168). To justify drug testing as a bona fide occupational requirement an employer would need to show that drug use by an employee could result in a significant reduction in that person's ability to perform the essential tasks of his or her job safely and productively (Pinsonneault, 1994:168). Pinsonneault (1994:168) points out that this argument would most easily be made with respect to employees in safety-sensitive positions; however, the justification is still problematic:

An argument against the legitimacy of drug testing as a bona fide requirement is that the link between testing positive and the capacity to do a job may be tenuous. A positive test result does not necessarily imply that the worker is a drug addict; depending on the drug and dosage, a positive result indicates that the worker has used a given drug in the hours, days, or even weeks prior to the test ... As well, the use of drugs may not necessarily mean that a worker is at increased risk of industrial accidents and performance problems.

All human rights statutes provide for a right to compensation for workers who are discriminated against. A finding of discrimination by an employer can result in compensatory and/or punitive damages, or even the right to obtain an injunction to restrain a person from depriving or restricting any individual from the enjoyment of a right under the legislation (Pinsonneault, 1994:170). Workers who are denied employment or who are fired based on a positive drug test or their refusal to undergo a drug test, and who succeed with a complaint under human rights legislation, have rights to damages and to be reinstated in their job (Pinsonneault, 1994:170-171).

In November of 1987, the Canadian Human Rights Commission issued a written policy with respect to drug testing in the workplace. The policy states that employers would need to establish that drug testing is relevant to determining whether the worker has the capacity to perform the

essential components of the job safely, efficiently, and reliably (cited in the Privacy Commission, 1990:66). This would entail, as noted above, identifying a drug free workplace as a bona fide occupational requirement (Butler, 1993:247).

Recently the Ontario Human Rights Commission also adopted written policies with respect to drug testing and employer directed medical examinations (VanRensburg, 1989:10). Other Canadian provinces have yet to follow suit. The Ontario Human Rights Commission argued that because workplace testing programs may identify workers with drug or alcohol related disabilities, and since such revelations may result in discipline or termination, drug testing is prima facie discriminatory (VanRensburg, 1989:10). The policy statements direct that: (1) substance testing of employees be undertaken only if it is a bona fide requirement of the employment that the person be drug or alcohol free; (2) job candidate testing be performed only after a written job offer has been made; (3) "reasonable accommodation" for employees who fail a substance test be implemented; and (4) even if a drug testing program can be justified on safety grounds, the Commission retain the right to rule on the validity of any mandatory drug or alcohol program (discussed in VanRensburg, 1989:11).

Despite the fact that both the Canadian Human Rights Commission and the Ontario Human Rights Commission have issued written policies regarding workplace testing, legal questions relating to human rights legislation have yet to be dealt with comprehensively. Some of the uncertainty resides in the paucity of cases coming before the courts and tribunals. Pinsonneault (1994:171), however, asserts that many of the problems may originate with the legislation itself:

... it can be said that all the questions raised by drug testing in the workplace cannot be answered with certainty by the current human rights legislation. The principles are very general and do not specifically deal with the issues raised by drug testing. This is not to say that the present legislation must be entirely rejected; the solution lies in the clarification of current law by enacting more specific guidelines for drug testing.

Challenges under Collective Bargaining and Labour Arbitration

Collective bargaining and labour arbitration represent the most likely recourse for unionized employees who are in dispute with their employers over workplace testing regimes. A thorough discussion of all aspects of employment law, including collective bargaining and labour arbitration, is beyond the scope of this thesis; however, an overview of the major issues is provided.

At the present time, there are no provisions for drug testing in most collective agreements; nevertheless, issues that are up for discussion include whether unions and employers have the power to bargain on this issue, whether employers can unilaterally implement drug testing programs, and how arbitration boards are likely to decide on grievances related to drug testing (Pinsonneault, 1994:171). Grievances filed by unionized workers against their employers are resolved by labour arbitrators who have the statutory authority to do so (Pinsonneault, 1994:172).

Unions and employers do have the power to negotiate working conditions regarding drug testing under existing collective bargaining rules mandated in Canadian legislation (Pinsonneault, 1994:171). Potential drug testing issues pertinent to collective bargaining include whom one should test, how and by whom the tests will be conducted, and what to do with the results.

Subject to certain limitations, employers do have the right to unilaterally implement substance testing programs in the workplace provided the program is consistent with the collective agreement

and is not considered "unreasonable" (Pinsonneault, 1994:172). If the testing program is found to contradict express or general provisions of the collective agreement, then it can be declared unenforceable by a labour arbitrator (Pinsonneault, 1994:172-173). Pinsonneault (1994:173) argues that legal guidelines on drug testing are required in order to assist labour arbitrators to make such decisions because "[d]eciding whether a program conflicts with the collective agreement ... can present difficulties and lead to a subjective decision in cases where the provisions of the collective agreement are general and/or leave room for uncertainty." An equally contentious issue is the assessment of the "reasonableness" of an employer-mandated drug testing program. Labour arbitrators are asked to balance the employer's management rights with the privacy rights of employees (Pinsonneault, 1994:173).

How are labour arbitrators likely to rule on grievances related to drug testing? Pinsonneault (1994:177) notes that the outcome of cases involving drug testing is often unpredictable because arbitral jurisprudence on drug testing is still developing, and no coherent and consistent principles or rules have yet been established. Generally speaking, however, arbitrators have ruled that there is no residual management right to search employees or to order medical examinations on an ad hoc basis (Feldthusen, 1988:105). The one exception to this rule is that an employee may be asked to submit to a medical examination if it can be proven that there are reasonable grounds to question his or her ability to work in a safe manner (Feldthusen, 1988:105). Legal analysts predict that testing may be allowed where there is a reasonable suspicion of work-related impairment which poses a serious safety risk (Pinsonneault, 1994:176; VanRensburg, 1989:10). It has been also been argued that it

is unlikely that random testing or screen testing (except under exceptional circumstances) will be upheld by arbitration unless previously approved by collective agreements (VanRensburg, 1989:10).

VanRensburg (1989:10) notes that recent labour arbitration decisions have recognized the employee's right to privacy; accordingly, in subsequent decisions, the testing of employees for drugs or alcohol may be rejected as a violation of this right. Henriksson (1991:191) believes that the intrusive nature of drug testing might be held as an unjustified invasion of privacy for the following reasons: (1) the ability of drug tests to reveal intensely personal information about an employee may prove to be a violation of individual autonomy; and (2) given that a relationship between drug tests, drug use, and job performance has yet to be adequately demonstrated - combined with the unreliability of urinalysis testing - drug testing results may contain information that is not a legitimate concern to employers.

Non-unionized workers are at a greater disadvantage than collective bargaining workers (Feldthusen, 1988:106). Their only recourse in the event of dismissal for a positive substance test is to pursue a wrongful dismissal action. The remedy sought would be for damages for lost wages.

To recap, discussion in the above sections concerning human rights legislation, and collective bargaining and labour arbitration, indicates that even outside the purview of the *Charter*, issues surrounding the legality of workplace drug and alcohol testing are far from resolved. Pinsonneault (1994:177) has argued that the solution lies in the enactment of legislation on drug testing in the workplace that would establish consistent principles or rules, while others - most notably the Ontario Law Reform Commission - advocate the promulgation of legislation that would ban drug testing in

the workplace. Caught somewhere in the middle of this legal quagmire are the employees who will be most affected by the implementation of workplace drug and alcohol testing programs. The response of organized labour to the workplace testing issue is discussed below.

Response from Organized Labour

The response from organized labour to workplace drug and alcohol testing in Canada has largely been negative. Whereas not all unions reject workplace testing (some organizations support drug screening under certain circumstances), the large "umbrella" unions - for example, the Canadian Labour of Congress (CLC) - have expressed considerable concern (Alvi, 1994:305-306).

Shahid Alvi (1994:306-308) notes that the union viewpoint on workplace testing is best understood in the context of the significant historical differences in philosophy between labour and management, and the current economic pressures affecting both groups. Traditionally unions have served to express the collective views of their members with an aim toward enhancing working conditions and standards, while the function of management has been to maximize productivity through the supervision and control of workers. In an era of increasing globalization, organizational restructuring and downsizing, labour-management relations have become increasingly strained. Alvi (1994:307) argues that although many unions and their employers are now calling for more cooperation in labour-management relations:

[T]here is no question that the opposing-teams mentality still governs the credos of labor management. Accordingly, management-labor relations are often confrontational; a winner-takes-all attitude prevails, and the parties often assume aggressive, intransigent positions. As might be expected, one consequence of this

situation is that labor is often suspicious of management-initiated programs and policies, particularly those (e.g., drug testing) that are perceived to impinge upon the freedom and dignity of the worker.

Many of organized labour's arguments in opposition to workplace drug and alcohol testing are the same as those put forth by other opponents. In short, unions have opposed workplace drug testing programs on the following grounds: (1) urinalysis is not a reliable technique; (2) a positive test cannot prove that a worker was impaired on the job; (3) drug testing techniques constitute a gross invasion of personal privacy; (4) there is no conclusive evidence that drug use contributes to workplace accidents; and (5) there is no evidence to suggest that drug and alcohol use represents a significant problem in the Canadian workplace.

Organized labour argues that the implementation of workplace testing programs does not address the underlying causes of substance abuse in the workplace (e.g. long hours, high workloads, separation from family, stress in relation to job security), and that management-initiated programs have more to do with the productivity of labour than with concerns for the well being of the worker (Alvi, 1994:310-311). In addition, unions contend that by virtue of the types of information that can be gleaned from a urine sample, employers are placed in a position of considerable power over the employee (Macdonald et al., 1993:16). Unions have also rejected workplace testing on the grounds that such programs exacerbate strained labour-management relations, and have a negative effect on workforce morale (Ontario Law Reform Commission, 1992:7). Furthermore, organized labour predicts that drug testing will widen the net of social control because of the potential to invade continually the privacy of innocent workers (Alvi, 1994:316). Finally, the motivations behind the

push by Canadian employers to impose workplace testing programs have been questioned by organized labour. Similar to other interested groups, labour argues that the impetus behind workplace testing is rooted in the "War on Drugs" imported from the United States (Alvi, 1994:309).

In his analysis of union perspectives on workplace drug testing, Alvi (1994:317) concludes:

Clearly, many unions see drug testing in the workplace not only as a short-term, Band-Aid solution but as an assault on the freedoms of workers and, in broader terms, as a method of controlling the labor power, productivity, autonomy, and political will of organized workers. Many of these concerns are entrenched in historically conditioned antagonisms over social and working conditions, as well as the rights and roles of working people.

To recap, challenges from organized labour echo those made by other interested observers and commentators, with a particular emphasis on the rights and dignity of workers. In Chapter 4, specific responses from some Canadian unions to Transport Canada's *Strategy* will be examined, including a discussion of possible differences between the perspectives of rank and file union members and labour leadership regarding the legitimacy of workplace testing.

Summary

In this Chapter a number of issues with respect to workplace drug and alcohol testing programs have been discussed, including the prevalence of use in the general population, the costs associated with drug and alcohol abuse in the workplace, and strategies for reducing use and abuse in the workplace. In addition, an overview of the arguments mobilized in favour of workplace testing programs has been presented, along with a review of the various criticisms levied against such programs. A discussion of the many challenges to mandated workplace testing programs has revealed the following: (1) issues with respect to the magnitude of substance use in the Canadian

trucking industry have yet to be adequately resolved; (2) urinalysis testing is believed to be unreliable, inappropriate, and intrusive; (3) the response from civil libertarian groups is overwhelmingly negative and, in fact, some groups have recommended an outright ban on workplace testing programs; (4) the legality of workplace testing in Canada remains unresolved at this time, but it is expected that mandated testing programs would face challenges under the *Charter*, human rights legislation, and labour arbitration; and (5) generally, organized labour's response to workplace testing programs has also been overwhelmingly negative.

In light of the controversy surrounding these issues, in Chapter 4 I will explore, through interviews and documentary analysis, the numerous issues identified in the previous two chapters with a view toward drawing inferences about drug testing in the Canadian trucking industry, and the specific policy initiatives that have evolved. In particular, I will address these issues in the context of the Transport Canada initiative, and will explore the implications and concerns from the perspective of the various participants and affected parties.

CHAPTER IV

RESEARCH METHOD, RESULTS AND ANALYSIS

Introduction

In the preceding two Chapters of this thesis, the roots of the employment-related drug testing movement were discussed, an overview of the evolution of workplace drug and alcohol testing policies in Canada and the United States was provided, and a number of workplace substance testing issues were set out. Chapter 4 encompasses an explanation of the method employed in this thesis, and a presentation of the data collected. The analysis and discussion of the data are organized around a number of themes that were identified in Chapters 2 and 3 including questions concerning the nature and magnitude of substance use in the Canadian trucking industry, the impetus for the development of Transport Canada's *Strategy*, and the various claims and counter-claims espoused by interested parties involved in the debate. The focus of Chapter 4 is on the development, evolution, and eventual demise of the *Strategy*; thus consideration is also given to the political economy of trucking, and to the reaction engendered by the federal government decision not to proceed with the initiative.

Method

The research method employed in this thesis proceeded in three stages including a review of the literature, the collection of documentary evidence, and the completion of a series of interviews.

The review of the literature can generally be broken down into two sub-categories:

(1) Information was collected with respect to the historical antecedents to the Transport Canada's proposed *Strategy* on substance use in the Canadian trucking industry in order to establish the backdrop against which it emerged, and to provide data regarding the impetus for the *Strategy* and the forces most influential in shaping it. The review also included an examination of the substance abuse literature with specific emphasis on Canadian materials regarding the scope of substance abuse among truck drivers. The purpose of the analysis was to establish the dimensions of the perceived problem and to examine how this information was enlisted by policy makers in the creation of the proposed *Strategy*; and (2) Literature reviewing workplace drug testing programs and related issues was reviewed. Data were compiled concerning the various challenges levelled at mandatory drug testing programs generally, and the proposed Transport Canada *Strategy* specifically. An exploration of the following four topic areas was completed: (a) the legal literature on challenges to mandatory drug testing programmes under the *Canadian Charter of Rights and Freedoms*, existing federal and provincial human rights legislation, and collective bargaining and arbitration rules; (b) the response from organized labour; (c) the scientific literature regarding the reliability of urinalysis testing; and (d) the response from civil libertarian groups and the research community.

The literature review utilized materials found at the Simon Fraser University library, the

University of British Columbia libraries, the University of Victoria libraries, the U.B.C. Accident Investigation Team library, Transport Canada's in-house library, the British Columbia Ministry of Transportation and Highways in-house library, and the National Library of Canada. The search included references to books, magazine and journal articles, government publications, dissertations, technical and research reports, computer programs, and other forms of available information.

Documentary materials that had been prepared specifically as background material for the proposed *Strategy*, and documents produced in response to the *Strategy*, were obtained from the federal government. These materials included reports of the proceedings in the various House of Commons committees investigating this issue (specifically, the Standing Committee on Transport and the Special Committee Investigation on Railway Accidents), reports prepared by these Committees, in-house policy proposals, the policy package presented to each member of the House of Commons prior to the tabling of the proposed *Strategy*, press releases, and other information that became available. Key personnel within Transport Canada provided some material, and other documents were collected during a visit by this researcher to the National Library of Canada in Ottawa.

A total of 12 interviews were conducted with informants who had been involved in the process of developing the *Strategy*; with representatives of the Canadian trucking industry, including drivers; and with various interested observers from organized labour and the academic community. The study employed purposive snowball sampling: contact with a number of the initial respondents provided additional interview candidates who in turn were approached for inclusion in the study. The interviews involved open-ended questions that were tape recorded and later transcribed. Six of the

interviews were conducted in person, while the remaining participants were interviewed over the telephone.

Two of the participants interviewed are employed by Transport Canada: one respondent is the Senior Policy Advisor for a western province, and the other is a senior official working for the Ministry in Ottawa. Two of the interviewees are employed by the Insurance Corporation of British Columbia (ICBC): one is a Senior Policy Analyst for the Corporation, and the other is a safety Manager. Representatives from the trucking community included a general manager of a provincial trucking association, a manager of a medium-sized trucking company (who also had previously driven commercial vehicles for a number of years), and a long-haul tractor-trailer driver. John Weir, the Director of Occupational Health and Safety for the B.C. Federation of Labour was interviewed, as was a representative from the Montreal headquarters of Teamsters Canada. Members of the academic community approached for inclusion in the study included Professor Neil Boyd, Director of Simon Fraser University (SFU) School of Criminology; Dr. Bruce Alexander, Professor of Psychology at SFU; and Dr. Barry Beyerstein, SFU Professor of Psychology.

A number of themes were identified from the review of the literature and the documentary evidence as areas of discussion for the interviews. It should be noted that, due to the open-ended nature of the questions, and the varying knowledge each respondent brought to the interview, not all questions were asked of all participants.

The greatest ethical concern surrounding this research involved the issue of confidentiality. Participation in the study was voluntary; agreement to participate in and complete the interview was

considered to constitute voluntary and informed consent. Due to the nature of the questions to be asked of the interviewees (particularly those questions involving drug use), the confidentiality of responses was guaranteed. Some respondents chose to remain anonymous, while others agreed to be identified by name and position.

This study was exploratory in nature; due to the low number of respondents, the data collected from the interviews cannot be considered to be exhaustive. Moreover, the focus of this thesis is on drug and alcohol use in the Canadian trucking industry; therefore, the findings cannot be generalized beyond the Canadian experience. The results of this research are also limited by the possible exclusion of documentary evidence that may have been overlooked, and by the absence of interview data from the political figures (i.e. Ministers Young and Lewis) most central to this analysis.

