LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL

SUBMISSION TO THE CNSC

REGDOC -2.2.4: FITNESS FOR DUTY

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OVERVIEW

The Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers'") oppose the regime of unnecessary intrusions into employee rights and freedoms being proposed by the Canadian Nuclear Safety Commission (CNSC) in REGDOC-2.2.4.

The CNSC is proposing that nuclear facilities, as a condition of their licensing, carry out intrusive, invasive and degrading screening of all employees deemed to occupy safety sensitive positions, including drug and alcohol testing as well as medical and psychological evaluations. The screening will occur not only where there is reasonable cause to suspect an issue with an employee's fitness for duty, but in some cases as an arbitrary precondition of accessing the work site, periodically at intervals, and/or randomly and indiscriminately. Undefined "duly qualified health professionals" will act as gatekeepers to employment, with seemingly unilateral power to decide whether or not employees are fit to work. There are thousands of employees potentially affected by these requirements, including thousands of senior employees who have worked in the industry for decades without incident.

While the problems with this proposal are manifold, the Labourers will focus on three, which are briefly summarized here and elaborated upon below.

First, the proposal is not only extreme and draconian; it is unnecessary. No problem requiring invasive employee testing exists or is even claimed to exist by the CNSC. It is startling that an agency created for its scientific expertise would promote a policy where there is no evidence of drug or alcohol abuse or psychological/medical problems at nuclear plants, no evidence of safety issues caused by substance use or psychological/medical problems, and absolutely no

evidence that drug, alcohol or psychological or medical testing improves safety. The policy is clearly not evidence based; it appears to reflect an ideological mission on the part of CNSC.

In this regard, the proposal disregards the measures taken by the workplace parties themselves (trade unions and employers) in maintaining and promoting a culture of safety in the industry. It fails to take into account policies already in place at nuclear plants, the purpose and importance of collective bargaining, and arbitral and court authorities who have consistently struck down policies such as those that the CNSC proposes. It demonstrates a total lack of respect for nuclear workers and their work environment.

Second, the proposal is substantively unreasonable, unbalanced, immoral, and wrong. It runs contrary to the principles recently confirmed by the Supreme Court of Canada, namely that a unilaterally imposed policy of mandatory random testing for employees is an unjustified affront to the dignity and privacy of employees unless there is evidence of a general problem with substance abuse in the workplace (which there is not). It is therefore vulnerable to a challenge under the *Canadian Charter of Rights and Freedoms* (including the protection against unreasonable search and seizure in s. 8), human rights legislation and privacy statutes. It also cannot be reconciled with the core values of the Government of Canada, including its commitment to evidence-based policy, the promotion of human rights and freedoms, and respect for democratic and collective bargaining processes. Indeed, in an analogous context, this Government has specifically promised to review unreasonable restrictions on the rights of citizens enacted by the previous administration under the guise of promoting collective security. The same kind of review is warranted here.

Third, the proposal ignores important feedback received through a prior consultation held in 2012, the validity of which was subsequently confirmed by recent developments in the jurisprudence, including a 2013 ruling by the

Supreme Court of Canada. For the CNSC to persist in even considering such a policy in the face of these developments is unprofessional and does not befit a commission mandated to act in the public interest.

In light of all this, it is the Labourers' position that the entire proposal must be set aside and these consultations terminated. There is nothing worth preserving in this indefensible attack on nuclear workers. If it is considered necessary for the CNSC to adopt some sort of fitness for duty policy, then it must be redrafted in a manner that accounts for fundamental employee rights, as recognized in the recent jurisprudence, as well as the measures that are already in place to safeguard employee and public safety. The revised policy should then be subject to meaningful consultation with the parties most affected by it, namely nuclear industry employees themselves and the trade unions that represent them.

SAFETY MEASURES ALREADY APPLICABLE TO MEMBERS OF THE LABOURERS' IN THE NUCLEAR INDUSTRY

The Labourers' represent approximately 100,000 employees in Ontario, working mostly, but not exclusively, in the construction industry.

There are three Labourers' locals that represent members employed in Ontario's nuclear industry. Local 183 represents approximately 350 employees working for various employers in the Darlington nuclear plant in Bowmanville, Ontario. Local 1059 represents approximately 150 employees working for various employers in the Bruce nuclear plant in Tiverton, Ontario. Local 506 represents approximately 55 employees working for various employers in the Pickering nuclear plant in Pickering, Ontario.

Employees represented by the Labourers' perform construction and/or maintenance work in all areas of the nuclear facilities in question, including inside reactors where exposure to radiation is a reality.

All members of the Labourers' employed in nuclear facilities are governed by the collective agreement between the Labourers' and the Electrical Power Systems Construction Association (EPSCA) ("the Collective Agreement"). Article 8 of the Collective Agreement provides for a referral system, through which members of the Labourers' are referred by the Union for employment in response to an employer request.

A number of safety measures are implemented through the referral system. For example, pursuant to a Letter of Understanding (LOU) appended to the Collective Agreement, it is agreed that "prior to any member being referred for employment under this agreement, the member must submit to a security check. Only members who successfully obtain security clearance will be referred for employment." The security check referred to in the LOU is administered by the facility owners and conducted by CSIS and the RCMP. All nuclear industry employees, both unionized and non-unionized, must undergo this security check.

Further, it is an internal requirement of the Labourers' that, in order to be referred to any employer, members must complete specific in-house safety and skills training, provided at the Labourers' own training facilities. The training offered by the Labourers' is known for being comprehensive, high-quality and up-to-date.

