

Court File No.

FEDERAL COURT OF CANADA

B E T W E E N:

SIERRA CLUB OF CANADA

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

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

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant 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 Applicant. The Applicant 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 Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, 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.

Date: April 15, 2009

Issued by:

Registry Officer

Address of
local office:

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

TO: Attorney General of Canada

c/o Department of Justice
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, ON M5X 1K6

APPLICATION

This is an application for judicial review of *Regulations Amending the Exclusion List Regulations, 2007* and *Infrastructure Projects Environmental Assessment Adaptation Regulations* enacted by the Governor in Council under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“the CEAA”) which will exempt up to 2,000 projects from environmental assessment (“EA”) under the CEAA.

The CEAA does not confer the power on the Governor in Council to enact these regulations which amount to an attempt to amend the CEAA absent statutory authority to do so.

As a result, the Governor in Council has acted without jurisdiction or beyond its jurisdiction; has erred in law; and is acting contrary to law within the meaning of section 18.1 of the *Federal Courts Act*.

The Applicants make application for:

1. An order declaring that the *Regulations Amending the Exclusion List Regulations, 2007* and the *Infrastructure Projects Environmental Assessment Adaptation Regulations* are *ultra vires* the Governor in Council.
2. An order for costs of this Application, if requested by the Applicant.
3. Such further and other orders as this Honourable Court deems just.

The grounds for the Application are:

Canadian Environmental Assessment Act – EA Processes Generally

1. The CEAA was enacted in 1992 to ensure that the federal government undertake EAs of projects which are facilitated by the action of federal authorities. EA under the CEAA is intended, *inter alia*, to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse

environmental effects and to promote cooperation and coordinated action between federal and provincial governments with respect to EA processes for projects (section 4).

2. Under section 5 of the CEAA, federal funding and federal permitting for projects, *inter alia*, trigger federal EA requirements. The Act operates to subject all projects to assessment which have a section 5 trigger unless they are explicitly exempted from assessment under regulations enacted by the Governor in Council (section 7).
3. The federal authority responsible for issuing a permit or funding which triggers environmental assessment under section 5 is designated as the “responsible authority” for the purpose of carrying out duties under the CEAA (section 11).
4. The CEAA requires that responsible authorities ensure that an EA of a project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made and before any permits or funding are issued to enable the project to be developed (sections 5 and 11).
5. There are three major levels of EA under the CEAA which are progressively more rigorous: screening level assessment, comprehensive study level assessment, and panel review.
6. Each level of assessment requires responsible authorities to determine the scope of the EA (section 15) and then conduct an assessment and prepare a report which considers the environmental impacts of the project, the significance of such effects, any comments received from the public, measures that would mitigate any significant adverse effects, the need for the project and alternatives to the project, and any other matter government requires to be studied (section 16(1)). In addition, comprehensive studies and panel reviews require a consideration of the purpose of the project, alternative means of carrying out the project, the need for and requirements of a follow-up program, and the effects on renewable resources from the project (section 16(2)).

7. Once the report is prepared, responsible authorities must then determine whether, in taking into account any mitigation measures, the project is or is not likely to cause significant adverse environmental effects. If it will not cause any significant adverse environmental effects, the responsible authority may issue a permit or funding. If the project will cause significant adverse environmental effects, the responsible authority may only issue a permit or funding if the effects can be justified in the circumstances (section 37). Alternatively, if uncertainty exists as to project impacts, screening and comprehensive level assessments can be subject to a panel review for further assessment (sections 20, 21.1, 28, 29 and 48).
8. Responsible authorities are required to design follow-up programs for projects to ensure implementation of mitigation measures and monitoring programs (section 38).
9. The vast majority of projects (approximately 99 per cent) that require a federal EA are subject to a screening level assessment. It has been estimated by the federal government that the typical cost for a screening level assessment is \$2,300 and the entire screening process takes between a few days and several months to complete.

Canadian Environmental Assessment Act – Federal-Provincial Coordination

10. In 1998, Canada concluded the Canada-wide Accord on Environmental Harmonization with the provinces and territories which included a Sub-Agreement on Environmental Assessment. The Sub-Agreement committed the federal government to avoiding duplication and reaching harmonization on EA with the provinces and territories. Since 1998, eight agreements have been concluded with the provinces and territories to ensure cooperation on EA. Each of these agreements clearly recognize differing jurisdictional legal responsibilities for EA and set out processes to speed up fulfillment of respective EA requirements.
11. During the 5-year Parliamentary review of the CEAA which began in 1998 and resulted in amendments to the Act in 2003, Parliament recognized the need to

cooperate with the provinces and amended the CEAA to allow for additional cooperation. Parliament did not amend the Act to allow for provincial EA and decision-making to replace federal EAs and decision-making authority in recognition of the fact that the environment is a matter of shared federal-provincial responsibility.

