

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241106

Docket: A-184-23

Citation: 2024 FCA 182

**CORAM: DE MONTIGNY C.J.
BOIVIN J.A.
LEBLANC J.A.**

BETWEEN:

**POWER WORKERS' UNION, SOCIETY OF UNITED PROFESSIONALS,
THE CHALK RIVER NUCLEAR SAFETY OFFICERS ASSOCIATION,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL 37, CHRIS DAMANT, PAUL CATAHNO, SCOTT LAMPMAN,
GREG MACLEOD, MATTHEW STEWART and THOMAS SHIELDS**

Appellants

and

**ATTORNEY GENERAL OF CANADA, ONTARIO POWER
GENERATION, BRUCE POWER, NEW BRUNSWICK POWER
CORPORATION and CANADIAN NUCLEAR LABORATORIES**

Respondents

Heard at Ottawa, Ontario, on January 31, 2024.

Judgment delivered at Ottawa, Ontario, on November 6, 2024.

REASONS FOR JUDGMENT BY:

LEBLANC J.A.

CONCURRED IN BY:

**DE MONTIGNY J.C.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] This is an appeal of a decision of Diner J. from the Federal Court (the Application Judge) rendered on June 6, 2023: *Power Workers' Union v. Canada (Attorney General)*, 2023 FC 793 (the Decision). In issue before the Application Judge was the validity of pre-placement and random alcohol and drug testing which were imposed by the Canadian Nuclear Safety Commission (the Commission) as a license condition to persons licensed to operate high security—or Class I—nuclear facilities (the Licensees).

[2] These pre-placement and random alcohol and drug testing requirements (the Impugned requirements) are aimed at workers within these facilities who occupy—or have successfully applied to occupy—what are called “safety-critical positions”. Safety-critical workers are those making decisions or taking actions that have the most direct and immediate impact on nuclear safety and security at Class I facilities. At all relevant times, they represented less than 10% of the facilities’ entire workforce (Decision at para. 16).

[3] The appellants—six affected workers and their unions—claimed before the Application Judge that the Impugned requirements breached their rights under sections 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter) and were not saved by section 1 of the Charter. They claimed, in the alternative, that the Commission’s decision to adopt and implement the Impugned requirements on Licensees was unreasonable on administrative law grounds.

[4] The proceedings, brought by the appellants in the form of an application for judicial review, were directed at the Attorney General of Canada (the Attorney General). They were directed as well at the three main Canadian Licensees (the Licensee Respondents), which all defended, as did the Attorney General, the validity of the Impugned requirements (collectively, the Respondents).

[5] The Application Judge rejected the appellants' claim on all counts. The appellants ask this Court to overturn the Application Judge's decision. Having carefully weighed the arguments of the parties and considered the applicable law, I am of the view that the appeal should be dismissed.

II. Context

[6] The essential elements forming the backdrop to the issues before us can be summarized as follows.

A. *The applicable legislative framework*

[7] Nuclear safety in Canada is governed by the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (the Act) and the regulations adopted thereunder. The Act's purpose is two-fold, as outlined in section 3 of the Act:

- a. To limit the risks to national security, the health and safety of persons and the environment that are associated with the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information; and
- b. To implement in Canada, measures to which Canada has agreed respecting international control of the development, production and use of nuclear energy, including the non-proliferation of nuclear weapons and nuclear explosive devices.

[8] The Commission is established by section 8 of the Act. It has a dual role, being both a regulatory and an adjudicative body. Consistent with the Act's purpose, the Commission is tasked with regulating the development, production and use of nuclear energy and the production, possession and use of nuclear substances and prescribed equipment, in a manner that: (a) prevents "unreasonable risk" to the environment, the health and safety of persons, and national security associated with those activities; and (b) achieves conformity with measures of control and international obligations to which Canada has agreed (subsection 9(a)).

[9] As Canada's sole nuclear regulator, the Commission is empowered to issue licences to persons wishing to carry any of these regulated activities, which are otherwise prohibited. This power entails the authority to issue, renew, suspend, in whole or in part, revoke or replace a licence, or authorize its transfer (sections 24–26). It entails, as well, the power to subject licenses to "any term or condition that the Commission considers necessary for the purposes of [the] Act" (subsection 24(5)).

[10] The Commission is also entrusted with a fairly wide regulation-making authority, albeit subject to Governor in Council's approval (subsection 44(1)). This authority includes the power to make regulations respecting the protection of the environment and the health and safety of persons from any risks associated with licensed activities (paragraph 44(1)(f)), and the qualifications and training of nuclear facility workers (paragraph 44(1)(k)).

[11] The body of regulatory instruments adopted by the Commission is quite substantial and covers a number of subject matters ranging from general nuclear safety (*General Nuclear Safety and Control Regulations*, S.O.R./2000-202), radiation protection (*Radiation Protection Regulations*, S.O.R./2000-203), and packaging and transport of nuclear substances (*Packaging and Transport of Nuclear Substances Regulations*, 2015, S.O.R./2015-145) to the classification of nuclear facilities (*Class I Nuclear Facilities Regulations*, S.O.R./2000-204, and *Class II Nuclear Facilities and Prescribed Equipment Regulations*, S.O.R./2000-205).

[12] In particular, the *General Nuclear Safety and Control Regulations* (the General Regulations) provide a general framework for the issuance, renewal, amendment, abandonment, revocation or replacement of a licence (sections 3–6), and lists grounds upon which the Commission may on its own motion renew, suspend, amend, revoke or replace a licence (section 8). One of the grounds listed in section 8 is a licensee's failure "to comply with the Act, the regulations made under the Act or the licence" (paragraph 8(2)(c)).

[13] The General Regulations also impose a number of obligations on licensees, including that of taking "all reasonable precautions to protect the environment and the health and safety of

persons and to maintain the security of nuclear facilities and of nuclear substances” (paragraph 12(1)(c)). Similarly, the General Regulations impose on workers an obligation to “comply with the measures established by the licensee to protect the environment and the health and safety of persons” (subsection 17(b)).

[14] More specifically, when it comes to Class I nuclear facilities, the *Class I Nuclear Facilities Regulations* (the Class I Regulations) provide that all licence applications for such a facility must contain, in addition to the information required by the General Regulations, “the proposed human performance program for the activity to be licensed, including measures to ensure workers’ fitness for duty” (subsection 3(d.1)).

[15] No one in this case seriously disputes that the nuclear industry in Canada is highly regulated.

B. *The pre-placement and random alcohol and drug testing requirements*

[16] The requirements for pre-placement and random alcohol and drug testing are found in what is called a “regulatory document”. In issue in this case is *Regulatory Document 2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use, Version 3* (the RD2.2.4). It sets out requirements and provides guidance for managing the fitness for duty of those workers in Class I nuclear facilities who occupy—or have successfully applied to occupy—safety-critical positions. RD2.2.4 is part of a series of regulatory documents on the management of human performance. According to the Commission, RD2.2.4 is a “key contributor to the safety and

security of nuclear facilities” (Appeal Book at 4321, Affidavit of Lynda Hunter at para. 34 (Hunter Affidavit)).

[17] In particular, RD2.2.4 requires Licensees to implement five types of drug and alcohol testing: pre-placement testing (section 5.1), reasonable grounds testing (section 5.2), post-incident testing (section 5.3), follow-up and return-to-duty testing (section 5.4) and random testing (section 5.5). RD2.2.4 also provides for a number of drug and alcohol testing processes and results thresholds, and it lays out what comes next for a safety-critical worker who receives a positive drug or alcohol test result (section 6).

[18] It is important to note that the appellants are not challenging the validity of RD2.2.4 as a whole. They only challenge the provisions requiring Licensees to conduct pre-placement (section 5.1) and random testing (section 5.5). These provisions read 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.

5.1 Tests de dépistage d'alcool et de drogues préalables à l'affectation

Les titulaires de permis devront exiger que tous les candidats à un poste essentiel sur le plan de la sûreté (voir la section 4.1, puces 1 et 2) qui ont réussi les étapes précédentes du concours se soumettent à des tests de dépistage d'alcool et de drogues, en tant que condition d'emploi. Les personnes transférées à un poste essentiel sur le plan de la sûreté (voir la section 4.1, puces 1 et 2) seront également tenues de se soumettre à un test de dépistage d'alcool et de drogues préalable à l'affectation.

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

5.5 Tests aléatoires de dépistage d'alcool et de drogues

Les titulaires de permis devront exiger que tous les travailleurs occupant un poste essentiel sur le plan de la sûreté (voir la section 4.1, puces 1 et 2) se soumettent à des tests aléatoires de dépistage d'alcool et de drogues. Le processus d'échantillonnage qu'utilisent les titulaires de permis pour sélectionner ces travailleurs qui devront se soumettre à un test aléatoire de dépistage devra faire en sorte que le nombre de tests aléatoires de dépistage réalisés au moins tous les 12 mois soit égal à au moins 25 % de la population de travailleurs visée.

Les titulaires de permis devront élaborer des procédures et des pratiques permettant de s'assurer que le test aléatoire de dépistage est administré d'une manière qui fournit l'assurance raisonnable que les personnes ne sont pas en mesure de prédire le moment où les échantillons seront prélevés.

La mise en œuvre et l'exécution des tests aléatoires de dépistage devront prendre en compte les éléments suivants :

1. veiller à ce que toutes les personnes de la population soumise aux tests de dépistage aient une probabilité égale d'être sélectionnées et soumises aux tests
2. exiger que les personnes se trouvant à l'extérieur du site au moment de la sélection pour le test de dépistage, ou celles qui se trouvent sur le site, mais

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.

qui, pour de bonnes raisons, ne sont pas disponibles en vue de subir le test de dépistage au moment de leur sélection, soient soumises au test de dépistage dans les plus brefs délais lorsque le donneur et les personnes chargées du prélèvement des échantillons sont tous disponibles pour recueillir les échantillons à analyser et sans préavis à la personne sélectionnée pour le test de dépistage

3. Provide that an individual completing a test is immediately eligible for another unannounced test.

3. prévoir qu'une personne ayant subi un test de dépistage soit à nouveau admissible à un autre test de dépistage non annoncé, et ce de façon immédiate.

[19] Regulatory documents are not regulatory instruments *per se*, as are the regulations adopted pursuant to subsection 44(1) of the Act. According to the Commission's evidence, regulatory documents "explain to licensees and applicants what they must achieve in order to meet the requirements set out in the [Act] and the regulations made under the [Act]". They contain mandatory requirements and provide for guidance as well. They are "typically implemented after a long consultation process and are utilized by the [Commission] frequently to implement standards and requirements across various areas of the nuclear industry." (Hunter Affidavit at paras. 27–30).

[20] Regulatory documents that form part of a license are those referenced in what is called the licensee's "Licensing Basis", which is a document that "sets out the boundaries for a

licensees [sic] regulated nuclear activity and establishes the basis for how the [Commission] assesses the licensee's compliance with its license." (Hunter Affidavit at para. 22).

