

Case Law

Canada

*Brunswick News Inc. v Her Majesty the Queen in the Right of the Province of New Brunswick denying release of nuclear power feasibility study*¹ (2008)

A superior court in Canada has made an important decision with regard to freedom of information legislation and protection of confidential commercial information. It denied a provincial newspaper company access to a feasibility study concerning the construction of a second nuclear power reactor in New Brunswick, Canada [*Brunswick News Inc. (c.o.b. New Brunswick Telegraph Journal) v New Brunswick (Minister of Energy)*].²

Background

On 7 February 2008, Brunswick News Inc. applied to the New Brunswick Minister of Energy under the provincial Right to Information Act³ for copies of two feasibility studies concerning the construction of a second nuclear power reactor at Point Lepreau, New Brunswick. On 21 February 2008, the Minister provided the newspaper with a copy of one study but refused access to the other study in its entirety. The latter study had been prepared by Team CANDU, a group of energy corporations including Atomic Energy of Canada Ltd. (AECL).⁴

At the time of the application, the Province of New Brunswick had not yet made a decision with respect to the construction of a second reactor by Team CANDU. The studies were prepared to provide advice and assistance to the Government of New Brunswick in its decision-making regarding new nuclear power.

The Minister's decision not to release the Team CANDU study in its entirety pursuant to the act was based on three provisions which stipulate that there is no right to information where:

- (a) release of information “would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract” [paragraph 6(c) of the act];

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1. Submitted by Jacques Lavoie, Senior General Counsel and Lisa Thiele, Senior Counsel, both at Legal Services, Canadian Nuclear Safety Commission. Opinions expressed in this summary are those of the authors alone and do not purport to represent the views or policies of the Canadian Nuclear Safety Commission or of the Government of Canada.
 2. 2008 NBQB 299, [2008] N.B.J. No. 329 [Atomic Energy of Canada Limited, (AECL) Intervenor].
 3. S.N.B. 1978, c. R-103 (hereinafter “act”).
 4. Team CANDU was described by affidavit evidence before the court as “the nuclear technology and engineering companies that have joined together to provide a nuclear energy proposal to meet the province’s electricity needs”, and its members included Atomic Energy of Canada Ltd. (AECL), SNC-Lavalin Nuclear Limited (SLN), Hitachi Canada Ltd. (HCL), GE-Hitachi and Babcock and Wilcox (B&W).

- (b) release “would reveal financial, commercial, technical or scientific information ... given in or pursuant to an agreement entered into under the authority of a statute or regulation, if the information relates to the internal management or operations of a corporation that is a going concern” [subparagraph 6(c.1)(ii) of the act]; or
- (c) release “would disclose opinions or recommendations for a Minister or the Executive Council” within the meaning of paragraph 6(g) of the act.

The decision of the court

When the newspaper company applied for a review of the Minister’s decision before the New Brunswick Court of Queen’s Bench, AECL sought and was granted status to intervene in the application in order to represent the interests of the members of Team CANDU. Before the court, in addition to the reasons that had been relied on by the Minister in denying release of the study, AECL raised another ground on which to argue that the feasibility study was not subject to disclosure under the legislation, the specific provision of the act providing that there is no right to information where its release “would disclose information the confidentiality of which is protected by law”.

AECL submitted affidavit evidence on 18 August 2008 advocating in favour of applying the act’s legally protected confidentiality provision [paragraph 6(a)]: “The release of the Study would result in the disclosure of information, the confidentiality of which is protected by law through confidentiality and non-disclosure agreements. These agreements were necessary for the formation of Team CANDU and the sharing of confidential information between Team CANDU members”.

Also of note to the court was the fact that a memorandum of agreement (MOA) had been executed between AECL and the Energy Minister pursuant to the provincial Executive Council Act.⁵ Such legal instruments are often used in Canada in the context of intergovernmental relations by federal, provincial and territorial governments and government bodies such as Crown corporations, such as AECL. With regard to the feasibility study in this case, the MOA specified that any information shared would be treated confidentially.

Justice G.S. Rideout reviewed the jurisprudence regarding confidentiality and noted that the test in Canada for a privilege against disclosure of confidential communications is a four-part test:

- 1) The communications must originate in a *confidence* that they will not be disclosed.
- 2) This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties.
- 3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
- 4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

In concluding that the Team CANDU feasibility study in its entirety was not subject to release on the basis of the confidentiality provision, the court was satisfied that “the communication originated in a confidence that it would not be disclosed” and that it had been the intention of the

5. R.S.N.B. 1952, c. E-12.

parties that both the report was to be confidential and that its confidentiality was to continue. The court stated:

“Given that we are dealing with a group of parties who exchanged their knowledge and sensitive information amongst themselves, it seems clear that the parties would require this information to be confidential... If that was not in place, it seems obvious that the parties would be reluctant to disclose their knowledge and information to the rest of the team. In addition, the nature of the work requires a free exchange of information in order to properly prepare the feasibility study”.

