Federal Court of Appeal  Cour d'appel fédérale

Date: 20231027

Docket: A-184-23

Citation: 2023 FCA 215

Present: **BIRINGER J.A.**

BETWEEN:

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

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 27, 2023.

REASONS FOR ORDER BY: BIRINGER J.A.

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REASONS FOR ORDER

BIRINGER J.A.

I. THE MOTION

[1] An appeal of the judgment of the Federal Court (per Diner J.), 2023 FC 793 [Merits Decision], is before this Court.

[2] In the Merits Decision, the Federal Court dismissed the appellants' application for judicial review that challenged as unconstitutional certain portions of a regulatory document issued by the Canadian Nuclear Safety Commission [CNSC, or "Commission", when referring to the quasi-judicial tribunal] and the reasonableness of the Commission's adoption of those provisions.

[3] The impugned provisions provide for pre-placement and random alcohol and drug testing of safety-critical workers employed by the respondent employers at Class I high-security nuclear power plants.

[4] The appellants bring a motion pursuant to Rule 373 of the *Federal Courts Rules*, S.O.R./98-106 for an interim and interlocutory injunction to:

a. stay the implementation of the impugned provisions of the regulatory document;

b. restrain the CNSC from requiring the respondent licensees to implement workplace alcohol and drug testing based on the impugned provisions as a condition of granting licenses; and

c. restrain the respondent employers from implementing workplace alcohol and drug testing based on the impugned provisions;

all pending the disposition of the appeal. They also seek the costs of this motion.

[5] For the following reasons, the appellants' motion is granted.

II. BACKGROUND

[6] The appellants are the unions representing employees in safety-critical positions and individual affected members. The respondent employers/licensees operate all licensed Class 1 high-security nuclear facilities regulated by the CNSC. The Attorney General of Canada is also a respondent.

[7] In furtherance of its mandate, the CNSC issued a direction in January 2021 entitled Regulatory Document or REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 [RegDoc]. The RegDoc requires license holders operating Class 1 high-security nuclear facilities to implement employee alcohol and drug testing in prescribed circumstances.

[8] The purpose of the RegDoc is to bolster fitness for duty programs and policies already in place in Class 1 high-security nuclear facilities, in order to further the "defence-in-depth" principle of safeguarding against risk. The RegDoc requires licensees to conduct drug and alcohol testing of workers in safety-critical and safety-sensitive positions in five circumstances.

[9] Three of these five circumstances—reasonable grounds testing, post-incident testing, and follow-up testing upon return to work after confirmation of a substance use disorder—have not been challenged by the appellants. They challenge the other two, pre-placement testing for workers who are to work in safety-critical positions (Section 5.1), as a condition of placement, and random testing for workers in safety-critical positions (Section 5.5) [impugned provisions].

[10] Pre-placement testing has been required as of July 2021; random testing was to be required as of January 2022.

[11] In the Merits Decision, the Federal Court concluded that the impugned provisions did not unjustifiably violate ss. 7, 8, and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*] and that the Commission's adoption of the RegDoc was reasonable on administrative law grounds.

[12] The Merits Decision was rendered on June 6, 2023. The CNSC has indicated that it will not require implementation of pre-placement and random testing until December 1, 2023.

[13] The appellants have appealed the Merits Decision on the basis that the judge erred in his conclusions that: the impugned provisions of the RegDoc did not violate the rights of safety-critical workers under sections 7, 8, and 15 of the *Charter*; the CNSC acted within its jurisdiction by adopting mandatory requirements through a regulatory document; and the Commission's

reasons for adopting the impugned provisions were sufficient. The appeal has not yet been perfected.

[14] Prior to the judicial review hearing in Federal Court, the appellants brought a motion for an interim and interlocutory injunction staying implementation of the impugned provisions of the RegDoc, pending disposition of the application for judicial review. On January 21, 2022, the Federal Court (per Gleeson J.) [Stay Judge] granted the injunction: 2022 FC 73 [Stay Decision]. The Stay Decision was not appealed.

