Federal Court Cour fédérale

Date: 20220121

Docket: T-1222-21

Citation: 2022 FC 73

Ottawa, Ontario, January 21, 2022

PRESENT: The Honourable Mr. Justice Gleeson

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 STEWARD AND THOMAS SHIELDS

Applicants

and

ATTORNEY GENERAL OF CANADA, ONTARIO POWER GENERATION, BRUCE POWER, NEW BRUNSWICK POWER CORPORATION AND CANADIAN NUCLEAR LABRATORIES

Respondents

ORDER AND REASONS

I. Overview

[1] The Canadian Nuclear Safety Commission [CNSC] is responsible for regulating the use of nuclear energy and materials in Canada. In furtherance of this 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-2.2.4 or RegDoc]. The RegDoc requires license holders operating Class 1 high security nuclear sites to implement employee alcohol and drug testing in defined circumstances.

[2] The Respondents, Ontario Power Generation, Bruce Power, New Brunswick Power Corporation and Canadian Nuclear Laboratories operate all licensed Class 1 nuclear facilities regulated by the CNSC [collectively, the Licensees or the Employers].

[3] The circumstances in which testing is required by the CNSC include random testing of employees in safety-critical positions and the testing of any candidate to be hired or transferred to a safety-critical position as a condition of placement. The latter is referred to as pre-placement testing. The CNSC directs that random testing of persons in safety-critical positions be required as of January 22, 2022. Pre-placement testing has been required since July 22, 2021.

[4] The Unions representing employees occupying safety-critical positions, the Power Workers' Union [PWU], the Society of United Professionals [Society], the Chalk River Nuclear Safety Officers Association [CRNSOA], and the International Brotherhood of Electrical Workers, Local 37 [IBEW, Local 37], along with affected members Chris Damant, Paul

Catanho, Thomas Shields, Matthew Stewart, Scott Lampman and Greg MacLeod [collectively, the Unions or the "Applicants], allege the collection of bodily samples for the purposes of random testing and pre-placement testing is contrary to labour arbitration case law and sections 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]. The Applicants have filed an Application for Judicial Review of the CNSC direction.

[5] Pending final disposition of the Application for Judicial Review, the Applicants filed a Motion on January 4, 2022, seeking an interim and interlocutory injunction:

A. staying the implementation of the impugned provisions of the RegDoc;

B. restraining the CNSC from requiring the Licensees to implement workplace alcohol and drug testing based on the impugned provisions of the RegDoc as any condition of the licenses;

C. restraining the Licensees from implementing workplace alcohol and drug testing based on the impugned provisions of the RegDoc;

D. the costs of this Motion; and

E. such further and other relief as this Honourable Court may deem just.

[6] I am granting the Applicants' Motion for a stay. First, having considered the merits of the case, I am satisfied the issues raised are neither frivolous nor vexatious. The Applicants have established a serious issue on this low threshold.

[7] I am convinced that the Applicants have established irreparable harm. Alcohol and drug testing involves the collection of bodily samples that engage significant privacy interests. Having considered the surrounding circumstances, I am satisfied that testing in the absence of reasonable grounds may unreasonably infringe upon those interests. Should the Applicants ultimately succeed on their underlying Application, those harms are not fully compensable through an award of damages.

[8] Each party may well suffer inconvenience where a stay is either granted or denied. In this instance, after balancing the interests and recognizing CNSC's legislatively mandated responsibility for the safety and security of the nuclear facilities and operations in Canada, I have concluded the balance of "inconvenience" weighs in favour of the Applicants.

II. Background

A. *Legislative Framework*

[9] The CNSC is an independent administrative tribunal established in 2000 under the *Nuclear Safety and Control Act*, SC 1997, c 9 [NSCA]. The NSCA defines the Commission in reference to the whole of the CNSC. However, the CNSC includes both a staff complement that works within the CNSC and the independent administrative tribunal, the Commission.

[10] Section 9 of the NSCA specifically provides the Commission with the statutory authority to regulate the production and use of nuclear energy in order to prevent unreasonable risk to the health and safety of persons, protect the environment and ensure the security of Canada's nuclear

energy as well as to disseminate objective scientific, technical and regulatory information to the public. This encompasses the safety and security of Canada's nuclear facilities:

9. The objects of the Commission are	**9.** La Commission a pour mission :
(a) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to	**a)** de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :
(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,	**(i)** le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,
(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and	**(ii)** le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and	**(iii)** ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;
(b) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production,	**b)** d'informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et

possession and use referred to in paragraph (a).	pour l’environnement, des activités mentionnées à l’alinéa a).

[11] All persons who operate a nuclear facility must do so in accordance with a license issued by the CNSC (NSCA, subsection 26(e)). The CNSC can only issue, renew, amend, transfer or replace a nuclear license if the nuclear facility has demonstrated that they are qualified to carry on the requested activity in a manner that adequately protects the environment, the health and safety of persons, maintains national security and sufficiently implements Canada’s international obligations (NSCA subsection 24(4)).

[12] A licence may contain any term or condition that the CNSC considers necessary for the purposes of the NSCA (NSCA subsection 24(5)). Each licence contains various conditions that a licensee must follow in order to maintain its license. Each license issued by the CNSC stipulates that the licensees are to conduct themselves in accordance with their “Licensing Basis.” The Licensing Basis provides for requirements and conditions to be added to a licence through documents, including regulatory documents. This allows the CNSC to regulate the nuclear industry in a manner that is adaptive and flexible to new science, operational experience and changing international obligations (see Hunter affidavit at paras 15 – 19).

[13] Sections 12 and 17 of the *General Nuclear Safety and Control Regulations*, SOR/2000-202, detail the obligations of licensees and workers. These obligations include the requirements that every licensee have a “sufficient number of qualified workers to carry on a licensed activity safely” and every worker must “take all reasonable precautions to ensure the worker’s own safety, the safety of the other persons at the site of the licensed activity, the protection of the

environment, the protection of the public, and the maintenance of the security of nuclear facilities and nuclear substances" (paragraphs 12(1)(a) and 17(e)).

[14] Pursuant to paragraph 3(d.1) of the *Class 1 Nuclear Facilities Regulations*, SOR/2000-204 [*Class 1 Regulations*], all license applications for a Class 1 nuclear facility must contain a proposed human performance program for the activity to be licensed, including demonstrating measures that ensure workers' fitness for duty.

[15] RegDoc-2.2.4 is implemented by the Licensees as part of their human performance program. After implementation in accordance with CNSC directed implementation dates, the RegDoc forms a part of the Licensing Basis for each of the Licensees (Hunter affidavit at paras 30-32).

