Court File Number: T-426-15

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
de bene esse

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: MAR 19 2015

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APPLICATION

This application for judicial review seeks an order requiring the Minister of Health or her delegate to perform a mandatory duty, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"), to initiate a special review of the registration of pest control products containing difenoconazole. The application is commenced *de bene esse* in order to safeguard the rights of the applicants.

On October 15, 2012, the applicants requested the Minister of Health to initiate special reviews of the registration of pest control products containing 30 active ingredients. When the Minister failed to initiate, *inter alia,* a special review of pest control products containing difenoconazole, the applicants commenced a judicial review application on August 23, 2013. That application was then consolidated with the applicants' three closely-related applications, under file no. T-1422-13 (the "Consolidated Proceeding").

On December 30, 2013, the Pest Management Regulatory Agency ("the Agency") initiated 23 mandatory special reviews, including a special review in relation to difenoconazole. Consequently, the Consolidated Proceeding was put into abeyance through the Abeyance Order rendered by Prothonotary Aalto on May 15, 2014.

On February 19, 2015, the Agency unlawfully reconsidered, reversed or cancelled its decision to initiate special review of pest control products containing difenoconazole.

The applicants apply for the following orders:

1. An order declaring that the Agency, as delegate of the Minister of Health, was *functus officio* or acted without jurisdiction when it purported to reconsider, reverse or cancel its statutory decision, made on December 30, 2013, to initiate a special review of registered pest control products containing difenoconazole.

2. An order declaring that the Agency's decision purporting to reconsider, reverse or cancel its statutory decision, made on December 30, 2013, to initiate a special review of registered pest control products containing difenoconazole is of no force or effect.

3. Additionally, an order declaring that the Minister of Health or her delegate has unlawfully failed and refused to perform her duty to initiate a special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing difenoconazole.

4. Additionally, an order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate a special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing difenoconazole.

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

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 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.

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

The related Consolidated Proceeding

4. On October 15, 2012, the applicants wrote to the Minister of Health, under subsection 17(4) of the *PCPA*. They requested that she initiate, pursuant to subsection 17(2), special reviews of the registration of pest control products containing 30 active ingredients that were prohibited for all uses, for environmental or health reasons, by member states of the Organization for Economic Co-operation and Development ("OECD"). Among the 30 special reviews requested was a special review of registered pest control products containing the active ingredient difenoconazole.

5. Between July 24, 2013 and August 9, 2013, the Agency refused to initiate special reviews of registered pest control products containing the three active ingredients trifluralin, chlorthal-dimethyl and trichlorfon.

6. Between August 23 and 26, 2013, the applicants commenced four closely-related applications for judicial review. Three applications challenge refusals by the Agency to initiate special reviews of registered pest control products containing trifluralin, chlorthal-dimethyl and trichlorfon respectively. In the fourth application, the applicants primarily seek an order in the nature of *mandamus* requiring the Minister or her delegate to initiate special reviews in relation to 26 active ingredients – including a special review in relation to difenoconazole.

7. On September 24, 2013, the Court consolidated the four applications into the Consolidated Proceeding.

8. In the fall of 2013, the applicants served and filed their supporting affidavit evidence in the Consolidated Proceeding.

On December 30, 2013, the Agency made final decisions to initiate 23 special reviews

9. On December 30, 2013, in response to the Consolidated Proceeding and pursuant to subsections 17(2) and 17(5) of the *PCPA*, the Agency decided to initiate 23 special reviews of registered pest control products containing 23 active ingredients, including a special review in relation to difenoconazole.

10. Also on December 30, 2013, the Agency initiated these 23 special reviews, including the difenoconazole special review. It did so under subsection 18(1) of the *PCPA,* by delivering a notice in writing to the registrants explaining the reasons for initiating these special reviews.

11. The Agency's decisions to initiate 23 special reviews, including its decision to initiate the difenconazole special review, were final decisions.

