

Federal Court



Cour fédérale

Date: 20241217

Docket: T-1510-23

Citation: 2024 FC 2046

Ottawa, Ontario, December 17, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

**JENNIFER CARLING,
KATHLEEN PANTON AND LISA SPECK**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] On this Application, Jennifer Carling, Kathleen Panton, and Lisa Speck seek review of a decision of the Canadian Nuclear Safety Commission (CNSC) refusing their request for testing and removal of the source of radon gas at their residential properties in Elliott Lake, Ontario. The Applicants' own testing confirmed the presence of unsafe levels of radon gas in their homes.

[2] CNSC refused to act on this request on the grounds that the radon gas was from “naturally occurring nuclear substances” and was therefore beyond its regulatory authority under the *Nuclear Safety and Control Act*, SC 1997, c 9 [Act] and the *General Nuclear Safety and Control Regulation*, SOR 2000-202 [General Regulations].

[3] Radon is a radioactive gas resulting from the breakdown of uranium in soil and rock. Testing done in the 1970s recorded high radon levels in homes in the Elliot Lake area, noting it could be from natural radon emanating from bedrock or from mine waste rock. Waste rock is rock that is removed in the process of mining. Here, the waste rock from the local uranium mine was used as backfill during construction on the Applicants’ properties. The Applicants argue that the waste rock at their properties is the cause of the radon gas.

[4] The core issue on this Application is whether the waste rock, used as backfill at the Applicants’ properties, falls within the regulatory authority of CNSC. CNSC regulates nuclear substances that have been associated with the development, production or use of nuclear energy.

[5] For the reasons outlined below, while I am sympathetic to the Applicants’ circumstances, I have concluded that the decision of CNSC—which is subject to judicial review—is nonetheless reasonable as there is no evidence that the waste rock was part of the nuclear energy cycle so as to bring it within the regulatory authority of CNSC.

I. Background

[6] Uranium mines were operated near Elliot Lake by Rio Algom Limited (Rio) and later by BHP Billiton. Although mining has ceased and the mines are decommissioned, the mine properties remain under CNSC jurisdiction.

[7] It is not disputed that waste rock from the mine was used in the construction of homes in the area around the mine. It is also not disputed that the Applicants' properties were backfilled with this waste rock and that radon gas is "naturally occurring" in this waste rock.

[8] The homes of Kathleen Panton and Jennifer Carling were originally located near the Rio uranium mine site and were moved to Elliot Lake, Ontario. Waste rock from the mine was used as backfill on their properties during the relocation. Ms. Panton and Ms. Carling say they were not informed about the waste rock or its associated health risks.

[9] In 2019, Lisa Speck purchased a house in Elliot Lake, Ontario. In 1998, before she owned the property, Atomic Energy of Canada Limited (AECL) hired Senes Consultants Limited (Senes) who determined that her property was backfilled with mine waste rock and recommended its removal.

[10] In 2002, CNSC was established as the regulatory agency pursuant to section 8 of the *Act*. Section 9 of the *Act* lists the objects of CNSC, which include:

- regulating the development, production and use of nuclear energy;

- the production, possession and use of nuclear substances, prescribed equipment;, and
- prescribed information to prevent unreasonable risk to the environment and to the health and safety of persons.

[11] The Applicants retained three experts to measure the indoor radon, gamma radiation, and exposure to radiation at their properties.

[12] First, the testing done by Algoma Radon Testing found the indoor radon readings at their properties to be above the Health Canada Guideline of 200 Bq/m³, as follows:

- Ms. Panton's home was 724.3 Bq/m³;
- Ms. Carling's home was 858.7 Bq/m³; and
- Ms. Speck's home was 468 Bq/m³.

[13] Second, Kenneth Bisson conducted a gamma radiation assessment of their properties and found that they were elevated.

[14] Third, Dr. M.V. Ramana calculated the annual and cumulative dose of radiation for persons living in their properties, and found that they were all being exposed to more than the 1 mSv per year limit as follows:

- Ms. Panton's home at 12.7 mSv per year;
- Ms. Carling's home at 15.1 mSv per year, and
- Ms. Speck's home at 8.2 mSv per year.

[15] On January 21, 2021, the Canadian Environmental Law Association (CELA) on behalf of the Applicant, Ms. Speck, wrote to CNSC requesting that they remove the waste rock from her property. CNSC responded that the Low-Level Radioactive Waste Management Office (LLRWMO) at AECL had previously undertaken remediation efforts at this property to reduce the radon. CNSC recommended that Ms. Speck contact Health Canada's radon program for further assistance.

