UNITED STEELWORKERS
USW
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**Ken Neumann**
National Director/ Directeur national

August 27, 2012

Canadian Nuclear Safety Commission
280 Slater Street
P. O. Box 1046
Station B
Ottawa, Ontario
K1P 5S9

Dear Members of the Review Committee,

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

Please find enclosed our submissions filed in respect of the CNSC's invitation for comments on its Discussion Paper DIS-12-03, *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing* and the related document INFO-0831, *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry*. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Katrin Pedelle for

Paula Turtle
Canadian Counsel

PT/pa

Encl:

# DRUG AND ALCOHOL TESTING IN THE NUCLEAR INDUSTRY: ISSUES OF LAW AND EVIDENCE

UNITED STEELWORKERS

USW

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS)

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## SUBMISSIONS OF THE UNITED STEEL WORKERS ON THE DISCUSSION PAPER, DIS-12-03: FITNESS FOR DUTY: PROPOSALS FOR STRENGTHENING ALCOHOL AND DRUG POLICY, PROGRAMS AND TESTING AND THE ACCOMPANYING REFERENCE DOCUMENT, INFO-0831: RECENT ALCOHOL AND DRUG WORKPLACE POLICIES IN CANADA: CONSIDERATIONS FOR THE NUCLEAR INDUSTRY

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**August 27, 2012**

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The USW in the Nuclear Sector

The United Steelworkers (USW) is Canada's largest private sector union, representing members in virtually every economic sector and jurisdiction in the country. USW represents men and women who work in mines, auto parts plants, universities, nursing homes, steel mills and bakeries. We are a strong and diverse union. We have the support of approximately 225,000 members across Canada as our union seeks to improve the lives of working people everywhere by negotiating collective agreements which set the standard for our own members and for other workers in similar workplaces.

USW is proud of its role as bargaining agent for many thousands of employees across Canada. We are committed to leadership in workplace safety. USW has successfully fought for legislative changes to improve health and safety for workers everywhere, from important improvements to Ontario's health and safety laws more than forty years ago, to the more recent "Westray Bill" which amended Canada's Criminal Code to make corporate killing a crime.

USW represents many workers who play an integral role in the nuclear power production process. USW Local 8914 currently represents miners and mill workers at the Cameco Key Lake mill and McArthur River uranium mine in Saskatchewan. USW also represents workers in Port Hope, Ontario in Local 13173 at the Cameco Refining and Conversion Facility, which produces uranium hexafluoride ($UF_6$) and natural uranium dioxide ($UO_2$) and Local 14193 at the Cameco Fuel Manufacturing facility, which produces the fuel used in nuclear power plants. Additionally, USW Local 8562 represents security guards at the

Port Hope Conversion Facility. These submissions are made and filed on behalf of USW and its Locals 8914, 13173, 14193 and 8562. USW and its local unions are collectively referred to as "USW" throughout these submissions.

USW has experience and a significant interest in ensuring that the conditions under which USW members work to mine, mill and convert the raw materials used to produced nuclear energy are safe. When properly applied in accordance with the law, the existing drug and alcohol testing provisions which are part of comprehensive health and safety policies in place at the mill and mine in Saskatchewan and the conversion and fuel manufacturing facilities in Port Hope are sufficient to ensure worker safety. There is no need for CNSC to regulate alcohol and drug testing in nuclear facilities.

USW and its local unions which represent Cameco employees in Saskatchewan and Ontario are always prepared to discuss safety-related concerns with Cameco and to support the further development of policies in accordance with the law and as may be necessary, based on objective evidence and demonstrated need.

USW has reviewed documents titled Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry dated March 2012 (the "Butler Report") and Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing dated April 2012 (the "Proposals"). We have also reviewed a draft copy of submissions in response to those documents prepared by the Power Workers Union, and a report by Professor Scott

Macdonald, submitted by the Power Workers Union and the Society of Energy Professionals.

