CITATION: Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017 ONSC 2078
COURT FILE NO.: CV-17-567048
DATE: 20170403

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, LOCAL113	)	*Clayton C. Ruby*, *Annamaria Enenajor*, *Ian J. Fellows* and *Dean Ardron*, for the Applicants
Applicants	)	
– and –	)	
TORONTO TRANSIT COMMISSION	)	
Respondent	)	*Paul Schabas*, *Roy Filion*, *Kaley Pulfer* and *Bonnea Channe*, for the Respondent
	)	**HEARD:** February 28 & March 1, 2017

INTERLOCUTORY INJUNCTION RULING

MARROCCO A.C.J.S.C.

[1] The applicants apply for an interlocutory injunction restraining implementation of random drug and alcohol testing of members of the Amalgamated Transit Union, Local 113 ("ATU") until the completion of an arbitration hearing concerning the validity of the respondent's drug and alcohol testing policy.

The Fitness for Duty Policy

[2] In September 2008, the respondent approved implementation of what it called a "Fitness for Duty Policy". The policy took effect on October 17, 2010.

[3] The purpose of the Fitness for Duty Policy is to "[e]nsure the health and safety of Commission employees and the safety of Commission customers and members of the public."

[4] The Policy intends to achieve this goal by requiring that TTC employees and senior management be mentally and physically fit to perform their assigned tasks without any limitations resulting from, among other things, the use or effects of drugs or alcohol. The Policy allows for the identification of individuals who create safety risks in the workplace due to drug or alcohol use and for the treatment and return to work of employees with substance abuse disorders. It also provides for disciplinary action against employees in defined circumstances.

[5] The Fitness for Duty Policy, as currently implemented, provides for drug and alcohol testing of employees in safety sensitive, specified management and designated executive positions. The policy requires drug and alcohol testing in the following situations:

- where there is a reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty;
- as part of a full investigation into a significant work-related accident or incident;
- where an employee is returning to duty after violating the Fitness for Duty Policy;
- where an employee is returning to duty after treatment for drug or alcohol abuse; and
- as a final condition of appointment to a safety sensitive position.

[6] The Fitness for Duty Policy did not initially provide for random drug and alcohol testing. However, when the Policy was introduced, the respondent advised the ATU that it reserved its right to implement random testing.

[7] After the respondent announced its Fitness for Duty Policy but prior to it taking effect, the ATU filed a policy grievance under its Collective Agreement. In the normal course, the policy grievance was referred to arbitration, which started on March 8, 2011 before Arbitrator M.K. Saltman. Even though six years have elapsed, the arbitration is not completed. The ATU has not yet completed its case and the respondent's case has not started.

[8] The ATU's position before the Arbitrator is that the entire Fitness for Duty Policy is contrary to the Collective Agreement and the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.

[9] In the arbitration, the ATU asks for:

- an order prohibiting the respondent from continuing the implementation of the Fitness for Duty Policy;
- an order requiring management to receive human rights and antidiscrimination training with respect to the matters raised in the grievance; and

- damages for breach of its right to be free from discrimination, for mental distress and for other "noneconomic losses".

Random Drug and Alcohol Testing

[10] On October 19, 2011, the respondent amended the Fitness for Duty Policy to require random drug and alcohol testing.

[11] The respondent advised the applicants that random testing would apply to employees in safety-sensitive, specified management, senior management and designated executive positions including that of the Chief Executive Officer.

[12] Employees randomly selected for testing will take an alcohol breathalyzer test and an oral fluid drug test.

[13] Administration of breathalyzer tests and the collection of oral fluid samples will be carried out by qualified and trained technicians from DriverCheck Inc., a company that provides alcohol and drug testing services to more than 5000 employers in Canada; 3600 of whom rely on it for random drug and alcohol testing.

[14] Selection for random testing will be facilitated by DriverCheck Inc. The selection rate of employees for random testing will be 20% per year; meaning that an employee eligible for random testing would have a chance of being tested once every five years.

[15] Mr. Peter Bartz, the Program Lead for the Fitness for Duty Program, provided an affidavit in support of the respondent's position on this motion. He indicated that:

- Every week, DriverCheck Inc. will provide the TTC's Program Administrator, through a confidential electronic portal, with the names of employees selected for random testing that week.

- A request to submit to testing will be communicated to employees in a manner that protects their privacy and confidentiality.

- Testing will occur at the employee's assigned work location in a room or area that provides privacy and confidentiality. If that is not feasible, the employee will be asked to attend at a nearby testing depot or clinic.

- A drug test result at or above the applicable cut-off or concentration levels will be followed by a review by a Medical Review Officer who will discuss the test results with the individual before determining whether a drug test should be reported to the respondent as positive or negative.

- All test results received from the Medical Review Officer will be stored in a confidential and secure manner.

- The December 2016 Fitness for Duty Update specifically represents that no details about substances or amounts detected will be provided to the respondent unless the employee fails a test. Confidentiality will be maintained to the greatest extent possible except where limited disclosure is necessary for related health and safety concerns.

[16] Under the Fitness for Duty Policy, an alcohol test result of .04 blood alcohol concentration (BAC) or higher is classified as a positive alcohol test and constitutes a violation of the Policy. So, does a positive oral fluid drug test. A positive oral fluid drug test is one in which the laboratory analysis determines that the sample tested contains a drug at or above a specified cut-off level and the Medical Review Officer, following a review, reports that the drug test result was positive.

[17] A failure to submit to a random test is a violation of the Policy.

[18] A TTC employee testing positive will be in violation of the Policy and considered unfit for duty.

[19] Oral fluid drug testing results are not immediately available, so the Policy provides that employees will return to work after testing, so long as their breathalyzer test result is less than 0.02 BAC. Employees who have an alcohol test result between .02 and .039 BAC will be removed from duty until it is safe for them to return to work and will be subject to progressive discipline.

