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JAN. 10/12

Date: ~~October 29, 2010~~

Issued by



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APPLICATION

This is an Application for judicial review in respect of a decision to approve additional air pollutant releases in an area of south Samia known as "Chemical Valley", which surrounds the Applicants' community of Aamjiwnaang First Nation. Existing air pollution in the area has had a significant impact on the Applicants.

The Applicants challenge a decision of the Director of the Ministry of Environment (the "Director") to permit Suncor Energy Products Inc. ("Suncor") to increase its petroleum refinery operations in Chemical Valley. The decision is comprised of two steps: (1) an Amending Control Order dated April 1, 2010 which was issued under the *Environmental Protection Act*, RSO 1990, c E.19 (the "EPA") to allow Suncor to increase its production if it submitted certain reports to the Director, and (2) a letter sent on or about April 30, 2010 by the Director to Suncor confirming that it was allowed to increase refinery operations by 25% (these two steps are hereinafter collectively referred to as the "Decision"). The Decision allows for an increase in various air pollutants, including sulfur dioxide, that already exist in Chemical Valley at levels that pose serious risks to the Applicants' health and well-being.

The Applicants challenge the Director's Decision on the basis that it infringes their rights to life, liberty and security of person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the "Charter") and their equality rights under section 15(1) of the *Charter*.

Additionally, the Applicants challenge the Minister of the Environment's application of the *Environmental Bill of Rights, 1993*, SO 1993, c 28 (the "EBR") as similarly infringing their rights to life, liberty and security of person as guaranteed by section 7 of the *Charter* and their equality rights under section 15(1) of the *Charter*.

1. The Applicants make application for:
 - (a) A declaration under section 24(1) of the *Charter* that the Director's Decision infringes section 7 of the *Charter*, in that it deprives the Applicants of their life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice.
 - (b) A declaration under section 24(1) of the *Charter* that the Director's Decision infringes section 15(1) of the *Charter* in that it deprives the Applicants of their right to equality.
 - (c) A declaration that the Minister's failure to apply the *EBR* in a manner that ensured that cumulative effects were considered and minimized when the Director made the Decision infringed the Applicants' rights under sections 7 and 15(1) of the *Charter*.
 - ~~(d) An order under section 52 of the *Constitution Act, 1982* declaring that sections 9, 18, 157.1, 157.2, and 196 of the *EPA* are inoperative in so far as they allow for the additional discharge of contaminants to air in Chemical Valley absent an assessment and minimization of the cumulative effects of pollution on the Applicants' health.~~
 - (d) A declaration under section 24(1) of the *Charter* that the Director's application of sections 18 and 157.2 of the *EPA* is contrary to sections 7 and 15(1) of the *Charter*

in so far as it allows for the additional discharge of contaminants to air absent an assessment and minimization of the cumulative effects of pollution.

- (e) An order under section 24(1) of the *Charter* setting aside the Decision of the Director.
 - (f) Alternatively, an order quashing the Decision of the Director on the basis that it is in violation of the rules of procedural fairness.
 - (g) Additionally in the alternative, an order quashing the Decision of the Director on the basis that he lacked the jurisdiction to make the Decision under the *EPA*, because he failed to adhere to the regulatory scheme established pursuant to the *EBR* and the *EPA*, which required, among other things, the consideration of cumulative effects of pollution.
 - (h) Additionally in the alternative, an order declaring that the Minister's failure to require an assessment of cumulative adverse health effects of pollution by the Director when making the Decision was unreasonable.
 - (i) Costs of this Application.
 - (j) Such further and other relief as counsel may advise and this Honourable Court may deem just.
2. The grounds for the application are:
- (a) The Applicants are members of the Aamjiwnaang First Nation community (also known as Chippewas of Sarnia) - a community of approximately 700 on-reserve residents and 1,100 off-reserve members that is surrounded on all sides by

refineries, petrochemical facilities, and other industrial manufacturing and energy production facilities.