USW notes that the Proposals are currently limited in their application to nuclear power plants, where the USW does not represent employees. However, the Proposals suggest that consideration may be given to expanding the scope to other licensed nuclear facilities, including the Saskatchewan and Port Hope locations described above where USW members work. USW objects to the implementation of the Proposals in general, and specifically to the application of the Proposals to the facilities where USW members work.

**Privacy is a Canadian Value**

USW notes that the Proposals include revisions to existing drug and alcohol policies to include random testing. While USW supports the objective of comprehensive and fair safety programs ensuring employees are fit for work, USW objects to random drug tests. Any consideration of drug testing in Canada must begin by acknowledging that the right to privacy is a fundamental Canadian value, and in connection with drug testing in Canada, the law has long protected workers' rights to privacy. The safety of Cameco's facilities can and must be protected while maintaining the legally protected rights of employees working in the nuclear sector.

Drug and alcohol testing in the workplace has been carefully considered by arbitrators, human rights tribunals and judges. The law has evolved over many years, from its origins in the late 1980's when arbitrators were first called upon to consider disciplinary action related to allegations of drug use. Drug and

alcohol testing regimes have properly been characterized by decision makers as invasive to the privacy rights of employees. Notably, they have been criticized for regulating off-duty conduct and for compromising human dignity. Arbitrator Burkett cites Justice LaForest in *Re Trimac Transportation Services - Bulk Systems and T.C.U.* 88 L.A.C. 4th 237 at p. 259 on this issue. Commenting on *R. v. Dyment,* [1988] 2 S.C.R. 417, Burkett notes that the case involved:

> [t]he taking of a blood sample for evidence of impairment. In his judgment, Justice LaForest referred to privacy as "at the heart of liberty in the modern state" and as "grounded in man's physical and moral autonomy (and) . . . as essential for the well-being of the individual . . . (and) for the public order". Although conceding that privacy must be balanced against other societal needs, the court found that "persons are protected not just against the physical search but against the indignity of the search (our emphasis) . . .". The court concluded that [at pp. 431-2]:
>
> > . . . 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 short, it is beyond debate that protection of the individual from unwarranted physical or property intrusion, including unwarranted searches, seizures or surveillance, is a core value of Canadian society.

The Butler Report rightly notes that these legal rules inform companies' design of drug and alcohol testing policies (at p. 5) to ensure that companies are in compliance with the law.

As noted above, the Proposals consider the adoption of a testing regime which goes far beyond what arbitrators have found to be justified in Canadian workplaces. Such action by the CNSC would be subject to scrutiny under the *Charter of Rights and Freedoms*. Section 7 of the *Charter* protects life, liberty and

the security of the person. As held in the *Dyment* case discussed above, privacy rights go to the very heart of *Charter*-protected liberty interests. Additionally, section 8 guarantees the right to be secure against unreasonable search or seizure. This means that Canadians have a *prima facie* right to be left undisturbed unless there is a good reason to consider searching their person or property. In the employment context, this requires employers to have reasonable grounds to suspect an employee is impaired and in possession of an intoxicant before any kind of search can be conducted.[i]

USW submits that a policy that imposes random testing in Canadian workplaces would not survive *Charter* scrutiny. Random drug testing has also been struck down as contrary to human rights laws in Canada. Courts have endorsed the position of human rights tribunals that found that on its face, random testing is an overly broad intrusion into the private lives of employees that cannot be justified as a genuinely necessary occupational requirement.[ii]

Additionally, legislation prohibits the collection of unnecessary personal information. Federal institutions such as the CNSC are governed by the *Privacy Act.*[iii] Section 4 of the *Privacy Act* restricts government data collection to what is related to a given institution's operating program. In addition, the employee information that private employers can collect, use or disclose is limited by the *Personal Information and Personal Information Protection and Electronic Documents Act (PIPEDA).* In Ontario, the *Personal Health Information Protection Act* strictly controls the collection, use and disclosure of personal health information. The spirit of intent of these statutes is to limit the information that

government and private bodies collect from citizens, including while they are at work. And this sprit and intent must inform consideration of drug and alcohol testing regimes.