[20] The policy provides oral fluid drug test cut off levels as follows:

- marijuana 10 ng/mL (nanograms per milliliter);
- cocaine 50 ng/mL;
- opiates 50 ng/mL;
- acetylmorphine 4 ng/mL;
- phencyclidine 10 ng/mL; and
- amphetamines 50 ng/mL.

[21] There seems to be agreement that these drugs are impairing. For example, Dr. Macdonald, an expert whose credentials are described elsewhere, provided an affidavit and a Report which were filed by the applicants. Dr. Macdonald appended a schedule to his Report which he called Table 1 containing a category entitled "Under the Influence". Dr. Macdonald states at page 4 of his report "Table 1, column 1, shows the time periods in which a person consuming the drug under typical conditions would normally be considered under the influence of each drug." In addition, at page 11 of his report Dr. Macdonald states: "with the exception of stimulants, research shows the acute effects of drugs (i.e. cannabis, PCP and opiates) can negatively affect performance, such as the ability to operate equipment." Dr. Macdonald

qualifies the statement by pointing out that a limitation of the studies is that they may not be applicable to real-world conditions. The expert affidavits and reports filed by the respondent are unanimous in their view that these drugs are impairing.

[22] Whether the experts completely agree on this or not, the evidence establishes to my satisfaction that the substances covered by the TTC Fitness for Duty Policy can impair the psychomotor and cognitive abilities of persons under the influence of those drugs.

[23] Finally, the TTC oral fluid drug cut-off levels are higher than those currently proposed for the same drugs in the draft Mandatory Guidelines for Federal Workplace Drug Testing Programs by the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA Guidelines). For example, a TTC employee will test positive and be unfit for duty with an oral fluid concentration of cocaine at or above 50 ng/mL.; a TTC employee with an oral fluid concentration of cocaine less than 50 ng/mL will test negative and be considered fit for duty. Under SAMHSA Guidelines, an employee will be unfit for duty at an 8 ng/mL oral fluid cocaine concentration.

The Delay in the Implementation of the Random Drug and Alcohol Testing Policy

[24] As indicated, random testing was added to the Fitness for Duty Policy in October 2011. The approval of implementation of random testing, however, was delayed for several years.

[25] In September 2012, the Respondent took the position that the Arbitrator had no jurisdiction to deal with random testing as part of the grievance as it was worded at the time before the Arbitrator. The Arbitrator ruled that she had jurisdiction to decide the appropriateness of the respondent's random drug and alcohol testing policy even though it was announced after the arbitration had begun.

[26] In addition, the respondent knew that there was a 2011 decision of the New Brunswick Court of Appeal dealing with the issue of unilateral implementation of random alcohol testing that was pending before the Supreme Court of Canada. That decision, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Limited*, 2013 SCC 34, was released in June 2013. The Respondent approved implementation of random drug and alcohol testing on March 23, 2016, slightly less than three years after the release of the *Irving Pulp and Paper* decision.

[27] When the respondent announced implementation of random testing, the applicants brought this motion for an interlocutory injunction.

The test for injunction

[28] On an application for injunction, the party requesting the injunction must demonstrate that its application meets the criteria set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. These criteria are that: a) there is a serious issue to be tried; b) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and c) the balance of convenience, taking into account the public interest, favours granting the interim relief.

Serious issue to be tried

[29] I am satisfied that there are serious issues to be tried in the arbitration. For example, the Arbitrator must determine how the decision of the Supreme Court of Canada in *Irving Pulp and Paper* is to be applied in this case and whether the *Irving Pulp and Paper* threshold requirement of a demonstrated workplace problem with alcohol and drugs has been met.

Irreparable harm

[30] I am satisfied for the purposes of this motion that the Fitness for Duty Policy is subject to the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. Specifically, it is subject to the employees' right to be free from unreasonable search and seizure.

[31] The guarantee of security from unreasonable search and seizure only protects a reasonable expectation of privacy: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at para. 25. Individuals can have different reasonable expectations of privacy in different contexts: see *R v. McKinlay Transport*, [1990] 1 S.C.R. 627 at para. 30.

[32] Accordingly, to determine the reasonable expectation of privacy, requiring the Court's protection, it is necessary to consider the circumstances surrounding the decision to institute random drug and alcohol testing.

The circumstances surrounding the decision to institute random drug and alcohol testing

[33] First, external candidates interested in working for the TTC in a safety sensitive or designated management or executive position must pass a pre-employment urinalysis test for drug use.

[34] I am satisfied that a reasonable person would assume that if he or she had to test negatively for drugs and alcohol to get a job with the TTC, then he or she would be required to continue to test negatively for drugs and alcohol to keep that job with the TTC.

[35] Second, Mr. John DiNino, an employee of the TTC since 1986, a former shop steward and a member of the ATU Executive Board, makes the following statement at paragraph 27 of his affidavit in support of this motion: "I have personally had employees tell me that as they became aware of another employee being tested for drug or alcohol use, they believed that the employee must be impaired and that they did not want to work with them in the future."

[36] I appreciate that Mr. DiNino was attempting to say that drug testing can be stigmatizing. That is an educational issue. I infer from his comment, however, that a notable number of TTC employees do not want to work with persons who test positive for drugs or alcohol. This attitude is not surprising. If a tragic accident happens, its consequences will not be limited to the victims and the person who was possibly unfit. Everyone caught up in the occurrence will be affected by the resulting legal proceedings that can go on for years.

[37] Mr. DiNino's observation is confirmed by Dr. Melissa Snider-Adler who provided affidavit evidence which was submitted by the respondent. Dr. Snider-Adler, apart from being a

licensed physician, is the Chief Medical Review Officer at DriverCheck Inc. Dr. Snider-Adler stated at paragraph 42 of her affidavit that it is very likely that an employee with a substance use disorder will report to work in an impaired condition.

[38] Dr. Snider-Adler was not cross-examined.

