

# CASE LAW AND ADMINISTRATIVE DECISIONS

## CASE LAW

### Canada

#### *Federal Court ruling quashing uranium mill and tailings licence (2002)*

In a judgement of 23 September 2002 in the case *Inter-church Uranium Committee Educational Co-operative v. Atomic Energy Control Board of Canada and Cogema Resources Inc.* (unreported at date of writing), the Federal Court of Canada (Trial Division) quashed a licence issued by the former Atomic Energy Control Board (AECB) for the operation of a uranium mill and tailings management facility.

The proposal for the uranium facilities at McClean Lake in the Province of Saskatchewan had been the subject of an environmental panel review in the 1990s under a previous regime known as EARPGO (Environmental Assessment and Review Process Guidelines Order, SOR/84-467). The environmental assessment regime changed in 1995 with the coming into force of the Canadian Environmental Assessment Act (CEAA). The staged licensing process of the former AECB (now the Canadian Nuclear Safety Commission – CNSC) resulted in the issuance of various licences for the McClean Lake facilities commencing in 1994, including a construction licence. In 1999, the AECB issued a licence to permit the operation of the mill and tailings management facility. Given that an environmental review had taken place under the previous environmental review regime, the AECB did not require a new environmental assessment before issuing the licence to operate the facility. The AECB found that the intent of the CEAA had been met in that one of the objects of that Act is to avoid duplication in environmental assessment matters.

The Inter-church Uranium Committee Educational Co-operative sought judicial review of the AECB's decision to issue the operating licence on the grounds that a new environmental assessment should have been conducted under the CEAA. They successfully argued that the transitional provisions in the CEAA did not operate to negate the necessity of a new environmental assessment under that Act. The Court held that the AECB had erred in law in issuing the licence and therefore acted without jurisdiction. The decision is under appeal.

The text of this decision is available on the Web site of the Federal Court of Canada at <http://decisions.fct-cf.gc.ca/fct/2002/2002fct994.html>.

## Germany

### *Ruling of the Supreme Court on the Phase-out Law (2002)*

On 19 February 2002, the Federal Constitutional Court in Karlsruhe ruled that the national nuclear energy phase-out (see *Nuclear Law Bulletin* No. 66) is a matter for the federal government only to decide and the states (*Länder*) are not entitled to intervene.

In December 2001, one of the *Länder*, Hesse, sued the federal government before the Federal Constitutional Court, alleging unconstitutional interference in licensing of safety-related upgrades at the two Biblis PWRs. Hesse claimed that in negotiating the phase-out with Biblis owner RWE AG, the Federal Ministry of Environment and Nuclear Safety (*Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit* – BMU) and RWE violated Hesse’s constitutional rights by deciding which safety-related backfits were necessary to justify continued operation of the two reactors. An annex to the final Phase-out Agreement concluded in June 2000<sup>1</sup> provided that BMU was responsible for deciding the issue of Biblis backfitting. Hesse claimed that the head of BMU and RWE management held meetings and negotiations on regulatory and safety issues at Biblis and made decisions that should have involved state regulators.

The Court rejected Hesse’s claim, announcing in a statement released after the verdict that “at any time [BMU] can take upon itself the responsibility for making technical decisions” in reactor regulation, including in direct interactions with third parties such as reactor owners. The Court stated that “decision-making on the [phase-out] consensus policy is a separate matter from routine regulation”.

## ADMINISTRATIVE DECISIONS

### Finland

#### *Parliamentary decision on construction of a new nuclear power plant (2002)*

On 17 January 2002, the Finnish Council of State (the Government) had issued a positive Decision in Principle on the application made by the utility *Teollisuuden Voima Oy* (TVO) to construct a new nuclear power plant unit (see *Nuclear Law Bulletin* No. 69). At that time, the Council of State also declared that the liability amount of nuclear operators should be raised significantly, and three ministers issued a statement according to which the 1987 Nuclear Energy Act (the text of this Act is reproduced in the Supplement to *Nuclear Law Bulletin* No. 41) should be amended to ensure that the nuclear operator has to bear liability for the costs of radioactive waste management for 50 years after the repository has been closed.

On 24 May 2002, by a vote of 107 votes in favour and 92 votes against (no abstentions), the Parliament ratified this Decision in Principle on the construction of the fifth nuclear power plant unit in Finland. The Decision in Principle remains in force for five years from the date of ratification by the

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1. The text of this Agreement is available on the Web site of the Federal Ministry of Environment and Nuclear Safety at [www.bmu.de/english/fset1024.htm](http://www.bmu.de/english/fset1024.htm)

Parliament, within which time TVO is required to submit an application for a construction permit pursuant to the Nuclear Energy Act. Before submitting the permit application, the company must also choose between the two proposals for the plant site – Hästholmen in Loviisa and Olkiluoto in Eurajoki. It is expected that the plant could be commissioned at the end of the decade. Spent fuel from the new power plant unit is to be disposed of in the bedrock in Olkiluoto.

## Switzerland

### ***Public vote on the proposal for a final repository for short-lived low and medium-level radioactive waste (2002)***

On 22 September 2002, the electorate of the Nidwalden Canton in central Switzerland rejected for the second time in seven years by public vote the proposal to grant a cantonal concession to the Wellenberg Co-operative Company for Radioactive Waste Management (*Genossenschaft für Nukleare Entsorgung Wellenberg – GNW*), which is responsible for carrying out all activities in relation to research on and construction of a final repository for short-lived low and medium-level radioactive waste. GNW had chosen the Wellenberg site in the Nidwalden Canton for this purpose (see *Nuclear Law Bulletin* Nos. 52 and 54). Pursuant to the 1959 Federal Act on the Peaceful Uses of Atomic Energy and Protection against Radiation (see *inter alia Nuclear Law Bulletin* Nos. 52-55), activities related to mining and the use of subsoil resources are subject to the legislative and regulatory requirements of each canton. Therefore, GNW required a cantonal concession in order to open an underground research laboratory (URL) to determine whether the rock type is appropriate for this method of disposal, even though such activities are part of a federal initiative to construct a national repository. The concession was granted by the cantonal authorities, but was rejected by 58% of the population when it was submitted to public vote. The Wellenberg site has been definitively rejected by GNW since the result of this vote.

Currently, the Swiss Parliament is examining a draft Law on Nuclear Energy, which would repeal and replace the 1959 Act, and the question of whether these cantonal prerogatives will be maintained or not is an eminently political one.

Pending the entry into operation of a final repository for disposal of short-lived low and medium-level radioactive waste, such waste will be placed in the Zwiilag interim waste repository at Würenlingen, in the canton of Argovia. This repository is designed for the temporary storage of all categories of radioactive waste (see *Nuclear Law Bulletin* No. 52).