Court File No. CV-17-567048

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 113, and ROBERT KINNEAR on his own behalf and on behalf of all other MEMBERS OF THE AMALGAMATED TRANSIT UNION, LOCAL 113

Applicant

- and -

TORONTO TRANSIT COMMISSION

Respondent

FACTUM OF THE RESPONDENT
(Returnable February 28 and March 1, 2017)

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto Ontario M5L 1A9

Paul Schabas LSUC#: 26355A
Tel: 416.863.4274
Fax: 416.863.2653

Kaley Pulfer LSUC#:58413T
Tel: 416.863.2756
Fax:416.863.2653

Lawyers for the Respondent

Filion Wakely Thorup Angeletti LLP
333 Bay Street, Suite 2500
Toronto, Ontario M5H 2R2

Roy C. Filion LSUC#: 11923T
Tel: 416.408.5510
Fax: 416.408.4814

Bonnea Channe LSUC#: 55480C
Tel: 416.408.5559
Fax: 416.408.4814

Lawyers for the Respondent

TO: **RUBY SHILLER**
11 Prince Arthur Avenue
Toronto, Ontario M5R 1B2

Clayton C. Ruby LSUC# 11682R
Tel: 416.964.9664
Fax: 416.964.8305

Annamaria Enenajor LSUC# 64837G
Tel: 416.964.9664
Fax: 416.964.8305

URSEL PHILLIPS FELLOWS HOPKINSON LLP
555 Richmond Street West, Suite 1200
Toronto, Ontario M5V 3B1

Ian Fellows LSUC# 34552V
Tel: 416.969.3511
Fax: 416.968.0325

Dean Ardron LSUC# 55147F
Tel: 969-3511
Fax: 968-0325

Lawyers for the Applicant

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PART I - INTRODUCTION

1. The Toronto Transit Commission (the "**TTC**") is Canada's largest public transit system and the third largest in North America. There is no industry that is more safety-sensitive than mass public transit. The safety of TTC's employees, customers and all road users – motorists, cyclists and pedestrians – is paramount in all that the TTC does.

2. Since 2010, the TTC has had a Fitness for Duty Policy that includes drug and alcohol testing. This testing has included certification (or pre-hiring) testing, and post-incident and reasonable cause testing, as well as unannounced testing of employees who have returned to work following a Policy violation and/or treatment for drug and/or alcohol abuse. At the time the Policy was introduced, the TTC indicated that it reserved the right to implement random testing. The Amalgamated Transit Union, Local 113 (the "**Union**") filed a policy grievance challenging the

Fitness for Duty Policy under the procedures available to it under the Collective Agreement. It did not seek an injunction. The grievance arbitration began in March 2011 before Arbitrator Maureen Saltman and is ongoing.

3. Between 2010 and the present, over 11,000 drug and alcohol tests have been conducted. The results of those tests, as well as accidents and other evidence, indicate that drug and alcohol use continues to be a significant problem for the TTC, a threat to its safe operation and to the safety of the public. There is also a strong body of empirical evidence demonstrating that random testing reduces the risk of workplace accidents and injuries. Random testing serves two major roles: it is an effective deterrent to workplace alcohol and drug use, and it provides for the early identification and potential rehabilitation of employees with substance use issues prior to being involved in an accident. Each day without random testing increases the risk of irreparable harm to employees, passengers and the public.

4. To reverse this continuing problem, the TTC has announced that, commencing April 1, 2017,[1] it will implement random alcohol and drug testing for all employees in safety-sensitive positions. All bus, streetcar and subway operators and maintenance employees, designated supervisors, managers and executives – anyone whose job has accountability or responsibility for the safety of employees and the public – will be subject to random testing. As with the current post-incident and reasonable cause testing, a standard breathalyzer device will be used for alcohol testing and a simple oral fluid sample will be collected for drug testing. Both are non-invasive and reliable. Twenty percent of the safety-sensitive workforce will be tested each year by random selection.

[1] As of November 30, 2016, the TTC was set to move forward with implementation of the random testing program on March 1, 2017. However, as a result of the within application, and this Court's availability, the TTC agreed to delay the implementation by one month.

5. Notwithstanding public statements by Union President Bob Kinnear that he does not oppose random alcohol testing by breathalyzer, the Union, which represents approximately 10,000 TTC employees in safety-sensitive positions, seeks an injunction to prevent the implementation of random testing pending the outcome of the arbitration hearing that started in March 2011 and will inevitably continue for several more years before completion, and for which there is no end in sight.

6. An injunction would require the TTC to wait several more years before implementing random testing. The Commission resolved in October 2011 to bring in random testing, but it was not implemented at that time due to, among other things, the jurisprudence awaiting guidance from the Supreme Court, and out of respect for the arbitration process which it was expected would resolve the issue in a timely way. However, despite numerous efforts by the TTC to speed up the arbitration, all of which were rebuffed by the Union, it continues at a snail's pace. The TTC is not willing to delay any longer the implementation of a safety program that has clear benefits and is necessary for public safety. The experience of other major mass transit systems – in the United States, the United Kingdom and Australia – as well as scientific research and studies, all demonstrate the beneficial effects of random testing.

7. The Applicants' case for an injunction is weak. Their legal argument is based largely, if not entirely, on the untenable submission that, because the TTC is government, section 8 of the *Canadian Charter of Rights and Freedoms* requires it to obtain prior authorization before it does any testing of employees – random *or* reasonable cause. While the TTC concedes it is government and must comply with the *Charter*, the case law clearly shows that prior authorization is not required here. Section 8 protects a reasonable expectation of privacy, which varies depending on the context. In the employment context, arbitrators and courts, including the Supreme Court of

Canada, have recognized an employer's right to implement mandatory alcohol and drug testing programs in safety-sensitive industries. This includes random testing where a need can be demonstrated, and which takes into account employees' privacy rights and expectations. Section 8, and the jurisprudence under it, therefore, is of little relevance.

8. Further, the Applicants have failed to provide evidence that seriously challenges the TTC's evidence of a continuing and significant problem of alcohol and drug use in the workplace, posing a safety threat to employees and the traveling public. Indeed, the TTC's evidence is largely unchallenged and uncontradicted, including detailed expert evidence on the safety benefits of random testing, as well as the way in which testing will be conducted, in a non-invasive manner, reviewed by independent experts in accordance with internationally accepted standards, that respects the privacy of employees and ensures that only those whose test results indicate a likelihood of impairment will be identified and have their situation addressed.

9. The balance clearly favours the TTC and public safety. The application should be dismissed.

PART II - SUMMARY OF FACTS

A. Toronto Transit Commission

a) The TTC's Operations

10. The TTC is, by passenger volume, the most used public transit system in Canada and the third most used in North America. The TTC serves the City of Toronto, which has a population of approximately 2.79 million, through the operation of 143 bus routes, 11 streetcar routes, 3 subway lines with 69 subway stations and a Light Rail Transit line. The TTC also operates a Wheel-Trans service, which provides accessible transit for persons with disabilities.

11. Every weekday, an average of 1.8 million journeys are made through the TTC's underground subway system and in TTC vehicles (buses and streetcars) along busy roadways in the Greater Toronto Area. Passenger trips totalled approximately 535,800,000 in 2015.[2]

12. The TTC's overriding obligation and main priority is to protect the health and safety of its employees, and to ensure the safety of its riders and other motorists, cyclists and pedestrians with whom the TTC shares Toronto roads.[3] TTC staff work with the TTC Board to ensure that Toronto's mass passenger transit system is reliable and safe.[4] The TTC takes a holistic approach to safety, striving to meet its obligation through a number of health and safety programs.[5] However, with more than 5,000 Preventable Collisions between 2012 and 2016, and over 100 positive employee drug or alcohol tests during that time, additional safety measures are clearly needed.[6]

b) The Public and Safety-Sensitive Nature of TTC's Operations

13. There is no question that the TTC's work, which involves the daily maintenance and operation of large vehicles, including buses, streetcars, subways and light rail transit trains, which operate underground and/or on public roads and thoroughfares, carrying millions of people to and from their destinations every day, is extremely safety-sensitive. There is potential every day for serious, if not catastrophic, incidents to occur. These risks and dangers inherent in the TTC's operations are not confined to TTC employees, or to one specific work location.[7] Rather, these risks affect the safety of millions of people in Toronto every day.

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[2] Affidavit of Andrew Robert Byford, sworn January 20, 2017, Respondent's Application Record ("RAR") Volume 1, Tab 2, [*Byford Affidavit*] at para 11-14.
[3] Byford Affidavit, RAR Vol. 1, Tab 2, at paras 14, 18.
[4] Byford Affidavit, RAR Vol. 1, Tab 2, at para 11. The TTC is continued as a City Board under the *City of Toronto Act, 2006*.
[5] Byford Affidavit, RAR Vol. 1, Tab 2, at paras 47-51.
[6] Byford Affidavit, RAR Vol. 1, Tab 2, at paras 21-22.
[7] Byford Affidavit, RAR Vol. 1, Tab 2, at paras 19-20.

14. As one TTC bus driver, Tracey Brown, agreed on cross-examination, "there is a potential all the time for accidents to happen", and that the need to suddenly take evasive action poses risks to passengers, TTC operators, people in other vehicles and pedestrians on the busy streets of Toronto.[8] These risks are supported by data which shows that TTC vehicles are involved in thousands of collisions every year, hundreds of which result in injuries, and, unfortunately, a number of which – 12 in the past three years – have resulted in fatalities.[9]

15. Catastrophic incidents have occurred on mass public transit systems in other cities, and there is potential for the same to happen on the TTC every day. Perhaps no one at the TTC is more keenly aware of that risk, and the need to do everything reasonably possible to avoid such disasters, than TTC CEO, Andy Byford.

16. Mr. Byford has worked in transit systems in the United Kingdom and Australia, including as the Operations and Safety Director at South Eastern Trains Limited in England, before joining the TTC in 2011.[10] Mr. Byford gave evidence of a number of incidents that brought home for him "the importance of safety in transit and the disastrous consequences that can flow from a single safety breach."[11] These include:

(a) a November 18, 1987 fire at King's Cross station on the London Underground , which killed 31 people and injured at least 100 more;[12]

(b) on December 12, 1988, a signal technician's failure to properly wire a signal on British Rail due to fitness for duty issues (fatigue) led to a crash that killed 35 people and injured 415 others;[13]

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[8] Cross-examination of Tracey Brown, dated February 15, 2017 at p 3 line 8 to p 6, line 3.
[9] Byford Affidavit, RAR Vol. 1, Tab 2 at para 21, Exhibit C.
[10] See Byford Affidavit, RAR Vol. 1, Tab 2, at paras 4-9 and Exhibit A at 34-36.
[11] Byford Affidavit, RAR Vol. 1, Tab 2 at para 24.
[12] Byford Affidavit, RAR Vol. 1, Tab 2 at para 27, Exhibit F.
[13] Byford Affidavit, RAR Vol. 1, Tab 2 at para 26, Exhibit E.

(c) the "Cannon Street Crash" on the British railway system, which was due to driver error (a driver who subsequently tested positive for marijuana), occurred on January 8, 1991, killing two people and injuring 542 others;[14]

(d) in 1991, a New York City subway train derailed as it was about to enter Union Square, killing five passengers and injuring 200 more. The driver was subsequently convicted of manslaughter on the basis that his recklessness in consuming alcohol before his shift caused the deaths of the five passengers;[15]

(e) on December 2, 1999, the Glenbrook Rail Accident in Australia killed seven train passengers and resulted in 51 others being transported to hospital with injuries;[16] and

(f) on January 31, 2003, a second crash in Australia, known as the Waterfall Rail Accident, killed seven people and injured 42 others.[17]

17. All of these incidents show how even momentary safety lapses – whether caused by human error, employees being unfit for duty, or complacency to safety risks – can have tragic, and far-reaching consequences for employees, employers and, most of all, members of the public who rely on the safe operation of their transit systems.[18] Random drug and alcohol testing was implemented following these catastrophes in all of the affected jurisdictions,[19] and, as discussed in greater detail below, all of those jurisdictions experienced a sharp drop in the rate of positive random drug and alcohol tests among transit employees within a few years of implementing random testing.[20]

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[14] Byford Affidavit, RAR Vol. 1, Tab 2 at para 25, Exhibit D.
[15] Byford Affidavit, RAR Vol. 1, Tab 2 at para 28, Exhibit G.
[16] Byford Affidavit, RAR Vol. 1 Tab 2 at paras . 86-87.
[17] Byford Affidavit, RAR Vol. 1 Tab 2 at paras 88-90.
[18] Byford Affidavit, RAR Vol. 1, Tab 2 at paras 27, Exhibit F.
[19] Byford Affidavit, RAR Vol. 1, Tab 2 at paras 69-72, 85-91. And see Affidavit of Dr Leo Kadehjian, RAR Vol. V, Tab 10 [*Kadehjian Affidavit*] at para 43 (random testing has been in place in the United States for more than 25 years.) For example, more than 14,000 safety-critical employees of London Underground are subject to random drug and alcohol testing (Byford Affidavit at para 74) and 60% of Sydney Trains' workforce is subject to random testing (Byford Affidavit at para 93).
[20] Byford Affidavit, RAR Vol. 1, Tab 2 at paras 80, 97, and Toronto Transit Commission Report No, September 18, 2008 at pp 20-21, in Affidavit of Cliff Piggott, sworn January 6, 2017, Application Record of the Applicants ("**AR**"), Vol. 2, Tab 3, Exhibit D at 398-399. See also Affidavit of Melissa Snider-Adler, RAR Vol IV, Tab 8 [*Snider-Adler Affidavit*] at para 36 regarding the deterrent effect of random testing on U.S. DOT regulated employers for which DriverCheck provides testing services.

18. The TTC must not be forced to wait for a similar, catastrophic incident to occur in Toronto before it can take the necessary action to make its operations safer, and consistent with comparable mass transit systems elsewhere.[21]

B. Evidence of Drug and Alcohol Incidents involving TTC Employees

a) Drug and alcohol-related incidents: Pre-Fitness for Duty Policy (2006-2010)

19. In April 2007, a subway track maintenance worker was killed after he drove his subway work car into the wall of a subway tunnel (the "**Lytton Subway workcar fatality**"). Two other employees were seriously injured. The TTC considered a number of factors relevant to that accident, including safety issues to which it pleaded guilty under the *Occupational Health and Safety Act*. However, one of the findings of the investigation was that the worker had levels of tetrahydrocannabinol ("**THC**") in his system consistent with having consumed marijuana recently, probably during his work shift.[22] Prior to the accident, the worker had been dismissed due to an incident involving marijuana but had later been reinstated pursuant to a Last Chance Agreement dated April 2006.[23] While the Union asserts there is no proof it caused the accident; nevertheless, a professional operator was driving a large commercial vehicle having recently – likely during his shift – consumed a drug that seriously impairs perception and judgment, and a serious accident occurred.

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[21] Byford Affidavit, RAR Vol. 1, Tab 2 at paras 98-100.

[22] Affidavit of Megan MacRae, sworn January 20, 2017, RAR Vol. II, Tab 3 [*MacRae Affidavit*] at para 9. And see Exhibit A to Affidavit of Bob Kinnear, sworn February 2, 2017, Second Supplementary Record of the Applicants, Tab 2 at p. 61 [*Kinear Affidavit*].

[23] MacRae Affidavit at para 9; Affidavit of Peter Bartz, sworn January 20, 2017, RAR Vol. II, Tab 4 [*Bartz Affidavit*] at para 35. See also Toronto Transit Commission Report No., September 18, 2008 at pp 4-5, attached as Exhibit D to the Affidavit of Cliff Piggott, sworn January 6, 2017, in Application Record of the Applicants ("**AR**"), Vol. 2, Tab 3 at pp 382-383. A "Last Chance Agreement" is a written agreement pursuant to which an employee may be reinstated to his or her employment.[23] It is the result of "progressive discipline" where an employee is relieved of duty (Step One) and the dismissal is upheld (Step Two), followed by consideration of whether the employee can be reintroduced into the work location on a last chance agreement (Step Three). Cross-Examination of John DiNino at p. 8 lines 7-24.

20. As a result of this finding, the TTC commenced a review of drug and alcohol incidents at the TTC and the ways in which the TTC was addressing employee fitness for duty. The results were alarming. Between January 1, 2006 and September 2008 (when the Fitness for Duty Policy was approved, as discussed below), there were approximately **40** drug or alcohol-related incidents involving TTC employees.[24] Many of these incidents involved TTC employees who reported to work while displaying signs of being unfit due to alcohol or drug use. One incident involved a bus operator who was driving a bus with passengers on board, while having a blood alcohol level significantly over the legal limit of 0.08 BAC.[25] The operator was arrested after a customer called the police.

21. This review led TTC staff to recommend to the Board in 2008 that a Fitness for Duty Policy incorporating drug and alcohol testing (hereafter, the "**Fitness for Duty Policy**"[26]) be approved.

22. Staff Sergeant Mark Russell, an investigator for the TTC with more than 25 years' experience, during which time he has conducted more than 1,000 investigations,[27] has provided uncontradicted and unchallenged evidence of **14** drug or alcohol-related incidents reported to TTC investigators and/or Transit Enforcement Unit between January 1, 2006 and September 2008, in addition to those 40 incidents.[28] This includes three separate incidents involving a bus operator, fare collector and janitor, all of whom, when arrested for theft from the TTC, admitted to substance abuse issues (marijuana, cocaine and/or alcohol). The operator, for example, admitted that he often

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[24] Bartz Affidavit, RAR Vol. III, Tab 4 at paras 43-44 and Exhibit C at pp1620-1626.
[25] Bartz Affidavit, RAR Vol. III, Tab 4 at paras 43-44 and Exhibit C at p1625.
[26] A copy of the Fitness for Duty Policy is contained in Exhibit H to the Byford Affidavit, RAR Vol. I, Tab 2, at 145.
[27] Affidavit of Mark Russell, sworn January 20, 2017, Vol IV, Tab 5 [*Russell Affidavit*] at paras 1-4.
[28] Russell Affidavit at paras 16(a), (b), 17(g), (h), 18(e)-(g), 22(x)-(y). See also: Exhibit I at pp. 2159-2161, 2163 of the Respondent's Record. This number does not include any incidents referenced in the Bartz Affidavit.

drank alcohol before reporting for duty.[29] In another case, TTC investigators were advised that Toronto police had arrested a TTC crane operator, who was known to be a heroin user, for possession of OxyContin and methadone for the purpose of trafficking.[30]

23. Following the approval of the Fitness for Duty Policy (i.e., October 2008) until its implementation on October 17, 2010, there were a further **53** drug or alcohol-related incidents involving TTC employees.[31] Incidents in this time period included criminal law issues relating to drugs (i.e., police warrants and property searches for drugs),[32] an employee smoking marijuana during his shift,[33] and another employee purchasing crystal methamphetamine during his break.[34] Other examples of incidents during this time period include employees consuming alcohol while on duty or consuming significant amounts of alcohol prior to the start of a shift, and an employee reportedly consuming cocaine in a washroom during his break.[35]

24. Given that the TTC's workplace is generally one of limited supervision,[36] it is perhaps not surprising that most of these 107 incidents between 2006 and October 16, 2010 (discussed in Mr. Bartz's and Mr. Russell's affidavits) came to the TTC's attention through complaints or reports from other employees, or members of the public, or reports from police.[37]

[29] Russell Affidavit, Vol IV, Tab 5 at paras 16(a) and 16(b), 17(g).
[30] Russell Affidavit at para 18(e), Exhibit C at 2022.
[31] Bartz Affidavit at paras 40, 43-44 and Exhibit C; Russell Affidavit at paras 17(f); 22(u)-(w). See also: Exhibit I at pp. 2166-2167.
[32] Russell Affidavit at paras 17(e), 17(f)
[33] Russell Affidavit at para 21.
[34] Russell Affidavit at para 22(w).
[35] Bartz Affidavit at para 40, Exhibit C at 1626 to 1632.
[36] Byford Affidavit at para 17.
[37] Bartz Affidavit at paras 43-44. Russell Affidavit at para 5.

b) Drug and alcohol-related incidents: Post-Fitness for Duty Policy (October 17, 2010 to December 31, 2016)

i. Drug and Alcohol Test Results

25. Unfortunately, since the Fitness for Duty Policy was implemented in 2010, there have been continued concerns about employees reporting for work unfit for duty due to drugs or alcohol. Between October 17, 2010 and December 31, 2016, there were 291 documented incidents where workplace safety concerns arose in connection with employees. Almost half of these incidents (**141**) have been classified as "not being compliant" with the TTC's Fitness for Duty Policy[38] – meaning incidents in which it was either suspected or confirmed that alcohol or drug use among TTC employees created safety concerns in the workplace. This includes, among other things, positive test results for post-incident, reasonable cause or aftercare testing, refusals to submit to testing, as well as situations in which employees created safety risks in the workplace due to recent or ongoing use of medications with impairing effects. Some of these incidents resulted in fatalities, injuries (including serious or life threatening injuries) and damage to vehicles and property.[39]

26. In particular, between October 17, 2010 and December 31, 2016, there were a total of **70** instances where employees tested positive for drugs (via oral fluid testing) or alcohol (via breathalyzer), or refused to be tested, in Reasonable Cause or Post-Incident circumstances.[40] During this time period, there were also **46** instances where employees refused to be tested or tested positive for drugs (via urinalysis) or alcohol (via breathalyzer) in relation to aftercare testing (i.e., Post-Violation or Post-Treatment Monitoring).[41] Further, as discussed below at paragraphs

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[38] Bartz Affidavit, RAR Vol. III, Tab 4 at paras 45-48, 55.
[39] Bartz Affidavit, RAR Vol. II, Tab 4, at para 63.
[40] Bartz Affidavit at paras 70, 79.
[41] Bartz Affidavit at para 60(b).

28 to 30, some incidents might result in a negative test but still raise concerns because of other evidence of alcohol or drug use.

27. These positive test results do not include external certification drug tests, which show that between October 2010 and December 2016, **187** (or approximately 2.4% of) external applicants to safety-sensitive positions – individuals who knew they would be subjected to drug testing – returned positive urinalysis tests for drugs.[42] In addition, between October 2010 and the end of 2016, at least **15** transit operators (that the TTC is aware of) were charged with impaired driving by police.[43]

28. Further, the number of positive tests does not reflect the true number of employees who may have been impaired at work. For example, one incident raised by John DiNino,[44] a member of the Union's Executive Board, which occurred on the Sunday of the Labour Day long weekend in 2016, involved a reasonable cause test for alcohol, based on a foreperson smelling alcohol on the employee's breath.[45] The employee's blood alcohol level was above zero but below 0.02 – a negative test result – six hours after the employee had reported for duty.[46] Although the Union refused to answer whether or not the employee admitted to Mr. DiNino to having consumed alcohol,[47] Mr. DiNino was aware that the employee "had indicated to his supervisor or whoever was in charge that day that he was concerned that he may not pass the test".[48] The employee subsequently disclosed that he had a substance use problem and, despite the negative test, the employee agreed to a 10-day suspension without pay, and agreed to comply with a recommended

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[42] Bartz Affidavit at paras 74-75.
[43] Byford Affidavit, RAR Vol. I, Tab 2, at para 45; Bartz Affidavit, RAR Vol. II, Tab 4, at paras 60(c).
[44] DiNino Affidavit at para 16.
[45] Cross-Examination of John DiNino, February 9, 2017 at p 16 line 18 to p. 18 line 24; p. 19 line 16-20
[46] Cross-Examination of John DiNino, February 9, 2017 at p 18 line 25 to p. 19 line 10; p. 22 line 10-1; p. 22 line 24 to p. 23 line 5.
[47] Cross-Examination of John DiNino, February 9, 2017 at p 20 line 11 to p. 22 line 7.
[48] Cross-Examination of John DiNino, February 9, 2017 at p 63 line 16-21.

treatment program as a condition of his return to work, set out in a Last Chance Agreement between the employee, Mr. DiNino (on behalf of the Union) and the TTC.[49]

29. In another incident in December 2015, a bus made contact with a pedestrian, who was injured and had to be transported to hospital. As described by Mr. Byford, although the operator "initially tested positive for Cannabinoids, related to the undisclosed use of medical marijuana," the result was changed to "negative", after the employee participated in the MRO review, "which found he had a legitimate prescription for medical marijuana, but had failed to disclose it to the TTC."[50]

30. Similar to the incident described by Mr. DiNino, this test result would be considered "negative", and would not be included as "positive" in the TTC statistics, despite the fact that these employees were likely impaired at work.

ii. Other Drug and Alcohol-Related Incidents

31. Between October 2010 and December 2016, the TTC received **45** additional reports, or obtained evidence, that TTC employees were using (and/or trafficking) drugs or alcohol while at work.[51] This includes TTC employees being investigated or charged by police for drug-related offences,[52] TTC employees – most of whom were in safety-sensitive positions – using and/or trafficking drugs,[53] such as marijuana,[54] cocaine and/or heroin,[55]and prescription drugs, such as

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[49] Exhibit 1 to the Cross-Examination of John DiNino, February 9, 2017.
[50] Byford affidavit, RAR Vol. I, Tab 2, at para 58(c).
[51] Russell Affidavit at paras 17(a)-(d), 18(a)-(d), 19(a)-(f), 22(a)-(t), 23, 24(b)-(d), (f)-(g). See also: Exhibit D at p. 2054 of the Respondent's Record; Exhibit E at p. 2061, 2063 of the Respondent's Record. This number does not include any incidents referenced in the Bartz Affidavit.
[52] See e.g., Russell Affidavit at paras 17(a)-17(c), 17(e).
[53] See e.g., Russell Affidavit at paras 18(b), 19(d), 19(e), 22(e), 22(f), 22(p), 22(r).
[54] See, e.g., Russell Affidavit at paras 18(c), 18(d), 18(e). 19(a), 19(b), 19(c), 20, 21, 22(a), 22(b), 22(c), 22(g), 22(i), 22(j), 22(k), 22(m), 22(n), 22(q), 22(s), 22(t), 22(u), 22(v).
[55] Russell Affidavit at paras 18(a), 22(l), 22(o),

OxyContin and Percocet,[56] and TTC employees consuming alcohol or being impaired from alcohol at work.[57]

32. Based on the reports received by TTC investigators prior to, and after, the Fitness for Duty Policy being implemented, Staff Sergeant Russell concluded as follows:

> Based on my 25 years of experience at the TTC and the knowledge I have accumulated during this time, it is evident to me that there is a culture of drug and alcohol use at the TTC, particularly in certain large complexes and in TTC yards (i.e., large areas on TTC property where buses, streetcars, subway cars and other vehicles are stored, cleaned and serviced when not in operation). Given the difficulties in detecting drug and alcohol-related Misconduct, and the difficulties in corroborating allegations of such Misconduct, I believe that many cases of drug and alcohol-related activity among TTC employees at work go undetected and unverified.[58] [Emphasis added.]

