Date: 20090407

Docket: T-246-08

Citation: 2009 FC 353

Toronto, Ontario, April 7, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

LINDA KEEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Linda Keen was, until January 15, 2008, the President of the Canadian Nuclear Safety Commission as well as a member of that Commission. On that day the Governor in Council by Order in Council (OIC), terminated her designation as President. She was not terminated as a member of the Commission. Later, by a letter addressed to the Prime Minister dated September 22, 2008, Ms Keen advised that she could no longer continue in a position as member of the Commission.

[2] Between those two dates, Ms. Keen had commenced and was pursuing this application for relief, which is set out in her Notice of Application as requesting:

1. *An Order of the Court declaring invalid and unlawful, or quashing, or setting aside the OIC of the Governor in Council.*
2. *An Order confirming the full force and effect of the Order in Council for the Applicant's re-appointment, dated November 15, 2005, bearing number P.C. 2005-2007.*
3. *The costs of this application.*

[3] At the hearing of this application Ms. Keen's Counsel advised that she would not be pursuing the relief sought in paragraph 2 and would restrict herself to the relief as requested in paragraphs 1 and 3 above. Further, her Counsel confirmed that none of the relief requested would be based on any argument arising from the *Charter of Rights and Freedoms*.

[4] Counsel for the Respondent, Attorney General of Canada, by way of a preliminary objection, sought to have the Court refuse to entertain the application on the basis of mootness. Given Ms. Keen's resignation as a member of the Commission, it was argued, she would no longer be eligible for appointment as President in any event. Further, it was argued that a declaration as sought in paragraph 1 of the request for relief would have no practical effect and, for the sake of judicial economy, should not be determined.

[5] For the reasons that follow, I will determine the matter in respect of the relief requested in paragraphs 1 and 3. I will dismiss this application without costs to any party.

FACTUAL BACKGROUND

a) Canadian Nuclear Safety Commission

[6] The Canadian Nuclear Safety Commission was established in 1997 by the *Nuclear Safety and Control Act*, S.C. 1997, c. 9. The preamble to that *Act* states:

WHEREAS it is essential in the national and international interests to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information;	*Attendu qu'il est essentiel :*
	dans l'intérêt tant national qu'international, de réglementer le développement, la production et l'utilisation de l'énergie nucléaire, ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés;
AND WHEREAS it is essential in the national interest that consistent national and international standards be applied to the development, production and use of nuclear energy;	*dans l'intérêt national, d'appliquer de façon uniforme les normes nationales et internationales de développement, de production et d'utilisation de l'énergie nucléaire,*

[7] The purpose of the *Act* is set out in sections 3(a) and (b):

3. *The purpose of this Act is to provide for*	***3.*** *La présente loi a pour objet :*

(a) the limitation, to a reasonable level and in a manner that is consistent with Canada's international obligations, of 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) the implementation in Canada of 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.

a) la limitation, à un niveau acceptable, des risques liés au développement, à la production et à l'utilisation de l'énergie nucléaire, ainsi qu'à la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés, tant pour la préservation de la santé et de la sécurité des personnes et la protection de l'environnement que pour le maintien de la sécurité nationale, et le respect par le Canada de ses obligations internationales;

b) la mise en œuvre au Canada des mesures de contrôle international du développement, de la production et de l'utilisation de l'énergie nucléaire que le Canada s'est engagé à respecter, notamment celles qui portent sur la non-prolifération des armes nucléaires et engins explosifs nucléaires.

[8] Section 8 of the *Act* provides for the establishment of the Commission. The objects of the Commission are set out in section 9:

9. *The objects of the Commission are*	***9.*** *La Commission a pour mission :*
(a) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to	*a) de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :*
(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,	*(i) le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,*
(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and	*(ii) le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,*
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and	*(iii) ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;*
(b) to disseminate objective	*b) d'informer objectivement le public — sur les plans scientifique*

scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (a).	*ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et pour l'environnement, des activités mentionnées à l'alinéa a).*

[9] Section 10 of the *Act* provides that the Commission shall comprise not more than seven permanent members and an unstated number of temporary members to be appointed by the Governor in Council. One of the permanent members is to be the President. A member holds office "*during good behaviour*".

[10] No special provision as to *"good behaviour"* or otherwise is made in respect of the President. Section 10 says:

10. *(1) The Commission consists of not more than seven permanent members to be appointed by the Governor in Council.*	***10.*** *(1) La Commission est composée d'au plus sept membres permanents, ou commissaires permanents, nommés par le gouverneur en conseil.*
(2) Notwithstanding subsection (1), the Governor in Council may appoint temporary members of the Commission whenever, in the opinion of the Governor in Council, it is necessary to do so.	*(2) Malgré le paragraphe (1), le gouverneur en conseil peut nommer, lorsqu'il l'estime nécessaire, des commissaires à titre temporaire.*
	(3) Le gouverneur en conseil

	désigne le président parmi les commissaires permanents.
(3) The Governor in Council shall designate one of the permanent members to hold office as President.	*(4) Le président est nommé à temps plein et les autres commissaires le sont à temps plein ou à temps partiel.*
(4) The President is a full-time member of the Commission and the other members may be appointed as full-time or part-time members.	*(5) Les commissaires permanents sont nommés à titre inamovible pour un mandat maximal de cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.*
(5) Each permanent member holds office during good behaviour for a term not exceeding five years and may be removed at any time by the Governor in Council for cause.	*(6) Chaque commissaire nommé à titre temporaire l'est à titre inamovible pour un mandat maximal de six mois.*
(6) Each temporary member holds office during good behaviour for a term not exceeding six months.	*(7) Le mandat des commissaires peut être reconduit, à des fonctions identiques ou non.*
(7) A member is eligible to be re-appointed to the Commission in the same or another capacity.	

