

Court File No. T-634-13

FEDERAL COURT

BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF FISHERIES AND OCEANS
and ONTARIO POWER GENERATION INC.

Respondents

APPLICATION UNDER sections 18, 18.1 and 18.2 of the *Federal Courts Act*,
R.S.C. 1985, c.F-7 as amended

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 12, 2013

Issued by: MAGGIE LAU
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office:

180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

TO:

ATTORNEY GENERAL OF CANADA
284 Wellington Street
East Memorial Building, 4th Floor
Ottawa, ON K1A 0H8
Tel: 613-992-4621

MINISTER OF FISHERIES AND OCEANS
1570 – 200 Kent Street
Ottawa, ON K1A 0H8
Tel: 613-996-3085

ONTARIO POWER GENERATION INC.
700 University Avenue
Toronto, ON M5G 1X6
Tel: 416-592-2555

APPLICATION

This is an application for judicial review of the decision dated March 13, 2013 by the Canadian Nuclear Safety Commission (“CNSC”) under section 20 of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA”) in relation to the screening-level environmental assessment (“EA”) conducted by the CNSC of the refurbishment and continued operation of the Darlington Nuclear Generating Station (“NGS”) as proposed by Ontario Power Generation Inc. (“OPG”).

The applicants make application for:

1. An order declaring that:
 - (a) the CNSC’s decision regarding the Darlington NGS Refurbishment and Continued Operation EA is invalid and unlawful due to non-compliance with the applicable requirements of the CEAA;
 - (b) the CNSC has no jurisdiction to amend or re-issue any licences under the *Nuclear Safety and Control Act*, S.C. 1997, c.9 (“NSCA”) to permit the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEAA has been fully complied with by the CNSC;
 - (c) in the alternative, the decision of the CNSC in relation to the Refurbishment and Continued Operation EA was unreasonable.
2. An order quashing or setting aside the CNSC’s decision under the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
3. An order remitting the Darlington NGS Refurbishment and Continued Operation EA back to the CNSC for further consideration and determination in accordance with the CEAA and any directions as this Honourable Court considers appropriate.

4. An interlocutory and permanent order prohibiting the CNSC and the Minister of Fisheries and Oceans, or any of their agents, servants or designates, from licensing, permitting or otherwise authorizing any activities related to the proposed refurbishment and continued operation of the Darlington NGS until such time as the CEEA has been fully complied with by these Responsible Authorities.
5. An order requiring the respondents to pay the applicants their costs of this application if requested, or, in the alternative, an order that all parties shall bear their own costs.
6. Such further or other relief, including interim relief, as this Honourable Court may deem just.

The grounds for the application are:

1. OPG proposes to undertake activities to refurbish four nuclear reactors, and activities related to the continued operation of the refurbished reactors, at the Darlington NGS, which is located on the Lake Ontario shoreline in the Municipality of Clarington, Ontario.
2. The intended purpose of OPG's refurbishment and continued operation project is to allow the Darlington NGS reactors to continue to generate electricity until approximately 2055. OPG proposes that the reactors will then be shut down and decommissioned in 2085; however, the radioactive wastes resulting from the overall project will continue to exist, and have to be safely managed, for thousands of years.
3. OPG's proposed refurbishment and continued operation activities at the Darlington NGS have the potential to cause environmental effects. In particular, OPG's project includes the following physical works, undertakings and facilities:

- (a) site preparation and construction of various buildings and structures;
 - (b) shutting down, defueling and dewatering the four CANDU nuclear reactors;
 - (c) inspection, servicing and replacement of the major reactor components, including nuclear fuel channel assemblies and feeder pipes;
 - (d) interim on-site storage of low- and intermediate-level radioactive refurbishment waste, or off-site transportation of such waste to a licensed facility;
 - (e) refilling each reactor system with heavy water;
 - (f) refueling and restarting the refurbished reactors;
 - (g) continued operation of the refurbished reactors and ancillary support systems;
 - (h) management of ongoing operational waste and low- and intermediate-level radioactive waste;
 - (i) construction of additional on-site storage capacity for high-level radioactive waste (i.e. used nuclear fuel);
 - (j) ongoing repair and maintenance, including possible replacement of steam generators; and
 - (k) operational activities required to achieve a safe state of closure prior to decommissioning.
4. In order to proceed with the proposed refurbishment and continued operation of the Darlington NGS, OPG requires various statutory approvals under federal law, including an amendment to OPG's current Power Reactor Operating Licence ("operating licence") issued by the CNSC under subsection 24(2) of the NSCA. OPG's proposal also requires an authorization under section 32 of the *Fisheries Act*, R.S.C. 1985, c.F-14 from the Minister of Fisheries and Oceans for the destruction of fish by means other than fishing. Accordingly, both the CNSC and the