In the most recent round of bargaining between the Labourers' and EPSCA, the parties negotiated a new classification for work-ready referrals entitled "Nuclear Qualified Worker" (NQW) who will be subject to specific training through the Electric Power Research Institute (EPRI) (see Appendix to Collective Agreement). The NQW classification is being implemented over a period of two years.

The Labourers' also administer their own health benefit plans, which are notably progressive and comprehensive. These plans provide, among other benefits, significant supports for members struggling with addictions and other mental or physical health problems, including access to rehabilitation centres and counseling by a psychologist or other mental health practitioner.

In addition to the protections described above, all nuclear industry employees, including members of the Labourers', are subjected to a broad array of safety protections and requirements. Most nuclear industry jobs require an "orange badge," which is granted on the completion of extensive computer training on nuclear plant safety. Each plant and/or employer also has fitness for duty policies and/or practices, through which employees are encouraged to report any issues to their supervisors and to self-refer to the appropriate community or company resources. Supervisors and managers, for their part, are instructed on how to recognize and appropriately address fitness for duty issues amongst their staff.

Notably, in the most recent round of collective bargaining, none of the EPSCA employers saw a need to propose mandatory drug, alcohol, medical or psychological testing in collective bargaining. This indicates that the parties view the current safety requirements, resources, practices and culture sufficient to ensure a safe work environment.

SUMMARY OF REGDOC-2.2.4 - FITNESS FOR DUTY

REGDOC-2.2.4 is a proposed regulatory framework for mandatory medical, psychological, drug and alcohol testing in Canada's nuclear industry.[1] The proposed regulation would require all licensees to implement mandatory medical,

[1] *Human Performace Management/Fitness for Duty,* REGDOC-2.2.4 (CNSC: November 2015) ["REGDOC-2.2.4"]

psychological, drug and alcohol testing for all employees in positions deemed to be safety sensitive.

The proposed framework would apply to three main categories of safety-sensitive work: 1. minimum staff complement and licensee identified safety-sensitive positions; 2. certified workers; and 3. security personnel. The testing requirements for the first two categories are very similar. Security personnel, however, are subject to more types of testing and more frequent testing. This submission will focus primarily on the testing requirements applicable to the first two categories (minimum staff complement and licensee identified safety-sensitive positions as well as certified workers), as these categories potentially includes members of the Labourers', and certainly the vast majority of nuclear industry employees.

The proposal would require mandatory drug and alcohol testing for employees falling into any of the categories of safety sensitive work not only where there is reasonable cause to suspect impairment, but as a precondition for accessing the work site,[2] and subsequently on a random and arbitrary basis.[3] Urinalysis would be the proposed method for drug testing; breath testing would be used to detect alcohol.[4] In the event of a positive drug or alcohol test, it is contemplated that the worker "shall be removed from safety-sensitive duties and referred to the EAP."[5] The employee cannot be considered for reinstatement to safety-sensitive duties until a recommendation for reinstatement has been received from a "duly qualified health professional."[6]

As well, medical testing would be required with respect to all categories of safety-sensitive work not only on a "for cause" basis, but as a precondition for accessing

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[2] REGDOC-2.2.4 ¶4.6.1
[3] REGDOC-2.2.4 ¶4.6.4
[4] REGDOC-2.2.4 ¶5.4
[5] REGDOC-2.2.4 ¶5.4.3
[6] REGDOC-2.2.4 ¶5.4.3

the worksite and periodically at an interval to be determined by the licensee.[7] For employees falling into the first category (minimum staff complement and licensee identified safety-sensitive positions), psychological testing would be carried out only for cause,[8] but for the second and third categories (certified workers and security personnel such testing is also required as a precondition of access.[9] The proposed regulation would require that the medical assessment be conducted by a "duly qualified medical practitioner"[10] and that psychological testing be conducted by a "duly qualified psychologist" on the basis of "an interview and one or more tests."[11]

BACKGROUND TO REGDOC – 2.2.4

In April of 2012, the CNSC released an initial discussion paper entitled "Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing"[12] in which the CNSC proposed a drug and alcohol testing regime that nuclear facilities would be required to implement as a licensing condition. Under this regime, drug and alcohol testing would be performed not only "for cause" on individuals suspected of being unfit for duty, but on all persons with unescorted access to the protected areas of nuclear power plants.[13] Testing would occur prior to placement (known as "pre-access testing") and then randomly at regular intervals.[14]

A number of stakeholders, including the Labourers' and other nuclear industry trade unions, filed submissions and evidence with the CNSC setting out serious

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[7] REGDOC-2.2.4 ¶4.3.3
[8] REGDOC-2.2.4 ¶4.4.3
[9] REGDOC-2.2.4 ¶4.4.1 and 4.4.2
[10] REGDOC-2.2.4 ¶5.1
[11] REGDOC-2.2.4 ¶5.2
[12] *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing,* Discussion Paper DIS-12-03, Edition 1.0 (CNSC: April 2012) ["DIS-12-03"]
[13] DIS-12-03 ¶6.1
[14] DIS-12-03 ¶6.3

concerns about the necessity and legality of the proposed policy.[15] The case law decided up to that point had already established that mandatory alcohol and drug testing is a serious invasion of employee privacy, dignity and equality, requiring a rigorous standard of justification even in dangerous workplaces.[16] Drug or alcohol testing of individuals may be carried out where the facts give an employer reasonable cause to do so; but random, unannounced drug testing of employees is inimical to the very concept of reasonable cause. Such testing may only be justified where an employer can demonstrate compelling evidence of a widespread substance abuse problem in the workplace that cannot be addressed by less invasive measures. These principles were established and confirmed in a 2006 arbitration award known as *Imperial Oil,* which was upheld as reasonable by the Ontario Court of Appeal. To quote from the award:

> [A] key feature of the jurisprudence in the area of alcohol or drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced testing for all employees in a safety sensitive workplace as being an implied right or management under the terms of a collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated. It is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices.[17]

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[15] See for example *Submissions of the Labourers' International Union of North America, Ontario Provincial District Council to the Canadian Nuclear Safety Commission* (August 30, 2012); *Submissions of the Power Workers' Union to the Canadian Nuclear Safety Commission* (August 28, 2012)

[16] See for example *Imperial Oil Ltd. and C.E.P. Local 900* (2006), 157 LAC (4th) 225 (M. Picher), upheld in 2009 ONCA 420 (CanLII) ["*Imperial Oil*"]; *Entrop v. Imperial Oil Ltd.,* 2000 CanLII 16800 (ONCA) ["*Entrop*"]; *Trimac Transportation Services – Bulk Systems and T.C.U.* (1999), 88 LAC (4th) 237 (Burkett); *Re Sarnia Cranes and I.O.U.E., Local 973,* [1990] OLRB Rep. May/June 479 (Shouldice); *Greater Toronto Airports Authority v. PSAC, Local 004,* 90 CLAS 177 (Devlin); *Re Canadian National Railway Co. and Canadian Auto Workers* (2000), 95 LAC (4th) 341 (M. Picher)

[17] *Imperial Oil* ¶101

> It may well be that the balancing of interests approach, which we favour, would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of 'for cause' justification.[18]

The unions and others stressed that there was no evidence of any substance abuse problem in the nuclear industry. To the contrary, the CNSC openly acknowledged that "[t]his initiative is not in response to any "evidence of safety issues related to FFD or substance use in Canada's nuclear industry."[19]

Some of the stakeholder unions also filed a report from Scott MacDonald, an expert in the field of substance use and drug and alcohol testing.[20] Dr. MacDonald confirmed that drug tests cannot identify whether employees are under the influence of a drug at the time of the test and therefore cannot be used to identify those unfit for duty. More generally, he concluded that that drug testing has not been scientifically shown to improve work safety. These conclusions have not been refuted or even challenged. To the contrary, they were essentially conceded by the CNSC's own expert, Barbara Butler, who acknowledged as follows:[21]

> [t]here has been limited research concerning the effectiveness of workplace policies that include testing. The committee that chaired a review on drugs and the American workforce in 1994 noted that preventative effects of drug testing programs have never been adequately demonstrated. This is not to say that the programs are not effective, but rather there has been insufficient research to prove or disprove that they work.

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[18] *Imperial Oil* ¶127
[19] DIS-12-03, pp. 3-4
[20] McDonald, Scott. *Submission to the Society of Energy Professionals and the Power Workers' Union/Comment on the Canadian Nuclear Safety Commission discussion paper Fitness for Duty: Proposals for strengthening alcohol and drug policy, programs and testing* (August 10, 2012)
[21] Barbara Butler and Associates, *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry* (CNSC, March 2012)

Since the 2012 consultations were held, the jurisprudence evolved further to confirm the validity of these principles and facts.

In particular, in 2013, the Supreme Court of Canada (SCC) issued its decision in *Irving Pulp and Paper,*[22] in which it ruled that a unilaterally imposed policy of mandatory random alcohol testing[23] for employees constitutes an unjustified affront to the dignity and privacy of employees, even in a dangerous workforce. The SCC confirmed that employees enjoy an inherent right to privacy in the workplace,[24] and endorsed as "unassailable" the view that alcohol or drug testing by urine, blood or breath sample "'effects a significant inroad' on privacy" and that "'the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity."[25] The SCC confirmed that safety considerations in the workplace do not in and of themselves justify random testing. Rather, random testing is only justified by evidence of a drug or alcohol problem in the workplace which cannot be addressed by less invasive means. In reaching its conclusions, the SCC endorsed and relied heavily upon the *Irving Oil* arbitral award quoted above. To quote from the decision:[26]

> A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can

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[22] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* 2013 SCC 34

[23] The policy considered by the SCC in *Irving Pulp & Paper* did not provide for random drug testing; however, the principles established in *Irving Pulp & Paper* are equally, if not more applicable to drug testing (see discussion of recent arbitral jurisprudence that follows).

[24] In *Irving Pulp & Paper,* the SCC expressly rejected the notion that employee privacy rights do not exist in the workplace unless specifically bargained. Indeed, the right to privacy in the workplace was seem as so axiomatic by the SCC that such an "extraordinary incursion into the rights of employees as random testing had to be "expressly and clearly negotiated" and could not be inferred solely from a general management rights clause" (¶33). See also *R v. Cole,* 2012 SCC 53 ¶8-9; E. Phillips, *The Changing Dimensions of Privacy in the Workplace: Legal Rights and Labour Realities* (2015), 18 CLELJ 467

[25] *Irving Pulp & Paper* ¶49-50

[26] *Irving Pulp & Paper* ¶4-6

> impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. **The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.**
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> This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> **But a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.** This body of arbitral jurisprudence is of course not binding on this Court, but it is nevertheless a valuable benchmark against which to assess the arbitration board's decision in this case [emphasis added].