[21] The "Licensing Basis" and by extension the regulatory documents to which it refers, are tools developed by the Commission to allow it "to regulate the nuclear industry in a manner that is adaptive and flexible to new science, operational experience, and changing international obligations." (Hunter Affidavit at para. 24).

[22] RD2.2.4 forms part of the "Licensing Basis" of the Licensees' licences.

[23] I note that the Impugned requirements are yet to be implemented due to a stay order issued first by the Federal Court and then by this Court, pending final disposition of the present matter (*Power Workers' Union v. Canada (Attorney General)*, 2022 FC 73 and *Power Workers' Union v. Canada (Attorney General)*, 2023 FCA 215) (the Stay Orders).

III. The Decision

[24] After having laid out the context of this case and reviewed the development of RD2.2.4, the Application Judge considered both the constitutionality of the Impugned requirements and their validity from an administrative law standpoint. He applied the standard of correctness to the first issue and engaged in reasonableness review with respect to the second issue.

A. *The Charter claim*

[25] The Application Judge found that the Impugned requirements did not breach sections 7, 8 or 15 of the Charter. This finding was largely informed by the “unique context” of the highly regulated nuclear industry where “safety is the most important priority” given the “devastating and long lasting impacts on the community and the environment” a nuclear incident can have (Decision at para. 56).

[26] On the section 8 claim, because no search has been carried out so far due to the successive Stay Orders, and because he was asked to “strike regulatory provisions that empower Licensees to authorize a seizure”, the Application Judge followed the analytical framework applied by this Court in *Reference re Marine Transportation Security Regulations (CA)*, 2009 FCA 234 (*Marine Reference*), and recently followed in *Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN) v. Canada (Attorney General)*, 2019 FCA 212 (*Correctional Officers*), “as guided by the [Supreme Court of Canada] in [*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 (*Goodwin*)]” (Decision at para. 77). In applying this framework, the Application Judge considered the following questions:

- a) Is section 8 engaged by the Impugned requirements, based on the safety-critical workers’ reasonable expectation of privacy?
- b) If so, are the Impugned requirements “authorized by law”? and
- c) If so, are they reasonable?

[27] On the first question, the Application Judge determined that requiring the Licensees to collect bodily samples (breath, urine or saliva) involved the taking of personal and informational data, and that this amounted to a search or seizure within the construct of section 8 (Decision at para. 82). On the reasonable expectation of privacy requirement, the Application Judge found that although safety-critical workers have a diminished expectation of privacy when working at nuclear facilities, given the highly regulated nature of the nuclear power workplace, their privacy interest in the collection of their bodily samples “[was] by no means eliminated”. Therefore, to the extent that the Impugned requirements permit the Licensees to take these workers’ biographical information without their consent, he concluded that section 8 is engaged (Decision at paras. 97–98).

[28] At the second stage of the analysis, the Application Judge held that the Impugned requirements are “authorized by law”. He was not persuaded by the appellants’ argument that the collection of bodily samples could only be authorized by clear statutory language, not general grants of regulatory power, as is the case here. This is because, he said, this argument “fails to consider the regulatory context in which the seizure is authorized”, a context that requires “a more flexible approach to the ‘authorized by law’ requirement, as suggested by the [Supreme Court of Canada]” (Decision at para. 104).

[29] For the Application Judge, the Commission’s authority to impose the Impugned requirements rests on the General Regulations and Class I Regulations, which both “require Licensees to maintain human performance programs that include ongoing attention to reducing the likelihood of human performance-caused safety events” and on the Commission’s broad

power under subsection 24(2) of the Act to impose licensing requirements “as it sees fit” (Decision at para. 105).

[30] On the third question, the Application Judge was satisfied that the Impugned requirements were reasonable “when considering all the contextual factors at hand, including the regulatory context, the public interest in nuclear safety, the identified need to bolster fitness for duty programs, the reliability of the testing methodology, and the availability of judicial oversight.” (Decision at para. 151). He agreed that in the nuclear industry, “one cannot ‘wait and see’ given the severe consequences that often result from nuclear incidents.” (Decision at paras. 127–28). Being urged by the appellants to rely on arbitral jurisprudence, according to which “an employer’s interest in safety will not justify breaching an employee’s privacy rights without reasonable cause, even in an inherently dangerous workplace”, the Application Judge found that this jurisprudence was not authoritative for the section 8 analysis, and was, in any event, distinguishable on a number of grounds (Decision at paras. 109–12).

[31] The Application Judge then examined the appellants’ section 7 claim. Although he felt that the claim was better captured by section 8, he proceeded to examine it on the merits and concluded that the appellants had failed to meet either prong of section 7’s security of the person test. That test, he said, requires demonstration that the impugned state action: (i) interferes with bodily integrity and autonomy, including deprivation of control over one’s body; or (ii) causes serious state-imposed psychological stress (Decision at paras. 163–64).

[32] The Application Judge found that the threshold for demonstrating a section 7 breach on the basis of employment “is significant and requires more than the non-invasive taking of saliva, urine or breath samples to check for evidence of drugs or alcohol as a measure to protect the broader public.” He stated that section 7 does not protect property or predominantly economic interests, adding that the “adverse effect of not working one’s preferred position at a nuclear plant” is not protected by section 7 (Decision at paras. 164–66).

[33] Finally, the Application Judge rejected the appellants’ section 15 claim on the basis that the first prong of the section 15 test was not met. In particular, he found that the appellants had failed to establish that the Impugned requirements create a distinction or have a disproportionate impact based on an enumerated or analogous ground of discrimination, which is the first prong of the test applicable to a section 15 analysis (Decision at para. 170, citing *R. v. Sharma*, 2022 SCC 39 at para. 28 (*Sharma*)). In this respect, the Application Judge noted that the Impugned requirements only applies to a category of workers at nuclear facilities and opined that these workers do not form a “protected group” for the purposes of section 15. He further noted that the appellants had adduced no evidence to show that the Impugned requirements may result in a situation where safety-critical workers affected by a drug or alcohol dependency are members of a disadvantaged group or may experience a disadvantage (Decision at para. 172).

[34] The Application Judge emphasized that an analogous ground of discrimination under section 15 cannot be found without compelling reasons based on personal characteristics that are either immutable or constructively immutable. He noted in this respect that the Supreme Court of Canada, in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 (*Malmo-Levine*), had rejected

attempts to recognize “occupational status” or “substance orientation” as analogous grounds of discrimination under section 15 (Decision at paras. 173–79).

[35] The Application Judge also indicated that had a full section 15 analysis been conducted, the second prong of the section 15 test, which requires a demonstration that the Impugned requirements have the effect of reinforcing, perpetuating or exacerbating a disadvantage would not have been satisfied (Decision at paras. 170, 180). In this respect, the Application Judge noted a “few deficiencies” in the appellants’ arguments, such as the lack of evidence, statistical or otherwise, supporting the claim that a disproportionate number of safety-critical workers have drug or alcohol dependencies and would be affected by the Impugned requirements. He also found that the appellants had failed to explain how the Impugned requirements would result in an arbitrary disadvantage for safety-critical workers with drug or alcohol dependencies (Decision at paras. 181–82).

[36] Having held that no violation of sections 7, 8 and 15 of the Charter had resulted from the addition of the Impugned requirements to RD2.2.4, the Application Judge declined to address the parties’ section 1 arguments.

B. The alternative administrative law claim

[37] The Application Judge dismissed both of the appellants’ contentions that the Impugned requirements were unreasonable. First, he held that, contrary to the appellants’ submissions, the Act provided the Commission with “the authority and the discretion to choose the instrument

under which to implement pre-placement and random testing provisions”. The decision to opt for a regulatory document, he said, was due to this type of instrument’s “flexibility and adaptability” and was reasonably informed “by changing circumstances such as guidance coming from the [International Atomic Energy Agency] after the nuclear accident in Fukushima [Japan], evolving international practices, the legalization of cannabis in Canada, evolving research on the accuracy and efficacy of drug and alcohol testing, and divergent stakeholders demands.” (Decision at para. 195).

[38] More particularly, the Application Judge was satisfied that the Commission could use the broad powers conferred on it by subsection 24(5) of the Act “to add mandatory requirements to the licence.” (Decision at para. 198). He was also satisfied that the inclusion of the Impugned requirements into RD2.2.4, after a decade-long process of consultation and outreach that led to the publication of that instrument, was done in conformity with the participatory rights of the various stakeholders, including the appellants (Decision at para. 199).

[39] As to the appellants’ contention that the Commission had failed to provide adequate reasons for the inclusion of the Impugned requirements into RD2.2.4, the Application Judge found that the material contained in the Certified Tribunal Record provided a rational chain of analysis to justify that inclusion. According to him, the inclusion of the Impugned requirements stems from “an identified need to bolster fitness for duty programs, particularly with respect to the detection of drug and alcohol impairment.” (Decision at para. 209). He was satisfied as well that the record shows that the Commission not only considered, but also addressed, the Charter

concerns raised during the consultation process leading to the inclusion of the Impugned requirements into RD2.2.4 (Decision at paras. 211–13).

IV. Issues and standard of review

[40] This appeal raises two issues:

- a) Did the Application Judge err in concluding that the Impugned requirements do not violate sections 7, 8 or 15 of the Charter?
- b) In the alternative, did the Application Judge commit a reviewable error in concluding that the Impugned requirements are not unreasonable from an administrative law standpoint?

[41] It is settled law that, when this Court hears an appeal from a decision of the Federal Court on judicial review, its role is to determine whether the Federal Court selected the appropriate standard of review and, if so, whether that standard was applied properly. It is settled law as well that this approach “accords no deference to the reviewing judge’s application of the standard of review”, therefore requiring the appellate court to “perform [] a *de novo* review of the administrative decision” (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10 (*Horrocks*); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–47 (*Agraira*); *Groupe Maison Cadiac Inc. v. Canada (Attorney General)*, 2020 FCA 88 at paras. 27–28; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para.

36 (*Mason*); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para. 15).

[42] As stated in *Mason* at paragraph 36, these principles have remained good law following the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*).

[43] Here, the Application Judge applied the correctness standard to the first question and the presumptive standard of reasonableness to the second.

[44] The Application Judge’s choice of standard of review is not in issue with respect to both questions. As stated in *Vavilov*, “respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions”, such as constitutional questions, including those involving Charter compliance issues (*Vavilov* at paras. 53–55). As for the second issue, I see nothing that displaces the presumption of reasonableness review, reaffirmed in *Vavilov* (*Vavilov* at paras. 23–25).

[45] Therefore, the issue for this Court becomes whether the Application Judge applied these standards properly. With respect to the first issue, the appellants relied on *Guérin v. Canada (Attorney General)*, 2019 FCA 272 at paragraph 23 for the proposition that the Application Judge’s findings “must be examined rigorously and without deference.” For its part, the Attorney General argues that, to the extent the Application Judge “made a determination at first instance” on this issue, the appellate standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33

(*Housen*), apply. The *Housen* standards require that findings on pure questions of law be reviewed on a standard of correctness and that findings of fact or of mixed fact and law, where there is no extricable question of law, be reviewed on a lesser standard, that of palpable and overriding error.

