



**SUBMISSIONS OF
THE SOCIETY OF ENERGY PROFESSIONALS
("The Society")**

On Draft REGDOC-2.2.4: Fitness for Duty

March 7, 2016

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Appendix

Society of Energy Professionals Comments on Discussion Paper for Public Consultation DIS-12-03: Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing, August 31, 2012

A. Summary of the Society's Concerns Regarding Draft REGDOC2.2.4

1. On August 31, 2012, The Society of Energy Professionals provided detailed comments on the Discussion Paper for Public Consultation: DIS-12-03: Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing. Those comments are appended to these submissions, and they accurately represent the Society's concerns regarding REGDOC-2.2.3, as well as the Society's expertise and history of leadership with respect to safety in the nuclear industry.

2. In its November, 2013 "What We Heard" report on DIS-12-03, the CNSC noted:

With regard to alcohol and drug testing, a moderate level of support was shown for a restricted set of testing circumstances where there are reasonable grounds in post-incident or follow-up situations. A large proportion of respondents expressed strong concern that the proposed requirement for random alcohol and drug testing of all workers with unescorted access is overly intrusive and may infringe on the privacy rights of workers.

3. The Society has reviewed Draft REGDOC-2.2.4 and is disappointed that, despite our comments and those of a large number of respondents in 2012, and despite the clarification provided in 2013 by the Supreme Court of Canada,¹ the regulatory scheme set out in REGDOC-2.2.4 mandates workplace drug and alcohol testing in the absence of reasonable cause to suspect impairment. Canadian courts have found testing in these circumstances to be incompatible with the Canadian *Charter of Rights and*

¹ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458,

Freedoms, human rights legislation and standards of reasonableness required of employers.

4. The drug and alcohol testing that REGDOC-2.2.4 requires licensees to impose on their employees involves a significant invasion of the employees' privacy, dignity and personal security. However, the CNSC has not identified any deficiencies in the area of fitness to work in the Canadian nuclear industry that would justify such an intrusion outside of particular circumstances where there are reasonable grounds to suspect impairment.

5. As was the case in 2012, it remains undisputed that the drug testing required by REGDOC-2.2.4 indicates past use but cannot detect impairment.² In contrast, supervisors at OPG and Bruce Power are trained to identify employees who are impaired as a result of factors including alcohol, drugs, physical or mental illness, fatigue, stress or other causes. The only justification put forward by the CNSC's 2012 Barbara Butler Report for pre-placement or random drug testing is that it is a deterrent, or that it identifies people who are likely to come to work impaired. However, there is no evidence of a problem with drug or alcohol use at OPG or Bruce Power necessitating deterrence. Moreover, there is simply no good evidence that random, pre-placement or post-incident drug testing is an effective deterrent³, and there is no evidence that people who test positive are likely to come to work impaired.⁴ Furthermore, the Supreme Court of Canada has determined that it is discriminatory, contrary to human rights legislation, to make an assumption that a positive result on a pre-employment drug test indicates that a person is likely to abuse drugs at work.⁵

² Olaf Drummer, *Expert Report on Technical Issues Associated with Drug Testing*, March 7, 2016, sections 5 and 9.

³ Scott MacDonald, *Report for the Society of Energy Professionals and the Power Workers' Union: Comment on the Canadian Nuclear Safety Commission Draft Regulatory Document, 2.2.4: Human Performance Management, Fitness for Duty* at pp 6, 15

⁴ *ibid* at pp. 5,6

⁵ *Entrop v. Imperial Oil*, 50 OR (3d) 18 (2000) Ont CA

6. Finally, REGDOC-2.2.4 unfortunately mandates drug and alcohol testing in circumstances where such testing is not only an unnecessary invasion of employees' privacy and dignity, but is potentially detrimental to existing workplace safety cultures.

B. *Irving Pulp and Paper*: The Supreme Court of Canada's 2013 decision on random alcohol testing.

7. The jurisprudence regarding drug and alcohol testing is reviewed in the Society's 2012 Comments on DIS-12-03, in paragraphs 50 through 80. The decisions of Canadian courts and boards of arbitration support the Society's position that workplace drug or alcohol testing in the following circumstances involves an unreasonable invasion of employee privacy rights and a violation of sections 7, 8 and 15 of the *Charter of Rights and Freedoms*:

1. Any drug or alcohol test performed on employees who do not work in safety sensitive positions, regardless of whether there is cause to suspect impairment;
2. Drug or alcohol tests performed on individuals working in safety-sensitive positions unless impairment would create a real threat to safety and there are reasonable grounds to suspect that the individuals are impaired.

8. In 2013, subsequent to the CNSC's public consultation on DIS-12-03, the Supreme Court of Canada had the opportunity to consider the issue of random alcohol testing in the workplace in the case of *Irving Pulp and Paper*⁶ ("*Irving*"). It is surprising that the CNSC has persisted with a plan to implement drug and alcohol testing in cases where there is no reasonable cause to suspect impairment, as the Supreme Court's decision is very much applicable to the situation in the nuclear industry.

⁶ *Supra* note 1

9. The Union in *Irving* appealed from a decision of the New Brunswick Court of Appeal's judicial review, which had overturned an arbitration decision. The board of arbitration had concluded that that the company's random alcohol policy was an unreasonable intrusion on employee privacy rights. The Supreme Court of Canada allowed the appeal. While the Court agreed that the workplace at issue was "a dangerous work environment" in which there were "risks and dangers in the operations performed both to the incumbent, and to others, as well as to the environment and to property," the Court found that the board of arbitration had correctly ruled that random alcohol testing was a significant intrusion upon employees' privacy rights which was not justifiable in the absence of evidence of a significant alcohol problem in the workplace.
10. In considering the scope of the employees' rights, the Court balanced the employer's safety concerns against the employees' privacy concerns and referred to the stringent standards and safeguards afforded by the *Charter* in cases where bodily samples are taken without consent to collect information:

49 On the other side of the balance was the employee right to privacy. The board accepted that breathalyzer testing "effects a significant inroad" on privacy, involving coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples. ... Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy.

50 That conclusion is unassailable. Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity" (*R. v. Dyment*, [1988] 2 S.C.R.

417, at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements.

51 In the end, the expected safety gains to the employer in this case were found by the board to range "from uncertain . . . to minimal at best", while the impact on employee privacy was found to be much more severe. Consequently, the board concluded that the employer had not demonstrated the requisite problems with dangerousness or increased safety concerns such as workplace alcohol use that would justify universal random testing. Random alcohol testing was therefore held to be an unreasonable exercise of management rights under the collective agreement. I agree.⁷

C. Safety gains expected from the CNSC’s testing regime are also “uncertain to minimal at best” and do not justify the severe impact on the privacy and dignity of employees proposed in REGDOC-2.2.4.

11. The circumstances in *Irving* were very similar to the situation in the Canadian nuclear industry. As in the *Irving* case, there is no drug or alcohol use problem affecting fitness for duty in workplaces falling within the scope of REGDOC-2.2.4, and therefore no safety gains that would justify a regime of biomedical testing in the absence of reasonable cause to suspect impairment. In its 2012 Discussion Paper (DIS-12-03), the CNSC confirmed that the biomedical testing it proposed was “not a response to any evidence

⁷ *Irving*, *supra* note 1 paras 49-51

of safety issues related to fitness for duty or substance abuse in Canada's nuclear industry (pp. 3-4).

C.1 Random and pre-placement drug and alcohol testing will not improve safety because existing Fitness for Duty Programs are effective

12. The Canadian Nuclear Association (the CNA) has approximately 100 members, including the Class I nuclear facilities and uranium mines and mills that could be subject to the requirements outlined in REGDOC-2.2.4. In its 2012 comments on DIS-12-03, the CNA submitted:

In closing, we would like to reinforce that the existing human performance programs effectively minimize the risk of impairment related incidences.

