

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160413

Docket: A-564-14

Citation: 2016 FCA 114

**CORAM: STRATAS J.A.
RYER J.A.
GLEASON J.A.**

BETWEEN:

**GREENPEACE CANADA,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION,
LAKE ONTARIO WATERKEEPER AND
NORTHWATCH**

Appellants

and

**ATTORNEY GENERAL OF CANADA AND
ONTARIO POWER GENERATION INC.**

Respondents

Heard at Toronto, Ontario, on December 2, 2015.

Judgment delivered at Ottawa, Ontario, on April 13, 2016.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**STRATAS J.A.
RYER J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160413

Docket: A-564-14

Citation: 2016 FCA 114

**CORAM: STRATAS J.A.
RYER J.A.
GLEASON J.A.**

BETWEEN:

**GREENPEACE CANADA,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION,
LAKE ONTARIO WATERKEEPER AND
NORTHWATCH**

Appellants

and

**ATTORNEY GENERAL OF CANADA AND
ONTARIO POWER GENERATION INC.**

Respondents

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants appeal from the November 25, 2014 decision of Justice Phelan of the Federal Court, reported as 2014 FC 1124, in which he dismissed their application for judicial review in respect of a screening level environmental assessment [EA] conducted under the

Canadian Environmental Assessment Act, S.C. 1992, c. 37 [CEAA 1992]. The assessment in question concluded that the refurbishment and continued operation of the Darlington Nuclear Generating Facility [the Darlington Facility] by Ontario Power Generation [OPG] would likely not cause significant environmental effects.

[2] The appellants submit that the Federal Court erred in rejecting their application for judicial review because the Responsible Authorities [RAs] who conducted the assessment unreasonably excluded severe low probability nuclear accidents from the scope of the assessment and unreasonably failed to give adequate consideration to the long term management of nuclear fuel waste that the Darlington Facility will generate. The appellants also say that the Federal Court erred in awarding costs against them without hearing from them on the issue even though all parties consented during the hearing that they would subsequently deliver submissions on costs.

[3] Issues very similar to those raised in the present case were recently considered by this Court in *Ontario Power Generation Inc. v. Greenpeace Canada*, 2015 FCA 186, 475 N.R. 247 [OPG v. Greenpeace]. That case involved the environmental assessment of OPG's plans to install and operate new nuclear power generation units at the Darlington Facility, a more extensive project than that of merely refurbishing the existing units that was considered in the present case. Due to the larger scope of the new-build project, it was assessed by a joint review panel.

[4] The joint review panel in *OPG v. Greenpeace*, like the RAs in the present case, determined that the severity of accidents it would consider as part of the assessment were those with a frequency of occurrence greater than one in a million per year. Both the joint review panel in *OPG v. Greenpeace* and the RAs in the present case also assessed the environmental impact of OPG's plans for on-site storage of spent nuclear fuel and did not assess the impact of the absence of a plan for off-site long term management of nuclear fuel waste. There, like here, the appellants argued that the decisions to exclude severe low probability nuclear accidents and to exclude long term off-site management of nuclear waste from the scope of the assessment were unreasonable. In *OPG v. Greenpeace*, this Court disagreed and unanimously concluded that the joint review panel's treatment of both issues was reasonable.

[5] I believe that similar conclusions should be reached in this case, and for the reasons below would dismiss this appeal with costs.

I. Background

[6] OPG operates the Darlington Facility in Clarington, Ontario, just west of the City of Toronto. OPG's operations are subject to detailed regulation, principally by the Canadian Nuclear Safety Commission [the CNSC], one of the RAs responsible for conducting the EA in the present case.

[7] OPG, or its predecessor, Ontario Hydro, has been generating nuclear power at the Darlington Facility since 1993 and currently operates four CANDU nuclear reactors at the site. These reactors utilize uranium fuel, which is incorporated into rods that are placed into the

reactors, where they are used to produce the fission reaction that generates electricity. When the fuel in the rods is spent, they are highly radioactive. Due to this, the spent fuel rods are moved by remote-controlled machinery from the reactors to shielded storage pools at the Darlington Facility and are stored underwater in these pools for at least ten years to allow the radioactivity to partially dissipate. Thereafter, the spent fuel rods are moved by machinery, protectively encased and stored in a shielded storage building at the Darlington Facility, known as the Darlington Waste Management Facility [DWMF].

[8] There is currently no comprehensive plan for the permanent storage of nuclear fuel waste in Canada. Under the *Nuclear Fuel Waste Act*, S.C. 2002, c. 23, the Nuclear Waste Management Organization [the NWMO] has been tasked with developing and implementing a long term management strategy for Canada's nuclear fuel waste. The NWMO is still in the process of developing this strategy, which is contemplated will provide for long term storage of such waste at a site other than the Darlington Facility.

[9] In addition to fuel waste, OPG's nuclear operations also produce other less radioactive types of waste, namely, low and intermediate level irradiated wastes, which are either stored at the DWMF or, more frequently, transported to and stored off-site at another facility, the Western Waste Management Facility, which is located on the Bruce Power site near Kincardine, Ontario [the WWMF]. The WWMF has been the subject of previous EAs conducted by the CNSC.

[10] On May 2, 2011, OPG submitted a project description to the CNSC for the refurbishment and continued operation of the four reactors at the Darlington Facility. In its project description,

OPG noted that the refurbishment was part of the anticipated life cycle of the reactors and indicated that its proposed project involved inspecting and servicing components in the reactors, removing and replacing fuel channel assemblies and feeder pipes in the reactors, refuelling them and returning the reactors to full operation for approximately another 30 years. OPG also noted that the refurbishment and continued operation of the reactors were expected to produce waste, including spent fuel. OPG stated that it planned to construct additional storage capacity at the DWMF to store the spent fuel rods and confirmed that other wastes were to be disposed of or stored in accordance with OPG's existing waste management practices, detailed above.