33. The TTC cannot ignore the unacceptable safety risks posed to TTC employees, customers and members of the public, by the numerous reports of drug and/or alcohol-related activity among TTC employees while at work, or the large number of instances where recent drug and/or alcohol use shortly before reporting to work has been confirmed. As noted by Staff Sergeant Russell, it is likely that many instances of drug and alcohol related activity go undetected, particularly given the limited circumstances in which drug and alcohol testing currently take place

c) Evidence of substance use disorders among TTC employees

34. Employees who suffer from substance use disorders are also a significant concern to the TTC. As noted by Mr. Byford, "the TTC…recognizes that alcohol and drug dependency is an illness that can be treated and that early intervention greatly improves the probability of lasting recovery."[59] The TTC encourages its employees to get the help they need for their own health, as well as for the well-being of those around them. For many years, the TTC has provided an

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[56] Russell Affidavit at para 19(f), 22(d),
[57] Russell Affidavit at paras 23, 24(a) to 24(g).
[58] Russell Affidavit, Vol IV, Tab 5 at para 12. This view is shared by
[59] Byford Affidavit at para 63.

employee assistance program ("**EFAP**") which provides support to employees from any number of issues in their personal lives, on an anonymous basis."[60]

35. TTC employees may be referred for assessment by a Substance Abuse Professional ("**SAP**") after voluntarily declaring a substance use problem (which often occurs after an employee has tested positive for alcohol or drugs).[61] The SAP process has been in place since the Fitness for Duty Policy was implemented in 2010.[62] The role of the SAP (in the TTC's case, a physician specializing in addiction medicine, qualified to make formal diagnoses[63]) is to conduct a clinical evaluation to determine whether an individual requires professional assistance to address substance use issues, and to make recommendations regarding appropriate treatment or education programs.[64] In her Affidavit, Megan MacRae, Director of Employee Relations at the TTC, states as follows:

> The SAP process facilitates the treatment and return to work of employees who have substance use disorders. The SAP process is thus an essential component in facilitating the accommodation of employees with substances use disorders.[65]

36. Employees with substance use disorders create serious safety risks to TTC employees, customers and members of the public. In particular, the uncontradicted and unchallenged evidence from two of the TTC's experts, Dr. Melissa Snider-Adler and Dr. Mace Beckson, both of whom are physicians specializing in addiction medicine, and both of whom have extensive experience

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[60] Byford Affidavit at para 63.
[61] Affidavit of Paul Gardiner, sworn January 18, 2017, RAR Vol IV, Tab 7 [*Gardiner Affidavit*] at paras 7-8.
[62] MacRae Affidavit at para 98.
[63] Gardiner Affidavit, Vol IV, Tab 7 at paras 17-18.
[64] Gardiner Affidavit, Vol IV, Tab 7 at para 6.
[65] MacRae Affidavit at para 96.

with workplace drug and alcohol testing,[66] is that employees with substance use disorders are very likely to report to work while impaired.[67]

37. As stated by Dr. Snider-Adler:

> ... a person with a substance use disorder will have significant impairments in their ability to exert self-control; this impairment in self-control is the hallmark of a substance use disorder. It is because of this that many people will continue to use substances even when it is hazardous. This is part and parcel of the disease. To explain this further, it is important to understand the physiological effects on the brain of substance use.
>
> Brain imaging of people with a substance use disorder show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behaviour control (Fowler et al 2007). These changes can alter the way the brain works and may help explain the compulsive and destructive behaviours of a substance use disorder, for example use while at work.[68] [emphasis added]

38. Dr. Beckson also addresses this issue. Based on Dr. Beckson's extensive experience and expertise in treating individuals with substance use disorders, Dr. Beckson is of the opinion that while "[n]ot all employees who test positive in a random testing [program] have an addiction...most do; and addicted employees, because of their ongoing abuse of substances, predictably report to work in varying states of impairment."[69]

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[66] Dr. Snider-Adler is a physician specializing in addiction medicine and certified as a Medical Review Officer through the American Association of Medical Review Officers. She is the Chief Medical Review Officer at DriverCheck Inc. and also runs an independent clinical practice in addiction medicine: Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 1, 2 and 4. Dr Beckson is a psychiatrist specializing in forensic psychiatry and addiction medicine. He is currently a full-time Health Sciences Clinical Professor of Psychiatry at the University of California, Los Angeles and has extensive experience in the field of substance use and abuse, substance abuse treatment programs, including drug testing programs, and addiction psychiatry. Dr. Beckson has evaluated and treated thousands of individuals with alcohol and drug problems and addictions and has provided consultation to employers on the design of alcohol and drug programs, and provided substance abuse assessments, recommendations and addiction treatment for employees: Affidavit of Dr. Mace Beckson, sworn January 19, 2017, RAR Vol. IV, Tab 9 [*Beckson Affidavit*] at paras 1 to 3.

[67] Snider-Adler affidavit at para 42: "The likelihood that an employee with a substance use disorder will report to work impaired from a substance is high." See also Exhibit C to the Snider-Adler Affidavit at 2254-2256.

[68] Exhibit C to the Snider-Adler Affidavit at 2254-2255.

[69] Beckson Affidavit at para 23.

39. The question then becomes whether or not there are TTC employees who struggle with substance use disorders, such that they pose this risk. The clear answer is that there are and they do.

40. First, simply extrapolating from statistics relating to Ontario's population in general, it is likely that approximately **10%** of TTC employees "have been diagnosed and/or have self-identified as having substance use disorders."[70] Similarly, cannabis use is "particularly prevalent" among Canadians over the age of 15, with approximately 27% of those who admitted to using cannabis in the past 3 months, reporting that they did so every day.[71] Assuming that the TTC's workforce is representative of the general population, it is clear that most TTC employees with substance use disorders have yet to self-disclose.[72]

41. Similarly, Dr. Beckson notes in his affidavit:

> Alcohol and drug use is prevalent in the workforce, including safety-sensitive workplaces that have elevated risk of injuries and fatalities and where there is a particular concern about the impairing effects of alcohol and drugs. This is supported by numerous surveys and studies in Canada, the United States, and Australia and cited in my Report at p. 28. The Alberta Alcohol and Drug Abuse Commission (2002) conducted a survey of working adults, of whom 5% reported very heavy drinking; 4% reported drinking within 4 hours of coming to work; and 11% reported using alcohol while at work. In addition, 10% of workers reported using illicit drugs in the past year (marijuana was the most common); 1% reported using illicit drugs while at work; and 2% reported using illicit drugs within four hours prior to coming to work.
>
> *The Alberta Survey of Addictive Behaviours and Mental health in the Workforce: 2009* (Thompson et al., 2011) found that nearly one in ten surveyed workers perceived the impact of alcohol and drug use on work performance to be "extremely serious" and 14.3 percent perceived there to be a "very good chance" of injury to themselves or coworkers.
>
> In a survey study in the United States, Frone (2012) found that during the preceding 12 months, 23% of the workforce reported exposure to a co-worker who used or was impaired

[70] Snider-Adler affidavit at para 41.
[71] Snider-Adler affidavit at para 44; Exhibit C, at 2250-2252, 2255. See also "A Framework for the legalization and regulation of Cannabis in Canada" (2016) at Exhibit C to the Beckson Affidavit, at 2552-2553.
[72] MacRae Affdiavit, RAR Vol. II, Tab 3 at para 153.

> by alcohol during the workday and 12.65% of the workforce reported exposure to a co-worker who used or was impaired by an illicit drug during the workday.[73]

42. The TTC's statistics relating to individuals applying for safety-sensitive work at the TTC also indicates substance use issues among potential TTC employees. These candidates for safety-sensitive positions – individuals who are informed in advance that they will be tested for drugs – regularly test positive for drugs via urinalysis as part of the application process.[74] In 2010 and 2011, **3.6%** and **3.5%** of applicants tested positive for drugs, respectively. After decreasing to **1.3%** in 2012, the rate of positive tests among applicants for safety-sensitive positions rose again to **2%** in 2013, **2.5%** in 2014, **2.1%** in 2015, and, most recently, **2.6%** in 2016.[75]

43. In addition, the TTC's statistics regarding employees who are diagnosed with substance use disorders is of significant concern. According to data collected by Integrated Work Solutions ("**IWS**"), the company retained by the TTC to conduct SAP assessments, the average annual rate of diagnosis of substance use disorders among employees in Canada who are referred to IWS for assessment, is between 35% and 50%.[76] Since 2011, however, when the TTC began referring employees to SAP assessments, the rate of assessments resulting in diagnoses of substance use disorders has ranged from between **83% to 94%**.[77] This means that the vast majority of TTC employees who have been referred to the SAP have substance use disorders. Most of those employees were referred to the SAP because they voluntarily disclosed a substance use problem after violating the Fitness for Duty Policy, such as by having a positive test result or refusing to test.

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[73] Beckson Affidavit at paras 59-61.
[74] In total, since February 2010, 187 (an average of 2.4%) applicants to safety-sensitive positions test positive for drugs: Bartz Affidavit at para 74.
[75] Bartz Affidavit at paras 74-76.
[76] Gardiner Affidavit, Vol IV, Tab 7 at para 22. This data is based on the clients of IWS, which consists of Canadian-based employers from various industries, including mining, construction, oil, and energy and gas industries. (Gardiner Affidavit, Vol IV, Tab 7 at para 3.)
[77] Gardiner Affidavit, Vol IV, Tab 7 at paras 21-22.

44. It is reasonably expected that the introduction of random testing will encourage more employees with substance use disorders to self-declare before being detected by a positive test result. As noted by Dr. Beckson:

> Employees with substance abuse problems who otherwise might not request treatment may do so because of the perceived inevitability of testing positive on a random test. Other addicted employees may not be so moved, but then test positive on a random test and consequently are mandated into treatment to preserve their employment. Research demonstrates that coerced treatment is as successful as or even more successful than voluntary treatment for substance abuse. In short, substance abuse rehabilitation is an important part of the workplace alcohol and drug policy, in the greater context of employee well-being. The objective of workplace drug testing is not apprehension and punishment, but rather deterrence, detection, and rehabilitation of employees with substance abuse problems. The theoretical ultimate achievement of a random workplace testing program would be a random test positive rate of zero.[78] [Emphasis added.]

C. Safety Measures

45. As Mr. Byford stated in his affidavit, "[t]he TTC must, to the extent reasonably possible, take steps to ensure the safety of its employees, its customers, pedestrians and other road users." In addition, "[i]ndividuals in positions of authority in safety-sensitive workplaces, such as executives, management and supervisors at the TTC, have an obligation to exercise due diligence…", and to take all reasonable steps to identify and mitigate risks to safety.[79] Mr. Byford also noted:

> I have a positive obligation to take reasonable steps to remedy the deficiency, and in my view, others at the TTC share in this obligation. In addition if, based on my experience or knowledge of safety initiatives at other transit systems, I am aware of programs or practices that the TTC can adopt that might improve its safety, it is my duty to consider them and to implement them if feasible to do so.[80]

46. Mr. Byford also acknowledges the TTC's obligations, and his own legal obligations regarding safety under the *Occupational Health and Safety Act* and Canada's *Criminal Code*:

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[78] Beckson Report, Exhibit A to the Beckson Affidavit, RAR Vol IV, Tab 9A at 2477.
[79] Byford Affidavit at paras 29-30.
[80] Byford Affidavit at para 30.

> I am also very aware that in my role as TTC CEO (as was the case in my job as Operations and Safety Director at South Eastern), I may be held legally responsible for safety failures or lack of due diligence. In particular, the TTC's safety obligations are underscored by legislation, such as the *Occupational Health and Safety Act*, which requires employers to take reasonable precautions to ensure the health and safety of employees at or near our workplace – which, in the TTC's case is literally everywhere our vehicles travel.
>
> In addition, due to the nature of TTC operations, which includes, for example, driving buses on public roads, the TTC must not be wilfully blind and/or negligent with respect to possible criminal offences taking place at the TTC. Canada's *Criminal Code* imposes a legal duty on everyone who directs the work of others to take reasonable steps to ensure the safety of workers and the public. Senior officers, organizations and representatives can be found criminally liable for negligence for failing to take steps to prevent bodily harm arising from work under their direction…[81]

D. Fitness for Duty: 2008 to 2010

a) Approval of the Fitness for Duty Policy

47. In 2008, the TTC proposed the implementation of the Fitness for Duty Policy, which included a drug and alcohol testing component. The Report to the Board stated, *inter alia*:

> The safety of employees and the public has been referred to as a sacred trust of the TTC.
>
> The TTC is charged with ensuring a safe workplace and the safe operation of a public transit system. The TTC needs to take all reasonable steps to ensure in particular that it does not place any responsibility for the movement and maintenance of its vehicles in the hands of employees who are not fit for duty. There could be serious and even fatal repercussions resulting from one employee performing his or her duties under the influence of alcohol and/or other drugs.
>
> While there are TTC policies that require employees to be fit for duty, there are currently no provisions allowing for alcohol or drug testing of employees. A number of alcohol and/or drug related incidents involving TTC employees have occurred in the last three years. Of particular note, to date in 2008 there have been four incidents of operators found to be under the influence of alcohol while in revenue operation. These incidents and the 2007 Lytton Subway Work Car Fatality triggered an extensive review into how the TTC currently addresses employee fitness for duty.
>
> Staff concluded that while improvements, changes, and modifications to the existing system can assist the TTC in addressing employee fitness for duty issues, these mechanisms have inherent limitations that do not fully assist the TTC in reaching its goal of helping its employees and in discouraging employees from performing their duties

[81] Byford Affidavit at paras 31-32. See also *R v Kazenelson*, 2016 ONSC 25, which is referred to in Mr Byford's affidavit at para 33. In that case, MacDonnell J. sentenced an employer to three and a half years imprisonment for criminal negligence that resulted in the deaths of four workers.

> while under the effects of alcohol and/or other drugs. The number of employee alcohol and drug related incidents strongly suggest that the TTC's current approach is deficient, not sufficiently proactive, and lacks adequate deterrence elements.[82] [Emphasis added.]
>
> [...]
>
> The main purpose of the testing provisions is not to "catch" employees, rather they are meant to deter them from dysfunctional behaviour which would pose risk in the workplace. The proposed Policy will impose sanctions against those who are identified as possessing, distributing, consuming or being under the influence of alcohol and/or other drugs on the job. Except in very limited circumstances, (such as a post treatment program or a post policy violation agreement), there is nothing in the proposed Policy that will prevent employees from engaging in alcohol and/or drug use on their own personal time as long as they report fit for duty.
>
> Testing if implemented in a proper and respectful way can be done so as to minimize its impact on a person's privacy concerns and will optimize safety in the workplace. A safe workplace is to the benefit of all employees and the public.
>
> TTC staff strongly believes that the current TTC policies related to employees' fitness for duty require the addition of alcohol and drug testing to improve employee assistance, early detection and treatment, and deterrence. The proposed Policy will find the appropriate balance between privacy concerns, prevention initiatives and deterrence. Each aspect of the proposed Policy will be designed to reinforce each other and proactively identify and deter risks thereby improving safety in the workplace and for the public.[83] [Emphasis added.]

48. TTC staff's proposed policy also included random drug and alcohol testing. This was based on evidence of the deterrent effect of random testing:

> The random testing portion of the TTC's proposed Policy will fully supports [*sic*] an approach involving prevention and assistance, but recognizes the limitations of depending solely on voluntary processes to proactively ensure workplace safety. Because of the highly safety-sensitive nature of TTC operations, the proposed Policy needs testing as deterrence to alcohol and drug use and abuse that impacts the workplace. The proposed Policy from a deterrence perspective will set clear rules, provide objective investigation tools and will clearly set out the consequences of a violation.[84]

49. In conclusion TTC staff stated:

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[82] Toronto Transit Commission Report No., September 18, 2008, Affidavit of Cliff Piggott, sworn January 6, 2017, in Application Record of the Applicants ("**ARA**"), Vol. 2, Tab 3, Exhibit D at pp 379.
[83] Toronto Transit Commission Report No., September 18, 2008, Affidavit of Cliff Piggott, sworn January 6, 2017, in Application Record of the Applicants, Vol. 2, Tab 3, Exhibit D at pp 379-381.
[84] TTC September 2008 Report at pp 20-22, AR Vol II, Tab D at 398-400.

> Testing is an appropriate response to the body of evidence that demonstrates a considerable number of significant workplace incidents involving alcohol and drugs in recent years and fairly balances the need for safety with privacy interests. The TTC is proposing minimally intrusive testing procedures that will help to ensure the safest possible environment for employees and the public at large. Any reasonable measures that can prevent accidents and injuries due to alcohol or drug abuse in the workplace should be adopted. One serious accident or one fatality arising from alcohol or drug abuse in the workplace is one too many.[85]

b) Drug and alcohol testing under the Policy: who it applies to

50. The Board approved the Fitness for Duty Policy, insofar as it included alcohol testing (via breathalyzer) and drug testing (via oral fluid) of employees in safety-sensitive, specified management and/or designated executive positions (collectively, "**Designated Employees**" or "**Designated Positions**"), where there is reasonable cause to believe an employee is impaired ("**Reasonable Cause**") and after a significant work-related incident (i.e., fatality, serious personal injury to any individual, a critical injury, an environmental incident with significant implications and/or significant loss or damage to property, equipment or vehicles) ("**Post-Incident**").

51. "Safety-sensitive" positions are "those in which individuals have a key and direct role in an operation where performance impacted by alcohol or drug use could result in a significant incident or failure to adequately respond to a significant incident, and could affect the health, safety or security of the employee, other persons, property or the environment. Safety-sensitive positions include employees who operate and/or maintain TTC vehicles, signal technicians, those charged with maintaining tracks and systems, frontline workers who are relied on in case of emergency, and employees who may be required to perform safety-sensitive duties from time to time."[86]

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[85] TTC September 2008 Report at pp 23, AR Vol II, Tab D at 401.
[86] Byford Affidavit RAR Vol. 1, Tab 1 at para 39.

52. "Specified management" positions are considered risk-sensitive because individuals in those positions have significant involvement in decisions or actions which could directly affect safe operations, and must respond to significant incidents. Staff Sergeant Mark Russell is subject to testing under this category.[87] "Designated executive" positions are those held by upper level management, such as Managers and certain Department Heads.[88] The TTC's CEO, Mr. Byford, and Director of Employee Relations, Ms. MacRae, are both subject to testing under this category.[89]

53. In addition, the Board approved alcohol testing (via breathalyzer) and drug testing (via urinalysis) for applicants to safety-sensitive positions at the TTC. Finally, the Board approved unannounced testing for drugs (via urinalysis) and alcohol (via breathalyzer) of employees who are returning to work after violating the Policy or after receiving treatment for drug or alcohol use.[90]

54. The Board did not approve the inclusion of random testing in 2008, but the TTC expressly reserved its right to introduce random testing for Designated Employees.[91]

c) How Fitness for Duty testing works

55. Since October 2010, Designated Employees at the TTC have been subject to drug and alcohol testing in the circumstances discussed in paragraph 50 (collectively, "**Fitness for Duty Testing**"). In addition, certification testing (by urinalysis) has been conducted on prospective safety-sensitive employees, and employees seeking to transfer into Designated Positions.

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[87] Exhibit H to Byford Affidavit at 194.
[88] Byford Affidavit RAR Vol. 1, Tab 1 at para 38, footnotes 1 and 2.
[89] Exhibit H to Byford Affidavit at 171 to 195.
[90] Byford Affidavit RAR Vol. 1, Tab 1 at paras 37-41. MacRae Affidavit at para 49.
[91] Byford Affidavit RAR Vol. 1, Tab 1 at para 42. MacRae Affidavit at para 15.

56. Between February 1, 2010 (when testing of external applicants to safety-sensitive positions began) and December 31, 2016, the TTC conducted 11,512 alcohol or drug tests (certification, reasonable cause, post-incident and aftercare testing).[92]

57. In accordance with the Policy, a positive alcohol test is one in which the employee's blood alcohol level is at or above 0.04. Individuals with a BAC level between 0.02 and 0.039 will have a "negative" alcohol test, but will be removed from duty for safety reasons. For employees subject to unannounced "return to duty" testing following a policy violation and/or completion of treatment, an alcohol test with a BAC level at 0.02 or higher constitutes a positive test.[93]

58. As discussed below, a positive oral fluid drug test is one in which the laboratory analysis determines that the sample tested contains a drug (or drug metabolite) at or above the specified cut-off level, and, following a review process conducted by the Medical Review Officer, is reported as positive by the Medical Review Officer to the TTC's Program Administrator. The same applies to a positive urinalysis drug test result.

59. A positive test result or a refusal to test, which includes tampering with a test, constitutes a violation of the Fitness for Duty Policy.[94]

iii. The Collection Process

60. The TTC employs a third party, DriverCheck Inc., to collect breath, oral fluid and urine samples, as appropriate.[95] DriverCheck provides alcohol and drug testing services to more than

[92] Bartz Affidavit at para 69-70. Testing of Designated Employees began on October 17, 2010.
[93] MacRae Affidavit at para 61; Exhibit F to MacRae Affidavit at 620.
[94] Exhibit H to Byford Affidavit, RAR Vol. I, Tab H at 161 to 162; Exhibit F to MacRae Affidavit, RAR Vol. II, Tab F at 623-624.
[95] Snider-Adler Affidavit at paras 8, 9-11.

5,000 employers in Canada,[96] which includes random services to over 3,600 employers.[97] In 2016 alone, DriverCheck collected samples for 2,079 oral fluid drug tests.[98] As noted by Dr. Snider-Adler in her expert report, the largest random pool is comprised of 30,131 drivers who are subject to testing under DOT regulations.[99]

61. Alcohol tests are administered by breathalyzer, and oral fluid tests are administered via placement of an absorbent pad – like a Q-tip – inside the cheek, for approximately 5 minutes.[100] These are the only methods of testing that will be used for random testing, both of which are non-invasive, relatively quick, painless and minimally intrusive.[101] The administration of breathalyzer tests and the collection of oral fluid samples for drug testing will be conducted by qualified and trained technicians from DriverCheck.[102]

62. Alcohol tests are administered using a calibrated breathalyzer approved by the U.S. Department of Transportation. The breathalyzer test provides a reading of the individual's blood alcohol concentration ("BAC") level. An employee will be asked to take a second breathalyzer test if the initial reading indicates a BAC level of 0.02 or higher.[103]

63. DriverCheck collects two oral fluid samples, referred to as "split samples", thereby providing the employee with "an opportunity to challenge the results of the laboratory analytical process by requiring a second analysis by the laboratory."[104]

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[96] Snider-Adler Affidavit at para 2.
[97] Exhibit C to Snider-Adler Affidavit at 2242.
[98] Snider-Adler Affidavit at para 15.
[99] Exhibit C to Snider-Adler Affidavit at 2242.
[100] Snider-Adler Affidavit at para 9, 12. Urinalysis is also conducted for certification testing and post-treatment/post-violation monitoring. See also MacRae Affidavit, RAR Vol II, Tab 3, Exhibit F at 619-621.
[101] MacRae affidavit at paras 51, 66. Snider-Adler affidavit at para 12.
[102] Snider-Adler Affidavit at para 10.
[103] MacRae Affidavit at paras 60, 72.
[104] Snider-Adler Affidavit at para 18. See also MacRae Affidavit, RAR Vol II, Tab 3, Exhibit F at 620-621.

64. Samples collected by DriverCheck are sealed, signed by the donor, identified by serial number and sent to the laboratory for analysis.[105]

iv. Privacy and confidentiality during the collection process

65. Dr. Snider-Adler's uncontradicted evidence is that "[w]hether it is oral fluid or urine collection, or the administration of a breathalyzer test, our technicians must ensure that the collection is performed in a manner that respects the individual's privacy and confidentiality."[106] With respect to the collection process, John DiNino, a member of the Union's Executive Board who has attended between 15 and 20 instances of drug and alcohol testing of TTC employees (as employees can request Union representation during the process), stated that testing usually takes place "in a secluded area", with a supervisor and union representative present,[107] and, taking into account the time required for the collector's explanation of the process and the completion of paperwork, the testing usually takes 30 minutes in total.[108] In addition, as discussed in greater detail below, serial numbers rather than names are used when sending samples to the laboratory, laboratory results are reported via encrypted website, and negative samples are destroyed within two weeks.[109]

v. The Laboratory Analysis

66. Laboratory analysis of the samples collected by DriverCheck is conducted by Dynacare, an independent laboratory based in London, Ontario.[110] Dynacare is certified by the Substance Abuse and Mental Health Services Administration ("**SAMHSA**") of the US Department of Health

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[105] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 20-21.
[106] Snider-Adler Affidavit at para 16.
[107] Cross-Examination of John DiNino, February 9, 2017 at p. 5, lines 19-p. 6 line 7.
[108] Cross-Examination of John DiNino, February 9, 2017 at p 14, line 21 to 15 line 11.
[109] Ptolemy Affidavit at paras 17, 20 and 23.
[110] Ptolemy Affidavit at paras 6-7, 9. Snider-Adler Affidavit at paras 20-21. See also MacRae Affidavit, RAR Vol II, Tab 3, Exhibit F at 622-623.

and Human Services and the US Department of Transportation.[111] The laboratory analytical services of oral fluid specimens for workplace clients are provided in compliance with the US federal government standards set out in the US Federal Register, Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs".[112] DriverCheck and Dynacare are independent entities.[113]

67. Dynacare is "one of Canada's largest and most respected providers of laboratory services and solutions", providing laboratory analytical drug testing services to many public and private clients across Canada in a number of industries (including transportation, oil and gas, mining, energy and environmental industries), and performing "more than 50 million tests each year".[114]

68. The samples received from DriverCheck are identified only by serial numbers. Dynacare does not receive any names or other identifying information about the donor.[115]

69. Dynacare conducts an initial test of the oral fluid (or urine) specimen for the presence of specified drugs and metabolites. If the initial test is "non-negative" for the presence of a drug (or drugs), the specimen is subject to a second "confirmation test", to confirm the presence and concentration level of the drug(s).[116]

70. Once the testing process is complete, Dynacare electronically reports the results (i.e., whether a drug was detected and, if so, the concentration level) directly to DriverCheck "through a

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[111] Ptolemy Affidavit at para 14.
[112] Ptolemy Affidavit at para 15. A copy of these Guidelines can be found at Exhibit H to the Kadehjian Affidavit, RAR Vol. V, Tab 10 at 2826.
[113] Ptolemy Affidavit at para 8; Snider-Adler Affidavit at para 20.
[114] Ptolemy Affidavit at para 13, Exhibit B at 2196.
[115] Ptolemy Affidavit, RAR Vol. IV, Tab 6 at paras 16-17.
[116] Ptolemy Affidavit, RAR Vol IV, Tab 6 at paras 18-19.

secured and encrypted website".[117] The information provided by Dynacare to DriverCheck consists of whether the lab identified the presence of a drug or drug metabolite in a specimen and, if so, the concentration level of the drug or drug metabolite.[118]

71. If the laboratory analysis determines that a urine or oral fluid specimen did not contain the presence of a drug or drug metabolite, the urine or oral fluid specimen is retained by Dynacare in secured refrigerated storage and disposed of as biohazard waste after one and two weeks of storage, respectively. If the lab identified the presence of a drug or drug metabolite in a urine or oral fluid specimen, the specimen is retained for one year in secured frozen storage and then discarded as biohazard waste.[119]

d) The Medical Review Officer

72. In addition to rigorous collection and laboratory standards and procedures, a number of additional safeguards are in place to ensure that a non-negative sample is not improperly reported as a positive test to the TTC.[120] This includes a review by an independent doctor and the opportunity for re-analysis of the sample.

