

TORONTO TRANSIT COMMISSION REPORT NO.

MEETING DATE: September 18, 2008

SUBJECT: Fitness for Duty Policy

ACTION ITEM

REASON FOR CONFIDENTIAL INFORMATION:

The receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

RECOMMENDATION

It is recommended that the Commission:

1. Receive the confidential information as set out in Confidential Attachment 1;
2. Note that the confidential information as set out in Confidential Attachment 1 remain confidential in its entirety as it contains advice which is subject to solicitor-client privilege;
3. Approve in principle a Fitness for Duty Policy ("Policy") that includes assistance programs, prevention measures, and investigation tools, including alcohol and drug testing in the following circumstances:
 - Employees in safety-sensitive, specified management and designated executive positions will be subject to reasonable cause, post incident, post violation, post treatment, applicant and random testing;
 - All other employees that do not fit in the proposed categories above will be subject to post violation and post treatment testing in appropriate cases; and
4. Note that staff will bring a Fitness for Duty Policy back to the Commission for approval within three months time.

FUNDING

There are no funds included in the 2008 and 2009 Budgets related to the implementation of the proposed Policy. The additional costs will include training, communication, substance abuse evaluations, medication and alcohol and drug testing. Once a Fitness for Duty Policy is adopted, the financial impact will be determined.

EXECUTIVE SUMMARY

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 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.

The inclusion of alcohol and drug testing in employment policies is not unusual in Canada. Canadian jurisprudence supports the implementation of alcohol and drug testing as part of an employer's obligation to ensure a safe workplace. As a result, a number of employers in safety sensitive industries have taken steps to ensure safety by requiring alcohol and/or drug testing. While it is instructive to review how other employers handle testing within the context of their policies, the TTC must ensure that it carefully considers the need and role of testing within the set of circumstances it faces.

It is important to appreciate that the proposed Policy will have a number of components to it beyond alcohol and drug testing. Under the proposed Policy, employees will be encouraged to seek assistance before an alcohol and/or drug concern affects the safety of the workplace and/or their work performance. Employees that voluntarily come forward with an alcohol and/or drug related problem will be assisted to address the issue, and will be treated fairly and sensitively in accordance with the terms of the proposed Policy.

The proposed Policy will highlight assistance and prevention. The provisions of the proposed Policy will include processes to prevent potential problems, assistance for individuals with current or emerging problems, and monitoring and support for those returning from treatment. The deterrence components of the proposed Policy will include communication of standards and expectations, investigation tools to help identify a violation, and clear consequences to enforce compliance.

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.

BACKGROUND

Current TTC Policies, Employee Assistance Programs and Supervisory Roles

The TTC currently has a Drug and Alcohol Policy and an Operations of TTC Vehicles Policy which contain basic fitness for duty responsibilities for all employees. The current Drug and Alcohol Policy states in part:

“Every Commission employee must arrive at work fit for duty, which means unaffected by the use or after effects of alcohol, illicit drugs or medication, which impair or may impair the employee, which therefore affects safety and proper performance in the workplace. Every employee must report fit for duty and remain fit while on duty and/or in issued uniform/clothing.”

There are also clear provisions stating that every employee shall not possess, distribute, and/or consume alcohol and/or other drugs while on duty.

In addition to a number of other requirements for operators of revenue vehicles, the Operation of TTC Vehicles Policy requires employees to be fit for duty. This policy addresses employee fitness for duty as follows:

Employees required to operate TTC vehicles must be fit to do so and free of any impairment that may prevent them from performing their duties in a safe manner. Employees must comply with the Drug and Alcohol Policy.

There are currently no provisions in TTC policies allowing for alcohol or drug testing of employees.

The Drug and Alcohol Policy and the Operation of TTC Vehicles Policy have not deterred a number of employees from reporting and/or performing their duties under the influence of alcohol and/or other drugs. These policies depend entirely on the self reporting of individual employees or the identification and reporting of employee with a problem by a co-worker or a supervisor.

To assist employees to address alcohol and drug issues, the TTC has an Employee and Family Assistance Program (EFAP) and an Occupational Health Section ("OH") that can aid employees with addressing alcohol and/or drug issues. The EFAP and OH also provide employees with drug and alcohol education programs and peer prevention programs.

Supervisors also monitor, assess and investigate an employee's fitness for duty. In appropriate cases, where an employee possesses and/or consumes alcohol and/or other drugs while on duty or performs his or her duties under the influence of alcohol and/or other drugs, the TTC has the right to terminate his or her employment. In some circumstances, the TTC will reinstate an employee who violates TTC policy and/or the collective agreement under conditions of continued employment.

Despite these various policies, procedures, collective agreement language and practices, employee drug and alcohol use has developed into a serious issue in the TTC workplace. The limitations of the TTC's current approach to employee alcohol and drug issues and the benefits of adding testing to the existing policy are discussed in greater detail below.

Working Committee Review

The fatal asbestos abatement accident of April 23, 2007 and other employee alcohol and drug related incidents precipitated a detailed and extensive review of employee alcohol and drug use at the TTC. The operator of the workcar on the asbestos abatement crew was killed and two employees were seriously injured. Most of the remaining crew members have had lengthy absences resulting from the psychological trauma of that incident.

Toxicological reports from the Coroner's office confirm that the operator of the workcar had measurable levels of tetrahydrocannabinol ("THC") in his system. THC is a chemical compound which develops in people as a result of marijuana use. The level of THC in the workcar operator's blood suggests that the drug was probably consumed during his shift.

On the date of the accident, the workcar operator was on a "last chance" agreement associated with a prior marijuana incident. The "last chance" agreement was signed approximately one year before the accident. The "last chance" agreement contained various provisions, including a requirement that the operator of the workcar not be impaired on duty due to the consumption of illegal and/or prescription drugs. The "last chance" agreement did not contain a testing provision permitting the TTC to monitor the

workcar operator's adherence to this agreement. The TTC must accept some responsibility for not putting some other mechanisms in place to reduce the likelihood of this employee being unfit for duty.

