Federal Court Cour fédérale

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Toronto, Ontario, June 6, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

POWER WORKERS' UNION, SOCIETY OF UNITED PROFESSIONALS, THE CHALK RIVER NUCLEAR SAFETY OFFICERS ASSOCIATION, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 37, CHRIS DAMANT, PAUL CATAHNO, SCOTT LAMPMAN, GREG MACLEOD, MATTHEW STEWART AND THOMAS SHIELDS

Applicants

and

ATTORNEY GENERAL OF CANADA, ONTARIO POWER GENERATION, BRUCE POWER, NEW BRUNSWICK POWER CORPORATION AND CANADIAN NUCLEAR LABORATORIES

Respondents

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JUDGMENT AND REASONS

I. Overview

[1] A decade ago, the Canadian Nuclear Safety Commission [CNSC] began a process to implement pre-employment and random alcohol and drug testing for the most sensitive positions in Canada's nuclear power plants. The CNSC engaged in various broad-based, public stakeholder consultations to refine the policy over the years. It released a final draft in 2020, requiring Class 1 high-security nuclear sites to implement random and pre-placement drug and alcohol testing for Safety-Critical Workers.

[2] The Applicants – six individuals employed in various Safety-Critical positions at Canada's Class 1 high security nuclear plants, and their Unions – now bring this Application, a judicial review challenging the CNSC's pre-placement and random testing provisions of the policy as being unconstitutional in several facets.

[3] On January 21, 2022, the Applicants obtained an injunction from this Court staying the implementation of the impugned provisions of the policy, pending the final disposition of this Application for Judicial Review (see *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 [*Power Workers 2022*]).

[4] For the reasons set out below, this judicial review will be dismissed.

II. Background

[5] Parliament established the CNSC through the *Nuclear Safety and Control Act*, SC 1997, c 9 [*Act*] to regulate the nuclear industry in the public interest. The objects of the CNSC are set out in section 9 of the *Act* (relevant sections are reproduced at Annex A to these Reasons). All nuclear facilities in Canada must be licensed by the CNSC [Licensees].

[6] The CNSC includes (i) staff working within the regulatory body; and (ii) a quasi-judicial tribunal and court of record [the "Commission"]. The Commission's functions include rendering decisions to adopt policies on recommendation from staff, including the one challenged in this Application.

[7] The Respondents are comprised of the Attorney General of Canada [AGC] and all the licensed high-security Class 1 nuclear facilities regulated by the CNSC, namely Bruce Power L.P., Ontario Power Generation Inc., Canadian Nuclear Laboratories Ltd., and New Brunswick Power Corporation [together, the "Employers"]. The Employers operate Canada's 19 nuclear fission technology reactors and provide most of Ontario's energy, as well as a significant quantity of New Brunswick's electricity. They employ the workers impacted by the RegDoc (defined below).

[8] The Applicants comprise unions representing workers at CNSC regulated nuclear facilities, namely the Power Workers' Union, the Society of United Professionals, the Chalk River Nuclear Safety Officers Association, and the International Brotherhood of Electrical

Workers, Local 37, [together, the "Unions"] and six affected workers: Chris Damant, Paul Catahno, Thomas Shields, Matthew Stewart, Scott Lampman and Greg MacLeod. The Unions represent the workers in Safety-Critical positions [Safety-Critical Workers] affected by the pre-placement and random testing provisions of the policy in question, namely REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 [RegDoc] (reproduced at Annex B to these Reasons).

[9] The definition of Safety-Critical positions has evolved with the development of the RegDoc, and now consists of (i) workers certified under subsection 9(2) of the *Class 1 Nuclear Facilities Regulations*, SOR/2000-204 [*Class 1 Regulations*], excluding certified health physicists; and (ii) on-site Nuclear Response Force workers, as defined in the final version of the RegDoc, which is the subject of this Application. Workers certified under the *Class 1 Regulations* include Authorized Nuclear Officers and Unit Control Room Operators. In sum, the workers impacted by the RegDoc's pre-placement and random testing provisions are a subset of highly trained, armed, nuclear security officers, who are responsible for maintaining the security of nuclear facilities. By way of reference to other sensitive positions, the fire brigade and emergency response team members are not considered "Safety-Critical" positions, but are rather classified as "safety-sensitive" positions.

A. *The development of the RegDoc*

[10] Regulatory documents form a critical component of the CNSC's licencing and compliance framework. They typically contain two types of information for Licensees: (i) requirements; and (ii) guidance. Compliance with the regulatory document requirements is

mandatory for Licensees that use nuclear substances, operate nuclear facilities or conduct other types of licensed activities. Regulatory document guidance, on the other hand, supplements the requirements. Licensees are expected to review and consider a regulatory document's guidance, and provide an explanation to the CNSC should they choose not to follow it.

[11] In 2012, CNSC staff began public consultation to develop a regulatory document for fitness for duty, which included pre-placement and random drug and alcohol testing. This public consultation resulted in the publication of a discussion paper, including a summary of comments received from stakeholders on the draft discussion paper (What We Heard Report – DIS-12-03, published in November 2013). In November 2015, the CNSC issued and published a first draft of the RegDoc for another round of consultation from relevant stakeholders.

[12] Many stakeholders, including the Applicants, reiterated objections they had initially raised in response to the draft discussion paper, including their claims of: (i) the unclear statutory basis for imposing testing; (ii) infringement of sections 8 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; and (iii) inconsistencies between the arbitral case law and the proposed testing.

[13] In August 2017, CNSC staff issued a second draft of the RegDoc, restricting the scope of pre-placement and random testing to Safety-Critical Workers. This version also narrowed the definition of a Safety-Critical Worker (see paragraph [9] of these Reasons), which remains the definition in the final version of the RegDoc.

[14] In terms of the feedback received during the RegDoc's development, CNSC staff presented to the Commission the second draft of the RegDoc, at a public meeting in August 2017. The Minutes of that meeting reflect that concerns were raised about the pre-placement and random testing provisions of the RegDoc, and that the Commission directed staff to amend the RegDoc and send it back for re-consideration and approval.

[15] In an October 2017 closed meeting, CNSC staff presented a third draft of the RegDoc to the Commission, with recommended amendments. Upon consideration of the third draft, the Commission approved the current version of the RegDoc for publication and use.

[16] The impugned provisions of the RegDoc are sections 5.1 (pre-placement testing) and 5.5 (random testing). These provisions require Licensees to implement pre-placement and random drug and alcohol testing for Safety-Critical Workers. CNSC estimates that out of approximately 12,000 workers across nuclear facilities, under 10% are Safety-Critical.

[17] Section 5.1 requires Licensees to conduct pre-placement testing for all successful candidates who apply for a Safety-Critical position at a high-security nuclear facility. Pre-placement testing must be implemented for both new and incumbent workers. The RegDoc indicates that pre-placement testing is not a screening tool and should only be administered once a candidate has met all other qualifications necessary.

[18] Section 5.5 requires Licensees to have all Safety-Critical Workers submit to random drug and alcohol testing, as distinct from section 5.1 pre-placement testing. At least 25% of the Safety-Critical Worker population of all facilities must be tested randomly every year.

[19] Under section 6.1 of the RegDoc, Licensees must test for alcohol through the collection of breath samples using approved instruments defined at section 2 of the *Approved Breath Analysis Instruments Order*, SI/85-201. The testing is to be administered by qualified technicians who are independent from workgroups subject to testing.

[20] Section 6.2 of the RegDoc, indicates that for drug testing, Licensees can choose to implement laboratory urine testing, laboratory oral fluid testing, or a combination of both. Licensees must retain and utilize the services of an accredited laboratory to analyze and report the results. For urine testing, the laboratory used must be accredited by the Substance Abuse and Mental Health Services Administration [SAMHSA]. For oral fluid testing, the laboratory used must be accredited by SAMHSA or meet the *General Requirements for the Competence of Testing and Calibration Laboratories*, ISO/IEC 17025.

[21] The RegDoc establishes threshold values, or cut-off levels, for the amount of a substance that must be found in a sample to constitute a positive test result for both alcohol testing and drug testing. The positive results from laboratory tests are sent to a medical review officer who reviews, interprets and verifies the laboratory tests results for each drug class as specified in the RegDoc. When faced with a positive test result, the medical review officer must provide the

worker an opportunity to explain any alternative reasons for such result. The medical review officer will only report verified positive test results to Employers.

[22] It should be noted that the pre-placement and random testing provisions of the RegDoc have not yet been implemented. The RegDoc went into effect on January 21, 2021. The November 2020 Meeting Minutes of the CNSC reflect that the Licensees would be required to implement pre-placement testing measures within six months (by July 22, 2021), and random testing measures within twelve months (by January 22, 2022). However, in early 2022, the Applicants successfully brought a motion for an injunction before the Court. Justice Gleeson granted the injunctive relief sought, staying the implementation of sections 5.1 (pre-placement testing) and 5.5 (random testing) of the RegDoc until the final disposition of this Application (see: *Power Workers 2022* at paras 5-8).

[23] As a result, the testing mechanism contemplated under the impugned sections of the RegDoc has yet to be administered. Courts are encouraged to proceed with caution when considering the constitutionality of a provision or legislative scheme in the absence of a factual matrix (*MacKay v Manitoba*, [1989] 2 SCR 357 at 366 [*MacKay*]; *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 22 [*Ernst*]).

III. Issues and Standard of Review

[24] Before setting out the issues before me, I note that in the Notice of Constitutional Question, the Applicants assert that the pre-placement and random testing provisions of the RegDoc are "invalid" under section 1 of the *Charter*. In the Notice of Application for Judicial

Review, the Applicants seek a declaration that sections 5.1 and 5.5 of the RegDoc are contrary to sections 7, 8, and 15 of the *Charter* and are of no force and effect. The Notice of Application also seeks an order quashing the CNSC's decision to adopt the provisions.

[25] Thus, this case is distinct from many of the administrative law cases challenging delegated legislation, in that the Applicants do <u>not</u> challenge the RegDoc as being *ultra vires* its enabling statute. In other words, they do not argue that the RegDoc is invalid because the CNSC exceeded the powers delegated to it by Parliament in the *Act*. Nor do the Applicants impugn the jurisdiction or *vires* of the *Act* writ large, to argue that the *Act* is contrary to the division of powers, the *Charter*, or section 35 of the *Constitution Act*.

[26] Instead, the Applicants submit that two specific elements of the RegDoc, namely the (i) pre-placement and (ii) random testing measures (sections 5.1 and 5.5), infringe several sections of the *Charter*. They contend that the CSNC's decision to adopt these measures was unreasonable. In other words, they say that while sections 5.1 and 5.5 must be struck, the remainder of the structure of the RegDoc may stand.

[27] The Applicants argue that the RegDoc's two impugned sections should fall for two reasons. First, they contend that its pre-placement and random testing requirements violate sections 7, 8, and 15 of the *Charter*, and are not justified under section 1. Second, they posit, in the alternative, that CNSC's decision to adopt the RegDoc was unreasonable on administrative law grounds.

[28] In determining the applicable standard of review in this case, it is important to understand how the issues were framed. In making their case, the Applicants pivoted between challenging the elements of the RegDoc as if they were seeking to invalidate provisions of a statute, and impugning the CNSC's decision to adopt a RegDoc that includes pre-placement and random testing requirements.

[29] On the one hand, for the purposes of their administrative law arguments, they dress the RegDoc in the garb of an administrative decision, attacking it for its unreasonableness. On the other, for the purposes of their constitutional arguments, they impugn it as a form of regulation or legislative measure that prescribes a limit on a *Charter* right.

[30] A similar blending of the classification of the RegDoc was also evident in the Applicants' written submissions. For instance, at paragraph 42 of their Factum, the Applicants state, "the RegDoc constitutes a "law" which prescribes a limit on *Charter* rights […] Non-statutory binding rules that establish obligations of general rather than specific application, and are sufficiently accessible and precise, qualify as "law" that prescribe a limit on a *Charter* right."

[31] Later, the Applicants also submit that the RegDoc purports to be a regulation and that the Commission improperly adopted it through the informal vehicle of a regulatory document, rather than having it go through the more rigorous procedure required by regulatory amendments, as further discussed in Section B (Step 2) below.

[32] However, at the outset of their Factum, at paragraph 1, the Applicants state they oppose the CNSC's <u>decision</u> to impose the RegDoc's requirements, and in terms of a remedy, request this Court quash the CNSC's <u>decision</u> to adopt the pre-placement and random testing elements of the RegDoc because those two elements are unconstitutional.

[33] In the alternative, the Applicants request that the Court remit the two "elements" of the RegDoc back to the CNSC for re-determination. During the hearing, when asked to delineate what exactly they were claiming violated *Charter* grounds, Counsel for the Applicants clarified that they were seeking a declaration of invalidity of sections 5.1 and 5.5 and for the Court to strike these impugned provisions from the RegDoc. Discussion of the remedy was mentioned at various points of the hearing. One such instance occurred at 02:43:00 to 02:45:00 of the audio recording of Day 1. Again, at no point did the Applicants request that the Court strike out the validity of the entire RegDoc.

[34] The Respondents agree with the Applicants that the constitutionality of the testing measures should be reviewed by adjudicating each *Charter* right and applying the framework in *R v Oakes*, 1986 CanLII 46 (SCC), 1 SCR 103 [*Oakes*] under section 1. The Parties are also in agreement that the Court ought not to apply the balancing framework for the review of discretionary administrative decisions set out in *Doré v Barreau du Québec*, 2012 SCC 12 at paras 37, 39 [*Doré*] (see also: *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 39-42 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 111 [*Trinity Western*]). The Parties submitted in their written materials – and reiterated at the hearing – that the Court must not use the *Charter* values paradigm in analysing the

RegDoc, because the Applicants are not challenging the CSNC's underlying decision to adopt the entire RegDoc, rather only two sections of it.

[35] While the Parties agree on the method for *how* the Court should approach the *Charter* questions raised by the Applicants, namely under the *Oakes* approach, they split on the esoteric question of whether correctness, or no standard of review applies. They agree that reasonableness applies to the administrative law question of whether the CNSC's decision to adopt the RegDoc was reasonable.

[36] The Applicants rely on *Elementary Teachers Federation of Ontario v York Region District School Board*, 2022 ONCA 476 at paras 36-37 [*Elementary Teachers*] to argue that the correctness standard applies in their *Charter* arguments. In *Elementary Teachers,* the Ontario Court of Appeal held that an arbitrator's decision was subject to a correctness standard of review on the question of law of whether the grievor had a reasonable expectation of privacy in their workplace laptop (*Elementary Teachers* at para 37 citing to *R v Shepherd*, 2009 SCC 35 at para 20). *Elementary Teachers* has since been appealed and is now before the Supreme Court of Canada [SCC] (see: *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2023 CanLII 19753 (SCC)).

[37] The Respondents, by contrast, contend that no standard of review applies to the issue of whether the testing requirements infringe the *Charter*, because the Applicants do not seek to review an administrative decision. The Respondents state in their written submissions that the application of a correctness standard is "fundamentally at odds with the *Oakes* test". They argue

that the Applicants seek to strike out provisions of the RegDoc, which in their view, is a policy "prescribed by law" that falls within the meaning of section 1 of the *Charter*. Relying on *Greater Vancouver Transportation Authority v Canadian Federation of Students British Columbia Component*, 2009 SCC 31 at paragraph 64 [*Greater Vancouver Transportation Authority*], they say the RegDoc qualifies as a "law" because it establishes a series of obligations that must be adhered to by all Licensees.

[38] I am not convinced by this distinction that the correctness standard is fundamentally at odds with the *Oakes* framework since, as recently noted by Justice Favel in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 at paragraph 54 [*Whitefish*], "[t]his distinction is more academic than practical, as "no standard of review" is the functional equivalent of a "correctness review"". Put simply, here the question is whether in its application, the RegDoc breaches the *Charter*.

[39] The Respondents also rely on *Reference re Marine Transportation Security Regulations*, 2009 FCA 234 [*Marine Reference*] and *Canada (Union of Correctional Officers) v Canada (Attorney General)*, 2019 FCA 212 [*Correctional Officers*]. These two Federal Court of Appeal [FCA] decisions dealt with *Charter* challenges to the validity of federal regulations.

[40] In *Marine Reference*, the AGC brought a reference to the Court under subsection 18.3(2) of the *Federal Courts Act*, RSC, 1985, c F-7 to determine their constitutional validity. As such, there was no administrative decision at play and the Court did not consider whether a standard of review was applicable.

[41] *Correctional Officers*, which was decided in 2019, involved a judicial review application to the Treasury Board's decision to adopt a standard for financial security screening procedures of correctional officers, and a directive by the Correctional Service of Canada implementing it. The applicants in *Correctional Officers* argued that the enhanced financial screening procedures infringed the section 8 *Charter* rights of employees at these correctional facilities.

[42] The FCA rejected the application judge's determination that the reasonableness standard applied in *Correctional Officers*, finding instead that the correctness standard applied. The Court went on to explain that *Doré* was not applicable because the application for judicial review "is more akin to a challenge of the constitutionality of a legislative or regulatory provision" (*Correctional Officers* at para 21):

> [21] […] the appellant is not challenging an individual administrative decision based on a provision of the 2014 Standard or the Commissioner's Directive that was interpreted by a decision maker. Instead, the appellant is challenging their adoption <u>in their entirety</u>. Thus, the Union is attacking head on the constitutionality of the 2014 Standard and the Commissioner's Directive themselves. It follows that the analytical framework described in *Doré* does not apply and that it is therefore inappropriate to apply the reasonableness standard. The appellant's application for judicial review is more akin to a challenge of the constitutionality of a legislative or regulatory provision. Such a challenge is typically subject to the correctness standard of review (*Dunsmuir*, at paragraph 58).
>
> [Emphasis in Original]

[43] In many respects, *Correctional Officers* is on point in that the Applicants here are not challenging a decision-maker's interpretation of the document in question. In both cases, they challenge the adoption of financial screening and drug testing (respectively) measures on *Charter* grounds.