73. If the laboratory analysis indicates that an individual's oral fluid specimen contains drug concentrations at or above the specified cut-off levels, a review process will then be conducted by a Medical Review Officer ("**MRO**") from DriverCheck.[121]

74. An MRO is "a licensed and trained physician responsible for receiving and interpreting the information produced by the laboratory analysis of...an oral fluid analysis or urinalysis", and is

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[117] Ptolemy Affidavit, RAR Vol IV, Tab 6 at para 20.
[118] Ptolemy Affidavit, RAR Vol. IV, Tab 6 at para 22.
[119] Ptolemy Affidavit, RAR Vol. IV, Tab 6 at para 23.
[120] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 26, 28.
[121] Drug and Alcohol Testing Procedures, MacRae Affidavit, Tab 3, Vol II, Exhibit F at 623-624.

specifically certified as an MRO.[122] DriverCheck provides the MRO services for the TTC. Dr. Snider-Adler, the Chief Medical Review Officer at DriverCheck, oversees this service.[123]

75. Upon receiving a report of a non-negative result from the laboratory, in accordance with the Fitness for Duty Policy the MRO will endeavour to contact the employee directly to discuss the laboratory results prior to determining whether or not the result should be reported to the TTC as positive or negative (or negative with a safety-sensitive flag, discussed below). [124] As noted by Dr. Snider-Adler:

> It is the MRO's responsibility to determine if there are any legitimate medical explanations for the individual's laboratory confirmed non-negative result, including for example, whether the result is due to the legitimate usage of medications."[125]

76. If the MRO is satisfied that a laboratory result was due to a legitimate explanation, such as an employee's necessary use of prescription medications where the laboratory result indicates the medication use was consistent with the prescribed dosage, the MRO has the discretion to report the test result as "negative" to the TTC's Program Administrator.[126] In appropriate cases, if the MRO is satisfied that a laboratory result was due to a legitimate explanation but believes there are potential safety risks associated with the individual's return to safety-sensitive duties, the MRO has the discretion to include a safety-sensitive flag with the negative result.[127]

77. If the MRO does not conclude that there is a legitimate, alternative explanation for the laboratory reported positive, he or she will report the result as "positive" to the TTC.

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[122] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at para 3.
[123] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 2, 8.
[124] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 22-25.
[125] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at para 25.
[126] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at paras 25-26.
[127] MacRae Affidavit, RAR Vol. II, Tab 3 at para 92

78. It is also during the MRO's discussion with the employee that the employee will have an opportunity to challenge the laboratory result by requiring analysis of the second specimen from the split sample, should the employee wish to do so.[128] The use of split samples is yet another important way to ensure that the test result is accurate and appropriate.

79. In the TTC's experience so far, it has been rare for an employee to challenge the validity of a drug test result by requesting a re-analysis.[129]

e) Consequences of a positive drug or alcohol test result

80. A reported positive test is treated as a Policy violation by the TTC. There are a number of possible outcomes if an employee violates the Fitness for Duty Policy, which include discipline, referral to a SAP for assessment (as discussed above at paragraph 35), providing accommodation if applicable, facilitating the employee's return to work and determining the appropriate conditions of the employee's return to work.[130]

81. As Mr. Byford states in his evidence, "The TTC takes fitness for duty requirements very seriously", and "[g]iven the consequences, the TTC simply cannot tolerate employees reporting for work when there is a likelihood that they are impaired by the effects of drugs and/or alcohol."[131] Accordingly, an employee who violates the Fitness for Duty Policy may be subject to discipline, up to and including dismissal.[132]

82. In determining the appropriate course of action, the TTC considers the specific facts of each situation. This includes, for example, the employee's prior disciplinary record, if any,

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[128] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at para 27.
[129] Exhibit D to Bartz Affidavit.
[130] MacRae Affidavit, para 102.
[131] Byford affidavit at para 62.
[132] Byford Affidavit at para 62; MacRae affidavit at paras 100-102.

whether the employee was subject to a Last Chance Agreement or other agreed upon conditions of continued employment, and whether the TTC's duty to accommodate under the *Human Rights Code* is engaged. If accommodation is required, the relevant factors include the employee's medical restrictions, the appropriate accommodation arrangements, and the amount, duration and frequency of any accommodation previously provided to the employee.[133]

83. If an employee declares that he or she has a substance use problem, the employee may be referred to a SAP for an assessment. The main purpose of the SAP assessment is to determine whether the individual meets the diagnostic criteria for a substance use disorder and, if so, the recommended treatment for the employee.[134] In most cases where an employee tests positive for drugs or alcohol and discloses a substance use problem which is confirmed by the SAP, he or she will be given the opportunity to enter into a Last Chance Agreement, following which he or she will be reinstated to his or her employment. The Last Chance Agreement provides for unannounced drug and alcohol testing, usually for a two-year period. [135]

84. If an employee believes he or she has been subject to unjust discipline or dismissal, recourse may be sought through the grievance arbitration procedure under the Collective Agreement, where all of the relevant evidence can be weighed and assessed.[136]

85. The employee will have access to union representation throughout the disciplinary process and the grievance process, should either be initiated.

86. It is rare for an employee to challenge the validity of a drug test by requesting a re-analysis. As discussed above, the majority of TTC employees who have violated the Policy ultimately

[133] MacRae Affidavit at para 103.
[134] MacRae Affidavit, at para 95.
[135] MacRae Affidavit at para 150(b); Cross-Examination of John DiNino at p. 12 line 11 to 13 line 17.
[136] MacRae Affidavit at paras 107-108.

declared a substance use problem and have been reinstated pursuant to Last Chance Agreements, similar to that in place with the employee who died in the Lytton Subway workcar fatality, and agreed to for the employee described in Mr. DiNino's cross-examination.[137] It is also consistent with Mr. DiNino's evidence on cross-examination that he had accompanied between 15 and 20 employees for testing, the majority of whom tested positive for either drugs or alcohol – most for drugs – and that all employees who tested positive declared a substance use disorder and were reinstated on a Last Chance Agreement.[138]

87. While the Union raises the spectre that those testing positive will be dismissed, in fact most are not. As Megan MacRae, Director of Employee Relations at the TTC, notes:

(a) Between 2014 and 2016, there were 55 disciplinary incidents associated with Policy violations and for which Step 3 grievances were filed.

(b) Of the 55 incidents, 43 (78%) resulted in the employee's reinstatement to employment. Of the 43 reinstatements, 30 (70%) involved employees who declared having a substance use disorder, with the remaining 13 involving employees who did not declare a substance use disorder.

(c) Furthermore, of the 55 incidents, 37 incidents (67%) involved employees who declared having a substance use disorder. In the majority of these incidents, the self-declarations were made for the first time during the grievance process.

(d) In all or almost all instances involving self-declarations, it was subsequently confirmed that the individual did in fact meet the diagnostic criteria for a substance use disorder. In most cases, the confirmation was obtained following the employee's participation in a SAP assessment. For employees with diagnosed substance use disorders, the TTC reviewed the specific accommodation requirements of the employee and also considered any previous accommodation provided to the employee. In almost all of the incidents requiring accommodation, the TTC offered to reinstate the employee to employment, subject to conditions such as the completion of any recommended treatment programs and submitting to unannounced, periodic testing for a specified period of time following the individual's return to work, all of which is intended to benefit the employee's recovery.

[137] MacRae Affidavit at para 9 and 105; Cross-Examination of John DiNino at p. 41 line 13 to p. 55 line 22.
[138] Cross-Examination of John DiNino, February 9, 2017 at p 39 line 9 to p. 40 line 7.

(e) An employee's reinstatement is made pursuant to a written agreement between the TTC, the employee and, where applicable, the union representing the employee, which in almost all cases is the ATU (the parties often refer to these agreements as "last chance" agreements). In some situations, an employee was already subject to a last chance agreement and, although the employee violated that agreement by engaging in a Policy violation, the TTC offered another last chance agreement to the employee.[139]

E. Oral Fluid Cut-off Levels

a) Alcohol and drugs are impairing

88. There is no dispute in this Application that the consumption of alcohol causes impairment. Nor is there any dispute that the drugs tested for by the TTC (cannabis, cocaine, opiates, phencyclidine, amphetamines/methamphetamines) cause impairment. For example, the unchallenged evidence of Dr. Snider-Adler is that cannabis can cause a "distorted sense of time, impaired memory, impaired coordination", that PCP can cause "inattention, sensory illusions, hallucinations, disorientation, psychosis", that opiates and opioids can cause "loss of interest" and "nodding", and that stimulants like cocaine and amphetamines can cause "over activity, tension/anxiety".[140]

89. Dr. Beckson summarized the impact of drugs of abuse and alcohol this way:

> Drugs of abuse impair complex human performance involving man-machine interaction, such as driving a motor vehicle or operating machinery. The impairing effects of alcohol and other drugs are well known in medicine and have been demonstrated in clinical and experimental research: drugs affect attention, divided attention, concentration, working memory, visual-spatial skills, reaction time, time perception, psychomotor skills, coordination, decision-making, ability to respond to emergencies, risk-taking, judgment, error-monitoring, and self-awareness of impairment. Drug use-related impairment of an employee's cognition and psychomotor skills degrades that employee's capacity to make the necessary adjustments to cope with the demands of sudden, unexpected, and emergency situations. Such impairment elevates the likelihood of an accident, as the employee may not perceive or recognize the emergence of a dangerous situation, may not

[139] MacRae Affidavit at para 105.
[140] Snider-Adler Report at pp 13-14, in RAR Vol IV, Tab 8, Exhibit C, at 2252-2253.

> be able to correctly assess the situation and decide upon an appropriate course of action, or may not respond in time.[141] [Emphasis added.]

90. Similarly, the *Final Report of the Task Force on Cannabis Legalization and Regulation* published by Health Canada in 2016 states that "[i]t is clear that cannabis impairs psychomotor skills and judgment",[142] and that "THC can remain in the brain and body of chronic, heavy users of cannabis for prolonged periods of time (sometimes several days or weeks), far beyond the period of acute impairment, potentially contributing to a level of chronic impairment".[143] The Health Canada Report also provides:

> Workplace safety: Drug and alcohol use or impairment in the workplace can pose a danger to everyone in the workplace, including the person who is impaired. This is particularly the case in "safety-sensitive" industries, such as transportation, health care and law enforcement, where symptoms related to impairment—reduced mobility, co-ordination, perception or awareness—can increase the risks of hazards, injuries and death. [Emphasis added]
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> [...]
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> Despite uncertainty with the current scientific evidence around a per se limit, establishing one would nevertheless be an important tool for deterring cannabis-impaired driving. As the scientific knowledge base continues to grow, a per se limit should be revisited and adjusted as necessary. A particular challenge with a per se limit is that it implies that it is acceptable to consume up to the established limit. Yet there is currently no evidence to suggest there is an amount of THC that can be consumed such that it remains safe to drive ... To deter cannabis-impaired driving among youth and new drivers, provincial and territorial governments should consider implementing a policy of zero tolerance for the presence of THC in the system of new or young drivers.[144] [Emphasis added.]

i. Oral fluid cut-off levels indicate increased likelihood of impairment

91. There is also no credible dispute on this Application that the TTC's cut-off levels for alcohol and drug testing (specifically oral fluid testing), are generally accepted as appropriate for

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[141] Beckson Affidavit at para 56.
[142] Health Canada Report at p 41, Exhibit C to Beckson Affidavit in RAR Vol V, Tab 9.
[143] Health Canada Report at p 41, Exhibit C to Beckson Affidavit in RAR Vol V, Tab 9.
[144] Health Canada Report at p 43, Exhibit C to Beckson Affidavit in RAR Vol V, Tab 9.

determining the likelihood of impairment at the time of the test.[145] The oral fluid cut-off levels employed by the TTC are higher than the oral fluid cut-off levels suggested by the U.S. Department of Transportation – meaning that the TTC's cut-off levels test for even more recent use and provide greater assurance that a positive test detects the likelihood of impairment.[146]

92. To the extent that the Union's expert, Dr. Macdonald takes issue with this, he is totally unqualified to do so, and his evidence must be rejected. Dr. Macdonald, an epidemiologist, admitted on cross-examination that, he has never participated in the design or implementation of a workplace drug and alcohol testing program,[147] and that he is not a medical doctor,[148] a pharmacologist, nor an expert in toxicology.[149] Dr. Macdonald has no experience in psychiatry, neurology, or addiction medicine,[150] and has never treated people with addictions or substance use disorders.[151] In addition, Dr. Macdonald has never (other than in the current litigation between the Union and the TTC) provided expert evidence regarding drug testing involving oral fluid (as opposed to urinalysis).[152]

93. Further, the unchallenged evidence of Dr. Leo Kadehjian and Dr. Beckson as to the appropriateness of the TTC's oral fluid cut-off levels is compelling and contradicts Dr. Macdonald's assertion that "tests at the cut-offs proposed by the TTC are only capable of detecting prior and present exposure to drugs and cannot be used to distinguish those who impaired from those who are not." As Dr. Kadehjian, an expert toxicologist, notes: "oral fluid drug testing has

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[145] The drugs tested for and related cut-off levels are set out in Exhibit A to the Bartz Affidavit, RAR Vol II, Tab 4 at 680.
[146] MacRae Affidavit at para 70.
[147] Cross-examination of Macdonald at p. 3 lines 19-23.
[148] Cross-examination of Macdonald at p. 3 lines 24-25.
[149] Cross-examination of Macdonald at p. 4 lines 8-15
[150] Cross-examination of Macdonald at p. 4 lines 1-7.
[151] Cross-examination of Macdonald at p. 4 line 25 to p. 5 line 2.
[152] Cross-examination of Macdonald at p. 5 lines 13-17.

been recognized to have a correlation with the likelihood of impairment" and that "with appropriate oral fluid cutoffs [such] as those specified in the TTC policy a positive test result at or above these cutoffs demonstrates use of drugs sufficiently recent to be associated with a likelihood of impairment."[153] He goes on to discuss the widespread use of oral fluid drug testing in workplace programs, noting:

> The point of workplace drug testing is not to measure, or quantify and prove a particular degree of impairment, or whether someone is currently impaired. Rather, the purpose of such testing is to obtain information on whether there is an increased likelihood of some degree of impairment that raises a valid concern about workplace safety and whether an employee is fit to perform a safety sensitive job. Oral fluid drug testing at appropriate cut-offs, such as those specified in the TTC policy, does that.[154]

94. Dr. Kadehjian also notes that there "have been many studies examining oral fluid drug concentrations over time after drug use" and that "this literature provides a base of clinical and scientific evidence upon which to choose cutoffs in oral fluid that are consistent with the time frames of drug related impairment." He notes as well that "the actual drug concentration observed (i.e. not simply positive or negative at the cutoff) can provide additional information for the clinical interpretation of the test result in light of other relevant information".[155]

95. Oral fluid testing is well-recognized in workplace drug programs. Detailed scientific and technical guidelines have been published by the Substance Abuse and Mental Health Services Administration ("SAMHSA") of the Department of Health and Human Services in the United States to be followed for oral fluid testing in federal workplace drug testing. The European

[153] Kadehjian Affidavit at para 12.
[154] Kadehjian Affidavit at para 15.
[155] Kadehjian Affidavit at para 34.

Workplace Drug Testing Society, the United Nations, and Australia have all published standards and guidelines for oral fluid testing.[156] In its Guidelines published in 2015, SAMHSA notes:

> Methods developed since 2004 offer enhanced analytical sensitivity and specificity for testing drugs in oral fluid.
>
> The scientific literature base for oral fluid testing and interpretation of results has grown substantially. Many nonregulated private sector organizations have incorporated oral fluid testing into their workplace programs. Also, during this period, SAMHSA funded a review of a Medical Review Officer (MRO) database of laboratory-reported results for urine and alternative specimens from both regulated and non-regulated workplaces. The study showed a dramatic increase in the use of oral fluid testing from 2003 to 2009.
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> [...]
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> The scientific basis for use of oral fluid as an alternative specimen for drug testing has been broadly established. [Footnotes 1–12 omitted] Corresponding developments have proceeded in analytical technologies that provide the needed sensitivity and accuracy for testing oral fluid specimens. [Footnotes 13–28 omitted] Oral fluid and urine test results have been shown to be substantially similar, and oral fluid may have some inherent advantages as a drug test specimen. Oral fluid collection will occur under observation, which should substantially lessen the risk of specimen substitution and adulteration and, unlike direct observed urine collections, the collector need not be the same gender as the donor.[157] [Emphasis added.]

96. Dr. Beckson, a psychiatrist and addiction specialist who has been involved in all aspects of workplace drug testing, also strongly disputes Dr. Macdonald's assertions, noting that Dr. Macdonald's "comments are written as if he were addressing the use of oral fluid tests to convict a driver for criminal violation of laws...as opposed to addressing the context of this matter, i.e., risk management in a safety-sensitive workplace."[158] Dr. Beckson continues:

> Dr. Macdonald talks of diagnosing impairment, which is not even the role of using blood alcohol concentration under per se laws against driving under the influence of alcohol. Under per se statutes, a blood alcohol concentration determines whether a driver is in violation of the statute, not whether the driver is impaired and unable to drive a motor vehicle.[159]

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[156] Kadehjian Affidavit at paras 35, 38

[157] See exhibit H to the Kadehjian Affidavit, pp. 2830-31 of the Record.

[158] Beckson Affidavit at para 13.

[159] Beckson Affidavit at para14, where Dr. Beckson further explains the difference between an "over the legal limit" offence versus impairment: "The concentration cited by statute varies by jurisdiction...The setting of blood alcohol concentration in such statutes reflects consideration of the risk of impairment (rather than impairment itself) and the

97. Dr. Beckson's unchallenged evidence is that "the risk of performance impairment is significantly elevated in an employee who has a positive oral fluid test…[and] poses an elevated risk to the public."[160] In responding to Dr. Macdonald's narrow focus on whether oral fluid proves impairment, Dr. Beckson states:

> Oral fluid testing is very similar to blood testing and more closely correlated with acute intoxication, compared with urine drug tests that span acute intoxication, carry-over effects, withdrawal, and chronic effects. Using appropriate cut-offs, workplace drug testing of oral fluid yields very similar drug detection windows as drug testing of blood. Hence, workplace oral fluid drug test results can be used as a proxy for blood drug test results, while avoiding the invasiveness inherent in blood testing.[161] [Emphasis added.]

98. In the same vein, Dr. Beckson notes:

> What is more important, however, from the safety perspective, is that it is undisputed (including by Dr. Macdonald) that THC impairs driving performance. A random oral fluid test that is positive for THC at appropriate cut-off, significantly elevates the risk that the employee is impaired, and, furthermore, greatly elevates the likelihood that the employee has a problem with drug use, such as addiction. Most employees who test positive in an established workplace random testing program suffer from addiction and are consequently high-risk employees, as previously discussed. Therefore, an employee who tests positive on a random test must be evaluated to more fully understand the nature and severity of the risk to the public safety. There is no stereotyping of employees; each employee who has a positive random test is individually evaluated with respect to problems related to drug use, and only those who meet accepted criteria for addiction are so diagnosed.[162] [Emphasis added.]

99. Dr. Beckson provides a detailed expert opinion on the validity and usefulness of oral fluid testing, noting that "testing of oral fluid is closely related to testing of blood for drugs of abuse",[163] and confirms that test results above the cut-off concentrations adopted by the TTC "indicate an elevated likelihood of impairment at the time of the test"[164] as "the window of drug detection at

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risk tolerance of the legislators in the jurisdiction in question. …The greater the blood alcohol concentration, the greater the risk of impairment...".

[160] Beckson Affidavit at para 12.
[161] Beckson Affidavit at para 18.
[162] Beckson Affidavit at para 25.
[163] Beckson Affidavit at para 42.
[164] Beckson Affidavit at para 50.

appropriate cut-off (e.g., TTC cut-off) substantially overlaps with the time frame in which the drug is known to cause impairment."[165]

100. Further, as an expert in addiction medicine and psychiatrist, Dr. Beckson notes that impairment from drug use can arise in different, and lingering, ways – including in addition to acute intoxication, carry-over effects (such as hangovers and the "crash" effect when some drugs wear off), withdrawal, long-term toxicity, and continuing exposure of the brain to lipophilic drugs such as THC in marijuana.[166] Similar concerns were noted in the recent Health Canada Report (discussed above at paragraph 90). Hence, the importance of workplace testing to identify workers who may have problems arising from drug use, and who may then receive treatment for their addiction. As Dr. Beckson puts it:

> A positive drug test is responded to with a clinical evaluation by a substance abuse professional, in order to determine whether the employee has a problem with drug use, and to formulate appropriate recommendations if treatment is indicated. There is no stereotyping in the conceptualization or the protocols. Not all employees who test positive in a random testing problem have an addiction, but most do; and addicted employees, because of their ongoing abuse of substances, predictably report to work in varying states of impairment.[167] [Emphasis added.]

101. The benefits of workplace drug testing are elaborated upon later by Dr. Beckson as follows:

> It is also important to consider the context in which a drug test is taken. In an established workplace drug testing program those without problems with drugs or alcohol typically abide by the policy; while others may come forward voluntarily for assistance or modify their behaviour. On the other hand, employees who do test positive in this context usually have alcohol and/or drug problems. And addicted employees, due to their chronic frequent drug use, have impairment that persists well beyond their last use of drugs. Also, addicted employees frequently use relatively large quantities of drugs. Depending upon the circumstances, they may be impaired by acute effects, carry-over effects, and/or chronic effects of the drug(s). The likelihood of impairment in the workplace is high for addicted

[165] Beckson Affidavit at para 98, and see "Time Windows" Table at pp 85-87 of Exhibit A, Beckon Report at 2402-2404.
[166] Beckson Affidavit at paras 51-55, and 93.
[167] Beckson Affidavit at para 23.

> employees; therefore, they pose a significant threat to workplace safety. In an established workplace drug testing program, a positive oral fluid drug test likely identifies an addicted employee (who is likely impaired).[168]

102. Similarly, Dr. Snider-Adler's opinion is that the "oral fluid cut-off concentrations applicable to the TTC's testing program detect likelihood of impairment at the time of the test, based on recent drug usage."[169] Dr. Snider-Adler points out that an important advantage of oral fluid testing over urinalysis is that "it provides a much better indicator of recent use and is therefore a more accurate measure of likely impairment at appropriate cut-off levels".[170] The fact that "[o]ral fluid screening devices are the most advanced today (and have the added advantage of signalling recent use)" was also noted in the Health Canada Report.[171]

103. In such circumstances, it is appropriate to draw the common sense inference that an employee who has used a drug recently enough that he or she tests positive at the cut-off levels chosen by the TTC, at some point during his or her work shift, is likely to be impaired at the time of the test, or to have reported to work impaired prior to taking the test.

b) Likelihood of impairment is the appropriate test for workplace safety

104. As discussed above, the cut-off levels employed by the TTC indicate whether or not an employee has used drugs or alcohol sufficiently recently that there is an increased likelihood that they are impaired by those substances. This is an appropriate standard for workplace testing. As Dr. Beckson states:

> In the safety-sensitive workplace, the goal is to minimize the risk of impairment in the workforce. This is done by prohibiting use of alcohol and drugs that would elevate the risk of impairment in the workplace. Deterrence of such use is the objective of workplace random alcohol and drug testing programs, rather than objective of proving that an

[168] Beckson Affidavit at para 97.
[169] Snider-Adler Affidavit, RAR Vol. IV, Tab 8 at para 39.
[170] Snider-Adler Affidavit at para 13.
[171] Health Canada Report at p 42, Exhibit C to Beckson Affidavit in RAR Vol. V, Tab 9 at 2586.

> employee is impaired. The risk of impairment and the risk tolerance of the safety-sensitive workplace are the issues of concern...[172]
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> [...]
>
> In the criminal justice system, impairment must be proved beyond a reasonable doubt; and if so done, criminal sanctions are imposed. By contrast, if an employee in a safety-sensitive position is not deterred by workplace prohibition, employee is removed from the workplace and is evaluated to determine whether the employee is suffering from an alcohol or drug problem, which then can be treated such that the employee may be returned to the safety-sensitive workplace with substantially reduced risk. Risk management is the focus in such workplaces and random testing is part of a proactive workplace safety program.[173]

c) No False Positives

105. The Union raises the spectre of "false positives", yet has failed to lead any evidence that this is a legitimate concern. The evidence comes from employees, unfamiliar with the testing process/safeguards and the science in this area, saying they worry about false positives, and from the affidavit of Dr. Ann Cavoukian. On cross-examination, Dr. Cavoukian stated that "false positives" were her area of interest and what she had "looked at"[174] – that they were a "huge problem" in her world.[175] However, it quickly became apparent that Dr. Cavoukian had absolutely no experience with, or knowledge of, the risk of false positives in the particular context of drug and alcohol testing, and in fact, knows very little at all about drug and alcohol testing.[176]

106. For example, although Dr. Cavoukian stated that she was "familiar" with what MROs do, asserting they examine "after the fact false positives", she could not recall what the "R" in MRO stood for.[177] Dr. Cavoukian also conceded that she has no experience involving alcohol and drug testing – or anything else – to support her "general comment" that "alcohol and drug testing is a

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[172] Beckson Affidavit at para 15.
[173] Beckson Affidavit at para 17.
[174] Cross-Examination of A Cavoukian at p 22 lines 12-25.
[175] Cross-Examination of A Cavoukian at p 82 line 16 to p. 83 line 9.
[176] Cross-Examination of A. Cavoukian at p. 82 line 16 to p. 87 line 2.
[177] Cross-Examination of A Cavoukian at p 22 lines 22-25.

highly technical and laborious task, which may result in human error in administering the test and obtaining its results",[178] nor did Dr. Cavoukian have any knowledge of the TTC's use of split samples,[179] or the methods by which oral fluid samples are analyzed by the laboratory.[180]

107. In addition Dr. Cavoukian relied solely on news reports of the 1998 incident involving Canadian Olympic gold-medal snowboarder, Ross Rebagliati, for the assertion regarding the risks of "false positives" with drug and alcohol testing. Dr. Cavoukian did not even know the method of testing used in Mr. Rebagliati's case (i.e., urinalysis).[181] Nevertheless, Dr. Cavoukian used Mr. Rebagliati to support the statement in her affidavit that it is reasonable to conclude that some individuals have tested positive after being exposed to second-hand smoke from a drug.[182] Dr. Cavoukian had not read any reports, tests or studies on the likelihood of testing positive for a drug after being exposed to second-hand smoke before making this statement.[183] In addition, Dr. Cavoukian's assertion was in direct contradiction to the Union's own evidence in the arbitration submitted through Dr. Macdonald, that "based on the research evidence available, it is extremely unlikely that passive inhalation in a typical social setting would result in a high enough concentration of THC or its metabolites to produce a positive drug test".[184]

108. This concern, which was also raised by Ms. Brown,[185] is also addressed by Dr. Kadehjian in his affidavit, where he says that "[u]sing the 10 ng/mL cutoff for THC as specified in the TTC

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[178] Cavoukian Affidavit at para 29; Cross-Examination of A Cavoukian at p 88 line 25 to 89 line 14.
[179] Cross-Examination of A Cavoukian at p 73 lines 10-13; p. 84 line 18-p. 85 line 9.
[180] Cross-Examination of A Cavoukian at p 84 lines 3-11.
[181] Cavoukian Affidavit at para 29. Cross-Examination of A Cavoukian at p 78 line 13, p. 79 line 23.
[182] Cavoukian Affidavit at para 29.
[183] Cross-Examination of A Cavoukian at p 81 lines 20-24.
[184] Cross-Examination of A Cavoukian at p80 line 12 to p. 81 line 19.
[185] Brown Affidavit at para 36.

policy, a positive result for marijuana would be virtually impossible except under the most extreme smoke exposure conditions."[186]

109. The speculative and unfounded nature of Dr. Cavoukian's purported expert evidence regarding false positives is summarized by Dr. Beckson in his affidavit:

> Dr. Cavoukian offers no scientific research to support her speculation on inaccurate test results (para 29), instead referring to the lay press. Research has demonstrated that it would be nearly impossible for an individual to test positive for marijuana at the TTC cut-off even under extreme conditions of second-hand smoke exposure (as discussed by me below and in my Report). Her discussion of false positives (para 30) is supported by reference to a book published 30 years ago and references false positives produced by screening immunoassays. Dr. Cavoukian apparently does not know that the TTC program, like similar workplace testing programs in 2017, requires that any positive result on a screening test, including the EMIT test, must be confirmed by a gas chromatography-mass spectrometry test (GC-MS), which identifies the specific molecule (the actual chemical structure of the drug) in question, thereby eliminating false positives that might have occurred had the screening test been used exclusively. She apparently doesn't know or understand that the MRO confidentially addresses issues such as poppy seeds and asthma inhalants with the employee, in order to eliminate false positives that might result.[187] [Emphasis added.]

