Federal Court Cour fédérale

Date: 20141125

Docket: T-634-13

Citation: 2014 FC 1124

Ottawa, Ontario, November 25, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

GREENPEACE CANADA,
CANADIAN ENVIRONMENTAL LAW
ASSOCIATION, LAKE ONTARIO
WATERKEEPER and NORTHWATCH

Applicants

and

ATTORNEY GENERAL OF CANADA and
ONTARIO POWER GENERATION INC.

Respondents

JUDGMENT AND REASONS

I. Introduction – Nature of the Matter

[1] This matter concerns Ontario Power Generation's [OPG] plans for the refurbishment and continued operation of the four nuclear reactors at Darlington Nuclear Generating Station [Darlington NGS] at Clarington, Ontario [the overall project referred to as the OPG

Refurbishment Project or the Project]. OPG was required to seek an amendment of its nuclear operator licence issued under the *Nuclear Safety and Control Act*, SC 1997 c 9 [NSCA] and a renewal of authorization to destroy fish by a means other than fishing as permitted under the *Fisheries Act*, RSC 1985, c F-14.

These applications triggered the environmental assessment provisions of the 1992 *Canadian Environmental Assessment Act*, SC 1992 c 37 [CEAA]. As the Canadian Nuclear Safety Commission [CNSC] and the Department of Fisheries and Oceans [DFO] are responsible for granting the relevant licences, they are the responsible authorities [RAs] charged with completing the environmental assessment [EA] under the CEAA.

[2] The Applicants seek judicial review of the decision made under s 20 of the CEAA [the Course of Action Decision] in which the RAs concluded that the OPG's proposal for Darlington NGS was not likely to cause significant environmental effects after taking appropriate mitigation measures into account. As a result, the RAs are permitted to consider the applications for the necessary licences and authorizations.

[3] The Applicants challenge the conclusions reached by the RAs, the manner of deciding the matter and the RAs' assessment of the nature, quality and sufficiency of the evidence upon which the decision is based.

[4] While the Applicants attempt to cast their arguments as jurisdictional, most of the arguments relate to the RAs' discretion and their assessment of the evidence. These matters are subject to the "reasonableness" standard of review and the RAs' conclusions are reasonable.

[5] The only exception to the reasonableness standard is the argument that the RAs improperly delegated tasks contrary to the CEAA. While the category of matters to be delegated is subject to the "correctness" standard of review, I find, for reasons to follow, that the RAs did not err in delegating any of these tasks.

II. Background

A. *Relevant Legislative Provisions*

[6] The EA is a planning tool in which the assessment process is to be followed by the licensing process. Section 15 of the CEAA provides for the responsible authority(ies) to take charge of the environmental assessment.

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by	15. (1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.
(a) the responsible authority; …	
…	
(2) For the purposes of conducting an environmental assessment in respect of two or more projects,	(2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut

	décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.
(a) the responsible authority, …	
…	
may determine that the projects are so closely related that they can be considered to form a single project.	
(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of	(3) Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage :
(a) the responsible authority, …	a) l'opération est proposée par le promoteur;
…	…
likely to be carried out in relation to that physical work.	

[7] CEAA s 16(1) and (2) set out the factors to be considered in an EA without directing how such factors are to be weighed or considered.

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of	16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments

the following factors:

suivants :

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

(b) the significance of the effects referred to in paragraph *(a)*;

b) l'importance des effets visés à l'alinéa *a)*;

(c) comments from the public that are received in accordance with this Act and the regulations;

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou

assessment by a review panel shall include a consideration of the following factors:

d'un examen par une commission portent également sur les éléments suivants :

(a) the purpose of the project;

a) les raisons d'être du projet;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

[8] Section 16(3) of the CEAA establishes that the scope of the EA is to be determined by the RA.

16. (3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)*(a)*, *(b)* and *(d)* and (2)*(b)*, *(c)* and *(d)* shall be determined

16. (3) L'évaluation de la portée des éléments visés aux alinéas (1)*a)*, *b)* et *d)* et (2)*b)*, *c)* et *d)* incombe :

(a) by the responsible authority; or

a) à l'autorité responsable;

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

[9] The CEAA also permits the RA to delegate certain parts of the EA.

