



RM
145 Court File No. 575/18

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GREENPEACE CANADA (2471256 CANADA INC.)

Applicant

- and -

**MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS and
LIEUTENANT GOVERNOR IN COUNCIL**

Respondents

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW
(Application under s. 6(2) of the *Judicial Review Procedure Act*)**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before a single judge of the Divisional Court, sitting as a judge of the Superior Court of Justice, on Friday, September 21, 2018 at the place of hearing requested by the Applicant. The Applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

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 an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE

APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date Sept 11th 2018

Issued By



Local Registrar

Address of
court office

Divisional Court

Superior Court of Justice

Osgoode Hall

130 Queen Street West

Toronto, ON M5H 2N5

TO: MINISTER OF THE ENVIRONMENT, CONSERVATION AND
PARKS
Ministry of Environment, Conservation and Parks
Minister's Office
Ferguson Block, 11th Floor
77 Wellesley Street West
Toronto, Ontario
M7A 2T5

AND TO: LIEUTENANT GOVERNOR IN COUNCIL
Office of the Lieutenant Governor of Ontario
Queen's Park
111 Wellesley Street West
Toronto, Ontario
M7A 1A1

AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, ON
M7A 2S9

APPLICATION

1. Greenpeace Canada challenges:
 - a. The Minister of the Environment, Conservation and Parks' ("Minister") decision to exempt Ontario Regulation 386/18 ("Regulation") from the mandatory and customary public notice and comment process under s. 16(1) of the *Environmental Bill of Rights, 1993* ("EBR"), by resort to s. 30(1)(a) of the *EBR*, which was unreasonable and incorrect, procedurally unfair, and therefore unlawful;
 - b. The purported validity or *vires* of the Regulation, made by the Lieutenant Governor in Council, which has an inconsistent purpose with the *Climate Change Mitigation and Low-carbon Economy Act*, SO 2016, c 7 ("Act"), its enabling legislation; and
 - c. The Minister's failure to comply with the mandatory and customary public notice and comment process under s. 15(1) of the *EBR* in respect of Bill 4, *Cap and Trade Cancellation Act, 2018* ("Bill 4") that would repeal the Act, which failure was unreasonable and incorrect, procedurally unfair, and therefore unlawful.
2. The Regulation revoked the operational elements of Ontario's cap and trade system for reducing greenhouse gas emissions through allocation of allowances and credits, and criminalized any person transacting in those emissions and credits. Cabinet made the Regulation on June 29, 2018 and filed it on July 3, 2018. For the aforesaid

reasons, and as elaborated in this Application, it is defective on both procedural and substantive grounds.

3. Bill 4 would repeal the Act, including its legislated targets for greenhouse gas emission reductions. If enacted Bill 4 would permit government to lower the level of protection against climate change currently enjoyed by Ontarians.

RELIEF SOUGHT

4. The applicant Greenpeace Canada makes application for:
 - (a) Leave for this application to be heard on an urgent basis before a single judge of the Divisional Court sitting as a judge of the Superior Court of Justice;
 - (b) If necessary, an order abridging the time for service of this application;
 - (c) A declaration that the Minister's decision to invoke s. 30(1)(a) of the *EBR* for the reason that the "recent Ontario election" was "a process of public participation that [is] substantially equivalent to the process required under the *EBR*" was unreasonable and incorrect, procedurally unfair, and therefore unlawful;
 - (d) An order prohibiting the Minister from further relying on s. 30(1)(a) of the *EBR* to equate the recent Ontario election and the public notice and comment provisions of the *EBR* as substantially equivalent;

- (e) A declaration that the Minister's failure to comply with s. 16(1) of the *EBR* in respect of the Regulation was unreasonable and incorrect, procedurally unfair, and therefore unlawful;
- (f) An order quashing the Regulation as *ultra vires* the Act's purposes;
- (g) A declaration that the Minister's failure to comply with s. 15(1) of the *EBR* in respect of Bill 4 is unreasonable and incorrect, procedurally unfair, and therefore unlawful;
- (h) Costs of this application if the parties cannot agree on costs or, in the alternative, an order that the parties bear their own costs; and
- (i) Such further and other relief as counsel may advise and this Honourable Court may deem just.

GROUND

5. The grounds for the application are:

The Parties:

6. 471256 Canada Inc., doing business as Greenpeace Canada ("Greenpeace Canada"), is a non-profit environmental interest group which operates as the Canadian arm of the organization Greenpeace. Greenpeace Canada has worked extensively on climate change mitigation and adaptation initiatives in Ontario and has a long history of using and advocating for the proper use of the *EBR*.