[11] The activities described in the project description required OPG to obtain an amendment to its Power Operating Licence and renewal of its Waste Facility Operating Licence under subsection 24(2) of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 [the *NSCA*] and an authorization from the Minister of Fisheries and Oceans [DFO] in accordance with the former section 32 of the *Fisheries Act*, R.S.C. 1985, c. F-14 to authorize the killing of fish by means other than fishing.

[12] Under the provisions of *CEAA 1992* in force in 2011, OPG's application under the *NSCA* and the request for an authorization under the *Fisheries Act* triggered the need to conduct a screening level EA. By virtue of an order issued by the Minister of Environment under subsection 124(2) of the new *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [*CEAA 2012*], OPG's refurbishment project continued to be governed by *CEAA 1992* despite the repeal of this legislation in 2012.

[13] Both the CNSC and the DFO were RAs with respect to OPG's refurbishment project as each bore responsibility for conducting the EA. The CNSC assumed the role of the federal assessment coordinator and took the lead in the EA process.

[14] The principal steps in the EA process undertaken in the present case encompassed the following:

- A. submission of the project description by OPG;
- B. preparation by the RAs' staff of a draft Environmental Assessment Scoping Information Document [EASID] that detailed the proposed scope of OPG's project;
- C. provision of comments by the public and interested parties, including the appellants, on the draft EASID;
- D. finalization of the EASID by the RAs;
- E. provision by OPG of a lengthy Environmental Impact Statement [EIS] and extensive supporting technical documentation, prepared in accordance with guidelines from the RAs and the RAs' decision to delegate the preparation of the EIS and supporting documentation to OPG, pursuant to section 17 of *CEAA 1992*;
- F. review of the EIS by the RAs' staff and submission of questions and comments to OPG;
- G. provision by OPG of replies to these questions and comments;
- H. conduct of consultations by OPG with potentially interested parties;
- I. preparation and release of a draft EA Screening Report by the RAs' staff;

- J. provision of comments on the draft EA Screening Report by interested parties, including all four appellants;
- K. release of the proposed EA Screening Report by the RAs and holding of a four day public hearing, during which the appellants appeared as intervenors; and
- L. release by the CNSC, on behalf of both RAs, of its decision in March of 2013.

[15] Thousands of pages of detailed materials were produced and filed with the RAs during the process, much of it of a highly technical nature.

[16] In the March 2013 decision that is the subject of the appellants' judicial review application, the CNSC reached four conclusions: first, that the proposed Screening Report was complete and complied with the requirements of *CEAA 1992*; second, that OPG's refurbishment project was not likely to cause significant environmental effects when the mitigation measures identified in the Screening Report were taken into account; third, that the project would not be referred to a review panel or mediator for further study under *CEAA 1992*; and, finally, that the CNSC would proceed to consider the licence application and application for licence amendments under the *NSCA*.

[17] During the EA process, consideration was given to the appellants' concerns regarding the exclusion of severe low probability nuclear accidents and off-site long term management of nuclear fuel waste from the scope of the EA.

[18] On the issue of nuclear waste, as noted, OPG set out in its project description the proposed treatment to be afforded to nuclear wastes that would be produced by the refurbishment and continued operation of the reactors and detailed what it proposed to do with the waste that would be produced. It said it would be required to construct one additional building at the DWMF, beyond the two then planned, for storage of spent fuel rods. OPG also noted that it would store other wastes on the site or would transfer many of them to the WWMF or another licenced facility.

[19] The draft EASID provided further details on the waste management issue. It defined the scope of the project to be assessed as including the site preparation and construction of storage and support buildings, refurbishment activities, the continued operation of the refurbished reactors until about 2055, the subsequent attainment of a safe closure state and assessment of waste management-related activities. Notably, interim storage of fuel waste was listed as an activity related to the continued operation of the reactors but permanent long term storage was not. Also excluded from the scope of the project to be assessed were other projects and activities that had been the subject of previous EAs conducted by the CNSC, including the expansion of the low and intermediate radioactive waste storage capacity at the WWMF.

[20] Following comments from interested parties, including the appellants, CNSC staff proposed changes to the draft EASID. On the issue of long term management of nuclear wastes, CNSC staff noted that permanent long term management of used nuclear fuel was not within the proposed scope of the EA, the NWMO was charged with implementing a plan for the long term management of used nuclear fuel, the CNSC would be required to licence any long term used

fuel storage facility and that such facility would be subject to its own EA. However, in response to concerns raised by some of the appellants and other intervenors, CNSC staff proposed changes to the draft EASID to require that contingency plans for the on-site long term storage of nuclear fuel be added to the scope of the project in case the NWMO failed to come up with a plan. The RAs accepted this proposal and included it in the final EASID.

[21] OPG dealt with this revision in the EIS that it filed. It noted that it was expected that off-site facilities for the long term management of used fuel and related wastes would be available during the continued operating phase of the four reactors. But, it added that if such facilities were not available, further storage buildings (beyond the additional three contemplated) would be constructed at the DWMF to store all the fuel waste it was anticipated the project would produce. OPG detailed in the EIS the maintenance and inspections planned for the storage buildings. OPG also described in detail in the EIS how it would handle the other types of waste produced by the refurbishment and continued operation of the reactors and assessed the environmental impacts of the waste management activities it would be undertaking.

[22] In the draft and proposed Screening Reports, the RAs noted that while off-site long term storage of nuclear fuel was not within the scope of the EA, OPG's contingency planning provided for construction of additional buildings at the DWMF to store fuel waste on a longer term basis. The issue was again canvassed during the public hearing phase.