110. To the extent such allegations relate to the idea that someone who has a level of substance in their system above the cut-off level, but is not independently assessed as being impaired, such allegations must be rejected. As pointed out in Ms MacRae's affidavit, "[t]he term "false positive" is, in fact, a misnomer. The issue is whether a positive test determines likelihood of impairment. The scientific evidence demonstrates that an oral fluid sample with concentration levels at or above the TTC's cut-off levels is a reliable indicator of likely impairment. Accordingly, an individual who tests at or above the TTC's cut-off levels for oral fluid drug testing is likely impaired at the time of the test."[188]

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[186] Kadehjian Affidavit at para 23.
[187] Beckson Affidavit at para 38.
[188] MacRae Affidavit at para 111.

F. The benefits of random testing

111. The TTC has filed uncontradicted and unchallenged evidence of the benefits of random testing experienced by major transit organizations in other free and democratic societies, such as the United States, the United Kingdom and Australia.

112. Following the introduction of random testing for federally regulated workplaces in the United States, positive rates dropped from 1.76% in 1995 to 1.2% in 1998, and in 2005 were at 0.79%.[189] Post-incident positive rates also dropped, from 4.3% in 1997 to 2.3% in 2011.[190]

113. Random testing was introduced for employees of the London Underground in 1993. Positive test rates dropped significantly following its introduction, from 3.42% in 1993 to 1.9% in 1994 to 1.18% in 1995, and have stayed low ever since. New hire and "for cause" drug testing also decreased dramatically following the introduction of random testing.[191] Mr. Byford's own first-hand experience working at London Underground at the time, and in other railways, was that the introduction of testing "radically changed the drinking habits of safety critical employees".[192]

114. Similarly, the introduction of random testing in the railway industry in New South Wales in 2004 saw the rate of positive drug tests decrease from 3% in 2004 to 1.4% in 2006, and as of 2012 was about 0.75%. Positive alcohol tests also saw a major decline.[193]

115. The deterrent effect of random testing was also noted in the 2016 Health Canada Report:

> In addition to the need for better detection techniques, we were also told about the importance of deterrence. Experts stated that the knowledge that impairment could and

[189] TTC Report, AR Vol. II at 398, Piggott Affidavit Exhibit D.
[190] Beckson Affidavit, RAR Vol. IV, Tab 9 [*Beckson Affidavit*] at para 105 (at 2312).
[191] Byford Affidavit, RAR Vol. I, Tab 2 at para 80 and Exhibit U.
[192] Byford Affidavit RAR Vol. I, Tab 1 at para 79.
[193] Byford Affidavit RAR Vol. I, Tab 1 at para 97.

> would be detected, coupled with the certainty of swift and meaningful sanctions, was the most effective way of deterring unwanted driving behaviours.[194]

116. Dr. Mace Beckson has provided unchallenged evidence on the clear benefits of random drug and alcohol testing. While observing the challenges in researching the effectiveness of random testing, he notes that there are a number of studies that support the conclusion that workplace random testing has a "marked deterrent effect based on significant declines in positive testing in the years following its introduction."[195]

117. A psychiatrist with extensive expertise in substance abuse, addictions and treatment, and drug testing programs, including workplace drug testing programs, Dr. Beckson notes that alcohol and drug use is prevalent in the workforce, including safety-sensitive workplaces. Random testing not only deters alcohol and drug use that elevates the risk of impairment, but also maximizes the early identification of high risk employees who have not sought assistance or been detected by their supervisor so that they may be rehabilitated and return to the workplace. It therefore reduces safety risks and treats employees who may have an addiction or dependence on alcohol or drugs.[196]

118. Dr. Beckson criticizes the Union's expert Dr. Scott Macdonald – an epidemiologist with no direct experience in workplace drug testing – for his assertion that there is "no credible scientific evidence that random oral fluid drug testing will reduce job accidents or otherwise improve work safety." As Dr. Beckson states, "Dr. Macdonald misses the mark and ignores common sense", observing that "there is data demonstrating the effectiveness of workplace drug testing as part of a comprehensive workplace fitness for duty program in reducing the incidence of drug-use related workplace incidents." This data is in scientific research studies published in peer reviewed

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[194] Beckson Affidavit, Exhibit C at p 42 [emphasis added]
[195] Beckson Affidavit, RAR Vol. IV, Tab 9 at para 87.
[196] Beckson Affidavit, RAR Vol. IV, Tab 9 at paras 3, 59, 82

journals, and is in addition to the experience of workplace safety interventions which "traditionally have been based upon experience, expertise, common sense, and qualitative risk management, rather than waiting for a large body of methodologically flawless scientific studies to be completed", as Dr. Macdonald would have us do.[197]

119. Dr. Beckson also notes that in a workplace with a well-established random testing program, "occasional users of drugs and alcohol have modified their behaviour...to comply with policy", and that those who do test positive on a random test "almost always have alcohol and drug problems."[198] This is, of course, consistent with the TTC's experience with those who test positive on post-incident and reasonable cause testing.[199] In addition, as Dr. Beckson states, random testing maximizes the effect of workplace drug testing, causing at least some of those with alcohol and drug problems to self-identify and obtain assistance before testing positive, while others will be identified through the testing process and, in appropriate cases, be provided with assistance.[200]

120. Dr. Leo Kadehjian, a toxicologist with over 25 years of expertise in workplace drug testing, notes that "there are numerous studies that have recognized the valuable role of drug testing in deterring drug use" and which "demonstrate that reducing drug use and identifying and removing those whose use of drugs creates workplace safety risks, reduces the risk to workplace safety and provides benefits to employees, their workplaces, employers and, in the case of transit workers, the

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[197] Beckson Affidavit, RAR Vol. IV, Tab 9 at paras 11 and 105.
[198] Beckson Affidavit, RAR Vol. IV, Tab 9 at para 22.
[199] See paragraph 43 above, and see Gardiner Affidavit, Vol IV, Tab 7 at paras 21-22. Also see MacRae Affidavit at para 105(b)(c) and (d), and Beckson Affidavit at para 23.
[200] Beckson Affidavit, RAR Vol. IV, Tab 9 at para 89.

public."[201] Dr. Kadehjian discusses the deterrent effect of random testing and that this has been well-recognized in the United States and elsewhere.[202]

G. The need to implement random testing now

121. On October 19, 2011 TTC Staff (again) sought approval for, and the TTC Board approved, the addition of random drug and alcohol testing to the Fitness for Duty Policy.[203] This approval followed a tragic incident in 2011 involving a bus crash in which one passenger was killed and 9 others were injured.[204] The bus operator complied with and passed a breathalyzer test but refused to be tested for drugs. Marijuana was subsequently found in the bag he had with him on the bus.[205]

122. As noted in the Report to the Board:

> Safety is one of the cornerstones of TTC corporate culture. Not only are all TTC employees obliged to ensure a safe workplace at the TTC, but they are also tasked with requiring the delivery of a safe transit service to the public. The TTC has an obligation to take all appropriate steps to implement policies and procedures that will promote a safe workplace and service. It is the opinion of staff that the implementation of random alcohol and drug testing for the safety sensitive, specified management and designated executive positions, is required as an appropriate step to improve safety in the workplace and to the public.[206] [Emphasis added.]

123. After reviewing evidence of the deterrent effect of random testing in the U.S. and among cross-border employers, the TTC staff stated its strong belief that "the introduction of random alcohol and drug testing is an effective and necessary deterrent to protect employees, our customers and the public at large."[207]

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[201] Kadehjian Affidavit, RAR Vol. V, Tab 10 at para 16.
[202] Kadehjian Affidavit, RAR Vol. V, Tab 10 at paras 42-45.
[203] Byford Affidavit, RAR Vol. I, Tab 2 at para , Exhibit J; MacRae Affidavit at para 118.
[204] Byford Affidavit, RAR Vol. I, Tab 2 at para 52; MacRae Affidavit at para 117.
[205] Byford Affidavit, RAR Vol. I, Tab 2 at para 52; MacRae Affidavit at para 117.
[206] Byford Affidavit, RAR Vol I, Tab 2, Exhibit J at 219.
[207] Byford Affidavit, RAR Vol I, Tab 2, Exhibit J at 223.

124. At the time, the TTC felt it was appropriate to wait for the Supreme Court's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Limited*,[208] which dealt with the issue of random drug and alcohol testing in the employment context, "in order to consider its impact on the determination of the specific elements of a proposed Random Testing program, which the TTC did following the release of that decision on June 14, 2013."[209]

125. On March 23, 2016, the TTC Board approved moving forward with the implementation of Random Testing. The non-confidential portion of the Report to the Board notes that the litigation with respect to the Policy was ongoing, and was "expected to continue for at least several more years."[210] After this meeting, "the Board agreed, in principle, to implement random drug and alcohol testing, on condition that Staff report back on implementation, program design and funding."[211]

126. On or around April 18, 2016, the TTC sent out, on Mr. Byford's behalf, a letter from him to all employees providing "an update on the TTC board's decision to approve funding for random drug and alcohol testing, and informed employees that the TTC would take steps over the next few months to finalize the program and implement random alcohol and drug testing at the TTC."[212]

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[208] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 [*Irving*].
[209] Byford Affidavit, para 56. There is no credibility to the Union's assertion at para 165 of its factum that Mr. Byford raised this as an issue in March 2015 – a statement Mr. Kinnear admits was removed from the news article.
[210] Exhibit K to Byford Affidavit at 226-228.
[211] Exhibit L to Byford Affidavit at 230.
[212] Supplementary Affidavit of A. Byford at para 1; Exhibit M to the Affidavit of A Byford, RAR Vol I, Tab 2M at 234. Contrary to the Union's assertion in paragraph 32 of its factum that "some employees did not receive" the TTC's notices, the evidence is that one of the two employees making that claim did not always read letters from the TTC: cross-examination of Akhmetov, p. 57 line 17 to p. 62 line 16

127. On November 30, 2016, $1.3 million in annual funding for the random testing program for 2017 was approved, following a report containing the requested information on program design, funding and implementation.[213]

128. Following the November 30th meeting, the TTC promptly informed the unions and announced to employees that random testing would start March 1st. Contrary to the Union's assertion that the TTC has not provided details of the proposed testing, Peter Bartz, Program Lead for the TTC's Fitness for Duty program, in uncontradicted and unchallenged evidence describes a detailed presentation that was given to the Union:

> On December 8, 2016, my colleague and I met with representatives of the ATU, Local 113 in order to notify them of the implementation date of our random testing program and to provide a presentation on the random testing program. We also answered their questions about the random testing program.
>
> Our presentation included information on the process and procedure applicable to random testing, including, among other things, the selection rate, the random selection process, the method of testing, and whether an employee selected for random testing may return to work afterwards.
>
> In our presentation, we also informed the ATU of the TTC's employee communications plan. This included the fact that in December 2016, notices with information about the random testing program would be emailed to employees, notices would be posted at the TTC's various premises, and information would be displayed on TV screens for employees at the TTC's premises. These steps have now been completed. We also informed the ATU that in February 2017, the TTC would begin to provide supervisory training on the random testing program and that a brochure or booklet regarding random testing will be issued to all employees. It continues to be our plan to proceed with these steps in February and March 2017.[214] [Emphasis added.]

129. Throughout, the TTC has kept employees and the Union informed regarding the Policy. As Mr. Bartz also stated in his affidavit:

> The TTC has issued and continues to issue communications to its employees in connection with the Policy. Based on my review of our records and my discussion with Ms. Pazzano,

[213] Byford Affidavit RAR Vol. I, Tab 2 at para 55.
[214] Bartz Affidavit at paras 140-142.

> who was the previous Program Lead (then known as Program Administrator), I am aware that in the period leading up to the implementation of the Policy in October 2010, the TTC issued notices and booklets to our employees in respect of the Policy. Newly hired employees are provided a copy of the booklet as part of their orientation materials. I understand we also provided supervisory training regarding the Policy during the summer and fall of 2010. Our supervisors receive ongoing refresher training at periodic intervals.
>
> Since the implementation of the Policy in October 2010, the TTC has provided periodic communications to employees in order to remind employees of their obligations under the Policy.[215]

130. In December 2016, the TTC agreed to move the start date to April 1, 2017, to accommodate the injunction application schedule.[216]

a) Continuing high rate of drug and alcohol-related incidents

131. The TTC's decision to move forward with implementing Random Drug and Alcohol Testing now has been influenced by a number of factors that have developed over the past few years." [217] As noted by Mr. Byford:

> In 2015 alone, there were 27 incidents [post-incident, reasonable cause, aftercare testing] in which employees tested positive, or refused to be tested, for drugs or alcohol (up from 15 in 2014), and 29 external candidates to safety sensitive positions tested positive for drugs via urinalysis, a rate of 2.1%. I cannot and will not ignore the risk that this creates for our customers, our employees and members of the public.[218]

132. Mr. Byford also points to three collisions in 2015, where operators tested positive for drugs, which raised fitness for duty concerns:

(a) in September 2015, a streetcar operator lost control of the vehicle, resulting in injuries to three operators and damage to three streetcars. The Post-Incident test was positive for opiates (codeine);

(b) also in September 2015, a bus operator was involved in a collision with an automobile, resulting in injuries to two onboard passengers and damage to both

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[215] Bartz Affidavit at paras 138-139. A copy of the Fitness for Duty Booklet is included as Exhibit A to the Supplementary Affidavit of A Byford.
[216] MacRae Affidavit at para 52.
[217] Byford Affidavit RAR Vol. 1, Tab 1 at para 55.
[218] Byford Affidavit RAR Vol. I, Tab 2, at para 46.

vehicles. The operator tested positive for cocaine. He was subsequently found to have a disability relating to substance use, and was referred to the aftercare/unannounced testing program; and

(c) in December 2015, a bus made contact with a pedestrian, causing injuries to the pedestrian who had to be transported to hospital. The operator initially tested positive for Cannabinoids, related to the undisclosed use of medical marijuana...[219]

133. As Mr. Byford stated :

> It is my opinion that the incidents referred to in paragraph 132 above may have been prevented if Random Drug and Alcohol Testing had been in place at the TTC. The employees involved may have been deterred from attending at work while unfit for duty. Alternatively, the employees may have been subject to testing, which, if they tested positive, would have provided the TTC with an opportunity to address the situation before these incidents occurred, through either discipline or dismissal, and/or referral to drug and alcohol counselling. This is a sentiment that appears to be shared by the [family of Jadranka Petrova, a 43-year-old mother of two who was killed in the 2011 bus crash that led to the approval of random testing], who in response to the TTC's decision to proceed with Random Testing, issued a statement saying: "Our family welcomes the drug and alcohol testing by the TTC[.] Maybe if it was in place in 2011, my mother would still be alive today. My family hopes this initiative will make Toronto streets safer."[220] [Emphasis added.]

134. In its press release of December 8, 2016, the TTC referred to a 200% increase in "workplace impairment" between 2011 and 2015. This is not misleading, as asserted by the Union. The 200% increase was based on, not just positive drug tests, but also refusals to submit to reasonable cause, post-incident and post-treatment/return to duty testing. A refusal to submit to testing in any of these three testing situations[221] cannot be ignored when it comes to managing safety risks associated with alcohol or drugs.

135. Statistics collected by the TTC between October 17, 2010, when the Policy took effect, and December 31, 2016 indicate a continuing, unacceptably high rate of positive tests and other incidents that are not compliant with the Policy. This evidence has clearly indicated to the TTC

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[219] Byford Affidavit at para 58.
[220] Byford Affidavit at para 59, Exhibit O. See also Byford Affidavit at para 52.
[221] Bartz Affidavit, at para 97 to 105.

that more must be done to deter its employees from reporting for duty while under the influence of drugs or alcohol. This is one of the main drivers for introducing random testing now. For example:

(a) Incidents which are Non-Compliant with the Policy: the number of known incidents in this category has not decreased since the Fitness for Duty Policy was introduced in 2010. In fact, the number has increased from 13 in 2011, to 20 in each of 2012 and 2013 and 19 in 2014, to **32** in 2015 and **33** in 2016.[222] This means that in 2015 and 2016, there were **65** incidents "in which there were workplace safety concerns arising in connection with an employee…".[223]

(b) Certification Testing: The TTC has seen an increase in the number of positive certification tests in recent years, from an average of approximately 21 between 2010 and 2012 to 32 in 2014, 29 in 2015, and 42 in 2016.[224] That is more than 100 potential safety sensitive employees in the past three years who tested positive for drugs when they knew that they would be tested. This is a serious concern.

(c) Reasonable Cause/Post-Incident: between 2011 and 2014, the annual average number of reasonable cause and post-incident tests that were positive results or refusals to test was 7.5. In 2015, the number of positive tests and refusals for reasonable cause and post-incident testing jumped to **17,** and the number of positive tests and refusals remained high in 2016, at 11.[225]

136. Based on these drug and alcohol related incidents in recent years, the TTC determined that it would be irresponsible to wait any longer to implement random testing. As Mr. Byford said when discussing the number of positive tests in 2015: "I cannot and will not ignore the risk that this creates for our customers, our employees and members of the public."[226]

137. Waiting for the conclusion of the arbitration hearing that has no end in sight was not, and is not, a reasonable option.[227]

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[222] Bartz Affidavit, RAR Vol. III, Tab 4 at paras 55,59.
[223] Bartz Affidavit at para 48.
[224] Bartz Affidavit at para 75.
[225] Bartz Affidavit at para 79.
[226] Byford Affidavit at para 46. See also Byford Affidavit at paras 59-60
[227] MacRae Affidavit, para 120, 141, 142

b) Legalization of marijuana

138. There have also been incidents in recent years where TTC bus operators who tested positive for marijuana post-incident, had not informed the TTC that they were using marijuana for medicinal purposes.[228] It is very likely that many TTC employees who use medical marijuana or other medications which can have impairing effects have not, and will not absent further incentive, disclose such use to the TTC.[229]

139. Related to this point, the pending legalization of cannabis/marijuana further supports the need to introduce Random Testing now. Dr. Melissa Snider-Adler makes the following observations[230]:

(a) Since 2000, the numbers of Canadians authorized to use marijuana for medical purposes has grown dramatically. As of 2014, there are 37,884 Canadians who are authorized to possess dried marijuana.

(b) The majority of authorized individuals reside in British Columbia (18,383) and Ontario (11,071). These numbers do not include the individuals purchasing marijuana from dispensaries or off the street.

(c) The legalization of marijuana for medical purposes has led to an acceptance of marijuana in the community in a similar way that alcohol is an acceptable substance to use.

(d) The best way to determine the potential legalization of marijuana is to look at communities who have started with medical marijuana, increased access to medical marijuana (as Canada has done over the last several years) and eventually legalized it (Colorado for example).

(e) Using the Colorado experience, legalizing recreational use of marijuana was shown to significantly increase the number of individuals using marijuana.

(f) Statistics from Colorado demonstrate a significant increase in positive testing rate of THC between 2006 to 2012.

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[228] Bartz Affidavit, RAR Vol. III, Tab 4 at para 65.
[229] Bartz Affidavit, RAR Vol. III, Tab 4 at para 67; Byford Affidavit RAR Vol. 1, Tab 1 at paras 58-60.
[230] Snider-Adler Affidavit at para 46.

(g) It is predictable that with legalization of marijuana, there will be more impaired driving, including those who drive for a living.

(h) The perception that marijuana is a benign, herbal, natural substance without any negative impact or impairment leads people to use the substance without considering its negative effects.

140. As discussed at paragraph 90 above, the findings of the Health Canada Report are important here.

c) Slow pace of the Arbitration

141. Notwithstanding the large body of jurisprudence existing in Canada by 2010, that found reasonable cause and post-incident testing to be a valid exercise of management rights, the Union commenced grievance and arbitration proceedings challenging the validity of all aspects of drug/alcohol testing. The scope of the grievance before the Arbitrator includes the issue of random testing.

142. An arbitration hearing before Arbitrator Maureen Saltman commenced in March 2011. Almost six years later there is no end in sight. After approximately 60 days of hearing, the Union has not yet closed its case, and it is unlikely that the TTC will even begin its case in 2017. The Union's assertion that the pace of the arbitration "has accelerated in recent years" is absurd.[231] They neglect to point out that there were only 11 hearing dates in 2016. At the current pace, it will take several more years for the hearing to be completed, and even longer for a decision to be rendered.

143. The slow pace of the hearing can be attributed to several factors:

(a) Both parties have submitted expert reports, pertaining to various scientific and medical disciplines such as pharmacology, toxicology, chemistry, psychiatry,

[231] Factum of the Applicant at para 25.

epidemiology and addiction medicine. The Union's expert reports have been extensive and have included several rebuttal reports. To date the Union has called fact witnesses and four expert witnesses, each of whose evidence has consumed many hearing days. The direct examination of the Union's fourth expert witness, the epidemiologist, Dr. Macdonald, has yet to be completed and has consumed approximately 21 hearing dates, with many more to come. The TTC expects to call at least eight witnesses, several of whom will be experts.

(b) None of the Union's experts are physicians. The only one of the Union's experts who had any prior experience regarding workplace drug and alcohol testing is Dr. Macdonald, but only in his research capacity as an epidemiologist and only in cases involving drug testing using urinalysis rather than oral fluid.

(c) Each of the Union's experts has been subject to a *voir dire* regarding their qualifications and the scope of their admissible opinion evidence. In each case, contrary to the Union's assertions, the scope of the evidence has been limited by the arbitrator, but issues of admissibility continue to arise. For example:

(i) The Union's first expert witness, Dr. Jonathan L. Freedman, a psychologist, was tendered as an expert "in the impact of social phenomena on human behaviour, how to measure that impact and the scientific method". In limiting the scope of Dr. Freedman's evidence after a *voir dire*, the Arbitrator stated:

> I find that Dr. Freedman has acquired no "special or peculiar knowledge through study or experience" in drug and/or alcohol testing, or the effect of drug and/or alcohol testing on employees in the workplace, beyond that of the trier of fact, which would qualify him to provide expert opinion evidence on these matters.

In the result, Dr. Freedman's evidence was narrowly limited to comments on research methodology and/or scientific method.

(ii) The Union's second expert was a Pharmacist, Dr. David Rosenbloom, Pharm.D. He was tendered as an expert regarding the extent of the correlation between blood and saliva for testing purposes and the extent to which a positive oral fluid reading correlates with current impairment.

After a *voir dire*, the Arbitrator found that Dr. Rosenbloom could testify as to the extent to which an oral fluid test reading correlates with blood, but limited the scope of his evidence as follows:

> Consistent with the rationale in *Mathisen and Hall*, I find that, as an expert pharmacist and pharmacologist, in particular, Dr. Rosenbloom can testify as to the effects of drugs, including drugs of abuse, on the brain (as well as the body), but that, notwithstanding his impressive

> *curriculum vitae*, which includes articles in peer-reviewed publications, abstracts and communications, and invited addresses, some of which cross into the area of brain behaviour, his expertise is limited to brain function, rather than brain behaviour, which comes within the expertise of other professionals (psychiatrists, psychologists, neurologists). Accordingly, I find that Dr. Rosenbloom *cannot* testify as to the extent to which an oral fluid reading, as conducted by the TTC, correlates with current impairment, which requires knowledge of cognition or brain behaviour, which is not within Dr. Rosenbloom's expertise. And, as it is not within his area of expertise, he cannot attain such expertise to the standard required by the jurisprudence by a literature review, publications or invited addresses, and the like. [Emphasis added.]

(iii) The Union's third expert witness was Dr. Khosrow Adeli, a Biochemist, Toxicologist and Laboratory Director. After a *voir dire*, the Arbitrator limited the scope of Dr. Adeli's opinion evidence as follows:

> This expertise qualifies him to opine on the extent to which an oral fluid test reading, as conducted by the TTC, correlates to the level of the substance in the blood. Furthermore, I find that he is equally qualified to testify on these matters as they relate to therapeutic drugs and to drugs of abuse, as the laboratory analysis, including the principles of measurement, of the two are one and the same.
>
> However, even though Dr. Adeli testified that he is regularly consulted by clinicians on these matters, unless he is testifying as to "brain function," rather than "brain behaviour," I do not find him to be qualified to give expert testimony as to the extent to which an oral fluid test reading, as conducted by the TTC, correlates to current impairment, which is generally within the expertise of medical doctors (neurologists, psychiatrists and addictionologists, in particular) and arguably psychologists. [Emphasis added.]

(iv) The Union's fourth expert witness, currently still in direct examination, is Dr. Scott Macdonald, who has a Ph.D in Epidemiology and Biostatistics. After a *voir dire*, he was allowed to answer a series of epidemiological questions, with a caveat that "he does not have the expertise, however, to speak to the pharmacology of the drugs (both pharmacokinetics, the effect of the body on the drug and pharmacodynamics, the effect of the drug on the body)."

After a second (mid-hearing) *voir dire* relating to Dr. Macdonald's ability to criticize a section on addiction in the report of Dr. Mace Beckson, one of the TTC's experts, the Arbitrator further limited Dr. Macdonald's evidence:

> Accordingly, while Dr. Macdonald can certainly offer a definition of addiction derived from his own expertise to answer question (a) put to Dr. Beckson, he cannot criticize Dr. Beckson's clinical definition of addiction, as this falls outside his area of expertise. Similarly, he can utilize the DSM-IV or DSM-V in his critique of Dr. Beckson insofar as this analysis falls within the realm of his expertise as an epidemiologist, i.e. in the field of research on a population level, but not as it applies to clinical medicine. [emphasis added]

(d) The Union rejected the TTC's suggestion that the parties either dispense entirely with expert evidence or at least forego preliminary challenges to the experts' qualifications in favour of leaving that issue to final argument.