[44] A few months after the release of *Correctional Officers*, the SCC released *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The decision in *Correctional Officers*, although decided by the FCA just before *Vavilov*, is still good law, having been cited by Chief Justice Crampton post-*Vavilov* in *Spencer v Canada (Health)*, 2021 FC 62 [*Spencer*].

[45] In *Spencer*, Chief Justice Crampton dismissed a challenge to the validity of certain federal quarantine measures affecting air travellers. The measures were part of the federal government's response to the COVID-19 global pandemic and were implemented by way of a series of Orders in Council. On appeal, the FCA held that the challenge was moot since the orders had been repealed (*Spencer v Canada (Attorney General)*, 2023 FCA 8).

[46] At paragraph 64 of *Spencer*, Chief Justice Crampton cites *Correctional Officers*, among other pre-*Vavilov* cases to find that "[t]he standard applicable to the Court's review of the issues that have been raised with respect to the *Charter*, the *Constitution Act, 1867* and the *Canadian Bill of Rights* is correctness" (see also: *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100 at paras 49 and 54, affd 2019 FCA 320 at paras 19 and 22).

[47] I will follow this approach, as suggested by the FCA at paragraph 21 of *Correctional Officers*, and followed by Chief Justice Crampton in *Spencer*. I find this approach to be consistent with my reading of *Vavilov* where the SCC confirmed at paragraphs 55-57, that the standard of correctness continues to be applied in reviewing constitutional matters.

[48] This is also consistent with subsequent binding case law issued by the FCA (*Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 [*Innovative Medicines*] and *Portnov v Canada*, 2021 FCA 171 [*Portnov*]). In both decisions, the FCA found that the adoption of delegated legislation should be reviewed against the reasonableness standard unless an exception under *Vavilov* applies (see *Portnov* at para 10 and *Innovative Medicines* at para 27). These cases depart from the approach that had been set out in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*], that the Court must find the regulation is “irrelevant,” “extraneous,” or “completely unrelated” to the statutory purpose of the enabling statute (*Katz* at para 28). *Katz* was published several years before *Vavilov*. The FCA confirmed that *Vavilov* is the most appropriate lens to consider the validity of regulations (*Innovative Medicines* at para 26, *Portnov* at paras 22-28).

[49] I note that both *Portnov* and *Innovative Medicines* are distinct from this case. They both considered the *vires* of the regulations in question in light of their enabling statute. In both decisions, the FCA determined that no exceptions to the presumption of reasonableness under the *Vavilov* framework applied (*Portnov* at para 17; *Innovative Medicines* at para 45). Here, on the other hand, the validity of the RegDoc is being challenged on the basis of certain elements violating sections 7, 8 and 15 of the *Charter*.

[50] *Vavilov* established that the standard of reasonableness is generally applicable when reviewing administrative decisions (*Vavilov* at paras 16, 23-25). However, there are two exceptions to this presumption. First, if the legislature specifies a standard of review or creates a

statutory appeal mechanism that suggests an appellate standard should be used (*Vavilov* at paras 17, 33-35).

[51] The second exception arises where the rule of law requires the application of the correctness standard for certain categories of legal questions, namely constitutional questions, general questions of law that are significant to the legal system as a whole, and questions concerning the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53).

[52] At paragraphs 54-56 of *Vavilov*, the SCC describes the issues that fall under the constitutional law category as including legal questions on the division of powers between Parliament and the provinces, the relationship between the legislature and other branches of the state, the extent of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, interpretations of the administrative decision-maker's enabling statute, and "other constitutional matters that require a final and determinate answer from the courts."

[53] The exception to the presumption of reasonableness carved out in *Vavilov* for constitutional questions follows long-standing jurisprudence confirming the certainty and rigour required in the examination of constitutional questions. As held by the FCA in *Guérin v Canada (Attorney General)*, 2019 FCA 272 at paragraph 23:

> Regarding whether the Regulations and Directives violate section 7 of the Charter, I am of the opinion that the standard of correctness must apply. <u>It is settled law that constitutional questions must be examined rigorously and without deference in the context of judicial review</u>: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R.

> 654, at paragraph 30; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 58 [Dunsmuir]; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2019] F.C.J. No. 186 at para. 30; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, [2018] F.C.J. No. 1007, at para. 36, leave to appeal to the SCC denied, 38439 (April 18, 2019), [2018] S.C.C.A. No. 506 [*Begum*]; *Canada (Attorney General) v. Association of Justice Counsel*, 2016 FCA 92, [2016] F.C.J. No. 304, at para. 23.
>
> [Emphasis added]

[54] Similarly, in *Air Canada Pilots Association v Air Canada*, 2023 FC 138 [*Pilots Association*], this Court recently considered whether a regulatory exemption under two subsections of the *Canadian Human Rights Benefit Regulations*, SOR/80-68 infringed subsection 15(1) of the *Charter*. Justice Furlanetto held at paragraph 20, relying on paragraphs 55-57 of *Vavilov*: "The standard of review for the substantive issue is correctness. The compatibility of subsections 3(b) and 5(b) of the Regulations with the *Charter* is a constitutional question that falls within an exception to the presumption of reasonableness."

[55] In this case, the *Charter* challenges advanced by the Applicants are characterized as "attacking head on the constitutionality" of the RegDoc (see: *Correctional Officers* at para 21). In my view, the approach used in *Correctional Officers*, and recently followed by this Court in *Spencer* and *Pilots Association*, is the more appropriate approach to adjudicate the *Charter* questions in this case; and I find it to be consistent with *Vavilov*, falling within the exception to the presumption of reasonableness of "other constitutional matters that require a final and determinate answer from the courts" (*Vavilov* at para 55).

IV. Analysis

[56] The nuclear industry is unique. All Parties concur that safety is the most important priority, and that public interest in nuclear safety is high. A nuclear incident can have devastating and long lasting impacts on the community and the environment. It is within this unique context of the highly regulated nuclear industry that I find the pre-placement and random testing provisions of the RegDoc are constitutional and do not breach sections 8, 15 or 7 of the *Charter*, as will be explained next.

A. *Applicability of the Charter*

[57] The *Charter* binds the conduct of state actors and does not limit private or non-governmental activity (*RWDSU v Dolphin Delivery Ltd*., 1986 CanLII 5 (SCC), [1986] 2 SCR 573). For instance, a search or seizure carried out by a private citizen does not trigger section 8 scrutiny unless the private citizen was acting as an agent of the state or was exercising statutory delegation of governmental powers (*R v Buhay*, 2003 SCC 30 at para 31).

[58] Subsection 32(1) of the *Charter* defines the scope of its application in the following terms:

32 (1) This Charter applies	**32 (1)** La présente charte s'applique :
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and	**a)** au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.	**b)** à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

[59] In *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, Justice La Forest, writing for a unanimous court, summarized the applicable principles for the interpretation of section 32:

> . . . the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[60] In *Greater Vancouver Transportation Authority*, Justice Deschamps reiterated that the *Charter* applies not only to Parliament, the legislatures, and government, but also to "all matters within the authority of those entities" (para 14).

[61] The Parties did not cite any decisions explicitly stating that the *Charter* applies to nuclear power workplaces, nor am I aware of any such jurisprudence. However, I note that in one somewhat analogous context in the early days of the *Charter*, the Ontario Labour Relations Board found at para 35 of *Electrical Power Systems Construction Council of Ontario v Ontario Hydro*, 1984 CanLII 1050 (ON LRB): "[t]here appears to be little doubt that the *Charter* would apply to actions of government officials in issuing regulations and granting or denying licences or benefits authorized under statutes."

[62] I further note that the SCC has held that bodies created by statute (like municipalities and school boards) are government entities with legislative powers and the *Charter* applies (*Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at paras 50, 51 118 [*Godbout*] and *Chamberlain v Surrey School District No. 36,* 2002 SCC 86). Likewise, the CNSC is an entity that was created by Parliament, is thus a "government entity", and accordingly, the *Charter* applies.

[63] More specifically, the CNSC is a federal regulator, mandated to oversee the production and use of nuclear power in Canada, operating in the public interest. It was established as an agent of the Crown pursuant to subsection 8(2) of the *Act*. The CNSC members and president are appointed by the Governor in Council (subsections 10(1) and (3) of the *Act*). Pursuant to section

19, the Governor in Council may issue "directives" to the Commission that are legally binding. Moreover, sections 12 and 72 of the *Act* define the role of the CNSC's President as being its chief executive reporting to the Minister of National Resources.

[64] In short, as the CNSC is governmental in nature, it is subject to *Charter* review.

B. *The pre-placement and random testing provisions of the RegDoc do not infringe section 8 of the Charter*

[65] Section 8 of the *Charter* confers the right "to be secure against unreasonable search or seizure." At its core, the purpose of section 8 is to shield against unjustified state intrusions on personal privacy (*R v Kang-Brown*, 2008 SCC 18 at para 8; *Hunter et al v Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145, at p 160 [*Hunter v Southam*]). Broadly speaking, section 8 protects a claimant's reasonable expectation of privacy against unreasonable state intrusion (*R v Tessling*, 2004 SCC 67 at paras 18-16 [*Tessling*]).

[66] I begin my analysis with a brief discussion of the applicability of the section 8 case law to the unique nature of the case at bar. In the context of criminal law, the contemplation of unreasonable search or seizure protection calls for a highly fact-specific analysis into whether an accused's personal right to privacy was infringed by the state. As a matter of standing under section 8, an accused may only invoke his or her own personal privacy rights and not those of a third party (see for instance: *R v Edwards*, 1996 CanLII 255 (SCC), [1996] 1 SCR 128 at paras 43, 45-47 [*Edwards*]; *R v Marakah*, 2017 SCC 59 at para 12).

[67] Section 8 has certainly been found to extend beyond the protection against unreasonable search and seizure in a criminal law context (see: *R v McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC), [1990] 1 SCR 627 at 640-641 [*McKinlay Transport*]; *Comité paritaire de l'industrie de la chemise v Potash*, 1994 CanLII 92 (SCC), [1994] 2 SCR 406 at 408 [*Comité paritaire*]; *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) (1990)*, 1990 CanLII 135 (SCC), 54 CCC (3d) 417 at 495-496 [*Thomson Newspapers*]).

[68] However, in each of these non-criminal law decisions, the SCC contemplated the particulars of a search or seizure event that had already transpired. In *McKinlay Transport*, the Court considered the constitutionality of provisions of the *Income Tax Act*, RSC 1985, c 1, after these provisions had been applied to two corporate taxpayers.

[69] The Court in *Comité paritaire*, similarly considered the inspection powers of an agency in a regulated industrial sector (textile manufacturing), after the inspectors had attempted to investigate the premises in question in accordance with their powers under the impugned legislation. In *Thomson Newspapers*, the Court considered whether section 17 of the *Combines Investigation Act* violated sections 7 and 8 of the *Charter* after it was used to serve the corporate appellant and several of its officers with orders to appear before the Restrictive Trade Practices Commission, to be examined under oath and to produce documents.

[70] Although non-criminal, *McKinlay Transport*, *Comité paritaire* and *Thomson Newspapers* each involved a "factual foundation" to consider the constitutionality of the search or seizure incident at issue (see also *MacKay* at page 361).

[71] Evidently, in this case, the implementation of the impugned provisions is stayed pending the final determination of this Application for Judicial Review (*Power Workers 2022* at para 6). I am thus being asked to adjudicate the constitutionality of a seizure to be authorized by the RegDoc, but which has not taken place for any particular worker, given the injunction issued in *Power Workers 2022*.

[72] The FCA decisions *Correctional Officers* and *Marine Reference* (above) are instructive on how to consider an inchoate search or seizure – namely one that is authorized by a particular statutory or regulatory regime, but which has not yet taken place. *Correctional Officers*, decided after *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 [*Goodwin*], considered the constitutionality of a prospective search in a regulatory context.

[73] In *Marine Reference*, the Court considered a regulatory scheme that would apply to screen workers employed in security-sensitive positions in Canadian ports. The regulations at issue required workers to provide biographical information about themselves and their spouses to the Minister of Transport to determine whether the workers represented a security threat to Canada's operations. At paragraph 28 of *Marine Reference*, Justice Evans, writing for the Court, emphasized three relevant considerations to frame the *Charter* challenges brought in a particular regulatory context:

> [28] First, as the party alleging *Charter* violations, ILWU [the Applicant] has the burden of proving a prima facie breach, even when the section of the *Charter* in question requires a contextual balancing of the right against competing interests, such as sections 7 (principles of fundamental justice) and 8 (unreasonable search). Second, when the issue is whether impugned state action has the effect of infringing a *Charter* right, ILWU, as the party alleging that it does, must adduce evidence to prove it, unless it is obvious. Third, it is important to distinguish an attack on the validity of the Regulations, such as that by ILWU, from an attack on an individual decision made under them. Regulations are not invalidated merely because they may be applied in an unconstitutional manner in individual cases.

[74] In the Court's section 8 *Charter* analysis, Justice Evans first assumed for the purposes of the reference, that the regulations would constitute a search (para 48). He went on to consider the second step for the section 8 analysis, that is, whether the search as authorized by the regulations was unreasonable. The Court balanced employees' interest in their personal privacy against the public interests served by the statutory scheme (*Marine Reference* at para 49). This balancing exercise compelled the court to take into account the following considerations:

(i) contextual factors; which take into account

(ii) prior authorization and post-decision review (ie. checks and balances to prevent abuses of power); and

(iii) degree of intrusion into privacy and pressing nature of the public interest (ie. fingerprints or photographs being less intrusive).

[75] In the more recent decision of *Correctional Officers*, the FCA ruled that a directive mandating correctional officers with specific security clearance levels to submit credit reports, did not infringe section 8 of the *Charter*. Since it was not disputed that the credit check was a search within the meaning of section 8, the Court's analysis was focused on whether the directive at issue would result in an unreasonable search of the applicants. Justice Boivin, writing for the

Court in *Correctional Officers*, outlined the steps of the section 8 analysis, after having considered both the approaches taken in *Marine Reference* and in *Goodwin*:

> [24] Since the respondent did not dispute at trial that the credit check was a search within the meaning of section 8 of the *Charter*, the Federal Court limited its analysis to the issue of whether that search was abusive (Federal Court decision at paragraphs 95–98; *Hunter v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145).
>
> [25] For that purpose, the Federal Court methodically applied the criteria set out by the Supreme Court of Canada in and the criteria described by our Court in the *Marine Reference*. In the present case, <u>the criteria in question can be described as follows: (i) the objective of the 2014 Standard and the Commissioner's Directive; (ii) the nature of those schemes; (iii) the mechanism for conducting the search, including the degree of intrusiveness; and (iv) the subsequent review and possible redress for overseeing the search.</u>
>
> [Full citations omitted; emphasis added]

[76] In both *Marine Reference* and *Correctional Officers*, the FCA considered whether the regulations were authorized by law and whether the law itself was reasonable. However, neither address whether the manner in which the search was carried out was reasonable, for the obvious reason that no search had yet been carried out.

[77] As a similar situation is also present here, given that the scheme exists but has not yet been exercised against any Safety-Critical Workers in light of this Court's injunction, I will apply the FCA's approach as guided by the SCC in *Goodwin*, since the Court has been asked to strike regulatory provisions that empower Licensees to authorize a seizure.

Step 1: The pre-placement and random testing provisions engage section 8

[78] The first step requires the claimant to show that state conduct amounts to a search or seizure within the construct of section 8 (*R v Jones*, 2017 SCC 60 at para 13 [*Jones*]), and determine whether section 8 is engaged, based on the claimant's reasonable expectation of privacy (*Goodwin* at paras 49-51).

[79] The word 'search' has been described as "an examination, by the agents of the state, of a person's person or property": Hogg, *Constitutional Law of Canada*, vol. 2 (Toronto: Carswell, 2021) at 48:4.

[80] The term 'seizure' was defined by Justice La Forest in *Thomson Newspapers* as "the taking of a thing from a person by a public authority without that person's consent." This definition was recently applied by the FCA in *Rémillard c Canada (Revenu national)*, 2022 CAF 63 at para 71.

[81] I reiterate that not every "examination" conducted by a state actor, nor every "taking" by the government, engages the section 8 protection (*Tessling* at para 18; *Goodwin* at para 51). Rather, a search or seizure only occurs when the state has interfered with a citizen's reasonably held expectation of privacy, taking into account the "totality of the circumstances of a particular case" (*Jones* at para 13 citing *Edwards* at para 31; *R v Wong*, 1990 CanLII 56 (SCC), [1990] 3 SCR 36, at 62).

[82] In this case, the Respondents concede that requiring Licensees to collect bodily samples – whether breath, urine or saliva – necessarily involves taking personal and informational data amounting to a "seizure." That point conceded, their position is that under the RegDoc, the state interferes in a limited manner. Based on the totality of the circumstances, the Respondents argue that Safety-Critical Workers employed at a nuclear power plant have a significantly reduced expectation of privacy.