[46] As the Application Judge received—and considered—new evidence on the Charter component of the case, the case law supports the Attorney General’s contention (*Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at para. 59; *Smith v. Canada (Attorney General)*, 2022 FCA 221 at para. 9; *Singh Brar v. Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at para. 49). Most recently, the appellate standard of review was applied by the Supreme Court in *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 (*Canadian Council for Refugees*). This was an immigration matter involving a decision of the Federal Court on judicial review regarding the constitutional validity of legislative provisions preventing certain refugee claimants from seeking refugee protection in Canada. Since the Federal Court had “reviewed the evidence first hand”, the Supreme Court reviewed “the factual questions on appeal” on a standard of palpable and overriding error (*Canadian Council for Refugees* at paras. 5–85, 98).

[47] At the hearing of this appeal, the appellants conceded that the standard of palpable and overriding error applied to the Application Judge’s findings respecting evidence he considered first hand. That said, this is not a case where subjecting the Application Judge’s findings regarding this evidence to the *Housen* standard of palpable and overriding error has a decisive influence on the outcome of the appeal.

[48] Since most of the written and oral submissions in this case relate to the section 8 claim, I will begin my analysis by addressing it.

V. Analysis

A. *The Charter claim*

(1) Section 8

[49] Section 8 provides constitutional protection against “unreasonable search or seizure”.

When it was first considered by the Supreme Court in *Hunter et al. v. Southam Inc.*, [1984] 2

S.C.R. 145 (*Hunter*), that Court identified three core features of that protection:

1. it protects individuals “from unjustified state intrusions upon their privacy”;
2. it only extends however to an individual’s “reasonable expectation of privacy”; and
3. it requires, for the purposes of determining if a state intrusion is justified in a particular situation, an assessment “as to whether the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement”.

(*Hunter* at 159-60).

[50] These core principles have given rise to a two-step analysis. First, it must be determined whether the impugned search or seizure interferes with an individual’s reasonable expectation of

privacy. If it does not, then section 8 is not engaged and the inquiry ends there. On the other hand, if the impugned state action does interfere with an individual's reasonable expectation of privacy, then the question becomes whether said action is reasonable (*Goodwin* at para. 48).

[51] It is now well-settled that this test applies whether the search or seizure is conducted in criminal or other contexts (*Goodwin* at para. 60; see also *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para. 101 (*York Region District*)). That said, both prong of the test call for a contextual analysis "adapted to occupational realities". This means, among other things, that courts must adopt a flexible approach "capable of application in a vast variety of legislation schemes" and guard against "indiscriminately import[ing]" criminal law jurisprudence "into non-criminal matters" (*York Region District* at para. 99; *Goodwin* at para. 53; *Thompson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 506-08 (*Thompson Newspapers*); *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 644-47 (*McKinlay Transport*); *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 35 (*BC Securities*)).

[52] As the Supreme Court stated in *Thompson Newspapers*, at page 506, such an approach, which contemplates the application of a "less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures", is "fully consistent with a purposive approach to the elaboration of s[ection] 8."

[53] Here, the appellants contend that the Application Judge erred in dismissing their section 8 claim:

- i. By concluding that safety-critical workers only have a residual privacy interests in their urine, saliva or breath;
- ii. By misapprehending the legal requirements that the Impugned requirements be “authorized by law”; and
- iii. By failing to perform the appropriate balancing exercise in determining whether the seizure these requirements permit, is reasonable.

(i) Safety-critical workers’ reasonable expectation of privacy

[54] There is no dispute that the taking of bodily samples – be it breath, saliva or urine – amounts to a “seizure” within the meaning of section 8. The Application Judge concluded as such and the Respondents conceded this point.

[55] However, the issue before the Application Judge rather turned on whether such seizure interferes with the safety-critical workers’ reasonable expectation of privacy (Decision at para. 78).

[56] The Application Judge concluded that it did, although to a lesser degree than the one claimed by the appellants. In the end, the Application Judge was satisfied that even if the seizure of bodily samples does not automatically attract a high expectation of privacy, the “taking of

one's biographical information without their consent falls squarely within the purview of section 8" (Decision at para. 98). The appellants take issue with the Application Judge's finding of a diminished expectation of privacy, claiming that it tainted the Application Judge's whole section 8 analysis.

[57] More particularly, the appellants contend that safety-critical workers have more than "residual" privacy interests in their body. They claim that it is incorrect to assume, as did the Application Judge, that the regulatory nature of the Impugned requirements "presumptively 'lower[s]' the reasonableness threshold". This assumption, they contend, overwhelmed the Application Judge's entire section 8 analysis despite bodily samples being rarely the subject matter of a regulatory search or seizure, contrary to the search or seizure of regulated premises and documents, which raises much weaker privacy concerns. This, they say, led the Application Judge to ignore the different concerns that arise when a seizure infringes upon a person's bodily integrity, something which has been described in the case law as "the ultimate affront to human dignity".

[58] The appellants further contend that the Application Judge erred in refusing to follow the Ontario Superior Court's decision in *Simon Gillies et al. v. Toronto District School Board*, 2015 ONSC 1038 (*Gillies*), which, according to them, provides the most useful analogy to the present matter. In that case, the Ontario Superior Court found mandatory breathalyser tests conducted by high school authorities as a condition of entry to a students' prom to be an unreasonable search within the meaning of section 8.

[59] Finally, the appellants claim that the Application Judge “fundamentally misapplied” *Goodwin*. In *Goodwin*, the Supreme Court was asked to consider the constitutional validity of a roadside breath demands regime put in place by the province of British Columbia as part of its efforts to remove impaired drivers from the province’s roads. They contend that *Goodwin* is distinguishable in two main respects. First, unlike the pre-placement and random testing regime established under RD2.2.4, the regime under scrutiny in *Goodwin* was a comprehensive, explicit, regulatory one. Second, the urgency and scope of the roadside breath demands regime’s state objective, which was to “control the tragic chaos caused by drinking and driving” was evident. Here they say, there is no evidence of any impairment problem at Canadian nuclear sites causing or contributing to safety concerns. It is therefore in an entirely different context, the appellants contend, that the provision of breath samples was considered minimally intrusive in *Goodwin*.

[60] With respect, I cannot agree with these submissions.

[61] The concept of “reasonable expectation of privacy” is a normative one. It corresponds to the “level of privacy that we, as a society, should reasonably expect in a given circumstance” (*Goodwin* at para. 48).

[62] In that sense, measuring a person’s reasonable expectation of privacy in a given circumstance will depend on the person’s subjective expectation of privacy in a subject matter, provided, however, that this subjective view is objectively reasonable. This test, which has sometimes been called the “twin subjective/objective enquir[y]”, requires that the reasonable expectation of privacy of a complainant in a given case be determined on the basis of the

“totality of the circumstances” (*Goodwin* at para. 48. See also *York Region District* at para. 102, referring to *R. v. Tessling*, [2004] 3 S.C.R. 432 at paras. 31–32 (*Tessling*); *R. v. Gomboc*, [2010] 3 S.C.R. 211 at paras. 18, 78; *R. v. Patrick*, [2009] 1 S.C.R. 579 at para. 27).

[63] Here, the Application Judge did just that and I see no error in the conclusions he reached. In particular, I see no error in the Application Judge’s reliance on *Goodwin*. It is important to underscore that these conclusions were drawn in answering the first prong of the section 8 test, which, as noted, requires the reviewing court to determine whether section 8 is engaged by the impugned state action, which, in turn, calls for an assessment of the complainant’s reasonable expectation of privacy.

[64] In my view, *Goodwin* does indeed provide ample support for the Application Judge’s conclusion that safety-critical workers have a diminished expectation of privacy, given the nature of their work and the unique environment in which that work is being performed (Decision at para. 97).

[65] In *Goodwin*, the Supreme Court ruled that people driving a vehicle on a public highway had a diminished expectation of privacy since the seizure (the roadside breath demand in that case) “occur[ed] in a vehicle [...] in the highly regulated context of driving on a public highway [...] and is relatively non-intrusive [...]” (references omitted). Yet, this did not oust section 8 protection because of the drivers’ “residual privacy interest in [their] breath.”

[66] I see no principled basis to distinguish *Goodwin* from the situation at hand. Both matters concern seizures in the form of random testing. In both instances, the seizures, in order to be conducted, do not require prior judicial authorization or reasonable or probable grounds of drug or alcohol impairment. In one case, the seizure occurs in a vehicle; in the other, it occurs at the workplace. Neither occurs at the complainant's home, which has traditionally been accorded "the highest degree of privacy" (*Tessling* at paras. 44–45).

[67] Both seizures are relatively non-intrusive as well. This is the case with the taking of breath samples, as confirmed in *Goodwin*. This is also the case of the taking of urine samples (*Mazzei v. Director of Adult Forensic Services and Attorney General of British Columbia*, 2006 BCCA 321 at para. 58).

[68] This brings me to *R. v. Stillman*, [1997] 1 S.C.R. 607 (*Stillman*), a judgment rendered in a criminal law context on which the appellants rely heavily. That case tested the limits of the common law power to search which is incidental to an arrest. Mr. Stillman was suspected of murder. In the course of his second arrest by the police, which led to charges being laid, hair samples, including pubic hair, teeth impressions, buccal swabs as well as saliva were taken from him (*Stillman* at para. 9). The whole procedure took two hours (*Stillman* at para. 44). The issue was whether the taking of the hair samples, teeth impressions and buccal swabs contravened section 8, and whether the evidence obtained as a result of that search should be ruled inadmissible by virtue of section 24 of the Charter. I note that the taking of saliva was not in issue.

[69] What is telling about *Stillman*, in my view, is that the standard and degree of justification for the taking of bodily samples will be a function of the invasive or intrusive nature of the body search. Hence, the greater the intrusion, for example the search of body cavities as opposed to the typical “frisk” search, the greater the degree of constitutional protection must be (*Stillman* at paras. 42–44. See also, *R. v. Grant*, 2009 SCC 32 at paras. 109–11; *R. v. S.A.B.*, 2003 SCC 60, at para. 44).

[70] On the spectrum of intrusiveness when it comes to body searches, the case law is clear that the taking of breath, urine or saliva samples are amongst the less intrusive. This supports the Application Judge’s finding that the seizure of bodily samples “does not automatically attract a high expectation of privacy” (Decision at para. 98). As a corollary, it also supports the conclusion that the taking of these types of bodily samples may only attract a diminished expectation of privacy in a given circumstance, as is the case here.

[71] Turning back to *Goodwin*, as in the present matter, it involved an undeniable highly regulated activity. As noted, no one seriously disputes that the nuclear industry in Canada is also highly regulated; the main purpose of the regulatory framework being to limit the risks to national security, the health and safety of persons and the environment that are associated with the development, production and use of nuclear energy, as outlined in section 3 of the Act.

