

Court File No. T-361-11

**FEDERAL COURT OF CANADA**

BETWEEN:

CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
and SIERRA CLUB OF CANADA

Applicants

and

ATTORNEY GENERAL OF CANADA  
MINISTER OF TRANSPORT  
and BRUCE POWER 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 Ottawa, 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.

March 4, 2011

Issued by:



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## APPLICATION

This is an application for judicial review of a decision by the Canadian Nuclear Safety Commission (“CNSC”) dated February 4, 2011 to issue Bruce Power Inc. (“BP”) a Transport Licence (TL-SX-40039.01.00/2011) and Certificate of Transport (CDN/5255/X-96 (Rev.0)) under the *Nuclear Safety Control Act* (“NSCA”) and *Packaging and Transport of Nuclear Substances Regulations* to permit BP to undertake road and marine transport of “prescribed equipment” (16 steam generators) and “nuclear substances” (radioactive surface contamination in the steam generators), hereinafter collectively referred to as the “transport licence.”

The applicants make application for:

1. An order in the form of a declaration that:
  - (a) road and marine transport of the radioactive steam generators to Sweden, as well as other functionally related activities proposed by BP with respect to this nuclear equipment, constitute an operation, modification, decommissioning or other undertaking in relation to a “project” within the meaning of the *Canadian Environmental Assessment Act* (“CEAA”); and
  - (b) as a Responsible Authority (“RA”) under the CEAA, the CNSC erred in law and/or acted beyond or without jurisdiction by issuing the transport licence without first conducting an environmental assessment (“EA”) under the CEAA.

2. An order in the nature of *certiorari* quashing or setting aside the CNSC's decision to issue the transport licence to BP.
3. An order prohibiting the CNSC from issuing any other licences, permits, certificates or statutory authorizations which would permit this project to be carried out, in whole or in part, until the CNSC complies with its statutory duties under the CEAA.
4. An interlocutory order in the form of an injunction enjoining the Minister of Transport, and the Minister's agents, servants or delegates, from issuing any statutory authorizations or undertaking any other action which would permit this project to be carried out, in whole or in part, until the issues raised in this application have been finally determined by this Honourable Court.
5. An order requiring the respondents to pay the applicants their costs of this application.
6. Such further or other relief as to this Honourable Court may seem just.

The grounds for the application are:

1. BP is a private corporation which currently operates the Bruce A Nuclear Generating Station ("NGS") located in Kincardine, Ontario. The Bruce A NGS is owned by Ontario Power Generation ("OPG"), which is a provincial Crown corporation.
2. After 20 years of use at the Bruce A NGS, 16 steam generators were

decommissioned by OPG in the mid-1990s. Each steam generator weighs 100 metric tonnes, and is approximately 11.7 metres in length and 2.5 metres in diameter.

3. Over the operating life of this nuclear equipment, various radioactive nuclides (including various isotopes of plutonium) were deposited in and around the numerous metal tubes contained within each steam generator.

4. Most of these nuclear substances in the steam generators became affixed to the tube surfaces as metal oxides, but some substances remain non-fixed, or loose, within the tubes.

5. In 2001, BP took over operation of the Bruce A NGS from OPG under a long-term lease. In 2004, BP proposed to return Bruce A Units 1 & 2 back to service through a series of refurbishments, upgrades and enhancements, including steam generator replacement.

6. For EA purposes under the CEAA, BP described this proposal as the "Bruce A Refurbishment for Life Extension and Continued Operations Project." In every EA document under the CEAA prepared by BP or the CNSC, the project description:

- (a) stated that it included "steam generator replacement;"
- (b) specified that the steam generators, "which penetrate the reactor vault, will be removed intact", and that they "will be processed and prepared to meet OPG's requirements for acceptance at the WWMF [Western Waste Management

Facility]” at the Bruce site; and

(c) made no reference whatsoever to the possibility of transporting the steam generators to Sweden for “recycling”.

7. While the Bruce A refurbishment project EA was underway, BP stated that low- and intermediate-level radioactive wastes “cannot be recycled for safety and environmental reasons,” and that such wastes would be transferred to and stored at the WWMF.

8. In 2006, the CNSC, as the RA under the CEAA, relied upon an EA Screening Report prepared by CNSC staff to conclude, pursuant to section 20(1)(a) of the CEAA, that the Bruce A refurbishment project would not cause any significant adverse environmental effects.