[23] In its March 2013 decision, the CNSC noted that off-site long term waste management had been raised as an issue during the EA process and commented on the concerns raised by

some intervenors, including some of the appellants, that off-site long term waste management was not part of the EA. The CNSC noted that the issue was outside the scope of the EA and that the NWMO was responsible for the implementation of Canada's plan for safe long term care of used nuclear fuel. In its decision, the CNSC accepted that the Screening Report was complete and therefore endorsed the approach taken to management of spent nuclear fuel and other wastes that would be generated during the project. It also concluded that this (and all other) aspects of the project would not likely cause significant adverse environmental effects.

[24] In terms of severe low probability accidents, the draft EASID indicated that the EA would include discussion and evaluation of potential accidents and malfunctions. Among the specifics to be considered were nuclear accidents with "postulated accident sequences leading to radiological release that could occur" with a frequency greater than one in a million per year "considering as appropriate internal events, internal hazards, external hazards and human-induced events, including an explanation of how these events were identified, and any modeling that was performed, for the purpose of [the EA]". The draft EASID also indicated that the assessment should include "an identification and discussion of any lessons learned from the events at Fukushima to the extent that they are relevant to the assessment of malfunctions and accidents for this project" (Joint Appeal Book, Vol. 5 at 1176).

[25] Some of the appellants and other intervenors provided submissions to the RAs on the scope of accidents to be considered as part of the EA process and expressed concern about the exclusion of serious accidents with an expected frequency of occurrence of less than one in a

million per year, especially in light of the severity of such possible accidents as exemplified by the disaster that occurred in Fukushima, Japan.

[26] Following receipt of these submissions, the CNSC slightly amended the scope of the required accident assessment in the final EASID and broadened the analysis as follows: “for those sequences having frequencies of less than [one in a million per year], but sufficiently close to this frequency, the proponent should provide the rationale for screening them out from further analysis” (Joint Appeal Book, Vol. 10 at 2558).

[27] In the EIS and technical documents that it filed, OPG explained the process undertaken to assess the environmental impact of the accidents it was required to assess by the EASID. It explained that it had developed a model for nuclear accidents that looked at both internal and externally caused accidents occurring in respect of a single or multiple reactors and had found that three types of accidents would exceed the one in a million per year threshold, the other possible scenarios having a lower likelihood of occurrence by several orders of magnitude.

[28] The three types of accidents OPG identified as meeting the threshold shared common release characteristics, so OPG modelled the one which was the most likely to occur and assessed its environmental impacts. This accident involved a malfunction in a single reactor, but stood as proxy for the other accidents identified. Thus, contrary to what the appellants assert, the EIS did not limit its assessment to accidents arising from a single reactor malfunction but, rather, used that type of accident as a proxy for all types of accidents that met the one in a million per

year threshold. In addition, the probability of more severe multi-reactor accidents was assessed and found to fall below the one in a million per year threshold.

[29] In the EIS, OPG also detailed the improvements to its processes that it had implemented or would implement as a result of the lessons learned from Fukushima, which were taken into account in assessing accident probabilities.

[30] The EIS concluded that no residual effect on humans was identified as a result of a possible nuclear accident and that the risk of exposure to radiation from an accident at Darlington was less than from general background radiation in the environment. OPG also reported in the EIS that the risk of nuclear accident at the Darlington Facility was not affected by the refurbishment project.

[31] The issue of low frequency, high severity accidents was raised by the appellants during the public hearing phase, where the Greenpeace representative made detailed submissions on the issue.

[32] In its decision, the CNSC dealt at length with potential malfunctions and accidents. It explained the rationale for the selection of the one in a million per year threshold, stating that this is the modern international threshold used in EAs for assessment of potential accidents at nuclear power facilities. It also noted that the threshold was published by the International Atomic Energy Agency and that it had been applied in previous EAs.

[33] In response to Greenpeace's concerns about the exclusion of less probable accidents, the CNSC noted that it would consider such accidents during the licencing process. It also noted the improvements that OPG had made or would make as part of the lessons learned from Fukushima and considered them to be mitigation measures.

[34] In addition, the CNSC underscored that multiple unit accidents were considered in the probabilistic safety assessment conducted as a backdrop to the technical studies referenced in the EIS, but noted that such accidents had a lower probability of occurrence than one in a million per year as did the likelihood of a Fukushima-type occurrence. The CNSC concluded that sufficient measures were in place to ensure that all accidents, including those of a nuclear nature, would not likely cause significant adverse environmental effects.

II. Relevant Legislation

[35] To understand the issues in this appeal, it is useful to briefly review the legislation applicable to the EA process followed in this case.

[36] By virtue of section 5 of *CEAA 1992*, an environmental assessment is required before a federal authority can exercise one of the powers or perform one of the duties listed in that section in respect of a project. Paragraph 5(d) applies to the issuance of a permit or licence, grant of an approval or other action taken to allow the project to proceed in the circumstances prescribed by regulation.

[37] Under the *Law List Regulations*, SOR/94-636, a screening level EA is required before the CNSC can issue or amend a licence under subsection 24(2) of the *NSCA* and before the DFO could issue an authorization under the former section 32 of the *Fisheries Act*. Thus, by virtue of these provisions, the RAs in the present case were required to conduct a screening level assessment in respect of OPG's refurbishment project.

[38] *CEAA 1992* provides for four different types of environmental assessments: screening, comprehensive study, mediation and assessment by a review panel. The least rigorous of these is a screening level assessment (see subsection 16(1) and section 18 of *CEAA 1992*).

[39] Pursuant to section 11 of *CEAA 1992*, a federal authority with responsibility for the conduct of an EA is an RA. There can be (and often are) more than one RA with respect to a project. Under subsection 11(1) of *CEAA 1992*, RAs are required to ensure that an EA is conducted "as early as is practicable in the planning stages of the project and before irrevocable decisions are made".

[40] Sections 18 to 20 of *CEAA 1992* govern screening level EAs. Section 18 requires the RA to ensure that the screening is conducted and that a screening report is prepared. The section also affords RAs the discretion to decide whether or not a public hearing should be held.