[72] To that end, human performance, including fitness-for-duty programs and requirements, plays a key role, notably in reducing the risks of drug or alcohol impairment-related safety events. I note that this component of the fitness-for-duty programs and requirements existed well

before the adoption of the Impugned requirements and provided for drug and alcohol testing processes as well. According to the record, Canada's legalization of cannabis in October 2018 also bolstered the need for more robust fitness-for-duty programs when it comes to managing the risks associated with drug and alcohol abuse.

[73] As I indicated earlier in these reasons, the Decision is largely informed by the “unique context” of the nuclear industry where “safety is the most important priority” given the “devastating and long lasting impacts on the community and the environment” a nuclear incident can have (Decision at para. 56). This, in my view, is an unavoidable and most critical contextual factor in the determination of the safety-critical workers' reasonable expectation of privacy.

[74] I believe it is fair to say that the nuclear industry is unlike any other inherently dangerous industries in Canada, like railways or chemical plants, given the magnitude and enduring damages a nuclear incident can cause to people and the environment. High security nuclear sites' workers whose tasks are critical to ensuring the safety of those sites, and as a corollary to the safety of the public and the environment, cannot, in my opinion, reasonably claim a high expectation of privacy when it comes to controls put in place as a license condition statutorily required to operate such sites, regarding matters such as workplace drug and alcohol impairment, that can directly impact it.

[75] But, say the appellants, the objective pursued by the state in authorizing roadside breath demands on British Columbia roads was urgent given the large number of tragic casualties

caused by drinking and driving whereas, here, there is no such urgency as there is no evidence of any impairment problem at Canadian nuclear sites causing or contributing to safety concerns.

[76] Removing impaired drivers from public roads so as to reduce driving fatalities caused by alcohol is no doubt an important and compelling objective. However, I believe the better view is that, in the nuclear industry context, the goal pursued by the Impugned requirements, which is to further contribute to reducing the risks to health and safety of persons and the environment associated with the development, production and use of nuclear energy, is equally important and compelling.

[77] Indeed, despite there being no evidence of impairment problems at nuclear sites, there is evidence that there were inadequacies – or gaps – in the fitness-for-duty programs as they existed at the time the Impugned requirements were adopted. This is particularly the case with respect to reliable, consistent and accurate methods to detect drug or alcohol impairment, including behavioural observation of impairment identification. If we accept, as the Application Judge did and as I do, that a pre-emptive and proactive approach to safety measures, instead of a “wait and see” approach, is more suited to the protection against identified risks in the “safety-first and foremost” environment of high security nuclear sites, where one nuclear incident may be one too many given the uniquely severe consequences it may have, then I am satisfied that bolstering these methods in order to fill those gaps, through the Impugned requirements, is a valid and compelling objective.

[78] Now, a last observation on *Goodwin*. The Supreme Court found in that case that the breath seizures authorized by the impugned regime, although occurring for a regulatory purpose, had “certain criminal law features”, which suggested to the Court that “closer scrutiny [was] required to ensure that the state does not unreasonably interfere with a driver’s privacy interest.” I note that if those features played a role in establishing the standard for assessing the reasonableness of such seizures, they did not enhance the drivers’ expectation of privacy, which, again, was held to be a diminished one. In the present matter, the Impugned requirements have no criminal law features whatsoever.

[79] Finally, the Application Judge found that *Gillies* was distinguishable from the case at bar mainly because the Ontario Superior Court in that case applied a “very specific test for section 8, that was established by the [Supreme Court] to determine whether searches conducted by teachers or a principal in the school environment is reasonable” (Decision at para. 95, referring to *Gillies* at para. 129). In *Gillies*, the Ontario Superior Court applied a “modified standard”, the one articulated in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 (*R. v. MR*) to determine the reasonableness of a search “in a school setting” (*Gillies* at para. 104).

[80] In that sense, one could say that *Gillies* is of limited assistance in determining the reasonableness of the Impugned requirements at stage 2 of the section 8 analysis. However, for our immediate purposes, it is of no moment to the appellants. Indeed, despite being of the view that students enjoy a heightened privacy interest in their bodies, the Ontario Superior Court, quoting again from *R. v. MR*, concluded that this expectation was “significantly diminished” in a

school setting “given the need for school authorities to provide a safe environment and maintain order and discipline in a school community.” (*Gillies* at para. 90).

[81] Ultimately, as the Application Judge most appropriately put it, a flexible approach reflects differing expectations of privacy for different contexts (Decision at para. 92). In the particular context of this case, a flexible approach calls for a diminished expectation of privacy for safety-critical workers. The Application Judge committed no error in so concluding. That said, I recall that the Application Judge determined that these workers were nevertheless entitled to the protection of section 8. He therefore engaged in the second stage of the section 8 analysis.

[82] The stage 2 test is clear: in order to be considered reasonable, the Impugned requirements: (i) must be “authorized by law”; (ii) the law itself must be reasonable; and (iii) the manner in which the seizure or the search is carried out must be reasonable (*Goodwin* at para. 48, referring to *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 10 (*Caslake*); *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23 (*Collins*)). It is also well settled that searches and seizures conducted without a warrant, as is the case here, are presumptively unreasonable. Therefore, the burden of establishing the reasonableness of such a search shifts to the state (*Goodwin* at para. 56; *Collins* at para. 22; *Caslake* at para. 11).

[83] As I said earlier, the appellants contend that the Impugned requirements are neither law nor reasonable and that the Application Judge erred in concluding otherwise. For the reasons that follow, I disagree with them on both counts.

(ii) The Impugned requirements are authorized by law

[84] According to the appellants, when Parliament has chosen to authorize the collection of bodily samples, it has done so by using clear authorizing language as well as by subjecting said collection to standards and safeguards. They say these requirements have not been relaxed when the collection of bodily samples occurs in a regulatory context as evidenced by *Goodwin* and the decision of this Court in *Royer v. Canada (Attorney General)*, 2003 FCA 25 (*Royer*). They further claim that when Parliament intended to give the Commission the power to search and seize workers' information, it has done so directly and explicitly through, for example, paragraph 44(h) of the Act. That provision of the Act empowers the Commission to pass regulations related to "medical examinations or tests" and the monitoring of radiation doses to which a person is exposed. That power, which, according to the appellants, could have provided a statutory anchor to the Impugned requirements, was not used by the Commission, even though it was available to it.

[85] In *R. v. Shoker*, 2006 SCC 44 (*Shoker*), relied upon by the appellants, the Supreme Court observed that where Parliament has chosen to authorize the collection of bodily samples, it has used clear language and included in the legislation, or regulations, a number of standards and safeguards (*Shoker* at para. 23). However, that observation was made in the criminal law context that is, where the search or seizure is made as part of a criminal investigation or for law enforcement purposes.

[86] In non-criminal law contexts, a more relaxed approach to stage 2's "authorized by law" requirement can be observed as well. For example, in *R. v. MR*, there was no specific, direct or explicit authorization to search in Nova Scotia's *Education Act*, S.N.S. 2018, c. 1, Schedule A, or its regulations. Yet, the Supreme Court ruled that "the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students" provided "by necessary implication" sufficient statutory authority to search students (*R. v. MR* at para. 51). In other words, that authority stemmed from very broad and general statutory language and was found to exist "by inference" (*R. v. MR* at para. 64).

[87] *R. v. MR* underscores the importance of a flexible approach as the Supreme Court pointed out that the reasonableness analysis in that case would have been different if the school authorities, as contended by the students, had acted as police agents. In such a scenario, the Court said, prior authorization based on the existence of reasonable and probable grounds would have been required to allow the school authorities to search students (*R. v. MR* at para. 56). However, the Court was satisfied that the school authorities, in that case, had not acted in that capacity.

[88] *R. v. MR* appears to be still good law, having been referred to in *York Region District* at paragraph 104.

[89] The Attorney General relies on this Court's decision in *Deacon v. Canada (Attorney General)*, 2006 FCA 265 (*Deacon*) for the proposition there is no section 8 authority prescribing a constitutional requirement of express statutory authorization as a feature of the reasonableness of a search or seizure. That case concerned the authority of the National Parole Board to require, in the

case of long-term offenders, the taking of medication as a condition for release. It was not disputed that such non-consensual condition for release amounted to a deprivation of bodily integrity, resulting in a violation of the offender's "liberty" and "security of the person" within the meaning of section 7 of the Charter (*Deacon* at para. 49).

[90] In *Deacon*, the offender was asserting that the principles of fundamental justice required that there be express statutory authorization if non-consensual medical treatment was to be imposed by the Board on a long-term offender (*Deacon* at para. 55). It was clear that no such authority had been conferred on the Board (*Deacon* at para. 29). However, the Court was satisfied that that power stemmed from the Board's "broad and flexible discretionary authority" designed to enable it "to achieve the objectives of the long-term offender provisions" and need not be found in express statutory language for the purposes of section 7 of the Charter (*Deacon* at paras. 37, 56).

[91] Relevant to the present matter is the Court's dicta that its conclusion that the principles of fundamental justice do not require express statutory authorization was "supported [...] by the case law concerning such searches under section 8 of the *Charter*." (*Deacon* at para. 57). It stated being unaware of any "section 8 authority prescribing a constitutional requirement of express statutory authorization as a feature of such reasonableness" and concluded that there was no such requirement under section 8 "that a deprivation of bodily integrity must be expressly authorized by statute in order to meet the requisite constitutional standard of reasonableness." (*Deacon* at paras. 62–63).

[92] *Deacon* was rendered a few months before *Shoker*. Therefore, the generality of these statements regarding section 8 has to be taken with caution, at least in the criminal law context. But in non-criminal law contexts, it remains good law on this point, as evidenced by *R. v. MR*, and cannot be ignored by this panel.

[93] *Royer* does not assist the appellants either. First, it precedes *Deacon* (by three years). Second, I agree with the Attorney General that this case does not stand for the proposition that every search and seizure of bodily samples conducted in a regulatory context must be explicitly authorized and detailed in legislation. All that *Royer* says, quoting *Stillman*, is that a urine sample is a “search” within the meaning of section 8 and that “in order for a search to be found reasonable [...] it must be authorized by law and that the manner in which the search itself has been carried out must be reasonable.” (*Royer* at para. 17).

[94] This is a mere reminder of the applicable test in that area. There is nothing new in *Royer*. What *Royer* stands for, in my view, is that when Parliament has set out a “complete statutory code with respect to ‘searches of inmates’” with a view to “put[ting] strict limitations on urinalysis”, and that this code provides for an exhaustive list of situations in which an inmate is required to submit to this particular type of search (*Royer* at paras. 9,11 and 17), Governor in Council cannot, by way of regulations, then add to this list without “collid[ing] head-on with the letter and spirit of the [enabling legislation],” (*Royer* at para. 24).

[95] Save for the reminder regarding the applicable test of reasonableness, *Royer*, therefore, has no application to the case at bar.