For the purpose of analysis, the findings of the interview discussions and the documentary evidence were grouped according to the various themes that emerged, each of which are delineated below.

Prologue

Consider the following exchange between Member of Parliament Brian Tobin, a member of the Standing Committee on Transportation during the time period the Committee was reviewing the Transport Canada *Strategy* paper, and Mr. Neil Eisner, Assistant General Counsel, United States Department of Transportation. Mr. Eisner attended the hearings on May 10, 1990 to present a brief to the Committee concerning the drug testing of American transportation workers (SCOT,

1990:46:31-46:34):

Mr. Tobin: ... You said you are not here to tell us that we ought to copy the U.S. experience or program. But you are the Assistant General Counsel for the U.S. Department of Transportation. You do have drug testing in the United States, and this is perfectly within the determination of the U.S. to say you need that and to deal with it in any way you see fit. We certainly would not tell you that you should not. But the United States wants nations whose transportation industries are doing business inside U.S. borders to bring in similar programs to that which has been designed in the U.S.

So on the one hand you are saying to us - and I am sure you are quite serious, Mr. Eisner - that you are not here to tell us we need a program like yours. But outside of looking at this question purely as a drug problem, what do we do in Canada with the drug problem; or is there a problem; and do we need to do something different from our heavy dependence on EAPs?

There is another factor hanging over this committee, and that factor is that we have been led to believe that if we want to continue [to] have our truckers ... do business inside U.S. borders, the U.S. is looking to have Canada adopt similar drug-testing measures, be it random drug testing or other measures, for Canadian workers in safety-sensitive areas as is now the case in the United States.

Do you not think there is an inconsistency on the one hand to say, we do not want to suggest you have a drug problem and that you need our program, but on the other hand at the diplomatic level to have a push by the United States to have not only Canada but many other nations adopt a similar program if they want to operate in American air space or on American highways or in American ports? That is an important question, Mr. Chairman.

The Chairman: I know, and the witness can handle it, but he came here to tell about the American experience. He is Assistant General Counsel to the Department of Transport. He is not the Secretary of Transport; he is not the President of the United States. He is not the person defining policy.

But anyway, answer the question...

Mr. Eisner: Sir, over a period of about three years I participated in every meeting between the Canadian government and the United States government ... The

information you have been provided is incorrect. There is no inconsistency. We have never suggested that the Canadian government needs to or should adopt a program similar to ours. What we have said is that we are concerned about the safety of Americans. We are concerned about truck drivers, for example, who drive on our highways...

What we have said is that even in the United States we do not have hard data to show there is a safety problem with respect to drugs. We have had some accidents. What we have said is that we have - and the courts have confirmed this - the responsibility to ensure that the problem does not spread to the transport industry, even if it is not there yet.

What we have said to Canadians is that if your truck drivers are going to drive on American highways, we think they should be subject to the same requirements as American truck drivers...*Let me stress that it is not just a safety issue, as I am sure you can appreciate, it becomes a competition issue ...*

The Canadians have said, and we appreciate it, that we have to understand your problems with respect to your requiring or allowing any kind of testing to be done. We have to understand your concerns about the impact. It appears that you are requiring testing in Canada. That is why we delayed the rules for a year and agreed to delay them for still another year because we recognize your concerns. We want to talk to you, we want to negotiate, we want to work something out. We do not want to make you do anything you do not want to do or feel uncomfortable with.

Mr. Tobin: A crucial point. Mr. Chairman, as it turns out, Mr. Eisner is very much apprised of this matter, and I think we appreciated his answer. Given the radically different results in the survey done in terms of substance abuse in the United States in the transportation sector, there have been a number of consistent survey results in Canada that include alcohol. The number still is at 4%. Is it possible for the Government of Canada to demonstrate both by way of the survey results and by way of the very substantial investment by both companies and governments, in particular companies and unions, that EAP programs appear to be working?...

In other words, we can demonstrate vigilance, a determined program and follow-up accountability, but we do not have to go the drug-testing route to satisfy the concerns of our good friends...

Mr. Eisner: That decision would have to be made in the end, as the chairman pointed

out, by the Secretary of Transportation and perhaps the Secretary of State. We have had very good negotiations with the Canadians. You have been very helpful and very co-operative and I am confident we can work out mutually acceptable solutions to this problem.

Let me stress something, however, at least with respect to our concerns in the United States. Even with a testing percentage of less than 1% within the Department of Transportation, this still means that at any one time there are controllers controlling traffic who have drugs in their system...I think I can speak for the secretary now and for the prior secretaries who have worked on this who feel that 3%, 4%, 5% or 6% may sound low, but it still means there are people operating in the system.

Mr. Tobin: We all agree. ...

Mr. Eisner: The question is how far you go. What kind of strong action do you take? That is a very difficult decision.

Mr. Tobin: You can raise pilots in the lab environment and have zero percent. Orwell would be happy (emphasis added).

This exchange highlights two of the most important issues that are at the heart of the controversy surrounding the proposed Transport Canada *Strategy*. First, it is clear from Mr. Tobin's comments that he is unhappy with the pressure he perceives is being placed on the Canadian government to comply with American drug testing rules; it is equally clear that the American representative, Mr. Eisner, is unwilling to admit that the U.S. government is pressuring Canada. Second, Mr. Tobin argues that the nature and magnitude of substance use among Canadian truck drivers does not equal that found in the American trucking industry; thus Canada ought not be forced into mandating a testing program that is not justifiable. Predictably, Mr. Eisner defends his position by reverting to the 'public safety' justification (as discussed in Chapter 3) - namely, that even levels of use less than 1% represent too much of a risk in the transportation industries.

Is drug and alcohol abuse a problem in the Canadian trucking industry? Does the nature and extent of the problem justify state mandated testing programs? If there isn't a definable problem in the Canadian trucking industry, how can a testing program be rationalized? What was the impetus behind the Transport Canada proposal? What do civil libertarians and organized labour representatives have to say about drug and alcohol testing generally, and the Transport Canada proposal specifically? How have members of the trucking community - namely, trucking associations, company managers, and truckers - responded to questions about their industry? How have proponents reacted to challenges concerning the reliability of urinalysis testing, the legality of drug testing, and issues of privacy? Why did Transport Canada fail to pass legislation in support of the proposed policy? What does the future hold for the Canadian trucking industry now that Transport Canada has shelved the *Strategy*? These are the principal questions to be addressed below.

Is There a Problem?

As discussed in Chapter 3, perhaps the most contentious issue within the trucking industry itself is the question of whether or not drug and alcohol abuse among truck drivers constitutes a safety problem of such a magnitude that it warrants either a state-mandated or employer-mandated remedy.

Recent American studies indicate that the problem of substance abuse among U.S. commercial truck drivers is of concern. A thorough review of the numerous studies conducted on this topic is beyond the scope of this thesis; however, three of the more frequently cited studies are discussed

below.

Two American investigations that targeted tractor-trailer drivers found significant levels of drugs or alcohol use among this driving population. In the first study, Lund et al. (1988:648-661) randomly selected tractor-trailer drivers at weigh scales in Tennessee and requested urine samples for testing. The substance screening revealed that 29% of the truck drivers had some evidence of alcohol, cannabis, cocaine, or other prescription or non-prescription stimulants in their bodies. Interestingly, only 1% tested positive for alcohol, while 15% tested positive for cannabis.

A second study conducted by Barry Sweedler (1991:5) utilized the testing of blood samples obtained from recently killed heavy truck drivers in eight American states. Of the 182 fatally injured drivers tested, 33% had alcohol or other drugs present in their bodies. Notably, 13% tested positive for alcohol, and 12% tested positive for cannabis.

However, a third report recently circulated by the American Trucking Association (1991) produced results that contradict the above findings. This study reviewed the outcomes of 153,000 drug tests performed on truck drivers across the United States, and found that only 1.95% of the drivers tested positive for the use of illegal drugs; however, it should be noted that this research was based on a voluntary sample and had a compliance rate of only 32%.

The magnitude of the American problem is important to an analysis of the evolution of Canada's response to perceived problems within its own trucking industry because it has been used to justify Transport Canada's initiatives. For example, when asked whether the problem was greater in the United States than in Canada, a Senior Policy Analyst for Transport Canada responded, "I don't

think so, no. One would have to ask why; I mean a lot of those truckers operate up here and a lot of our truckers operate down there. Why would it be much different, I don't know?" A Senior Policy Analyst for the Insurance Corporation of British Columbia (ICBC) who was involved with the BCTA pilot project also argued that the magnitude of the problem was similar in Canada:

We've got evidence that alcohol and drugs are a significant factor in impairment and traffic accidents for the B.C. population in general and that those levels are directly comparable to the levels in all the major States - all the major cities in the States. So, its not like B.C. has less and they have more, with the exception of crack cocaine, and there is no reason to believe that it is not a problem with the trucking industry. In fact, there is good reason to believe that it is.

In contrast, a truck driver who regularly travels between Canada and the U.S. responded to a similar question by stating:

Like I say, Canadians aren't nearly as bad as Americans. From what I know of the industry, and listening to guys on CBs and stuff like that, I just find that abuse is more increased in the United States than it is in Canada. Even though the majority of Canadian drivers do travel the States, they work for reputable businesses.

In Canada, a significant proportion of the research into drug and alcohol use among Canadian truck drivers has originated with Transport Canada. As outlined in Chapter 2, the federal government requested in 1989 that Transport Canada undertake nine separate studies to ascertain the nature and extent of drug and alcohol use in all modes of the Canadian transportation industry. In addition, the British Columbia Trucking Association (BCTA) was commissioned to undertake a survey and random urinalysis study of truckers at B.C. truck stops. Two of the most pertinent investigations, and the findings of the BCTA research, are discussed below.

The first project was conducted by the Traffic Injury Research Foundation of Canada (TIRF)

(1989). The purpose of the research was to determine the incidence and role of alcohol and other drugs in fatal transportation accidents in Canada. The section of the study that focused on tractor-trailer drivers enlisted historical data that captured toxicological results from fatally injured tractor-trailer drivers. A review of the historical data revealed that of the 627 fatally injured tractor-trailer drivers who had been killed between 1974 and 1987, 27% had been drinking prior to the accident (TIRF, 1989:17). Of these fatally injured drivers, 19% had a blood alcohol level (BAC) over .08%, and 8% had a blood alcohol below the legal limit. The researchers noted that the incidence of alcohol use among fatally injured drivers had decreased over the fourteen year span, but that among those who had been drinking, the proportion with high BACs had increased (TIRF, 1989:21). They indicated that there may be a "hardcore" of tractor-trailer drivers who are not affected or influenced by the usual educational or enforcement procedures (TIRF, 1989:17). In writing their report for Transport Canada, the authors concluded (TIRF, 1989:56):

Whether or not drugs other than alcohol are a problem is constrained by the lack of data. Testing for drugs other than alcohol is not routine...Based on these limited data we find little basis for concern about drugs with the possible exception of the highway transportation sector in which the use of central nervous stimulants may be a problem among tractor-trailer drivers.

The stated purpose of the second research project was to determine the extent and nature of substance abuse in the transportation sector (Canadian Facts, 1990:1). This study utilized survey research methods. A sample of truck drivers was taken from 70 weigh scales selected from the 10 provinces. Of the 4,220 drivers asked to complete the interview, 2,912 consented, representing a completion rate of 69% (Canadian Facts, 1990:3,5). The survey asked a variety of questions ranging

completion rate of 69% (Canadian Facts, 1990:3,5). The survey asked a variety of questions ranging from self-report incidence to reactions to drug testing in the workplace. The results gleaned from the work-related questions are as follows: (1) less than 1% of the drivers reported any negative effects on their job performance due to work-related use of drugs or alcohol; (2) less than 1% of drivers stated that their use of alcohol or drugs had contributed to an accident on the job; and (3) more than 50% related "pressure and stress" to substance use (Canadian Facts, 1990:18).

Interestingly, the questions designed to measure the *perception* of a possible substance abuse problem in the trucking industry, and to gauge support for possible mandatory drug testing programs, revealed the following: (1) 64% of truck drivers rated the use of alcohol and drugs as important contributors (relative to other things) to safety risk among people in the transportation industries; (2) levels of support for testing regimes were strongest for post-accident situations (94%), followed by for "cause" (80%), after treatment for a drug or alcohol problem (78%), and during routine medical examinations (85%); and (3) the drug testing regime that garnered the weakest support was random testing (60%) (Canadian Facts, 1990:20).

The final investigation to be discussed here was undertaken by Campbell et al. (1989) for the BCTA in consultation with Transport Canada. This study was completed by independent researchers who enlisted both survey methods and random urinalysis testing of commercial truck drivers stopped at B.C. weigh scales. One thousand truck drivers completed a questionnaire, and another 500 were asked to provide a urine sample for testing (1989:3).

The findings from the self-report survey were similar to those found in the Canadian Facts

obtain self-report data on drug and alcohol use. The results were as follows: (1) alcohol use is fairly high among truck drivers (56% claimed that they had consumed alcohol within the past week); (2) cannabis is the illicit drug of choice for truckers (7.6% admitted to occasional or frequent use); (3) on a typical workday, 2% of the drivers stated that they might drink alcohol during work hours or at a meal break; and (4) the use of alcohol and drugs is more prevalent among young drivers who are not married, and those who drive long hours (Campbell et al., 1989:6).

Of the 500 truck drivers approached to provide urine samples, 82% consented. Curiously, the urinalysis did not test for the presence of alcohol. The findings of the urinalysis revealed that 90.4% of the drivers tested negative for all of the drugs screened, and 9.6% tested positive for one or more of the drugs tested. The breakdown of the positive drug test results was as follows: 5.2% tested positive for cannabis, 2.2% for codeine, 2.2% for antihistamines, 0.6% for cocaine, 0.4% for barbiturates, and 0.2% tested positive for each of amphetamines and benzodiazepine (Campbell et al., 1990:8).

To summarize, it is clearly evident from the above review that while there is some use of substances by Canadian truck drivers, the level of consumption does not approach that found in most similar American literature. When asked about the findings of the Canadian research, some respondents defended the results. For example, a Transport Canada Senior Policy Analyst had this to say with specific reference to the BCTA study:

Well, the percentages weren't that small. If I recall it was seven or eight percent without taking into consideration the refusal rate. That's a pretty good indication. Some of them might [have] been in too big a hurry to give a sample; it might have

also been an indication that they were using. If anything, it was more than seven percent. That's pretty significant when you consider the nature of the work that these people do. It's one thing if you are sitting behind a desk, it's another if you are sitting behind the wheel of a tractor-trailer; it's a different situation. Some of testing - they did one in Tennessee and it was 27 percent or something - when you look at that...even at seven percent, and you look at the number of commercial vehicles on the road, it's frightening you know?

Similar to Mr. Eisner, the U.S. representative present at the Standing Committee on Transportation hearings, other respondents defended the Canadian findings with reference to public safety. For instance, a manager with a provincial trucking association stated:

Well, you know, how do you define the problem? You know, is one person on the road not a problem whereas two people might be? Or is one person a problem, I don't know? As I said, we did a survey of truck drivers in B.C., and we determined that there were those on the road driving trucks who likely had a substance use problem or were addicted or were in some way a safety threat. So, in that context, yes there is a problem. But if you look at the elevated need for safety because of our interaction with the public on the public highways, I would say that one person having an addiction problem that could cause a serious crash or other incident, that is a problem that has to be addressed.

Other interviewees argued that drug and alcohol abuse among Canadian truck drivers was underestimated in the research, and that this had occurred for a variety of reasons. A Senior Policy Analyst from ICBC explained:

One of problems is that it is very difficult to get evidence. You can try doing toxicologies on fatally injured truck drivers but the difficulty there is that most trucking accidents do not involve a fatality on the part of the truck driver. The truck accidents that involve a fatality on the part of the truck driver tend to be [a tractor-trailer travelling] on a high-speed highway, it's relatively early in the morning, it's a left hand curve, the rear trailer gets one wheel off the road, it's going around, the rear trailer flips, the front trailer flips, and the cab flips. That's what kills an awful lot of truck drivers. The general reason there is fatigue. That kind of accident occurs under very particular circumstances and it is almost the only kind of accident that will kill

a truck driver.

So, you've got this very small sample of accidents that you are going into and then if you are real, real lucky the persons dies within 24 hours and you get a sample of the blood. I'm not saying you're lucky 'cause the guy died but in terms of data collection, there it is. So we get to into this tiny, tiny, tiny, very tremendously restricted sampling problem, and say well, "gee, doesn't seem to be a lot of alcohol or drugs here"... Having no good way of extrapolating from the truckers that we can do the toxicologies on, your next best bet is to look at the general population. In terms of the general population, we know that between 45 and 60 percent of those killed are impaired to some extent. Well, let's be real conservative, and say that we're wrong by 50 percent, what that would tell you is somewhere between, I don't know what, 22 and 32 and a half percent of the truck drivers - I mean divide it in half and it's still a huge number. So, we can't get decent sampling from the trucking population ... So logic then would dictate that you do what you can and you say well what do we got in the general population? The general population - we know these levels are relatively high. If the levels are only half as high in the trucking population, they're still high.

