

Court File Number: T-1423-13



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.

Date: AUG 23 2013

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APPLICATION

This is an application for judicial review seeking to quash the unlawful decision of the Pest Management Regulatory Agency (“the Agency”) to refuse to initiate a mandatory special review, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 (“*PCPA*”), of the registration of pest control products containing chlorthal-dimethyl. The Agency communicated this decision to the applicants in writing on July 24, 2013.

Reference
Number

The application further seeks to order the Minister of Health or the Agency to initiate a special review of registered pest control products containing chlorthal-dimethyl.

2012-4494

AM

The applicants apply for the following orders:

1. An order declaring that the Agency erred in law when it refused to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.
2. An order in the nature of *certiorari* quashing and setting aside the Agency’s decision refusing to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.
3. An order in the nature of *mandamus* ordering the Minister of Health or her delegate the Agency to immediately initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.
4. 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.
5. An order requiring the respondent to pay the applicants’ costs of this application.
6. 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 section 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to 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. These four applications share common parties, legal issues and factual issues.
7. The four applications all arise out of the applicants' request on October 15, 2012, to the Minister of Health. That request addressed 30 active ingredients contained in various registered pest control products. This application regarding chlorthal-dimethyl, and two other applications regarding trifluralin and trichlorfon, seek orders in the nature of *certiorari* and *mandamus*, quashing the Agency's decisions refusing to initiate mandatory special reviews in relation to these 3 of the 30 active ingredients and requiring the Minister or her delegate to initiate these special reviews. The fourth application seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate mandatory special reviews in relation to 26 of the 30 active ingredients.

The Agency assigned the closely related decisions the same reference number.
AM

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

8. The primary, overarching objective of the Agency in administering 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 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, when an OECD country prohibits all uses of an active ingredient for health or environmental reasons, to initiate a special review of registered pest control products containing that active ingredient.
13. If an active ingredient in a pest control product that is 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 under subsection 17(2) to initiate a special review is not limited by subsection 17(1) or by 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 a 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 submitted a request to the Agency to 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 must 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, in relation to chlorthal-dimethyl

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 these 30 active ingredients, including chlorthal-dimethyl, 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, including for chlorthal-dimethyl, and to the supporting reasons.
24. The applicants' request did not provide the Agency with any information that is legally irrelevant to a determination under subsection 17(2)—such as scientific studies relied on by OECD countries when banning these active ingredients for environmental or health reasons or any previous re-evaluations by the Agency.
25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of their 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.

In July 2013, the Agency refused to initiate a mandatory special review in relation to chlorthal-dimethyl

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. It did not indicate any date by which it anticipated responding 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 suggested that, as a precondition to determining if a special review must be initiated under subsection 17(2), the Agency was required to go behind OECD countries' regulatory decisions by gathering and reviewing the scientific reviews forming the basis for those decisions. It also 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* 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 deciding to initiate special reviews under subsection 17(2).
32. On July 24, 2013, the Agency advised the applicants of its decision to refuse to initiate any special review in relation to chlorthal-dimethyl, despite accepting that this active ingredient is prohibited in OECD countries for all uses and for environmental or health reasons.
33. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. In its letter, the Agency again set out processes that it purportedly must follow in making determinations under subsection 17(2). As in the Agency's March 2013 Letter, the Agency incorrectly asserted that it must go behind the OECD countries' decisions and obtain the detailed scientific reviews supporting those decisions. The Agency also incorrectly relied on section 18 to justify its consideration of information that is legally irrelevant to subsection 17(2).

The Agency's refusal to initiate a special review under subsection 17(2) of the *PCPA* of registered pest control products containing chlorthal-dimethyl was unlawful

34. 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.
35. To ascertain these 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.

36. In their request for special review, the applicants provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.
37. While not disputing that chlorthal-dimethyl is contained in pest control products registered in Canada, is prohibited in OECD countries for all uses and that this ban is for environmental or health reasons, the Agency nonetheless concluded that a special review was “not warranted” under subsection 17(2).
38. In reaching this conclusion, the Agency made numerous legal errors.

The Agency misdirected itself on what information it may lawfully consider

39. The Agency insisted on examining scientific evidence underlying the OECD countries’ regulatory decisions and on assessing whether and how that evidence may have informed the Agency’s own earlier re-evaluation decision in 2008.
40. In so doing, the Agency misdirected itself and erred in law. These considerations are legally irrelevant to the Agency’s determination of whether to initiate a special review under subsection 17(2).
41. Subsection 17(2) permits the Agency to consider regulatory evidence of whether an OECD country has made a regulatory decision to ban pest control products. It does not permit the Agency to evaluate scientific evidence concerning the risks and acceptability of those pest control products—this evaluation is the objective of the special review itself.
42. Only *after* a special review has been initiated under subsection 17(2), and during the course of the special review, is the Agency permitted to consider scientific evidence and other information relevant to evaluating whether pest control products containing chlorthal-dimethyl should continue to be registered in Canada.

