Drug and alcohol testing in Canada: SCC denies leave to appeal in Power Workers' Union v. Canada

June 12, 2025

On May 29, 2025, the Supreme Court of Canada (SCC) dismissed an application for leave to appeal from the decision of the Federal Court of Appeal (FCA) upholding drug and alcohol testing requirements of the Canadian Nuclear Safety Commission. The application for leave was filed after the FCA dismissed the appeal of an earlier 2023 Federal Court decision on Nov.6, 2024.

The testing requirements are a condition placed on individuals to be licensed to operate high security (Class I) nuclear facilities.

The appellants, six affected workers and their unions, claimed that the requirements breached their rights under Sections 7, 8 and 15 of the Canadian *Charter of Rights and Freedoms* and were not saved by Section 1 of the Charter. They also claimed that the Canadian Nuclear Safety Commission's decision to implement the requirements was unreasonable on administrative law grounds.

This article reviews the legislative context, discusses the 2023 Federal Court decision, examines the FCA's decision from a Charter and administrative law perspective, and discusses the implications of the SCC's judgment on the application for leave to appeal.

Key takeaways

The FCA decision demonstrates that interpreting drug and alcohol testing laws in Canada will often require balancing public interest with individual expectations of privacy. In particular:

- A court is likely to consider context, including public safety, when determining the reasonableness of drug and alcohol testing. This is especially likely during a Section 8 Charter analysis.
- Section 7 of the Charter is unlikely to be engaged when testing is relatively non-invasive and there are no adverse disciplinary consequences from a positive test.

- A worker's expectations of privacy are significantly influenced by the nature of work and the environment in which the work is being performed.
- Taking less intrusive bodily samples, such as breath, urine or saliva, does not automatically attract a high expectation of privacy.

Legislative context

The *Nuclear Safety and Control Act*, S.C. 1997, c. 9

The *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (the Act) and its regulations govern nuclear safety in Canada. The Act's purpose is two-fold:

- To limit the risks to national security, the health and safety of persons, and the environment that are associated with the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information; and
- To implement measures, to which Canada has agreed, respecting international control of the development, production and use of nuclear energy, including the non-proliferation of nuclear weapons and nuclear explosive devices.[1]

Section 8 of the Act establishes the Canadian Nuclear Safety Commission (the Commission), which is tasked with regulating the development, production and use of nuclear energy and the production, possession and use of nuclear substances and prescribed equipment, in a manner that meets the requirements of the Act. The Commission is empowered to issue licences to persons carrying out these activities.

The General Nuclear Safety and Control Regulations

The General Nuclear Safety and Control Regulations (General Regulations) provide a framework for licencing and list grounds upon which the Commission may renew, suspend, amend, revoke or replace a licence. These regulations also impose a number of obligations on licensees, including taking reasonable precautions to protect the environment and the health and safety of persons and maintain the security of nuclear facilities and nuclear substances.

The Class I Nuclear Facilities Regulations

The Class I Nuclear Facilities Regulations (Class I Regulations) state that licence applications for a Class 1 nuclear facility must contain the proposed human performance program for the activity to be licensed, including measures to ensure workers' fitness for duty, in addition to information required by the General Regulations.

Regulatory Document 2.2.4

Regulatory Document 2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use, Version 3 (RD2.2.4) requires licensees to implement five types of drug and alcohol testing, with two of them at issue in this matter. Under RD2.2.4, licensees must require all successful candidates to submit to drug and alcohol testing as a condition of placement in a safety-critical job. Incumbent workers transferring into a safety-critical

position are also required to submit to a pre-placement alcohol and drug test. Licensees must also require all workers holding safety-critical positions to submit to random alcohol and drug testing.

Under RD2.2.4, alcohol and drug-testing processes include breath alcohol-testing (assessing blood alcohol concentrations) and either laboratory urine drug testing or laboratory oral fluid drug testing, or a combination of both. Workers who provide a verified positive alcohol or drug test must be removed from safety-critical or safety-sensitive duties and referred for a mandatory substance abuse evaluation. Further, a licensee cannot consider the worker for reinstatement to safety-critical or safety-sensitive duties until a recommendation for reinstatement has been received from a duly qualified health professional.

Rather than challenging the validity of RD2.2.4 overall, the appellants challenged the provisions requiring licensees to conduct pre-placement and random testing. These were referred to as the "impugned requirements" because they were yet to be implemented due to a stay order issued first by the Federal Court and then by the Federal Court of Appeal, pending final disposition of the appeal.