[39] Dr. Snider-Adler's evidence is entirely consistent with the respondent's experience that between October 2010 and December 2016, 187 (or approximately 2.4% of) external applicants for designated or safety-sensitive positions — individuals who knew they would be subjected to drug testing — returned positive urinalysis tests for drugs.[1]

[40] I am satisfied that the negative attitude of TTC's employees towards working with individuals who test positive for alcohol or drugs, as described by Mr. DiNino, is one of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing. Accordingly, I am satisfied that TTC management and its employees, both of whom assist people in making approximately 1.8 million journeys on the TTC's subway, buses and streetcars every day, expect that steps will be taken to make sure that those in safety critical positions are fit for duty. This safety concern will reasonably diminish their expectation of privacy concerning their drug and alcohol consumption.

[41] Third, the nature of the workplace is also part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing. In *Irving Pulp and Paper* the workplace was a pulp and paper mill. In this case the workplace includes the subway, buses and streetcars that travel throughout the city. The workplace genuinely is Toronto itself.

[42] Fourth, the procedure for and method of testing are also circumstances surrounding the respondent's decision to institute random drug and alcohol testing. Just because an expectation of privacy is diminished does not mean it is eliminated.

[43] According to Mr. DiNino, current reasonable cause or post incident drug and alcohol testing takes place in a secluded area. He also testified that while the testing itself takes approximately 30 minutes, the entire interval required is 2 to 3 hours.

[44] The breathalyzer test requires a person to breathe into a device that screens the person's breath for a measurable presence of alcohol. The breathalyzer measures a person's breath alcohol level at the time of the test. It does not reveal other personal information about the individual. If the first breathalyzer test reads zero, there is no second test. If there is any reading on the breathalyzer, per Mr. DiNino, a second test is performed approximately 15 minutes after the first test.

[45] The oral fluid test takes about 5 minutes and involves rubbing something like a Q-tip against the inside of a person's cheek. Two samples are taken concurrently. One is used for

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[1] Bartz Affidavit, Respondent's Application Record, Vol. 2, at 654-655.

testing and the other is kept in case the employee wants to have the oral fluid sample retested. Unlike urinalysis, oral fluid testing does not pose the privacy issue of having to directly observe specimen collection to prevent adulteration of the sample.

[46] Dr. Snider-Adler states at paragraph 12 of her affidavit: "An important advantage of oral fluid testing over urinalysis is that the collection process for oral fluid is relatively quick, non-invasive, minimally intrusive and painless."

[47] Dr. Snider-Adler also points out that an 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." This statement is inconsistent with a DriverCheck Inc. Disclaimer for Release of Quantitative Levels, tendered by the applicants. The Disclaimer states: "quantitative levels are levels at a snapshot in time, and do not illustrate impairment, do not indicate if levels are increasing or decreasing, and cannot be used to determine time, method or amount of use." Dr. Snider-Adler explained this discrepancy by stating at paragraphs 51-54 of her affidavit that DriverCheck Inc. provided this Disclaimer in a labour arbitration concerning a TTC employee who had participated in an oral fluid drug test on one occasion and a post-treatment urinalysis drug test on another. Dr. Snider-Adler indicated that the Disclaimer was provided to the employee regarding the quantitative levels for his urine drug test result and not for his oral fluid drug test result. Dr. Snider-Adler indicated that the Disclaimer was five years old and provided at a time when the clear majority of requests for quantitative levels pertained to urine drug tests. Dr. Snider-Adler indicated that this Disclaimer would not be used if the request pertained to quantitative levels for oral fluid drug testing.

[48] Dr. Mace Beckson provided an affidavit which was filed by the respondent on this motion. Dr. Beckson is a Health Sciences Clinical Professor of Psychiatry at the University of California, Los Angeles. He has been employed as a staff psychiatrist working in substance abuse programs and psychiatric intensive care. In his affidavit, Dr. Beckson indicated that he has evaluated and treated thousands of individuals with alcohol and drug problems and addiction and that his evidence has been previously received as expert evidence in judicial proceedings. At paragraph 18 of his affidavit, Dr. Beckson states that "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."

[49] Dr. Mace Beckson was not cross-examined.

[50] Dr. Snider-Adler also indicated at paragraph 40 of her affidavit that she had advised the TTC that for cocaine, an oral fluid cut off concentration lower than the TTC's current level of 50 ng/mL would still detect likely impairment. It was Dr. Snider-Adler's opinion that the higher cut off levels in the TTC Fitness for Duty Policy, such as the one used for cocaine, provide greater assurance that a positive test result indicates a higher likelihood of impairment at the time of testing based on recent drug use. This means that the higher cut off levels chosen by the TTC minimize the intrusion into the employees' personal life choices by screening out test results which detect drug use that is unlikely to cause impairment because it occurred long before the test.

[51] As indicated, Dr. Snider-Adler was not cross-examined.

[52] Consideration of these circumstances leads me to conclude that the procedures and methods that the respondent has chosen to randomly test for drugs and alcohol are minimally invasive and superior to other methods of testing for drugs available on the market.

[53] Fifth, the nature of the Fitness for Duty Policy is also part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing.

[54] The Policy has a treatment component. Mr. Paul Gardiner of Integrated Workplace Solutions (IWS) provided an affidavit in support of the respondent on this motion. His unchallenged evidence is that the TTC retained IWS to provide substance abuse professional services to support the Fitness for Duty Policy. Mr. Gardiner indicated that IWS would continue to provide the services following implementation of random drug and alcohol testing. Pursuant to its agreement with the TTC, IWS substance abuse assessments are provided by physicians specializing in addiction medicine. Mr. Gardiner indicated that the TTC can refer an employee for an assessment following a violation of the Fitness for Duty Policy, a positive drug or alcohol test result, or an employee's voluntarily declaration of a substance use problem. Disclosure of any recommendations made to the employee by the substance abuse professional can only occur with the employee's consent.

[55] The Fitness for Duty Policy contains controls intended to ensure accountability for the information collected. Further, there is no evidence that, under the current testing policy, the results of drug and alcohol tests are used in a manner inconsistent with the reasonable expectations of the persons submitting to the testing.