[96] The appellants' reliance on the passage of *Goodwin*, which says that a contextual analysis of the reasonableness of a search "requires regard to the purpose for which the seizure occurs, and to the statutory provisions that set out the grounds, means and consequences of the seizure" (*Goodwin* at para. 53), is not helpful either. In my view, this quote needs to be put in its proper context. There, the province was claiming that the drivers' section 8 rights were engaged not by the impugned roadside breath demands regime established by its legislation but by the provisions of the Criminal Code authorizing the seizure (*Goodwin* at para. 52). Therefore, the province was arguing that the driver's constitutional attack was directed at the wrong legislation.

[97] The Supreme Court rejected that argument, saying that "[s]uch a narrow understanding of whether the seizure is 'authorized by law' would insulate the province from s[ection] 8 scrutiny over any use of a Criminal Code search power." (*Goodwin* at para. 53). To the contrary, the "purpose and consequences" of the roadside seizure were established in the provincial legislation and the seizure was "[taking] its color" from that legislation and could not be read in isolation from the provincial scheme (*Goodwin* at para. 54). The Court concluded that the provincial scheme was the proper subject of Charter scrutiny in that case.

[98] On that point, therefore, the issue before the Supreme Court was not whether the authority to require roadside breath demands was transpiring from clear language in the legislation. Rather, the issue was whether that legislation could escape Charter scrutiny because the province relied on the *Criminal Code* to authorize those demands. In that sense, *Goodwin* is not particularly helpful to the appellants.

[99] With this jurisprudential backdrop in mind, I am satisfied, applying a flexible approach in the context of the highly regulated, safety first, nuclear industry, that the Impugned requirements RD2.2.4 are, by necessary implication - or by inference - , “authorized by law”. These requirements’ statutory anchor, to use the appellants’ language, derives from the Commission’s crucial statutory responsibility as set out in subsection 9(a) of the Act of regulating the development, production and use of nuclear energy in a way that prevents “unreasonable risk” to the environment, the health and safety of persons and national security and achieves conformity with measures of control and international obligations to which Canada has agreed.

[100] More particularly, it is mainly tied to two things: the obligation made on Licensees under the General Regulations and Class I Regulations to maintain human performance programs that include ongoing attention to reducing the likelihood of human performance-caused safety events and the Commission’s concurrent power under subsection 24(5) of the Act to impose licensing requirements “as it sees fit” (Decision at para. 105).

[101] These closely intertwined features of the regime set out in the Act provides, in my view, the necessary statutory authority on the Commission to adopt the Impugned requirements and implement them through licenses’ conditions. As mandatory license conditions, they are legally binding on Licensees and, according to subsection 17(b) of the General Regulations, on workers as well, to the extent that they are meant to protect the environment and the health and safety of persons. It is clear from the record that the Impugned requirements were always intended to be binding licensing requirements and never purported to be non-binding policy or guidelines.

[102] All things being equal, it is fair to say, in my opinion, that the Commission’s mission, an integral part of which turns on reducing the likelihood of human performance-caused safety events associated with the inherently dangerous activity of nuclear energy production, is no less important than that of school authorities to maintain proper order and discipline in the school and attend to the health and comfort of students.

[103] But the appellants claim that in order to be “authorized by law”, the Impugned requirements could only have been adopted through the exercise of the Commission’s power under paragraph 44(1)(h) of the Act to pass regulations related to medical examinations or tests, which is the means – and only means – chosen by Parliament to permit a worker’s privacy invasion.

[104] I find this argument unpersuasive. I agree with the Application Judge that the Act provides the Commission with a “variety of tools [...] to tailor specifications and requirements to Licencees governed by the *Act* and its *Regulations*.” (Decision at para. 107). These tools are comprised of both the Commission’s regulatory power and the power to subject licenses to such terms and conditions that the Commission “considers necessary for the purposes of [the] Act”. The latter has been framed in broad and open-ended language which signals Parliament’s intention to confer on the Commission significant leeway and flexibility in interpreting the scope of its licensing power. This language signals as well that this intention be given effect by the reviewing courts (*Citizens Against Radioactive Neighbourhoods v. BWXT Nuclear Energy Inc.*, 2022 FC 849 at paras. 57–58 (CARN), quoting *Vavilov* at paras. 68–110).

[105] I fail to see how the Commission’s power to adopt regulations concerning medical tests would limit, in a context such as the present one, the otherwise broad power conferred on the Commission to impose license conditions deemed necessary for achieving the purposes of the Act. Both powers are not mutually exclusive. In fact, nothing in the Act precludes that they be exercised in a complementary way.

(iii) The Impugned requirements are reasonable

[106] A search and seizure that is authorized by law is reasonable if the “law” that authorizes it is itself reasonable and if it is carried out in a reasonable manner (*Goodwin* at para. 48).

Considerations that are helpful in the reasonableness analysis include “the nature and purpose of the legislative scheme ..., the mechanism ... employed and the degree of its potential intrusiveness [,] and the availability of judicial supervision”. Above all, a flexible approach “remains compelling” in conducting such analysis, there being no “hard and fast” test in that regard (*Goodwin* at para. 57). The appellants acknowledge that determining the reasonableness of a search or seizure is “a fact-specific inquiry” (Appellants’ Memorandum of Fact and Law at para. 60).

[107] The appellants contend that the Application Judge erred in conducting this analysis by: (i) refusing to apply arbitral jurisprudence; (ii) concluding that the warrant-less Impugned requirements are reasonable despite being suspicious-less; and (iii) failing to properly measure these requirements’ impact on the dignity and bodily integrity of safety-critical workers.

(a) *Arbitral jurisprudence*

[108] Contrary to the appellants' submissions, I believe the Application Judge was correct in considering arbitral jurisprudence with caution, as not being conclusive in a section 8 analysis context.

[109] Arbitral jurisprudence arises in an entirely different statutory context and applies a different analysis. The arbitral decisions relied upon by the appellants in the present matter are concerned with management rights clauses found in collective agreements and their use by employers to unilaterally impose safety measures, including drug and alcohol random testing, in a dangerous workplace.

[110] The validity of such unilateral measures must be assessed using a specific test developed in the labour law context, requiring case-by-case balancing to preserve public safety concerns while protecting privacy (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper, Ltd.*, 2013 SCC 458 at paras. 4, 22–23 (*Irving*). One important consideration in assessing the validity of this type of unilateral measures is the employees' right not to be discharged or disciplined by an employer, save for "just cause" or "reasonable cause" where the impugned measure is enacted as a vehicle for discipline (*Irving* at para. 23).

[111] According to that test – known as the "KVP" test –, "any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable" (*Irving* at para. 24).

[112] As we have seen, the section 8 reasonableness test does not bring into play the exact same set of considerations. It requires a flexible approach that takes its colour from the totality of circumstances. What is in issue here is clearly outside the confines of the unilateral exercise of a management rights clause in a collective agreement. What is in issue is the validity of requirements imposed on employers, by a federal regulator as a legally binding condition, to the statutory license the employers must hold to carry on with any of the regulated activities. This calls for a different, more nuanced, reasonableness analysis.

[113] But even arbitral jurisprudence is not a complete bar to the imposition of random testing in a dangerous workplace. On the contrary, if random testing “represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified” (*Irving* at para. 52). I note from *Irving* that absent a reasonable cause, such as a general problem of substance abuse in the workplace, it is the unilateral imposition of random testing for “all employees in a dangerous workplace” that has been generally rejected by arbitrators (*Irving* at para. 6) (*italicized in original*). This is not the case here, random testing being imposed to safety-critical workers only, who represent less than 10% of the nuclear industry’s entire workforce.

[114] In my view, the Application Judge was right to distance himself from arbitral jurisprudence on the ground that it lacks authoritative value for the purposes of the section 8 analysis that he was called upon to perform in the present matter.

(b) *Suspicious-less search*

[115] The appellants contend that warrant-less searches and seizures require additional safeguards to ensure that they are not being abused. One such safeguard is that the state must have reasonable grounds to conduct the search. Acknowledging that the reasonable grounds requirement may be relaxed when the search intrudes on a lesser privacy interest, the appellants assert that if the search is related to an individual's bodily integrity, then at least a reasonable suspicion is required in order to conduct the search. But here, they claim, there is no such minimum safeguard, given the suspicious-less nature of the Impugned requirements.

[116] According to the appellants, the Application Judge erred on this point by framing their reasonable suspicion argument as effectively challenging the availability of judicial oversight. By doing so, they say, the Application Judge impermissibly conflated two different pre-conditions of the reasonableness analysis.

[117] With respect, I see no fatal flaws in the Application Judge's reasonableness analysis. The Application Judge scrupulously followed the jurisprudential analysis framework by looking at the purpose of RD2.2.4 and of the Impugned requirements, the nature of the regulatory scheme, the mechanism for obtaining bodily samples, including its degree of intrusiveness, and the availability of judicial oversight (Decision at para. 113).

[118] In considering their purpose, the Application Judge held that RD2.2.4 and the Impugned provisions were intended "to standardize and improve Licensees' fitness for duty programs relating to drug and alcohol testing." (Decision at para. 114). After having thoroughly reviewed

the record, including some of the key reports produced “over the course of the decade leading up to the planned 2021 implementation of [RD2.2.4]”, the Application Judge found that “the pre-placement and random testing provisions were reasonably included in [RD2.2.4] after years of research identified gaps in the existing fitness for duty programs, particularly with respect to reliable, consistent, and accurate methods to detect drug and/or alcohol impairment among workers at nuclear facilities.” (Decision at para. 125).

[119] He concluded that the reinforcement of the Licensees’ fitness for duty programs, which led to the adoption of the Impugned requirements, was a “compelling purpose in light of those gaps in protecting against the identified risks”. That purpose, he added, “weigh[ed] in favour of the reasonableness of the seizure required by the pre-placement and random testing measures.” (Decision at para. 126).

[120] The Application Judge further noted that the purpose of the Impugned requirements was “aligned with the defence-in-depth principle” according to which “the existence of multiple methods and layers of detection of drug and alcohol impairment is not a redundancy, but rather an intended outcome”. He agreed with the respondents that in the nuclear industry one cannot “‘wait and see’ given the severe consequences that often result from nuclear incidents.” (Decision at paras. 127–28).

[121] I would add that in adopting RD2.2.4, the Commission considered the recommendation of the International Atomic Energy Agency (the IAEA), of which Canada is a member, that nuclear plants establish and implement fitness-for-duty programs that address the use of drugs

and alcohol. It considered as well, the specific advice of a group within the IAEA, the International Physical Protection Advisory Service, recommending the inclusion in these programs of “at least random drug and alcohol testing for persons entering the protected areas to ensure they can safely carry out their duties.” (Hunter Affidavit at para. 125).

[122] The Application Judge then looked at the second reasonableness consideration, the nature of the regulatory scheme. Relying on Supreme Court jurisprudence and *Correctional Officers*, he held that the highly regulated nature of the nuclear industry supported the reasonableness of the Impugned requirements since searches conducted in regulatory contexts are generally considered less intrusive than searches conducted in a criminal law context (Decision at paras. 130–31).