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation of the screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).	17. (1) L'autorité responsable d'un projet peut déléguer à un organisme, une personne ou une instance, au sens du paragraphe 12(5), l'exécution de l'examen préalable ou de l'étude approfondie, ainsi que les rapports correspondants, et la conception et la mise en oeuvre d'un programme de suivi, à l'exclusion de toute prise de décision aux termes du paragraphe 20(1) ou 37(1).
(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.	(2) Il est entendu que l'autorité responsable qui a délégué l'exécution de l'examen ou de l'étude ainsi que l'établissement des rapports en vertu du paragraphe (1) ne peut prendre une décision aux termes du paragraphe 20(1) ou 37(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi et à ses règlements.

[10] The Course of Action Decision at issue in this judicial review was made pursuant to the powers in s 20 of the CEAA.

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):	20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :

(a) subject to subparagraph *(c)*(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

a) sous réserve du sous-alinéa *c)*(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;

(c) where

c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph *(b)* does not apply, or

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa *b)* ne s'applique pas,

(iii) public concerns warrant a reference to a mediator or a review panel,

(iii) si les préoccupations du public le justifient.

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

(1.1) Mitigation measures that may be taken into account under subsection (1) by a responsible authority are not limited to measures within the legislative authority of Parliament and include

(1.1) Les mesures d'atténuation que l'autorité responsable peut prendre en compte dans le cadre du paragraphe (1) ne se limitent pas à celles qui relèvent de la compétence législative du Parlement; elles comprennent :

(a) any mitigation measures whose implementation the responsible authority can ensure; and

a) les mesures d'atténuation dont elle peut assurer l'application;

(b) any other mitigation measures that it is satisfied will be implemented by another person or body.

b) toute autre mesure d'atténuation dont elle est convaincue qu'elle sera appliquée par une autre personne ou un autre organisme.

B. *Facts*

[11] In April 2011, OPG submitted a project description of the OPG Refurbishment Project to CNSC, which outlined a plan to refurbish and continue operation of four nuclear reactors at Darlington NGS.

[12] Both Fisheries Canada and CNSC are responsible authorities for the project, which would require authorization under the *Fisheries Act* as well as under the NSCA. CNSC assumed the role of federal environmental assessment coordinator and assembled a federal review team consisting of CNSC, DFO, Environment Canada, Natural Resources Canada and Health Canada.

[13] The CNSC then issued a draft EA Scoping Information Document and invited comments. The purpose of this document was to establish the scope of the EA and to provide OPG with project specific guidance for the conduct of the environmental technical studies.

[14] The scope of the Project to be assessed included: the site preparation and construction of storage and support buildings; refurbishment activities at each of the four reactor units; activities related to the continued operation of the refurbished reactors until about 2055; the subsequent achievement of safe state of closure; and, the assessment of all waste management related activities including waste reduction activities and determination.

[15] While some changes were made as a result of various submissions, the scope of the project and the factors to be considered remained largely unchanged. Importantly, both the draft

and the proposed Scoping Information Document directed OPG to include in the Environment Impact Study [EIS] a consideration of accident scenarios "that could occur with a frequency greater than 10^6 per year". This accident occurrence figure of 1 in 1 million was an important aspect of the Applicant's judicial review.

[16] On October 28, 2011, the CNSC approved the draft Scoping Information Document, which defined the scope of the Project generally as the refurbishment and continued operation of four reactor units and their ancillary systems until 2055. The CNSC declined to refer the matter to a review panel and pursuant to CEAA s 17, delegated the preparation of technical support studies to OPG. The scope of the EA would include the enumerated considerations set out in CEAA s 16(1) as well as the "optimal" consideration of the Project's purpose, preliminary design and the implementation plan for a follow-up program.