A manager of a medium-sized trucking firm, who had previously driven heavy trucks for many years, claimed that drug and alcohol use is underestimated in current research as a consequence of confidentiality issues:

If you are talking to, lets say Motorways, you've got a national company here. Everyone knows the name Motorways - well it's gone now - everyone knew the name Motorways... There is no way in hell that they are ever going to admit to you that they have a problem that they can pinpoint. No matter how much you tell them it is confidential, they are going to figure it is going to get out. And a truck driver is going to do the same thing, "I don't have a substance abuse problem, shit I only use caffeine pills," and that's what you will get. The BCTA thing was, I'm sure, with the best of intentions - "Hi, want to do a random drug test?" - what are you going to get from that, you are going to get the guy with the cross hanging from his grille. I'm not saying they're not doing it either - but you gotta know what you're gonna get.

Yet another respondent argued that the magnitude of the problem is underestimated because of a lack of enforcement of existing legislation. A safety manager with ICBC stated:

We haven't had the police officer or the enforcement officer out there that is not absolutely unintimidated by the trucking community. In fact, sometimes you will see a little bit of a relationship. A highway patrol officer is out there at 2:00 in the morning, and who's out there with him? The truck driver. [The police officer thinks] "I'm not going to bother that guy, he's out there working, I'm working." The [truck driver] could be stoned, but they don't want to stop him. The other reason being, they don't stop them because they don't have the experience. The driver will put them through real hoops because the [police officer] doesn't know what he's doing. They'll never stop anybody else, see?

Interestingly, when representatives from Transport Canada were questioned further about the magnitude of a substance problem in the Canadian trucking industry, their responses suggested a move away from the original Transport Canada position - namely, that while the transportation industries were safe, the extent of alcohol and drug use in the industry represented enough of a risk to public safety to warrant a strategy that included drug and alcohol testing - to a rationale based on economic concerns. A Transport Canada Senior Policy Analyst had this to say:

...the driving force behind it is the safety consideration, Okay? Also, another aspect of it -that isn't always taken into consideration - you can say "well there hasn't been an accident in a certain length of time so why are we saying there is a problem?" It's much larger than that - it's how it affects people's behaviour on the job, Okay? Quite often the use of drugs and alcohol and other drugs results in a number of unproductive practices in the industry. Absenteeism, or accidents that perhaps don't involve vehicles, can result in higher workman [sic] compensation premiums; it can be very unproductive for the company.

Of course the strongest evidence suggesting that Transport Canada has distanced itself from its previous position resides in the fact that recently Transportation Minister Young dropped the proposed *Strategy* from his Ministry's legislative agenda. When asked whether or not he believed that substance abuse represented a safety problem in the Canadian trucking industry, a senior Transport

Canada official provided a telling response:

Well, I mean, that is a very difficult question to answer. We went out and determined the nature and the extent of the problem. I don't know if you can really track it to the number of accidents where alcohol or drug use can be isolated and stated as the exact problem or resulted in the actual traffic accident. We did find that there was some use of alcohol and drugs in the trucking industry. But obviously, the industry, as well as the Minister, has looked at this, and they've decided that they will look at an - ah, you know, let the industry develop their own program.

What is interesting about this response is that the interviewee indicates that the trucking industry was in favour of the Minister's decision not to proceed with legislation. As will be discussed later in this Chapter, it is clear that the Canadian trucking industry was not consulted prior to the Minister's decision and, moreover, reacted with some outrage to the announcement.

Both representatives from labour unions interviewed for this thesis were unequivocal in their assertions that drug and alcohol abuse does not represent a significant safety problem in the Canadian trucking industry. John Weir, Director of Occupational Health and Safety for the B.C. Federation of Labour, stated:

The question for us, really, is that we don't see the overwhelming evidence in Canadian society that there is need to take such draconian action. There are a lot of other health and safety risks that need to be addressed, and that you need to get at the root causes of the problem which go well beyond the actual ingestion of the stuff. I mean, if I look around and look at any of the accidents that I've looked at in terms of the trucking industry in B.C., it's been hardware maintenance, it's been speeding because of competitive pressure, it's been falling asleep at the wheel because of long hours of work. So I haven't really seen - and I can't recall in a long time - any evidence, at least in B.C., where I keep a closer eye, drug and alcohol contributing to an accident in B.C.; I mean that kind of accident. In fact if you look right now, in 1994, there was quite a big increase in forest trucking fatalities and basically what they are attributing it to, is long working hours.

When asked a similar question, a representative from Teamsters Canada reiterated this viewpoint:

If you look - there was a study on that, and the study reveals - and maybe you can contact somebody at Transport Canada, and I'm not sure they will be willing to reveal the results of the study because they said exactly what we said many, many, months ago, years ago - that there is not a major drug problem or substance abuse problem here in Canada. At least we don't have the same kind of problem that they have in the United States.

Despite the official position of some Canadian transportation unions that drug and alcohol use does not represent a sufficient safety risk to warrant mandated testing regimes, truckers - many of whom are union members - do not necessarily hold to this view. Referring to the Canadian Facts study discussed above in which strong support for a variety of testing regimes was indicated by truck drivers, Butler (1993:139) has argued:

Despite the very strong and vocal objection to drug testing from the executive levels of a number of labour organizations, ... Canadian employees have provided a clear indication of their own views on drug testing through the veil of anonymity provided in confidential surveys.

Indeed, one truck driver interviewed indicated that he would support drug and alcohol testing in his industry, while another - as illustrated in the following exchange - provided evidence of activities he was aware of that, in his view, would justify such testing:

I - I just have a couple more questions for you. When you were a truck driver, did you ever use any substances to help you in your driving?

R - No.

I - Did you know anyone who did?

R - Yep.

I - So you have first-hand experience with drivers who did that?

R - I knew a lot of them.

I - It was pervasive then?

R - Yep, particularly in my industry. When I was in the heavy-haul industry. Generally speaking, my week would start Monday morning at 2:00 and we would work until 3:00 or 4:00 that afternoon, go home do whatever had to be done and call dispatch at 8:00 and get our moves for the morning and go to bed. The next days' moves would dictate whether we would get up at 1:00, 2:00, 3:00, 4:00 or whatever the case may be. That is the way it went until Friday and you worked Friday until you were done, if you didn't want to work Saturday. And I'll make no bones about it, we made a shit load of money, but there were a lot of individuals who couldn't deal with the pressure, couldn't organize their lives so they could get a sleep pattern established and be properly rested. So they sought out all kinds of cornucopia of pharmaceuticals. There is a ridiculous phrase for you!

The Canadian Facts survey finding that 64% of truck drivers viewed drug and alcohol as a problem in their industry, combined with anecdotal evidence, would appear to support the contention that union executives and union members do not always agree on significant policy issues. In fact, Alvi (1994:308) has noted:

...this issue points up one of the central problems of the modern union movement - namely, how to develop and maintain a unified position given the seeming indifference of the rank and file to questions of social and workplace policy and the continued assault on the freedoms and rights of labor to even exist.

This may be true; however, in the context of drug and alcohol use in the Canadian trucking industry, the findings of the Canadian Facts and the BCTA studies can be viewed from another perspective. The survey research reveals that while there is a *perception* amongst truck drivers that

drug and alcohol abuse may represent a safety problem, this perception is not confirmed by the self-report findings and random urinalysis testing. In response to questions concerning workplace testing generally, John Weir, of the B.C. Federation of Labour, noted this phenomenon:

One of the interesting things is that it is also perception, I mean if you look at some of the research about people's attitudes. For instance, in the US they [asked] "is drug abuse a problem in the workplace?" Sixty percent of the CEOs said "yes," and then they [asked] "is drug abuse a problem in your workplace?" and ten percent said "yes." Part of it is our television exposure to life - basically what we think about violence is how much of it comes into our living room every night on the television, so we think the world is like that...

It is interesting you know, when you're looking at the background - reading the Hinton inquiry stuff is really interesting because the allegation was that the crew was all stoned out of their minds. And then when you read the report you get quite a different sense of the world, but most people still think it was some drug-crazed engineer who was ignoring every stop sign. The problem is that you don't come up with good public policy on any of this stuff unless you really have a good sense of what's going on. That's the problem - it's driven by this perception of things.

Some evidence of this perception is also revealed in the following exchange with a truck driver who had previously stated that he would support a substance testing program in Canada:

I - Is drug use openly discussed in the coffee shops when you are travelling?

R - No.

I - But it is on the CBs?

R - Oh you just hear different drivers say "I ran into this guy and he was all popped up, he's been running for four days straight." It's just talk. You hear it in the coffee shops too. I personally haven't met anybody who actually uses drugs or taken drugs.

I - No one has ever tried to sell you drugs at the truck stops?

R - No.

I - If you wanted them, would you know how to get them?

R - No. But I know how to get hookers. You hear them on the CB. When you pull your truck into a truck stop, you hear girls on the CB looking for company, and you know they're not talking about friendship. And there is actually rest areas too around Sacramento - maybe they get their drugs from them.

I - Have you ever used drugs while you were driving?

R - Never. Or alcohol.

A related question is whether or not a mandated drug and alcohol testing program would reduce the number of heavy truck accidents in Canada. A senior manager with a provincial trucking association and a Senior Policy Analyst with Transport Canada were both convinced that a government mandated program would have a positive effect on safety in the trucking industry. A truck driver interviewed for this project was of a similar view, although he still felt there would still be some abuse:

Well, of course. Anything you do to reduce substance abuse is going to, you know - unless the drivers come up with some way of beating it. There is still going to be abuse. People are going to say they're not going to catch me. There is always going to be that guy who says, "I can just make it another mile."

A Senior Policy Analyst with ICBC was not as convinced, but still found justification for such a program:

Its really hard to say. There is the argument, and it's not an absurd argument, that you could get even increased levels of fatigue. Notwithstanding, there is a moral obligation to do what we can and to address those factors that are known. We know impairment causes accidents with truckers, or any commercial vehicles, not just truckers, but that is what comes to mind. God knows, I've been driven home by taxi drivers that are drunker than me - scary. But, as government we are responsible for

the public safety. This is employment-related testing that is perfectly legitimate to do. You determine whether or not someone is physically capable of doing what you are licensing them to do, and that's legitimate. I believe that there is a real moral obligation to try to ensure the public safety as much as can be done. Within bounds, but in this instance I suspect no ethical difficulty at all. I think that the major source of commercial vehicle accidents is the economy of running commercial vehicles. That's where the problem is. The taxi driver has to speed to make more money, the long distance driver has to drive more hours to make more money. We can regulate these things, but there is the problem. How to get around that is another issue, I don't know.

The issue of the impact on drug and alcohol testing programs on workers was discussed with

Neil Boyd, Professor of Criminology at Simon Fraser University:

I - What about the efficacy of changing behaviour by implementing a policy like this? Do you think it would actually have an impact on the behaviour of people?

R - Well, I think we first of all have to ask - is it a major problem?

I - Oh well, yes, that is one of the central questions...they say, well is even one drunk or drugged driver a problem? How many constitutes a problem?

R - Well, yeah, its a question of balance, it seems to me, too. Are you using a sledgehammer to deal with a problem? Is there any good evidence to suggest that that kind of sledgehammer approach would really work?

I - Do you have any opinion on that - that such a policy would change behaviour?

R - I think the only way you get a policy that would change behaviour is if it was incredibly draconian and incredibly unfair. In other words, if it was zero-tolerance at all times of day, for all kinds of drugs, legal or illegal. In other words, if you want to work for Transport Canada you cannot use legal or illegal drugs at any time and you will be randomly tested once a month to ensure that that's the case at home or at work. Yeah, that would have an impact on behaviour. But as you suggest, that's not on the agenda.

I - No it's not.

R - So, if what is on the agenda is that they have to have reasonable and probable grounds to request the test - no, I mean why would that have any impact on behaviour? Maybe if you have reasonable and probable grounds, there are other ways of dealing with the problem. But again, I'm not convinced that that's the case, and I'm not opposed in principle to drug testing in the event that there are reasonable and probable grounds to suspect that an employee has a problem, and that you cannot deal with the problem in a less intrusive manner.

SFU Professor of Psychology, Bruce Alexander, was of the opinion that there may be some utility inherent in the consumption of drugs by truck drivers:

So guys drive trucks and they use drugs - whether the drugs increase or decrease the total number of accidents that occur is really not that clear. I mean people take drugs not because they make them have accidents, they take drugs because it enables them to function better. It seems to me equally likely that to interfere with people taking drugs is going to increase the rate of accidents, rather than decrease. We just don't know, we just don't know. We're just operating on sort of a blind prejudice that somehow if we've got a problem and we strike out at people who use drugs, somehow the problem will get better. We have no real reason to think that...

I think what it is, is that we just can't think about this the way we think about other things. There is always a cost-benefit analysis to be done - people use drugs because they serve them. Obviously if the guy is totally stoned and blind from drugs or alcohol he is very likely to have an accident. And maybe from time to time you catch someone in that condition. But, my god, if you can't tell if somebody is totally incapacitated without giving him a drug test you are in serious trouble. I mean all you need to do, if a person is totally wrecked, is look at them and see they are totally wrecked, they don't have to pee in a jar. So I'm not sure that it does any good in those extreme cases you've described. But I suspect it can do a great deal of harm in those cases that are not extreme cases. I mean the case of the person who, let's say, takes a little bit of amphetamine or cocaine because they know they are going to fall asleep if they don't. Well it's very likely that the drug is helping them, rather than hurting them. And to me it's much more likely that the guys you are going to get off the road are, for the most part, people who are using those drugs to their advantage rather than to their disadvantage. I'm not claiming to be an expert in this area; I'm just saying that unless that kind of analysis is made, unless those questions are asked seriously, then I'm opposed to the whole thing...

What was the Rationale Behind the Transport Canada Strategy?

What becomes clear from an analysis of interview discussion concerning the impetus behind Transport Canada's *Strategy*, is that based on the organization being represented one could predict individual responses. With the exception of one respondent, all government and trucking industry representatives were somewhat ambiguous with respect to questions concerning pressure from the American government. This is illustrated in a response elicited from a senior Transport Canada official:

I - But prior to the Minister deciding to let industry handle it - if you go back to the beginning - what do you think was the major impetus behind the creation of the policy at that time?

R - Well, obviously, back at that point in time, when the nature and extent of the problem was determined, and you develop a policy that basically says that there is a no-use policy, therefore you could not condone any use in the workplace. So that was really the impetus behind the policy.

I - Well, what influence do you think the American government had, if any, on the creation of the Canadian policy?

R - Well, I think it was something that had to be considered, obviously. I mean, we are trading partners and what happens to our industry as we go into the States had to be a consideration. But all along, from day one, we had stated that we were going to develop a policy that was a Canadian solution to our own problem, and that was the first thing that was developed. And if you go back and take a look at the literature when that policy was being announced - that was the driving force. There had been a number of things we had to look at, one of them as a result of various accidents within the rail industry, I think there was one accident, but I can't remember, so I wouldn't want to be quoted ...

I - Hinton?

R - The Hinton, ah, I mean from that there was a Standing Committee at Transport and from that they had agreed that there would be drug testing for, I think, 'for-cause' and post-accident situations. But before that could be implemented, we wanted to take a look - I think it was under Minister Crosbie at the time - they wanted to take a look to see what the problem was - the nature and extent of the problem in all modes. So, if you look at the history, we were developing that before the American program was even implemented.

A manager of a provincial trucking association had this to say in response to an analogous line of questioning:

I - What do you think was the major impetus behind the policy package at the time that Transport Canada started to develop it?

R - Well, it was precipitated by a House of Commons review. And of course the U.S. actions did much to promote Canadian policy makers too.

I - So there was influence from the American government?

R - Oh yeah, they've been doing it down there for quite awhile. I wouldn't say influence from the American government, just a recognition that the U.S. had entered into this legislative process and that Canada had to look at it as well.

I - OK. The Canadian Labour Congress has been very vocal in their opposition to any type of workplace drug testing. They say that the Canadian government has been under pressure from the U.S. government to implement testing in the trucking industry. Do you agree with that statement?

R - Well, no. I don't really know how governments pressure one and other, and I don't really have a comment on that. You know the fact is that the U.S. has implemented a drug testing requirement to address their own requirements and their own needs and their own understanding of the problem and they have said that all drivers on U.S. highways will be subject to the same requirements, so therefore, I guess, to that extent the pressure is on Canada to make sure that if they want to continue operating in the United States, to meet their rules.

A Transport Canada Senior Policy Analyst also responded in a somewhat ambivalent fashion

when asked whether or not he believed the Canadian government had submitted to pressure from the Americans:

I don't think so. I think indirectly perhaps there might have been some pressure that came more from Canadian industry which were saying "Okay, if we don't do something here..." Motor carriers in particular recognized that it didn't make an awful lot of sense if just one company did it; it was an industry problem. They knew that in order to continue to do business into the States that they would have to have an industry-wide program in place. That in itself, I think, put pressure on the government, and at the same time the government was already moving forward based on their own reasons for safety concerns and stuff to introduce a program in Canada.

In other words, the federal government was responding to pressure, not from the American government, but rather from the Canadian trucking industry, who, in turn, were reacting to the implications for their industry inherent in the American drug testing rules. Arguably, the responses from both of the above two interviewees are tautological, and obfuscate the issue at hand. Furthermore, both Transport Canada officials assert that, prior to the implementation of the American drug testing rules, Transport Canada was already working on a substance use policy for the Canadian transportation industries. In fact, when asked directly whether or not Transport Canada would have looked at the issue had the U.S. not instituted mandatory drug testing rules, the Transport Canada Senior Policy Analyst stated:

Yes. Going back to the surveys and studies that Transport Canada did initially to see if there was indeed a problem. The major stimulus for Parliament undertaking those was a Standing Committee review of a train accident that occurred in Hinton, Alberta. As a result of that review the Committee recommended that the Minister of Transportation introduce, and I quote, "a drug testing program in the railway industry." So when that recommendation came to our Minister and he was directed to respond to it, he said "well, perhaps it's not only a problem in the railway industry, maybe it's a problem in some of the other modes as well, so before we do anything,

let's determine whether or not there is a problem in the various modes." So the surveys were conducted, and interviews and everything were done in all modes that are federally regulated.