[56] The procedures for collection, laboratory analysis and reporting of the drug tests provided for in the Policy give employees an opportunity to challenge and explain their test results before the results are reported to the respondent.

[57] I recognize that the TTC will not provide employees subject to testing with an oral fluid sample for their own independent analysis. However, as indicated, two oral fluid samples are taken so that the person tested can challenge the positive result by asking for an analysis of the second specimen.

[58] Laboratory results are reported to the Medical Review Officer and not to the TTC. If the laboratory analysis indicates that an individual's oral fluid specimen contains drug concentrations above the cut off levels, a review process will be conducted by a Medical Review Officer who is a licensed and trained physician employed by the independent testing company DriveCheck Inc. Specifically, prior to reporting a positive test result to the TTC, the Medical Review Officer contacts the employee to determine if there is a legitimate medical explanation for the positive result. If the Medical Review Officer is satisfied that there is such an explanation, then the Officer has the discretion to report the test result as negative.

[59] The nature of the Medical Review Officer's report is described by Mr. Bartz in his affidavit at paragraphs 14 et seq. Both breathalyzer and oral fluid test results are classified as

positive, negative, cancelled or a refusal to test. If an employee advises the Medical Review Officer that he or she is taking medication that may affect his or her fitness for duty, a safety sensitive flag is attached to the negative result. Thus, Mr. Bartz receives the employee's name, a one-word description of the test result and possibly a safety sensitive flag next to a negative result. For the sake of completeness, a result is described as cancelled if an irregularity has occurred during the testing process. In addition, Dr. Snider-Adler indicated at paragraph 29 of her affidavit that it is the practice of Medical Review Officers under her supervision to advise the employee of the laboratory result and ask the employee to call the Medical Review Officer back within 72 hours. This gives the employee an opportunity to discuss laboratory result with a Union representative prior to discussing it with the Medical Review Officer.

[60] Andrew Byford, the Chief Executive Officer for the TTC, describes at paragraph 58(c) of his affidavit a situation in December 2015 where a bus hit a pedestrian and the operator tested positive for cannabinoids. After the bus operator decided to participate in a review by the Medical Review Officer, the test result was changed from positive to negative because the Medical Review Officer found that the operator had a prescription for medical marijuana. There was no suggestion that the Medical Review Officer was required to disclose to the TTC the reason why the employee's physician prescribed marijuana.

[61] Finally, the fact that a refusal to submit to a random test is considered a policy violation, just like a positive test result, adds a coercive element to the Fitness for Duty Policy. I am satisfied that it is impossible to effectively enforce the Policy if an employee can simply refuse to test. In my view, there is no other sensible way to view a refusal to submit to a random test.

[62] I am satisfied that the nature of the Fitness for Duty Policy is not only disciplinary but also remedial. I am also satisfied that employees have some degree of control over the information collected and generated under the policy and that there is accountability for the information collected.

[63] In short, I am satisfied that the Fitness for Duty Policy is reasonably tailored to its stated health and safety purpose.

[64] If the random test process under the Policy is not properly explained to employees, is unreasonably slow or carried out in an embarrassing way, the grievance process may provide a remedy, if the Collective Agreement covers drug and alcohol testing and the ATU takes up the grievance. If the grievance procedure is not available, then this may be an issue when the next agreement is negotiated. For the purposes of this motion I am satisfied that problems in the execution of the Policy are not irreparable.

[65] Sixth, part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing is the state of the law of damages with respect to breaches of privacy.

[66] The Ontario Court of Appeal recognized a common-law tort of invasion of privacy in the context of intrusion upon seclusion in *Jones v. Tsige,* 2012 ONCA 32. In that case, the Court of Appeal found that the defendant committed the tort when she used her position as a bank employee to access private bank records of her ex-spouse's common-law partner 174 times.

Significantly, for the purposes of this motion, the Court of Appeal awarded damages for the privacy violation committed by the defendant. At paragraph 87 of the decision, the Court of Appeal set out considerations in awarding damages and stated that "damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done." At paragraph 90 the court made a more specific observation concerning the consequences of an invasion of privacy: "I would place this case at the midpoint of the range I have identified and award damages in the amount of $10,000. Tsige's intrusion upon Jones' seclusion does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages." It is clear from this comment that the Court of Appeal not only felt the damages were an appropriate remedy but also contemplated aggravated or punitive damages for an egregious invasion of privacy.

[67] I am satisfied that the considerations in awarding damages outlined in *Jones v. Tsige* at paragraph 87 can be adapted to this situation so that a court can calculate damages for wrongfully obtaining breath or fluid samples from employees, should that be the result of the arbitration. Specifically:

- the nature, incidence and location of the act will be known;
- the effect of the taking of the samples on the health, welfare, social, fine or financial position of employees can be determined;
- the relationship between the parties is known;
- any distress, annoyance or embarrassment suffered by the employees can be described in evidence; and finally
- the conduct of the respondent leading up to and including the taking of the sample is easily described.

[68] Accordingly, I am satisfied that, should the TTC's Fitness for Duty Policy be found to contravene the Collective Agreement or the Ontario *Human Rights Code*, the law of Ontario provides for the payment of money damages to those employees whose privacy has been "wrongfully" infringed by random testing.

[69] The applicants complain about possible reputational damage. I do not accept this submission.

[70] The Policy tests 20% of the Safety Sensitive, Specified Management and Designated Executive workforce in a year. This means the entire population of employees who are subject to random testing will have a chance of being tested within five years. It seems to me that because everyone will have a chance of being tested, over time, any stigma attached to compelling an employee to attend a location where drug and alcohol testing takes place will be quickly eliminated. In addition, presumably the TTC workforce will know that there is a random testing policy and will appreciate that a co-worker attending at a testing location may be there to be randomly tested and for no other reason. Further, random testing applies to senior management

of the TTC, including the Chief Executive Officer. This will also reduce any stigma associated with being tested for drugs or alcohol.

[71] The applicants also complain that random testing will permanently damage the relationship between employees and management. The applicants claim in their factum that this risk is exacerbated by the fact that no clear, detailed and comprehensive information has been communicated about the random testing procedures. The applicants complain that there is an atmosphere of secrecy that causes mistrust.