12. The CEAA currently provides various legislative tools that allow the federal government to cooperate with the provinces and avoid federal-provincial EA duplication. These tools include cooperation with provinces on screening and comprehensive studies (section 12(4)), facilitation of communication and cooperation with the provinces through a federal environmental assessment coordinator (sections 12.1 and 12.2), delegation of part of the screening or comprehensive study preparation to the provinces or other persons (section 17), striking of joint federal-provincial review panels (section 40), and concluding agreements and arrangements with the provinces (section 54).
13. Most provincial EA laws also contain provisions that ensure that federal-provincial jurisdictional responsibilities are respected, harmonization is pursued and duplication is avoided.

Canadian Environmental Assessment Act – Streamlining EAs

14. Parliament provided various tools under CEAA to further reduce the time and costs associated with EA. For example, groups of projects with known environmental impacts and generally known mitigation requirements can be subjected to class screening environmental assessments to avoid the need for the preparation of individual reports for each project (section 19). This mechanism has not yet been used to its full potential however.
15. In addition, in 2007 the federal government established the Major Projects Management Office to facilitate the review and approval of large infrastructure projects. As part of its mandate, the Office is to ensure federal EA processes for infrastructure projects are conducted in a timely manner.

New CEAA Regulatory Exemptions

16. On March 19, 2009 *Regulations Amending the Exclusion List Regulations, 2007* (“the *Exclusion List Regulations*”) and *Infrastructure Projects Environmental Assessment Adaptation Regulations* (“the *Adaptation Regulations*”) were published as a package in the Canada Gazette, Part II with an associated regulatory impact statement.
17. The basis for the regulations is outlined in the regulatory impact statement as avoiding overlap and duplication of environmental assessments, avoiding federal EA that unnecessarily slows down funding decisions and avoiding triggering of federal EA after the completion of provincial EA and to allow funding for infrastructure projects under the \$33 billion Building Canada Plan to flow. The effect of the regulations is to exempt 2,000 or more projects from EA under the CEAA over 2 years, based largely on an assumption that these projects will have no adverse environmental impacts.
 - i. ***Regulations Amending the Exclusion List Regulations, 2007***
18. The *Exclusion List Regulations* add a significant number of new types of projects to the *Exemption List Regulation* enacted under the CEAA, including waste disposal sites, public transit infrastructure, railways, highway interchanges, bridges, road widening projects, and sewage treatment plants. The regulatory impact statement indicates that the *Exclusion List Regulations* will exempt 2,000 infrastructure projects that will receive federal funding through the Building Canada Plan.
19. The stated authority for the *Exclusion List Regulations* are sections 59(c)(ii) and (iii) of the CEAA which allow the Governor in Council to enact regulation exempting projects from EA if they are considered to have insignificant environmental impacts or if they have a total cost below a prescribed amount and meet environmental conditions.

20. The regulatory impact statement included with the *Exclusion List Regulations* in the Canada Gazette states that experience with over 1,000 of these types of projects indicates that mitigation measures will be incorporated into the exempted groups of projects despite lack of EA and thus, their environmental impacts will be insignificant. It is largely because of federal EA that mitigation measures are incorporated into projects.
21. The opinion of the Governor in Council set out in the *Exclusion List Regulations* that “the environmental effects of certain projects in relation to physical works are insignificant” was reached in a manner inconsistent with the CEAA in that it is based largely upon assumptions as to environmental impacts of such projects. Absent federal EA under the CEAA, the Governor in Council’s finding that the exempted projects will have insignificant environmental effects is erroneous and nullifies the underlying basis for the *Exclusion List Regulations*.
22. In addition, the Governor in Council’s jurisdiction under sections 59(c)(ii) and (iii) to exempt projects from EA is constrained by the overall objects and purpose of the CEAA which requires that projects be considered in a careful and precautionary manner before federal authorities take action in connection with them to ensure they do not cause significant adverse environmental effects. Exempting up to 2,000 federally funded projects from EA is inconsistent with the overall intent of Parliament under the CEAA and amounts to an illegal amendment to the CEAA itself.
- ii. *Infrastructure Projects Environmental Assessment Adaptation Regulations***
23. The *Adaptation Regulations* allow for additional exemptions of projects or classes of projects from federal EA that also receive federal funding under the Building Canada Plan.

