RL
Exec Summ
Plain ~~Comparison~~ Generic summary

PRIVILEGED & CONFIDENTIAL

February 14, 2006

Mark Winfield
Pembina Institute for Appropriate Development
c/o Ottawa-Gatineau Office
164 Wellington Street
Gatineau, Quebec
J8X 2J4

Dave Martin
Greenpeace Canada
250 Dundas Street West, Suite 605
Toronto, Ontario
M5T 2Z5

Morag Carter
David Suzuki Foundation
401 Richmond Street West, Suite 401
Toronto, Ontario
M5V 3A8

Dear Mark, Dave and Morag:

RE: APPLICABILITY OF ONTARIO'S *ENVIRONMENTAL ASSESSMENT ACT* TO PROPOSED EXPANSION OF NUCLEAR ENERGY

You have asked for CELA's legal opinion on whether – or to what extent – Ontario's *Environmental Assessment Act* ("EA Act") may be applicable to recent proposals to establish, refurbish or expand nuclear energy capacity in Ontario.

This general question of law encompasses four specific legal issues, which may be framed as follows:

1. Does the federal government have exclusive jurisdiction over all aspects of nuclear energy in Ontario?

2. Do Ontario's environmental laws generally apply to nuclear energy facilities in the province?

3. Which aspects of the proposed nuclear expansion may be subject to Ontario's EA Act?

4. Which legal options exist to ensure compliance with the EA Act?

For the reasons set out below, it is our overall opinion that:

1. Given the constitutional division of powers, the federal government has exclusive jurisdiction over some – but not all – aspects of nuclear energy in Ontario. The provincial government has considerable legislative authority over its own institutions (i.e. Ontario Power Authority, Ontario Power Generation, etc.), and over the effects of these institutions' activities or projects on matters of provincial jurisdiction (i.e. environment, natural resources, development and management of electrical generation, etc.).

2. Despite the existence of the federal *Nuclear Safety and Control Act*, nuclear facilities in the province are subject to Ontario's environmental laws of general application, including the *Environmental Protection Act* and the *Ontario Water Resources Act*. Ontario's EA Act can also be characterized as a law of general application that is primarily aimed at broad environmental planning considerations, and that does not purport to specifically regulate the nuclear industry in the province.

3. There is a strong legal argument that Ontario's Integrated Power Supply Plan is subject to the EA Act, just as the 1989 provincial Demand-Supply Plan was subject to the EA Act. The application of the EA Act to individual nuclear generating stations is less clear due to the existence of various exemptions made by order and/or regulation. However, if Ontario Power Generation volunteers (or is ordered) to undertake a provincial EA for new or expanded facilities, then it is possible to "harmonize" the process with applicable federal EA requirements. Electricity infrastructure expansion or upgrades (i.e. transmission lines) that are needed to accommodate nuclear expansion will likely trigger the application of the environmental planning procedures under Ontario Regulation 116/01 under the EA Act.

4. If you wish to pursue this matter in the courts, then the preferable option is to commence a judicial review application for declaratory and injunctive relief under the *Judicial Review Procedure Act.* Alternatively, it may be possible to bring this matter to court framed as an application under Rule 14.05(3)(d) of the Rules of Civil Procedure (e.g. determination of rights that depend upon the interpretation of a statute). As described below, however, there are several procedural considerations – and adverse cost implications – which must be seriously considered before either type of application is commenced.

It should be noted that our legal opinion is based upon information obtained from you during our recent meetings, telephone conversations and email exchanges. We have also considered copies of the key documents that you have forwarded to us, or that are otherwise available in the public domain.

PART 1 – THE FACTS

Our understanding of the relevant facts is set out in the following bullet point summary:

- Ontario's oldest nuclear energy facilities (i.e. Pickering) either pre-date the 1975 EA Act or received specific exemptions from the EA Act (i.e. Darlington), and therefore were not developed in accordance with EA planning principles (i.e. consideration of "need" and "alternatives to");

- Darlington's EA exemption order was subsequently relied upon by Ontario Hydro (and upheld by the Divisional Court) to authorize the construction of a centralized tritium removal facility in the late 1980s without EA Act coverage;[1]

- in 1989, Ontario Hydro initiated a 25 year Demand Supply Plan ("DSP"), which was referred under the EA Act to a public hearing before the EA Board;[2]

- in November 1990, the NDP government announced an indefinite moratorium on the development of new nuclear energy facilities in Ontario;

- in 1993, Ontario Hydro withdrew the DSP, and the public hearing before the EA Board was terminated;

- after the termination of the DSP hearing, no governmental proposals for new or expanded nuclear energy facilities were announced or implemented until recently (see below);

- in 1995 and 1997, Ontario Hydro laid up Bruce A Units 1 and 2;

- in 1998, Ontario Hydro sought and received "program approvals" under Ontario's *Environmental Protection Act* ("EPA") to authorize wastewater discharges from the Bruce, Pickering and Darlington facilities in excess of the regulatory limits under the applicable MISA regulation (O.Reg.215/95, as amended);

- in 1998, the Eves government passed the *Electricity Act, 1998* which, among other things, established the Ontario Power Authority ("OPA"), Ontario Power Generation Inc. ("OPG"), and Hydro One, and provided that none of these entities are Crown agents (although OPG and Hydro One remain under provincial ownership);

---

[1] *Energy Probe v. Ontario* (1988), 2 CELR (NS) 161 (Ont. Div. Ct).

[2] Significantly, the EA for the DSP generally did not address the siting of individual facilities or infrastructure. If the DSP was approved by the EA Board, then projects needed to implement the DSP would undergo individual EA's: see Estrin and Swaigen (eds.), *Environment on Trial* (3rd ed), page 198.

- in 2001, Bruce Power was created by a private consortium of companies and unions, and entered into a long-term lease with OPG whereby Bruce Power is the licenced operator of the Bruce A and B Units, while OPG remains responsible for the cost of spent fuels, waste, and decommissioning;

- in May 2002, Ontario opened up its electricity market to competition;

- shortly after the provincial election in 2002, the Liberal government committed to close all coal-fired power plants by 2009;

- in March 2004, the OPG Review Committee released a report which recommended the construction of new nuclear facilities in Ontario;

- in July 2004, OPG announced the restart of Pickering A Unit 1;

- in October 2005, Bruce Power reached a long-term agreement with the OPA, and initiated a project to refurbish and restart the Bruce A Units by 2009;

- the Bruce A Refurbishment Project is currently undergoing a federal EA pursuant to the *Canadian Environmental Assessment Act* ("CEAA") and the *Nuclear Safety and Control Act* so that the Canadian Nuclear Safety Commission can make a decision on the proposed restart of Bruce A Units 1 and 2;

- Ontario's Ministry of the Environment ("MOE") has taken the position that the EA Act does not apply to the Bruce A Refurbishment Project, but other provincial approvals may be necessary (i.e. EPA, *Ontario Water Resources Act*, etc.);

- in December 2005, the OPA released the "Supply Mix Advice Report" which recommended, among other things, that Ontario should spend up to $40 billion to overhaul or replace its nuclear reactors to ensure that half of the province's energy supply is met by nuclear energy by 2025;

- the OPA report was essentially drafted behind closed doors, and was not subjected to EA planning principles or meaningful public participation;

- the OPA report has been posted on the EBR Registry for public comment period that expires at the end of February, and then the Ontario government will decide whether to accept, reject or modify the recommendations contained within the report;

- in December 2005, Premier McGuinty stated that the Ontario government will consider the OPA recommendations while publicly developing the province's long-term energy plan, which the Premier indicated would be referred to an EA;

- after the release of the OPA report, there has been significant public concern regarding various risks and issues arising from nuclear energy expansion (i.e. public health and safety; environmental harm; economic costs; long-term waste disposal, etc.);

- in 2006, the OPA intends to develop and consult upon an Integrated Power System Plan ("IPSP"), which is apparently scheduled to be reviewed by the Ontario Energy Board, rather than by the Environmental Review Tribunal pursuant to the EA Act;

- in January 2006, the Energy Minister advised that there will be a "third round of consultations" on the issues raised in the OPA report (but did not state whether these consulations will occur under the auspices of the EA Act);

- in January 2006, the Director of MOE's EA & Approvals Branch advised that the Ministry is "considering" the request made by certain NGOs to subject the IPSP to the requirements of the EA Act;

- in February 2006, the Energy Minister announced a series of open houses and public meetings to solicit public input on the IPSP (although it is unclear whether these limited opportunities are part of – or a substitute for – public consultation under the EA Act);

- in February 2006, the Premier again repeated his assurance that the outcome of the energy supply planning consultations will be subjected to "full" EA, but it was unclear whether he was referring to provincial or federal EA requirements; and

- in February 2006, documents released to Greenpeace under federal FOI legislation reveal that OPG officials have had preliminary discussions with federal regulators about siting a new nuclear generating station east of Toronto (i.e. Darlington or Wesleyville), although the Ontario government continues to claim that no firm decisions have been made about nuclear expansion.