[11] Section 12 of the *Act* deals specifically with the President who is to be the chief executive officer and has supervision over and direction of the work of the members, officers and employees of the Commission. Subsection (4) requires the President to provide to the Minister of National Resources certain reports as required:

12. *(1) The President is the chief executive officer of the Commission and has supervision over and direction of the work of the members and officers and employees of the Commission, including the apportionment of work among the members and, where the Commission sits in a panel, the assignment of a member or members to the panel and of a member to preside over the panel.*

(2) If the President is absent or incapacitated or if the office of President is vacant, such other member as may be designated by the Commission has all the powers and functions of the President during the absence, incapacity or vacancy, but no person may so act for a period exceeding ninety days without the approval of the Governor in Council.

(3) The President may delegate any of the powers delegated to the President pursuant to subsection 16(2) or 17(2) to any officer or employee of the Commission.

(4) Subject to the regulations made pursuant to paragraph 44(1)(d), the President shall make such reports to the Minister as the Minister may require concerning the general administration and management of the affairs of

12. *(1) Le président est le premier dirigeant de la Commission et, à ce titre, il en assure la direction et contrôle la gestion de son personnel; il est notamment responsable de la répartition du travail parmi les commissaires, de leur affectation à l'une ou l'autre des formations de la Commission et de la désignation du commissaire chargé de présider chaque formation.*

(2) En cas d'absence ou d'empêchement du président, ou de vacance de son poste, le commissaire que la Commission désigne assure l'intérim, qui ne peut dépasser quatre-vingt-dix jours sans l'agrément du gouverneur en conseil.

(3) Le président peut déléguer les pouvoirs qui lui sont conférés aux paragraphes 16(2) et 17(2) à un dirigeant ou un employé de la Commission.

(4) Sous réserve des règlements pris en vertu de l'alinéa 44(1)d), le président est tenu de présenter au ministre les rapports que celui-ci exige sur l'administration et la gestion des affaires de la Commission. Le ministre désigne ceux de

the Commission and such of these reports as the Minister may direct shall form part of the report referred to in section 72.	*ces rapports qui font partie du rapport annuel.*

[12] Section 19 of the *Act* provides that the Governor in Council may issue "*directives*" to the Commission which are binding on the Commission:

DIRECTIVES	*INSTRUCTIONS*
19. *(1) The Governor in Council may, by order, issue to the Commission directives of general application on broad policy matters with respect to the objects of the Commission.*	***19.*** *(1) Le gouverneur en conseil peut, par décret, donner à la Commission des instructions d'orientation générale sur sa mission.*
(2) An order made under this section is binding on the Commission.	*(2) Les instructions du gouverneur en conseil lient la Commission.*
(3) A copy of each order made under this section shall be *(a) published in the Canada Gazette; and* *(b) laid before each House of Parliament.*	*(3) Les décrets pris en vertu du présent article sont publiés dans la Gazette du Canada et déposés devant chaque chambre du Parlement.*

[13] Section 20 of the *Act* provides that the Commission is a court of record (une cour d'archives) and has the power to summon witnesses and to receive evidence. Section 21 provides

that a second power of the Commission is to train persons, disseminate information and other activities.

[14] Sections 24 to 26 of the *Act* provide that the Commission may issue, renew, suspend, amend, revoke or replace licences to deal in a variety of ways with nuclear substances and nuclear facilities. Section 25 provides that the Commission may do so on its own initiative. Section 40(3) supplements this provision regarding procedure. Section 43(3) provides that the Commission, on its own initiative, may redetermine a term or condition of a licence.

[15] In brief, the Commission grants licences to operate nuclear facilities and is to hold hearings in that regard. Those licences, even at the Commission's own initiative may be revisited.

b) <u>Appointment of Ms. Keen</u>

[16] Ms. Keen states in paragraph 2 of her affidavit, that prior to her appointment to the Commission, she had over twenty years of experience in senior management positions within the federal and provincial public service, including within the science, technology and resource sectors. On October 4, 2000 the Governor General in Council advised as follows:

> *Her Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources, pursuant to section 10 and 13 of the Nuclear Safety and Control Act, hereby*
>
> > *a. appoints Linda Keen of Ottawa, Ontario, to be a permanent member of the Canadian Nuclear Safety Commission to hold office during good behaviour for a term of five years, on a full-time basis, effective November 1, 2000;*

> *b. designates Linda Keen as President of the Canadian Nuclear Safety Commission, effective January 1, 2001; and*
>
> *c. fixes her remuneration at the rate set out in the schedule hereto which remuneration is within the GIC 8 ($119,900 - $141,100).*

[17] The commission granted by the Queen in respect of this appointment dated November 3, 2000 states, *inter alia*:

> ***A PERMANENT MEMBER OF THE CANADIAN NUCLEAR SAFETY COMMISSION***
>
> *TO HAVE, hold exercise and enjoy the office of a permanent member of the Canadian Nuclear Safety Commission onto you, Linda Keen, with all the powers, rights, authority, privileges, profits, emoluments and advantages unto that office of right and by law appertaining during your good behaviour for a term of five years, effective the first day of November in the year of Our Lord two thousand.*
>
> *AND KNOW YOU that, We did further, on the fourth day of October, designate you*
>
> *PRESIDENT OF THE CANADIAN NUCLEAR SAFETY COMMISSION*
>
> *TO HAVE, hold, exercise and enjoy the office of the President of the Canadian Nuclear Safety Commission onto you, Linda Keen, with all the powers, rights, authority, privileges, profits, emoluments and advantages onto that office of right and by law appertaining during Our Pleasure, effective the first day of January in the year of Our Lord two thousand and one.*

[18] That appointment was renewed by the Governor General in Council on May 19, 2005 by an appointment stating:

> *Her Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources, pursuant to sections 10 and 13 of the Nuclear Safety and Control Act, hereby:*
>
> > *a. re-appoints Linda Keen of Ottawa, Ontario, to be a permanent member of the Canadian Nuclear Safety Commission to hold office during good behaviour of a term of five years;*
> >
> > *b. designates Linda Keen as President of the Canadian Nuclear Safety Commission; and*
> >
> > *c. fixes her remuneration at the rate set out in the annexed schedule, which salary is within the range GCQ 8 ($184,500 - $217,000).*

[19] No further Commission given by Her Majesty is in evidence. I presume that the one previously granted continues.

c) <u>The Isotope Facility</u>

[20] Among the nuclear facilities subject to licence by the Commission is a reactor (National Research Universal-NRU) located in Chalk River, Ontario operated by a Crown corporation, Atomic Energy of Canada Limited (AECL). This facility provides nuclear isotopes used in the medical diagnosis and treatment of humans suffering from certain conditions. That reactor requires cooling by means of water which is pumped through the reactor. The design is such that it is essential that water must continue to be pumped even if there is an external incident or power interruption.

[21] The licence granted by the Commission respecting this reactor required that two pumps be suitably connected to an emergency power supply so as to ensure safe operation. In November

2007 it was discovered, during a routine plant shutdown, that the two pumps were not connected to the emergency power supply as required by the licence. AECL confirmed in writing that this was the case.

[22] On November 27, 2007 AECL met with Commission staff and proposed that the reactor be re-opened with only one pump connected to the emergency power supply (sometimes referred to as the one pump option). A series of discussions followed. The Commission indicated to AECL that this would require an amendment to the licence, which in turn would require a hearing at which an adequate safety case would have to be presented. On December 2, 2007 AECL informed the Commission that it would no longer be pursuing the one pump option and that the reactor would remain shut down until the two pumps could be connected.

[23] On December 5, 2007 the Minister of Natural Resources, the Honourable Gary Lunn, in a teleconference with AECL and the Commission, stated that AECL had "dropped the ball" and requested that the parties work together to resolve the matter. In a meeting on December 6, 2007 AECL advised the Commission that it would extend the shutdown until it was able to connect the two pumps. On December 7, 2007 AECL advised the Commission that it would not be pursuing the two pumps connection approach but would pursue connection of one pump. The Commission advised AECL that a safety case would have to be made out and a hearing held but that it would vary its procedural rules so as to expedite a hearing.

[24] On Saturday, December 8, 2007 the Minister, in a conference call with Ms. Keen and others, requested that a hearing be convened immediately so as to approve a restart of the reactor. Ms. Keen advised the Minister that she was awaiting an application by AECL and once it was received, an expedited hearing could be conducted. The next day, Sunday, December 9, 2007, AECL advised the Commission that it could submit the required information by the close of business on Thursday, December 13, 2007.

[25] On December 10, 2007 the Governor in Council prepared a "Directive", as provided by section 19 of the *Act*, the operative portion of which stated:

> *DIRECTIVE TO THE CANADIAN NUCLEAR SAFETY COMMISSION REGARDING THE HEALTH OF CANADIANS*
>
> *1. In regulating the production, possession and use of the nuclear substances in order to prevent unreasonable risk to health of persons, the Canadian Nuclear Safety Commission shall take into account the health of Canadians who, for medical purposes, depend on nuclear substances produced by nuclear reactors.*
>
> *2. This Directive comes into force on the day on which it is registered.*

[26] That Directive however was not delivered to Ms. Keen at the Commission until 11:00 am of the following day, December 11, 2007. By that time a Bill, known as Bill C-38, had been drafted and, in the afternoon of the same day, introduced in the House of Commons.

[27] Bill C-38, assented to December 12, 2007 as S.C. 2007, c. 31, permits the re-opening of the AECL reactor for a period of 120 days despite any conditions of the licence granted by the Commission. The preamble to that *Act* states, in part:

> *Whereas that reactor has been shut down for maintenance purposes and Atomic Energy of Canada Limited is prohibited from resuming the operation of the reactor until conditions of its licence relating to earthquake-proof backup units have been complied with;*
>
> *And whereas the shutdown has created a serious shortage of medical isotopes in Canada and around the world and is putting the health of Canadians at risk;*

[28] Section 1(1) of that *Act* states:

> *1. (1) Atomic Energy of Canada Limited may resume and continue the operation of the National Research Universal Reactor at Chalk River in Ontario for a period of 120 days after the coming into force of this Act despite any conditions of its licence under the Nuclear Safety and Control Act relating to the installation of seismically qualified motor starters on the heavy water pumps and the connection to the emergency power supply.*

d) <u>Removal of Ms. Keen as President</u>

[29] On December 27, 2007 the Minister wrote a letter to Ms. Keen expressing deep concern with respect to the actions of the Commission and advising that he was considering making a recommendation to the Governor in Council that her designation as President be terminated while maintaining her as a full-time member of the Commission. That letter stated in part:

> *I am writing to convey to you my deep concern with respect to the actions of the Canadian Nuclear Safety Commission (the "Commission"), of which you are President, that resulted in the continued shutdown of the NRU reactor in Chalk River, Ontario. My concern extends to the failure of the Commission to facilitate the return to operation of the NRU reactor in a timely manner, considering it is the primary source of medical isotopes necessary for the critical health care of Canadians.*
>
> …