Applying the arbitral benchmark to the facts before it, the SCC did not find that there was a general problem of substance abuse in the workplace under consideration. In this regard, the SCC found that the eight alcohol-related incidents over the course of 15 years did not reflect a significant problem with alcohol abuse. The SCC concluded that the policy before it constituted an unreasonable exercise of management rights, contrary to the collective agreement.

The principles established *Irving Pulp and Paper* have been applied in recent arbitral jurisprudence.

For instance, in *Mechanical Contractors Association Sarnia,* [27] arbitrator Surdykowski confirmed that the *Irving Pulp and Paper* principles apply to pre-access drug and alcohol testing as well as random testing. The arbitrator held that a unilaterally-imposed policy of pre-access drug and alcohol testing constituted an unreasonable exercise of management rights as well as a violation of the *Human Rights Code.* The arbitrator noted the SCC's admonition that the dangerous nature of the workplace does not automatically justify mandatory random testing; the employer must demonstrate an actual problem with drugs or alcohol that creates "a real potential for significant negative workplace health and safety events" and that testing will probably improve workplace safety. To quote from the award:[28]

> Our labour relations justice system is as reasonable and probable cause-based as the other components of our civil law and litigation system. It is evidence-based, not faith or belief-based. Accordingly, assumptions, unsupported presumptions, anecdotal or unparticularized evidence, and broad-based statistical inferential reasoning is typically "not good enough" to satisfy the balance of probabilities onus of proof. The extent to which an employer can require an employee to undergo alcohol and drug testing will depend on the degree of safety sensitivity and demonstrated (not presumed) legitimate need in the particular workplace. The evidence sufficient for the purpose will depend on the circumstances of the particular case, but it must in any event always include cogent direct non-anecdotal evidence from that workplace. The employer must also establish that the rule or policy will probably improve workplace health and safety. Uncertain or speculative health and safety gains do not justify a significant invasion of employee privacy. The resulting threshold may be a high one, but the Supreme Court of Canada in *Irving Pulp & Paper, Ltd.* has made it clear that that is the way it should be, particularly when fundamental individual privacy rights are in the balance.

In *Suncor Energy Inc.,*[29] the arbitrator held that a policy of random and alcohol and drug testing constituted an unreasonable exercise of management rights.

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[27] *Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada,* 2013 Canlii 54951 (Surdykowski) ["*Mechanical Contractors Association Sarnia*"]
[28] *Mechanical Contractors Association Sarnia* ¶127
[29] *Unifor, Local 707A v Suncor Energy Inc,* 2014 CanLII 23034 (Hodges) ["*Suncor*"]

Even though the workplace in question was dangerous (oil sands), the arbitrator did not find evidence of a significant problem with respect to the use of alcohol in the workplace. Drug testing, for its part, could not be justified due to its failure to gauge present impairment. To quote from the award:[30]

> a urinalysis test is simply unable to provide an employer the specificity of information necessary with respect to impairment or influence by drugs – whether by acute or sub-acute effects – at the time the test is taken. The evidence offered in this case is not compelling. As such, the interest in 'red flagging' an employee who has 'recently used' drugs does not meet the threshold of a legitimate business interest which would justify the significant intrusion into privacy which a demand for urine entails, even were we to determine significant or serious safety concerns existed in this bargaining unit, in this workplace.

In this regard, the arbitrator noted that "[n]o decision in this country has allowed random drug testing."[31]

In reaching his conclusions, the arbitrator in *Suncor* considered and rejected the evidence of Barbara Butler, the same consultant whose opinions formed the basis for the CNSC's proposed policies. The arbitrator noted the following with respect to Ms. Butler's expertise, findings, and opinions:[32]

> Ms. Butler is a consultant on workplace alcohol and drug policy development and implementation. I accept that she is an expert for such policy purposes. However, there is nothing in her will say statement or background which suggests that she is an expert in statistics or sociology. With respect, there is very little in Ms. Butler's report which assists the SCA. Assuming that one can extrapolate the CAMH general population alcohol and drug use statistics to the SCA Member Employer workforce (something which is far from clear that Ms. Butler is qualified to express an opinion on, or which is apparent from the evidence before me), I am not satisfied that anything in the will say evidence suggests that there is a need for privacy invasive pre-access alcohol and drug testing on any Suncor work site in the Sarnia area. Nor does Ms. Butler make a case for pre-access testing effectiveness. Read as a whole, her report pays scant

[30] *Suncor* ¶343
[31] *Suncor* ¶240
[32] *Suncor* ¶202

> attention to employee privacy considerations and does little more than offer an opinion that it is desirable from a policy point of view to include pre-access alcohol and drug testing as part of a comprehensive alcohol and drug policy [emphasis in original].

At the same time, the arbitrator accepted and relied upon the evidence of Scott MacDonald, the same expert who filed a report with the CNSC in 2012 in response to DIS-12-03. Mr. MacDonald had testified before the tribunal in Suncor, as he did before the CNSC, that there is no evidence that mandatory drug and alcohol testing identifies individuals who are unfit for duty or improves safety. With regard to Mr. MacDonald's expertise and evidence, the arbitrator states as follows:[33]

> We prefer the more specific evidence of Dr. Macdonald [to the evidence provided by the employer's experts]....Dr. MacDonald's report and testimony thoroughly reviewed the methodological issues at play in this area of research and explained the validity or lack thereof of research outcomes. His report provides the most thorough analysis of the issues...]