Most importantly in the context of workplaces covered by collective agreements (as is the case for Cameco's Saskatchewan mine and mill and refining facilities in Port Hope), Canadian arbitration law has established important limitations on drug and alcohol testing. Arbitrators have held that testing is only justified when a "balancing of interests" between the legitimate goal of workplace safety and employee privacy favours the right to test. The importance of worker privacy in the application of this balancing test was recently summarized by Arbitrator Sims, as follows:

> Safety is an indisputably important cause and no tolerance should be afforded personal choices that expose co-workers to the risk of physical harm at work. However, privacy and dignity interests are sometimes too easy to discount just because they are so private and personal. Not every step taken in the name of safety is beyond rational examination. If such action is ineffective, or extracted at an unnecessary cost to human dignity and privacy, then it must remain open to question, and ultimately to a choice, based on an objective balancing of interests. This must include the effectiveness of the tests and the other alternatives that might be available (*Re Weyerhaeuser Company Ltd. and Communications, Energy and Paperworkers Union, Local 447*, 154 L.A.C. (4th) 3, p. 25).

Employers face a very high burden of proof to establish that the balance should be weighed in favour of testing. Arbitrator Burkett held in *Re Trimac Transportation Services - Bulk Systems and Transportation Communications Union* 88 L.A.C. (4th) 237 that the employer must meet a risk threshold before it is possible to justify testing. He found that:

> [w]here countervailing privacy interests are at stake, there must be a balancing of impacts such that the degree of risk must meet a threshold sufficient to override the privacy interest...The onus is upon the Company, as the party seeking to force employees to submit to mandatory random drug testing, to establish that the risk threshold necessary to validate its initiative is met (p. 273-274)... in so far as the Company has based its need for mandatory random drug testing on the risk caused by the delayed or residual effects of drug taking, it has failed to establish that the level of risk so caused meets the threshold necessary to establish an overriding business interest and, thereby, to legitimize the resultant invasion of privacy (p. 278).

Based on the considerable body of jurisprudence which has developed around drug testing, as a general rule, testing employees for drug and alcohol use can only be conducted if an employer can establish on the basis of objective evidence that it has reasonable cause to believe the employee in question is impaired; or after a significant incident or accident where evidence indicates impairment is a contributing factor; or as part of a return to work plan following treatment for drug abuse or admission of a current addiction. These reflect the findings of Arbitrator M. Picher in *Canadian National Railway Co. and C.A.W.-Canada* 95 L.A.C. 4th 341.

USW submits that there is no need to change the drug and alcohol testing regime at Cameco, but if the existing policies are revised, due weight must be given to the importance of the rights of Canadian workers which are well established in the law referred to above.

**The Butler Report Misunderstands Canadian Law and Policy**

The "War on Drugs" describes a series of policies introduced by U.S. President Ronald Reagan in the mid-1980's that were designed to prevent trade

in illegal drugs. Recently, the Global Commission on Drug Policy (whose members include former Canadian Supreme Court Justice Louise Arbour and former United Nations High Commissioner Kofi Annan) examined the initiatives and policies behind the War on Drugs and also considered whether the War on Drugs had achieved its objectives. The Global Commission concluded that President Reagan's policies had not reduced drug use or reduced the trade in drugs and was, in fact, a complete failure.[iv] Mandatory workplace testing is a central element to the unsuccessful War on Drugs. Notwithstanding its failure to have achieved its objectives, President Reagan's policies have influenced the development of law and policy which has led to the establishment of mandatory random drug testing in many American workplaces.

In stark contrast to the American approach, Canadian law has always protected workers' privacy rights of while maintaining public and worker safety. By not properly considering the law which protects a worker's right to be free from intrusive searches, the Butler Report does not account for the significant differences between the Canadian and American approaches, and as a result it is fatally flawed. The Butler Report states that, "[w]ith its close proximity to the United States, Canadian industry has been significantly influenced by the very strong American anti-drug stance and acceptance of testing as one solution to workplace drug problems" (at p. 5). However, the suggestion that proximity to the US has caused "Canadian industry" in its entirety to accept U.S. policy is wrong. Only cross-border trucking companies have been significantly influenced by American random drug testing, and that is because cross border truckers are

