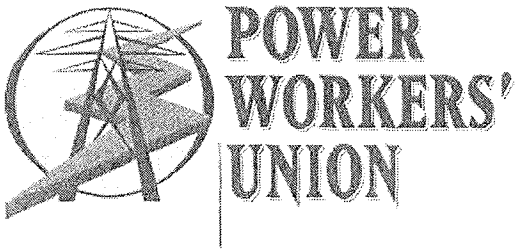

SUBMISSIONS OF THE POWER WORKERS' UNION ON THE DRAFT REGULATORY DOCUMENT 2.2.4 TO THE CANADIAN NUCLEAR SAFETY COMMISSION

REGARDING REGULATORY DOCUMENT, REGDOC-2.2.4, Fitness for Duty

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Chris Dassios
General Counsel
Power Workers' Union
244 Eglinton Ave. East
Toronto ON M4P 1K2
T: 416-322-2444
F: 416-322-2436
E: dassiosc@pwu.ca

Emily Lawrence
External Counsel
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th fl.
Toronto, ON M5V 3H1
T: 416-646-7475
F: 416-646-4301
E: Emily.Lawrence@paliareroland.com

Richard Stephenson
External Counsel
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th fl.
Toronto, ON M5V 3H1
T: 416-646-4325
F: 416-646-4301
E: Richard.Stephenson@paliareroland.com

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EXECUTIVE SUMMARY

The Power Workers' Union represents several thousand employees working at nuclear facilities in Ontario, including the majority of employees who have unescorted access within the protected areas of all of the nuclear power plants in the province.

The PWU recognizes the importance of health and safety at nuclear facilities and has worked responsibly with its employers to ensure the safe operation of nuclear generating stations since the first one was commissioned in 1971.

Ensuring that nuclear facility employees are fit for duty and can safely and competently perform their duties is and always has been an important objective for the PWU. Freedom from impairment by substances is one element of fitness for duty, but only one. The PWU supports measures to clarify and enhance the regulatory framework on this issue, so long as the measures are tailored to meeting this objective and are balanced against the human rights, constitutional rights and privacy rights of employees. Aspects of this Draft Regulatory Document do not do so.

The PWU supports the development of fitness for duty programs applicable to the broader population of employees at licensees set out in Section 3, except to the extent that such programs are inconsistent with testing limitations set out in Part IV of these submissions. Education programs, access to assistance, supervisory awareness programs, and investigative tools provide a comprehensive set of measures that promote prevention and early detection of substance abuse issues, while respecting the rights and privacy of employees. Working in conjunction, they are more than sufficient to meet the objectives of safety and fitness for duty in nuclear facilities. However, the Commission has not established any basis to mandate fitness for duty measures beyond those currently in place at nuclear facilities, given that such measures as those proposed would of necessity impinge on the legal rights of Canadians working at licenced facilities. The programs currently in place have worked well for many years. The PWU submits that it is unnecessary to mandate such programs through a regulatory document.

The Draft Regulatory Document sets out additional requirements for employees in safety-sensitive positions. The PWU submits that the determination of safety-sensitive positions should be based on a risk-informed analysis, within the discretion of the licensee and with input from employees and their representatives. Categorical approaches should be avoided.

The PWU strongly objects to the comprehensive alcohol and drug testing regime for workers in safety-sensitive positions set out in the Draft Regulatory Document. Alcohol and drug testing is immensely invasive. The methods of

collection intrude upon the privacy, bodily integrity and dignity of employees. The results they produce provide third parties with private medical information about employees, while failing to demonstrate that a worker is actually impaired at the time the test is taken. The PWU submits that a random testing regime would violate human rights and privacy legislation and the *Canadian Charter of Rights and Freedoms.* The Commission's proposed expansion of the regulatory framework to include random testing fails to strike the appropriate balance between its desire to increase nuclear safety and the fundamental rights of employees to privacy, dignity, equality and security of the person, and is inconsistent with established Canadian jurisprudence.

The Commission does not rely on any evidence to demonstrate a past or current safety concern with drug use in nuclear workplaces. Absent any evidence of safety issues related to fitness for duty, there is no legal justification to impose any form of invasive testing on citizens working in nuclear plants.

The Draft Regulatory Document also sets out medical, psychological and occupational fitness assessments. To the extent that the medical, psychological and occupational fitness testing requirements go beyond what is currently required by the Nuclear Security Regulations and the applicable regulatory documents, they are unnecessary and unjustified.

Finally, the Draft Regulatory Document requires the retention of medical, physical and psychological certificates for workers as well as alcohol and drug testing results, but imposes no requirement that such records be kept safe and secure or that their confidentiality be maintained. Moreover, there is no direction as to when the records should be destroyed, or if and when the results would be reported to the Commission. The collection of personal health and other information by licensees and its potential disclosure to the Commission, which can have a severe and detrimental impact on an employee's future employment, raises serious privacy concerns. Retention and reporting requirements would have to be limited to avoid unnecessary and unjustifiable disclosure of personal confidential health information

PART I. INTRODUCTION

A. The PWU as Stakeholder

1. The Power Workers' Union ("PWU") is a trade union which represents over 15,000 workers employed in Ontario's electricity industry, most of whom are employed in the nuclear power industry. Its members work throughout Ontario and make up a large majority of employees in the nuclear power industry, including at Ontario's nuclear power plants: Darlington Nuclear Generating Station, Pickering Nuclear Generating Station, and Bruce Power Generating Station ("PWU Employers"). PWU members form the majority of workers employed at Ontario's other electrical generating facilities, as well as in transmission, local distribution companies and nuclear research laboratories.

2. As an external stakeholder who represents employees in nuclear facilities, the PWU has an important role to play in ensuring that Ontario's nuclear facilities are safe and secure through the development and implementation of effective policies to ensure fitness for duty ("FFD") of its employees. In 2012, the PWU made lengthy submissions regarding the Commission's 2012 Discussion Paper for Public Consultation, DIS-12-03: *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing* ("FFD Discussion Paper") and an accompanying Reference document: INFO-0831: *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry,* prepared by Barbara Butler and Associates Inc. ("Butler Paper").

3. The PWU has reviewed the Canadian Nuclear Safety Commission (the "Commission")'s draft Regulatory Document, 2.2.4 *Human Performance Management, Fitness for Duty* ("Draft Regulatory Document").These Submissions set out the PWU's comments, concerns and feedback on the Draft Regulatory Document, and in particular, the proposed requirement for alcohol and drug testing for certain employees in nuclear facilities.

4. The PWU, jointly with the Society of Energy Professionals, has also retained two experts to provide the Commission with additional information. The reports of these experts and their curriculum vitaes are enclosed as Appendices "A" through "D" to these submissions.

B. Overview of the PWU's Submissions

5. The PWU recognizes the importance of health and safety at nuclear facilities and has worked responsibly with its employers to ensure the safe operation of nuclear generating stations since the first one was commissioned in 1971. Ensuring that nuclear facility employees are fit for duty and can safely and competently perform their duties is an important

objective. The PWU supports measures to clarify and enhance the regulatory framework on this issue on the basis of proven necessity.

6. In summary, the PWU's submissions are five-fold:

   a. The PWU supports the "programmatic elements" for FFD programs set out in section 3 of the Draft Regulatory Document, which are applicable to workers who could pose a risk to nuclear safety or security and are already in place at licensees (a group the Commission refers to as the "broader population") (the "Broader Population FFD Program Requirements"). The Broader Population FFD Program Requirements include supportive employee assistance programs, and peer and supervisor behavioural observation. Licensees, their bargaining agents, managers and employees have been operating nuclear facilities safely for over 40 years, without evidence of safety issues arising from substance misuse, using these programs. These programs work, on a lawful and non-intrusive basis. The PWU supports the measures, as long as they are flexible enough to permit nuclear facility licensees to adopt policies and practices that are workplace-specific and comply with their legal duty to accommodate employees on a case-by-case basis under Human Rights legislation. Apart from the Broader Population FFD Program Requirements and the specific FFD assessments and tests mandated by the *Nuclear Security Regulations*, there is no need to mandate changes that intrude on the privacy rights of citizens employed in safety-sensitive positions at nuclear facilities;

   b. Safety sensitive positions must be determined on a risk-informed analysis, in the judgment of the licensee, and with input from employees and their representatives. The current definition of safety sensitive positions based on broad categories is overly broad, as it captures employees who do not engage in genuinely safety sensitive work;

   c. The Draft Regulatory Document's alcohol and testing requirements do not comply with human rights and privacy legislation, or the *Charter of Rights and Freedoms* ("*Charter*").[1] Most significantly, the random alcohol and drug testing requirements do not strike the appropriate balance between safety concerns and the rights of employees, and would be inconsistent with established Canadian jurisprudence. In this regard, the Draft Regulatory Document is unlawful; and

   d. The Draft Regulatory Document contains insufficient guidance as to the consequences of a positive alcohol or drug test, the circumstances under which substance abuse evaluations are required, or the

[1] The *Constitution Act*, being Schedule B of the *Canada Act* (UK), 1982, c 11.

appropriate collection of personal health and other information. The Commission must ensure that any changes to the regulatory regime are consistent with the licensees' duty to accommodate, comply with privacy legislation and ensure the highest level of protection of the privacy and respect for employees.