B. *REGDOC-2.2. 4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3*

[16] The purpose of the RegDoc is not disputed. Its objective is to bolster fitness for duty programs and policies that are already in place at Class 1 high security nuclear facilities in order to further the "defence-in-depth" principle.

[17] The defence-in-depth principle is integral to the nuclear industry. It ensures there are multiple safeguards in place to ensure the safe operation of a facility and that the failure of one component, human or mechanical, will not lead to an incident.

[18] The Applicants agree this principle is indispensable but claim that the provisions requiring random and pre-placement drug and alcohol testing for safety-critical employees are overly invasive and unnecessary given the robust fitness for duty programs that are already in place at every Class 1 nuclear facility.

(a) *Development of the RegDoc*

[19] In 2009, the CNSC identified fitness for duty as an area requiring further clarification for Licensees. The CNSC initiated a public consultation process in April 2012 regarding fitness for duty as it relates to drug and alcohol use. This process spanned 120 days. The CNSC published its first draft version of the RegDoc in November 2015 and a four-month public consultation process followed. The CNSC amended the draft version of the RegDoc in response to the feedback received, in part by limiting random and pre-placement drug and alcohol testing to workers in safety-critical positions.

[20] CNSC staffers further amended the RegDoc after its presentation for approval at a CNSC public meeting on August 17, 2017. The licensing branch of the CNSC directed the separation of the drug and alcohol use components from the medical, physical and psychological fitness components and requested a complete list of the scientific literature reviewed. The CNSC approved and published the RegDoc in November 2017 after these amendments were made. The CNSC published a second version with minor administrative changes in January 2018.

[21] The government of Canada legalized recreational cannabis and approved oral fluid testing for roadside use later in 2018. At the request of the Licensees, the CNSC deferred the

implementation of the RegDoc to address these developments and undertake a public consultation process. The final draft was presented and discussed by the Licensees and Unions at a public meeting held by the CNSC. The CNSC approved the third version of the RegDoc in November 2020 and published it in January 2021, directing implementation by the Licensees by July 2021 with the exception of random testing for safety-critical employees. This is to be implemented by January 2022.

(b) *Required drug and alcohol testing*

[22] The RegDoc requires Licensees to conduct drug and alcohol testing of workers in safety-critical and safety-sensitive positions in five circumstances. Three of the five circumstances have not been challenged by the Applicants: reasonable grounds testing; post-incident testing; and follow-up testing upon return to work after confirmation of a substance use disorder before the worker is reinstated in their position. Workers in both safety-critical and safety-sensitive positions are subject to these categories of testing.

[23] The remaining two circumstances are those in issue. Pre-placement testing tests workers who are hired for, or transferred to a safety-critical position as a condition of placement. Random testing is required for safety-critical workers only and the number of random tests conducted annually must be equal to 25 percent of the safety-critical worker population at a facility. Upon completion of a random test, a worker is immediately eligible for another test. The RegDoc describes these two categories of testing as follows:

> **5.1 Pre-placement alcohol and drug testing**
>
> Licensees shall require all candidates who succeed in progressing through all the previous stages of a job competition to a safety-

> critical position (see section 4.1, bullets 1 and 2) to submit to alcohol and drug testing as a condition of placement. Incumbent workers transferring into a safety-critical position (see section 4.1, bullets 1 and 2) shall also be required to submit to a pre-placement alcohol and drug test.
>
> **5.5 Random alcohol and drug testing**
>
> Licensees shall require all workers holding safety-critical positions (see section 4.1, bullets 1 and 2) 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.
>
> Licensees shall develop procedures and practices to ensure that random testing is administered in a manner that provides reasonable assurance that individuals are unable to predict when specimens will be collected.
>
> The following shall be addressed for the implementation and conduct of random testing:
>
> 1. Ensure that all individuals in the population subject to testing have an equal probability of being selected and tested.
>
> 2. Require that individuals who are offsite when selected for testing, or who are onsite and are not reasonably available for testing when selected, be tested at the earliest reasonable opportunity when both the donor and specimen collectors are available to collect specimens for testing and without prior notification to the individual that he or she has been selected for testing.
>
> 3. Provide that an individual completing a test is immediately eligible for another unannounced test.

(c) *Safety-critical positions*

[24] The RegDoc recognizes two categories of safety-critical employees. The first are employees certified under the *Class 1 Regulations*, excluding certified health physicists. These employees have a direct impact on a facility's nuclear safety and security. The positions

encompassed by this category are reactor operators, “unit 0” operators (who operate monitoring panels in plants with multiple nuclear reactors) and control room and plant shift supervisors [Operators].

[25] The second category of safety-critical workers are the subset of security officers referred to as the onsite nuclear response force [NRF]. These officers are armed and stationed at high-security sites.

(d) *The drug testing process*

[26] The RegDoc requires that collection and testing be carried out by independent collectors and accredited labs. A facility may choose whether to implement urinalysis, oral fluid testing or both.

[27] Laboratory confirmed positive, adulterated and/or invalid test results are not provided directly to the Employers. Instead, they are reviewed by a qualified Medical Review Officer [MRO] engaged by the independent collector who will confidentially discuss the result with the worker to determine whether a test result could have resulted from the legitimate use of medications. The worker is given the opportunity to explain the finding to the MRO, who then determines whether the result will be reported to the Licensee as a negative, a verified positive, or a tampered or substituted specimen result.

[28] Provision is made for the collection of a secondary sample or the splitting of samples. This allows workers, within 72 hours of receiving a verified positive test, to request the testing of

the split/secondary sample by an accredited laboratory of the worker's choice. If the second confirmed test is negative, it prevails.

[29] The RegDoc establishes cut-off levels for alcohol and drugs, including cannabis. A positive drug test is one in which the laboratory analysis determines that cut-off levels have been met or exceeded following a review and report by the MRO.

[30] The RegDoc does not mandate that workers who have a verified positive test be terminated or disciplined. Instead, the RegDoc requires that these employees be removed from their positions and referred for a mandatory substance abuse evaluation.

C. *Procedural History*

[31] The Employers have developed a joint policy allowing for the operationalization of the RegDoc. The joint policy, entitled *Fitness for Duty: Policy on Managing Alcohol and Drug Use* [Employers' Policy], provides for drug testing of safety-critical and safety-sensitive workers as required by the RegDoc but goes further and imposes certain drug and alcohol testing on classes of employees beyond those captured by the RegDoc. The Unions have grieved the Employers' Policy.

[32] The grievances have been referred to arbitration. The parties, with the Respondent Attorney General of Canada [AGC] intervening, appeared in front of Arbitrator Eli Gedalof in June 2021 upon the Unions' requests for interim relief, including requests that the

implementation of the pre-placement and random testing requirements in the Employers' Policy be stayed pending the resolution of the Unions' grievances.