In response to this serious incident and other employee alcohol and drug related incidents, staff retained Ms. Barbara Butler, a workplace alcohol and drug expert to assist the TTC in reviewing and improving how it handles employee alcohol and drug issues and incidents. A working group was formed to work with Ms. Butler and was charged with reviewing the TTC's existing practices, procedures, rules and protocols and discussing the necessity and appropriateness of alcohol and drug testing. With the assistance of Ms. Butler, the working group thoroughly reviewed how the TTC addresses employee alcohol and drug issues. In particular, the working group gathered and presented extensive information related to the prevalence of alcohol and drug incidents involving employees in the workplace.

Staff reviewed this evidence in the context of the state of the science, the evolving Canadian jurisprudence, best practices in Canadian industry, and best practices in the global transportation sector. The team identified various deficiencies and considered options to address these. Staff is of the view that the recommendations in this report are reasonable and necessary in the circumstances to protect the health and safety of our employees and the public.

DISCUSSION

Safety is Paramount

The TTC, its Commissioners, Officers and employees are under a general legal obligation to exercise due diligence and to take all reasonable steps to protect the health and safety of its employees and the public. This responsibility includes taking reasonable steps to ensure in particular that those employed in safety sensitive positions, such as employees responsible for the movement and maintenance of its vehicles, are fit for duty.

Steps Taken

As mentioned, prior to bringing forward the recommendations in this report, staff reviewed its current policies, practices, rules, standard operating procedures (SOPs), reporting procedures, employee benefit programs and collective agreements to:

1. identify gaps or missing pieces; and
2. determine what can be improved, changed or modified.

Staff identified several deficiencies in how the TTC addresses employee alcohol and drug concerns and incidents. Staff felt it was necessary to make a number of changes to improve and expand training for employees on alcohol and drug issues; improve supervisor training on how to identify employees under the influence of alcohol and/or drugs; improve

and expand SOPs for supervisors that address how to investigate employee fitness for duty issues; alter employee reporting structures; improve communication between TTC departments and sections; improve and increase employee education programs; and improve EFAP assistance.

While these improvements, changes, and modifications can assist the TTC to better address employee fitness for duty issues, these mechanisms have their limitations. The TTC's current approaches require the addition of testing to improve self referral to employee assistance, to assist with the early detection of individuals with dependencies, and to reinforce the expectation of policy compliance. The limitations to the TTC's current approach and the benefits of adding testing are discussed in greater detail below.

Shortcomings of Existing Measures / Programs

1. *Education Programs and EFAP*

Education and employee assistance programs are available to TTC employees. The TTC provides employees with health and wellness information, written literature and access to counselling and/or treatment through its EFAP program. The goal of these programs is to educate employees on alcohol and drug issues and to also encourage employees to seek assistance at an early stage before safety and job performance is compromised. There are two distinct groups of employees these programs address: dependent and casual users.

For those individuals who have a current or emerging dependency, denial is the principal characteristic of substance abuse. In cases where an individual is convinced that his or her substance use is normal and that other problems are not related to dependency, diagnosis is difficult, treatment does not occur and the potential for success in recovery is significantly reduced.¹ Where there is a greater risk of being detected, employees with substance abuse problems may be motivated to seek assistance at an early stage before they could be identified in a policy violation and prior to the safety of the workplace or the public being affected.

Some casual users will choose to abuse alcohol, use illegal substances, or misuse medications in a manner that negatively impacts the workplace regardless of how comprehensive the TTC's education and EFAP programs are. For these individuals, use or abuse of alcohol and/or other drugs will continue until there is a strong reason to stop. For casual users, these reasons can include a serious accident, financial or family impacts or the threat of loss of employment. Without the serious threat of being identified in a policy violation, there is no incentive for a casual user in this situation to change his or her behaviour. As such, it is likely that these employees will continue to use substances in a manner that has the potential to negatively impact the workplace placing themselves and others at risk.²

¹ B. Butler, "Submissions on the Matter of *Milazzo v. Autocar Connaissanceur Inc.*", (2003) Canadian Human Rights Tribunal

² IBID.

While education and employee assistance play an important part in any alcohol and drug prevention program, the success of these programs in addressing employee alcohol and drug issues depends in the most part on voluntary self referral. Without a strong motivating factor, neither group of employees will refrain from engaging in conduct that has the potential to impact the workplace negatively. Furthermore, if the objective risk of apprehension is not high enough, the deterrent impact on individuals can be lost.³

2. *Peer Prevention*

Through peer prevention programs, employees provide assistance and support for co-workers who have personal problems that may affect their safety and/or effectiveness at work. The internal TTC EFAP runs a volunteer peer group to support employees. The detection portion of peer prevention programs are driven by the theory that co-workers may be in a better position to identify impairment or behaviours that may lead to a problem at an earlier stage.⁴

The success of a peer intervention program depends on the trust between management and employees. Unfortunately participation in such a program is often limited as employees assume it means "snitching on their brother", advocating prohibition, or operating as vigilantes. In addition, cultural norms may act as a barrier (e.g. drinking buddies, covering up).⁵

Enabling is also a factor in the effectiveness of peer intervention programs. Overcoming the tendency to enable is a fundamental problem to the effectiveness of peer prevention because an individual will shield a substance abuser from experiencing the impact or consequences of his or her action. Enabling behaviours are equally applicable to supervisors and co-workers.⁶

Although peer intervention programs can be an important component of a comprehensive workplace program, they are only one of the pieces of the puzzle. These programs cannot simply be implemented with the hope that the cultural environment will be overcome. It can take many years, without any guarantee of success, to implement an effective peer prevention program.⁷

3. *Supervisor Training*

Supervisors are responsible for performance management and ensuring the TTC's health and safety standards are met. Supervisors at the TTC are also expected to monitor and assess an individual's immediate ability to perform his or her job.

³ E. Vingilis, "Problems in Detecting DWIS" (1991) 7:3 Alcohol, Drugs and Driving 197.

⁴ Butler, supra note 1.

⁵ IBID.

⁶ IBID.

⁷ IBID.

There are five significant barriers to supervisory identification of employees who are under the influence of alcohol and/or drugs.