7. In reference to the specific sections of the Draft Regulatory Document, the PWU submits that the Commission should make the following deletions, revisions or changes:

    a. Section 4.1: the sentence starting with "Safety-sensitive positions" and the criteria 1-4 should be deleted;

    b. Section 4.3-4.5 should be revised to include only those medical, psychological and occupational requirements currently required by regulatory documents or the *Nuclear Security Regulations;*

    c. Section 4.6 should be

        i. deleted in its entirety (along with all provisions in section 5 that relate to alcohol and drug testing); or

        ii. in the alternative,

            1. section 4.6.1 and 4.6.4 should be deleted in their entirety;

            2. section 4.6.2 should be amended in respect of post-incident testing to read "Under post-incident testing, workers in safety-sensitive positions shall be required to submit to for-cause testing as soon as practical after a significant incident where a human act or omission by the worker may have caused or contributed to the event and where there is an indication that impairment may have caused or contributed to the significant incident";

            3. section 4.6.3: should be amended in respect of the length of follow-up testing "to a maximum" of two years;

    d. Section 5.4.2: the last sentence of this section ("In the event...fit for duty") should be deleted because it is vague and confusing;

    e. Section 5.4.3 should be amended to provide discretion to the licensees regarding the procedure after a report of a positive test;

    f. Section 5.5 should be deleted; and

g. Section 5.7 should be amended to clarify that records should be held in a confidential manner apart from the worker's employment file, not disclosed to any third party without consent of the worker and securely destroyed when they are no longer needed for employment purposes.

8. As noted above, the PWU, jointly with the Society of Energy Professionals, retained two experts to opine on the Draft Regulatory Document.

9. Olaf Drummer is a forensic pharmacologist and toxicologist from the State of Victoria, Australia. Currently, he is employed as Deputy Director (Academic Programs) at the Victorian Institute of Forensic Medicine and as Professor and Head of the Department of Forensic Medicine, Monash University in Melbourne, Australia. Professor Drummer has over forty years of experience in the area of the detection of drugs of abuse in human specimens, including as the past President of the International Association of Forensic Toxicologists, the inaugural and continuing President of the Forensic and Clinical Toxicology Association of Australia, the past Chair of the Drugs of Abuse and Clinical Toxicology Committee, International Association of Therapeutic Drug Monitoring and Clinical Toxicology (2005-2013) and as a member of the consultative committee for the United Nations Drug Control Program (UNDCP), in which he was a consultant on the international *Guidelines for Testing Drugs under International Control in Hair, Sweat and Oral Fluid* (2014).

10. Professor Drummer provides a summary of drug detection techniques. In his expert opinion, the ability to detect drugs in blood and urine is determined by (1) the dose, or doses, used by the person, (2) the time these drugs were last used, (3) the pharmacokinetic property of the drug, that is, the mode and rate of removal of the drug from the body, and (4) the detection method used by the laboratory with respect to sensitivity and specificity. Moreover, detection times for certain drugs is between 1 and 28 days, depending on the drug, and can be longer for heavy users.

11. Professor Drummer confirms that urine testing cannot provide evidence of impairment. He notes: "[a]ll that can be said from a positive urine result is that the person had used the drug in previous day or three (depending on the dose and type of drug). It is possible that the subject will not fail an impairment assessment even though the urine is positive for an impairing substance. In this situation is likely that the drug is (almost) not detectable in blood and is nearing the end of its excretion cycle. Urine testing is used predominately to assess if a person is a user of drugs of abuse, and if so if

s/he may pose a risk to the workplace at some stage in their employment; not necessarily whether they are impaired at that point in time."[2]

12. Professor Scott MacDonald is a professor in the School of Health Information Science, University of Victoria. He holds a PhD in Epidemiology and Biostatistics.

13. In Professor MacDonald's expert opinion:

    a. There is not enough research evidence to conclude that those who test positive for drugs represent an increased risk for work injuries or accidents, which is a fundamental requirement of causation;

    b. Research has not shown that the decline in positive drug testing rates corresponds to safer workplaces;

    c. Companies with drug testing programs, employee assistance programs, and written policies on substance use had lower prevalence of drug use among employees than those without these policies. However, separation of the unique effects of drug testing from other programs was not possible;

    d. There are effective programs to identify impairment in workers, including a series of physical and psychomotor tests and computer-based psychometric testing, and which can pick up a wider variety of performance deficits beyond those that are drug related, such as those caused by fatigue, and thus could potentially be more directly linked to overall fitness for work; and

    e. Saliva, blood and urine tests, and the use of random drug testing in particular, will not achieve the goals of assessing fitness for duty in relation to substance use.[3]

PART II. THE PWU'S SUBMISSIONS ON THE BROADER POPULATION FFD REQUIREMENTS

A. Fitness for Duty

14. The PWU acknowledges that many of its members carry out important functions in the operation of licensees' facilities. The Commission and licensees can and should expect that employees at nuclear facilities will perform their duties in a safe manner, and will not be mentally or physically impaired from any cause that significantly impairs their ability to safely and competently perform their duties.

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[2] Report of Professor Olaf Drummer, dated March 7, 2016 ("Drummer Report"), at paras 9.4-9.6

[3] Report of Professor Scott MacDonald, dated March 7, 2016 ("MacDonald Report")

15. The PWU agrees that FFD can be described as a condition in which an employee is physically, physiologically, and psychologically capable of competently and safely performing his or her assigned tasks within the required standards of safety, quality, efficiency and behaviour.

16. Employees may have diminished FFD because of medical, psychological, behavioural, or external factors. Freedom from chemical substances that actually impair an employee's ability to safely carry out his or her work is only one aspect of FFD. Family problems, grief, fatigue, stress, shift work and excessive hours of work (among other things) may all affect an employee's ability to perform his or her functions to a satisfactory standard.

17. Appropriate FFD programs recognize that nuclear facilities are ultimately controlled and operated by human beings who inevitably experience the full range of human strengths and frailties. Policies which only seek to correct unsafe behaviour without providing supports and encouraging safe behaviour are counterproductive.

18. The Commission has begun development of regulatory guidance on a full range of human performance programs to address the complicated issue of FFD which addresses all aspects of FFD. The PWU supports a comprehensive, multi-faceted approach to this issue.

B. Policies, Procedures and Training Programs: What PWU Employers Already Do

19. The PWU Employers have long had programs and practices that require employees to be fit for duty and monitor the FFD of workers.[4] They ensure the prevention of, detection of and intervention for substance abuse and other FFD problems, and do so in accordance with human rights and constitutional rights, and the labour law governing collective agreements to which the PWU is a party.

1. Safety Culture

20. The PWU has worked with the PWU Employers to develop a culture of safety in nuclear power plants. The PWU and Ontario Hydro developed an internal responsibility system to promote safe work practices long before there was an *Occupational Health and Safety Act* in Ontario. This joint effort to promote safe work practices has been carried on by the successors to Ontario Hydro and specifically in the nuclear facilities operated by Ontario Power Generation and Bruce Power. Part of this safety culture is the embedded value that every employee has a

[4] The foregoing reference written policies of the PWU Employers. These policies are not authored by the PWU, and thus are not included as appendices to these submissions. These policies are available to the Commission.

responsibility to ensure safety in a nuclear facility. PWU Employers expect employees to build safety into every task they perform, to adhere strictly to policies and rules, and to report safety violations, including reporting peers who appear to be unfit for duty. "Safety is everyone's business" is not a slogan in these facilities, it is the way work is carried out.

21. Regular peer-to-peer and employee-to-supervisor interactions are built into the daily practices at PWU Employers. Regular interaction permits employees and supervisors to learn their colleagues' temperament and behaviour, and to assess any deviations. The vigilance of human beings provides a level of monitoring to which no chemical test can aspire.

22. To begin with, at the start of every shift, every employee entering a nuclear generating station in Ontario has to go through security and make personal contact with a Nuclear Security Officer ("NSO") qualified under the *Nuclear Safety and Control Act*[5] in a supervised security search area. There is therefore already in place a high level of vigilance and scrutiny applicable to all employees entering the protected area of the nuclear facility.

23. Beyond this daily review, employees in nuclear generating stations in Ontario are subject to supervisor-to-employee ratios that are high to very high depending on the level of responsibility of the job in question. The first level of supervision for most workers in the facility is the First Line Manager ("FLM") and FLM Assistant ("FLMa"). Nuclear Operators on shift have a ratio of 2-4 Operators supervised by an FLMa and FLMs. Control Room supervision is even more intensive. Even the typical trades worker works in a group of 4-10 employees per supervisor.

24. In addition to this high degree of supervision, critical workgroups employ a "shift turnover" protocol, which is a process of face-to-face assessment by an outgoing shift worker of an incoming shift worker to ensure work can be turned over safely. Authorized Nuclear Operators ("ANOs"), for example, engage in the shift turnover process at each shift change and assess the fitness for duty of incoming ANOs to ensure that work can be safely carried out by incoming staff. Notably, the assessment is done on a functional basis – that is, whether the incoming worker appears impaired – without resort to determining whether the cause of the impairment is fatigue, emotional upset or substance impairment. This process permits employees to observe the appearance and demeanour of the incoming employees prior to the completion of the changeover. The observation is focussed on actual impairment from any cause, not on a test mechanism intended to measure past impairment from specific causes. As a result, the assessment is targeted at potential safety threats, not on potentially

[5] SC 1997, c 9.

discriminatory and likely futile analyses of causes of impairment. This has been, and continues to be, an effective means of determining FFD.

