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# Privacy in Employment

## Case Study

Thompson v Swann and CUPE  
(Ontario Superior Court)



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# Privacy in Employment

A note on drug and alcohol testing

Why the privacy analysis is better

*W. v. Canadian National Railway*

*Random alcohol testing as a term of reinstatement following on-the-job intoxication does not treat employee as an alcoholic.*



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## Drug and Alcohol Testing

- Has been looked at through the Human Rights lense (assumption: must be a disability)
- Test: BFOR
  - 1) tests are adopted because there is a rational connection to the job
  - 2) tests are honestly **believed** as necessary to fulfill the legitimate work-related purpose
  - 3) tests **are** reasonably necessary to accomplish the legitimate purpose (i.e. that it is impossible to accommodate through something other than a blood or alcohol test)



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# Drug and Alcohol Testing

- Issues about Drug and Alcohol testing:
- Alcohol
  - Breath
  - Detects current impairment
- Drugs
  - Blood or urine
  - Detects presence of narcotics
    - Not necessarily current impairment



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# Drug and Alcohol Testing

- The Privacy Lens
  - More appropriate lens than making presumption of disability
  - Cases to date recognize that what's at stake is privacy:
    - Involves bodily integrity and some nudity
    - Ensuring no tampering means even less privacy (being watched)
    - Discovers other things (pregnancy etc)
    - False positives and their effect on the employee



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# Drug and Alcohol Testing

- The Privacy Test
- Usually two parts
  - Is it *reasonable*
  - Is there consent (in employment situations, the consent requirement is generally either not present or there is implied consent)
- To determine if it is a reasonable invasion of privacy:
  - 1) Is the test demonstrably necessary to meet a specific need
  - 2) Is the test likely to meet that need
  - 3) Is the loss of privacy proportional to the benefit gained
  - 4) Is there a less privacy invasive way of achieving the desired result



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Questions / Discussion