III. ANALYSIS

[15] The test for obtaining an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385 [*RJR-MacDonald*]. The moving party must establish that: (1) there is a serious issue to be tried; (2) it will suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience, taking into account the public interest, favours granting the injunction.

[16] The moving party has the burden of satisfying each branch of the test, on a balance of probabilities (*Canada (Attorney General) v. Robinson*, 2021 FCA 39 at para. 17, citing *Novopharm Limited v. Janssen-Ortho Inc*., 2006 FCA 406).

[17] On this motion, the appellants seek the same interlocutory and interim relief ordered by the Federal Court in the Stay Decision. The appellants rely on the same evidentiary record that

was before the Federal Court. However, the motion brought in this Court is a new motion, brought in the context of an appeal to this Court and, therefore, I must conduct a *de novo* analysis of the considerations relevant to granting an injunction.

A. *Serious Issue*

[18] The threshold for determining whether there is a serious issue is low. (*RJR-MacDonald* at 335; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2020 FCA 3 at para. 8 [*Western Oilfield*]). The Court must be satisfied that an issue to be determined is "not frivolous or vexatious" (*RJR-Macdonald* at 337; *Toronto Real Estate Board v. Commissioner of Competition*, 2016 FCA 204 at para. 11).

[19] Generally, a motions judge need not and should not engage in an extensive consideration of the merits to make this determination. Whether the Court might be of the view that the party seeking the stay will not succeed on its appeal is an irrelevant consideration (*RJR-MacDonald* at 338; *Western Oilfield* at para. 8).

[20] The Stay Judge concluded that there were serious issues to be determined in the judicial review application before the Federal Court (Stay Decision at para. 67). These included whether the impugned provisions of the RegDoc are contrary to sections 7, 8 or 15 of the *Charter* and the reasonableness of the Commission's adoption of those provisions.

[21] The appellants submit and the respondents concede that the issues raised in the appeal are neither frivolous nor vexatious. I agree. They are issues that concern alleged violations of fundamental rights and freedoms protected under the *Charter* and the process and decision-making of the Commission, all within the context of the nuclear power industry.

[22] I agree with the appellants that the Merits Decision having been decided against them does not bear on the issue of interlocutory relief. This appeal involves allegations of *Charter* violations; the fact that a decision has been made on the merits does not result in an increased burden on the appellant in this motion (*RJR-MacDonald* at 336).

[23] I am satisfied that the appeal raises a serious issue for determination. The appellants have met the first branch of the test.

B. *Irreparable Harm*

[24] Under the second branch of the test, the appellants must show that they would suffer irreparable harm if the stay were not granted. “Irreparable” harm refers to the nature of the harm, not the magnitude. It is harm which “cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other” (*RJR-MacDonald* at 341). The harm cannot be “hypothetical and speculative” (*Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at para. 24).

[25] The Stay Judge, on reviewing the same record that is before this Court, concluded that the appellants had established irreparable harm in respect of both impugned provisions of the RegDoc. The Stay Judge found that the appellants had not merely asserted a breach of section 8 of the *Charter*. The Stay Judge concluded based on "undisputed evidence", that "the highly intrusive and non-consensual collection of bodily fluids is clear and concrete evidence of harm in light of the privacy interests engaged" (Stay Decision at paras. 86 and 106).

[26] On this motion, the appellants argue, echoing the reasons given by the Stay Judge, that the evidence of harm is neither hypothetical nor speculative, the privacy interests of the workers in their bodily fluids are at the "high end of the spectrum", and these intrusions on privacy cannot be remedied after the fact.

[27] The respondents submit that the harms alleged by the appellants are hypothetical and speculative. They say that taking of bodily samples pursuant to the RegDoc is minimally invasive and the harm, if any, is mitigated by the workers' diminished expectation of privacy working in the nuclear power industry and the privacy protections contained in the RegDoc.

[28] The respondent employers add, relying on the decision in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078 at para. 67 [*TTC*], citing *Jones v. Tsige*, 2012 ONCA 32 [*Jones*], that the breaches of privacy can be remedied through awards of damages.