[17] In December 2011, OPG submitted the EIS and 15 technical documents. The EIS considered potential nuclear accidents, the effects of the Darlington cooling system on Lake Ontario, management of nuclear waste, the impingement and entrainment of fish, as well as a representative beyond-design-basis accident with a mean frequency in excess of 10^6 per year. The EIS concluded that, taking mitigation measures into account, the Project would not result in any significant adverse environmental effects.

[18] Following a period of public comment and a series of questions and comments to OPG, CNSC finalized its Screening Report which formed the basis of its decision.

[19] Although the CEAA was replaced by the *Canadian Environmental Assessment Act, 2012*, SC 2012, C 19, s 52 [the new CEAA], by virtue of an order under the new CEAA issued by the Minister of the Environment, the Project would continue under the former CEAA.

[20] In the CNSC's Proposed Screening Report issued in September 2012, the CNSC noted the public comments including the concerns raised by these Applicants.

The Applicants also appeared as intervenors in the December 2012 four-day public hearing process.

[21] On March 13, 2013, the CNSC issued the decision (now under review), the Course of Action Decision, pursuant to s 20 of CEAA. The CNSC determined that:

- the Screening Report is complete, the scope of the project and assessment were appropriately determined in accordance with sections 15 and 16 of CEAA and all the required assessment factors were addressed during the assessment;
- the Project, taking into account the mitigation measures identified in the Screening Report, is not likely to cause significant adverse environmental effects;
- the Project will not be referred to the federal Minister of the Environment for his referral to an EA review panel or mediator;
- applications for license amendments will be considered; and
- before beginning refurbishment activities, OPG must complete the CNSC licensing process and the CNSC requested that a number of actions be completed prior to the anticipated licensing public hearing in 2014.

III. Analysis

[22] While the parties advanced varying descriptions of the issues, there are two principal issues; one of which with sub-issues:

1. What is the appropriate standard of review for the relevant issues?
2. Have the Applicants established any reviewable error in respect of:
   (a) excluding low probability accidents from the scope of the EA?
   (b) failing to consider measures to mitigate the consequences of the low probability accidents?
   (c) their consideration of the likelihood and significance of environmental effects of the Project?
   (d) unlawfully delegating their CEAA duties?

A. *Standard of Review*

[23] The Applicants assert that the issues are jurisdictional because they question whether the RAs properly completed their duties under the CEAA. Justice Hugessen in *Alberta Wilderness Assn v Express Pipelines Ltd*, (1996), 137 DLR (4th) 177, 64 ACWS (3d) 904 [*Alberta Wilderness*], described the situation presented when he wrote at paragraph 10:

> 10 In the first place, and in a general way, the great majority of the applicants' submissions failed to raise any questions of law or jurisdiction but were simply an attack on the quality of the evidence before the panel and the correctness of the conclusions that the majority drew from that evidence. No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did,

> a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

[24] In *Friends of West Country Assn v Canada (Minister of Fisheries and Oceans)* (1999), [2000] 2 FC 263 (CA), 92 ACWS (3d) 558 [*Friends of West Country Assn*], at paragraphs 25-27, this Court outlined that the EA process has two aspects. Importantly, the scope of an environmental assessment is a matter for the RA. The RA has a legal obligation to consider certain matters but how it does that is a matter of discretion.

> 25 Again, it is necessary to focus on the question of statutory interpretation. Subsection 16(1) is indeed mandatory. It requires consideration of the factors enumerated in paragraphs 16(1)(a) to (f). In particular, paragraph 16(1)(a) states that the environmental assessment shall consider the environmental effects of the project as scoped and "any cumulative environmental effects that are likely to result from the (scoped) project in combination with other projects or activities that have been or will be carried out." However, the scope of the factors to be taken into consideration pursuant to paragraph 16(1)(a) is to be determined by the responsible authority under subsection 16(3). This scoping is a discretionary decision on the part of the responsible authority.
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> 26 The process involves two aspects. The first is for the responsible authority to consider the applicability of all of the factors in paragraphs 16(1)(a) to (f) to the project being assessed. The use of the word "shall" in subsection 16(1) indicates that some consideration of each factor is mandatory. Under paragraph 16(1)(a), the relevant factor is the environmental effect of the project which includes, inter alia, cumulative environmental effects. This requires the responsible authority to consider environmental effects that are likely to result from the projects scoped under subsection 15(1), in combination with other projects or activities that have been or will be carried out.