The Canadian nuclear industry is confident that their current human performance and fitness for duty programs are not only effective, but comparable to other industrial sectors and jurisdictions.

13. The Society is very familiar with existing fitness for duty programs at both Ontario Power Generation and Bruce Power. These programs are comprehensive and effective. They address all issues which may impact on fitness for duty, not just impairment from drugs or alcohol. They involve training and awareness in the recognition of signs of impairment or other factors impacting on fitness for duty as well as access to support for individuals who may not be fit for duty for a range of reasons. There are also tools for ensuring that prohibited substances are not brought into workplaces. Importantly, these programs are effective because they are accepted and understood by the employees to whom they apply.

14. The fitness for duty programs at OPG and Bruce Power are in effect at all times. Society-represented employees understand, and it is frequently reinforced, that they are responsible for reporting and/or responding to any potential safety hazard, from foreign materials to an impaired employee or contractor.
15. Moreover, Society-represented employees at OPG and Bruce Power do not work in isolation. They work in teams, and are constantly interacting with and observed by colleagues, managers, the employees they supervise and on-site Security. In addition, Society-represented employees in safety sensitive positions generally have a turnover period on each shift during which they work collaboratively and in close proximity with the individual replacing them on the next shift.
16. Alcohol and illicit drugs are explicitly banned from both the Bruce Power and OPG sites. The entire sites are secured and entry is controlled by Bruce Power and OPG Security. Security clearance, including a CSIS background check, is required of all employees who access the sites and employee ID cards must be shown at all times. Employees entering the site are subject to random vehicle searches. Visitors to the site must be sponsored by an employee and must be cleared through security at the main gate to the site, which includes a vehicle search. Entry into specific protected areas in the stations requires that employees pass through additional security safeguards, including passing through a metal detector and all items being carried go through an X-ray scan.
17. License conditions at OPG and Bruce Power ensure that there are adequate human resources to safely maintain and operate the nuclear facilities and that complex and risk significant operations are undertaken by competent

staff. There are also regulatory limits pertaining to the hours of work and shift assignments to control the effects of fatigue staff.

18. Both Bruce Power and OPG have Observation and Coaching programs which are used to reduce risk to employees and the business through the setting and reinforcing of high standards of behaviour and performance. This is achieved through regular observation, including paired observation, feedback and coaching. All employees are trained and are aware of their responsibility for participating in these programs.

C.1.i Fitness for Duty Programs at OPG

19. OPG supervisors are trained to monitor employees' fitness for duty in the workplace. Employees are made aware of fitness for duty requirements at orientation as well as throughout their careers through communication rollouts. All supervisors in OPG Nuclear from Society-represented supervisors to Site Vice Presidents must complete a Continuous Behaviour and Observation Program (CBOP).
20. This program trains supervisors to detect insider threats by developing awareness to recognize and respond to behaviours that may include a risk to the security, safety, or health of employees, facilities and the public. It trains supervisors to be aware, through direct observation of changes in the behaviours of their employees, to assess the risk that is posed by these changes and to respond accordingly to the potential risk. The Program includes training on the process to be followed when a worker reports to work and is presumed to be unfit for duty. This process is also outlined in the Nuclear Operations & Maintenance Hand Book.

21. In addition to training of supervisors, OPG takes measures to ensure that all staff understand its expectations regarding fitness for duty. These expectations are communicated through training on the Code of Business Conduct Policy (under Safety and Health) and Corporate Safety Rules (under Common Safety Rule 2.1 : "Inform your supervisor of any physical or other limitations that may reduce your ability to work safely."
22. For certified and security staff, regulatory documents RD-204 and RD-363 also outline specific fitness for duty requirements that are complied with by OPG
23. OPG's procedure OPG-HS-PROC-0007, *Disability Management*, governs situations where there is a need for additional rehabilitation or support upon return to work after a medical absence. This procedure ensures that such situations are managed to ensure the returning employee is medically fit for the duties.
24. The Employee and Family Assistance Program provides confidential professional assistance for a variety of issues related to physical and psychological wellbeing.

C.1.ii Fitness for Duty Programs at Bruce Power

25. As with OPG, Bruce Power has a number of policies and procedures dealing with employee fitness for duty. Among these policies are the following:
 - BP-PROC-00059 – Event Response and Reporting
 - BP-PROC-00271 – Observation and Coaching
 - BP-PROC-00276 – Code of Conduct
 - BP-PROC-00377 – Employee Health Management
 - BP-PROC-00378 – Bruce Power Health Surveillance
 - BP-PROC-00411 – Managing Employee Performance
 - BP-PROC-00610 – Fitness for Duty

26. All employees are made aware of the fitness for duty requirements and responsibilities at orientation as well as throughout their career through communication rollouts and training. There is a clearly understood expectation that employees not be under the influence of alcohol or illegal drugs while on Bruce Power premises.
27. Society-represented supervisors (referred to as FLMs) are trained to monitor employee's fitness for duty in the workplace, and are expected to be vigilant for fitness for duty issues when interacting with, and observing, their staff. As well, CNSC Certified staff are expected to be vigilant for fitness for duty issues during turnover and to assure themselves that the incoming staff is fit to take over the duties they are relinquishing.
28. Bruce Power maintains an Employee Wellness website and an Employee and Family Assistance Program. Both provide access to confidential professional assistance for a variety of issues related to physical and psychological well-being, including drug and alcohol issues.
29. For certified and security staff, regulatory documents RD- 204 and RD-363 also outline specific fitness for duty requirements that are complied with by Bruce Power

C.2 Fitness for Duty Programs and Safety Culture

30. The CNSC's 2013 *Discussion Paper for Public Consultation: DIS-12-07: Safety Culture for Nuclear Licensees*, incorporated a definition of safety culture developed by the IAEA:

...the characteristics of the work environment, such as the values, rules, and common understandings that influence employees'

perceptions and attitudes about the importance that the organization places on safety.”

31. DIS-12-07 identified key characteristics of an organizational safety culture, including the requirement that “a safety leadership process exists in the organization.” The discussion paper proposed that this requirement could be identified through performance objectives including: “Involvement and motivation of all staff in the organization is evident,” “collaboration and teamwork are encouraged, supported and recognized,” and “the impact of informal leaders on safety culture is recognized.”
32. What these assessment objectives correctly identify is that the concept of safety culture put forward by the CNSC in DIS-12-07 and generally shared by respondents to the Discussion Paper cannot simply be imposed by management but requires the engagement, motivation and leadership of staff.
33. The fitness for duty programs in place at OPG and Bruce Power, including Employee Assistance Programs, are part of this safety culture. They ensure that employees are engaged and take a leadership role. They place on employees the responsibility to be observant and to take responsibility for any threats to safety they may observe. They also offer education and support.
34. The Society is concerned that subjecting employees to drug and alcohol testing in circumstances where there is no cause to suspect impairment will have a negative impact on employee engagement with safety culture, and on the trust and respect between employees subjected to testing and the employers who are required to implement the tests. This in turn will impact the credibility and effectiveness of the fitness for duty program as a whole. In order for a fitness for duty program to be effective, it is important that the participants believe that the program has been implemented for a legitimate

purpose and that any intrusion on their privacy and dignity is minimal and necessary. If the people who are expected to participate in the program see that their rights and interests are being compromised unnecessarily, to a greater extent than other employees in Canada and in a way that is inconsistent with court rulings, human rights commission policies and expert opinion, there will be no acceptance of the program or trust in those who impose it. In that case, we believe that aspects of the program involving communication, observation, reporting and access to support and assistance will be seriously weakened.