D. *The Arbitrator's decision*

[33] In his July 2021 award, Arbitrator Gedalof agreed with the position advanced by the AGC, finding he lacked jurisdiction to award interim relief to the Unions with respect to any RegDoc requirement. He directed the Unions to the Federal Court. However, Arbitrator Gedalof did stay the "implementation of the Employers' Policy as it relates to For-Cause Reasonable Grounds and Post-Incident Alcohol and Drug Testing for Nuclear Workers who do not fall within the scope of the RegDoc." (*Power Workers' Union et al v Ontario Power Generation et al*, 2021 CanLII 65284 (ON LA) at para 130 [*Power Workers' Union*])

[34] In considering the request for a stay of the drug and alcohol testing of workers not falling within the scope of the RegDoc, Arbitrator Gedalof applied the three-part test for the granting of interim relief.

[35] The parties agreed that there was a serious issue to be tried. In considering irreparable harm, Arbitrator Gedalof found that an individual's privacy interest in their bodily samples and the personal information those samples may contain fell at the high end of the privacy spectrum and that the potential harm resulting from testing later found impermissible would be irreparable. Arbitrator Gedalof also found that the balance of convenience lay with granting the stay because the Employers failed to provide evidence demonstrating that significant harm would result from an inability to implement testing pending a determination on the merits of the case.

III. The Evidence on this Application

[36] The records filed on this Motion are extensive. The Applicants have filed nine affidavits with exhibits that exceed 4000 pages. The Employers have filed 11 affidavits with exhibits exceeding 3000 pages and the Attorney General of Canada has filed a single affidavit with exhibits that exceed 1900 pages.

[37] Although the evidence is considerable, there appears to be little in dispute factually. All parties agree that safety is of paramount importance in the operation of nuclear facilities and that a culture of safety permeates the work culture within the facilities operated by the Employers. There is no substantial disagreement in respect of the nature of the work done by safety-critical employees, the potential serious consequences that may result in the event of an incident relating to the performance of that work or, more broadly, the requirement for the close monitoring of employees in the performance of their duties and the need for a robust fitness for duty policy.

[38] I note that much of the affidavit evidence is repetitive in that the parties have included affidavit evidence addressing each of the two categories of safety-critical workers from each of the Employers. As would be expected, details of this evidence differ from employer to employer but it is generally consistent in all significant aspects. I will therefore provide only a generalized summary of the evidence to provide some context for the analysis that will follow.

[39] The Applicants' evidence describes the current fitness for duty policies and practices in place that allow fitness for duty concerns, including any instance of suspected impairment, to be

identified and acted upon. Both Operators and NRF members undergo rigorous security measures that allow security personnel to observe safety-critical employees as they arrive at, and enter the workplace and have shift handover protocols that include extensive handover briefings. Both have high supervisor to employee ratios and are required to generally work in teams. Operators engage in pre-job briefings before performing any non-routine tasks. NRF members attend mandatory pre-shift crew briefings and are monitored during the loading and unloading of all weapons systems. In addition, management personnel at all facilities undergo a training program that teaches them to identify signs of safety-significant behaviour changes, including those associated with substance impairment. The evidence notes the availability and promotion of employee assistance programs that recognize substance abuse as a disorder to be treated with the employee accommodated. These programs contribute to destigmatization and encourage proactive disclosure by employees of issues, including substance abuse, that may impact their fitness for duty.

[40] The Applicants' evidence also describes the impact of the RegDoc. The evidence indicates impairment in the workplace is inconsistent with the way safety-critical personnel view and do their jobs. The suggestion that random testing is needed to deter employees from coming to work in an impaired state is insulting in light of the commitment these employees have to the workplace safety of themselves and their co-workers. The view is expressed that employees will experience fear and anxiety due to the possibility of a false positive that will require them to establish they were not impaired and this may change behaviours outside the workplace with employees avoiding food products or even over the counter and prescription medicines. The

testing process will also compel disclosure of personal medical information to persons not of an employee's choosing in the event an employee seeks to explain a positive result.

[41] The Applicants' evidence includes an expert report from Dr. Olaf Drummer, a Professor and Forensic Toxicology Consultant Specialist. Dr. Drummer's affidavit expressed his view that urine or oral fluid testing and cut-off concentration thresholds, in the absence of evidence of behaviour and/or performance deficits, cannot accurately assess the level of a person's impairment because of the numerous factors that influence the concentration of drug and drug metabolites in the human body. This is particularly true for urinalysis. Dr. Drummer also attested that there is no worldwide consensus on the appropriate cut-off thresholds for most drugs, that thresholds are more commonly designed to detect prior use of drugs rather than current impairment and that the RegDoc's cut-off limit for oral fluid testing of cannabis is low and may result in non-negative results for much longer than the period of acute impairment. Finally, Dr. Drummer expressed that benzodiazepines should be removed from the RegDoc testing regime because of the particular difficulties involved in screening for this class of drug.

[42] The Employers' evidence establishes that there is a rigorous process in place for workers aspiring to either category of safety-critical positions. A worker must have two years of plant experience or a minimum of two years of education in a science or technology field before undergoing a three-year training process to become an Operator. The evidence establishes that there is a high failure rate for this program across all facilities. At New Brunswick Power Corporation, for instance, approximately 40% of candidates do not successfully complete the certification process. Workers aspiring to Operator positions also undergo medical examinations

prior to hiring which include a review of drug and alcohol use and tailored fit tests regarding the safe use of their equipment.

[43] A prospective NRF member participates in a three-month Basic Tactical Operator Course. An NRF member must also obtain medical, physical and psychological certificates stating they are fit for duty. In addition, they undergo thorough background checks. Other aspects of the NRF training plan and minimum standards are classified, but it is clear that NRF candidates are closely scrutinized and highly trained.

[44] The Employers' evidence also establishes that Canadian Nuclear Laboratories has had a drug and alcohol testing policy in place since 2014. This policy includes reasonable grounds, post-incident and follow-up testing for all workers and remains operative except where it has been superseded by the RegDog in respect of testing for safety-sensitive and safety-critical workers. The CRNSOA has not grieved this policy.

[45] Finally, the Employers' evidence includes two expert reports. One, from a physician and MRO, explained that urinalysis and oral fluid testing are not true tests of impairment but that they will aid in determining the likely risk of impairment. She stated that the threshold cut-offs established by the RegDoc are consistent with drug and alcohol testing thresholds in most other safety-sensitive and safety-critical workplaces in Canada and that the thresholds set for cannabinoids and benzodiazepines are appropriate. The second expert report, written by a toxicologist, stated that supervisors often ignore or do not notice impairment in their workers and

that the RegDoc protocols, including the cut-off thresholds, are well-designed and comprehensive.