[41] In terms of the issues to be covered in an EA, section 15 provides RAs the authority to determine the scope of the project to be assessed in a screening level assessment, with the only

limits on this broad discretionary authority set out in subsection 15(3). The relevant portions of section 15 provide:

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

(a) the responsible authority;

[...]

(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

(a) the responsible authority, [...]

likely to be carried out in relation to that physical work.

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.

[...]

(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) l'opération est proposée par le promoteur;

[...]

[42] Section 16 governs the factors to be considered in the EA. It provides in relevant part as follows:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa

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;	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.
[...]	[...]
(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	(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; [...]	a) à l'autorité responsable;

[43] Under section 20 of *CEAA 1992*, an RA is provided the final decision-making authority in respect of screening level assessments to determine if a project would cause significant adverse environmental effects. If an RA finds such effects likely, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

the federal authority is prohibited from exercising any power or duty or performing any statutory function in respect of the project, thereby preventing the project from proceeding. Subsection 20(2) also provides for the recognition by an RA of mitigation measures to be taken with respect to a project and provides RAs with authority to follow up and ensure that follow up measures were implemented in “any manner” the RA “considers necessary”.

[44] Finally, section 17 affords RAs the authority to delegate to any entity they deem appropriate “any part of the screening or comprehensive study of a project or the preparation of the screening report [or] any part of the design and implementation of a follow-up program”.

[45] The provisions of *CEAA 1992*, the former provisions in the *Fisheries Act*, and the *NSCA* that are relevant to this appeal are reproduced in the Appendix to these Reasons.

III. The Federal Court Decision

[46] The appellants appear to have raised somewhat different issues before the Federal Court than they raise on this appeal. They argued before the Federal Court that the RAs failed to assess the matters they were required to assess under section 16 of *CEAA 1992* and, in particular, erred in excluding low probability severe nuclear accidents from the scope of the EA, in failing to assess the likelihood or significance of the effects of the project on fisheries and in improperly deferring a portion of the assessment they were required to conduct to the licencing process under the *NSCA*.

[47] The Federal Court held that the reasonableness standard applied to the errors alleged by the appellants, except the issue of improper delegation, which it held was reviewable on the correctness standard of review. The Federal Court found that the RAs did not err in excluding severe low probability accidents from the scope of the assessment, finding the determination to be reasonable in light of the explanation offered for the selection of the one in a million per year threshold and the fact that the CNSC gave consideration to the appellants' concerns on the issue. The Federal Court also found the treatment afforded to the significance of the effects of the project on fisheries to be reasonable. Finally, the Federal Court held that the RAs were entitled to delegate completion of the EIS and technical studies to OPG under section 17 of *CEAA 1992* and that they did not need to postpone their decision until after the design and implementation of the follow up program that was to be pursued by OPG and presented to the CNSC as part of the licencing process under the *NSCA*.

IV. The Appellants' Arguments before this Court

[48] As noted, the appellants submit before this Court that the CNSC's decision is unreasonable as the RAs unreasonably excluded severe low probability nuclear accidents from the scope of the assessment and unreasonably failed to give adequate consideration to the long term management of the nuclear fuel waste that the Darlington Facility will generate.

[49] More specifically, in terms of the long term fuel waste management issue, the appellants contend that OPG initially included long term waste management in its project description and that this element was improperly excluded from the scope of the project by the RAs in the EASID. They allege that such an alteration in the scope of a project is impermissible under

section 15 of *CEAA 1992* and submit that the Supreme Court of Canada so held in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[50] The appellants also say more generally that risks associated with fuel waste are necessarily incidental to the operation of a nuclear reactor and, therefore, that the RAs could not reasonably exclude analysis of permanent long term waste management from the scope of the assessment. They submit that no assessment was undertaken of the adequacy of the additional buildings that OPG might be required to construct as part of its contingency plan and argue that this distinguishes this case from *OPG v. Greenpeace*, where the project was scoped to include storage of spent nuclear waste on the Darlington site in perpetuity.

[51] In terms of severe low probability accidents, the appellants contend that the CNSC made two unreasonable factual findings. First, they attack the CNSC's conclusion that the probabilistic risk assessment undertaken by OPG evaluated multi-reactor accidents. They say the CNSC did not consider such accidents at all. Secondly, the appellants submit that, contrary to what OPG said in the EIS and technical supporting documents and to what the CNSC determined in its decision, the probability of a multi-reactor externally caused accident actually exceeds one in a million per year. They allege that this is shown in reports generated by OPG outside the EA assessment process that Greenpeace placed before the CNSC. The appellants say that the RAs therefore made an unreasonable factual finding in excluding such accidents from the assessment because they actually fell within the one in a million per year threshold set by the RAs.

[52] In addition to these alleged factual errors, the appellants also argue that in light of the magnitude of risk posed by a severe low probability accident, the RAs erred in setting the threshold for assessment at the level of one in a million per year as such accidents may well occur, would be severe, as the Fukushima experience demonstrates, and therefore ought to have been assessed under section 16 of *CEAA 1992*.

[53] The appellants also contend that the RAs failed to discharge their obligations under sections 15 and 16 of *CEAA 1992* because they improperly deferred consideration of certain issues to subsequent regulatory processes – to the NWMO in the case of the fuel management issue and to the licencing process to be undertaken by the CNSC under the *NSCA* in the case of severe low probability nuclear accidents.

[54] The appellants finally submit that they ought not bear the costs associated with this appeal or in the Federal Court as they are public interest litigants and ought to have been heard by the Federal Court before the costs award against them was made.

V. Standard of Review

[55] On the issues other than that related to costs, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *OPG v. Greenpeace* at paragraphs 33, 123.

[56] In terms of the first step of that analysis, involving the selection of the appropriate standard of review, I believe that the reasonableness standard applies to each of the errors now identified by the appellants as they are all either factual or involve an exercise of fact-based discretion under sections 15 and 16 of *CEAA 1992*.