[123] As for the third consideration, the Application Judge said that he needed to consider two factors: (i) the degree of intrusiveness on a worker’s bodily integrity; and (ii) the reliability of the tests results. Having already addressed the intrusiveness factor, the Application Judge focussed on the reliability of the testing methodology. He rejected the appellants’ assertion that the testing methodology set out in RD2.2.4 could not accurately measure the level of impairment from alcohol or drug use. Rather, he was satisfied that this methodology “[could] accurately measure the concentration of a substance in a person’s body and/or the recency of use of a substance, which are both strong indicators of impairment when examined in conjunction with studies available on the impact and duration of the effects of drugs on performance”. He further held that the different research-based cut-off levels prescribed in RD2.2.4 were set “so that a positive test result would indicate very recent use and be a better signal for possible impairment” (Decision at paras. 138–40).

[124] The Application Judge was satisfied, therefore, that the testing methods set out in RD2.2.4 were reasonable.

[125] Finally, the Application Judge discussed the availability and adequacy of review, noting that a “less exacting review” could suffice in a regulatory context (Decision at para. 146, citing *Goodwin* at para. 71).

[126] The Application Judge noted that RD2.2.4 provided safety-critical workers with access to a procedure which involved medical review officers and allowed for a positive test result to be challenged. He further noted that such challenge could lead to a positive test result not being reported to the Licensee (Decision at para. 147). As to the availability of judicial oversight of any adverse consequences resulting from a positive test result, the Application Judge agreed with the respondents that RD2.2.4 did not provide for any adverse disciplinary consequences. He also acknowledged that RD2.2.4 did not specify any appeal mechanism, such as judicial review or a complaint to a third party. However, he opined that as with any administrative decisions made by the Licensees “under the regulatory scheme of [RD2.2.4]” and affecting the rights or interests of their employees, judicial review before the Federal Court was available (Decision at para. 150). He was therefore satisfied that this fourth criterion was met as well.

[127] It is true that the Application Judge made reference to the appellant’s argument relating to the suspicious-less nature of the seizure conducted under the Impugned requirements when he discussed the availability of judicial oversight. However, he did consider the merits of that argument and noted that a contention of a similar nature, relating to the absence of any adequate

checks to prevent the abuse of a regulatory power, had been rejected by this Court in *Marine Reference* (Decision at para. 144). The Application Judge also relied on *Goodwin* to say that the availability of oversight was particularly important where a search or seizure occurs without prior authorization (Decision at para. 146).

[128] *Goodwin* is instructive in two other respects in this regard. First, these four considerations are factors that “may be helpful in the reasonableness analysis”. Ultimately, even where the impugned seizure is warrantless (and therefore, not subject to a reasonable grounds pre-condition), the analysis must be flexible (*Goodwin* at para. 57). Second, characterizing a seizure as criminal or regulatory “is relevant in assessing its reasonableness” and its characterization as regulatory may call for “less stringent standards” (*Goodwin* at para. 59).

[129] The Decision shows that the Application Judge was well aware of these guiding principles throughout his reasonableness analysis. Just as in *Goodwin*, he dealt with the reasonableness of warrantless, random, and suspicious-less bodily samples search and seizure provisions (and here, contrary to *Goodwin*, with no criminal law features) adopted in a regulatory context. And in *Goodwin*, the roadside breath demands regime was set aside, not because there was no reasonable suspicion requirement for demanding a breath sample, but because the impugned regime did not provide the possibility to challenge the test results while the consequences for a driver registering a “fail” were automatic and immediate— licence suspension and monetary penalties – and given that the testing device was known to have serious reliability issues (*Goodwin* at para. 76).

[130] I see no error in the Application Judge's finding in regard to the suspicious-less nature of the seizure permitted by the Impugned requirements.

(c) *The impact on the dignity and bodily integrity of safety-critical workers*

[131] The appellants claim that the Application Judge failed, in his reasonableness analysis:

- a. to "identify or give weight to the employees' significant privacy interest";
- b. to consider the extent to which the state objective in ensuring fitness for duty was already being met by the "defence-in-depth" approach;
- c. to determine whether that objective was outweighed by the impact of the seizure on safety-critical workers given the high standard of justification that applies to searches that intrude upon an individual's bodily integrity;
- d. to take into account the safety-critical workers' interest in the nature and quality of the information obtained by the seizure; and
- e. to consider whether the Impugned requirements contained sufficient procedural safeguards.

[132] I find these arguments meritless. First, the Application Judge did grapple with the safety-critical workers' privacy interest but found it was a diminished one in light of the totality of circumstances, including the relatively non-intrusiveness of the seizure conducted under the Impugned requirements. As stated by the Application Judge, a flexible approach reflects differing expectations of privacy for different contexts. Here, as I explained earlier in these

reasons, the unique context of the nuclear industry where, for obvious reasons, safety is the most important priority, makes it such that those who occupy safety-critical positions can hardly reasonably claim a high or significant expectation of privacy. This is particularly the case when it comes to controls put in place as a license condition statutorily required to operate high security nuclear sites, regarding matters, such as workplace drug and alcohol impairment, that can directly impact the safety of those sites, of co-workers, the public and the environment.

[133] Second, the Application Judge did consider the “defence-in-depth” principle in his reasonableness analysis and concluded that the existence of multiple methods and layers of detection of drug or alcohol impairment was not a redundancy in ensuring fitness for duty but an intended outcome that, far from undermining the purpose of the Impugned requirements, contributed to it by putting in place additional measures designed to prevent failure and ensure safety (Decision at paras. 127–128).

[134] Again, if we accept, as I do, that a pre-emptive and proactive approach to safety measures is more suited to the protection against identified risks in the “safety-first and foremost” environment of high security nuclear sites than a “wait and see” approach, and that a flexible approach to the reasonableness analysis is justified in these circumstances, then the Application Judge’s conclusions regarding the role of the “defence-in-depth” principle are defensible both in law and in fact. This is especially so given the gaps identified, through years of research, in fitness for duty programs for drug and alcohol detection, as they existed prior to the adoption of the Impugned requirements. Therefore, I see no basis to interfere with the Application Judge’s conclusions on that point.

[135] Third, the alleged failure of the Application Judge to determine whether the state objective in ensuring fitness for duty was outweighed by the impact of the seizure on safety-critical workers given the high standard of justification that applies to searches that intrude upon an individual's bodily integrity, is unfounded. This argument is essentially premised on section 8 criminal law jurisprudence, which, again, "should not be indiscriminately imported into non-criminal matters." (*York Region District* at para. 99). As the Supreme Court observed in *Goodwin*, "[w]here an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards." (*Goodwin* at para. 60). In other words, the standard of justification in a given context "must be flexible if it is to be realistic and meaningful" (*McKinlay Transport* at 645; see also *BC Securities* at 35; *Correctional Officers* at para. 29). Applying the criminal law standard here, as the appellants urge the Court to do, would not be realistic or meaningful in the present highly regulated and unique context.

[136] As indicated earlier, the Application Judge scrupulously adhered to the applicable reasonableness test and I see no flaws in his balancing of the broad public interest being pursued by the Impugned requirements and the safety-critical workers' residual privacy interests.

[137] Fourth, the Application Judge did consider the safety-critical workers' interest in the biographical information obtained by the seizure. It was on that very basis that he concluded that these workers' section 8 rights were engaged. In *Goodwin*, the Supreme Court, in its reasonableness analysis of the impugned regime in that case, ruled that a roadside breath demands had a "much less significant impact on an individual's bodily integrity and privacy interests" when compared to "many other searches or seizures that may be performed for law

enforcement purposes”. It concluded that these roadside demands’ “minimally intrusive character support[ed] the reasonableness of the [impugned] seizure.” (*Goodwin* at para. 65) (my emphasis).

[138] Based on *Goodwin*, in my view, nothing more was required from the Application Judge, when it comes to the safety-critical workers’ interest in their biographical information, than his finding of the relatively non-intrusive nature of the seizure authorized by the Impugned requirements. Just as in *Goodwin*, this contextual factor, common to both cases, supported the reasonableness of these requirements without the need to further expand on it. After all, under the guidance of *Goodwin*, the Application Judge was invited to turn his mind to the degree of intrusiveness the Impugned requirements would have when taking bodily samples (*Goodwin* at para. 57). That is what he did. To that extent then, I see no error in the Application Judge’s treatment of the informational interest of safety-critical workers.

[139] Fifth, and lastly, on the procedural safeguards issue, the Application Judge acknowledged that the availability of oversight was “particularly important where, as here, a search or seizure occurs without prior authorization”. However, he pointed out, as the Supreme Court did in *Goodwin* at paragraph 71, that a “less exacting review” could be sufficient in a regulatory context (Decision at para. 146). In fact, the administrative nature of a scheme “justifies the administrative nature of the review” (*Goodwin* at para. 75).

[140] As indicated previously, the Application Judge was satisfied that RD2.2.4, when it comes to drug testing, provides for an administrative procedure before a medical review officer

whereby positive test results can be challenged (Decision at para. 147). He was correct. I note as well that the best practices recommended to Licensees for breath alcohol testing is that there be a confirmatory testing following an initial positive test result (Decision at para. 140).

[141] In *Goodwin*, as soon as a driver had registered a “fail”, serious consequences ensued immediately. The situation is different here because, as we have seen, a positive test must be confirmed by a subsequent test or can be challenged administratively. Moreover, as noted by the Application Judge, the consequences of a verified positive test is not detrimental to the individual concerned. These consequences are the person’s removal from safety-critical duties and referral to a mandatory medical substance evaluation. There are no adverse disciplinary consequences.

[142] The appellants take issue with the Application Judge’s finding with regards to the non-detrimental aspects of a positive test. They claim that a verified positive result could lead to a dismissal or charges being laid for the failure of taking reasonable precautions to ensure safety at a nuclear site as required under the General Regulations. However, this is far down the road and highly speculative. At this point in time, the Impugned requirements have not been applied to any particular case due to the Stay Orders. Thus, as correctly noted by the Application Judge, this “resides in the realm of the hypothetical” (Decision at para. 149).

[143] Be that as it may, the Application Judge opined that any administrative decision, disciplinary or otherwise, taken against a safety-critical worker by his employer as a result of a

positive drug or alcohol test result, could eventually be the subject of judicial review proceedings. I see no error there.

[144] Finally, the appellants claim that there is no mention in RD2.2.4 of the fact that urine testing would occur “in a secure and private testing location”, as stated by the Application Judge. First, I note that this statement was not made while the Application Judge was addressing the issue of availability and adequacy of safeguards. Rather, it was made when he was discussing the degree of intrusiveness of the seizure authorized by the Impugned requirements (Decision at para. 134).

[145] As a result, assuming he was wrong in making that statement, this is of no moment for the appellants as this statement was not part of the Application Judge’s reasoning, nor grounds for concluding that RD2.2.4 provides adequate safeguards to safety-critical workers. Furthermore, I note, according to the random testing provision of RD2.2.4, that the best practice recommended to Licensees is to have the safety-critical worker selected for random testing report to a “collection site”. This signals that the test would be conducted at a place other than the area where the worker is actually performing his duties.