First, a supervisor may engage in peer enabling and not take action against an employee that is unfit for duty. A supervisor may attempt to address the problem on his or her own or refrain from taking action because of concerns for the repercussions that an individual may face if he or she is disciplined.⁸

Second, even in cases where supervisors have good intentions to take action, it is very difficult to identify an individual who is unfit on the job. Studies demonstrate that individuals, including police officers, have a low success rate in detecting impaired individuals.⁹ For example, Transport Canada conducted a study in Alberta and found that only 8% of drivers with a BAC greater than .08% were detected by police officers.¹⁰ A similar study was performed in Sweden where experienced police officers were unable to detect about half of those individuals with BAC concentrations in excess of .15%. While these studies were conducted in the 1970s, it appears that problems of identification have not been rectified in intervening years.¹¹

A more recent study conducted discussed the usefulness and difficulty of using odour as a basis for investigating alcohol related offences.¹² This study used very experienced police officers to evaluate alcohol odour under optimum conditions that do not occur in actual traffic situations. The study was conducted indoors with subjects blowing their breath through a short tube directly facing the nostrils of the officers. Even under optimum conditions that do not exist in actual traffic situations (closeness to subject) only 78.5% of the detections were correct with a majority of errors being failure to detect the presence of alcohol based on odour. One would have assumed that the ideal conditions and the experience of the police officers would have produced a greater accuracy in detection of alcohol odour.

These same principles would arguably apply in the workplace. Due to the difficulties in identifying employees under the influence of alcohol and/or drugs, a supervisor may use the criterion of overwhelming evidence before they tackle a problem. Often a supervisor may only confront a situation when the circumstances are repeated many times, or the situation is blatant.¹³

Third, studies have shown that employees with alcohol and drug problems may not immediately demonstrate recognizable performance problems. In fact, only a small percentage of employees will exhibit performance concerns in the early stages. Furthermore, the cause of identifiable performance concerns such as absenteeism or poor

⁸ IBID.

⁹ Vingilis, *supra* note 3.

¹⁰ IBID.

¹¹ IBID.

¹² H. Moskowitz et.al., "Detecting Breath Odor from Alcohol Consumption" Paper presented at ICADTS, T'97.

¹³ Butler, *supra* note 1.

job performance may be attributed by the supervisor to other causes.¹⁴

Fourth, impaired individuals can learn to “cover up” the signs of impairment and avoid detection. A number of studies have revealed that individuals when motivated can avoid the obvious signs of impairment.¹⁵

Fifth, the nature of TTC operations is one of limited supervision. In many cases, employees report for duty to other unionized employees or they book on and off duty by phone without any interaction with a foreperson or supervisor. In addition, many employees perform their duties independently and absent supervision. This reporting system is in place because of the size of the TTC’s operations and the requirement of employees to report for and perform their duties across the system. As a result, supervisory staff will not always be in a position to assess an employee’s fitness for duty prior to or during his or her shift.

Simply improving and expanding supervisory fitness for duty training will not overcome these barriers. The TTC cannot provide training to a supervisor that will ensure that he or she will identify an employee who is under the influence of alcohol and/or drugs or that will prevent a supervisor from engaging in enabling conduct. In addition, the nature of the TTC’s business cannot be completely altered to ensure supervisory contact in all instances and throughout the day.

Despite the potentially strong penalty language in the Collective Agreement (Discharge for Possessing, Consuming and Being Impaired While on Duty), there are further inherent weaknesses and vulnerabilities with respect to using supervisors’ subjective observations as the basis for management action and discipline. When supervisors do attempt to take action, often allegations are made as against supervisors of bias, malice, harassment or simply poor judgment and mistake. There are currently no means to objectively, independently verify the supervisor’s conclusions. Given the potential allegations in these circumstances, supervisors may be reluctant to take necessary action or may compromise disciplinary action in order to resolve a matter.

4. *Reinstatement on Conditions of Employment*

Employees who arrive at work and/or perform their duties under the influence of drugs and/or alcohol will be disciplined by the TTC. Depending on the circumstances, an employee may be subject to conditions of reinstatement, which may be a “last chance” agreement.

¹⁴ J. Normand et. Al., “Under the Influence? Drugs and the American Workforce” (1994) National Research Council 206.

¹⁵ E. Vingilis and V. Vingilis, “The Importance of Roadside Screening for the Impaired, Drivers in Canada” (1987) Canadian Journal of Criminology, vol. 29, no. 1, 17. | R. Mann and M. Vogel-Sprout, “Control of Alcohol Tolerance by Reinforcement in Non-Alcoholics.” (1981) 75:3 Psychopharmacology 315.

Typically, these agreements require an employee to be assessed to determine if they have an alcohol or drug dependency, to get assistance for any problem they may have, and to refrain from using alcohol and/or drugs or abusing prescription medication. However, there is no objective measure currently being used to ensure compliance with the requirement to be fit for duty and to refrain from alcohol and/or drug use or abuse. This is particularly problematic because: (1) relapse is common in the case of addicted individuals, and (2) an individual may deny that his or her use patterns have a negative impact on the workplace and continue consuming. Without an objective measure, there is simply no way to know with certainty that the employee is not a risk to the safety of the workplace and the public at large.

Alcohol or Drug Use Issues

Employee Incidents

Despite the attempts of the TTC to address alcohol and drug issues, a number of employee alcohol and/or drug related incidents have occurred which have raised serious safety concerns.

As noted earlier in this report, staff compiled and reviewed information relating to a number of alcohol and/or drug incidents involving TTC employees. When reviewing these documents, staff were cognizant of the following facts: (1) the TTC does not have an internal database wherein it tracks the number of drug and/or alcohol related incidents involving employees; (2) the nature of the TTC's business is one of limited supervision and many employees will not come in contact with a supervisor at the beginning, end or throughout their entire shift making detection difficult; and (3) incidents may not be reported by supervisors and co-workers. In the absence of a centralized database that tracks these incidents and the limited supervision of employees, there may well be other incidents involving employees.

Since the asbestos abatement accident in April 2007, there have been 17 alcohol and/or drug related incidents involving TTC employees. As noted in the executive summary of this report, between January 2008 and June 2008 four of the incidents involved Operators. For the period of January 2006 to June 2008 there have been approximately 39 alcohol and/or drug related incidents involving employees.

While some involved employees held non-safety sensitive positions and were unfit for duty, there are still concerns relating to these individuals potentially moving into safety sensitive positions. It is important to remember that seniority permits bidding to other positions within the TTC. For instance a janitor could bid for a position and after a period of training, he or she could be operating a train in the yard. Similarly a collector could use his or her seniority to bid for a revenue operating position and after a period of training, he or she could be transporting customers. Also, while some of these employees may not be operating revenue vehicles, they may be responsible for implementing safety procedures that affect the safety of the public or they may be performing some safety sensitive duties that could pose a significant risk to themselves.

