Federal Court Cour fédérale

Date: 20140514

Dockets: T-1572-11
T-1723-12

Citation: 2014 FC 463

Ottawa, Ontario, May 14, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT,
CANADIAN NUCLEAR SAFETY COMMISSION
AND ONTARIO POWER GENERATION INC.

Respondents

for the site preparation, construction, operation, decommissioning, and abandonment of the Project. At each stage, OPG will be required to supply additional information on the Project design specifications and the environmental effects of the Project. The CNSC will not issue a license unless it is of the opinion that OPG "will, in carrying out the activity, make adequate provision for the protection of the environment."

[385] In my view, this is not improper delegation or crystal-ball gazing. Other than for the exceptions I have already noted, it seems to me that the Panel's approach accords with the guidance from this Court in such cases as *Pembina Institute*, above, at paras 23 and 34.

Procedural Issues

[386] The Applicants contend that the Panel's failure to assess the Project in accordance with ss. 15(3), 16(1) and (2) and 34 of the CEAA was compounded by procedural errors in that the Panel refused to:

(a) extend the public comment period or the EIS;

(b) allow cross-examination on evidence or undertaking answers; and

(c) adjourn the public hearing so that missing information could be obtained, publicly disclosed and carefully assessed by the Panel.

[387] My review of the record confirms the factual background on these issues provided by OPG:

> 50. The Applicants wrote to the Panel requesting that OPG and CNSC staff be required to present evidence at the hearing under oath. Waterkeeper had made a similar request of the Agency, which was not accepted, prior to the establishment of the Panel.

> The Panel rejected the Applicants' requests in oral reasons delivered on the first day or the hearing. The Panel stated that it was not a court of law and had the discretion to review and accept evidence and information it considered appropriate. Neither *CEAA* not the *NSCA* required decision-makers to accept or reject evidence based on the formal rules of evidence applicable to a civil or criminal trial.
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> 51. The Applicants CELA and Waterkeeper also requested that the Panel adjourn the hearing to allow for the collection of what they described as "information missing from the record." The Panel rejected this request in the same oral reasons. It indicated that if public hearings were only to be held once the Panel had obtained all the information it needed to make its recommendations, the assessment would never get to the hearing stage. The Panel stated that once it heard from all participants, it would review the evidence gathered and make a decision with regard to the sufficiency of the information provided.
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> 52. The Panel also addressed in its ruling the Applicants' request that the hearing be adjourned because they did not have adequate time to deal with the EC-6 design. The Panel expressly rejected "the intervenors' assertions that they did not have sufficient time or notice to prepare." The Panel explained that it had provided direction on its process in both 2010 and March 2011, that its directions had made clear that the review process was technology neutral, and that if it determined that further information was required regarding EC-6 it would provide participants with an opportunity to file further submissions. After considering all of the submissions on the issue, the Panel concluded that it did not need to adjourn the proceeding as the EC-6 technology would be considered during the hearing.

[388] The Panel was obliged under its Terms of Reference to direct procedures in accordance with the CEAA, the NSCA, and the Panel Agreement. As the Supreme Court of Canada made clear in *Prassad*, above, at pp 568-569,

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial

> functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.

[389] In the present case, the CEAA, the NSCA and the Panel Agreement do not stipulate any specific applicable rules for the hearing process that was conducted by the Panel. I can find nothing unreasonable or procedurally unfair about the way the Panel handled these issues.

Conclusions

[390] Given the Panel's acknowledgment that the PPE "is a departure from a more standard approach where the major components of a project are defined in advance of an environmental assessment," this was bound to be a highly controversial EA that strained the boundaries found in the CEAA. However, in my view, the record shows that, through input and the hearing process the Applicants and other like-minded participants were given ample opportunity to present their views of the inadequacies of the PPE as an approach to environmental assessment and the specific problems to which it gave rise for this particular Project. The arguments against the PPE approach and the failure of OPG to identify a specific reactor technology are fully acknowledged and discussed in the EA Report itself (see section 3.3.10 for example) and the Panel shows itself to be alive to the criticisms of the Applicants and others through the Report.

[391] This debate has been continued before the Court in this application. However the legal issues are characterized (no "project," failure to apply ss. 34, 16(1) and (2) of the CEAA etc.), the principal complaint is that the PPE approach did not allow for a meaningful EA as required by the CEAA. The Panel, however, makes a specific finding that the PPE approach used in this case does permit a meaningful assessment:

> The Panel accepts the use of a plant parameter envelope for environmental assessments purposes as an approach that allows the prediction of adverse environmental effects for a select group of reactor technologies.

[392] In the end, the Applicants are asking the Court to disagree with this finding. Many of the Applicants' objections to the approach do not strike me as unreasonable. However, the issue is not whether I agree or disagree with the Applicants or the Panel. Paragraph 47 of *Dunsmuir*, above, requires me to examine "justification, transparency and intelligibility within the decision-making process" and to decide "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[393] It is certainly possible to disagree with both the Panel's conclusion that the PPE approach allows for a meaningful EA and with the PPE's application to the factors mandated by the CEAA, but I don't think it is possible to say that it falls outside of the range posited in *Dunsmuir*, above. And I do not think it is possible to say that the Panel's deployment of the PPE approach throughout its analysis, other than those instances I have cited above, was not in compliance with the CEAA, even though the nature and duration of this Project, and OPG's failure to designate a specific reactor technology undoubtedly caused the Panel to rely heavily upon mitigation, follow-ups, commitments and future actions and measures that will need to be considered and implemented as the Project advances through its various stages. In the end, however, the Panel was of the view that it could all be done in a way that would not be likely to cause adverse environmental and health impacts. Notwithstanding the strong concerns of the Applicants, other than those instances I have already pointed out, the Court cannot say that this conclusion was

unreasonable or that the references to future actions mean that a meaningful assessment of environmental impacts was not conducted in accordance with the Act.

[394] My specific findings of inadequacies and unreasonableness in the EA Report do not vitiate the whole Report, although it seems to me that some reconsideration and corrective action is required that will allow the Cabinet and s. 37 decision-makers to assess, or re-assess, the whole Project and make their decision accordingly. I have attempted to craft a remedy that will allow this to happen without discarding what appears to me to be the highly competent work accomplished by the Panel.

The Site Preparation License T-1723-12

The Dispute

[395] The Panel's dual mandate was to conduct the EA required under the CEAA and (acting as the Commission) to review OPG's application under the NSCA for a license to prepare the Darlington site.

[396] The background to this application involves the issue of whether the Panel conducted an EA in accordance with the CEAA (dealt with above under T-1572-11) as well as other allegations that, in issuing the License, the Panel failed to comply with certain mandatory requirements under the NSCA, and also breached procedural fairness by relying upon extraneous documents that were not part of the record.