35. This concern is supported by the Ontario Law Reform Commission's observation that "employee assistance programs and mandatory drug and alcohol workplace testing are 'mutually incompatible': one is based on trust and cooperative working relationships; the other is punitive and based on suspicion."⁸

36. The Society is also concerned that a program of drug and alcohol testing, particularly testing done randomly and without cause, will actually impede the effectiveness of the other aspects of a broad fitness for duty program, such as awareness, supervision and support. For example, testing could result in a decrease in vigilance by supervisors, who are trained to constantly assess general fitness for duty and possible impairment resulting from a range of possible factors far broader than drugs or alcohol, including fatigue, illness, workplace stress or psychological problems. These supervisors may come to simply rely on occasional drug and alcohol testing, along with the proposed psychological and medical testing, where it is more effective to be constantly aware.

⁸ *Report on Alcohol and Drug Testing in the Workplace*, (Toronto: Ontario Law Reform Commission, 1992), online: Internet Archive, Osgoode Hall Law Library.

C.3 Drug testing does not improve safety because it does not identify impairment

37. Professor Olaf Drummer is a forensic pharmacologist and toxicologist. He is Deputy Director (Academic Programs) at the Victorian Institute of Forensic Medicine and Head of the Department of Forensic Medicine, Monash University, Australia. He is one of the world's foremost experts on drug detection.

38. Dr. Drummer's 2016 *Expert Report on Technical Issues Associated with Drug Testing* confirms that it is not possible to relate a positive result on a urine drug test to any assessment of impairment from any drug. In the case of cannabis, the most common drug of abuse, impairment lasts for a few hours, while urinalysis may detect cannabis metabolite for anywhere from three to twenty-eight days.⁹

39. The following is a table of drug detection times from Dr. Drummer's report¹⁰:

Table 1. Likely duration of action and detection times in blood and urine for selected drugs

Drug/Drug Metabolite	Duration of Action	Detection Times	
		Blood	Urine
Heroin	<6 hours	0-1 hours	Rarely detectable
6-Acetylmorphine (heroin metabolite)		1-3 hours	6 hours
Benzodiazepines	6-24 hours	12-24 hours	1-7 days
THC	<6 hours	1-12 hours	
Cannabis metabolite		1-3 days	3-28 days
Cocaine	<4 hours	1-12 hours	
Cocaine metabolite (BE)			1-3 days
Oxycodone	12-24 hours	1-2 days	1-3 days
Methadone	1-2 days	1-3 days	3-7 days
Methamphetamine	12-24 hours	1-3 days	2-4 days

⁹ Drummer, *supra* note 2, sections 5 and 9

¹⁰ *Ibid* para 5.4

Amphetamine	12-24 hours	1-3 days	2-4 days
MDMA	12 hours	1-3 days	2-4 days

The duration of action refers to any substantial behavioural response but will depend on dose, frequency of use and sensitivity to drug; for benzodiazepines it will also depend on the drug; hence times are only indicative of more typical use. Detection times will depend on dose, pharmacokinetic differences, and which metabolite is targeted, as well as on other factors, and are therefore only indicative. For cannabis, significantly longer detection times are seen with persons using the drug repeatedly. Some screening kits based on immunoassay will detect more metabolites than others.

BE = benzoylecgonine, THC = Δ^9 -tetrahydrocannabinol, MDMA = 3,4-methylenedioxy-methamphetamine, Ecstasy.

C.4 Drug testing does not make workplaces safer

40. The stated objective of the CNSC’s proposed drug testing requirements and its justification for infringing on the privacy and dignity of employees, is to improve safety. However, there is no credible evidence that drug testing actually makes workplaces safer.
41. Professor Scott MacDonald is Assistant Director of Research at the University of Victoria Centre for Addictions Research. In his March, 2016 *Report for the Society of Energy Professionals and the Power Workers’ Union: Comment on the Canadian Nuclear Safety Commission Draft Regulatory Document, 2.2.4: Human Performance Management, Fitness for Duty*, he explains that, while workplace drug testing has been going on in the United States for the past forty years, scientific evidence does not point to any causal connection between drug testing and improved workplace safety or accident reduction. Random drug tests, in particular, are neither effective deterrents, nor useful for identifying people who are impaired. Dr. MacDonald concludes:

The Commission has not justified random drug testing and given the research evidence outlined in this report, there is not a strong evidence base to support this recommendation. Random drug testing has not been shown to reduce workplace accidents, deter drug

impairment in the workplace or make workplaces safer. 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 as defined by the Commission. These components do not have a sufficient evidence base to justify their use.¹¹

C.5 There are alternative, less intrusive means of detecting impairment

42. Another reason for the Society's objection to "without reasonable cause" drug and alcohol testing is that, not only is there no problem requiring deterrence, but even if there were some justification for general impairment-related testing in the workplace, there are less intrusive, more effective means. In his report, Dr. MacDonald discusses the use of behavioural performance testing, such as computerized tests which can assess drug related deficits by testing psychomotor skills, memory, divided attention, decision-making and critical tracking. These kinds of tests have been recommended by the Ontario Law Reform Commission as a better option for assessing impairment in the workplace. Dr. MacDonald points out that a possible advantage of these tests is they 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.¹²

D. Conclusion

43. The Supreme Court of Canada has recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity." In

¹¹ MacDonald, *Supra* note 3 at p.15

¹² *ibid* at pp 13, 14

Irving, the Court determined that, absent reasonable cause to suspect impairment, employees should only be required to submit to seizure of bodily samples in the workplace through measures such as a breathalyzers or urine test if such an intrusion on their rights is justified both by the dangerousness of the workplace and also by enhanced safety concerns, such as a workplace drug or alcohol problem.

44. There is no evidence of a drug or alcohol problem among employees of CNSC licensees. There is no evidence that drug and alcohol testing would assist to make the licensees' workplaces safer. There is, in fact, a real concern that testing would harm the strong, effective safety culture that exists in the workplaces where our members are employed. There is therefore no justification for drug or alcohol testing except where:

- Employees work in safety sensitive positions; and
 - There is reasonable cause to suspect impairment; or
 - Following confirmation of a substance abuse or dependency issue by a health professional

All of which is respectfully submitted by The Society of Energy Professionals
March 7, 2016

APPENDIX



SOCIETY OF ENERGY PROFESSIONALS COMMENTS ON

Discussion Paper for Public Consultation

**DIS-12-03: Fitness for Duty: Proposals for Strengthening Alcohol and Drug
Policy, Programs and Testing**

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A. Introduction

A. I. The Society of Energy Professionals and Our Commitment to the Safe Operation of Nuclear Facilities

1. The Society of Energy Professionals represents over 8,300 engineers, scientists, supervisors and other professionals in Canada's energy sector. As an organization, we have represented professionals for almost 70 years.
2. We represent employees working for fourteen different employers in the electricity sector, including Ontario Power Generation, Bruce Power, AMEC-Nuclear Safety Solutions, Nuclear Waste Management Organization, Hydro One, the Independent Electricity System Operator, the Ontario Energy Board, New Horizon System Solutions, Toronto Hydro, Inergi, Kinectrics, Vertex, the Electrical Safety Authority and Brookfield Power.
3. Our members work in every aspect of the electricity industry. They are involved in generation, transmission and distribution of electricity, management of the electricity system, regulation and enforcement of standards, and management of the electricity market. They are employed as first-line managers and supervisors, professional engineers, scientists, information systems professionals, economists, auditors and accountants, as well as many other professional, administrative, and associated occupations.
4. Approximately 90% of our membership holds post-secondary degrees and diplomas, with 70% holding degrees at the Bachelor's, Master's or Ph.D. levels. Society members are knowledge workers who take great pride in exercising their civic, social and professional responsibilities. As a union, we stand behind our members' professionalism, integrity, and commitment to excellence in all areas, particularly workplace safety, public health and environmental sustainability.
5. At OPG Society members provide technical expertise in areas of conventional health and safety, radiation safety, emergency preparedness and environment. Society represented safety-related occupations include ergonomists, safety specialists, industrial hygienists, safety officers, health physicists, emergency managers, environmental scientists and environmental engineers.