Ultimately, the focus of the TTC should be on the harm to the public and employees that could result from an employee performing his or her duties under the influence of alcohol and/or drugs. It only takes one employee who is under the influence to cause a significant incident with tragic results.

The evidence reviewed by TTC staff demonstrates a continuing, if not an increasing trend in the number of alcohol and drug related incidents. As discussed, the TTC has attempted other means of addressing employee drug and alcohol issues. The number of identified incidents highlights and emphasizes the need for a more proactive and deterrent approach to how the TTC handles employee alcohol and drug issues to further ensure the safety of the workplace and ultimately the public we serve.

Alcohol and Drug Policies in Different Jurisdictions

While it is instructive to review how other safety sensitive operations handle employee alcohol and drug issues, it is important to remember that the TTC must review its own operations to determine what an appropriate alcohol and drug policy should contain. Due diligence requires that the TTC develop a policy that adequately addresses the safety issues it faces in its operations.

United States ("U.S.")

Drug use prevention and testing programs have been required by the U.S. Federal Government since the mid to late 1980's. Drug testing rules were put in place for 6 modal administrations and then confirmed and expanded through modal specific regulations. These modal administrations are: aviation, pipeline, public transportation, railroad, ships/vessels and trucking/school bus/tour bus.

The original regulations were for drug testing only, but were modified after the Federal *Omnibus Transportation Employee Testing Act of 1991* ("Act"), to include alcohol testing as well. The Act was sparked by the derailment of a New York City subway train. The train operator had a blood alcohol content ("BAC") of 0.21 percent more than 13 hours after the crash.

Pursuant to the U.S. regulations, employees in safety-sensitive positions must undergo testing for five illegal substances and alcohol. Employees in safety sensitive positions must undergo testing in the following circumstances: pre-employment, random, post incident, reasonable cause, return to duty and follow up testing. The success of random drug and alcohol testing in the U.S. transit industry as a proactive deterrence mechanism is discussed later in this report.

London, England

Alcohol and drug testing in London, England arose from the *Transport and Works Act*, which made it a criminal offence to be intoxicated anywhere around the movement of a

train (note that it also applies to anyone who can effect the movement of the train). The *Transport and Works Act* placed corporate liability on employers who would be held responsible for damage, loss of life or injury caused by an employee being intoxicated unless the company could demonstrate that they had been duly diligent in trying to prevent such an event. In response, the London Transit Authority implemented an alcohol and drug policy. Under its policy all employees are subject to reasonable cause, post incident, post treatment, post policy violation, and applicant testing. Employees in safety critical positions are also subject to random alcohol and drug testing.

Canada

Unlike the U.S., in Canada there are no laws requiring drug and alcohol testing in the workplace. Canadian employers have implemented drug and alcohol testing rules and policies under their implied authority to make reasonable rules. The legality of alcohol and drug testing rules and policies are currently determined by the courts, boards, arbitrators and tribunals on a case by case basis.

Canadian Alcohol and Drug Policies

For safety reasons, many Canadian companies in high risk industries have introduced comprehensive alcohol and drug policies that include testing. Many employers in the transit, rail, aviation, bus (coach, school and transit) and ferry service industries have included testing in their alcohol and drug policies.¹⁶ Employers in other sectors, including the construction, exploration, utility, chemical, mining and oil and gas sectors have also implemented alcohol and drug policies that include testing.

Federal and cross-border bus, transportation and transit companies have alcohol and drug testing programs in place, including random testing.

The TTC is the largest transit agency in Canada and the third largest in North America after New York and Mexico City. In light of the nature and size of its operations, the TTC should assume a leadership role in advancing comprehensive alcohol and drug policies that include testing requirements for transit employees.

Effects of Alcohol and Drugs

The risks associated with individuals who perform their duties under the influence of alcohol and/or drugs are significant. The following has been stated in relation to substances of concern in the workplace and their affects on an employee's motor co-ordination, perceptual abilities, and physical and mental capabilities:

¹⁶ Legal cases where employers were challenged on their alcohol and drug policies were reviewed by the TTC on a legal database to locate Canadian companies in safety sensitive industries that have included alcohol and drug testing in various circumstances in their respective policies. The legal database does not contain a complete listing of all Canadian Companies that engage in alcohol and drug testing. There were in excess of 27 decisions, some of which were related to Greater Toronto Airport, Imperial Oil, Albian Sands Energy Inc., CN Rail, Greyhound, Petro Canada, Weyerhaeuser Co., Dupont Canada, Trimic Transportation, Brewster Transportation, Elk Valley Coal, J.D. Irving Ltd., Suncor Energy, Lockerbie and Hole Co., Kimberly Forest

"Psychoactive drugs, including alcohol, act on the central nervous system, altering the way a person thinks, feels, and acts....Their impacts on motor coordination, perceptual abilities, and physical and mental capacity can all be of concern in a workplace setting. Even at low levels, drug and alcohol use can cause performance impairment. Potential impacts on job skill performance include a decrease in accuracy, efficiency, productivity, worker safety and job satisfaction. At higher doses, these effects will be more significant."¹⁷

Furthermore, the more difficult or complex a task is, the more readily evident or significant a person's impairment is even at low concentration levels of alcohol and drugs.

Alcohol

The ingestion of any amount of alcohol can result in a decline in the body's ability to perform to its full potential. The general performance impacts associated with each BAC range are:

- less than .015 BAC: performance of cognitive tasks can begin to decrease;
- from .015 - .04 BAC: sensory and cognitive performance is reduced, and perception, visual field, tracking, information processing and performance of multiple tasks are affected; and
- at blood alcohol levels higher than .04, the probability of causing an accident is increased, all skills almost universally seriously impaired and psychomotor skills (coordination, balance, visual acuity) are impaired for most individuals.¹⁸

The U.S. National Highway Traffic Safety Administration ("NHTSA")¹⁹ examined the impacts of alcohol on driving skills at BAC levels from 0.00 to 0.10 for a wide range of subjects (varying ages, drinking practice and sex). The NHTSA concluded:

- alcohol impairs driving-related skills at .02% BAC, the lowest tested level;
- the magnitude of impairment increased consistently at BACs through 0.10%, the highest level tested;

Products, Fluor Constructors Canada, Island Pacific Transport, etc.