[72] I do not accept this submission.

[73] The respondent's record contains a letter from Andrew Byford to all TTC employees dated April 18, 2016, providing an update on the TTC Board's decision of March 23, 2016 to approve funding for random drug and alcohol testing. The respondent's record also contains a booklet issued by the TTC to all employees that provides an overview of the Fitness for Duty Policy. The respondent's Record also contains a Fitness for Duty Update dated December 2016, explaining random drug and alcohol testing. One of the employees, Mr. Akhmetov, provided an affidavit dated January 12, 2017, in which he in part claimed that management had provided no information about random testing. However, he acknowledged on cross-examination that TTC did provide information about random testing, but he did not read it.

[74] I am satisfied that the TTC distributed comprehensive information to all employees about its Fitness for Duty Policy and about its intention to implement random drug and alcohol testing. I am not persuaded that random testing will permanently damage the relationship between employees and management.

[75] The applicants complain about the risk of false positives due to, for example, exposure to second hand smoke, flawed testing or prescription medication.

[76] With respect to the applicant's concern that exposure to secondhand smoke may lead to a false-positive result, Dr. Kadehjian, a toxicologist whose unchallenged affidavit evidence was tendered by the respondent, stated at paragraph 23 of his affidavit that "[u]sing the 10 ng/mL cutoff for THC as specified in the TTC policy, a positive result for marijuana would be virtually impossible except under the most extreme smoke exposure conditions."

[77] With respect to false-positive results due to flawed testing, two samples are taken in case the employee who has tested positive wants a retest. In addition, a certified laboratory analyzes the oral fluid samples.

[78] False positive results caused by prescription medication will be addressed through a review by the Medical Review Officer. An employee who tests above a cut-off level will have an opportunity to provide a legitimate explanation to a Medical Review Officer who, if satisfied with that explanation, will report the test result as negative.

[79] Wrongful dismissal due to a proven false positive result would also be compensable in damages. Monetary damages are available as compensation for loss of employment. As the

Saskatchewan Court of Queen's Bench stated in *Robinson v. Saskatoon (City)*, 2009 SKQB 183 at paras. 23-24,

> [l]oss of employment with a particular employer, or loss of a particular opportunity to earn self-employed income, can lead to harm. That harm is compensable in damages, though. The loss of employment is not, and does not lead to, irreparable harm. Canadian courts have recognized the trauma and strain experienced by a person when losing a job. Courts have not determined, however, that irreparable harm flows from the loss of a job. The loss of a job leads to a claim for damages, not to irreparable harm.

[80] This court routinely calculates damages for wrongful dismissal.

[81] I do not wish to diminish the difficulties of proving that the test result is falsely positive or the anxiety associated with losing a job. Rather, the test for me on this motion is whether the harm caused by a false positive result is compensable with money. I am satisfied that it is.

[82] The applicants submitted the evidence of Dr. Ann Cavoukian, a former Information and Privacy Commissioner of Ontario for 17 years, who stated that random mandatory drug and alcohol testing "is among the most intrusive forms of personal surveillance." Dr. Cavoukian acknowledged that the focus of her work was on protection of data about identifiable individuals and not on collection of that data through, for example, collection of bodily fluids. She agreed that she had not looked at any guidelines on collecting and interpreting results of oral fluid, urine, or breathalyzer testing. Dr. Cavoukian acknowledged that she had not studied or written about the psychological impact of being tested.

[83] Dr. Cavoukian stated at paragraph 21 of her affidavit that she

> share[d] the opinion of various Canadian courts that given that the existence and application of a mandatory random alcohol and drug testing for workers in "safety sensitive" positions may create psychological harm to individuals, such testing and policies must only be done in circumstances where there is clearly reasonable cause to do so.

[84] In her report, at paragraph 16, Dr. Cavoukian recognized that privacy interests must be balanced against the interests of security and safety.[2] On cross-examination Dr. Cavoukian acknowledged that she had written a report about the TTC's video surveillance program in response to a complaint from Privacy International in which she recognized that there was a role for video surveillance by the TTC despite the privacy invasion it caused.

[85] Finally, two members of the ATU described in their affidavits the anxiety that they feel about the possibility of being randomly tested.

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[2] Cavoukian Report, Application Record, Vol. 5 at 1197.

[86] I am not persuaded by the evidence that instituting random drug and alcohol testing creates the likelihood of psychological harm to the TTC employees.

[87] Despite random testing being common place in the US, Australia and other foreign jurisdictions, there is no evidence that employees subject to random testing in those countries suffer any emotional or psychological harm. Dr. Cavoukian acknowledged, when cross-examined on her affidavit, that she was not aware of any studies of individuals suffering psychological harm due to workplace random testing.

[88] Mr. Byford stated at paragraph 66 of his affidavit that he had been subject to random testing when he was employed in the United Kingdom and Australia and that "there was no feeling of loss of dignity or discomfort with the testing process. We accepted the testing was necessary for safety. Nor did any stigma attach to being randomly tested because the programs applied to all safety critical workers, which will also be the case at the TTC."

[89] The Fitness for Duty Policy and the Fitness for Duty Update explain how information generated by random drug and alcohol testing will be used.

[90] Persons being tested have some control over the results in the sense that the Medical Review Officer will discuss with them a result above the cut-off to find an explanation for it before reporting a positive result. There is an opportunity to retest an oral fluid sample because two test samples are taken. In short, this is not a situation in which the person being tested has completely lost control over the information produced by the test.

[91] I attach no weight to the statements of anxiety that the two members of the ATU voiced in their affidavits. One of them has never been tested, and the other submitted without complaint to post accident drug and alcohol testing.

