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

SUBMISSIONS OF THE UNITED STEELWORKERS ON THE CANADIAN NUCLEAR SAFETY COMMISSION REGDOC – 2.2.4 FITNESS FOR DUTY

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USW in the Canadian Nuclear Industry

The United Steelworkers ("USW") is one of Canada's largest private sector trade unions, representing over 225,000 members in a diverse range of economic sectors. USW is committed to ensuring healthy and safe working conditions for its members, as well as for all workers across Canada. We do this by negotiating collective agreements with strong health and safety protections, vigorously enforcing workers' rights, and engaging in political advocacy.

USW represents almost 2,000 workers in all aspects of the federally-regulated nuclear power production process in Canada. USW local union 8914 represents over 700 mill workers and miners at the Cameco Key Lake mill and the McArthur River uranium mine in Saskatchewan. Over 215 workers and security guards at the Cameco Refining and Conversion Facility in Port Hope, Ontario are represented by USW local unions 13173 and 8562. USW local union 14193 represents 115 workers at the Cameco Fuel Manufacturing Facility in Port Hope, Ontario.

Over 900 technicians, technologists, utility workers, and clerical/administrative staff at Canadian Nuclear Laboratories in Chalk River, Ontario are represented by USW local unions 1568, 4096-404 and 4096-896. Finally, USW local union 7806 represents 26 workers at Canadian Nuclear Laboratories in Pinawa, Manitoba.

Summary of USW's Position

USW has received and reviewed the Canadian Nuclear Safety Commission's November 2015 draft regulatory document entitled REGDOC-2.2.4, *Fitness for Duty ("Fitness for Duty 2015")*, which is intended to replace the current regulatory document RD-363, *Nuclear Security Officer Medical, Physical, and Psychological Fitness.*

Fitness for Duty 2015 would apply to all employees at "high security sites" working in safety sensitive positions in Canada's nuclear industry, a definition that catches some, if not all, of the sites where members of USW member work. USW makes these submissions because its members will be directly affected by the provisions of *Fitness for Duty 2015*.

USW strongly objects to the adoption of the drug and alcohol testing regime proposed in *Fitness for Duty 2015*. Specifically, *Fitness for Duty 2015* proposes a mandatory drug and alcohol testing regime that includes random testing of workers as a condition of the licensing of operators in Canada's nuclear industry. USW objects to the implementation of random, without-cause drug and alcohol testing for workers in Canada's nuclear industry.

Canadian law at all levels has strictly limited random, without-cause drug and alcohol testing of unionized workers. Random drug and alcohol testing is, in the circumstances of Canada's nuclear industry, an unjustified intrusion upon employees' privacy and dignity.

Fitness for Duty 2012: USW's Submissions

In August 2012, USW filed submissions with the Canadian Nuclear Safety Commission ("CNSC") in response to its discussion paper DIS-12-03, *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing ("Fitness for Duty 2012")* and the related document INFO-0831, *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry ("Butler Report")*. A copy of USW's earlier submissions is appended to these submissions.

USW's position in 2012 was straight-forward: there was no justification, either on the facts or the law, for the CNSC to impose on licensees, as a condition of operation, a requirement that the employees of licensees be subject to mandatory, random, without-cause drug and alcohol testing. In *Fitness for Duty 2012*, the CNSC itself acknowledged that its proposals on drug and alcohol testing were not made in response to safety issues related to substance use in Canada's nuclear industry.

With respect to the law, USW's position was that the jurisprudence of Canadian courts and labour arbitrators strictly circumscribed the imposition of random, without-cause drug and alcohol testing on unionized workers and that there was no justification, in the circumstances, to impose such testing on workers in Canada's nuclear industry. We opposed any CNSC regulation which would expand drug and alcohol testing beyond the limits permissible under Canadian law.

USW maintained that employers and trade unions in Canada's nuclear industry were working together successfully to ensure that their workplaces were free from the impairing effects of drug and alcohol use. While some unionized workplaces in Canada's nuclear industry utilized drug and alcohol testing policies based on reasonable cause and post-incident testing, none relied upon random, without-cause testing. USW saw no reason in either the facts or the law to justify expanded regulation by the CNSC with respect to drug and alcohol testing.

USW encouraged the CNSC to work with licensees to provide employee education and support programs around drug and alcohol use/abuse and to explore other, non-privacy intruding methods for ensuring the safety of the public and employees.