25. Both the intensive level of supervision and the shift turnover procedures ensure the likelihood that unusual or aberrant behaviour will be detected and addressed in a much more effective manner than any test could. No test can replicate the knowledge that a supervisor or peer has of what an employee normally looks like and how she normally behaves, nor can it measure a deviation from the norm that could indicate current impairment.

2. Policies

26. PWU Employers expressly prohibit the use and possession of impairing substances. For example, Ontario Power Generation ("OPG")'s safety rules prohibit employees from being under the influence of intoxicants or illegal drugs, and from bringing intoxicants, illegal drugs, firearms, or illegal devices into the workplace. Employees are also required to inform supervisors of any physical or other limitations that may reduce their ability to work safely.

27. PWU Employers also have express policies for situations where an employee appears to have diminished FFD. These policies require supervisors to take prompt and appropriate action when they have grounds to believe that an employee is unfit for duty. Appropriate action includes:

    a. removing the employee from the workplace;

    b. providing access to medical treatment;

    c. arranging escort to a safe place or to the employee's residence;

    d. referrals to support programs; and

    e. discipline, if warranted.

3. Supervisor Training and Investigations

28. PWU Employers already provide substance abuse awareness components with the supervisory awareness requirements mandated by the *Nuclear Security Regulations*.[6] Supervisors are trained to look for and identify the signs of safety-significant behavioural changes associated with substance dependency and substance impairment.

29. For example, supervisors at OPG are trained in the Continuous Behaviour and Observation Program ("CBOP") every three years. Through this

[6] *Nuclear Security Regulations*, SOR/2000-209 ("*Nuclear Security Regulations*"), ss 38 and 48.

program, supervisors learn the risks associated with substance use and abuse, and the physical and behavioural signs associated with substance use and dependency. They also learn how to directly observe and note changes in the behaviour of their employees and to assess the risk from those changes, in order to identify problems before they become safety concerns.

30. PWU Employers investigate where there is a reason to believe that an employee may be unfit for duty. As noted above, supervisors at PWU Employers are trained to initiate fitness for duty investigations where there are specific, objective and documented grounds to believe an employee is unfit for duty.

4. Employee Assistance Programs and Protection of Private Medical Information

31. All of the PWU Employers already have employee assistance programs ("EAPs"). Access to EAPs is confidential, as it must be in order for the program to be effective. EAPs allow employees to self-identify issues that could affect their performance and assist supervisors or wellness staff with appropriate referrals.

32. By using EAPs, PWU Employers signal that they recognize that substance dependency is a treatable disorder that must be accommodated, and that early intervention greatly improves the probability of sustainable recovery. The EAP process reinforces the message that employees are valuable members of the nuclear enterprise, and will be accommodated. The priority is to provide a safe and healthy working environment that minimizes any negative effects due to the inappropriate use of illicit substances, while respecting employees' privacy and maintaining confidentiality.

33. PWU Employers are aware of their obligation to accommodate disabled employees and to protect their private medical information. To the extent that an employer needs to know about an employee's health-related issue, as identified through the EAP or through other means, PWU Employers segregate medical information from other employment-related information. At each PWU Employer, a wellness department manages and controls access to an employee's confidential health information. Supervisors are not privy to an employee's medical information unless there is some reason requiring it. Management receives only the information they need to manage their workforce. They are advised of functional abilities and restrictions of an employee, without revealing the employee's medical information or diagnosis.

5. Medical Assessments, Psychological Assessments and, Occupational Fitness Assessment

34. PWU Employers conduct various fitness assessments of their employees, in accordance with regulatory requirements.

35. For unarmed and armed NSOs, PWU Employers conduct the assessments required by the s. 18.2 of the Nuclear Security Regulations and detailed in Regulatory Document 363. These include a one-time psychological fitness test administered by a qualified psychologist, an annual medical test including hearing and vision, and an annual fitness test (unarmed NSOs) and semi-annual fitness test (armed NSOs). Emergency response and fire brigade members also undergo occupational fitness testing.

36. Minimum complement staff such as Nuclear Operators and all certified workers undergo medical testing based on the nature of their work and undergo a non-intrusive medical examination prior to hiring. In addition, tailored occupational fitness assessments (relevant to the equipment they use, such as respirators) are carried out for workers (minimum complement or not) to ensure that they can safely carry out the duties of their job. There is no psychological testing of employees outside the ranks of Nuclear Security Officers. There is no evidence to suggest that the current medical regime is in any way failing to meet safety interests of any stakeholder.

37. PWU Employers have mechanisms to obtain medical and psychological fitness assessments if there is cause for concern about an individual's fitness for duty, by requesting functional assessments and medical clearance from the worker's physician. Employer-conducted medical assessments are extremely intrusive, as they provide significant information about a worker's health, and as such are permitted only in exceptional circumstances.

C. The PWU Supports the Broader Population FFD Requirements

38. The PWU strongly supports programs that educate and increase awareness in employees of the negative consequences of drug use and provide access to assistance on a broad range of issues that workers may face, including mental, emotional, family, financial, health, and alcohol- or drug-related problems.

39. The current FFD programs and the Broader Population FFD Requirements make up a comprehensive, effective, tailored, non-intrusive set of measures that promote prevention and early detection of substance abuse issues, while respecting the rights and privacy of employees.

Working in conjunction, they are more than sufficient to meet the objectives of safety and fitness for duty in nuclear facilities.

40. As set out above, PWU Employers already have well-developed FFD programs that include most, if not all, of the Broader Population FFD Requirements. In the PWU's experience with the PWU Employers, these requirements simply codify FFD programs that are currently in place.

D. The Broader Population FFD Program Requirements are Sufficient

41. The PWU submits that the current FFD systems in place in Ontario nuclear facilities, as those codified in the Broader Population FFD Program Requirements, are both effective and sufficient to prevent, deter, detect and remediate potential impairment by substance use at Canada's nuclear power plants. The safety record of the nuclear power industry in Ontario proves this. Those programs focus on preventative and proactive responses to substance abuse. That is, they focus on the actual problem, not on an arbitrary clinical measure.

42. EAPs play a particularly important role in the prevention, detection, and treatment of substance abuse and other problems that can affect FFD.[7] EAPs are one of the most effective means of dealing with substance abuse problems in the workplace and other problems that can affect fitness for duty.[8] As Professor Macdonald notes, the preponderance of the evidence suggests that EAPs are beneficial in alleviating psychological problems and can have a positive effect on work performance.[9]

43. Peer-to-peer and supervisor-to-employee interaction provides a regular and valuable opportunity to assess FFD. As set out above, PWU members have frequent interaction with and monitoring by peers and supervisors. The PWU submits that trained supervisors and employees of PWU Employers are in the best position to obtain reliable evidence of current

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[7] See MacDonald Report *supra* at p 14; See also p. 18 of the *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry,* prepared by Barbara Butler and Associates Inc. for the Commission in 2012 ("Butler Paper") available online: Nuclear Safety < http://nuclearsafety.gc.ca/pubs_catalogue/uploads/March-2012-INFO-0831-Recent-Alcohol-and-Drug-Workplace-Policies-in-Canada_Considerations-for-the-Nuclear-Industry_e.pdf>. The Ontario Law Reform Commission stated that "EAPs are viewed as not only an efficient but also a cost-effective vehicle for addressing the addiction problems of employees" and noted that they are supported by "both the Addiction Research foundation and the Ontario Human Rights Commission...in addressing addiction/dependency issues of employees": Ontario Law Reform Commission, *Report on Alcohol and Drug Testing in the Workplace*, (Toronto: Ontario Law Reform Commission, 1992), online: Internet Archive, Osgoode Hall Law Library < http://ia700708.us.archive.org/32/items/reportondrugalco00onta/reportondrugalco00onta.pdf> ("OLRC Report") at p 117.

[8] Macdonald Report, *ibid*; Barb Butler & Associates, "Employee assistance programs" (2006), online: Barb Butler & Associates <http://www.butlerconsultants.com/bb_benefits.html>.

[9] Macdonald Report, *ibid.*

impairment of their colleagues. This is particularly so for certified staff, who engage in lengthy overlap during shift changes. The PWU submits that the safety culture at PWU Employers, daily interaction with security staff, high levels of supervision, and peer and supervisor assessments, especially when linked with new employee education programs, meet the objectives of an impairment-free workplace.

44. There is plainly no need for any further impairment testing of any kind at nuclear facilities. However, if further impairment testing could be justified, there are several other effective tools which measure current impairment, none of which involve urine testing for alcohol or drugs, such as computerized testing and testing of eye reactivity.[10] These methods test substance impairment and may also provide insight into FFD based on non-substance-related bases, as measured at the time the test is taken. These testing methods are significantly less intrusive than urine testing to employee's privacy and his or her dignity.[11] While the PWU is strongly of the view that the current processes in place are effective and reasonable, it also notes that the Commission does not appear to have considered whether any of these testing methods would achieve the goal of increased safety in nuclear facilities, without unduly intruding on the rights of employees.

45. The PWU submits that the Commission has failed to justify the imposition of any additional requirements on workers who hold safety sensitive positions. The Broader Population FFD Requirements and the current fitness assessments have proven themselves as both reasonable and effective.

PART III. THE PWU'S SUBMISSIONS ON THE SCOPE OF THE ADDITIONAL REQUIREMENTS FOR SAFETY SENSITIVE POSITIONS

46. Section 4 of the Draft Regulatory Document sets out specific FFD requirements for employees who hold "safety-sensitive positions", being specified medical, psychological and occupational fitness assessments, and alcohol and drug testing.

