

CASE LAW

Argentina

*Proceedings before the Federal Criminal Court of First Instance Concerning Environmental Radiological Contamination near the Ezeiza Centre (2005)**

Allegations made in a daily newspaper by an environmental association in Argentina concerning possible radiological contamination of groundwater by releases from wells located in the vicinity of the Ezeiza Nuclear Research Centre, located 40 kilometres from Buenos Aires, resulted in a prosecutor referring these questions to the Federal Criminal Court of First Instance for investigation.

The federal criminal judge nominated a professional geologist as an expert witness to carry out tests on water samples. The analysis was carried out in the laboratories of the Nuclear Regulatory Authority (ARN). The expert witness concluded in late December 2004¹ that the water consumed by almost a million persons in the vicinity of the nuclear installation was contaminated with radioactive elements (enriched and depleted uranium) and therefore not fit for human consumption. This information caused great anxiety amongst the local population and gave rise to many public meetings. The ARN issued a rebuttal to this expert's report and suggested that an IAEA evaluation was necessary.

The Argentinian government, at the request of the Nuclear Regulatory Authority, asked the IAEA to verify that the international safety standards for radiation protection of the public in the area of the Ezeiza plant were being observed. In response to this request, the IAEA sent a fact finding mission to Argentina.

The IAEA's evaluation² established that "the ARN's report is technically sound ... and it presents credible conclusions related to the radiological public and environmental protection". It judged that the Expert Appraisal Report No. 6 referred to above contained deficiencies compromising the expert's conclusions. Amongst those deficiencies were inappropriate use of dose assessment methodology for radiation protection and incorrect use of international radiation protection standards and international health guidelines.

Following this evaluation, the Argentinean Federal Judiciary requested that an international expert appraisal be organised. Such international expert appraisals are organised by the IAEA in the form of an international fact-finding mission with the participation of such organisations as the World Health Organization (WHO), the Pan-American Health Organization (PAHO) and the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR).

* The information contained in this note is based upon the presentation by Ms. Cristina A. Dominguez before the INLA Congress held at Portoroz, Slovenia, in October 2005.

1. Expert Appraisal Report No. 6.
2. Its report of 28 April 2005.

The IAEA fact-finding mission conducted inspections at a number of locations and discussions were held with local officials in relation to technical aspects of the procedures for environmental monitoring, laboratory measurements and effluent management. On the basis of this mission, the IAEA considers that the requested international expert appraisal is unnecessary, given that there is no evidence that the international standards for radiation protection of the public have been violated and that the ARN has the technical capacity to make its own independent assessments. However, in light of the request emanating from the Argentinean federal judiciary and the consideration given to this request by the Argentinean government, the IAEA has undertaken to organise this expert appraisal in December 2005 and its report is expected in February 2006.

Canada

*Federal Court of Appeal Decision Respecting the McClean Lake Project (2004)**

In a judgement delivered on 4 June 2004, in the case of *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board) and Cogema Resources Inc* (2004 FCA 218), the Federal Court of Appeal of Canada allowed the appeals of the Atomic Energy and Control Board (AECB – now the Canadian Nuclear Safety Commission) and Cogema Resources Inc. (Cogema) against an order of the Federal Court of Canada (Trial Division) that quashed an operating licence (the Operating Licence) issued by the AECB for a uranium mill and tailings management facility known as the McClean Lake Project (the Project) (see *Nuclear Law Bulletin* No. 70).

Decision of the Federal Court of Canada (Trial Division)

The basis of the order of the Federal Court is that the licence was invalid because its issuance was not preceded by an environmental assessment under Section 5 of the Canadian Environmental Assessment Act, S.C. 1992, c. 37 (CEAA), the substantive provision of which came into force on 19 January 1995. The environmental assessment regime in place prior to that time was governed by the *Environmental Assessment and Review Process Guidelines Order*, SOR84-467 (the Guidelines).

In accordance with the Guidelines, there had been an Environmental Assessment Panel established to complete an environmental assessment of the Project. The assessment was completed prior to the coming into force of the CEAA. However, the Trial Division accepted, on an application for judicial review of the AECB's decision to issue an Operating Licence to Cogema in 1999, the Inter-Church Uranium Committee Educational Co-operative's argument that the transitional provisions of the CEAA did not operate to negate the necessity of a new environmental assessment under that Act.

The transitional provision at issue was subsection 74(1) of the CEAA, which provides:

The *Environmental Assessment and Review Process Guidelines Order*, approved by Order in Council P.C. 1984-2132 of 21 June 1984 and registered as SOR/84-467, shall continue to apply in respect of any proposal that prior to the coming into force of this

* This case note was kindly provided by Ms. Samantha Maislin Dickson, Counsel, Canadian Nuclear Safety Commission, Department of Justice. The author alone is responsible for the facts mentioned and opinions expressed therein.

section was referred to the Minister for public review and for which an Environmental Assessment Panel was established by the Minister pursuant to that Order.