Fitness for Duty 2015

USW's position in response to *Fitness for Duty 2015* remains the same as its position in response to *Fitness for Duty 2012*. No regulation should be adopted by CNSC that will expand drug and alcohol testing in Canada's nuclear industry beyond the limits of what is permissible under Canadian law. Specifically, there remains no justification in the facts or the law for imposing random, without-cause drug and alcohol testing on employees in Canada's nuclear industry.

Since USW's 2012 submissions, there have been a number of significant developments in Canadian law respecting random, without-cause drug and alcohol testing which serve to amplify and underscore USW's position. USW's focus in these submissions is on the strong jurisprudential basis for rejecting random, without-cause drug and alcohol testing of employees in Canada's nuclear industry.

Irving Pulp and Paper

USW's August 2012 submissions in response *to Fitness for Duty 2012* outlined the case of *Irving Pulp and Paper*, a New Brunswick labour arbitration case which had dealt with an employer's unilateral imposition of a random alcohol testing policy at a pulp and paper mill. A labour arbitrator had struck down the employer's random alcohol testing policy as an unreasonable exercise of management's rights and an unreasonable invasion upon employees' personal privacy. At the time of USW's earlier submissions, the New Brunswick Court of Appeal had upheld, upon judicial review, the quashing of the arbitrator's decision.

In June 2013, the Supreme Court of Canada overturned the decision of the New Brunswick Court of Appeal, and upheld the arbitrator's original decision – in effect quashing random alcohol testing at Irving Pulp and Paper – see *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, 2 SCR 458. The decision of the Supreme Court in *Irving Pulp and Paper* is now the leading – and binding - case on the issue of random testing in Canadian unionized workplaces.

In upholding the labour arbitrator's decision to quash random alcohol testing at Irving Pulp and Paper, the Supreme Court considered and endorsed over twenty years of Canadian arbitral jurisprudence on the issue of drug and alcohol testing. Specifically, the Supreme Court endorsed the "balancing of interests" analysis utilized by labour arbitrators in drug and alcohol testing cases – a proportionality analysis that weighs the harm from drug and alcohol testing upon employees' privacy interests against the safety benefits of drug and alcohol testing. At paragraphs 5 and 6 of *Irving Pulp and Paper,* the Supreme Court endorsed a Canadian "arbitral consensus" that found that drug and alcohol testing could only be justified on the basis of reasonable cause:

> This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse…. *But a unilaterally imposed policy of mandatory, random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.* (emphasis added)

In its decision in *Irving Pulp and Paper*, the Supreme Court endorsed the significant weight placed by labour arbitrators upon employee privacy rights in the balancing of privacy and safety

interests in the context of drug and alcohol testing. The Supreme Court endorsed the findings of the arbitrator that the seizure of bodily substances in workplace drug and alcohol testing was a significant invasion of employees' privacy and dignity, was coercive and restrictive on employees' movement, and constituted a loss of liberty and personal autonomy. At paragraphs 49 and 50 of *Irving Pulp and Paper*, the Court said:

> The board accepted that breathalyzer testing "effects a significant inroad" on privacy, involving
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> > 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.
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> 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."

The Supreme Court expressly rejected the argument of Irving Pulp and Paper that the dangerousness of the workplace alone justified the imposition of random alcohol testing. The Court held that while the dangerousness of a workplace is relevant to a determination of whether a random testing policy is reasonable, it is insufficient, on its own, to justify random alcohol testing. At paragraph 45 of *Irving Pulp and Paper* the Court said:

> [T]he fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (*Canadian National*) and chemical plants (*DuPont Canada Inc. and C.E.P., Loc. 28-O (Re)* (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (*ADM Agri-Industries*), in the absence of a demonstrated problem with alcohol use in that workplace.

The Supreme Court explicitly endorsed the position that, absent reasonable cause, an employer is not permitted to institute random drug and alcohol testing in a workplace. The Court held that employers will normally be required to demonstrate that random testing is necessary in order to deter a demonstrated workplace problem with drugs or alcohol use before such testing will be found to outweigh employees' privacy and dignity rights. In conclusion, the Court held at paragraph 52 of *Irving Pulp and Paper* that random testing may be reasonable where it represents "a proportionate response in light of both legitimate safety concerns and privacy interests."

USW submits that the proposed requirement in *Fitness for Duty 2015* for mandatory, random, without-cause drug and alcohol testing for safety-sensitive employees of licensees is not a proportionate safety response in light of the absence of proven safety concerns in the nuclear industry related to drug and alcohol use, and the privacy interests of the thousands of employees who work in the nuclear industry in Canada. In 2012, the CNSC acknowledged in *Fitness for Duty 2012* that its proposals on random testing were not made in response to safety issues related to substance use in Canada's nuclear industry. The CNSC has not provided any updated information that suggests that a problem with substance abuse and safety in the nuclear industry has since emerged.