[29] This Court has held that allegations of a *Charter* infringement, without more, do not establish irreparable harm (*Groupe Archambault Inc. v. Cmrra/Sodrac Inc.*, 2005 FCA 330 at para. 16; *International Longshore and Warehouse Union Canada v. Canada (Attorney General)*, 2008 FCA 3 at paras. 26 and 33). Here, there is more.

[30] The non-consensual seizure of bodily fluids has been held to be highly intrusive, invading personal privacy essential to the dignity of the person (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 50 [*Irving Pulp & Paper*], citing *R. v. Dyment*, [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503 [*Dyment*]). This arises from the loss of control over personal information contained in the samples, and the use of the person's body in the process by which that personal information is obtained (*Dyment* at para. 34). Here, the bodily samples are breath, saliva and urine.

[31] Compared to privacy interests in, for example, business documents, the privacy interests in bodily samples is "at the high end". Accordingly, this type of seizure is subject to stringent standards and safeguards to meet constitutional requirements (*Irving Pulp & Paper* at para. 50, citing *R. v. Shoker*, 2006 SCC 44).

[32] The harm identified by the appellants has yet to occur, but it is neither hypothetical nor speculative. Once implemented, the impugned provisions of the RegDoc will result in mandatory pre-placement testing and random testing of safety-critical employees. Avoiding future harm is an essential feature of an interlocutory injunction (*Horii v. Canada*, [1992] 1 F.C. 142 at 147, 7 Admin L.R. (2d) 1 (C.A.)).

[33] I accept the respondents' submissions that the RegDoc includes features to protect the privacy interests of the safety-critical employees. I also accept that working in the highly regulated nuclear power industry reduces expectations of privacy.

[34] I would not go so far as to conclude that these mitigating factors cause any harm arising from the implementation of the impugned provisions to be "minimal" or that, as a result, the second branch of the test is not passed. Nor will I engage in an assessment of the severity or the reasonableness of the privacy intrusion by virtue of these potentially mitigating circumstances. That is not necessary or appropriate. It is a matter for this Court to consider on a full hearing of the appeal. The appellants have established that harm will ensue if the proposed injunction is not granted.

[35] The employer respondents say that any harm from the pre-placement and random testing can be remedied. They rely on *TTC*, where the Court concluded, in the context of an injunction application relating to random drug and alcohol testing, that damages for wrongfully obtained bodily fluids could be compensated. The Court relied on the damages analysis in *Jones* where the subject matter of the privacy invasion was an individual's banking records.

[36] I am not persuaded by these authorities. *TTC* appears to stand alone in extending the analysis in *Jones* to conclude that the wrongful seizure of bodily samples is compensable. Also, as addressed by the Stay Judge, the workplace circumstances in *TTC* differed significantly from those at hand (Stay Decision at paras. 98-103).

[37] Other courts have concluded that invasions of privacy are not remediable with post-intrusion compensation (*143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at 382, 167 N.R. 321). This includes decisions confirming irreparable harm from the taking of bodily fluids, on the basis that the harm cannot be undone or fully remedied through monetary compensation (*Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*, 2012 ABQB 627 at para. 38, aff'd 2012 ABCA 373; Stay Decision at para. 104; *Fieldhouse v. Canada*, 1994 CarswellBC 2219 at para. 71, [1994] B.C.J. No. 740 (B.C. S.C.)).

[38] I am satisfied that the appellants would suffer irreparable harm if the injunction were not granted. The breach of privacy rights engaged in submitting bodily fluids under the impugned provisions would result in harm that could not be undone or fully remedied with a retroactive award of damages. The appellants have met the second branch of the test.

C. *Balance of Convenience*

[39] Finally, the appellants must demonstrate that the balance of convenience favours granting the stay (*RJR-MacDonald* at 342). This branch of the test involves a comparison of the harm to the responding party from granting the injunction and the harm to the moving party from refusing to grant the injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Canada (Citizenship and Immigration) v. Canadian Council of Refugees*, 2020 FCA 181 at para. 10).

[40] It is often referred to as the “balance of inconvenience” test. The precise factors will vary from case to case; however, the public interest is considered at this stage (*RJR-MacDonald* at 342).