Thus, there can now be no doubt, if there ever was, that a unilaterally-imposed policy of mandatory pre-access or random drug or alcohol testing constitutes a serious invasion of employee privacy and human rights that can only be justified in the rarest of circumstances, where there is compelling evidence of a rampant and out-of-control drug or alcohol problem in the workplace in question, as well as evidence to support the view that drug and alcohol testing will solve that problem.

Despite this history, in November 2015, the CNSC released REGDOG-2.2.4, a revised "fitness for duty" proposal that, while more nuanced in scope, retains pre-access and random drug and alcohol testing as one of its central features (see description above).

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[33] *Suncor* ¶126

The CNSC has also inexplicably broadened its proposed fitness for duty regime to include medical and psychological testing of all employees working in positions deemed to be safety-sensitive. In doing so, the CNSC purports to have "incorporated the content of RD-363, *Nuclear Security Officer Medical, Physical and Psychological Fitness.*"[34] However, as its title would imply, RD-363 applied exclusively to nuclear security officers, who play a role akin to police officers in nuclear facilities. Among other factors that make them unique, nuclear security officers are armed. While the case for psychological and medical screening of security officers may be made, the CNSC has offered no explanation whatsoever for its decision to apply some of the principles in RD-363 to the thousands of nuclear industry employees who are not security officers.

CONCERN #1: A FITNESS FOR DUTY REGULATION IS UNNECESSARY AND COUNTERPRODUCTIVE

REGDOC-2.2.4 is a solution in search of a problem. There is simply no evidence of any problem demanding any regulatory response, let alone such a severe and draconian one. To the contrary, the proposed regulation ignores the safety culture that already prevails in the industry, and would undermine the collective bargaining structures through which this culture is fostered and promoted.

As noted above, the CNSC admitted, in 2012, that the predecessor to REGDOC-2.2.4 "is not in response to any "evidence of safety issues related to FFD or substance use in Canada's nuclear industry."[35] It has not claimed, nor is it the case, that any such evidence has emerged since 2012. Nor is there any evidence of any sort of medical or psychological issues that are preventing nuclear industry employees from performing their jobs safely.

That there are no widespread fitness for duty problems in Canada's nuclear industry comes as no surprise to the Labourers'. The industry is heavily

[34] *Fitness for Duty, supra* fn 1, p. i.
[35] DIS-12-03, pp. 3-4

unionized and governed by many mature collective bargaining relationships. It is through these relationships that a safety culture is promoted. Specifically, fitness for duty issues are identified and addressed by the parties most closely affected by them, and appropriately balanced against considerations of employee dignity, privacy and human rights, just cause, and reasonableness.

As noted above, Labourers' collective agreements already include protections that ensure members referred to safety-sensitive positions are fit for work. The Labourers' have also implemented, on their own initiative, a number of services and supports for members struggling with addictions and other physical or mental health issues. If and when new fitness for duty issues emerge, solutions to those issues can be negotiated through the collective bargaining process. Where disputes arise as to the scope of existing protections, grievance arbitration affords a means of dispute resolution. As detailed in the Background section above, a rich arbitral jurisprudence has already been generated with respect to the very forms of employee screening mandated by the policy, and specifically, the extent to which it is reasonable for employers to exercise their "management right" to require drug, alcohol, medical or psychological testing.

In *Irving Pulp & Paper,* the SCC specifically recognized the fundamental role that collective bargaining plays in striking an appropriate balance between public safety considerations and privacy. To quote from the decision:[36]

> But the reality is that the task of negotiating workplace conditions, both on the part of unions and management, as well as the arbitrators who interpret the resulting collective agreement, has historically — and successfully — included the delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy. Far from leaving the public at risk, protecting employees — who are on the front line of any danger — necessarily also protects the surrounding public. To suggest otherwise is a counter-intuitive dichotomy.

[36] *Irving Pulp & Paper* ¶19

The proposed regulation ignores the safety culture that already prevails in the industry. It also threatens to undermine the collective bargaining structures that enable this safety culture to exist and thrive. As discussed elsewhere in this brief, the proposed regime is fundamentally different from the procedures and protections that the parties have negotiated. The parties, who are intimately concerned with and informed about issues of worker fitness, have not seen fit to implement a regime of mandatory medical, psychological or drug and alcohol testing. The proposed regime also conflicts with the arbitral jurisprudence, which would otherwise prohibit pre-access and random testing, and require that 'for cause' testing, where appropriate, be carried out in accordance with human rights and privacy protections. Indeed, the proposed regime appears to usurp arbitration altogether, leaving it to "duly qualified health professionals" to make unilateral determinations about employment status. It is at the very least unclear as to whether and how the decisions of these "duly qualified health professionals," or other decisions made under the policy, could be challenged through the grievance process.

CONCERN #2: THE PROPOSAL IS UNREASONABLE, UNBALANCED, IMMORAL AND WRONG

Leaving aside the issue of whether any fitness for duty regulation may be necessary or appropriate at this time in Canada's nuclear industry, it is the Labourers' position that this proposed regulation is substantively unreasonable, unbalanced, immoral and wrong. It runs contrary to both the principles established by the drug and alcohol testing and privacy jurisprudence, as well as many of the commitments of the Government of Canada.