Procedural history: The 2023 Federal Court decision

Before discussing the Federal Court of Appeal decision, it is helpful to explore the earlier decision in *Power Workers' Union v. Canada (Attorney General)*, 2023 FC 793.

After reviewing the context and development of RD2.2.4, the application judge examined: (i) the constitutionality of the impugned requirements and (ii) their validity from the perspective of administrative law. The application judge applied the standard of correctness to the first issue and engaged in reasonableness review with respect to the second administrative law issue.

The constitutionality of the impugned requirements

The application judge found that the impugned requirements did not breach Sections 7, 8 or 15 of the Charter.

Section 7 of the Charter

The application judge found that the appellants' Section 7 claim failed because the appellants did not demonstrate that impugned requirements: (i) interfered with bodily integrity and autonomy; or (ii) caused serious state-imposed psychological stress. The application judge noted that the threshold for demonstrating a Section 7 breach on the basis of employment is significant and requires more than the non-invasive taking of saliva, urine or breath samples to check for evidence of drugs or alcohol as a measure to protect the broader public.

Section 8 of the Charter

The application judge followed the analytical framework set out in *Reference re Marine Transportation Security Regulations (CA),* 2009 FCA 234:[2]

- Is Section 8 engaged by the impugned requirements, based on the safety-critical workers' reasonable expectation of privacy?
- If so, are the impugned requirements "authorized by law"?
- If so, are they reasonable?

On the first question, the application judge determined that Section 8 was engaged. In requiring the licensees to collect bodily samples (breath, urine or saliva), personal data was taken, amounting to a search or seizure.

At the second stage, the application judge held that the impugned requirements were "authorized by law," as the Commission's authority to impose them had two foundations: (i) the General Regulations and Class I Regulations and (ii) the Commission's broad power under subsection 24(2) of the Act to impose licensing requirements "as it sees fit."

On the third question, the application judge found the impugned requirements were reasonable when considering all contextual factors, including the regulatory context, the public interest in nuclear safety, the identified need to bolster fitness for duty programs, the reliability of the testing methodology, and the availability of judicial oversight.

Section 15 of the Charter

The application judge also rejected the appellants' Section 15 claim because the impugned requirements only apply to a category of workers at nuclear facilities and these workers do not form a "protected group" for the purposes of Section 15.

Having held that the impugned requirements did not violate Sections 7, 8 and 15 of the Charter, the application judge declined to address the parties' Section 1 arguments.

Alternative administrative law claim

The application judge found that the impugned requirements were not unreasonable. Among other reasons, the application judge found that the Act provided the Commission with the authority and discretion to choose the instrument under which to implement the impugned requirements, and the impugned requirements were included in RD2.2.4 after a decade-long outreach and consultation with various stakeholders, including the appellants.

The Federal Court of Appeal decision

In *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182, the Federal Court of Appeal (FCA) examined two issues:

- Did the application judge err in concluding that the impugned requirements do not violate Sections 7, 8 or 15 of the Charter?
- Alternatively, did the application judge commit a reviewable error in concluding that the impugned requirements are not unreasonable?

The FCA confirmed that, following the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, when the FCA hears

an appeal of a Federal Court decision on judicial review, its role is to determine whether the Federal Court selected the appropriate standard of review and, if so, whether that standard was applied properly.

The FCA found that the application judge's application of the correctness standard to the first question and the presumptive standard of reasonableness to the second were not at issue. Specifically, constitutional questions require courts to apply the standard of correctness, and there was nothing to displace the presumption of reasonableness review for the second issue. Accordingly, the issue for the FCA was whether the application judge applied these standards properly.

The Charter analysis

Section 8

The FCA found that there were no errors in the following conclusions reached by the application judge:

- Safety-critical workers have a diminished expectation of privacy given the nature of their work and the unique environment in which that work is being performed.
- The case law is clear that the taking of breath, urine or saliva samples are among the least intrusive forms of body searches. Accordingly, the seizure of bodily samples does not automatically attract a high expectation of privacy.
- A critical factor was the unique context of the nuclear industry where safety is the most important priority.

The FCA also found that the application judge did not err in finding that the impugned requirements are authorized by law and reasonable. The FCA found that the statutory anchor of the impugned requirements derives from the Commission's statutory responsibility in the Act. Further, it was clear from the record that the impugned requirements were always intended to be binding licensing requirements and never purported to be non-binding policy or guidelines.

The FCA found that there were no flaws in the application judge's balancing of the broad public interest and the safety-critical workers' privacy interests. The application judge had grappled with the safety-critical workers' privacy interest but found it was diminished in light of the circumstances, including the relative non-intrusiveness of the seizure conducted.