¹⁷ Additional information on performance impacts is found in Chapter 2, "Alcohol and Drugs in the Workplace", B. Butler, Butterworths Canada Ltd, 1993 as well as Drugs and Drug Abuse: A Reference Text, 3rd Edition, B. Brands, B. Sproule and J. Marsham, eds, Addiction Research Foundation, 1998. See also E.J. Wadsworth, et. al., "Cannabis Use, Cognitive Performance and Mood in a Sample of Workers" (2006) *Journal of Psychopharmacology* 14.

¹⁸ Butler, *supra* note 1.

¹⁹ H. Moskowitz et al, "Driver Characteristics and Impairment at Various BACs", (August 2000) Southern California Research Institute.

- by .04% BAC, all measures of impairment that were statistically significant were in the direction of degraded performance;
- there was no evidence of a BAC below which impairment does not occur; and
- greater impairment would be expected from drivers during alcohol consumption and absorption when BACs are rising.

Subsequent studies by these authors of the above study have reconfirmed the above findings.²⁰

Marijuana

Marijuana is the most common form of illegal substance consumed by individuals. Recent findings indicate that marijuana contributes to: decreased attention and impairment in ability to divide attention between two tasks; adverse effects on short-term memory and hindered long term memory; reduction in learning ability and increased time needed to make decisions; and impaired psychomotor performance, as demonstrated repeatedly in simulated driving and flying experiments.²¹

In one critical study, individuals were not aware of the affects of cannabis leading the researchers to conclude the situation is particularly dangerous because "operators of complex machinery cannot rely on their own judgment concerning their ability to perform."²²

Other Drugs

Other illegal drugs and prescription drugs can have an impact on performance and safety.

²⁰ M. Burns and D. Fiorentino, "The Effects of Low BACs on Driving Performance" (August 2000) Southern California Research Institute. H. Moskowitz and D. Fiorentino, "A Review of Experimental Studies of Low BAC Effects on Skills Performance", (2002) proceedings of ICADTS.

²¹ W. Hall and R. Homel, "Reducing Cannabis-Impaired Driving: Is there Sufficient Evidence for Drug Testing of Drivers." (2007) 102:12 *Addiction* 1918. It is noted that cannabis increase risk of motor vehicle accidents. See also: J. Ramaekers, J.G., Berghaus, G., Van Laar, M. and H.O. Drummer, "Dose Related Risk of Motor Vehicle Crashes After Cannabis Use" (2004) 73 *Drug and Alcohol Dependence* 109. H.W.J. Robbe, "Influence of Marijuana on Driving" (1994) Maastricht Institute for Human Psychopharmacology, University of Limberg. E.J. Wadsworth, et. al., "Cannabis Use, Cognitive Performance and Mood in a Sample of Workers" (2006) 20:1 *Journal of Psychopharmacology* 14.

²² J.A. Yesavage et al, "Marijuana Carry-over Effects on Aircraft Pilot Performance" (1991) 62:3 *Aviation, Space, and Environmental Medicine* 221. See also M. Huestis, SOFT/AAFS Committee on Driving under the Influence of Drugs, "Drug Monographs: Marijuana" (1994) 6:2 *DRE*. Note that the conclusions in this paper were drawn after substantial review of the available research on the affects of cannabis.

For example:

- individuals will overestimate their abilities after consuming cocaine even after low doses, increasing the potential for risk taking;
- opiates can interfere with work performance due to mood changes, decreased activity, drowsiness and slowed motor function;
- hallucinogen use can impact on a person's sensation and perception, making the operation of motor vehicles and other machinery dangerous;
- amphetamine use at low doses can cause chronic sleep problems, anxiety and tension, depression, irritability and appetite suppression; and
- stimulant use can increase a person's risk-taking impulse and can impair judgment and decision making.²³

Testing Methods

Alcohol Testing

Testing will be done using a calibrated breathalyzer. The concentration of alcohol in end-expiratory breath accurately reflects the alcohol level in the blood and can appropriately interpret the presence and degree of intoxication or impairment at the time the sample is taken.

For the purposes of the proposed policy, a positive alcohol test will be one in which the blood alcohol concentration is at or above .04 BAC. However, in those instances where an employee is subject to an unannounced testing program on return to duty after a policy violation or treatment, a positive test will be one in which the blood alcohol concentration is .02 BAC or more. Anyone tested in any other situation who has an alcohol test result of .02 to .039 BAC will be removed from duty until considered safe to return (progressive discipline may be appropriate in certain circumstances).

Although the current standard for impaired driving is .08% BAC under the *Criminal Code* and a driver may temporarily lose his or her license under the Ontario *Highway Traffic Act* at 0.05% BAC, a consistent practice for employers in Canada has been to set 0.04 BAC as the level at or above which would be a policy violation. This level of BAC in workplace alcohol and drug policies has been upheld in court and arbitration decisions. As discussed above, alcohol presence up to 0.04% BAC will result in a reduction in sensory and cognitive performance. In addition, at 0.04% BAC, virtually all individuals experience decreased cognitive abilities resulting in impacts on perception, visual field, tracking, information processing and performance of multiple tasks.

Drug Testing

In random drug testing situations, the testing method would be oral fluid testing. In applicant, reasonable cause and post incident situations, the testing method would be oral fluid or urinalysis testing. The testing method used in an applicant, reasonable cause or

²³ Butler, *supra* note 1.

post incident testing situation would be the one TTC, in its discretion, deemed appropriate in the circumstances.

Through urinalysis and oral fluid testing methods typically five classes of drugs are examined: marijuana, cocaine, opiates, amphetamines, and phencyclidine. The list of drugs tested for can be expanded where the employer has seen a need. Similarly, in a post treatment situation, additional drugs may be tested for as recommended by a substance abuse professional.

Urinalysis testing is currently used by employers worldwide in random, post incident, reasonable cause, applicant (new and existing employees), post policy violation and post treatment situations. Urinalysis testing has been accepted as an appropriate line of inquiry in applicant, post policy violation, post treatment, post incident and in reasonable cause situations in Canada.