→ Proposal Contrary to Jurisprudence

The proposed testing regime runs contrary to the principles established by the jurisprudence, and thus would be vulnerable to a legal challenge under the

Canadian Charter of Rights and Freedoms (to which the CSNC is bound and any to which any regulation would be subject) as well as human rights legislation.

Because the jurisprudence typically deals with drug and alcohol testing has evolved independently from medical and psychological testing, we will analyze each of those forms of testing separately below. However, as the analysis below reveals, all of these forms of testing raise the same fundamental concerns.

Drug and Alcohol Testing

The jurisprudence clearly recognizes that drug and alcohol testing raises serious privacy concerns. These tests result in the disclosure of employees' personal medical information to employers, including information about off-duty substance use and medical conditions that go to the heart of what the SCC has described as the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state."[37] What's more, the tests themselves, even independently of what they reveal, have been recognized by the SCC as highly invasive. As the SCC reiterated in *Irving Pulp & Paper*:[38]

> Early in the life of the Canadian Charter of Rights and Freedoms, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity" (*R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements" (para. 23).

This kind of testing also raises equality concerns, since it is employees with certain disabilities that are most likely to test positive, to reveal personal medical

[37] *R. v. Plant*, 1993 CanLII 70 (SCC), cited in *R v. Cole, supra* ¶45
[38] *Irving Pulp & Paper* ¶50

information to their employers, and potentially face adverse employment consequences. Such disabilities include addiction (which is a disability protected under human rights law[39]), as well as other medical conditions that could result in a positive drug test result.

Because of these implications for employee privacy, dignity and equality, the drug testing regime proposed by the CNSC, and particularly the pre-access and random testing components of the regime, demands an extremely high level of justification. It is not enough for the CSNC to point out that nuclear facilities are dangerous. As the SCC has held, this is a consideration that factors into the balancing exercise but does not end the analysis. Rather, to justify the extreme degree of intrusion into employee privacy as a result of pre-access or random testing, the CNSC must demonstrate a significant problem with drugs or alcohol in the nuclear industry, and provide evidence that mandatory pre-access and random screening would help alleviate this problem.

The CNSC has not proven the existence of a problem with alcohol and drugs in the nuclear industry. To the contrary, the CNSC frankly acknowledged in 2012 that such a problem did not exist. The CNSC has not even claimed, let alone proven, that a problem has emerged since 2012. Moreover, as the CSNC concedes, there is no evidence to support the conclusion that mandatory drug or alcohol testing improves health and safety. As such, the CNSC has utterly failed to provide the kind of justification the SCC and arbitrators have held is necessary to justify such privacy invasive measures.

Even if the CNSC could establish the existence of a drug or alcohol problem in the nuclear industry (which it has not), it would still have to demonstrate that methods less invasive than pre-access or random testing are not viable. The CNSC has not shown this, nor could it. In this heavily unionized sector with a long history of negotiated solutions to health and safety issues, the first step

[39] *Mechanical Contractors Association Sarnia* ¶161-163; *Entrop* ¶88-89

would be to leave it to the workplace parties themselves to develop and maintain an appropriate solution. The CNSC has not done this. To the contrary, it appears to have ignored the significant efforts that the parties have already made in creating and maintaining a safety culture in this country's nuclear industry.

The pre-access and random drug testing component of the policy would also be unjustifiable because of the known inability of drug testing to measure present impairment. Drugs remain detectable through urinalysis for days or weeks after consumption. As such, a positive drug test reveals that the employee has consumed drugs at some point in the recent past, which would obviously include non-working hours. It does not indicate whether the employee is impaired at work. As the arbitrator confirmed in *Suncor,* employers have no legitimate interest in collecting information about which of its employees may have used drugs "recently".[40]

Thus, the regime of random and pre-access alcohol and drug testing proposed by the CNSC is entirely devoid of justification. For this reason alone, the proposed regulatory framework cannot stand.

The proposed policy also falls short even in situations where drug and alcohol testing may be justified, i.e. where here is an incident or other reasonable cause to suspect that an employee is not fit for duty. For one, by law, employees who test positive due to an actual or perceived disability are entitled to be accommodated in their employment up to the point of undue hardship.[41] The policy does not expressly guarantee such accommodation. Rather, it provides for the removal of employees from their positions without any guarantee that they will be reinstated to their positions pending medical clearance.

[40] *Suncor* ¶343. See also *Entrop* ¶99
[41] *Entrop* ¶112

Moreover, despite requiring employees to disclose personal health information to their employers, and requiring licensees to retain records of their employees' alcohol and drug testing results, the proposed policy does not require compliance with privacy legislation, which imposes limitations on the retention, use, disclosure and destruction of personal health information. Indeed, privacy legislation is not even mentioned in the document.

Particular Sensitivity of Medical and Psychological Testing

As noted, the proposed regulation requires medical testing not only where a concern that may affect the worker's fitness for duty is suspected or identified, but on a pre-access basis and periodically at intervals. Psychological testing is contemplated for all categories of safety-sensitive positions for cause, and for some positions (including certified workers) as a pre-condition for accessing the work site.