The trial judge concluded that because Sub-section 74(1) did not provide any explanation as to what was to occur after a panel completed its work under the Guidelines, the process mandated by the CEAA had to be undertaken for the same project.

Decision of the Federal Court of Appeal of Canada

The Federal Court of Appeal disagreed with the trial judge's interpretation of the transitional provisions contained in subsection 74(1) of the CEAA. It accepted the interpretation of this provision propounded by the AECB and Cogema to the effect that a new environmental assessment under the CEAA was not required as one had been completed under the regime of the Guidelines. The Appeal Court relied on the principles of statutory interpretation respecting transitional principles, which include certainty, predictability, stability, rationality, and formal equality. The Appeal Court further indicated that the trial judge's interpretation of subsection 74(1) of the CEAA was not consistent with the object of that provision or the important objectives of the CEAA, namely the avoidance of unnecessary duplication of work, and the general understanding of environmental assessment as a planning tool to ensure that government decision makers consider environmental issues early in the planning process of projects [para. 45 and 46]. The Appeal Court allowed the appeals and set aside the order the Federal Court (Trial Division).

Supreme Court of Canada

On 24 March 2005, the Supreme Court of Canada denied leave to appeal by the Inter-Church Uranium Committee Educational Co-operative. This, in effect, resulted in upholding the Federal Court of Appeal decision and confirming the validity of the original licence issued by AECB to Cogema for the McClean Lake Project in accordance with a purposive interpretation of subs. 74(1) CEAA.¹ At this point in time, one could reasonably conclude that the Supreme Court of Canada agreed that the appellant's interpretation of subs. 74(1) CEAA would result in unnecessary duplication and would not be consistent with the legislative purpose of this section as a transitional rule.

Outlook

The decision from the Federal Court of Appeal was *de facto* upheld as a consequence of the denial of leave to appeal to the Supreme Court of Canada. The clarifications provided by the decision will certainly assist in the statutory interpretation of a transitional provision that has raised some legal and factual concerns in the past. The decision also reviewed and confirmed the validity of the environmental assessment process and some significant legal issues as it pertains to uranium mining projects in accordance with the *Canadian Environmental Assessment Act*. The decision has already been cited with approval by the Federal Court of Appeal in *Minister of the Environment and the Canadian Environmental Assessment Agency v. Bennet Environmental Inc.* [2005] FCA 261.

1. [2004] S.C.C.A. No. 388. The text of the decision of the Federal Court of Appeal is available on the website of the Federal Court of Canada at <http://decisions.fca-caf.gc.ca/fca/2004/2004fca218.shtml>.

France

Judgement of the Court of Appeal of Caen on the Licence to Reprocess Australian Spent Nuclear Fuel (2005)

On 12 April 2005, the Court of Appeal of Caen handed down a judgement which reversed, in part, the judgement of the County Court (*Tribunal de grande instance*) of Cherbourg of 3 February 2003 (see *Nuclear Law Bulletin* No. 71). The Cherbourg Court had rejected the claims of two associations (*Manche Nature* and Greenpeace France) which had taken out proceedings against the General Company for Nuclear Materials (*Compagnie générale des matières nucléaires – Cogema*) with a view to prohibiting the unloading and storage of German and Australian spent nuclear fuel at its factory in La Hague. They claimed that the licences necessary for reprocessing had not been delivered.

The licensing procedure for the reprocessing of nuclear fuel comprises two different licences:

- a licence in principle (*autorisation de principe*) through a decree which allows the operator to establish the reprocessing installation and to define its purpose and the list of materials which may be reprocessed there;
- an operating licence (*autorisation opérationnelle*) delivered by the DGSNR which approves the safety measures proposed by the operator for each reprocessing operation, and allows it to proceed; in most cases, this operating licence is delivered in two stages, the first of which deals with the reception, unloading and storage of spent fuel, and the second of which focuses on the actual reprocessing of the fuel.

Greenpeace France appealed this decision on 17 February 2003. The appellant claimed that the Australian spent fuel was waste pursuant to Articles L 541-1 and L 541-2 of the Environmental Code, rather than useful raw material, and therefore its storage in France, in the manner and under the conditions established by Cogema, went beyond the timeframe technically necessary for its reprocessing. Cogema was therefore in breach of Article L 541-2 referred to above.

In its judgement of 12 April 2005, the Court of Appeal of Caen considered that the spent fuel originating from the Australian research reactor HIFAR operated by ANSTO and stored in the La Hague Cogema installations pending its reprocessing, was radioactive waste subject to the regime established by Articles L. 542-1 et seq. of the Environmental Code.