However, a representative from the Teamsters Union was not convinced when it was suggested to him that Transport Canada had been contemplating a substance use policy prior to the involvement of the United States:

No, I don't think so. This was basically consequences of the American policy. And this is not the first time that this has happened. If you look at the hours-of-service in the trucking industry, for example. Many years ago the American Trucking Association wanted to introduce a new concept in the hour-of-service regulation for the U.S. It's funny because a few months after, the Canadian Trucking Association and the Ontario Trucking Association took the same position and they asked the Canadian government - I'm also talking about the provincial authorities - they asked the authorities to introduce the same concept regarding the hours-of-service. I'm talking about the 36 hour reset rule that allows the driver to reset his hours after 36 hours off duty. This is another example - drug testing - the Americans took a decision to implement or to introduce legislation. The Canadian companies are pushing to have the same kind of legislation. Hours-of-service - same thing applies - the American wants to modify the hours-of-service, well the Canadian wants to modify the hours-of-service.

Similarly, a Senior Policy Analyst from ICBC had plenty to say about possible pressure from the American government, and related issues:

I - ... Was that the impetus behind this policy? Did it grow from pressure from the American government?

R - Yes, absolutely.

I - Was anybody working on it prior to that?

R - Nope.

I - No. So when the Americans developed it and said OK you've got to take care of

your truckers - then that's where it came from?

R - Yeah, although I don't think the Americans were as kind-hearted as that. As I see it from a political point view, you start with ah, who was it? Nancy Reagan? Just say no...ah...

I - The War on Drugs?

R - The War on Drugs. A general combination of hysteria in the States around the issue of drugs plus the already well established tradition of drug testing, not just for commercial truck drivers, but for people who sell shoes in clothing stores. I mean, drug testing, and that kind of thing. For all of their talk about individual rights, it was something that was around. It was easily applied to the commercial vehicle area because of the history, because of the publicity, and because of the hysteria.

It was also easily applied because such legislation will virtually give a monopoly on all North American trucking to the American trucking industry. I mean, let's understand this: Canadians can't drive in the States, Americans can drive in Canada. Mexicans can't drive in the States, Americans can drive in Mexico. Americans can drive anywhere, and anybody else can't drive in the States. Lets pass the law, gee, I mean we're doing it for the good of, you know, traffic accidents, or something. Commercially this is a wonderful idea. And all you're doing is applying something that is already there. Drug testing. Where Canada ran into problems is that we have a *Charter of Rights*, and we have universal medical coverage and that kind of thing. So we take the position, and I think rightly so, that something like alcoholism is not an inclination, but is a disease. And so we can't fire somebody for being sick. So that in the States, you smell of beer, you're fired, go away, we don't care. And that's legal. You try and import that kind of thinking into Canada and it just can't be done. There's gonna be resistance.

First off there is resistance to testing, but passing over that for a minute -this person appears to be impaired, you know, I have cause, I reluctantly test them and I find out in fact they are impaired. Now I can't fire them, they can't do their job, and somebody has to pay for their rehabilitation, and then give them their job back or another job that is the equivalent. This is not "fire the bugger," this is a whole different thing. Which means reluctance on the part of the trucking industry to tie into this because of the expense. It means reluctance on the part of the federal government to tie into this because of the expense. It means reluctance on the part of the provincial government to tie into it because of the expense. We're dealing with medical treatment

here and rehabilitation and all those good things. Which is what makes Canada great, etc. etc. But at the same time the applicability of the notion is much less in Canada, much more difficult to implement than in the States. But from the States' point of view, the trucking industry, the politicians, the balance of payments, it's just a dandy idea, we have just passed this righteous legislation that means an awful lot of money!

This respondent raises a number of interesting points, including issues around the political economy of trucking itself. These topics will be revisited in a later section of this Chapter. Notably, this interviewee also places the evolution of American drug testing rules within the context of the War on Drugs. John Weir of the B.C. Federation of Labour discussed the same phenomenon:

R - ... But the issue is really what are we after here? In the U.S., drug testing is being introduced for social reasons - I don't think for safety reasons.

I - Because of their War on Drugs?

R - Their sort of War on Drugs; the communists are gone now and you gotta fight somebody - so it's the drug lords now.

Bruce Alexander, Professor of Psychology at SFU, has extensively researched the development of Canadian drug policy. He had this to say with respect to the relationship between the War on Drugs and the evolution of drug testing in the workplace:

I - Let's talk about the progression of the drug policy in Canada. Where do you see drug testing fitting into that? Is it the influence of the U.S. or is it just a natural progression here in Canada?

R - ... I think it is just a natural progression of a way of thinking that is very much alive in Canada, although not quite as alive in Canada as it is in the U.S., this way of thinking that somehow problems are caused by drugs - if we've got a problem we've got to figure out what kind of drug policy to impose to solve the problem, rather than looking at the nature of problems in a broader way. I think that's the fundamental error, as I said earlier. It's not going away, there is no move away from that, we have these momentary discussions of legalizing cannabis or of providing heroin and cocaine

to addicts, those sorts of things. But those are not really fundamental issues either. The assumption that somehow drugs cause our problems is a very real one in Canada, and that I think manifests itself in these types of tasks...

I - Let's go back to putting it in the context of the War on Drugs.

R - Obviously it is that. It is just an extension of that way of thinking. I think the key to all of this is what I call the temperance mentality which was laid out absolutely clearly in Canada and in the U.S. by 1830 and which is still just startlingly modern when you read it. It's what we're still doing, it hasn't changed, we've just applied it to new drugs that's all. It was made in 1830 with respect to alcohol. I think that's what we're doing, we are carrying out that program with a little bit of statistics to sort of make us feel that there is a scientific basis for it but I don't think there is really. Another part of the work that I have done is to actually analyse the scientific bases for other kinds of claims that are made, for example, the claim that cocaine causes heart attacks. It's absolutely a wrong claim. And there are a number of them that are turning out to be wrong - well the crack baby one is just unfolding now - it's absolutely a wrong claim. The literature is full of those kinds of blatant sort of distortions of scientific method. Which all goes to show that it really is just an expression of ideology, it doesn't really have much to do with statistics at all.

I - And there is the complications around drugs and driving - it's just not as clear cut as alcohol and driving.

R - And we don't even consider the possibility that taking drugs makes you drive better - it's not in our ideology to even ask that question.

A more personal viewpoint regarding the impact of the American War on Drugs on Canadian beliefs and values is clearly articulated by a representative from Teamsters Canada:

I mean Canada is a sovereign country. This is not for the Americans to determine what will be our regulations or what will be our way of living. I mean I have a lot of respect for the Americans, but this is not their business. This is Canada, we are a country, we are a sovereign country, and if we decide collectively that there is a need for drug testing, fine. But at this point we don't think that we should have drug testing only because the Americans decided a few years ago that drug testing is a good thing and should be something that is applied to American people.

Urinalysis

Before turning to a discussion of urinalysis testing, it is important to reiterate here that Transport Canada's proposed *Strategy* with respect to substance use in the Canadian trucking industry did not rely solely on drug and alcohol testing; in fact, testing of drivers represented just one strategy - albeit the most controversial one - to be employed in an effort to reduce consumption. Other components of the *Strategy* included education and an expansion of EAPs. In fact, this theme was repeatedly pointed out during the course of the project interviews by government and industry representatives. For example, a senior manager of a provincial trucking association had to this to say in response to questions concerning criticisms aimed at drug and alcohol testing programs:

Well, once again, testing is not the only part of the substance use program, so you have to have just as much emphasis or perhaps more emphasis on prevention and identification before you even have to get into drug testing. Testing is only one tool in the whole substance use program.

Having said that, and as discussed in Chapter 3, there has been considerable criticism aimed at urinalysis technology as a reliable and accurate means of testing workers. It is important to examine these objections because, arguably, it is the inclusion of a biological testing component in the *Strategy* that has offended the sensibilities of many observers. In short, opponents of urinalysis have made the argument that a positive test cannot "reveal the dosage of the drug that was consumed, the time since or frequency of its use, or the degree of impairment (if any) at the time" (Beyerstein, 1993:1). Moreover, despite recent improvements in the technology of urinalysis, human error may still result in unacceptable levels of false results (see Privacy Commission, 1990:12). Proponents of

workplace drug testing now, however, contend that in light of the issuance of "Mandatory Guidelines for Federal Workplace Drug Testing Programs" by the U.S. Department of Health and Human Services in 1988, many of the concerns around urinalysis have been adequately resolved (Walsh and Trimble, 1991:25). In addition, the U.S. has recently developed federal guidelines for 'certifying' laboratories to ensure the quality of the testing procedures. Walsh and Trimble (1991:25) assert that these recent developments signify that "[t]he rigour of the federal standards has virtually dispensed with concerns regarding accuracy and reliability."

The conclusions reached by Walsh and Trimble were discussed with Barry Beyerstein, Simon Fraser University Professor of Psychology, who has conducted extensive research in the area of urinalysis technologies. Professor Beyerstein had this to say about the recent 'improvements' in urinalysis testing:

... Now that one [GC/MS] - if done carefully by a competent person following all the proper procedures with all the proper calibrations and all the proper double checks - that one is definitive. If it is done right it tells you exactly what that molecule is, and I think you have to concede that it is reliable. On the other hand, these are human beings doing these tests, and it's quite different if they're doing one for the OJ Simpson trial where the entire world is watching and the prestige of the lab is on the line or maybe \$100,000 is coming in because of it, as opposed to one of a thousand samples being run through in a routine thing by someone being paid minimum wage who doesn't really care a whole lot whether it's being done perfectly or not and so on. There are many, many human errors that can creep in, even if the technology is sound. So we shouldn't be over-awed by what is indeed a very sophisticated and reliable technology in the right hands.

... What it looks like on the surface doesn't exactly pan out when you start looking at these things. I mean any lab can do it right if they know a test sample is coming through; supposedly they don't, these are supposedly blind-tests. But every time I go to one of [the Drug Policy Foundation] meetings and I hear about what actually

happens and how these supposed blind-tests are gotten around, and how forgiving the inspectors are, it just isn't anywhere near as good as it should be. Of course the problem is - this is just a basic problem of what is called signal detection theory - if you are dealing with something with a very low base rate in the population, even a technique with a very high percentage reliability is still going to produce more false positives than it is correct detections. So the person who is caught unfairly - it can be done for a variety of reasons - I mean people put the wrong labels on bottles. Even if the technique is done right, there are lots of human errors that can come in - the glassware can be contaminated, the reagents can be old, the standard samples can be mismatched - I mean you've got human beings doing this and it's a dull, repetitive, boring job and you run these things day in and day out. What we know from the psychology of human performance - especially if these people are not highly paid, highly trained, highly motivated - the chances that they're going to make mistakes are fairly high. The consequences of mistakes for people can be horrendous. I get letters from people all the time - lives have been ruined essentially by mistakes that have been made in these labs.

Despite the harsh and ubiquitous criticism of urinalysis testing as a means of detecting problem workers, the government representatives interviewed for this thesis unanimously supported this technology. For example, when asked about the reliability of urinalysis testing a Senior Transport Canada Policy Analyst replied:

We have done extensive research into it to prove - we have come up with a protocol that 99.9% avoids false positives or tampering. All these things that they were concerned about with urinalysis - the time delay, you need an isolated area, and stuff. The protocol that we developed in conjunction with CanTest Laboratories here in Vancouver and [a physician] - another professional - I think we have overcome any concerns of that nature.

A senior Transport Canada official reiterated this position:

Well, I mean, we had said - that is interesting, I mean you are going to find different views out there on all sides. When we proposed that, that had been tested quite extensively through experts, and we were told that urinalysis may not determine - remember, our policy was not at a cut-off level; our policy basically stated that there would be no use of alcohol or drugs in the

workplace, so we were trying to identify the presence, not the level, OK? So we had found by going through the various experts, that urinalysis was accurate to determine the actual presence of either alcohol or drugs so we felt we were quite confident going that way.

Perhaps the most revealing argument in support of urinalysis testing is provided in the following exchange with a Senior Policy Analyst from ICBC:

I - There is also all the scientific challenges - urinalysis testing, false positives, it's not reliable (pause)

R - It doesn't matter.

I - Why?

R - Well, um, because you don't get fired.

I - But you still get identified as being a person with a problem.

R - But you don't just do that for whatever. Look at the way the policy works. You're tested when you are hired, you're tested on a known basis, and you're tested 'for cause'. It's not like we sneak up behind you and go "boo, pee in this." And the whole aspect of 'for cause' is adding credibility to observation, it's like a breathalyser, it is confirming the problem, it's not defining the problem. If you walk in on your first day of the job and fill out the form and fall down drunk -well, that's, you know, an IQ test.

Of course, representatives from organized labour, and other interested observers, do not agree with this perspective. For example, John Weir from the B.C. Federation of Labour had this to say about pre-employment testing:

What kind of need does it really satisfy? The thing about pre-employment screening is, though, there is obviously a cost to testing, and so in order to have an appropriate chain of custody and all these things, there is going to be significantly increased costs. But with pre-employment screening, because you have no liability for the efficacy of the results, do you think that employers are going to take the short-cut, cheap test,

or are they going to go into the more expensive tests? So that is a real issue as a matter of public policy that really isn't affected by whether people are organized or not, because you don't have any rights until you've established an employment contract. So I think there is a real vulnerable population, so when they start taking samples, they will use samples for other reasons. Is the person healthy? So you really aren't going to have any control over that. One of the interesting things, though, about pre-employment screening, in terms of health risks from your exposure to the workplace, is that there are no tests that can really screen you for that. In fact, in terms of occupational health and occupational health risks, most jurisdictions are reducing the amount of medical surveillance they do, realizing that it's not really that productive. For instance, they used to do back x-rays on people and they found out that back x-rays are no predictor at all of whether somebody will have back problems. The danger is that you will use these procedures not just to test for the presence of drugs, but for other kinds of - and there is a peculiar brand of eugenics involved in all of this. I guess that's the other thing too, you know, unless you have a companion set of social policies around this stuff, what kind of culture do you create by screening people in the workplace? What's its impact on your society? We are going to have socially less desirable people forced down into the underclass.

Mr. Weir's position with respect to providing programs for drug and alcohol abuse in the workplace is made clear in the following passage:

In terms of education, EAPs, that kind of stuff, and we have no objection to employers scrutinizing the performance of people and concluding that their performance isn't up to a certain standard. The question is, though, do you submit to biological testing? Because there is also some other major concerns with what we describe as chemical McCarthyism, that you know, really, you have the ability to, for instance, if you don't like somebody - and this is particularly relevant to the labour movement - if you don't like a shop steward you just come back with a positive drug test. The other thing is what else do you do with the sample you obtain? Do you test this person to see if they have diabetes and they are an increased risk for employee benefit use? Or some other systemic disease or condition? You know, I can't think of anything much more private than my tissue, and the things that go through my body. So I don't think you give them up politely. So a big part of our concern is obviously the social implications of drug testing.

In addition to EAPs and education programs, some respondents indicated that an alternative

to drug and alcohol testing was available through 'performance testing' or 'competence testing'. For instance, Professor Beyerstein noted the following:

There is another movement - you are probably aware of it - and it's called competence testing. Human factors psychologists are getting somewhat better at devising little tests that are now sort of encapsulated in little things like my son's walkman or what do you call it, the little gameboy thing, you know? They test eye hand coordination, they test mental speed of detection and correlation of information, and they're little snippets of the kinds of things that you would want somebody to be able to do satisfactorily before you put them behind several tons of hurtling steel on the highway. I don't think that's such a bad thing. That says that the guy who did have a fight with his roommate, or the guy that hasn't slept all night because he was out partying even if he wasn't drunk, these people shouldn't be driving trains or trucks or airplanes or anything else. So if you want to have something that is a valid test of the skills, that we know have an impact on safety and productivity, within reason, I would not object. But I still believe that this is really ideological screening, and not what up front it is up front claimed to be.

John Weir also was of the opinion that performance testing was a viable alternative to biological testing:

For example, there is a technological solution which is a - and I can't remember the name of it now, it's one of these future 2000 things - and in fact, one trucking company in the U.S. now in Texas has just installed them in their trucks for instance, and that is, it's like a coordination test, so it really tests your ability to function without regard to whether the problem - the question it asks is are you functioning to a satisfactory level? And the cause of that is really irrelevant or the cause of a problem is really irrelevant because they just need to satisfy themselves with your function. So, for instance, you've got allergies and you're taking prescription allergy pills or even non-prescription drugs that bring on drowsiness and all of that stuff, that method then tests for that kind of impairment in your function or lost capacity. So I think if you narrow your concern about people's capacity to perform in safety-sensitive positions simply to the effect of illicit drugs, then you're missing the much broader picture about people's ability to perform in those positions...