Medical or psychological screening, like pre-access and random drug and alcohol screening, engages employee privacy and dignity to a significant degree. To subject an employee to a medical examination without his or her consent is concerned a trespass or an assault upon the person. An employer can only demand a medical or psychological test for particular legitimate purposes (e.g. where an employee returns to work after a serious injury and there is a concern about the employee's fitness to perform his or her duties), and then only to the extent demonstrably necessary for the particular legitimate purpose. [42] Psychological testing in particular has been described as especially sensitive and

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[42] *ONA v. St. Joseph's Health Centre,* [2005] OJ No. 2874 (Div. Ct) ¶18, 20, 21: *Mechanical Contractors Association of Sarnia* ¶138; *Imperial Oil, supra* ¶115; *Monarch Fine Foods Co. Ltd.,* (1978), 20 LAC (2d) 419 (M. Picher) *Hamilton Health Sciences v. Ontario Nurses' Association,* 2007 CanLII 73923 (ON LA) (Surdykowski); *Providence Care, Mental Health Services v. OPSEU, Local 431,* 2011 CanLII 6863 (Surdykowski); *Rio Tinto Alcan Primary Metal Kitimat/Kemano Operations B.C. v. National Automobile, Aerospace Transporation and General Workers of Canada (CAW-Canada, Local 2301),* 2011 CanLII 7211 (BC LA) ¶35; *British Columbia Teachers Federation vs. British Columbia Public School Employees Association,* [2004] B.C.C.A.A.A. No. 177 (Taylor); *Peace Country Health v. United Nurses of Alberta,* 2007 CarswellAlta 2612; *Canadian Pacific Railway v. CAW-Canada, Local 101,* 2011 CarswellNat3110 (Picher) ¶12

invasive of employee privacy, attracting an even higher degree of scrutiny. As the Divisional Court of Ontario has confirmed:[43]

> The privacy of one's medical records is assured by the regulations applicable to health care professionals. The doctor-patient relationship is among the most private in Canadian society.
>
> The request [for medical information] must be related to the reasons for absence; no broad inquiry as to health is allowed.
>
> A psychiatric or psychological examination is a highly intrusive and sensitive procedure and should only be available to employers in cases where the necessity for it has been firmly established.

Like drug and alcohol testing, medical and psychological testing also engage human rights legislation because its adverse effects are disproportionately borne by employees with disabilities.

As noted, mandatory medical and psychological testing demands an especially high standard of justification. This kind of testing, when carried out on a pre-access or otherwise indiscriminate and arbitrary basis, will necessarily fail to meet this standard. Even if such testing could somehow be justified, it has not been in this case. The CNSC has failed to identify any particular medical or psychological or medical issue that is preventing employees in the industry from performing their jobs safely. With the possible exception of nuclear security officers, virtually none of the jobs in the industry have ever been identified as requiring any particular level of health or wellness. In other words, it is a mystery what the CNSC is proposing to screen for. The proposal to require thousands of employees to undergo indiscriminate medical and psychological testing is entirely without precedent and devoid of rationale.

The proposal fails to ensure adequate protections even to the extent that medical or psychological testing of an individual may be justified, i.e. where there is

[43] *ONA v. St. Joseph's Health Centre,* [2005] OJ No. 2874 (Div. Ct) ¶18, 20, 21.

reasonable cause to suspect a medical or psychological condition affecting fitness for duty. For one, it is well-established that in circumstances where an employer has made a reasonable request for medical information from an employee, that employee has a right to be assessed by his or her own physician. It is only where an employer has reasonable cause to doubt the accuracy or reliability a medical report that it can require an employee to submit to an examination by an independent medical examiner (agreed to by the parties and/or operating independently from either of the parties). The rationale for this protection was well-articulated by the Ontario High Court in 1963:[44]

> We start with this general principle at law stated in 26 Hals., 3rd ed., p. 18, para. 25: " "...A medical examination involves the confidence of the doctor if he is your own physician, but it is otherwise if he is making an examination on behalf of another..."

This principle has since been reaffirmed many times by labour arbitrators.[45]

The policy states only that an employee is to be assessed by a "duly qualified" medical practitioner or psychologist. There is no assurance with respect to the existence and scope of the employees' right to be examined by a practitioner of his or her own choosing.

Further, the policy fails to guarantee that an employee certified as being medically or psychologically incapable of performing their tasks will be accommodated, as required under human rights legislation and collective agreements. As well, while requiring licensees to retain records of medical and psychological certificates, it also lacks safeguards to ensure that information related to or arising out of these medical or psychological tests are retained,

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[44] *Re Thompson and Town of Oakville Re Ruelens and Town of Oakville*, 1963 CanLII 254 (ON SC)

[45] See for example *Canvill v. IAM & AW, Lodge 1547* (2002) 112 LAC (4th) 313 (Marcotte); *Brinks Canada Ltd. v. Teamsters, Local 141,* (1994) 41 LAC (4th) 422 (Stewart) ¶20-22; *William Osler Health System v. ONA (Ibrahim),* [2015]123 CLAS 288 (Tims) ¶57, 65

used, disclosed and destroyed in accordance with the requirements of privacy legislation.

For all of the above reasons, the proposed cannot be reconciled with the arbitral jurisprudence. This would render the regulation vulnerable to a legal challenge under the *Canadian Charter of Rights and Freedoms,* to which the CNSC and its regulations are bound.[46] The *Charter* provisions that are potentially engaged include s. 7 ("[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"); s. 8 ("[e]veryone has the right to be secure against unreasonable search or seizure") and s. 15 ("[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on...mental or physical disability). The regulation is also vulnerable to a challenge under the *Canadian Human Rights Act,*[47] in particular s. 7, which prohibits employment discrimination on grounds that include disability. All of the considerations that make pre-access or random drug, alcohol, medical or psychological testing an unreasonable exercise of management rights would be relevant, if not determinative, of a *Charter* or a human rights claim.