Section 7

Regarding Section 7, the FCA found that the relatively non-invasive nature of the seizure permitted by the impugned requirements, coupled with the absence of any adverse disciplinary consequences resulting from a positive test, did not rise to the level of serious and profound state-imposed psychological stress required to engage Section 7.

Section 15

The FCA agreed with the application judge that the Section 15 claim failed at the first step of the analysis. As noted by the application judge, there was no evidence

presented that the impugned requirements created or contributed to a disproportionate impact on the basis of a protected ground.

The administrative law claim analysis

The appellants asserted that the impugned requirements were unreasonable because: (i) their adoption and implementation were not supported by adequate reasons; and (ii) they offend the administrative law principle that a regulator cannot adopt sub-regulatory guidelines and treat them as equivalent to a statutory provision or regulation.

The FCA found that the appellants failed to show that the Federal Court's reasoning was flawed. Regarding the adequacy of reasons, the record clearly showed that the Commission was actively engaged with its staff throughout the development of the impugned requirements. This engagement included raising concerns with prior versions as they were drafted, directing changes and requesting staff to provide more information, including on balancing safety risks with human rights and Charter concerns.

Regarding the argument that the Commission treated sub-regulatory guidelines as statute, the FCA found that there was nothing in the Act that limited or otherwise prescribed how the Commission was to set out its conditions for licences.

Key takeaways from the FCA decision

The following key points can be gleaned from the decision of the FCA:

- When assessing whether requirements involving testing are reasonable (particularly under a Section 8 Charter analysis), a court is likely to examine all contextual factors, including the regulatory context, the public interests at play, the identified need for the requirements, the reliability of the testing involved and the availability of judicial oversight.
- Where testing is relatively non-invasive and there are no adverse disciplinary consequences resulting from a positive test, Section 7 of the Charter is unlikely to be engaged.
- The nature of work and the environment in which the work is being performed have a significant impact on the determination of a worker's expectation of privacy. In this regard, safety-critical workers have a lower expectation of privacy than others.
- The seizure of bodily samples (such as the taking of breath, urine or saliva samples) does not automatically attract a high expectation of privacy given their less intrusive nature.

Application for leave to appeal to the Supreme Court

On Jan. 8, 2025, the appellants applied for leave to appeal the FCA decision to the SCC. In the application for leave, the applicants claimed that the testing requirements violated Section 8 of the Charter and that the decision of the FCA permitted a regime providing for the seizure of bodily samples where: (i) there was no basis to believe an individual was impaired and (ii) there was no workplace problem such that there was a generalized suspicion or credibly-based probability.

In reviewing the FCA decision, the applicants claimed that the FCA's Section 8 analysis significantly lowered the protections available to the subjects of regulatory searches when compared to those previously contemplated by the Court. The applicants claimed that it was a matter of national importance that the Court articulate the "basement" for the reasonableness of regulatory searches and that "warrantless searches done in the absence of reasonable grounds or evidence of an issue giving rise to credibly-based probability ought not pass constitutional muster."

The applicants also claimed that the imposition of the impugned requirements significantly shifted the legal justification for seizing bodily samples in two important ways. First, the seizure of bodily samples would be justifiable solely for the generalized objective of safety, even where there was no actual evidence of a threat to safety. Second, regulators could "infer" the power to demand bodily search and seizures from general and non-specific regulatory powers.

The application stated that, if granted leave to appeal, the applicants would argue that "it is undesirable for the law to develop such that regulators may infer suspicion less search powers from general grants of statutory authority, and that the collection of bodily samples at the direction of a regulator should only be permissible through statutory authorization."

Conclusion

Given the FCA decision, courts are more likely to undertake a contextual approach in determining whether to uphold drug and alcohol testing requirements, including considering whether the testing is invasive, has disciplinary consequences, or serves any public safety purposes. Such an analysis will also likely include balancing the broad public interest with workers' privacy interests.

Moving forward, it will be interesting to see how these decisions impact the ability of regulatory authorities to impose drug and alcohol testing requirements, the basis for testing that will be required, the statutory authorization for testing, and the circumstances under which testing will be permitted.

Footnotes

[1] *Nuclear Safety and Control Act*, S.C. 1997, c. 9, s. 3.

[2] The framework was recently followed in *Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN) v. Canada (Attorney General),* 2019 FCA 212 as guided by the Supreme Court of Canada in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46.

By

Nadia Effendi, Laura M. Wagner, Agatha Suszek

Expertise

Labour & Employment, Disputes, Appellate Advocacy, Administrative and Public Law

---

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.