



Some Recent Developments in Nuclear Law

Lisa Thiele

Senior General Counsel, CNSC

Canadian Nuclear Law Organization

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Canadian Nuclear
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de sûreté nucléaire

Canada

Outline

- Recent Commission decisions
- Judicial review of CNSC decision-making:
Darlington new build, Darlington refurbishment
- Ongoing/upcoming judicial review
- Other developments:
 - *State of New York et al v. US NRC and USA*
 - Convention on the physical Protection of Nuclear Material (CPPNM) amendment
- A look ahead



Commission decision-making



- Bruce A and B – 5-year renewal, single licence
- Darlington – 10-year renewal, refurbishment
- Regulation-making: Packaging and Transport of Nuclear Substances Regulations (*PTNSR*) 2015
- Gentilly-2 – 10-year decommissioning licence





at the Supreme Court of Canada

Darlington New Build – SCC file 36711

Greenpeace Canada, Lake Ontario Waterkeeper, Northwatch and the Canadian Environmental Law Association (CELA) applied for leave to appeal the September 10, 2015 Federal Court of Appeal decision.

- CNSC was a Respondent, as were OPG and the Attorney General of Canada (AG)
- **This matter involved an environmental assessment Joint review panel report and a licence decision by the CNSC.**
- **By decision dated 28 April 2016, the SCC denied leave to appeal – without costs, without reasons**





Same case – *Federal Court of Appeal*

Darlington New Build – 2015 FCA 186

- Majority allowed appeal from Federal Court (2014 FC 463), finding that none of the three “lacunae” identified by the Court as meriting the return of the matter to the panel for full consideration under CEAA, were errors.
- Those “lacunae” were:
 - Long-term management of used fuel
 - Severe common-cause accident consideration
 - Hazardous substance emissions (HSE)
- Dissenting judge (Rennie JA) would have agreed with the Federal Court on the third item, would have remitted the matter to panel to consider HSE
- Standard of review – reasonableness
- “Reminder” of limits on role of tribunal in judicial review (para. 73) – see also *Ontario (Energy Board) v. OPG, 2015 SCC 44*, for full treatment of this issue by the SCC



at the Federal Court of Appeal

Darlington Refurbishment

- Greenpeace Canada, CELA, Lake Ontario Waterkeeper and Northwatch appealed the Federal Court decision of November 25, 2014 (**2014 FC 1144**) in which the application for judicial review was dismissed.
- The appeal was heard on December 2, 2015.
- CNSC had sought unsuccessfully to intervene in this matter.
- **This matter involved an EA decision made by the Commission.**
- CNSC made a licensing decision after a late-2015 hearing, authorizing refurbishment and continued operation of Darlington, on strength of the Federal Court's upholding of EA determination





Darlington Refurb at FCA (2)

- 13 April 2016 decision – **2016 FCA 114** – no reviewable error by the Responsible Authorities (RAs), CNSC and Fisheries and Oceans Canada (DFO)
- On standard of review (para 60):

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



Darlington refurb at FCA (3)

Exclusion of severe low-probability accidents

On the reasonableness of the severe accident threshold:

“... as concerns the allegation that the selection of the probability threshold of one in a million per year is not stringent enough, there is no basis to disturb the RAs’ selection of this threshold. As was noted in OPG v. Greenpeace at paragraph 70 [...], CEAA 1992 does not require that all accidents, no matter how improbable, be taken into account in an EA or the process would be interminable.”

- The Court found that this threshold was the “accepted norm applied in these sorts of assessments, as the CNSC explained in its decision”.
- There was no reviewable error in the application of the norm.



Darlington refurb at FCA (4)

Long-term management of fuel waste

- Court found CNSC had reasonably broadened the scope of the project by including the possibility of ongoing long-term on-site storage of spent fuel.
- Requiring this contingency plan ensured that adequate provision was made to store the spent fuel on site for a longer term, and the EA assessed the impacts of this contingency plan.
- It was not unreasonable to exclude from the scope of the EA, the permanent off site storage of spent fuel:

“Indeed, to hold otherwise would mean that OPG could not proceed to refurbish the Darlington reactors unless and until the NWMO comes up with a solution for permanent storage of nuclear waste in Canada. Forestalling the refurbishment on this basis would not be a reasonable outcome when a workable alternate solution was assessed by the CNSC and found to pose no likely environmental risk.”





US Court of Appeals, DC Circuit

State of New York et al v. US NRC

- Petitions to review US NRC’s “continued storage rule” for spent fuel – rule upheld – decision 3 June 2016 (file no. 14-1210)
 - “the NRC has done exactly what *National Environmental Policy Act* (NEPA) requires for major federal actions; it prepared an environmental impact statement. So long as that EIS complies with NEPA, and we hold that it does, no more is required.”
 - “arbitrary and capricious” standard of review
 - the generic environmental impact statement (GEIS) is not a licensing action, only an input for future site-specific action
 - the GEIS thoroughly considered risks that were “essentially common” to all US NPPs
 - the NRC evaluated the probability of failure to site a repository and considered its reasonably foreseeable impacts





Amended CPPNM in force

Convention on the Physical Protection of Nuclear Material

- Original convention adopted 1979 (in force 1987)
- Amendment adopted 2005 – in force 8 May 2016
- Broadens scope to include domestic facilities, material
- Expands offences, some new ones (smuggling, sabotage)
- Provides for expanded cooperation among countries
- Requires States to exchange information, as appropriate, with a view to recovering and protecting material
- Amended CPPNM is implemented in Canada through:
 - NSCA (*Nuclear Security Regulations*, mostly); and
 - *Criminal Code* provisions





A Look Ahead

- *Nuclear Liability and Compensation Act*
 - comes into force Jan 1, 2017;
 - Canada can ratify the Convention on Supplementary Compensation (CSC)
- Fukushima-related amendments to CNSC regulations
- Fitness for Duty – CNSC draft REGDOC 2.2.4
 - Licensees' human performance programs
- Small Modular Reactors – DIS 16-04
- Radioactive Waste Management – DIS 16-03
- CNL – decommissioning, closure projects
- 7th Review Meeting – *Convention on Nuclear Safety*
- EA process review





Questions?



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