24. Section 3 of the *Adaptation Regulations* “adapts” sections 43 to 45 of the CEAA to confer wide discretion on the Minister of the Environment to substitute a provincial EA process for a federal EA that would be otherwise required under the CEAA.
25. Sections 43 to 45 of the CEAA only allow for substitution of a more rigorous federal EA process by way of review panel. CEAA does not contemplate provincial EA as an adequate substitute for federal EA and only confers the power to require more rigorous assessment processes where uncertainty exists as to environmental impacts.
26. The stated authority for the *Adaptation Regulations* is section 59(i)(iv) of the CEAA. This provision allows the Governor in Council to enact regulations only to vary or exclude any procedure or requirement of the EA process set out in the CEAA. The section does not confer authority on the Governor in Council to exclude federal EA altogether where a provincial process may exist.
27. When section 59(i)(iv) of the CEAA was enacted, the intent was that the Governor in Council be able to enact regulations to adapt the EA process, but not adapt the core substantive requirements of sections 15 and 16 of the Act to scope a project and study its environmental impacts in consideration of federal responsibilities. Nor was section 59(i)(iv) intended to alter the decision-making responsibility at the end of an EA process as has been done under the *Adaptation Regulations*. These
28. Further, the *Adaptation Regulations* remove the requirement for further assessment under section 20(1)(c) of the CEAA where uncertainty in relation to a project’s impacts on the environment exist. This removal is inconsistent with the intent of the CEAA that projects be considered in a careful and precautionary manner before federal authorities take action in connection with them to ensure they do not cause significant adverse environmental effects.

29. Section 59(i)(iv) of the CEEA does not confer the authority on the Governor in Council to enact the *Adaptation Regulations* which are inconsistent with the overall objects and purpose of the CEEA and amount to an amendment to the CEEA itself without legal authority.
30. Parliament did provide various legislative mechanisms to ensure federal-provincial EA duplication is avoided and cooperation is pursued in a manner that ensures federal responsibilities are properly addressed and maintained. Both the *Exemption List Regulations* and the *Adaptation Regulations* are inconsistent with legislative intent and amount to the Governor in Council amending the CEEA absent the statutory authority to do so.

Nature of the Applicant

31. The Applicant has been active on environmental issues in Canada since 1963 and was incorporated in 1992 as a registered charitable organization.
32. The Applicant has been deeply involved in the development of federal environmental assessment laws for twenty years. Sierra Club of Canada has advocated for strong federal environmental assessment legislation and regulations that ensure rigorous environmental assessments occur in Canada.
33. The Applicant is currently a leading participant or intervener in the Mackenzie Gas Project joint panel review, the Joslyn North Oil Sands Project joint panel review, the Lower Churchill Hydro-electric Project joint panel review and the Romaine River Hydro-electric Project joint panel review, all of which were EA processes established pursuant to CEEA.
34. The Applicant has also participated or intervened in various federal environmental assessments processes of development projects over the years, including the Sydney Tar Sands Clean-up joint panel review, the Digby Neck Marine Terminal and Basalt Quarry joint panel review, and the Deep Panuke Offshore Exploration panel review.

Issue of Public Importance

35. There is significant public interest in having a rigorous federal environmental assessment process under the CEAA.
36. As the regulations challenged in this Application may be indicative of the federal government's intent to devolve itself of EA responsibilities, environmental impacts from infrastructure projects may not be properly assessed and mitigated in future.
37. Lack of EA federally for infrastructure projects may result in public liabilities and environmental impacts that could have otherwise been identified and addressed.
38. It is for these public interest reasons that the Applicant brings this application.

The Applicant relies on the following statutory provisions, rules and principles:

1. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, as amended.
2. *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18 and 18.1.
3. *Federal Courts Rules*, SOR/98-106.

This Application will be supported by the following material:

1. The affidavit of Stephen Hazell, Sierra Club of Canada, to be sworn.
2. The record before the Governor in Council.
3. Such further and other affidavits and material as counsel may advise and this Honourable Court permit.

The Applicant requests that the Attorney General send a certified copy of the following material that is not in the possession of the Applicant but is in the Governor in Council's possession, to the Applicant and to the Registry:

1. The record of all documents and other materials before the Governor in Council in forming the opinion that the groups of projects included in the *Exclusion List Regulations* will not have significant environmental effects.
2. Such further and other material that may be in the possession, power or control of the Governor in Council and which may be relevant to these proceedings.

April 15, 2009

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