Notes on the Federal Court Decision in

Linda Keen vs. Attorney General of Canada[1]

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Summary:

The federal government's recently reaffirmed right to terminate without cause the head of a technical safety-oriented regulatory agency, illustrates a fundamental barrier to the independence of quasi judicial regulatory bodies where the key decision makers hold tenure at the pleasure of the government of the day.

Background:

CNSC had issued a licence to AECL to operate a reactor called NRU to produce isotopes, mostly used for radiopharmaceutical purposes. The key isotope in question is molybdenum-99 (Mo-99) which decays in a matter of days, making stockpiling impossible. Until recently, output from the NRU supplied up to 2/3 of the world demand. The NRU was brought into service in 1957 making it the oldest operating reactor in the world. Mo-99 is used for a wide variety of highly beneficial medical imaging applications.

Mo-99 is a fission product of uranium-235. The fission process occurs in the reactor. AECL's production of Mo-99 relies on weapons grade high enriched uranium as a feedstock. Reliance on this special feedstock has caused concerns with respect to nuclear weapons proliferation and also with respect to the management of the resulting waste stream since it contains a large amount of potentially unstable U-235. These concerns have played a role in preventing AECL's competitors from developing business in this area, reinforcing Canada's market dominance for supplying Mo-99.

The age of NRU and the reliability of isotope supply has been an international concern for some time. As early as December 1990, AECL claimed in applications to the U.S. government requesting export of weapons grade uranium, that NRU would be phased out by the year 2000 and replaced by non-weapons usable low enriched uranium, to be used in the two Maple reactors then under development.[2] The scope of the Maple project was later changed to switch the target design from low enriched uranium to weapons grade high enriched uranium. Technical problems caused AECL to terminate efforts to operate the Maple reactors in 2008.

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[1] The Federal Court decision was issued April 7, 2009. The citation number is 2009 FC 353. The docket is T-246-08. The decision was rendered by Justice Roger T. Hughes.

[2] Statement of Paul L. Leventhal and Alan J. Kuperman, Presented to the U.S. Nuclear Regulatory Commission, Briefing on Proposed Export of High Enriched Uranium to Canada, July 10, 2000, <http://www.nci.org/n/nci-nrc-710.htm>.

The licence under which AECL was operating the NRU reactor in 2007 required a safety upgrade to the reactor's cooling system. The licence required connecting two coolant pumps to emergency power supplies. AECL had previously assured the CNSC that the upgrade had been completed in 2005. However, in November 2007 CNSC inspectors discovered that contrary to AECL's assurances, one of the pumps was not connected to the emergency power supply. At a meeting on November 27, 2007, AECL proposed to operate the reactor with only one pump, a change that would have required an amendment to the licence issued by the CNSC for the operation of NRU. On December 2nd, AECL informed the Commission that it would no longer pursue the one pump option and would leave the reactor off-line until the two pumps could be connected. Soon after, the Minister responsible for both AECL and the CNSC, Gary Lunn, began demanding that the CNSC immediately convene a hearing to allow restart of the reactor.[3]

On December 10, 2007, the Governor in Council prepared a Directive ordering the CNSC to "take into account the health of Canadians who, for medical purposes, depend on nuclear substances produced by nuclear reactors".

The mandating legislation of the CNSC requires the CNSC to consider the safety of the reactors directly and not derived issues related to the use of a reactor's products. However, the legality of the December 10, 2007 Directive has never been challenged. The Directive gives rise to serious questions about potential future reactor safety eventualities. For example, should a serious safety deficiency generic to Candu reactors be discovered that required shutdown but the shutdown threatened the reliability of electricity supply in Ontario, could a Directive require that electricity service reliability trump reactor safety?

Keen was removal as president on January 15, 2008. She was replaced by a career civil servant, Michael Binder.

It appears that the federal government's concerns over health consequences for patients, possibly coloured by concerns about the cost and reputational consequences for AECL and the Minister's conflicted role as being responsible for both the regulator and the regulated party[4] may have contributed to its decisions regarding Keen and her dismissal.

Notes on the judgement:

The judge in the Keen case was mindful of the importance of the litigation. He noted that "the issue raised may well have broader application than just upon Ms. Keen's circumstances, but also upon many others who have found themselves appointed to government positions." [para. 43] He notes with approval a remark in a previous decision of the Federal Court of Appeal "judicial independence is the single most important element in the rule of law in a democratic society." [para. 47] He also quotes another justice saying "The guarantee of judicial tenure free from improper interference is essential to judicial

[3] Mr. Lunn's political web site lists his qualifications as those of a lawyer, licensed carpenter, and first aid trainer.

[4] The wisdom of having one minister responsible for both agencies has been debated since at least 1987-88 during reviews of reactor safety issue conducted under the auspicious of Ontario Nuclear Safety Review, lead by Dr. F.K. Hare.

independence. But it is equally important to remember that protections for judicial tenure were 'not created for the benefit of the judges, but for the benefit of the judged'".

The government's case against Keen appears to this non-lawyer to have been a slam dunk. The *Interpretation Act*, R.S.C. 1985, c. I-21 provides in section 23 that every public officer is deemed to hold office "during pleasure" unless otherwise expressed in the relevant enactment, commission or instrument of appointment. The mandating legislation for the CNSC is silent as to whether the designation as President is "during good behaviour" or "at pleasure". In a case with similar employment/unemployment facts – *Houle v. Canada* [1987] 2 F.C. 493 – it was found that although members of the Immigration Appeal Board enjoy tenure during good behaviour, a vice-chairmanship can be demoted to member without cause. The *Houle* decision was affirmed by the Federal Court of Appeal.

Notwithstanding the strength of the law against Keen, the judge was highly respectful, even sympathetic, toward her in the decision. The judge was particularly supportive of Keen's position that she was guilty of no mis-behaviour.

> "Ms. Keen's letter of January 8 2008 adequately rebuts any suggestion of lack of good behaviour. The failure of the Minister to enter into further dialogue or hold some form of independent inquiry demonstrates a clear lack of fairness. Further, if it was believed by the Minister of Governor in Council that Ms. Keen lacked "*good behaviour*" as President why keep her on as a member when there is a clear statutory requirement of good behaviour for a member." [para. 57]

On the matter of costs, the judge noted "The matter was sufficiently controversial and well argued by both sides in a matter of sufficient general interest that it is appropriate that no costs be ordered." The phrase "sufficiently controversial" does not appear to refer to the letter of the law, which seems to be not controversial at all. In the context of the decision, the phrase suggests to me that judge thought the good side lost.