Despite such endorsements as illustrated above, performance or competency testing is a relatively new technology and some researchers have argued that its effectiveness has not yet been proven (Macdonald et al., 1993:20). Butler and Tranter (1994:251-252) point out that:

... it should be recognized that computer tests will only identify individuals who may be candidates for further assessment. In order to determine if the individual was impaired by drugs or alcohol, further tests would be required, which may include drug or alcohol tests. Therefore, computer tests currently available are not necessarily an alternative to drug testing, as they simply identify an employee who *may* be impaired by a substance. Studies are finding that as the technology improves, the ability to detect alcohol and/or drug impairment may be there; it is simply too early to tell with certainty at this point.

Another concern is that the employee who fails may have failed a test of skills that have little to do with those needed to do his or her job; provision for further assessment is then needed. It is not sufficient to show that the subject is impaired on any given performance test if it is not also shown that impairment on the test correlates with impairment on the work task. It has been suggested that to develop a true workplace *performance* testing program, the critical skills must be determined for the specific job at hand, and the tests must be tailored to evaluate the individual's ability to perform those particular skills (original emphasis).

Interestingly, the flaws noted by Butler and Tranter inherent in performance testing technologies - namely, that performance testing can only identify an employee who *may* be impaired by a substance, and that failure to pass a performance test may have little to do with his or her ability to perform the job - are fallacies that have been repeatedly pointed out by the opponents of urinalysis testing.

Legal Challenges

As discussed at length in Chapter 3, there are a variety of ways in which a legal challenge to mandated drug and alcohol testing programs could be launched. Prior to the recent decision made by Transport Canada not to proceed with its *Strategy*, arguably the most potent legal challenge would have been initiated under section 7 or section 8 of the *Canadian Charter of Rights and Freedoms*. Many of the interviewees were asked about legal challenges to the proposed *Strategy*, specifically with reference to the role that *Charter* rights may have played in its creation and evolution. This topic was discussed with a Senior Policy Analyst from Transport Canada:

I - Because [truck drivers] are federally regulated, do you believe you will have a challenge under the *Charter*?

R - Yes ...

I - When you go through the policy development process, are you already preparing for the possibility of a challenge?

R - Yes, it's certainly a consideration, this whole aspect of a bona fide occupational requirement is certainly something that was foremost in our minds. There is no sense in putting a program in place and somebody challenges it and wins and then it goes out the window. I mean, you have to make sure you have these angles covered off.

A senior Transport Canada official had this to say about the role the *Charter* played in the evolution of the *Strategy*:

I - ... Were *Charter* rights considered in the creation and evolution of the policy?

R - Oh, well definitely, I mean you can't proceed on any type of program without taking into consideration the rights of the individual. And what we said from day one was that any type of program that we would develop would respect the rights of the individual.

I - I know in the initial policy that random drug testing was considered.

R - Yes, the random drug testing. Actually we initially looked at random testing, then we went to what was called, to a random element, and then we moved away from that. And after the Standing Committee looked at our program, we agreed with them and we dropped the whole reference to random testing. Because that in itself they felt was going too far. But obviously they felt that the program that was being proposed - that basically was under a 'for cause' environment - would pass the *Charter* risk. Obviously if you were putting the public safety at risk, and we thought that we had reasonable cause, they thought that we would be successful on any type of a *Charter* risk at that time.

The above-noted responses to questions concerning *Charter* challenges indicate plainly that such challenges were necessarily considered in the development and evolution of the *Strategy*.

In light of the individual rights enshrined in the *Charter*, the legality of mandatory drug and alcohol workplace testing programs in Canada is uncertain, and represented one of the more difficult questions policy makers had to address. An understanding of the complex issues around the legality of testing in Canada is implied in Neil Eisner's response to questioning during the Standing Committee hearings when he stated, as previously noted, that "The Canadians have said, and we appreciate it, that we have to understand your problems with respect to your requiring or allowing any kind of testing to be done." Of course, a recognition by the United States of Canada's distinctive legal situation with respect to mandated drug testing programs did not mean that the American government was about to change its mind on the issue. In fact, when asked what effect possible *Charter* challenges had on the evolution of the proposed *Strategy*, a Senior Policy Analyst from ICBC replied:

I don't think directly. The policy is a response to American legislation, so [as] any good government is trying to do, Canada is trying to do as little as possible to still

conform to what's necessary to allow our commercial vehicle drivers into the States. Clearly, the policy was written with an eye to having it succeed court challenges because otherwise we can't drive in the States. The point is to drive in the States. But the motor mechanism of the policy is American pressure.

As discussed in Chapter 3, once the decision was made by the federal government not to proceed with legislation in Canada, Charter-based litigation against mandatory workplace testing programs has likely become moot. Legal challenges to employer-mandated programs will now fall under the purview of human rights legislation, and labour arbitration rules. When asked about possible legal objections to employer-initiated workplace testing programs, a manager of a provincial trucking association replied:

Well, you know, there is no prohibition against testing programs provided you do it properly. It can be done, and it can be done without breaking the law, and without breaking human rights codes and so on. But that's the key - there's got to be enough education done within the industry to make them aware of what the human rights issues are, how to implement your program so you are not in violation of them, and that you achieve the results you intended without violation of a person's legal or human rights.

As noted in Chapter 3, due to a scarcity of decisions rendered with respect to workplace substance testing programs under human rights codes and labour arbitration rules, many questions concerning the legality of such programs remain unresolved, including the strength of the protection that will be afforded workers outside of the scope of the *Charter*. Some indication of the uncertainty around these issues is apparent in the following exchange with a representative with Teamsters Canada:

I - Do you think that there is as much protection as there would have been under the *Charter*?

R - I don't know if there is the same kind of protection, but I know that there will be a lot of questions - we have a lot of concern about how the tests will apply. For example, let's say you have a company with 100 drivers and only 15 or 20 of them regularly go to the U.S. and you have a drug testing policy, can you tell me if the drug testing policy will apply only to the 20 drivers who normally go to the United States? Or will it apply to all the drivers? So that's a big question, and if the drug testing policy applies to the other drivers, the ones that don't go to the United States, is it discrimination or what? That's a major question here. And why should the Canadian drivers who drive in Canada exclusively be subject to drug testing policy? ... So this is the kind of question that will be raised in the near future regarding the private company and private drug testing policy.

Civil Liberties

As discussed in Chapter 3, one of the most vocal critics of workplace drug and alcohol testing programs has been The Privacy Commission of Canada. In its 1990 report, *Drug Testing and Privacy*, the Commission took aim at Transport Canada's proposed *Strategy*. After reviewing the various components of the Transport Canada program, the Commission argued that the *Strategy* failed to satisfy several of the conditions necessary for the drug and alcohol testing component to comply with the *Privacy Act*. This conclusion (The Privacy Commission of Canada, 1990:38-39) was based on findings that Transport Canada failed to demonstrate that there was a significant prevalence of workplace drug use or impairment among safety-sensitive workers; that drug use or impairment poses a substantial threat to the health and safety of the public; that the behaviour of the workers in question could not be otherwise adequately supervised; that drug testing programs can significantly reduce safety risks; or that less intrusive programs should be discounted.

Moreover, the Privacy Commission expressed concern over the quality of Transport Canada's

assurances that testing would be conducted in such a way that would minimize intrusion (The Privacy Commission of Canada, 1990:39):

There can be little dignity in urinalysis as long as the subject may be required to urinate under direct observation or in private, after a thorough physical search. Transport Canada too easily glosses over the inherent intrusiveness of testing by speaking of 'minimizing intrusions.'

It should be noted here, however, that the Commission did not object to all forms of drug testing proposed by Transport Canada, stating that testing for 'reasonable suspicion' and post-accident should be the focus of a revised policy for drug testing in the transportation industry (1990:40). Despite a limited endorsement of some forms of testing, the views of the Privacy Commission with respect to Transport Canada's proposed *Strategy* are clearly evident in the following passage (1990:40):

Government should not allow itself to be led into accepting such intrusions without the strongest possible evidence to justify them. It is also important that the government not allow itself to be stampeded by the wide-ranging acceptance in the United States of drug testing in government and in the transportation sector. Canada's federal government generally took a humane approach to HIV/AIDS testing, despite the influence of the United States. There is no reason why Canada should be less humane when it comes to drug testing.

In light of the lack of evidence of drug-related safety problems in safety-sensitive transportation positions and the inadequate canvassing of other less intrusive alternatives before adopting drug testing, Transport Canada has cast the net too widely...

Academics have taken aim at the underlying ideology inherent in the substance testing of workers. For example, Professor Neil Boyd offers the following analysis:

I - What about the whole context of drug testing in the War on Drugs strategy? Do

you see it as a natural progression?

R - Well, I think if people who are interested in drug testing in the workplace are honest, and if you look at their proposals, you find that it really doesn't have a whole lot to do with making the workplace safer. It has a whole lot to do with instilling a particular world view with respect to the line between illegal and legal drugs and the inappropriateness of using illegal drugs in any context. Which, from my point of view, really doesn't have anything to do with safety at work.

I - So it's sort of ideological testing?

R - Oh I think so, yeah. To find out that a person uses marijuana at home, for example, is really quite unrelated to issues of public safety. From what I've seen of most drug testing [programs], they're not concerned - the people who want this drug testing - about the private use of alcohol at home; they are only concerned about the use of alcohol on the job. But they are, because of the way the testing is done - that is, that marijuana shows up for such a long period of time in a person's urine. They, by definition, are concerned about illicit drug use at any time, and licit drug use at work. That may not be true of all drug testing programs, but it is certainly true of some of them.

Professor Barry Beyerstein holds the same view:

The claims, of course, are that it increases safety and reduces employee absenteeism and so on. These are all worthwhile goals, but I don't see any evidence that urinalysis as such accomplishes them, and in fact most of them are things that proper supervision by diligent managers should be taking care of. The only justification I see in all of this, is not that it's really a test to eliminate the impaired worker, but it's really the test to eliminate the worker who has bad ideas in his or her head. I see it as an ideological screen. In fact, I wrote an article on this for the Drug Policy Foundation publication that came out a few years ago and I called it, *Reading the Mind by Tapping the Bladder*, and what I'm really arguing is that what employers are explicitly or implicitly looking for are not impaired workers. I mean you should be able to tell that in a variety of ways; no decent person wants an impaired worker on philosophical grounds or just plain safety grounds, that's a non-issue. But I'm not sure that urinalysis, which picks up metabolites in the urine that may be weeks or even months old, tells you anything about the person's likely conditions at that time. And I have no problem with sending home impaired workers - I don't think they should be operating machinery or anything else, if they're not in good mental order. What I

really see, given what the technology can in fact tell you - which is that this person was exposed at some time in a quite wide time window in the past to some licit or illicit substance - it won't tell you when, it won't tell you if it was on the job or off the job, it won't tell you whether he took a little bit over a long time or a large amount over a short time, it won't tell you if the person was impaired in any way when he took it. None of the proponents will say that, and if they did they would be laughed at, because it's just not true. So what does that leave you with? It leaves you with the belief on the part of many employers and a lot of politicians of the more right-wing end of the spectrum that people who use drugs have other attitudes that you may not like. That is what they are really screening for, is ideological purity, not impairment, or anything of the sort.

Professor Bruce Alexander takes this analysis even one step further, arguing that focusing on drug use obscures the more complex structural problems underlying the construction of social problems:

I - Can you tell me what your views are on drug testing as a policy?

R - Sure. I just think it's crazy for all kinds of reasons. There are some obvious reasons, you know, for example, for the fact that it is an invasion of privacy and civil liberties and so forth. But that's not my main concern - my main concern is that it reflects an assumption which is that we can do something about our social problems - in this case accidents - by attacking drugs, as if drugs were in some sense a major part of the cause. I think it is that assumption that has really not been established, although there are some claims that it has. I think that it confuses the whole issue. I mean, the fact is that we have all kinds of accidents, all kinds of crime, murder, everything, and the causes of all those disasters that strike us as a society are really complex and deep. And there is no reason to think that drugs are any significant part of the cause, and therefore to concentrate our efforts on solving these problems by drug testing is in my mind to lose track of the importance of these problems, and how we really do need to look out for the causes. I'm trying to think of what is the simplest example of that - well, the simplest example comes from the U.S., where people all through the 1980s were arguing that the cause of black crime in the black ghettos was crack, and that all we had to do was get rid of crack and the drug lords, and that somehow crime would be reduced. It is just perfectly obvious to anyone who has studied that situation that the cause of crime in those black communities is much, much deeper than that; it was there long before there was

crack. All the same crimes were there and they have a great deal to do with all kinds of degradation and all kinds of historical problems that exist there. That in general is my problem with this.

The response from most government and industry interviewees to questions concerning the individual rights of workers generally addressed the issue of the responsibility of ensuring public safety. Along this line, an interesting perspective is provided by a safety manager at the Insurance Corporation of British Columbia:

I - [Civil libertarians] believe that [drug testing] is a violation of a person's right to privacy.

R - Why? But Lynne, if you operate as a commercial driver, you are getting paid for your professionalism. Your professionalism is the point. Transport moves goods or people from this point to that point, perfectly if we can, or at least within the laws of the land, which is - here is the speed limit, here is - your training has allowed you to become this responsible and accountable driver, then I would ask you to be reasonable about your profession. So, if you're not doing that properly, it will show up in the manifest itself, in either the single-vehicle accident, the truck has run off the road, something has happened. So, we come along after the fact. We would much rather see prevention, rather than coming in post [accident]. You see?

And also what about attracting, Lynne. The [civil libertarians are] forgetting one very important issue here - we need to raise the level of professionalism in our country when it comes to these types of occupations. How are we, I should say, how the hell are we going to attract young, good people to this industry if they see there are no standards in there? And the epitome of this whole industry is sometimes portrayed, unfortunately, by the bad driver who is out there that has no respect for the rules of the road, has no respect for the other motorists on the highway, and has no responsibility for his condition, physically or mentally. We don't want that to be prevailing. That is what the industry is saying...

Organized Labour

In 1989 Transport Canada approached a number of Canadian transportation unions for assistance in examining drug and alcohol use in the transportation industries, including a request that the unions encourage the participation of their members in the various survey studies being conducted by Transport Canada during that time. The cooperation of organized labour was secured by promising that, prior to the development of policy recommendations, the unions would be consulted on the results of the research findings, and would be afforded some input into the process (discussed in Canadian Conference of Teamsters, 1990:4-8). Two of the unions most central to the trucking industry - the Canadian Labour Congress (CLC)¹⁸ and the Canadian Conference of Teamsters (the Teamsters)¹⁹ - both agreed to assist Transport Canada with the project. Apparently, however, Transport Canada did not hold up its end of the bargain, and failed to consult with the unions prior to the announcement of the *Strategy* in March of 1990 (Canadian Conference of Teamsters, 1990:8). Needless to say, the union movement was outraged, and this anger is clearly evident in the following passage from the submission of the Teamsters (1990:8) to the Standing Committee on Transportation:

...[T]he Teamsters were advised of the Minister's Substance Use Strategy after it had

¹⁸ The CLC is Canada's major central labour body representing a membership of approximately 2.2 million workers (Canadian Labour Congress, 1990:1).

¹⁹ The Teamsters represent over 95,000 workers and are the dominant labour union in the Canadian trucking industry (Canadian Conference of Teamsters, 1990:2).

been tabled in the House. We understand that the Canadian Labour Congress received their notification on the same day the *Strategy* was tabled, March 16, 1990. This is precisely the outcome we had sought to avoid, and thought we had avoided, by securing Transport Canada's highly specific commitment on consultation in exchange for our participation. By breaking this commitment, Transport Canada has not only done serious harm to the process of consultation between labour and government, but also damaged the credibility of the *Substance Use Strategy* being proposed.

We are of the view that all of this is due to the nature of the research findings and their failure to give support to Transport Canada's predetermined policy on drug testing. Since this policy cannot withstand a rational examination in light of the evidence at hand, it appears that the Minister simply chose to forego any examination by interested parties whose views were known to be at odds with his.

With specific reference to the findings of Transport Canada's research, the Teamsters (1990:18-19) made the following statement to the Standing Committee:

In sum, the research findings simply do not support the drug testing component of Transport Canada's *Substance Use Strategy*. In fact, by focussing on drugs rather than other substances, the program will be counterproductive. When we consider the numerous other higher priority risks to safety in the Canadian transportation system - overly long hours of service for truck drivers, defective equipment, lack of enforcement, insufficient air traffic controllers, etc., etc., - the introduction of mandatory drug testing appears even more ill-conceived and ridiculous.

The Teamsters were also of the view that Transport Canada's concern over substance use in the transportation industries had little to do with public safety. This perspective is evident in the following statement (Canadian Conference of Teamsters, 1990:20):

Given the research findings, and the Minister's failure to honour the commitment to consult with us on these findings, we have concluded that transportation safety is not his main concern in this matter. We are not alone in holding this view. It is now readily apparent to all interested parties that the Minister's *Substance Use Strategy* is being driven by the U.S. drug testing regulations and our Government's desire to achieve the easiest possible form of compliance with respect to Canadian trans-border

operations. In short, what we have is an international trade strategy disguised as a transportation safety strategy.

The Teamsters' position with respect to the drug and alcohol testing of truck drivers has not changed over the last five years. In 1995, a representative of the Teamsters had this to say:

R - ... The position of the Teamsters Union on that is, and always has been, is that we are opposed to [a] drug testing policy basically based on the fact that we don't see any major problems or any major needs for such a policy. And also based on the fact that drug testing is only something that we're forced to deal with because the Americans decided that - they decided to impose drug testing policies on their own territories. Our position is that we are opposed to drug testing at this point.

I - That was always your position?