[57] It is well-settled that the reasonableness standard is applicable to review of an administrative tribunal's findings of fact or mixed fact and law that are heavily infused by fact, including its exercises of fact-based discretion: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 51, 53 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraphs 60-62, 66-67; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at paragraph 26.

[58] This Court and the Federal Court have often applied the reasonableness standard to the review of RAs' factual determinations: see, for example, *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203 at paragraphs 39-40, 273 N.R. 62 [*Inverhuron FCA*]; *Canadian Transit Company v. Canada (Minister of Transport)*, 2011 FC 515 at paragraph 85, 389 F.T.R. 85 aff'd 2012 FCA 70; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at paragraphs 37, 40, 323 F.T.R. 297. Likewise, this Court has applied the reasonableness standard to review an RA's discretionary determination as to the scope of factors to be assessed under section 16 of *CEAA 1992* in *OPG v. Greenpeace* at paragraph 122 and has also applied the reasonableness standard to scoping determinations made under section 15 of *CEAA 1992* in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 at paragraph 80.

[59] Reasonableness review requires the reviewing court to assess whether a decision is justified, transparent and intelligible and whether the result reached is defensible on the facts and the law: *Dunsmuir* at paragraph 47. This involves both assessment of any reasons given by the decision-maker in light of the record and of the result reached.

[60] Where, as here, the issues at play involve detailed factual findings and discretionary decisions within the heartland of the tribunal's expertise, the reasonableness standard requires that considerable deference be given to the tribunal's determinations. This is particularly so when the issues under review concern nuclear safety and the tribunal is the nuclear safety regulator. In short, the CNSC is much better placed than a reviewing court to factually assess and determine what types of possible accidents are likely to occur at a nuclear power plant and how to conduct the assessment of the environmental impacts of potential accidents. It is therefore inappropriate for a reviewing court to second-guess these determinations through a detailed re-examination of the evidence as the appellants would have us do in the instant case.

[61] As Pelletier J. (as he then was) noted in the oft-cited passage at paragraph 71 of *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of The Environment)*, 191 F.T.R. 20, 2000 CanLII 15291 (F.C.),

the function of the Court in judicial review [of this sort of decision] is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors which the Act requires the comprehensive study to address. If there has been

some consideration, it is irrelevant that there could have been further and better consideration.

[62] Contrary to what the appellants assert, the wide margin of appreciation to be afforded to the CNSC's decisions in a case such as this does not mean that its decisions are unreviewable or that judicial review of environmental assessments is a hollow and meaningless exercise.

[63] While the range of deference to be afforded to decisions like the present one is significant, it is not without bounds. There are indeed situations where decisions may be unreasonable. For example, decisions which fail to consider the mandatory components of a project as required by subsection 15(3) of *CEAA 1992* may well be open to question. Similarly, factual determinations or determinations of mixed fact and law that are central to a decision and which are made in bad faith or for an improper purpose, in a perverse or capricious manner or entirely without regard to the evidence before the RA may prompt a court to interfere despite the broad margin of appreciation given to the decision-maker. The list is not closed. However, to establish grounds for the Court to interfere an applicant must do more than merely allege that a better analysis could have been undertaken by the RA or that a particular piece of evidence was not given adequate weight by the RA, as the appellants assert in this case.

VI. Analysis

[64] Turning to the specific errors alleged by the appellants in the present appeal, I do not find any of the impugned factual findings to be unreasonable. Similarly, there is nothing unreasonable about the discretionary determinations made by the RAs in the present case.

[65] On the fuel management issue, contrary to what the appellants assert, the RAs did not narrow the scope of the project to be reviewed in the EASID. Rather, they broadened it to encompass the possibility of ongoing long term on-site storage of spent nuclear fuel at the Darlington Facility, which would require the construction of buildings beyond the three contemplated by OPG in its project description. This expansion rendered the scope of fuel waste management in the present case identical to the scope of the fuel waste management assessed in *OPG v. Greenpeace*, where the new-build project was scoped to include the permanent storage of spent nuclear fuel at the Darlington site to address the eventuality that the NWMO might not find a permanent solution to nuclear waste management issues during the life of the Darlington Facility.

[66] Thus, the appellants' first argument must fail as the RAs did not narrow the scope of the project as it pertains to nuclear waste management in the EASID.

[67] As for the appellants' contention that it was unreasonable to exclude off-site long term fuel management from the scope of the assessment, for much the same reasons as were given in *OPG v. Greenpeace*, I believe there is nothing unreasonable about excluding this issue from the

scope of the EA in the present case. The RAs, through the requirement for a contingency plan, ensured that adequate provision was made to store the spent fuel at the Darlington site in the eventuality the NWMO did not find an alternate solution before 2055. Moreover, the CNSC assessed the environmental impacts of OPG's contingency plan. Accordingly, there was no gap in the assessment.

[68] In these circumstances, it was not unreasonable to exclude off-site storage of spent fuel from the scope of the assessment as every physical work associated with OPG's proposed project was assessed, in conformity with subsection 15(3) of *CEAA 1992*. Indeed, to hold otherwise would mean that OPG could not proceed to refurbish the Darlington reactors unless and until the NWMO comes up with a solution for permanent storage of nuclear waste in Canada. Forestalling the refurbishment on this basis would not be a reasonable outcome when a workable alternate solution was assessed by the CNSC and found to pose no likely environmental risk.

[69] I therefore conclude that no reviewable error was made in the assessment of long term nuclear waste management and that the RAs did not improperly defer consideration of the issues they were required to address to the NWMO.

[70] As for low probability nuclear accidents, the appellants' factual arguments would have this Court engage in a microscopic re-assessment of the evidence, which is not an appropriate exercise in the context of reasonableness review and highly inappropriate in the face of scientific evidence as complex as that reviewed by the CNSC in the present case. In essence, the appellants would have this Court determine that the scientific modelling exercise undertaken by OPG as

described in the EIS, which the expert regulator found appropriate, was in fact flawed. However, this is not the role of a court on judicial review under the reasonableness standard.

