Court File Number: T-1422-13

FEDERAL COURT

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

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 Courts Rules and serve it on the applicants' 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 Courts 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.

AUG 23 2013

Date: _____

Issued by: _____

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APPLICATION

This is an application for judicial review challenging the failure of the Minister of Health, or her delegate, to perform mandatory statutory duties under subsections 17(2) and (5) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"). Relatedly, this application challenges the unreasonable delay of the Minister of Health, or her delegate, to perform those mandatory duties within a reasonable time as required by subsection 17(5). There is no file or reference number.

On October 15, 2012, the applicants submitted a request to the Minister of Health to initiate mandatory special reviews, as required under subsection 17(2) of the *PCPA*, of the registration of the pest control products containing 30 active ingredients that have been prohibited by member countries of the Organisation for Economic Co-operation and Development ("OECD") for environmental or health reasons.

As of August 23, 2013, over ten months later, the Minister of Health or her delegate has unlawfully failed to decide "within a reasonable time" after receiving the applicants' request to initiate these mandatory special reviews, as required under subsection 17(5) of the *PCPA*, in relation to 26 of these 30 active ingredients.

The applicants apply for the following orders:

1. An order declaring that the Minister of Health or her delegate has failed, refused and unreasonably delayed the performance of her mandatory duty to initiate a special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

2. An order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate special reviews, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

3. In the alternative to the relief sought at paragraph (2), an order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately determine whether special reviews must be initiated, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

4. An order declaring that the matter in respect of which relief is sought at paragraphs (1), (2) and (3) is limited to a single order; or, in the alternative, an order allowing this matter to be the subject of a single application for judicial review pursuant to Rule 302 of the *Federal Courts Rules.*

5. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this application be consolidated or heard together with three other closely related applications issued by these applicants on or about August 23, 2013

6. An order requiring the respondent to pay the applicants' costs of this application.

7. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing s. 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to Health Canada's Pest Management Regulatory Agency (the "Agency"). The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA.*

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA.*

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review, which share common parties, legal issues and factual issues.

7. The four applications arise out of the applicants' request on October 15, 2012 to the Minister of Health. That request addressed 30 active ingredients contained in pest control products registered for use in Canada. This application primarily seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate special reviews in relation to 26 of the 30 active ingredients. The other three applications seek orders in the nature of *certiorari* quashing the Agency's decisions refusing to initiate special reviews in relation to 3 of those 30 active ingredients, and in the nature of *mandamus* requiring the Minister or her delegate to initiate special reviews in relation to those 3 of 30 active ingredients.

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations of whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

    b. an active ingredient that is used to manufacture anything described in paragraph (*a*); or

    c. any other thing that is prescribed to be a pest control product.

10. An "active ingredient" is defined, in section 2, to mean a component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency to initiate a special review of registered pest control products containing an active ingredient when an OECD country prohibits all uses of that active ingredient for health or environmental reasons.

13. If an active ingredient in a pest control product registered for use in Canada has been banned by an OECD country for all uses for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty in subsection 17(2) is not limited by subsection 17(1) or section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate special review under subsection 17(2) is not limited by section 18 of the *PCPA*. Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has requested that the Agency initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review, and to respond to the person with written reasons for its decision, within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries, for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that at the time of the request these 30 active ingredients were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information legally irrelevant to a determination under subsection 17(2) — such as underlying scientific studies relied on by OECD countries when banning active ingredients for environmental or health reasons, or any previous evaluations by the Agency.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of the request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health and advising that the applicants would be notified, in due course, of the Agency's determination.

The Agency delayed for over nine months, until July 2013, before making only two decisions in relation to only two of 30 active ingredients

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate the anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied, acknowledging receipt of the applicants' letter dated February 27, 2013, although it did not indicate any date by which it would respond to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly asserted that, as a precondition to determining if a special review must be initiated, the Agency was first required to go behind the OECD countries' regulatory decisions, by gathering and reviewing the scientific reviews forming the basis for those decisions. It further incorrectly asserted that the Agency was first required to investigate previous Canadian regulatory decisions and whether the OECD countries' decisions were based on "new" scientific evidence.