[46] The AGC's evidence includes third-party reports commissioned during the development of the RegDoc. These reports concluded that the fitness for duty programs at Class 1 nuclear facilities varied and stated that supervisory and peer observations are not always reliable methods of recognizing impairment. The AGC's evidence also explains the urinalysis testing method required by the RegDoc was chosen for its efficacy and that oral fluid testing was chosen as a second method because the short window of drug detection monitored by oral fluid testing more closely correlated to the window of drug impairment. The AGC's evidence also clarifies the reasoning behind the chosen "cut-off" values above which would constitute a positive result. The AGC's evidence states that the threshold levels were chosen to target the length of time of acute impairment.

[47] The AGC's evidence also establishes that the Employers' fitness for duty programs prior to the development of the RegDoc were inconsistent with international criteria and expectations. The International Atomic Energy Agency has advised that Canada implement random drug and alcohol testing for persons entering secure areas to ensure they can safely carry out their duties. The United States and Finland have regulatory requirements regarding the random drug and alcohol testing of nuclear power plant workers. This testing also takes places at nuclear power plants in the United Kingdom and Sweden, although it is not a regulatory requirement.

IV. Preliminary Issue – Admissibility of the Hunter Affidavit

[48] As a preliminary matter, in written submissions the Applicants argued that the affidavit of Lynda Hunter, a Human and Organizational Factors Specialist with the CNSC and filed by the AGC, is inadmissible. The Unions submitted the apparent purpose of the affidavit is to provide supplementary reasons for the CNSC's adoption of the RegDoc.

[49] The AGC submits there is no basis for the Applicants' objection. The information contained in the Hunter affidavit provides important context and background information on the CNSC's development and approval of the RegDoc. This information is in the Certified Tribunal Record or otherwise publicly accessible.

[50] In seeking an injunction or a stay, an applicant engages issues relating to the public interest and the harm that might be occasioned in either granting or refusing the relief sought. These issues go beyond those raised in the underlying proceeding and evidence relevant to the issues is admissible and to be considered by the motions judge in assessing whether the relief sought is to be granted (*Unifor, Local 707A v Suncor Energy Inc*, 2018 ABCA 75 at paras 9 and 10 [*Suncor 2018*]; also see the reasons of Slatter, JA in dissent at paras 28 and 29 where it is stated the "the chambers judge has an obligation to carefully consider all the evidence on the record with respect to the [irreparable haram and balance of convenience] branches of the test").

[51] In oral submissions, the Applicants advised that their concerns with the affidavit were significantly diminished after having had the opportunity to review the Respondents'

submissions. Applicants' counsel did submit that the affiant, as a member of the CNSC staff, is not the statutory decision maker. As such, any concerns she describes in relation to the development or implementation of the RegDoc must be considered in that light and the Court should be mindful of this in relying on the affidavit.

[52] The Applicants' objection having essentially been withdrawn, I have considered and relied on the Hunter affidavit. In doing so, I have been mindful of the Applicants' concern.

V. <u>The Test and Guiding Principles</u>

[53] As recalled by Justice John Norris in *Gray v Canada (Attorney General)*, 2020 FC 1037 [*Gray*], an interlocutory injunction is an extraordinary and equitable form of relief. The decision to grant or refuse the relief is discretionary and must be made having regard to all the relevant circumstances (at para 49, citing *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 27).

[54] Interlocutory relief seeks to preserve the subject matter of the underlying litigation so that effective relief will be available in the event the applicant is successful (*Gray* at para 48, citing *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at para 24 [*Equustek*]).

[55] To obtain interlocutory relief an applicant must demonstrate (1) there is a serious issue to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours the applicant (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*]).

[56] The applicant has the burden of satisfying each branch of the test. However, the branches are not to be treated as individual and watertight silos. Strength on one part of the test may compensate weakness on another (*Bell Canada v 1326030 Ontario Inc*, 2016 FC 612 at para 30). The fundamental question to be addressed is whether the granting of the injunction is just and equitable in all of the circumstances (*Equustek* at para 25).

[57] The balance of convenience branch of the test best represents this balancing of equities and has been described as a determination of which of the parties will suffer the greater harm from the granting or refusal of the injunction (*Metropolitan Stores* at p. 129). Framed otherwise, the question is: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion? (*Gray* at para 54, citing Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14).

VI. Analysis

A. *The Applicants have demonstrated a serious issue*

[58] An individual seeking interlocutory relief is required to satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" (*RJR-MacDonald* at para 49, citing *American Cyanamid Co v Ethicon Ltd*, [1975] A.C. 396).

[59] This low threshold recognizes that it is generally not appropriate to decide complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding.

This is particularly so where issues relating to the fundamental rights and freedoms protected by the *Charter* are raised (*RJR-MacDonald* at paras 50 and 53).

[60] Where satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third branches of the test, even if of the opinion that the plaintiff is unlikely to succeed at trial.

[61] The Supreme Court of Canada has identified two exceptions to the general rule that a motions judge should not engage in an extensive consideration of the merits. Neither of those exceptions arise in this case (*RJR-MacDonald* at para 56).

[62] The Applicants argue the CNSC-directed random and pre-placement testing in the workplace involves a search and seizure. They submit that the CNSC does not have the authority to authorize the search and seizure of bodily substances for the purposes of random or pre-placement alcohol and drug testing and that in any event the search authorized by the RegDoc is unreasonable.

[63] They submit the underlying Application raises a number of serious issues encompassing sections 7, 8 and 15 of the *Charter* and the arbitral jurisprudence in respect of pre-placement and random testing:

A. Relying on arbitral jurisprudence, the Applicants submit that random testing has been overwhelming rejected in workplaces with a recognition that such testing may only be justified in the rarest of cases (*Communications, Energy and Paperworkers Union, Local*

707 v Suncor Energy Inc, 2012 ABQB 627, paras 27-33 [*Suncor 2012 #1*], affirmed 2012 ABCA 373, para 5 [*Suncor 2012 #2*]; *Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc*, 2012 ABCA 307, paras 25-32 [*Suncor 2012 #3*]; *Unifor, Local 707A v Suncor Energy Inc*, 2017 ABQB 752, paras 51-56 [*Suncor 2017*]; *Office and Professional Employees International Union v Cougar Helicopters*, 2019 CanLII 66726 (NL LA), para 21 [*Cougar Helicopters*]; *Teck Coal Ltd and USW, Local 9346, Re*, 2013 CarswellBC 3772 (BC LA), para 39, affirmed 2014 CarswellBC 421 (BC LRB) [*Teck Coal*]; *TTC, Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078, para 29 [*TTC*]). They submit that whether the facts in this matter disclose one of those rare instances, particularly in the absence of a proven workplace problem, raises a serious issue.