6. Advocating for safe and healthy operation of our nuclear workplaces is one of the Society's highest priorities as a union. Our members work inside of and in close proximity to nuclear facilities, and they are among the first in harms way if the highest standards of safe operation, and occupational health and safety are not adhered to. They and their families are local residents of Clarington and Durham and Port Elgin and they are very conscious of the importance of ensuring a safe and healthy environment in the areas where they live.
7. The Society takes a leadership role in the area of workplace health and safety and accident reduction. We advocate for our members' health and safety interests in collective agreement negotiations and through grievance processes. Society leaders participate on multiple joint health and safety committees at each of the companies where our members work (for example, there are 35 at OPG), including joint working groups, joint health and safety policy committees, Joint Committees on Radiation Protection at OPG and Bruce Power, Corporate Safety Rule Advisory Groups, and Corporate Code Advisory Groups. Society leaders also participate in broader health and safety initiatives, including the Infrastructure Health and Safety Association Board, the Provincial Labour Management Safety Committee and the Ontario Federation of Labour Health and Safety Committee.
8. The Society is concerned that any workplace safety programs implemented within workplaces where our members are employed are actually effective and focused on improving safety, and are not just about improving public relations. And while we are passionate advocates for workplace safety, we are concerned that individual privacy and dignity, also deeply valued and carefully safeguarded in this country, are not needlessly and inappropriately compromised in the name of public safety.

A. II. The Society's Objections to the CNSC's Proposed Program of Drug and Alcohol Testing

9. The program of drug and alcohol testing which the CNSC is proposing to mandate in nuclear facilities would be a radical departure from the approach taken by the federal and provincial governments in Canada to date. No government in Canada has imposed workplace drug and alcohol testing by legislation or regulation, both because the Canadian public is not receptive to unnecessary intrusions into individuals' privacy, dignity and physical integrity, and because of the likelihood that such

government action would infringe on the rights guaranteed by the Canadian *Charter of Rights and Freedoms*. The Society is opposed to the CNSC's proposed program of mandatory workplace drug and alcohol testing. We are also very concerned that the government is considering imposing such a drastic step as an administrative act at the level of the CNSC, rather than through Parliament.

10. The Canadian approach to fitness for duty programs has been defined by courts, labour arbitrators, human rights commissions, Privacy Commissioners, and bodies like the Senate Standing Committee on Illegal Drugs and the House of Commons Standing Committee on National Health and Welfare. While the approach in some American jurisdictions has been to use the workplace as a forum for the promotion of particular moralistic agendas or social policies regarding drug use, the Canadian approach to fitness for duty and substance abuse programs in the workplace has been to focus exclusively on safety and accident prevention. The Canadian approach has also recognized that individual privacy and dignity are highly valued and carefully guarded in our society and must not be discounted when considering approaches to assessing fitness for duty. The Society wishes to ensure that any fitness for duty policies which impact on our members are consistent with this balanced and safety-focused Canadian approach.
11. For these reasons, the Society opposes the CNSC's proposal to mandate a program of drug and alcohol testing in the workplaces within its jurisdiction. In particular, we strongly object to the implementation of any fitness for duty program that includes drug or alcohol testing in situations where there is no reasonable cause to suspect impairment. In our position, such a requirement would be inconsistent with rights guaranteed by the Canadian Charter of Rights and Freedoms, human rights legislation and Privacy legislation as well as being an ineffective and likely counter-productive approach to promoting safety in the nuclear facilities.
12. In addition to our concerns regarding the proposed program of testing for prohibited substances, the Society has serious concerns about issues of privacy arising from the collection and dissemination of information related to such testing. Any requirements to collect, record and report information through a Fitness for Duty Program must be consistent with rights guaranteed by the *Canadian Charter of Rights and Freedoms* and with relevant privacy legislation.

B. Existing Fitness for Duty Programs

13. The CNSC is proposing that nuclear power plant licensees take measures to prevent, deter, detect, and remediate potential alcohol and drug use. The Society is very familiar with existing fitness for duty programs at both Ontario Power Generation and Bruce Power. These programs are comprehensive and effective. They address all issues which may impact on fitness for duty, not just impairment from drugs or alcohol. They involve training and awareness in the recognition of signs of impairment or other factors impacting on fitness for duty as well as access to support for individuals who may not be fit for duty for a range of reasons. There are also tools for ensuring that prohibited substances are not brought into workplaces. Importantly, these programs are effective because they are accepted and understood by the employees to whom they apply.

B. I. Existing Programs at Ontario Power Generation

14. OPG supervisors are trained to monitor employee's fitness for duty in the workplace. Employees are made aware of fitness for duty requirements at orientation as well as throughout their career through communication rollouts.
15. All supervisors in OPG Nuclear from Society-represented supervisors to Site Vice Presidents must complete a Continuous Behaviour and Observation Program (CBOP). This program trains supervisors to detect insider threats, by developing awareness to recognize and respond to behaviours that may include a risk to the security, safety, or health of employees, facilities and the public. It trains supervisors to be aware, through direct observation of changes in the behaviours of their employees, to assess the risk that is posed by these changes and to respond accordingly to the potential risk. The Program includes training on the process to be followed when a worker reports to work and is presumed to be unfit for duty. This process is also outlined in the Nuclear Operations & Maintenance Hand Book.
16. In addition to training of supervisors, OPG takes measures to ensure that all staff understand its expectations regarding fitness for duty. These expectations are communicated through training on the Code of Business Conduct Policy (under Safety and Health) and Corporate Safety Rules (under Common Safety Rule 2.1 : "Inform your supervisor of any physical or other limitations that may reduce your ability to work safely')

17. OPG's license conditions ensure that there are adequate human resources to safely maintain and operate OPGs nuclear facilities and that complex and risk significant operations are undertaken by competent staff. There are also regulatory limits pertaining to the hours of work and shift assignments to control the effects of fatigue of OPG staff. For certified and security staff, regulatory documents RD-204 and RD-363 also outline specific fitness for duty requirements that are complied with by OPG.
18. OPG's procedure OPG-HS-PROC-0007, *Disability Management*, governs situations where there is a need for additional rehabilitation or support upon return to work after a medical absence. This procedure ensures that such situations are managed to ensure the returning employee is medically fit for the duties assigned.
19. The Employee and Family Assistance Program provides confidential professional assistance for a variety of issues related to physical and psychological well being.
20. Since May, 2012, OPG has retained a security firm to provide dog handlers and dogs capable of identifying the presence of drugs and other prohibited materials. The security dogs are used at the Pickering and Darlington sites. In our view, this approach provides more useful and relevant information than can be obtained by drug testing, which at best, can indicate only that an employee has used a particular substance at some time in the past. We also believe that dogs are an effective deterrent for any individual who would consider bringing prohibited substances into the workplace. Since the dogs were introduced at Pickering and Darlington, they have found no illegal drugs on site.