9. In this “course of action” decision, the CNSC received and relied upon assurances from CNSC staff that “the scope of the EA included all activities associated with the management of the waste generated by the proposed project and the transportation of waste to the Western Waste Management Facility.” This “course of action” decision made no reference whatsoever to the possibility of transporting the steam generators to Sweden for “recycling.”

10. On the basis of this CEAA decision, the CNSC conditionally authorized the staged restart of Bruce A Units 1 & 2 under the NSCA, and amended the Bruce A NGS operating licence accordingly.

11. In 2007, the 16 steam generators were removed by BP from the Bruce A NGS and transferred to the WWMF, where this nuclear equipment is still being managed and stored at the present time.

12. OPG's operating licence for the WWMF does not permit OPG to export or import the steam generators, and OPG is currently considering a deep geologic repository for the long-term disposal of low- and intermediate-level radioactive waste, such as steam generators.

13. In 2009, BP began to consider shipping the 16 steam generators to a Swedish facility for "recycling" purposes, instead of storing them intact at the WWMF in accordance with the EA commitments made by BP and accepted by the CNSC. In general terms, the new BP proposal includes the following interrelated activities and undertakings with respect to the nuclear equipment and nuclear substances:

- (a) removal of the steam generators from their secure location at the WWMF;
- (b) preparing the steam generators for road and marine transport;
- (c) transporting each steam generator by truck on public roads from the WWMF to the port of Owen Sound, Ontario;
- (d) loading each steam generator into the cargo hold of an ocean-going vessel;
- (e) shipping all 16 of the steam generators at the same time on the same vessel from Owen Sound through Georgian Bay, Lake Huron, St. Clair River, Lake Erie, Welland Canal, Lake Ontario, the St. Lawrence Seaway, and the north

Atlantic Ocean to a private commercial facility located in Nykoping, Sweden;

- (f) subjecting the steam generators to a recycling process intended to: separate the contaminated metals within the nuclear equipment; melt the less contaminated steel into ingots; and send the ingots to foundries which re-melt them with other scrap in order to meet applicable clearance standards for release into the general recycled metals market;
- (g) packaging, transporting and importing approximately 400 tonnes of residual radioactive waste (contaminated metal from the steam generators) from Sweden to the port of Halifax, Nova Scotia; and
- (h) transporting the residual radioactive waste from Halifax by land back to the WMMF for management and storage.

14. In October 2009, BP and OPG executed an amending agreement which transferred title and possession of the steam generators from OPG to BP.

15. In April 2010, the CNSC received an application from BP under the NSCA for a Transport Licence and Certificate for the Transport of the 16 steam generators to Sweden.

16. Pursuant to section 22 of the NSCA, the CNSC established a five member panel to review the BP transport licence application, and to conduct a public hearing on this matter in Ottawa on September 28 and 29, 2010.

17. The applicants, which are non-profit public interest organizations with a lengthy history of involvement and demonstrated interest in nuclear issues and



environmental protection, intervened at the public hearing, and made oral and written submissions to the CNSC in relation to the BP application.

18. In total, 78 intervenors appeared at the public hearing, most of whom expressed legal, factual, technical or scientific concerns about various environmental and human health risks posed by the BP proposal. The applicants also addressed the applicability of the CEAA to this matter.

19. At the public hearing, each of the intervenors (including the applicants) were limited by the CNSC panel to making a 10 minute presentation, and were not permitted to cross-examine BP or CNSC staff on their written and oral submissions, which had been received by the panel as unsworn evidence or information.

20. On February 4, 2011, the CNSC decided to conditionally approve the issuance of the transport licence pursuant to section 24 of the NSCA. However, the CNSC failed or refused to conduct an EA under the CEAA prior to the issuance of this transport licence.

21. In its decision dated February 4, 2011, the CNSC concluded, without adequate reasons to support its decision, that it was "satisfied that the requirements of the CEAA have been met" in relation to the transport licence.

22. The CNSC's conclusion that the CEAA requirements had been met, despite having not conducted an EA under the CEAA prior to the issuance of the transport licence, constitutes a fundamental error of law on the face of the record.

