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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE July 12, 2023 12 juillet 2023	D É P O S É
File No	Imrana Ahmed	
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FEDERAL COURT OF APPEAL

B E T W E E N:

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

Appellants

and

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

Respondents

Notice of Appeal

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant.
The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____ Issued by _____
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Brunswick Power Corporation and Canadian
Nuclear Laboratories

Notice of Appeal

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Justice Alan S. Diner dated June 6, 2023 which dismissed the Appellants’ application for judicial review in respect of a decision of the Canadian Nuclear Security Commission (“CNSC”) to approve a Regulatory Document entitled REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use (“RegDoc”) approved by the CNSC on January 21, 2021, and to incorporate the requirements of the RegDoc into the licences to operate nuclear facilities held by Ontario Power Generation, Bruce Power, New Brunswick Power, and Canadian Nuclear Laboratories (“Licences” and “Licensees”).

THE APPELLANT ASKS:

1. The Order of Justice Diner, dated June 6, 2023, be set aside;
2. A declaration that sections 5.1 and 5.5 of RegDoc that require pre-placement alcohol and drug testing and random alcohol and drug testing of employees (the “impugned provisions”) of the Licensees are contrary to s. 7, 8, and/or 15 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and are of no force or effect;
3. A declaration that to the extent that the impugned provisions of the RegDoc are licence conditions of the Licences, these license conditions are contrary to s. 7, 8, and/or 15 of the *Charter*, and are of no force or effect;
4. In the alternative, an order quashing and setting aside the CNSC’s decision to approve the impugned provisions of the RegDoc, and remitting the matter back to the CNSC for redetermination in accordance with the reasons of this Court;

5. In the further alternative, an order quashing and setting aside the CNSC's decision to incorporate the impugned provisions of the RegDoc into the Licence Condition Handbooks of the Licensees;
6. An interim and interlocutory injunction:
 - (a) Staying the implementation of the impugned provisions of the RegDoc pending disposition of the appeal of the order of Justice Alan Diner, issued on June 6, 2023;
 - (b) Restraining the CNSC from requiring the Respondent Licensees to implement workplace alcohol and drug testing based on the impugned provisions of the RegDoc as any condition of the Licenses pending disposition of the appeal of the order of Justice Alan Diner, issued on June 6, 2023;
 - (c) Restraining the Respondent Licensees from implementing workplace alcohol and drug testing based on the impugned provisions of the RegDoc pending disposition of the appeal of the order of Justice Alan Diner, issued on June 6, 2023;
7. An order that this application be subject to case management;
8. An order that this application be heard on an urgent and expedited basis;
9. Costs of this appeal and the application; and
10. Such further and other relief as this Honourable Court may deem appropriate and just in the circumstances.

THE GROUNDS OF APPEAL are as follows:

The Parties

11. The Appellants, the Power Workers' Union ("PWU"), the Society of United Professionals ("Society"), Chalk River Nuclear Security Officers Association ("CRNSOA") and International Brotherhood of Electrical Workers, Local 37 ("IBEW, Local 37") (the "Unions") are the bargaining agents of employees employed by the Licensees at the Chalk River Nuclear Facility operated by Canadian Nuclear Laboratories ("CNL"); Bruce Nuclear Generation Station operated by Bruce Power, the Pickering Nuclear Generation Station and Darlington Nuclear Generation Stations, operated by Ontario Power Generation ("OPG"), and the Point Lepreau Nuclear Generation Station operated by New Brunswick Power Corporation.

12. The Unions' members include employees who are subject to the terms of the RegDoc as described in more detail below. The Unions bring this application on behalf of their members who are subject to the impugned provisions of the RegDoc. The individual Appellants are members of the Union who are subject to the RegDoc.

CNSC's Statutory Authority

13. The CNSC regulates the development, production and use of nuclear energy, and the production, possession and use of nuclear substances, prescribed equipment and prescribed information, and disseminates objective scientific, technical and regulatory information to the public concerning the activities of the CNSC and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use of nuclear substances and equipment.