[92] The applicants argue that random testing raises an issue of embarrassment and humiliation. Specifically, the applicants are concerned that employees who are not impaired at work may be embarrassed or humiliated by testing positive due to drug consumption outside of the workplace. In *B.(A.) v. Stubbs* (1999), 97 O.T.C. 15 (Ont. S.C.J.), the plaintiff sued a surgeon because he was unhappy with the result of a penile enlargement procedure. At the beginning of the litigation, the plaintiff asked for an injunction preventing publication of his name. The plaintiff claimed that he would suffer intense embarrassment and thus be irreparably harmed. The injunction was denied. The court held in para. 22 et seq. that the potential for embarrassment does not in itself constitute irreparable harm. Evidence of irreparable harm must be clear and not speculative.

[93] In conclusion, after considering all the evidence submitted on this motion and after considering the surrounding circumstances including those to which I have referred, I am not satisfied that the applicants will suffer irreparable harm unless I issue an injunction. On that basis, I am dismissing this motion with costs.

[94] In case I am wrong, I propose to comment on other aspects of the test for an interlocutory injunction.

The balance of convenience

[95] Under the third branch of the *RJR-MacDonald* test, the court must determine which of the two parties will suffer the greater harm from the granting or refusal of the injunction, pending the decision on the merits: see *RJR-MacDonald* at para. 67.

[96] In applications involving *Charter* Rights, in addition to the damage each party alleges it will suffer, the interest of the public must be considered when assessing where the balance of convenience lies: see *RJR-MacDonald* at paras. 69, 71 and 85.

[97] On this motion, the interest of the public is also a consideration because, as indicated, people in Toronto make 1.8 million journeys on the TTC every day and it is important that they do so as safely as possible.

[98] It is important, before proceeding further, to emphasize what could easily be forgotten. The applicants and the respondent agree on the importance of public safety; they disagree on the importance of random testing in achieving the TTC's public safety goals.

[99] Dr. Scott Macdonald provided two affidavits and an expert report that were filed by the applicants. Dr. Macdonald is a social epidemiologist and a biostatistician. He is a Professor at the School of Health Information Science, University of Victoria in British Columbia.

[100] Dr. Macdonald repeatedly accepts that the breathalyzer is a valid indicator of impairment and that there is a body of evidence linking alcohol impairment and collisions.[3]

[101] Breath alcohol testing measures breath alcohol concentration that allows for estimation of blood alcohol concentration. The breathalyzer result is admissible evidence on the issue of impairment. The *Criminal Code* provides a blood alcohol concentration cut-off and makes it an offence to drive when exceeding the cut-off without requiring proof of impairment: see section 253(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46.

[102] Dr. Macdonald also agrees that performance deficits can result from acute use of some drugs.[4]

[103] Dr. Macdonald agrees that the presence of drugs in oral fluid indicates recent drug use.[5]

[104] Dr. Macdonald agrees that a positive saliva test can be used to determine prior use of drugs within certain detection periods that vary, depending on the drug.[6]

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[3] Macdonald Expert Opinion at Application Record, vol. 3, at 672, 703-704, 780; Macdonald Affidavit at Application Record, Vol. 3, 619 at para. 4.
[4] Macdonald Expert Opinion at Application Record, vol. 3 at 697.
[5] Macdonald Expert Opinion at Application Record, vol. 3 at 695.
[6] Macdonald Expert Opinion at Application Record, vol. 3 at 661.

[105] With respect to marijuana, Dr. Macdonald cites studies showing a positive relationship between tetrahydrocannabinol (THC) concentrations in the blood with "both being a driver of car crashes and being responsible for crashes.[7] He agrees that "there is some evidence that blood tests can be used to determine impairment for cannabis."[8]

[106] Dr. Macdonald maintains, however, that oral fluid tests do not correlate with blood tests and are incapable of measuring impairment.[9]

[107] I do not find Dr. Macdonald's position persuasive. One of the aspects of the public interest involved in this case is the interest of safety of millions of TTC passengers. Thus, the question is not the extent of impairment of a TTC employee in a safety-sensitive position, but whether he or she poses a greater safety risk due to recent consumption of any of the drugs referred to in the TTC Fitness for Duty Policy.

[108] It is not necessary to correlate oral fluid drug concentrations to blood concentrations to identify those posing an increased safety risk. If the cut-offs for oral fluid drug testing are appropriately chosen, then a positive test result (i.e. a result above the cut-off) for a drug can be associated with use of that drug which is sufficiently recent that it falls within the known time frames for the impairing effects of that drug.

[109] For example, Dr. Snider-Adler states in her Report that at the TTC cut-off level of 50 ng/mL, cocaine is first detected 2-5 minutes after use and then for up to 8 hours after use. She also states that the impairing effects of cocaine can last up to 9 hours after use and many days after binge use. It is because of this overlap that Dr. Snider-Adler states that a positive oral fluid test for cocaine indicates impairment from the substance.[10]

[110] In a similar vein, with respect to THC, Dr. Snider-Adler points out that an oral fluid test reflects the remnants of THC (prior to it being metabolized) found in the oral cavity after marijuana use. These remnants remain there for several hours. A Table in Dr. Snider-Adler's Report indicates that when the cut-off for THC is set at 10 ng/mL, as it is in TTC's testing policy, the remnants will test positively for approximately 4 to 8 hours after use. In her explanation to the table, Dr. Snider-Adler clarifies that the timeframe is limited to approximately 4 hours after use. After this time, the THC levels fall below the 10 ng/mL cut-off level and the test result will be negative. Dr. Snider-Adler states that it is accepted that psychomotor and cognitive deficits from marijuana use last 4-24 hours at minimum. Dr. Snider-Adler maintains that it is thus reasonable to correlate a positive test for THC with impairment.[11]

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[7] Macdonald Expert Opinion at Application Record, vol. 3 at 753.
[8] Macdonald Expert Opinion at Application Record, vol. 3 at 687.
[9] Macdonald Expert Opinion at Application Record, vol. 3 at 753.
[10] Snider-Adler Report at Respondent's Application Record, vol. 4 at 2246-2247.
[11] *Ibid.*

[111] Dr. Macdonald agrees with the minimum detection window for THC in the TTC policy as described by Dr. Snider-Adler. At one point in his Report he cites his own 2010 study that showed that "meaningful deficits from cannabis peak within 2 hours and persist for about 4 hours after use."[12]

[112] In her report, Dr. Snider-Adler charts the detection windows and impairing effects timeframes for all drugs covered by the TTC Fitness for Duty Policy.[13]

[113] I agree with Dr. Snider-Adler's approach.

