T.D. 12/94
Decision rendered on August 16, 1994

CANADIAN HUMAN RIGHTS ACT
R.S.C.(1985), Chap. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

TORONTO DOMINION BANK

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Keith C. Norton, Q.C., B.A., LL.B, Chairperson
Judith H. Alexander, LL.B
J. Grant Sinclair, Q.C.

APPEARANCES: René Duval and Eddie Taylor, Counsel for the Canadian Human Rights Commission.

Ian Scott and John Tyynela, Counsel for the Canadian Civil Liberties Association.

Robert P. Armstrong, Q.C., and Steven Tenai, Counsel for the Toronto-Dominion Bank.

DATES AND LOCATION
OF HEARING: October 13 to 15, 1993
October 18 to 20, 1993
January 10 to 14, 1994
TORONTO, ONTARIO

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1. THE COMPLAINT:

This complaint is brought by the Canadian Civil Liberties Association under section 10 of the Canadian Human Rights Act, R.S., 1985 c. H-6 as amended ("CHRA" or "the Act").

The substance of the complaint as set out in the Complaint Form dated April 22, 1991, (Exhibit HR-1, Tab 1) reads:

> The Toronto Dominion Bank pursues a policy which deprives or tends to deprive persons of employment by forcing all new and returning employees to undergo a mandatory drug test because of a disability (perceived drug dependence) in contravention of section 10 of the Canadian Human Rights Act.
>
> Under the respondent's recently announced drug testing program, newly-hired employees are required to undergo urine tests within 48 hours of being accepted for employment. Should they refuse to provide the requisite urine sample their employment with the respondent is subject to immediate termination. In the event such tests yield positive results, the employees involved are required to participate in a special employee assistance programme. At the conclusion of the program, they are tested once again. Such employees risk dismissal for either refusing to be tested or for testing positive.
>
> The respondent in pursuing such a policy is engaging in a discriminatory action against its employees on the basis of disability (perceived drug dependence).

2. THE LEGISLATION:

The complaint was made pursuant to section 10 of the Canadian Human Rights Act R.S., 1985, c.H-6 as amended which provides:

> It is discriminatory practice for an employer, employee organization or organization of employers
>
> a) to establish or pursue a policy or practice, or
>
> b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship,

transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

This particular complaint alleges discrimination on the basis of disability (perceived drug dependence) and therefore section 25 of the CHRA is relevant. This section provides:

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

It is also noteworthy that this complaint was not made by an individual or class of individuals alleging to be victims of discrimination. There are no identified or identifiable individual victims. The matter is brought forward by the Canadian Civil Liberties Association and the Canadian Human Rights Commission ("the Commission") pursuant to section 40 of

the CHRA which states in part:

40.(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

b) occurred in Canada and was a discriminatory practice within the meaning of section 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim;

Finally, the CHRA provides the following ("B.F.O.R.") defence for an employer:

15. It is not a discriminatory practice if

a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a

bona fide occupational requirement;

3. BACKGROUND FACTS:

The Respondent, Toronto Dominion Bank (the Bank), has some 901 branches and employs about 30,200 persons. Like other financial institutions the trust and confidence of the public is an important underpinning of the industry. The ethical standards of the Bank and its employees are an important part of maintaining that trust and confidence.

In or about 1987, officials from the Government of Canada approached the banks and other financial institutions expressing concern about possible laundering of money obtained as the proceeds of crime. They requested that the financial institutions review and tighten their policies and controls in an effort to protect against such activity.

In part in response to this request and in part in response to an internal concern that, with the general problem in society related to the abuse of illicit drugs, the Bank, with its over 30,000 employees should attempt to protect against the impact of drugs in the workplace, the Bank decided to develop a policy on alcoholism and substance abuse.

The stated concerns of the bank officials included the potential impact of drugs upon the health of employees, work performance, security of funds and information and the possible connection with criminal activity and persons engaged in that activity.

Thus, Bank staff with the assistance of external consultants developed

a policy which includes a provision for drug testing

worded as follows (Exhibit HR-2, page 00106):

Consistent with the Bank's commitment to maintain a safe, healthy and productive workplace for all employees, to safeguard Bank and customer funds and information, and to protect the Bank's reputation, the following measures have been adopted in an effort to

provide a work environment that is free from both alcohol abuse and illegal drug use.

Each senior executive is demonstrating support for the Bank's commitment to a drug-free workplace by submitting to a drug test as part of the annual medical examination.

New employees, full-time, part-time, contract and students will be tested for drug use upon acceptance of employment. This will include all former TD employees rehired after an absence of three months or more.

Present employees will be referred for a Health Assessment which may or may not include a drug test in situations where there are strong grounds to believe that poor job performance, unusual personal behaviour, serious errors in judgment, or violations of the "Guidelines of Conduct" are related to alcohol abuse or illegal drug use.