USW submits that the Supreme Court of Canada's decision in *Irving Pulp and Paper* has placed strict limitations upon the imposition of random, without-cause drug and alcohol testing on unionized workers. In the circumstances, USW submits that CNSC's proposed regulations expand drug and alcohol testing beyond the limits permissible under Canadian law.

Since the *Irving Pulp and Paper* decision was issued in June 2013, three labour arbitration awards have applied the Supreme Court's analysis of the legality of drug and alcohol testing. In each case, the labour arbitrators found that the impugned regimes of drug and alcohol testing were unjustified invasions of employees' privacy.

Mechanical Contractors Assn. Sarnia and UA, Local 663

In *Mechanical Contractors Assn. Sarnia and United Assn. of Journeymen and Apprentices of the Plumbing & Pipefitting Industry, Local 663,* 2013 CarswellOnt 18985, a decision dated August 20, 2013, Arbitrator Surdykowski applied the Supreme Court of Canada's analysis in *Irving Pulp and Paper* to a mandatory pre-employment access drug and alcohol testing policy for employees in Suncor workplaces in Sarnia, Ontario. The employer in this case was a contractor who provided workers for Suncor, and the drug and alcohol testing policy was implemented to comply with Suncor's contractor policy and contractor drug and alcohol standards.

Following *Irving Pulp and Paper*, Arbitrator Surdykowski found that the fact that a workplace is safety-sensitive is not in itself a justification for an otherwise arbitrary alcohol and drug testing policy. The Arbitrator held at paragraph 127 that, in order for an employer to demonstrate that there was evidence of a problem with substance use in a workplace, the evidence must "always include cogent direct non-anecdotal evidence from *that* workplace." Further, the Arbitrator held at paragraph 152 that an employer's evidence must demonstrate that "the expected safety gains of a policy which significantly impacts employee privacy rights must be real and more than minimal."

In finding that the employer had failed to demonstrate evidence of a problem with substance use in the affected workplace, Arbitrator Surdykowski held that any expected safety gains were insufficient to justify mandatory pre-employment access drug and alcohol testing. The decision of Arbitrator Surdykowski quashing the employer's pre-employment access drug and alcohol

testing policy was upheld upon judicial review by the Divisional Court of the Ontario Superior Court of Justice in a decision dated November 27, 2014, 2004 CarswellOnt 19084.

Suncor Energy Inc. and Unifor, Local 707A

In a decision dated March 18, 2014, an Alberta arbitration panel in *Suncor Energy Inc. and Unifor, Local 707A*, (2014), 118 CLAS 138, 242 LAC (4th) 1, applied *Irving Pulp and Paper* to a random drug and alcohol testing policy. The policy affected thousands of workers of Suncor occupying safety-sensitive positions at its base plant in the Athabasca oil sands and two off-site camps. The majority of the arbitration panel found that Suncor's random, without-cause drug and alcohol testing policy unjustifiably intruded upon employees' privacy rights.

In applying the balancing of interests test as endorsed in *Irving Pulp and Paper*, the majority of the panel was quick to dispense with Suncor`s argument that the risk of potentially tragic safety consequences alone justified a random drug and alcohol testing policy. The majority of the panel at paragraph 246 held that the justification for random testing did not lie in avoiding "catastrophic consequences," but in striking the appropriate balance between the employer's legitimate interests in safety and employees' privacy interests.

In coming to its decision, the majority of the panel embraced several key principles emerging from the Supreme Court's *Irving Pulp & Paper* decision: employees' privacy rights are very significant rights; drug and alcohol testing are highly intrusive on employees' privacy rights; employers must prove that any workplace where random testing is introduced has a problem with drug and alcohol use/abuse; and a random testing policy is only justifiable where the benefits gained by the employer in imposing the policy outweigh the harm done to employees' privacy interests.

The majority of the panel found that Suncor had not established in its evidence that there was a demonstrable problem in the workplace amongst bargaining unit employees with drug and alcohol use/abuse. The majority of the panel found that Suncor's workplace had a declining reportable injury rate and that Suncor had failed to prove a causal link between employees' drug and alcohol use, or positive drug and alcohol test results, and accidents, injuries and near misses in the workplace. In the absence of such a link, the majority of the panel could not find that the benefits from imposing the policy for Suncor outweighed the significant intrusion upon employees' privacy rights.