B. The Applicants submit pre-placement testing does not test for or detect impairment in the workplace. They note the Respondents do not appear to dispute this but instead take the position, relying on the evidence of Dr. Snider-Adler, that such testing is intended to deter those who use recreational substances from engaging in safety-critical work. The Applicants submit that whether or not such deterrence is reasonable and whether pre-placement testing is a reasonable means of achieving this deterrence are also serious issues.

C. The Applicants submit that government-imposed testing regimes that do not require a reasonable and individualized basis for the conduct of a drug and alcohol test have been held to be contrary to sections 7 and 8 of the *Charter* (*Jackson v Joyceville Penitentiary*, [1990] 3 FC 55, paras 82, 96-97; *Dion c Canada (Procureur général)*, 1986 CarswellQue 1362 (SC), paras 35, 38-40, 77. See also *R v Dyment*, [1988] 2 SCR 417, paras 34-35;

Gillies (Litigation Guardian of) v Toronto District School Board, 2015 ONSC 1038, paras 84-89, 122-125; *R v Shoker*, 2006 SCC 44, para 23; *Royer c Canada (Procureur général)*, 2003 CAF 25, para 17; *R v Campbell*, 2019 ONCA 258, paras 31-33; *Fieldhouse v Canada*, 1994 CarswellBC 2219 (SC), para 62 [*Fieldhouse*]).

D. They further submit that the absence of an individualized approach to the random and pre-placement testing regimes engages *Charter* section 15's equality and non-discrimination guarantees which in turn dovetail with protections against discrimination under the Human Rights legislation.

[64] In response, the AGC concedes that the Applicants' claim is neither frivolous nor vexatious but submits the likelihood of success on the underlying Application is low. The Employers have adopted the AGC's position on serious issue.

[65] In advancing its view that the Applicants' likelihood of success is low, the Attorney General argues:

A. The arbitral jurisprudence is of little relevance to the judicial review of the actions of a federal regulator carrying out its mandate.

B. That, in any event, the arbitral jurisprudence relied on by the Applicants recognizes the safety interests of the workplace may justify random testing in the absence of prior drug or alcohol related issues (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd,* 2013 SCC 34 at para 45 [*Irving Pulp*]).

C. Safety-critical workers have a significantly diminished expectation of privacy given the evidence establishing they are subject to numerous intrusive procedures in furtherance of workplace safety, including regular urinalysis testing to monitor radiation exposure.

D. The RegDoc is reasonable, as it is authorized by law, that the law itself is reasonable and the impugned testing is conducted in a reasonable manner.

E. The Applicants' sections 15 and 7 arguments are deficient and that in the event a court were persuaded that the RegDoc infringes section 7, 8 and/or 15 of the *Charter*, the infringement would be saved under section 1. Ensuring the safety of Canada's nuclear facilities is a pressing and substantial objective.

[66] In oral submissions, counsel for the Applicants strongly disagreed with the AGC's characterization of the issues raised as having a low likelihood of success. However, the Applicants submitted that they do not rely on the strength of the serious issues raised to bolster their position on either irreparable harm or balance of convenience. They have therefore not pursued their disagreement with the AGC's characterization of the strength of the issues raised.

[67] On the record before me, and without reaching a final determination on any of the issues, I am satisfied that the issues raised by the Applicants are neither frivolous nor vexatious. I find the Applicants have satisfied the first branch of the tripartite test.

B. *Irreparable Harm*

[68] In *RJR-MacDonald*, the Supreme Court of Canada described irreparable harm at paragraphs 64 and 84:

> 64. “Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…
>
> […]
>
> 84. At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. ‘Irreparable’ refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

[69] An applicant must establish irreparable harm through clear and concrete evidence that is not speculative or hypothetical (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24; *Stoney First Nation v Shotclose*, 2011 FCA 232 at para 49).

(a) *Positions of the parties*

[70] The Applicants argue that the random testing and pre-placement testing regimes effect a loss of liberty and personal autonomy that will result in irreparable harm. They submit that compelling the provision of bodily samples is both intrusive and an invasion of privacy and that in the absence of reasonable grounds this compulsion causes harm at the time the samples are taken. That harm cannot be remedied retroactively. The Applicants argue that the jurisprudence

reflects this view and it is the view adopted by Arbitrator Gedalof in considering the very facts before the Court on this Motion.

[71] The Applicants have also placed evidence before the Court describing the general impact of random testing on safety-critical workers. This evidence describes the potential impacts of false positive results upon individual workers.

[72] In response, the AGC submits the Applicants have only asserted a general loss of privacy. They have not provided concrete examples and the assertion of speculative invasions of privacy does not establish irreparable harm. The AGC submits the jurisprudence the Applicants rely on is of little assistance as it arises in the context of the interpretation of collective agreements, which involve a different framework, a different context and different parties. Arbitrator Gedalof's award is similarly of little assistance to the Court.

[73] The AGC also submits that the evidence of the Applicants' affiants regarding the impact of false positive tests is speculative. There is no evidence to indicate that there will be an issue with false positives. The RegDoc procedures specifically contemplate this possibility and provide for it through a review and verification process conducted by an independent MRO. The possibility that unspecified workers may alter their diets or not take prescription medication to avoid a false positive is equally speculative.

[74] Finally, the AGC submits that any alleged harm to privacy interests in this case is minimal as safety-critical workers have a low expectation of privacy. Workers are already

subjected to various intrusive searches in the workplace, including routine urinalysis for the purpose of monitoring radiation exposure.

[75] The Employers similarly argue that the mere engagement of a constitutionally protected privacy interest is insufficient to establish irreparable harm. They submit the evidence does not demonstrate in a detailed and concrete way that workers will suffer real, definite and unavoidable harm from the testing regime or any aspect of the testing procedure. It is insufficient for the Applicants to argue that the existence of the testing regime must be presumed to infringe privacy rights and the *Charter* and, in turn, that this presumed breach constitutes irreparable harm.

[76] The Employers submit that the question of irreparable harm must consider the context and circumstances. These include the testing procedures and methods, the nature of the workplace and the health and safety measures that have been accepted as reasonable, including urinalysis. In doing so, it is submitted any harm arising from testing is incremental and does not rise to the level of irreparable harm. To the extent any harm is suffered, that harm can be remedied by an award of damages. The affidavit evidence alleging harm is vague and non-specific and cannot ground a finding of irreparable harm.

(b) *Irreparable Harm has been established*

[77] I conclude that the Applicants have met their burden. Irreparable harm has been established on a balance of probabilities.