[83] The Applicants argue that Safety-Critical Workers do not have a diminished expectation of privacy, but on the contrary, have a heightened expectation of privacy based on (a) the subject matter of the search (b) their interest in the subject matter (c) their subjective expectation of privacy in the subject matter and (d) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances. In support of their argument that they deserve a heightened expectation of privacy, the Applicants primarily rely on the SCC decisions in *Tessling* at paragraph 32, and *R v Spencer*, 2014 SCC 43 at paragraph 18 [*R v Spencer*] and the lower court decision in *Gillies (Litigation Guardian of) v Toronto District School Board*, 2015 ONSC 1038 (Sup. Ct.) at paragraphs 79-80 [*Gillies*].

[84] In particular, the Applicants note that the urine and/or oral fluids collected in the pre-placement and random process testing are bodily samples over which the Safety-Critical Workers have both a high interest and a subjective expectation of privacy. The Applicants argue that bodily samples and what they reveal about a person's lifestyle constitute an individual's "biographical core", and there can be no doubt that an individual has a significant interest in that

information both on a subjective and objective basis (*R v Plant*, 1993 CanLII 70 (SCC), [1993] 3 SCR 281 at para 20).

[85] The Applicants highlight the comments of Justice Himel, at paragraph 96 of *Gillies*:

> [96] I do not accept the respondents' submission that, in light of the Supreme Court decision in *Jarvis*, the seizure of the students' breath sample would not attract the full panoply of *Charter* rights. First, the principal deposed in his affidavit that although the breathalyzer is not intended to be a precursor to student discipline, he noted the potential for discipline for student alcohol consumption. Second, the seizure of a bodily sample interferes with a person's bodily integrity regardless of the context in which it is taken. I am not persuaded that the Supreme Court intended to diminish the *Charter* scrutiny to be applied to the seizure of a bodily sample. In *Jarvis*, the impugned search at issue was at a person's residence and of a person's personal documents; the subject matter of the search in the present case interferes with a person's bodily integrity. That difference is paramount.
>
> [Emphasis added]

They contend that the Superior Court's decision in *Gillies* rejects the Respondents' position that a workplace attracts a diminished expectation of privacy for workers when the object of the seizure is bodily samples. There, Justice Himel found that the practice of mandatory, blanket breathalyzer testing of students at their school prom infringed their rights under section 8.

[86] The Applicants also argue that their situation is analogous to that of the teachers in the recent Ontario Court of Appeal decision in *Elementary Teachers* at para 56. In that case, the Court of Appeal held that two teachers' section 8 rights were breached when the school's principal read and documented the teachers' personal logs of concerns about the school, which were left open on a school laptop. The Applicants rely on that case to argue that employees have

a right to keep information about their personal choices private from their employer, as well as to expect that information to remain private in the workplace.

[87] The Applicants further contend that Safety-Critical Workers have a heightened expectation of privacy because they do not consent to the pre-placement and random testing. It is compulsory and could result in significant consequences for these impacted employees, including removal from their work duties and referral to a mandatory substance abuse evaluation. The Applicants argue that Safety-Critical Workers did not – and cannot – waive their reasonable expectation of privacy or their *Charter*-protected right against unreasonable searches by choosing to work at nuclear facilities. They assert that under the RegDoc, there is no true right of refusal, but rather only a spectrum of negative employment and reputational consequences.

[88] Finally, the Applicants reject the notion that a flexible approach must be adopted in the section 8 analysis for regulatory contexts because this approach would result in a more lenient standard in assessing reasonableness of the search, and effectively diminish rights under the *Charter*. The Applicants argue (relying on *Gillies* at para 94) that even in regulatory contexts, the “full panoply” of *Charter* rights apply.

[89] The Respondents, on the other hand, primarily rely on *Goodwin* at paragraph 51 to argue that the SCC has made clear that individuals who participate in highly regulated activities have a diminished expectation of privacy, even in relation to the seizure of bodily samples to determine a measure of alcohol and drug use. In that case, Mr. Goodwin was driving on a public highway and was asked to give a breath sample to determine whether he was driving while impaired. The

Respondents emphasize that the SCC considered driving on a public highway to be a "highly regulated context," resulting in a diminished expectation of privacy (*Goodwin* at para 51). They argue that the same standard should necessarily apply to the handling of safety-critical tasks in a nuclear facility, such that the impacted positions attract a diminished expectation of privacy.

[90] The Respondents highlight that context is important in establishing the reasonable expectation of privacy because a search and seizure arising from a regulatory context cannot be reviewed under the same standard as one arising from a criminal context. The Respondents urge this Court to apply, as *McKinlay Transport* requires, a "flexible and purposive approach to s. 8 of the *Charter*" and "draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter v Southam* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review" (at page 647).

[91] In my view, a flexible approach, which takes its colour from context, does not diminish *Charter* rights for individuals. As Justice Wilson wrote on behalf of the *McKinlay Transport* majority at pp 644-645:

> In my opinion, flexibility is key to interpreting any constitutional document including the *Charter*. It would be wrong, I think for the courts to apply a rigid approach to a particular section of the *Charter* since that provision must be capable of application in a vast variety of legislative schemes.
>
> […]
>
> Since individuals have different expectations of privacy in different kinds contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

[92] *McKinlay Transport* thus established that a flexible approach is not a mechanism to be used by the courts to limit *Charter* rights. Rather, it allows the courts to interpret *Charter* rights in a wide variety of contexts in a "realistic and meaningful" way. A flexible approach reflects differing expectations of privacy for different contexts.

[93] In this case, I agree with the Respondents that the Court should use a flexible approach to the section 8 analysis due to the highly regulated nature of the nuclear power workplace. As noted above, it is undisputed that obtaining bodily samples in the workplace constitutes a seizure within the meaning of section 8.

[94] With respect to the reasonable expectation of privacy, I disagree with the Applicants that the balance of contextual factors points to a heightened expectation of privacy for Safety-Critical Workers at nuclear facilities. In particular, the Applicants argued that the compulsory nature of the pre-placement and random testing provisions and lack of consent would result in a heightened expectation of privacy. However, if Safety-Critical Workers had a right of refusal or consented to the requirement, their section 8 rights would not be engaged at all because there would be no search or seizure in the first place. As held by the Ontario Court of Appeal in *R v Wills*, 1992 CanLII 2780 (ON CA), 7 OR (3d) 337 at paragraph 86: "[a] valid consent is a waiver of one's s. 8 rights. A 'consent search or seizure' is, in fact, no search or seizure at all for the purposes of s. 8."

[95] I also take issue with the Applicants' reliance on the *Gillies* decision. It is distinguishable from the case at bar. First, the Superior Court in *Gillies* applies a very specific test for section 8

that was established by the SCC to determine whether searches conducted by teachers or a principal in the school environment is reasonable (*Gillies* at para 129). As discussed above, the framework of analysis in *Goodwin*, *Marine Reference*, and *Correctional Officers* is more appropriate for the present case, given the regulatory framework within which those three cases arise.

[96] Second, I am not convinced by the Applicants' attempt to draw a parallel between the negative employment and reputational consequences that could befall a Safety-Critical Worker subject to a pre-placement or random test, and the "disruptive, invasive and humiliating" experience of a student subject to a breathalyzer test at their high school prom (*Gillies* at para 132).

[97] When balancing the contextual factors to determine the strength of the privacy interests at stake, I find that the section 8 rights of Safety-Critical Workers are engaged. Although these workers have a diminished expectation of privacy when working at nuclear facilities, their residual privacy interest in the collection of their bodily samples is by no means eliminated.

[98] While the seizure of bodily samples does not automatically attract a high expectation of privacy, particularly for "relatively non-intrusive samples," such as breath (*R v Grant*, 2009 SCC 32 at para 111; *Goodwin* at paras 51 and 65), and buccal – or mouth – swabs (*R v SAB*, 2003 SCC 60 at para 44 [*R v SAB*]), the taking of one's biographical information without their consent falls squarely within the purview of section 8. This determination is supported by the SCC's remarks in *Goodwin*:

> [50] It is undisputed before this Court that the roadside breath demand constitutes a seizure within the meaning of s. 8 of the *Charter*.
>
> [51] It is also undisputed before this Court that drivers of vehicles have some expectation of privacy in their breath, even if a diminished one. The factors identified by this Court as "helpful markers" in *Tessling*, at paras. 43-62, support this conclusion. The seizure occurs in a vehicle (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 111 and 113); in the highly regulated context of driving on a public highway (*R. v. McKinlay Transport Ltd*., 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627, at pp. 647-48); and is relatively non-intrusive (*Grant*, at para. 111). While these factors support a diminished expectation of privacy, they do not eliminate any residual privacy interest in one's breath. Thus the demand to breathe into a roadside screening device constitutes a seizure that infringes on an individual's reasonable expectation of privacy. The protection of s. 8 is engaged.
>
> [Emphasis added]

Step 2: The pre-placement and random testing provisions in the RegDoc are authorized by law

[99] The Applicants argue that the pre-placement and random testing provisions are not authorized by law, because there is nothing specifically in the *Act*, nor a common law rule, that authorizes the search (*R v Caslake*, [1998] 1 SCR 51 at para 12 [*Caslake*]). The Applicants rely on *R v Shoker*, 2006 SCC 44 at para 22 [*Shoker*] to argue that searches must be authorized by law through specific statutory language and not general grants of regulatory power as was used by the CNSC in passing the RegDoc, because where Parliament has chosen to authorize the collection of bodily samples, it has used both clear authorizing language, and standard safeguards surrounding the collection of bodily samples.

[100] The Applicants also rely on *expressio unius est exclusio alterius*, a maxim meaning the express mention of an item excludes others. They submit as the basis of the *expressio unius* principle that paragraph 44(1)(h) of the *Act* specifically mentions the Commission's power to make regulations prescribing medical examinations or tests to nuclear energy workers to ensure their protection, but does not contain authorizing language with respect to pre-placement or random testing, or any standards and safeguards for such methods of testing.

[101] The Applicants further argue that the *Act* does not contain any provision, other than paragraph 44(1)(h), which mentions medical examinations or tests that would include pre-placement and random testing. The Applicants contend that this absence of a specific grant of authority in the *Act* demonstrates Parliament's intent to deny the CNSC the power to impose pre-placement and random testing provisions on nuclear workers.

[102] The Respondents counter that the pre-placement and random testing provisions of the RegDoc are authorized by law, because the RegDoc is a law. As noted above, they rely on *Greater Vancouver Transportation Authority* to submit that a RegDoc can constitute a "law" where it establishes a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority that is sufficiently precise and accessible. The Respondents contend that the RegDoc is an instrument enacted by Canada's nuclear regulator under a broad statutory grant or power, and thus satisfies the "authorized by law" requirement for section 8 of the *Charter*.

[103] The Respondents further submit that jurisprudence emanating from a regulatory context is more applicable and persuasive than that arising from the criminal context. For example, they argue that the decisions in *Caslake* and *Shoker*, which authorize the collection of bodily samples within a law enforcement regime, are not applicable in the current case because the RegDoc is not punitive in nature. Instead, the Respondents invite the Court to follow the flexible approach required in a regulatory context, as described by the SCC in *Goodwin* at para 53:

> The analysis of a search or seizure under s. 8 is a contextual inquiry: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 26. It requires regard to the purpose for which the seizure occurs, and to the statutory provisions that set out the grounds, means and consequences of the seizure. A search or seizure can be valid for one purpose and not for another.

[104] I am not persuaded by the Applicants' position because it fails to consider the regulatory context in which the seizure is authorized. It is true that neither the *Act* nor its associated *Regulations* stipulate the collection of bodily samples for drug and alcohol testing, as do certain provisions of the *Criminal Code*, RSC 1985, c C-46. However, we must adopt a more flexible approach to the "authorized by law" requirement, as suggested by the SCC, when in a regulatory and not in a criminal, context. That encapsulates the present circumstances.

[105] Indeed, here the associated *Regulations*, the *General Nuclear Safety and Control Regulations*, SOR/2000-202, and the *Class 1 Regulations* [collectively the *Regulations*], require Licensees to maintain human performance programs that include ongoing attention to reducing the likelihood of human performance-caused safety events. These regulatory provisions and CNSC's broad powers to impose licensing requirements under subsection 24(2) of the *Act* constitute a sufficient statutory basis for this Court to find that the pre-placement and random

testing provisions of the RegDoc are authorized by law. These statutory provisions also reflect Parliament's intent to empower the CNSC to regulate and set standards in the nuclear industry as it sees fit.

[106] I find the Applicants' *expressio unius* argument to be unconvincing. In particular, I do not find compelling the suggestion that this Court should look to what has been excluded from the *Act* and its associated *Regulations* to understand Parliament's intent concerning drug and alcohol testing at nuclear facilities. Indeed by reviewing subsection 24(2) and paragraph 44(1)(h) of the *Act* (see Annex A to these Reasons for both provisions), there is nothing that indicates that Parliament intended to exclude the CNSC's broad regulatory powers from applying to medical examinations and testing of workers.

[107] I note that in the context in which this judicial review application arises, Parliament has given the CNSC a wide latitude to regulate Canada's nuclear industry in the public interest. To achieve this regulatory purpose, Parliament delegates a variety of tools to the CNSC to tailor specifications and requirements to Licencees governed by the *Act* and its *Regulations*. The CNSC acted pursuant to its broad powers when it decided to implement pre-placement and random testing to bolster the fitness for duty programs and ameliorate the safety conditions in these nuclear facilities. These powers are authorized by law under subsection 24(2) of the *Act*.

Step 3: The pre-placement and random testing provisions are reasonable

[108] Before I begin my analysis of the reasonableness of the pre-placement and random testing provisions using the framework set out in *Goodwin* and applied in *Correctional Officers*, I will briefly discuss the Applicants' reliance on arbitral jurisprudence.

[109] The Applicants rely on arbitral jurisprudence, in particular *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34 [*Irving*] to argue that pre-placement and random testing is unreasonable. The Applicants submit that the well-established arbitral jurisprudence about pre-placement and random testing ought to weigh heavily on the section 8 analysis because that case considered the same balancing between individual privacy rights and employer interests as does section 8. The Applicants rely on the SCC's comments in *Irving* at paras 30-31 to argue that an employer's interest in safety will not justify breaching an employee's privacy rights without reasonable cause, even in an inherently dangerous workplace:

> [30] In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse […]
>
> [31] But the dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

[110] While the SCC's analysis of the balancing of interests between the employer and employees in *Irving*, along with the other arbitral jurisprudence, is helpful, I do not feel it is authoritative for the section 8 analysis in this case. Indeed, one must consider how Justice Abella approached *Irving*, writing at paragraph 3 of that decision:

> The legal issue at the heart of this case is the interpretation of the management rights clause of a collective agreement. This is a labour law issue with clear precedents and a history of respectful recognition of the ability of collective bargaining to responsibly address the safety concerns of the workplace – and the public.
>
> [Emphasis added]

[111] The reality is that *Irving* and the arbitral jurisprudence focuses on the exercise of management rights and the application of the "KVP test," a test which was contained in the labour law decision *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. (1965),* 16 LAC 73. The KVP test ensures "that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable" (*Irving* at para 24). While the KVP test focuses on the relationship between the employer and the employees, and the terms of the collective agreement between them, a section 8 analysis is more contextual and requires the examination of the totality of circumstances.

[112] In any event, the circumstances in the present case are distinguishable from those in *Irving* in two significant ways. First, the subject matter under review is a measure enacted by a federal regulator, and not workplace requirements introduced by an employer. Second, the RegDoc does not mention disciplinary consequences, whereas the employer policy in *Irving* did.

Also notable is the fact that *Irving* does not preclude the implementation of pre-placement and random testing in workplaces (*Irving* at para 52):

> [52] This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.

[113] In keeping with the analysis set out by *Goodwin* as applied in *Correctional Officers*, my assessment of whether the seizure authorized by sections 5.1 and 5.5 of the RegDoc is reasonable, will be subject to the following criteria: (a) the purpose of the RegDoc and the provisions at issue; (b) the nature of the regulatory scheme; (c) the mechanism for obtaining the bodily samples, including the degree of intrusiveness; and (d) the subsequent review and possible redress for seizure, i.e. the availability of judicial oversight (see *Correctional Officers* at para 25). Each of these four criteria is discussed next.

(a) *The purpose of the RegDoc and the provisions at issue*

[114] I am satisfied that the purpose of the RegDoc and of its pre-placement and testing provisions, is to standardize and improve Licensees' fitness for duty programs relating to drug and alcohol testing.

[115] The Respondents submit that the pre-placement and random testing provisions of the RegDoc arose from a need for better fitness for duty provisions in light of lessons from nuclear disasters such as the one in Fukushima, Japan in 2011. This required looking abroad to align with international standards, including the recommendations and expectations of the International

Atomic Energy Agency [IAEA], as well as addressing domestic developments such as measures needed to respond to the introduction of the *Cannabis Act*, SC 2018, c 16.

[116] As mentioned by the 2021 Arbitral Decision in this matter, "[t]he RegDoc is the product of almost 10 years of study and consultation by the CNSC, in which the parties to this litigation have participated, and over the course of which this litigation has been anticipated": *Ontario Power Generation, Bruce Power, Power Workers' Union, Society of United Professionals, The Chalk River Nuclear Safety Officers Association and International Brotherhood of Electrical Workers, Local 37 v Canadian Nuclear Laboratories and New Brunswick Power*, 2021 CanLII 65284 (ON LA) at para 2 [Arbitral Decision].