[16] On June 13, 2023, the Applicants requested that CNSC order:

- 1- An inspection, including further testing and soil samples, at the properties by a CNSC inspector pursuant to sections 30 and 32 of the NSCA [*Act*]; and
- 2- An order pursuant to section 35 of the NSCA [*Act*] against the licensee BHP to remove the uranium mine waste from the properties and place the mine waste at a CNSC-licensed waste facility.

II. Decision under review

[17] On June 20, 2023, CNSC responded to this request [Decision] stating that the mine waste rock at the Applicants' properties in Elliot Lake, Ontario consisted of "naturally occurring nuclear substances". CNSC noted that under section 10 of the *General Regulations*, such substances are exempt from the *Act*, unless they are or have been associated with the development, production, or use of nuclear energy or for the transport, import and export of such materials. The Decision states:

...The CNSC assesses that the materials in question were never chemically processed; they were simply broken up and moved a short distance from their place of origin. This waste rock is

naturally radioactive at levels consistent with the region; it was not subjected to any of the processes of the nuclear fuel cycle.

[18] In its Decision, CNSC notes that the homeowners signed contracts with AECL agreeing to be responsible for radon mitigation measures and noting that the Federal-Provincial Task Force on Radioactivity (FPTFR) deemed these contractual obligations to be sufficient. In the 1970s, the FPTFR reported that the high radon levels in many houses could have been from natural radon emanating from bedrock or from the use of waste rock for construction purposes. CNSC says that, in both cases, “all the rock is naturally radioactive and would not be considered radioactive waste by the CNSC.”

III. Relevant legislative provisions

[19] The relevant provisions of the *Act* and the *General Regulations* are attached as an Appendix to these reasons.

IV. Evidence

[20] The Applicants rely upon the following evidence in support of their Application:

Affidavit of Jennifer Carolyn Carling, affirmed June 10, 2022

Affidavit of Kathleen Susan Panton, affirmed June 10, 2022

Affidavit of Lisa Lynne Speck, affirmed June 8, 2022

Affidavit of Marguerite Wamsley, affirmed June 10, 2022

Affidavit of Pamela Margaret Wamsley, affirmed June 10, 2022

Affidavit of Zoé Christine St Pierre, affirmed on September 13, 2023 with attached exhibits:

Expert Report: K.C. Bisson, *Gamma Radiation Assessment at Four Residential Properties in Elliot Lake, Ontario* (November 17 2022)

Expert Report: Dr. M.V. Ramana, *Radon Concentrations and Dose Conversion Report* (November 30 2022)

Expert Report: L. Lance, *Radon and Gamma Radiation Levels in Client Homes in Elliot Lake* (December 20, 2022)

Affidavit of Kesi Disha, affirmed on October 27, 2023.

[21] The Respondent relies upon the Affidavit of Patrick Burton, affirmed on November 24, 2023. Mr. Burton is the Director of the Uranium Mines and Mills Division for CNSC. Mr. Burton confirms that CNSC regulates the Elliot Lakes decommissioned uranium mine and waste sites where uranium waste rock is stored.

V. Issues and standard of review

[22] The following are the issues for determination:

- A. Is CNSC's June 20, 2023 letter subject to judicial review?
- B. Is CNSC Decision reasonable?
 - 1) Did CNSC err in relying on the AECL contracts?
 - 2) Did CNSC fail to consider relevant evidence?
 - 3) Did CNSC err in their interpretation of section 10 of the *General Regulations*?

[23] The parties agree that the appropriate standard of review of the CNSC Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*), 2019 SCC 65 at para 98 [*Vavilov*]).

VI. Analysis

A. *Is CNSC's June 20, 2023 letter subject to judicial review?*

[24] The Respondent argues that the CNSC Decision to refuse the Applicants' request is not subject to judicial review as the Applicants have no statutory right to have their complaint investigated and CNSC has no statutory duty to act. They rely upon *Democracy Watch v Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15 at para 11 [*Democracy Watch*] to argue that there is no statutory provision that "allows a member of the public to request that the Commissioner begin an examination". CNSC notes that there are no statutory provisions that give the Applicants the right, as members of the public, to file complaints, request inspections, or demand orders.

[25] Subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 provides that "[a]n application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought". In *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at para 24 [*Air Canada*], the Court notes this includes not just a decision or order but "any matter in respect of which a remedy may be available under section 18 of the Federal Courts Act...". In *Air Canada*, the Court notes there are situations where an administrative body's conduct does not trigger rights to bring a judicial review, such as

where it “fails to affect legal rights, impose legal obligations, or cause prejudicial effects...” (*Air Canada* at paras 28-29).