If you find that the foregoing summary is incomplete or inaccurate, please advise us at your earliest convenience as this may affect the legal opinions and recommendations described below.

PART 2 – THE LAW

This part of our opinion letter provides an overview of four key legal matters: (i) the constitutional division of powers regarding nuclear energy; (ii) the regulatory framework for nuclear energy facilities in Ontario; (iii) the applicability of provincial EA requirements to certain aspects of the proposed nuclear expansion; and (iv) the legal options for ensuring compliance with Ontario's EA Act.

(i) Constitutional Division of Powers regarding Nuclear Energy

The Canadian Constitution divides legislative authority between the federal and provincial governments in relation to a number of prescribed matters. Not surprisingly, the "environment" *per se* was not expressly assigned by the original drafters of the Constitution to one level of government or the other. This legislative fact was recognized by the Supreme Court of Canada in the *Oldman River* case as follows:

> I agree that that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government...
>
> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter that does not fit comfortably within the existing division of powers without considerable overlap and uncertainty.[3]

Similarly, the matter of "nuclear energy" has not been assigned by the Constitution to either the federal or provincial government. However, as one commentator has noted:

> Although the categories of legislative power enumerated in in the Canadian Constitution do not specifically deal with atomic energy or nuclear radiation (the subject matter could not possibly have been foreseen by the framers of the original constitution in 1867), the regulation of the nuclear industry has been assumed by the federal government. This has been justified alternatively under section 92(10)(c) of the *Constitution Act, 1867*, which allows Parliament to control works that are declared to be "for the general advantage of Canada", and under the "Peace, Order and Good Government" heading of the federal powers, on the basis that the production of atomic energy is of "national concern".[4]

With respect to the federal head of power under section 92(10)(c), it should be noted that the former *Atomic Energy Control Act* contained a provision stating that "all work and undertakings constructed for the production, use and application of atomic energy...[are] declared to be works or a work for the advantage of Canada".[5] As discussed below, this federal declaration was relied upon by the Supreme Court of Canada to find that federal labour legislation applied to workers within provincially owned nuclear plants in Ontario.[6]

However, after this case was decided, the *Atomic Energy Control Act* was replaced by the current *Nuclear Safety and Control Act* (see below), which now asserts that "it is essential in the national and international interests to regulate the development, production and use of nuclear energy".[7] Aside from this preamble statement, a statutory provision that mirrors the wording of section 92(10(c) (i.e. "declared to be works for the

---

[3] *Friends of Oldman River Society v. Canada*, (1992), 132 NR 321 (SCC), per La Forest J.
[4] Estrin and Swaigen , *op. cit.*, page 677.
[5] *Atomic Energy Control Act*, RSC 1985, c.A-16, section 18.
[6] *Ontario Hydro v. Ontario*, [1993] 3 SCR 327 (SCC), Iacobucci, Sopinka and Cory JJ. dissenting.
[7] *Nuclear Safety and Control Act*, SC 1997, c.9, preamble.

advantage of Canada") does not appear to be contained with the *Nuclear Safety and Control Act.*

With respect to the residual federal power under the peace, order and good government ("POGG") clause, the Supreme Court of Canada decision in *Crown Zellerbach* articulates the factors to consider when determining whether a particular matter properly falls within the scope of the POGG power:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order amnd good government power, which is chiefly distinguishable by the fact that it provides a consitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense, it must have a singleness, distinctiveness and indivisibility that clearly distinguish it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconciliable with the fundamental distribution of legislative power under the Constitution.

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.[8]

Applying these factors in the instant case, it is clear that nuclear energy did not exist in 1867, and is therefore a "new" matter for the purposes of the POGG analysis. Moreover, the centrepiece of the current federal regulatory regime (i.e. *Nuclear Safety and Control Act*) would not be justifiable under the "national emergency" branch of the POGG power since the legislative framework is not temporary in nature, nor does it address a time-limited emergency or crisis. Instead, the "national concern" branch of the POGG power would likely serve as the main constitutional underpinning of the legislation, provided that "nuclear energy" possesses sufficient "singleness, distinctiveness and indivisibility" (and satisfies the "provincial inability" test) for the purposes of POGG.[9] If so, then it

[8] *R. v. Crown Zellerbach Ltd. et al.,* [1988] 1SCR 401, per Le Dain J.

[9] In light of Canada's endorsement of various international agreements respecting nuclear matters, it could also be argued that the legislation implements the federal government's treaty-making authority under section 132 of the Constitution. Notwithstanding the Supreme Court of Canada decision in *R. v. Hydro-Quebec* (1997), 217 NR 241, it seems unlikely that the federal criminal law power under section 91(27) would support federal nuclear legislation that contains a complex regulatory and licencing scheme which goes well beyond simple prohibitions and penalties normally found in criminal law.

may be assumed that "nuclear energy" falls within the scope of the POGG, and Parliament enjoys exclusive jurisdiction to regulate this matter.

However, while nuclear generating stations are licenced and regulated by federal law on the basis of the federal POGG and/or "declaratory" powers, there are certain aspects of, or environmental effects from, such facilities may also still be addressed by provincial legislation. Writing in 1993, Estrin and Swaigen describe this situation as follows:

> Although atomic energy is primarily a federal matter, there are many aspects of the use, production and sale of atomic energy and radioactive substances that also fall under the purview of the provincial legislatures. For instance, uranium mining, transportation, public health, occupational health and safety, and environmental protection are all areas of responsibility that are shared by both the provincial and federal levels of government... Hence, although the primary regulatory agency is the Atomic Energy Control Board [now the Canadian Nuclear Safety Commission], the regulation of nuclear radiation as a whole is composed of complicated collection of federal and provincial statutes and standards.[10]

It must be further noted that under the *Constitution Act, 1867*, Ontario enjoys numerous heads of provincial power in relation to environmental protection, such as "property and civil rights" (section 92(13)), "matters of a merely local or private nature" (section 92(16)), and provincially owned lands and minerals (section 109). Moreover, section 92A gives Ontario <u>exclusive</u> legislative jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy".

The constitutional division of powers in the nuclear context has been considered in a relatively small number of court decisions since the above-noted discussion by Estrin and Swaigen in 1993.

For example, in *Ontario Hydro v. Ontario*, the Supreme Court of Canada held (in a split 4:3 decision) that federal (not provincial) labour legislation is constitutionally applicable to some workers employed at provincially owned and operated nuclear generating stations in Ontario.[11] Relying upon the federal statutory provision that declared nuclear "works" to be "to the advantage of Canada", the majority followed a long line of labour relations cases, and held that regulating the labour-management relationship in nuclear facilities was an "integral" component of Parliament's exclusive jurisdiction over such "works" (i.e. the need to prevent strikes or lock-outs). In particular, the majority held that a "work" subject to the federal declaration effectively brings that "work" into the exclusive legislative power of Parliament, and ousts provincial jurisdiction over the same subject-matter. Nevertheless, the majority recognized that:

---

[10] Estrin & Swaigen, *op. cit.*, p.678.
[11] *Ontario Hydro v. Ontario*, [1993] 3 SCR 327.

> Laws of general application in the province (such as taxation) will, of course, apply to the work, but they cannot touch an integral part of Parliament's jurisdiction over the work. The province cannot legislate the work *qua* work.[12]

It should be noted that this view was shared by the three dissenting justices, who agreed that federal legislative declarations do not confer "plenary" federal jurisdiction over all aspects of the "work" in question. Instead, the "work" may still be subject to laws of general application in the province, provided that such laws do not extend to the integral aspects of the work that are declared as being "to the advantage of Canada". While the dissenting justices agreed with the majority on the legal test to be applied, they did not agree that provincial labour legislation was "ousted" by federal jurisdiction over the licencing and regulation of nuclear "works" in Ontario.

Given the existence of this strong dissent (and the two separate concurring judgments for the majority), it is questionable how binding or persuasive the *Ontario Hydro* decision may be in the environmental context. This is particularly true given that, as compared to the federal government, Ontario enjoys predominant jurisdiction over the environment and natural resources in the province, and possesses <u>exclusive</u> jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" (section 92A). Indeed, the Divisional Court and Court of Appeal judges below in *Ontario Hydro* could not agree among themselves on the proper resolution of the basic constitutional question. In our opinion, this lack of judicial unanimity (up to and including Canada's highest court) underscores the lingering constitutional uncertainty over the precise interplay between federal and provincial legislation in the nuclear context.

The *Ontario Hydro* decision was subsequently considered in *Energy Probe v. Canada*, which was an action that raised various legal challenges against the federal *Nuclear Liability Act*.[13] Regarding the division of legislative powers, the Ontario Court of Justice held that the POGG power and the federal "declaratory" power provided a sufficient constitutional underpinning for the impugned Act, which the Court found was "logically related" and "integral" to the "development, application and use of atomic energy" in Canada.[14] Indeed, the Court found that the nuclear industry would not have survived or thrived but for the Act's $75 million limit on potential civil liability arising from a "nuclear incident", and further opined that the Act's inter-provincial liability provisions could have formed part of the *Atomic Energy Control Act* itself.[15] Accordingly, the Court found the Act to be *intra vires* of Parliament, and went on to dismiss *Charter* and *Canadian Bill of Rights* challenges to the Act.