[78] I will first address the Respondents' argument that the Applicants must fail on this branch of the test as they have simply raised an alleged infringement of their *Charter* and privacy rights and this cannot be sufficient to establish irreparable harm.

[79] The Respondents rely on *Professional Institute of the Public Service of Canada v Canada (Attorney General),* 2015 FC 1101 [*PIPSC*], wherein Justice Catherine Kane concludes at para 161 and after reviewing the relevant jurisprudence of the Federal Court of Appeal that:

> [161] The jurisprudence from the Court of Appeal is, therefore, consistent in establishing that irreparable harm must be established with clear evidence, not hypothetical and speculative allegations. Allegations of a breach of section 8, without more, will not establish irreparable harm for the purpose of the tripartite test.

[80] It is clear, as Respondents submit, that the mere allegation of a section 8 breach without more will not establish irreparable harm. However, the jurisprudence upon which the Respondents rely does not stand for the proposition that the intrusive nature of the search resulting in the alleged section 8 breach is either irrelevant or to be ignored in assessing irreparable harm.

[81] In *PIPSC*, the applicants relied on *143471 Canada Inc v Quebec (Attorney General)*, [1994] 2 SCR 339, 31 CR (4th) 120 [*143471*] and specifically Justice Corey's statement that "[i]f it transpires that the respondents are correct in their constitutional contention, then I would think that the loss of that privacy interest would, in itself, constitute irreparable harm." (at page 380).

[82] However, as Justice Kane notes in *PIPSC*, Justice Corey's conclusion was not founded on the mere assertion of the constitutional breach. He goes on to state in the following paragraph:

“[y]et there is another aspect which I consider to be far more significant in this case. Namely, that the documents were obtained by means of intrusive searches of residential and business premises.” Justice Kane concludes and I agree that this was a significant factor in the finding of irreparable harm in that case.

[83] In *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 26 [*Information Commissioner*], the Federal Court of Appeal confirms that irreparable harm cannot be speculative and considers *143471* (at para 22). The Court notes that *14371* dealt with the intrusive nature of the searches of residential and business premises and finds that the Supreme Court viewed the intrusive nature of the search as giving rise to a greater need for protection of the privacy interest.

[84] The Federal Court of Appeal has consistently held that the mere assertion of a *Charter* infringement will be insufficient to establish irreparable harm (see *Information Commissioner*, *Groupe Archambault Inc v Cmrra/Sodrac Inc*, 2005 FCA 330, *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3). However, it is important to recognize that none of the cases cited and relied on by the Respondents involve an intrusive and non-consensual seizure of bodily fluids.

[85] Nor do those cases stand for the principle that the intrusiveness of a search is irrelevant or to be ignored in assessing irreparable harm. Instead, the Court has recognized that the intrusive nature of a search was an important and determinative question before the Supreme Court in *143471* (*Information Commissioner* at para 22).

[86] In this instance, and contrary to the position the Respondents have advanced, the Applicants do not merely assert a breach of section 8 of the *Charter*. There is more. The undisputed evidence on the record establishes that the alleged violation arises in the context of the non-consensual seizure of bodily fluids. This evidence is neither hypothetical nor speculative.

[87] The relevance of the intrusive nature of the search, where established in the evidence, reconciles the two lines of jurisprudence the parties rely upon. While the Respondents have argued the mere assertion of a section 8 breach will not establish irreparable harm, the Applicants rely on arbitral jurisprudence to argue that non-consensual seizures of bodily fluids or breath samples, in the absence of cause, may result in irreparable harm (see *Suncor 2012 #1-3*, *Suncor 2017*, *Cougar Helicopters*, *Tek Coal*).

[88] The Respondents argue that the arbitral jurisprudence is of limited relevance in this case. They submit that line of jurisprudence addresses the unique context of labour law and management rights. The Labour/management context engages different considerations than those that arise where the actions of a federal regulator operating within the authority provided it by Parliament are being judicially reviewed. Relying on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, they note that judicial review is not concerned with the limits of a collective agreement and management's ability to unilaterally impose rules or policies. Instead, judicial review inquires into the reasonableness of a decision from a starting point of judicial restraint and demonstrated respect for the distinct roles of decision makers and Parliamentary intent.

[89] I am unpersuaded by these submissions. Irreparable harm focuses on the harm that might be suffered by the applicant. The only issue to be decided at the irreparable harm stage of the analysis is whether the refusal to grant the relief sought could so adversely affect the applicant's interests that the harm could not be remedied if the applicant were ultimately successful in the underlying proceeding. The focus is on the individual applicant (*RJR-MacDonald* at paras 62 and 63).

[90] The source of the harm the applicant seeks to avoid (whether it flows from an employer decision or a regulator decision) and the legal framework within which an impugned decision or action will be reviewed is of little consequence within this branch of the tripartite test. In reaching this conclusion, I recognize that the decision maker may well be a relevant consideration when addressing the serious issue and the balance of convenience branches of the test.

[91] For the same reasons, I reject the Respondents' argument that Arbitrator Gedalof's analysis is inapplicable here.

[92] I therefore reject the Respondents' arguments that the Applicants must fail on this branch of the test on the basis that they rely only upon a mere assertion of a breach.

[93] In the arbitration context, random drug testing regimes have not been upheld, the exception being in circumstances where there has been a demonstrated general problem with

alcohol use in a dangerous workplace (*Irving Pulp* at paras 37 and 38). This appears to be consistent with the injunction jurisprudence the Applicants rely on.

[94] In the *Suncor* line of cases, for example, injunctive relief was sought after the employer adopted a random drug and alcohol testing program. The employer operated a mining site where heavy equipment was in use and there had been fatalities involving individuals under the influence of alcohol or drugs. Despite these circumstances, the Court found the non-consensual seizure of bodily fluid may cause irreparable harm and also concluded the balance of convenience favoured the applicants (*Suncor 2012 #1* at para 38). The Alberta Court of Appeal dismissed an application for a stay of the injunction order as well as the employer's appeal of the injunction (*Suncor 2012 #2*; *Suncor 2012 #3*). Further litigation followed years later with the granting of a new injunction that was also upheld on appeal (*Suncor 2017*; *Suncor 2018*).

[95] The *Suncor* cases reflect the stringent approach that courts have adopted where highly intrusive searches involving bodily integrity are in issue. This approach is also evidenced in the following comments of Justice Abella in *Irving Pulp*:

> [49] On the other side of the balance was the employee right to privacy. The board accepted that breathalyzer testing "effects a significant inroad" on privacy, involving
>
> > "coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples. . . . Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy."
>
> [50] That conclusion is unassailable. Early in the life of the Canadian Charter of Rights and Freedoms, this Court recognized that "the use of a person's body without his consent to obtain

> information about him, invades an area of personal privacy essential to the maintenance of his human dignity" (*R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often re-affirmed, it is subject to stringent standards and safeguards to meet constitutional requirements" (para. 23).