> 27 The second aspect involves the exercise of the discretion vested in the responsible authority by subsection 16(3) to determine the scope of this part of the paragraph 16(1)(a) factor, i.e. the cumulative environmental effects that will be considered. By necessary implication, a decision as to the cumulative environmental effects that are to be considered requires a determination of which other projects or activities are to be taken into account. It is, therefore, within the discretion of the responsible authority to decide which other projects or activities to include and which to exclude for purposes of a cumulative environmental effects assessment under paragraph 16(1)(a).

[25] As made clear in *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520, 422 FTR 299, at page 25, "consideration" requires that the decision maker turn its mind to the pertinent issue. How it then conducts its analysis or determination is left to its reasonable discretion.

[26] Truly jurisdictional matters have been narrowed since many of the cases relied on by the Applicants had been decided. Justice Rothstein, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, held that the category of true questions of jurisdiction is narrow. At paragraphs 33-34, Justice Rothstein held:

> 33 Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited warning in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*, [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the

> category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).
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> 34 The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[27] While the Applicants base their standard of review analysis on the nature of the decision maker, it is more relevant to consider the nature of the question at issue (see *Alberta Wilderness*, at paragraph 10).

[28] In considering issues regarding the scoping of the Project, the decision is structured by s 15 of the CEAA.

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

15. (1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.

(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

(2) For the purposes of conducting an environmental assessment in respect of two or more projects,

(2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.

(a) the responsible authority, or

(b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so closely related that they can be considered to

form a single project.

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of	(3) Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage :
(a) the responsible authority, or	*a)* l'opération est proposée par le promoteur;
(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,	*b)* l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.
likely to be carried out in relation to that physical work.	

[29] The discretion in s 15(1) is unfettered except for subsection (3) which provides that all physical work in relation to a project must be subject to an EA. It is unnecessary for every aspect of a physical work to be subject to the same EA process. For example, it is permissible that the Darlington Water Management Facility be excluded from the EA at hand and be considered under a separate EA process.

[30] The Applicants' complaints regarding scoping are based on the exclusion of a low-probability high-severity accident with a likelihood of incidence greater than 1 x 10^{-6} per year

(the Fukushima incident was frequently cited – the probability of that occurrence being lower than 1×10^{-6} per year).

[31] The RAs have a broad discretion in regard to scoping of the Project and the nature and level of risks to be accepted. It is the very type of decision which Parliament put in the hands of the RAs. As such, it attracts a reasonableness standard.

[32] The Applicants also challenge the RAs' assessment of the evidence in respect of the consideration of feasible mitigation measures. These measures relate to the mitigation of excluded low probability accidents and are included in the conclusions in paragraph 31 above. The reasonableness standard is likewise applicable.

[33] The Applicants further challenge the RAs' consideration of the likelihood and significance of environmental effects of the Project. In particular, they focus on the impacts on fish caused by impingement, entrainments and thermal pollution. This is also a broad discretionary decision attracting the reasonableness standard of review.

[34] Finally, the Applicants complain that the RAs improperly delegated their duties. This complaint has two aspects. The first is the allegation of failure to comply with the CEAA delegation power; the second relates to the exercise of discretion to delegate and weighing of the evidence of the delegatee.

[35] On the question of interpretation of the CEAA's delegation power, while CNSC may have specialized expertise under the NSCA, it does not have specialized expertise under CEAA. Similarly, the DFO also lack that CEAA expertise. Justice Rothstein's comments in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 FCR 610 [*Prairie Acid Rain*], at paragraphs 9-10 are germane.