R - That has always been our position. As a matter of fact we have to be realistic right now and the drivers who go in the United States, well, there is nothing we can do against that because they are subject to the American legislation so the one who goes in the U.S. basically they are subject to drug testing. There is nothing we can do against that. But, as far as the Canadian trucking industry is concerned, on the Canadian territories, we have always been opposed to any drug testing. So that's our position.

Representatives of the Canadian Labour Congress (CLC) came before the House of Common's Standing Committee on Transport in April of 1990 and presented their submission with respect to Transport Canada's proposed *Strategy*. According to this submission, the Congress is vehemently opposed to any form of mandatory drug testing in the workplace. Similar to the Teamsters, the CLC accused the Canadian government of yielding to pressure from the American government, and of failing to deal adequately with the underlying causes of alcohol and drug abuse in the workplace, including work related stress (Canadian Labour Congress, 1990:2,13). The CLC (1990:11) stated:

Drug testing is a "red herring" that is designed explicitly to draw attention away from other causes of health and safety hazards that cause accidents. It is an attempt to shift the burden of responsibility of safety problems onto employees and to hide employer failure to ensure safe and healthy workplaces.

Among other proposals, the CLC called upon the Standing Committee to recommend to the federal government that: (1) drug testing not be part of the proposed Transport Canada *Strategy*; (2) the federal government provide support to labour and management to establish joint EAPs; and (3) the federal government pass legislation banning all forms of employment-related drug testing. The CLC (1990:11) also pointed out in its submission that programs advocated by unions promoting a safe and healthy workplace had continuously been turned down in the past by employers, and that the success of EAPs necessarily depends on the extent of resources in the community. Therefore, the CLC (1990:27) also recommended that the federal government bolster its financial support of community drug and alcohol programs.

Other unions have also expressed opposition to workplace drug and alcohol testing programs, although it should be noted that not all transportation unions appearing before the Standing Committee on Transportation were completely antagonistic to such programs. A common theme voiced by unions opposed to mandated workplace testing programs - in particular those unions representing truck drivers - is their belief that such programs will not ameliorate the true safety risks inherent in the trucking industry, nor address the underlying causes of drug and alcohol use. For example, when discussing the B.C. Federation of Labour's position with respect to workplace drug testing, John Weir made the following observations:

I - ... What is your organization's views on drug testing in the workplace?

R - OK. We think it is a stupid and useless strategy. Short and to the point.

I - Why?

R - Why? Well, first of all drug testing really is not an issue about the protection of workers' health and safety. I think the biggest effort is to improve the productivity of employees; that certainly is the real justification for it. I mean sometimes it is rationalized on the basis of health and safety, but the real issue is the attempt to assert control over all of the worker's life in order to improve their productivity in the workplace. That is one aspect of it. The question then becomes, should the workers sacrifice their privacy rights for that objective. As a health and safety risk it is fairly minor compared to a number of other risks where employers aren't undertaking any initiatives at all, and in fact are refusing to deal with the risks that arise in the workplace. So if you were really interested in health and safety, you would think that your priorities would start with more significant problems, for instance sleep problems.

I - Fatigue?

R - Fatigue, but actually sleep problems are a very significant occupational and health problem these days.

I - Lack of sleep?

R - Lack of sleep, problems in sleep, shift schedules, length of shift, occupational stress that interferes with people's sleep, a whole variety of things. It is a much more significant factor in the cause of injuries, than drug usage.

All of the government and industry respondents were asked to address the specific concerns of the CLC that drug testing is a 'red herring' that deflects attention away from other safety and health hazards in the workplace. Predictably, this group of interviewees was not in agreement with the CLC. For instance, a senior Transport Canada official answered:

Well, basically what we were saying all along is that we wanted to find something that

would deter the use of alcohol or drugs in the workplace. Now in order to do that you have to come up with some type of drug testing program, at that point in time, to try to identify what the use was and who were the users because the bottom line was that we did not want to have safety put at risk - not of anyone, not the travelling public. So [the CLC], I mean, definitely had their view - there were other issues out there, but we felt this was something that had to be looked at.

A Senior Policy Analyst with ICBC had this to say in response to criticisms from the CLC:

What a chipper bunch. No, it is not a 'red herring'. It is a serious problem; we have evidence it is a serious problem. There is absolutely nothing wrong with, I think, doing testing for people who make their living in big vehicles or who carry around people or dangerous goods...

It was this line of questioning that once again elicited responses from government and industry representatives who argued that drug testing comprises only a small part of the overall Transport Canada *Strategy*. A Senior Transport Canada Policy Analyst explained:

My response to [CLC] criticism goes back to what I said about the differences between the Canadian program and the American program. The American program is very much focused on drug testing. The Canadian program is designed to be much more focused on education to prevent this type of behaviour before it happens. That doesn't preclude the necessity of having some testing regime in place, because there are always those that, no matter how much education they receive, are still going to be abusers.

Another perspective on this particular point is provided by Professor Beyerstein during the following exchange:

I - Is it ever appropriate to test people in what they call safety-sensitive positions, like truckers and pilots?

R - Not urine testing, no. I think this is a case of the technological tail wagging the dog. We've got a technology here that is available and it is highly promoted, and if you look into the politics of this you see who's making the money off of it and that sort of thing, and it becomes a lot more questionable too. I don't think this is the way

we ought to go. I mean we all want safety and we all want improved productivity, but this is not anything that I see coming out of that. In fact I think what it does in terms of reduced employee morale probably harms the company more than any benefit they might get anyway.

I - Even if testing is just one small part of the whole - we have education, and EAPs - testing is just one small part of the overall policy, and [the] major focus here is prevention. That is the argument that [Transport Canada] keeps making.

R - Good, well that's fine, but if it's that small, then get rid of it. I mean I'm an educator. You don't have to wave the education flag to me; I'll salute. Sure, I don't see that it adds anything to those other things. What I see it doing, is that it is an unnecessary intrusion into people's private lives that doesn't really produce the supposed benefits down the line anyway. It lines the pockets of some dubious entrepreneurs in the process. It's just wasteful. I mean you should put the money where it is more likely to be effective. I think those other things are effective - EAPs, education - I mean treating the 99% of your workforce who are honestly trying to give an honest and safe day work for an honest day pay as if they are criminals hardly seems like a way to me to get a trusting and cooperative workforce that are going to further the aims of your organization.

Reaction From the Trucking Industry

As briefly discussed in Chapter 2, initial reaction of the trucking industry to the announcement of Transport Canada's *Strategy* was less than favourable. Unions questioned the impetus behind the *Strategy* and the reliability of urinalysis testing, while transportation companies argued that they did not want to be responsible for policing the activities of their workers, nor for the costs of implementing such a program. However, according to documentary evidence and interviews with government and industry representatives, the overall attitude of the trucking industry to the *Strategy* softened somewhat by the time the Standing Committee on Transportation held its hearings in the late spring of 1990. Arguably, the industry may have tempered its position in light of the implicit

threat from the American government that, without a reciprocal Canadian substance use program, truckers would not be allowed entry into the United States.

The Canadian Trucking Association (CTA) presented a brief before the Standing Committee on Transport that was tentatively supportive of the proposed *Strategy*, provided certain provisos were met by Transport Canada. The following is an excerpt from the submission that summarizes the CTA's position (Canadian Trucking Association, 1990:1):

Canadian Trucking Association (CTA) generally supports the government's substance use strategy and the concept of substance use testing for safety sensitive positions in the transportation industry. CTA's support of substance use testing, however, is based on certain conditions:

- Any regulations associated with the testing regime must be industry-specific. There are too many significant differences in operating conditions between the trucking, rail, marine, and air industries to apply one set of rules to all modes.
- The Canadian testing regime must be in place by 1992 and be parallel to that in the U.S. in order to reach a reciprocity agreement with the United States which will allow Canadian truck drivers to operate on U.S. highways.
- The Canadian regime must apply to all commercial truck drivers and not just to inter-provincial and international for-hire motor carriers as is currently envisaged.
- Enforcement of the regime must be uniform across Canada.
- The mandated drug testing regime must clearly override requirements of the *Charter of Rights and Freedoms* and the ability of the Canadian Human Rights Commission to intervene.
- The regime must be phased in and the government must cooperate with industry in all stages of its implementation, particularly in helping companies overcome difficulties related to setting up the testing process, finding adequate testing facilities, and establishing employee assistance programs (EAPs) (original emphasis).

The support of the CTA would have been important to the success of the Transport Canada *Strategy*, as the CTA is the major body representing the interests of the for-hire trucking industry across Canada. Its membership comprises seven provincial and regional trucking associations and extra-provincial motor carriers (Canadian Trucking Association, 1990:2). The importance of bringing all of the Canadian trucking associations on side is illustrated in the following response given by a Senior Policy Analyst from Transport Canada when he was asked whether or not the trucking community was supportive of the proposed *Strategy*:

No, initially they - some resisted because of [the potential financial costs to the industry]. But, when they were educated - shall we say - on the benefits of increased productivity, reduction in WCB premiums and stuff, they saw it in a much larger perspective rather than just what is it gonna cost me to educate my employees [and] do the testing. But when they were informed or whatever, to look at it from a total cost-benefit point of view, that in the long run it was in their own best interests, then the trucking associations - B.C. Trucking Association has always been convinced of that, but some of the other provincial trucking associations weren't. But in the end they all came on side, and the CTA adopted the position to be supportive of the program.

Apparently the cost-benefit argument provided by Transport Canada was a persuasive one, as illustrated by the response provided by a manager of a provincial trucking association when asked about the impact of the *Strategy* on the trucking industry:

Well, there's no doubt that it will be expensive to implement a drug screening and a substance use program within a company, but our information is that the benefit to be gained will be greater than those costs through reduced accidents, reduced claims on benefits plans, reduced roll-over of employees, and those sort of things. It will have a positive impact and those savings will out-weigh the costs.

Other concerns for many in the ownership and management side of the trucking industry are

expressed in the following exchange with a senior official with Transport Canada:

I - You didn't have any opposition from the trucking industry itself?

R - Well, obviously, I mean when you go through a program like this you have some supporters and then you have others that are not all that supportive. The trucking industry - I'd have to think back, I can't remember completely - I think in some areas, from a management perspective we were getting support. Obviously, from the union side they had different view, but overall I don't think we were getting a lot of complaints from the trucking industry. I guess they were more concerned with how the program was going to be applied.

I - In terms of the economic impact to them?

R - Well, the economic impact, and also, like I mean, in some cases because of the industry, you'd have to set up some type of consortia to do the drug testing for you, because obviously some of these companies are not big enough, right? So that was the type of thing that they wanted to wait and see how the program was going to be implemented, and that was some of their concerns, and rightfully so.

Of course, even though the CTA and other provincial trucking associations eventually elected to support the proposed *Strategy*, others did not. For instance, as discussed in Chapter 2, the Canadian Owner-Operator Drivers Association (COODA) has steadfastly held to its position that drug and alcohol testing of truck drivers should not be allowed. This range of support within the trucking industry is noted by a Senior Policy Analyst from ICBC:

I - ... What impact do you think [the *Strategy*] will have on the trucking industry?

R - Oh, whining and complaining, and then they will cave in.

I - They are not supportive of it?

R - They're supportive, sort of. I think there is a range of support. Its been my observation that the BCTA is supportive - the big organizations who understand the implications are going to be supportive. But I can quite easily imagine [an]

independent trucker telling someone where to put their bottle.

The manager of a medium-sized trucking firm was supportive of the substance testing

Strategy proposed by Transport Canada:

I - ... [A]re you aware that Transport Canada has proposed a policy to deal with substance abuse in the trucking industry?

R - Yes, I am aware of that.

I - And what are your feelings about that?

R - They are about 10 years behind the times putting a policy like that into effect.

I - Why is that?

R - The United States recognized it as a problem about 15 years ago and due to their Constitution they had a hell of a time getting the legalities of it sorted out to put it into place. They did forge ahead and do it. Canada sat back on its haunches and watched....

I - So you don't have a problem with the mandatory drug testing component of it?

R - No, I think it is important.

I - Why is that?

R - It's well known that for years and years truck drivers have been known as the speed kings and coffee kings of the industry - of most industries - the more miles a guy can turn in a day, the more money he's likely to make. It's no big secret that amphetamines are, or have been, I should say, fairly commonly used in the industry. Barring that, the thermos is full of espresso - hit the trail and hope the caffeine works for ya. You can buy over the counter caffeine pills as well, and that's not uncommon. What you get is a fairly deadly combination. The research that you are doing on this probably tells you a little bit about the down swing from amphetamines and it is usually deep sleep, and it usually hits without a lot of warning. And we're getting a lot of accidents and incidents in the industry that point very much to a guy with less than satisfactory reflexes. It's quite often hard to point fingers because you don't get

the blood testing and drug testing on site of an accident like that. They go for the basics, they look for alcohol, they look for logbooks, if everything is up to snuff, well, it's just one of those things. There could be a lot more to it. They still don't have definitive statements about the effect of THC, they don't have definitive statements about the effects of amphetamines really.

It is truck drivers themselves who would be most affected by the implementation of substance testing programs in their industry. When asked what kind of reaction to the *Strategy* Transport Canada received from truck drivers, a senior official replied:

I think truck drivers recognize that there is a problem out there in the industry. They're on the road everyday, they know what's going on. We didn't get a big negative reaction from truck drivers or the industry. They recognize that it is an issue that has to be dealt with so let's go on, and go ahead, and deal with it.

A truck driver interviewed for this project was not quite as convinced. While he endorsed drug testing, he also expressed concern about other types of safety hazards:

I - Would you agree or not agree with a mandatory drug testing program in Canada?

R - To what extent? I mean if you are going to start pulling licenses because the guy is on demerol because he's got bad headaches and he's not always on them - no I don't agree with that. If the guy's got an infection and he takes some penicillin and it shows up in the testing - I mean they got to have some kind of guidelines.

I - What kind of drugs are not OK to test for?

R - Anything that is prescribed by a physician and the physician says it is OK for him to drive under those conditions.

I - What about illegal drugs?

R - Like bennies and cocaine. Cocaine is big in the States.

I - Would you support a policy that would test for those type of substances?

R - Yeah, if they are going to go in conjunction with more safety checks. [Transport Canada] now has spot checks where they will pick any day and pull over trucks and check them. Right now your truck has to be tested every six months - a lot of damage can be done in six months.

The Political Economy of Trucking

A common thread that has been woven through much of the above discussion is a belief on the part of some respondents that drug and alcohol abuse in the trucking industry is not at the crux of safety problems in this community, but rather, there are other more pressing issues that have yet to be dealt with adequately by governments, trucking company owners, and trucking associations.

There are those who argue, for example, that the deregulation of the Canadian trucking industry has exacerbated existing problems. As asserted during interview by John Weir of the B.C. Federation of Labour:

... Deregulation has created a much more significant hazard and has in fact contributed in a sense to drug problems in the workplace because, you know, one of the key drugs they use is amphetamines so that they can make a decent living. So deregulation is probably as big a hazard, in terms of the trucking industry, as drug use.

In fact, in their review of the impact of deregulation on the American motor carrier industry,

Dempsey et al. (1990:174) concluded:

Under deregulation, motor carriage in the United States is an anaemic industry with a high turnover rate among firms running aging and poorly maintained equipment and employing overworked and underpaid drivers. A recent study by the U.S. Office of Technology Assessment reveals that heavy-truck accidents have increased significantly under deregulation, and at a rate higher than the increase in truck miles travelled...

In contrast, Blair Gough, writing for *Motor Truck* (April 1994:5) argues that the deregulation

of the Canadian trucking industry has played the largest role in improving highway safety despite warnings of "highway mayhem" from industry observers:

The Canadian trucking industry is, for the most part, a safe industry, and indications are that it is getting even safer. But it wasn't always that way, and there are several factors in my view which explain the positive trend. Firstly, economic deregulation has likely played the biggest role in achieving necessary improvements, contrary to those old arguments that such policies would result in highway mayhem.

When the industry was comfortably insulated from wide-open competition, little safety regulation was in place, one reason being the industry was convincing in its argument that protection from competition allowed it to have the money to spend on safety. Safety apparently was a cost, and an important spin-off benefit that could only be achieved by limiting competition...

That our governments, in part, bought the highway-mayhem argument, was the second positive factor on the road to improved safety. Canadian regulatory initiatives such as the National Safety Code standards, and particularly those which have served to improve industry monitoring and control, have significantly raised both government and industry commitment to safety...

The third factor is that the industry has made sweeping management changes, consistent with the rest of the business world. With respect to safety, carriers have begun to truly manage the function in a manner which includes identification of those items and factors which potentially serve as a cost risk and therefore reduced revenues. The approach responds to a recognition that the lack of a proactive safety program costs money.

No matter how one chooses to evaluate the impact of deregulation on safety, the fact remains that hours-of-service violations, fatigued drivers, and mechanical problems are still considered to be significant safety issues within the trucking industry. The Insurance Institute for Highway Safety (IIHS) reported recently that nearly three-quarters of long distance truckers violate government

hours-of-services rules²⁰. Moreover, the IIHS found that of the 1,249 tractor-trailer drivers surveyed for the project, those who reported that their employers penalized them or gave them "a lot of flack" for late drop-offs or pick-ups were significantly more likely to have admitted to hours-of-service violations (Insurance Institute for Highway Safety, 1994:7).