Oral fluid testing is administered through a simple collection device placed in the mouth. Oral fluid consists of a compilation of tissues made up primarily of saliva, mixed with other glandular secretions of the oral cavity. In the case of oral fluid²⁴ technologies, the presence of the substance immediately contaminates the oral fluid and will be detected by the laboratory test.

Cut off levels in oral fluids can be chosen to demonstrate a likelihood of impairment.²⁵ These cut off levels can establish that an individual consumed the drugs within a few hours of the test. The likelihood and extent of impairment increase as the levels increase. Ontario court and arbitration decisions have accepted that oral fluid testing results are indicative of actual impairment at the time of the test.

Proposed Policy

The proposed Policy will include alcohol and drug testing under specified circumstances. The main purpose of the testing provisions will not be to “catch” employees, rather these provisions will be used to deter them from dysfunctional behaviour which would pose risk in the workplace.²⁶

²⁴ E. Cone and M. Huestis, “Interpretation of Oral Fluid Tests for Drugs of Abuse”, (2007) 1098 51 Ann. N.Y. Acad. Sci. 51.

²⁵ F. Grotenhermen, et. al., “Developing Limits for Driving Under Cannabis” (2007) 102:12 Addiction 1910, correlated impairment level between THC level in blood and BAC levels. See also A.G. Verstraete, “Detection Time of Drug Abuse in Blood, Urine, and Oral Fluid” (2004) 26:2 Therapeutic Drug Monitoring 200. J. G. Ramaekers, et. al., “Cognition and Motor Control as a Function of delta9 THC Concentration in Serum and Oral Fluid: Limits of Impairment” (2006) 85:2 Drug and Alcohol Dependence 114.

²⁶ “Review into Safety Benefits of Introducing Drug and Alcohol Testing for Safety Sensitive Personnel in the Aviation Sector”, Department of Transportation and Regional Services (DOTARS) and the Civil Aviation Safety Authority, (2006), Commonwealth of Australia. Research found that testing works as it confirms the existence of use, can be correlated to reducing levels in accident and personal injuries, complements non-testing initiatives such as education, training and employee assistance programs, and acts as a deterrent to alcohol and drug use.

No one element of the proposed Policy or existing rules, procedures, practices, training and EFAP will be successful on its own. In addition, no one element is an alternative to testing since each aspect of the proposed policy will play a separate and distinct role in the TTC's proposed overall approach to employee alcohol and drug issues. It is important to appreciate that the proposed Policy will have a number of components to it beyond alcohol and drug testing and that each part of the proposed Policy will complement and reinforce the others.

The proposed Policy will stress the importance of prevention and early identification of potential problem situations. Employees are encouraged to access assistance through the EFAP, their personal physicians, or appropriate community services for help with any problem that may be affecting work performance or safety including an alcohol or drug problem. Furthermore, the proposed Policy will recognize that alcohol and drug dependencies are treatable illnesses and that early intervention greatly improves the probability of a lasting recovery. Individuals who suspect they have a substance dependency or emerging alcohol or drug problem will be expected to seek advice and to follow appropriate treatment promptly before job performance is affected or violations of the proposed Policy occur.

Application

The proposed Policy will apply to all TTC employees while engaged in TTC business, when on TTC premises and worksites and when in issued uniform/identifiable clothing. The proposed Policy will remind all employees that it is their responsibility to report for work fit for duty without any limitations due to the effects or after effects of alcohol and/or drugs. Certain employees because of the safety sensitive nature of their employment will be subject to higher standards under the proposed Policy.

Designated Positions Testing

Under the proposed Policy, employees who occupy safety sensitive, specified management positions and designated executive positions will be held to a higher standard through greater testing requirements. Employees in these positions will be held to a higher standard of conduct because of the impact their positions have on safety in the workplace. The TTC will engage in a review of all positions to classify them to ensure that testing is applied in appropriate circumstances. A list of all positions at TTC and their designation in accordance with the terms discussed below will be added as an appendix to the proposed Policy.

Safety sensitive positions have a key and direct role in an operation where performance impacted by drug or alcohol use could result in a significant incident, the failure to adequately respond to a significant incident, and/or affect the health, safety or security of the employee, the public or the environment.

Specified management positions are considered risk sensitive because they have a significant involvement in decisions or actions that could directly affect safe operations. This designation will include all individuals who directly supervise individuals who hold a safety sensitive position.

Designated executive positions include general superintendent and above. These positions will be included because of the role of these executives in making significant business decisions that affect the health and safety of the employees and the public.

Under the proposed policy, staff recommends that testing occur in the following circumstances:

Testing situation	Safety-sensitive Positions	Specified Management Positions	Designated Executive Positions	Other Employees
Reasonable Cause	X	X	X	n/a
Post Incident	X	X	X	n/a
Post Violation	X	X	X	X
Post Treatment	X	X	X	X
Applicant	X	X	X	n/a
Random	X	X	X	n/a

Testing Situations

Reasonable Cause testing is triggered when there are reasonable grounds to believe the actions, appearance or conduct of individuals while on duty are indicative of the use of drugs or alcohol. In a reasonable cause situation, testing is only one tool of investigation into the likely reason an employee is unfit for duty. Reasonable cause testing provides an objective assessment tool, acts as a deterrent to those who would report or perform their duties unfit and/or may encourage employees to seek assistance at an early stage for an alcohol and/or drug problem before an incident occurs or work performance is affected.²⁷

Post Incident testing arises when an individual is directly involved in an incident resulting in a fatality, serious injury to any individual, an environmental incident with significant implications, significant loss or damage to property, equipment or vehicles or a near miss with potential for more serious consequences. The individual will be subject to testing as part of the larger investigation. Testing is an objective tool that can assess the root causes of an incident.²⁸ A test will not be necessary if there is clear evidence that the acts or

²⁷ D. Feinauer and S. Havlovic, "Drug testing as a strategy to Reduce Occupational Accidents: A Longitudinal Analysis" (1993) 24 Journal of Safety Research 1. Results in study were found to be limited because of the following factors: (1) supervisors rely on subjective observations and may not identify impairment; (2) supervisors have limited contact with employees and have less opportunity to monitor; and (3) employees who continued drug use were convinced they could hide it from their employers.