[117] In the course of its research, the CNSC commissioned a number of key reports, which it relied on when developing the RegDoc. These reports include: (i) "*Review, Analysis and Synthesis of CNSC's Licensees' Fitness for Duty Programs*" by AIM Health Group in 2011 [AIM Report]; (ii) "*The Forensic Toxicology of Alcohol and Best Practices for Alcohol Testing in the Workplace*" by James Wigmore in 2014 [Wigmore Report]; (iii) "*State of Policies and Practices on Substance Use in Safety-sensitive Industries in Canada*" by the Canadian Centre on Substance Use and Addiction in 2017 [CC Report]; (iv) "*Urine Drug Testing Practices*" by Dr. Albert Fraser in 2014 [Fraser Report]; and (v) "*Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry*" by Barbara Butler and Associates Inc. in 2012 [Butler Report].

[118] The findings in these five reports [Reports] point to an identified need for better methods of detection of drug and alcohol impairment at nuclear facilities, as well as to the efficacy of the testing methods proposed by the RegDoc.

[119] In particular, the AIM Report looked into deficiencies in the CNSC's existing fitness for duty programs and compared them with standards from the IAEA, the world's central intergovernmental forum for scientific and technical co-operation in the peaceful use of nuclear energy. Canada is a member of the IAEA, as one of its 175 member states. While the AIM Report found that CNSC's existing fitness for duty programs were compliant with IAEA standards, it also found the programs across the different nuclear facilities in Canada were inconsistent with each other. Page 24 of the AIM Report recommended the following specific areas of improvement within the domain of "substance use and abuse":

- Improve the policy of Licensees to include clear expectations on the number of hours of alcohol abstinence necessary prior to reporting to work or on-call;
- Define additional policy statements for off-duty expectations regarding use, possession or distribution of illegal substances;
- Drug and/or alcohol testing protocols need to be defined.

[120] The Wigmore Report noted that there were concerns with supervisory awareness programs for detecting impairment in the workplace, including a lack of scientific evidence to show that supervisors were able to detect impairment since some workers may not show outward signs of impairment but still exhibit symptoms of functional impairment.

[121] For its part, the CC Report indicated that the impact of legalization and regulation of cannabis in Canada could result in increased use in populations that typically did not use cannabis, particularly adults in the workforce.

[122] The Fraser Report discussed the efficacy of urine drug testing practices and how it could be used to detect impairment.

[123] The Butler Report addressed the deterring effects of random testing and recommended it as a more objective method of testing than reasonable cause testing (testing after referral based on judgment calls made by supervisors).

[124] According to the Respondents, these five Reports informed the development of the RegDoc to improve methods of detection of drug and alcohol impairment at nuclear facilities.

[125] The record, including the Reports, produced over the course of the decade leading up to the planned 2021 implementation of the RegDoc, shows that the pre-placement and random testing provisions were reasonably included in the RegDoc after years of research identified specific gaps in the existing fitness for duty programs, particularly with respect to reliable, consistent, and accurate methods to detect drug and/or alcohol impairment among workers at nuclear facilities. CNSC staff testified that the Commission had, as early as 2007, identified gaps and inconsistencies in the existing fitness for duty programs, particularly for drug use. As a result, CNSC staff researched drug and alcohol use, the risks posed to the nuclear industry, and what steps would reduce those risks.

[126] The bolstering of Licensees' fitness for duty programs relating to drug and alcohol testing is a compelling purpose in light of those gaps in protecting against the identified risks. This compelling purpose weighs in favour of the reasonableness of the seizure required by the pre-placement and random testing measures.

[127] I note that the purpose of the pre-placement and random testing provisions is also aligned with the defence-in-depth principle. As underscored by the Respondents, in the nuclear industry, one cannot "wait and see" given the severe consequences that often result from nuclear incidents. Thus fitness for duty programs must be built on a foundation that layers various measures to minimize risk and implement best practices to both prevent failure, and ensure safety. Contrary to the Applicants' submissions, pre-placement and random testing procedures neither undermine nor diminishes that principle. Rather, they represent additional measures to the other uncontested methods of detecting drug and alcohol impairment in the RegDoc. The additional measures contribute to the purpose of the scheme, namely to improve the fitness for duty programs relating to drug and alcohol testing.

[128] Under the defence-in-depth principle, the existence of multiple methods and layers of detection of drug and alcohol impairment is not a redundancy, but rather an intended outcome. In this unique case, the defence-in-depth principle helps to justify multiple methods of detection by pre-placement and random testing under the regime of the RegDoc; it does not controvert that principle or undermine the purpose of the scheme.

(b) *The nature of the regulatory scheme*

[129] In the context of a regulatory scheme, the SCC departed from the rigid framework of analysis in *Hunter v Southam* to assess the reasonableness of a search and/or seizure. As Justice La Forest held for the Court in *Comité paritaire*, "[i]n a context in which their occupations are extensively regulated by the state, the reasonable expectations of privacy employers may have…are considerably lower" (at page 420). He added at page 421:

> It is thus impossible, without further qualification, to apply the strict guarantees set out in *Hunter v. Southam Inc.*, *supra*, which were developed in a very different context. The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection.

[130] Furthermore, as held by Justice Karakatsanis writing for the majority at paragraph 60 of *Goodwin*, "[the SCC] has recognized in its s. 8 jurisprudence that the characterization of a search or seizure as either criminal or regulatory is relevant in assessing its reasonableness. Where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards." Likewise, in this case, the highly regulated nature of nuclear facilities is relevant for assessing the reasonableness of the seizure (see also *Comité paritaire* at page 418 and *Marine Reference* at para 50).

[131] The RegDoc's administrative law context differs from the criminal domain (*McKinlay Transport* at para 647; *Thomson Newspapers* at paras 495-496). The focus here is rather the broad public interest served by the RegDoc, namely nuclear safety (see *Marine Reference* at para 53). As the FCA held in *Correctional Officers* at para 29, where the impugned directive was administrative and not criminal in nature: "[t]he case law is uniformly clear: the resulting searches are thus considered less intrusive than those performed in a criminal investigation."

[132] In sum, considering the nature of this regulatory scheme, I find that the RegDoc's context supports the reasonableness of the searches under its pre-placement and random testing provisions.

(c) *The mechanism for obtaining the bodily samples, including the degree of intrusiveness*

[133] The SCC held in *Goodwin* at paras 64-67 that the two relevant factors to assess the reasonableness of the manner of a search are (i) the degree of intrusiveness on an individual's bodily integrity, and (ii) the reliability of the results. The Applicants argue that the manner in which the testing is carried out as proposed in the RegDoc is unreasonable, because the collection of bodily samples is highly intrusive, and the RegDoc's testing methodology is unreliable because it may show only past drug use rather than present impairment.

[134] The two testing methods (breath samples and buccal swabs) are prescribed by sections 6.1 and 6.2 of the RegDoc. Under the third – and arguably the most contentious – bodily sample method contained in the RegDoc, Licensees will be required to conduct urine testing in a

secure and private testing location, a measure intended to protect bodily integrity and reduce, as the Respondents assert, any affront to privacy and dignity of Safety-Critical Workers (*R v SAB* at para 44).

[135] The Respondents counter that the manner in which the testing is carried out is reasonable for two primary reasons. First, as mentioned above, while the collection of bodily samples can be intrusive, they urge this Court to use a flexible approach, one that considers other contextual factors, such as the narrow scope of the RegDoc, and the absence of disciplinary consequences that flow from a positive test result. Second, they emphasize that the testing methods contained in the RegDoc are highly reliable.

[136] As I have already addressed the intrusiveness of the collection of bodily samples as well as the need for a flexible approach and the consideration of contextual factors due to the regulatory context, I will focus on the reliability of the testing methodology of the RegDoc in my analysis of the reasonableness in the testing methodology.

[137] The Applicants argue that the alcohol and drug testing methods outlined in the RegDoc actually detect the amount of alcohol and/or drug that an individual has taken, which can only be used to determine whether an individual is intoxicated, but cannot be used to accurately measure the level of impairment of an intoxicated individual. They point to the Butler Report, which suggests that no alcohol and/or drug testing method can actually and directly measure an individual's level of impairment from alcohol and/or drug use.

[138] A CNSC staff member testified that the testing methods outlined in the RegDoc were actually designed to measure recency of use, and recency is the most accurate indicator of impairment. Specifically, the Butler Report suggests that while alcohol and drug testing cannot measure impairment, it can accurately measure the concentration of a substance in a person's body and/or the recency of use of a substance, which are both strong indicators of impairment when examined in conjunction with studies available on the impact and duration of the effects of drugs on performance.

[139] The Butler Report also examines how different cut-off levels set out for testing affect the accuracy of measuring recent use. CNSC staff used this research to set the cut-off levels in the RegDoc to represent narrow windows on recent use to ensure the accuracy of test results. In other words, the cut-off levels in the RegDoc are set so that a positive test result would indicate very recent use and be a better signal for possible impairment. Therefore, there is a research-established link between the RegDoc's testing methods, including the proposed cut-off levels for a positive test result, and the detection of alcohol and drug impairment.

[140] Finally, turning back to the fundamental safety assurance objective of the impugned provisions, the testing methodology outlined in the RegDoc also embodies the nuclear safety principle of defence-in-depth and its multiple layers. First, it sets out a combination of testing methods for higher accuracy. For example, Licensees can opt for a combination of urine drug testing and oral fluid drug testing. Second, the RegDoc requires multiple steps of analysis before a positive result is reported, namely a laboratory screening, followed by examination, as well as confirmation from a medical review officer.

(d) *The subsequent review and possible redress for seizure (i.e. availability of judicial oversight)*

[141] The consequences arising from a regulatory scheme that enables a search or seizure generally (i.e., without prior authorization for each incident) are lessened if an individual subject to the regulatory scheme can challenge both the basis for, and the accuracy of, their test results (*Goodwin* at para 69). As such, the availability and adequacy of judicial oversight, or "procedural safeguards", are relevant measures in assessing the reasonableness of a search or seizure under section 8 (*Goodwin* at paras 71-72).

[142] The Applicants, through their argument of an absence of reasonable and probable grounds for the pre-placement and random testing measures, are effectively challenging the availability of judicial oversight. They argue that in the absence of prior judicial authorization, a search is presumptively unreasonable and the state bears the onus of rebutting that presumption, relying on *R v Spencer* at paragraph 68. The Applicants submit, given the absence of reasonable and probable grounds, that the presumption has not been rebutted and therefore the proposed pre-placement and random testing is unreasonable.

[143] The Applicants contend that random testing is, by definition, without grounds. They also assert that pre-placement testing arises from an individual's application for a Safety-Critical position, not because of reasonable and probable grounds to suspect that an individual might be impaired at work. The Applicants rely on pages 167 and 168 of *Hunter v Southam* to submit the SCC affirmed that the state's interest only prevails over the individual's right to privacy "at the point where credibly-based probability replaces suspicion".

[144] The applicants in *Marine Reference* also argued that the regulatory scheme in that case was "fatally flawed" because there was no prior authorization for the searches (i.e., security screenings). However, the FCA rejected those arguments at paras 57-59 of its decision:

> [55] ILWU argues that the scheme is fatally flawed because it lacks any adequate checks to prevent the abuse of the power to obtain and use information about an employee. In particular, prior independent authorization is not required, and an employee who has been refused a security clearance has no right of review by an independent decision-maker. Hence, any "search" under the Regulations is unreasonable.
>
> [56] Counsel relies on *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 ("*Hunter*"), for the proposition that, even when undertaken as part of a regulatory scheme, a search will normally not be reasonable for the purpose of section 8 without prior authorization by an independent person capable of acting in a judicial manner.
>
> [57] I disagree. In my opinion, *Hunter* cannot be applied to the scheme under consideration here. For one thing, to require prior authorization before an employee completes a security clearance application would serve no purpose because all employees complete the same form. The complaint in this case is not to abuses in the way that forms are administered to different employees, but to the form itself.
>
> [58] Further, cases in which prior authorization has been required have invariably arisen in contexts where criminal and *quasi*-criminal offences are being investigated and where the expectation of privacy is highest. Here, in contrast, existing and future employees who wish to work in security-sensitive positions in marine transportation, a highly regulated activity giving rise to a much lower expectation of privacy, may be refused a security clearance, which may adversely affect their employment opportunities. See *Comité paritaire* at 419-20.
>
> [59] To the extent that ILWU argues that authorization is required before the information provided by an employee is checked a8nd verified by law enforcement and intelligence agencies, its argument is equally flawed. It would be impracticable to require prior authorization before the information provided by thousands of port employees across the country could be processed. Nor is it clear to me what purpose would be served by

> such an exercise, since it will often not be possible to identify potential security risks until background checks have been conducted.
>
> [Emphasis added]

[145] I agree with the FCA's approach in *Marine Reference* that the Court cannot take a rigid approach of requiring prior authorization in its assessment of the availability of judicial oversight. In *Correctional Officers*, the FCA found that correctional officers who were obligated to consent to credit checks, which constituted a search under section 8, were afforded judicial oversight because the scheme allowed them to explain any adverse information in their credit report and contest any decision to revoke their reliability status as a result of an adverse search result (*Correctional Officers* at para 32). The correctional officers also had recourse to the Federal Courts and the Human Rights Commission, which the FCA found to be "undeniably relevant in assessing the reasonableness of the search" (*Correctional Officers* at para 32).

[146] In *Goodwin* at para 71, the Court found "[t]he nature of the review required will of course vary with the circumstances, including the nature of the scheme. On the other hand, the availability of oversight is particularly important where, as here, a search or seizure occurs without prior authorization: *R v Tse*, 2012 SCC 16, [2012] 1 SCR 531, at para 84. While less exacting review may be sufficient in a regulatory context, the availability and adequacy of review is nonetheless relevant to reasonableness under s. 8."

[147] Here, under the "Drug-testing process" (section 6.2 of the RegDoc), Safety-Critical Workers are provided with the opportunity to explain any alternative reasons for the positive test result, and if a medical review officer finds a legitimate medical explanation for the positive test

result, it will not be considered "verified" or reported to the Employers. Thus, similar to the regulatory scheme in *Correctional Officers*, the RegDoc provides a procedure to contest the results of the search.

[148] I agree with the Respondents that the RegDoc does not result in any adverse disciplinary consequences if a Safety-Critical Worker receives a positive test. Under section 6.3 of the RegDoc, Safety-Critical Workers who receive a verified positive test result shall be removed from Safety-Critical duties and referred for a mandatory substance abuse evaluation. The removal from Safety-Critical duties does not result in the individual's dismissal. Instead, the individual is referred to a substance abuse evaluation, which is a medical process designed for rehabilitation.

[149] Neither the removal from Safety-Critical duties, nor the referral to a substance abuse evaluation, are detrimental to Safety-Critical Workers. At least, that is all that I am prepared to conclude at this early stage, which is before the RegDoc has been applied to any particular case. Based on the record,the purported detrimental effects of a positive test to employment reside in the realm of the hypothetical, rather than on any tangible basis.

[150] Although the RegDoc does not outline an appeal mechanism for adverse consequences resulting from a positive test result once the administrative process is complete, such as a possibility of judicial review or of filing a complaint to a third-party, any administrative decision made by the Employers under the regulatory scheme of the RegDoc can eventually be subject to judicial review before the Federal Court.

[151] In conclusion, the pre-placement and random testing provisions of the RegDoc engage, but do not infringe, section 8 of the *Charter*. The Safety-Critical Workers have a diminished expectation of privacy due to the highly regulated nature of their workplace, and the testing provisions are reasonable when considering all the contextual factors at hand, including the regulatory context, the public interest in nuclear safety, the identified need to bolster fitness for duty programs, the reliability of the testing methodology, and the availability of judicial oversight.

C. *The pre-placement and random testing provisions of the RegDoc do not infringe section 7 of the Charter*

[152] Section 7 of the *Charter* guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[153] There is a two-step test for applying section 7. The Court must first determine whether the impugned provisions deprive the claimant of life, liberty, or security of the person. If affirmed, the Court must then determine whether the deprivation is contrary to the principles of fundamental justice (*R v Beare*, [1988] 2 SCR 387 at 401).

[154] These steps are sequential. As noted by the SCC in *Blencoe v BC (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at para 47, "if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there" (see also: *R v Pontes*, [1995] 3 SCR 44 at para 47).

[155] The Applicants claim that the provisions deprive them of their security of the person interest. They argue that the absence of reasonable and probable cause to authorize each seizure renders the pre-placement and random testing provisions of the RegDoc in contravention of the principles of natural justice. Specifically, the Applicants submit that the impugned provisions are: arbitrary because the testing is without reasonable and probable grounds; overbroad because it captures employees who are not suspected of being impaired; and disproportionate given all the existing measures in place in nuclear facilities, as well as the non-contested measures already contained in the RegDoc that sufficiently monitor impairment.

[156] The Respondents dispute these assertions. They rely on *Wakeling v United States of America*, 2014 SCC 72 at paras 49-50 [*Wakeling*] to submit that the arguments raised by the Applicants under their section 7 challenge can and should be dealt with under the section 8 analysis. In any event, the Respondents argue that the pre-placement and random testing provisions of the RegDoc are not arbitrary, overbroad or grossly disproportionate, and that any interference with the bodily integrity of Safety-Critical Workers resulting from the testing, is in accordance with the principles of fundamental justice.

[157] At the outset, I am of the view that the Applicants' concerns are more appropriately framed for consideration under the section 8 *Charter* analysis and not section 7. I agree with the Respondents' submission that a section 7 analysis in this case is redundant since the taking of bodily samples ought only be considered under section 8 (*Wakeling* at paras 49-50; *R v Rodgers*, 2006 SCC 15 at paras 23-24; *Ontario (Attorney General) v Bogaerts*, 2019 ONCA 876 at para 54

[*Bogaerts*]). Nonetheless, I will respond to the Applicants' section 7 claim for the sake of completeness.