B. II. Existing Programs at Bruce Power

21. Safety is a key value of the Bruce Power culture and every employee is expected to play a role.
22. As with OPG, Bruce Power has a number of policies and procedures dealing with employee fitness for duty. Amongst these policies are the following:
 - BP-PROC-00059 – Event Response and Reporting
 - BP-PROC-00271 – Observation and Coaching
 - BP-PROC-00276 – Code of Conduct
 - BP-PROC-00377 – Employee Health Management

- BP-PROC-00378 – Bruce Power Health Surveillance
 - BP-PROC-00411 – Managing Employee Performance
 - BP-PROC-00610 – Fitness for Duty
23. All employees are made aware of the fitness for duty requirements and responsibilities at orientation as well as throughout their career through communication rollouts and training. There is a clearly understood expectation that employees not be under the influence of alcohol or illegal drugs while on Bruce Power premises.
 24. Society-represented supervisors (referred to as FLMS) are trained to monitor employee's fitness for duty in the workplace, and are expected to be vigilant for fitness for duty issues when interacting with, and observing, their staff. As well, CNSC Certified staff are expected to be vigilant for fitness for duty issues during turnover and to assure themselves that the incoming staff is fit to take over the duties they are relinquishing.
 25. Bruce Power maintains an Employee Wellness website and an Employee and Family Assistance Program. Both provide access to confidential professional assistance for a variety of issues related to physical and psychological well-being, including drug and alcohol issues.
 26. Bruce Power's Observation and Coaching program is used to reduce risk to employees and the business through the setting and reinforcing of high standards of behaviour and performance. This is achieved through regular observation, including paired observation, feedback and coaching.
 27. Alcohol and illicit drugs are explicitly banned from the Bruce Power site. The entire site is secured with entry being controlled by Bruce Power Security. Security clearance, including a CSIS background check, is required of all employees who access the Bruce Power site and employee ID cards must be shown at all times. Employees entering the site are subject to random vehicle searches. Visitors to the site must be sponsored by an employee and must be cleared through security at the main gate to the site, which includes a vehicle search. Entry into specific protected areas in the stations requires that employees pass through additional security safeguards, including passing through a metal detector and having all items being carried go through an X-ray scan.
 28. Bruce Power's license conditions ensure that there are adequate human resources to safely maintain and operate Bruce Power's nuclear facilities and that complex and risk significant operations are undertaken by competent staff. There are also regulatory limits pertaining to the hours of work and shift assignments to control the effects of fatigue of Bruce

Power staff. For certified and security staff, regulatory documents RD-204 and RD-363 also outline specific fitness for duty requirements that are complied with by Bruce Power .

C. The Society's Objections to the Proposed Program of Drug and Alcohol Testing

C. I. Drug Testing Does Not Improve Safety

29. The stated objective of the CNSC's proposed drug and alcohol testing requirements is to improve safety. We understand this to mean that proponents of testing believe that testing would make nuclear facilities safer by deterring people from coming to work impaired and perhaps identifying and rooting out people who have a tendency to come to work impaired. However, there is no credible evidence that drug testing actually makes workplaces safer.
30. Professor Scott Macdonald is Assistant Director of Research, Centre for Addictions Research at the University of Victoria. In his report "*Comment on the Canadian Nuclear Safety Commission discussion paper Fitness for duty: Proposals for strengthening alcohol and drug policy, programs and testing*"¹, he explains that, while workplace drug testing has been going on in the United States for the past forty years, scientific evidence does not point to any causal connection between drug testing and improved workplace safety or accident reduction.
31. Dr. McDonald indicates that one way in which drug testing might have been shown to be effective is to look at employees who were fired for testing positive, and compare their safety records prior to their dismissal to other employees. If drug testing were effective, one would expect that the employees testing positive would have poor safety records. Employers might then justify the programs by arguing that their drug testing program really was helping them root out the at-risk employees. But there is no such evidence.
32. Dr. McDonald has done research into the question of whether drug testing makes workplaces safer, and in his report concludes that "the preponderance of the evidence does not indicate that measurable improvements in safety will be achieved with random testing" and further "that there is no credible evidence that drug testing programs reduce job accidents (p.17)."

¹ August 7, 2012 (**Attachment 1**)

33. There are a number of reasons why drug testing does not make workplaces safer. The first is that the impact of impairment by drugs in workplaces is negligible. The fact is that it is extremely rare for employees anywhere to come to work impaired, and impairment is not a significant cause of workplace accidents. Dr. Macdonald looked at a large sample of post-accident drug test results from 2009 to 2011 and found that the percentage of people testing positive after an accident is the same as the percentage who test positive on random tests. In other words, there is a small segment of the working population who will test positive and those people are not involved in accidents to a greater extent than the rest of the working population (Macdonald, pp. 13, 14).

C. II. Drug testing Does Not Indicate Impairment

34. The other reason that drug testing does not make workplaces safer is that testing does not identify people who are impaired at work or people who are likely to be impaired at work. This is a likely explanation for the results of the study referenced above, in which it was demonstrated that the small percentage of people who test positive on random drug tests are no more likely than the general working population to be involved in workplace accidents.
35. In his report, Dr. Macdonald demonstrates that even the newer saliva test technology cannot be taken as an indicator of impairment. For example, while impairment from cannabis may last up to four hours following exposure, a saliva test may indicate a positive result for as long as thirty-four hours after exposure and the maximum detection time using a urine test is five weeks.² While Barbara Butler's report³ indicates that saliva testing presents a "tighter window" on recent use, even that report does not claim that saliva testing is evidence of impairment. Moreover, the fact that an individual has used a prohibited substance is not a reason to assume that this person will be impaired at work, just as it would not be reasonable to assume that because people drink alcohol on the weekend they are likely to be drunk at work.
36. The other problem with the science of saliva testing is that tests must be done in a laboratory, with a delay of several days before the results are revealed. In the meantime, the employee who has been randomly tested is presumably sent back to work in her safety-sensitive job. As Arbitrator

² Macdonald, *supra*, see pages 7 - 9 and page 21 table 1

³ Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry INFO-0831, Barbara Butler, 2012.

Picher noted in *Imperial Oil and CEP Local 900*,⁴ it is impossible to reconcile this delay with a claim that the test is reasonably necessary to ensure the safety of the workplace.

C. III. False Positives

37. In addition to the possibility of a false positive resulting from exposure to substances which are not prohibited (e.g. poppy seeds), even the most accurate technology in drug testing is susceptible to human error and chain of custody issues. It would be unrealistic to accept any claim that a false positive is impossible. A positive result will have an immediate stigmatizing effect on an employee, even if that result is subsequently shown to have been flawed. In order to be properly assured that every possible measure has been taken to ensure the integrity and accuracy of results, there would need to be significant regulation and monitoring of testing procedures (including chain of custody requirements), as well testing providers and facilities.

C. IV. Potential Negative Impact of drug and alcohol testing on the Effectiveness of Fitness for Duty Programs

38. The existing measures at OPG and Bruce Power are clearly focused on fitness for duty and they comprehensively address the range of issues that may impact on an individuals' ability to safely perform their jobs. In contrast, it is our view that some of the measures being proposed by the CNSC are not accurately focused on the workplace safety issues they are intended to target. Because drug testing can only indicate past use of drugs and not impairment, such testing does not address the issue of safety at the nuclear facilities. At the same time, we believe that the narrow focus on drugs and alcohol will interfere with existing programs that now ensure attention to other issues impacting on fitness for duty.
39. It has been noted by the Ontario Court of Appeal,⁵ as well as labour arbitrators and human rights commissions, that in the limited circumstances when certain types of testing are legally acceptable, they are only acceptable if they are implemented as part of a comprehensive program of education and support. The Society is concerned that a program of drug and alcohol testing, particularly testing done randomly and without cause, will actually impede the effectiveness of the other

⁴ 157 L.A.C. (4th) 225 (2006) at para. 113, later upheld on judicial review by the Ontario Court of Appeal (*Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900*, [2009] O.J. No. 2037)

⁵ *Entrop v. Imperial Oil*, 50 OR (3d) 18 (2000) Ont CA

aspects of a broad fitness for duty program, such as awareness, supervision and support. For example, testing could result in a decrease in vigilance by supervisors, who are trained to assess general fitness for duty and possible impairment resulting from a range of possible factors far broader than drugs or alcohol, including fatigue, illness, workplace stress or psychological problems. These supervisors may come to simply rely on drug and alcohol testing to monitor fitness for duty.