- (b) The Applicant Ada Lockridge resides on the Aamjiwnaang reserve with her family.
- (c) The Applicant Ronald Plain previously resided on the Aamjiwnaang reserve until fears about the adverse effects of pollution on his and his family's health forced him to move off reserve.
- (d) The Director is responsible for regulating air pollution in the Sarnia District of Ontario pursuant to the *EPA* and its regulations.
- (e) The Minister of the Environment has various powers under the *EPA* to regulate pollution and is required under section 11 of the *EBR* to take every reasonable step to ensure that the Ministry's statement of environmental values ("SEV") is considered whenever decisions that might significantly affect the environment are made within the Ministry. Among the principles enshrined in the SEV are an ecosystem approach to environmental protection, and the consideration of cumulative effects and the protection of human health.
- (f) Suncor is a multinational petroleum products producer that has both ethanol production and petroleum refinery operations in Chemical Valley. The Applicants seek no direct relief against Suncor. Suncor is named as a party pursuant to Rule 5.03 of the *Rules of Civil Procedure*, RRO1990, Reg 194, since its interests may be affected by some of the relief sought in this Application.

Chemical Valley and Aamjiwnaang

- (g) The heavily industrialized area surrounding Aamjiwnaang is commonly known as "Chemical Valley" due to the concentration of refineries, petrochemical facilities, and other industry located there. A large number of these facilities are located within a few kilometres of Aamjiwnaang.
- (h) The closest industrial sources of air pollutants to Aamjiwnaang are adjacent to the reserve and across the street from important community institutions, such as the Band Council office, church, cemetery and traditional burial grounds, community resource centre and, until it was recently moved to reduce the exposure of children to pollution, the day care. The majority of additional industrial sources of air pollutants are located within several kilometres of Aamjiwnaang.
- (i) One of the closest industrial sources of pollutants to the reserve is Suncor's petroleum refinery at issue in this Application. This facility is adjacent to Aamjiwnaang's cemetery and traditional burial grounds, and is approximately 1.4 kilometres from the residence of the Applicant Ada Lockridge.
- (j) For the purpose of this Application, "Chemical Valley" is the area within approximately 15 kilometres of the Applicant Ada Lockridge's current residence.
- (k) Chemical Valley has one of the highest levels of air pollutant emissions in Ontario, including numerous pollutants that increase the risk of adverse respiratory, cardiovascular, reproductive, and developmental health effects, as well as cancers.

Regulation of Pollution in Chemical Valley

- (l) The Director and the Minister are the main regulators of air pollution in the Province of Ontario through the *EPA* and the *EBR*.
- (m) The *EPA* prohibits the discharge of contaminants that may cause an adverse effect, but exempts discharges approved by the Director if the Director believes they are not likely to cause an adverse effect (section 14). The *EPA* defines "adverse effect" as including "an adverse effect on the health of any person".
- (n) The Director permits otherwise unlawful releases of air pollution by issuing certificates of approval or Director's Orders pursuant to discretion conferred under the *EPA*.
- (o) Certificates of approval to discharge contaminants to air are issued under section 9 of the *EPA*.
- (p) In order to receive a certificate of approval, an industrial facility must estimate maximum emissions using methods defined under *EPA* regulations, and must not exceed standards set under regulations for certain pollutants.
- (q) The standards for air pollutants are established under *Air Pollution - Local Air Quality*, O Reg 419/05 ("Ontario Reg. 419/05"), enacted under the *EPA*. These regulatory standards are commonly referred to as "point of impingement" ("POI") standards, as they establish a limit on the concentration of a pollutant that can be present at a given POI, which is often the property line of a facility.
- (r) The *EPA* confers discretion on the Director to apply the same process for issuing certificates of approval, regardless of whether a facility operates in isolation or is

surrounded by other facilities emitting other pollutants linked to similar adverse effects.