> 9 In *Friends of the West Country Assn. v. Canada (Minister of Fisheries)* (1999), 248 N.R. 25 at paragraph 10, it was held that questions of interpretation of the CEAA by the Coast Guard were reviewable on a standard of correctness.
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> 10 The same considerations apply in this case. There is no applicable privative clause. The CEAA is a statute of general application. It is administered by a broad range of federal authorities. There is no particular expertise in the DFO relative to that of the Court in respect of the interpretation of the CEAA. The interpretation issues are legal. While there is a general public interest in matters concerning the environment, the absence of relative expertise and the nature of the question being legal suggest a correctness standard of review in respect of the interpretation by the DFO of the CEAA.

[36] Similar conclusions are found in *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, [2008] 3 FCR 84, at paragraphs 135-137 and in *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, 323 FTR 297, at paragraphs 37, 40 and 41.

> *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*
>
> 135 The Federal Court of Appeal has already addressed the issue of the standard of review in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 18 (*Bow Valley*). At para. 55, Justice Linden noted in this regard:
>
> > The leading case dealing with sections 15 and 16 of the Act is a decision of this Court in *Friends of the West Country Assn. v. Canada (Minister of*

> *Fisheries and Oceans)* [1999] F.C.J. No. 1515. Writing for the unanimous Court, Rothstein J.A. concluded that the interpretation of the Act, a statute of general application, is a question of law reviewable on a correctness standard [citation omitted]. Consequently, this standard of review of statutory interpretation issues will be employed in this case. However, in that case, this Court did not rule on the appropriate standard of review for discretionary decisions of substance pursuant to the authority granted in the Act. The Trial Judge in that case has held that the standard of review for such cases should be reasonableness. Applying the *Pushpanathan* [1998] 1 S.C.R. 982, factors, this would be appropriate in this case particularly because there is no privative clause, and because the level of expertise in administering the Act is minimal in this and most, if not all, other responsible authorities. The Court determines that the standard of review applicable to the issues of jurisdiction and applicability of the impugned legislative and regulatory provisions to the Project raised by the Applicant is that of correctness. In coming to this conclusion, all four contextual factors mentioned in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 (presence or absence of a privative clause or statutory right of appeal; expertise of the tribunal relative to that of the reviewing court on the issue in question; purposes of the legislation and of the provision in particular; and, nature of the question) have been considered by the Court.

136 The Court must determine whether, as alleged by the Applicant, the Project falls under items 16(a) and/or 16(c) of the CSL and whether the RAs are required by section 21 of the CEAA to consult the public on the scope of the Project and the scope of the assessment prior to making any scoping or course of action decisions with respect to the Project. The Respondents submit on the contrary that section 21 does not apply since the Project "as scoped" under section 15 by the RAs is not mentioned on the CSL; therefore, the impugned decisions or actions made by the RAs were authorized by section 18 of the CEAA.

137 As can be seen, the Court must interpret and determine the scope of sections 15 and 21 of the CEAA. The nature of the

questions of law and of law and fact involved in this case is determinative. Accordingly, the statutory interpretation issues raised in this case will be decided on a correctness standard.

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37 All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans*), [2000] 2 F.C. 263, [1999] F.C.J. No. 1515 (QL), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (QL), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley*, *supra*, at para. 55; *Inverhuron*, *supra*, at paras. 39-40).

…

40 With respect to the arguments relating to the Panel's reliance on mitigation measures that were not technically and economically feasible, there is no indication in the Report that the Panel misunderstood the legal interpretation of technically and economically feasible mitigation measures. In essence, what the applicants are challenging is the underlying completeness or quality of the evidence which in their view was not sufficient to allow the Panel to conclude as it did given the uncertainties that still remained regarding the Project. Thus, this question is reviewable on the standard of reasonableness *simpliciter*.

41 With respect to the question of providing a "rationale" for the conclusions and recommendations of the Panel, this question relates to the interpretation of the requirements of s. 34(c)(i) of CEAA. The applicants do not attack the rationale provided but rather question whether any rationale at all was put forth by the Panel. Whether or not the Panel has provided a rationale for its conclusions and recommendations is question of law, reviewable on a standard of correctness.