All applicants for employment with the Toronto Dominion Bank are notified on the application form that, as a condition of employment, "all new employees accept and sign a Drug Screening Authorization Form which provides for a drug screening test in accordance with Bank approved Standards" (Exhibit R-9, page 2). The authorization Form is part of the application Form and includes this statement:

I understand that acceptance of the terms and conditions of employment will include consent to be drug tested for illegal substances and agreement to abide by the Bank's conditions should my test results be positive. One of those conditions will be that the Bank's designated health professional is authorized to release relevant information to the Human Resources Department in certain cases.

In practice, once the acceptance of employment has been received, the new employee is advised to appear at a designated clinic within 48 hours to provide a urine sample for the purpose of the drug screening test.

The Bank contracts with two private laboratory companies, Mann Laboratories in Toronto and Dynacare Laboratories with laboratories in Edmonton, Alberta and London, Ontario. These companies operate the only two accredited substance abuse laboratories in Canada - the one in Toronto

and the one in Edmonton. The London laboratory of Dynacare is currently seeking accreditation.

These companies not only provide testing facilities but also designate and instruct the clinics across Canada authorized to collect specimens. They also provide the specimen kits used.

The evidence indicates that there is a protocol for the specimen collection and its delivery to the testing laboratory which takes great care to document the identity of the individual, protect the anonymity of the sample until the results reach the Bank's Health Centre in Toronto, prevent tampering with the sample and secure the chain of custody of the sample throughout.

The laboratories screen the samples for cannabis (marijuana and hashish), cocaine and opiates (codeine, morphine and heroin). Although they could test for a broader range of illicit drugs the evidence indicated that the incidence of abuse of others beyond these categories was so low in the general population as to make the additional testing not worthwhile.

The laboratories use a two stage testing protocol: The first stage is an immunoassay test which is used to screen out the negatives. If there is a positive result at this stage then confirmatory testing is done using gas chromatography, and mass spectrometry (GCMS). The result of GCMS is both to confirm the positive result and in some cases more specifically identify the substance.

Although there was some difference of opinion regarding the precision of the immunoassay test, there was agreement among the expert witnesses that when it is used in conjunction with GCMS the results are highly reliable - approaching 100%.

If the result of the first test is negative then the employee is notified and that is the end of the matter.

If the sample on the first test is positive, upon the report being received at the Toronto Health Centre of the Bank, the employee is notified by telephone of the result and the fact that a further sample will be required for a second test during the employee's probationary period. This is followed by a letter to the employee from the Medical Director of the

Health Centre which indicates the date for a second sample to be provided. This date is determined by the amount of time for the particular substance to be cleared from the body.

At this point in the process, no one outside the Health Centre, other than the employee, is aware of the result.

At the conclusion of the first test, if there is a positive result indicating cocaine use, there is an exception to the usual procedure. If cocaine is indicated, the employee's file is immediately transferred to a rehabilitation nurse on staff for follow-up with the employee. Otherwise the same procedure of notification regarding the second test is followed.

In the event that the first test is positive for an opiate (codeine, morphine or heroin) and the employee has provided a credible medical explanation for taking prescription medications which would produce the result, the matter is reviewed with the Medical Director and usually the employee would be given the benefit of the doubt.

If the second sample tests negative, the employee is so notified and advised that a third test is required during the probationary period.

In the event that the third test is also negative, the employee is notified and that would terminate the process.

When a second test produces a positive result, the employee is notified by telephone within twenty-four hours of the result being received by the Health Centre and advised the file is being referred to a rehabilitation nurse on the Health Centre staff.

A follow-up letter is then sent outlining the requirement to submit to an assessment and, if indicated by the assessment, a treatment program. This also includes two consent forms to be signed authorizing the exchange of information between the Health Centre and the Assessment Centre.

The employee is then required to appear for assessment at a designated treatment centre within forty-eight hours.

If the assessment indicates non-dependence and casual use which can be dealt with through counselling then that is done and the employee is advised of the requirement of a further test.

Should the assessment indicate a more sophisticated treatment regime, then the employee is referred to his or her personal physician with the information and arrangements are made through that office for an appropriate rehabilitation program.

If necessary, arrangements are made for time off work for unspecified medical reasons. Still, at this stage, no one in the bank outside the Health Centre is privy to this information.

Following treatment, if required, an appropriate aftercare program would be put in place. There would also be periodic random testing.

If a third test is positive, then the Health Centre does notify the Human Resources personnel and this would lead to termination of employment.

It is also clear, that if the employee refuses to co-operate at any stage by refusing to provide a sample for testing, refusing a consent, or refusing to co-operate in rehabilitation, such refusal if persisted in, would lead to dismissal.