- (s) Control orders issued under the *EPA* (sections 18, 157, 157.1, 157.2, 196) allow companies to, among other things, operate outside or above the POI standards at the discretion of the Director or a Provincial Officer.
- (t) *EPA* provisions do not explicitly require consideration of cumulative effects of pollution before a control order is issued. For the purposes of this Application, cumulative effects is defined as exposures, public health, or environmental effects from the combined emissions and discharges, in a geographic area, including environmental pollution from all sources, whether single or multimedia, routinely, accidentally, or otherwise released. Impacts should take into account sensitive populations and socio-economic factors, where applicable, and to the extent that information or data are available.
- (u) At present, when the Director approves contaminant discharges to air under the *EPA*, no consideration is given to cumulative effects from background pollutant concentrations in the air, emissions of pollutants from neighbouring facilities, and emissions of other pollutants that may have similar adverse effects.

Suncor Operations and Cumulative Effects of Air Pollution

- (v) Suncor's petroleum refinery in Sarnia produces transportation fuels, heating fuels, liquefied petroleum gases, residual fuel oil, asphalt feedstock, and petrochemicals. Approximately 75% of the crude oil refined at Suncor's Sarnia petroleum refinery

is synthetic crude supplied from Suncor's tar sands operations. This crude contains high levels of sulphur.

- (w) Suncor's petroleum refinery emits a number of air pollutants even during its normal operations. The main pollutants released by Suncor which are putting the health of the Applicants at risk are those released by many refineries and petrochemical facilities in Chemical Valley, such as sulphur dioxide (SO₂), hydrogen sulphide (H₂S), oxides of nitrogen (NO_x), carbon monoxide (CO) particulate matter (PM), and benzene. These pollutants variously pose serious risks to respiratory, reproductive, developmental, and cardiovascular health, and are known to cause cancers.
- (x) There are at least 10 other industrial facilities in Chemical Valley that emit these same pollutants at significant levels. Along with Suncor's refinery, these facilities' emissions contribute in a cumulative manner to the air pollution that jeopardizes the Applicants' health.
- (y) Ontario Reg. 419/05 was not enacted with cumulative effects as a consideration, and none of the POI standards established under the regulation were established with the view to addressing the type of cumulative effects at issue in Chemical Valley.
- (z) The existing POI standards for some pollutants, such as sulphur dioxide (SO₂), are severely outdated in terms of protecting human health.
- (aa) Some pollutants released by Suncor's facility do not have POI standards at all, and are largely unregulated. Benzene, which poses serious adverse risks to human

health, is among the pollutants that do not have standards under the *EPA* or its regulations.

- (bb) In November 2007, Suncor completed upgrades to its refinery to produce ultra low sulphur diesel. The upgrades included the construction of its #4 Sulphur Recovery Unit (the "Unit") to recover sulphur from the acid gas stream generated in the production of ultra low sulphur diesel fuel.
- (cc) The Director approved the construction of the Unit in November 2004, before construction began, and without a cumulative effects assessment or any consultation with Aamjiwnaang or the Applicants.
- (dd) When the Unit malfunctions, the acid gas which is a by-product of the sulphur removal process, is sent to a flare stack that burns (or "flares") the gas. Acid gas is comprised mainly of hydrogen sulphide (H_2S), which is a neurotoxin and is dangerous to human health. Flaring of the gas burns the hydrogen sulphide, which is changed into sulphur dioxide and other pollutants which are emitted to air in much higher amounts than Suncor normally releases. These pollutants pose serious adverse health risks.
- (ce) In April 2008, a Provincial Officer conducted an investigation of Suncor's acid gas flaring incidents and pollutant emissions.
- (ff) On April 15, 2008 the Officer issued a Provincial Officer's Order under sections 157, 157.1 and 196(1) of the *EPA* which, among other things, effectively capped the production capacity of Suncor's Unit to 145 tonnes of sulphur per day.

Reducing the production capacity of the plant was intended to ensure compliance with the fence line POI standards contained in Ontario Reg. 419/05.