[71] Moreover, even if it were, the appellants' arguments are not borne out by the evidence. Contrary to what the appellants assert, the EIS did in fact consider multi-reactor externally caused accidents as they were studied in OPG's probabilistic risk assessment exercise and were found to fall below the one in a million per year threshold.

[72] As for the allegation that the CNSC misinterpreted the evidence and that one of OPG's reports showed that the probability of a multi-reactor externally caused accident actually exceeds one in a million per year, the appellants have taken this document out of context. It was created before the EIS was undertaken and did not factor in the improvements that OPG made and planned to make as a result of the lessons learned from Fukushima. When these improvements are factored in, as they were in the EIS, the probability of the particular accident's occurrence fell below the one in a million per year threshold, as was documented in the EIS.

[73] The CNSC assessed the likelihood of all accidents based on these improvements being implemented, which is not an unreasonable approach as the improvements were found to be mitigation measures and the CNSC ensured their follow up through the licencing program under the *NCSA*. It is incontrovertible that an RA may require a follow up program under section 17 and subsection 20(2) of *CEAA 1992* and the CNSC accordingly did not err in so doing.

[74] Similarly, as concerns the allegation that the selection of the probability threshold of one in a million per year is not stringent enough, there is no basis to disturb the RAs' selection of this threshold. As was noted in *OPG v. Greenpeace* at paragraph 70 (quoting *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 at 280-281, 1999 CanLII 9379 (F.C.A.)), *CEAA 1992* does not require that all accidents, no matter how improbable, be taken into account in an EA or the process would be interminable.

[75] Given the wide-ranging discretion afforded to RAs to set the scope of the factors to be assessed under section 16 of *CEAA 1992*, an RA's choice as to what types of accidents should be assessed must be respected unless it is irrational. Here, there is nothing irrational about the one in a million per year threshold, which is the accepted norm applied in these sorts of assessments as the CNSC explained in its decision.

[76] Finally, contrary to what the appellants assert, the CNSC did not delegate the environmental assessment it was required to undertake to the licencing process under the *NSCA* when it mentioned in its decision that less probable accidents excluded from the scope of the EA would nonetheless be examined as part of the safety review to be undertaken by the CNSC in the upcoming licencing process. This comment was offered to assuage Greenpeace's concerns and is not an admission that the scope of accidents that required consideration under *CEAA 1992* needed to be broadened. The CNSC examined each of the factors it was required to assess with respect to nuclear accidents under section 16 of *CEAA 1992* and therefore did not improperly defer part of that assessment to the licencing process.

[77] The appellants' arguments regarding the exclusion of severe low probability nuclear accidents from the scope of the assessment are therefore without merit.

[78] On the issue of costs, given the agreement that additional submissions were to be filed on this issue, I agree with the appellants that the Federal Court judge ought to have heard from the appellants before ruling against them on costs. However, despite the failure to hear from them I do not believe that the appellants are entitled to their costs before the Federal Court.

[79] Under section 52 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, this Court is empowered to make the decision that the Federal Court should have made, if appropriate. Having heard the appellants on the issue of costs, I see no reason to disturb the Federal Court's costs award as the award is appropriate. The mere fact that the appellants are public interest litigants does not immunize them from costs awards, as has been held frequently, see e.g. *Inverhuron FCA* at paragraphs 62, 69-70; *Lavoie v. Canada (Minister of the Environment)*, 2002 FCA 268 at paragraph 22, 291 N.R. 282; *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)*, 2006 FCA 274 at paragraph 7, [2006] F.C.J. No. 1204. And, there is nothing about this case which would warrant departing from the normal rule that costs should be awarded to a successful party. I thus would not disturb the Federal Court's costs award.

VII. Conclusion and Costs

[80] It thus follows that this application for judicial review should be dismissed and the respondents are entitled to their costs on appeal.

[81] I would accordingly dismiss this appeal, with costs.

"Mary J.L. Gleason"

J.A.

"I agree

David Stratas J.A."

"I agree

C. Michael Ryer J.A."

APPENDIX

Canadian Environmental Assessment Act, S.C. 1992, c. 37 (repealed July 6, 2012):

Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of

Projets visés

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :

a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;

b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement, annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;

c) une autorité fédérale

federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

RESPONSIBLE AUTHORITY

Timing of assessment

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

No power, etc., to be exercised until assessment is complete

11. (2) A responsible authority

administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie;

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

AUTORITÉ RESPONSABLE

Moment de l'évaluation

11. (1) Dans le cas où l'évaluation environnementale d'un projet est obligatoire, l'autorité fédérale visée à l'article 5 veille à ce que l'évaluation environnementale soit effectuée le plus tôt possible au stade de la planification du projet, avant la prise d'une décision irrévocable, et est appelée, dans la présente loi, l'autorité responsable de ce projet.

Effet suspensif

11. (2) L'autorité responsable

shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).

d'un projet ne peut exercer ses attributions à l'égard de celui-ci que si elle prend une décision aux termes des alinéas 20(1)a) ou 37(1)a).

ENVIRONMENTAL ASSESSMENT PROCESS

PROCESSUS D'ÉVALUATION ENVIRONNEMENTALE

Scope of project

Détermination de la portée du projet

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.

All proposed undertakings to be considered

Projet lié à un ouvrage

15. (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

15. (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

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority, likely to be carried out in relation to that physical work.

Factors to be 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 the following factors:

(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;

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

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

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

le promoteur;

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.

Éléments à examiner

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

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

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

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.

Determination of factors

Obligations

(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

(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.

Delegation

Délégation

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

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

take a course of action pursuant to subsection 20(1) or 37(1).

paragraphe 20(1) ou 37(1).