It can be argued, however, that the *Energy Probe* decision is distinguishable from the instant case in that we do not anticipate challenging the constitutional basis of federal nuclear legislation. To the contrary, the instant case will likely focus on the different

---

[12] *Ibid.*, per Laforest J.
[13] *Energy Probe v. Canada* (1994), 14 CELR (NS) 245 (Ont. Ct. G.D.).
[14] *Ibid.*, pages 255 to 256.
[15] *Ibid.*, pages 255 and 257.

(and somewhat narrower) question of whether Ontario's EA Act can constitutionally apply to provincial energy supply plans, or to new or expanded nuclear generating stations that may be proposed by or for the province of Ontario. In addition, it should be pointed out that the judgment in the *Energy Probe* action was rendered by a single judge of the Ontario Court (General Division), which is not necessarily binding upon a panel of Divisional Court judges who may be called upon to decide a judicial review application framed on different grounds in this case.

Notwithstanding the strong federal role in licencing and regulating nuclear energy production, it should be noted that other provinces with nuclear generating stations have elected to apply their own EA requirements to such facilities. In New Brunswick, for example, the "Environmental Impact Assessment Regulation" under the province's *Clean Environment Act* specifically lists "all electric power generating stations with a production rating of three megawatts or more" and "all facilities for the processing of radioactive materials" as undertakings to which the Act applies.[16] This arrangement has recently lead to a "harmonized and cooperative" provincial-federal EA for modifications to the radioactive waste facility at the Point Lepreau nuclear generating station, which is owned and operated by NB Power (a publicly owned Crown corporation). Similarly, Quebec has applied its provincial EA requirements to nuclear generating stations (i.e. Gentilly-2 modifications), and has passed a regulation under the *Environmental Quality Act* to this effect.[17]

The EA practices in other provincial jurisdictions are not determinative if a legal challenge is brought against Ontario's refusal to apply the EA Act to nuclear-related plans, programs or projects. However, these practices may have some persuasive value and clearly lend support to the overall argument that there is concurrent (or shared) EA jurisdiction over provincially owned or operated nuclear facilities, as described below.

In our opinion, the current state of the law regarding the constitutional division of powers in the nuclear energy context is best described as mixed, complex and far from well-settled. Nevertheless, it is fair to say that the federal government enjoys exclusive jurisdiction over some – but not all -- aspects of OPG's nuclear generating stations within Ontario.

It can be further argued that regardless of whether federal nuclear law is based upon the POGG power or the "declaratory" power under the Constitution, the resulting federal jurisdiction is not "plenary," and provincial laws of general application can continue to apply to OPG stations. However, these provincial statutes must not aim at directly regulating or controlling the "integral" aspects of nuclear energy production that are within exclusive federal jurisdiction. For the reasons described below, it is our opinion that, in pith and substance, the EA Act does <u>not</u> purport to regulate the integral aspects of nuclear energy production that fall within exclusive federal jurisdiction. This is particularly true if the EA Act is applied to the IPSP itself, rather than to the site-specific expansion of individual nuclear facilities.

---

[16] N.B. Reg. 87-83, Schedule A.
[17] R.Q. c.Q-2,r.9.

(ii) Regulatory Framework for Nuclear Energy in Ontario

At the federal level, the principal regulatory statute is the *Nuclear Safety and Control Act* ("NSCA"). Among other things, the NSCA establishes and empowers the Canadian Nuclear Safety Commission ("CNSC"), which licences, inspects, and reports upon nuclear facilities and activities in accordance with regulations and by-laws promulgated under the Act.

Some of the nuclear projects regulated by the CNSC are also required to prepare federal EA documents pursuant to CEAA and regulations thereunder. For most nuclear projects (i.e. facility upgrades, restarts, decommissioning, etc), it appears that the federal EA takes the form of a "screening report", although in some instances a "comprehensive study" may be triggered. For example, the above-noted Bruce A Refurbishment Project is currently undergoing a screening exercise under CEAA. To date, it appears that few (if any) nuclear projects have been subjected to "panel review" under CEAA.

In our opinion, the main drawback to using "screening" as the predominant federal EA mechanism in the nuclear context is that the scope of screening reports may be restricted, and the opportunities for meaningful public participation during the screening exercise may be limited. For example, the "responsible authority" (which can be the CNSC itself) can determine the scope of the project which is to be assessed via screening: see section 15 of CEAA. Similarly, the responsible authority can determine the scope of the various factors to be considered during the screening exercise: see section 16 of CEAA. In effect, this means that important EA planning considerations – such as purpose, "need", and alternatives – may be excluded from the screening exercise. Finally, the CNSC itself can determine the extent of public consultation to be undertaken for specific projects.[18] For these and other reasons, it cannot be seriously contended that the CEAA screening process constitutes a more open, inclusive, rigorous or comprehensive EA process than the "individual EA" process prescribed under Part II of Ontario's EA Act (see below).

In addition, it should be noted that there are certain nuclear activities that fall outside the scope of the NSCA. For example, the NSCA does not apply to military uses of nuclear energy. Therefore, the NSCA does not completely occupy the field of nuclear energy regulation, even at the federal level.

At the provincial level, there are no Ontario statutes that attempt to directly regulate nuclear energy facilities. For example, there is no provincial equivalent to the *Nuclear Safety and Control Act*, nor is it likely that such a statute could be enacted by Ontario in light of the constitutional constraints discussed above. However, there are a number of provincial laws of general application that can and do apply to nuclear energy facilities. Estrin and Swaigen describe this overlapping jurisdiction as follows:

[18] CNSC, *Guidelines for Environmental Assessment pursuant to the Requirements of the Canadian Environmental Assessment Act*, Appendix C, "Criteria for Public Consultation in EA Projects".

"Spraytech" – can → less likely to use "occupy the field" arg's

> There is no provincial legislation purporting to govern atomic energy, since the field has been occupied by federal legislation. However, there are several provincial ministries whose jurisdictions touch on various aspects of nuclear regulation, through a number of different statutes and regulations…
>
> [The] Ministry of the Environment has been frequently involved in monitoring radioactive emissions, and has the power to regulate the treatment and disposal of radioactive wastes, since radiation is included under the definition of "contaminant" under the provincial *Environmental Protection Act*…
>
> The Ministry… also administers the *Ontario Water Resources Act* and the *Environmental Assessment Act*, under which a study of the entire complex of environmental effects that a project might generate is carried out, at an early stage of the planning of a project.[19]

It should be further noted that Ontario's *Safe Drinking Water Act, 2002* prescribes numerical drinking water standards for 78 radiological parameters (see Schedule 3 of O.Reg.169/03). In our opinion, these standards provide further support for the proposition that Ontario's laws of general application can and do apply to certain nuclear-related matters (i.e. radioactive contaminants), even though nuclear energy itself is primarily regulated and licenced under federal legislation.

There are several leading constitutional cases which indicate that provincial laws of general application can apply to activities that fall within federal jurisdiction, provided that the provincial laws do not attempt to control or regulate a vital or integral aspect of the undertaking. For example, in *Air Canada v. Ontario*, the Supreme Court of Canada held that provincial liquor legislation can constitutionally apply to national airline carriers, even though "aeronautics" falls within Parliament's exclusive jurisdiction under POGG.[20] Writing for the Court, Iacobucci J. summarized the law as follows:

> The federal power to make laws touching on a vital part of a federal undertaking is exclusive. However, a provincial law that does not purport to control an undertaking directly will be invalid only if it impairs, sterilizes or paralyzes that undertaking.[21]

Similarly, in *Irwin Toy Ltd. v. Quebec*, the Supreme Court of Canada upheld a provincial law which restricted television advertising aimed at children, even though broadcasting regulation falls within Parliament's exclusive jurisdiction.[22]

In addition to the foregoing constitutional cases, there are several environmental cases which also support our opinion that Ontario's general laws can apply to federally regulated undertakings. Notable examples include the following decisions:

---

[19] Estrin and Swaigen, *op. cit.*, pages 697-98.
[20] *Air Canada v. Ontario*, [1997] 2 SCR. 581 (SCC), per Iacobucci J.
[21] *Ibid.*, para.70.
[22] *Irwin Toy Ltd. v. Quebec*, [1989] 1 SCR. 927 (SCC), per Dickson C.J. *et al.*

R. v. Canadian Pacific (1995), 17 CELR (NS) 129 (S.C.C.): A federally regulated railway was convicted under Ontario's EPA for contaminant discharges arising from track-clearing operations;

R. v. Nitrochem (1993), 14 CELR (NS) 151 (Ont. Ct. P.D.): A federally regulated inter-provincial trucking firm was convicted under Ontario's EPA for contaminant discharges into inter-provincial (and international) river;

R. v. TNT Canada (1987), 1 CELR (NS) 109 (Ont. C.A.): A federally regulated inter-provincial trucking firm was convicted for failing to have requisite approval under Ontario's EPA for transporting PCBs in the province;

CNR v. Director (1992), 8 CELR (NS) 1 (Ont. C.A): An administrative cleanup order under Ontario's EPA was applicable to federally controlled harbour lands.