[26] The Applicants argue that they satisfy the *Air Canada* requirements because the Decision of CNSC does affect their legal rights and obligations, and there are prejudicial effects. They argue that CNSC’s interpretation of section 10 of the *General Regulations* has effectively absolved CNSC of any responsibility and has, in turn, imposed legal obligations on the Applicants to address the uranium waste rock. They argue that the health risks associated with exposure to the uranium mine waste rock causes them serious prejudice.

[27] The *Act* and the *General Regulations* do confer discretion on CNSC. A grant of discretion—however broad—does not mean that a decision made within that discretionary authority is not subject to judicial review. The question is ‘if the decision affects legal rights, imposes legal obligations, or causes prejudice’. The issue of the exercise of discretion is more properly considered in the analysis of the reasonableness of the Decision.

[28] Additionally, unlike in *Democracy Watch*, CNSC has not demonstrated there is another route for the Applicants to seek relief under the *Act*. Finally, considering one of CNSC’s statutory objectives is to “prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,” I agree with the Applicants that the CNSC Decision falls within the ambit of affecting “legal rights, imposes legal obligations, or causes prejudice.”

[29] In the circumstances, I am satisfied that the CNSC Decision of June 20, 2023 is subject to judicial review.

B. *Is the CNSC Decision reasonable?*

(1) Did CNSC err in relying on the AECL contracts?

[30] The Applicants argue that it was an error for CNSC to claim that the Applicants had entered contracts with AECL to address radon remediation.

[31] In the Decision, CNSC refers to work done in the 1970s by a Federal Provincial Task Force on Radioactivity and that measures were taken to protect human health, and it states:

...Via signed contracts with Atomic Energy Canada Limited, homeowners agreed to be responsible for the long-term care and maintenance of these radon mitigation measures.

[32] The Applicants confirm they do not have any such contracts with AECL. While they acknowledge there was a contract with the previous owner of 187 South Bay Road and AECL, there are no ongoing contracts between any of the Applicants and AECL. This was confirmed by Mr. Burton in cross examination, where he admitted that he was not aware of signed contracts between AECL and the Applicants.

[33] I agree that this statement in the Decision is an error. This raises the question of whether this error is sufficient to render the entire Decision unreasonable. Put another way, is the error “sufficiently central and significant” to the Decision as a whole (*Vavilov* at para 100).

[34] In considering the Decision as a whole, CNSC refers to AECL contracts in discussing the historical context and past remediation efforts undertaken by provincial and federal governments. I do not read the reference to “contracts with AECL” as a factor supporting CNSC’s finding that it lacks regulatory jurisdiction over the Applicants’ properties under the *Act* and the *General Regulations*. As such, the reference to the AECL contracts was to provide historical context, and not to bolster the Decision. In that context, I do not regard this error as sufficiently central and significant so as to render the entire Decision unreasonable.

(2) Did CNSC fail to consider relevant evidence?

[35] The Applicants argue that CNSC failed to consider their expert reports, namely: the Report of K.C. Bisson, the Report of Dr. M.V. Ramana, and the Report of L. Lance. Instead, the Applicants say CNSC only referred to and relied upon older investigations and work completed in the 1970s as part of the Federal Provincial Territorial Task Force on Radioactivity in Elliot Lake, Ontario.

[36] The Applicants’ expert reports confirm the presence of unsafe levels of radon at the Applicants’ properties, and I do not understand CNSC to dispute this evidence. Similarly, I do not understand CNSC to disagree that waste rock is present on the Applicants’ properties. However, to come within the regulatory ambit of CNSC, the waste rock at the Applicants’ properties must meet the requirement of being “associated with the development, production or use of nuclear energy”. In this case, there is no evidence in the expert reports that the waste rock at the Applicants’ properties had been chemically processed as part of a nuclear fuel cycle.

[37] While it is a well-settled principle that administrative decision-makers are presumed to have weighed and considered all the evidence before them unless proven otherwise (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36). In this case, the absence of a reference to the Applicants’ expert reports by CNSC is not an indication that they were ignored or that CNSC disagrees with their findings particularly since the reports do not suggest that the waste rock was used in conjunction with nuclear energy.

[38] In the circumstances, the failure by CNSC to reference the Applicants expert reports does not render the Decision unreasonable.

(3) Did CNSC err in their interpretation of section 10 of the *General Regulations*?

[39] The Applicants argue that CNSC’s interpretation of section 10 of the *General Regulations* is inconsistent with the goals of the *Act* which include: protecting the public and environment from risks associated with uranium mining operations (paras 9(a)(i) and 44(1)(f)); and to limit, to a reasonable level, health and safety risks to persons and the environment that are “associated with production and use of nuclear energy”.