47. The Draft Regulatory Document requires licensees to identify their safety sensitive positions through a documented risk-informed analysis – a principle with which the PWU agrees. However, it also designates certain classes of positions as automatically "safety sensitive" which the PWU submits is overly prescriptive and overly broad.

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[10] *Macdonald Report ibid* at pp 12-14. See also R. Evans, Chair, *Drug Testing in the Workplace: Report of the Independent Inquiry into Drug Testing in the Workplace*, (New York: Joseph Rowntree Foundation, 2004), online: Joseph Rowntree Foundation < http://www.ukcia.org/research/DrugTestingInWorkplace.pdf> at pp 47-48 ("IIDTW Report") and the OLRC Report, *supra*, at pp 118-120 in respect of available non-biomedical testing methods.

[11] OLRC Report, *supra* at p 119.

48. The Draft Regulatory Document mandates the following as "safety sensitive":

> 1. certified workers;
>
> 2. the following security personnel: (a) Nuclear Security Officers ("NSOs"); (b) onsite nuclear response force ("NRF") members; and (c) designated non-NRF personnel;
>
> 3. positions that are part of the minimum staff complement at high-power reactor facilities, unless excluded based on the results of the risk-informed analysis; and
>
> 4. any other positions identified via the risk-informed analysis performed by the licensee.

49. Positions designated as "safety sensitive" are subject to the fitness assessments and the alcohol and drug testing in sections 4.3-4.6. These additional requirements significantly intrude on workers' privacy and human rights. The jurisprudence is clear that alcohol and drug testing of individuals in non-safety sensitive positions is impermissible.[12] As such, the designation of "safety sensitive" is only justifiable if it is applicable to those who hold genuinely safety sensitive positions.

50. The PWU acknowledges that, using a risk-informed analysis, certified workers and armed members of the NRF are properly categorized as "safety-sensitive", given the specifics tasks that each of these groups of workers perform and the equipment they use (i.e. loaded guns). However, not all workers who are part of the non-armed NRF team or who are the minimum staff complement will engage in work that could directly cause or contribute to a significant incident. For example, civil maintainer stock-keepers at Darlington NGS are part of the minimum complement. Their positions are not safety sensitive. They provide equipment and goods to others on request and any errors or omissions made by them are extremely unlikely to cause risks to the safety of the public because their decisions are effectively subject to second checks by others.

51. While the PWU recognizes the administrative efficiency achieved by the use of a categorical approach, administrative efficiency must yield to more important human rights values. As a result, the PWU submits that the Draft Regulatory Document should be amended to require licensees to complete risk-informed analyses on a position-by-position basis for all

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[12] *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 ["*Irving Pulp*"] at paras 38 and 51; *Canadian National Railway Co. and CAW-Canada (Re)* (2000), 95 LAC (4th) 341 (Picher) at paras 221-222 ["*CNR v CAW*"]; *Greater Toronto Airports Authority v P.S.A.C., Local 0004*, [2007] LVI 3734-2, 90 CLAS 177 (Devlin) at para 225 ["*GTAA*"]; *Canadian Civil Liberties Assn. v. Toronto Dominion Bank* (1998), 163 DLR (4th) 193 (Fed CA) at para 38.

positions other than certified workers, and armed NSOs. The focus of this risk-informed analysis should be the actual tasks performed by the worker, the equipment and material the worker handles, and the actions expected to be performed by the worker, with a view to identifying a very strong nexus between the tasks performed by the worker and the risk to safety.[13] This analysis is best left to licensees, with input from workers and their representatives.

PART IV. THE PWU'S SUBMISSIONS ON THE ALCOHOL AND DRUG TESTING REQUIREMENTS FOR SAFETY SENSITIVE POSITIONS

52. The Draft Regulatory document sets out a comprehensive alcohol and drug testing regime that includes pre-placement, reasonable cause, post-incident, follow-up and random testing.

53. The Commission has not explained why it has elected to adopt alcohol and drug testing, apart from a general reference to its mandate to protect public safety, or why it has elected to do so now. As the Commission has acknowledged, the Draft Regulatory Document is not a response to evidence of a safety issue arising from alcohol and drug use in nuclear facilities, or that the significant measures for insuring fitness for duty that have been in place and nuclear generating facilities for many years are in any way deficient. There is no evidence that drug use represents a safety concern in nuclear facilities, or that it is more prevalent now than in the past forty years of safe operation. Similarly, the Commission has ignored the significant limitations of drug testing in identifying or deterring workplace impairment. The Draft Regulatory Document has not been proposed because of technological advances in drug testing that overcome those limitations.

54. Nothing in the Draft Regulatory Document suggests that the Commission considered the significant constitutional, human and privacy rights of workers balanced against its interest in safe nuclear workplaces, in respect of any component of the proposed regime, as the Canadian jurisprudence instructs it to do.

55. The PWU acknowledges that the Canadian jurisprudence has concluded that reasonable cause, post-incident and follow-up testing components may be reasonable, although the PWU submits that there is no reason for the CNSC to impose such testing requirements, given that licensees already have the right to conduct testing on this basis.

56. In contrast, random and pre-placement testing violate human rights, constitutional rights and privacy rights and cannot be justified as striking an appropriate balance between the rights of employees and the actual

[13] *GTAA, ibid* at paras 238-239 and 288.

safety and security needs of nuclear facilities. The Commission has ignored the weight of years of arbitral jurisprudence, as well as recent and binding case law from the Supreme Court of Canada, addressed below.

57. The PWU submits that the Commission has relied, unfairly and ultimately unlawfully, on the myth that random alcohol and drug testing make workplaces safer to validate the need for the extraordinary measure to impose intrusive and invasive testing of nuclear workers. The Commission has disregarded the significant technological limitations of drug testing which mean that it does not "prove" that a worker is impaired on the job. Given that drug testing only identifies past drug use, the Canadian jurisprudence is unambiguous: absent a demonstrated endemic issue with drug use in the workplace, random and pre-placement testing are unlawful.

A. The Balancing of Interests

58. All forms of biomedical testing for alcohol and drugs are invasive. All methods of collection of bodily fluids intrude upon the bodily integrity and dignity of employees. The results they produce provide third parties with private medical information about the employee. Testing may require employees to disclose their medical conditions and medications they are taking. As such, alcohol and drug testing violate the fundamental rights of employees to privacy, equality, dignity and security of the person and does so in respect of some of the most sensitive and private information about a human being – their physical health and medical condition. The invasive nature of this testing was a prime motivator of the Ontario Law Reform Commission's recommendation to prohibit chemical testing in the workplace.[14]

59. In assessing the scope and propriety of alcohol and drug testing in the workplace, the Supreme Court of Canada has confirmed that the issue is one of balancing the competing interests of an employer (and here, the Commission) to ensure a safe and productive work environment for employees and members of the public, against an employee's rights to equality, dignity and security of the person.[15] As one of the most senior and respected labour arbitrators in the country, Kevin Burkett, has noted:

> **Because the objective of providing a safe and productive work environment is unassailable and because privacy interests are**

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[14] *OLRC Report supra* at pp 112-114.

[15] *Irving Pulp supra* at paras 4 and 57; *CNR v CAW* at paras 190-192 and the cases cited therein including: *Esso Petroleum Canada and C.E.P. Loc 614 (Re)* (1994) 56 LAC (4th) 440 (McAlpine); and *Trimac Transportation Services-Bulk Systems v TCU* (1999), [2000] LVI 3090-2, 88 LAC (4th) 237 (Can Arb) ["*Trimac*"]. See also: *Suncor Energy Inc and CEP, Local 707 (Woods), Re,* 2008 CarswellAlta 2503, [2008] AGAA No 11 ["*Suncor*"]; and *Bombardier Transportation v Teamsters Canada Rail Conference – Division 660,* 2014 CanLII 5318 (CA LA).

> **somewhat nebulous, it is easy to weigh in on the side of mandatory random drug testing, especially in a safety sensitive industry. It is easy to support the implementation of any policy that is designed to promote a safe and productive work environment and, on its face, has the potential to do so. However, when the privacy interest is understood, the debate takes on another dimension. It becomes not just a question of the efficacy of the mandatory random drug testing, *vis-à-vis* the objective of a safe and productive work environment, but rather a debate concerning the reconciliation of two competing interests. The "best" reconciliation of two legitimate but competing interests is achieved by measuring their competing impacts. Accordingly, the assessment of the extent of which mandatory random drug testing furthers the objective of a safe and productive workplace and a corresponding assessment of the extent to which it invades individual privacy is required.**[16]

60. As set out below, employees' rights to privacy, dignity and equality are fundamental rights. Any alcohol and drug testing regime must start from an evidence-based analysis that justifies alcohol and drug testing for the purposes of safety, in light of the serious infringements that such testing imposes on employees' rights. A starting principle is that employers, even those at nuclear facilities, do not have the right to control the private lives of their employees.[17] As the Privacy Commissioner of Canada noted in its position paper on Drug Testing:

> **Testing supposes an employer's (or a government agency's) right to exercise substantial control over individuals and to intrude into some of the deepest recesses of their lives. The technology of drug testing is being allowed to shape the limits of human privacy and dignity.**
>
> **The situation should be the other way around. Notions of respect should place limits on the intrusions which technology will be permitted to make into personal lives. In other words, the uses of technology should not limit human rights; human rights should limit the uses of technology.**[18]

61. The Commission's goal of safety and security in nuclear facilities is indisputable. However, the Draft Regulatory Document does not address the balancing of rights and interests, even though this is the critical legal issue the Commission is compelled to consider before implementing any FFD requirements. Consequently, by failing to consider this critical issue, it is no surprise that the Draft Regulatory Document fails to strike the appropriate balance. Before turning to an analysis of the appropriate

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[16] *Trimac supra* at para 42.