Therefore, even though Ontario's nuclear facilities are federally regulated undertakings, they are also subject to provincial environmental laws of general application. Indeed, as noted above, MOE officials appear to have conceded this point when they issued EPA program approvals for the Darlington, Bruce and Pickering facilities. In this sense, there is shared responsibility between the federal and provincial governments for ensuring that nuclear facilities in Ontario do not adversely affect ecosystem health or public safety. However, the central question is whether Ontario's EA Act can be fairly characterized as a provincial law of general application. This question is addressed below in our discussion of the nature, structure and application of the EA Act, and it is our opinion that the EA Act can be fairly characterized as a provincial law of general application.

(iii) Applicability of Provincial EA Requirements to Nuclear Expansion

Overview of EA Act

The purpose of the EA Act is defined in section 2 as "the betterment of the people of Ontario" by providing for the "protection, conservation and wise management" of the environment.

"Environment" is broadly defined in section 1 of the EA Act as:

(a) air, land or water;

(b) plant and animal life, including human life;

(c) the social, economic and cultural conditions that influence the life of humans or a community;

(d) any building, structure, machine or other device or thing made by humans;

(e) any solid, liquid, gas, odour, heat, sound, vibration or <u>radiation</u> resulting directly or indirectly from human activities; or

(f) any part or combination of the foregoing and the interrelationships between any two or more of them (emphasis added).

In general terms, Ontario's EA Act applies to "undertakings" (see below) proposed by public sector proponents, unless such undertakings have been exempted from the Act by way of "declaration orders". The EA Act does not apply to private sector undertakings, unless such undertakings have been designated by regulation as undertakings to which the Act applies. It is also possible for proponents to voluntarily agree to the application of the EA Act.

Where an undertaking is subject to the EA Act and requires the preparation of an individual EA, the proponent is responsible for preparing the necessary EA documentation in consultation with interested persons. At the present time, Ontario's individual EA process consists of four main steps:

- preparation and approval of "Terms of Reference" to direct the content and conduct of the EA process for the proposed undertaking;

- preparation and submission of the EA, consisting of the studies, reports and research prescribed by the Terms of Reference;

- government and public review of the EA submitted by the proponent; and

- Minister's decision on the proposed undertaking (i.e. approve, reject, refer to mediation, or refer to the Environmental Review Tribunal for a public hearing and decision).

Part II.1 of the EA Act provides statutory authority for the approval of "Class EAs", which set out streamlined planning, consultation and documentary requirements for certain classes of projects. If subject to a Class EA, a proposed project is carried out in accordance with the prescribed procedures, and can be implemented without securing individual EA approval. However, the Minister has residual discretion to order that particularly significant or controversial Class EA projects be "bumped up" or "elevated" to the individual EA process outlined above.

Which Proponents and Undertakings are Subject to the EA Act?

"Proponent" is defined under section 1 of the EA Act as:

the person who,

(a) carries out or proposes to carry out an undertaking; or

(b) is the owner or person having charge, management or control of an undertaking.

"Person" is defined under section 1 of the EA Act as including "a municipality, Her Majesty in right of Ontario, a Crown agency within the meaning of the *Crown Agency Act*, [or] a public body". "Public body" is further defined as "a body other than a municipality that is defined as a public body by the regulations".

"Undertaking" is defined under section 1 of the EA Act as:

(a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies, or by a municipality or municipalities;

(b) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or or business enterprise of a person or persons, other than a person or persons referred to in clause (a), that is designated by the regulations; or

(c) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program.

The foregoing definitions of "undertaking" are essentially repeated in section 3 of the EA Act, which, in effect, specifies that the Act applies to:

- public sector undertakings proposed by or on behalf of the provincial Crown, by public bodies, or by municipalities;

- private sector undertakings that are designated by regulation; and

- undertakings by proponents who consent in writing to the application of the EA Act.

Despite the potentially broad scope of the foregoing provisions, it should be noted that countless public sector proponents and undertakings have been exempted by "declaration orders" (section 3.2) or by regulation (section 39(f)). For example, Ontario Regulation 334 exempts certain undertakings by municipalities, conservation authorities, and various ministries. Section 9 of the Regulation also exempts certain financial matters, such as the "making a loan, giving a grant, or giving a guarantee of debts". On this point, there is caselaw suggesting that it is inappropriate for the courts to supervise the government's economic policies or priorities.[23]

[23] *Hamilton-Wentworth v. Ontario* (1991), 2 OR (3d) 716 (Ont. Div. Ct.); *Wolfe Island v. Ontario* (1995), 23 OR (3d) 737 (Ont. C.A.).

If a public sector undertaking is not exempted by order or regulation, then the proponent must apply to the Environment Minister for approval to proceed. This application consists of the Terms of Reference and the EA documentation prepared in accordance with the Terms of Reference (section 5). Proponents are under a mandatory legal duty to consult with "interested persons" when preparing the Terms of Reference and EA documentation (section 5.1).

The Nature of Ontario's EA Regime

In essence, EA is an information-gathering and decision-making tool that should be open, participatory, and comprehensive (i.e. addressing broad matters such as pollution control, resource conservation, land use planning, etc.).[24] This general description of EA was endorsed by the Supreme Court of Canada in the *Oldman River* decision:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D.P. Emond in "Environmental Impact Assessment" in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision-making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool, it has both and information-gathering and decision-making component to provide the decision-maker with an objective basis for granting or denying approval for a proposed development... In short, environmental impact assessment is simply descriptive of a process of decision-making.[25]

In theory (if not in practice), Ontario's EA regime fits within this conceptual model, particularly where proponents of environmentally significant or risky undertakings are required to consider "need" and "alternatives to" as part of the EA planning exercise. Accordingly, it is clearly consistent with the public interest purpose of the EA Act to ensure that there is appropriate EA coverage of electricity infrastructure projects, provincial electrical supply plans, and new or expanded nuclear facilities so that informed decisions can be made about whether to proceed in light of the ecological and socio-economic impacts. Potential legal barriers to EA Act coverage of these matters are discussed below.

It should be noted, however, that EA, in and of itself, has no independent or "stand-alone" status under the constitutional division of powers. In particular, there is no head

---

[24] Hughes et al, *Environmental Law and Policy* (3rd ed.), page 216.

[25] *Friends of the Oldman River Society v. Canada* (1992), 132 NR 321 (SCC), per Laforest J.

of power called "EA" that has been given to either the federal or provincial levels of government. Accordingly, "EA" cannot be used by Ontario in a "colourable" manner to directly regulate vital aspects of matters that otherwise fall within exclusive federal jurisdiction (and *vice versa*). Instead, Ontario's EA regime is simply an environmental planning tool that enables public officials to gather information and make informed decisions about matters that properly fall within provincial jurisdiction (i.e. air, land, water and other natural resources within the province). In other words, the EA Act cannot be used as the basis for intruding into matters that are otherwise exclusively assigned to Parliament's jurisdiction. Instead, the EA Act is merely a tool that is ancillary to the exercise of provincial powers on matters falling within Ontario's legislative competence.

In the *Oldman River* decision, the Supreme Court of Canada found that EA had an "auxiliary nature", and held that it was open to the federal government to self-impose EA planning procedures (i.e. the *EARP Guidelines Order*) in order to reach informed decisions about whether to grant or refuse approvals in relation to matters of federal interest (i.e. permit under the federal *Navigable Waters Protection Act*):

> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction... Given the necessary element of proximity that must exist between the impact assessment and the subject matter of federal jurisdiction, this legislation can, in my view, be supported by the particular head of power invoked in each instance... Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction... the environmental effects to be studied can only be those that may have an impact on the areas of federal responsibility affected.
>
> I should make it clear, however, that the scope of the assessment is not confined to the particular head of power under the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction. There is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time...
>
> In the end, I am satisfied that the *Guidelines Order* is, in pith and substance, nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. Consequently, it is nothing more than an adjunct to the federal legislative powers affected... An intrusion into provincial matters is merely incidental to the pith and substance of the legislation.[26]

[26] *Ibid.*

Applying this reasoning to Ontario's EA regime, it can be argued that the EA Act is an adjunct to Ontario's clear legislative competence over the institutions in question (i.e. Minister of Energy, OPA or OPG), and over the effects of activities carried out by or for these institutions (i.e. long-term electricity supply planning) upon matters within provincial jurisdiction (i.e. environment, natural resources, and the development, conservation and management of electrical energy facilities). In pith and substance, the EA Act is merely an auxiliary instrument for gathering information and making decisions about matters within provincial jurisdiction, and any intrusion into matters of federal jurisdiction is not only incidental, but easily avoidable if the EA Act is engaged and completed <u>before</u> provincial proponents seek federal permits and approvals. Alternatively, the applicable federal and provincial EA requirements may be jointly applied or merged into a single "harmonized" process, as discussed below.