[41] The Stay Judge found that there were competing public interests, one in implementing the RegDoc and another in protecting workers’ privacy interests (Stay Decision at paras. 123-124). The Stay Judge also noted that the injunction would not suspend implementation of the RegDoc in full, a robust alcohol and drug testing program was in place, and there was no evidence of actual workplace impairment issues (Stay Decision at paras. 129-130). Weighing these factors, the Stay Judge concluded that the balance of convenience favoured the appellants.

[42] On this motion, the appellants rely on many of the factors recognized in the Stay Decision: the public interest in safeguarding workers’ privacy, existing workplace safety measures, and the lack of workplace impairment issues. They also submit that the respondents have not provided evidence of prejudice that would flow from the stay being granted. They say that the proposed injunction would preserve the *status quo*.

[43] The respondents submit that the public interest in implementing the RegDoc without further delay prevails, given the statutory mandate of the CNSC and heightened safety concerns associated with nuclear power plants. The respondents argue that maintaining the *status quo* requires implementation of the RegDoc, to respond to emerging issues in the nuclear power industry, or that the *status quo* is the application of the RegDoc, as it has been in effect since January 2021.

[44] The onus on a public authority to demonstrate irreparable harm to the public interest is less than for a private applicant. The test will usually be satisfied upon establishing that the authority is charged with the duty of promoting or protecting the public interest and the activity in issue was undertaken pursuant to that responsibility. Once these requirements are met, a court should in most cases assume that irreparable harm to the public interest would result from restraint of the activity in issue (*RJR-MacDonald* at 346; *Harper v. Canada (Attorney General)*, 2000 SCC 57 at para. 9).

[45] The public interest in nuclear safety is readily acknowledged. The CNSC regulates the development, production and use of nuclear energy to prevent unreasonable risk to the environment, health and safety of persons or national security. The RegDoc was issued pursuant to that mandate. The public interest in the RegDoc is established, as is the presumption of irreparable harm should the implementation of the RegDoc be suspended (Stay Decision at para. 119).

[46] However, no party to this litigation, including the government, has a monopoly on the public interest (*RJR-MacDonald* at 343). The "public interest" includes both the interests of identifiable groups and the concerns of society generally (*RJR-MacDonald* at 344). A private party challenging the constitutionality of legislation or the authority of a public authority may represent the public interest in upholding rights under the *Charter* (*RJR-MacDonald* at 344).

[47] Here, there is a public interest in suspending implementation of the RegDoc. The privacy interests are not only personal to the particular safety-critical employees who would be subject to

the testing if implemented. The interest in protecting constitutional privacy rights transcends the individuals and, like other important public interests, concerns society at large (*Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 33 and 75; Stay Decision at para. 120).

[48] I acknowledge the important public interest in allowing the CNSC to carry out its statutory mandate and the essential nature of nuclear power safety. But the Attorney General of Canada risks hyperbole when it raises the "devastating and long lasting impacts" of a potential nuclear incident as an additional reason to not grant the injunction.

[49] The evidence does not support a conclusion that a nuclear incident is more likely to occur if the impugned provisions are suspended pending disposition of the appeal. The evidence reflects many circumstances mitigating against such a risk: safety in the workplace is a shared priority for all parties, the employers' facilities operate with extensive "defence-in-depth" measures to avoid a workplace incident, there are no issues with workplace impairment, and other provisions of the RegDoc that allow for drug and alcohol testing in certain circumstances will not be suspended (Stay Decision at para. 127).

[50] Further, any injunction granted by this Court would be of limited duration. All remaining steps to perfect the appeal are to be completed by December 13, 2023. The Court is prepared to assist the parties in expediting a hearing for the appeal, which would minimize the duration of any injunction. Subject to the availability of the parties, this could be early in 2024.

[51] As addressed under the “irreparable harm” prong of the test, the evidence concerning the invasive nature of the proposed testing under the impugned provisions of the RegDoc, including the collection of bodily fluids and personal information, establishes harm. This is actual, non-trivial, and irreparable harm.