Minister of Fisheries and Oceans are “Responsible Authorities” as defined by the CEAA, and both are legally required to ensure that an EA of the OPG proposal is conducted in compliance with the CEAA.

5. Operating licences under subsection 24(2) of the NSCA and authorizations under section 32 of the *Fisheries Act* are prescribed by the *Law List Regulations* (SOR/94-636) under the CEAA. Thus, the CNSC and the Minister of Fisheries and Oceans are prohibited by subsection 5(1)(d) of the CEAA from permitting the proposed refurbishment and continued operation of the Darlington NGS until an EA has been completed in accordance with the CEAA and unless a “course of action” decision is lawfully taken by the Responsible Authorities under section 20 of the CEAA.
6. For CEAA purposes, the CNSC served as the Federal EA Coordinator and took the lead role in conducting the Darlington NGS Refurbishment and Continued Operation EA.
7. Because no provincial EA has been (or will be) conducted in relation to OPG’s proposal, the federal EA at issue in this application is the only EA that will be required for the multi-billion dollar refurbishment and continued operation project over the next 70 years (i.e. to 2085).
8. After OPG filed its project description in April 2011, the CNSC commenced a screening-level EA of OPG’s proposal in June 2011, pursuant to section 18 of the CEAA.
9. In July 2011, the CNSC issued a public notice inviting comments on the draft EA Scoping Information Document for the Darlington NGS Refurbishment and Continued Operation EA. The applicants submitted detailed written comments that raised various legal, technical, and EA

planning concerns about the conduct and content of the proposed screening process for OPG's project.

10. In October 2011, a panel of the CNSC was established to review and issue an EA Scoping Information Document regarding the scope of the project and the scope of the factors to be assessed in the Darlington NGS Refurbishment and Continued Operation EA. During these non-public proceedings, the CNSC panel received written submissions from OPG and CNSC staff, but no transcript was prepared and no members of the public (including the applicants) were permitted to make submissions directly to this CNSC panel.
11. In issuing the EA scoping documentation, the CNSC panel declined to refer the matter to a review panel or mediator under the CEEA, and the CNSC panel delegated the preparation of technical support studies to the proponent, OPG, pursuant to section 17 of the CEEA. In addition, the CNSC panel determined that the scope of the project to be assessed in the EA would include all components of the project as proposed by OPG, including waste management activities related to the project.
12. The CNSC panel further affirmed that the scope of the EA would include not only the considerations in subsections 16(1)(a) to (d) of the CEEA, but would also address the project's purpose and preliminary design and implementation plan for a follow-up program for the project. However, the CNSC panel declined to exercise its discretion to assess the "need" for the project, or the "alternatives to" the project pursuant to subsection 16(1)(e) of the CEEA.
13. In December 2011, OPG submitted an Environmental Impact Study ("EIS") and technical supporting documents, which the CNSC made available for public review and comment. The applicants filed detailed

written comments that reiterated their earlier concerns about the OPG proposal, its adverse environmental effects, the inadequacy of the EIS, and the unsatisfactory nature of the screening process to date.