Viewed in this manner, it can be argued that Ontario's EA Act does not attempt to directly licence or regulate the "vital", "essential" or "integral" aspects of nuclear energy that are otherwise subject to the *Nuclear Safety and Control Act*. In the words of the *Ontario Hydro* decision discussed above, the EA Act does not purport to regulate this "work *qua* work". In our opinion, there is nothing in the EA Act that expressly regulates (or prohibits) nuclear energy, and there appears to be no direct duplication or operative conflict between the EA Act and the *Nuclear Safety and Control Act*. This is particularly true if the EA Act is applied to the IPSP (see below), which will presumably encompass long-term power supply options that might include -- but are not limited to – generic consideration of nuclear generating stations as well as other non-nuclear generation options. !?

To paraphrase the *TNT Canada* decision discussed above, the EA Act does not prevent public sector proponents from pursuing nuclear undertakings; instead, it merely requires such proponents to apply for and receive EA Act approval in order to proceed. Thus, it can be argued that the threshold determination in the IPSP of whether there is a demonstrable need for additional power generation capacity (by nuclear or non-nuclear means) should be systematically (and publicly) examined under the auspices of the EA Act. If, at the end of the provincial EA process, the Minister (or ERT) approves an IPSP that includes a nuclear component, then it becomes necessary for the proponent to apply for and obtain other necessary provincial and federal approvals, including licences under the *Nuclear Safety and Control Act*. As discussed below, it is also possible to harmonize the provincial and federal EA processes into a joint review so that the EA procedures occur concurrently rather than consecutively.

It should be noted that the courts could apply the constitutional doctrine of "reading down" to help confine the EA Act to nuclear-related issues that properly fall within Ontario's legislative competence. This interpretive doctrine was explained by the Supreme Court of Canada as follows:

> As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect

> matters coming within the exclusive jurisdiction of Parliament. The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations.[27]

For example, in *Mississauga v. Greater Toronto Airport Authority*, the Ontario Court of Appeal found that the provincial building code requirements were *intra vires* of Ontario. However, the provincial regime was "read down" so as to not apply to a federally owned airport.[28]

Applying this doctrine in the instant case, if the EA Act were extended to individual nuclear facilities (as opposed to the IPSP itself), the OPG and/or the Ontario government might conceivably argue that this scenario would affect vital matters within Parliament's exclusive regulatory jurisdiction over nuclear energy, thereby making it necessary to "read down" the statute to exclude such matters. Of course, this argument begs the question of what exactly is the basic minimum or unassailable "core" of the federal government's jurisdiction regarding nuclear energy.

On this point, the limited nuclear caselaw to date has not precisely delineated the dividing line between the "vital" aspects of nuclear energy that are exclusively regulated by Parliament (via the NSCA and CEAA), and the "non-vital" aspects that can be addressed by Ontario Legislature (via the EPA, OWRA or EA Act). However, there is some non-nuclear jurisprudence suggesting that matters related to the specific location, design, or construction materials for federal undertakings cannot be dictated by provincial requirements since these matters are "vital" or "integral" to the undertaking.

For example, in *Construction Montcalm v. Quebec*, the Supreme Court of Canada held that issues such as "whether to build an airport and where to build it", and airport dimensions and related structural issues, are vital aspects of the exclusive federal jurisdiction over aeronautics.[29] However, the majority upheld the constitutional applicability of provincial wage decrees to a provincially incorporated company that was contracted to physically build a runway upon federally owned lands. We hasten to add that in the instant case, there is no federally owned or operated undertaking, and no federal lands in question. Instead, the case essentially involves provincial corporations established by the Ontario Legislature (i.e. OPA, OPG, etc.), which are proposing, *inter alia*, to carry out certain activities within provincial jurisdiction (i.e. electricity generation), at considerable public expense, at provincially owned facilities located upon provincially owned lands.

Thus, the bottom line question may be broadly framed as follows: is Ontario free to self-impose EA planning requirements upon its own institutions in order to: (a) identify and

[27] *Ordon Estate v. Grail*, [1998] 3 SCR 437, per Iacobucci and Major JJ., para. 81.
[28] *Mississauga v. Greater Toronto Airport Authority* (2000), 50 OR (3d) 641 (Ont. CA).
[29] *Construction Mountcalm v. Quebec*, [1979] 1 S.C.R. 754, per Beetz J, para. 25.

evaluate the impacts of provincial facilities or activities upon matters of provincial interest; and (b) reach an informed decision on whether these activities should proceed? For the reasons outlined above, we conclude that there is a strong argument that this question should be answered in the affirmative, which means that, at the very least, the EA Act can constitutionally apply to the IPSP (assuming that the IPSP is not otherwise granted an exemption from the EA Act). Because of the "double aspect" nature of nuclear energy, some issues fall within the provincial domain (i.e. EA Act, EPA, OWRA), and some fall within the federal domain (i.e. CEAA, NSCA, etc.). In our opinion, this dual arrangement is entirely consistent with the principles of federalism entrenched in the Constitution.

EA Requirements for Electricity Infrastructure

Traditionally, provincial EA requirements in the electricity sector applied only to Ontario Hydro (not private proponents), and took the form of individual EA's for large-scale transmission corridors or, more recently, as Class EAs for certain classes of projects.

However, once the Ontario government decided to open up the electricity market to competition, Ontario attempted level the EA playing field between public and private proponents of electricity. Thus, Ontario passed the Electricity Projects Regulation (O.Reg.116/01) under the EA Act, and published a *Guide to EA Requirements for Electricity Projects* (March 2001) to explain the new regulatory approach. In essence, the Regulation divides specified electricity projects into three different categories (i.e. A, B and C), and prescribes varying levels of planning and assessment requirements for each category (i.e. no EA, "environmental screening process", or individual EA). For example, 500 kilovolt transmission lines longer than 2 kilometres are classified as Category C projects, and proponents of such projects are required to prepare individual EAs.

Nuclear generating stations are conspicuously absent from the O.Reg. 116/01 list of prescribed electricity projects (see below). This omission is neither determinative nor surprising since the Ontario government now appears to take the position that such facilities are not subject to the EA Act. Nevertheless, there can be little doubt that the construction of major transmission lines to accommodate new or expanded nuclear energy facilities should trigger EA requirements pursuant to the Electricity Projects Regulation.

EA Requirements for Electricity Supply Plans

As noted above, Ontario Hydro's 1989 DSP was subject to the EA Act, and was referred to the EA Board for a public hearing before it was withdrawn by the proponent in 1993.

At the present time, the OPA has delivered its "Supply Mix Advice Report", and is about to engage in another long-term electricity supply planning exercise that will culminate in hearings before the Ontario Energy Board. What is less clear is when – or whether – the EA Act will be applied to the IPSP, although Premier McGuinty has certainly indicated that there will be EA coverage at some stage. Whether the Premier is referring to federal or provincial EA remains to be seen.

Having regard for the definition of "undertaking" in the EA Act, it is our opinion that the IPSP is a "proposal, plan or program" in respect of "an enterprise or activity" (i.e. power supply) within the meaning of the Act. However, the key question is whether this undertaking is being proposed by "a public body" or "by or on behalf of Her Majesty in right of Ontario".

On this point, we note that the list of "public bodies" in section 3 of Ontario Regulation 334 does not include the OPA or OPG. Therefore, in order to trigger application of the EA Act, it will be necessary to demonstrate that the proponent of the IPSP is, in fact and in law, Her Majesty in right of Ontario, as represented by the Minister of Energy. In this regard, it can be argued that in drafting and consulting upon the IPSP, the OPA is merely an agent or *alter ego* that is acting on behalf of a Minister of the Crown. The fact that the Energy Minister is statutorily empowered to give "directives" to the Ontario Energy Board regarding the IPSP further substantiates the argument that there is overriding provincial ownership and carriage of the IPSP initiative.

Moreover, we presume that the OPA itself will have no responsibility to actually fund, construct, operate and maintain the facilities that may be necessary to implement the approved IPSP. On this point, we note that OPA is statutorily empowered to procure power supply contracts from public or private suppliers inside or outside of Ontario, and to undertake other broad electricity planning initiatives.[30] However, the OPA is not authorized to construct or operate its own facilities. Therefore, insofar as new or expanded provincial facilities are concerned, operational responsibility for site-specific projects will fall upon Her Majesty in right of Ontario, as represented by the Minister of Energy (and as funded by the taxpayers and electricity ratepayers of Ontario), and will be implemented via the provincially owned OPG.

Nevertheless, section 6(2) of Ontario Regulation 334 provides that:

> All undertakings and classes of undertakings by or behalf of Her Majesty in right of Ontario and carried out by an agent of Her Majesty in right of Ontario who is not,
>
> (a) a Minister of the Crown;
>
> (b) acting on behalf of a Minister of the Crown; or
>
> (c) defined as a public body,
>
> are exempt from subsection 5(1) of the Act.

[30] See section 25.2 of the *Electricity Act, 1998*.