(e) In direct examination, the Union's experts have been encouraged to provide a line by line recitation and elaboration on the contents of their extensive written reports.

(f) A great deal of hearing time has been consumed by testimony regarding the voluminous scientific literature referred to in the expert reports.

(g) The Arbitrator's practice is to take verbatim notes in longhand of each word of the oral evidence, most of which is repetitive of the expert reports themselves. This practice causes interruptions to virtually every question, and answer.

(h) The Union has rejected the TTC's suggestion that a certified reporter be retained to provide transcripts of the evidence.

(i) The Union has declined the TTC's suggestion that hearings begin earlier than 10:00 a.m. each day.

(j) The arbitrator provides a limited number of days each year for holding hearings.

H. The Union's February 1, 2017 Letter

144. By way of letter dated February 1, 2017 from Union counsel to TTC counsel, the Union finally made a proposal to try to expedite the arbitration process. It has proposed that Arbitrator Saltman be removed as arbitrator and replaced by a new arbitrator who would presumably adopt an alternate form of expedited arbitration procedure. This is the first time that the Union has, through counsel or otherwise, made any kind of suggestion to move the arbitration along. The TTC views

this overture as a disingenuous attempt to persuade the Court that there can somehow be an expeditious conclusion to the arbitration, such that the implementation of random testing should be delayed.[232]

145. Counsel for the TTC responded to Union counsel by letter dated February 23, 2017 stating, *inter alia*, that while the TTC remains willing to discuss with the Union a better way to deal with the litigation, the Union's proposed expedited procedure is unworkable. Starting over again with a new arbitrator is not likely to resolve the arbitration any sooner than continuing with the present arbitrator.[233]

I. Procedures for Random Testing

146. The random testing program will apply to employees in safety-sensitive, specified management and designated executive positions. Employees randomly selected for testing will be subject to an alcohol breathalyzer test and an oral fluid drug test. The procedures for the collection, analysis, review and reporting of breath and/or oral fluid samples is the same as that set out above in paragraphs 57 to 85 above (with the exception of the employees ability to return to work following the test, as set out in paragraph 153 below).

147. The selection rate of employees for random testing will be 20% per year. In other words, an employee eligible for random testing has a chance of being tested, on average, once every five years.[234]

148. The TTC's random testing selection procedure will be facilitated by DriverCheck, whose proprietary software program provides unbiased, unpredictable and fair randomization of

[232] Exhibit B to the Kinnear Affidavit, Second Supplementary Record of the Applicants, Tab 2 at 81-83.
[233] Supplementary Responding Application Record at Tab C, 48-49.
[234] MacRae Affidavit at para 54; Bartz Affidavit at para 25.

employees selected for testing.[235] The program has the ability to select all employees at once to ensure that each employee in the pool has an equal probability of being picked for a random test. Each individual in the pool is assigned a number. The numbers are generated in a way that prevents the user from predicting its sequence and thus provides an unbiased method of selection.[236]

149. DriverCheck's software program limits user influence in a number of other ways.[237] Only select users have access to the system's random selection program and those staff members are unable to see who has actually been selected for testing until the selection is completed. Once the selection is made, the staff members are prevented from making any changes given the detailed audit trail reports that created when the selection is made. These audit trail reports cannot be tampered with. [238]

150. Through a confidential electronic portal, DriverCheck will notify the TTC's Program Administrator on a weekly basis the names of the employees selected for random testing that week.[239]

151. Random alcohol and drug tests will occur during an employee's scheduled shift. To minimize any inconvenience to the employee and the TTC's operations, testing will occur at the employee's assigned work location whenever possible, and in a room or area that provides the employee with sufficient privacy and confidentiality. If it is not feasible to administer the test at

[235] Snider-Adler Affidavit at para 37.
[236] Snider-Adler Affidavit at para 38.
[237] Snider-Adler Affidavit at para 38.
[238] Bartz Affidavit at para 27.
[239] Bartz Affidavit at para 28.

the employee's work location, the employee will be required to report to a nearby testing depot or clinic for testing.[240]

152. Contrary to the allegations raised by the Union (through the affidavit evidence of bus operator, Tracey Brown): a "request for testing will not be made in front of passengers and will not be made … in the middle of [a] bus route. A request to an employee to undergo random testing will be made in a manner that respects the individual's privacy, confidentiality and dignity. The request to participate in testing will be made at a time during the employee's shift that minimizes disruptions to our operations as much as possible, such as at the start of an employee's shift."[241]

153. Employees will return to work after testing (so long as their breathalyzer test is negative, (i.e., the breathalyzer test result is less than 0.02 BAC).[242]

J. Poor quality of the Union's evidence

154. The Applicants' Application Record contains two affidavits from purported "experts", Affidavits from three members of the Union's Executive Board, and affidavits from two employees. As discussed below, this evidence has many weaknesses.

a) Dr. Ann Cavoukian

155. The Union put forward Dr. Ann Cavoukian as a purported expert in privacy to provide an opinion on drug and alcohol testing, but not the TTC's Fitness for Duty Policy in particular.[243] Dr. Cavoukian conceded that she had no experience – let alone expertise – in the field of drug and alcohol testing, and/or the area of workplace privacy, and her evidence must be given no weight. In addition, most of Dr. Cavoukian's affidavit is comprised of legal argument, which Dr.

[240] Bartz Affidavit at para 28.
[241] Bartz Affidavit at para 135.
[242] MacRae affidavit at paras 58, 143. Bartz Affidavit at para 29.
[243] Cross-examination of A Cavoukian at p.24 line 21 to p. 25 line 21.

Cavoukian – who is not a lawyer[244] – admitted on cross-examination was written by other lawyers. Not only is this legal argument inadmissible (for reasons discussed below), but given Dr. Cavoukian's lack of any legal expertise in this area, it can be afforded absolutely no weight.

i. No expertise in drug and alcohol testing

156. On cross-examination, Dr. Cavoukian conceded that she had not researched or written any reports addressing the actual conduct of workplace drug and alcohol testing.[245] Dr. Cavoukian admitted that her work during her time as Ontario's Information and Privacy Commissioner, and afterwards, focused on the protection of data,[246] and that any work she has done that has applicability to the workplace context relates to protection of data.[247]

157. Despite making several assertions in her affidavit about the psychological impact of drug and alcohol testing on individuals, Dr. Cavoukian is not a clinical psychologist, toxicologist or psychiatrist.[248] In addition, Dr. Cavoukian has not studied or written anything about the impact of drug and alcohol testing on an individual's psychological well-being,[249] nor does she have any personal knowledge of any studies of individuals suffering psychological harm as a result of workplace drug testing to support the assertions in her affidavit.[250]

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[244] Cross-examination of A Cavoukian at p. 4 lines 25 to p. 5 line 7; p. 20 lines 15-18.
[245] Cross-Examination of A Cavoukian at p. 19 lines 5-16; p. 20, lines 5-14.
[246] Cross-Examination of A Cavoukian at p. 7 line 27 to p. 9 line 23.
[247] Cross-Examination of A Cavoukian at p. 14 line 14 to p. 18 line 17. See also p. 21 line 21-22 line 11. The sole exception appears to be a paper produced in 1992 by the Ontario Information and Privacy Commissioner while Dr Cavoukian was Assistant Commissioner (see Cross-Examination of A Cavoukian at p. 19 lines 5-16), and though she initially claimed to have "contributed significantly" she admitted her memory is "terrible" and that she has "no idea" as to her actual level of involvement in the report: (Cross-Examination of A Cavoukian at p. 14 line 14 to p. 15 line 16).
[248] Cross-examination of A Cavoukian at p. 20 line 19 to p. 21 line 5.
[249] Cross-examination of A Cavoukian at p. 21 lines 6-10; p.27 line 3-6.
[250] Cross-examination of A Cavoukian at p. 51 line 11 to p. 56 line 14; p. 68 line 5 to p. 69 line 7.

158. This lack of expertise on the psychological harms of drug and alcohol testing is evident from Dr. Cavoukian's almost exclusive reliance in her affidavit on American law review articles that do not actually discuss workplace drug and alcohol testing, but instead concern online and electronic surveillance, strip searches, and data security breaches.[251] The sole exception is an example stemming from a 1988 article written by law professor Bruce Feldthusen concerning an individual observed for a urinalysis test.[252] This failure to include any more recent, specific or cogent evidence of psychological harm resulting from drug and alcohol testing conducted in the manner proposed by the TTC is especially telling, given Dr. Cavoukian's acknowledgement that such testing has been commonplace in the United States over the last thirty years.[253] Her bald assertion that "similar concerns exist"[254] with respect to drug and alcohol testing conducted by means of an oral fluid sample is similarly unfounded and unsupported.

159. Furthermore, Dr. Cavoukian has no experience regarding the efficacy of drug testing – including random drug testing – in the workplace.[255] Dr. Cavoukian admitted that she had not studied or done any work with respect to the methodologies by which drug and alcohol testing are conducted,[256] and she had no knowledge of the SAMHSA Guidelines relating to oral fluid, urine, or breathalyzer testing and results.[257] Not surprisingly, Dr. Cavoukian has never provided expert evidence on the subject of drug and alcohol testing before.[258]

160. As discussed above beginning at paragraph 105, Dr. Cavoukian's concerns with regard to false positives similarly do not hold any weight. Other concerns she raises, such as a potential

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[251] Cross-examination of A Cavoukian at p. 51 line 11 to p. 56 line 14; p. 68 line 5 to p. 69 line 7.
[252] Affidvait of A Cavoukian at para 25; Cross-examination of A Cavoukian at p. 69 to 72 line 20.
[253] Cross-examination of A Cavoukian at p.53 line 22 to p. 54 line 2.
[254] Affidavit of A Cavoukian at para 26.
[255] Cross-examination of A Cavoukian at p.21 lines 11-16.
[256] Cross-examination of A Cavoukian at p. 21 lines 17-20.
[257] Cross-examination of A Cavoukian at p. 23 line 25 to p. 24 line 20.
[258] Cross-examination of A Cavoukian at p. 25 lines 9-11.

"substitution effect" are similarly unsupported and outside her area of expertise,[259] as Dr. Beckson rightly points out in his critique of Dr. Cavoukian's evidence.[260] Overall, her evidence concerning the efficacy of drug and alcohol testing should not be given any weight.

ii. Not a legal expert and legal argument is inadmissible

161. A proportion of Dr. Cavoukian's affidavit consists of inadmissible legal argument. Dr. Cavoukian is not a lawyer;[261] her affidavit was a "collaborative effort" between herself and lawyers who provided her with research assistance.[262]

162. However, even if Dr. Cavoukian was a lawyer, expert opinion evidence as to the interpretation of domestic law is unreliable, unnecessary and inadmissible in Canada. An opinion concerning the interpretation of Canadian domestic law improperly oversteps the limited exceptions granted to the hearing of opinion evidence from experts and intrudes on the role of the judge, who is presumed to be competent to interpret, determine, and apply domestic law.[263] The role of an expert is to provide their factual expertise to assist the court in interpreting factual matters, not to act as a proxy advocate for their side's position , let alone argue law.

163. Under this standard, much of Dr. Cavoukian's affidavit is inadmissible. Dr. Cavoukian argues her preferred interpretation of privacy, not from a psychological perspective but from a legal one. The sources she relies on consist of Canadian legislation,[264] Canadian and American case law,[265] and American law review articles (again, none of which specifically discuss drug and

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[259] Cross-examination of A Cavoukian at p. 85 line 17 to p. 86 line 9.
[260] Beckson Affidavit at para 39.
[261] Cross-examination of A Cavoukian at p. 4 lines 25 to p. 5 line 7; p. 20 lines 15-18.
[262] Cross-examination of A Cavoukian at p. 29 line 16 to p. 30 line 24; p. 36 lines 21-25; p. 40 lines 11-13.
[263] See e.g. *Wallace v* Allen, [2007] OJ No 879 at para 7: "It is simply not helpful to hear the opinion of the legal expert that the correct conclusion of law is such and such, because an expert says so. Rather, I will need to hear why such a conclusion is correct. That is a matter for argument, not evidence"; *Walsh v BDO Woody LLP*, 2013 BCSC 1463 at para 87, [2013] BCJ No 1781; *Steen Estate v Iran (Islamic Republic),* 2011 ONSC 6464 at para 28, 108 OR (3d) 301.
[264] Affidavit of A Cavoukian at paras 5-6.
[265] Affidavit of A Cavoukian at paras 6, 9-11, 13, 14, 16, 24, 33, and 35.

alcohol testing).[266] Her ultimate conclusion as to the legal standard to be applied in this case, expressed at paragraph 36 of her affidavit, blatantly oversteps both her expertise and her role as an expert witness and intrudes into the exclusive domain of the Court tasked with determining the very questions she purports to answer. These conclusions are therefore entirely inadmissible.

iii. Opinion has no bearing on the Fitness for Duty Policy

164. Finally, Dr. Cavoukian's opinion should be given no weight in respect of an assessment of the TTC's Fitness for Duty Policy because, as Dr. Cavoukian admitted in cross-examination, she was not asked to, nor did she provide an opinion on the Policy.[267] Dr. Cavoukian did not review any of the necessary information to provide a proper assessment of the Policy. For example, she believed that urinalysis might be used for random testing,[268] which is not the case. Dr. Cavoukian claimed that she had requested specific details relating to the TTC's Policy[269], which were either not provided to her, or she was not asked to review, in order to provide a Reply affidavit.[270] The result is that, even where her opinions are admissible, properly supported and within her expertise, Dr. Cavoukian's evidence is of no value to the assessment of TTC's Fitness for Duty Policy.

b) Dr. Scott Macdonald

165. In addition to Dr. Macdonald's complete lack of expertise in the area of oral fluid drug and alcohol testing, including appropriate cut-off levels and their relationship to likelihood of

[266] Cavoukian Affidavit at paras 7-9, 11, 12, 15, 17-19, 24, 25, and 30.
[267] Cross-examination of A Cavoukian at p. 25 line 19-21.
[268] Cross-examination of A Cavoukian at p. 27 line 7 to p. 28 line 3.
[269] Cross-examination of A Cavoukian at p. 35 line 10 to p. 36 line 16.
[270] Cross-examination of A Cavoukian at p. 34 line 12 to p. 35 line 21.

impairment (as discussed above at paragraph 92),[271] Dr. Macdonald's evidence should be viewed with skepticism.[272]

166. In his Supplementary Affidavit sworn January 4, 2017, Dr. Macdonald provided a brief response to the following question posed to him:

> How do the conclusions relating to cannabis consumption and the detection of impairment contained in the Government of Canada Report relate to the scientific consensus on this issue in the field of epidemiology?

167. In his brief response, Dr. Macdonald quoted the following sentence from the "Government of Canada Report":

> While scientists agree that THC impairs driving performance, the level of THC in bodily fluids cannot be used to reliability indicate the degree of impairment or crash risk.[273]

168. The "Government of Canada Report" refers to a publication entitled, *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*. The report is 106 pages in total.[274]

169. In cross-examination, when asked if he read the report in its entirety, Dr. Macdonald answered "yes", but qualified his answer with the following: "I skimmed through some sections."[275]

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[271] As discussed above at paragraph 93 Dr. MacDonald never participated in the design or implementation of a workplace drug and alcohol testing program, he is not a medical doctor, a pharmacologist, nor an expert in toxicology. Dr. Macdonald has no experience in psychiatry, neurology, or addiction medicine, and has never treated people with addictions or substance use disorders. In addition, Dr. MacDonald has never (other than in the current litigation between the Union and the TTC) provided expert evidence regarding drug testing involving oral fluid (as opposed to urinalysis).
[272] Cross-examination of S. Macdonald at p. 7 line 9
[273] Supplementary Affidavit of Macdonald, para 26
[274] Exhibit C to Beckson Affidavit.
[275] Cross-Examination of Macdonald at p. 7 line 16 to 10.

170. Dr. Macdonald attempted to justify his selective reliance on one sentence of the report, on the basis that he "was focusing on the detection of impairment."[276] However, he conceded that there were other aspects of the report that he did not quote but were relevant to the question being asked of him.[277]

171. Those relevant aspects which Dr. Macdonald failed to reference in his Supplementary Affidavit, and were put to Dr. Macdonald during cross-examination, are referenced in Dr. Beckson's Affidavit.[278] A full copy of the Report is found at Exhibit C to Dr. Beckson's Affidavit.

c) Clifford Piggott

172. The most extensive of the Union's fact affidavits is that of Executive Board member Cliff Piggott, who purports to comment extensively on the quality of the Union's expert evidence and the Arbitrator's rulings. However, Mr. Piggott was not present at the hearing during any of the evidence presented by the Union's expert witnesses, Dr. Freedman, Dr. Rosenbloom and Dr. Adeli,[279] and was only present for the last part of Dr. Macdonald's evidence.[280]

173. Although Mr. Piggott made extensive comments in his Supplementary Affidavit sworn February 2, 2017 on the Arbitrator's *voir dire* rulings, Mr. Piggott never even read those rulings.[281] Yet he did not state this in his affidavit or attribute his evidence to anyone else. It became clear on cross-examination that he relied exclusively, without question, on what the Applicants' lawyers had written for him:[282]

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[276] Cross-Examination of Macdonald at p. 11 line 2 to 7.
[277] Cross-Examination of Macdonald at p. 11 line 15 to p. 13 line 19.
[278] Beckson Affidavit at para 26.
[279] Cross-examination of Piggott, p. 5 line 7 to 12.
[280] Cross-examination of Piggott, p. 5, line 2 to 6.
[281] Cross-examination of Piggott, p. 11, line 16 to p. 12, line 3.
[282] Cross-examination of Piggott, p. 6 line 2 to 24.

> Q: Yes. The one that is part of the second supplementary application record. Starting at paragraph 12, and going on for some length after that, you provide fairly extensive evidence regarding the expert evidence. And, so, I take it that all of this evidence in your affidavit with respect to any of the experts prior to Dr. Macdonald is based on information that you received from somebody else?
>
> A: Yes.
>
> Q: And that you have no personal information concerning any of the subject matter of your affidavit relating to experts Freedman, Rosenbloom and Adeli, correct?
>
> A: Yes.
>
> Q: And where did the information come from?
>
> A: It has been provided for me by the lawyers.
>
> Q: All right. Can you indicate which lawyers?
>
> A: Not directly. The team of lawyers that put this together and provided it for me.

174. Mr. Piggott conceded that he simply believed that the content drafted by the Union's counsel were true and accurate:[283]

> Q: Well, do you understand what you are testifying to? And if you didn't read the report…if you didn't read the ruling, what gave you any ability to…
>
> A: When I read the information in the affidavit, or when it was provided, I believed at the time that what was here was accurate and rights.
>
> Q: But not based on your interpretation of the ruling, because you didn't have one, because you hadn't read it, right?
>
> A: Right.

175. Mr. Piggott also acknowledged that, prior to swearing his Supplementary Affidavit, he did not review any hearing notes that were taken by Union counsel or any other representatives of the Union who had attended the arbitration hearings.[284]

176. Similarly, Mr. Piggott acknowledged that his comments in his Supplementary Affidavit concerning the progress of the arbitration was not based on his personal experience or personal

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[283] Cross-examination of Piggott, p. 15 line 3 to 13.
[284] Cross-examination of Piggott, p. 21 line 21 to p. 22 line 5.

observations of the proceeding: his views were based on information received from the Union's counsel.[285]

177. Similarly, when questioned about the contents of his initial Affidavit sworn January 6, 2017, it was apparent that Mr. Piggott's knowledge of certain subject matters addressed in that Affidavit was limited or misinformed. Although Mr. Piggott deposed that the TTC never advised the Union "that there was a significant or out of control drug or alcohol problem at the workplace",[286] Mr. Piggott also included at Exhibit D to his Affidavit a TTC document entitled, "Toronto Transit Commission Report, Fitness for Duty Policy".[287] Mr. Piggott believes that the Union received a copy of the report when it was issued in September 2008.[288] In cross-examination, Mr. Piggott agreed that the report contained references to the TTC's conclusion that there was a substance use problem among the workforce.[289] Mr. Piggott further agreed that the report, having been brought to the Union's attention in or around September 2008, indicated the TTC had "some concern" about workplace alcohol and drug issues.[290]

d) John DiNino

178. Mr. DiNino is a member of the Union's Executive Board.[291] In his affidavit, Mr. DiNino claimed that he has represented bargaining unit members who tested positive under the TTC's

[285] Cross-examination of Piggott, p. 33 line 22 to p.36 line 9.
[286] Piggott Affidavit at para 17.
[287] Piggott Affidavit at para 19.
[288] Cross-examination of Piggott, p. 39 line 10 to 23.
[289] Cross-examination of Piggott, p. 39 line 3 to 13.
[290] Cross-examination of Piggott, p. 42 line 21 to p. 43, line 3.
[291] DiNino Affidavit, para 2

Policy despite not being impaired at the time of the test.[292] Mr. DiNino referred to these purported incidents as "false positive test results".[293]

179. Mr. DiNino's claims about "false positive" results are unsubstantiated and not supported by reliable evidence. In cross-examination, Mr. DiNino could neither recall nor identify the names of any members that he represented and had purported "false positive" results, with one exception.[294] Mr. DiNino claimed that he represented one member who submitted to post-incident testing and tested positive for THC.[295] Mr. DiNino acknowledged that the member disclosed that "he had consumed [THC] over the weekend and the test was performed on the Monday or the Tuesday following the weekend".[296] Mr. DiNino's belief that the member was not impaired at the time of the test, despite having a positive test result, was based solely on the member's self-assertion that he was not impaired at the time of testing.[297]

180. In his Affidavit, Mr. DiNino makes the bald assertion that the TTC's oral fluid testing cannot detect likelihood of impairment.[298] Although Mr. DiNino deposed that his belief was based on information provided to him by "experts in the field," in cross-examination Mr. DiNino admitted that, in fact, he had not been provided with information by any experts. Rather, his belief was based on an internet search and the information provided to him by the Applicants' counsel.[299]

181. Furthermore, in his comments about "false positive" results, Mr. DiNino did not consider an important safeguard in the TTC's testing process, namely the opportunity for re-analysis.

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[292] DiNino Affidavit, paras 33 to 34.)
[293] DiNino Affidavit, para 38.
[294] Cross-examination of DiNino, p. 58, line 1 to p. 60, line 1.
[295] Cross-examination of DiNino, p. 60, line 4 to p. 51, line 8.
[296] Cross-examination of DiNino, p. 60 line 14 to 21.
[297] Cross-examination of DiNino, p. 62 line 10 to p. 63 line 9.
[298] DiNino Affidavit at para 36.
[299] Cross-examination of DiNino, p. 40 line 8 to p. 41, line 5.

Although Mr. DiNino is aware that employees subject to oral fluid testing are asked to provide two oral fluid samples, he had no knowledge that the purpose of this was to preserve an employee's opportunity to request a re-analysis, should the employee wish to challenge the laboratory results of the initial sample.[300]

182. Similarly, Mr. DiNino's purported concerns about any embarrassment or reputational harm arising from random testing are entirely speculative. In cross-examination, Mr. DiNino acknowledged that all bargaining unit employees in safety-sensitive positions – over 10,000 of the Union's members – are eligible to be selected for random testing.[301] Mr. DiNino also acknowledged his understanding that, unlike reasonable cause or post-incident testing, employees selected for random testing will be returned to duty after successful completion of the collection process.[302] When asked how, in light of these features, the TTC's random testing could cause reputational harm, Mr. DiNino was unable to respond that it could:

> Q. …I asked you what effect does it have on somebody's reputation…why would anybody feel that it would have an adverse effect on their reputation to be one of 10,000 selected for random testing on any given day.
>
> A. Well, I can't answer that because that hasn't happened yet so I guess we will have to see when that happens.[303]

183. Lastly, Mr. DiNino's comments about the disclosure of personal medical information have no application to the TTC's random testing program. In cross-examination, Mr. DiNino clarified that his comments on this subject were exclusively in relation to employees subject to return-to-duty / post-treatment testing.[304] Mr. DiNino also acknowledged that such employees

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[300] Cross-examination of DiNino, p. 6 line 16 to p. 6 line 9.
[301] Cross-examination of DiNino, p. 34 line 8 to 15.
[302] Cross-examination of DiNino, p. 35 line 2 to p. 36, line 18.
[303] Cross-examination of DiNino, p. 38, line 4 to 9.
[304] Cross-examination of DiNino, p. 27 line 23 to p. 29 line 13.

were subject to unannounced, urinalysis drug testing – not oral fluid.[305] His purported concern about the "disclosure of personal medical information" was a specific reference to Mr. DiNino's understanding that an employee reporting for an unannounced, urine drug test would be asked by the collector if the employee took any medications.[306] Mr. DiNino agreed that the purpose of obtaining this information was done for the benefit of the employee, that is, to ensure that the employee's test result is fair.[307]

e) Bob Kinnear

184. Mr. Kinnear, as Union President, instructed the Union's counsel to propose to the TTC the procedure set out counsel's "with prejudice" letter dated February 1, 2017.[308] The proposal sets out a procedure purporting to "facilitate the expeditious litigation" of the arbitration of the Union's policy grievance.

185. Although the proposal provides that Arbitrator Saltman would be removed and replaced with one of two specifically named arbitrators, in cross-examination, Mr. Kinnear admitted that he would be content to have the arbitration continue before Arbitrator Saltman.[309] In fact, Mr. Kinnear denied TTC counsel's suggestion that, by making the proposal, the Union had lost confidence in Arbitrator Saltman.[310] Although Mr. Kinnear claimed that the Union's idea for the proposal occurred about two months ago (*i.e.*, in December 2016), the Union did not give "serious consideration" to the idea until "the last couple weeks" (*i.e.*, after January 26, 2017), by which time

[305] Cross-examination of DiNino, p.31 line 24 to p. 32 line 6.
[306] Cross-examination of DiNino, p.31 line 24 to p. 32 line 6.
[307] Cross-examination of DiNino, p. 33, line 11 to 15.
[308] Cross-examination of Kinnear, p. 10 line 17 to p. 11 line 10
[309] : Cross-examination of Kinnear, p. 12 line 16 to 25.
[310] Cross-examination of Kinnear, p. 12 line 3 to 15.

the Union had been served with the TTC's Responding Application Record and Mr. Kinnear had reviewed the Affidavit of Megan MacRae.[311]

186. Mr. Kinnear was unable to provide a rational basis as to why the Union's proposed method would expedite the arbitration. Mr. Kinnear has no prior experience with the litigation procedure being proposed by the Union, nor did he have knowledge as to whether the Union had even checked on the availability of either of the two "replacement" arbitrators suggested by the Union.[312] He also acknowledged the issue of re-creating a record based on over 60 days of hearings that consists of, *inter alia*, testimony from a number of the Union's witnesses, most of which have been expert witnesses, extensive cross-examination of those experts on their reports, and expert testimony pertaining to, cumulatively, hundreds of reference articles and other publications.[313] Mr. Kinnear also acknowledged that the Union previously rejected the TTC's proposal to have a court reporter at the arbitration proceeding and, accordingly, the only record of the arbitral proceeding is Arbitrator Saltman's notes.[314] Mr. Kinnear was unable to explain how the Union's recent proposal would expedite the arbitration. Although he indicated that the parties and the replacement arbitrator could conduct the hearing during nights and on weekends, Mr. Kinnear agreed that it was unlikely that such a schedule could be sustained over an extended period.