12. The Agency's initiations of these 23 special reviews, including its initiation of the difenoconazole special review, were final actions.

13. On January 9, 2014, the Agency provided written reasons to the applicants, pursuant to subsection 17(5) of the *PCPA*, for its decision to initiate 23 special reviews, including a special review of pest control products containing difenonoconazole.

14. Subsequently, the Consolidated Proceeding was put into abeyance under the terms of an Order issued on May 15, 2014 by Prothonotary Aalto ("the Abeyance Order").

15. Paragraph 4 of the Abeyance Order permits the applicants to take the Consolidated Proceeding out of abeyance for any reason and at any time, with ten days' notice in writing to the respondent and to the Court. Paragraph 3 of the Abeyance Order requires the respondent to notify the applicants if it reverses or cancels its decision to initiate any of those 23 special reviews.

16. Pursuant to the Abeyance Order, the applicants intend to put the respondent and the Court on notice of their intention to re-activate the Consolidated Proceeding.

17. Nevertheless, in order to maintain their rights should the respondent attempt to resurrect arguments that it made unsuccessfully to Prothonotary Aalto in April 2014, the applicants commence this Notice of Application *de bene esse*.

Subsection 17(2) of the *PCPA* imposes a duty to initiate special reviews

18. 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 objective must guide all decisions made under the *PCPA*, including the Agency's determinations of whether it must initiate special reviews under subsection 17(2).

19. Subsection 17(2) requires the Agency to initiate a special review of registered pest control products containing an active ingredient when an OECD member country prohibits all uses of that active ingredient for health or environmental reasons.

20. If an active ingredient contained in a pest control product registered for use in Canada is prohibited by an OECD member country for all uses for environmental or health reasons, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review of registered pest control products containing that active ingredient, or to conclude that a special review is "not required".

21. 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.

22. 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.

On February 19, 2015, the Agency reconsidered, reversed or cancelled its decision to initiate a special review of registered pest control products containing difenoconazole

23. On February 19, 2015, the Agency purported to reconsider, reverse or cancel its statutory decision, made on December 30, 2013 under subsection 17(2) of the *PCPA*, to initiate a special review of registered pest control products containing difenoconazole.

24. The Agency communicated this decision on February 19, 2015 in two ways. First, it published its decision purporting to reconsider, reverse or cancel the difenoconazole special review to its website; secondly, it sent the applicants a letter notifying them of its decision and reasons (together, the "February 19, 2015 Decision Documents").

25. In its February 19, 2015 Decision Documents, the Agency indicated its position that the special review of registered pest control products containing difenoconazole is no longer required under subsection 17(2) of the *PCPA,*

26. The Agency based these statements on its opinion that not all uses of difenoconazole are prohibited in Norway. The Agency reached this opinion because, in 2013, Norway had granted approval to import seed pre-treated with difenoconazole.

27. In reaching this opinion, the Agency misrepresented contrary information that had been provided by the Norwegian Food Safety Authority. The Norwegian Food Safety Authority had provided contrary information in a letter to the Agency dated May 15, 2014, which it also enclosed with an email on September 29, 2014.

28. Specifically, in its May 15, 2014 letter, the Norwegian Food Safety Authority explained that Norwegian law does not regulate treated seeds as pesticides but rather regulates them as seeds. It further explained that its seed import decision does not mean that Norway still has any uses of difenoconazole allowed in Norway. It explained that, to the contrary, Norway's decision from 1998 was "still in effect" such that it remains prohibited to sell, stock, store or use difenoconazole as a pesticide in Norway.

29. In its February 19, 2015 Decision Documents, the Agency implicitly rejected the Norwegian Food Safety Authority's own explanation of Norway's laws and regulations. It appears that the Agency did so without considering any other

opinion or information that identified the relevant Norwegian laws and regulations and that analyzed how those legal provisions apply.