subject to American testing regulations when they enter the United States. Indeed, a 2009 case expressly rejected the use of random testing for drivers within Canada (*Petro-Canada Lubricants Centre (Mississauga) and Oakville Terminal and C.E.P., Local 593 (Re)*, 99 C.L.A.S. 40). In *Trimac Transportation Services - Bulk Systems and Transportation Communications Union* 88 L.A.C. (4th) 237, the union accepted that drivers working in the United States were required to comply with American random testing requirements. However, Arbitrator Burkett explicitly rejected the existence of the American testing regime as a justification for importing random testing into Canada (at p. 272). Furthermore, and as noted above, Canadian law has firmly and consistently rejected the American model. This history has been explained in a significant Ontario Human Rights Tribunal decision on drug testing by Ontario Board of Inquiry Member Backhouse. She noted that:

> [i]nfluenced by President Reagan's 1986 Executive Order, Prime Minister Mulroney announced a National Drug Strategy in 1987, and established an all-party Committee of the House of Commons to study the matter. The Committee recommended against the introduction of random drug screening of job applicants or employees except where drug use constitutes a "real risk to public safety." Even then, the Committee advised that samples should only be requested for cause, where there is evidence of impairment or performance difficulties.
>
> In 1990, another report was issued by the House of Commons Standing Committee on Transport. The Committee endorsed drug and alcohol testing only under the following circumstances: pre-employment, post-accident, for cause, and periodic testing at the time of regular medical examinations for employees in safety-sensitive positions. The Committee explicitly ruled out random testing.[v]

Canada has clearly and repeatedly rejected an approach to drug testing which permits sweeping intrusions into the private lives of workers, even in the transportation sector which is subject to extensive regulation in the United States. Arbitrator M. Picher, speaking for the majority of a Board of Arbitration acknowledged that this reluctance can be attributed to the importance of workers' privacy rights in Canada:

> [t]he 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 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 (*Imperial Oil Ltd. and C.E.P., Loc. 900 (Re)*, [2006] O.L.A.A. no. 721, aff'd 2009 ONCA 420, at para. 117).

The Butler Report also vaguely and broadly asserts that the "testing procedures" adopted in Canada are the same as those in the United States (p. 5). This sweeping statement warrants clarification. While the procedures used by testing laboratories may be similar, the conditions under which an employer can legitimately require an employee to undergo an alcohol or drug test are very different in Canada.

The Proposals acknowledge that there are currently no drug or alcohol problems in the Canadian nuclear sector.[vi] This is important to the Proposals

under consideration, given that the 1990 Standing Committee on Transportation Report included in its reasons for rejecting random testing the absence of a demonstrated problem in the transportation industry, as follows:

> [t]he Committee recognizes the force of the argument of deterrence but is persuaded by the weight of the evidence that mandatory random testing should not be endorsed. To begin with, as we have noted, substance use is not a problem in the industry, nor, apparently is it causing a risk to safety. Certainly it is not a problem that would, in our view, justify such a draconian infringement of individual rights (our emphasis, cited in *Entrop v. Imperial Oil* [1996] O.H.R.B.I.D. No. 30 at para. 54).

Canadian authorities have considered and rejected a codified or regulatory approach to drug and alcohol testing like that which has been accepted in the United States, because Canadian law and values are different. The Butler Report ignores these important differences. USW submits that history and experience prove that Cameco's existing policies can uphold safety and protect workers' privacy rights.

**Privacy Rights Prevail Even Where Technology Proves Impairment**

Drug tests do not establish current impairment. As a result, even where testing is justified, test results are not conclusive evidence, but rather are one element to be considered as part of a comprehensive health and safety system. Arbitrator M. Picher held in *Re Canadian National Railway Co. and CAW* 95 L.A.C. 4th 341 that:

> [a] positive drug test is not conclusive of impairment when on duty, subject to duty or on call. It does not, therefore, of itself constitute just cause for discipline or discharge. It may, however, become material evidence which, in light of other evidence,

> supports inferences of impairment that do justify discipline or discharge (p. 400).