4. EXPERT EVIDENCE

On the subject of the testing procedure, the Tribunal concluded that there was little or no substantive disagreement between the two principal expert witnesses in that field, Dr. Bhushan Kapur and Dr. David Kinniburgh.

The experts were in agreement that when the immunoassay test is followed by the Gas Chromatography-Mass Spectrometry (GCMS) the results are highly reliable.

The Tribunal is satisfied that the testing protocol including security of the specimen is state of the art.

The Respondent called expert evidence from three sources - Dr. J.C. Negrete from Montreal and Drs. Michael Walsh and Jacques Normand from the United States - in an effort to establish a relationship between illicit drug use and job performance on the one hand and crime on the other hand.

It is not the Tribunal's intention to review all of that evidence here but we will make some reference to it and draw some conclusions regarding it later in the analysis of the evidence and the argument of counsel.

5. THE POSITIONS OF THE PARTIES

1) THE COMPLAINANT/COMMISSION

Counsel for the Commission put forward a number of arguments in support of the Commission's position that the policy and practices of the Bank were discriminatory and not justified under the Act.

The first argument focused on the Canadian Charter of Rights and Freedoms ("The Charter"). It was argued that the policy of the Bank, in so far as it requires the production of a sample of body fluid, urine, constitutes an unreasonable search and seizure and violates the Charter rights of the employees protected under section 8.

The Commission counsel maintained that, since this Tribunal is a statutory creature of Parliament, it is an "agent of the state" and thus the Charter applies. The argument holds that in this case the Charter applies through s. 8, the protection against unreasonable search and seizure and the result is that the Bank cannot rely on s. 15(a) of CHRA to assert a B.F.O.R. defence nor can the Tribunal accept a B.F.O.R. defence if the effect it is to justify or support compulsory drug testing.

In advancing this argument counsel relied primarily upon the following decisions: R. Dyment, [1988] 2 S.C.R. 417 ("Dyment"); Slaight Communications v. Davidson, [1989] 1 S.R.C. 1038 ("Slaight"); R.W.D.S.U. v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573 ("Dolphin"); Hunter v. Southam Inc. [1984] 2 S.C.R. 145(" Southam"); Jackson v. Joyceville Penitentiary [1990] 3 F.C. 55 ("Joyceville"); and Re Dion and the Queen 30 C.C.C. (3d) 108 ("Dion").

The second argument advanced is that the whole of the policy of the Bank with respect to drug testing constitutes direct discrimination. The reason given is that, from the testing onward, it is based upon the perception that the new and returning employees are prone to drug dependence. It is this "perceived disability" which tends to deprive them of employment. To support the concept of perceived disability they relied upon the case of Brideau v. Air Canada (1983) 4 C.H.R.R. D/1314 ("Brideau").

It was further argued that this being direct discrimination, the Bank had failed to establish that the policy constitutes a bona fide occupational requirement (B.F.O.R.).

Counsel relied on the decision in Alberta v. Central Alberta Dairy Pool [1990] 2 S.C.R. 489 ("Alberta Dairy Pool") for the proposition that for a B.F.O.R. to be established the rule must be applied to all members of the group affected - in this case, the Bank employees - and argued that since it applied only to new and returning employees, it failed.

He also argued that the Bank failed to substantiate the impossibility of making individualized assessments, again relying on the Alberta Dairy Pool decision at p. 513.

The Supreme Court of Canada decision in Brossard v. Québec (Commission des droits de la personne) [1988] 2 S.C.R. 279 ("Brossard") further refined the objective prong of the two pronged test established for the determination of a B.F.O.R. in Ontario Human Rights Commission v. The Borough of Etobicoke [1982] 1 S.C.R. 202 ("Etobicoke"). Commission counsel argued that the Bank failed to meet the Brossard test of being (1) rationally connected to the employment and (2) applied without undue burden.

He further submitted that the Federal Court in The Attorney General of Canada v. Clarence Levac and Canadian Human Rights Commission [1992] 3 F.C. 463 ("Levac") at p. 475 further restricted the availability of the B.F.O.R defence by suggesting that the employer must demonstrate that the rule be absolutely necessary and without any workable alternative.

In addressing the expert evidence regarding the impact of drug use upon job performance and the association with crime, Commission counsel submitted that there was nothing to tie the various Canadian and American surveys and studies to the employees of the Bank.

He also asserted that the Bank's justification for the introduction of the policy on the basis that its employees were a microcosm of society and there was a drug problem in society and further that there was a causal relationship between drug use and crime was "impressionistic" and not supported by the evidence.

2) THE RESPONDENT

Respondent counsel emphasized that the CHRA is clear that disability in this case requires dependence on a drug and that it does not extend protection to the use of drugs per se. Therefore, the voluntary user is not protected by the Act.

