

Court File No.

**FEDERAL COURT OF CANADA**

**B E T W E E N:**

CONSERVATION COUNCIL OF NEW BRUNSWICK – CONSEIL DE  
CONSERVATION DU NOUVEAU-BRUNSWICK and  
FRIENDS OF THE EARTH – LES AMI(E)S DE LA TERRE

Applicants

- and -

MINISTER OF THE ENVIRONMENT,  
MINISTER OF FISHERIES AND OCEANS,  
MINISTER OF TRANSPORT and  
IRVING OIL LTD.

Respondents

APPLICATION PURSUANT TO sections 18 and 18.1 of the *Federal Court Act*.

**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 Court Rules* and serve it on the Applicants' solicitor, or where the

Applicants are self-represented, on the Applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court 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.

December 20, 2007

Issued by: \_\_\_\_\_

Registry Officer

Address of  
local office:

Federal Court of Canada  
Registry Office  
180 Queen St. W.  
Toronto, ON

TO: MINISTER OF THE ENVIRONMENT  
c/o THE ATTORNEY GENERAL OF CANADA  
East Memorial Building  
284 Wellington Street  
Ottawa, ON K1A 0H8

AND TO: MINISTER OF FISHERIES AND OCEANS  
c/o THE ATTORNEY GENERAL OF CANADA  
East Memorial Building  
284 Wellington Street  
Ottawa, ON K1A 0H8

AND TO: MINISTER OF TRANSPORT  
c/o THE ATTORNEY GENERAL OF CANADA  
East Memorial Building  
284 Wellington Street  
Ottawa, ON K1A 0H8

AND TO: IRVING OIL LTD.  
10 Sydney Street  
Saint John, NB E2L 4K1

## APPLICATION

**This is an application for** judicial review of the actions of the Minister of the Environment, of the Minister of Fisheries and Oceans, and the Minister of Transportation (together the “Ministers” or the “responsible authorities”) in relation to the federal environmental assessment of the Irving Oil Eider Rock Project (“the Refinery Project”) under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 32, as amended (“the *CEAA*”).

On November 21, 2007 public notice was posted on the Canadian Environmental Assessment Registry (“the *CEAA Registry*”) of the decision to restrict the federal environmental assessment of the Refinery Project to a comprehensive study of the marine terminal structure, despite other portions of the project, as described by the proponent, being described on the *Comprehensive Study List Regulations* (“*CSL Regulations*”). The responsible authorities to date have not properly defined the project to be assessed and proper public consultation has not occurred on the proposed assessment.

The Ministers have therefore been acting without jurisdiction or beyond their jurisdiction; have erred in law; and are acting contrary to law within the meaning of section 18.1 of the *Federal Courts Act*.

### **The Applicants make application for:**

1. An order or orders in the form of a declaration that:
  - a. The “project”, as described by the proponent Irving Oil Ltd., is the construction and operation of a new petroleum refinery and associated land-based and marine-based infrastructure in Saint John, New Brunswick;
  - b. The Refinery Project exceeds three applicable thresholds in the *Comprehensive Study List Regulations*; and

- c. The Refinery Project is therefore described on the *CSL Regulations* and must be included in the scope for the purpose of public consultation and included in the Report to the Minister under s. 21 of the *CEAA*.
2. In addition, orders in the nature of mandamus:
    - a. Directing the responsible authorities to publish a new Scoping Document that includes the Refinery Project as described by the proponent, solicit public consultation on that document and then report to the Minister on any comments received; and
    - b. Directing the Minister to then decide if the Refinery Project as described by the proponent will continue as a comprehensive study or will be referred to a mediator or review panel.
  3. An order that the Applicants shall not be required to pay costs to the Respondents of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.

**The grounds for the Application are:**

***Legal Requirements of the CEAA not met***

1. The proponent, Irving Oil Ltd., described the Refinery Project in its Environmental Impact Assessment Registration/Project Description document, dated January 25, 2007, as follows: “The Project involves the development of a new petroleum refinery and associated land-based and marine-based infrastructure in the Red Head area, in Saint John, New Brunswick”. This document was submitted to federal and provincial authorities for the purpose of defining parameters for environmental assessment of the project.
2. Notice of Commencement of federal environmental assessment was posted to the CEAA Registry on or about May 1, 2007.

3. On or about May 1, 2007, the Department of Fisheries and Oceans (“DFO”), Transport Canada (“TC”) and Environment Canada (“EC”) determined themselves to be responsible authorities under the *CEAA* charged with preparing a federal environmental assessment of the Refinery Project.
4. DFO’s role as a responsible authority arises from the Refinery Project requiring an authorization, pursuant to s.35(2) of the *Fisheries Act* to harmfully alter and/or destroy fish habitat and also a permit or license under s.32 of the *Fisheries Act* to destroy fish; TC’s role as a responsible authority arises from the Refinery Project requiring permits for building structures in navigable waters under s.5(1)(a) the *Navigable Waters Protection Act*; and EC’s role as a responsible authority arises from the Refinery Project requiring a permit for ocean dredging and disposal under s.127(1) of the *Canadian Environmental Protection Act*.
5. Pursuant to, *inter alia*, ss.2 (definition of “environmental assessment”), 5(1)(d), 13, and 59(f) of *CEAA*, and ss.3(a), 6 (d) and (e), and 11(a) of the *Law List Regulations*, SOR/94-636 as amended, Part I, the responsible authorities must prepare an environmental assessment of the project in compliance with the *CEAA* prior to issuing any authorizations or permits.
6. The Refinery Project exceeds three different thresholds in the *CSL Regulations*. The refinery input threshold of 10 000 cubic metres per day and the petroleum storage capacity threshold of 500 000 cubic metres contained in s.13 and the threshold for a marine terminal designed to handle vessels larger than 25 000 dead weight tonnes in s.28 have all been surpassed.
7. Where there is a federal trigger under s.5 of the *CEAA* for a project and where the “project” as described by the proponent is on the *CSL Regulations*, s.21(1) of the *CEAA* requires the “project” to be included within the scoping document put to the public for consultation and s.21(2) requires the responsible authorities to, *inter alia*, report to the Minister of the Environment on any public comments obtained and recommend to the Minister to continue with the environmental assessment by

means of a comprehensive study, or to refer the project to a mediator or review panel under s.29 of the *CEAA*.