40. OPG and Bruce Power currently have comprehensive employee assistance programs. A testing program may discourage individuals from seeking help under these programs when they have problems impacting their fitness for duty, as they may be concerned about testing and reporting requirements.
41. We are also concerned that subjecting employees to drug and alcohol testing in circumstances where there is no cause to suspect impairment will have a very negative impact on the trust and respect between those employees and the employers who are required to implement the tests, and between the employees and the CNSC. This in turn will impact the credibility and effectiveness of the fitness for duty program as a whole. In order for a fitness for duty program to be effective, it is important that the participants believe that the program has been implemented for a legitimate purpose and that any intrusion on their privacy and dignity is minimal and necessary. If the people who are expected to participate in the program see that their rights and interests are being compromised unnecessarily, to a greater extent than other employees in Canada and in a way that is inconsistent with court rulings, human rights commission policies and expert opinion, there will be no acceptance of the program or trust in those who impose it. In that case, we believe that aspects of the program involving communication, observation, reporting and access to support and assistance will be seriously weakened.
42. The Society's concerns are reflected in the testimony of one of the Union's witnesses in Imperial Oil and CEP. Arbitrator Picher reviewed the remarks of this witness in his 2006 decision:

When asked to comment on his view of the random and unannounced drug testing by means of the oral fluid drug test program, Mr. Punchak, a Company employee since 1981 with no disciplinary record, was adamant. As he put it: "I continually have to prove myself innocent, over and over again. ..."⁶

⁶ *Supra* note 4 at para

C. V. Concerns regarding Privacy, Dignity and Bodily Integrity

43. It is highly invasive of an individual's privacy and dignity to demand that he or she produce a sample of a bodily fluid to be taken away for laboratory testing. Biomedical testing raises concerns regarding the invasiveness of the testing procedure as well as the collection of private information which is contained in a bodily fluid sample. Courts have recognized this and have responded by strictly limiting the circumstances under which the state may make such a request (see below).
44. The Society has serious concerns about the impact on our members' privacy rights from the proposed requirement for biomedical testing and the proposed requirement to report test results to the CNSC.
45. The communication of any information relating to biomedical tests, including the fact that the test was imposed on an individual, the existence of the test results and any personal information disclosed by the test, is governed by statute and subject to constitutional restrictions. For example, the *Privacy Act*⁷ imposes limitations on federal government departments and agencies with respect to the collection, use and disclosure of personal information. The *Personal Information and Personal Information Protection and Electronic Documents Act*⁸ imposes similar controls on private sector organizations and in Ontario, the *Personal Health Information Protection Act*⁹ strictly regulates the collection, use and dissemination of medical information.
46. With respect to drug and alcohol testing, these protections are critical because of the impact that information revealed by a test (including information unrelated to the individual's fitness for duty) may have on an individual's life, including current and future employment. It is therefore essential that any requirement to release information regarding biomedical testing to the CNSC to be strictly controlled and safeguarded.

D. Legal Context

47. The CNSC, as a federal regulator established by statute, constitutes a "government" within the meaning of s. 32 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Any fitness for duty program mandated by the CNSC, including a drug or alcohol testing program would have to be consistent with requirements in the *Charter*, including

⁷ R.S.C. 1985, c. P-21

⁸ Act (S.C. 2000 c.5)

⁹ S.O. 2004 c.3

sections 7, 8 and 15. The Barbara Butler report commissioned by the CNSC makes no reference to the obligations of the CNSC pursuant to the *Charter* at all.

48. While the CNSC has made reference to practices in other sectors, including the transportation sector, it should be noted that any drug testing that has been implemented in Canada has been in the context of private employment relationships. Since no government in Canada has ever imposed workplace drug and alcohol testing by law or other government action, such testing has never been subject to scrutiny under the *Charter*. The constitutionality of drug and alcohol testing has been considered by the courts in other contexts however, and, except in very limited circumstances, has been found to violate the *Charter* rights of the individuals subjected to testing. The kind of testing proposed by the CNSC goes well beyond what the Courts have found to be constitutionally permissible.

49. **In the Society's position, drug or alcohol testing in the following circumstances would be in violation of the CNSC's obligations under the *Charter*:**
 1. **Any drug or alcohol test performed on employees who do not work in safety sensitive positions, regardless of whether there is cause to suspect impairment;**

 2. **Drug or alcohol tests performed on individuals working in safety-sensitive positions unless impairment would create a real threat to safety and there are reasonable grounds to suspect that the individuals are impaired.**

D. I. Section 7 of the Charter

50. Section 7 guarantees the right not to be deprived of liberty or security of the person except in accordance with the principles of fundamental justice. The courts have looked at mandatory drug and alcohol testing in other contexts, such as police searches, and have determined that seizure of bodily fluids from an individual for the purposes of testing, like other forms of intrusion into individual privacy, involves the individual's liberty and security of the person and may violate section 7 of the Charter.

51. Significantly for the CNSC, regulations that authorize drug and alcohol tests without including adequate protection from unreasonable or arbitrary testing have also been found to violate section 7. Both the

Quebec Superior Court and the Federal Court, Trial Division found a violation of s. 7 in a section of the *Penitentiary Service Regulations* authorizing a member of the Correctional Services of Canada to require an inmate to produce a urine sample where the member “considers the requirement of a urine sample necessary to detect the presence of an intoxicant in the body of an inmate.”

52. The decision of the Quebec Superior Court in *R. v. Dion*¹⁰ was based on the failure of the Regulations to provide sufficient protection from arbitrary or unreasonable searches. The judge in that case noted that his finding might have been different if the section had specified, as did the *Criminal Code* on the taking of breath samples, that a member of the Correctional Service of Canada must have *reasonable and probable* grounds to believe that the inmate has ingested an intoxicant.
53. The Federal Court in *Jackson v. Jacksonville Penitentiary*¹¹ also concluded that the drug testing sections of the Regulations were in violation of section 7 of the *Charter*. The Court ruled that an obligation to provide a urine sample deprives the inmate of a certain security. Moreover, as refusal to comply with this obligation may entail disciplinary measures, it constitutes a breach of liberty. Finally, as section 41.1 of the Regulations specifies no standards, criteria or circumstances governing the obligation to provide a urine sample, the obligation is contrary to the principles of fundamental justice. The Court accepted that intoxicants are the source of serious problems in penitentiaries, and that the goal of section 41.1 of the *Regulations* was to address these concerns, to ensure order and to improve security in the institutions. However, as this regulation did not provide any standards or criteria for taking an inmate's urine sample, it did not constitute a reasonable limit justifiable in a free and democratic society.
54. The Supreme Court of Canada has also noted that the right to liberty in section 7 applies “whenever the law prevents a person from making fundamental personal choices.”¹²
55. **It is the Society’s position that section 7 of the Charter would prohibit any action or regulation by the CNSC resulting in a situation where continued employment is conditional on an unreasonable and unjustified demand for the production of bodily fluids or a breathalyzer test. It is also our position that such a demand is not reasonable or justified unless impairment in the**

¹⁰ (1986) 30 CCC (3d) 108

¹¹ [1990] 3 FC 55 (TD)

¹² *Blenco v. British Columbia* [2000] 2 SCR 307

workplace is a real threat to safety and there are reasonable grounds to suspect impairment.