14. While the various stages of the screening process were underway, the Parliament of Canada repealed CEAA and replaced it with new federal EA legislation (S.C. 2012, c.19) that came into force in July 2012. However, the federal Minister of the Environment issued a statutory order under the new legislation that the Darlington NGS Refurbishment and Continued Operation EA would continue as a screening-level EA under the applicable provisions of the former CEAA.
15. In July 2012, the CNSC invited public comments on the draft EA Screening Report that had been prepared by CNSC staff on the basis of OPG's EIS and technical supporting documents. The applicants submitted detailed written submissions on this draft EA Screening Report and raised various procedural and substantive concerns, particularly in relation to data, information, and details that were missing, in whole or in part, from the draft report.
16. Subsequent to the public comment period, CNSC staff finalized the EA Screening Report, which was submitted to the CNSC for consideration under the CEAA.
17. In December 2012, the CNSC concurrently held public hearings on the Darlington NGS Refurbishment and Continued Operation EA and on two related OPG applications (i.e. licence renewals for the Darlington NGS and on-site waste management facilities). At the four-day public hearing, the CNSC received written and oral submissions from OPG, CNSC staff, and approximately 690 individuals, residents' groups, non-governmental organizations, industry associations, municipalities, First Nations

representatives, and governmental departments and ministries at the federal and provincial level.

19. At the CNCS public hearings, testimony was not presented under oath and cross-examination on oral or written evidence (including opinion evidence and expert qualifications) was not permitted.
20. The applicants participated as interveners during the CNCS's public hearings. Like other interveners, the applicants' presentations were restricted by the CNCS to 10 minutes in total on all three matters being considered at the public hearings (i.e. the Darlington NGS Refurbishment and Continued Operation EA and the two related OPG licensing applications).
21. On March 13, 2013, the CNCS made its decision under section 20 of the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA. Among other things, the CNCS's decision concluded that:
 - (a) the screening-level EA is "complete" and meets "all of the applicable requirements" under the CEAA;
 - (b) after taking into account the appropriate mitigation measures identified in the EA, OPG's proposed refurbishment and continued operation of the Darlington NGS "is not likely to cause significant adverse environmental effects";
 - (c) the CNCS would not request the federal Environment Minister to refer OPG's project to a review panel or mediator under the CEAA; and
 - (d) pursuant to subsection 20(1)(a) of the CEAA, the CNCS will consider an amendment of OPG's operating licence under the NSCA which, if approved, would allow OPG's project to proceed. The CNCS anticipates that such amendments will be considered in 2014.

22. As a matter of statutory interpretation, the CNSC's decision incorrectly or unreasonably construed the legal requirements imposed by the CEAA in relation to the Darlington NGS Refurbishment and Continued Operation EA.
23. The statutory condition precedent for the issuance of an amendment to OPG's operating licence, and for the issuance of a section 32 authorization under the *Fisheries Act*, is the completion of an EA in full compliance with all applicable requirements of the CEAA. This condition precedent has not been satisfied to date because contrary to the CEAA, the Darlington NGS Refurbishment and Continued Operation EA:
- (a) failed to assess, or incorrectly or unreasonably assessed, the mandatory considerations listed in subsections 16(1)(a) to (d) of the CEAA, particularly in relation to the direct and cumulative environmental effects of OPG's project;
 - (b) failed to conduct, or incorrectly or unreasonably conducted, an EA in respect of every construction, operation, modification, decommissioning, abandonment or other undertakings in relation to OPG's project, contrary to subsection 15(3) of the CEAA;
 - (c) failed to assess, or incorrectly or unreasonably assessed, the "environmental effects of accidents or malfunctions that may occur in connection with the project", contrary to subsection 16(1)(a) of the CEAA, even though CNSC staff confirmed at the public hearings that such an analysis was feasible;
 - (d) incorrectly or unreasonably constrained its assessment of the foregoing factors by unlawfully adopting the so-called "bounding approach" (i.e. excluding low-probability, high-consequence nuclear accidents or malfunctions) when reviewing OPG's proposal, its environmental effects, and the efficacy of proposed mitigation measures, such as emergency planning and public evacuation;