[96] The jurisprudence also recognizes that each time an individual is required to submit a bodily fluid sample they will suffer some form of harm to their privacy interests that cannot be compensated (*Fieldhouse* at para 67). This is relevant in the context of the already commenced pre-placement testing.

[97] The Respondents rely heavily on the *TTC* decision. In *TTC*, the Court refused to grant an injunction pending resolution of outstanding grievance proceedings arising from the adoption of a random drug and alcohol testing policy. I note this case arises in an arbitral context, however it is of value in considering irreparable harm for the reasons I have set out above.

[98] The surrounding workplace circumstances in *TTC* differ significantly from those before me. There was a large, dispersed workforce operating with minimal direct supervision in a workplace where there was a demonstrated issue of substance abuse. I acknowledge that public safety was a concern before the Court in *TTC*, as it is here. The drug testing procedures and processes that were to be adopted in *TTC* were similar to those that have been adopted under the RegDoc. These are procedures that the Respondents describe in their submissions as the "gold standard" of testing methodology.

[99] In finding no irreparable harm, the Court engaged in a detailed consideration of the circumstances to determine if the applicants had a reasonable expectation of privacy, noting that the right to be secure against search and seizure is limited to unreasonable searches where a reasonable expectation of privacy exists (*Hunter v Southam Inc*, [1984] 2 SCR 145 at para 25).

[100] I have been invited by the Respondents to adopt a similar approach in this instance. While not convinced that the analysis of irreparable harm requires a comprehensive consideration of all surrounding circumstances and certainly does not require a motions judge to determine if the search is reasonable under section 8 of the *Charter*, I have nonetheless taken into account the surrounding circumstances.

[101] The circumstances I have considered include the nature of the workplace, the size of the targeted population, the importance of safety given the nature of the work undertaken by safety-critical workers employed in both the facility operation and facility security roles, the potential severe consequences of error, the other fitness for duty processes and procedures in place, the fact that pre-placement testing has commenced and the testing procedures and processes themselves. In considering the testing procedures and processes, I have specifically taken note of the collection process, the safeguards adopted to minimize the negative impacts of a false positive and the prescribed cut-off concentrations upon which a positive result is based.

[102] I reject the Respondents' argument that the highly regulated context in which safety-critical workers are employed lowers their expectation of privacy and renders any harm arising from the implementation of pre-placement and random testing minimal. In doing so, I recognize

that an individual's expectation of privacy is context dependent (*R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at para 30). However, I am not convinced that, having accepted intrusive searches for one purpose, an individual can be found to have a diminished expectation of privacy where an authority chooses to engage in a similar but different type of intrusive search that is undertaken for a different purpose. The Respondents cite no authority for this proposition.

[103] I do note that in *TTC* the judge concluded pre-employment testing would have created a reasonable expectation within the target population that testing would occur for the duration of their employment. It is clear the judge found that the prior testing was undertaken for the same, or at least a similar, purpose. Those facts do not arise here and I need not express a view on this issue.

[104] The Respondents submit that if this Motion were refused and the Applicants were to subsequently succeed in the underlying Application, any harm that may arise could be fully remedied retroactively. I disagree and adopt the comments of Arbitrator Gedalof on this issue:

> 117. On the facts before me, I find that the harm that would be suffered by the Unions' members in the event they are compelled to participate in a mandatory testing regime that is ultimately found to be impermissible could not be fully compensated by a post facto damages award. In particular, unlike the circumstances in TTC, the Employers currently have no functioning drug testing program that has already been applied to employees, and that has already revealed an existing problem. Indeed, the Employers have publicly stated in the CNSC consultations giving rise to the Policy that no such problem exists and that additional measures are unnecessary. In TTC the Court considered in detail how existing circumstances at the TTC operated to set employee's reasonable expectations with respect to personal privacy. None of those considerations apply in the instant case. (*Power Workers' Union* at para 117)

[105] I do agree with the Respondents' submissions as they relate to the nature and quality of the Applicants' affidavit evidence on harm. The harms identified are speculative and that evidence falls well short of establishing irreparable harm.

[106] The jurisprudence the Applicants relies on demonstrates that the privacy interests engaged where an intrusive search invades an individual's bodily integrity are at the high end of the spectrum. These activities are subject to stringent standards and safeguards and engage significant interests. Having rejected the Respondents' argument that the arbitral jurisprudence is of no assistance and having concluded 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, I am satisfied that the Applicants have established irreparable harm.

[107] The circumstances of the workplace, having been reviewed and considered, do not lead me to a different conclusion. After having assessed the jurisprudence, the surrounding circumstances, the submissions of the parties and the evidence on the record I find the Applicants have met their burden.

[108] Irreparable harm has been established in respect of both the pre-placement and random drug and alcohol testing provided for in the RegDoc.

C. *Balance of Convenience*

(a) *Balance of Convenience Standard*

[109] Finally, a court must determine which party will suffer the greater harm from the granting or refusal of an interlocutory injunction (*RJR-MacDonald* at para 67).

[110] The balance of convenience, or, as it is often referred to, the "balance of inconvenience" requires the consideration of numerous factors. These factors will vary with the circumstances of each case (*RJR-MacDonald* at para 68).

[111] The public interest is assessed at this stage and its consideration is of particular importance in constitutional cases where the validity of legislation or the authority of a publicly mandated authority is called into question. In these instances, the public interest in the authority carrying out its mandate is to be given the "weight it should carry" (*RJR – MacDonald* at para 69; *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 [*Harper*]). However, the government does not have a monopoly on the public interest, as was recognized in *RJR-MacDonald* at paragraph 71:

> [71] It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

[112] The onus on a public authority to demonstrate irreparable harm to the public interest is less than that of a private applicant. Irreparable harm to the public interest will normally be satisfied upon establishing that the authority is charged with the responsibility of protecting the

public interest and the activity in issue was undertaken pursuant to that responsibility. In these situations, the public interest is to be presumed (*RJR-MacDonald* at para 76; *Harper* at para 9).

[113] Where a private party alleges a public interest is at risk, that harm must be demonstrated and the court must be convinced of the public interest benefit that will flow from granting the relief sought (*RJR-MacDonald* at para 73).

[114] The current *status quo* may also be a pertinent element for a court to consider where everything else is equal. However, this approach has no merit in the face of alleged violations of fundamental rights (*RJR-MacDonald* at para 80).