> *Under your leadership, the Commission did not initiate the process to permit the return to operation of the NRU reactor, despite the issuance on December 10, 2007 of the Directive to the Canadian Nuclear Safety Commission regarding the Health of Canadians. The failure of the Commission to modify its approach in light of the Directive lead all parties in Parliament to take the extraordinary measure of adopting Bill C-38 to allow for the resumption of operations of the NRU reactor so that the production of medical isotopes could resume.*
>
> *These events have cast doubt on whether you possess the fundamental good judgement required by the incumbent of the office of President of the Commission, and whether you are duly executing the requirements of the office. Serious questions have arisen about whether the Commission, under your leadership, could have dealt more appropriately with the risk management of the situation.*
>
> …
>
> *The purpose of this letter is to provide you with an opportunity to make any submissions that you believe should be taken into account before a decision is made regarding your continued role as President of the Commission. Please ensure that I receive your written submissions by the close of business on January 10, 2008.*
>
> *You should be aware that I am considering making a recommendation to the Governor in Council that your designation as President of the Commission be terminated while maintaining your status as a full-time member of the Commission. However, before I decide whether or not to make the recommendation, I am prepared to hear from you as indicated above. If the matter of your continued designation as President proceeds to the Governor in Council, your submissions will be considered in order to assist in making a final determination.*

[30] Ms. Keen replied on January 8, 2008 by an eight page letter to which was attached a twenty-seven page detailed narrative of the events and actions in question. In part Ms. Keen's letter stated:

> *Dear Minister:*
> *Further to your attached letter of December 27, 2007, and the serious allegations contained therein, please accept this letter and attached submission as the formal response on behalf of both myself*

and the Canadian Nuclear Safety Commission ("CNSC"). Any objective assessment of the facts will reveal that the allegations contained in your letter are entirely without merit. While the Narrative and Commentary – attached here as Appendix "A" – outlines our position in greater detail, I will take this opportunity to provide you with my views on the contents of your letter.

…

Your letter does not contain a single allegation of personal misconduct on my part or even any allegation that my actions fell below expected performance standards. Rather, the threat of removal is entirely and exclusively based on an assessment of the steps taken – or not taken – by the CNSC in respect of the extended shutdown of the NRU reactor. If you believe that I have engaged in any misconduct, or that my conduct has failed to meet any performance standard, the law requires that you provide me with specific claims that you intend to rely on to justify my removal as President. In addition, the law requires that I be provided with an opportunity to provide a full response to any such claims once presented.

…

Recent comments made by Prime Minister Harper, Minister Clement and yourself have cast serious doubt on whether I could possibly receive a fair and impartial review of the events in question by the Cabinet. The Courts have made clear that the Governor in Council must act in good faith in an impartial manner when considering whether to remove a GIC appointee. As a fair and objective review of my performance by the government does not seem possible, I would therefore request that the government not take any steps along the lines suggested in your letter until the circumstances of this matter have been fairly and independently reviewed.

…

Taking into account the concerns I have raised above, alongside the matters raised in the attached Narrative and Commentary, I would strongly recommend that the issue of my performance as the President of the CNSC be referred to some form of public inquiry, Parliamentary committee or independent international review. I would welcome public scrutiny of my performance over the last

> *seven years and, in particular, the events leading up to the shutdown of the NRU reactor.*

[31] The Minister did not reply to Ms. Keen's letter of January 8. Instead on January 15, 2008 the Governor in Council, on recommendation of the Minister, issued an Order in Council terminating the designation of Ms. Keen as President of the Commission without affecting her status as full-time permanent member of that Commission. This Order in Council, which is the decision under review, states:

> *Whereas pursuant to the Nuclear Safety and Control Act, the Canadian Nuclear Safety Commission is responsible for regulating the production of nuclear substances as well as preventing unreasonable risk to the health and safety of Canadians associated with that production;*
>
> *Whereas by Order in Council P.C. 2000-1563 of October 4, 2000, Linda Keen was appointed a permanent full-time member of the Canadian Nuclear Safety Commission;*
>
> *Whereas by Order in Council P.C. 2000-1 563 of October 4, 2000, Linda Keen was designated President of the Canadian Nuclear Safety Commission;*
>
> *Whereas the President of the Canadian Nuclear Safety Commission is the chief executive officer of the organization and has supervision over and direction of the work of the members and officers and employees of the Commission;*
>
> *Whereas the position of President of the Canadian Nuclear Safety Commission requires the utmost confidence of the Governor in Council;*
>
> *Whereas the recent extended shutdown of the Nuclear Research Universal Reactor at Chalk River, Ontario and the interruption in the world supply of medical isotopes resulted in a serious threat to the health of Canadians and others;*
>
> *Whereas, the President of the Canadian Nuclear Safety Commission failed to take the necessary initiative to address the crisis in a timely*

fashion using the means at her disposal, and failed to demonstrate the leadership expected by the Governor in Council;

Whereas by letter dated December 27, 2007, the Minister of Natural Resources invited Linda Keen to comment, on or before January 10, 2008, on why her designation as President of the Canadian Nuclear Safety Commission should not be terminated;

Whereas by submission dated January 8, 2008, Linda Keen responded to the invitation of the Minister of Natural Resources;

Whereas the Governor in Council has carefully considered the submission received from Linda Keen, and has concluded that Linda Keen no longer enjoys the confidence of the Governor in Council as President of the Canadian Nuclear Safety Commission;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources, pursuant to sections 10 and 13 of the Nuclear Safety and Control Act, hereby

> *(a) terminates the designation of Linda Keen as President of the Canadian Nuclear Safety Commission; and*
>
> *(b) fixes her remuneration as a permanent member (full-time) of the Canadian Nuclear Safety Commission at the rate set out in the schedule hereto, which remuneration is within the range ($204,300 - $240,400).*

e) <u>Resignation of Ms. Keen as Member</u>

[32] These proceedings challenging the Order in Council were commenced on February 14, 2008. Ms. Keen filed an affidavit in support. The Respondent filed affidavits in support of its case in April 2008. Ms. Keen was cross-examined on July 16, 2008. The Respondent filed further affidavits in August, 2008.