The random drug testing suggested in the Proposals would at most indicate that an employee had consumed a drug within a window of several days, but could not prove whether or not an employee was impaired at work. As such, a drug test is a limited tool for reducing workplace impairment.

Arbitrators have considered whether drug testing could be justified even if the technology were improved so that drug test results could be linked with impairment. This has arisen in connection with cases about alcohol breath testing, which does establish a link between the test result and impairment. Many arbitrators have held, in consideration of random alcohol testing, that employee privacy rights prevail over an employer's right to introduce a random alcohol testing regime.[vii] On judicial review of a decision by Arbitrator M. Picher, the Ontario Court of Appeal affirmed his decision, which held the following:

> [W]e have grave doubts as to whether the Company could randomly administer drug tests, even if it could be shown that the test would reveal impairment on the spot. The question would remain as to the basis upon which an employer, absent reasonable cause, could assert such an extraordinary right, a right which is available to police authorities for the purposes of criminal and highway traffic law only after they satisfy the threshold test of reasonable cause. In a society based on respect for integrity and dignity of an individual, an employer must bear a heavy onus of justifying resort to such a measure.[viii]

This analysis has been followed by other arbitrators, and by the Quebec Court of Appeal. Agreeing with Arbitrator Picher's position in *Imperial Oil*, the Court of Appeal struck down a clause in the company's policy which provided for random

alcohol and drug testing in safety sensitive positions because it violated the *Quebec Charter of Human Rights and Freedoms*.[ix]

An arbitration decision in New Brunswick struck down a random alcohol testing policy which had been introduced by the employer at Irving Pulp and Paper Limited. The arbitration award was overturned on judicial review and was the subject of a recent decision by the New Brunswick Court of Appeal[x] which is now being appealed to the Supreme Court. While the effect of the decision upholds the employer's random alcohol testing for safety sensitive positions, both levels of Court focused on the question of whether the arbitrator had erred in his consideration of whether the workplace was sufficiently dangerous to introduce a policy in the absence of evidence of a problem. The courts did not focus their attention on the issue of whether random testing is unreasonable on a balancing test which has to date been adopted and applied by other courts and many arbitrators across the country. This analysis represents a marked departure from the approach in Ontario and Quebec[xi] described above, which is consistent with an approach which is careful to protect privacy rights of workers.

The Butler Report relies entirely on the technology of drug testing to prevent workplace impairment, and fails to acknowledge the effect of long-standing legal precedent. Prevailing weight of authority on alcohol testing in Canada demonstrates that even where technology proves a link between test results and impairment, privacy rights do not justify random testing.

## Workplace Safety Policies

USW has consistently supported the implementation of workplace policies that improve workplace safety by considering and addressing all causes. The safety of uranium mines and processing facilities is a priority for USW, its local unions and its membership. Safety can and must be achieved without the use of random drug and alcohol testing.

### (a) Existing Safety Protocols are Effective

Cameco's existing drug and alcohol policy (the "Alcohol and Substance Program") is part of a broad and comprehensive safety policy at Cameco's operations. It contains the following provisions:

1) it prohibits the use and possession of drugs and alcohol at Cameco facilities;

2) it requires employees to manage the use of prescription and over the counter medication during work hours as necessary to prevent impairment;

3) it provides employees with training, awareness programs and employee and family assistance programs;

4) it permits drug testing, which USW does not object to, as long as the testing is done in accordance with the law;

5) it permits the employer to require drug tests in accordance with well established legal principles. Testing may be performed with reasonable cause, post-incident and as part of a return to work protocol in certain circumstances;

6) in addition to the foregoing, employees at the Key Lake and McArthur River sites are also subject to security searches when travelling by plane to remote sites. Common areas of the camps are monitored by camera.

The Port Hope conversion facility has a "Safety Authorities and Responsibilities Policy" that directs supervisors to ensure employees attend monthly safety meetings, thus affording Cameco an opportunity to provide continuing and frequent education to USW members. The policy also contains a protocol requiring supervisors to participate in the investigation of workplace accidents, and to conduct regular inspections in the areas they supervise. The policy also requires that supervisors initiate and participate in "new or specialized training programs as may be needed."