[146] Hence, although not entirely accurate, the impugned statement is not devoid of any foundation. But, again, the main flaw in the appellants’ argument is that this statement is irrelevant for the purposes of determining whether the Application Judge erred in concluding as he did on the safeguards issue.

[147] For all these reasons, I find that the Application Judge did not commit any error in finding the Impugned requirements do not violate section 8. I fully agree with his overall conclusion in this regard, as summarized at paragraph 151 of the Decision:

In conclusion, the pre-placement and random testing provisions of [RD2.2.4] engage, but do not infringe, section 8 of the *Charter*. The Safety-Critical Workers have a diminished expectation of privacy due to the highly regulated nature of their workplace, and the testing provisions are reasonable when considering all the contextual factors at hand, including the regulatory context, the public interest in nuclear safety, the identified need to bolster fitness for duty programs, the reliability of the testing methodology, and the availability of judicial oversight.

[148] In other words, in the unique context of this case, I find that the safety-critical workers' interest in being left alone by the government does not, given the safety-critical nature of their work, outweigh the government's interest in intruding on their privacy in order to advance its goals, namely limit the risks to national security, the health and safety of persons and the environment that are associated with the development, production and use of nuclear energy, including the risks of drug or alcohol impairment-related safety events.

(2) Section 7

[149] The appellants contend that the Application Judge erred in “two fundamental ways” in concluding that section 7 was not engaged by the Impugned requirements, first by focussing his analysis on the safety-critical workers' economic interests, which had not been advanced, and then by finding that the taking of bodily samples does not constitute interference with bodily integrity.

[150] They further contend that the Impugned provisions are not in accordance with the principles of fundamental justice because:

- a) being suspicious-less, they are arbitrary and overbroad as they capture workers not suspected of being impaired; and
- b) given all the measures already in place to monitor impairment in nuclear facilities, they are grossly disproportionate.

[151] I disagree. The Application Judge did consider the appellants' contention that the Impugned requirements engaged section 7 by compromising the safety-critical workers' bodily integrity and, thereby, their security of the person. First, he held that the two cases the appellants relied on to advance that claim, *Jackson v. Joyceville Penitentiary* (T.D.), [1990] 3 F.C. 55 (*Jackson*) and *Cruikshanks v. Stephen* (1992), 16 B.C.A.C. 59 (B.C. C.A.) (*Cruikshanks*), were either distinguishable (*Jackson*) or simply had no precedential value because no section 7 analysis had been conducted (*Cruikshanks*) (Decision at paras. 158–62). Besides, *Cruikshanks* was not raised in this Court.

[152] With respect to *Jackson*, the Application Judge noted that the primary concerns in that case were that inmates refusing to be subjected to a demand for a urine sample could be punished at the whim of prison staff, or that the tests obtained following a demand could conceivably be used as a tool to coerce inmates to do certain acts or as a form of punishment outside the applicable statutory disciplinary regime. It is in that particular context, he said, that the inmates' security of the person and liberty interest were held to be engaged.

[153] I agree. The safety-critical workers' situation in the present matter is wholly different. While state action that has an impact on an individual's psychological integrity may engage section 7's security of the person, in order to do so, however, that impact must be "serious and profound" and be measured "objectively", that is from the perspective of the "person of reasonable sensibility" (*Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176 at para. 125, quoting from *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 60. See also *Canadian Council for Refugees* at para. 90).

[154] From the point of view of the person of reasonable sensitivity, I do not believe that the relatively non-invasive nature of the seizure permitted by the Impugned requirements, coupled with the absence of any adverse disciplinary consequences resulting from a positive test, rise to the level of serious and profound state-imposed psychological stress that engages section 7's security of the person protection.

[155] In *Deacon*, for instance, it was conceded by the government that imposing the taking of medication as a condition of release of long-term offenders amounted to a deprivation of bodily integrity, resulting in a violation of the offender's "liberty" and "security of the person" within the meaning of section 7 of the Charter (*Deacon* at para. 49). On its face, this, in my view, entails, for a person of reasonable sensitivity, a different kind of state-imposed psychological stress than the relatively non-intrusive taking of breath, urine or saliva samples.

[156] While the Application Judge also discussed the appellants' section 7 claim from an employment perspective, presumably for the sake of completeness, I am satisfied that he

addressed the appellants' security of the person's main contention and that he committed no reversible errors in concluding that section 7 is not engaged in this case.

[157] Having found no deprivation of the safety-critical workers' security of the person, the Application Judge ended the section 7 analysis. He was correct (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47). Therefore, I see no reason to embark, as the appellants invites the Court to do, in a stage 2 analysis of section 7, which focusses on whether the alleged deprivation of life, liberty or security of the person has occurred in accordance with the principles of fundamental justice. This is so especially where, as here, an appeal court does not have the benefit of the lower court's views on the issue.

[158] It is also unnecessary in my view to engage in the issue of whether the appellants' section 7 concerns ought to only have been considered under section 8 on the basis that these concerns are necessarily encompassed in the section 8 analysis and are, therefore, redundant. This is better left for another day.

(3) Section 15

[159] Section 15 guarantees to every individual equality before and under the law as well as equal protection and benefit of the law without discrimination. A section 15 claim is made out if the claimant demonstrates that the impugned law or state action: (i) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (ii) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating a

disadvantage (*Sharma* at para. 28). The impact at stage 1 of the analysis must be “disproportionate” as “[a]ll laws are expected to impact individuals” (*Sharma* at para. 40).

[160] The Application Judge concluded that the appellants’ claim failed at the first prong of the test. The appellants contend that the Application Judge erred in concluding as he did: (i) by focussing on the safety-critical workers’ job category at nuclear facilities, instead of drug dependency as a category of disability, one of section 15’s enumerated grounds of discrimination; (ii) by holding, without conducting a human rights analysis, that persons who have a drug dependency are not persons with a disability for the purposes of section 15; and (iii) by refusing to recognize the possibility of discrimination by conflating “substance orientation” with “drug dependency”.

[161] These contentions are unpersuasive. The fact the Application Judge focussed on the safety-critical workers’ job category was certainly consistent with the first prong of the section 15 analysis which requires demonstration that the impugned state action creates a distinction based on enumerated or analogous grounds, on its face or in its impact. Here, on its face, the Impugned requirements creates a distinction based on job category. The record is clear in this respect: safety-critical workers are targeted because they hold safety-critical positions in a highly regulated, safety-first, work environment that presents unique risks of causing damages of catastrophic proportions to the public and the environment. As is well settled, a distinction between job categories is not a distinction based on an enumerated or analogous ground of discrimination for the purposes of section 15 (*Baier v. Alberta*, [2007] 2 S.C.R. 673 at paras.

65–66, quoting from *Delisle v. Canada (Attorney General)*, [1999] 2 S.C.R. 989 at para. 44).

There are no errors here.

[162] The question then becomes whether the impugned requirements create a distinction based on an enumerated or analogous ground due to their alleged impacts on workers suffering from drug dependency. The Application Judge did consider, but rejected, that “drug dependency” could possibly be a potential ground of discrimination thereby engaging the second prong of the section 15 analysis (Decision at para. 172).

[163] What is key, in my view, to the Application Judge’s finding in that regard is not so much his reluctance to apply a human rights analysis to this question, as he was urged to do by the appellants, but the fact that the appellants “have not brought any evidence to support that there are drug dependencies amongst [s]afety-[c]ritical [w]orkers.” (Decision at paras. 172, 175). In particular, there is no evidence on record “statistical or otherwise [...], about the demographic make-up of [s]afety-critical [w]orkers, to support [the appellants’] claim that a disproportionate number of these Workers have drug dependencies and would be affected by the impugned provisions of the [RD2.2.4].” (Decision at para. 181).

[164] As I noted in the section 8 analysis of these Reasons, one important – if not, the most important – feature of the appellants’ claim that the Impugned requirements amount to an unreasonable seizure is the fact that there is no evidence on record of impairment problems at nuclear sites. Again, this fact is not disputed.

[165] As stated in *Sharma*, to succeed on that point, the appellants needed to present sufficient evidence to prove the Impugned requirements “in [their] impact, *create[] or contribute[] to a disproportionate impact on the basis of a protected ground.*” (*Sharma* at para. 42) (italicized in original). This burden required comparison between the appellants’ alleged protected group and other groups (*Sharma* at para. 50), notably, here, non-substance dependent workers at Canada’s nuclear facilities. As correctly noted by the Application Judge, there is no such evidence in this case whereas this evidentiary burden had to be fulfilled by the appellants (*Sharma* at para. 50).

[166] We are therefore left to speculate that there might be a protected group of safety-critical workers suffering from a drug or alcohol dependency and as to what would be the impact of the Impugned requirements on them compared to the impact on other groups, especially given that none of these workers have been impacted so far by these requirements as a result of the Stay Orders.

[167] Although for slightly different reasons, I agree with the Application Judge that the appellants’ section 15 claim must be rejected at the first step of the analysis. Therefore, there is no need to consider whether an analogy can be drawn between “substance orientation” on the one hand (which was rejected as an analogous protected ground in *Malmo-Levine*; and “drug dependency” on the other, as analogous grounds of discrimination for the purposes of section 15.

[168] But even accepting that “drug dependency” is an analogous ground of discrimination, I agree with the Application Judge that the appellants have failed to demonstrate that the Impugned requirements impose “burdens or den[y] benefits in a manner that has the effect of

reinforcing, perpetuating, or exacerbating the group’s disadvantage.” (*Sharma* at para. 51). Put differently, the appellants have failed to show that the Impugned requirements are discriminatory in a substantive sense, that is, that they are arbitrary, prejudicial or stereotyping.

[169] As the Attorney General points out, RD2.2.4 would only require that a safety-critical worker who is found to have a drug or alcohol dependency issue be assessed for treatment, not punished. And I agree that there is nothing arbitrary in removing such worker from safety-critical duties until that worker is deemed fit for duty.

[170] As the Attorney General points out as well, section 2 of RD2.2.4 would require Licensees to meet their duty to accommodate the particular needs of workers with a drug or alcohol dependency issue to the point of undue hardship. I agree that such an individualized approach is the “antithesis of the logic of the stereotype” (Attorney General’s Memorandum of Fact and Law, quoting from *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 88). In other words, there is no evidence that RD2.2.4, in its current iteration, “fails to respond to the actual capacities and needs of the members of the group and instead impose[] burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (*Sharma* at para. 53) (underlined in the original).

[171] For all these reasons, I see no reversible errors in the Application Judge’s finding that the appellants’ Charter claim, be it under sections 7, 8, or 15, has not been made out. As noted earlier, given this finding, the Application Judge declined to address the parties’ section 1

arguments. Again, without the benefit of the Application Judge's views on this issue, this Court should decline as well to undertake a section 1 analysis.

B. *The alternative administrative law claim*

[172] The appellants essentially assert that the Impugned requirements are unreasonable because: (i) their adoption and implementation are not supported by adequate reasons; and (ii) they offend the administrative law principle that a regulator cannot adopt sub-regulatory guidelines and treat them as the equivalent of a statutory provision or regulation.