He further argued that there is a presumption that all legislation of Parliament is part of a coherent system. Thus, "disability" in the CHRA should be interpreted as being consistent with the Narcotics Control Act. In this way, he submitted, the CHRA should be interpreted as not extending protection to persons dependent on illicit drugs.

In support of this argument he cited Pierre André Côté, The Interpretation of Legislation in Canada, 2nd Edition (Les Éditions Yvon Blais, Inc., 1991) at p. 288 and p. 297.

He further referred to an American case Rothweil v. Wetterau, Inc. 820 S.W. 2d 557 (Mo. App. 1991) ("Rothweil") and Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs ("Standing Committee Minutes"), December 21, 1982 at 115:44.

In the alternative, counsel argued that if the Act does extend to those dependent on illicit drugs, it does not protect the right to use illicit drugs but only protects those who are dependent and are either rehabilitated or seeking rehabilitation. This he suggested is consistent with the interpretation of the Rehabilitation Act, 1973 in the United States which was cited by the then Minister of Justice in the Standing Committee Minutes, December 20, 1982 at 114:24.

The cases of Burka v. New York City Transit Authority 680 F. Supp 590 (S.D.N.Y. 1988) at pp. 599-600 ("Burka") and Barr v. Niagara Mohawk Power Corporation (New York State Division of Human Rights, unreported, September 22, 1993) were cited in support of this argument.

In addition, the interpretation which the Saskatchewan Human Rights Commission has applied to the Saskatchewan Human Rights Code was also cited as set out in Saskatchewan Human Rights Commission, "Commission Proposes Drug Testing Policy", Newsletter, (Vol. 18, no. 1, Spring 1989) at p. 7.

Further, in the alternative Respondent counsel submitted that if the Act does extend protection to those dependent upon an illicit drug and who are not in rehabilitation or seeking it, then the employer's only responsibility is to provide reasonable accommodation. To this end, and contrary to the argument of Commission counsel, he argues that, if there is discrimination, it is indirect or adverse effect discrimination in that the policy applies to all new and returning employees but has an adverse effect only upon those who use illicit drugs.

He submitted that there is a limit to the obligation to accommodate and relies upon the decisions of the Supreme Court of Canada in Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at p. 984 ("Renaud") and Re Ontario Human Rights Commission and Simpson-Sears Ltd., [1985] 2 S.C.R. 536 at p. 555 ("Simpson-Sears") to support that proposition.

Finally, in the alternative circumstances of a finding of direct discrimination, counsel argued that it is a bona fide occupational requirement to dismiss a drug dependent employee who will not seek rehabilitation.

He further submitted that since issues of honesty, integrity and trust are so important in the banking industry, the requirement that the employees not engage in illegal activity is a B.F.O.R.

6. ANALYSIS OF THE ISSUES

It is not necessary, in view of the disposition of this complaint, to address all of the arguments advanced in the hearing. However, given the importance of this matter to the parties and the community at large and given the thoroughness with which counsel presented their respective cases, the Tribunal decided to address all of the major arguments presented.

1) DOES THE ACT PROTECT ILLICIT DRUG DEPENDENCE?

As noted above, Respondent counsel argued that the CHRA should be interpreted as not extending protection to persons dependent on illicit drugs. The argument maintains that the Act should be viewed as part of a coherent system of legislation and consistent with the Narcotics Control Act.

The Tribunal, after reviewing the authorities relied upon, finds that American legislation in the field of human rights has not been accorded the same status as human rights legislation in Canada. The Supreme Court of Canada has, on a number of occasions, given human rights legislation a quasi-constitutional status.

In Insurance Corporation of British Columbia v. Heerspink [1982] 2 S.C.R. 145 ("Heerspink") at p. 157 and 158, Lamer J. states:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in a jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or some other enactment, it is intended that the Code supersede all other laws when conflict arises.(our emphasis)

...Indeed, the Human Rights Code, when in conflict with "particular and specific legislation" is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

On reading the Act, it is evident that there is no distinction made between licit and illicit drugs with respect to the protection provided to a drug dependent person. The Tribunal finds that the Act does provide such protection in both instances.

However, the Tribunal is also of the view that there is no conflict between the Narcotics Control Act and CHRA. The purposes of the two Acts are quite different from one another. The CHRA does not condone or protect the illegal activity of using illicit drugs. It does, however, protect a person who is afflicted with a drug dependency from being summarily fired from their employment. If they are indeed committing an illegal act, then, if convicted following due process, the Narcotics Control Act will provide the means of punishment. It is not for the employer to be the trier of fact and the enforcer of the criminal law.

2) HAS THE COMPLAINANT MADE A PRIMA FACIE CASE OF DISCRIMINATION ON THE PROHIBITED GROUND ALLEGED?

It is important to note that the testing requirement in the Bank's policy is not a pre-employment test but only comes into effect after the candidate for employment has been hired. Thus there is clearly no denial of employment before the actual hiring.