14. All nuclear power plants in Canada must be licensed by the CNSC.

15. Licensees are and always have been responsible for operating their facilities safely and are required to implement programs that make adequate provisions for meeting legislative and

regulatory requirements. All nuclear power plant licensees are required to adopt measures, policies, methods and procedures for operating and maintaining the nuclear facility. One such requirement is to develop an ongoing supervisory awareness program to ensure that its supervisors are trained to recognize behavioural changes in all personnel, including contractors, which could pose a risk to security at a facility at which it carries on licensed activities.

16. Section 24 of the *NSCA* empowers the CNSC, amongst other things, to issue, renew, amend, and replace licenses.

17. The CNSC also approves regulatory documents prepared by CNSC staff that contains directives purported to form part of the licensing conditions of licensees.

18. The CNSC also has regulation-making powers, subject to approval by the Governor-General.

19. Pursuant to s. 21(1)(i) of the *NSCA*, the CNSC is empowered to certify analysts, inspectors, nuclear energy workers and other persons employed in a nuclear power plant.

20. The CNSC includes both staff people working within the CNSC (“CNSC staff”), and the independent administrative quasi-judicial tribunal that renders decisions, including the decision to adopt the RegDoc (“the Commission”). CNSC staff advise and make recommendations to the Commission.

Development and Approval of the RegDoc

21. In 2017, CNSC staff published RegDoc version 1, revised as version 2 in January 2018. Both versions 1 and 2 of the RegDoc required licensees to develop and implement an alcohol and drug testing regime for both “Safety-Sensitive” and “Safety-Critical” positions. Safety-Critical

workers are workers certified under *Class I Nuclear Facilities Regulations* subsection 9(2), excluding Certified Health Physicists and onsite nuclear response force members. Certified workers include Authorized Nuclear Operators Control Room Operators, and Shift Supervisors.

22. On January 21, 2021, the CNSC approved RegDoc version 3 with minor amendments from the consultation version.

23. The RegDoc directed Licensees to develop and implement a drug and alcohol testing regime (the “Testing Regime”) that included the following provisions:

- (a) all candidates who succeed in progressing through all the previous stages of a job competition to a Safety-Critical position to submit to alcohol and drug testing as a condition of placement. Incumbent workers transferring into a Safety-Critical position shall also be required to submit to a pre-placement alcohol and drug test;
- (b) all workers in Safety-Critical or Safety-Sensitive positions to submit to for-cause testing under the reasonable grounds testing circumstance, including when there is reasonable cause to believe, through observed behaviour, physical condition or after receiving credible information, that the individual is unfit to perform his or her duties, due to the adverse effects of alcohol or drug use;
- (c) all workers in Safety-Critical or Safety-Sensitive positions to submit to for-cause testing as soon as practicable after a significant incident where a human act or omission by the worker may have caused or contributed to the event;
- (d) all workers in Safety-Critical or Safety-Sensitive positions to submit to follow-up testing after confirmation of a substance use disorder by a health professional, and

return-to-duty testing as part of the reinstatement process, and be subject to follow-up alcohol and drug testing in an unannounced and random fashion at a minimum of every three months for a minimum period of two years; and

- (e) all workers holding Safety-Critical positions to submit to random alcohol and drug testing. Licensees' sampling process used to select these workers for random testing shall ensure that the number of random tests performed at least every 12 months is equal to at least 25 percent of the applicable worker population.

24. The minutes of CNSC meeting, released on January 21, 2021, include a Decision Item in respect of the RegDoc version 3:

The Commission approves the proposed amendments set out in REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use, version 3 for publication and use, including oral fluid testing and point of collection testing. The effective date for REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use, version 3 will be January 22, 2021. ...

REGDOC-2-2.4, Volume II, version 3 will form part of the licensing basis for high-security sites and will be incorporated into the licence conditions handbook (LCH) for each applicable licensee. [...] Licensees committed to the implementation of the entire REGDOC-2-2.4, Volume II, version 3 within six months of being approved and published [July 21, 2021], with the exception of random testing which is to be implemented within 12 months of the approval of version 3 of this REGDOC [January 21, 2021].