30. On June 11, 2013, the Agency wrote to the applicants, advising that it would notify them of *some* of its decisions for the 30 ingredients in early July 2013.

31. On July 9, 2013, the applicants wrote the Agency to express concern about its delay in determining that it must initiate special reviews under subsection 17(2).

32. On July 24, 2013, more than nine months after the applicants' request, the Agency advised that it was refusing to initiate special reviews of trifluralin and chlorthal-dimethyl. While not disputing that the two active ingredients are banned in OECD countries for all uses for environmental or health reasons, the Agency nonetheless concluded that special reviews were "not warranted" under subsection 17(2).

33. These two decisions refusing to initiate special reviews of pest control products containing trifluralin and chlorthal-dimethyl are the subject of two separate, closely related applications for judicial review, which the applicants will seek to consolidate or have heard together and with the instant application.

34. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. As in the Agency's March 2013 Letter, the Agency set out processes that it purportedly must follow in making determinations under subsection 17(2). The Agency incorrectly asserted that, as a precondition to determining whether it must initiate special reviews under subsection 17(2), it must first obtain and review the scientific reviews supporting the OECD countries' decisions. It also incorrectly relied on section 18 of the *PCPA* to justify its delay in initiating special reviews.

The Agency delayed for almost ten months, until August 2013, before making two additional decisions, in relation to another two of the 30 active ingredients

35. On August 9, 2013, almost ten months after the applicants' request, the Agency advised the applicants of its decision to refuse to initiate special reviews of bifenthrin and trichlorfon.

36. While not disputing that trichlorfon is prohibited in OECD countries for all uses for environmental or health reasons, the Agency nonetheless concluded that a special review of the registration of the pest control products registered in Canada that contain trichlorfon was "not warranted" under subsection 17(2).

37. The Agency's refusal to initiate a special review of the registration of pest control products containing trichlorfon is the subject of a separate application for judicial review (which the applicants will seek to consolidate or have heard together with their applications on trifluralin and chlorthal-dimethyl, and with this application).

38. The applicants do not challenge the Agency's decision refusing to initiate a special review of pest control products containing bifenthrin. In July 2012, the applicants had completed their regulatory research for their special review request. In August 2012, the European Union Pesticides Database was updated. This update disclosed that the European Union had removed its prohibition on bifenthrin in July 2012. Thus, as of October 15, 2012, when the applicants made their request, a special review of registered pest control products containing bifenthrin was no longer legally required pursuant to subsection 17(2).

For the remaining 26 active ingredients at issue, the Agency has not yet initiated mandatory special reviews of pest control products

39. As of August 23, 2013, the Agency has yet to initiate, or to decide whether to initiate, mandatory special reviews of the pest control products containing the remaining 26 active ingredients at issue in the applicants' request.

40. As of August 23, 2013, the Agency has not communicated any dates by which it will initiate, or decide whether to initiate, the mandatory special reviews of the pest control products containing the remaining 26 active ingredients.

The Agency has unreasonably delayed initiating mandatory special reviews required by subsection 17(2)

41. Subsection 17(5) of the *PCPA* provides that, within a reasonable time after receiving a request, the Minister shall decide whether to initiate a special review and shall respond to the request with written reasons for her decision.

42. Whether an administrative decision-maker has failed to perform a duty within a reasonable time depends on the time inherently necessary to make the decision, the causes of the delay and the impact of the delay.

The time inherently necessary to make the decision and provide written reasons

43. Parliament understood that the Agency would *complete* special reviews, including the considerations and processes required by sections 18 and 19, and consultation of the applicants and others required by section 28, within a year. This intention would be defeated if the Agency were permitted to take nearly a year, or more, to simply determine whether to *initiate* special reviews, as has occurred here.

44. Where a request to initiate a special review is specifically based on the conditions set out in subsection 17(2), the time inherently required by the Agency is short.

45. The only three facts that the Agency must ascertain—indeed the only facts that the Agency may lawfully consider—in determining whether it is legally required under subsection 17(2) to initiate a special review of registered pest control products containing a certain active ingredient are:

    a. whether the active ingredient is contained in pest control products that are registered in Canada;

    b. whether an OECD member country prohibits all uses of the active ingredient at issue; and

    c. whether that prohibition is for health or environmental reasons or both.