All truck drivers operating in Canada and the United States are required to maintain logbooks that provide an account of the numbers of hours they have been in service. A common practice in the industry is for truck drivers to maintain two sets of logbooks: one set for inspection if they are stopped by the authorities, and another that reveals their true running time. From a safety risk perspective, then, the argument is made that drivers who violate the hours-of-service rules will not only be more likely to keep two sets of logbooks, but they will also drive while fatigued, and hence be more susceptible to accidents. A truck driver interviewed for this project gave the following account of how logbook violations and fatigue contribute, in his view, to safety problems in the trucking industry:

I - What do you see as the major problems in the trucking industry?

R - Safety-wise?

I - Yes.

R - Guys are running more than one logbook and overbooking their hours. In other words in a 24 hour period they are just running, running, and running. Not so much Canadian drivers. In the United States a lot of the owner-operators are on a time

²⁰ American drivers are allowed a maximum of 13 hours driving under U.S. hours-of-service rules, while for Canadian drivers the maximum allowed is 10 hours.

schedule and a lot of the companies that they are running for or the customers they have, they have deadlines to meet. So, the drivers are forced to meet the deadline, so what happens is they run two or three logbooks. What happens is that legally you can be back four hours on your logbook, right, because obviously every five minutes you are not pulling over and putting in every half hour in your book. So you are allowed four hours behind, and you shouldn't be running more than four hours without some kind of a break, pull over to check the truck or pull over to check the brakes. Guys are running. I see it time and time again - on the CB radio - guys are looking for team drivers to come in and be the driver and pull them out of the scales and drive a couple of hundred miles down the road. And they'll pay them for it, eh? So it doesn't get caught on their logbooks. So they can keep running.

I - So they get someone to meet them before the scales?

R - No, they'll get pulled into the scales and the DOT or the highway patrol will check their logs so they'll be out, shut down for 10 hours. But he doesn't want to go to sleep, for one reason or another, so he'll get on the CB and ask a team driver to come and grab his truck and drive it and get him out of the way of the cop or the DOT. Then, they'll go back in the other truck and this guy who was over on his log can keep running.

I - Other than the logbook problems, are there any other safety issues?

R - No, 'cause your logbook running hours is what runs into everything else. I don't care who you are, you can't run, by yourself, that many hours in a day. So to keep you awake you have to take some kind of drug whether it be some kind of an upper or bennies or synthetic heroin. Synthetic heroin is real big in the states, I don't know the actual name of it. That will keep you running for 10 or 12 hours until you need another shot of it. They are just constantly on drugs and just keep running, running, and running.

When asked about possible safety problems within the Canadian trucking industry, a representative from the Teamsters also raised the spectre of logbook and hours-of-service violations:

... I'm going to tell you one thing - rather than focusing on drug testing I think the government should focus on hours-of-service. As you are aware a lot of drivers are keeping two or three log books in their cab in order to fool around with the hours-of-services regulations. I mean if the government had put the same kind of urgency on

the hour-of-service issue that they put on the drug testing our roads would be much safer right now. Right now the major problem in the trucking industry is training and hour-of-service - these are the two major issues we are facing right now as far as the drivers are concerned. I think that the government should focus on these two issues rather than putting a lot of energy on drug testing.

A manager of a medium-sized trucking company had this to say about logbook violations:

I would say there is no doubt that a lot of guys will run legally in terms of substance abuse, but illegally in terms of logbooks. The National Safety Code has done a fair amount for reducing the number of dual logbook incidents, all companies in Canada now have to be on the National Safety Code if they are extra-provincial... There are still guys that run two books, there are still companies that will ask them to do it, and those companies that ask them to do it are paying enormous premiums for it [in terms of insurance premiums as a result of accidents].

Are Canadian trucking companies guilty of pushing unreasonable deadlines on drivers, and consequently contributing to logbook violations and increased accidents caused by fatigued truckers?

Comments made by the manager of a Canadian trucking company published in a recent issue of *Motor Truck* (April 1995:5) indicate this may indeed be the case:

... I can't believe that the obvious has escaped everyone. The people that need to be regulated are the dispatchers and shippers. They are the people that insist that the load be at Point A by time B.

In 27 years of working in the industry, I have found that the majority of drivers will stop and get proper rest and only push it when the dispatcher and the customer are pushing.

The cowboys that run around the clock popping pills still do it today with a box full of log books.

Just leave the drivers alone. Train them properly and make it illegal to reprimand a driver for being late due to fatigue or road conditions and you will solve the problem. Let the human brain do the job.

Professor Barry Beyerstein also points out the dangers inherent in overworked truck drivers:

... I'm a biological-psychologist and I am firmly convinced that the truck driver who had a fight with his wife that morning over breakfast is more of a danger on the road than the guy who smoked a joint two weeks ago. Or the truck driver whose boss who puts him in the double bind of saying you've got to drive safely, but you've got to drive 12 hours in a row. I do work in biological rhythms too, and telling people they have to drive all night or telling people that they have to have a rig at a certain place at a certain time - they don't care how many hours they have to drive to get there - but your money and your next job depend on getting it there in a hurry. I mean, there are far more dangerous things built into the way that the profit motive drives the trucking industry than the chance that somebody had a drink at some time, or smoked a joint at some time. You know if they really were interested in safety and productivity then they would attack those things, because I think there is a much bigger chance of improving in those cases...

A different perspective on the issue is provided by a Senior Policy Analyst with ICBC during the following exchange:

I - Well, in fact some people have argued, wait a minute, drug use is not our problem, it may in fact save lives. How do you respond to that argument?

R - Absolutely, its quite true. One of the problems we've got is the economy of trucking. The economy of any kind of commercial vehicle endeavour. Basically, if you get it there faster, if you can do more, you make more money. While that exists, it will always be open to abuse. And there is no getting around it. Yes, there are other problems, there are problems of insufficient vehicle testing stations, there are problems in terms of fatigue. Fatigue is an impairing issue. There are problems, at any given border-crossing, or road-check, any unpublicized road check, you find at least 30 percent of the vehicles have serious problems. Yeah, we are not just dealing with, you know, some impaired driver, and that is the only problem that's there. But the way to deal with any kind of traffic safety problem or any kind of traffic safety issue is little bit from this angle and little bit from that angle. You don't say we are going to ignore impairment because everybody's brakes are unadjusted. Maybe if they were less impaired they would adjust their damn brakes.

I - Well, I suppose that's their argument. Their argument is that the only reason we are doing anything about this, and we are not dealing with what they consider to be

the bigger issue of fatigue, is because Americans are putting pressure on us to do it.

R - Probably true. I mean we are dealing with something, if it weren't for the Americans we would be dealing with nothing. I mean, come on!

The final problem that is often raised in conjunction with logbook violations and fatigue is the mechanical condition of commercial vehicles that may contribute to an increased safety risk. A 1994 report in *Traffic World*, an American transportation trade magazine, indicated that one in four trucks were placed out of service by enforcement officers checking for mechanical faults. Defective brakes were the most prevalent mechanical problem found during the inspections (*Traffic World*, 1994:24).

Interestingly - although this issue was not directly addressed in the course of the interview - a truck driver brought up mechanical faults as possible safety problems as the interview drew to a close:

I - I have asked you all my questions. Is there anything you think I haven't covered?

R - Nope. You might want to do a little research on safety checks, on the damage to the trucks, the brakes, the frame. A lot of drivers don't have their own trailers, they don't check these trailers, they could have a split axle, anything. And if they don't check the trailers before they take them out on the highway -they could cause problems on the highways too, eh?

Despite concerns around mechanical defects as safety risks, both ICBC representatives were of the view that such problems were still ultimately related to the condition of the driver. A Senior Policy Analyst with ICBC maintained:

... I mean another angle on this is that commercial drivers, much more than you or I, are responsible for the conditions of their vehicles. We know that from border

crossing data - which I did a couple of little studies on - scary, scary stuff. Something like one third of the commercial vehicles out there should not be on the road. I mean, at one point we had something like 15 percent that were stopped had to be removed from the road, and another 15 percent couldn't go until they got repaired, something like that. Some were just, "I'm sorry we're taking your license plates - it's not like your brakes are not adjusted - it's like, I'm sorry, you're not going anywhere at all; it'll be towed."

So we've got good evidence that somewhere in the range of 30 percent of all commercial vehicles have serious to irreparable vehicle faults that involve things like brakes and steering and so forth and so on. An impaired commercial vehicle driver may not remember to reset the brakes, or care to reset the brakes, or do it properly. And, again, the consequences are very much different than if you or I neglected our vehicle to some extent. Brakes need setting all the time. I just replaced the brakes on my Volkswagen because it has, I don't know, 180,000 kilometres on it. That is about how often I have to replace my brakes. They've got to do it on an hourly basis. If they forget one hour, they're in trouble...

The safety manager from ICBC agreed:

We look at things like the mechanical fitness of the vehicle. We spend more money on programs, Lynne, the provinces and Canada, making sure these vehicles are supposedly quote mechanically fit. That doesn't cause the problems - what are the problems stemming from? If we look at probably 40% of our single-vehicle commercial crashes - could probably be said to be fatigue related. Well, what other reason would a guy have to run off the road in the middle of the night? Is he fatigued, or is he drunk?

Reactions to Transport Canada's Decision Not to Proceed With the *Strategy*

As previously discussed, in late 1994 the Minister of Transportation announced that Transport Canada would not proceed with legislation in support of the substance use *Strategy* proposed for the transportation industries. This decision has garnered considerable reaction from the trucking community, and leaves a number of questions open for consideration regarding the applicability of

American drug testing rules. Before focussing on reactions to the announcement, it is of interest to consider some of the comments made by respondents who were interviewed for this thesis prior to the demise of the *Strategy*. When asked whether he anticipated any implementation problems, a Senior Transport Canada Policy Analyst replied:

Anything that is political - timing is always of the essence. There is opposition to something like this; there is bound to be some. The government is faced with introducing it early in its mandate - in other words, they wouldn't do it near an election. If there is any sense at this rate currently - like if the Quebec government was opposed to it, which has not been the case, by the way, but if they were, then you couldn't do it now without getting them on side. All in all, I think, based on the consultations that we've had with industry and the governments and stuff there would not be, besides from the CLC, any strong opposition to it.

When further questioned about the prospects that the *Strategy* would proceed, the same respondent stated:

I'm optimistic, but I'm also a realist. The Government right now - the Minister that would be responsible for this - has so much on his burner, it's just mind boggling. The aviation industry has just gone through a major upheaval, the railways are about ready to call it quits - that's sort of turning around - the internal restructuring of Transport Canada itself. We are looking at a department of 20,000 employees and if plans proceed that are now being proposed, it would be down to about 5,000 people. That doesn't mean that these people would be out of jobs; we're looking at commercialization of a lot of things where the private sector or other types of organizations would take on different roles and responsibilities.

It's hard to get people's attention on something like this with so much else going on. If you look at the deficit situation - the whole federal government is so focused on reducing any type of expenditures. So, I'm optimistic, but not overly so.

The possible consequences for the Canadian trucking industry, should the *Strategy* not be mandated by the federal government, were raised by a Senior Policy Analyst from ICBC during the

following exchange:

I - My final question. Do you anticipate any problems once the policy is implemented?

R - Not that haven't been already thought through. I mean, there is going to be a lot of difficulty at first getting systems into place and smoothing them out. I will be very surprised if it gets in place in time. My bet is that it won't be in place because the Canadian government is going to sit there saying "I dare ya."

I - What would be their purpose behind that?

R - Because the whole thing is a pain in the ear, isn't it?

I - But they are going to put the cost off on to the truck companies, right?

R - And the truck companies support the politicians. What's bad for the truck companies is bad for the politicians. Anyway, I haven't seen a lot of frantic activity around the issue anyway. It will drag on and drag on and drag on. I imagine what will happen, unless a miracle happens, is that it won't be ready in time, they'll ask for extensions, and eventually it will be implemented because the States says "fine, as of this date the border is being closed: do something." Then we will have a whole bunch of legal challenges and on again and off again stuff. I can imagine a situation where small houses are built at border crossings where you can rent an American trucker, you know. Can you see the Canadian trucker who has to move over to let the American drive?!

Some indication of the trucking industry's concern during this period of indecision on the part of the federal government is apparent in the following report published in the December 1994 issue of *Motor Truck* (1994:1, 11):

Although it has come close to the wire, with [the U.S. Department of Transportation] backing off the requirement for foreign drivers on several occasions in the past, there won't be any delay in implementation beyond January 1, 1996 this time, cautioned Barbara Butler, a consultant and guest speaker at this year's annual conference of the private Motor Truck Council.

Canada's own proposed substance abuse program has the support of most unions and the Canadian Trucking Association, but the present Liberal government, like its predecessor has been loath to implement it for a number of reasons including:

- The substantial cost to carriers of implementing employee and supervisor training programs;
- Conceivable challenges of employee rights under the *Charter of Rights and Freedoms*;
- The possible strong opposition of one or several major transportation unions;
- The NDP government of Ontario has indicated it will refuse to enforce such regulations on the grounds that they may be an infringement of worker's rights.

The *Motor Truck* (1994:11) article also states that trucking association officials were convinced during this time period that Liberal Transport Minister Doug Young would not proceed with the introduction of legislation in support of the proposed *Strategy*. A Transport Canada spokesperson is quoted as responding that "truckers are premature in assuming Young has rejected adoption of a made-in-Canada drug screening program because the truth of the matter is that the Minister has not yet decided what he intends to do" (cited in *Motor Truck*, 1994:11). Apparently, however, the trucking association officials were correct in their assumption; by December of 1994 Transport Canada had stepped back from the proposed *Strategy*, and indicated that the trucking industry would be responsible for developing their own programs.

Why did Transport Canada back down from implementing a substance use *Strategy* for the Canadian trucking industry? The official reasoning for the Transport Canada decision is articulated in a letter Minister Doug Young sent to trucking executives in late December of 1994. Young wrote,

"I have decided not to introduce federal substance-use legislation at this particular time but rather to exercise a facilitation role where appropriate" (cited in *Traffic World*, February 6, 1995:12). Young also stated that he required more time for review because drug and alcohol testing is "an extremely complex issue with implications for all modes of transportation. I firmly believe our mutual objective should be to maintain transportation safety while minimizing intrusion in the operations of industry and the lives of transportation workers" (cited in *Traffic World*, February 6, 1995:12). Not surprisingly, when asked why Transport Canada had decided not to proceed with legislation in support of its *Strategy*, a senior Transport Canada official's reply echoed - almost verbatim - that found in the Young letter:

Well, to be fair, what's happened is that the Minister has decided not to proceed with the legislation at this particular time and is leaving it up to industry to develop their own programs that are tailored to their needs ... He decided not to introduce the federal legislation at this time, but rather to exercise more of a facilitation role with respect to trucking in regard to the truckers meeting U.S. rules. And also, he was trying to weigh the objective for transportation safety, while minimizing, I guess what you could term, intrusion into the operations of the industry and the lives of the workers. So, he has just decided not to proceed at this point in time, and to let industry develop their own program tailored to their own particular needs.

A representative from the Teamsters offered another perspective on the decision when asked whether he thought the labour movement had had an impact on Transport Canada's decision to shelve the *Strategy*:

I think the labour movement did, and I think that across society there is a real concern about that privacy issue. So, I think there was a strong public reaction, certainly we raised the issue publicly. I think what they sensed is that Canadian society is not prepared to compromise some of those principles. And so I think they just prefer the U.S. to take the political flak for the issue.

In responding to a similar question, John Weir of the B.C. Federation of Labour asserted:

There is an issue under the Canadian *Charter* of whether you could mandate it. There is a legal issue there that is a bit different from the U.S. as well. There are also those implications, so they had a lot of hoops to jump through. I mean ultimately it was a political decision, I think. I mean, you are going to have this prolonged battle, you've got declining standards that you're putting in through deregulation of the industry. Do you want to be caught focusing on this one narrow problem, while you've got other health and safety issues that you, in fact, seem unwilling to act on?

Whether or not the federal government shelved the *Strategy* in order to allow the industry to develop programs it could 'tailor to their own needs'; or because the Minister was concerned about intruding into the private lives of individuals; or because of pressure brought to bear from organized labour; or because the Minister believed that a mandated testing program could not survive a *Charter* challenge, will probably never be known. Most likely, it was a combination of all these factors and, as John Weir notes, it was most probably a political decision. One thing that is clear, however, is that in the aftermath of the decision not to proceed with enabling legislation, Transport Canada sought to distance itself from the *Strategy*. Consider the following exchange between this researcher and a senior official from Transport Canada:

R - You have to understand, though - and I mean, this is quite critical in anything that you might be looking at - is that Transport Canada does not now have a policy with respect to drug testing. So anything that you refer to as being a Transport Canada policy is not true. Because it doesn't exist. Because with the legislation not going through, there is no policy.

I - Okay.

R - Do you see what I mean?

I - There is no policy now, but (pause).

R - And there wasn't before. I mean what it was, it was (pause).

I - You want me to call it policy development?

R - Exactly. And I think that is the way you have to refer to it.

What was the reaction of the interested parties to the shelving of the *Strategy* by Transport Canada? Organized labour viewed the decision as a victory, as indicated in the following statement made by a Teamsters representative:

Well, basically our reaction is that Transport Canada finally recognized the fact that there was no emergency and there is no major need for such a policy. Transport Canada probably also realized that [the] drug testing policy is against the *Charter of Rights and Freedoms*. And if you are going to test the truck drivers, why shouldn't we go in to test all the nuclear central operators, why shouldn't we test all the bankers, or the ones who administer financial operations of banks, and things like that? Why should we focus on the truck drivers, or on the transportation employees? Basically that was our position. And we think that Transport Canada recognized the fact that if they had introduced [the] drug testing policy they would have gone against the *Charter of Rights and Freedoms*, and it would have been discrimination against transportation workers.