Idem

Précision

(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.

SCREENING

EXAMEN PRÉALABLE

Screening

Examen préalable

18. (1) Where a project is not described in the comprehensive study list or the exclusion list made under paragraph 59(c), the responsible authority shall ensure that

18. (1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion établie par règlement pris en vertu de l'alinéa 59c), l'autorité responsable veille :

(a) a screening of the project is conducted; and

a) à ce qu'en soit effectué l'examen préalable;

(b) a screening report is prepared.

b) à ce que soit établi un rapport d'examen préalable.

Public participation

Participation du public

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances — or where required by regulation — the

(3) Dans les cas où elle estime que la participation du public à l'examen préalable est indiquée ou dans les cas prévus par règlement, l'autorité responsable :

responsible authority

(a) shall, before providing the public with an opportunity to examine and comment on the screening report, include in the Internet site a description of the scope of the project, the factors to be taken into consideration in the screening and the scope of those factors or an indication of how such a description may be obtained;

(b) shall give the public an opportunity to examine and comment on the screening report and on any record relating to the project that has been included in the Registry before taking a course of action under section 20 and shall give adequate notice of that opportunity; and

(c) may, at any stage of the screening that it determines, give the public any other opportunity to participate.

Decision of responsible authority following a screening

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):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of

a) verse au site Internet, avant de donner au public la possibilité d'examiner le rapport d'examen préalable et de faire des observations à son égard, une description de la portée du projet, des éléments à prendre en compte dans le cadre de l'examen préalable et de la portée de ceux-ci ou une indication de la façon d'obtenir copie de cette description;

b) avant de prendre sa décision aux termes de l'article 20, donne au public la possibilité d'examiner le rapport d'examen préalable et tout document relatif au projet et de faire ses observations à leur égard et un avis suffisant de cette possibilité;

c) peut donner au public la possibilité de prendre part à toute étape de l'examen préalable qu'elle choisit.

Décision de l'autorité responsable

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) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible,

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;

(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

(c) where

(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,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority

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) 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 œuvre du projet en tout ou en partie;

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

(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) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est

considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

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

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.

**Mitigation measures —
extent of authority**

(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

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

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

**Responsible authority to
ensure implementation of
mitigation measures**

(2) When a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, with respect to

susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

**Mesures d'atténuation —
étendue des pouvoirs**

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

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

**Application des mesures
d'atténuation**

(2) Si elle prend une décision dans le cadre de l'alinéa (1)a), l'autorité responsable veille à l'application des mesures

any mitigation measures it has taken into account and that are described in paragraph (1.1)(a), ensure their implementation in any manner that it considers necessary and, in doing so, it is not limited to its duties or powers under any other Act of Parliament.

d'atténuation qu'elle a prises en compte et qui sont visées à l'alinéa (1.1)a) de la façon qu'elle estime nécessaire, même si aucune autre loi fédérale ne lui confère de tels pouvoirs d'application.

Fisheries Act, R.S.C. 1985, c. F-14, s. 32 (repealed November 24, 2013):

Killing of fish

32. (1) No person shall kill fish by any means other than fishing.

Exception

(2) No person contravenes subsection (1) if the killing of fish

(a) is done as a result of carrying on a prescribed work, undertaking or activity in or around any prescribed Canadian fisheries waters and is done in accordance with any prescribed conditions;

(b) is done in accordance with the regulations;

(c) is authorized by the Minister and is done in accordance with the conditions

Interdiction de tuer des poissons

32. (1) Il est interdit de tuer des poissons si ce n'est dans le cadre d'une activité de pêche.

Exceptions

(2) Le paragraphe (1) ne s'applique pas à quiconque tue des poissons, selon le cas :

a) dans le cadre d'un ouvrage, d'une entreprise ou d'une activité visés par règlement dans des eaux de pêche canadiennes visées par règlement ou à proximité et conformément aux conditions réglementaires;

b) conformément aux règlements;

c) avec l'autorisation du ministre et conformément aux conditions que celui-ci établit;

established by the Minister;

(d) is authorized by a prescribed person or entity and is done in accordance with the prescribed conditions; or

(e) is done as a result of doing anything that is authorized, otherwise permitted or required under this Act.

Failure to comply with conditions

(3) Every person who fails to comply with a condition imposed under any of paragraphs (2)(a) to (d) that applies to them is guilty of an offence punishable on summary conviction and liable, for a first offence, to a fine of not more than \$100,000 and, for any subsequent offence, to a fine of not more than \$100,000 or to imprisonment for a term of not more than six months, or to both.

d) avec l'autorisation de toute autre personne ou entité précisée par règlement et conformément aux conditions réglementaires;

e) alors qu'il accomplit des gestes requis, autorisés ou autrement permis sous le régime de la présente loi.

Infraction

(3) La personne qui ne respecte pas les conditions imposées sous le régime des alinéas (2)a) à d) qui lui sont applicables commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 100 000 \$ pour la première infraction et, en cas de récidive, une amende maximale de 100 000 \$ et un emprisonnement maximal de six mois, ou l'une de ces peines.

Nuclear Safety and Control Act, S.C. 1997, c. 9 (subsection 24(8) repealed June 28, 2012):

Licences

24. (1) The Commission may establish classes of licences authorizing the licensee to carry on any activity described in any of paragraphs 26(a) to

Catégories

24. (1) La Commission peut établir plusieurs catégories de licences et de permis; chaque licence ou permis autorise le titulaire à exercer celles des

(f) that is specified in the licence for the period that is specified in the licence.

activités décrites aux alinéas 26a) à f) que la licence ou le permis mentionne, pendant la durée qui y est également mentionnée.