[40] In the Decision, CNSC relies upon the Exemption at section 10 of the *General Regulations* which states:

Exemption of Naturally Occurring Nuclear Substances	Exemption des substances nucléaires naturelles
10 Naturally occurring nuclear substances, other than those that are or have been	10 Les substances nucléaires naturelles, autres que celles qui ont été ou sont associées

associated with the development, production or use of nuclear energy, are exempt from the application of all provisions of the Act and the regulations made under the Act except the following:

(a) the provisions that govern the transport of nuclear substances;

(b) in the case of a nuclear substance listed in the schedule to the Nuclear Non-proliferation Import and Export Control Regulations, the provisions that govern the import and export of nuclear substances.

au développement, à la production ou à l'utilisation de l'énergie nucléaire, sont exemptées de l'application de la Loi et de ses règlements à l'exception :

a) des dispositions régissant le transport des substances nucléaires;

b) des dispositions régissant l'importation et l'exportation des substances nucléaires, dans le cas des substances nucléaires qui figurent à l'annexe du Règlement sur le contrôle de l'importation et de l'exportation aux fins de la non-prolifération nucléaire

[41] The *Act* does not define “naturally occurring nuclear substances”, but it does define “nuclear energy” at section 2 as “any form of energy released in the course of nuclear fission or nuclear fusion or of any other nuclear transmutation.” CNSC takes the position that because the waste rock at the Applicants’ properties has not undergone nuclear fission or nuclear fusion, it does not fall within the definition of substances associated with the “production or use of nuclear energy,” and is, therefore, outside its regulatory authority.

[42] There is no evidence that the waste rock at the Applicants’ properties had been associated with the development, production or use of nuclear energy. Also, the evidence is that there is naturally occurring sources of radon in Elliott Lake, as noted in the Burton Affidavit as follows:

38. As described above, uranium is present in all ground rock across the globe. It can contribute to natural background radiation. Further, there are areas and materials that contain a higher concentration of uranium than [sic] others and, as a result, emit a higher level of radon gas. Elliot Lake is one of these regions with high background radiation arising from natural uranium deposits in the ground.

[43] These facts fit squarely within the wording of the section 10 Exemption of the *General Regulations*.

[44] I find that CNSC's interpretation of section 10 of the *General Regulations* is reasonable and is consistent with the plain meaning of the text being whether the "naturally occurring nuclear substance" is associated with development, production, or use of nuclear energy as defined at section 2 of the *Act*. I, therefore, conclude that CNSC's application of the exemption provision is consistent with the language and the intention of the legislation, and is, therefore, reasonable (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 para 69).

VII. Conclusion

[45] In conclusion, although CNSC erred in the Decision by referring to non-existent AECL contracts, that error was not sufficiently central and significant as to render the entire Decision unreasonable. Further, CNSC does not dispute the evidence of the presence of radon gas at the Applicants' properties. CNSC's regulatory authority is triggered if the nuclear substance arises from the development, production or use of nuclear energy, which is a defined term at section 2 of the *Act*. In this case, there is no evidence to support such a finding, therefore, I have concluded that CNSC's interpretation of section 10 of the *General Regulations* is consistent with

the language and the intent of the legislation. It was, therefore, reasonable for CNSC to conclude that the relief requested by the Applicants is beyond its regulatory authority.

[46] I am, therefore, dismissing this Application for judicial review.

VIII. Costs

[47] The parties agreed they would not seek costs; therefore, no costs are awarded.

JUDGMENT IN T-1510-23

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is dismissed.
2. No costs are awarded.

"Ann Marie McDonald"

Judge

Appendix – Relevant legislative provisionsA. *Federal Courts Act*, RSC 1985, c F-7, s 18.1(1)

Application for judicial review	Demande de contrôle judiciaire
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

B. *Nuclear Safety and Control Act*, SC 1997, c 9, ss, 2, 9, 30(3), 32, 35

Definitions	Définitions
2 [...]	2 [...]
nuclear energy means any form of energy released in the course of nuclear fission or nuclear fusion or of any other nuclear transmutation. (énergie nucléaire)	énergie nucléaire Toute forme d'énergie provenant de la fission ou de la fusion nucléaires ou de toute autre transmutation nucléaire. (nuclear energy)
...	...
Objects	Mission
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	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

prescribed information in order to	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, possession and use referred to in paragraph (a)	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 pour l'environnement, des activités mentionnées à l'alinéa a).
...	...
Special circumstances	Circonstances spéciales
30 (3) An inspector may, at any time, enter and inspect a vehicle or place in which the inspector believes on reasonable grounds that	30 (3) L'inspecteur peut en tout temps visiter un véhicule ou un lieu, s'il a des motifs raisonnables de croire :
(a) there is contamination by a nuclear substance;	

(b) a nuclear substance is being used, handled, stored or transported in a manner that may cause an unreasonable risk to the environment or to the health or safety of persons; or

(c) a nuclear facility is being operated in a manner or is in a state that may cause an unreasonable risk to the environment or to the health or safety of persons.