In practice, prospective employees are notified of the policy on the application form for employment and sign an authorization at that time. The form states:

I understand that acceptance of the terms and conditions of employment will include consent to be drug tested for illegal substances and agreement to abide by the Bank's conditions should my test results be positive. (Exhibit R-9)

The Tribunal finds that compliance with the Bank policy is a condition of employment. There is nothing in the CHRA to prohibit such a requirement. The notice regarding this condition is included with such other requirements as:

- receipt of at least three satisfactory written references;
- satisfactory completion of the probationary period;
- confirmation of medical fitness to perform the job, including a medical examination if necessary;
- enrolment in the Bank's longterm disability program; and
- authorization to obtain factual/credit and investigative/personal information regarding the employee from others.

A review of the evidence before the Tribunal shows that there are several points in the policy, as practised, at which the employee can face termination of employment:

- upon refusal to submit to a urine test;
- upon refusal to proceed to the next step following an initial positive test result or at any point throughout the process;
- upon a third positive test result following a counselling or rehabilitation program.

The Tribunal finds that when employment is terminated following the refusal of an employee to comply with the Bank policy, whether it be refusal to provide a urine sample or at any subsequent stage, the termination is for breach of a condition of employment and it is not necessary to look beyond that for a "perception of drug dependence".

This finding would seem to be supported by the statement regarding perceived drug dependence contained in the CHRC Policy 88-1 (Exhibit HR-1, Tab 2) which says:

In the absence of compelling evidence to the contrary, when an individual is treated adversely as the result of a "positive" test, it may be presumed that the employer perceived the individual as drug dependent.

The Commission policy would appear to contemplate that the perception of drug dependence may arise only where an employee is adversely treated after a positive test result.

However, where an employee does comply with the program and there are positive test results, it could lead to a different conclusion.

In the situation where the initial test is positive, the employee is not terminated, but is advised of the result, which is otherwise kept confidential by the Health Centre, and of the requirement of a further test. At this stage, there would appear to be no tendency towards denial of employment and the response of the Bank is at least as consistent with the stated concern about illegal substance use as with any perception of

dependence.

In the event of a second positive test result, (except in the case of cocaine, when referral follows the first positive test) the employee is still not terminated and is referred to a rehabilitation nurse and to an assessment centre. If the assessment indicates drug abuse or dependency, an appropriate counselling or treatment regime is prescribed.

Here we are not talking about a perception of drug dependence but an actual professional diagnosis. Still, the employee is not terminated but is supported throughout whatever treatment is prescribed, at the Bank's expense.

Whether the assessment determines that a need for treatment exists or not, a third test is required even for the persistent casual user. If the third test is positive, then steps are taken to terminate employment.

This termination following the third positive test takes place whether the assessment has indicated drug dependence or persistent casual use of an illegal substance on a non-dependent basis and is consistent with the stated policy of the Bank on the use of illegal substances.

The Tribunal finds that the ultimate dismissal is not based upon a perceived disability (drug dependence) but upon the persistent use of an illegal substance even though in some instances that may include a drug dependent person. Thus, the policy and practice of the Bank does not constitute discrimination on a prohibited ground under the CHRA.

3) IF THE TRIBUNAL ERRED IN FINDING NO DISCRIMINATION ON A PROHIBITED GROUND AND THERE IS DISCRIMINATION IN THIS CASE, IS IT DIRECT OR ADVERSE EFFECT DISCRIMINATION?

The law as it applies to cases such as this has evolved considerably over the past decade through successive decisions of the Supreme Court of Canada and the Federal Court. The Tribunal in the decision Thwaites v. Canadian Armed Forces, rendered on June 7, 1993, conducted a very thorough review of the law which is probably the most up-to-date analysis now available.

The Tribunal at the end of the analysis stated at p. 31:
The logical conclusion from this analysis is that there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination. The only difference may be semantic... In the case of direct discrimination, the employer must justify its rule or practice by demonstrating there are no reasonable alternatives and that the rule or practice is proportional to the end being sought. In the case of adverse effect discrimination, the neutral rule is not attacked but the employer must still show that it could not otherwise reasonably accommodate the individual disparately affected by that rule. In both cases, whether the

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operative words are "reasonable alternative" or "proportionality" or "accommodation" the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

Thus, the question of what type of discrimination this is may be less relevant than it once was.

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However, since the parties in this case advanced opposing conclusions as to the type of discrimination and argued that this would impact on the defence available, the Tribunal decided to address the question.

This Tribunal finds that if it had determined that the policy of the Bank discriminates against employees on the basis of a disability, perceived drug dependence, it would be adverse effect discrimination. The practice (or rule) applies equally to a whole class of employees (new and returning employees). Employment is denied only to a very small minority who test positive for an illicit drug on three successive occasions.