If this awkwardly worded exemption is invoked by the Ontario government to avoid EA Act coverage of the IPSP, then two counter-arguments are possible. First, section 25.3 of the *Electricity Act, 1998* states that the OPA is not an agent of the Crown, and section 53.1(2) of the *Electricity Act, 1998* states that OPG is not an agent of Crown. Therefore, it is difficult to see how the opening phrase of the section 6(2) exemption is satisfied when "non-agents" are involved in carrying out the undertaking.

Second, even if the OPA and/or OPG really are "agents" (despite the statutory disclaimers) because the provincial Crown is the sole shareholder in both entities, it cannot be seriously contended that these entities are <u>not</u> acting on behalf of a Minister of the Crown, as required by section 6(2)(b) for the exmption to apply. It should be further noted that the list of exempted ministries in section 6(1) does not include the Ministry of Energy.

In summary, in light of the statutory language in the EA Act, and in light of the DSP precedent, it is our opinion that a strong argument can be made that the IPSP should be subject to the EA Act, particularly since (to our knowledge) there are no orders or regulations which specifically exempt this overarching provincial plan from EA coverage. As discussed below, there are some existing exemptions that may affect the applicability of the EA Act to individual nuclear generating stations. However, it remains unclear how these exemptions could preclude EA Act coverage of a higher-order provincial plan for identifying and evaluating a reasonable range of energy alternatives, many of which are not nuclear at all (i.e. renewables, natural gas, conservation/efficiency, etc.).

EA Requirements for Nuclear Generating Stations

There can be no doubt that the EA Act is *intra vires* (i.e. within jurisdiction) of Ontario. Therefore, the key question is whether it is constitutionally applicable to individual nuclear generating stations within the province.

Estrin and Swaigen describe the application of the EA Act to nuclear facilities as follows:

> The Act does not cover federal projects, but it should apply to all nuclear installations in Ontario, since they are all owned by a public utility, Ontario Hydro [now OPG]. It is interesting to note that despite the fact that the provincial *Environmental Assessment Act* has been in force since 1975, and the federal guidelines order [EARP] since 1984, there has never been an environmental assessment hearing performed for any nuclear plant in Ontario. The many nuclear-related projects that have been exempted from the application of the provincial Act include some Ontario Hydro generating stations and heavy water plants, for which, according to Ontario Hydro, the planning was already too far advanced for the environmental assessment to be applied to them. The Ontario Act would have applied to the Darlington nuclear generating station, but this was exempted in mid-1977.[31]

[31] Estrin and Swaigen, *op. cit.*, page 696.

The chronology of the Darlington facility is concisely summarized in *Energy Probe v. Ontario*, which involved an unsuccessful legal challenge to Ontario Hydro's subsequent construction of a TRF at Darlington without a provincial EA. Interestingly, the proposal to construct the Darlington nuclear generating station was submitted concurrently to both the Atomic Energy Control Board and the provincial Minister of the Environment. In June 1977, the AECB approved the proposal, and approximately one month later the Minister exempted the proposal from the EA Act.

In particular, the exemption was specifically granted for "the program of planning, designing, constructing, operating, and maintaining a 3,400 megawatt nuclear generating station project on the Darlington site (emphasis added)."[32] Although this definition of the undertaking blurs the distinction between a "program" and a "project", this chronology leaves little doubt that the prevailing provincial view from the 1970's until recently was that the EA Act applied *ab initio* to such undertakings, thereby necessitating the need for specific exemptions from the EA Act.

In the Darlington situation, the Ministry subsequently took the position that the broad scope of this exemption order included the TRF (and other facilities "necessary and ancillary" to the nuclear generating station), and this interpretation was upheld by the Divisional Court. Significantly, the Divisional Court (and the parties) did not dispute the constitutional applicability of the EA Act to the Darlington facility. Instead, the Court found that the TRF proposal was conceptually known at the time that the exemption order was granted, and was therefore exempted from further EA Act coverage. Moreover, the Court found that, in any event, the practice of transporting tritiated water was commenced before the EA Act came into force.

At the present time, we have not had the opportunity to retrieve and re-read the full text of the Darlington exemption order. It goes without saying that this critically important document should be reviewed with legal counsel before any decision is made to proceed with the litigation options described below. However, for the purposes of this opinion letter, we assume that the Darlington exemption order still remains in force in accordance with its terms. If so, then it may be open to OPG (as the statutory successor to Ontario Hydro) to invoke and rely upon the ongoing exemption order if OPG intends to refurbish or expand the units at Darlington. For the same reason, it will be important to determine whether Ontario's other existing nuclear generation facilities that have exemption orders which remain in effect, and which might "shield" future expansion proposals from EA Act coverage.

Given the Divisional Court's decision to give an open-ended interpretation to the Darlington exemption order in the TRF case, it can be reasonably expected that the Court may be inclined to, in effect, allow OPG to again "hide" behind the exemption order in order to shield further nuclear development at Darlington from EA Act coverage. Nevertheless, one could argue that the order "capped" the exempted Darlington capacity at 3,400 MW, and that any new or expanded capacity in excess of 3,400 MW goes

[32] *Energy Probe v. Ontario,* (1988), 2 CELR (NS) 161 (Div. Ct.) at page 165.

beyond the exemption order and therefore triggers fresh application of the EA Act (unless, of course, a further exemption is granted). Similar arguments about "capacity caps" might be possible in relation to the Bruce and Pickering stations if further research reveals the existence of similar exemption orders that remain in effect, and that contain actual limits on permitted capacity.

However, the Bruce situation may be somewhat more complicated because of the involvement of the private consortium in the operation and management of the facility. Indeed, it is our understanding that this consortium is serving as the *de facto* proponent of the Bruce refurbishment project that is currently undergoing a federal EA under CEAA. Nevertheless, since OPG still owns the Bruce facility, and since the Ontario Crown is the sole shareholder in OPG, then it can be argued that the private consortium is functionally serving as an agent of the Crown in an undertaking that is subject to the EA Act (unless exempted).

One potential difficulty with this line of argument is that section 15 of Ontario Regulation 334 attempts to provide a broad EA Act exemption for electricity facilities that are otherwise not caught by the Electricity Projects Regulation (O.Reg. 116/01). In particular, section 15 provides that:

> An undertaking by Her Majesty in right of Ontario, a municipality or a public body that is not designated as an undertaking to which the Act applies by Ontario Regulation 116/01 (Electricity Projects) and that is the planning, designing, establishing, constructing, operating, changing, expanding or retiring of a generation facility, transmission line, transformer station, or distribution station within the meaning of that regulation <u>is exempt from Part II of the Act</u> (emphasis added).

Because nuclear facilities are not designated or caught by O.Reg. 116/01, it may be open to the Ontario government to argue that such facilities are exempt from individual EA requirements under Part II of the Act.

Even if this position is correct, it should noted that section 39(g) of the EA Act still empowers Cabinet to enact a further regulation designating public sector undertakings that are otherwise exempted by Regulation 334. Therefore, if the Ontario government maintains that section 15 of Regulation 334 effectively exempts new or expanded nuclear facilities, then it may be advisable for NGOs to commence a political and media campaign to persuade the Cabinet to pass a subsequent regulation designating such facilities under the EA Act.

In addition, consideration could be given to filing an EBR Application for Review to formally request the passage of a new designating regulation and/or amendments to Regulation 334 to ensure EA coverage or new or expanded nuclear facilities. While there is no guarantee that such an Application would be granted, it would certainly heighten the public and media profile of this dispute, and would likely generate a paper trail that more fully fleshes out the constitutional or statutory basis for Ontario's refusal to apply the EA Act to its own nuclear facilities.

Alternatively, it is always open to OPG to voluntarily commit to doing an EA (see section 3(c) of the EA Act), and once the EA is submitted, then section 10 of Regulation provides that the EA Act applies with full force to the undertaking:

> Despite any provisions of this Regulation exempting any undertaking from the provisions of the Act, where an environmental assessment is submitted, all provisions of the Act apply in respect of that undertaking.

As an aside, it should be pointed out that if the Ontario government relies upon section 15 of Regulation 334 as a regulatory exemption for nuclear facilities, then this position would be inconsistent with the proposition that Ontario's EA jurisdiction over nuclear facilities is precluded by the constitutional considerations discussed above. Put another way, if the Ontario government is correct in arguing that it has no constitutional authority to apply the EA Act to nuclear facilities, then it would also lack constitutional authority (or even a reason) to exempt such facilities via section 15 of Regulation 334.

We would also observe that the wording of section 15 of Regulations appears to be aimed the site-specific planning, construction and operation of individual facilities. Therefore, it can be argued that this regulatory exemption does not extend to a province-wide "proposal, plan or program" (i.e. the IPSP) that will systematically identify and evaluate the environmental advantages and disadvantages of generic power supply options, with a view towards selecting a preferred alternative (i.e. optimum supply mix).