23. With respect to the CEAA, the CNSC erred in law and/or acted beyond or without jurisdiction in issuing the transport licence because:

(a) section 11 of the CEAA prohibits federal authorities from exercising any powers or performing any duties or functions listed in section 5 of the CEAA unless and until an EA has been prepared in accordance with the Act and a “course of action” decision has been made under section 20(1)(a) or 37(1)(a) of the CEAA;

(b) section 5(1)(d) of the CEAA provides that an EA of a project is required before a federal authority can issue a permit, licence or other statutory approval that is prescribed by regulations made under section 59(f) of the CEAA;

(c) “project” is defined under section 2(1) of the CEAA as meaning:

- “in relation to a physical work, any proposed construction, operation, modification, decommissioning or other undertaking in relation to that physical work”; or
- “any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities prescribed pursuant to regulations” made under section 59(b) of the CEAA;

(d) the Law List Regulations made under section 59(f) of the CEAA specifically prescribe CNSC approvals under section 24 and 37 of the NSCA as “triggers” under section 5(1)(d) of CEAA;

(e) the Exclusion List Regulations made under the CEAA do not exempt any of the physical works, activities or undertakings that constitute BP’s proposal to transport the steam generators to Sweden; and

(f) section 24 of the CEAA provides, *inter alia*, that where a proponent proposes an undertaking that is different from that proposed when an EA was completed in respect of a project, or the manner in which the project is to be carried out has changed, then the RA shall use the previous EA, but with appropriate updates or other necessary modifications, in order to comply with screening requirements imposed by section 18 of the CEAA.

24. The new BP proposal to transport the steam generators to Sweden constitutes an operation, modification, decommissioning or other undertaking in relation to the physical work that was the subject-matter of the EA Screening Report under the CEAA for the “Bruce A Refurbishment for Life Extension and Continued Operations Project.”

25. In the alternative, if the management and storage of the steam generators was outside the scope of the “Bruce A Refurbishment for Life Extension and Continued Operations Project”, then the potential environmental effects of the current BP proposal to transport the steam generators to Sweden were not identified or evaluated by the CNSC in the EA Screening Report for the Bruce A refurbishment project.

26. In either case, since the current BP proposal has never been assessed in an EA under the CEAA, the CNSC lacks jurisdiction to licence any aspect of this new proposal unless and until the EA mandated under the CEAA has been undertaken and completed by the CNSC.

27. The failure or refusal by the CNSC to comply with its statutory duties as an RA under the CEEA renders the CNSC's transport licence decision *ultra vires*.

28. The CNSC's conclusion that the EA requirements under the CEEA have been "met" by the NSCA regime is not transparent, intelligible, or rationally defensible in law or on the material before the CNSC.

29. The NSCA is a licencing regime that lacks the procedural and substantive safeguards that Parliament incorporated into the CEEA in order to ensure that environmentally significant projects are rigorously reviewed in an open, accessible and accountable manner.

30. The transportation of the steam generators to Sweden has not been commenced to date. Before the steam generators can be shipped through the Great Lakes and St. Lawrence Seaway, BP must obtain licences from Transport Canada and the U.S. Department of Transportation.

31. BP must also obtain additional approvals to authorize the shipment of the steam generators through international waters near the United Kingdom, Norway, Denmark, and Sweden.

32. BP has received a licence from the CNSC to export the steam generators to Sweden. In relation to the return shipment from Sweden, BP requires an import licence from the CNSC, which has not been issued to date.

33. The applicants were participants in the CNSC's public hearing on the

transport licence, and have public interest standing to bring this application because: it raises serious issues; the applicants have a genuine interest in this matter; and there is no other reasonable or effective manner in which the issues may be brought to this Honourable Court.

34. Sections 18, 18.1 and 18.2 of the *Federal Courts Act*; the *Federal Court Rules*; the CEEA and the *Law List Regulations* (SOR/94-636), *Inclusion List Regulations* (SOR/94-637), and *Exclusion List Regulations, 2007* (SOR/2007-108); the NSCA and *Packaging and Transport of Nuclear Substance Regulations* (SOR/2000-208) and *Nuclear Non-Proliferation Import and Export Control Regulations* (SOR/2000-210); *Transportation of Dangerous Goods Regulations* (SOR/2001-286); and International Atomic Energy Agency *Regulations for the Safe Transport of Radioactive Material TS-R-1*.

35. Such further or other grounds as counsel may advise and this Honourable Court may consider.


This application will be supported by the following material:


1. The affidavit of Sarah Miller, on behalf of Canadian Environmental Law Association, to be served.
2. The affidavit of John Bennett, on behalf of Sierra Club of Canada, to be served.
3. The record before the CNSC.
4. Such further or other materials as counsel may advise.

Rule 317 Request: The applicants request the CNSC to send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the CNSC to the applicants and to the Registry:

1. The record of materials before the CNSC in respect of the transport licence.

March 4, 2011

*per:*   
\_\_\_\_\_  
Theresa A. McClenaghan  
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*per:*   
\_\_\_\_\_  
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