4) ACCOMMODATION

If this were a case of indirect or adverse effect discrimination, let us then examine whether the Bank made a reasonable effort to accommodate those adversely effected.

In the Alberta Dairy Pool case, following a discussion of the law, Wilson J. states at p. 517:

However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

Further, in canvassing some of the factors which might be helpful in determining undue hardship, she says at p. 521:

I begin by adopting those identified by the Board of Inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances.

In this case, when an employee tests positive in the first instance the Bank maintains the employee on the work force and requires a subsequent test. If the second test is also positive, the employee is then referred for assessment at a clinic and following assessment, is provided with whatever treatment is indicated - from counselling to a residential treatment program.

Throughout, the employee is continued on the employment roll and only after treatment and if the employee tests positive on a third test, is employment terminated.

It is stated in the Policy 88-1 of the Canadian Human Rights Commission (Exhibit HR-1, Tab 2), the Commission's drug testing policy, "The employer may, where reasonably possible, be required to avoid any discriminatory effect on the individual (i.e. reasonably accommodate the individual)." It goes on to explain:

Reasonable accommodation may include referring employees who test "positive" to an employee assistance program for assessment and, if needed, counselling and rehabilitation. The duty to reasonably accommodate has limits, however. For example, if the employer sends an employee on a rehabilitation program and the employee does not overcome his or her dependency, no further accommodation may be required.

This Tribunal finds that by referring the employees for assessment after a second positive test and by paying for whatever treatment is indicated and by maintaining the employee on the payroll, the Bank is making a reasonable effort to accommodate the employee.

The Bank is a large corporation and can be expected to make such an effort to accommodate where a small enterprise might find such a program would create severe economic hardship. However, to expect the Bank to continue beyond this treatment scheme which in some cases could continue over a period of some months from the time of engagement, during which time the employee could be completely non-productive, would be unreasonable and, the Tribunal finds, would create undue hardship.

(5) B.F.O.R.

If we are not correct either in finding no discrimination on a

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prohibited ground or in finding that any discrimination would be adverse effect discrimination and, in fact, this is a case of direct discrimination, then let us examine whether the Bank succeeded in establishing a B.F.O.R. defence.

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In Etobicoke, supra., at p. 208, McIntyre J. sets out the now familiar subjective and objective elements of the two pronged test required to establish a B.F.O.R.:

To be a bona fide occupational qualification, a limitation... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the

Code. In addition, it must be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned... In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of the employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.

In the 1988 S.C.C. decision in Brossard, supra. at p. 311, Beetz J. further refined the Etobicoke test as follows:

McIntyre J. suggested in Etobicoke that the purpose of the objective test is to determine whether the employment requirement is "reasonably necessary" to assure the performance of the job. In the case at bar, I believe that this "reasonable necessity" can be examined on the basis of the following two questions:

(1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question...

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The sixty-year mandatory requirement (sic) age in Etobicoke

was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength to do the job.

Wilson J. in Alberta Dairy Pool, supra. at p. 514 says:

> Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. ...Either it is valid to make a rule that generalizes about members of a group or it is not... If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the B.F.O.Q.

And Marceau J.A. in the Federal Court, Appeal Division in Levac, supra. at p. 475 in discussing the Alberta Dairy Pool judgement states:

> It may have rendered the defence of B.F.O.R. even less available than previously. Until now, the prevalent view, I believe, was that, to be justified, a bona fide occupational requirement had to be, as expressed in Etobicoke (at page 208), ...It seems from now on that it must be, not only "reasonably", but absolutely necessary, that is, it must be without any other workable, less stringent, alternative.

As indicated in the earlier factual summary and briefly referred to in the reference to the expert testimony the Bank cited a number of factors in justification of the introduction of the policy. One of the first mentioned in testimony was that with over 30,000 employees, they regarded their workforce as a microcosm of Canadian society and since there were problems in society generally and in schools and universities in particular with the abuse of illicit drugs, this was probably reflected in the Bank.

In addition, the Bank officials cited a concern about contact of employees with the criminal element in society. If they were using illicit drugs, it followed that they were obtaining them from persons who were breaking the law. Evidence was also adduced through expert witnesses which indicated that in both Canada and the United States people in conflict with the law had a high incidence of illicit drug use.

A further factor which was emphasized was the impact of illicit drug use on job performance. In support of this, they introduced through Dr. Michael Walsh two reports prepared by Personnel Research and Development Branch, Office of Selection and Evaluation based upon data

collected in the pre-employment drug testing programme of the United States Postal Service (Exhibit R-48 and R-49). This was further supported by Dr. Jacques Normand. These reports demonstrated a correlation between a positive result in the pre-employment drug test and problems in job performance on a number of parameters.