[37] In summary, issues raised by the Applicants which challenge the exercise of discretion or assessment of evidence attract a reasonableness standard of review. Issues raised by the Applicants which allege a breach of the requirements of the CEAA, particularly the power to delegate, are legal questions which attract a correctness standard.

B. *Exclusion of Low Probability Accidents*

[38] In my view, the RAs did not err in excluding low probability high impact accidents from the scope of the EA, given that this is a discretionary decision subject to the reasonableness standard of review.

[39] Justice Rothstein's comments at paragraph 15 and 18 of *Prairie Acid Rain* are apt:

> 15 The appellants say the DFO misdirected itself as to its discretion under subsection 15(1) of the CEAA and wrongly limited the scope of the project in respect of which an environmental assessment was to be conducted to the destruction of the Fort Creek fish habitat. They submit that the DFO was required to scope the project as the entire oil sands undertaking
>
> …
>
> 18 The appellants' argument that the DFO was obliged to scope the project for environmental assessment purposes as the entire oil sands undertaking ignores the words of subsection 15(1), which empower the responsible authority, the DFO in this case, to determine the scope of the project. In *Friends of the West Country* at paragraph 12, this Court described the powers of a responsible authority under subsection 15(1) in the following words:
>
> > Subsection 15(1) is straightforward. It confers on the responsible authority ... the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.

> The appellants' approach would deprive the DFO of any discretion in respect of the scoping of a project contrary to the words of subsection 15(1).

[40] CEAA s 16 contemplates that accidents may occur. Section 16(1) requires consideration of the effects of malfunction or accidents that may occur and s 16(3) gives a discretion to determine the "scope of the factors taken into consideration pursuant to paragraphs (1)*(a)*, *(b)* and *(d)*". Thus, the RA has discretion to exclude certain accidents from the scope of consideration. See *Friends of the West Country Assn* at paragraph 27.

> 27 The second aspect involves the exercise of the discretion vested in the responsible authority by subsection 16(3) to determine the scope of this part of the paragraph 16(1)(a) factor, i.e. the cumulative environmental effects that will be considered. By necessary implication, a decision as to the cumulative environmental effects that are to be considered requires a determination of which other projects or activities are to be taken into account. It is, therefore, within the discretion of the responsible authority to decide which other projects or activities to include and which to exclude for purposes of a cumulative environmental effects assessment under paragraph 16(1)(a).

[41] The RA did as they were entitled to do. They considered malfunctions and accidents that may occur in relation to the Project (for example, a spontaneous pipe rupture in the Heat Transport System inside containment). They placed a threshold on the accidents which they would consider; only accidents which had a more than 1:1,000,000 chance of occurring in a year would be considered.

[42] The RAs' rationale for the probability threshold – 1×10^{-6} – is that it is a modern international threshold in EAs as set by the *International Atomic Energy Agency* INSAE-12 "Basic Safety Principles for Nuclear Power Plants 75-INSAG-3Rev. 1", Vienna 1999.

[43] The RAs articulated a threshold and a rationale for it. As such, they turned their mind to the issue and met the requirement to give “consideration” to pertinent matters. Beyond that, the RAs reviewed the Fukushima Lessons Learned document and in response to Greenpeace’s concerns, they required that additional work and information be completed as part of the licensing process.

[44] The assertion that an RA must consider any accident which may possibly occur is unsustainable in reality and law. Particularly, since the goal of the EA process is a determination as to whether a project is “likely” or “not likely” to cause significant adverse effects.

[45] There is nothing unreasonable about the decision in regards to the exclusion of low probability accidents.

C. *Mitigation of Consequences of Low Probability Accidents*

[46] The Applicants’ position on this issue is dependent on a conclusion that the excluded low probability accidents should have been considered by the RAs. In view of the conclusion concerning the scope of the EA and the reasonableness of excluding certain low probability accidents, this argument must fail.

[47] The probability of severe multi-unit reactor accidents falls below the 1×10^{-6} threshold – a standard which was within the RAs’ discretion to adopt.