The court came to an interesting conclusion based on the latter two parts of the test for confidentiality. It asks whether or not the relation should be “sedulously fostered” in the community and also if the potential injury as a result of disclosure outweighs the benefits of disclosure. In the circumstances of this matter, the court noted that “disclosure, not secrecy is the policy and foundation to the legislation”. In finding that the study was not to be released, the court concluded:

“In my opinion, the community would want parties who are preparing a feasibility study to have the benefit of a free exchange of the information that each party could bring to the table. The feasibility study will be addressing government on very serious and expensive matters, therefore, the community would want the most forthright opinions based on all the facts, information, discoveries and trade secrets that each party may have. If the parties were reluctant to produce this information because it may be disclosed, with adverse results to the party, this could result in a detriment to the community. Consequently, while slightly different in the context of this case, I believe tests three and four have been met”.

The court was satisfied that the confidentiality of the feasibility study was legally protected, such that the study in its entirety was not subject to disclosure. On the other grounds that had been relied upon by the Minister for non-release, the court found that those provisions did not protect the feasibility study from release in its entirety.

Conclusion

This case should be of interest to the legal community as it could assist parties involved in such agreements in gaining a better understanding of the reach of freedom of information laws and the extent to which protection against disclosure may be afforded under similar circumstances or agreements in some Canadian jurisdictions.

It is also worth noting that a new provision was added to the federal Access to Information Act⁶ (ATIA) to provide a general exclusion from the provisions of the legislation with respect to records containing information that is under the control of AECL. Section 68.2 of the ATIA states:

This act does not apply to any information that is under the control of Atomic Energy of Canada Limited other than information that relates to

- (a) its general administration; or
- (b) its operation of any nuclear facility within the meaning of section 2 of the *Nuclear Safety and Control Act* that is subject to regulation by the Canadian Nuclear Safety Commission established under section 8 of that act.

6. R.S. 1985, c. A-1, as amended by 2006, c.9, s.159 (hereinafter “ATIA”).

The Canadian Parliament has expressed an intention to exclude records from the ATIA such as the ones which were considered in the New Brunswick case. At this time, however, it may still be too early to conclude with certainty the extent to which such a provision may be interpreted by Canadian courts in the future.

Germany

Judgement of the Federal Administration Court on the so-called “Biblis-obligations” (2008)

In a judgment handed down on 2 July 2008, the German Federal Administrative Court declared an order by the state Baden-Württemberg against the operator of the nuclear power plant Philippsburg to be unlawful, upholding only one obligation in the order.⁷

In 2005, the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) instructed the regulatory and supervisory body of the federal state Baden-Württemberg to issue an order, which required the operator to shut its plant, without delay or further orders, in case of not “obviously insignificant” non-compliance with technical limits, measures or other specific safety-related requirements deemed to control incidents. The operator was further required to inform the regulatory and supervisory body immediately if it was no longer able to demonstrate the controllability of design basis accidents.

The operator of the nuclear power plant Biblis had received the first order of this kind and challenged it in a trial which is pending in a lower court. According to the Federal Administrative Court, the BMU intends to have similar orders issued to all nuclear power plant operators in Germany.

In the judgement of the Federal Administrative Court, the instruction to stop operation is too ambiguous since it does not specify what technical criteria should compel operators to shut their reactors. The court ruled that, in compliance with the *principle that administrative decisions must be precise, clear and unambiguous*, an order to terminate operations must clearly state when and for what reasons an operator has this duty. A global obligation to immediately cease operation irrespective of the gravity of the non-compliance also violates, according to the court, the *principle to take proportionate decisions*.

The court dismissed the case with respect to the operator’s obligation to inform the regulatory authority when it has any doubt concerning the controllability of design basis accidents. The judges deemed this requirement to be “clear” enough.

United States

Judgement of the U.S. Court of Federal Claims on the interpretation of the U.S. Department of Energy’s Standard Contract (2008)

In the Court of Federal Claims, plaintiffs Carolina Power & Light Company and Florida Power Corporation (collectively Progress Energy) claimed damages of USD 91 029 704 from defendant U.S. Department of Energy (DOE), under the terms of DOE’s Standard Contract for Disposal of Spent

7. BVerwG 7 C 38.07; BVerwG Press Release No. 42/2008.

Nuclear Fuel and/or High Level Waste (Standard Contract).⁸ DOE's liability was previously established and the amount of damages was the sole issue in this case.