25. The CNSC purported to require the Licensees to implement the terms of the RegDoc version 3 as part of the "licensing basis" of the Licences by way of incorporation into the licence conditions handbook (LCH) for each applicable Licence.

26. The CNSC did not hold a hearing to amend the Licences to incorporate the terms of the RegDoc into the Licences.

Judicial Review of CNSC Decision

27. In August 2021, the Appellants brought an application for judicial review challenging two aspects of the RegDoc: random and pre-placement testing for Safety-Critical workers (the “impugned provisions”). The Appellants’ review was brought on the basis that, amongst other things:

- (a) The impugned provisions of the RegDoc violate the ss. 7, 8, and 15 of the *Charter* of Safety-Critical workers;
- (b) The CNSC acted beyond its jurisdiction by imposing the impugned provisions as part of the “licensing basis” of the Licences by way of incorporation into the licence conditions handbook (LCH) for each applicable Licence, and by doing so without holding a hearing to amend the Licences.
- (c) The CNSC failed to provide adequate reasons or grapple with live issues before it, including the application of the *Charter*, the extensive jurisprudence concerning random and pre-placement testing, and the contested statutory basis for the CNSC to impose random and pre-placement testing.
- (d) The CNSC impermissibly adopted administrative guidelines imposing mandatory requirements enforceable by sanction in the absence of a specific statutory authority to do so.

28. The Appellants also brought a motion for an interim injunction to stay the implementation of the impugned provisions of RegDoc. Justice Gleeson granted the motion in January 2022, and stayed the implementation of the impugned provisions pending final disposition of the application for judicial review.

29. The application for judicial review was heard in December 2022 before Justice Diner (the “Application Judge”), who ultimately dismissed the application for judicial review on June 6, 2023.

30. The Application Judge erroneously concluded that:

- (a) The impugned provisions of the RegDoc did not violate the ss. 7, 8, and 15 rights of Safety-Critical workers;
- (b) The CNSC acted within its jurisdiction by adopting mandatory requirements through a regulatory document;
- (c) The Commission’s reasons were sufficient because the Commission could adopt the views of CNSC staff.
- (d) The various responses that CNSC staff provided to stakeholders during the consultation period constituted intelligible reasons for the Commission’s decision.

The Application Judge’s Errors

31. The Application Judge properly concluded that the RegDoc engaged the s. 8 rights workers to be secure against unreasonable search and seizure. However, the Application Judge erred by finding that the s. 8 rights of Safety-Critical Workers were not breached, and in so finding, committed the following reversible errors, amongst others:

- (a) The Application judge erred by concluding that Safety-Critical workers have a diminished expectation of privacy;
- (b) The Application judge erred by holding that the impugned provisions are authorized by law despite the absence of clear authorizing language in the statute;
- (c) The Application Judge erred by holding that the CNSC's licensing powers under s. 24(2) provide jurisdiction to impose search and seizure on individuals, despite the fact that the CNSC did not rely on the licence amendment process to approve the RegDoc or implement the impugned provisions;
- (d) The Application Judge erred by failing to consider the lack of reasonable and probable grounds for the search and seizure of bodily samples as informing the unreasonableness of the search;
- (e) The Application Judge erred by failing to consider the extensive jurisprudence which has largely rejected the use of random and pre-placement drug testing in the workplace, except in very narrow circumstances, given the unjustified intrusion into the privacy of workers;
- (f) The Application Judge erred by failing to consider that there was no evidence of safety issues at nuclear sites, and no evidence of fitness for duty or substance use in Canada's nuclear industry;
- (g) The Application Judge erred by failing to consider whether the current measures in place at nuclear sites sufficiently ensure fitness for duty without resort to groundless seizures of bodily samples;

- (h) The Application Judge misapprehended the evidence by finding that the RegDoc does not impose disciplinary consequences;
- (i) The Application Judge misapprehended reports commissioned by CNSC in support of the RegDoc, finding that those reports showed the impugned provisions were “reasonably included”, despite the fact that the majority of the reports do not address random or pre-placement testing at all; and,
- (j) The Application Judge erred by failing to consider or give any weight to the Applicants’ expert evidence.