The majority of the arbitration panel found that the fact that urinalysis cannot detect impairment at the time a test is taken seriously undermined Suncor's claim that its business interests were served by imposing random testing. As urinalysis detects only use of drugs, and not present impairment from drugs, the positive results in urinalysis testing did not demonstrate either a problem with drug use/abuse, or any real risk to safety flowing from drug use/abuse. The majority of the panel found that Suncor's claim that random drug testing acted as a deterrent to drug use was speculative.

Teck Coal Ltd. and UMWA, Local 1656

In a decision dated December 7, 2015, Arbitrator J. Alexander-Smith in *Teck Coal Ltd. and United Mine Workers of America, Local 1656* (2015) CarswellAlta 2237, considered the reasonableness of a unilaterally introduced random, without-cause drug and alcohol testing policy at an open-pit coal mine in Cardinal River, Alberta. The Arbitrator found that the employer's policy was an unreasonable exercise of management's rights under the collective agreement and an unjustified intrusion upon employees' privacy.

The Arbitrator considered and rejected the employer's arguments that the Supreme Court's ruling in *Irving Pulp and Paper* did not apply to its policy. Applying *Irving Pulp & Paper*, the Arbitrator held that, in order to justify a random testing policy and its intrusion on employee privacy, the employer had to demonstrate that there was a workplace problem with drug and alcohol use amongst employees at Cardinal River.

The Arbitrator found that the evidence put forward by the employer failed to demonstrate a workplace problem with drugs and alcohol. The Arbitrator arrived at this conclusion after review of evidence of the employer`s excellent safety record, the steady decline in employee injury rates, the low number of positive drug and alcohol test results, and the absence of any link between accident rates and drug or alcohol use at Cardinal River.

The Arbitrator rejected the employer's assertions that its policy was justifiable on the basis that it was designed to provide assistance to employees and was not disciplinary in nature. The Arbitrator found that many aspects of the employer's policy were, in fact, disciplinary.

The employer had sought to justify its imposition of random testing at its Cardinal River operations by introducing evidence about drug and alcohol use and accidents amongst employees at its other coal-mining operations. The Arbitrator found that such evidence was irrelevant to determining whether it was reasonable to impose random testing on the employees at Cardinal River.

The employer had also attempted to justify its policy by arguing that random testing constituted a very minimal intrusion on employees' privacy and dignity – similar to undergoing a urine test in a doctor's office. On the basis of evidence from employees at Cardinal River that random testing left employees feeling mistrusted, disrespected, coerced, without rights, undignified, embarrassed, etc., the Arbitrator strongly rejected the employer's "minimal intrusion" argument and found – as had the Supreme Court in *Irving Pulp and Paper* - that random testing was a "significant infringement" on employee privacy.

The employer attempted to argue that, even if there was no evidence of a workplace problem with drugs and alcohol at Cardinal River, its random testing policy was justifiable on the basis that random testing enhanced safety by identifying employees who presented a safety risk in the workplace. On this point, the Arbitrator rejected the evidence of the employer's scientific experts, preferring the evidence of the union`s expert, Dr. Scott Macdonald, that positive urine drug test results did not represent evidence of employees' increased risk for accidents and

injuries. On the basis of evidence about drug test results and accident and injury rates at Cardinal River, the Arbitrator also found that the reality on the ground did not support the employer's theories about the effectiveness of random testing in making the workplace a safer place.

At the end of the day, Arbitrator Alexander-Smith found that the employer had not demonstrated that its previous reasonable cause and post-incident testing policy was not adequately dealing with the risk posed to workplace safety by employee drug and alcohol use at Cardinal River. And further, the Arbitrator found that the employer had failed to establish either a workplace problem with drug and alcohol use at Cardinal River, or an enhanced safety risk caused by drug and alcohol use by employees at Cardinal River. Finding that the employer's anticipated safety gains from random testing were uncertain or minimal, the Arbitrator held that the employer had not justified its privacy-intruding random testing policy.

Teck Coal Ltd. and USW Local Unions 7884 and 9346

USW is presently arbitrating the reasonableness of Teck Coal Ltd.'s random, without-cause drug and alcohol testing policy in its application at two open-pit coal mines located in south-eastern British Columbia. The policy at issue in the case is the very same policy in effect at Teck's operations at Cardinal River, Alberta that was struck down by Arbitrator Alexander-Smith in December 2015. USW is relying in its case on the expert evidence of Dr. Scott Macdonald.

