

## DARLINGTON NUCLEAR NEW BUILD ENVIRONMENTAL ASSESSMENT FULLY RESTORED ON APPEAL

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In a two to one decision the Federal Court of Appeal on September 10, 2015 (2015 FCA 186) overturned Judge Russell's decision which would have sent the environmental assessment 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, the Department of Fisheries and Oceans and Transport Canada. Judge Russell had concluded that the *Canadian Environmental Assessment Act* S.C. 1992, c.37 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 stormwater 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
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 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 Court 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.



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