→ Proposal Runs Contrary to Government's Commitments

In addition to running afoul of the law, the proposal runs contrary to some of the core values of the Government of Canada, which include a commitment to policies rooted in evidence, human rights, democratic principles and respect for the collective bargaining process. To quote from the mandate letters recently issued to Ministers of Parliament:[48]

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[46] *Canadian Charter of Rights and Freedoms,* s. 32
[47] *Canadian Human Rights Act,* R.S.C., 1985, c. H-6
[48] See http://pm.gc.ca/eng/ministerial-mandate-letters

> If we are to tackle the real challenges we face as a country – from a struggling middle class to the threat of climate change – Canadians need to have faith in their government's honesty and willingness to listen. I expect that our work will be informed by performance measurement, evidence, and feedback from Canadians.
>
> We made a commitment to Canadians to pursue our goals with a renewed sense of collaboration.
>
> We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default. If we want Canadians to trust their government, we need a government that trusts Canadians. It is important that we acknowledge mistakes when we make them. Canadians do not expect us to be perfect – they expect us to be honest, open, and sincere in our efforts to serve the public interest.
>
> As Minister, you will be held accountable for our commitment to bring a different style of leadership to government. This will include: close collaboration with your colleagues; meaningful engagement with Opposition Members of Parliament, Parliamentary Committees and the public service; constructive dialogue with Canadians, civil society, and stakeholders, including business, organized labour, the broader public sector, and the not-for-profit and charitable sectors; and identifying ways to find solutions and avoid escalating conflicts unnecessarily.
>
> We have committed to an open, honest government that is accountable to Canadians, lives up to the highest ethical standards, and applies the utmost care and prudence in the handling of public funds.

The mandate issued to the Minister of Justice and AG of Canada is particularly instructive, and includes an admonition to make "early decisions to end appeals or positions that are not consistent with our commitments, the Charter or our values."[49] In this vein, both the Minister of Justice and the Minister of Public Safety and Emergency Preparedness are expressly mandated to work together to repeal parts of Bill C-51 and "introduce new legislation that strengthens accountability with respect to national security and better balances collective security with rights and freedoms."[50]

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[49] http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter
[50] http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter ; http://pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter

As set out above, the proposal, far from being rooted in evidence, runs contrary to the evidence. It is a solution in search of a problem, reflective of an era in which policies were adopted on the basis of trumped up fears and without regard to the evidence. Far from respecting the human and *Charter* rights of nuclear industry employees, it ignores them. Far from respecting collective bargaining, it disregards, overrides and undermines it. And as set out below, far from respecting the democratic process, the CNSC appears to have in large measure ignored feedback from trade unions, who represent the very people most affected by the proposed regulation and by occupational health and safety issues in general. Just as the current government has undertaken to review other laws and policies that fail to strike the appropriate balance between security and rights and freedoms, this proposal cries out for a dramatic rethink. It fails entirely to strike an appropriate balance between safety considerations and the rights and freedoms of thousands of nuclear industry employees.

CONCERN #3: THE POLICY IGNORES CRITICAL FEEDBACK AND JURISPRUDENTIAL DEVELOPMENTS

As noted above, the CNSC held "consultations" on a prior version of the proposal in 2012. A number of stakeholders, including a number of nuclear industry trade unions, filed submissions and evidence with the CNSC setting out serious concerns about the necessity and legality of the proposed policy. Subsequently, the jurisprudence evolved further to confirm the validity of the unions' concerns. The jurisprudence included *Irving Pulp & Paper,* a major and widely anticipated decision from the SCC that directly addressed the very subject of the CNSC's proposal and threw its legality and appropriateness into question. In REGDOC-2.2.4, the CNSC appears to have ignored the feedback it received from trade unions, as well as the jurisprudence. The document makes no mention of the significant concerns with pre-access and random drug and alcohol testing

identified in the 2012 consultations, nor does it refer to *Irving Pulp & Paper* (or for that matter, any jurisprudence).

The CNSC's approach casts doubt on the *bona fides* of these consultations. The CNSC knows, or ought to know, that the regime it is proposing is unnecessary, offensive, irreconcilable with the jurisprudence and vulnerable to a legal challenge. While the CNSC would have been wise to reach this conclusion in 2012, the jurisprudence decided since then should have served as the proverbial nail on the coffin as far as mandatory drug and alcohol testing of employees is concerned. For the CNSC to persist in considering such a regime in 2015 or 2016, and moreover to expand its proposal to include mandatory medical and psychological testing, suggests ideological considerations - rather than evidence, jurisprudence and reason – are influencing the policy direction of the CNSC. Such conduct is not befitting an agency with an express mandate to act in the public interest and specifically to "disseminate objective scientific, technical and regulatory information to the public."[51]

CONCLUSION

In light of the above, it is the Labourers' position that the CNSC ought to withdraw its proposal, terminate these consultations, and refocus its efforts on addressing real safety issues that exist in the industry. If it is considered necessary for the CNSC to adopt some sort of fitness for duty policy, then it must be redrafted in a manner that accounts for fundamental employee rights, as recognized in the recent jurisprudence, as well as the measures that are already in place to safeguard employee and public safety. The revised policy should then be subject to meaningful consultation with the parties most affected by it, namely nuclear industry employees themselves and the trade unions that represent them.

[51] http://nuclearsafety.gc.ca/eng/about-us/index.cfm