...

Powers of inspectors

32 The measures that an inspector may take, in exercising authority under this Act, include

(a) using any equipment or causing any equipment to be used;

(b) taking any measurement;

(c) carrying out any test on a vehicle or in relation to anything in a vehicle or place that the inspector has been designated to inspect;

(d) examining any vehicle or place and making or causing to be made a record of anything in any vehicle or place that the inspector has been designated to inspect and removing anything from such a vehicle or place for a reasonable period for the

a) que le véhicule ou le lieu est contaminé par des substances nucléaires;

b) qu'on y utilise, manipule, stocke — ou que le véhicule transporte — des substances nucléaires d'une manière qui pourrait créer un danger inacceptable pour la santé ou la sécurité des personnes ou pour l'environnement;

c) qu'une installation nucléaire est exploitée d'une manière pouvant créer un tel danger ou se trouve dans un état susceptible de créer un tel danger.

...

Pouvoirs de l'inspecteur

32 Dans l'exercice des attributions que lui confère la présente loi, l'inspecteur peut notamment :

a) utiliser ou faire utiliser le matériel qui se trouve sur place;

b) effectuer des mesures;

c) faire des essais sur un véhicule ou sur tout objet qui se trouve dans le véhicule ou le lieu visité;

d) examiner tout véhicule ou lieu visité et établir ou faire établir un document relatif à tout objet qui s'y trouve, et enlever pour une période que justifient les circonstances ces

purpose of making a record of it;	objets en vue d'établir un document;
(e) opening or requesting the opening of any receptacle;	e) ouvrir ou faire ouvrir tout contenant;
(f) taking and disposing of any sample;	f) prendre des échantillons et en disposer;
(g) examining any records that are required to be kept or reports that are required to be made under this Act, or any books, records, electronic data or other documents that the inspector believes on reasonable grounds relate to such records or reports; or	g) examiner les documents dont la tenue est exigée ou les rapports qui doivent être faits sous le régime de la présente loi, ou les livres, registres, données électroniques ou autres documents qui, à son avis, s'y rapportent;
(h) questioning any person in charge of, found in or having a connection with, any vehicle or place that the inspector has entered, inspected or searched or from which any thing is seized by an inspector.	h) interroger toute personne présente ou liée à son intervention ou toute personne responsable du véhicule ou lieu visité.
...	...
Order of an inspector	Ordres de l'inspecteur
35 (1) An inspector may order that a licensee take any measure that the inspector considers necessary to protect the environment or the health or safety of persons or to maintain national security or compliance with international obligations to which Canada has agreed.	35 (1) L'inspecteur peut ordonner à un titulaire de licence ou de permis de prendre les mesures qu'il estime nécessaires à la préservation de la santé ou de la sécurité des personnes, à la protection de l'environnement, au maintien de la sécurité nationale ou au respect par le Canada de ses obligations internationales.

C. *General Nuclear Safety and Control Regulation, SOR 2000-202, s 10*

Exemption of Naturally Occurring Nuclear Substances	Exemption des substances nucléaires naturelles
<p>10 Naturally occurring nuclear substances, other than those that are or have been associated with the development, production or use of nuclear energy, are exempt from the application of all provisions of the Act and the regulations made under the Act except the following:</p> <p>(a) the provisions that govern the transport of nuclear substances;</p> <p>(b) in the case of a nuclear substance listed in the schedule to the Nuclear Non-proliferation Import and Export Control Regulations, the provisions that govern the import and export of nuclear substances.</p>	<p>10 Les substances nucléaires naturelles, autres que celles qui ont été ou sont associées au développement, à la production ou à l'utilisation de l'énergie nucléaire, sont exemptées de l'application de la Loi et de ses règlements à l'exception :</p> <p>a) des dispositions régissant le transport des substances nucléaires;</p> <p>b) des dispositions régissant l'importation et l'exportation des substances nucléaires, dans le cas des substances nucléaires qui figurent à l'annexe du Règlement sur le contrôle de l'importation et de l'exportation aux fins de la non-prolifération nucléaire.</p>

FEDERAL COURT

SOLICITORS OF RECORD

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