Needless to say, the trucking industry did not perceive Minister Young's decision in quite the same way. Note the vehemence contained in the following excerpts from the February 1995 issue of *Motor Truck*, as writer Barry Holmes reacts to the Transport Canada decision (February 1995:3):

It's a double cross.

Douglas Young had almost 18 months to make a decision. But like Emperor Nero, he decided to fiddle while Rome burned.

In a form letter sent just before Christmas to the trucking industry, oil companies, and others, our Transport Minister announced that he "has decided not to introduce

federal substance abuse legislation at this particular time."

Talk about kicking an industry in the teeth.

A manager of a provincial trucking association also reacted with disappointment to the decision by Minister Young not to proceed with enabling legislation:

I - What is your reaction to the fact that there isn't going to be a legislative mandate?

R - We are disappointed and it makes it a lot more difficult for carriers to apply a substance use program in their companies because the legislation would have created - would have provided a lot more avenues for programs to be put in place with some mandatory aspects to it. ...

I - Do you think the Canadian government will change its mind again, or do you think that's it?

R - Ahh - it's hard to say, it doesn't appear as though that is going to happen.

I - Are you putting pressure on them; or is the CTA putting pressure on them to try to change their minds?

R - Umm, the CTA let them know that we're not happy with their decision, but at the same time, we recognize that the decision has been made and we have to get on and try and develop a program for the industry. Try to get one that would work; one that is acceptable to the U.S.

What are the consequences of Transport Canada's decision for the trucking industry? Barry Holmes (February, 1995:8) notes three reasons why he believes the 'double cross' by Minister Young will make the present situation worse for Canadian carriers operating in the United States:

1. Both houses of congress are now ruled by Republicans who tend to take a harder line on trade agreements and foreign treaties than the Democrats. They may insist that while in the U.S., Canadian truckers must play by American rules;
2. Always mindful of any special treatment Canadian carriers may be accorded in the

U.S., the American Trucking Association will be watching like a hawk as the [Federal Highway Administration] proceeds to enforce its drug testing rules the minute our truck drivers cross the border; [and]

3. If the FHWA was to concede certain points to avoid possible conflict with our human rights regulations, for the sake of fair play, this agency would also be compelled to bend their rules to accommodate Mexican regulations that don't jibe with their own. Even with Young on an extended leave of absence, don't expect the DOT to strike separate special deals with the Canadian and Mexican Trucking Associations.

Over the last few years, Transport Canada gave every indication that it would adopt a made-in Canada employee drug and alcohol program and in its desire to cooperate, senior FHWA officials indicated that they would likely be receptive to a Canadian version that excluded random sampling of drivers' urine for illicit drugs and mandatory drug/alcohol tests for truck drivers involved in fatal or chargeable accidents. But now all bets are off.

A manager of a provincial trucking association also expressed some concern over the Transport Canada decision and the fact that the development of drug and alcohol testing programs that will meet the U.S. standards would now fall to the trucking industry itself:

I - What will you do now?

R - Well, carriers that are operating into the United States will be subject to substance use regulation effective January 1, 1996 so through the Canadian Trucking Association we are trying to develop a program that carriers could follow in Canada which would meet the needs of the U.S. requirements. It's going to be a little bit difficult because Canadian law, of course, is different from U.S. law, and therefore there is going to be some difficulties in truly meeting all the requirements of the U.S. legislation...

I - If the legislation had been passed, did you anticipate problems with implementation?

R - Sure, there would've been problems. It's a whole new area of activity and learning that the industry would have to go through. But we've done the pilot project and

done a lot of work in setting up routines, policies, manuals and that sort of thing. And part of the reason we did the pilot project was to ensure that the legislation that was introduced was capable of being implemented in a way that the industry could do it reasonably and effectively. So, I think that after all that process there is a pretty good chance of having legislation that would have worked and would have been effective.

I - Now you have to do it yourselves?

R - Now we have to do it on our own - that's right.

I - And that changes it how?

R - There is not the legal backing that we would have had with the legislation, you know, obliging the industry to undertake this course of action. Now it's really only going to be required by those carriers who operate into the United States so therefore we're creating some costs to the industry - some carriers are going to be facing cost structures different than others, depending on how they operate. It's just not, you know, equitable. And it fails to address the problem as we had viewed it.

I - Will it be different from province to province then?

R - Could be.

As noted in Chapter 2, in response to the decision by Transport Canada not to proceed with a substance use program, the CTA has taken responsibility for developing a program for Canadian carriers that will satisfy the U.S. drug and alcohol testing regulations. Initially it was announced that Canadian carriers - even after Transport Canada had backed out - would still be required to meet the January 1, 1996 deadline; however, the compliance starting date has reportedly once again been extended for Canadian drivers, this time until March or April of 1996 (*Motor Truck*, March, 1995:9). According to the March edition of *Motor Truck* (March 1995:9), the CTA has imposed a "news blackout" on the details of the program it has under development at this time, and:

... the CTA will now have to go cap-in-hand to Washington in an effort to negotiate the best deal it can. The U.S. Department of Transportation officials are not impressed with Young's last minute decision to back out of a drug program after they had granted us five extensions to get a watered down made-in-Canada drug/alcohol regime up and running.

A manager of a provincial trucking association discussed the ramifications of the January 1, 1996 deadline prior to the recently announced extension:

I - If there isn't an agreement in place by January 1996, what do you think will happen?

R - Well, the U.S. have already told us that they will expect Canadian drivers going into the United States to be subject to a program which is similar to one that is in place down there. They have already extended that a couple of times, and I don't anticipate they will extend it again. So, the jury is still out on that, but it is going to create significant difficulties.

I - Is it that the Canadian truckers won't be allowed across the border?

R - That would be the extreme case, yes....

I - In the best case scenario, what would happen?

R - Well, the best case scenario is that the government of Canada would realize what they have done and help through legislation and implementing a program here in Canada that would meet the U.S. requirements because that was the intent all the way along. The U.S. had written their legislation anticipating that they would be entering into a reciprocal agreement with Canada on substance use programs.

A final word on the Transport Canada decision from the trucking industry perspective is best provided by Barry Holmes (*Motor Truck*, March 1995:3):

While only a few months ago it seemed everyone was paranoid that if the federal transport minister failed to introduce a federal drug and alcohol program for truck drivers we'd be caught between the devil and deep blue sea, I suspect this is changing

...

... the impression I'm now getting from truckers is a sense of relief that the impotent transport ministry has weaselled itself out of the picture so that truckers themselves can deal with the issue of drug and alcohol compliance with the U.S.

When Transport Canada told DOT officials over the years that it intended to exclude random testing from the Canuck reg[ulations] because of a conflict with our human rights laws, I actually believed them. But in light of our recent exposure to Mr. Young's true colours, I now wonder if Transport Canada's real intentions were to take the Americans down the garden path?

Summary

Throughout the first three Chapters of this thesis, a number of questions have been raised around workplace drug testing generally, and the proposed Transport Canada *Strategy* specifically. In this current Chapter, the data collected through semi-structured interviews and documentary analysis were presented in an effort to address several of these issues. Overall, the inquiry revealed the complex nature of the disputes inherent in any discussion of employment-related substance testing, and the considerable controversy that accompanies this debate.

In Chapter 5 the principal results of the study are summarized, and the implications of the work are considered.

CHAPTER V

EPILOGUE

The intent of this thesis was twofold: first, to provide an overview of the life cycle of Transport Canada's proposed *Strategy*, including an evaluation of its antecedents, an analysis of the debate surrounding drug testing issues generally, and the impact of this debate on the evolution of the initiative; and second, through semi-structured interviews and documentary analysis, to move beyond the immediate circumstances surrounding the development of the proposed policy, in order to address a number of substantive research questions. What follows is a review of the main findings of this study, and some thoughts on its implications.

First, this work revealed that, despite the denial of most government representatives, there is considerable evidence to suggest that pressure from the American government was the central impetus behind the creation of the federal initiative in 1990. The 1986 Hinton train collision is often cited as the genesis for the development of drug and alcohol programs in the Canadian transportation industries; however, one can argue that while the Hinton crash may have represented a defining event in the evolution of the initiative, the true stimulus for the development of the *Strategy* is found in the passage of U.S. drug testing rules. The implicit threat that Canadian carriers would not be allowed to operate on American highways without a similar substance testing regime provided the momentum for the rapid development of the federal initiative. Indications that the Canadian government was responding to U.S. pressure are apparent in the initial negative reaction of the trucking industry to the proposed *Strategy*. Further proof is found in the proceedings of the Standing Committee on

Transportation as they expressed their “deep concern” regarding the attempt by the federal government to “harmonize” Canadian and American substance use rules. Finally, the Privacy Commission of Canada, the Ontario Law Reform Commission, the Canadian Labour Congress, and the Teamsters, among others, all implicitly or explicitly accused the Canadian government of submitting to American pressure on this issue.

Perhaps the most condemnatory evidence of a U.S. connection resides in the questionable rationale underlying the *Strategy*. The research data indicate that the magnitude of substance use among Canadian truck drivers does not reach the levels witnessed in the United States. Even the studies undertaken by Transport Canada in support of its *Strategy* are not definitive in this respect. The research revealed that there is a *perception* within the trucking industry that a problem may exist, but the random urinalysis studies do not prove this out. Notably, when the Canadian government announced the proposed *Strategy*, an attempt was made in the presentation of the policy to allay fears that drug and alcohol abuse among truck drivers constituted a significant public safety risk. This most likely occurred as a consequence of the inconclusive nature of the Transport Canada research findings. Nevertheless, the federal government proceeded with its policy proposal - although it could not justifiably rationalize the initiative - lending further support to the position that pressure from the U.S. government was the impetus behind the emergence of the *Strategy* in 1990.

Second, it was discovered through the interview discussions that many of the government and industry representatives continue to support urinalysis, even in the face of suggestions, by Professor Barry Beyerstein for example, that the technology may be unreliable and inappropriate. Performance

or competency tests were suggested as possible alternatives to urinalysis; however, the discussion revealed that such tests are subject to many of the same limitations inherent in biological testing methods. At the core of this issue is not only the fact that urinalysis technology is notoriously unreliable, but also that it is an inappropriate testing method for the purposes envisaged in the *Strategy*. Urinalysis testing does not - and cannot - reveal to an employer when, or in what quantity, a banned substance was ingested; nor can it reveal whether or not the employee was ever impaired (in terms of work performance), or whether or not the level of impairment constituted a risk to public safety (unless, of course, the testing occurs in the immediate aftermath of an accident). Proponents of the *Strategy* have argued that the policy embraces a 'zero tolerance' philosophy, and hence questions concerning the suitability of urinalysis technology are moot. The problem with this position, however, is that it raises other considerations around the right of individuals to be free from interference in their private lives. Some observers have argued that biological testing is, in reality, 'ideological screening' as employers seek to weed out workers who may lead alternative lifestyles.

Third, it was apparent from the interview data that those respondents involved in the policy making process were aware of the possibility of challenges to the *Strategy* under the *Canadian Charter of Rights and Freedoms*, and had attempted to minimize this risk. Most likely the elimination of random testing from the initial version of the proposed policy represented an effort to protect the initiative from the possibility of a successful challenge. The inclusion of a number of transportation unions during the initial consultation process might also be interpreted as a calculated move on the part of Transport Canada to ward off potential troublesome protests from organized labour, while

at the same time ensuring the cooperation of the rank and file in its research studies. It appears that this strategy may have backfired somewhat for the federal government, as the unions - despite promises to the contrary - were not consulted regarding the content of the proposed *Strategy*, nor given notice prior to its announcement. Their outrage over their treatment at the hands of Transport Canada is clearly evident in many of the union submissions to the Standing Committee on Transportation. In all likelihood, these events served only to further entrench organized labour's opposition to workplace substance testing.

Fourth, a common theme that was discussed by many respondents concerned the political economy of the North American trucking enterprise. It was argued that alcohol and drug use among truckers is not at the heart of safety problems in the industry, but rather, the long hours many drivers are forced to work in order to meet deadlines or earn a decent living lead to fatigued drivers and to possible mechanical problems. Tired drivers or defective brakes were considered by some to represent more likely contributors to heavy truck accidents than alcohol or drug use.

Finally, a review of the data concerning reaction from trucking representatives indicated that although the industry was initially opposed to the Transport Canada proposal, it soon became politically expedient for it to support the *Strategy*, as the trucking community came to understand the implications for Canadian carriers if the American drug testing rules were not met. The harsh criticism directed at Transport Minister Doug Young in the aftermath of his December 1994 decision not to proceed with the federal initiative reveals the depth of the industry's commitment to ensuring that Canadian truckers and carriers will continue to conduct business in the United States. Of course,

the fact that the trucking community will now take responsibility for developing its own substance use programs and procedures leaves open for consideration a number of other questions that have yet to be adequately resolved.

Why did the Canadian government pursue a policy advocating the biological testing of workers that, arguably, it could not justify? It most likely did so because it was politically expedient at that time. Given the intractability of the U.S. drug testing rules, and the economic consequences to the Canadian trucking industry if the American demands were not met, the federal government was faced with some difficult decisions. It could choose either to challenge the legality of the U.S. extraterritoriality provision, or - under the auspices of protecting public health and safety - to develop similar substance use programs for the Canadian transportation industries. In light of the resurgence of a 'new' War on Drugs during the late 1980s, the cozy U.S.-Canada relationship following the passage of the Free Trade Agreement, and the aftermath of the Hinton train crash, it appears the Canadian government chose what it perceived at that time to be the path of least resistance. Referring to the history of narcotics control legislation, Lafontaine (1989:63) has observed that "the decision to prohibit a particular drug is often motivated by economic policy more than by health and welfare concerns." One might also make the same argument with respect to the emergence of Transport Canada's substance use *Strategy* in early 1990.

The stagnation of the *Strategy* over a four year period, and its eventual demise in late 1994, can be interpreted in a number of ways. Did the federal government finally see the error of its course? Did a new Liberal majority find the implementation of state-mandated urine testing anathematic to

its party politics? Could the *Strategy* pass the scrutiny of the *Charter*? Did resistance from organized labour, civil libertarians, and some provincial governments finally make the *Strategy* less politically expedient than it once had been? Was it going to cost the federal government too much money to assist the trucking industry in the implementation of the *Strategy*? Whatever the reasons, one thing is clear from an analysis of the data collected for this thesis: despite clear evidence that the *Strategy*'s underlying rationale is questionable, and despite the recent decision by Transport Canada not to proceed with enabling legislation, support for the development of drug and alcohol testing programs for Canadian truckers remains strong among trucking industry representatives and government insiders. In fact, the Canadian trucking industry is currently developing its own substance use policy for truckers travelling American highways. The policy will necessarily include an employer-mandated drug and alcohol testing regime in order to meet the U.S. regulations, and such a program will not fall under the purview of the *Canadian Charter of Rights and Freedoms*.

Glasbeek and McRobert (1989:33, 62) have made some interesting observations with respect to employer-mandated drug testing programs. They raise the level of analysis to include the roles played by the state and social class, and argue that discussion around this issue has usually been dominated by "technocrats and professional civil libertarians" who have missed the point:

...the issue is a controversial one because the idea that employees might be subjected to drug tests which are mandated by employers brings into sharp focus the hollowness of some of the conventional assumptions made about the nature of our political economy. Specifically, inasmuch as it is widely assumed that the real threat to freedom is the inability to control an omnipotent state and that all our efforts to protect and to further our liberties ought to be directed at holding this leviathan in check, employer-mandated drug testing draws attention to the fact that the private power of property owners may well be a more significant fetter on freedom and

democracy. And, once attention is drawn to this possibility, it becomes manifest that the distinction between the private and the public, between the economic and the political, is not as stark in advanced capitalist economies as liberal pluralist theorists - especially lawyers - would have us believe.

Employer-mandated drug testing is part of the trend towards privatization of the discipline of the ruled. Employer-mandated drug testing is, in a sense, a microcosm of the larger terrain of struggle between capital and labour and reveals some of its (usually) carefully hidden features.

Overall, the analysis embodied in this thesis reveals the underlying political, social, and economic context within which the Canadian government's *Strategy* emerged and evolved, and in so doing it contributes to our general understanding of the underpinnings, influences, and conflicts inherent in any exercise of socio-legal control. The findings of this study provide evidence of the complex nature of law-making - be it regulatory or statutory - and illustrate the numerous ways in which resistance to forms of socio-legal control can assert itself. Resistance to the proposed Transport Canada *Strategy* took many shapes, ranging from the tireless criticism voiced in the political arena by the Standing Committee on Transportation, to the predictable opposition of organized labour. Notably, in this case, the initiative ultimately succumbed to the political process; however, the Canadian trucking industry continues to be haunted by the spectre of drug and alcohol testing embodied in the form of employer-mandated programs.

One final comment - it is not in dispute here that an issue of major public concern is the fact that Canadian truck drivers who abuse substances may represent a safety risk. This is a 'motherhood' issue: nobody wants drunk or drugged tractor-trailer drivers careening recklessly down Canada's highways. However, as Feldthusen (1988:107) has argued, "At the core [of this issue] is the

question of personal privacy, of what it consists, and the extent to which it must yield to competing claims of social interest." Moreover, it is argued here that the intrusion into the private lives of workers necessitated by biological testing cannot be justified until such a time that a substance abuse problem of significant proportion can be identified, and until a reliable and *appropriate* drug testing technology can be devised.

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