[158] The Applicants argue the impugned provisions engage the "security of the person" interest. In particular, they argue that pre-placement and random testing provisions lead to a measure of psychological harm by compromising Safety-Critical Workers' bodily integrity. In support of their argument that security of the person is engaged, the Applicants rely on two decisions, *Jackson v Joyceville Penitentiary (TD)*, [1990] 3 FC 55 [*Jackson*], and *Cruikshanks v Stephen*, 1992 CanLII 1929 (BC CA) [*Cruikshanks*]. Both decisions involved a prison inmate contesting the requirement to submit to a urinalysis test.

[159] However, the facts and issues in both *Jackson* and *Cruikshanks* are highly distinguishable from the RegDoc's testing for several reasons.

[160] In *Jackson*, Justice MacKay found that the design of the impugned regulation was at risk of improper use by prison staff. The primary concern was that inmates could be subjected to a demand for a urine sample, or punished for refusing to provide a sample, at the whim of prison staff, and that the test could conceivably be used as a tool to coerce inmates to do certain acts or as a form of punishment outside of the disciplinary system mandated by statute. At para 49 of *Jackson*, the Court characterized the section 7 *Charter* issue before it as follows:

> Section 41.1 in so far as it permits a member to require an inmate, who is considered to have ingested an intoxicant, to provide a specimen of the inmate's urine for analysis to detect the presence of an intoxicant in the body of the inmate, when coupled with disciplinary proceedings for failure to obey a lawful order if the requirement not be met, contravenes section 7 of the Charter by

> depriving the inmate of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice.
>
> (see also para 91)

[161] It was in this context that the Court found the deprivation of the inmate's security of the person and liberty interests (*Jackson* at para 96):

> To require an inmate to provide a specimen of urine for purposes of testing for trace elements of intoxicants, as section 41.1 provides, is in my view, an interference with bodily integrity. Urinalysis may reveal health or other conditions beyond the indications sought for traces of unauthorized intoxicants. In many cases requiring a specimen for testing aside from health reasons might lead to a measure of psychological stress, particularly where, as here, the procedure for collecting the sample involves direct observation by another. The requirement deprives the inmate concerned of security of his or her person. To require this or risk punishment for failure to comply with an order, as practice under standing orders for disciplinary proceedings here provides, is also an interference with the liberty of the person.

[162] The Applicants' reliance on *Cruikshanks* is also misplaced due to different circumstances. In *Cruikshank*, the Court of Appeal for British Columbia did not consider the section 7 *Charter* rights of the inmate:

> [123] We are agreed as we assume was the learned judge in the court below, that <u>in the particular circumstance of this case</u> the requirement as a condition of mandatory supervision to furnish urinalysis samples on demand by a supervisor or peace officer without reasons or probable grounds, was not authorized by any law or regulation <u>and constituted a breach of *Charter* s.8.</u>
>
> [Emphasis added]

[163] There is well-established case law setting out the test for demonstrating an interference with the security of the person interest. It was recently summarized by the Ontario Court of Appeal in *Bogaerts* as follows:

> [52] To demonstrate an interference with security of the person, an applicant must show either (1) interference with bodily integrity and autonomy, including deprivation of control over one's body: *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 66-67, or (2) serious state-imposed psychological stress: *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 81-86; Hamish Stewart, *Fundamental Justice:* Section 7 *of the* Canadian Charter of Rights and Freedoms, 2nd ed. (Toronto: Irwin Law, 2019), at pp. 95-106.

[164] The Applicants here have not demonstrated either prong of the security of the person interest test. The choice to work in a Safety-Critical position at a nuclear power plant is not one of the "basic choices going to the core of what it means to enjoy individual dignity and independence protected by s. 7" (*Blencoe* at para 49). Section 7 does not protect property or other predominantly economic interests, including the right to practice a particular profession. The adverse effect of not working one's preferred position at a nuclear power plant is not protected under the scope of section 7 (*Marine Reference* at para 47, citing *Mussani v College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1, at paras 41-43).

[165] I note that the Applicants provided no authority to support the notion that section 7 guarantees the right to have one's choice of employment. The closest analogy occurred only on one occasion, when a minority of the SCC judges (Justice La Forest writing, supported by two other) held that the right to choose to establish one's home vis-à-vis a job fell within section 7 liberty interests. The other six *Godbout* judges struck down the municipal resolution requiring its

employees to reside within its boundaries, as invalid, because it violated section 5 of the *Quebec Charter of Rights and Freedoms*, RSQC, C-12.

[166] The facts and context in *Godbout* are thus also very different from those under review. In the 25 years since the SCC decided *Godbout*, suffice it to say that the threshold to demonstrate a section 7 breach on the basis of employment is significant and requires more than the non-invasive taking of saliva, urine or breath samples to check for evidence of drugs or alcohol as a measure to protect the broader public.

[167] Ultimately, if the Safety-Critical Workers fundamentally object to being tested on the basis of security of their person, they can apply for the other 90% of positions in nuclear facilities not classified as "safety-critical" or work in a less safety sensitive industry.

[168] Since the Applicants have not demonstrated that their section 7 interests are implicated, "the s. 7 analysis stops there" (*Blencoe* at para 47).

D. *The pre-placement and random testing provisions of the RegDoc do not infringe section 15 of the Charter*

[169] Subsection 15(1) of the *Charter* safeguards every individual's right to the equal protection and benefit of the law, without discrimination based on, among other grounds, race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[170] Subsection 15(1) of the *Charter* requires the claimant to show (i) that the impugned law draws a distinction or has a disproportionate impact on the basis of an enumerated or analogous ground; and (ii) that the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*]).

[171] The first step of the subsection 15(1) test requires the claimant to demonstrate either that the law draws a distinction on the basis of an enumerated or analogous ground, or that the law has a disproportionate impact on a group identified by an enumerated or analogous ground. This is a question of "whether the impugned law created or contributed to a *disproportionate impact* on the claimant group based on a protected ground" (*Sharma* at para 31; Emphasis in original).

[172] The Applicants' claim fails on the first step of the section 15 test for two reasons. First, the RegDoc applies to a job category of workers at nuclear power facilities. This is not a "protected group" for the purposes of section 15. Moreover, the Applicants do not properly establish individuals experiencing 'drug dependency' as an enumerated or analogous ground of persons living with a disability. The RegDoc does not draw a distinction, either on its face or through an adverse impact on that ground. The Applicants have not adduced any evidence to show that the RegDoc may result in a situation wherein certain workers affected by it are members of a disadvantaged group, or may experience disadvantage.

[173] The Applicants rely on human rights case law to argue that "drug dependency" should be recognized as an analogous ground worthy of protection under section 15 of the *Charter*. They

rely on *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*BCGSEU*] to argue that this Court should use a human rights analysis to establish discrimination under subsection 15(1). The SCC found there to be "little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*" (*BCGSEU* at para 48).

[174] Under a human rights analysis, the Applicants submit that drug dependency is recognized as a protected ground and can give rise to *prima facie* discrimination if three factors are present: (i) the worker has a drug dependency, (ii) they have experienced an adverse impact, and (iii) the drug dependency was a factor in that adverse impact (*Entrop v Imperial Oil Limited*, 2000 CanLII 16800 (Ont CA) at para 92 [*Entrop*] and *Canada (Human Rights Commission) v Toronto-Dominion Bank*, [1998] 4 FC 205 (CA) at para 28 [*TD Bank*]).

[175] It would not be appropriate to apply a human rights analysis instead of a *Charter* section 15 analysis to determine whether the RegDoc provisions draw a distinction on an analogous ground, especially given that the Applicants have not brought any evidence to support that there are drug dependencies amongst Safety-Critical Workers.

[176] The clear and authoritative criteria established by the SCC to recognize an analogous ground under section 15, holds that an analogous ground cannot be found without compelling reasons. Analogous grounds are similar to the enumerated grounds insofar as they identify a

basis for stereotypical decision-making or a group that has historically suffered discrimination. They describe personal characteristics that are either immutable or constructively immutable.

[177] The analysis for determining an analogous ground involves “considering whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1)” *(Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 59-60 [*Corbiere*]). Once a ground has been found to be analogous, it will always be considered a ground in the future (*Corbiere* at para 13):

> [13] What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[178] As noted above, while I find that the RegDoc makes a distinction between the job categories of workers at nuclear power facilities, it does not do so on an enumerated ground. The SCC has rejected claimants' attempts to recognize occupational status as an analogous ground (see: *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 44; *Baier v Alberta*, 2007 SCC 31 at para 65).

[179] The SCC has also rejected the analogous ground of "substance orientation." In *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 185, the Court held:

> [185] A taste for marihuana is not a "personal characteristic" in the sense required to trigger s. 15 protection: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. As Malmo-Levine argues elsewhere, it is a lifestyle choice. It bears no analogy with the personal characteristics listed in s. 15, namely race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It would trivialize this list to say that "pot" smoking is analogous to gender or religion as a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs": *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 5; *Vriend*, *supra*, at para. 90. Malmo-Levine's equality claim therefore fails at the first hurdle of the requirements set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The true focus of s. 15 is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society": *Swain*, *supra*, at p. 992, *per* Lamer C.J.; and *Rodriguez*, *supra*, at p. 616. To uphold Malmo-Levine's argument for recreational choice (or lifestyle protection) on the basis of s. 15 of the Charter would simply be to create a parody of a noble purpose.

[180] An identified protected ground is a threshold question for the section 15 analysis. If there is no enumerated or analogous ground identified, there is no need to consider whether the law creates or contributes to a distinction. The section 15 challenge fails on the first step of the section 15 test.

[181] For the edification of the Safety-Critical Workers challenging the pre-placement and random testing provisions of the RegDoc, I will note a few deficiencies in their section 15 had a full analysis been merited. In particular, the Applicants did not advance any evidence, statistical or otherwise, as was done in *Fraser*, about the demographic make-up of Safety-Critical Workers, to support their claim that a disproportionate number of these Workers have drug dependencies and would be affected by the impugned provisions of the RegDoc. At the hearing, Counsel to the Applicants, relying on paragraph 57 of *Fraser v Canada (Attorney General)*, 2020 SCC 28, suggested that I take judicial notice of the existence of drug dependencies among Safety-Critical Workers. I am not prepared to do so.

[182] The Applicants also failed to explain how the impugned provisions would result in an arbitrary disadvantage for Safety-Critical Workers with drug dependencies, lacking evidence beyond a mere "web of instinct" (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34). Lastly, the Applicants did not demonstrate that the provisions are arbitrary, prejudicial or stereotyping (*Sharma* at para 53).

[183] Another deficiency of the section 15 arguments (beyond what I have found to be a neutral policy on both its face and in its effects) is that since the RegDoc has not been implemented, there are no concrete situations that can be addressed. No worker has yet been impacted by the implementation of the RegDoc, due to the injunction that was issued before its intended implementation date. Thus, any actual impact or potential discrimination is purely hypothetical.

[184] Indeed, this observation is applicable to the entire *Charter* analysis. The harm alleged by the Applicants as a result of potential section 8, 7 or 15 breaches is hypothetical at this point in time. It could be that the ensuing Employers' policies, implementing pre-placement and random testing at nuclear facilities in accordance with the licensing requirements of the RegDoc, could infringe workers' *Charter* rights under sections 8, 7 and 15. However, these policies have not been enacted and this Court cannot work in the realm of the hypothetical when the RegDoc and its effects are neutral on their face (*Ernst* at para 22; *Ozcevik v Canada (Revenue Agency),* 2021 FC 13 at para 30).

[185] In light of my findings with respect to sections 8, 15 and 7 of the *Charter*, I decline to address the Parties' arguments with respect to section 1 of the *Charter*.

[186] Finally, before moving on to the Applicant's administrative law arguments, I turn back to the earlier discussion on standard of review, and the *Doré*/*Loyola* approach that I found to be inapplicable to this Application. However, even if I had applied the *Doré*/*Loyola* framework and its proportionality analysis to determine whether the CNSC's decision to adopt specific provisions in the RegDoc has an adverse effect on the rights of employees and candidates in the nuclear industry, I would have arrived at the same outcome as I did under the correctness standard. This is because the measures contained in sections 5.1 and 5.5 of the RegDoc pass *Doré* muster, because they support a proportionate balancing between, on the one hand, their objective of bolstering fitness for duty standards in order to protect the public, and on the other hand, the *Charter* rights and values of Safety-Critical Workers under sections 7, 8 and 15.

[187] After all, as argued by Professor Richard Stacey in his recent article on *Doré*, the *Oakes* framework and *Doré* approach are “merely different heuristics, or modes of reasoning” to determine whether the limit to a *Charter* right is justified, and thus both have a common underlying culture of justification (Richard Stacey, “Public Law’s Cerberus: A Three-Headed Approach to Charter Rights-Limiting Administrative Decisions” (2023) 1-36 Can J Law Jurisprud).

E. *The impugned RegDoc provisions are reasonable under administrative law*

[188] Having disposed of the constitutional arguments, I now turn to my analysis of the second issue. The administrative law issues raised by the Applicants with respect to the two RegDoc provisions are separate from the *Charter* challenges, and were raised in the alternative, in the event that the Court were to find no *Charter* breaches. That has occurred, such that I will now address these alternate arguments.

[189] Specifically, the Applicants argue from an administrative law perspective that if this Court should find the pre-placement and random testing provisions of the RegDoc constitutional, these aspects are nonetheless unreasonable because (i) there was no statutory basis for the Commission to adopt the two impugned testing provisions; and (ii) the Commission did not provide adequate reasons to justify the inclusion of the provisions in the RegDoc, particularly when addressing stakeholder concerns about the *Charter* raised during the consultation phase.

[190] I agree with the Parties that the administrative law questions at issue are reviewable on a standard of reasonableness, meaning the rationale for the RegDoc’s inclusion of pre-placement

and random testing provisions must be rational, logical and justified under the relevant law and facts (*Vavilov* at paras 102, 105).

[191] To ensure nuclear safety, Parliament created and empowered the CNSC, a highly specialized administrative body. Its expertise commands a high level of deference from reviewing courts with respect to the decisions of the Commission, as emphasized in *Citizens Against Radioactive Neighbourhoods v BWXT Nuclear Energy Inc*, 2022 FC 849 at para 42:

> [60] Where, as here, the issues at play involve detailed factual findings and discretionary decisions within the heartland of the tribunal's expertise, the reasonableness standard requires that considerable deference be given to the tribunal's determinations. This is particularly so when the issues under review concern nuclear safety and the tribunal is the nuclear safety regulator. In short, the CNSC is much better placed than a reviewing court to factually assess and determine what types of possible accidents are likely to occur at a nuclear power plant and how to conduct the assessment of the environmental impacts of potential accidents. It is therefore inappropriate for a reviewing court to second-guess these determinations through a detailed re-examination of the evidence as the appellants would have us do in the instant case.
>
> See also: *Greenpeace Canada v Canada (Attorney General)*, 2016 FCA 114 at para 60

[192] It is within the unique context of the highly specialized CNSC, that I find the Commission's decision to adopt the pre-placement and random testing provisions of the RegDoc was reasonable, intelligible and justified.

(1) There is a statutory basis for the random testing provisions to be in the RegDoc

[193] The Applicants argue that the RegDoc does not have a statutory basis. First, they rely on their submissions with respect to section 8 of the *Charter* to submit that the pre-placement and

random testing provisions of the RegDoc are *ultra vires*, because they were not authorized by law, and thus were unlawful and unreasonable. Second, the Applicants argue that the Commission fettered its discretion by adopting the contested provisions using its broad licencing authority. Third, the Applicants contend that the mechanism used by the Commission to adopt the RegDoc unreasonably denied them participatory rights.

[194] The Respondents maintain that the RegDoc was authorized by law, and lawfully adopted using the Commission's broad licensing authority. The Respondents argue that the Commission had multiple tools at its disposal to implement the pre-placement and random testing provisions of the RegDoc, and that it was reasonable for the Commission to choose regulatory documents for flexibility and adaptability. The Respondents submit that this decision attracts a high level of deference, because of the unique context of, and CNSC's expertise in, the nuclear industry. The Respondents contend that the Applicants were not denied participatory rights since they were consulted during the development process of the RegDoc, and had the opportunity to submit comments and share concerns.

[195] As discussed earlier under the section 8 *Charter* analysis for the "authorized by law" requirement, the RegDoc indeed has a statutory basis: under the *Act*, the CNSC had the authority and the discretion to choose the instrument under which to implement pre-placement and random testing provisions. It chose the regulatory document as the instrument due to its flexibility and adaptability. This was a reasonable decision, informed by changing circumstances such as guidance coming from the IAEA after the nuclear accident in Fukushima, evolving international

practices, the legalization of cannabis in Canada, evolving research on the accuracy and efficacy of drug and alcohol testing, and divergent stakeholder demands.

[196] The purpose of the RegDoc further justifies the instrument chosen. CNSC staff testified that the purpose of the RegDoc is to bolster fitness for duty programs by adding more reliable methods to detect impairment, including pre-placement and random testing. This purpose does not fall directly within the scope of subparagraph 44(1)(h)(iii) of the *Act* (the regulation-making power), which is geared towards the “protection of nuclear energy workers”.