46. To ascertain these two facts, the Agency must engage in a straightforward, factual confirmation of the status and content of OECD countries' regulatory decisions. The Agency must obtain and read the relevant decisions, to confirm that the active ingredients are prohibited for all uses and for environmental or health reasons.

47. Here, the applicants' request provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.

48. Given the simple nature of the factual confirmation required by subsection 17(2), in these circumstances, the inherent time required for the Agency to determine whether to initiate a special review of the registered pest control products containing the 30 active ingredients at issue is no more than two months. Further, the inherent time required by the Agency to provide the applicants with written reasons of its decision is no more than three months from the date of their request.

The causes of delay

49. The Agency has not provided any valid or lawful justification for its delay. To the contrary, the cause of delay is the Agency's unlawful interpretation of the *PCPA*.

50. As the applicants allege in closely related applications for judicial review, the Agency has unlawfully insisted on examining scientific evidence underlying the OECD countries' regulatory decisions and on assessing if that evidence informed the Agency's earlier re-evaluation decisions. These considerations and processes are legally irrelevant to the Agency's determinations under subsection 17(2).

51. Relatedly, as the applicants have alleged in their related applications, in determining whether special reviews are legally required under subsection 17(2), the Agency unlawfully relies on section 18 to impose additional, time-intensive considerations as purported pre-conditions to initiating a special review. By engaging in considerations and processes that have no lawful application until *after* a special review has been initiated, the Agency causes delay.

52. The applicants did not cause or contribute to the Agency's delay in any way.

The impacts of delay

53. The Agency's delay in initiating special reviews—and thus in determining at the conclusion of those special reviews whether the pest control products should remain registered in Canada—potentially imposes serious impacts on Canadians.

54. Where the Agency delays initiating mandatory special reviews of pest control products containing active ingredients banned by OECD countries for environmental or health reasons, the Agency increases the chance that Canadians will face unacceptable health risks from these ingredients. It likewise increases the likelihood of unacceptable environmental risks to biodiversity in Canada.

The Agency has unreasonably delayed and failed to act within a reasonable time

55. In light of relevant factors including:

    - the inherently short time needed to make decisions under subsection 17(2),
    - the fact that the cause of delay is the Agency's unlawful consideration of irrelevant factors under subsection 17(2), and
    - a potentially serious impact of delay on Canadians and their biodiversity,

    the Agency's delay in initiating mandatory special reviews under subsection 17(2) constitutes unreasonable delay.

56. In the circumstances, the Agency required no more than two months to determine that it was legally obliged, under subsection 17(2) of the *PCPA*, to initiate special reviews of registered pest control products containing 29 of the 30 active ingredients addressed in the applicants' special review request.

57. In the circumstances, the Agency required no more than three months to respond to the applicants, under subsection 17(5) of the *PCPA*, with written reasons for its mandatory decision to initiate special reviews of registered pest control products containing 29 of the 30 active ingredients addressed in the applicants' request.

The Agency's unreasonable delay necessitates the relief sought by the applicants

58. The Agency is under a public legal duty to initiate special reviews of these active ingredients, a duty that it owes both to the public and to these applicants.

59. The applicants have a clear right to performance of that duty, including as a result of their special review request made on October 15, 2012.

60. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus*.

61. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has jurisdiction to hear this application and to grant the relief sought.

62. In particular, this Court has the express jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate mandatory special reviews, under subsection 17(2) of the *PCPA*, of pest control products containing any of the remaining 26 active ingredients at issue.

63. In addition, this Court has the express jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to immediately decide whether it is obliged to initiate special reviews, under subsection 17(2) of the *PCPA*, of pest control products containing any of the remaining 26 active ingredients at issue.

64. The applicants further rely on the *Federal Courts Rules*, the *PCPA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

1. An affidavit of Dr. Elaine MacDonald, on behalf of the Applicants, to be served;
2. An affidavit of Mara Kerry, on behalf of David Suzuki Foundation, to be served;
3. An affidavit of Nadine Bachand, on behalf of Équiterre, to be served; and
4. Such additional materials as counsel may advise and the Court may allow.

August 22, 2013

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