- (e) failed to assess, or incorrectly or unreasonably assessed, the project's effects upon Lake Ontario fish species, or the significance of such effects, by, *inter alia*, purporting to consider potential impacts on the basis of lake-wide populations and excluding consideration of technically and economically feasible mitigation measures (i.e. closed-cycle cooling) to prevent, reduce or control such effects, contrary to subsections 16(1)(a), (b) and (d) of the CEAA; and
 - (f) failed to meet the purposes and duties imposed by subsections 4(1) and 4(2) of the CEAA to protect the environment and human health, to apply the precautionary principle, and to take actions to promote sustainable development.
- 24. In failing to rectify these fundamental deficiencies in the Darlington NGS Refurbishment and Continued Operation EA, the CNSC's interpretation of the screening provisions in the CEAA is neither reasonable nor correct, and its reasons for decision are not justified, transparent or intelligible in law or on the facts.
- 25. The above-noted EA deficiencies (particularly the missing information about the human health and environmental effects of a severe accident or malfunction) deprived the CNSC of any statutory ability under the CEAA to make credible, rational, and evidence-based determinations on: whether the OPG proposal is likely to cause significant adverse environmental effects; whether the OPG proposal should be referred to a review panel or mediator under CEAA; or whether to CNSC should proceed to consider amending OPG's operating licence to allow the refurbishment and continued operation of the Darlington NGS.
- 26. The CNSC decision purports to address the significant evidentiary gaps in the EA (and the applicants' concerns about such omissions) by noting that

some of the missing information (i.e. thermal effects on aquatic biota, public health effects of a severe reactor accident, etc.) will be subsequently gathered and considered by OPG and CNSC staff in future regulatory proceedings.

27. As a matter of law, the above-noted matters are important considerations that were required under subsection 16(1) of the CEEA, and should have been fully set out, at an appropriate level of detail for public and agency review, within the record for the Darlington NGS Refurbishment and Continued Operation EA. In the absence of such critical information, the screening EA cannot be considered “complete” or “compliant” with CEEA requirements, as erroneously claimed in the CNSC decision.
28. The applicants are non-profit public interest organizations with a lengthy history of involvement and demonstrated interest in nuclear issues and environmental protection.
29. The applicants have public interest standing to bring this application because: it raises serious issues; the applicants have a genuine interest in this matter; and this is a reasonable manner in which the issues may be brought to this Honourable Court.
30. Sections 18, 18.1 and 18.2 of the *Federal Courts Act*; the *Federal Court Rules*; the NSCA; the *General Nuclear Safety and Control Regulations*, SOR/2000-202; the *Class I Nuclear Facilities Regulations*, SOR/2000-204; the CNSC Regulatory Document RD-346; the CEEA; the *Law List Regulations*, SOR/94-636; and section 32 of the *Fisheries Act*.
31. Such further or other grounds as counsel may advise and this Honourable Court may consider appropriate.

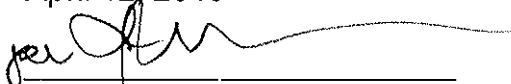
This application will be supported by the following material:

1. The affidavit of Shawn-Patrick Stensil on behalf of Greenpeace Canada, to be served.
2. The affidavit of Kathleen Cooper on behalf of Canadian Environmental Law Association, to be served.
3. The affidavit of Mark Mattson on behalf of Lake Ontario Waterkeeper, to be served.
4. The affidavit of Brennain Lloyd on behalf of Northwatch, to be served.
5. The decision records before the CNSC and the Minister of Oceans and Fisheries.
6. Such further or other materials as counsel may advise.

Rule 317 Request: The applicants request the CNSC and the Minister of Fisheries and Oceans to send certified copies of the following materials that are not in the possession of the applicants, but are in the possession of the CNSC and the Minister of Fisheries and Oceans, to the applicants and to the Registry:

1. The record of materials before the CNSC in respect of the Darlington NGS Refurbishment and Continued Operation EA.
2. The record of materials before the Minister of Fisheries and Oceans in respect of the Darlington NGS Refurbishment and Continued Operation EA.

April 12, 2013



Theresa A. McClenaghan &
Richard D. Lindgren
130 Spadina Avenue, Suite 301
Toronto, ON M5V 2L4
Tel: 416-960-2284
Fax: 416-960-9392
Solicitors for the Applicants



Justin Duncan
550 Bayview Avenue, Suite 401
Toronto, ON M4W 3X8
Tel: 416-368-7533
Fax: 416-363-2746
Solicitor for the Applicants