Cameco has an established employee and family assistance program. Both the Saskatchewan and Port Hope sites have active workplace health and safety committees with union and employer representation that are appropriate bodies for considering issues related to drug and alcohol abuse. USW continues to encourage the employer to take full advantage of the non-invasive measures available in its drug and alcohol policy to promote safety in the workplace. These are sufficient to ensure worker and public safety in the nuclear sector.

Cameco has many policies that aim to limit risks in the nuclear sector. For example, the Port Hope facility has also implemented a "Human Factors Program Plan." The objective of this policy is to minimize the risks inherent to human error

in the ongoing operation and maintenance of the conversion facility. To that end, the policy provides for the following:

1) human error analysis which evaluates the potential for human error to impact safety;

2) a review of the human-machine interface to minimize human error and the risks associated with it;

3) mental demands analysis which details the decision-making and computational demands that are associated with a given area of work;

4) communication analysis, which reviews whether there is adequate communication systems amongst employees.

The supervisory structure in nuclear facilities also ensures safety. Cameco's Key Lake and McArthur River sites are fly-in locations where the employees have significant contact with their supervisors. In Cameco's Port Hope facility workers have frequent contact with supervisors and colleagues, with one supervisor for every five employees. Supervisors and managers at all operations are trained to detect impairment. Daily, repeated communication enables supervisors and peers to be able to meaningfully evaluate employee behaviour to determine if the objective criteria to justify drug testing are met.

Cameco plans to expand its impairment detection training to union members. The USW will participate jointly with management in the development of a "Safe Haven Program," which is designed to facilitate employees in seeking assistance and to encourage sensitivity to drug and alcohol abuse. These

policies and programs, when properly implemented in accordance with the law, provide the necessary framework for ensuring safety at the Cameco sites. The Proposals document itself acknowledges that less intrusive methods, such as medical, psychological or behavioural-performance evaluations can be used to achieve this goal.[xii] These methods can be further supported by drug and alcohol awareness programs; employee support programs (as suggested by the Proposals at 6.2); routine health and safety trainings regarding drugs and alcohol and testing when there is a reasonable cause to do so.

**(b) Fair Policies Must Address the Actual Causes of Workplace Accidents**

USW has had an opportunity to review a draft report prepared by Professor Scott Macdonald, Assistant Director at the Centre for Addictions Research of BC and Professor, School of Health Information Science at the University of Victoria and an internationally-respected epidemiologist specializing in workplace drug issues, and submitted by the Power Workers' Union and the Society of Energy Professionals. The evidence reviewed and presented by Professor Macdonald establishes that drugs and alcohol are not in fact the root cause of major workplace accidents. Accordingly, a drug and alcohol testing policy is not the most effective means of ensuring workplace safety because it is too narrow in focus. Rather, a comprehensive policy directed at all causes of inattention, with continuous attention to objective evidence of impairment at work, and consideration of factors specifically within the employer's control, like shift structures and workplace stress is a more effective means of ensuring a safe workplace.

Dr. Macdonald's review of the literature on drug use found that there is no causal link between drug use and workplace accidents,[xiii] and that studies could not rule out other intervening variables, such as fatigue and shift work. Any regime which is directed at eliminating impairment must address all of these factors. USW submits that the existing policies more effectively achieve this objective than would a regime of random drug testing.

**Random Testing Does Not Deter Drug or Alcohol Use**

The Butler Report repeatedly claims that drug and alcohol testing has a deterrent effect.[xiv] However, while she was testifying in an arbitration proceeding, Ms. Butler admitted that this claim is not supported by the evidence. Arbitrator Newman said the following about Ms. Butler's evidence in *Navistar Canada, Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA), Local 504 (Substance Abuse Grievance)* [2010] O.L.A.A. No. 227 195 L.A.C. (4th) 144:

> [Barbara] Butler admits that there is insufficient research in the workplace context to support her conclusion that testing has a deterrent effect (emphasis added), since most of the studies involve the transportation industry, but she insists that the statistics from those studies are equally applicable in a workplace environment, where the potential of being identified deters use and encourages people to reach out for help (para. 24).