With respect to the subjective element in the test set out in Etobicoke, this Tribunal is prepared to find that the Bank officials meet the requirement of acting honestly, in good faith and in the sincerely held belief that the policy is in the interests of the adequate performance of the work involved.

However, when we turn to the objective element we must examine the rational connection between the policy objective and the performance of the job or the "reasonable necessity" which Beetz J. addressed in Brossard.

As Beetz J. expressed it, this entails first examining the appropriateness in an objective sense of the employers purpose in establishing the requirement and then examining the method chosen by the employer to test for that requirement.

We can be further guided in this by the test set out by Wilson J. in the Alberta Dairy Pool case in that if the general requirement can be justified at all, it must be justified by its general application to all of the members of the group.

The Tribunal is of the view that the Bank acted on some very impressionistic assumptions. There is no substantive evidence to show that the Bank employees constitute a microcosm of Canadian society. If you look at factors such as education, gender distribution, career motivation, age, etc. you might well find that the Bank employee population differs substantially from the general population. There is no evidence that the Bank employees approximate a statistically valid sample of the greater population.

No research was done among the population of Bank employees to support the impressionistic assumption that there might be a drug problem among them sufficient to justify the introduction of such a policy.

Furthermore, while there is some evidence that people in treatment for drug abuse (Canada) and people arrested (U.S.A.) demonstrated a correlation between crime and drug use, no causal relationship was established. In fact, only one case was mentioned, in evidence, of theft by a Bank employee

who was drug dependent and that person was a management employee who would not have been subject to this policy.

It is also noteworthy that during an 18 month period there were 57 incidents of theft by Bank employees - none linked to the use of drugs.

The reports based on the study by the United States Postal Service clearly showed a correlation between a positive drug test and job performance in a number of areas. The impact of drugs on job performance was further substantiated by the evidence of Dr. Negrete. The Tribunal accepts this evidence but, in the absence of evidence showing a problem within the Bank employee group, fails to see how it could assist in substantiating a B.F.O.R. in this case.

There was no evidence to show any demographic correlation between the

postal service employees and Bank employees or societal comparisons which would justify extrapolating the data and drawing any inferences with respect to Canadian bank employees. In fact, after over two years of testing producing several thousand test results, indications are that the incidence of drug use among new and returning Bank employees is very low.

This is clearly a case where the employer's concern is economic whether it be a concern about theft, employee productivity or the reputation of the Bank. It does not involve any "unusual dangers to employees or the public". Thus with reference to the words of McIntyre J. in Etobicoke, it may be difficult if not impossible to demonstrate that such a mandatory requirement (drug testing) may be imposed without regard to individual capacity of the employee to perform the job requirements.

Furthermore is this policy "reasonably necessary" to assure the efficient and economical performance of the job? Surely, as the Bank operates overall, it demonstrates that it is not. The majority of employees are not subject to the mandatory drug testing policy and those who are, if they test negative on the first test or otherwise get through the initial testing program are not subject to further testing unless, based upon the observation of a supervisor, there is a reasonable ground to suspect a problem.

If mandatory testing were reasonably necessary as a means to assure job performance, employee health or freedom from criminal activity, then surely it would be necessary on a regular basis for all employees not just once in the career of some employees when they first accept employment.

In applying the Brossard test, if we assume that the employer's purpose is to eliminate illicit drugs from the employee population because of the impact they might have upon job performance, this Tribunal finds that this is an appropriate purpose.

On the other hand, if we examine the concern relative to the connection with the criminal element and the risk of such things as money laundering we find little evidence before us to support this concern. If the concern is that the employee is engaging in a criminal act by using illicit drugs, that is a matter for concern but also a matter for the law enforcement officials.

In examining the reasonableness of the method chosen by the employer, this Tribunal finds that the method - namely mandatory urinalysis - is intrusive. As a blanket policy, it does represent a major step in the invasion of the privacy of many individuals in the employment field. This method could only be seen as reasonable in the face of substantial evidence of a serious threat to the Bank's other employees and the public, its customers.

Clearly, the evidence is not there to support this. The Bank did not act upon evidence of a problem but upon impressions and some evidence from other sources, much of it from the United States bearing little relevance

to the actual circumstances in the Bank.

If observation works for the majority as a method of individual assessment even though evidence indicated it was imperfect, why not for the new and returning employees also? It is at least noteworthy that no other Canadian bank has such a policy and the Canadian Bankers Association has not found it necessary to take a policy position on the matter.

Thus, the Tribunal finds that if a B.F.O.R. defence were available to the Bank in this case, it would fail.

(6) THE CHARTER

Within the Constitution Act, 1982, section 8 of the Canadian Charter of Rights and Freedoms reads:

s. 8 Everyone has the right to be secure against unreasonable search and seizure.