It is possible FLM incl. non-binding commitments

We are aware that in recent media articles, representatives of the Ministry of Energy have vaguely hinted that EAs will be performed for any new or expanded nuclear facilities that may be recommended by the IPSP. ~~We suspect~~, however, that what is actually being referred to is a federal EA (i.e. screening) under CEAA, rather than an individual EA under the EA Act.

cf. Mclr. quote again

Nevertheless, if OPG volunteers (or is obligated) to do a provincial EA, then it should be noted that this EA exercise can be dovetailed or "harmonized" with applicable federal EA requirements under CEAA. Indeed, both the EA Act and CEAA contain provisions that authorize joint provincial-federal EA exercises, and the Ontario government and the federal government have recently signed an administrative agreement intended to facilitate harmonized EA reviews. As discussed above, a joint provincial-federal EA exercise was recently carried out in relation to certain modifications at the Point Lepreau nuclear generating station in New Brunswick.

In our opinion, there is no serious legal impediment to embarking upon a similar harmonized EA review in Ontario for new or expanded nuclear facilities, provided that OPG is convinced (or is required) to comply with the provisions of the EA Act. Indeed, a joint review would appear to be an ideal and highly efficient way to proceed since provincial and federal EA requirements can be addressed within a single process.

(iv) Legal Options for Ensuring Compliance with the EA Act

In the instant case, it is our opinion that there are four different legal options that warrant further consideration. These legal options are as follows:

- private prosecution;
- civil action;
- judicial review application;
- Rule 14.05 application.

Each of these legal options is summarized below, and we have attempted to briefly analyze the pros and cons associated with each option.

Private Prosecution

If a proponent commences an undertaking that is subject to the EA Act but approval to proceed has not been obtained, then the proponent may be prosecuted for contravening section 5(3) of the EA Act:

> 5.(3) No person shall proceed with an undertaking unless the Minister gives his or her approval under section 9 or the Tribunal gives its approval under section 9.1.

Similarly, if other provincial approvals are issued but no EA approval has been granted to an undertaking subject to the EA Act, then the issuance may contravene section 12.2 of the EA Act:

> 12.2(2) No person shall issue a document evidencing that an authorization required at law to proceed with an undertaking has been given until the proponent receives approval under this Act to proceed with the undertaking.

Upon conviction for offences under the EA Act, the maximum penalty that may be imposed by the court is $10,000 for a first offence, and $25,000 for a subsequent offence, for every day (or part of a day) that the offence continues: see section 38 of the EA Act. It goes without saying that media coverage, public attention and political scrutiny that would accompany a conviction under the EA Act is far more damaging to the proponent (especially if it is a Ministry or Crown agency) than the relatively small fine that may be imposed by the court.

In the instant case, even if there is evidence that proves proponent non-compliance with the EA Act, then it seems unlikely that the provincial Attorney General would commence a prosecution against fellow Cabinet colleagues. If so, then it would be possible for an individual person to commence a private prosecution against the alleged violator(s). In fact, the relatively few prosecutions that have been commenced under the EA Act tend to have been commenced by private complainants.[33]

In essence, a private prosecution is commenced by attending before a Justice of the Peace, and laying an "information" (charge) pursuant to the *Provincial Offences Act*. The information states that the informant has reasonable and probable grounds to believe that the alleged offence has occurred. Upon receipt of the information, the Justice of the Peace has discretion to hear evidence from the informant or witnesses in order determine whether a summons should be issued against the defendant. If the summons is issued and served upon the defendant(s), then the trial proceeds in the normal course.

The main advantage of the private prosecution option is that it may allow a relatively quick adjudication of the legal issues in dispute in this case. In addition, the private prosecution is less procedurally complex (and potentially less costly) that the civil litigation options described below.

The main disadvantage of private prosecution is that that it is reactive rather preemptive in nature. In other words, the private prosecution may have to wait until the alleged offence actually occurred, as opposed to stopping the impugned activities in advance. Other disadvantages include: higher standard of proof (i.e. beyond a reasonable doubt); possibility of only a small fine upon conviction; and the very real possibility of Crown intervention to stay or withdraw the charges.

On this latter point, it should be noted that the Attorney General for Ontario intervened to withdraw EPA charges brought by an environmentalist against a soft drink manufacturer for clear non-compliance with refillable quotas prescribed by regulation.[34] More recently, the Crown intervened to withdraw water-related charges brought by an environmentalist in relation to the proposed extension of Highway 407. In the instant case, given the politically charged nature of the current debate over nuclear expansion, it would not be surprising if the Crown considered intervening to withdraw any EA Act charges laid by a private informant against OPG, OPA or another entity, so that the debate would be confined to the political realm rather than the courts. Of course, any Crown intervention would itself attract considerable public, media and political reaction.

It should be further noted that if there is a contravention of the EA Act, it would also be open to two Ontario residents to file an Application for Investigation under Part V of the *Environmental Bill of Rights*. The benefit in filing such an Application is that it is the condition precedent for bringing a civil action under section 84 of the EBR to protect public resources (see below). However, in our experience, the downside to filing such an Application is that it may result in a self-serving report by MOE denying that an offence

[33] See, for example, *R. v. Snow* (1981), 11 CELR 13 (Ont. Prov. Ct.), where Ontario's Minister of Transportation (and Deputy Minister) were convicted under the EA Act for commencing the construction of a 400 series highway without the requisite EA approval.

[34] *Perks v. R.* (1998), 26 CELR (NS) 251 (Ont. Ct. G.D.).

occurred and/or exonerating the alleged defendant(s) of any wrongdoing. If such a report is produced, one can reasonably anticipate that OPA, OPG or the Energy Ministry may try to use or rely upon the report if other forms of litigation are commenced (i.e. judicial review).

Civil Action

There are various common law "causes of action" (rights to sue) -- such as nuisance, trespass, negligence, strict liability, and riparian rights – that may be available to aggrieved persons where environmental harm occurs. Certain statutory causes of action (e.g. Part X of the EPA) may also be available if environmental harm results from a "spill" as defined by the EPA. In a civil action, the plaintiff may claim monetary relief as well as other remedies (e.g. declaration, mandatory or prohibitory injunction, etc.).

Generally speaking, the plaintiff bringing a civil action on the basis of the above-noted causes of action must be able to demonstrate that he/she has suffered damages (e.g. harm to property, health, business, etc.). Thus, an environmental group would likely lack the requisite legal interest in order to bring a civil action (except under section 84 of the EBR, as discussed below). Moreover, given that the proposed nuclear expansion has not yet occurred, it would be premature to launch a civil action because no demonstrable damages attributable to the impugned expansion have yet been incurred.

However, section 84 of the EBR permits Ontarians to commence an action in the civil courts to protect public resources (i.e. public land, wildlife, air, surface water, or groundwater). If the action is successful, then the court may order an injunction to enjoin the impugned activity or conduct. It must be noted, however, that in order to utilize the statutory cause of action in section 84, it is necessary for the plaintiffs to prove (on a balance of probabilities) that: (a) the defendant has contravened (or will contravene) an environmental law, regulation or instrument; and (b) the actual or imminent contravention will cause "significant harm" to public resources.

Given the general lack of litigation activity under section 84, it is difficult to determine how a court might interpret and apply these concepts in the instant case. For example, even if it is demonstrated that an offence under the EA Act has been committed (i.e. if the province proceeds with the IPSP without subjecting it to EA), it may be difficult to point to how this "paper" offence might cause "significant harm" (especially when there is a comprehensive federal regime in place to deal with the nuclear facilities that might be necessary to implement certain aspects of the IPSP).

The main advantage of a civil action is that there are special rules that facilitate early determinations of questions of fact or law (e.g. motion for summary judgment under Rule 20, motion for determining an issue before trial under Rule 21, etc). In addition, in a civil action, certain disclosure mechanisms (e.g. production of documents, examination for discovery, etc.) are available to the plaintiff to test the strengths/weaknesses in the defendant's case. It should be noted that the standard of proof is lower in a civil action (e.g. balance of probabilities) than a private prosecution (e.g. beyond a reasonable doubt).

The main disadvantage of a civil action is that it generally tends to be reactive rather than preemptive in nature. In other words, environmental harm is generally not actionable until it after it actually occurs. In some instances, it is possible to seek a *quia timit* injunction before the anticipated harm materializes, but such orders are rare and difficult to obtain. Other disadvantages of the civil action option include: possibility of significant adverse cost award against the plaintiff; time-consuming nature of civil litigation; and complexity of the civil rules of procedure. In relation to costs, it should be noted that the Court ordered a sizeable cost award against the unsuccessful plaintiffs in the *Energy Probe* case discussed above.

Judicial Review

Exercises (or non-exercises) of statutory powers may be challenged by aggrieved persons under Ontario's *Judicial Review Procedure Act*. A judicial review application is typically argued on the basis of written evidence (e.g. decision record, affidavits, etc.). The application is normally heard by a three judge panel of the Ontario Divisional Court, but in cases of urgency, it is possible for a single judge to hear the application (see section 6).