30. In its February 19, 2015 Decision Documents, the Agency misleadingly failed to disclose that the Norwegian Food Safety Authority had advised that all uses of difenoconazole are prohibited in Norway. Further, the Agency misleadingly implied that its own opinion, that not all uses of difenoconazole are prohibited in Norway, had been "verified" with the Norwegian Food Safety Authority.

31. Regarding the facts pleaded at paragraphs 27-30 of this Notice of Application, the Agency has purported to reserve a right to claim that these facts are "confidential". The applicants disagree that these facts are "confidential".

In purporting to reconsider, reverse or cancel its December 30, 2013 decision, the Agency was *functus officio*

32. Consistent with the common law doctrine of *functus officio,* administrative decision-makers do not retain any inherent jurisdiction to reconsider or vary a final decision after it has been made. Rather, apart from limited exceptions, administrative decisions-makers may only lawfully reconsider, reverse or cancel a final statutory decision if they have been granted statutory authority to do so.

33. The *PCPA* provides no statutory authority permitting the reconsideration of a decision to initiate a special review made under subsections 17(2) and 17(5). Nor does the *PCPA* provide any statutory authority permitting the reversal of the initiation of a special review under subsection 18(1).

34. In contrast, the *PCPA* contains provisions, at sections 35-39, expressly enabling reconsideration of various other decisions under the Act. The type of statutory decisions that may be subject to this reconsideration are referred to in paragraphs 28(1)(a) or (b). For example, the *PCPA* enables reconsideration of decisions about the registration of a pest control product, made pursuant to section 21, resulting from the completion of a special review [s. 28(1)(b)].

35. By necessary implication, no implied statutory authority exists for the Agency to reconsider, reverse or cancel a decision to initiate a special review pursuant to subsection 17(5) of the *PCPA.*

36. Likewise, no implied statutory authority exists for the Agency to reconsider, reverse or cancel the initiation of a special review under subsection 18(1) of the *PCPA.*

37. On December 30, 2013, the Agency had made a final decision to initiate a special review in relation to difenoconazole. Also on December 30, 2013, the Agency initiated this special review. On January 9, 2014, the Agency provided the applicants with reasons for its decision to initiate this special review.

38. Therefore, by January 9, 2014, the Agency had taken all the legally required steps to perfect and to implement its decision to initiate a special review of products containing difenoconazole.

39. Having perfected and implemented its decision to initiate the difenconazole special review, and lacking statutory authority to reconsider, reverse or cancel its decision, the Agency was *functus officio* after January 9, 2015. After January 9, 2015, the Agency had no jurisdiction to reconsider, reverse or cancel that decision.

40. The Agency was *fuctus officio* and without jurisdiction when it purported, on February 19, 2015, to reconsider, reverse or cancel its decision to initiate a special review of registered pest control products containing difenoconazole.

41. The Agency had no jurisdiction to revisit its decisions to initiate the 23 special reviews, including the difenoconazole special review, for the reasons that the Agency changed its mind, made a legal error within its jurisdiction or because there had been a change of circumstances.

In purporting to reconsider, reverse or cancel its December 30, 2013 decision, the Agency acted unlawfully

42. In Canada, treated seeds are not regulated as pest control products under the *PCPA.*

43. Rather, treated seeds are regulated under the *Seeds Act,* RSC 1986,c S-8 and the Seeds Regulations, CRC, c 1400.

44. Treated seeds are expressly exempted from the application of the *PCPA* by the Pest Control Products Regulations, SOR/2006-124 (the "PCP Regulations").

45. More specifically, paragraph 4(1)(b) and Item 3 of Schedule 2 of the PCP Regulations exempt treated seeds from the prohibition in section 6 of the *PCPA,* which provides that no person shall, *inter alia,* use a pest control product that is not registered under the *PCPA.*

46. Consequently, treated seeds are exempt from processes under the *PCPA* that apply only to pest control products, such as registration, evaluation and reporting processes aimed at preventing unacceptable risks to people and the environment.