Furthermore, under the heading Application of Charter the Act provides:

s.32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In the matter before us, the complaint relates to the policy of a private sector corporation, the Bank, as it impacts a group of the corporation's employees. On reading The Charter, it would not appear to apply since not Parliament nor the government nor any agent thereof is directly involved.

However, as noted above, Commission counsel argued that this Tribunal is an agent of the state and thus must not make an order which would have the effect of permitting an infringement upon the protection afforded by section 8 of The Charter. Thus he asserted, the Tribunal could not, for example, make a finding that the Bank's drug testing policy is a B.F.O.R. and dismiss the complaint.

In Dyment, supra., which was one authority cited, a blood sample taken by an attending physician, without consent, from a driver injured in an automobile accident was subsequently given to the investigating police officer who had neither requested that it be taken nor had a warrant. Testing showed the sample to contain above the legal alcohol limit and resulted in a conviction.

The Supreme Court of Canada found that the action of the officer was an unreasonable seizure and an infringement of section 8 of The Charter. The evidence was thus found to be inadmissible.

However, La Forest J., in the decision states at p. 431:

As I see it, the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent.
(Emphasis added).

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He further states on the same page, "...Section 8 was designed to protect against actions by the state and its agents."

It is clear in Dyment that the police officer is an agent of the state engaged in carrying out his duties. The focus is upon the action of the police officer and not upon the doctor who took the sample without consent. The doctor's actions might be a breach of ethics but they are not, in themselves, covered by The Charter since he is not an agent of the state.

In Slaight, supra., an adjudicator was appointed under s. 61.5(6) of the Canada Labour Code to hear a complaint of unjust dismissal. He made two orders: the first was that the employer prepare a letter of recommendation setting out certain information stipulated in the order; the second was a direction that the employer not respond to requests for further information about the employee other than by providing a copy of the letter. The employer appealed on the grounds that the order infringed his freedom of expression guaranteed by s. 2(b) of The Charter.

The S.C.C. noted that the adjudicator was a statutory creature and derived all his powers and authority from the statute. Thus, in the words used in Dyment he acted as a "public authority" or an "agent" of the state.

It is important to note, however, that in Slaight the offending act was a direct act of the public authority. The order, standing on its own was an infringement of The Charter. It did not simply make a neutral or objective finding with respect to the actions of a private individual. The order itself restricted the freedom of the individual and infringed The Charter.

The Tribunal finds that the circumstances in this hearing are easily distinguishable from those in both Dyment and Slaight. In Dyment, the offending action was a direct act of an agent of the state, a police officer. In Slaight, again the offending order was a direct act of an agent of the state. However in the case before us, the policy in question is that of the Bank, a private sector corporation and although the Tribunal is a creature of statute and would as in Slaight, be unable to make an order directly infringing one's Charter rights it is here simply carrying out its statutory mandate to adjudicate.

Some elements of this issue are very similar to those in the case of Dolphin, supra. In the decision of the S.C.C. at p. 598, McIntyre J. is discussing this very issue with respect to the courts. He states:

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is involved in public or private litigation.

He continues at p. 599:

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The element of governmental intervention necessary to make the Charter applicable in an otherwise private action is difficult to define.

And further at p. 600:

The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of the Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view this approach will not provide the answer to the question. A more direct and more precisely defined connection between the element of government action and the claim advanced must be present before the Charter applies.

In Dolphin, the action in question was a more direct intervention by the court than is contemplated in this case by counsel's argument. Dolphin involved an injunction granted by the court against secondary picketing. Here all that would be contemplated is an objective finding about the acts of private persons.

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This Tribunal finds much in the words of McIntyre J. helpful. If we were to find that the testing and the subsequent use of the results did not constitute a B.F.O.R. under the CHRA, that finding and an order dismissing the complaint would surely not be sufficient intervention by the state to convert a private act not covered by The Charter to an infringement of The Charter.

Otherwise, this Tribunal, acting simply as a neutral adjudicator, would become the agent for the extension of The Charter to all private matters referred to it for adjudication.

In all of the other cases cited: Southam, supra.; Joyceville, supra.; and Dion, supra., the offending act was a direct act of an agent or agency of the state and distinguishable on that ground.

Thus, although the Tribunal is bound by The Charter, it does not apply in this case so as to restrict our authority to make any neutral, objective finding and subsequent order provided that the order, standing on its own, does not infringe The Charter.

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7. ORDER

For the reasons stated above, the Tribunal finds that the complaint has not been substantiated and is therefore dismissed.

DATED IN OTTAWA ON THIS 13th DAY OF JULY, 1994.

Keith C. Norton, Q.C., Chairperson

DATED IN OAKVILLE ON THIS 14th DAY OF JULY, 1994.

Judith H. Alexander, LL.B., Member

DATED IN TORONTO ON THIS 18th DAY OF JULY, 1994.

J. Grant Sinclair, Q.C., Member