Generally, the applicant in a judicial review application must be able to demonstrate private or public interest standing to challenge the impugned statutory decision. This means that the applicant must be able to demonstrate either personal interest in the matter, or history of involvement in (and knowledge of) the matter. Otherwise, the application may be dismissed due to the lack of standing, rather than on the merits. Given the lengthy involvement that your respective organizations have had in Ontario's energy debate, we are confident that the court would likely find that your organizations have sufficient public interest standing to seek judicial review. It is also reasonable to anticipate that this kind of judicial review application might attract interventions by other groups, corporations or entities with an interest in the matters at stake).

Section 2(1) of the *Judicial Review Procedure Act* sets out the various orders that may be granted by the Court, including: *mandamus* (compelling an act or duty); prohibition; *certiorari* (quashing or setting aside); declaration; or injunction. Interim orders are also available in appropriate cases (section 4).

The grounds for judicial review typically include: breach of the duty of fairness; error of law on the face of the record; excess or want of jurisdiction; complete absence of evidence; and other administrative law grounds.

Unlike judicial review applications filed in the Federal Court, there is no specific deadline or limitation period specified under Ontario's *Judicial Review Procedure Act* for bringing a judicial review application. However, under the doctrine of *laches*, the courts have discretion to dismiss the application if there has been unreasonable delay by the applicant. In short, the judicial review applicant must act in a timely manner when challenging an impugned statutory decision. On the facts of this case, we believe that *laches* is a non-issue at this point in time, particularly since the IPSP has not even been drafted or adopted, and the Premier and Cabinet claim that no firm decisions have been made regarding nuclear expansion in the future.

The main advantage of the judicial review application is that it entails a relatively straightforward way to adjudicate the issues in dispute. Cross-examination is also possible to explore the affidavit evidence (if any) filed by the responding parties. If it appears that there are material facts in dispute, then the proceeding might be better framed as an action (see above) rather than an application.

The main disadvantage of judicial review (aside from the prospect of establishing a troublesome legal precedent) is that an unsuccessful applicant could be faced with a sizeable adverse cost award. In our review of recent judicial review cost awards, it appears that the mid-range is approximately $15,000 per court hearing day (although the actual amount may be higher or lower, depending the court's discretion and its view of the merits of the case). At this point, our best estimate is that it would take at least 2 to 3 days in court to fully argue a case of this complexity and magnitude, which means an adverse cost award could be in the $30,000 to $45,000 range (or higher or lower). Of course, the courts have discretion to <u>not</u> order costs against unsuccessful parties if "special circumstances" exist (i.e. novel point of law, public interest in having the jurisdictional issues clarified, etc.). However, one cannot count on having the court exercising its cost discretion in favour of unsuccessful public interest groups, and any decision to seek judicial review in this case must take into account the serious adverse cost consequences if the application is dismissed.

It should also be noted that under the doctrine of "curial deference", the Divisional Court may be reluctant to overturn or second-guess the position of a specialized decision-maker (such as the MOE Director or Minister), unless there is a clear jurisdictional error or blatant error of law.

Rule 14.05 Application

Rule 14.05 of the *Rules of Civil Procedure* provide an expedited means of having questions of statutory interpretation brought to the Court in a relatively simplified manner.

In particular, Rule 14.05(3) permits such applications "where the relief claimed is... (d) the determination of rights that depend on... the interpretation of a statute, order in council, regulation, or municipal by-law or resolution" or "(h) in respect of any matter where it is unlikely that there will be any material facts in dispute".

The main advantage to a Rule 14.05 application is that it could facilitate a speedy determination of the legal issues in dispute. Cross-examination is also available to explore the affidavit evidence (if any) filed by the responding parties.

The main disadvantage is that some caselaw suggests that declaratory relief may not be appropriate orders in a Rule 14.05 application. In addition, the court may be reluctant to entertain a Rule 14.05 application in the instant case if the respondents make it appear that there are serious factual disputes among the parties. Finally, a 14.05 application carries the risk of an adverse cost award if the application is dismissed.

In summary, having regard for the pros and cons of the four legal options outlined above, it is our recommendation that you consider bringing a judicial review application for declaratory and injunctive relief. Of the various procedural options, judicial review has the potential to have the legal issues adjudicated in a relatively straightforward manner, and it would be possible to seek interlocutory relief to enjoin further planning, design or construction activities pending the outcome of the judicial review application.

PART 3 – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, it is our opinion that:

1. Given the constitutional division of powers, the federal government has exclusive jurisdiction over some – but not all – aspects of nuclear energy in Ontario. The provincial government has considerable legislative authority over its own institutions (i.e. Ontario Power Authority, Ontario Power Generation, etc.), and over the effects of these institutions' activities or projects on matters of provincial jurisdiction (i.e. environment, natural resources, development and management of electrical generation, etc.).

2. Despite the existence of the federal *Nuclear Safety and Control Act*, nuclear facilities in the province are subject to Ontario's environmental laws of general application, including the *Environmental Protection Act* and the *Ontario Water Resources Act*. Ontario's EA Act can also be characterized as a law of general application that is primarily aimed at broad environmental planning considerations, and that does not purport to specifically regulate the nuclear industry in the province.

3. There is a strong legal argument that Ontario's Integrated Power Supply Plan is subject to the EA Act, just as the 1989 provincial Demand-Supply Plan was subject to the EA Act. The application of the EA Act to individual nuclear generating stations is less clear due to the existence of various exemptions made by order and/or regulation. However, if Ontario Power Generation volunteers (or is ordered) to undertake a provincial EA for new or expanded facilities, then it is possible to "harmonize" the process with applicable federal EA requirements. Electricity infrastructure expansion or upgrades (i.e. transmission lines) that are needed to accommodate nuclear expansion will likely trigger the application of the environmental planning procedures under Ontario Regulation 116/01 under the EA Act.

4. If you wish to pursue this matter in the courts, then the preferable option is to commence a judicial review application for declaratory and injunctive relief under the

Judicial Review Procedure Act. Alternatively, it may be possible to bring this matter to court framed as an application under Rule 14.05(3)(d) of the Rules of Civil Procedure (e.g. determination of rights that depend upon the interpretation of a statute). As described below, however, there are several procedural considerations – and adverse cost implications – which must be seriously considered before either type of application is commenced.

The above-noted recommendation is made on the assumption that there will be an applicant with private and/or public interest standing to bring the application for judicial review. We further assume that such an applicant would be willing to run the risk of an adverse cost award (or is judgment-proof) in the event that the application is unsuccessful.

It should be noted that it is impossible to guarantee success in any legal proceeding. This is particularly true in the context of judicial review, where the court, in effect, is being asked to "second-guess" specialized statutory decision-makers, such as Ministers of the Crown. Nevertheless, given the mandatory language of the EA Act, it is our opinion that a judicial review application in this case is more than merely arguable. Indeed, we conclude that a judicial review application has a reasonable prospect of success in this case, provided that the application focuses on the strongest argument (i.e. that the IPSP is subject to the EA Act).

One potential difficulty is that the caselaw is mixed as to whether the Court can judicially review a statutory decision-maker that has not exercised or purported to exercise a "statutory power" (or "statutory power of decision") within the meaning of the *Judicial Review Procedure Act*. In our opinion, this threshold issue requires further legal research before a decision is made to have a notice of judicial review issued and served in this case. We raise this issue because although certain steps leading up to the IPSP are underway, the IPSP itself has not been drafted or adopted. On the other hand, in light of the *laches* doctrine, judicial review applicants cannot lie in the weeds too long and wait until the last minute to commence the application.

As an alternative to judicial review, it may be possible to frame the matter as an application under Rule 14.05(3), subject to the caveats noted above regarding the inherent limitations of such applications.

Finally, we must also point out that even if the judicial review application (or Rule 14.05 application) is granted, success may only be short-lived and the proposed nuclear expansion may still ultimately be carried out by the proponents. If, for example, the Court rules that the EA Act is applicable, then the proponent(s) might quickly cobble together an "scoped" EA application upon which the MOE may simply "rubberstamp" its approval with a hearing by the ERT. The limited EA caselaw is clear that the courts are reluctant to overturn or second-guess the Minister's approval of scoped "Terms of Reference", the Minister's refusal to refer matters to the ERT for a public hearing, or the Minister's decision to grant approval to proceed under the EA Act. Indeed, even if a proposed nuclear undertaking was referred to the ERT, and if the ERT rejected the proposal, it would still be open to the Minister and Cabinet to review and vary the ERT decision within 28 days of its release: see 11.2 of the EA Act.

Accordingly, a successful judicial review application should not be perceived as a complete or permanent bar to the expansion of nuclear capacity in Ontario in perpetuity. In this sense, the primary benefit of commencing a judicial review application is that it may "buy" time and delay matters until the next provincial election.

In closing, we trust that this opinion letter sheds some light on this highly complex area of environmental, administrative and constitutional law. If you have any questions or comments about this opinion letter, please contact us at your earliest convenience. If requested, we would be please to meet with you to further discuss the findings and recommendations contained within this opinion letter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Paul Muldoon
Executive Director

Richard D. Lindgren
Counsel

Theresa A. McClenaghan
Counsel