²⁸ IBID. Post accident testing was proven effective in offsetting workplace accident rates.

omissions of the employee could not have been a contributing factor (e.g. structural or mechanical failure, environmental factors, a non-preventable incident.) Employees referred for a test will only be those who are identified, with reasonable grounds, as having been directly involved in the chain of acts or omissions leading up to the event.

Post incident testing will provide evidence of diligence in taking measures to ensure a safe operation. In addition, the knowledge that an investigation will take place that includes the potential to be tested for alcohol and/ drugs, can be a deterrent to the performance of duties when under the influence and may encourage employees to overcome denial and get help at an early stage.

Applicant testing will require individuals as a condition of qualification for a safety sensitive, specified management and designated executive positions to undergo drug testing. Without testing as an objective measure, the TTC must rely on honest self reporting of drug abuse and/or use.

In the proposed policy, a positive test may render the candidate ineligible for the position, depending on the circumstances. The test results will be one aspect of the overall assessment of the candidate for the position.

Testing applicants prior to their appointment in one of these proposed job categories is an objective tool that will assist the TTC in identifying those individuals who pose a risk to the safety of employees and the public. Applicant testing will also send a clear message about the TTC's position on drug use and may deter substance abusers from applying for one of these positions.

Post Violation testing typically arises as a condition of "return to duty" and on an ongoing basis as part of a continuing employment agreement. The objective of testing is to deter alcohol and drug use in contravention of the agreement. The testing program can be made very specific to the situation at hand, and therefore these programs have been found to be effective in deterring further violations. Testing is also an objective tool to monitor employee compliance with conditions of reinstatement and "last chance" agreements.

Post Treatment testing, involves a shift of focus respecting employee's conduct from deterring drug or alcohol use that affects the workplace to preventing drug or alcohol use. The focus of the TTC in overseeing the wellness of an employee in the process of behaviour modification or rehabilitation must shift from ensuring that the employee is not working under the influence of drugs or alcohol to ensuring that the employee in question is not using drugs or alcohol at all consistent with their recovery program. Testing in these circumstances can deter further policy violations and support ongoing recovery.

Random testing for the specified higher risk positions, will take place on an unannounced basis spread evenly throughout the year, with selection handled by an independent third party administrator. The main objective of random testing is to deter alcohol and drug use

in contravention of the Policy. As there is a greater likelihood of being identified in a rule violation, this will encourage individuals to seek assistance or change behaviour before work performance and/or the safety of the workplace is affected.

The basic premise behind the deterrence theory of alcohol and drug testing is that individuals will be dissuaded from committing a particular act if they perceive that one of the consequences will be disciplinary action, including dismissal in appropriate circumstances. The notion is that individuals will alter their behaviour only when they believe that there is a strong potential that the benefits of one’s conduct will outweigh the negative impact consequences.²⁹

The random testing portion of the TTC’s proposed Policy will fully supports 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.

Random Testing & Deterrence

The success of random drug and alcohol testing has been demonstrated in the reported positive testing results of the U.S. Federal Transit Agency (“FTA”). The information below is drawn directly from the FTA’s most recent alcohol and drug testing statistical report.³⁰

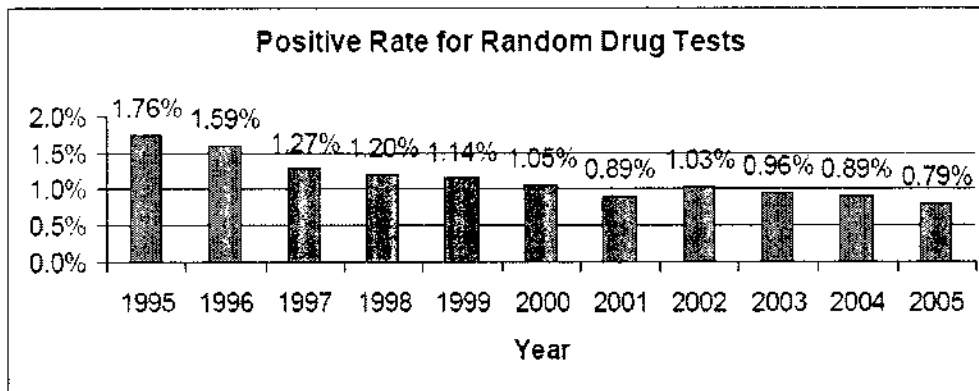


Figure 2. Positive Rate for Random Drug Tests (1995–2005)

²⁹ Butler, *supra* note 1.

³⁰ Federal Transit Administration, “Drug and Alcohol Testing 2005 Annual Report” (2008) Office of Safety and Security, Department of Transportation.

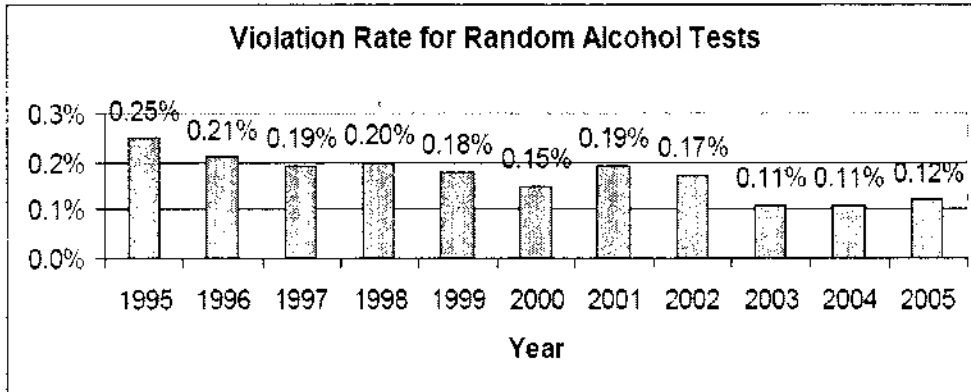


Figure 3. Violation Rate for Random Alcohol Tests (1995–2005)

Random testing for U.S. transit workers shows declines in positive drug tests from 1.76 to 0.79%; (140,000 tests done) and positive alcohol tests declined from 0.25 to 0.12%. (40,000 tests done).

All Canadian cross-border drivers are subject to U.S. drug and alcohol testing regulations. The table below illustrates results from the largest consortium (Driver Check) with respect to random drug tests of Canadian employees.