D. *Consideration of Likelihood or Significance of Environmental Effects*

[48] The Applicants' focus here is on the alleged failure to properly assess the likelihood or significance of environmental effects of the Project upon fisheries. The decision adopted CNSC staff's conclusion that there are residual adverse impacts on fish that are likely to be caused by impingement and entrainment; however, these impacts are considered insignificant.

[49] As with the 1×10^{-6} threshold, the evidence was that the RAs were aware of the issue, its impacts, and of the Applicants' preferred mitigation measure (a closed system).

[50] The Applicants contend that the issue is a jurisdictional one because the RAs did not "properly" assess the matters. This is not a true jurisdictional matter; it is an attack on the assessment of environmental impacts. As such, the RAs' conclusions are subject to the reasonableness standard of review.

[51] The RAs have a wide discretion to determine what is "significant". They are entitled to deference in respect of the factors, which are rationally connected to the goal of determining the significance of the impact of any adverse environmental effect.

[52] The American law relied on by the Applicants, with its different legal principles and statutory framework, is of no assistance to the Applicants.

[53] With regard to the adverse impacts, the RAs considered the merits of the flow through versus closed-loop cooling systems. The flow through system was acknowledged to have higher adverse effects but it was found that these effects could be adequately mitigated. The RAs' determination is one to which a court owes deference as it is based on expertise in the field and has a rationally explained basis.

[54] Any issue regarding the Darlington Waste Management Facility was not advanced forcefully and it can be dismissed as a matter which the RAs had discretion to exclude from the current process. That facility is subject to a separate EA process.

[55] Therefore, the RAs have articulated a rational basis for their conclusion and there is no reason for this Court to intervene.

E. *Unlawful Delegation*

[56] The Applicants have argued that the RAs unlawfully delegated their CEAA duties. In particular, it is alleged that the RAs purported to delegate the consideration of mandatory s 16(1) factors to other entities in future licensing processes and to non-EA exercises not specific to the OPG Refurbishment Project.

The Applicants submit the RAs erred in law by purporting to delegate to OPG the future design of follow-up programs because any delegation cannot be forward looking.

[57] It is difficult to follow the Applicants' first argument that the RAs improperly delegated information gathering to third parties. Section 17(1) specifically authorizes the RAs to delegate "any part of the screening … or the preparation of the screening report".

[58] It was within the RAs' power to delegate to OPG the completion of the EIS and technical reports. There is nothing impermissible about delegating to "generate critically important information".

[59] The second argument that the RAs impermissibly delegated information generating tasks to be done after the Course of Action Decision cannot stand in light of the RAs' conclusion that the Screening Report was complete.

[60] Section 38(1) of the CEAA provides confirmation that the consideration of follow-up and design flows from the decision to take a course of action and therefore must follow after the decision.

38. (1) Where a responsible authority takes a course of action under paragraph 20(1)*(a)*, it shall consider whether a follow-up program for the project is appropriate in the circumstances and, if so, shall design a follow-up program and ensure its implementation.	38. (1) Si elle décide de la mise en œuvre conformément à l'alinéa 20(1)*a)*, l'autorité responsable examine l'opportunité d'un programme de suivi dans les circonstances; le cas échéant, elle procède à l'élaboration d'un tel programme et veille à son application.

[61] This is consistent with the French version of s 17(2) where the delegated matter need not be completed before a RA takes a course of action.

17. (2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.	17. (2) Il est entendu que l'autorité responsable qui a délégué l'exécution de l'examen ou de l'étude ainsi que l'établissement des rapports en vertu du paragraphe (1) ne peut prendre une décision aux termes du paragraphe 20(1) ou 37(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi et à ses règlements.

[62] To the extent that the English version has a broader meaning than the French, the shared meaning is thus the narrower French version.

[63] Therefore, the RAs committed no error in the delegation of matters post the decision.

IV. Conclusion

[64] The RAs have committed no error in their Course of Action Decision.

[65] Therefore, this judicial review will be dismissed with costs at the usual scale.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs at the usual scale.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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