- (gg) On the face of the Provincial Officer's Order and accompanying decision, no consideration was given to cumulative effects when this Order was issued despite the fact that other facilities were also releasing the same pollutants as Suncor.
- (hh) Following the issuance of the Provincial Officer's Order, Suncor reduced production at the Unit, and Suncor's sulphur dioxide emissions reduced.
- (ii) At some point following the issuance of the Provincial Officer's Order, Suncor requested that the Director authorize increased production at the Unit to 180 tonnes of sulphur per day, to allow it to meet demand for its fuel products.
- (jj) On April 1, 2010, in response to Suncor's request to increase production, the Director issued an Amending Control Order under sections 18 and 157.2(2) of the *EPA*, amending the 2008 Provincial Officer's Order. The Applicants were never consulted on or notified of the Amending Control Order when it was issued. The Amending Control Order is the first part of the Decision at issue in this Application.
- (kk) The Director informed Suncor when the Amending Control Order was issued that once it had fully complied with requirements of the Amending Control Order, the Director would exercise his discretion and revoke the Provincial Officer's Order completely.

- (ll) No cumulative effects assessment of health impacts was required when the Amending Control Order was issued to ensure health risks were minimized during normal operations, and also during malfunctions that result in flaring.
- (mm) On or about April 30, 2010, the Director revoked the Provincial Officer's Order, and wrote to Suncor authorizing an increase at the Unit to a production level of 180 tonnes of sulphur per day - a 25% increase in production. This written authorization is the second part of the Decision at issue in this Application.
- (nn) On May 1, 2010, Suncor reported an increase in its production to the Director.
- (oo) The Decision will result in Suncor's air contaminant releases exceeding the standards set under Ontario Reg. 419/05 through acid gas flaring or other malfunctions. The Director was aware of this when he made the Decision.
- (pp) The Minister failed to require the Director or the Provincial Officer to consider cumulative effects in their Orders with respect to Suncor's operations.
- (qq) Notice of the Decision was only made known to the Applicants on August 16, 2010 after the Decision had been made and only after repeated inquiries were made to the Director and other Ministry of the Environment officials. The Applicants have also been forced to seek background information on the Decision by way of requests under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.21.

Impact of the Decision on the Applicants

a. Violation of section 7 Rights

- (rr) People living close to heavily industrialized areas are subject to an increased risk of adverse mental and physical health impacts.
- (ss) Community health surveys show residents of Aamjiwnaang are suffering numerous health impacts, including high rates of asthma (22% of children and 17% of adults, which is well above the Ontario and national averages), birth defects, miscarriages and stillbirths, skin rashes, chronic headaches, high blood pressure, and cancers.
- (tt) At times, the Aamjiwnaang community has suffered a skewed birth ratio where two girls have been born for every boy in the community.
- (uu) Fear is a major impact of living in Chemical Valley. The Applicants are continuously subjected to a vista of industrial facilities and the associated smoke stacks, smells, and sirens both from accidents and practice drills. Not only do they fear the daily, ongoing pollutant releases, the Applicants live in a constant state of emergency preparedness waiting for the next accidental release of dangerous levels of pollutants.
- (vv) Members of Aamjiwnaang, including the Applicants, fear the outdoors, the warning sirens, unreported or poorly managed accidents, and increases in the number of industrial sources of pollution being approved in Chemical Valley.
- (ww) The Applicants have lost a great deal of personal autonomy and control over their health and well-being as a result of the pollution in Chemical Valley. The Director's Decision and the Minister's failure compounds this impact.