The scientific evidence does not support Ms. Butler's assertions. Dr. Macdonald states that:

> Quest diagnostics is the largest provider of drug testing in the United States and conducted about 6.4 million tests in 2011 (Quest Diagnostics Incorporated, 2012). The proportion of employees who test positive has dropped considerably from

> 13.6% in 1988 to 3.5% in 2011. This decline might be interpreted as an indication of a deterrent effect of drug use among employees in companies where testing is conducted. However, other explanations are possible...Although overall research indicates that companies that drug test generally produce a lower proportion of positive tests over time, this does not mean that fewer people are impaired by drugs at work. If some employees change their drug using behaviours, the intervention may have a greater effect on recreational users, who are unlikely to use at work. Testing does not appear to have had any impact on overall drug use in the US population (p. 13).

The Butler Report's repeated claims that drug testing deters use are not supported by the evidence. Sound policy must have its roots in more than anecdotal suspicion and unproven analogies.

Even if drug testing did have a deterrent effect, deterrence has been found not to justify the invasion of privacy associated with random drug and alcohol testing. In considering the issue, Arbitrator M. Picher held in *Re Imperial Oil Ltd. and CEP, Local 900* that:

> Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices (at para. 101).

**Only Jobs where Impairment Could Impact Safety Should be Classified as Safety Sensitive**

The CNSC's plan considers all employees who have unescorted access to a nuclear facility to occupy safety sensitive positions; the CNSC suggests that they should therefore undergo random drug and alcohol testing (*Fitness for Duty,*

p.1). However, this proposal runs counter to existing Canadian law which provides that, where the grounds for drug or alcohol testing are established, only those employees whose jobs are safety sensitive should be subjected to testing.

An employer may include drug and alcohol testing in its comprehensive investigation of workplace impairment where the employer has reasonable cause to believe a worker is impaired or after a significant incident where impairment appears to be a contributing factor. Consistent with the principle that an employee's privacy rights should not be violated except in limited circumstances, only employees whose job functions are "safety sensitive" should be subject to drug testing, even when cause exists.

Safety sensitive jobs are those occupied by an employee whose work could impact the health, safety or security of the public or fellow employees if she is working while impaired. The test appropriately focuses on the daily requirements of the work when determining whether or not a position should be designated as safety sensitive.

A New Brunswick Arbitration Board found that the division between positions that are "safety sensitive," where drug and alcohol testing may be justified in some circumstances, and "non-safety sensitive," where drug testing is never justified, hinges on a purposive approach which asks "what consequences are risked if the person performing a particular kind of work does so impaired by drugs or alcohol."[xv] Whether or not a given position is safety sensitive must be decided on a case by case basis.[xvi]

Arbitrator Picher held that an employer in an "inherently dangerous" industry was justified in introducing a drug and alcohol program that included reasonable cause testing without evidence of an existing problem. However, the characterization of an industry as "inherently dangerous" does not entitle the employer to test everyone who works in that industry. Even within an inherently dangerous workplace, only employees occupying safety sensitive jobs may be subject to reasonable cause testing and not random drug and alcohol testing.[xvii]

The Proposals would treat all workers alike, regardless of their job duties in proposing to test all employees who have "unescorted access" to certain areas of the operations in question. This approach is inconsistent with protection of employee privacy rights and is inconsistent with the purposive approach of arbitrators which have prohibited testing of employees who are in non-safety sensitive jobs. A policy that authorizes mass testing on people whose work is not genuinely safety sensitive is flawed and overbroad. The use of fail safes and appropriate supervision, hand in hand with the existing employer policies discussed above, are the best routes to achieving the goal of workplace safety.

USW submits that many of the jobs at the workplaces where it represents Cameco's employees are not safety sensitive.

**Drug Addiction is a Disability**

Drug and alcohol addiction are recognized as disabilities under human rights legislation. In any regime of drug and alcohol testing, the employer is bound by the legal obligation to treat a drug or alcohol addiction as a disability.

