

SUPREME COURT OF CANADA UPHOLDS EA FOR DARLINGTON NUCLEAR NEW BUILD

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Despite a dissenting opinion in the Federal Court of Appeal, the Supreme Court of Canada today denied leave to appeal the Federal Court of Appeal's September 10, 2015 decision. That decision overturned the Federal Court Trial Division's decision which would have sent the environmental assessment (EA) for the proposed Darlington Nuclear New Build Project back to the Joint Review Panel and invalidated approvals rendered by the Governor-in-Council, the Canadian Nuclear Safety Commission (CNSC), the Department of Fisheries and Oceans and Transport Canada.

IMPLICATIONS OF THE DECISION TODAY

With the decision today by the Supreme Court of Canada and the Federal Court of Appeal's decision on April 13, 2016 upholding the environmental assessment for the refurbishment of Ontario Power Generation's four Darlington reactor units, the ability to challenge the CNSC's scoping of nuclear projects, or the factors to be assessed as part of the EA, will now be limited to determinations of fact and law on issues central to the Commission's decision made without regard to evidence, in bad faith or for an improper purpose. Deference to responsible authorities and joint review panels under CEAA has been reaffirmed.

The Trial Decision

Trial Division Judge Russell had mistakenly concluded that the *Canadian Environmental Assessment Act* S.C. 1992, c.37 (CEAA) requirements had not been met in three instances:

1. the Panel failed to fully consider the environmental effects of hazardous substance emissions, in particular liquid effluent and storm water runoff and the sources, types and quantities of non-radioactive wastes to be generated by the project;
2. the Panel failed to consider radioactive waste management and more particularly the management of spent nuclear fuel off-site; and
3. the Panel failed to consider the effects of a common cause accident involving both the existing and proposed nuclear reactors, but left this issue to be addressed by the nuclear regulator prior to the actual construction some 8 years down the road.

The Federal Court of Appeal Decision

The Appeal Court was unanimous in deciding that the waste management issue and the common cause accident had been adequately addressed by the Panel. The Terms of Reference did not require consideration of spent nuclear fuel off-site and the improbability of a common cause accident supported the Panel's deferral of the issue to a later date as a reasonable conclusion.

The Appeal Court had disagreed on the question of whether the effects of hazardous substances emissions had been properly considered. The majority found that there had been a reasonable consideration and that was all that was required. The reasonableness of the consideration was found in the acceptance by the panel of the plant parameter envelope or bounding approach under which the proponent did not propose one design or technology but four separate ones. The distinct characteristics of each design giving rise to the greatest adverse effects set the boundaries for the environmental impact assessment. Without any firm design selection the full suite of effects could not be predicted fully at the assessment stage, but the majority of the court found that the approach was reasonable when accompanied by recommendations for further regulatory action if and when the project proceeded.

The full appeal court decision may be found at [2010-09-10-federal-court-of-appeal-reasons](#). The Supreme Court provides no additional reasons.



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