[114] I am satisfied on the evidence that due to the high cut-off levels set out in the TTC Policy (which are higher than the cut-off levels proposed in the draft SAMHSA Guidelines) and the corresponding short windows of detection, the time periods when oral fluid samples test positive for drugs overlap with the time periods during which these drugs impair the psychomotor and cognitive abilities of the person tested. Therefore, there is a likelihood that the person who tested positive was impaired when tested.

[115] I recognize that there is a disagreement among the experts about the length of impairment caused by marijuana. Dr. Beckson and Dr. Macdonald disagree whether "under the influence" or "impairment" includes the carry-over effect of cannabis after the 4-hour period. In Dr. Beckson's opinion, impairment may occur past the 4-hour period of acute intoxication due to carry-over effects, withdrawal and long-term toxicity of drugs. For example, Dr. Beckson relies on a study that states that cannabis carry-over effects can last 24-31 hours.[14]

[116] Dr. Macdonald states that the preponderance of scientific evidence indicates no meaningful carry-over or hangover effect for cannabis.[15]

[117] This issue would have been significant had the TTC chosen a lower cut-off level for THC, which resulted in a longer detection window for THC. However, by selecting a cut-off that limits the detection window to approximately 4 hours, the TTC Policy reasonably ensures that only employees who are most likely acutely intoxicated due to recent consumption of marijuana will test positive.

[118] I recognize that there is also a question about chronic use of marijuana. A chronic user may test positive for THC even if he or she consumed marijuana more than 4 hours before the test due to a build-up of the substance in the body. This does not mean, however, that the chronic user does not still pose a safety risk.

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[12] Macdonald Expert Opinion at Application Record, vol. 3 at 759.
[13] *Ibid.*
[14] Beckson Report at Respondent's Application Record, vol. 5 at 2335-2336.
[15] Macdonald Expert Opinion at Application Record, vol. 3 at 761.

[119] Dr. Macdonald agrees that "chronic use or dependency may elevate safety risks for some people."[16]

[120] Finally, I approach the balance of convenience issue by considering two hypothetical outcomes.

The first hypothetical outcome is that the applicants are successful at the arbitration but unsuccessful on this injunction motion.

[121] If this motion is refused, random testing will proceed. Annually, 20% of the eligible employees will be tested. It is impossible to predict how long the arbitration will take. There appears to be no end in sight. So, it is safe to assume that a significant number of eligible employees will be tested before the arbitration is finally completed.

[122] For those who test negatively, DriverCheck Inc. will advise Mr. Bartz that the employee's test was negative. Assuming the applicants are successful at the arbitration, the testing and disclosure of the negative result will constitute a privacy violation, which I am satisfied is compensable in damages, per the formula set out in *Jones v. Tsige*. These damages will reflect the public interest that these employees have in the protection of their privacy.

[123] For those who test positively in this hypothetical outcome, some will then be referred to IWS for substance use disorder professional help. Some will enter agreements with the TTC that allow them to continue their employment in return for their consent to a treatment programme and unannounced periodic testing for a specified period following their return to work (Last Chance Agreement). Some will be subject to progressive discipline. Some may lose their jobs. Assuming the applicants are successful at the arbitration, these consequences will result in damages for the persons concerned. The damages will reflect the public interest that these employees have in protection of their privacy.

[124] These consequences are serious. However, they are consequences visited upon persons who test positive on a workplace test for drugs or alcohol and who likely pose a safety risk at the time of the test.

[125] I have already indicated that I am not persuaded that instituting random drug and alcohol testing creates the likelihood of psychological harm to the employees, results in reputational damage or permanently damages the relationship between employees and management. I have also indicated elsewhere why I do not accept that there is a real risk of harm from false-positive results.

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[16] Macdonald Expert Opinion at Application Record, vol. 3 at 716.

The second hypothetical outcome is that the TTC is successful at the arbitration but unsuccessful on this injunction motion and an injunction is issued.

[126] In this hypothetical situation, random testing will not commence until the conclusion of the arbitration. It is impossible to predict how long the arbitration will take. There appears to be no end in sight.

[127] This motion does not seek to prevent the testing currently in place. The employees in safety sensitive, specified management and designated executive positions will continue to be tested:

- where there is reasonable cause to believe drug or alcohol use has made them unfit for duty; or
- as part of a full investigation into a significant work-related accident; or
- where the employee is returning to duty after violating the Fitness for Duty Policy; or
- where the employee is returning to duty after treatment for drug or alcohol abuse; or
- as a final condition of appointment to a safety sensitive position.

[128] The question of whether and to what extent the TTC will suffer harm if it is prevented from adding random testing to this list requires a consideration of drug and alcohol use by TTC employees. It is important to keep this consideration in perspective. The evidence suggests there is a problem in Ontario with drugs and alcohol and there is no reason to believe that the applicants and the respondent have been spared from it.

[129] Specifically, Dr. Melissa Snider-Adler stated at page 11 of her Report that approximately 10% of Ontarians have been diagnosed and/or self-identify as having substance use disorders.[17]

[130] A 2012 Canadian Community Health Survey by Statistics Canada showed that 18.1% of Canadians 15 years or older met the criteria for abuse or dependence of alcohol. 6.8% of Canadians 15 year or older displayed symptoms of cannabis abuse or dependence. This is much higher than the rate of abuse or dependence for other substances, which was 4%. According to Health Canada, approximately 27% of Canadians surveyed in 2012 who had used cannabis in the past three months reported that they used cannabis every day.[18]

[131] Mr. Byford in his affidavit at paragraphs 44-46 stated that there were continuous instances of impairment at work since the Fitness for Duty policy was implemented in 2010. Specifically, there were 116 instances where employees tested positive or refused to be tested

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[17] Snider-Adler Report, Respondent's Application Record, vol. 4 at 2250.
[18] *Ibid.*

between October 2010 and December 2016, with 27 incidents occurring in 2015. In addition, 2.4% of external applicants for safety sensitive positions — individuals who knew they would be subjected to drug testing — tested positive.