In light of the expert evidence, the facts, and the arbitral law, USW expects that it will succeed in establishing that Teck's random testing policy as applied at its British Columbia coal mines is not a proportionate safety response by Teck in light of the safety record in the affected workplaces and employees' privacy interests.

Evidence of Dr. Scott MacDonald

Dr. Scott MacDonald is the Assistant Director at the Centre for Addictions Research of British Columbia and Professor, School of Health Information Science at the University of Victoria. He is an internationally-respected epidemiologist specializing in workplace drug and alcohol testing issues. In particular, Dr. MacDonald has studied the relationship between drug and alcohol use and accident/injury risk, as well as the effectiveness of random drug and alcohol testing in improving workplace safety.

Dr. MacDonald's research and scientific opinion has been crucial to the current state of Canadian law regarding random drug and alcohol testing. He was qualified as an expert in epidemiology in the Human Rights Tribunal of Ontario's *Entrop* case, in the two Alberta arbitration cases *Suncor Energy Inc. and Unifor, Local 707A* and *Teck Coal Ltd. and UMWA*, *Local*

1656, and in the British Columbia arbitration case *Teck Coal Ltd. and USW Local Unions 7884 and 9346*.

Dr. MacDonald's research and scientific opinions were accepted and relied upon by the majority of the arbitration panel in *Suncor Energy Inc. and Unifor, Local 707A,* and by Arbitrator Alexander-Smith in *Teck Coal Ltd. and UMWA*, *Local 1656,* in their determinations that the random testing regimes at issue in those cases were unreasonable and unjustified. In those cases, Dr. Macdonald's scientific opinion was accepted as establishing that a positive urine drug test is not associated with an increased risk of injury or accident in the workplace, and as establishing that random drug and alcohol testing has not been proven to be an effective measure for improving workplace safety.

In 2012, in response to *Fitness for Duty 2012*, the Power Workers' Union and the Society of Energy Professionals submitted to the CNSC a report prepared by Dr. Macdonald. In his expert report, Dr. Macdonald found that the scientific evidence base did not justify the random drug testing proposed by the CNSC in *Fitness for Duty 2012*.

Based on Dr. Macdonald's accepted research and opinion, USW submits that there is no scientific basis for the proposition that random drug and alcohol testing is an effective measure in lessening the risk to workplace safety caused by employee drug and alcohol use, or for the proposition that random testing improves workplace safety. The scientific evidence does not support the CNSC's proposed expansion of regulation

Conclusion

USW supports the CNSC in taking steps to work with licensees to maintain and improve the exemplary safety record in the nuclear industry. However, USW strongly opposes the enactment of regulations that expand the use of random drug and alcohol testing beyond the prescribed limits in Canadian law. Random drug and alcohol testing in the workplace – because of its significant intrusion upon employee privacy - has been found in the law to be justified only in very narrow circumstances. Those circumstances do not exist in Canada's nuclear industry.

USW reiterates its 2012 submissions made to the CNSC in response to *Fitness for Duty 2012*. Since 2012, the law on random drug and alcohol testing in Canada has been clarified and strengthened by the Supreme Court of Canada in *Irving Pulp and Paper* and in the subsequent arbitral jurisprudence.

The law is clear. Random drug and alcohol testing of employees in unionized workplaces is only permissible under exceptional circumstances, that is where there is a general workplace problem arising from employee drug and alcohol use in that workplace. An employer seeking to justify a random drug and alcohol testing policy bears a heavy evidentiary burden in proving such a workplace problem.

As indicated by the CNSC in *Fitness for Duty 2012,* its proposals on drug and alcohol testing were not made in response to safety issues related to substance use in Canada's nuclear industry. The CNSC has not indicated that this situation has changed in the past four years. In the absence of a demonstrated problem with drugs and alcohol in workplaces in Canada's nuclear industry, random drug and alcohol testing is not justified and would constitute an unreasonable intrusion upon employees' privacy and dignity.

Further, the scientific evidence does not support the effectiveness of random drug and alcohol testing in lessening the risk to workplace safety caused by employees drug and alcohol use. There is no scientific basis to justify the random drug and alcohol testing proposed by the CNSC in *Fitness for Duty 2015*.

USW submits that the CNSC should continue to work with licensees in the nuclear industry to provide education and support programs around drug and alcohol use for employees and to explore non-privacy intrusive measures to continue to ensure the safety of the public and employees.

USW appreciates the opportunity to make submissions on this important issue and encourages the CNSC to meet with stakeholders, including USW, in the event it considers these issues further.