On the same day on which the Court of Appeal handed down its judgement, Cogema had still not obtained a licence to reprocess that fuel, and therefore the Court judged that it was in breach of Article L 542-2 of the Environmental Code which provides that “the storage in France of imported radioactive waste, even if it has been reprocessed on national territory, may not be longer than is technically necessary for reprocessing”. The Court ordered Cogema to produce and provide to Greenpeace France, within a time limit of three months, a licence to reprocess the entire stock of nuclear fuel.

If Cogema does not produce this licence within the allowed timeframe, it will be required to terminate storage of such waste within a period of two months, failing which Cogema will be required to pay a penalty of EUR 1 500 per day.

Cogema has decided to appeal this decision. Deliberations will be held on 7 December 2005.

Judgement of the Magistrates' Court of Limoges Concerning the Dumping of Radioactive Waste by Cogema (2005)

The association *Sources et Rivières du Limousin* (Springs and Rivers of Limousin) took out proceedings in March 1999 against Cogema for pollution of various lakes and rivers in Haute-Vienne and the endangering of peoples' lives. The federation *France Nature Environnement* became another civil party to this action in March 2002. Tests carried out by the Independent Research and Information Commission (*Commission de recherche et d'information indépendantes – CRII-RAD*) and the Centre for the study of the metrology of nuclear radiation and dosimetry (*Centre d'étude de métrologie des rayonnements nucléaires et de dosimétrie – CEMRAD*) demonstrated chemical and radioactive contamination of sediment taken from several streams.

In an Ordinance of 18 August 2003, the examining judge (*juge d'instruction*) considered that the head of action involving the endangering of peoples' lives was not applicable. He ordered that the case be returned to the Magistrates' Court to be judged in respect of the dumping and water pollution offences. The instructing chamber of the Court of Appeal of Limoges decided on 25 March 2004 in favour of the examining judge (see *Nuclear Law Bulletin* No. 74).

The counter-appeal lodged by Cogema against this decision was rejected by the French Supreme Court (*Cour de cassation*) on 3 November 2004. The case was therefore returned to the Magistrates' Court to be judged in respect of the offences concerning the dumping of waste containing radioactive substances and water pollution causing damage to fish fauna.

In its judgement of 14 October 2005, the Magistrates' Court of Limoges discharged Cogema, considering that there was no proof of any of the accusations made.

With regard to the dumping of waste containing radioactive substances, the Court noted that each time a site was opened or closed, a prefectural order was issued specifying the standards applicable to the mine water discharged, and it considered that the ten-yearly environmental report produced by Cogema for the period 1994 to 2003 demonstrated that the average annual concentration in radium or thorium had always respected those limits, as established. Therefore there could be no offence of having dumped waste containing radioactive substances. Furthermore, it was not possible to prove a causal link between the discharged mine water at certain sites which, for ten years, did not go above prefectural limits, and the presence of radioactivity considered abnormal by the examining judge and third parties. Consequently, the Court ruled that Cogema could not be considered guilty of dumping radioactive waste.

As regards the damage to fish fauna, the Court noted that there was no proof of dumping or deliberate deposit by Cogema of the quantities of uranium discovered in the lake or river in question. As the two charges of dumping waste and damage to fauna are closely linked, Cogema could not be declared responsible for the quantity of uranium discovered in the fish found in that lake.

The two associations have asked the State Prosecutor to appeal this decision before the criminal courts as this recourse is not available to civil parties to the action.

Japan

Judgement of the Japanese Supreme Court Confirming the Validity of the Licence to Establish the Monju Reactor (2005)

On 30 May 2005, the Japanese Supreme Court pronounced its judgement, on appeal, in relation to a case filed by local residents calling for the closure, on safety grounds, of Japan's prototype fast-breeder nuclear reactor, Monju, located in Tsuruga, Fukui Prefecture. Monju supplied its first electricity to the grid in 1995, but a sodium leakage incident in December of that year led to the 280 MW unit being shut down. The Fukui District Court had rejected this lawsuit in March 2000 (see *Nuclear Law Bulletin* No. 65) and the Nagoya High Court reversed the ruling of that Court on appeal in January 2003 (see *Nuclear Law Bulletin* No. 71). The Nagoya High Court had specifically faulted the design and safety measures of the reactor which, in its view, were not sufficient to prevent leaking sodium from contacting concrete reactor structures and the design of the steam generators.

The Supreme Court overturned the ruling of the Nagoya High Court and confirmed the legitimacy of the licensing and safety review for Monju. Following the leak in 1995, extensive investigations were undertaken to determine the cause of the leak, and in December 2002 regulators approved a plan for reactor modifications to counteract the leak. Such modifications are expected to take approximately two years, followed by one year of testing to confirm the integrity and operation of the plant before its restart.

The main points of the judgement were as follows:

- the licence to establish the Monju reactor cannot be considered illegal or invalid because the examinations and safety reviews carried out by the Nuclear Safety Commission and the Committee on Examination of Reactor Safety were without obvious defect;
- the basic design of the plant and its safety measures are reasonable and justify the issue of a licence.