[17] See *Re Provincial-American Truck Transporters and Teamsters Union, Local 880* (1991), 18 L.A.C. (4th) 412 (Ont.) particularly at paras 25-26; See also IIDTW Report, *supra* at p 28 and the OLRC Report, *supra* at 57-59 and 114.

[18] Privacy Commissioner of Canada, *Drug Testing and Privacy*, (Ottawa: Minister of Supply and Services Canada, 1990), online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca/information/02_05_12_e.pdf> at p 18 ("Privacy Commissioner's Report").

balancing of interests, the PWU highlights the employee rights that are engaged by any alcohol and drug testing requirements and the limitations on the use of drug testing that are relevant to the appropriate balancing of interests.

1. Employees' Rights

Privacy

62. The right to privacy, as protected by the *Charter of Rights and Freedoms* is an essential value of Canadian society and lies at the heart of liberty in the modern state.[19] This is particularly so for compelled searches of a person's body. As the Supreme Court of Canada has noted the "seizure of bodily samples is highly intrusive" and "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."[20]

63. In the *Irving Pulp* case, the Supreme Court of Canada affirmed that breathalyzer testing "effects a significant inroad" on privacy, involving coercion and restriction on movement[21] and that the compelled provision of bodily fluid for testing purposes "effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy."[22]

64. In addition to constitutional and common law rights to privacy, employees also have statutory rights to privacy in respect of the collection, use and disclosure of personal information, including the result of any biomedical test. In particular, the *Privacy Act* imposes obligations on over 150 federal government departments and agencies to respect privacy rights by limiting the collection, use and disclosure of personal information.[23] The *Personal Information Protection and Electronic Documents Act,* sets out ground rules for how private sector organizations may collect, use or disclose personal information of customers and employees.[24] Privacy legislation applies to the actions and requirements of the Commission and licensees.[25] In Ontario, the *Personal Health Information Protection Act, 2004* strictly limits the collection, use and disclosure of personal health information.[26]

65. In the area of biomedical testing, personal information protected by privacy legislation includes:

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[19] *R v Dyment*, [1988] 2 SCR 417 at para 28 ("*Dyment*").
[20] *Ibid* at para 38.
[21] Irving Pulp, *supra* at para 49.
[22] *Ibid.*
[23] RSC 1985, c P-21 ("*Privacy Act*").
[24] SC 2000, c 5 ("*PIPEDA*").
[25] *Privacy Act*, *supra* at s 2; *PIPEDA*, *ibid* at s 4.
[26] S.O. 2004, c. 3, Schedule A.

a. the test results;

b. the fact that an employee has been requested to take a test;

c. peripheral information such as medical conditions that may influence the test results, including medical or physical condition that could affect the test results;

d. information that provided the reasonable grounds for testing; and

e. any outcome in response to the drug test, including any treatment programs the employee undertakes or any discipline he or she receives.[27]

Constitutional Rights

66. Alcohol and drug testing engages the constitutional rights of employees under the *Charter*. The Commission is engaged in governmental action by promulgating legally enforceable regulatory documents and standards.[28] Hence, the Commission's regulatory framework must also comply with the *Charter* and the constitutional principles of equality, dignity, privacy and security of the person.

67. Section 7 of the *Charter* sets out the right to security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. Security of the person includes liberty from physical constraint, privacy, and freedom from state intrusion into personal matters.[29]

68. Section 8 of the *Charter* guarantees the right to be secure against unreasonable search and seizure. Section 8 also provides for the protection of personal privacy, both to privacy of the person and to informational privacy.[30] Alcohol and drug testing constitutes a seizure within the meaning of that section.[31] The PWU submits that, even in the context of regulatory or administrative proceedings, section 8 requires that biomedical testing measures have some "threshold level of cause"[32],

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[27] Privacy Commissioner's Report, *supra* at pp 19-20.

[28] See the *Charter, supra*, s 32.

[29] See *R* v *Dion*, [1986] RJQ 2196 (QSJ) at para 40, affirmed by the Quebec Court of Appeal, unreported, rendered 31 May 1990 ("*Dion*"); and *Jackson* v *Joyceville Penitentiary,* [1990] 3 FC 55 (TD) ("*Jackson*") at paras 94-96 in respect of drug testing of inmates. See also *Blencoe* v *British Columbia*, (2002) 2 SCR 307 at para 49, where the majority confirmed that the notion of liberty in section 7 was "no longer restricted to mere freedom from physical restraint," as demonstrated by previous jurisprudence, but rather applied whenever the law prevented a person from making "fundamental life choices."

[30] OLRC Report, *supra* at p 69, citing *Dyment*, *supra.*

[31] See *Dion supra* at paras 27 and 35; and *Jackson supra* at para 82.

[32] OLRC Report, *supra* at p 81.

bearing in mind the privacy concerns of employees. In particular, there must be "reasonable and probable grounds" to conduct a search and seizure, for example some reasonable basis to suspect that an employee has violated a policy against the use of alcohol or drugs while at work.[33]

69. Section 15 of the *Charter* guarantees the right to equality. Although the Commission has not specified the consequences of a positive test, the PWU submits that testing will inevitably impose a burden or disadvantage upon employees resulting from a positive test result, based on the protected ground of disability (substance dependency or perceived substance dependency). It is clear, for example, that because urinalysis provides evidence of past drug use, rather than current impairment, the CNSC proposal for random drug testing would simply result in employers gathering information regarding the private lives of their employees rather than their fitness for duty. Not only can this sort of testing not be justified as reasonable, it would also create opportunities for discrimination on the basis of a disability or perceived disability.

70. To justify an alcohol and drug testing regime that breaches any of these sections of the *Charter*, the Commission must show that the objectives of the testing program related to an important, pressing and substantial concern and that the means chosen were proportional or appropriate to the ends.[34] An alcohol and drug testing program must be rationally connected to the objective and must impair constitutional rights as little as possible.

Human Rights Legislation

71. Employees who are disabled by substance dependence (or who are perceived to be so disabled) are protected under human rights law.[35] The *Canadian Human Rights Act* is a quasi-constitutional document. It sets out fundamental human rights protections and prevails over other federal legislation.[36] Thus, any regulatory document that the Commission creates must be interpreted in accordance with the *CHRA* as well as the *Charter.*

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[33] See *Dyment supra* at para 46; and *R v Collins*, [1987] 1 SCR 265 at para 46. See also *R v Grant*, 2009 SCC 32 at para 78: "Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."

[34] See *R v Oakes*, [1986] 1 SCR 103 ("*Oakes*") at paras 73-74.

[35] *Canadian Human Rights Act*, RSC 1985, c H-6, s 25 ("*CHRA*"): "In this Act, 'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug"; *Chiasson v Kellogg Brown & Root (Canada) Co,* 2006 ABQB 302 at para 65.

[36] *Canada (House of Commons) v Vaid*, 2005 SCC 30 at paras 26 and 81.

72. Under the *CHRA*, it is a discriminatory practice to refuse to employ, or to differentiate adversely in relation to an employee, on a prohibited ground of discrimination, including disability.[37] The Supreme Court of Canada has adopted a unified approach to determining whether or not there is *prima facie* discrimination that examines the *effects* of the impugned conduct or policy, rather than the respondent's intention to discriminate.[38]

73. Alcohol and drug testing policies, especially those relating to random testing, are *prima facie* discriminatory as they impose differential treatment on employees who test positive and have or are perceived to have a disability.[39] The conclusory statement in the Draft Regulatory Document that FFD requirements represent "reasonable occupational and operational requirements" does not acknowledge that the specific means and method used to measure and ensure FFD must nevertheless be tailored and be reasonably necessary to achieve a safe work environment.

74. Further, all employers are obliged to accommodate their employees to the point of undue hardship. Arbitral case law has held that employers must accommodate employees who test positive for prohibited substances.[40]

2. The Limitations of Drug Testing

75. In order to justify the adoption of any alcohol and drug testing, the Commission must demonstrate that such testing (1) provides accurate, relevant and significant information about employees and their ability to perform their duties and (2) actually results in a safer workplace using the least intrusive means possible. The alcohol and drug testing regime in the Draft Regulatory Document does neither.

76. Drug testing does not provide accurate, relevant or helpful information about an employee's state of impairment at the time the test is taken. Professor Olaf Drummer notes, laboratory analysis for drug tests cannot identify current impairment in the employee.[41] In other words, drug tests are not reliable indicators of levels of intoxication or impairment or of the employee's pattern of substance use.[42] It is for this reason that the

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[37] *CHRA*, *supra* at s 10.

[38] *British Columbia (Public service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.),* [1999] 3 SCR 3 at paras 29 and 54-55 ["*Meiorin*"]; and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 19.

[39] *Entrop v Imperial Oil Ltd,* 2000 CarswellOnt 2525, [2000] OJ No 2689 ["*Entrop*"] at para 92.

[40] See for example, *GTAA supra* at para 242.

[41] Drummer Report, supra, at pp 13-14, 17.