DOT Required Drug Tests Canadian Companies

Year	#of Tests	Positive Tests	Percentage
1999	13867	140	1.01
2000	15728	120	0.76
2001	14774	134	0.91
2002	13778	123	0.89
2003	13356	114	0.85
2004	21823	175	0.80
2005	21477	158	0.74
2006	21612	156	0.72
2007	23564	114	0.50

The Canadian cross border random positive drug testing results declined by approximately 50% from 1.01 percent in 1999 to 0.50 percent for 2007.

The U.S. National Transportation Safety Board ("Safety Board") released a "Safety Recommendation" report on April 10, 2008.³¹ The report was prepared in response to a train accident where a passenger commuter train struck a track maintenance vehicle killing two employees and seriously injuring two employees. Several passengers were also injured. The accident also caused significant damage to the trains, the work car, the rail, cross ties and ballast. The cause of the accident was the failure of the train dispatcher to maintain blocking that provided signal protection for the track segment occupied by the maintenance crew and the failure of the work crew to apply a shunting device that would have provided redundant signal protection for their track segment.

One of the fatally injured employees was the foreperson responsible for the work crew on the track maintenance vehicle. The fatally injured track foreperson tested positive for marijuana. He had likely used the marijuana within three hours of his death and would have been measurably impaired at the time of the accident.

The foreperson and the members of the work crew were not subject to the random testing requirements of the railway regulations as members of the maintenance way group. The Safety Board compared the positive drug testing results of maintenance way group to the positive testing results of employees covered by random testing under the railway regulations. The Safety Board noted that over a 10 year period ending January 9, 2007, the post accident testing of 26 maintenance-of-way fatalities resulted in 5 positive test results or a 19.23 percent positive rate. The post accident test data for employees subject to random testing for the same period of time was 122 fatally injured employees with 8 positive test results or a 6.56 percent positive rate. The Safety Board attributed this significant gap to the deterrent value in random testing.

In Australia, all State and Territory police conduct random breath testing of motor vehicle drivers. Analyses of the effects of random testing demonstrate that it has had an immediate, substantial and permanent impact in all States except Tasmania (the latter showing a substantial impact within three months of introduction).³²

Statistics Canada³³ conducted an analysis based on incidents substantiated by police relating to persons charged with impaired driving. Despite the fact that alcohol consumption levels have remained essentially the same, there was a demonstrated drop in impaired driving rates during the same period of time. In Ontario, impaired driving charges dropped from 31,295 in 1992 to 19,445 in 2002. It is suggested in the report that the decline in impaired driving charges by police is attributable to a number of factors including changing attitudes about impaired driving, aging of the general population and other enforcement procedures such as roadside suspensions.

³¹ National Transportation Safety Board, "Safety Recommendation" R-08-05 through-07, April 10, 2008.

³² J. Henstridge, et. al., "The Long Term Effects of Random Breath Testing in Four Australian States: A Time Series Analysis" (1997) Canberra, Federal Office of Road Safety 135. See also M. Butler, "Australia's Approach to Drugs and Driving", *Of Substance* (2007) 5:3.

³³ Juristat, Canadian Centre for Justice Statistics, "Impaired Driving and other Traffic Offences" (2002) 23:9.

Assistance and Accommodation

Employees are encouraged to seek assistance voluntarily before the safety of the public or employees and/or job performance is affected. All employees who voluntarily seek assistance will be provided with support and encouragement to ensure their successful recovery. However, it should be remembered that a successful recovery requires the dedication of the affected employee.

In appropriate circumstances, in accordance with Human Rights obligations, the TTC will accommodate employees with disabilities to the point of undue hardship. However, employees cannot avoid complying with Policy, testing or disciplinary action by claiming a problem.

Discipline

While the TTC has the right to immediately terminate an employee for being impaired, possessing or consuming an illicit drug or alcohol on duty, it will consider the circumstances of each individual case. The registering of a positive test result does not automatically and necessarily result in termination, although in certain situations, this may be appropriate. The appropriate disciplinary sanction is an issue to be determined on a case by case basis, having regard to all the relevant facts.

When safety is at issue, it is important to remember that discipline carries both a rehabilitative and deterrence element. Discipline can correct the conduct of the policy violator and deter others from engaging in similar conduct. Alcohol and drug testing will assist the TTC in this regard to ensure that disciplinary action is taken in appropriate circumstances.

Balancing Safety and Privacy Concerns

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.

Communication Plan

Developing, communicating and implementing a well-considered alcohol and drug policy is an important step which establishes a framework for decision-making and taking action to deal with workplace problems. The TTC will meet with employees to provide training with respect to the content of the Policy, its purpose, and their obligations under it to dispel any

myths and false rumours. The TTC will also design and implement a multi-faceted education campaign to ensure all employees understand the nature of the proposed Policy, assistance that is available, and their personal obligations.

Timelines for Implementation

With respect to introducing the testing component of the proposed Policy, it will be necessary for a period of lead time between the official policy announcement date and the effective date. This lead time is necessary to permit the TTC to have time to provide employees with education, train supervisors and hire a reputable testing company that can meet the TTC's needs.

Once the proposed Policy is approved in principle, it will take up to three months to bring back the Policy for final review and approval, three months to begin training from the date of implementation, six to eight months from the first training date to complete employee training and hire a service provider. Overall, it should take 8-12 months from the date of implementation for the Policy to be in full effect.

The TTC could proceed to implement applicant drug testing for new employees almost immediately.

JUSTIFICATION

The provisions of the proposed Policy will be consistent with the TTC's enhanced commitment to the health and safety of employees and the public. The TTC has an obligation and responsibility to provide a safe working environment to its employees and safe travel to its customers. Employees who perform their duties while they are unfit for duty due to the consumption of alcohol and/or other drugs threaten their own safety, the safety of their co-workers and/or the public.

Staff believe that the proposed Policy will find the appropriate balance between assistance programs, privacy concerns, prevention initiatives and deterrence components. The proposed Policy provisions will include processes to prevent potential problems, assistance for individuals with current or emerging problems, and monitoring and support for those returning from treatment. The deterrence components of the proposed Policy will include communication of standards and expectations, investigation tools to help identify a violation, and clear consequences to enforce compliance.

Alcohol and drug testing will form an integral part of the proposed Policy. No one component of the proposed Policy can replace another. Each aspect of the proposed Policy will be designed to identify risks and improve safety in the workplace.