[33] On September 22, 2008 Ms. Keen sent a letter to the Prime Minister advising that, effective immediately, she would no longer serve as a Member of the Commission. That letter said, in part:

> *Dear Sir,*
> *I am writing to inform you that, effective immediately, I will no longer serve as a member of the Canadian Nuclear Safety Commission ("CNSC"). In the current circumstances, I have been constructively dismissed from my position as President and Chief Executive Officer ("CEO") of the CNSC by the Government of Canada and cannot continue in a demoted position of Commission member.*
>
> …
>
> *Until I get the relief that I am seeking from the court, I have concluded that I cannot sit while being the subject of constructive dismissal by the Government and thus continue in this artificial Commission member position. I do so with the full knowledge that I may be risking two and half years of salary and benefits. However, in good conscience, I have no choice.*

[34] It is on the basis of this letter that the Respondent requests that the Court decline to hear this matter on the grounds of mootness.

MOOTNESS

[35] The Respondent's counsel argues that the resignation of Ms. Keen as a member of the Commission means that there is now no practical effect in the declaration that she seeks from this Court. It is recognized that she no longer seeks re-instatement as President.

[36] Authority for the proposition of mootness can be found in the decision of the late Justice Sopinka for the Supreme Court of Canada in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342.

[37] The general proposition is stated at page 353 of that decision: a case is moot if events subsequent to the institution of the proceeding affect the relationship between the parties such that a live controversy no longer exists. However the Court retains discretion to hear the case in any event. At page 353 Sopinka J. wrote:

> *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*

[38] Sopinka J. then addressed what consideration should be given by the Court in determining whether to hear the matter in any event. At pages 358 to 363 he provided three rationalia for consideration:

i. The matter should be rooted in the adversarial system. Even if a party no longer has a direct stake in the outcome, are there collateral consequences?

ii. There should be concern for judicial economy. Is a similar point likely to recur? Is it better to resolve the matter now rather than suffer continued uncertainty in the law?

iii. The Court should be aware of its proper law-making function. It should not intrude unnecessarily into the legislative branch of government.

[39] These rationalia are not to be applied in a mechanical process; one of them may overbalance the others. Sopinka J. concluded at page 363:

> *In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.*

[40] Respondent's Counsel relies on the decision of the Federal Court of Appeal in *Pro-West Transport Ltd. v. Canada (Attorney General)*, 2007 FCA 206 in which the Court, on the basis of mootness, declined to hear a case which requested that an Order in Council be quashed. By the time the matter came to the Court the Order in Council had been superceded. Sexton J.A. for the Court said at paragraphs 7, 8 and 9:

> ***7*** *In the present case, there is no live controversy. The licensing system and Order in Council under attack no longer exist. The relief sought by the Appellants includes declaring that the Order in Council and licenses granted under the old licensing system are void. Such declarations, if granted, would have no effect upon the parties' rights now as they are governed by the new licensing system.*
>
> ***8*** *In considering the exercise of discretion, although the case does exist in an adversarial context, the second and third factors militate against the exercise of discretion. The issues raised in the appeal are not brief nor are they recurring, which are considerations taken into account in Borowski. Furthermore there appears to be no pressing need to resolve questions relating to the powers of the VPA or the Governor in Council relating to access to*

> *the port. More importantly, the central issue in this case is whether the Governor in Council had the authority to issue the Order in Council. By passing judgment on this issue, the Court would be intruding into the political domain which does not appear to be necessary at the present time. In Thorne's Hardware Ltd. v. The. Queen, [1983] 1 S.C.R. 106, Dickson J. said it would take an egregious case to warrant the Court striking down an Order in Council. The present case does not qualify.*
>
> ***9*** *At the hearing of this appeal, counsel for the Appellants argued that his clients require a finding of the Court relating to the Order in Council so as to enable them to sue the Respondents for damages relating to the Order in Council. However, counsel did not direct the Court to any evidence in the material that his clients have suffered damages or to any evidence that they intend to advance such a claim. Furthermore, counsel for the Appellants made no attack on the motives of the Respondents in imposing the old licensing system.*

[41] Counsel for the Applicant, Ms. Keen, argued that the Court should exercise its discretion and hear the case. Citing *Manuge v. Canada,* 2009 FCA 29 a decision of the Federal Court of Appeal affirming its earlier decision in *Canada v. Grenier*, 2005 FCA 348, notwithstanding the intervening decision of the Ontario Court of Appeal in *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, Counsel says that the declaration sought here is a necessary prelude to any claim that Ms. Keen may have for damages against the Crown. While considering that the Record is not entirely robust as to any claim that Ms. Keen may seek to make, Counsel argues that her letter of September 22, 2008 is sufficient to indicate that she is contemplating such a claim.

[42] Ms. Keen’s Counsel further argues that the issues in this proceeding have been well and thoroughly argued and have broad effect in that a decision could impact upon many persons who have been appointed to quasi-judicial government commissions and the like.

[43] I am satisfied that, having heard this matter fully and competently argued by all Counsel, that I should proceed to determine the remaining issue. There is some possibility of a future claim by Ms. Keen and, more importantly, 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.