[42] The PWU acknowledges that some forms of testing do offer some reliable evidence of impairment for alcohol. However, the PWU submits that the symptoms of alcohol impairment are easily identified by trained supervisors, and that the programs listed under support programs above have historically been and are sufficient to identify alcohol impairment. Moreover, as noted in Irving Pulp, random alcohol testing is rarely appropriate, and only where there is compelling

Ontario Court of Appeal held random drug testing cannot be justified in the following terms in *Entrop*:

> **[99] I deal with drug testing first. The drugs listed in the policy all have the capacity to impair job performance, and urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.**[43]

77. A positive drug test only indicates the presence or absence of the substance or its metabolite; that is, the "recent" use of a tested substance.[44] The positive test provides no evidence to conclude that the employee was impaired while at work, or worked while subject to any after-effects of the substance. A positive drug test alone does not answer the essential question: "is the employee fit for duty?"

78. As noted below, several cases have concluded that the inability of drug tests to measure current impairment is relevant in an assessment of whether a testing regime is reasonable and justified when balanced against the infringements on employees' rights. In those cases adjudicators and the courts have declined to uphold random drug testing.[45] Given the serious limitations in the reliability of drug testing to confirm current impairment, and in the absence of any reasonable basis to suspect impairment at work, the PWU submits that it is an unjustifiable infringement to the privacy and bodily integrity of the employee to compel the employee to provide bodily fluids.

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evidence of a wide-spread substance abuse problem in the workplace that cannot be addressed by less invasive measures: see below, *Irving Pulp*, *supra* at paras 45 and 51; and *GTAA*, *supra* at paras 254 and 301.

[43] *Entrop supra* at para 99.

[44] Drummer report, *supra* at pp 13-14, and 17. How "recent" the use will depend upon a range of variables.

[45] *Entrop supra* at para 99; *GTAA*, *supra* at paras 270-285.

3. The Commission's Ultimate Goal of Public Safety and its Specific Goal of Preventing Impairment on the Job

79. The PWU understands that the Commission has adopted the alcohol and drug testing provisions to meet the Commission's ultimate goal of public safety.[46] The PWU, as the representative of employees who work in nuclear facilities and whose families work and live near nuclear facilities, unreservedly supports this ultimate goal.

80. The Commission intends to impose an alcohol and drug testing regime in the context of the FFD program. This testing regime can only be understood as part of the program to ensure that workers are fit for duty, and in particular, that workers are not impaired by substances while at work. Some aspects of the testing regime are intended to confirm suspected impairment (reasonable cause testing and post-incident testing) and other aspects are intended to deter workers from being impaired at work on pain of disciplinary consequences (follow-up testing, random testing). The Commission's underlying goal of ensuring that workers are not impaired by substances while at work (as opposed to some amorphous reference to public safety writ large) must be kept at the forefront in the assessment of the appropriate balance.

81. There are studies that suggest that drug testing reduces accidents or deters drug use. However, as noted by Professor MacDonald, many of these studies do not separate the implementation of comprehensive fitness programs, like those set out in the Broader Population FDD Requirements from the implementation of targeted drug testing (reasonable cause, post-incident, follow-up testing) and the implementation of random drug testing. There are no studies that scientifically demonstrate that imposing random testing on workers without any other FFD program increases workplace safety. Nor are their studies that demonstrate that there is measurable positive benefit to workplace safety or workplace impairment if a workplace adds *random* testing as part of an existing comprehensive FFD regime. Each aspect of an alcohol and drug testing regime must be assessed with a view to its purpose and its potential efficacy.

B. The Appropriate Balance

82. To determine what, if any, alcohol and drug testing should be permitted or required, the rights of employees must be assessed in a balancing against the Commission's goals of ensuring that workers are not impaired by substances while at work. This assessment must include an assessment of the nature (i.e. dangerousness) of the workplace and employee

[46] Canada's Nuclear Regulator, *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing,* Discussion Paper DIS-12-03 (Ottawa, ON: April 2012) at p 3.

positions, any demonstrable safety issues relating to impairment at work existing in the workplace, and a clear and accurate understanding of how specific alcohol and drug testing will remedy or deter the demonstrable safety issue.

83. The dangerousness of the workplace does not alone justify the imposition of alcohol and drug testing. As the Supreme Court noted, the dangerousness of the workplace only begins the inquiry[47] – the dangerousness of the workplace is what tips the balance for some level of testing. Alcohol and drug testing is permissible only in dangerous/safety sensitive workplaces. This is because the enhanced safety concern from the dangerousness of the workplace outweighs the significant intrusion into the private lives and bodily integrity of employees. For testing regimes in dangerous workplaces, there must be a further assessment of the safety issues and the type of testing that is required to remedy or deter that safety issue.

84. Recently, in *Irving Pulp*, the Supreme Court affirmed the use of the balancing of interests approach, and set out a "blue print", derived from years of arbitral jurisprudence on alcohol and drug testing in dangerous workplaces, with the following principles:

a. An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so ("reasonable cause testing");

b. An employer may require alcohol or drug testing of an individual following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred ("post-incident testing");

c. Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use ("return to work testing"). As part of an employee's program of rehabilitation, such agreements or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years. In a unionized workplace, the Union must be involved in negotiating that agreement. This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interest of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing; and

[47] *Irving Pulp supra* at para 31.

d. No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitation program.[48]

1. The Appropriate Balance: Reasonable, Post-Incident, and Follow-Up Testing

85. Reasonable cause testing, post-incident testing and follow-up testing are permissible infringements on employees' rights because they are linked directly to the identified safety risks and tailored to deter or remedy those risks. Reasonable cause testing is triggered only where there is some observed evidence of possible impairment, with the purpose of confirming impairment. Reasonable cause testing also deters employees from being impaired at work with the knowledge that there will be scientific evidence of drug use to support a supervisor's observations of impairment.

86. Post-incident testing is also confirmatory. It assists in an investigation of significant events. The PWU submits that testing in every circumstance where an employee's involvement caused or contributed to an accident, without requiring reasonable grounds to believe that the particular employee is impaired or even that he or she has consumed drugs or alcohol, is inappropriate. Post-incident testing should be available only where there is evidence that impairment played a factor in the event.[49]

87. Follow-up testing *may* be appropriate as a condition of return to work or of continued employment for individuals with a disclosed substance dependency. Follow-up testing imposes random or scheduled testing to deter and identify relapses. However, the use of random follow-up testing, and the frequency and duration of that testing, must be assessed by the parties (the employer, the union and the employee) on a case-by-case basis. This is the necessary effect of the legal duty to accommodate imposed by human rights law. The employee's bargaining agent and health professionals will be involved in this process as the process of accommodation in a unionized workplace is tripartite.[50] Blanket requirements for testing and hard requirements on the length of testing and frequency of testing do not accord with the duty to accommodate a substance dependant employee, having regard to their personal circumstances.[51]

88. While these types of testing are not necessarily impermissible, they are not necessary and the PWU urges the Commission not to adopt them. The Broader Population FFD Requirements are sufficient. Moreover, such

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[48] *Irving Pulp*, *supra* at para 32.

[49] *Weyerhaeuser Co. v. CEP, Local 447* (2006), 154 L.A.C. (4th) 3 (Sims) ("Weyerhaeuser Co. (1)"), as follows, at paras 161-162

[50] *Renaud v Central Okanagan School District No. 23,* 1992 CarswellBC 257, [1992] 2 SCR 970 at paras 43-44.

[51] See *GTAA supra* at paras 241, 242, and 245.

testing would erode the safety culture which PWU Employers and PWU members have worked hard to develop.[52] An employer having access to testing may well use the test as a quick method of assuming impairment rather than dealing with the underlying FFD issues. The result will be the reduction in trust and transparency between employees and employers, and in the valuable information this communication provides. Further, testing would likely result in less vigilance by supervisors and peers in their observations or reporting of aberrant or impaired behaviour. Instead, they will rely on the biomedical testing process to "catch" employees with substance dependency.

2. The Appropriate Balance: Random Testing

89. The Supreme Court of Canada, citing Arbitrator Picher, noted that arbitrators have overwhelmingly rejected random testing as 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".[53]

90. Random testing is different from other types of testing because it has no relationship to individualized personal circumstances or to identified safety issues. The theory behind random testing is that is deters on-the-job drug use, and thus on-the-job impairment. This theory is fundamentally flawed.

91. There is no reliable evidence that a random testing regime successfully deters employees from being impaired *at work*. As noted above, drug testing does not provide reliable, accurate or valuable information about current impairment in the workplace. Drug tests do not test for impairment; they test for presence of a chemical in the worker's body. This has been the case for decades, and remains so. A positive random drug test does not provide "proof" that a worker is impaired on the job. Rather, a positive random drug test demonstrates that a worker has used the drug tested within the detection time. Workplace testing may deter employees who engage in off-duty drug use - the kind of drug use that would affect work behaviour minimally (if at all), but not the at-work drug abuse that could be most deleterious to organizational function.[54] The deterrence of off-duty conduct is not a legitimate function of employers or the Commission and would verge on state or employer control of the private lives of citizens and workers.

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[52] As noted in the Macdonald Report, *supra* at 12, studies have argued that testing reduces employee morale or undermines labour-management relations.

[53] *Suncor supra* at para 54 citing *Imperial Oil Ltd and C.E.P. Local 900* (2006), 157 L.A.C. (4th) 225 (Picher) at para 100 ["*Imperial Oil*"], upheld by the Divisional Court (2008), 234 OAC 90 and by the Court of Appeal for Ontario, 2009 ONCA 420.