- (xx) The Applicants have experienced a great deal of loss of their community connections, due to the lowered life expectancy on reserve and the high proportion of band members who have moved from the reserve.
- (yy) The Applicants have been deprived of personal choices that most Canadians take for granted, such as not living in a constant state of fear for their health and safety, being able to work and engage in recreation outdoors, and not being forced to choose between their culture and community connections, and their own health and safety.

b. Violation of section 15(1) equality rights

- (zz) As First Nation people, the Applicants have a strong connection to their community, land, and local environment, and seek to maintain it. A close physical connection to reserve lands is a personal characteristic of the Applicants.
- (aaa) The Applicants cannot move off of the Aamjiwnaang reserve without great personal cost in terms of loss of culture and community connection, as well as economic loss.
- (bbb) Aboriginal persons living on-reserve belong to a group that has faced historic economic, social, health, and cultural disadvantage in Canadian society.
- (ccc) First Nations communities historically, and today, are disproportionately affected by pollution from industrial developments. Highly polluting facilities have been, and continue to be sited in close proximity to First Nation reserves.

- (ddd) The Applicants are disproportionately affected by air contaminant releases in Chemical Valley, including the pollution released in accordance with the Decision of the Director.
- (eee) Aamjiwnaang is the closest community to the Respondent Suncor's facility, and the Applicant Ada Lockridge lives in one of the homes closest to the refinery.
- (fff) As members of Aamjiwnaang, the Applicants and their families have lived in the community for generations and intend to live there for generations to come. In this respect, they rely on the Director and the Minister to ensure that cumulative effects are taken into account in the granting of pollution approvals. If this is not undertaken, they are doomed to an unending cycle of pollution exposures and health risks.
- (ggg) The pollution released in Chemical Valley is known to pose significant risks through generational impacts, whereby health effects are passed on from one generation to the next. The Applicants can escape this air pollution, and its associated health risks, only at a great personal cost.
- (hhh) For the Applicants, their traditional lands are irreplaceable. Moving off-reserve to avoid the pollution regulated by the Director and the Minister constitutes a profound cultural dislocation.
- (iii) Pollution approved by the Respondent has had a profound impact on the Applicants' ability to carry out traditional cultural activities such as hunting, fishing, medicine gathering, and ceremonial activities which have been consistently impacted and degraded by the heavy presence of industry in Chemical Valley.

- (jjj) As a result of the cumulative effects of pollution approved in Chemical Valley, and the economic and cultural barriers to relocation off-reserve, the Applicants bear a disproportionate burden of the significant adverse health impacts resulting from the pollution approved by the Director.
- (kkk) The Director's approval of additional pollution releases in Sarnia under the *EPA* infringes the Applicants' rights under sections 7 and 15(1) of the *Charter*.
- (lll) The Director's failure to consider and alleviate cumulative effects in approving pollution under the *EPA* infringes the Applicants' rights under sections 7 and 15(1) under the *Charter*.
- (mmm) The Minister's duty under section 11 of the *EBR* must be interpreted consistently with the *Charter*.
- (nnn) The Minister's application of the *EBR* has failed to ensure that cumulative effects are considered by the Director consistent with the *Charter*. This failure infringes the Applicants' rights to life, liberty and security of person as guaranteed by section 7 of the *Charter*, and their equality rights under section 15(1) of the *Charter*.
- (ooo) *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c II, sections 7, 15, 24 and 52.
- (ppp) *Environmental Protection Act*, RSO 1990, c E.19.
- (qqq) *Environmental Bill of Rights, 1993*, SO 1993, c 28.
- (rrr) *Judicial Review Procedure Act*, RSO 1990, c J.1.
- (sss) *Courts of Justice Act*, RSO 1990, c C.43.

(ttt) *Rules of Civil Procedure*, RRO 1990, Reg 194.

(uuu) Such further and other grounds as counsel may advise and this Honourable Court may deem just.

3. The following documentary evidence will be used at the hearing of the application:

(a) The affidavit of Ada Lockridge, to be sworn.

(b) The affidavit of Ronald Plain, to be sworn.

(c) The affidavit of Dr. Elaine MacDonald, to be sworn.

(d) The record of decision of the Director.

(e) Such other affidavit material and evidence as counsel may advise and this Honourable Court may deem proper.

October 29, 2010
(Amended January 10, 2012)

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Court File No:

528/16

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding Commenced at Toronto

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