187. Most astonishingly, while agreeing that he is correctly quoted, Mr. Kinnear seeks to resile from his clear statement to the TTC that he did not object to random breathalyzer testing.[315]

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[311] Cross-examination of Kinnear, p. 17 line 13 to p. 18 line 23.
[312] Cross-examination of Kinnear, p. 24 line 6 to 16.
[313] Cross-examination of Kinnear, p. 27, line 16 to p. 29 line 3.
[314] Cross-examination of Kinnear, p. 29 line 20 to p. 30 line 2.
[315] MacRae Affidavit paras 156 to 162; Kinnear Affidavit, paras 11 to 14

f) Almat Akhmetov and Tracey Brown

188. The Union also filed affidavit evidence from two TTC employees, Almat Akhmetov, a Vehicle Repairperson (mechanic), and Tracey Brown, a bus operator. Both employees readily acknowledged that their work was safety-sensitive.[316] For example, Ms. Brown acknowledged in cross-examination that her position as a bus driver is a safety-sensitive one,[317] which poses risks to passengers, the bus driver and the general public, including pedestrians and cyclists.[318] Similarly, as Mr. Akhmetov stated in cross-examination:

> ...The same for me, like, at work, I'm not going to drink or do something silly to lose my job, because it's very important for me, and it's safety for the people who work with me and the customers.
>
> Q. Right, and I take it you hope that all your fellow employees feel the same way?
>
> A. The people who I am working with, I have to trust them, because my life depends on them also.[319] [Emphasis added.]

i. Mr. Akhmetov's Evidence

189. Mr. Akhmetov claimed that he would never give a bodily substance to anyone but his doctor, but conceded that he was subject to urinalysis as part of his hiring process into a safety-sensitive position in 2015 and raised no complaints about that.[320]

190. One of Mr. Akhmetov's major complaints regarding the TTC's random testing program is that he alleges he was not given any information about it. For example:

(a) In his affidavit, Mr. Akhmetov states that he "recently" became aware that the TTC was going to implement random testing through media reports. When pressed on cross-examination, Mr. Akhmetov could not provide any dates or time ranges but

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[316] See, e.g., Cross-Examination of A. Akhmetov, February 15, 2017 at p. 5, lines 16-20, p. 5 line 24 to p. 6 line 10.
[317] Cross Examination of T. Brown, February 15, 2017 at p. 4 lines 2-4.
[318] Cross Examination of T. Brown, February 15, 2017 at p. 5 line 19 to p. 6 line 4.
[319] Cross-Examination of A. Akhmetov, February 15, 2017 at p.24 lines 10 -18.
[320] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 11 line 24 to p. 15, line 13, Exhibit 1.

subsequently agreed that he had known about it for perhaps "six or seven months".[321]

(b) When Mr. Akhmetov was asked whether he had asked anyone for information regarding the random testing procedures, he stated that the TTC should provide the information "because you know, it's hard to ask the person. I'm a little bit shy person. I don't like to give hard time to people, and ask too many questions".[322] Similarly, when asked whether Mr. Akhmetov asked his Union about the random program, he stated that the Union was busy with other issues, and "So instead of bringing them more hard time, I decided, like, to step back and wait."[323]

191. However, Mr. Akhmetov's evidence on cross-examination reveals that the reason he had not received information about the random testing program, was likely because he was not paying attention to the information being provided to employees by the TTC:

(a) While Mr. Akhmetov acknowledged that the TTC did post information in the workplace, he stated that he did not see any workplace postings regarding the random testing program. This may be because, in Mr. Akhmetov's view, the TTC sometimes posted "useless information" and so "instead of spending time on that kind of stuff, you're just going straight to work."[324]

(b) Mr. Akhmetov claimed that he had never seen the letter sent to employees by Mr. Byford on April 16, 2016 (included as Exhibit M to Mr. Byford's Affidavit),[325] which according to Mr. Byford's supplementary affidavit was mailed out to all TTC employees on or around that date.[326] Subsequently, however, Mr. Akhmetov conceded that he may have received the letter in the mail,[327] and while he maintained he hadn't seen it, Mr. Akhmetov also acknowledged that he does "not always" read mail from his employer.[328]

(c) Mr. Akhmetov also claimed he had never received the TTC's Fitness for Duty booklet, which is given to employees when they are hired,[329] although that may be

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[321] Akhmetov Affidavit at para 3. Cross-Examination of A. Akhmetov, February 15, 2017 at p. 6 line 26 to p. 7 line 21.
[322] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 50 line 19 to p. 51 line 1.
[323] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 38 lines 7-14.
[324] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 7 line 22 to p. 8 line 24
[325] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 10 line 25 to p. 11 line 12.
[326] Supplementary Affidavit of A. Byford, in Respondent's Supplementary Application Record ("SAR"), Tab 1 at para 1. See also Byford Affidavit at para 54.
[327] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 57 lines 17-23.
[328] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 56 line 2-4. See also p.55 line 20 to p. 62 line 21.
[329] Supplementary Affidavit of A. Byford, in Respondent's Supplementary Application Record ("SAR"), Tab 1 at para 2, Exhibit A. See also Bartz Affidavit at para 138.

because Mr. Akhmetov admitted that he "didn't look inside" the package he was given when he was hired.[330]

(d) Mr. Akhmetov stated that he did not receive any information from his union regarding the random testing program.[331] Mr. Akhmetov stated that he did not receive Union newsletters.[332]

192. The fears and anxiety described in Mr. Akhmetov's affidavit are based on inaccurate, unreasonable, or a complete absence of information. For example:

(a) Mr. Akhmetov was not aware of the TTC's proposed random testing rate of 20% when he stated in his affidavit that he would "feel afraid all of the time" that he could be randomly tested.[333]

(b) In his affidavit, Mr. Akhmetov claims that he has "great fear and anxiety that I could suffer from a false positive".[334] However, on cross-examination he conceded that neither his certification nor post-incident test returned a false positive result.[335] In addition, Mr. Akhmetov admitted he had "no clue" what kind of laboratory tests would be done on the sample,[336] did not know what "split samples" were,[337] did not know what the MRO's responsibilities were,[338] and did not know what the cut-off levels for either breathalyzer or oral fluid testing,[339]

193. In turn, Mr. Akhmetov's claims of "great fear and anxiety"[340] are exaggerated. Although recently tested following an incident moving a subway train, he filed no grievance or complaint relating to drug and alcohol testing. His reason for not doing so cannot be accepted as credible. In particular:

(a) Initially on cross-examination, Mr. Akhmetov claimed that he did not know how to file a grievance or complaint in relation to the post-incident testing and had not been informed by the Union because he did not have a representative.[341] He

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[330] Cross-Examination of A. Akhmetov, February 15, 2017 at p.16 line
[331] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 8 line 41 to p. 9 line 9.
[332] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 9 lines 17-19.
[333] Akhmetov Affidavit at para 10; Cross-Examination at p. 20 line 4 to p. 21 line 11.
[334] Akhmetov Affidavit at para 27.
[335] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 48 lines 1-6.
[336] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 48 lines 7-20.
[337] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 48 line 21 to p. 49 line 9.
[338] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 49 lines 16-22.
[339] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 49 line 23-50 line 3.
[340] See, e.g., Akmetov Affidavit at paras 20, 27.
[341] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 30 line 7 to p. 31 line 12.

subsequently claimed that he "couldn't even grieve or complain too much" because he was on probation at the time of the incident.[342] Mr. Akhmetov subsequently conceded that the probation period for a new employee is 10 months and that, at the time of the incident, he'd been employed for 12 months.[343]

(b) Although Mr. Akhmetov states in his affidavit that knowing he could be randomly tested would cause him "to come to work afraid and in an anxious state",[344] he had not sought any medical assistance for his fear and anxiety because he didn't have time. As to why he had not contacted a doctor, Mr. Akhmetov stated he would need to take time off to go see a doctor and could not do so because it was during his probation period (which, as discussed, above, was completed in August 2016).[345]

194. Mr. Akhmetov's fears relating to random testing, largely centre on his unreasonable belief that he will be targeted by the TTC through random testing. For example:

(a) Despite Mr. Akhmetov's understanding of the concept of "random" testing (i.e., being like "playing bingo" and "picking up one ball from the box"[346]), Mr. Akhmetov, unreasonably, remains convinced that he will nevertheless be "targeted" by the TTC (as he claims he was in relation to the post-incident testing).[347] According to Mr. Akhmetov, it makes no difference to him that the random selection would be done by a company other than the TTC (of which he was not aware when he swore his affidavit),[348] nor would it make any difference that the company used random selection software.[349]

(b) Alternately, Mr. Akhmetov likened random testing to handing out his DNA to "a stranger on the street",[350] and stated that it would make no difference to his concern about what would happen to the information if the testing was done by a professional lab, because "they are...strangers."[351] In contrast, Mr. Akhmetov stated he would have no trouble giving a sample to a family doctor, even though the doctor also sends the sample to a lab.[352]

195. Finally, Mr. Akhmetov's complaints about his post-incident test for drugs (via oral fluid) and alcohol (via breathalyzer) in October 2016 after a subway car he was driving back-tripped

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[342] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 35 line 9-15.
[343] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 42 line 16 to 43 line 8; Akhmetov Affidavit at para 1
[344] Affidavit para 20
[345] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 42 line 1to 43 line 8.
[346] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 34 lines 12-22
[347] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 32 lines 13 to p. 37 line 24.
[348] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 39 line1 to p. 40 line 23.
[349] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 40 line 24 to p. 41 line 7.
[350] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 52 line 16 to p. 53 line 1.
[351] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 53 lines 5-11.
[352] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 53 line 13-p. 55 line 13.

when he crossed a "double impassible", are simply not credible. For example, initially on cross-examination, Mr. Akhmetov denied having union representation during the testing process,[353] and specifically denied that Joe Dambrosio, his Union representative, was present for the testing.[354] When confronted with post-incident testing documentation indicating Mr. Dambrosio had, in fact, attended to represent him during the testing process, Mr. Akhmetov agreed that he had attended, but "came at the end when already the whole stuff is finished", and stated that they did not have time to talk before or after the testing.[355] Later in cross-examination, Mr. Akhmetov stated that "it was already a big pleasure to see [Mr. Dambrosio] there, that he came. I just…to see him there, at least for five, 10 minutes, to be sure that I am okay and nothing bad happened to me."[356]

ii. Tracey Brown

196. Ms. Brown has been involved with the Union for more than 15 years, in various roles, including as a political action committee member appointed by the Executive Board and a returning officer. Ms. Brown is currently a member of the women's committee, having been appointed by Union President Bob Kinnear.[357]

197. Ms. Brown's statements regarding random testing pursuant to the Fitness for Duty Policy are entirely speculative and appear to be driven by pre-existing distrust of her employer, rather than any real issue with drug and alcohol testing itself. In particular, Ms. Brown's description of anticipated drug and alcohol testing (by anyone other than her doctor) as "extremely violating",

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[353] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 28 line 147 to p. 30 line 3.
[354] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 33 line 16 to p. 34line 7.
[355] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 44 line 13 to p. 45 line 17. See also p. 46 line 12 to p. 47 line 16.
[356] Cross-Examination of A. Akhmetov, February 15, 2017 at p. 52 lines9-15.
[357] Cross Examination of T. Brown, February 15, 2017 at p. 6 line 24 to p. 8 line 1.

and as an indignity that she would "never be able to forget or forgive",[358] is based entirely on conjecture, given that Ms. Brown has never been tested for drugs or alcohol, nor been involved with or present when anyone else was tested.[359] In addition, Ms. Brown stated that she "wouldn't have a problem" with testing if it was done by her doctor, and felt no anxiety about the fact that her personal information from samples given to her doctor were retained by laboratories she didn't know.[360]

198. Similarly, many of the concerns cited by Ms. Brown are speculative or based on inaccurate information. For example, Ms. Brown was not aware that employees are able to return to work immediately following random testing, unless there is a positive breathalyzer test, when she stated that random testing "can result in serious reputational harm" if she was "relieved of duty and subsequently disciplined as a result of an investigation into my testing results".[361] In addition, Ms. Brown's statement regarding the "massive" "public humiliation" she would suffer from being "taken off the bus in front of passengers" is based on erroneous information from the Union, which is specifically contradicted by Mr. Bartz's evidence that this would simply not happen.[362] It is also seriously undermined by Ms. Brown's concession on cross-examination that it is not unusual "for passengers to see a driver get up and leave and have another driver take over."[363]

199. In her affidavit, Ms. Brown also raised concerns about the testing process being "abused" and not being random,[364] and stated that she had "serious anxiety" about the personal information

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[358] Brown Affidavit paras 7-11.
[359] Cross Examination of T. Brown, February 15, 2017 at p. 13 lines 11-18.
[360] Cross Examination of T. Brown, February 15, 2017 at p. 25 line 8 p. 26 line 7, p. 30 lines 1-21.
[361] Cross Examination of T. Brown, February 15, 2017 at p. 19 line 15 to p. 21 line 23.
[362] Brown Affidavit at para 22, Cross Examination of T. Brown, February 15, 2017 at p. 22 lines 9-24, Bartz affidavit at para 135.
[363] Cross Examination of T. Brown, February 15, 2017 at p. 25 lines 4-7.
[364] Brown Affidavit at para 23.

obtained and accessed.[365] In particular, she was concerned that when she tested negative, her sample or information could be saved and accessed by the TTC in the future, and that the TTC would have access to sensitive information unrelated to the drug or alcohol use.[366]

200. However, when she made these statements, Ms. Brown was not aware that the TTC will test 20% of the safety-sensitive work force each year. Nor was she aware that a third party – not the TTC – would be doing the random selection through random selection software,[367] that a third party laboratory would conduct the testing, that negative test results would be destroyed within two weeks, or that the TTC would not be privy to any personal information other than the test result being negative.[368] Ms. Brown nevertheless maintained these concerns when confronted with this information, stating that this information would not make a difference to her, and she remained suspicious because of the contractual relationship between the TTC and the third party.[369]

201. Finally, Ms. Brown identified one of the "most anxiety inducing concerns" as experiencing a false positive.[370] Yet, Ms. Brown was not familiar with the MRO Review process[371] or the use of split samples.[372] When asked about her concerns relating to second-hand marijuana smoke, Ms. Brown conceded that she was not aware of the likelihood of testing positive after exposure to second-hand smoke, because she is "not a scientist".[373]

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[365] Brown Affidavit at paras 12-17.
[366] Brown Affidavit at paras 13-15.
[367] Cross Examination of T. Brown, February 15, 2017 at p. 15 line 23 to p. 17 line 7.
[368] Cross Examination of T. Brown, February 15, 2017 at p. 26 line 8 to p. 33 line 12, p. 34 lines 6-15.
[369] Cross Examination of T. Brown, February 15, 2017 at p. 16 line 12 to p. 17 line 7.
[370] Brown Affidavit para 27-37.
[371] Cross Examination of T. Brown, February 15, 2017 at p. 26 line 8 to p. 27 line 19.
[372] Cross Examination of T. Brown, February 15, 2017 at p. 36 lines 1-7.
[373] Cross Examination of T. Brown, February 15, 2017 at p. 36 lines 17-24.

PART III - STATEMENT OF LAW & ARGUMENT

A. Overview

202. The Fitness for Duty Policy does not contravene Section 8 of the *Charter*. The application of s. 8 of the *Charter* to the Fitness for Duty Policy must be done in a contextual manner. As the Supreme Court has held, an assessment of "what is 'reasonable' in a given context must be flexible if it is to be realistic and meaningful".[374] The testing performed under the Policy is neither criminal nor-quasi criminal in nature, but rather occurs within a highly regulated and safety-sensitive workplace. [375] Reasonable expectations of privacy in such environments are necessarily reduced,[376] as recognized by arbitrators and the Courts which have found, in balancing privacy rights and safety, that drug and alcohol testing (certification, reasonable cause, post-incident, post-treatment and post-violation) is permissible in all safety-sensitive workplaces, and that random testing may be permissible depending on the circumstances.

203. Accordingly, the Union's application for an injunction must be dismissed. The Section 8 argument does not raise a serious argument and, factually, there is overwhelming evidence of drug and alcohol use threatening the extraordinarily safety sensate operations of the TTC. No irreparable harm will result from random testing of employees who are already subject to testing in other circumstances, whereas the potential harm to the TTC and, in particular, its customers, is enormous. The balance all favours the TTC and public safety.

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[374] *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at para 30 [*McKinlay*].
[375] The standard of review of the search is less onerous outside of the criminal and quasi-criminal context: *McKinlay* at para 34.
[376] *Reference re Federal Courts Act*, 2009 FCA 234 at para 50 [*FCA Reference*]: "In my view, because they are part of a regulated workforce, members of the ILWU have a relatively low expectation of privacy with respect to personal information that is reasonably related to an assessment of the extent to which they pose a threat to the security of marine transportation".

B. This Court has jurisdiction and the Charter Applies

204. The Respondent does not take issue with this Court's jurisdiction. This matter is properly brought before the Court and not an arbitrator. Further, on this application the TTC does not dispute that it is "government" to which the *Charter* applies.

C. The Appropriate Test for an Injunction

205. The parties are largely in agreement on this issue. The Supreme Court of Canada has articulated a three-part test that must be satisfied by the Applicant in order to grant an injunction.

(a) there is a serious question to be tried;

(b) the applicant would suffer irreparable harm if the application was refused; and

(c) the applicant would suffer greater harm if the application were refused than would the respondent if it were granted pending a decision on the merits.[377]

206. In *RJR Macdonald*, the Court interpreted the term "irreparable" to mean that it "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or cannot be cured."[378]

207. Irreparable harm is not to be considered in isolation from the other elements of the tripartite test. It has been held that, "in a strong case, harm can be inferred from the facts of the case but in a weak case it needs to be proved independently."[379]

208. The third stage of the three-part test, determining where the balance of convenience lies, involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[380]

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[377] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at para 43 [*RJR-MacDonald*].
[378] *RJR-MacDonald* at para 59.
[379] *Bell Canada v Rogers Communications Inc,* [2009] OJ No 3161 (Sup Ct J) at paras 39-40 [*Bell Canada*].

a) No serious question to be tried

209. The Union frames its case under s. 8 of the *Charter* and argues that the TTC must seek prior authorization to conduct drug and alcohol testing. It seems to be suggesting that random testing, therefore, can never be justified due to s. 8 and its requirement of reasonable grounds.[381] Both positions are untenable, without any support in the case law, and do not rise to the level of a serious issue to be tried.

i. The TTC meets the requirements of Section 8 of the Charter

210. The Union makes the novel and extraordinary argument that s. 8 of the *Charter* requires the TTC to comply with the criminal law requirement to obtain prior authorization from a person "capable of acting judicially", based on reasonable and probable grounds that an offence has been committed and that evidence will be found as a result, before doing any drug or alcohol testing – be it reasonable cause, post-incident or random.[382]

211. As a result, the Applicant relies almost exclusively on *Hunter v Southam* and its progeny in the context of the criminal law, to argue that the Fitness for Duty Policy violates s. 8, as if workplace testing is a criminal matter.[383] As noted above, Dr. Macdonald seems to have approached the matter in this context as well, missing the point that workplace testing does not seek to convict people of crimes, but is a mechanism to ensure safety by deterring dangerous behaviour, by helping employees with drug and alcohol issues to obtain the treatment they need,

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[380] *RJR-MacDonald* at para 62, citing *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 at para 35 [*MTS Stores*].
[381] Applicant's Factum at paras 76-77.
[382] Applicant's Factum at paras 72-78; *Hunter v Southam*, [1984] 2 SCR 145 at para 32 [*Hunter*].
[383] See, e.g., Applicant's Factum at paras 79, 81, citing *R v Stillman*, [1997] 1 SCR 607 [*Stillman*]; *R v SAB*, [2003] 2 SCR 678 [*SAB*]; *Baron v Canada*, [1993] 1 SCR 416 [*Baron*].

and by ensuring compliance with the Fitness for Duty Policy to protect the safety of employees, customers and members of the public.

212. If the Applicants' argument is accepted, it would mean that drug and alcohol testing can never be employed in the public employment context without prior authorization, that private employees are somehow entitled to a lower reasonable expectation of privacy than public employees, and that public employers will be less able to respond to safety concerns in the workplace than private employers, where the *Charter* does not apply. This massive and untenable leap would lead to absurd results, and is completely unsupported by the case law. Indeed, the Union's argument on section 8 is completely inconsistent with the body of jurisprudence that has developed in the labour and employment context, culminating in *Irving* which the Union itself describes as "controlling",[384] that permits testing pursuant to workplace policies – including both reasonable cause and random in appropriate circumstances – in safety-sensitive workplaces without prior authorization.[385]

213. As submitted below, a proper purposive and contextual application of s. 8 to the TTC's Policy leads to the inevitable conclusion that the criminal cases cited by the Applicants have no application to a unionized, safety-sensitive workplace where the balance to be struck is between privacy expectations of employees in that context and the employer's obligation to ensure safety, and that the TTC's random drug and alcohol testing program is reasonable and justified. Accordingly, there is no arguable case, let alone serious issue to be tried, that the proposed random testing violates s. 8 of the *Charter*.

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[384] Applicant's Factum at paras 50, 132, citing *Irving*.

[385] See, e.g., *Mechanical Contracting Association Sarnia and UA Local 66*, 2013 CarswellOnt 18985 at para 102 (Surdykowski) [*Mechanical Contracting*]; *Entrop v Imperial Oil Ltd.*, (2000), 50 OR (3d) 18 (Devlin) [*Entrop*]; *Imperial Oil Ltd v CEP, Loc 900 (Re)* (2006), 157 LAC (4th) 225 at para 101 [*Nanticoke*]; *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004*, [2007] CLAD No 243 (Devlin) [*GTAA*].

The importance of context in constitutional cases

214. Courts must undertake a contextual analysis when assessing the scope and meaning of *Charter* rights, generally. The Supreme Court has repeatedly held that the scope and meaning of constitutional guarantees, and a proper balancing of collective and individual rights underlying such guarantees, vary with context.[386] For example, in *R v Wholesale Travel Group Inc.*, the Supreme Court stated:

> In *R v Big M Drug Mart Ltd.*, Dickson J. (as he then was) set out the general approach to *Charter* interpretation and the basic principles to be applied. One of his central premises was the need to consider context in order to render the rights and freedoms guaranteed in the *Charter* meaningful and relevant. He observed that the *Charter* was not enacted in a vacuum, and emphasized that its provisions had to be placed in their proper linguistic, philosophic and historical contexts.
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> In *Edmonton Journal v. Alberta (Attorney General)*, Wilson J. stressed the importance of a contextual approach to *Charter* interpretation. She recognized that a particular right or freedom may have a different meaning, depending upon the context in which it is asserted.
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> ...
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> It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.[387] [Citations omitted; Emphasis added.]

215. There is no question that a contextual and purposive approach must also be taken when considering s. 8, the purpose of which is to protect an individual's reasonable expectation of privacy.[388] This is the threshold issue for s. 8 and the applicant must show on a "totality of the circumstances" that they have a reasonable expectation of privacy.[389] Accordingly, where there is

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[386] See, e. g., *Hunter* at para 25; *Comité paritaire de l'industrie de la chemise v Potash*, [1994] 2 SCR 406 at para 11 [*Potash*]; *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para 46 [*Wholesale Travel*]; *R v Campanella* (2005), 75 OR (3d) 342 at paras 20-21 [*Campanella*]

[387] *Wholesale Travel* at paras 43-46. See also *Potash* at para 11, where the Supreme Court reiterated, with regard to s. 8, that the "Court has pointed out on several occasions that the scope of a constitutional guarantee, like the balancing of the collective and individual rights underlying it, varies with the context."

[388] *Hunter* at para 25.

[389] *Mazzei v British Columbia (Director of Adult Forensic Services)*, 2006 BCCA 321 at para 42 [*Mazzei*].

no reasonable expectation of privacy, there can be no unreasonable search within the meaning of s. 8.[390]

216. As established in *Hunter*, the determination of the reasonable expectation of privacy and the reasonableness of a search or seizure must be context specific:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[391] [Emphasis added.]

217. Two main contextual factors to consider (both in determining whether there is a reasonable expectation of privacy and whether the search is reasonable) are the purpose of the search and the intrusiveness of the search.

218. Both of these factors clearly point to a reduced expectation of privacy in the TTC workplace, such that the minimally invasive oral fluid and breath testing for drugs and alcohol, in order to ensure employee and public safety, is reasonable. However, instead of taking a contextual approach, the Union focuses exclusively on one element of the Policy – the taking of bodily substances – to conclude that the criminal law enforcement standard of prior authorization must apply. As set out below, there is no merit to the Applicant's position.

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[390] *R v Plant*, [1993] 3 SCR 281 at para 32.
[391] *Hunter* at para 25.

The *Hunter* criteria are not applicable to workplace drug and alcohol testing

219. The purpose of the search must be considered in determining the reasonable expectation of privacy, and (if necessary) whether or not the search was, in fact, reasonable. As the Supreme Court recently stated in *Goodwin v British Columbia (Superintendent of Motor Vehicles)*:

> The analysis of a search or seizure under s. 8 is a contextual inquiry...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.[392] [Emphasis added.]

220. This usually involves consideration of whether the search is being conducted for criminal, administrative or regulatory purposes. Even in *Hunter* the Court emphasized that one needed to look at the purpose of the section and what interests were engaged and needed protection, stating:

> Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.[393] [Emphasis added.]

221. In addition, the Supreme Court of Canada has held that the application of *Hunter v Southam* outside the criminal and quasi-criminal realm is limited,[394] and that the *Hunter* criteria are not "hard-and-fast rules" to be applied in a mechanical fashion. For example in *Thomson Newspapers Ltd. v Canada*,[395] Wilson J. stated:

> Not all seizures violate s. 8 of the *Charter*, only unreasonable ones. Put another way, an individual is accorded only a reasonable expectation of privacy. At some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed. However, the state interest becomes paramount only when care is taken to infringe the privacy interest of the individual as little as possible. It is because of this need for delicate balancing that Dickson J. in *Hunter* identified several criteria which must be met if a search in a criminal investigation is to meet the test of

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[392] 2015 SCC 46 at para 53.
[393] *Hunter* at para 20.
[394] *Potash* at paras 12-13.
[395] *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at para 96 [*Thomson Newspapers*].

> reasonableness. I think that these criteria were accurately summarized by J. Holland J. at trial, as set out earlier in these reasons. I would agree, however, that these criteria are not hard-and-fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal of quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*. This having been said, however, it would be my view that, the more akin to traditional criminal law the legislation is, the less likely it is that departures from the Hunter criteria will be countenanced.[396]

222. Justice La Forest also noted that the standard of reasonableness appropriate in the criminal law context will usually not be appropriate in the administrative or regulatory context:

> Since the adoption of the *Charter*, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context...
>
> The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter v. Southam Inc.*...[397] [Emphasis added.]