[54] Macdonald Report, *supra* at 7. See also Debra R. Comer, "A Case against Workplace Drug Testing", (May 1994) *Organization Science*, 5(2): 259 at 260.

92. Although random alcohol testing does provide measurable information about a worker's current impairment, random alcohol testing has been found as a permissible infringement *only* where there is compelling evidence of a wide-spread substance abuse problem in the workplace that cannot be addressed by less invasive measures.[55] In such circumstances, an employer may be able to meet the heavy onus to justify resorting to random alcohol testing if it has met the "threshold test of reasonable cause" to suspect widespread impairment in the workplace, and can show that a random alcohol testing program will deter the problem. As the Commission itself notes, this is not the case in nuclear facilities - the Draft Regulatory Document has not been created in response to any identified substance abuse problem in nuclear facilities, and the Commission has not considered less invasive deterrent or investigative measures.

93. There is little evidence that random alcohol and drug testing results in a safer workplace, or is the least intrusive manner by which to achieve a safer workplace. There is insufficient evidence to conclude that those who test positive for drugs have an increased risk of workplace injuries or accidents.[56] In one large-scale study, only 5.2% of employees tested following an incident tested positive for substance use.[57] The positive rate was virtually identical to the rates of positive tests in random testing pools. If there is a causal impact of drugs on workplace accidents, one would expect much larger positive rates in post-incident testing than in random testing. This is not borne out by the evidence.[58]

94. There is little evidence to suggest that alcohol and drug testing is the best or only method to increase safety when compared to the adoption of the less intrusive means of detecting workplace impairment, including the support programs noted above, or other impairment testing protocols.[59] Without considering alternatives, the Commission has proposed the most intrusive methods available, without a factual basis for doing so and without engaging in the balancing of rights process that is the essence of the law in this area.

95. Random alcohol and drug testing, without linkage to any evidence to suggest impairment, is an unjustified and unreasonable infringement on

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[55] *Irving Pulp*, supra at paras 29, 31, 37, and 45; *GTAA supra,* at paras 254 and 301.

[56] Macdonald Report, *supra* at 7-9; IIDTW Report, *supra* at p 44.

[57] For example, see the IIDTW Report, *supra*, which found the following at p 43: "Nor was the IIDTW presented with any conclusive evidence of the deterrent effect of testing. The Commissioners heard of three instances when a follow-up random testing of the entire workforce on an oil installation in the North Sea conducted shortly afterwards produced a drop in positive results compared with the original setting. Elsewhere, however, there was a lack of compelling evidence to show that drug testing is an effective deterrent (although the Inquiry notes that this is very difficult to prove one way or another)."

[58] Macdonald Report, *supra* at 8.

[59] IIDTW Report, *supra* at pp 46-48.

the rights of employees and would violate the Constitution, human rights legislation and established arbitral jurisprudence. In particular, the PWU submits that the adoption of the Draft Regulatory Document would violate sections 7, 8 and 15 of the Charter, human rights and privacy law.

96. To justify random testing that breaches any of the relevant sections of the Charter, the Commission must show that the objectives of the testing program relate to an important, pressing and substantial concern and that the means chosen were proportional or appropriate to the ends.[60] A random testing program must be rationally connected to the objective and must impair constitutional rights as little as possible.

97. While the goal of safety in nuclear facilities is a laudable one, the random testing regime in the Draft Regulatory Document is not rationally connected to this goal because there is no compelling evidence to conclude that random testing programs achieve the outcome that the Commission wants to achieve – ensuring that workers are not impaired on the job.[61]

98. Further, random testing is not the least intrusive method by which to achieve this goal. As noted above, the Commission has provided no evidence on which to conclude that the current FFD programs are insufficient or fail to identify employees who are not fit for duty as a result of impairment. The Commission has not assessed whether other tools to investigate current impairment may identify unfit employees without infringing upon the rights of employees.[62]

99. The random testing regime is not proportional to the objective of increasing safety in nuclear facilities. The alleged (and unproven) benefit of the random testing (as compared to the current FFD programs or the Broader Population FFD Requirements) does not outweigh the clear and palpable infringement of the legal rights of thousands of citizens employed in nuclear facilities.

100. To the extent that the Commission has concluded that it can overcome the lack of rational connection or proportionality because of the industry or as a bona fide occupational requirement ("BFOR"), the PWU submits that the Commission has erred. The PWU acknowledges that it is an occupational requirement that members be fit for duty but the Commission has not demonstrated that random drug and alcohol testing is the best or only way to achieve fitness for duty. The few cases in which random testing has been permitted to achieve the BFOR of fitness for duty, occurred in industries like the commercial bus and truck industry; industries that are

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[60] *Oakes supra* at paras 73-74.

[61] OLRC Report, *supra* at pp 95-96.

[62] *Ibid* at p 98.

markedly different from nuclear facilities in terms of the nature of work, supervisory involvement and evidence of drug use.[63] Nuclear employees are directly and intensively supervised and pass through security checks on a daily basis, unlike employees in the commercial truck and bus sector. There are less invasive alternatives to test workplace impairment in nuclear facilities that may be unavailable in other industries. To the extent that Canadian testing in the trucking industry is justified on the basis that Canadian truckers are required to be tested in the U.S., no such justification exists here. Canadians employed in nuclear facilities in this country are never subject to U.S. law.

101. We also note that there is no suggestion from the Commission that it has turned its mind to the costs of implementing a large scale random drug and alcohol testing regime on nuclear employers and what effect that might have on existing measures that effectively prevent substance abuse impairment. Specifically, there may be a risk that an employer forced to pay the cost of an unnecessary random drug testing program may decide to offset the cost of the program by reducing the ratio of supervisors to employees which would result in the reduced effectiveness of a proven fitness for duty program so as to pay for a monitoring regime that is both unnecessary and ineffective at monitoring impairment at work.

102. In short, the PWU submits that the Commission cannot lawfully mandate its random alcohol and drug testing regime set out in the Draft Regulatory Document. There is no reasonable basis in fact or law to impose drug or alcohol testing or any other violation of the legal rights of employees in nuclear facilities. Random testing is not proven to achieve the goal of increased nuclear safety, or to be the best or only method to do so. In this weighing of rights against safety concerns, the random alcohol and drug testing regime set out in the Draft Regulatory Document is not justified or lawful and, indeed, may for reasons set out above, actually impair current measures in place to prevent workplace impairment.

3. Appropriate Balance: Pre-Placement Testing

103. Pre-access testing infringes the same rights as other alcohol and drug testing and is subject to the same balancing of interests. The PWU asserts that pre-placement testing is neither appropriate nor justified. Pre-placement testing does not advance the goal of ensuring workers are not impaired while at work.

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[63] Note, however, that random testing has been held to be unlawful as an unacceptable invasion of an employees privacy in the railway sector, where safety concerns would be at the highest level: *Canadian Pacific Limited v UTU* (1987) 31 LAC (3d) 179 at para 20: "... it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing."

104. Just as the deterrent impact of random testing is flawed, so too is the apparent purpose behind pre-placement testing. At its best, pre-placement testing will only demonstrate that an incumbent or applicant has used a drug during the detection window. The fact of past drug use provides little relevant information to predict future on-the-job impairment; it does not demonstrate drug abuse or a potential for on-the-job drug impairment. Identifying individuals who have used a tested substance – including several legal substances – is an unjustifiable intrusion into a worker's personal life, without a compelling corresponding safety benefit. The potential negative consequences to an applicant, which are not set out in the Draft Regulatory Document – are severe. As noted in a recent arbitral decision on pre-access testing, such testing "is bound to capture employees who are not impaired, performance deficient, and who present no workplace health and safety risk. Employees who are not impaired or performance deficient during working hours due to alcohol or drug use are treated as though they are or will be."[64]

105. Pre-promotion or pre-transfer testing is also an unjustifiable and unreasonable infringement on current employees' privacy rights.[65] The licensee has a documented work history for existing employees. Where there is no indication of impairment due to substance use or abuse, such testing is not based on any reasonable cause. Moreover, licensee employers have a legal duty to accommodate employees to the point of undue hardship. Even if pre-transfer testing were lawful, the regulatory framework would have to expressly recognize that a positive test will not result in an automatic rejection of the employee's application for transfer.[66]

106. The PWU submits that pre-placement testing should be removed from the Draft Regulatory Document. The Commission has provided no safety benefit that can be directly linked to pre-placement testing which would justify this intrusion.

C. The Testing Regime: Additional Concerns

1. Scope of Substances Tested

107. The Commission has proposed to test for illicit drugs and performance-altering medications. The PWU submits that the scope of the substances

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[64] *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (Arb Surdykowski) at para 222.

[65] *Re Graymount Western Canada Inc. and Cement, Lime Gypsum & Allied Workers, Local D575* (2002), 114 LAC (4th) 269. at paras 25-26; See also *Entrop supra,* at para 103 where the Ontario Court of Appeal held: "Pre-employment drug testing suffers from the same two flaws: a positive test does not show future impairment or even likely future impairment on the job, yet an applicant who tests positive only once is not hired".

[66] *CNR v CAW supra* at para 192.

listed is unjustifiably broad, especially in the context of a random testing regime.

108. Several of the drugs to be tested are substances that are controlled substances available by prescription, for example opiate and benzodiazepine derivatives. While the PWU acknowledges that no workers should come to work while impaired, these substances may be prescribed for legitimate medical conditions. As a positive test may indicate past, off-duty use, the effect of the testing is to require workers to justify their use of prescribed medications taken while not at work, and likely be compelled to disclose personal health information.