The employer is required to "accommodate individual differences and capabilities to the point of undue hardship".[xviii]

## Conclusion

USW is proud of the strong safety culture that exists in Canada's nuclear industry. By its own admission, the CNSC acknowledges that there is no evidence of a drug and alcohol problem in this sector. Nevertheless, nuclear employers and the unions that represent nuclear workers are taking effective, proactive measures to ensure that workplaces are safe, including by ensuring that all forms of impairment are addressed.

Thousands of employees work in Canada's nuclear industry. The current state of the law ensures that a balance between employee privacy and public safety is properly maintained. USW strongly opposes the enactment of regulations which expand drug and alcohol testing beyond the limits of what is permissible in Canada. We encourage the CNSC to work with licensees in providing employee education and support programs and exploring other methods of ensuring safety. Doing so will best serve the legitimate interests of the public and workers.

USW appreciates the opportunity to make submissions on this important issue. We reserve our right to make such other submissions and representations as we deem appropriate. In addition, we encourage the CNSC to meet with stakeholders, including USW in the event it considers these issues further.

[i] The Supreme Court in *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 (p. 168) held that reasonable and probable grounds must be established in order to ensure s. 8 offers meaningful protection against search and seizure. This standard has been applied in labour arbitral jurisprudence (see, Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) 95 L.A.C. (4th) 341 at paras. 181 and 189).

[ii] *Entrop v. Imperial Oil* [1996] O.H.R.B.I.D. No. 30.

[iii] *Privacy Act,* R.S.C. 1985, c. P-21, s.3, 4.

[iv] *War on Drugs.* The Global Commission on Drug Policy. 2011, p. 24.

[v] *Entrop v. Imperial Oil* [1996] O.H.R.B.I.D. No. 30 at para. 54, our emphasis.

[vi] Canadian Nuclear Safety Council, *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing Discussion Paper DIS-12-03*, April 2012, at p. 3-4.

[vii] *Re Imperial Oil Ltd. And CEP, Local 900* [2006] O.L.A.A. No. 721, aff'd *Imperial Oil Ltd v. CEP, Local 900* [2009] O.J. No. 2037. ONCA 420.

[viii] *Ibid.* at para. 125, our emphasis.

[ix] *Local 143 of the Communications, Energy and Paperworks Union of Canada v. Goodyear Canada Inc.* 2007 QCCA 1686 at para. 33.

[x] *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30* 2011 NBCA 58.

[xi] The key difference centres on the kind of testing the Court considers allowable. Past decisions endorse the implementation of reasonable cause testing in inherently dangerous workplaces. However, the New Brunswick Court of Appeal departs from past jurisprudence and uses the inherently dangerous designation to to justify the introduction of random alcohol testing. The New Brunswick Court of Appeal decision also fails to consider the important difference between the ability to implement reasonable cause drug and alcohol testing policy without evidence of an existing problem in an inherently dangerous workplace and the need to actually designate which employees occupy safety sensitive positions in this inherently dangerous environment. See the safety sensitive section of this paper for further clarification.

[xii] Canadian Nuclear Safety Council, *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing Discussion Paper DIS-12-03*, April 2012, at p. 5.

[xiii] Scott MacDonald, "Comment on the Canadian Nuclear Safety Commission discussion paper Fitness for duty: Proposals for strengthening alcohol and drug policy, programs and testing," Submission to the Society of Energy Professionals and the Power Workers' Union at pp. 10-11.

[xiv] See for example, pp. 28 and 48.

[xv] *J.D. Irving Ltd. v. Communications, Energy and Paperworkers' Union, Local 104 and 1309 (Drug and Alcohol Policy Grievance)* [2002] N.B.L.A.A. No. 7 at para. 10.

[xvi] *Ibid.* at para. 12.

[xvii] *Canadian National Railway Co. and C.A.W.-Canada* 95 L.A.C. 4th 341, p. 130.

[xviii] *Entrop v. Imperial Oil Limited,* 2000 CanLII 16800 (ON CA) at para. 112.