NATURE OF MS. KEEN'S APPOINTMENT

[44] Appointments to judicial or senior administrative positions made by the federal government fall into two general categories, those that are made "at pleasure" and those that are made "during good behaviour". A Judge of the Federal Court of Appeal or Federal Court, for instance, is appointed until age 75 "during good behaviour" as provided by section 8 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[45] 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:

> ***23.*** *(1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure, unless it is otherwise expressed in the enactment, commission or instrument of appointment.*
>
> ***23.*** *(1) Indépendamment de leur mode de nomination et sauf disposition contraire du texte ou autre acte prévoyant celle-ci, les fonctionnaires publics sont réputés avoir été nommés à titre amovible.*

[46] The concept of appointment "during good behaviour" was the subject of a recent decision of the Federal Court of Appeal in *Canada (Attorney General) v. Cosgrove*, 2007 FCA 103 where an issue of concern was based on whether public confidence in the judiciary would be undermined. Sharlow J.A. for the Court put the issue this way at paragraph 14:

> **14** *The opinion expressed by the Attorney General of Ontario was said to be based on the test for judicial incapacity stated in the 1990 Decision of the Inquiry Committee of the Council in relation to the complaint of the Attorney General of Nova Scotia about the conduct of the Royal Commission on the Donald Marshall Jr. Prosecution* (*published (1990), 40 U.N.B.L.J. 212*):
>
> > *Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?*

[47] In *Cosgrove* the Federal Court of Appeal stressed the nature of judicial independence and the concern that judges may deal with and decide their cases free from inappropriate scrutiny by the legislative and executive branches of government. At paragraphs 29 to 32 Sharlow J.A. wrote:

> ***29*** *An independent judiciary is essential to the rule of law in a democratic society. Indeed, the Inquiry Committee in this case said that judicial independence is the single most important element in the rule of law in a democratic society, followed closely by the necessity for an independent bar (Inquiry Committee decision, paragraph 26). I agree.*
>
> ***30*** *The independence of the judiciary is a constitutional right of litigants, assuring them that judges will determine the cases that come before them without actual or apparent interference from anyone, including anyone representing the executive or legislative arms of government: see Beauregard v. Canada, [1986] 2 S.C.R. 56 at paragraph 21, and R. v. Lippé, [1991] 2 S.C.R. 114 at page 139.*

> ***31*** *Justice Strayer expressed this principle as follows in Gratton v. Canadian Judicial Council (T.D.), [1994] 2 F.C. 769, at paragraph 16 (cited with approval in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, at paragraph 329):*
>
> > *Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial 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".*
>
> ***32*** *However, judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary: Moreau-Bérubé v. N.B. (Judicial Council), [2002] 1 S.C.R. 249 at page 285.*

[48] On the other hand, an appointment “at pleasure” is one that has been described by the Federal Court of Appeal in *Pelletier v. Canada (Attorney General)*, [2008] 3 F.C.R. 40 as “intrinsically precarious”. Decary J.A. in writing for the Court said at paragraph 33:

> ***33*** *Imposing an obligation to consult at the time of termination of a person appointed during pleasure in the absence of clear wording, even if only symbolic, would change the very nature of their appointment i.e. their intrinsically precarious status.*

[49] This concept of *"at pleasure"* appears to be derived from an ancient concept of appointments being at His or Her Majesty's pleasure. Recently the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 had occasion to review an "at pleasure" appointment and held that certain duties of fairness were owed to a person having such an appointment before action was taken to dismiss that person. If the statutory provisions were silent, such a person has at least a right to notice of an intention to be dismissed and to make representations in that regard for consideration before a final decision as to dismissal is made. At paragraphs 115 and 116 of *Dunsmuir* the majority of the Court wrote:

> ***115*** *The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (Wells, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick Interpretation Act, R.S.N.B. 1973, c. I-13, s. 20; Interpretation Act, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.*
>
> ***116*** *A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In Malloch, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice*

> *procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (Knight, at p. 682).*

[50] Turning to the scheme of the *Nuclear Safety and Control Act*, section 10, provides that the Commission shall comprise not more then seven permanent members who may be either full-time or part-time. Sub-section 10(5) states that each member holds office "*during good behaviour*". The President is designated by the Governor in Council according to sub-section 10(3) from the group of permanent full-time members. The *Act* is silent as to whether the designation as President is "*during good behaviour*" or "*at pleasure*".

[51] In the present situation, Ms. Keen was initially appointed as a member, effective November 1, 2000 and designated as President effective January 1, 2001. Both the appointment and designation were continued effective November 1, 2005. The Order in Council dated 15 January 2008 terminated Ms. Keen's designation as President but continued her appointment as a permanent full-time member with remuneration within the permitted range which meant in effect that her salary remained about the same. At that time, therefore, she was no longer President but continued as a permanent full-time member. By her letter dated September 22, 2008 to the Prime Minister, Ms. Keen resigned voluntarily as a member of the Commission.

[52] The substantive issue before the Court is the propriety of the Order in Council terminating Ms. Keen's designation as President of the Commission. She remained as a member until her voluntary resignation.

[53] There is no doubt that the appointment of Ms. Keen, or any other person, as a member of the Commission is, as set out in sub-section 10(5) of the *Act*, "*during good behaviour*". Ms. Keen was not terminated as a member. Therefore, from that point of view, neither the Minister nor the Governor in Council have criticized Ms. Keen's behaviour.

[54] The *Act* is silent as to the designation of Ms. Keen or any other member, as President. Is that designation "*during good behaviour*" or is it "*at pleasure*"? If that designation was "*at pleasure*" the evidence shows that Ms. Keen was afforded the procedural fairness contemplated by *Dunsmuir* at paragraphs 115-116, *supra*. The Minister, by his letter of December 27, 2007, gave Ms. Keen notice of his intention to recommend termination of her designation as President and gave her an opportunity to make submissions. Ms. Keen made those submissions in her letter of January 8, 2008. The Minister did not respond to that letter however the Order in Council dated January 15, 2008 states that "…*the Governor in Council has carefully considered the submission*".

[55] As stated by Dickson J. for the Supreme Court of Canada in *Thornes's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106 at page 115 at g-h, the Court cannot enquire into the validity of such a recital in an Order in Council.

[56] I am, therefore, satisfied that, if the designation of Ms. Keen as President of the Commission was "*at pleasure*", then the requirements of procedural fairness have been satisfied and the dismissal cannot be set aside.