[197] For example, as explained by the Respondents at the hearing, dosimetry tests, which measure the level of radiation a person is exposed to, would fall under the regulation-making power of subparagraph 44(1)(h)(iii) since dosimetry tests are a type of medical test prescribed for the protection of nuclear energy workers by ensuring they are not exposed to radiation levels that would threaten their health. By contrast, the purpose of the pre-placement and random testing measures of the RegDoc aims to protect the broader community interests and public safety.

[198] Considering these competing demands, CNSC was justified in using the broader powers under subsection 24(5) of the *Act* to add mandatory requirements to the licence. The RegDoc was always intended to be a licensing requirement, and never purported to be a non-binding policy or a guideline. Therefore, the CNSC did not fetter its discretion in passing mandatory pre-placement and random testing requirements through a regulatory document.

[199] With respect to participatory rights, the CNSC conducted broad outreach over the course of the decade during which the RegDoc was developed. The Commission provided multiple opportunities for the public – including the Applicants – to comment at various stages of the development of the RegDoc.

[200] The other mechanisms under the *Act*, which the Applicants argue the CNSC should have proceeded under – namely, the formal licence amendment process under section 25 and the regulation-making authority under section 44 – would not likely have provided the Applicants with any significant additional participatory rights beyond opportunities they received to participate in the RegDoc's development process. Pursuant to the formal licence amendment process and the regulation-making authority under subsections 39(1) and 40(1) of the *Act*, the Applicants would have been given the opportunity to appear before the Commission in a hearing, as occurred with the RegDoc.

[201] Although regulatory documents are not specifically discussed in the *Act*, they do form part of the legislative framework. They are a lawful mechanism under which to implement licence requirements, and provide for considerable stakeholder input, as occurred in the case under review.

[202] For all the reasons outlined above, the CNSC reasonably chose to use the RegDoc as the mechanism by which to include pre-placement and random testing provisions as a condition of the Employers' licences. The RegDoc and the decade-long process that led to its publication, in

which the Parties had opportunities to be heard during that lengthy consultation and development phase, all properly formed part of the CNSC's licensing basis.

(2) The Commission provided adequate reasons for the RegDoc

[203] The Applicants argue that the rationale provided by the CNSC for the inclusion of the pre-placement and random testing provisions in the RegDoc, does not meet the *Vavilov* standards of "an internally coherent and rational chain of analysis" (*Vavilov* at para 85). The Applicants submit that the RegDoc does not provide an adequate basis to explain the rationale for what amounts to such a significant new requirement for impacted Safety-Critical Workers. The Applicants further submit there is no concise set of documents to show that adequate reasons were provided, and that the thousands of pages of documents that form the Certified Tribunal Record [CTR] constitute a "data dump". They point out that this term was in fact used by a Commission member at the August 2017 public meeting.

[204] The Applicants argue that even if this Court gives deference to the institutional setting in which the RegDoc was adopted, there are fundamental gaps in the development of the pre-placement and random testing provisions that make the inclusion of these provisions in the RegDoc unjustifiable, unintelligible and unreasonable. In particular, the Applicants raise the Commission's lack of responsiveness to stakeholder concerns with *Charter* breaches.

[205] The Applicants submit that the Commission undertook no analysis of the Unions' concerns flowing from the *Charter* and from arbitral jurisprudence, despite their awareness and recognition of the impact of the impugned provisions on *Charter* rights as voiced during the

public meeting in August 2017. They also argue that the record shows that CNSC staff dealt with the core constitutional and legal concerns only in a cursory fashion. The Applicants point out that they are not making a procedural fairness argument based on the lack of reasons provided by the CNSC, but rather submit that the inadequacy of the reasons provided gives rise to the fatal flaw of the decision to include the impugned provisions in the RegDoc (*Vavilov* at para 133).

[206] The Respondents counter that the extensive CTR reveals an internally coherent and rational chain of analysis in accordance with *Vavilov*, and that the CNSC adequately addressed stakeholder concerns with respect to *Charter* rights. They rely on *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37 and *Gupta v Canada (Attorney General)*, 2016 FC 1089 at para 17, to submit that when a decision-maker can adopt recommendations from a body which assists it in its duties, those recommendations form a part of the decision and thus formal reasons are not required.

[207] In addition, the Respondents argue that the Commission is not a quasi-judicial tribunal, but can have a quasi-judicial role, and carry out functions such as providing punishments when it acts as a court of record under sections 20 and 48 of the *Act*. However, the creation of regulatory documents, such as the RegDoc, which serve to create new licensee requirements relating to pre-placement and random testing, falls squarely within the Commission's regulatory and administrative role, which does not require it to issue formal reasons.

[208] The SCC addressed the sufficiency of reasons at para 103 of *Vavilov*:

> [103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due

> sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point.

[209] I find that the documents in the CTR provide a rational chain of analysis to justify the inclusion of the pre-placement and random testing provisions in the RegDoc. As discussed above, the inclusion of these provisions was in response to an identified need to bolster fitness for duty programs, particularly with respect to the detection of drug and alcohol impairment.

[210] While the Applicants argue that "the reasons in conjunction with the record do not make it possible to understand the decision maker's reasons on a critical point" – that point being responsiveness to concerns about the *Charter* – I find that both the record before me and the regulatory scheme of the RegDoc show that the CNSC not only considered stakeholder concerns about *Charter* rights, but also addressed these concerns by modifying the RegDoc after considering the stakeholder feedback.

[211] Specifically, CNSC staff created "Comments Tables" to collect all the comments provided in the public feedback process from stakeholders, which included feedback from many of the Applicants and Employers, in addition to the responses to the feedback in the form of comments from CNSC staff. The Comments Tables were published on the CNSC's website for

public consultation during the development phase of the RegDoc. They form part of the reasons for the Commission's decision and show that CNSC staff reasonably considered and addressed *Charter* rights.

[212] In their responses to stakeholder comments, CNSC staff explained how the RegDoc balanced privacy interests with the CNSC's mandate to prevent unreasonable risk in various ways, including the environment, to public health and safety, and to national security, arising from the development production and use of nuclear energy.

[213] Furthermore, the statutory scheme of the final version of the RegDoc shows changes from earlier versions as being directly responsive to stakeholder concerns. The modifications made in response to public feedback include the narrowing of the categories of workers affected by the pre-placement and random testing provisions, the inclusion of the duty to accommodate, and the consideration of the *Canadian Human Rights Act*, RSC, 1985, c H-6.

[214] The flaws that the Applicants point to in the CNSC's reasons are "merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100). They have pointed to missing documents in the CTR, even though CNSC staff testified in cross-examination that these documents were sent to the Commission by staff. They also point to contradictory statements made by the Employers about the efficacy of testing methods and the sufficiency of existing impairment detection methods at the time – statements which were made over the course of the decade-long development of the RegDoc. None of these alleged flaws, in my opinion, are enough to show that the CNSC's decision to implement the RegDoc was based on an irrational

chain of analysis given the totality of the evidence before the Court, including the Reports discussed above.

V. Costs

[215] The Parties have jointly submitted that costs be awarded in a lump sum of $20,000 to either the collective group of Applicants or Respondents who prevail in this judicial review. Accordingly, the Applicants shall pay an inclusive lump sum of $20,000 to the Respondents.

VI. Conclusion

[216] For the reasons outlined above, I find the pre-placement and random testing provisions, sections 5.1 and 5.5 respectively, of the RegDoc pass constitutional muster, in that they do not breach sections 8, 15 or 7 of the *Charter*. I also find that the CNSC's decision to adopt the pre-placement and random testing provisions was reasonable from an administrative law perspective. The Application for Judicial Review is accordingly dismissed. Costs are issued to the Respondents in the amount of $20,000.

JUDGMENT in T-1222-21

THIS COURT'S JUDGMENT is that:

1. The pre-placement and random testing provisions of the RegDoc (sections 5.1 and 5.5 respectively) do not infringe sections 8, 15 or 7 of the *Charter*.
2. The CNSC's decision to adopt sections 5.1 and 5.5 of the RegDoc was reasonable.
3. The Application for Judicial Review is dismissed.
4. The Applicants shall pay an inclusive lump sum of $20,000 in costs to the Respondents.

"Alan S. Diner"
Judge

ANNEX A
***Nuclear Safety and Control Act*, SC 1997, c 9**
***Loi sur la sûreté et la réglementation nucléaires*, LC 1997, ch 9**

Objects	**Mission**
9 The objects of the Commission are	**9** La Commission a pour mission :
(a) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to	**a)** de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :
(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,	**(i)** le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,
(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and	**(ii)** le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and	**(iii)** ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;
(b) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the	**b)** d'informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et

development, production, possession and use referred to in paragraph (a).

la sécurité des personnes et pour l’environnement, des activités mentionnées à l’alinéa a).

[…]

[…]

Licences

Licences et permis

Licenses

Catégories

24 (1) The Commission may establish classes of licences authorizing the licensee to carry on any activity described in any of paragraphs 26(a) to (f) that is specified in the licence for the period that is specified in the licence.

24 (1) La Commission peut établir plusieurs catégories de licences et de permis; chaque licence ou permis autorise le titulaire à exercer celles des activités décrites aux alinéas 26a) à f) que la licence ou le permis mentionne, pendant la durée qui y est également mentionnée.

Application

Demande

(2) The Commission may issue, renew, suspend in whole or in part, amend, revoke or replace a licence, or authorize its transfer, on receipt of an application

(a) in the prescribed form;

(b) containing the prescribed information and undertakings and accompanied by the prescribed documents; and

(c) accompanied by the prescribed fee.

(2) La Commission peut délivrer, renouveler, suspendre en tout ou en partie, modifier, révoquer ou remplacer une licence ou un permis ou en autoriser le transfert lorsqu’elle en reçoit la demande en la forme réglementaire, comportant les renseignements et engagements réglementaires et accompagnée des pièces et des droits réglementaires.

[…]

Conditions for issuance, etc.

(4) No licence shall be issued, renewed, amended or replaced — and no authorization to transfer one given — unless, in the opinion of the Commission, the applicant or, in the case of an application for an authorization to transfer the licence, the transferee

(a) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and

(b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

Terms and conditions of licences

(5) A licence may contain any term or condition that the Commission considers necessary for the purposes of this Act, including a condition that the applicant provide a financial guarantee in a form that is acceptable to the Commission.

[…]

[…]

Conditions préalables à la délivrance

(4) La Commission ne délivre, ne renouvelle, ne modifie ou ne remplace une licence ou un permis ou n’en autorise le transfert que si elle est d’avis que l’auteur de la demande ou, s’il s’agit d’une demande d’autorisation de transfert, le cessionnaire, à la fois :

a) est compétent pour exercer les activités visées par la licence ou le permis;

b) prendra, dans le cadre de ces activités, les mesures voulues pour préserver la santé et la sécurité des personnes, pour protéger l’environnement, pour maintenir la sécurité nationale et pour respecter les obligations internationales que le Canada a assumées.

Conditions des licences et des permis

(5) Les licences et les permis peuvent être assortis des conditions que la Commission estime nécessaires à l’application de la présente loi, notamment le versement d’une garantie financière sous une forme que la Commission juge acceptable.

[…]

Renewal, etc.	**Renouvellement, suspension et révocation**
25 The Commission may, on its own motion, renew, suspend in whole or in part, amend, revoke or replace a licence under the prescribed conditions.	**25** La Commission peut, de sa propre initiative, renouveler, suspendre en tout ou en partie, modifier, révoquer ou remplacer une licence ou un permis dans les cas prévus par règlement.
Regulations	**Règlements**
44 (1) The Commission may, with the approval of the Governor in Council, make regulations	**44 (1)** Avec l'agrément du gouverneur en conseil, la Commission peut, par règlement :
[…]	[…]
(h) respecting the protection of nuclear energy workers, including prescribing	**h)** régir la protection des travailleurs du secteur nucléaire, notamment :
[…]	[…]
(iii) medical examinations or tests and the circumstances under which they are to be conducted on persons so employed, and	**(iii)** déterminer les examens médicaux et les tests qu'une telle personne doit subir et les circonstances dans lesquelles elle doit les subir,

ANNEX B
REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3

Canada's Nuclear Regulator

Human Performance Management

Fitness for Duty, Volume II: Managing Alcohol and Drug Use

REGDOC-2.2.4
Version 3

January 2021

Canadian Nuclear Safety Commission
Commission canadienne de sûreté nucléaire

Canada

Fitness for Duty, Volume II: Managing Alcohol and Drug Use
Regulatory document REGDOC-2.2.4, Version 3

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January 2021	Version 3.0

Preface

This regulatory document is part of the CNSC's human performance management series of regulatory documents, which also covers human factors, personnel training and personnel certification. The full list of regulatory document series is included at the end of this document and can also be found on the CNSC's website.

Regulatory document REGDOC-2.2.4, *Fitness for Duty, Volume II: Managing Alcohol and Drug Use*, sets out requirements and guidance for managing fitness for duty of workers in relation to alcohol and drug use and abuse at all high-security sites, as defined in the *Nuclear Security Regulations*.

REGDOC-2.2.4, *Fitness for Duty, Volume II* is intended to form part of the licensing basis for a regulated facility or activity within the scope of the document. It is intended for inclusion in licences as either part of the conditions and safety and control measures in a licence, or as part of the safety and control measures to be described in a licence application and the documents needed to support that application.

The CNSC's regulatory framework includes CNSC regulatory documents as well as national and international standards. Specifically, the Canadian Standards Association (CSA Group) N-series standards provide an interlinked set of regulatory requirements for the management of nuclear facilities and activities. The CSA N286 standard provides an overall management framework and direction to develop and implement sound management practices and controls for the licensing basis. This regulatory document does not duplicate the generic requirements of CSA N286. However, it provides more specific direction for those requirements.

For proposed new regulated facilities and activities, this document will be used to assess licence applications.

Guidance contained in this document exists to inform the applicant, to elaborate further on requirements or to provide direction to licensees and applicants on how to meet requirements. It also provides more information about how CNSC staff evaluate specific problems or data during their review of licence applications. Licensees are expected to review and consider guidance; should they choose not to follow it, they should explain how their chosen alternate approach meets regulatory requirements.

For existing facilities: The requirements contained in this document do not apply unless they have been included, in whole or in part, in the licence or licensing basis.

A graded approach, commensurate with risk, may be defined and used when applying the requirements and guidance contained in this regulatory document. The use of a graded approach is not a relaxation of requirements. With a graded approach, the application of requirements is commensurate with the risks and particular characteristics of the facility or activity.

For information on the implementation of regulatory documents and on the graded approach, see REGDOC-3.5.3, *Regulatory Fundamentals*.

Important note: Where referenced in a licence either directly or indirectly (such as through licensee-referenced documents), this document is part of the licensing basis for a regulated facility or activity.

The licensing basis sets the boundary conditions for acceptable performance at a regulated facility or activity, and establishes the basis for the CNSC's compliance program for that regulated facility or activity.

Where this document is part of the licensing basis, the words “shall” and “must” are used to express requirements to be satisfied by the licensee or licence applicant. “Should” is used to express guidance or that which is advised. “May” is used to express an option or that which is advised or permissible within the limits of this regulatory document. “Can” is used to express possibility or capability.

Nothing contained in this document is to be construed as relieving any licensee from any other pertinent requirements. It is the licensee’s responsibility to identify and comply with all applicable regulations and licence conditions.

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Fitness for Duty, Volume II: Managing Alcohol and Drug Use

1. Introduction

1.1 Purpose

This regulatory document establishes requirements and guidance for managing worker fitness for duty with respect to alcohol and drug use.

1.2 Scope

This regulatory document is intended for high-security sites as defined in the *Nuclear Security Regulations*. The requirements and guidance in this document apply to workers holding safety-critical or safety-sensitive positions as described in section 4.1.

1.3 Relevant legislation

The following provisions of the *Nuclear Safety and Control Act* (NSCA) and the regulations made under it are relevant to this document:

- Subparagraph 9(a)(i) of the NSCA states that one of the objects of the Commission is "to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use".
- Paragraph 12(1)(a) of the *General Nuclear Safety and Control Regulations* requires that every licensee shall "ensure the presence of a sufficient number of qualified workers to carry on the licensed activity safely and in accordance with the Act, the regulations made under the Act and the licence".
- Paragraph 12(1)(b) of the *General Nuclear Safety and Control Regulations* requires that every licensee shall "train the workers to carry on the licensed activity in accordance with the Act, the regulations made under the Act and the licence".
- Paragraph 17(b) of the *General Nuclear Safety and Control Regulations* requires that every worker shall "comply with the measures established by the licensee to protect the environment and the health and safety of persons, maintain security, control the levels and doses of radiation, and control releases of radioactive nuclear substances and hazardous substances into the environment".
- Subparagraph 17(c)(i) of the *General Nuclear Safety and Control Regulations* requires that every worker shall "promptly inform the licensee or the worker's supervisor of any situation in which the worker believes there may be a significant increase in the risk to the environment or the health and safety of persons".
- Paragraph 17(e) of the *General Nuclear Safety and Control Regulations* requires that every worker shall "take all reasonable precautions to ensure the worker's own safety, the safety of the other persons at the site of the licensed activity, the protection of the environment, the protection of the public and the maintenance of the security of nuclear facilities and of nuclear substances".
- Paragraph 3(d.1) of the *Class I Nuclear Facilities Regulations* requires that an application for a licence to operate a Class I nuclear facility shall contain "the proposed human performance program for the activity to be licensed, including measures to ensure workers' fitness for duty".