On 19 May 2008, the court issued an order and opinion awarding plaintiffs approximately USD 83 million of the USD 91 million plaintiffs had sought for mitigation damages for costs incurred from 31 January 1998 through 31 December 2005 due to the Government's delay in disposal of their spent nuclear fuel. The court made determinations on damages awards consistent with prior Federal Claims Courts rulings by finding that DOE would accept spent nuclear fuel at a rate of 3 000 MTUs a year and that claims for costs of capital are not recoverable. DOE has appealed.

As background, the Nuclear Waste Policy Act of 1982 (NWPA) requires the Secretary of Energy to "enter into contracts with any person who generates or holds title to high-level radioactive waste or spent nuclear fuel of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent nuclear fuel".⁹ The NWPA provided that, in return for payment of fees, the Secretary of Energy would begin disposal not later than 31 January 1998. Thus, DOE issued the Standard Contract as a final rule on 18 April 1983.¹⁰ DOE then entered into contracts with the utilities in which, in return for payment of fees into the Nuclear Waste Fund, the Department agreed to begin disposal of spent nuclear fuel by 31 January 1998. Because it had no repository to receive the spent nuclear fuel under the NWPA, DOE was unable to commence disposal by 1998 and litigation ensued as a result of the delay. The "spent fuel litigation" established that DOE's obligation to begin disposal is legally binding notwithstanding the lack of a facility, *Indiana Michigan Power Co. v Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996); that the utilities' remedies for DOE's failure to begin disposal of their spent nuclear fuel are to be determined as a matter of contract law, *Northern States Power Co. v U.S.*, 128 F.3d 754 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 540 (1998); and that DOE cannot deny liability on the ground that its delay was unavoidable.

The court noted that in order to obtain renewal of their operating licences, nuclear power plant owners and operators were required to enter into the standard contract with DOE.¹¹ Both Progress Energy and DOE understood the standard contract to ensure that Progress Energy would not have to provide additional storage space for spent nuclear fuel at their facilities after 31 January 1998.¹² DOE did not comply with the intended time frame and has not yet collected any spent nuclear fuel.¹³ Nonetheless, DOE collected fees from utilities pursuant to the contract. As of 31 December 2005, Progress Energy had paid DOE approximately USD 661 million in fees for the disposal of spent nuclear fuel under Plaintiffs' Standard Contracts.¹⁴ Progress Energy has had to take various mitigation measures in order to store its spent nuclear fuel to maintain full core reserve at each of its plants.¹⁵

The court found that, given the parties' expectations at the time of contract formation, Progress Energy was justified in believing it would not have to build any additional storage for spent nuclear

8. *Carolina Power & Light Co. v U.S.*, 82 Fed. Cl. 23, 26 (Ct. Cl. 2008).

9. 42 U.S.C. § 10222(a)(1).

10. Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 48 Fed. Reg. 16590 (18 April 1983).

11. *Carolina Power & Light Co.*, 82 Fed. Cl. at 29.

12. *Ibid* at 30.

13. *Ibid* at 32-33.

14. *Ibid* at 30.

15. *Ibid* at 33-34.

fuel onsite after 31 January 1998.¹⁶ It also held that the damages awarded were reasonably foreseeable to DOE at the time of the contracting, that DOE's breach was a substantial factor causing the damages, and that the damages it awarded were established with reasonable certainty.¹⁷ Progress Energy's claimed damages fall into five categories:

(1) USD 208 120 to complete a study for a dry storage facility known as an Independent Spent Fuel Storage Installation (ISFSI) at the Brunswick plant; (2) USD 32 734 951 to activate two additional spent fuel storage pools at the Harris plant; (3) USD 16 975 182 to ship spent fuel from the Robinson and Brunswick plants to the Harris plant; (4) USD 36 436 059 to construct and load the Robinson plant ISFSI; and (5) USD 4 675 392 to design, construct and replace spent fuel racks at the Crystal River Plant.¹⁸

The court disallowed the Crystal River re-rack project and the Harris component cooling water system upgrade. It concluded that plaintiffs would have incurred these expenses even in the absence of DOE's partial breach of the standard contract. It also disallowed various manual journal entries because Progress Energy did not meet its burden of showing the reason for the expenses, or whether the expenses were caused by DOE's partial breach. The court also disallowed Progress Energy's claim for Allowance for Funds Used During Construction (AFUDC), because it is actually a claim for interest against the U.S. Government. This claim is not allowable by law.¹⁹ After deduction of the above items, the court allowed Progress Energy a recovery of USD 82 845 926.²⁰

Subsequently, DOE filed a motion for reconsideration, on which the court ruled on 19 June 2008.²¹ In its motion, DOE contended that the court erred in three matters:

(1) the court failed to consider evidence showing that, even if [DOE] had collected spent nuclear fuel as its contract required, Plaintiffs still would have incurred USD 260 037 in railroad track maintenance costs to ship some of its spent fuel by rail between nuclear plants; (2) the court failed to credit Defendant for USD 42 295 in avoided overhead costs; and (3) the court failed to deduct USD 14 102 in construction interest components known as "AFUDC" from plaintiff's claims for crud and sludge cleanup.²²

The court denied DOE's first two claims and granted the third, reducing Progress Energy's award by USD 14 342. Final judgment for Progress Energy was in the amount of USD 82 789 289.²³

Summary Order of the U.S. Court of Appeals on petitions for revision of Nuclear Regulatory Commission regulations (2008)

On appeal to the Federal Court of Appeals for the Second Circuit, the joint petitioners objected to the Nuclear Regulatory Commission's (NRC) denial of their petitions for revision of the NRC's nuclear

16. *Ibid* at 40-41.

17. *Ibid* at 41-44.

18. *Ibid* at 26.

19. *Ibid* at 27.

20. *Ibid*.

21. *Carolina Power & Light v U.S.*, 82 Fed. Cl. 317 (Ct. Cl. 2008).

22. *Ibid*.

23. *Ibid* at 318.

power plant licensing regulations so that a licence renewal “would be subject to the same standards imposed on initial applications for a license”.²⁴ Petitioners challenged the denial of their petitions on the following grounds:

(1) the NRC, in violation of its own regulations, did not provide petitioners with an opportunity to supplement their petitions; (2) the NRC did not hold a hearing or conduct fact-finding; (3) the NRC improperly relied on the existence of other administrative remedies; and (4) the NRC did not consider the “new information” and “new issues” raised in the petitions.²⁵

As to the first objection, the petitioners argued that the NRC should have notified them of its determination that petitioners failed to provide a factual or technical basis sufficient to support a petition for rulemaking. The petitioners cited 10 C.F.R. § 2.802(f) in support of their argument. This provision states that if a petition for rulemaking is found to be incomplete, the petitioner will be notified and given the opportunity to submit additional information. The court found petitioners’ argument unavailing, noting the distinction between an incomplete petition for rulemaking as discussed in 10 C.F.R. § 2.802(f) and one that is merely unpersuasive.

As to the second objection, the petitioners objected to the NRC’s omission of an adjudicatory hearing or fact-finding. The Commission’s regulation at 10 C.F.R. § 2.803 provides that “[n]o hearing will be held on [a] petition [for rulemaking] unless the Commission deems it advisable”. The court held that the NRC’s decision not to conduct fact-finding or a hearing was reasonable.

As to the third objection, petitioners challenged the NRC’s conclusion that the petitioners’ concerns relating to specific plants did not justify a revision of NRC policy for all nuclear power plants. Instead, the NRC suggested that the petitioners use other administrative mechanisms to address their concerns about specific plants. The court held that the NRC’s determination was reasonable.

Finally, as to the fourth objection, the petitioners argued that the NRC did not consider new issues and information set forth in their petitions. The petitioners identified the following information in support of their petitions for rulemaking:

(1) the mishaps at Three Mile Island, Chernobyl, and Browns Ferry; (2) utility bankruptcies; (3) delays in the construction of the nuclear waste repository at Yucca Mountain and the corresponding problem of storing nuclear waste on-site; (4) the reactor-head problems at the Davis-Besse reactor; (5) the terrorist attacks of 11 September 2001; (6) demographic changes bringing population centres closer to power plants; (7) the complexities of evacuating communities surrounding nuclear power plants; (8) the forty-year “design life” of nuclear power plants; (9) the necessity of complying with state regulations; (10) growing public opposition to the existence of nuclear power plants; and (11) studies raising concerns about the health consequences of the low-level radiation emitted by nuclear power plants.²⁶

The NRC concluded that the issues petitioners raised are most effectively addressed using the NRC’s on-going regulatory process. It found that “[i]n some cases, safety or security might be

24. *Spano v NRC*, No. 07-0324-ag(L), 07-1276-ag, slip op. at 1 (2d Cir. 19 September 2008).

25. *Ibid.*

26. *Ibid.*

endangered if resolution of a safety or security matter were postponed until the final renewal decision”.²⁷

The court, noting the narrow scope of its review, found reasonable the NRC’s decision to address these concerns during its on-going regulatory process.²⁸

27. Andrew J. Spano and Joseph C. Scarpelli; Denials of Petition for Rulemaking, 71 Fed. Reg. 74848, 74851 (13 December 2006).

28. Spano, No. 07-0324-ag(L), 07-1276-ag, slip op. at 3.