The Agency prejudged the outcome of a mandatory special review and deprived the applicants of their right to be consulted about the outcome of that special review

43. Pursuant to sections 19 and 28, the Agency is required to evaluate risks and acceptability of pest control products *during* its special review of the registration of those pest control products, as initiated under subsection 17(2).
44. In concluding that a special review of registered pest control products containing chlorthal-dimethyl was “not warranted,” the Agency relied on its own earlier

regulatory decisions regarding the registration of such pest control products. Specifically, the Agency relied on its own re-evaluation decision from 2008.

45. In so doing, the Agency unlawfully prejudged the outcome of a mandatory special review of the registration of pest control products containing chlorthal-dimethyl.
46. Further, the Agency unlawfully deprived the applicants of their statutory rights under sections 18, 19 and 28 to participate in and seek to influence the outcome of that special review, including by opposing the continued registration of these pest control products.
47. The Agency has a legal duty to consult the public in any special review of registered pest control products, and the applicants are legally entitled to be consulted by the Agency in a special review of registered pest control products containing chlorthal-dimethyl, pursuant to subsection 18(4) and section 28.
48. In that consultation, the applicants would be entitled to provide the Agency with existing or new information about the health and environmental risks of registered pest control products containing chlorthal-dimethyl. Specifically, the applicants would be entitled to provide existing or new information showing that these pest control products present unacceptable risks to Canadians or to their biodiversity.
49. The applicants would also be entitled to explain why the Agency should reconsider and rescind its 2008 re-evaluation decision allowing the registration of these pest control products and why it should cancel or amend their registration.

The Agency erroneously relied on section 18 to limit its duty under subsection 17(2)

50. In refusing to initiate a special review of pest control products containing chlorthal-dimethyl, the Agency relied on subsection 18(1). Specifically, the Agency asserts that, for the purpose of subsection 18(1), it must first engage in time-intensive analysis of various information underlying OECD countries' decisions before it can initiate any special review under subsection 17(2).
51. In relying on compliance with section 18 as a precondition to initiating a special review under subsection 17(2), the Agency errs in law. Section 18 does not apply until after a special review has been initiated. Rather, it sets out procedural duties that the Agency must comply with after it has initiated a special review.

The Agency misdirected itself on the required subject or focus of a special review

52. The Agency concluded that a special review of the active ingredient chlorthal-dimethyl was not warranted. Its decision letter of July 24, 2013 did not ask or answer whether a special review of the registered pest control products containing chlorthal-dimethyl was required.
53. In so doing, the Agency misdirected itself as to the correct subject matter or focus of a special review under section 17 and erred in law. A special review does not evaluate the active ingredient itself. Rather, a special review evaluates the registered pest control products containing that active ingredient.

The Agency's errors of law invalidate its decision

54. As registered pest control products containing chlorthal-dimethyl are prohibited by OECD countries for all uses for environmental reasons, the Agency did not have any discretion or authority, under subsection 17(2) of the *PCPA*, to conclude that special review of these pest control products was “not warranted.”
55. The Agency erred in law and misdirected itself in deciding that a special review of the registration of pest control products containing chlorthal-dimethyl was “not warranted” under subsection 17(2) of the *PCPA*. In refusing to initiate a mandatory special review under subsection 17(2), the Agency acted unlawfully.

The applicants are entitled to the relief sought

56. 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.
57. 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.
58. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus* or *certiorari*.
59. 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.
60. In particular, this Court has the jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing chlorthal-dimethyl.

61. In addition, this Court has the jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to declare invalid or unlawful, and to quash or set aside, the Agency's refusal to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing chlorthal-dimethyl.
62. 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;
4. Material requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to the applicants and to the Court pursuant to Rule 318; and
5. Such additional materials as counsel may advise and the Court may allow.

Pursuant to Rule 317 of the *Federal Courts Rules*, the applicants request the Minister of Health or her delegate send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Minister of Health or her delegate to the applicants and to the Registry:

1. The materials considered and relied on by the Agency in determining that a special review in relation to chlorthal-dimethyl was not warranted under subsection 17(2) of the *PCPA*, including but not limited to:
 - i. The longer, underlying analysis upon which the Agency based the "Summary of Analysis" that it provided to the applicants as Attachment 1 to its decision letter of July 24, 2013;
 - ii. All "relevant information" on which the Agency relied in conducting its analysis as referenced by the Agency in its decision letter of July 24, 2013, including but not limited to:
 - the 1998 US EPA assessment and the 2004 US EPA assessment;
 - any records containing the Agency's analysis described at paragraph 5 of "Attachment 1 – Summary of Analysis for Chlorthal-dimethyl" (as the analysis described at paragraph 5 does not appear in either PRVD 2008-18 or RVD2008-30, the two re-evaluation reports that are in the possession of the applicants); and

- any communications between the Agency, on one hand, and registrants, stakeholders, other agencies, or OECD member countries, on the other, that the Agency relied on in deciding that a special review in relation to chlorthal-dimethyl was not warranted.

iii. For chlorthal-dimethyl, any translations of scientific reviews forming the basis of the OECD countries' decisions, as referenced in the Agency's March 2013 Letter.

August 22, 2013



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