[115] With these principles in mind, I now turn to the arguments of the parties.

(b) *The balance favours the Applicants*

[116] The Applicants and the Respondents assert the view that their respective positions represent the *status quo* and that the balance of convenience branch of the test should be determined on the basis of maintaining the *status quo*. I reject these submissions for two reasons.

[117] First, the consideration of the public interest must begin with an acknowledgement that the RegDoc advances the public interest. Suspension of its application, even for the limited time the Applicants argue is required to have their issues adjudicated on their merits, must be presumed to result in irreparable harm to the public interest. While this presumption of harm is to

be accorded significant weight, it is not determinative of the balance of convenience. Rather, it marks the point of departure for the consideration and balancing of competing interests.

[118] Second, reliance on the *status quo* to determine the balance of convenience has no merit where alleged violations of fundamental rights are involved, as is the case here (*RJR-MacDonald* at para 80).

[119] It is not disputed that the CNSC is charged with the responsibility of protecting the public interest, particularly public safety, and that the RegDoc was issued pursuant to that responsibility. The public good has been established, as has the presumption that irreparable harm will result if the implementation of the RegDoc is suspended (*RJR-MacDonald* at para 76; *Harper* at para 9).

[120] The Respondents submit there are no interests to weigh on the Applicants' side of the equation. I respectfully disagree. The Applicants argue and I agree that the protection of privacy rights also engages an important and competing public interest (*Sherman Estates v Donovan*, 2021 SCC 25 at para 75 [*Sherman*]). *Sherman* grappled with the competing interests between the protection of personal information and the open court principle. In that context, the Court held that the public interest would only be seriously at risk where information striking at the core identity of an individual, the revelation of which could be an affront to dignity, would be disseminated in the service of open proceedings (*Sherman* at para 34).

[121] This is a high bar. However, I am of the view that the non-consensual collection of bodily fluids as a result of the implementation of the RegDoc is a consequence which unassailably goes to the heart of the right to privacy and meets that bar (*Irving Pulp* at paras 49 and 50).

[122] I am satisfied that the Applicants have demonstrated a harm from which a public benefit may flow if the relief sought is granted.

[123] In weighing and balancing these competing public interests, I give significant weight to the presumed irreparable harm the granting of the relief sought will cause. The Respondents submit, and I do not disagree, that judicial intervention in respect of the CNSC decision to implement the RegDoc and the timing of that implementation would displace CNSC decision making in respect of the very matters Parliament has entrusted to it. They submit that in the course of developing the RegDoc, the CNSC considered its responsibilities to proactively address safety and security in Class 1 nuclear facilities and took into account numerous factors, including the views of the Applicants.

[124] However, the countervailing public interest in protecting against highly intrusive searches that are alleged to be unlawful and contrary to individual *Charte*r and privacy rights is also deserving of significant weight.

[125] I have therefore considered the broader circumstances as reflected in the evidence and the submissions of the parties. The Respondents point to compliance with international recommendations and expectations, the fact that pre-placement testing is in force, the small

number of employees who are impacted and the likelihood of success in the underlying Application.

[126] In response to these factors, the Applicants point out that the implementation of the RegDoc will only partly bring the Canadian nuclear industry in line with the recommendation and expectations of the International Atomic Energy Agency because this Agency recommends random testing for any workers who enter protected areas. The Applicants also submit and I note that granting the relief sought will not suspend the full operation of the RegDoc. This reality partially addresses the Respondents' argument that, in the development of the RegDoc, the CNSC identified prior fitness for duty programs to be insufficient in managing the risk of impairment and that further measures were required.

[127] I have also considered:

A. the evidence that there is no issue with workplace impairment;

B. the acknowledgment of a shared commitment and awareness of all parties as to the importance of safety in the workplace;

C. the comprehensive supervision and oversight of safety-critical workers in effect; and

D. the availability of the expanded fitness for duty policy that allows for drug and alcohol testing where a justification exists, including testing for cause.

[128] I have also considered but given little weight to the delay in implementing the RegDoc in response to the Employers' request to CNSC for delay. Similarly, I have noted but given little weight to the views expressed by at least two of the Employers in 2016 in respect of the contribution the impugned testing would make to nuclear safety and security.

[129] It is significant that the granting of the relief sought will not suspend the implementation of the RegDoc in full and that an alcohol and drug testing program will remain in effect to address circumstances where there is a justification to require an employee submit to the testing. The jurisprudence recognizes that some relief may be provided while limiting the impact on the public interest of doing so (*RJR-MacDonald* at para 79).

[130] This factor, coupled with the evidence of a robust fitness for duty program and the absence of actual workplace impairment issues, tips the balance in favour of the Applicants.

[131] Weighing all of the above noted factors and applying the principles set out above, I am satisfied that the public interest and, in turn, the balance of convenience weigh in the Applicants' favour. I also note that the case management judge has established a timeline for the completion of all steps prior to the setting of a hearing date for the underlying Application, those steps to be completed on or before June 24, 2022.

[132] The Applicants have satisfied the third branch of the tripartite test.

VII. Conclusion

[133] Having found that the Applicants have established each of the three branches of the conjunctive test, and being of the view that granting of the relief sought is just and equitable in all of the circumstances, the Motion is granted.

[134] The Applicants shall have their costs.

ORDER IN T-1222-21

THIS COURT ORDERS that:

1. The implementation of paragraphs 5.1 (pre-placement testing) and 5.5 (random testing) of REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 [RegDoc] is stayed pending final disposition of the Application for Judicial Review;

2. The Canadian Nuclear Safety Commission is restrained from requiring Ontario Power Generation, Bruce Power, New Brunswick Power Corporation and Canadian Nuclear Laboratories to implement or continue the workplace alcohol and drug testing provided for at paragraphs 5.1 (pre-placement testing) and 5.5 (random testing) of the impugned provisions of the RegDoc as any condition of their licenses pending final disposition of the Application for Judicial Review;

3. Ontario Power Generation, Bruce Power, New Brunswick Power Corporation and Canadian Nuclear Laboratories are restrained from implementing or continuing the workplace alcohol and drug testing provided for at paragraphs 5.1 (pre-placement testing) and 5.5 (random testing) of the RegDoc; and

4. The Applicants shall have their costs.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1222-21
STYLE OF CAUSE:	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 STEWARD AND THOMAS SHIELDS v ATTORNEY GENERAL OF CANADA, ONTARIO POWER GENERATION, BRUCE POWER, NEW BRUNSWICK POWER CORPORATION AND CANADIAN NUCLEAR LABRATORIES
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 18 AND 19 2022
ORDER AND REASONS:	GLEESON J.
DATED:	JANUARY 21, 2022

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