[173] The Application Judge reviewed the appellants' administrative law arguments using the standard of reasonableness. As noted previously, it is not disputed that he made the correct choice and that the issue before this Court is whether he applied that standard properly to the facts of this case. Our role in answering that question is to focus, in effect, on the Commission's decision (*Horrocks* at para. 10, quoting from *Agraira* at paras. 45–47).

[174] However, in performing such review, it is important to underscore that the Court must refrain from deciding the issue itself. Put another way, it must not “ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem.” The Court's role is rather confined to considering “only whether the decision made by the administrative decision

maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.” (*Vavilov* at para. 83).

[175] I now turn to the appellants’ two administrative law arguments.

(1) Adequacy of reasons

[176] The appellants contend that the only documents recording the Commission’s decision to approve the addition of the Impugned requirements to RD2.2.4 are minutes of meetings it held in 2017 and 2020. These minutes, they say, record the Commission’s ultimate decision but not the underlying rationale. In particular, they assert that these minutes do not state the jurisdictional basis for the Impugned requirements or how the Commission satisfied itself that these requirements were Charter compliant despite having voiced their concerns over that issue. They further claim that relying on the work of the Commission’s staff, as did the Application Judge, to remedy the Commission’s lack of reasons is improper in the circumstances of this case. In any event, that work does not demonstrate any real analysis, including on the applicability of *Irving*, which according to the appellants, acted as a constraint on what the Commission could reasonably decide in this case.

[177] I disagree.

[178] It is trite that written reasons are not required for all administrative decisions. Whether or not they are required in a given circumstance is eminently variable and context-specific. The

nature of the decision, the process followed in making it and the nature of the statutory scheme are among the factors to be considered. Reasons will generally be required where “the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal” (*Vavilov* at para. 77).

[179] Here, the indicia go both ways. There is no right of appeal of a Commission’s decision to adopt a regulatory document and the Act does not provide for a decision-making process giving stakeholders participatory rights in the adoption of a regulatory document. However, the evidence is that the Impugned requirements were adopted following a vast consultation process put in place by the Commission that allowed various stakeholders, including some of the appellants, to voice their concerns over the various iterations of the version that would eventually be adopted by the Commission. One could say as well that the adoption of the Impugned requirements, and their subsequent incorporation as license conditions into the Licensing Basis of the Licensees, had an impact on the interests of one category of Class I nuclear facilities employees.

[180] That said, I need not decide whether the Commission was under a duty to provide reasons, because assuming it was, I am satisfied that adequate reasons were provided for adopting the Impugned requirements and making them licence requirements for Licensees. And I come to that conclusion essentially for the reasons given by the Application Judge at paragraphs 208 to 214 of the Decision.

[181] As this Court stated in *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189, at paragraph 4, where the Federal Court appears to have given a complete answer to all the arguments advanced by the losing party on a judicial review application, that party “bears a strong tactical burden to show on appeal that the Federal Court’s reasoning is flawed”.

[182] That burden was not met by the appellants.

[183] As noted by the Application Judge, *Vavilov* teaches us that formal reasons “should be read in light of the record and with due sensitivity to administrative regime in which they were given” and will be found to be unreasonable if “read holistically”, they “fail to reveal a rational chain of analysis” (*Vavilov* at para. 103). I would add that reasons given by an administrative body “must not be assessed against a standard of perfection” and need not “include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” (*Vavilov* at para. 91). Furthermore, they need not “deploy the same array of legal techniques that might be expected of a lawyer or judge” (*Vavilov* at para. 92).

[184] With that in mind, I find that the Commission was entitled to rely on the work done by its staff throughout the consultation process in support of its decision. As noted by the Attorney General, the document called “Regulatory Fundamentals” describes the Commission’s regulatory approach and philosophy and underscores that it relies on “highly skilled scientific, technical, professional and administrative personnel” – its staff – to “carry out the work necessary to fulfil [its] mandate” (Appeal Book at 4381; Attorney General’s Memorandum of Fact and Law at para. 86). Paragraph 16(1) of the Act empowers the Commission to “appoint and employ such

professional, scientific, technical or other officers or employees as it considers necessary for the purposes of this Act”.

[185] In *Sketchley v. Canada (Attorney General)* (F.C.A.), 2005 FCA 404 (*Sketchley*) , this Court ruled that the reasons for decision of the decision-maker - in that case the Canadian Human Rights Commission - could be found by reference to the report of the investigator who had investigated the complaint made to the Commission, even though both have “mostly separate identities”. It was so, in the Court’s view, because the investigator’s report was prepared “*for the Commission*”, resulting in the “investigator [being] considered to be an extension of the Commission” (*Sketchley* at paras. 37–39; see also *Kemp v. Canada (Finance)*, 2022 FCA 198 at para. 18) (*italicized in original*).

[186] This flexible rule has been applied in other contexts, such as labour law grievance matters (*Andruszkiewicz v. Canada (Attorney General)*, 2024 FCA 105 at para. 4), workplace harassment complaints (*Haynes v. Canada (Attorney General)*, 2023 FCA 158 at para. 55) and final determinations made under the very technical *Special Import Measures Act*, R.S.C., 1985, c. S-15 (*Canadian Hardwood Plywood and Veneer Association v. Canada (Attorney General)*, 2023 FCA 74 at para. 60).

[187] I agree with the Attorney General that the record clearly shows that the Commission was actively engaged with its staff throughout the development of the Impugned requirements, including raising concerns with prior versions, as they were drafted, directing changes and

requesting staff to provide more information, including on balancing safety risks with human rights and Charter concerns.

[188] It is clear as well that when the Commission ultimately adopted the Impugned requirements, they had accepted the staff's work and its reasoning. While it might be said that the staff's work does not deploy the same array of legal techniques that might be expected of a lawyer or a judge or display all the details a reviewing court would have preferred, this is not a sufficient basis to conclude that the Commission's decision is unreasonable.

[189] I further agree with the Attorney General that this Court's decisions in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 (*Vancouver Airport Authority*) and *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19 (*Safe Food Matters*), do not assist the appellants.

[190] In one case, *Safe Food Matters*, the decision-maker was required by its enabling statute to provide written reasons (*Safe Food Matters* at para. 54). In the other, *Vancouver Airport Authority*, the lack of reasons could not be remedied because it was "impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rational for the [decision-maker]'s decision" (*Vancouver International Airport Authority* at para. 27). As for *Irving*, it was directly considered by the staff in response to some of the comments the Commission received through the consultation process that led to the adoption of the Impugned requirements (Appeal Book at 4814-15).

[191] In sum, there is no basis to the appellants' contention that the Commission's decision to adopt the Impugned requirements must be set aside because of the Commission's failure to provide adequate reasons.

(2) Fettering of discretion

[192] The appellants take issue with the Application judge's statement that the Impugned requirements were never intended to be a non-binding policy or guideline and that, therefore, there was no fettering of discretion on the part of the Commission. They contend that if that statement is correct, then the Commission acted without any statutory authority when it adopted and implemented the Impugned requirements because, according to them, the Commission does not have the power to adopt binding rules independently of the licensing process set out in the Act.

[193] This argument is without merit. It is another way to claim that the Impugned requirements lack any statutory anchor. I rejected this assertion when considering the appellants' section 8 claim. There is nothing in the Act that limits or otherwise prescribes how the Commission is to set out its conditions for licences in the way the appellants suggest.

[194] In terms of process, as indicated previously, the Impugned requirements were adopted through a vast 10-year consultation process where the public was invited to comment on discussion papers and various draft versions of RD2.2.4. In addition, oral submissions were sought at the public meeting held by the Commission on November 5, 2020 when it was

presented RD2.2.4 for approval (Affidavit of Shaun Cotman, Canadian Nuclear Laboratories, Appeal Book, at p. 8409, para. 76; Minutes and transcript of meeting, Hunter Affidavit, Exhibits AA and BB).

[195] It is correct to say that the Act requires the Commission to provide an opportunity to be heard when amending a licence or varying a licence's term or condition. However, according to subsection 40(1)(b), this participatory right is only conferred on the licensee, as is the right to seek redetermination of a Commission's decision to amend a licence or vary a term or condition of a licence, as *per* subsections 43(2)(c) and (d).

[196] Here, the Commission extended the participatory rights to the public and I fail to see how, in the circumstances of this case, this process might have impaired its otherwise clear authority to adopt and implement RD2.2.4.

[197] As stated earlier in these reasons, the Commission's power to set out license conditions that it "considers necessary for the purposes of [the] Act", is framed in broad and open-ended language which provides the Commission with significant leeway and flexibility in interpreting the scope of that power (*CARN* at paras. 57–58).

[198] I have already decided that this broad power coupled with the obligation made on Licensees under the General Regulations and Class I Regulations, to maintain human performance programs that include ongoing attention to reducing the likelihood of human performance-caused safety events, provided ample authority for the adoption and

implementation of the Impugned requirements. This authority is reinforced when considering the Commission's most important responsibility, which is to regulate the development, production and use of nuclear energy in a way that prevents "unreasonable risk" to the environment, the health and safety of persons.

[199] In that sense, the fettering administrative law principle is, as the Attorney General puts it, simply inapposite to the Impugned requirements scheme.

[200] For these reasons, I find that the appellants have not made out their alternative administrative law claim against the Decision.

[201] I would therefore dismiss the present appeal. Both the Attorney General and the Licensee Respondents seek their costs. Given that they are successful in the appeal, I would award costs in their favour.

"René LeBlanc"

J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Richard Stephenson
Emily Lawrence
Douglas Montgomery

FOR THE APPELLANTS
Power Workers' Union, Chris
Damant and Paul Catahno

Michael Wright
Brendan McCutchen

FOR THE APPELLANTS
Society of United Professionals,
Matthew Stewart and Thomas
Shields

Michael H. Morris
Elizabeth Koudys
James Schneider

FOR THE RESPONDENT
Attorney General of Canada

Henry Y. Dinsdale
Frank J. Cesario
Dianne E. Jozefacki
Amanda P. Cohen

FOR THE RESPONDENTS
Ontario Power Generation, Bruce
Power, New Brunswick Power
Corporation and Canadian Nuclear
Laboratories

SOLICITORS OF RECORD:

Paliare Roland Rosenberg Rothstein LLP
Toronto, Ontario

Wright Henry LLP
Toronto, Ontario

Shalene Curtis-Micallef
Deputy Attorney General of Canada

Hicks Morley Hamilton Stewart Storie LLP
Toronto, Ontario

FOR THE APPELLANTS
Power Workers' Union, Chris
Damant and Paul Catahno

FOR THE APPELLANTS
Society of United Professionals,
Matthew Stewart and Thomas
Shields

FOR THE RESPONDENT
Attorney General of Canada

FOR THE RESPONDENTS
Ontario Power Generation, Bruce
Power, New Brunswick Power
Corporation and Canadian Nuclear
Laboratories