223. This statement – that the standard of reasonableness for a search and seizure in the course of enforcement in the criminal context is not usually the appropriate standard in an administrative or regulatory context – was reiterated by the Supreme Court in *British Columbia (Securities Commission) v Branch*,[398] where the Court also held that "[t]he greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness" [Emphasis added.].[399]

224. As a majority of the Supreme Court explained in *Comité paritaire de l'industrie de la chemise v Potash*, one of the reasons the strict guarantees set out in *Hunter* are impossible to apply without qualification in a regulatory context, "designed to promote the interests of those on whose

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[396] *Thomson Newspapers* at para 96.
[397] *Thomson Newspapers* at paras 126-127.
[398] [1995] 2 SCR 3 at para 57 [*Branch*].
[399] *Branch* at para 57.

behalf the statute was enacted" and to encourage compliance rather than to punish,[400] is that impact on the individual differs between criminal and non-criminal searches and, thus, affects the reasonable expectation of privacy.[401] Writing for the majority, La Forest J. stated:

> In a context in which their occupations are extensively regulated by the state, the reasonable expectations of privacy employers may have with respect to documents whose content is specifically provided for by the Act, or the premises where an activity subject to specific standards is conducted, are considerably lower. I made this point in *Thomson Newspapers*, supra, where I wrote (at p. 507):
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> > It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.
>
> 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.[402] [Emphasis added.]

225. Accordingly, Courts have repeatedly acknowledged that the *Hunter* criteria simply do not apply in contexts like schools, workplaces, penitentiaries and other institutions, where there is no law enforcement or criminal law purpose, such that there is a reduced expectation of privacy.[403]

226. For example, in *R v Campanella* the Ontario Court of Appeal held that prior authorization was not required for broad-based preventative searches of individuals, such as those conducted prior to entering a courthouse, aimed at protecting members of the public.[404] The Court accepted that "the search provides reassurance to all members of the public" as to the safety of courthouses and highlighted three factors in reaching this decision:

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[400] *Potash* at para 13.
[401] *Potash* at paras 12-13.
[402] *Potash* at paras 12-13.
[403] See, e. g., *March*; *FCA Reference*; *Potash*; *Ozubko v Manitoba Horse Racing Commission*, [1986] MJ No 500 (Man CA); *R v JMG*, [1986] 56 OR (2d) 705 [*JMG*].
[404] *Campanella* at para 26.

> First, courthouse searches like the one carried out in this case are not conducted for the purpose of criminal investigation. The state and the individual are not antagonists in the same way that they are in a criminal investigation. The search is not conducted for the purpose of enforcing the criminal law or investigating a criminal offence.
>
> Second, even if the person has a reasonable expectation of privacy in their personal belongings when entering a courthouse, that expectation is considerably diminished. Prominent signs warn everyone that they will be subjected to a security search and that they are not permitted to bring weapons or dangerous items into the courthouse. Regrettably, in this day and age, people expect that they will be subject to some kind of security screening when entering prominent public buildings such as courthouses or the Legislature. These buildings, which are symbols of authority, are believed to be potential targets by some individuals and groups. People reasonably expect that everyone without prior clearance will be searched on a non-discriminatory basis in a reasonable manner to ensure the safety of all persons in attendance at the building.
>
> Third, as the Crown points out, the persons being searched are also the beneficiaries of the process. Like the security clearance at airports, the search provides reassurance to all members of the public that they will be safe from attack by persons with weapons within the confines of the courthouse despite the sometimes volatile nature of the proceedings.[405]

227. In addition, as noted by the Applicants, the Supreme Court of Canada has held that searches conducted by school authorities are held to a different standard from police searches, such that the criminal law requirement for pre-authorization does not apply. Contrary to the Applicants' unsupported submission, however, this holding has nothing to do with teachers standing "*in loco parentis*" to the students, nor does it have anything to do with "the swift discipline required for maturing adolescents in high school".[406] Rather, the focus in these cases is on the diminished reasonable expectation of privacy arising from the school's interest in maintaining a safe environment. For example, in *R v MRM*, the Supreme Court stated:

> ...the reasonable expectation of privacy, although it exists, may be diminished in some circumstances, and this will influence the analysis of s. 8 and a consideration of what constitutes an unreasonable search or seizure. For example, it has been found that individuals have a lesser expectation of privacy at border crossings, because they know they may be subject to questioning and searches to enforce customs laws (see *Simmons, supra*). It was because of this lesser expectation of privacy, that a customs search did not have to meet the standards in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, in order to be reasonable. Similarly, the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their

[405] *Campanella* at paras 22-24.
[406] Applicant's Factum at paras 87, 89.

> teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished.[407] [Emphasis added.]

228. Similarly, in *R v JMG*, the Ontario Court of Appeal concluded that, in light of the principal's duty to "maintain proper order and discipline in the school", it was not unreasonable to require a student to remove his shoes and socks to prove or disprove an allegation.[408] In addition, the Court held that pre-authorization for searches of students by school authorities who are not acting as police agents was not required:

> Although, as I have said, I am prepared to presume that the Charter applies to the relationship between principal and student, that relationship is not remotely like that of a policeman and citizen. First, the principal has a substantial interest not only in the welfare of the other students but in the accused student as well. Secondly, society as a whole has an interest in the maintenance of a proper educational environment, which clearly involves being able to enforce school discipline efficiently and effectively. It is often neither feasible nor desirable that the principal should require prior authorization before searching his or her student and seizing contraband.[409] [Emphasis added.]

229. The Supreme Court has also commented on the "substantially reduced" reasonable expectation of privacy that inmates have in a prison environment,[410] and the reduced expectation of privacy of persons found "not criminally responsible on account of mental disorder" ("**NCR**") in a medical facility.[411]

230. In the latter context, in *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, cited by the Applicants, the B.C. Court of Appeal upheld weekly, random urinalysis of a

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[407] *R v MRM*, [1998] 3 SCR 393 at para 33 [*MRM*].
[408] *JMG* at para 10. In this case, a search took place when the principal asked a student to remove his socks and shoes and retrieved 3 marijuana cigarette butts from the right sock. The Court also noted that the "search was not excessively intrusive".
[409] *JMG* at para 13.
[410] *Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872 at para 5; *R v Tessling*, 2004 SCC 67 at para 22 [*Tessling*].
[411] *Mazzei* at para 45.

patient, concluding that the testing did not violate s. 8 of the *Charter*.[412] In reaching this decision, the Court considered the fact that illegal drug use had been a recurring problem affecting the individual's risk level, that drug testing was a tool that permitted monitoring compliance with the conditions of abstinence and facilitating a treatment plan, and that it provided the individual's treatment team with information to manage and monitor his safety risk.[413] The Court also noted that, while a positive test could result in consequences for the individual, those consequences were not imposed to punish him, but to protect the public and assist in his rehabilitation:[414]

> Further, the drug testing is not done as part of any criminal investigation or for any law enforcement purpose. The testing has a broader purpose focused on promoting community safety while supervising and providing opportunities for rehabilitation.[415]

231. In another B.C. Court of Appeal Case cited by the Applicants,[416] *Fieldhouse v Canada*, a random urinalysis drug testing program, aimed at reducing substance abuse among inmates and violence associated with drugs in the institution, was found to be reasonable and justified.[417]

232. Although the Court of Appeal was of the opinion that "the trial judge would have been justified" in concluding that there was no reasonable expectation of privacy in the circumstances, because "there was a very real necessity for a method of detecting narcotics trafficking and use in the Kent Institution for the 'security of the institution, the public and even the prisoners themselves'"[418] such that s. 8 was not engaged, the Court of Appeal did conduct a s. 8 analysis. In doing so, the Court did not rely on either *Hunter* or *Collins*, but instead, cited the need to balance societal interests and individual rights in the context of s. 8:

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[412] *Mazzei* at paras 67-68; Applicant's Factum at para 88.
[413] *Mazzei* at para 61.
[414] *Mazzei* at para 63.
[415] *Mazzei* at para 64.
[416] Applicant's Factum at para 88.
[417] *Fieldhouse v Canada*, [1995] BCJ No 975 (CA) per Lambert, Gibbs and Hollinrake JJ.A [*Fieldhouse*] at paras 9, 12.
[418] *Fieldhouse* at paras 15-17.

> ...the court is called upon to strike "a delicate balance ... between societal interests and individual rights": *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 at p. 642; *and Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 [20 C.R. (4th) 57] (S.C.C.) at p. 499 [C.C.C., p. 64 CR.]. Both of those are s. 7 cases but the weighing process appears to be the same as in s. 8.[419] [Emphasis added.]

233. This analysis took into account the purpose of the random urinalysis testing program, which was "to substantially reduce substance abuse within the institution and the violence, both physical and psychological, which drugs and the drug trade cause in an institutional environment",[420] noting that it was significant that the impugned regulations carried "the themes of security and safety".[421] The Court also considered the necessity of random urinalysis testing given the scope of the problem with drug-related assaults, intimidation, overdoses, and the diminished reasonable expectation of privacy in this context,[422] and concluded that the testing was reasonable:

> [G]iven the magnitude and pervasiveness of the problem and the minimal intrusion into the already limited privacy expectation of the inmates I have no difficulty in concluding that the balance falls heavily in favour of the societal interest. It follows that in my opinion the law is reasonable.[423] [Emphasis added.]

234. The TTC is not suggesting that its employees are directly comparable to high school students or patients and inmates in custody. Rather, the application of s. 8 in these non-criminal law contexts, where policies or regulations are enacted to address safety issues, illustrates the spectrum of reasonable expectations of privacy that exist in different circumstances. As noted by the Supreme Court of Canada in *R v Tessling*: [424]

> The original notion of territorial privacy...developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private

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[419] *Fieldhouse* at para 27.
[420] *Fieldhouse* at para 9.
[421] *Fieldhouse* at para 20.
[422] *Fieldhouse* at paras 15-17.
[423] *Fieldhouse* at para 28.
[424] *Tessling.*

> activities are most likely to take place..., in diluted measure, in the perimeter space around the home, in commercial space, in private cars, in a school, and even, at the bottom of the spectrum, a prison. Such a hierarchy of places does not contradict the underlying principle that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.[425] [Citations omitted.]

235. Therefore, where a problem exists in a facility such as a school, workplace, hospital or prison, one's reasonable expectation of privacy vis-à-vis the non-criminal measures undertaken to address those problems is lower than in the criminal context. Such considerations also apply in the employment context, where courts have held that employees in certain workplaces have a reduced expectation of privacy.

236. For example, in *R v March*, a corrections officer employed by a correctional institution was subjected to a search of his bag for contraband.[426] In finding that the regulations authorizing such a search were reasonable, the Court properly looked to the employment law context in which there is a reduced expectation of privacy, stating:

> The starting point in the section 8 analysis is the determination of the expectation of privacy that a Ministry employee can reasonably expect while on the premises of a correctional institution.
>
> .....
>
> The case authorities filed by counsel support the proposition that employees generally have a reduced expectation of privacy at work: *R. v. Laforet*, [1991] Y.J. No. 102 (Y.T. Terr. Ct.); *C.U.P.W., Calgary Local 710 v. Canada Post Corp.* (1987), 40 D.L.R. (4th) 67 (Alta. Q.B.); and *Ottawa (City) v. Ottawa-Carleton Public Employees Union, Local 503*, [2005] O.L.A.A. No. 496 (Ont. Arb.).
>
> The evidence adduced establishes that the problem of employee smuggling of contraband into institutions is fairly widespread and that the presence of contraband is a significant safety risk to inmates, correctional officers and visitors. Given the very nature of their workplace, correctional institution employees must expect that their activities within the institution will be subject to heightened scrutiny.
>
> Employees of correctional institutions necessarily have a significantly reduced expectation of privacy within the correctional institution. A correctional officer's reasonable

[425] *Tessling* at para 22.
[426] [2006] OJ No 664 (OCJ) [*March*].

> expectation of privacy in his or her personal property located on the premises of the institution is also considerably diminished.[427] [Emphasis added.]

237. Justice McKerlie's statements in *R v March* acknowledge that there is à continuum of reasonable expectations of privacy, including in the workplace, such that, prior-authorization is not necessary:

> The search provisions of section 22(2) have a valid, necessary and focused administrative purpose, that being to deter and stop the smuggling of contraband into the institution by employees. The purpose of the search is safety, not criminal evidence gathering.[428] [Emphasis added.]

238. Similarly, in *Reference re: Federal Courts Act (Can.)*, the Federal Court of Appeal held that the requirement for prior authorization did not apply in the context of an employer conducting background checks of port employees in security-sensitive positions.[429] In reaching its decision, the Court distinguished the context from one of criminal and quasi-criminal implications:

> 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.
>
> 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 the 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.[430]

239. In *Potash*, the Supreme Court considered whether prior authorization was necessary where inspectors are given the authority to examine, as of right and at any reasonable time, the registration system, register and pay-list of any employer for the purpose of legislation.[431] It was

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[427] *March* at paras 63-69.
[428] *March* at paras 81-83.
[429] *FCA Reference* at para 57.
[430] *FCA Reference* at paras 56-58.
[431] *Potash* at paras 2-3.

held that in the regulatory context "a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization."[432] Justice La Forest, writing for the majority, stated:

> In view of the important purpose of regulatory legislation, the need for powers of inspection, and the lower expectations of privacy, a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization. Of course the particular limits placed on the inspection scheme must, so far as possible, protect the right to privacy of the individuals affected. In this regard the respondents objected to the scope of the second paragraph of s. 22(e) of the Act, which makes all employers subject to the inspection powers. They argued that the latter should only be exercised where there are reasonable grounds to believe that the employers are subject to a decree. This argument, which is the crux of the dispute between the parties, must be rejected.[433] [Emphasis added.]

Prior authorization is not required when unfeasible and impractical

240. Courts have also recognized that prior authorization may be dispensed with where the requirement is unfeasible and impractical.[434] For example, prior authorization is not necessarily required where the purpose of a search or seizure is to determine whether a violation of a regulation has occurred;[435] where there is a real possibility that the safety of the public might be imperilled if time was taken to obtain a warrant;[436] and where administrators must be able to respond quickly and effectively to problems that arise.[437] Additionally, the Federal Court of Appeal, in *Reference re: Federal Courts Act (Can.)*, held that pre-authorization was not required where it would be impractical to obtain due to the number and location of employees:[438]

> To the extent that ILWU argues that authorization is required before the information provided by an employee is checked and 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

[432] *Potash* at para 15.
[433] *Potash* at para 15.
[434] *MRM* at para 44, citing *Hunter* at para 29; *Potash* at para 84; *JMG* at para 13.
[435] *Thomson Newspapers*, per La Forest J at paras 154-156.
[436] See, e.g., *R v Farrah*, 2011 MBCA 49 at para 44.
[437] *MRM* at para 45.
[438] *FCA Reference* at para 59.

> 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.[439][Emphasis added.]

Oral fluid and breathalyzer testing do not bring the Policy within the Hunter criteria

241. The misplaced nature of the Union's argument that the criminal law requirement for pre-authorization applies to the TTC Policy, is also evident in its submission emphasizing the invasion of privacy associated with taking bodily fluids. Again, all cases cited are criminal cases, such as *Stillman*, *SAB*, and *Baron*, dealing with the taking of bodily substances – hair, blood, DNA, etc. – for purposes of a criminal investigation.[440] Statutory protections in that context have been enacted, including breathalyzer demands by police to enforce criminal law – a very different purpose, and context, than drug and alcohol testing in a safety-sensitive workplace.

242. While the intrusiveness of the search is a contextual factor to consider in determining the reasonable expectation of privacy and the reasonableness of the search, and there may be a "heightened privacy interest associated with the taking of bodily samples", the intrusiveness of the search depends on the specific circumstances.[441] For example, certain types of bodily searches, such as strip searches,[442] taking of dental impressions,[443] collection of hair and pubic hair,[444] and taking bodily substances like blood and saliva for DNA analysis,[445] are clearly more invasive than other types of bodily searches, such as breathalyzer and urinalysis testing, which have been

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[439] *FCA Reference* at para 59.
[440] *Stillman, SAB* and *Baron*, cited by the Union at paras 79, 81 of the Applicant's Factum.
[441] *Mazzei* 2006 BCCA 321 at para 43.
[442] Strip searches have been held to be "inherently humiliating and degrading" (*R v Golden*, 2001 SCC 83 at para 90) and more invasive than DNA warrants (properly executed) in terms of "concerns for personal dignity and bodily integrity" (*SAB* at para 55); Likewise, as held in *R v Grant*, 2009 SCC 32 [*Grant*] at para 103: "The seriousness of the police conduct and the impact on the accused's rights of taking the bodily evidence, may vary greatly. Plucking a hair from the suspect's head may not be intrusive, and the accused's privacy interest in the evidence may be relatively slight. On the other hand, a body cavity or strip search may be intrusive, demeaning and objectionable".
[443] *Stillman* at paras 45-46.
[444] *Stillman* at paras 45-46.
[445] *Stillman, SAB, Baron* cited by the Union at paras 79, 81 of the Applicant's Factum.

recognized by Courts to be far less intrusive.[446] For example, in *Mazzei v British Columbia (Director of Adult Forensic Services)*, cited by the Applicants,[447] the British Columbia Court of Appeal held that urinalysis was "non-invasive and does not constitute a serious insult to individual privacy and human dignity", and is "minimally intrusive", so long as the individual is afforded reasonable privacy.[448]

243. The fact that a search involves oral fluid or breath samples does not, therefore, turn it into a search subject to the criminal law standard of prior authorization in *Hunter*. This is clearly illustrated in the cases of *Mazzei* and *Fieldhouse* discussed above – both cases involving random urinalysis testing in a non-criminal context, where the purpose of the testing was to address safety and other issues arising out of drug use.

244. In upholding an employer's right in a safety-sensitive workplace to implement drug and alcohol testing, including random testing in appropriate circumstance, the Supreme Court in *Irving* was well-aware that such testing involved collecting bodily substances without a warrant[449] and that, in certain contexts, the taking of bodily samples is associated with a heightened privacy interest.[450]

ii. Application to the TTC Policy

245. TTC's Fitness for Duty Policy is akin to a regulatory scheme developed to further the public interest in workplace safety, labour productivity and public safety. Its purpose, speaking broadly, is the protection of the health and safety of all individuals affected by the TTC's work.

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[446] *Grant* at para 11: "...this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive".
[447] Applicant's Factum at para 88.
[448] *Mazzei* at para 58.
[449] *Irving* at para 10.
[450] *Irving* at para 50.

The Policy is neither criminal law nor is it intended to be punitive. Rather, the Policy is aimed at preventative measures to ensure and promote the safety of TTC employees, as well as TTC customers and the general public. Indeed, the Union is not contesting this valid purpose. The drug and alcohol testing program under this Policy is clearly not a criminal tool but an aspect of employment in a safety-sensitive workplace.

246. It is evident, therefore, that the TTC's Fitness for Duty Policy does not fall within the criminal, quasi-criminal, or even necessarily regulatory context. It arises in the context of employment in a safety-sensitive workplace, and any expectation of privacy of employees must be considered in that context.

247. The TTC does not suggest that employees have no reasonable expectation of privacy, but rather that any reasonable expectation of privacy is diminished. TTC employees are subject to various workplace rules and policies, including the strict requirement of reporting to work fit for duty, and the potential consequences that can result if they do not. Accordingly, and contrary to the Union's submission, the workplace does involve some surveillance, searching and scrutiny, to the point necessary to maintain safety.[451] In such circumstances, the assertion that a TTC employee's reasonable expectation of privacy is violated by random drug and alcohol testing is simply not reasonable.

248. Indeed, requiring prior authorization for random testing is inconsistent with the very purpose underlying the requirement for prior authorization, which is to ensure that searches are conducted pursuant to an objective standard. This was noted by the Supreme Court in *Hunter*:

[451] Applicant's Factum at para 89. One example of this is the introduction of video surveillance on TTC vehicles, one purpose of which was to improve safety of TTC employees – a valid intrusion into privacy, Ann Cavoukian agreed, as she had found in an investigation of the TTC's actions when she was Privacy Commissioner (Cavoukian Affidavit p. 58 line 5 to p. 65 line 25). Another example is, of course, the introduction of reasonable cause and post-incident drug and alcohol testing in 2010.

> The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.
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> [...]
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> Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them.[452] [Emphasis added.]

249. Random drug and alcohol testing is inherently objective. Requiring the additional step of prior authorization as a means of ensuring that the testing is not applied arbitrarily is, therefore, not only unworkable, but is also wholly unnecessary, given the purpose of that requirement.

250. Prior authorization for random drug and alcohol testing in the TTC's workplace is neither necessary nor feasible. Workplace testing must be done promptly, and is already in place for, among other things, reasonable cause and post-incident circumstances. In the context of random testing, it is difficult to contemplate how prior authorization could work since the concept of random testing is that no one is singled out and its function – by being random – is to act as a deterrent and to identify those who may be at risk. The *Hunter* principles, therefore, are of no relevance and the requirements set out in that case, and its lengthy progeny cited by the Union, simply have no application to workplace safety programs.

The Policy is clearly reasonable and meets the requirements of section 8

251. Here, because prior authorization is not required, the burden remains on the Union to establish the unreasonableness of the Policy. This was affirmed in *R v MRM* where the Supreme Court stated:

> A teacher or principal should not be required to obtain a warrant to search a student and thus the absence of a warrant in these circumstances will not create a presumption that the

[452] *Hunter* at paras 41-42.

> search was unreasonable. A search of a student will be properly instituted in those circumstances where the teacher or principal conducting the search has reasonable grounds to believe that a school rule has been violated and the evidence of the breach will be found on the student.[453] [Emphasis added.]

252. To the extent that s. 8 of the *Charter* has any application, the TTC's Policy easily complies. The taking of breath and oral fluid samples is set out in a clear Policy which limits testing to safety-sensitive employees in defined circumstances. Its purpose is to ensure safety in a highly safety-sensitive workplace where employees have a diminished expectation of privacy, and the manner of taking the samples is simple, non-invasive and painless, thereby meeting the criteria in *R v Collins* cited by the Union.[454] Testing is not being conducted to pursue criminal charges against employees. While an employee may suffer consequences for testing positive, such consequences are aimed at promoting compliance with the Policy rather than punishing non-compliance. Random drug and alcohol testing provides assurance to both employees and members of the public that the transit system will operate safely.[455]

253. Accordingly, and in any event, the burden of demonstrating a serious issue based on an alleged violation of s. 8 of the *Charter*, remains on the Union, and it has failed to meet that burden.

iii. The reasonableness of workplace drug and alcohol testing is well-established

254. Further, the standard of reasonableness that applies to this case is well-established in the labour and employment jurisprudence, culminating most recently in the Supreme Court's "controlling" decision in *Irving*.[456] A long line of cases in that context have considered and balanced the privacy rights of employees with the employers' obligation to ensure safety in a

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[453] *MRM* at para 50.
[454] *R v Collins*, [1987] SCJ No 15 at paras 22-23. See also Applicant's Factum at para 73.
[455] This is similar to the reasoning of the B.C. Court of appeal in *Mazzei* at paras 61-64.
[456] *Irving*.

dangerous, or safety-sensitive, workplace by instituting drug and alcohol testing programs, including random testing.

255. In *Irving*, similar to the TTC's Policy, management had imposed random alcohol testing on unionized employees holding safety-sensitive positions:

> The policy contained a universal random alcohol testing component, whereby 10% of the employees in safety sensitive positions were to be randomly selected for unannounced breathalyzer testing over the course of a year. A positive test for alcohol, that is, one showing a blood alcohol concentration greater than 0.04%, attracted significant disciplinary action, including dismissal. Failure to submit to testing was grounds for immediate dismissal.[457]

256. With regard to the reasonableness analysis, the Supreme Court affirmed the standard of reasonableness outlined in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.*, which requires a "balancing of interests" approach whereby the benefit to the employer must be balanced against the proportional harm to employee privacy.[458] This balancing of interests test was derived from arbitrators' determination of whether unilateral rules or policies imposed by employers and not agreed to by the union are reasonable:

> The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test", which is generally applied by arbitrators, is 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...[459]

257. The Supreme Court went on to describe the balancing of interests approach taken in *KVP*:

> In assessing *KVP* reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:

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[457] *Irving* at para 10.
[458] *Irving* at paras 27, 43, citing *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 LAC 73 [*KVP*].
[459] *Irving* at paras 24, citing *KVP*.

> Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.
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> ...
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> The balancing of interests approach was subsequently applied in assessing the reasonableness of unilaterally imposed employer policies calling for universal random drug or alcohol testing of all employees performing safety sensitive work. Universal random testing refers to the testing of individual employees randomly selected from all or some portion of the workforce. As in the search cases, arbitrators rejected unilaterally imposed universal random testing policies as unreasonable unless there had been a workplace problem with substance abuse and the employer had exhausted alternative means for dealing with the abuse.
>
> ...
>
> 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.[460] [Emphasis added.]

258. In applying the balancing of interests test, the Supreme Court found that where there is reasonable cause – which includes a demonstrated problem with alcohol use in a dangerous workplace – employers are justified in implementing random alcohol testing for unionized employees in safety-sensitive positions.[461] Writing for the Majority, Justice Abella summarized the arbitral jurisprudence regarding reasonable cause, post-incident and post-treatment testing as follows:

> A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is

[460] *Irving* at paras 27, 29 and 31.
[461] *Irving* at paras 38-45.

> dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse.[462] [Emphasis added.]

259. After discussing and acknowledging the additional body of arbitral jurisprudence requiring that company imposed rules must be reasonable based on a "balancing of interests" with respect to random testing, Abella J. stated:

> But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (Canadian National) and chemical plants (*DuPont Canada Inc. and C.E.P., Loc. 28-O (Re)* (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (ADM Agri-Industries), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.[463] [Emphasis added.]

260. Although the Court found that random alcohol testing in *Irving* was unreasonable, due primarily to lack of evidence of a workplace problem, Abella J. added the following caveat:

> 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.[464] [Emphasis added.]

261. In *Irving*, the evidence showed only 8 documented incidents of alcohol or impairment at the workplace over a 15 year period. Further, the testing had been in effect for 22 months, during which no employees had tested positive on either random or reasonable cause testing.[465] The contrast with the TTC is stark – a public transit agency carrying millions of passengers daily, has continuing high numbers of employees who test positive for drugs and alcohol in the workplace, even with a robust Fitness for Duty Policy. Adding random testing is a "proportionate response" to

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[462] *Irving* at para 4.
[463] *Irving* at para 45 [Emphasis added].
[464] *Irving* at para 52 [Emphasis added].
[465] *Irving* at paras 13, 46-47.

address a "demonstrated problem" in the workplace "in light of both legitimate safety concerns and privacy interests."