- Paragraph 6(d) of the *Class I Nuclear Facilities Regulations* stipulates that an application for a licence to operate a Class I nuclear facility shall contain "the proposed measures, policies, methods and procedures for operating and maintaining the nuclear facility".
- Section 18.4 of the *Nuclear Security Regulations* states that "an authorization referred to in section 18 may be issued for any term not exceeding five years and shall be subject to any terms and conditions necessary to minimize the risk to the security of the facility."
- Section 38 of the *Nuclear Security Regulations* requires that "every licensee shall develop a supervisory awareness program and implement it on an ongoing basis to ensure that its supervisors are trained to recognize behavioural changes in all personnel, including contractors that could pose a risk to security at a facility at which it carries on licensed activities."

1.4 Relevant international standards and guidelines

The International Atomic Energy Agency (IAEA) has identified the need for nuclear facilities to address fitness for duty. The IAEA's framework that supports fitness for duty is embedded in two safety requirement documents [1, 2] and in numerous safety guides [3 to 6].

For all nuclear facilities, the IAEA recommends that regulators inspect licensees' fitness-for-duty programs and evaluate their effectiveness [3]. Regulators are also to ensure nuclear facility operators have "guidelines on fitness for duty in relation to hours of work, health, and substance abuse" [4].

With respect to drugs and alcohol, the IAEA recommends that all nuclear facilities have guidelines on fitness for duty related to substance use [5]. The IAEA further recommends that licensees have methods for identifying those with a tendency toward alcohol or drug abuse, and that administrative controls be established to allow the fitness for duty of shift personnel to be observed, verified and controlled. As well, the IAEA also advises that "personnel prone to drug or alcohol abuse should not be employed for safety related tasks" [6].

2. Background

Human performance is a key contributor to the safety and security of nuclear facilities. One factor that affects human performance is fitness for duty. The adoption of measures that monitor alcohol and drug use or abuse is a key component of ensuring worker fitness for duty. For the purposes of this document, fitness for duty is defined as:

> A condition in which workers are physically, physiologically, and psychologically capable of competently and safely performing their tasks.

The implementation of an effective fitness-for-duty program relating to alcohol and drug use and abuse provides reasonable assurance that workers have the capacity, and are free of impairment that could hinder their ability, to competently and safely perform the duties of their position, and as such do not pose a safety or security risk.

The fitness-for-duty requirements herein in relation to alcohol and drug use and abuse represent reasonable occupational and operational requirements for the applicable worker population. An employer is responsible for assessing the extent, where considered necessary, of the duty to accommodate. In fulfilling the duty to accommodate, an employer is required to accommodate a worker whose need(s) are based on any of the grounds of discrimination in the *Canadian Human Rights Act* – for example, someone identified with a disability – to the point where accommodation would cause undue hardship for the employer [7]. The licensee is also responsible for ensuring that any duties assigned to a worker do not pose a risk to his or her health or safety, the health or safety of others, the safety of the facility and the environment, and do not impact the effectiveness of the licensee's operation.

3. Managing Alcohol and Drug Use

With respect to alcohol and drug use and abuse, licensees shall manage the fitness for duty of applicable workers (see section 4.1) who could pose a risk to nuclear safety or security in accordance with their management system as defined in the licensee's licensing basis. The following subsections specify how the management system's generic requirements apply to managing fitness for duty in relation to alcohol and drug use and abuse.

3.1 Policy statements

Licensees shall establish, implement and maintain clear fitness-for-duty policy statements regarding alcohol and drug use and abuse. The policy statements shall provide workers with information on what is expected of them and the consequences that may result from policy violations.

Guidance

Licensees' alcohol- and drug-related policy statements should:

1. prohibit reporting to work or remaining at work under the influence of alcohol, cannabis, cannabis-derived products, or illicit drugs;
2. prohibit bringing, keeping or consuming alcohol, cannabis, cannabis-derived products, illicit drugs, drug paraphernalia or prescribed medications without a legal prescription on the grounds of the high-security site;
3. reinforce the responsible use of prescription or over-the-counter medications, or mood-altering substances, and the process to follow if a worker uses medication that impairs or has the potential to impair his or her ability to competently and safely perform his or her duties;
4. describe the responsibilities of workers, supervisors, oversight personnel and escorts to report fitness-for-duty concerns in relation to alcohol and drug use and abuse;
5. describe the expectations regarding the reasonable length of time that workers should abstain from the use of alcohol and/or drugs prior to reporting to work, with due consideration of longer-term impairing effects.

3.2 Fitness-for-duty program

With respect to alcohol and drug use and abuse, a licensee shall implement a documented fitness-for-duty program that includes a set of coordinated measures designed to provide reasonable assurance that applicable workers (see section 4.1) are capable of performing their tasks and as such do not pose a risk to their safety, the safety of others, or the safety or security of

the facility. Note: In implementing the fitness-for-duty program, licensees are required to consider all relevant privacy-related legislation.

3.3 Authorities, accountabilities and responsibilities

With respect to alcohol and drug use and abuse, licensees shall define and document the authorities, accountabilities, and responsibilities for those involved with managing worker fitness for duty including the interfaces with external organizations.

Guidance

With respect to alcohol and drug use and abuse, licensees should define and document the authorities, accountabilities, and responsibilities of the following, if applicable:

- senior management
- supervisors, oversight personnel and escorts
- workers
- security personnel
- human resources
- fitness-for-duty program administrators
- duly qualified health professionals
- duly qualified forensic toxicologists
- duly qualified pharmacists
- breath alcohol technicians
- specimen collectors
- medical review officers (MROs)
- accredited laboratories
- third-party providers
- employee assistance program (EAP) providers
- substance abuse evaluation providers

3.4 General fitness-for-duty process

Licensees shall establish, implement and maintain a process to identify and manage applicable workers who have temporary or ongoing limitations that may make them incapable of performing their assigned duties competently and safely due to alcohol or drug use or abuse. This process shall include actions for a supervisor to take if he or she believes – through self-reporting, peer reporting, observed behaviour, physical condition, a fitness-for-duty screening or assessment, a health professional's report or after receiving credible information – that a worker may be unable to competently and safely perform his or her assigned duties because of alcohol or drug use or abuse.

Licensees shall establish, implement and maintain a referral process to guide workers to seek assistance from the appropriate resources.

Guidance

The fitness-for-duty process may include both self-referrals and directed referrals to appropriate fitness-for-duty resources, such as health professionals, employee assistance program provider or

testing program through the fitness-for duty administrator. Processes should identify the conditions that warrant for-cause assessments.

Prior to a mandatory referral based on observed behaviour, a fitness-for-duty screening should be conducted. The screening should be based on face-to-face interaction between the worker, a supervisor and at least one other person. A screening checklist should be used.

3.5 Access to assistance

Licensees shall ensure that applicable workers have access to an EAP. EAPs shall be designed to achieve early intervention and provide confidential assistance.

Guidance

The EAP should offer confidential assessment, short-term counselling, referral services and treatment monitoring to workers who have problems, including alcohol or drug use or abuse that could adversely affect their ability to competently and safely perform their duties.

3.6 Behavioural observation

Licensees shall ensure that applicable workers are subject to behavioural observation, specifically related to alcohol or drug use or abuse.

3.6.1 Peer observation and reporting

Licensees shall ensure that expectations regarding peer observation and reporting are included in their fitness-for-duty processes and aligned with their respective policy statements on peer observation for potential alcohol or drug use or abuse issues.

3.6.2 Supervisory awareness program

As indicated in section 1.3 of this document, section 38 of the *Nuclear Security Regulations* requires licensees to develop a supervisory awareness program. This is to ensure that supervisors are trained to recognize behavioural changes in all personnel, including contractors that could pose a risk to security at a facility.

Supervisory awareness training shall be delivered to supervisors and other designated personnel identified by the licensee.

Guidance

Observations related to a worker’s fitness for duty related to alcohol or drug use or abuse should be made in a variety of situations, such as during task assignments, observation and coaching sessions, field inspections, pre-job briefings, performance reviews, one-on-one sessions, shift turnovers and incident investigations.

Aberrant behaviour and incidents related to alcohol and drug use and abuse should be documented and trended to facilitate appropriate intervention strategies based on risk.

Supervisory awareness training may include the following aspects:

- knowledge of the authorities, accountabilities, and responsibilities of supervisors and other designated personnel with respect to behavioural observation
- knowledge of the interfaces between related fitness-for-duty policies, procedures, and supporting programs
- the ability to recognize behaviours that may indicate the possible use, sale, or possession of illegal drugs; use or possession of alcohol or impairment from prescription and over-the-counter medication onsite or while on duty

Further information on observed behaviours can be found in section 5.2.

3.7 Assessment and continual improvement

An assessment of the fitness-for-duty program related to alcohol and drug use and abuse and the supervisory awareness program shall be performed periodically to identify opportunities for continual improvement and to confirm the program's effectiveness.

Licensees shall carry out trend analyses of problems and causes related to the use and abuse of alcohol and drugs.

3.8 Training, education, and awareness

Licensees shall ensure that those with authorities, accountabilities, and responsibilities for monitoring alcohol and drug use and abuse, including workers, receive initial and continuing training commensurate with their authorities, accountabilities and responsibilities.

Guidance

With respect to alcohol and drug use and abuse, licensees' training, education and awareness for workers who are subject to the fitness-for-duty program should include the following aspects:

- knowledge of the fitness-for-duty policy statements and procedures that apply to the worker, the methods that will be used to implement them, and the consequences of violating the policy and procedures
- knowledge of the individual's authorities, accountabilities, and responsibilities under the fitness-for-duty program
- knowledge of the EAP and other support or assessment services available to the worker
- knowledge of the health and safety hazards associated with abuse of illegal and legal drugs and alcohol
- knowledge of the potential adverse effects of alcohol, and prescription and over-the-counter drugs on job performance
- the ability to recognize behaviours in peers that may indicate the possible use, sale or possession of illegal drugs; use or possession of alcohol or impairment from prescription and over-the-counter medication on site or while on duty
- knowledge of the individual's responsibility to report a fitness-for-duty concern and the ability to initiate appropriate actions related to self- and peer-reporting

Additional requirements and guidance related to training can be found in sections 3.6.2, 6.1, 6.2 and 6.5.

Requirements and guidance for training systems are found in REGDOC-2.2.2, *Personnel Training* [2].

4. Positions Subject to Alcohol and Drug Testing

4.1 Safety-critical and safety-sensitive positions

Safety-critical positions shall include:

1. workers certified under *Class I Nuclear Facilities Regulations* subsection 9 (2), excluding certified health physicists
2. onsite nuclear response force (NRF) members

For the purposes of alcohol and drug testing, safety-sensitive positions shall include:

3. certified health physicists
4. the following security personnel: nuclear security officers (NSOs), and designated non-NRF personnel
5. emergency response teams (ERTs) / fire brigade

Guidance

Additional information regarding certified workers and ERTs may be found in RD-204, *Certification of Persons Working at Nuclear Power Plants* [8], CSA N293, *Fire protection for nuclear power plants* [9], and CSA N393, *Fire protection for facilities that process, handle, or store nuclear substances* [10].

5. Alcohol and Drug-Testing Requirements by Circumstance and Workgroup

Alcohol and drug testing of workers holding safety-critical or safety-sensitive positions shall be conducted in accordance with the breath alcohol-testing and drug-testing processes described in sections 6.1 to 6.6. The testing circumstances relevant to the prescribed workgroups are summarized in table A.1 of appendix A.

5.1 Pre-placement alcohol and drug testing

Licensees shall require all candidates who succeed in progressing through all the previous stages of a job competition to a safety-critical position (see section 4.1, bullets 1 and 2) to submit to alcohol and drug testing as a condition of placement. Incumbent workers transferring into a safety-critical position (see section 4.1, bullets 1 and 2) shall also be required to submit to a pre-placement alcohol and drug test.

Guidance

As job applicants are not workers, a substance test should not be used as a screening tool and should only be administered once a candidate has met all other qualifications necessary.

5.2 Reasonable grounds alcohol and drug testing

Licensees shall require all workers in safety-critical or safety-sensitive positions (see section 4.1, bullets 1–5) to submit to for-cause testing under the reasonable grounds testing circumstance.

Licensees shall define within their fitness-for-duty governance documents when workers in safety- critical or safety-sensitive positions will be required to submit to for-cause reasonable grounds testing.

Under for-cause reasonable grounds testing, workers in safety-critical or safety-sensitive positions (see section 4.1, bullets 1–5) shall be required to submit to for-cause reasonable grounds testing when there is reasonable cause to believe, through observed behaviour, physical condition or after receiving credible information, that the individual is unfit to perform his or her duties, due to the adverse effects of alcohol or drug use. The grounds for for-cause reasonable grounds testing shall be independently verified by at least two people (one of whom is a supervisor).

Guidance

Observed behaviours and physical conditions that may establish for-cause reasonable grounds testing include:

- breath odour
- observed use or possession of alcohol, illicit drugs, or drug paraphernalia
- speech patterns
- physical appearance and behaviour
- an episode or events that suggest irrational or reckless behaviour

Further information on supervisory awareness is found in section 3.6.2.

5.3 Post-incident alcohol and drug testing

Licensees shall require all workers in safety-critical or safety-sensitive positions (see section 4.1 bullets 1–5) to submit to for-cause testing under the post-incident testing circumstance.

Under post-incident testing, workers in safety-critical or safety-sensitive positions (section 4.1 bullets 1–5) shall be required to submit to for-cause testing as soon as practicable after a significant incident where a human act or omission by the worker may have caused or contributed to the event.

Guidance

In deciding whether or not to conduct post-incident testing, it is not necessary to determine if alcohol or drugs were contributing factors to the significant incident.

Significant incidents refer to a subset of incidents that have safety significance (see Glossary for definitions of "incident" and "safety significance").

5.4 Follow-up and return-to-duty alcohol and drug testing

Licensees shall require all workers in safety critical or safety-sensitive positions (see section 4.1, bullets 1–5) to submit to follow-up testing after confirmation of a substance use disorder by a health professional, and return-to-duty testing as part of the reinstatement process.

Workers shall be subject to follow-up alcohol and drug testing in an unannounced and random fashion at a minimum of every 3 months for a minimum period of 2 years. At the discretion of the health care professional, additional testing beyond these minimum requirements may be conducted to ensure abstinence.

Licensees shall, as part of the reinstatement process to a safety-critical or safety-sensitive position, require workers identified with a substance use disorder to be tested prior to returning to and on assuming safety-sensitive duties. The worker must have a negative drug test result and/or an alcohol test with an alcohol concentration below 20 mg/100mL before resuming performance of safety-sensitive duties.

5.5 Random alcohol and drug testing

Licensees shall require all workers holding safety-critical positions (see section 4.1, bullets 1 and 2) to submit to random alcohol and drug testing. Licensees' sampling process used to select these workers for random testing shall ensure that the number of random tests performed at least every 12 months is equal to at least 25 percent of the applicable worker population.

Licensees shall develop procedures and practices to ensure that random testing is administered in a manner that provides reasonable assurance that individuals are unable to predict when specimens will be collected.

The following shall be addressed for the implementation and conduct of random testing:

1. Ensure that all individuals in the population subject to testing have an equal probability of being selected and tested.
2. Require that individuals who are offsite when selected for testing, or who are onsite and are not reasonably available for testing when selected, be tested at the earliest reasonable opportunity when both the donor and specimen collectors are available to collect specimens for testing and without prior notification to the individual that he or she has been selected for testing.
3. Provide that an individual completing a test is immediately eligible for another unannounced test.

Guidance

The following should be considered for the implementation and conduct of random testing:

- Collect specimens on an unpredictable schedule, including weekends, night shifts and holidays, and at various times during a shift.
- Have testing administered by the fitness-for-duty program on a nominal weekly frequency.
- Require individuals who are selected for random testing to report to the collection site as soon as reasonably practicable after notification, within the time period specified in the fitness-for- duty program policy.
- Establish, implement and maintain alcohol- and drug-testing processes.

6. Alcohol- and Drug-Testing Processes

6.1 Breath alcohol-testing process

Licensees shall establish, implement and maintain a process to test workers holding safety-critical and safety-sensitive positions for the presence of alcohol.

Licensees shall retain or maintain competency in the administration, collection, and analysis of evidential breath alcohol testing. The qualified technicians conducting the breath alcohol testing shall be independent from workgroups subject to testing. For licensee-maintained processes, licensees shall establish, implement, and maintain procedures for the administration of evidential breath alcohol testing. For retained services, licensees shall ensure service providers maintain procedures for the administration of evidential breath alcohol testing.

Licensees shall ensure that an evidential breath testing instrument is used that has been evaluated, tested and recommended by the Alcohol Test Committee (a committee under the auspices of Canada's Department of Justice) as an approved instrument published in the *Approved Breath Analysis Instruments Order* (SI/85-201) [11].

Licensees shall ensure that the following blood alcohol concentrations (BACs) are used for the determination of positive breath alcohol test results:

1. A BAC below 20 mg/100mL shall be considered a negative test, and no further action is required.
2. A BAC from 20 to 39 mg/100mL shall be considered an action level. The licensees shall prohibit the worker from performing safety-sensitive duties until a determination of fitness indicates that the worker is fit to competently and safely perform his or her duties.
3. A BAC of 40 mg/100mL or greater shall be considered a positive test and a fitness-for-duty policy violation (see section 6.3).

Table B.1 in appendix B provides a summary of BAC ranges and associated actions [12].