8. The responsible authorities in this case erred in not properly following the legal requirement of the *CEAA* to determine whether the “project” as described by the proponent is captured by the *CSL Regulations* but rather, assessed whether that portion of the project triggering environmental assessment is described on the *CSL Regulations*. This legal error runs consistently through the decisions made on this environmental assessment to date.
9. On May 23, 2007 the responsible authorities announced public consultation on the proposed scope of the federal environmental assessment. The Scoping Document circulated for public input proposed that the federal environmental assessment be restricted to a comprehensive study of the marine terminal structure of the project. The project described in the Scoping Document was not the Refinery Project as described by the proponent.
10. Since the project, as defined by the proponent, was not reflected in the Scoping Document released for public comment, the public, including the Applicants, have not yet been adequately consulted on: a) the proposed scope of the Refinery Project for the purposes of the environmental assessment; b) the factors proposed to be considered in its assessment; c) the proposed scope of those factors; and d) the ability of the comprehensive study to address issues relating to the Refinery Project as required by s.21 of the *CEAA*. The public was merely given the opportunity to provide narrowly focused input on how those portions of the project triggering environmental assessment under s.5 of the *CEAA*, namely the marine terminal, would be assessed.
11. In the s.21(2) report, dated September 24, 2007 and posted to the *CEAA* Registry on November 21, 2007, which was provided to the Minister of the Environment after public consultation, the responsible authorities recommended that the assessment continue by way of comprehensive study. However, the report only proposed to subject the marine terminal to federal environmental assessment.

12. On November 21, 2007 the Minister of the Environment's Notice of Decision was posted on the CEAA Registry. The Minister decided to accept the recommendation of the responsible authorities to merely subject the marine terminal of the Refinery Project to comprehensive environmental assessment.
13. The Minister of the Environment's decision was deficient as he failed to decide whether to refer the Refinery Project, as described by the proponent, to the responsible authorities to continue with a comprehensive study or refer the project to a mediator or review panel and further, the legal precondition to him making a decision, that of proper public consultation, had not been satisfied.

***Notices Given to Responsible Authorities of CEAA Requirements***

14. Assurances have been sought from the responsible authorities that the Refinery Project, as described by the proponent, be subject to federal environmental assessment.

***Nature of the Applicants***

15. The Applicant Conservation Council of New Brunswick is a provincial non-profit environmental organization that creates awareness of environmental problems and advocates solutions through research, education and interventions. The Applicant has been involved in commenting on major new developments such as the Refinery Project, and participated in their environmental reviews since the establishment of federal and environmental assessment processes in the 1970's as part of its founding mandate to prevent pollution. It has a track record of assessing the adequacy of environmental review processes and advocating for their improvement when warranted.
16. The Applicant Friends of the Earth Canada is a national non-profit environmental group with a strong international umbrella organization. The Applicant has been very involved in the climate change debate and in particular, proper planning of oil and gas development in Canada.

17. The Applicants have both been involved in the issue of oil and gas development projects and proper assessments of such projects. In addition, the Applicants have been involved in the development of policy with governments, industry, environmental groups and others regarding oil and gas development and the greenhouse gas emissions and other environmental impacts associated with such development.

***Issue of Public Importance***

18. The Refinery Project is one of several new refineries proposed across Canada. These proposed refineries will be the first to be built in Canada in approximately 25 years. The Applicants and the public they work with are of the view that the federal government ought to have a significant role in ensuring that there is consistent environmental assessment of such projects.
19. There is significant public interest in having the Refinery Project reviewed at the federal level under the *CEAA*. Similarly, there is significant public interest in having a consistent national assessment process for these types of facilities.
20. The avenues by which the public can participate in the environmental assessment of the Refinery Project by the Province of New Brunswick are very limited.
21. It is for these public interest reasons that the Applicants bring this application.
22. Such further grounds as counsel may advise and this Court may accept.

**The Applicants rely on the following statutory provisions, rules and principles:**

1. *Canadian Environmental Assessment Act*, S.C. 1992, c. 32, as amended and sections 21 and 21.1 in particular;
2. *Law List Regulations*, SOR/94-636 as amended;
3. *Comprehensive Study List Regulations*, SOR/94-638;

4. *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181;
5. *Federal Courts Act*, ss. 18 and 18.1; and
6. *Federal Courts Rules*.

**This Application will be supported by the following material:**

1. The affidavit of Beatrice Olivastri, Friends of the Earth, to be sworn;
2. The affidavit of David Coon, Conservation Council of New Brunswick, to be sworn;
3. The affidavit of David Thompson, the Conservation Council of New Brunswick's Fundy Baykeeper, to be sworn;
4. The record before the Ministers/responsible authorities;
5. Such further and other affidavits and material as counsel may advise and this Honourable Court permit.

**The Applicants request that** the Ministers send a certified copy of the following material that is not in the possession of the Applicants but is in the Ministers' possession, to the Applicants and to the Registry:

1. The record of all documents and other materials before the Ministers in the Irving Oil Refinery Project environmental assessment; and
2. Such further and other material that may be in the possession, power or control of the Ministers and which may be relevant to these proceedings.

December 20, 2007

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