[52] On the other side of the balance, while recognizing the important public interest in allowing the CNSC to carry out its statutory mandate, I find the evidence lacking that other irreparable harm is likely if the impugned provisions of the RegDoc are temporarily suspended, pending a disposition of the appeal. Balancing the actual harm anticipated on implementation of the impugned provisions of the RegDoc against the harm to the public interest in temporarily suspending that implementation, I find that the balance of convenience favours the appellants.

[53] Preserving the *status quo* may be a relevant consideration in the balance of convenience when everything else is equal. As a general rule, it is not relevant in *Charter* cases where the effect is to tip the balance against those challenging the *status quo* by claiming a breach of the *Charter* (*RJR-MacDonald* at 347). Here, the concept confuses more than assists the determination of whether to grant the injunction as the *status quo* has different aspects. The RegDoc has been in effect since January 2021. Originally, pre-placement testing was to be implemented as of July 2021 and random testing as of January 2022, but the CNSC has indicated that it will not enforce these provisions before December 1, 2023.

[54] Having determined that the balance of convenience favours the appellants, I do not rely on the *status quo* as a relevant consideration.

[55] I am satisfied that the balance of convenience favours granting the injunction pending final disposition of the appeal. The appellants have satisfied the third branch of the test and thus all of the requirements for granting an injunction.

[56] These reasons do not and should not be construed as having any bearing on the issues in the appeal. Those issues will be determined by this Court on a full hearing of the merits.

IV. DISPOSITION

[57] The appellants' motion is granted. An order will issue in accordance with these reasons.

[58] The appellants shall have their costs of this motion.

[59] The Court is prepared to assist the parties in expediting the hearing of the appeal.

"Monica Biringer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-184-23
STYLE OF CAUSE:	POWER WORKERS' UNION ET AL. v. ATTORNEY GENERAL OF CANADA ET AL.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	BIRINGER J.A.
DATED:	OCTOBER 27, 2023

WRITTEN REPRESENTATIONS BY:

Richard Stephenson Emily Lawrence Douglas Montgomery	FOR THE APPELLANTS POWER WORKERS' UNION, CHRIS DAMANT AND PAUL CATAHNO
Michael Wright Brendan McCutchen	FOR THE APPELLANTS SOCIETY OF UNITED PROFESSIONALS, MATTHEW STEWART AND THOMAS SHIELDS
Georgina Watts	FOR THE APPELLANTS THE CHALK RIVER NUCLEAR SAFETY OFFICERS ASSOCIATION AND SCOTT LAMPMAN
Brenda Comeau	FOR THE APPELLANTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 37 AND GREG MACLEOD
Henry Y. Dinsdale Frank Cesario	FOR THE RESPONDENTS ONTARIO POWER

Dianne E. Jozefacki Amanda P. Cohen A. Gabrielle Lemoine	GENERATION, BRUCE POWER, NEW BRUNSWICK POWER CORPORATION AND CANADIAN NUCLEAR LABORATORIES
Michael H. Morris Elizabeth Koudys James Schneider	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Paliare Roland Rosenberg Rothstein LLP Toronto, Ontario	FOR THE APPELLANTS POWER WORKERS' UNION, CHRIS DAMANT AND PAUL CATAHNO
Wright Henry LLP Toronto, Ontario	FOR THE APPELLANTS SOCIETY OF UNITED PROFESSIONALS, MATTHEW STEWART AND THOMAS SHIELDS
Morrison Watts LLP Toronto, Ontario	FOR THE APPELLANTS THE CHALK RIVER NUCLEAR SAFETY OFFICERS ASSOCIATION AND SCOTT LAMPMAN
Pink Larkin LLP Fredericton, New Brunswick	FOR THE APPELLANTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 37 AND GREG MACLEOD
Hicks Morley Hamilton Stewart Storie LLP Toronto, Ontario	FOR THE RESPONDENTS ONTARIO POWER GENERATION, BRUCE POWER, NEW BRUNSWICK POWER CORPORATION AND CANADIAN NUCLEAR LABORATORIES
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT

ATTORNEY GENERAL OF
CANADA