Guidance

Licensees should refer to the Alcohol Test Committee when establishing procedures for the administration of evidential breath alcohol testing, including:

- the initial and continuing training and qualification of breath alcohol technicians for the operation of approved instruments, including conversion training
- the initial and continuing training and qualification of designated service personnel for the preventative and corrective maintenance of approved instruments
- the development and implementation of protocol(s) for:
    - maintaining approved instruments authorized for use at the nuclear site
    - the preparation required prior to conducting alcohol testing
    - handling and processing workers that will be tested, including escort procedures
    - conducting an initial alcohol test using a breath specimen
    - conducting a confirmatory test for alcohol (when the initial test is 20 mg/100mL or greater)
    - determining a confirmed positive breath alcohol test result
    - shy lung
    - documenting and reporting requirements of breath alcohol specimens

6.2 Drug-testing process

Licensees shall establish, implement and maintain a process to test workers holding safety-critical and safety-sensitive positions for the presence of drugs. In meeting this requirement, licensees may choose to use either laboratory urine drug testing or laboratory oral fluid drug testing, or a combination of both.

Licensees shall develop, implement, and maintain procedures for the administration of drug testing including the collection, storage, and transportation of specimens to a designated accredited laboratory. Licensees shall retain or maintain competency in the collection, storage and transportation of specimens, and shall ensure that specimen collectors are independent from workgroups subject to testing.

Licensees shall retain and utilize the services of an accredited laboratory to analyze and report the results of urine or oral fluid drug specimens. For urine drug testing, licensees shall use a laboratory accredited by the Substance Abuse and Mental Health Services Administration (SAMHSA)[1]. For oral fluid drug testing, licensees shall use a laboratory accredited by SAMHSA or a laboratory that meets ISO/IEC 17025, *General Requirements for the Competence of Testing and Calibration Laboratories* [14].

For each drug class, licensees shall document in their governance whether urine or oral fluid test results will be used to determine a policy violation. Licensees shall direct the accredited laboratory to report positive test results in conjunction with the urine or oral fluid drug panel (initial and confirmatory cut-off thresholds) as established in appendix B (see tables B.2 and B.3 for urine and tables B.5 and B.6 for oral fluid).

Licensees shall develop, implement, and maintain a procedure for reviewing and verifying positive, adulterated or invalid drug test results from a medical, toxicological or pharmacological perspective. The procedure shall ensure that a medical review officer (MRO) is designated to review, interpret and verify the laboratory test results for each drug class as specified in the urine and oral fluid drug panels [13, 15] in appendix B.

Licensees shall direct the accredited laboratory to report all positive, adulterated or invalid test results directly to the MRO conducting the drug test review.

In determining whether the donor has violated the fitness-for-duty policy, licensees shall direct the MRO to:

1. provide the donor an opportunity to explain any alternative reasons for the positive test result
2. only report verified positive test results to the licensee

Licensees shall direct the MRO to raise any for-cause mandatory referrals for other fitness-for-duty assessments, as necessary, to ensure safety and security.

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[1] Effective May 12, 1998, the Standards Council of Canada (SCC) voted to end its laboratory accreditation program and adopt United States Department of Transportation regulations for the conduct of forensic urine drug testing. The SCC program was formerly known as the Laboratory Accreditation Program for Substance Abuse (LAPSA).

Guidance

Procedures for the administration of drug-testing collection and transportation of specimens should include or make reference to the following:

- licensee-approved collection kits, containers, and other supplies for specimen collection
- protocol for chain of custody, including relevant forms
- protocol for urine and oral fluid specimen collection, including collector duties, specific collection site requirements, verification of donor identity, and potential collection errors (recoverable and non-recoverable)
- protocols for handling and processing workers that will be tested, including escort procedures
- protocol for verification and assurance of sample integrity, including tampering and adulteration
- protocols for urine and oral fluid specimen storage and security
- protocols for urine and oral fluid specimen packaging and transportation to a designated accredited laboratory
- licensee-approved shipment containers
- protocols for shy bladder and dry mouth
- protocol for refusal to test
- initial and continuing training and qualification of urine and oral fluid specimen collectors

Licensees should retain and utilize the services of a third-party provider, where feasible, for the administration, collection, verification and assurance of specimen integrity and chain of custody, and shipment of specimens to an accredited laboratory.

Licensees should consider adopting a dilution protocol for urine samples and should consider testing samples identified as dilute against the urine drug panel (initial and confirmatory cut-off thresholds) established in table B.4 [13] of appendix B.

Licensees should direct the MRO to consult with duly qualified toxicologists, duly qualified pharmacists, or other specialists as required when reviewing, interpreting, and verifying test results. In the event that the MRO determines that there is a legitimate medical explanation for the positive drug test – such as legitimate use of prescription drugs, or a medical condition – the positive test should not be considered verified. However, a fitness-for-duty assessment may be required to determine if the worker is fit for duty.

6.2.1 Point of collection testing

Requirements and guidance contained above in section 6.2 also apply to point of collection testing (POCT), where appropriate.

Licensees may choose to utilize POCT as a screening tool (following up with additional testing only for non-negative results) or to assess the risk of having a worker return to safety-sensitive or safety-critical duties pending the MRO's report on the urine- or oral-fluid-based laboratory test.

If licensees choose to utilize POCT, a protocol shall be established and documented.
Non-negative results shall be verified by laboratory immunoassay screening and confirmation testing.

For a minimum of 5% of negative POCT tests, licensees shall compare negative POCT results with laboratory-based results on the same type of biological sample (urine or oral fluid), for quality assurance purposes.

Licensees who decide to conduct POCT shall select devices that are:

1. certified by Health Canada or independently evaluated by qualified laboratory personnel on an initial and annual basis to ensure that the devices meet forensic standards such as specificity, sensitivity and efficiency
2. calibrated to the extent possible (±25%) with the urine or oral fluid drug testing cut-offs established in appendix B (see table B.2 for urine immunoassay or table B.5 for oral fluid immunoassay cut-offs)

If licensees choose to utilize POCT, POCT devices shall be used only in random or post-incident testing circumstances. POCT devices shall not be used in pre-placement, reasonable grounds, follow-up or return to duty testing circumstances.

Guidance

For the minimum 5% of negative POCT tests used to assess quality assurance, a second sample from the same person should be collected, labelled only with a quality assurance sample identifier, and sent to the laboratory for testing. The laboratory test results should be used to evaluate the performance of the POCT device and the collection techniques of the collector. As a good practice, all collectors and all sites should be evaluated every quarter.

6.3 Process for positive alcohol and drug tests

Workers who provide a verified positive alcohol or drug test shall be removed from safety-critical or safety-sensitive duties and referred for a mandatory substance abuse evaluation.

The licensee shall not consider the worker for reinstatement to safety-critical or safety-sensitive duties until a recommendation for reinstatement has been received from a duly qualified health professional.

6.4 Substance abuse evaluation process

Licensees shall establish, implement and maintain an assessment process to evaluate workers in safety-critical or safety-sensitive positions for a substance use disorder. Licensees shall identify the conditions under which a substance abuse evaluation is required, including a verified positive alcohol or drug test.

Licensees shall ensure that both licit and illicit drugs are addressed.

The substance abuse evaluation shall be conducted by a duly qualified health professional. Duly qualified health professionals shall be certified by a professional association that includes substance abuse evaluation or shall have received training in substance abuse evaluation and be affiliated with a provincial college of physicians or nurses.

Workers assessed as having a substance use disorder shall not return to safety-critical or safety-sensitive duties until they have met conditions for reinstatement, as recommended by the duly qualified health professional.

Guidance

The assessment process should include consideration of the following aspects:

- organizational and procedural interfaces between internal and external stakeholders with defined roles in the management of substance dependency, such as the duly qualified health professionals, supervisors and oversight personnel, and external third-party providers
- reporting to the designated fitness-for-duty program administrator
- referral to the licensee's designated substance testing facility

In determining the duly qualified health professional's qualifications, licensees may consider the following or equivalent certifying bodies as listed below:

- Canadian Addiction Counsellors Certification Federation
- Canadian Society for Addiction Medicine
- Canadian Counselling and Psychotherapy Association
- Association of Cooperative Counselling Therapists of Canada
- Canadian Professional Counsellors Association
- Indigenous Certification Board of Canada
- Canadian Council of Professional Certification

Substance use disorders may also be diagnosed through medical or psychological assessments.

Licensees should consider adopting relapse agreements with workers assessed as having a substance use disorder.

6.5 Investigative and alcohol and drug screening tools

Licensees shall establish and document the accepted use of investigative and alcohol and drug screening tools included in their respective fitness-for-duty programs. Use of these tools shall be clearly documented, and training programs shall be provided to support the designated personnel in the proper use of the tools.

Guidance

Licensees may consider the adoption of the following investigative and alcohol and drug screening tools:

- fitness-for-duty assessment screening checklist for supervisors
- fitness-for-duty self-assessment screening checklist for workers
- passive alcohol screening devices
- drug detection dogs and devices (for example, ion scanners)
- physical searches

6.6 Records

The licensee shall retain alcohol and drug testing results for workers holding safety-critical or safety-sensitive positions.

Appendix A: Alcohol and Drug Tests by Workgroup and Circumstance

Table A.1 provides a summary of the alcohol and drug testing to be conducted, by workgroup and circumstance.

Table A.1: Summary of alcohol and drug testing to be conducted, by workgroup and circumstance

Workgroup		Pre-placement	For-cause reasonable grounds	For-cause post-incident	Follow-up	Random
Certified workers (excluding certified health physicists)		YES	YES	YES	YES	YES
Security personnel	**Onsite nuclear response force (NRF) members**	YES	YES	YES	YES	YES
	Nuclear security officers	NO	YES	YES	YES	NO
	Designated non-NRF personnel	NO	YES	YES	YES	NO
Certified health physicists		NO	YES	YES	YES	NO
Emergency response teams / fire brigade		NO	YES	YES	YES	NO

Appendix B: Alcohol- and Drug-Testing Thresholds

B.1 Blood alcohol concentration ranges and associated actions

Table B.1 provides a summary of blood alcohol concentration (BAC) ranges and associated actions to be taken by licensees [12].

Table B.1: Blood alcohol concentration ranges and associated actions to be taken by licensees

BAC range	Action
Below 20 mg/100mL	Negative test – no action required
20 to 39 mg/100mL	Action level – removal of worker from safety-critical or safety-sensitive duties until assessed as fit
40 mg/100mL or greater	Positive test – fitness-for-duty policy violation and removal of worker from safety-critical or safety-sensitive duties until assessed as fit by duly qualified health professional

B.2 Urine immunoassay screening

Table B.2 provides the urine analysis drug panel and the associated cut-offs to be used for immunoassay screening [13].

Table B.2: Urine analysis drug panel and associated cut-offs

Drug / Drug class/ Metabolite	Cut-off (ng/mL)
Cocaine metabolite (benzoylecgonine)	150
Opiates :	
Morphine, codeine	2,000
Hydromorphone and hydrocodone	300
Oxymorphone and oxycodone	100
6-acetylmorphine	10
Amphetamines	500
Cannabinoids	50
Benzodiazepines	100
Methadone metabolite (EDDP)	100

B.3 Urine GC-MS and LC-MS/MS confirmation

Table B.3 provides the urine analysis drug panel and the associated cut-offs to be used for GC-MS and LC-MS/MS confirmation [13].

Table B.3: Urine analysis drug panel and associated cut-offs for GC-MS and LC-MS/MS confirmation

Drug / Drug class / Metabolite	Cut-off (ng/mL)
Amphetamines (amphetamine, methamphetamine, MDMA, MDA)	250
Cannabinoids (as 11-nor-Δ-9 THC COOH)	15
Cocaine metabolite (benzoylecgonine)	100
Methadone metabolite (EDDP)	100
Opiates:	
Morphine, codeine	2,000
Hydromorphone, hydrocodone, oxymorphone and oxycodone	100
6-monoacetyl morphine (6-AM, heroin metabolite)	10
Benzodiazepines (LC-MS/MS):	
Oxazepam, temazepam, diazepam, nordiazepam	50
Alprazolam, lorazepam, triazolam, clonazepam	50
Bromazepam, flurazepam	50

B.4 Urine: Recommended dilution protocol cut-off concentrations

Table B.4 provides the urine analysis drug panel and the associated cut-offs recommended to be used as part of a dilution protocol for immunoassay screening and GC-MS and LC-MS/MS confirmation.

Table B.4: Urine analysis drug panel and recommended associated cut-offs to be used as part of dilution protocol

Drug / Drug class / Metabolite	Screening cut-off (ng/mL)	Confirmation cut-off (ng/mL)
Amphetamine/ methamphetamine	100	100
Benzodiazepines	50	50
Cannabinoids	20	6
Cocaine metabolite	15	15
Opiates (codeine and morphine only)	120	120
Methadone metabolite	50	50

B.5 Oral fluid immunoassay screening

Table B.5 provides the oral fluid analysis drug panel and the associated cut-offs to be used for immunoassay screening [15].

Table B.5: Oral fluid analysis drug panel and associated cut-offs

Drug / Drug class / Metabolite	Cut-off (ng/mL)
Amphetamines	50
Cannabinoids	10
Cocaine	20
Opiates:	
Morphine, codeine	30
Hydromorphone and hydrocodone	30
Oxymorphone and oxycodone	30
6-acetylmorphine	4
Benzodiazepines	10
Methadone	20

B.6 Oral fluid GC-MS and LC-MS/MS confirmation

Table B.6 provides the oral fluid analysis drug panel and the associated cut-offs to be used for GC-MS and LC-MS/MS confirmation [15].

Table B.6: Oral fluid analysis drug panel and associated cut-offs for GC-MS and LC-MS/MS confirmation

Drug / Drug class / Metabolite	Cut-off (ng/mL)
Amphetamines (amphetamine, methamphetamine)	25
Cannabinoids (THC)	5
Cocaine and its metabolite (benzoylecgonine)	8
Opiates:	
Morphine, codeine	15
Hydromorphone, hydrocodone, oxymorphone and oxycodone	15
6-monoacetyl morphine (6-AM, heroin metabolite)	2
Benzodiazepines (LC-MS/MS):	3
Methadone and its metabolite (EDDP)	15

Abbreviations

BAC	blood alcohol concentration
CSA	Canadian Standards Association
EAP	employee assistance program
ERT	emergency response team
FFD	fitness for duty
GC-MS	gas chromatography–mass spectrometry
IAEA	International Atomic Energy Agency
LC-MS/MS	liquid chromatography-tandem mass spectrometry
MRO	medical review officer
NRF	nuclear response force
NSO	nuclear security officer
POCT	point of collection testing

Glossary

For definitions of terms used in this document, see REGDOC-3.6, *Glossary of CNSC Terminology*, which includes terms and definitions used in the *Nuclear Safety and Control Act* and the regulations made under it, and in CNSC regulatory documents and other publications. REGDOC-3.6 is provided for reference and information.

The following terms are either new terms being defined, or include revisions to the current definition for that term. Following public consultation, the final terms and definitions will be submitted for inclusion in the next version of REGDOC-3.6, *Glossary of CNSC Terminology*.

dry mouth
The inability of a donor to provide a sufficient amount or volume of oral fluid (i.e., saliva) to permit a valid oral fluid drug test.

follow-up testing
As part of a follow-up plan to verify an individual's continued abstinence from substance abuse.

oral fluid specimen collector
A trained person who instructs and assists workers at an oral fluid collection site, receives the specimen provided by each worker and performs an initial inspection of that specimen, and initiates and completes a custody control form for that specimen.

point of collection testing
An immunoassay urine or oral fluid drug screening test that is conducted in the field outside the laboratory setting and that provides immediate results.

shy bladder
The inability to provide a urine sample as a result of a physiological or psychological medical condition.

shy lung
The inability to provide a sufficient amount or volume of breath to permit a valid alcohol test as a result of a physiological or psychological medical condition.

urine specimen collector
A trained person who instructs and assist workers at a urine collection site, receives the specimen provided by each worker and performs an initial inspection of that specimen, and initiates and completes a custody control form for that specimen.

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6. IAEA, NS-G-2.8, *Recruitment, Qualification and Training of Personnel for Nuclear Power Plants*, Vienna, 2002.
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11. Canada, *Approved Breath Analysis Instruments Order* (SI/85-201).
12. J. Wigmore. *The Forensic Toxicology of Alcohol and Best Practices for Alcohol Testing in the Workplace: A Report to the Canadian Nuclear Safety Commission*, *RSP-0315*, Ottawa, 2014.
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14. International Organization for Standardization, ISO/IEC 17025:2017, *General Requirements for the Competence of Testing and Calibration Laboratories*, Geneva, Switzerland.
15. M. Huestis, PhD. *Oral Fluid Drug Testing Practice: Report to the Canadian Nuclear Safety Commission*, RSP-673.2, Ottawa, 2019.

Additional Information

The following documents provide additional information that may be relevant and useful for understanding the requirements and guidance provided in this regulatory document:

1. Canadian Nuclear Safety Commission (CNSC), INFO-0831, *Recent Alcohol and Drug Workplace Policies in Canada: Considerations for the Nuclear Industry*, Ottawa, 2012.
2. CNSC, REGDOC-2.2.2, *Personnel Training*, Ottawa, 2016.
3. United States Nuclear Regulatory Commission, NUREG/CR-7183, *Best Practices for Behavioral Observation Programs at Operating Power Reactors and Power Reactor Construction Sites*. Washington, D.C., 2014.
4. United States Department of Transportation, *Prescription and Over-the Counter Medications Tool Kit*, Washington, D.C., 2011.
5. Canada, *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).
6. Canadian Human Rights Commission, *Accommodation Works! A user-friendly guide to working together on health issues in the workplace*, (no date).

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