32. The Application Judge erroneously concluded that the impugned provisions of the RegDoc do not infringe the s. 7 rights of Safety-Critical workers to security of the person. Amongst other things:

- (a) The Application Judge fundamentally erred by focusing on the “property or other predominantly economic interests” of Safety-Critical workers, instead of considering the impact of the seizure of bodily samples on security of the person;
- (b) The Application Judge erred by finding that the taking of bodily samples does not constitute interference with bodily integrity and autonomy; and,
- (c) The Application Judge erred by holding that *Charter*-breaching activity is permissible as long as the subject of the taking of bodily samples may choose to work in different positions or industries.

33. The Application Judge erroneously concluded that the impugned provisions of the RegDoc do not infringe the s. 15 rights of Safety-Critical workers to equality and free from discrimination.

Amongst other things:

- (a) The Application Judge erred by focusing on the “job category of workers at nuclear power facilities” as the enumerated or analogous ground in the s. 15 analysis, instead of drug dependency as a category of disability;
- (b) The Application Judge erred by holding that persons with a drug dependency are not persons with a disability for the purpose of the s. 15 analysis, and further erred by failing to consider and apply the extensive human rights case law that holds that drug dependency is a disability;
- (c) The Application Judge erred by requiring evidence of drug dependency amongst Safety-Critical workers;
- (d) The Application Judge erred by conflating “substance orientation” with “drug dependency”; and,
- (e) The Application Judge erred by failing to consider the adverse impacts of the impugned provisions on Safety-Critical workers with drug dependencies, and in particular, the negative employment and reputational consequences.

34. The cumulative effect of the Application Judge’s errors is to exempt nuclear sites from the application of the *Charter*.

35. Additionally, or in the alternative, the Application Judge's erroneously dismissed the application for judicial review despite the CNSC's flawed process and reasoning in adopting and implementing the impugned provisions of the RegDoc. Amongst other things:

- (a) The Application Judge erred by concluding that the impugned provisions could be implemented by way of regulatory document;
- (b) The Application Judge erred by relying on the CNSC's statutory licensing power under s. 24(2) of the *NSCA* as the statutory jurisdiction of the CNSC to impose the RegDoc, when the licensing power was not identified by the CNSC itself as the source of its jurisdiction to impose the RegDoc;
- (c) The Application Judge erred by failing to consider whether the statutory objectives of the CNSC, as set out in s. 9 of the *NSCA*, and which were relied on by the CNSC to ground its jurisdiction to implement the impugned provisions, are in fact jurisdiction-conferring provisions;
- (d) The Application Judge erred by concluding that the opportunity for the Appellants to provide input during the consultation process was equivalent to the statutory process for a licence amendment;
- (e) The Application Judge erred by failing to consider the record that was actually before the Commission in its decision to adopt the impugned provisions, and in doing so, disregarded the contents of the Certified Tribunal Record in favour of the evidence adduced by CNSC staff in the application for judicial review;

- (f) The Application Judge erred by holding that the Commission was not required to give reasons, and by finding that the responses to public feedback during the consultation phase, which drafted by CNSC staff, relieved the Commission of its duty to provide its own reasoning;
- (g) The Application Judge erred by concluding that amendments to the RegDoc as a result of public feedback render the decision substantively reasonable;
- (h) The Application Judge erred by concluding that a “Comments Table” prepared by CNSC staff during the consultation phase provided intelligible and justified reasons, despite the fact that the Comments Table are silent on the issues of *Charter* compliance, and substantively unreasonable on other arguments raised by the Appellants; and,
- (i) The Application Judge erred by failing to consider the Commission’s own public statements that the RegDoc did not strike a balance between security of nuclear sites and the rights of workers.

Appeal Management

36. The Appellants will seek directions from this Court regarding the conduct of this appeal.

Jurisdiction

37. The decision under appeal is a final judgment of the Federal Court. Accordingly, this Court has jurisdiction over the appeal pursuant to subsection 27(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

38. Leave to appeal is not required.

July 11, 2023

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