D. II. Section 8 of the Charter

56. Section 8 sets out the right to freedom from unreasonable search and seizure. The Supreme Court of Canada has held that taking of bodily fluids (including breathalyzer tests) constitutes a “seizure” within the meaning of section 8. Any requirement for drug or alcohol tests set by the CNSC, therefore, would have to be reasonable. This means that the search must be authorized by law and the law itself must be reasonable and the search must be carried out in a reasonable manner.¹³ Even in the context of a school, where authorities are responsible for the safety of students and there may be a somewhat lower expectation of privacy than in a police search situation, the SCC has found that a search of students’ property cannot be conducted without reasonable cause:

...the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A warrant is not essential in order to conduct a search of a student by a school authority. ***The school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach...***: [italics added].¹⁴

57. Searches of bodily fluids, however, are subject to a particularly high standard of reasonableness. LaForest J., speaking for the majority of the Supreme Court of Canada made the following statement in *R. v. Dyment* (1988) ¹⁵ a case about the seizure of a blood sample

Quite simply, the constitution does not tolerate a "low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude" (*Hunter v. Southam Inc.*, *supra*, at p. 167); if anything, when the search and seizure relates to the integrity of the body rather than the home, for example, the standard is even higher than usual.

¹³ *R. v. S.A.B.*, 2003 SCC 60 (CanLII)

¹⁴ *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393

¹⁵ 2 SCR 417

58. The cautious approach of the Supreme Court towards searches and seizures which intrude on bodily integrity, even where the objective is public security, is similar to the approach taken by labour arbitrators toward alcohol and drug tests in the workplace (see discussion below,). This approach was summarized by arbitrator Picher in 2006 in *Imperial Oil v. and Communications, Energy and Paperworkers Union of Canada, Local 900*):

In the nearly twenty years since the above decision in *CP Rail* the preponderance of Canadian arbitral jurisprudence has not varied from the conclusion that in a safety sensitive industry, where there is reasonable cause to do so, absent any contrary provision in a collective agreement, it is open to an employer to require that an employee undergo a drug test. From the outset it was recognized that to conduct a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause. The notion that under a collective bargaining regime based on bargaining between union and employer it is implicitly open to an employer to subject all employees, regardless of cause, to speculative, random drug testing has been all but universally rejected.¹⁶

59. **It is the Society's position, based on the principles set out by the Supreme Court, that s. 8 of the Charter prevents the CNSC from mandating the production of bodily fluids, (including, for example, urine, saliva, hair, blood, and breath samples) as a condition of employment or access to an employee's place of work, unless impairment in the workplace is a real threat to safety and there are reasonable grounds to suspect impairment.**

D. III. Section 15 of the Charter

60. Section 15 guarantees the right to equality. Like the Canadian *Human Rights Act* and the human rights legislation of Ontario and the other provinces, it prohibits discrimination on a number of grounds, including disability. Courts applying federal and provincial human rights legislation have determined that addiction and substance abuse or dependency are disabilities. Section 15 protects people from laws or government actions that impose a burden, obligation or disadvantage on individuals on the basis of one of the listed grounds or on grounds analogous to those listed in section 15. A fitness for duty program which requires a negative result on a drug or alcohol test as a condition of employment would result in a disadvantage for individuals suffering from addictions.

¹⁶ *Supra* note 4

61. The Ontario Court of Appeal has found that some kinds of drug and alcohol testing programs also discriminate against individuals who test positive but do not suffer from addictions. In its 2000 decision in *Entrop v. Imperial Oil Ltd*¹⁷ the Ontario Court of Appeal found that the requirement was *prima facie* discriminatory against employees and prospective employees on the basis of disability and **perceived disability**.

Imperial Oil applies sanctions to any person testing positive – either refusing to hire, disciplining or terminating the employment of that person – on the assumption that the person is likely to be impaired at work currently or in the future, and thus not “fit for duty.” Therefore, persons testing positive on an alcohol or drug test – perceived or actual substance abusers – are adversely affected by the Policy. The Policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, *prima facie* discriminatory.¹⁸

D. IV. Section 1 of the Charter

62. Once it is determined that drug and alcohol requirements constitute limitations on rights guaranteed by sections 7, 8 or 15 of the Charter, section 1 says that such limits are permissible only if they can be shown to be reasonable limits justifiable in a free and democratic Society. Following the “Oakes” test developed by the Supreme Court of Canada in 1986, the CNSC would have to demonstrate that the objectives of any testing program it imposes relates to an important, pressing and substantial concern and that the means chosen are proportional and appropriate to the ends.
63. **In the Society’s position, a requirement that individuals produce samples of bodily fluids or submit to breathalyzer tests as a condition of employment or a condition of access to their workplaces would not be justifiable under section 1 of the Charter except in cases where impairment in the workplace is a real threat to safety and there are reasonable grounds to suspect impairment.**

D. V. Canadian Human Rights Act

64. In addition to the requirements of the Charter the CNSC is subject to the *Canadian Human Rights Act* (the “CHRA”). The CHRA prohibits

¹⁷ *Supra* note 5

¹⁸ *Ibid* at para 92

discrimination in employment on the basis of disability. As indicated in the Butler report, the Canadian Human Rights Commission has a policy on drug and alcohol testing which reflects jurisprudence under the CHRA. The policy indicates that testing in the following circumstances would constitute a violation of the CHRA:

- Any drug or alcohol testing that is not part of a broader program of medical assessment, monitoring and support
- Any drug test other than: (1) where there is reasonable cause to suspect impairment, (2) where the testing follows a significant incident or accident and there is evidence that an employee's act or omission may have contributed to the incident or accident; (3) following treatment for drug or alcohol abuse or following disclosure of current substance dependency or abuse
- For employees who are not in safety sensitive positions, any alcohol test other than (1) where there is reasonable cause to suspect impairment; (2) where the testing follows a significant incident or accident and there is evidence that an employee's act or omission may have contributed to the incident or accident; (3) following treatment for drug or alcohol abuse or following disclosure of current substance dependency or abuse.

65. It is important to recognize that this policy and the jurisprudence on which it is based addresses the narrow issue of whether there had been discrimination contrary to the CHRA and did not deal with the higher standards imposed by sections 7, 8 and 15 of the Charter.

E. Types of Testing

E. I. Random Drug and Alcohol tests

Sections 7 and 8 of the Charter

66. Workplace drug tests have not yet been subjected to Charter scrutiny. However, as noted above, Courts have found violations of the right to liberty and security of the person and the right to protection from unreasonable search and seizure where bodily fluids have been seized without reasonable cause or where the authorization to require a body fluid sample for testing is given without adequate protection against unreasonable testing.

67. The principles on which the Courts have relied are similar to those relied upon by labour arbitrators who have struck down random drug testing programs in the workplace as violating collective agreement requirements for reasonableness in the exercise of management discretion. In these cases, arbitrators have balanced concerns for safety and security against the interests of employees' in maintaining their privacy and dignity, and have required that employers demonstrate reasonable cause before imposing drug or alcohol testing. On this basis, random drug testing has been universally rejected by labour arbitrators. The basis for this rejection was set out by Arbitrator Picher in his 2006 decision in *Imperial Oil and CEP*:

[117] The dignity, integrity and privacy of the individual person is among the most highly prized values in Canadian society. Employment is a large part of the human experience, normally spanning the better part of an adult life. The place of a person in his or her profession, trade or employment is therefore a significant part of his or her humanity and sense of self. That reality is deeply reflected in the law [page281] of employment and labour relations in Canada. It is therefore not surprising that, as contrasted with developments in other countries, the federal and provincial governments in Canada have not rushed to enact legislation or regulations authorizing employers to alcohol or drug test their employees. Nor is it surprising that boards of arbitration have been careful to seek a balance which protects the privacy and dignity of employees in this area.