47. In Canada, under the *PCPA,* the import or sowing of treated seed does not comprise the use of an active ingredient specifically or the use of a pest control product more generally.

48. In Canada, under the *PCPA,* the import or sowing of seed pre-treated with a pest control product containing difenoconazole does not constitute the use of difenoconazole or the use of a pest control product containing difenoconazole.

49. Since 1998, Norway has prohibited all uses of the active ingredient difenoconazole. In Norwegian law, as in Canadian law, treated seed is not a pest control product. In Norwegian law, as in Canadian law, the import or sowing of treated seed does not comprise the use of an active ingredient specifically or the use of a pest control product more generally.

50. On February 19, 2015, the Agency unlawfully reconsidered, reversed or cancelled its decision to initiate a special review of registered pest control products containing ingredient difenoconazole.

51. On February 19, 2015, the Agency incorrectly decided that the special review of registered pest control products containing difenoconazole "is no longer required" under subsection 17(2) of the *PCPA.*

52. In the alternative to the foregoing paragraph, on February 19, 2015, the Agency unreasonably decided that the special review of registered pest control products containing difenoconoazole "is no longer required" under subsection 17(2) of the *PCPA.*

53. The Agency's opinion that Norway has not prohibited all uses of difenoconazole was incorrect or unreasonable or both.

54. In reaching the opinion that Norway does not prohibit all uses of difenoconazole, the Agency unreasonably rejected the Norwegian Food Safety Authority's explanation that Norway does prohibit all uses of difenoconazole, without considering or having before it any other opinion or information identifying relevant Norwegian laws and regulations or analyzing how they apply.

55. In its February 19, 2015 Decision Documents, in misrepresenting and failing to disclose information that had been provided by the Norwegian Food Safety Authority explaining that all uses of difenoconazole are prohibited in Norway, the Agency acted in bad faith.

The Federal Court has the jurisdiction to grant the relief sought by the applicants

56. In the event that the Agency was *functus officio* or without jurisdiction, in purporting to reconsider, reverse or cancel its December 30, 2013 decision to initiate a special review of registered pest control products containing difenoconazole, the Court has the jurisdiction to declare that the Agency's February 19, 2015 decision is of no force or effect.

57. Alternatively, in the event that the Agency did have the jurisdiction to reconsider, reverse or cancel its December 30, 2013 decision, and its reconsideration was made in error or unreasonably, the Agency is under a public legal duty to initiate a special review of all registered pest control products containing difenoconazole. The Agency owes this duty both to the Canadian public generally and to these applicants specifically.

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

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

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

If necessary, this application, which is commenced *de bene esse,* will be supported by the following material:

1. An affidavit of Dr. Elaine MacDonald, on behalf of the applicants, to be served;
2. The affidavit materials served by the parties in the Consolidated Proceeding in file no. T-1422-13.

Rule 317 request

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

1. The materials considered and relied on by the Agency in purporting to reconsider, reverse or cancel its decision to initiate a special review of registered pest control products containing difenoconazole, including the ~~four~~ five "unpublished documents" relied on and cited by the Agency in its February 19, 2015 Decision Documents:
    a. Norway's 1998 comprehensive assessment of Divident, 37.5 LS – difenoconazole;
    b. Norway's 2010 Form for Notification Regulatory Action to Ban or Severely Restrict a Chemical – difenoconazole;
    c. An un-redacted copy of the September 29, 2014 e-mail sent to the Agency by the Norwegian Food Safety Authority;
        i. An un-redacted copy of the Norwegian Food Safety Authority's seed import decision of March 6, 2013, translated to English, which was attached to its September 29, 2014 email; and
        ii. An un-redacted version of the Norwegian Food Safety Authority's letter to the Agency of May 15, 2014, which was attached to its September 29, 2014 email.
2. The letters or e-mails by the Agency to the Norwegian Food Safety Authority, which elicited the May 15, 2014 letter and September 29, 2014 email in response.

March 19, 2015

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