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LABOUR RELATIONS

Drug and alcohol testing — Motion seeking interim, interlocutory injunction to stay implementation of impugned provisions of Canadian Nuclear Safety Commission (CNSC) Regulatory Document REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 (RegDoc) — That document requiring license holders operating Class 1 high security nuclear sites to implement employee alcohol, drug testing in defined circumstances — Motion also seeking to restrain CNSC from requiring licensees to implement workplace alcohol, drug testing based on impugned provisions of RegDoc as any condition of licenses; restrain licensees from implementing workplace alcohol, drug testing based on impugned provisions of RegDoc — CNSC independent administrative tribunal established under *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (Act) — All persons operating nuclear facility having to do so in accordance with license issued by CNSC — All license applications for Class 1 nuclear facility having to contain proposed human performance program for activity to be licensed, including demonstrating measures ensuring workers' fitness for duty — RegDoc objective to bolster fitness for duty programs, policies already in place at Class 1 high security nuclear facilities — Applicants claiming provisions requiring random, pre-placement drug, alcohol testing for safety-critical employees overly invasive, unnecessary — Employers developed joint policy allowing for operationalization of RegDoc — Grievances referred to arbitration — Arbitrator finding he lacked jurisdiction to award interim relief to applicants — Applying three-part test for granting of interim relief (i.e., serious issue to be tried; irreparable harm if injunction not granted; balance of convenience favouring applicants) — In considering irreparable harm, Arbitrator finding that an individual's privacy interest in their bodily samples, personal information those samples may contain falling at high end of privacy spectrum, that potential harm resulting from testing later found impermissible irreparable — Also finding that balance of convenience lay with granting stay because employers failed to provide evidence demonstrating significant harm resulting from inability to implement testing pending determination on merits of case — Whether applicants establishing each of three branches of tripartite test — Issues raised by applicants neither frivolous nor vexatious — Applicants satisfying first branch of tripartite test — Also establishing irreparable harm on balance of probabilities — While Respondents argued mere allegation of *Canadian Charter of Rights and Freedoms*, s. 8 breach without more not establishing irreparable harm, applicants relied on arbitral case law to argue that non-consensual seizures of bodily fluids or breath samples may result in irreparable harm — Irreparable harm focusing on harm suffered by applicant — Source of harm applicant seeking to avoid (whether flowing from employer decision or regulator decision), legal framework within which impugned decision or action will be reviewed of little consequence within this branch of tripartite test — Applicants not failing on this branch of test on basis that they relied only upon mere assertion of breach — In arbitration context, random drug testing regimes have not been upheld — This appearing to be consistent with injunction case law relied on by applicants — Courts adopting stringent approach where highly intrusive searches involving bodily integrity at issue — Surrounding circumstances (i.e., nature of workplace, size of targeted population, importance of safety, potential severe consequences of error) taken into account here — Highly regulated context in which safety-critical workers employed not

lowering their expectation of privacy, not rendering any harm arising from implementation of pre-placement, random testing minimal — Privacy interests engaged where intrusive search invading individual's bodily integrity at high end of spectrum — Those activities subject to stringent standards, safeguards, engage significant interests — Irreparable harm established in respect of both pre-placement, random drug and alcohol testing provided for in RegDoc — Applicants satisfying third branch of tripartite test — Protection of privacy rights engaging important, competing public interest — Non-consensual collection of bodily fluids resulting from implementation of RegDoc unassailably going to heart of right to privacy — Applicants demonstrating harm from which public benefit may flow if relief sought granted. — Motion granted.

POWER WORKERS UNION V. CANADA (ATTORNEY GENERAL) (T-1222-21, 2022 FC 73, Gleeson J., reasons for order dated January 21, 2022, 45 pp.)