[118] Indeed, such laws as do exist in Canada with respect to the random substance testing of individuals are extremely limited and highly protective of individual rights. As noted above, police authorities who operate a roadside breathalyzer testing program cannot randomly test motorists. Before any motorist is tested under such a program, the constable involved must form some opinion as to whether there is a likelihood that the individual to be tested is impaired. Where there is no reasonable cause for that conclusion, no breathalyzer test is conducted. In other words, such breathalyzer testing which has been legally authorized in Canada is in fact a form of "for cause" testing, and not purely random alcohol testing. We believe that it should not be lightly inferred that by the mere fact of an employment contract an employer can assert an extraordinary authority which government itself does not claim.¹⁹

68. Random testing is, by definition, testing without cause. It is an infringement of the rights guaranteed by sections 7 and 8. Further, a

¹⁹ *Supra* note 4

requirement by the CNSC that its members impose random testing cannot be reasonably justified in a free and democratic society, pursuant to Section 1, for reasons including the following, also set out by Arbitrator Picher in *Irving Oil*:

[104] As the cases would indicate, the "Canadian model" has gained broad acceptance within safety sensitive industries in Canada. The reported jurisprudence is devoid of any serious incidents or accidents attributed to workplace drug use. That would suggest, as a general rule, that the balancing of interests approach evolved by Canadian arbitrators has been an appropriate, measured and ultimately effective response in balancing the rights of employers and employees in this sensitive area. While it is obviously for each employer to decide which course it feels is appropriate for its enterprise, the fact remains that a significant number of major employers in highly safety sensitive industries in Canada have founded their alcohol and drug testing policies on principles of reasonable cause and have not attempted to force upon their employees mandatory, random, unannounced drug testing. To the extent that those employers and industries have functioned well and have operated safely without apparent difficulty by holding to reasonable grounds as the basis for demanding a drug test, there is little reason to conclude that random, unannounced drug testing of all employees is, of necessity, an essential element for a successful alcohol and drug policy.²⁰

69. Moreover, as Dr. Macdonald's report indicates, there is no evidence that random testing leads to improved safety or a decrease in workplace accidents
70. Random alcohol testing has also been generally rejected by labour arbitrators, except where the testing was introduced because of a general alcohol problem in the workplace that could not be addressed by less intrusive means.²¹ The basis for this is that, as with random drug tests and police breathalyzer tests, there must be reasonable cause for any intrusion into privacy and bodily integrity. An exception to this approach is a recent decision of the New Brunswick Court of Appeal found in favour of an employer's policy of random alcohol testing in safety sensitive positions despite the fact that there was no existing

²⁰ *Ibid*

²¹ For example, *Greater Toronto Airports Authority and Public Service Alliance of Canada, Local 0004 [2007] CLAD No. 243, (Devlin)* and *Petro-Canada Lubricants Centre (Mississauga) and Oakville Terminal v. CEP local 593 (2009), 186 L.A.C. (4th) 424 (Kaplan)*

alcohol problem in the workplace. That decision has been appealed to the Supreme Court of Canada.²²

71. In our view, a requirement by the CNSC that its members impose random alcohol tests would not survive scrutiny under sections 7 and 8 for the same reason that the police cannot demand a breathalyzer test without reasonable and probable cause and arbitrators in jurisdictions outside of New Brunswick have insisted on evidence of an alcohol problem in the workplace before permitting random alcohol testing.

Section 15 and Section 1 of the Charter

72. In the Society's position, random drug testing mandated by the CNSC would also constitute an unjustifiable limitation on section 15 equality rights, for the reasons that the Ontario Court of Appeal found that random drug testing violated the Ontario *Human Rights Code*.
73. As indicated above, in paragraph 60, the Ontario Court of Appeal in *Entrop and Imperial Oil* determined that random drug testing was *prima facie* discriminatory because it created a disadvantage for employees who tested positive, based on disability or perceived disability because the employer's drug and alcohol policy treated all employees who tested positive as though they were likely to come to work impaired, in other words, as though they suffered from a substance abuse or addiction.
74. In our position, this disability-based discrimination is not justifiable in a free and democratic Society under s.1, because random drug testing is neither rationally connected to the objective of improving safety nor proportional to that objective. It does not impair constitutional rights as little as possible.
75. As we have indicated, there is no evidence that random drug testing improves safety or reduces accidents. Moreover, while drug testing technology has developed since the *Entrop* case, it is still not capable of accurately measuring impairment. In his report, Dr. Macdonald demonstrates that even the newer saliva test technology cannot be taken as an indicator of impairment. For example, while impairment from cannabis may last up to four hours following exposure, a saliva test may indicate a positive result for as long as 34 hours after exposure.²³ While the Butler report indicates that saliva testing presents a "tighter window"

²² *Irving Pulp & Paper Ltd v. Communications Energy and Paperworkers Union of Canada, Local 30* [2011] NBCA . Note that this decision only concerned random alcohol testing and not drug testing.

²³ see pages 7 – 9 and page 21 table 1

on recent use and “likely impairment when examined in conjunction with studies available on the impact and duration of the effects of drugs on performance” even that report does not claim that saliva testing is evidence of impairment.

76. The other problem with the science of saliva testing is that tests must be done in a laboratory, with a delay of several days before the results are revealed. In the meantime, the employee who has been randomly tested is presumably sent back to work in her safety-sensitive job. As Arbitrator Picher noted in *Imperial Oil and CEP Local 900*,²⁴ it is impossible to reconcile this delay with a claim that the test is reasonably necessary to ensure the safety of the workplace.

E. II. Pre-Employment and Pre-appointment Drug and Alcohol Testing

77. The Society objects to any drug or alcohol test required as a pre-condition of employment, upon assignment to work in a new position or prior to access to a particular area because such tests, like random tests, are imposed without reasonable cause. In our view, these tests are inconsistent with rights guaranteed by sections 7, 8 and 15 for the same reasons random testing infringes on these rights.
78. In the *Entrop* decision, the Ontario Court of Appeal specifically determined that pre-employment drug testing violated anti-discrimination provisions in the Ontario *Human Rights Code* for the same reason as random testing.

E. III. Reasonable Cause Testing

79. As indicated above, the only circumstances in which drug or alcohol tests may be justified are those in which impairment in the workplace would pose a serious threat to safety and there is reasonable cause to suspect that a worker may be impaired. In this respect, a drug test may be used to support a trained supervisor’s observation or confirm concerns arising from suspicious behaviour.
80. This also means that even with reasonable cause to suspect impairment, drug or alcohol tests cannot be required except where a worker occupies a safety-sensitive position. This principle has been universally articulated by Canadian courts, labour arbitrators and human rights tribunals.

²⁴ *Supra* note 4 at para.113

F. Conclusion

81. The Society submits that the current regulatory regime and the measures which have been voluntarily adopted at Canadian nuclear facilities, as described above, more than adequately address fitness for duty requirements in the nuclear industry. There is no evidence, nor is any cited by the CNSC in its discussion paper, to indicate where and how the current regulations have fallen short or to justify the need for additional regulation.

82. Furthermore, the proposals related to drug and alcohol testing are a radical and unprecedented departure from the approach taken by the Canadian government and its agencies up to this point in time. The kind of testing proposed would involve an unjustified affront to the dignity and privacy of responsible and committed employees in the energy sector and would infringe on fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* and Privacy legislation. Even in the narrow circumstances, outlined above, in which certain kinds of drug or alcohol testing may be legally justifiable, it is the Society's position that it would be inappropriate for the CNSC to implement such measures through regulation. If it is the government's intention to embark on such a departure from Canadian norms, then that is a matter which should be debated by Parliament, not imposed by a government regulator.