109. The PWU notes that the Commission has included benzodiazepine as a tested substance, without any explanation, while benzodiazepine are not a tested substance in the U.S. testing regime. This substance should be deleted from the list of tested substances.

2. Consequences of a Positive Test

110. Where a worker has tested positive on a drug and alcohol test, the Draft Regulatory Document requires licensees to:

a. direct its laboratory to provide the designated specialist with all positive, adulterated or invalid test results;

b. direct the designated specialist to provide the donor with an opportunity to explain any alternative reasons for the positive test result, and to report only verified positive test results to the license;

c. remove workers who have tested positive from safety-sensitive duties and referred to the EAP; and

d. not consider the return of workers who have tested positive until it receives a recommendation from a duly qualified health professional.

111. The PWU agrees that a designated specialist should review and confirm positive tests before they are reported to the licensee, to maintain the confidentiality of the workers' health information. The designated specialist should have discretion to decline to report a positive test result when the test result arises from prescribed medication and there is no evidence to suggest that the worker was impaired on the job (for example, in a random test).

112. Workers who are reported to have tested positive are required to obtain a report from a health professional before they return to work. This blanket

requirement is unduly burdensome. For random testing in particular, this will require an employee, who had past drug use within the detection window, but was not impaired at the time of the test, to obtain a report to this effect. In this regard, the Draft Regulatory Document is overly prescriptive. The removal of a worker from his duties and the requirement to obtain medical clearance before returning to work should be left to the discretion of the licensee, who will exercise that discretion in accordance with law and the specific circumstance of the employee, her job and the workplace – the bedrock principles of human rights law in the workplace.

113. The Draft Regulatory Document also requires licensees to adopt a substance abuse evaluation process for workers in safety-sensitive positions. It is unclear how this process is related, if at all, to the alcohol and drug testing regime, and the conditions under which a substance abuse evaluation is required are left to the licensee. While the PWU supports the development of supportive programs for substance abusing employees, there is no benefit to requiring the development of such a program without specifying the conditions which would triggers its use. PWU Employers already have well developed processes to manage substance abusing employees. This section should be deleted.

PART V. THE PWU'S SUBMISSIONS ON MEDICAL, PSYCHOLOGICAL AND OCCUPATIONAL FITNESS ASSESSMENTS

114. The medical, physical and psychological fitness requirements and testing procedure set out in the Nuclear Security Regulations[67] and Draft Regulatory Document are invasive. Their purpose and effect is to reveal personal health information about the worker to his or her employer and third parties.

115. PWU Employers already have specific mechanisms to gather pertinent medical information on a regular basis through medical assessments (which are tailored to job and safety issues) and on a for cause basis, through a member's physician or, if justified, an independent medical professional. These mechanisms are appropriately tailored to the specific job duties of the worker, and the disclosure of pertinent information to supervisors is limited, in accordance with human rights law and privacy considerations. There is no evidence that these mechanism have failed to protect the public interest or the mutual interests of maintaining a safe workplace.

116. The PWU submits that the medical, physical and psychological fitness requirements set out in the Nuclear Security Regulations and in any regulatory documents must be carefully tailored to comply with human rights, constitutional and privacy law. The requirements and training

[67] *Nuclear Security Regulations*, SOR/2006-191, as amended (the "Regulations").

detailed in the Draft Regulatory Document must balance the actual safety and security needs of nuclear facilities with the legitimate human rights and privacy concerns of workers. The Commission bears a heavy burden in establishing that requirements are rationally connected to the duties and responsibilities of certified workers, NSOs, and NRF members, and minimum complement staff, and are reasonably necessary to accomplish the goal of nuclear safety.

117. The PWU submits that to the extent that the medical, psychological and occupational fitness testing requirements go beyond what is currently required by the Nuclear Security Regulations and the applicable regulatory documents and the mechanisms current in place at PWU Employers, they are unnecessary.

118. In particular, the Draft Regulatory Document has provided no explanation for why certified workers and staff in the minimum shift complement are required to undergo pre-placement, or periodic medical and/or psychological assessments. Absent some demonstrated concern that these workers are working while unfit, additional testing represents an unjustified intrusion into their health and private lives and violates their human rights and constitutional rights.

PART VI. RETENTION, USE AND DISCLOSURE OF PERSONAL INFORMATION

119. The Draft Regulatory Document requires licensees to maintain medical, psychological and occupational fitness certificates and alcohol and drug testing results. The Draft Regulatory Document does not address the manner of retention, disclosure and appropriate uses of the personal health information that is revealed through the fitness assessments and drug and alcohol testing. The PWU submits that the Commission should recognize and promote procedures that protect an individual's personal information and that limit its retention, use, disclosure and destruction without the individual's consent, in accordance with privacy legislation.[68]

120. PWU Employers currently do not allow supervisors access to the personal medical information provided to their human resources and medical staff. That limitation is entirely appropriate. Supervisors receive only information in respect of an employee's functional abilities. Disclosure of medical information without voluntary consent of the individual to whom the information relates is unlawful.[69]

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[68] As noted above, the *Privacy Act* and *PIPEDA*, *supra,* set out ground rules for how private sector organizations may collect, use or disclose personal information of customers and employees.

[69] *Hamilton Health Sciences and O.N.A. (Re)* (2007), 167 LAC (4th) 122 at para 63.

121. The PWU submits that any legally justified testing results should be similarly restricted. Such a procedure should ensure that the employee's personal health information is:

a. maintained by third-party testing administrator/facilities in Canada, in accordance with privacy legislation;

b. disclosed to licensees in a limited manner. In particular, licensees should receive only confirmation as to whether the individual is fit for duty or not. The results of the test (including the fact of a positive test, the drug found, the quantum of drug metabolite found in the sample, etc.) should not be disclosed;

c. maintained by licensees in a confidential manner, apart from the employee's employee records, by appropriate medical professionals bound by their professional obligations to maintain confidentiality of medical records, such as Registered Nurses or Medical Doctors;

d. not disclosed to third parties, including the Commission without the written consent of the employee;

e. available for review by the employee upon request; and

f. not used in a discriminatory manner., i.e. is not part of the evaluation or promotional processes for employees.

PART VII. CONCLUSION

122. Nuclear generating facilities have been operating safely in Ontario for over 40 years without the mandating by any regulator of a specific means of ensuring that employees at these facilities are fit for duty, let alone the mandating of a drug or alcohol testing regime. This is no surprise. It is the result of the interest of all stakeholders, including the PWU and the licensees in establishing and maintaining a safe workplace. This record has been achieved by the people in management and the bargaining units in these facilities who are intimately familiar with the operation of nuclear facilities and who realize that their livelihood rests on the safe production of nuclear power.

123. While the Commission has an oversight role, in this context, it bears a heavy onus to justify any potential interference with the rights of citizens employed in these facilities. Over four decades of safe operation speaks louder than the hypothetical claims of those who would promote drug and alcohol testing. Moreover, even if the testing were of any significant value in reducing impairment (which it is not), the value would be outweighed by the harm caused by the imposition of broad based rules by a regulator.

124. The Commission seems to have decided to adopt an essentially arbitrary "top down" approach without regard to existing systems in place at nuclear facilities and without any evidence of a problem that needs to be addressed. If the Commission were proposing only the Broader Population FFD Requirements, it might not be necessary to show the existence of a problem to justify the measures. However, the Commission is proposing measures that are not only rigid and intrusive, but which are, on their face, unlawful. The Commission cannot proceed on this basis.

125. Even if the Commission had a basis to justify mandating any detailed fitness for duty requirements, it would bear a heavy onus to establish that proposed requirements are rationally connected to the duties and responsibilities of targeted employees and are reasonably necessary to accomplish the goal of nuclear safety. Reference to vague, non-specific and wide-reaching safety concerns falls far short of constituting a justification for the imposition of alcohol and drug testing (and random and pre-placement testing in particular) in the absence of reasonable cause to suspect impairment impacting on the safe operation of a nuclear facility. The Commission has provided no explanation for why it has chosen to do so now, in the face of clear guidance from the Supreme Court of Canada that alcohol and drug testing are permissible only in extremely limited circumstances, none of which exist here. The Commission has failed to engage in an evidence-based analysis of whether the regime proposed by the Draft Regulatory Document is the only option available to address this issue, and if it is the best option. The PWU submits that it is neither.

126. Superficially, alcohol and drug testing purports to offer a method to make nuclear workplaces safer and reduce incidents of workplace impairment. However such testing does not deliver the results it promises - it is not a "silver bullet" for the complex issue of workplace impairment and it should not be adopted given that it would of necessity impair the rights of employees and undermine the current and effective human observation based means of ensuring fitness for duty.

127. As outlined above, the PWU submits the alcohol and drug testing regime set out in the Draft Regulatory Document is unlawful and contrary to the fundamental rights of employees to privacy, dignity, equality and security of the person. Moreover, it is applicable to a group of employees that include those that are not holding genuinely safety sensitive positions.

128. If the imposition of an alcohol and drug testing regime were justified at all, it should be limited to reasonable cause, limited post-incident and follow-up testing, subject to the conditions and concerns raised by the PWU above and endorsed by the Supreme Court of Canada in *Irving Pulp.* Nothing beyond these types of testing is lawful, or would withstand legal scrutiny.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

POWER WORKERS' UNION