[57] On the other hand, if the designation of Ms. Keen as President was "*during good behaviour*", it is quite clear that neither the Minister nor the Governor in Council have provided Ms. Keen adequate information setting out the grounds upon which it was believed that she lacked good 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.

[58] Ms. Keen's counsel argues that her designation as President was "*during good behaviour*", for a number of reasons:

i. She was told by certain government officials during interviews at the time of her appointment that she would be designated as President during good behaviour.

ii. The position of President is intertwined with that of a member such that both are during good behaviour.

iii. Chairs and Presidents of quasi-judicial tribunals are generally appointed during good behaviour.

iv. Members of the predecessor entity held their offices during pleasure. The new *Act* provides for a stipulated term of office which implies removal only for cause.

v. Canada's international obligations require an independent supervisory body. An appointment of a President on good behaviour is more consistent with these obligations.

[59] Counsel argues that these five factors must be taken together and contextually, so that when weighed as a whole, Ms. Keen's designation as President must be taken as one "*during good behaviour*".

[60] The first point is as to what was or may have been said during interviews between Ms. Keen and government officials about the job she was being offered at the Commission. During her cross-examination, particular in answer to questions numbered 70 to 86 and in paragraph 4 of her Affidavit, Ms. Keen states that certain government officials told her that the position of President was held during good behaviour. No person was specifically identified except one by the first name Manon. The Respondent filed affidavits in reply from several persons one of whom may have been the one identified as Manon. All of these persons state that they had no recollection of having made such a statement and that it would have been surprising if they had made such a representation.

[61] Ms. Keen's Counsel says that I should prefer her evidence in that regard since she testifies positively that something happened whereas the others, save McCutcheon, have no recollection and simply state that it was unlikely to have happened.

[62] One of the Respondent's affiants, Wayne McCutcheon, attended the interview in question and provided a copy of his contemporaneous notes. These notes make no reference to any discussion to the effect that a President holds office during good behaviour or otherwise.

[63] During the hearing Ms. Keen's counsel acknowledged that the persons representing the Government had no power to bind the Government or commit it for instance, to a standard of good behaviour.

[64] I find that there is insufficient evidence to satisfy me that there was any meaningful discussion as to the designation of President being during good behaviour and, even if there was, such discussions were in no way binding upon the Crown.

[65] The second point raised by Ms. Keen's counsel is that the position of President and member are sufficiently intertwined so that the member's status of "*during good behaviour*" is that of the President as well. This second point is continued in the Applicant's third point which is that if the legislation is silent or ambiguous then the rule of law and natural justice should dictate the that the designation as President would be on the same basis as that of a member, namely, during good behaviour.

[66] Both parties rely upon the decision of the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia*, [2001] 2 S.C.R. 781 in which that Court was considering what degree of independence the chair and members of a provincial Liquor Appeal Board enjoyed. Both counsel quoted from paragraphs 21 to 24 of that decision written by the Chief Justice for the Court:

> ***21*** *Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495, at p. 503; Law Society of Upper Canada v. French, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: Matsqui, supra (per Lamer C.J. and Sopinka J.); Régie, supra, at para. 39; Katz v. Vancouver Stock Exchange, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": Régie, at para. 39.*
>
> ***22*** *However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra, [1981] 2 S.C.R. 145; Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301; Ringrose v. College of Physicians and Surgeons (Alberta), [1977] 1 S.C.R. 814; Kane v. Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*

> ***23*** *This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (the "Provincial Court Judges Reference"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges -- both in fact and perception -- by insulating them from external influence, most notably the influence of the executive: Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 69; Régie, at para. 61.*
>
> ***24*** *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial [page795] decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.*

[67] Ms. Keen's counsel relied further on a recent decision of McEwan J. of the British Columbia Supreme Court in *McKenzie v. British Columbia* (2006), 272 D.L.R. (4th) 455 where a residential tenancy arbitrator's position was terminated in mid-term. McEwan J. wrote at paragraphs 149 and 150:

> ***149*** *The question left unanswered by* ***Ocean Port*** *was what to make of tribunals that are not "government" decision makers. In finding that tribunals such as the Liquor Appeal Board are not*

> *constitutionally required to be independent, the court was addressing a decision-making entity with functions that could not conceivably be folded straight back into the courts, owing to its nature. Its policy-making and policy-driven adjudicative responsibilities are of a type that could only ever be supervised, not performed, by courts.*
>
> ***150*** *Tribunals that are assigned responsibilities lifted straight from the courts' jurisdiction are obviously different. If the Respondents are correct, the same function, depending solely on whether it is located in a court or in a tribunal, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion, thrusts into the judgment seat. This is such an affront to the notion of "a fair and public hearing by an independent and impartial tribunal," guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself.*

[68] These two cases, *Ocean Port* and *McKenzie* state general principles that are directed to situations where the enabling legislation is unclear. *Ocean Port* states that where the legislation can be reasonably and clearly interpreted, it should prevail over any general concepts bases on the rule of law and natural justice.

[69] A case relied upon by Respondent's counsel is directly on point. In *Houle v. Canada*, [1987] 2 F.C. 493 Martin J., then a Judge of this Court, was considering a situation where a person was appointed to be a member of the Immigration Appeal Board and was designated to be Vice-Chairman of that Board. The relevant *Act* stated that a member was appointed "*during good behaviour*" but was silent as to the designation of Vice-Chairman. This is exactly the situation in the present case. The Applicant Houle's position as Vice-Chairman was terminated by the Governor in Council but he was not terminated as a member of the Board. Again exactly as in the

present case. It was argued that the appointment as member and designation as Vice-Chairman meant that the "*during good behaviour*" requirement merged into both positions. Martin J. said at pages 504-505:

> *Counsel submits Parliament's specific intention that the plaintiff's office as a Vice-Chairman be held during good behaviour is evidenced by subsections 60(5) and 61(4) which together continue him as a member and as a Vice-Chairman. He submits that the two offices merged and that, accordingly, he cannot have his office as a Vice-Chairman terminated so long as he remains a member of the Board. Counsel cites no authority for this proposition. The sections do not specifically provide that the offices merge so that the good behaviour tenure attaching to that of a member automatically flows to that of a Vice-Chairman, and I can see no inherent reason why the tenures should be for [page505] identical terms. As I have already mentioned, if Parliament had wanted the office of Vice-Chairman to be held during good behaviour, it could have provided for it in the legislation as it did for the offices of members under the original Immigration Appeal Board Act.*

[70] Martin J. held against such a concept of merger concluding at page 505:

> *Instead, in the original Act, Parliament addressed the issue and provided "good behaviour" tenure for members but made no provision for the tenure of Vice-Chairman. That implied, to me at least, that Parliament intended sections 22 and 23 of the Interpretation Act to apply to the office of a Vice-Chairman. When Parliament enacted the Immigration Act, 1976 it again addressed the issue of tenure. It provided for the continuation of "good behaviour" tenure for members appointed under the original Act and provided for limited terms for members appointed under the Immigration Act, 1976. It made no provision with respect to tenure for the Vice-Chairmen. Under such circumstances, it seems clear to me, once again, that Parliament intended sections 22 and 23 of the Interpretation Act to apply to the office of a Vice-Chairman which it intended be held at pleasure.*
>
> *Offices held at pleasure may be terminated without cause unless the office holder has been extended some special protection. If, as the plaintiff claims, the right of the Governor in Council is*

> *somehow limited, he must show some express or necessarily implied statutory, contractual or regulatory limitation.*

[71] It was further argued in Houle that, by necessary implication, the position of Vice-Chairman was like to that of a superior court judge and could not be terminated at pleasure. Again Martin J. rejected this argument, reasoning that the security of tenure was afforded to a member and not to the member's designation as Vice-Chairman. He wrote at pages 508-509:

> *The security of tenure of the judicial officials was thus raised in each case. The issue raised however went to the tenure of those officers as judicial officers and not to their positions as executive officers within their respective judicial fields. Neither case is, in my opinion, of assistance to the [page509] plaintiff. His security of tenure and thus his judicial independence is founded on his appointment as a member of the Immigration Appeal Board and not on his designation as Vice-Chairman.*
>
> …
>
> *The plaintiff's tenure as a member was during good behaviour. In my view that was a sufficient assurance of judicial independence for his judicial functions as a member of the Board. He was not given express tenure in his office as a Vice-Chairman. He held it at pleasure and was liable to have it terminated without cause. There was no express limitation in contract, in the terms of his appointment or designation, or in the statute under which he held that office limiting the right of the Governor in Council to terminate him in that office without cause, nor can I find by necessary implication any such restriction.*

[72] This decision was affirmed by the Federal Court of Appeal (1988), 86 N.R. 38. Urie J. gave brief oral reasons for the Court:

> ***URIE J.**:— We are all of the opinion that the learned Trial Judge did not err in his conclusion that the Governor in Council had the authority and power under the Immigration Act, 1976, to revoke the designation of the Appellant as a vice-chairman of the Immigration Appeal Board and to exercise that power at pleasure.*

> *We are in general agreement with the reasons for Judgment of the Trial Judge in coming to that conclusion although it was not necessary, in our view, to have recourse to the Interpretation Act in reaching it.*
>
> *Accordingly, the appeal will be dismissed with costs.*

[73] The decision of this Court, affirmed by the Federal Court of Appeal, in *Houle* is a complete answer to Ms. Keen's arguments as to construction of a statute such as the one under consideration here where membership in the Commission is during good behaviour but the designation as President (or Vice-Chairman in the case of *Houle*) is silent. Such designation is "*at pleasure*".

[74] The fourth point raised by Ms. Keen's counsel is that the designation as President being for a fixed term is inconsistent with an appointment "*at pleasure*". A reading of the Governor in Council's advice to Ms. Keen and the commission from Her Majesty makes it clear that her appointment as a member was for a period of five years. There is no stipulation as to any term for the designation as President.

[75] It must be restated that the commission as granted by Her Majesty to Ms. Keen clearly states that her appointment as member is for five years "*during good behaviour*" and that the designation as President is "*during Our Pleasure*". It could not be more clear.

[76] The last point raised by Ms. Keen counsel relates to Canada's international obligations under the *Convention on Nuclear Safety*. Reliance is placed on the decision of L'Heureux-Dubé J. for the majority in *Baker v. Canada*, [1999] 2 S.C.R. 817 at paragraph 70 where she wrote:

> ***70*** *Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 330:*
>
> > *[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]*

[77] At best *Baker* says that international law or obligations may "*help inform*" a decision of the Court. I have not been referred to any part of the *Convention on Nuclear Safety* that would address the security of tenure of a person designated as President of a Commission such as the one at issue here, particularly where that person may continue as a member of the Commission. I find no real help from this point.

[78] Considering all of the above, I must conclude that Ms. Keen, while remaining as a member of the Commission "*during good behaviour*" must be considered to hold her designation as President, as her commission from Her Majesty says "*during Our Pleasure*". The decision of this Court in *Houle* affirmed by the Federal Court of Appeal in respect of a statute almost identical in the wording of the relevant sections to that under consideration here is binding, and if not binding, persuasive such that the result must be the same here.

FINDING

[79] Ms. Keen's designation as President of the Commission was "*at pleasure*". Therefore the circumstances of her termination as President were sufficient to satisfy the requirements of fairness and natural justice as set out in *Dunsmuir supra*.

CONCLUSION AND COSTS

[80] Having found as I have, this application will be dismissed. 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.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT ADJUDGES that:

1. The application is dismissed;

2. No costs are awarded to any party.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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