[132] Two offsetting facts must be remembered to keep this evidence in perspective.

[133] First, the TTC has 11,000 employees. Dr. Macdonald stated at paragraph 14 of his supplementary affidavit that the TTC has experienced a decline in the proportion of combined positive and refusal test results since 2010.

[134] Second, drug or alcohol misuse at the TTC carries the complication that any accident can have tragic consequences for many people, not all of whom are TTC employees, and thus the TTC is not a typical Ontario workplace.

[135] Mark Russell is a Staff Sergeant with the Investigative Services Unit at the TTC. He has been in that role since 2001. He is responsible for investigating allegations of wrongdoing and misconduct by TTC employees as it relates to their employment.

[136] Staff Sergeant Russell provided an affidavit filed by the respondent. He states at paragraph 12: "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)."

[137] Staff Sergeant Russell also commented at paragraph 12 of his affidavit on the difficulty of detecting employees who are unfit for duty: "[g]iven 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."

[138] Staff Sergeant Russell was not cross examined.

[139] The evidence satisfies me that there is a demonstrated workplace drug and alcohol problem at the TTC which is currently hard to detect and verify. This is factually different from the *Irving Pulp and Paper* decision where the arbitration board concluded that the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use.

[140] While the ATU challenges the entire drug testing policy, the evidence as to the workplace safety risks posed by drugs and alcohol seems to focus largely on marijuana.

[141] Dr. Snider-Adler states that when looking at marijuana specifically, several studies have shown that cannabis impairs the cognitive and motor abilities necessary to operate a motor

vehicle and doubles the risk of crash involvement. After alcohol, cannabis is the most commonly detected substance among drivers who die in traffic crashes in Canada.[19]

[142] Dr. Snider-Adler cites a statement by Health Canada that the ability to drive or perform activities requiring alertness may be impaired for up to 24 hours following use of marijuana.[20]

[143] Dr. Macdonald, however, maintains that "research studies have failed to show that drug users, as determined by saliva or urinalysis tests, are more likely to be drivers injured in crashes".[21]

[144] Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.

Random testing is a deterrent.

[145] Specifically, Dr. Snider-Adler points out at paragraph 36 of her affidavit that DriverCheck Inc. has seen a significant decline in the rate of positive random drug tests among employees of 3,377 employers who are clients of DriverCheck Inc. and are subject to U.S. DOT regulations mandating random testing programs: from 2.31% in 1996 to 0.55% in 2015.

[146] Mr. Byford in his affidavit attaches an Exhibit which shows a reduction in positive test results in other jurisdictions after the implementation of unannounced/random drug and alcohol testing. In London Underground, the positive tests results went from 3.42% in 1993 when random testing was introduced to 1.18% in 1995.[22]

[147] Counsel for the applicants pointed out that these statistics demonstrate a decline in persons testing positive and not a decline in workplace accidents.

[148] However, because I accept that the acute effects of cannabis and the other drugs referred to in the TTC Fitness for Duty Policy can negatively affect performance, I am satisfied that a decline in persons testing positive for those drugs, given the Policy cut-off levels, reduces the risk that persons impaired by those drugs will cause a performance related accident.

The public interest

[149] The public interest presents itself in two ways,

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[19] Snider-Adler Report at Respondent's Application Record, vol. 4 at 2253.
[20] Snider-Adler Report at Respondent's Application Record, vol. 4 at 2259.
[21] Macdonald Expert Opinion at Application Record, vol. 3 at 672.
[22] Byford Affidavit, Exhibit U at Respondent's Application Record, vol. 1 at 287.

[150] First the reasonable expectation of privacy of the employees of the TTC must be protected by the court. The right to privacy is protected by the Charter of Rights and Freedoms and recognized at common law by the Court of Appeal in *Jones v. Tsige.*

[151] Second, the workplace is literally the City of Toronto and as a result all the people who move about in the City, whether or not they are passengers on the TTC, have an interest in the TTC safely taking its passengers from one place to another.

[152] The best way to take the second aspect of the public interest into account is to have reference to it, as I have, when deciding what is reasonable when defining a TTC employee's reasonable expectation of privacy.

Conclusion concerning the balance of convenience

[153] After considering all the evidence, including the evidence to which I have referred, I am satisfied that, if random testing proceeds, I will increase the likelihood that an employee in a safety critical position, who is prone to using drugs or alcohol too close in time to coming to work, will either be ultimately detected when the test result is known or deterred by the prospect of being randomly tested.

[154] This will increase public safety.

[155] To the extent that refusing the injunction results in, if the applicants are ultimately successful at the arbitration, an invasion of an employee's reasonable expectation of privacy, the person concerned can be compensated with damages.

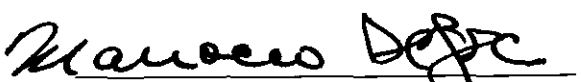
[156] Accordingly, I am satisfied on the evidence that the balance of convenience favours the respondent on this motion and I would have refused this motion on that basis.

Conclusion concerning the applicants' motion

[157] For the reasons set out, this motion is dismissed.

Costs

[158] The parties have agreed that costs in the amount of $100,000 would be reasonable. Having read the materials and listened to the argument I agree that this is a reasonable sum. Accordingly, the applicants will pay the respondent $100,000 inclusive of HST and disbursements on account of costs.



MARROCCO A.C.J.S.C.

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COURT FILE NO.: CV-17-567048
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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, LOCAL113

Applicants

– and –

TORONTO TRANSIT COMMISSION

Respondent

REASONS FOR JUDGMENT

MARROCCO A.C.J.S.C.

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