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## CONSTITUTIONAL LAW

### CHARTER OF RIGHTS

*Related Subject: Human Rights*

Judicial review of Canadian Nuclear Safety Commission policy<sup>1</sup> (RegDoc) requiring Class 1 high-security nuclear sites (licensees) to implement random and pre-placement drug and alcohol testing for Safety-Critical Workers — Commission established through *Nuclear Safety and Control Act*, S.C. 1997, c. 9 to regulate nuclear industry in public interest — Safety-Critical positions consisting of (i) workers certified under *Class 1 Nuclear Facilities Regulations*, SOR/2000-204, s. 9(2); (ii) on-site Nuclear Response Force workers, as defined in RegDoc — Applicants seeking order quashing RegDoc, s. 5.1 (pre-placement testing), RegDoc, s. 5.5 (random testing), declaration that these provisions of no force, effect because contrary to *Canadian Charter of Rights and Freedoms*, ss. 7, 8, 15 — In alternative, applicants arguing Commission's decision to adopt RegDoc unreasonable on administrative law grounds — Issues herein whether RegDoc, ss. 5.1, 5.5 violating Charter (ss. 7, 8, 15); whether RegDoc provisions reasonable under administrative law — Flexible approach to section 8 analysis required herein due to highly regulated nature of nuclear power workplace — Section 8 rights of Safety-Critical Workers engaged — Although these workers having diminished expectation of privacy when working at nuclear facilities, residual privacy interests in collection of bodily samples by no means eliminated — While neither Act nor its associated Regulations stipulating collection of bodily samples for drug and alcohol testing, as do certain provisions of *Criminal Code*, R.S.C., 1985, c. C-46, more flexible approach to “authorized by law” requirement must be adopted, as suggested by Supreme Court of Canada, when in regulatory (as opposed to criminal) context — Associated Regulations, *General Nuclear Safety and Control Regulations*, SOR/2000-202, Class 1 Regulations (collectively the Regulations), require licensees to maintain human performance programs that include ongoing attention to reducing likelihood of human performance-caused safety events — These regulatory provisions, Commission's broad powers to impose licensing requirements under Act, s. 24(2) constituting sufficient statutory basis for finding that pre-placement, random testing provisions of RegDoc authorized by law — Record, including reports, produced over course of decade leading up to planned 2021 implementation of RegDoc, showing that pre-placement, random testing provisions reasonably included in RegDoc after years of research identified specific gaps in existing fitness for duty programs, particularly with respect to reliable, consistent, accurate methods to detect drug and/or alcohol impairment among workers at nuclear facilities — In terms of nature of regulatory scheme, highly regulated nature of nuclear facilities is relevant for assessing reasonableness of seizure — That context supporting reasonableness of searches under pre-placement, random testing provisions — In conclusion, pre-placement, random testing provisions of RegDoc engage, but do not infringe, section 8 of the Charter — Safety-Critical Workers have

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<sup>1</sup> REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 (RegDoc)

diminished expectation of privacy due to highly regulated nature of their workplace, testing provisions reasonable when considering all contextual factors at hand, including regulatory context, public interest in nuclear safety, identified need to bolster fitness for duty programs, reliability of the testing methodology, availability of judicial oversight — Turning to Charter, s. 7, necessary to determine (1) whether impugned provisions depriving claimant of life, liberty, or security of person; if so (2) whether deprivation is contrary to principles of fundamental justice — Applicants not demonstrating either prong of security of person interest test — Choice to work in Safety-Critical position at nuclear power plant not one of “basic choices going to the core of what it means to enjoy individual dignity and independence protected by s. 7” — Finally, as to whether pre-placement, random testing provisions of RegDoc infringing Charter, s. 15, necessary for claimants to show (i) that impugned law draws distinction or has disproportionate impact on basis of enumerated or analogous ground; (ii) that law has effect of reinforcing, perpetuating, or exacerbating disadvantage — Applicants’ claim failing at first step — Safety-Critical positions not “protected group” for purposes of s. 15 — Also not appropriate to apply human rights analysis instead of Charter, s. 15 analysis to argue “drug dependency” should be recognized as analogous ground worthy of protection — Since no enumerated or analogous ground identified herein, no need to proceed further in s. 15 analysis — In the alternative, applicants arguing pre-placement, random testing provisions of RegDoc unreasonable because (i) no statutory basis for Commission to adopt two impugned testing provisions; (ii) Commission did not provide adequate reasons to justify inclusion of provisions in RegDoc, particularly when addressing stakeholder concerns about Charter raised during consultation phase — Commission, highly specialized administrative body, empowered by Parliament to ensure nuclear safety — Such expertise commanding high level of deference — As discussed earlier, RegDoc indeed having statutory basis: under the Act, Commission having authority, discretion to choose instrument under which to implement pre-placement and random testing provisions — Commission reasonably chose to use RegDoc as mechanism by which to include pre-placement, random testing provisions as condition of employers’ (i.e. nuclear sites) licences — RegDoc, decade-long process that led to its publication (process in which parties had opportunities to be heard), all properly formed part Commission’s licensing basis — With respect to sufficiency of reasons, documents in certified tribunal record providing rational chain of analysis to justify inclusion of pre-placement and random testing provisions in RegDoc — Record herein, regulatory scheme of RegDoc showing that Commission not only considered stakeholder concerns about Charter rights, but also addressed these concerns by modifying RegDoc after considering stakeholder feedback — Application dismissed.

POWER WORKERS’ UNION V. CANADA (ATTORNEY GENERAL) (T-1222-21, 2023 FC 793, Diner J., reasons for judgment dated June 6, 2023, 76 pp. + 36 pp.)