Application

(2) The Commission may issue, renew, suspend in whole or in part, amend, revoke or replace a licence, or authorize its transfer, on receipt of an application

Demande

(2) La Commission peut délivrer, renouveler, suspendre en tout ou en partie, modifier, révoquer ou remplacer une licence ou un permis ou en autoriser le transfert lorsqu'elle en reçoit la demande en la forme réglementaire, comportant les renseignements et engagements réglementaires et accompagnée des pièces et des droits réglementaires.

(a) in the prescribed form;

(b) containing the prescribed information and undertakings and accompanied by the prescribed documents; and

(c) accompanied by the prescribed fee.

Refund of fees

(3) The Commission may, under the prescribed circumstances, refund all or part of any fee referred to in paragraph (2)(c).

Remboursement

(3) Dans les cas réglementaires, la Commission peut rembourser la totalité ou une partie des droits visés au paragraphe (2).

Conditions for issuance, etc.

(4) No licence shall be issued, renewed, amended or replaced — and no authorization to transfer one given — unless, in the opinion of the Commission, the applicant or, in the case of an application for an authorization to transfer the licence, the transferee

Conditions préalables à la délivrance

(4) La Commission ne délivre, ne renouvelle, ne modifie ou ne remplace une licence ou un permis que si elle est d'avis que l'auteur de la demande, à la fois :

(a) is qualified to carry on the activity that the licence will

a) est compétent pour exercer les activités visées par la

authorize the licensee to carry on; and

(b) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

Terms and conditions of licences

(5) A licence may contain any term or condition that the Commission considers necessary for the purposes of this Act, including a condition that the applicant provide a financial guarantee in a form that is acceptable to the Commission.

Application of proceeds of financial guarantee

(6) The Commission may authorize the application of the proceeds of any financial guarantee referred to in subsection (5) in such manner as it considers appropriate for the purposes of this Act.

Refund

(7) The Commission shall grant to any person who provided a financial guarantee under subsection (5) a refund of any of the proceeds of the guarantee that have not been

licence ou le permis;

b) prendra, dans le cadre de ces activités, les mesures voulues pour préserver la santé et la sécurité des personnes, pour protéger l'environnement, pour maintenir la sécurité nationale et pour respecter les obligations internationales que le Canada a assumées.

Conditions des licences et des permis

(5) Les licences et les permis peuvent être assortis des conditions que la Commission estime nécessaires à l'application de la présente loi, notamment le versement d'une garantie financière sous une forme que la Commission juge acceptable.

Affectation du produit de la garantie financière

(6) La Commission peut autoriser l'affectation du produit de la garantie financière fournie en conformité avec le paragraphe (5) de la façon qu'elle estime indiquée pour l'application de la présente loi.

Remboursement

(7) La Commission rembourse à la personne qui a fourni la garantie la partie non utilisée de celle-ci; le cas échéant, elle peut ajouter les intérêts calculés au taux réglementaire

spent and may give the person, in addition to the refund, interest at the prescribed rate in respect of each month or fraction of a month between the time the financial guarantee is provided and the time the refund is granted, calculated on the amount of the refund.

sur le montant du remboursement, pour chaque mois ou partie de mois entre le moment où la garantie a été donnée et celui du remboursement.

Licence not transferable

Incessibilité des licences et des permis

(8) A licence may not be transferred.

(8) Les licences et les permis sont incessibles.

Prohibitions

Interdictions

26. Subject to the regulations, no person shall, except in accordance with a licence,

26. Sous réserve des règlements, il est interdit, sauf en conformité avec une licence ou un permis :

(a) possess, transfer, import, export, use or abandon a nuclear substance, prescribed equipment or prescribed information;

a) d'avoir en sa possession, de transférer, d'importer, d'exporter, d'utiliser ou d'abandonner des substances nucléaires, de l'équipement réglementé ou des renseignements réglementés;

(b) mine, produce, refine, convert, enrich, process, reprocess, package, transport, manage, store or dispose of a nuclear substance;

b) de produire, de raffiner, de convertir, d'enrichir, de traiter, de retraiter, d'emballer, de transporter, de gérer, de stocker provisoirement ou en permanence ou d'évacuer une substance nucléaire ou de procéder à l'extraction minière de substances nucléaires;

(c) produce or service prescribed equipment;

c) de produire ou d'entretenir de l'équipement réglementé;

(d) operate a dosimetry service for the purposes of this Act;

d) d'exploiter un service de dosimétrie pour l'application

de la présente loi;

(e) prepare a site for, construct, operate, modify, decommission or abandon a nuclear facility; or

e) de préparer l'emplacement d'une installation nucléaire, de la construire, de l'exploiter, de la modifier, de la déclasser ou de l'abandonner;

(f) construct, operate, decommission or abandon a nuclear-powered vehicle or bring a nuclear-powered vehicle into Canada.

f) de construire, d'exploiter, de déclasser ou d'abandonner un véhicule à propulsion nucléaire ou d'amener un tel véhicule au Canada.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-564-14

STYLE OF CAUSE: GREENPEACE CANADA et al. v.
ATTORNEY GENERAL OF
CANADA et al.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 2, 2015

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: STRATAS J.A.
RYER J.A.

DATED: APRIL 13, 2016

APPEARANCES:

Theresa McClenaghan
Richard Lindgren
Kaitlyn Mitchell
Laura Bowman

FOR THE APPELLANTS

Michael Morris
Joël Robichaud
Laura Tausky

FOR THE RESPONDENT
ATTORNEY GENERAL OF CANADA

John Laskin
James Gotowiec

FOR THE RESPONDENT
ONTARIO POWER GENERATION INC.

SOLICITORS OF RECORD:

Theresa McClenaghan
Richard Lindgren
Kaitlyn Mitchell
Laura Bowman
Barristers and Solicitors
Toronto, Ontario

William F. Pentney
Deputy Attorney General of Canada

Torys LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE APPELLANTS

FOR THE RESPONDENT
ATTORNEY GENERAL OF CANADA

FOR THE RESPONDENT
ONTARIO POWER GENERATION INC.