262. Subsequent to the *Irving* decision, in *Suncor Energy Inc. and Unifor Local 707A*, Justice Nixon of the Alberta Court of Queen's Bench overturned a 2014 arbitration ruling where a majority of an arbitration panel struck down Suncor Energy's random alcohol testing policy.[466] In quashing the arbitration award, the Court of Queen's Bench found that the majority had misapplied the *Irving* test by imposing more stringent requirements than those contemplated by the Supreme Court of Canada. The court's findings included the following:

(a) The majority of the arbitration panel elevated to an unwarranted threshold the *Irving* test concerning the degree of evidence necessary to establish the general workplace problem involving drugs and/or alcohol.[467]

(b) It was not appropriate for the majority to consider only evidence that demonstrated an alcohol and drug problem within the bargaining unit. [468]

(c) It was not necessary for there to be proof of a causal connection between drug and/or alcohol abuse and the incidences of workplace accidents/injuries.[469]

iv. The Policy is justified under Section 1 of the Charter

263. The TTC agrees with the Union that where s. 8 has been infringed, it is unlikely to be upheld under s. 1, as the assessment of purpose and reasonableness of the action is included in the s. 8 analysis. Nevertheless, a component of the section 1 analysis is whether the infringement is justifiable in "free and democratic society." In this regard, reference may be made to other democracies for guidance. [470] It is appropriate, therefore to note that random testing is

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[466] *Suncor Energy Inc. and Unifor Local 707A*, 2016 ABQB 269 [*Suncor*]. An Appeal from the Judgement of Nixon J. was heard by the Alberta Court of Appeal in November 2016, with a final decision pending.
[467] *Suncor* at paras 69 to 73.
[468] *Suncor* at paras 78 to 84.
[469] *Suncor* at paras 74 to 77.
[470] See e.g. *R v Zundel*, [1992] 2 SCR 731 at para 54.

well-accepted elsewhere, including countries seen to be most closely aligned with Canadian democratic values, such as the United States, the United Kingdom, Australia and New Zealand.

264. As noted in the evidence, random testing is widespread in the United States, and this has been the case for over 25 years.[471] Similarly, in the United Kingdom, random testing is common and accepted as part of an employer's obligation to take all due diligence to ensure safety under the Transport and Works Act.[472]

265. In Australia, there are a number of decisions of tribunals where random drug and alcohol testing policies are upheld. For instance, in 1994 Chairman Bacon of the Coal Industry Tribunal upheld a random drug and alcohol testing policy, stating:

> I do not believe that the erosion of civil liberties is so substantial that [the employer] should be prevented from introducing this programme which has as its objective a safer workplace. I concluded that the loss of civil liberties in this case to be identical to that regarding [random breath testing] on the road. That is such a minor reduction in liberties is overwhelmed by the goal of taking one more step to ensuring that every employee that starts a working shift in the industry returns to his or her family at the end of that shift in the same physical condition (other than a bit tireder) as when he or she left for work.[473]

More recent decisions have affirmed that, while an employer does not have the right to dictate what an employee does on their own time, such testing is justified on health and safety grounds. Further, "public authorities in Australia have in a number of industries actually mandated random drug and alcohol testing."[474]

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[471] Kadehjian Affidavit at para 43. See paragraph 95 above regarding established guidelines for oral fluid testing in the United States.
[472] Byford Affidavit at paras 65, 66, 69 and 70. Also see Exhibit Q to Byford Affidavit, 244 to 256.
[473] *Automotive, Food, Metals & Engineering Union v Newlands Coal Pty Limited*, Coal Industry Tribunal, Bacon C, 14/1/1994, cited in entirety in the affirming decision of Sydney C, 30/3/1994, [1994] ACIndT 4708 at 1 online: http://www.austlii.edu.au/au/cases/cth/ACIndT/1994/4708.html
[474] *Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The Sydney Branch; The Australian Workers' Union - re Random drug and alcohol testing - whether justified - the need for appropriate safeguards* [2009] FWA 424 at para 97, online: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FWA/2009/424.html; see e.g. *Shell Refining (Australia) Pty Ltd, Clyde Refinery v Construction, Forestry, Mining and Energy Union* [2008] AIRC 510, online: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AIRC/2008/510.html; *Endeavour Energy v Communications,*

266. Courts in New Zealand have also upheld random testing for employees in safety-sensitive positions. The leading case is the 2004 decision of the Employment Court of New Zealand, *NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated v Air New Zealand Limited.*[475] Here, the Court upheld a random drug testing regime for employees operating in safety-sensitive areas. The Court applied a balancing test, concluding:

> The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.[476]

267. The reasoning in *NZ Amalgamated* was adopted by the Supreme Court of New Zealand in *Lisa Cropp v A Judicial Committee and Bryan McKenzie*, which upheld a random testing regime applying to race horse jockeys, on the basis that, "Without random testing there will be insufficient deterrence and the safety of race meetings may be compromised".[477]

v. No serious issue – conclusion

268. The Union has failed to show that there is a serious question to be tried. The s. 8 jurisprudence cited by the Union is largely inapt with regard to the facts and context of this case. The Union has presented insufficient evidence to show that there is a serious issue to be tried.

269. The TTC has a long term, continuing and pervasive problem with regard to alcohol and drug use by its employees. This is clearly evidenced by the statistics, testimony of investigators,

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Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others [2012] FWA 180, online: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FWA/2012/1809.html; *Construction, Forestry, Mining and Energy Union-Construction and General Division v Port Kembla Coal Terminal Limited* [2015] FWC 2384, online: http://www.austlii.edu.au/au/cases/cth/FWC/2015/2384.html, aff'd [2015] FWCFB 4075, online: https://www.fwc.gov.au/documents/decisionssigned/html/2015fwcfb4075.htm

[475] *NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated v Air New Zealand Limited AC* 22/04 [2004] NZEmpC 32; [2004] 1 ERNZ 614 [*NZ Amalgamated*], online: http://www.austlii.edu.au/cgi-bin/sinodisp/nz/cases/NZEmpC/2004/32.html

[476] *NZ Amalgamated* at para 251.

[477] *Lisa Cropp v A Judicial Committee and Bryan McKenzie* [2008] NZSC 46 at para 32; [2008] 3 NZLR 774, online: http://www.austlii.edu.au/cgi-bin/sinodisp/nz/cases/NZSC/2008/46.html

and the incident reports presented by the TTC. The TTC clearly meets the *Irving* test of a demonstrable problem of drug and alcohol use creating enhanced safety risks.

270. The TTC is also an extremely safety-sensitive workplace and is more safety-sensitive than workplaces in the oil and mining sector, which do not generally concern the safety and well-being of the public.

271. Random drug and alcohol testing pursuant to the Fitness for Duty Policy is a proportionate response to a problem that has not diminished since the Policy was implemented in 2010. The testing will be conducted in a reasonable, professional and appropriate manner, just as reasonable cause, post-incident and other testing has been done since 2010. The TTC will use oral fluid and breathalyser testing, with the appropriate thresholds, which show a likelihood of impairment. Further, the TTC has shown through expert evidence, and the experience at other mass transit systems, that random drug and alcohol testing is proven to reduce workplace impairment.

b) Irreparable Harm and Balance of Convenience

272. The second branch of the interlocutory injunction tests asks whether "a refusal to grant relief could so adversely affect the applicant's own interests that harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application".[478] As a general rule, harm which can be adequately compensated monetarily is not irreparable.[479] Evidence of irreparable harm must be "clear and not speculative".[480] While this is a flexible standard, to the extent courts are willing to infer harm they will only do so in a "strong case" where

[478] *RJR-MacDonald* at para 58.
[479] *UNA v St Michael's Health Centre*, 2003 ABCA 5 [*St Michael's*].
[480] *Syntex Inc v Novopharm Ltd*, 1991 CarswellNat 1113 (Fed CA) at para 15, and *Kanda Tsushin Kogyo Co v Coveley*, 1997 CarswellOnt 80 (Ont Div Ct), at para 14.

"harm can be inferred from the facts of the case".[481] A weak case will require that the harm be proved independently.[482] Ultimately, the irreparable harm question is a flexible "risk-balancing exercise", that requires a contextual assessment of the strength of each party's case, and other relevant factors.[483]

273. The third branch of the interlocutory injunction test is related to the second, and requires "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".[484] As the Union notes, the second and third branches should not be seen as separate, watertight categories.[485] This category is important in *Charter* cases, where the irreparable harm test can be difficult to apply and the public interest must be considered:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.
>
> [...]
>
> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[486]

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[481] *Bell Canada* at para 40.
[482] *Bell Canada* at para 40.
[483] Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Edition) at section 2.450 [Sharpe]; see also *TG v Nova Scotia (Minister of Community Services)*, 2012 NSCA 71 at para 60.
[484] *RJR-MacDonald* at para 62.
[485] Applicant's Factum at p 40, footnote 3.
[486] *RJR-MacDonald* at paras 64 (citing *Ainsley Financial Corp v Ontario Securities Commission* (1993), 14 OR (3d) 280) and 66 [Emphasis added].

274. As with irreparable harm, the *prima facie* strength of a party's case is directly relevant to an assessment of the balance of convenience:

> It can be seen be seen from the above formulations of this factor that the apparent strengths and weaknesses of the case again play a role at this stage: if the case is weak, the risk of harm to the defendant is likely to be great in granting an interlocutory injunction; if the case is strong, and damages provide an uncertain remedy, the risk of harm to the plaintiff is likely to be great in refusing an interlocutory injunction.[487]

i. The Union does not have a strong case and it will not suffer irreparable harm.

275. The Union argues that the violations of privacy resulting from the introduction of random testing will cause workplace psychological and emotional stress. However, its evidence here is weak at best. Dr. Cavoukian was unable to point to any studies demonstrating negative psychological effects stemming from the manner of testing the TTC is seeking to impose.[488] The evidence of the Union witnesses was not credible as they simply asserted statements written by the Union's lawyers, or had no experience of testing.[489]

276. There is an obvious and palpable difference between the harms the Union would have the Court infer will result from the introduction of random testing, yet have not led evidence of, and the actual harms that both common sense and the evidence reasonably point to. The invasion of privacy arising from the implementation of random testing is limited. Consider:

(a) Only 20% of the safety-sensitive workforce will be tested each year.

(b) The manner of testing is non-intrusive, quick and painless.

(c) The results are confidential (and are destroyed) unless positive, in which case a safety risk is identified to the employer, and employee, and can be addressed.

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[487] *Bell Canada* at para 48.
[488] See paragraph 157 above.
[489] See paragraphs 172-201 above.

(d) There is no evidence that false positives occur or that employees will be treated unjustly – to the contrary, the experience of the TTC is that there have been no false positives, and that most of those who test positive need treatment for drug or alcohol problems, which they get.

(e) No one is singled out or will suffer reputational harm by being selected for random testing, as everyone will be subject to the same likelihood of being tested. *Nothing* can be inferred from the fact that an employee was selected for random testing.

(f) While two employees said they would feel anxious about being tested, one of them had never been tested and didn't really know what was involved,[490] and the other had voluntarily participated in pre-employment testing before being required to undergo a post-incident test – for which he filed no complaint or grievance.[491] These anxieties also stand in marked contrast to the evidence of Andy Byford – the sole witness in this application who has actually been subjected to random drug and alcohol testing – who states that the tests did not result in any loss of dignity, discomfort or stigma.[492]

(g) There is no evidence that employees subject to random testing, including the millions subject to testing each year in the United States and elsewhere, suffer any emotional or psychological harm from testing.[493] Nor is there any evidence of this arising from the over 11,000 tests the TTC has conducted since 2010.

277. Instead of providing specific evidence of irreparable harm resulting from random testing – which it cannot do – the Union points to privacy harms *generally*, again relying on section 8 jurisprudence from criminal law and other unanalogous contexts. As discussed, the controlling case is *Irving*, which considered the balance of interests in the very context before this Court.

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[490] See paragraphs 189-195 above.
[491] See paragraphs 196-201 above.
[492] Byford Affidavit at para 66.
[493] See paragraphs 157-158 above.

278. Contrary to the Union's assertion that monetary damages are inadequate compensation for breaches of privacy, such damages are entirely possible in the context of this case. Damage awards to employees who have been wronged by an employer's disciplinary action are commonplace in grievance arbitration. For example: in *Jones v Tsige,* the Ontario Court of Appeal established the tort of intrusion upon seclusion as a mechanism for compensation for breaches of privacy.[494] *Jones* has been applied numerous times in the labour context to compensate employees for breaches of privacy,[495] including for improper drug or alcohol testing. As the arbitrator held in *Teck Coal*, "I accept that the consequences of an improper drug (or alcohol) test are substantially compensable in damages. I also accept that courts, privacy commissioners and arbitrators have of late become more expert in quantifying damages for breach of privacy."[496]

279. For employees who are randomly tested and pass the test, the privacy-violation resulting from the cheek swabbing procedure or breathalyzer procedure does not amount to irreparable harm. These harms may be compensable by damages through the regular grievance arbitration process.

280. As for the more serious harms the Union points to – embarrassment or humiliation from having private matters revealed or the negative results of disciplinary sanction or loss of employment – this will only credibly occur *after an employee tests positive* for drug or alcohol use. In other words, the proportion of employees who are likely to suffer this more serious harm is

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[494] *Jones v Tsige*, 2012 ONCA 32 [*Jones*].

[495] See e.g. *Alberta v AUPE*, 2012 CarswellAlta 896 (Alta Arb) – awarding $1,250.00 in damages for unjustified credit checks; *St Patrick's Home of Ottawa Inc. and CUPE, Local 2437,* 2016 CarswellOnt 3234 (Ont Arb) – awarding $1,000.00 for the improper disclosure of medical information; *Howe Sound Pulp & Paper Corp and Unifor, Local 1119,* 2014 CarswellBC 3103 (BC Arb) – awarding $200 against employer who wrongfully insisted employee provide bank account details to enable direct deposit of pay cheques.

[496] *Teck Coal Ltd and USW, Local 9346, Re,* 2013 CarswellBC 3772 (BC Arb) at para 107 [*Teck Coal*]. Alternatively, Union member's whose section 8 rights are breached may be compensable by way of *Charter* damages. The potential availability of *Charter* damages was a factor weighing against a claim of irreparable harm faced by an applicant facing deportation. See *Cabral v Canada (Minister of Citizenship and Immigration)*, 2015 FC 822 at paras 24-25.

naturally limited to those who pose a safety risk and, as the uncontradicted evidence shows, likely have a drug or alcohol problem.

281. These harms are not the result of random drug and alcohol testing itself, but of the well-understood and already-existing consequences resulting from the discovery of workplace impairment. The exact same consequences will arise should an employee test positive after a reasonable cause or post-incident test, and while the Union challenges such testing, it has not sought injunctive relief to stop it – which is hardly surprising given the clear acceptance of such testing in Canadian law.

282. The TTC's alcohol and drug testing procedure is carried out in a manner that protects employees' privacy, confidentiality and dignity. If the procedure is not properly applied in a particular situation, depending on the specific circumstances, a nominal award of damages for any infringements would be entirely adequate.

ii. An injunction would cause irreparable harm to the TTC and the public interest

283. Consideration of the public interest is necessary in cases where government rulemaking authority is challenged. The Fitness for Duty Policy has been approved by the TTC – a public body created by statute. While the Union argues that "that public interest in enforcing the law does not operate in this case, which question mere Government conduct", this assertion is clearly contradicted by the Supreme Court's statement in *MTS Stores* which provides the basis upon which the public interest is to be considered in these cases:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be

> criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.[497] [Emphasis added.]

284. Nonetheless, there are competing public interests in this case that must be weighed against each other:[498] the TTC's interest in maximizing public safety, against the Union member's personal privacy. And whereas the harm to privacy interests that will be suffered by Union members while the matter is being decided is compensable by damages, the personal injuries – or worse – that would be suffered by the TTC's employees and members of the public in the event of an accident are truly irreparable.[499]

285. This case is similar to that of *Teck Coal*, where Arbitrator Taylor refused to grant an interlocutory injunction against a proposed random drug testing policy, concluding:

> In the result, I am left with a weighing of drug and alcohol testing versus the risk of industrial accident in terms of "irreparable harm". I have concluded that drug and alcohol testing are more amenable to being compensated in damages, whereas the risk of industrial accident carries greater potential for irreparable harm.[500]

286. The Union's contention that public safety will not be improved by random testing because oral fluid testing does not detect *present* impairment misses the point. As the ample body of largely

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[497] *MTS Stores* at paras 55-56. As the Federal Court has stated in regards to this question: "It should make no difference whether the violation occurs as a result of prohibited conduct, rather than as a result of invalid legislation": *Khadr v Canada,* 2005 FC 1076 at para 20.
[498] *RJR-MacDonald* at para 66.
[499] *St Michael's* at para 11.
[500] *Teck Coal* at para 140.

uncontradicted and unchallenged evidence on the record demonstrates, random testing improves safety by acting as an effective *deterrent* to impairment in the first place.

287. In *Teck Coal*, the arbitrator recognized the challenge of balancing competing evidence from the same experts – Dr. Beckson and Dr. Macdonald:

> All aspects of the parties' positions are dependent on the appropriate balance to be struck between safety and privacy. This is a highly fact-dependent exercise, upon which the parties take very different positions. The relevant facts include the reasonable expectation of privacy, the extent of intrusion into that reasonable expectation, and the need for any such intrusion. The last noted-issue (the need for any such intrusion), in turn, involves assessment of the safety needs of the operation; the safety needs of the position; the extent to which those may be put at risk by impairment; and the extent to which the intrusion overcomes that risk. On the limited evidence heard to date, and their forecast of the evidence to come, the parties' differences on these facts are both thorough and substantial. [501]

288. In *Teck Coal*, Arbitrator Taylor took the competing evidence at face value and found the balance favoured the employer:

> I reject this submission for two reasons. First, it misconstrues my earlier ruling. The effect of that ruling is that both parties' expert evidence is considered at face value at this stage, and considered in the balance of convenience. (In other words, Dr. Macdonald's opinion is also considered for the risk that the Employer would ultimately be unsuccessful.) It was not a ruling that differing opinions would thereby nullify each other.
>
> Second, even if I were to take the approach urged by the Union, which, effectively, amounts to a weighing of the experts' evidence – I would not find it has the effect the Union contends.
>
> In summary on this point, the Employer's evidence is sufficient to factor a genuine risk of serious accident into the balance of convenience.[502]

289. The same conclusion must be reached in this case, where the Union's case is weak and the TTC's is strong and largely unchallenged. In the context of the TTC's safety-sensitive public transit operations, there is a significant risk of injury or death due to accidents related to drugs or alcohol, which random testing will reduce. There is a strong body of evidence that random testing has significant preventative effects on accidents related to drug or alcohol. The TTC should not be

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[501] *Teck Coal* at para 88.
[502] *Teck Coal* at paras 95-97.

delayed for years in implementing random testing until the arbitration process is complete and a final decision is rendered.

290. In sum, the balance of convenience favours the TTC. The TTC has made a strong *prima facie* case regarding the dangers posed by intoxication in its safety-sensitive and public-oriented workplace. And the irreparable harm that the TTC will suffer in the event of a serious accident outweighs the harm resulting from the infringement of the Union members' privacy.

iii. Status Quo and Urgency

291. The Union's claim that the TTC is attempting to "steal a march" in its decision to implement random drug and alcohol testing under the Fit for Duty Policy prior to the completion of the arbitration is without merit. Despite noting that the phrase "status quo" is problematic in applications for interlocutory relief, the Union nonetheless invokes it to argue that its position in this case represents the status quo. [503] However, as noted by the Supreme Court in *RJR-MacDonald*, reference to the status quo is of "limited value in private law cases" and of "no merit" in constitutional cases.[504] Ultimately, the debate over which side's position represents the status quo is a matter of semantics that does not provide useful guidance on the question of the merits of interlocutory relief. As Justice Sharpe notes,

> Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trials... The proper application of the *status quo* factor, then, merely rephrases the basic question the plaintiff must answer: does the situation meet the basic test for interim relief?[505] [Emphasis added.]

292. The TTC has long-stated its concern over the continuing problem of drug and alcohol use in the workplace, and recognized the possible need to institute random testing several years ago.

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[503] Applicant's Factum at paras 154 ff.
[504] *RJR-Macdonald* at para 75.
[505] Sharpe at section 2.550

The reasons for not moving forward earlier have been explained, as the TTC sought a proportionate, effective response to the problem. The Union was content to await an extraordinarily slow arbitration process so long as random testing was not introduced. The TTC – and public safety – cannot wait several more years.

PART IV - ORDER REQUESTED

293. The TTC respectfully requests that the Union's Application for an injunction be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of February, 2017.

Paul Schabas
Kaley Pulfer

Blake, Cassels & Graydon LLP
Lawyers for the Respondent

Roy C. Filion
Bonnea Channe

Filion Wakely Thorup Angeletti LLP
Lawyers for the Respondent

SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

1. *Alberta v AUPE*, 2012 CarswellAlta 896 (Alta Arb)
2. *Automotive, Food, Metals & Engineering Union v Newlands Coal Pty Limited*, Coal Industry Tribunal, 30/3/1994, [1994] ACIndT 4708
3. *Baron v Canada*, [1993] 1 SCR 416
4. *Bell Canada v Rogers Communications Inc.*, [2009] OJ No 3161
5. *British Columbia (Securities Commission) v Branch*, [1995] 2 SCR 3
6. *Cabral v Canada (Minister of Citizenship and Immigration)*, 2015 FC 822
7. *Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The Sydney Branch; The Australian Workers' Union – re Random drug and alcohol testing – whether justified – the need for appropriate safeguards* [2009] FWA 424
8. *Comité paritaire de l'industrie de la chemise v Potash*, [1994] 2 SCR 406
9. *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34
10. *Construction, Forestry, Mining and Energy Union-Construction and General Division v Port Kembla Coal Terminal Limited* [2015] FWC 2384, aff'd [2015] FWCFB 4075
11. *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others* [2012] FWA 1809
12. *Fieldhouse v Canada*, [1995] BCJ No 975
13. *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46
14. *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004*, [2007] CLAD No 243 (Devlin)
15. *Howe Sound Pulp & Paper Corp and Unifor, Local 1119*, 2014 CarswellBC 3103 (BC Arb)
16. *Hunter v Southam*, [1984] 2 SCR 145
17. *Imperial Oil Ltd v CEP, Loc 900 (Re)* (2006), 157 LAC (4th) 225
18. *Jones v Tsige*, 2012 ONCA 32

19. *Kanda Tsushin Kogyo Co v Coveley* (1997), 96 OAC 324

20. *Khadr v Canada,* 2005 FC 1076

21. *Lisa Cropp v A Judicial Committee and Bryan McKenzie* [2008] NZSC 46

22. *Mazzei v British Columbia (Director of Adult Forensic Services)*, 2006 BCCA 321

23. *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110

24. *NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated v Air New Zealand Limited AC* 22/04 [2004] NZEmpC 32

25. *Ozubko v Manitoba Horse Racing Commission*, [1986] MJ No 500

26. *R v Campanella* (2005), 75 OR (3d) 342

27. *R v Collins*, [1987] SCJ No 15

28. *R v Farrah*, 2011 MBCA 49

29. *R v Golden*, 2001 SCC 83

30. *R v Grant*, 2009 SCC 32

31. *R v JMG*, [1986] 56 OR (2d) 705

32. *R v Kazenelson*, 2016 ONSC 25

33. *R v March,* [2006] OJ No 664

34. *R v McKinlay Transport Ltd*, [1990] 1 SCR 627

35. *R v MRM*, [1998] 3 SCR 393

36. *R v Plant*, [1993] 3 SCR 281

37. *R v SAB*, [2003] 2 SCR 678

38. *R v Stillman*, [1997] 1 SCR 607

39. *R v Tessling*, 2004 SCC 67

40. *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154

41. *R v Zundel*, [1992] 2 SCR 731

42. *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 LAC 73

43. *Reference re Federal Courts Act*, 2009 FCA 234

44. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311

45. *Shell Refining (Australia) Pty Ltd, Clyde Refinery v Construction, Forestry, Mining and Energy Union* [2008] AIRC 510

46. *St Patrick's Home of Ottawa Inc. and CUPE, Local 2437,* 2016 CarswellOnt 3234 (Ont Arb)

47. *Steen Estate v Iran (Islamic Republic),* 2011 ONSC 6464

48. *Suncor Energy Inc. and Unifor Local 707A*, [2016] AJ No 530

49. *Syntex Inc. v. Novopharm Ltd.* (1991), 126 NR 114

50. *Teck Coal Limited and United Steelworkers Local 9346 (Elkview Operations); United Steelworkers Local 7884 (Fording River Operations)*, 2013 CanLII 82541 (C. Taylor)

51. *TG v Nova Scotia (Minister of Community Services)*, 2012 NSCA 71

52. *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425

53. *UNA v St Michael's Health Centre*, 2003 ABCA 5

54. *Wallace v Allen*, [2007] OJ No 879

55. *Walsh v BDO Woody LLP*, 2013 BCSC 1463

56. *Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872

Texts

57. Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Canada Law Book, Loose Leaf)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY–LAWS

***Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11**

Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Legal Rights

8. Everyone has the right to be secure against unreasonable search or seizure.

***City of Toronto Act, 2006*, S.O. 2006, c 11, Schedule A**

Purposes of this Act

2. The Purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:

1. Determine what is in the public interest for the City.

2. Respond to the needs of the City.

3. Determine the appropriate structure for governing the City.

4. Ensure that the City is accountable to the public and that the process for making decisions is transparent.

5. Determine the appropriate mechanisms for delivering municipal services in the City.

6. Determine the appropriate levels of municipal spending and municipal taxation for the City.

7. Use fiscal tools to support the activities of the City.

***Criminal Code*, R.S.C., 1985, c. C-46**

Offences of negligence — organizations

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

Other offences — organizations

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Duty of persons undertaking acts

217 Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Criminal negligence

219 (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Causing death by criminal negligence

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(b) in any other case, to imprisonment for life.

***Occupational Health and Safety Act*, R.S.O. 1990, c. O.1**

Duties of employers

25. (1) An employer shall ensure that,

...

Idem

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

...

(h) take every precaution reasonable in the circumstances for the protection of a worker;

Penalties

66. (1) Every person who contravenes or fails to comply with,

(a) a provision of this Act or the regulations;

(b) an order or requirement of an inspector or a Director; or

(c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.

Idem

(2) If a corporation is convicted of an offence under subsection (1), the maximum fine that may be imposed upon the corporation is $500,000 and not as provided therein.

Court File No.: **CV-17-567048**

AMALGAMATED TRANSIT UNION, LOCAL 113, and ROBERT KINNEAR on his own behalf and on behalf of all other MEMBERS OF THE AMALGAMATED TRANSIT UNION, LOCAL 113	and	**TORONTO TRANSIT COMMISSION**
Applicants		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE RESPONDENT

Filion Wakely Thorup Angeletti LLP
333 Bay Street, Suite 2500
Toronto, Ontario M5H 2R2

Roy C. Filion LSUC#: 11923T
Tel: 416.408.5510
Fax: 416.408.4814

Bonnea Channe LSUC#: 55480C
Tel: 416.408.5559
Fax: 416.408.4814

Lawyers for the Respondent

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, Ontario M5L 1A9

Paul Schabas LSUC#: 26355A
Tel: 416.863.4274
Fax: 416.863.2653

Kaley Pulfer LSUC#: 58413T
Tel: 416.863.2756
Fax: 416.863.2653

Lawyers for the Respondent