7. Greenpeace Canada brings this Application because it has been denied its statutory right, pursuant to Part II of the *EBR*, to receive notice and give comment on the Ontario government's proposed:
 - a. regulatory repeal of the cap and trade program, via the Regulation; and
 - b. legislative repeal of the Act, via Bill 4.
8. In the alternative, Greenpeace Canada asserts public interest standing to bring this Application.

The *EBR*:

9. The listed purposes of the *EBR* are, *inter alia*, to protect and conserve the environment and to protect "the right to a healthful environment" by the means provided in the legislation. To fulfill its purposes the Act provides for "means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario" and "increased accountability of the Government of Ontario for its environmental-decision making".
10. Part II of the *EBR* gives both natural and legal persons the statutory right to participate in environmental decision-making in Ontario. It does so, *inter alia*, by requiring that the government provide public notice and receive public comment prior to taking environmentally significant decisions.
11. Ontario Regulation 73/94 (the "General Regulation") requires that proposals for regulations under the Act must pass through the public notice and comment process

under s. 16(1) of the *EBR* where there could be a significant effect on the environment.

12. Proposals for an Act must pass through the public notice and comment process under s. 15(1) of the *EBR* where there could be a significant effect on the environment and the Minister considers that the public should have an opportunity to comment on the proposal.
13. In determining whether a proposed regulation or Act could have a significant effect on the environment, the Minister is required to consider prescribed factors under s. 14 of the *EBR*.
14. *EBR* s. 30(1)(a) allows the Minister to exempt a proposal from the aforesaid provisions if the Minister concludes that another public participation process “that was substantially equivalent to” the *EBR* process has occurred.
15. Where the Minister has duly provided for public notice and comment, ss. 35-36 of the *EBR* require the Minister to consider the public’s comments in deciding the proposal and to provide reasons explaining how the comments impacted the decision.
16. Whenever decisions that might significantly affect the environment are made in the Ministry, s. 11 of the *EBR* requires the Minister to “take every reasonable step to ensure that the ministry statement of environmental values is considered”.

The Actual *EBR* Process in This Matter:

17. On June 29, 2018, the new Premier and government were sworn in. The Regulation was made that same day, and filed after the first Cabinet meeting on July 3, 2018.
18. The Minister did not post prior notice of the Regulation on the Environmental Registry, as required by *EBR* s. 16(1) for proposed regulations that could have a “significant effect” on the environment. This omission defeated the public notice and comment and decision-making procedures of Part II of the *EBR*.
19. On July 6, 2018, three days after the Regulation came into force, a notice appeared on the Environmental Registry that the Minister had decided to take an exception under s. 30(1)(a) of the *EBR*, for this stated reason:

“The Minister was of the opinion that the recent Ontario election was a process of public participation that was substantially equivalent to the process required under the *EBR* and that the environmentally significant aspects of the regulation were considered during that process because the government made a clear election platform commitment to end the cap and trade program.”
20. The Applicant asserts that the Minister’s decision to invoke the s. 30(1)(a) exception on the grounds that the “recent Ontario election” was “a process of public participation that was substantially equivalent to the process required under the *EBR*” was unreasonable and incorrect, and was therefore unlawful, and in contravention of the Applicant’s statutory rights under Part II of the *EBR*.
21. On July 25, 2018, the government introduced Bill 4 in the legislature.
22. The Minister did not post prior notice of Bill 4 on the Environmental Registry, as required by *EBR* s. 15(1) for proposed legislation that could have a “significant effect” on the environment and merited public consultation. This omission defeated

the public notice and comment and decision-making procedures of Part II of the *EBR*.

23. Moreover, there is no indication that the Minister acted under *EBR* s. 11 to consider the ministry statement of environmental values in respect of the Regulation or Bill
4. The Minister appears to have decided to omit this step.

The Regulation:

24. The purpose of the Regulation is to abolish, and indeed criminalize, the operational elements of Ontario's cap and trade program for greenhouse gas emissions.

Section 1 of the Regulation criminally prohibits all transactions of emissions allowances and credits. Section 2 revokes O Reg 144/16, which formerly contained the rules governing such transactions.

25. In contrast, the purpose statement of the Act as framed by the Legislature reads:

2 (1) Recognizing the critical environmental and economic challenge of climate change that is facing the global community, the purpose of this Act is to create a regulatory scheme,

(a) to reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy; and

(b) to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions in order to ensure the efficacy of its regulatory scheme in the context of a broader international effort to respond to climate change.

(2) The cap and trade program is a market mechanism established under this Act that is intended to encourage Ontarians to change their behaviour by influencing their economic decisions that directly or indirectly contribute to the emission of greenhouse gas

26. There is fundamental inconsistency between the purpose of the Regulation, and the purpose of Act. The objective and purpose of the Regulation is irrelevant, extraneous, and completely unrelated to that of the Act. The rule of law and the principle of legislative (or parliamentary) sovereignty require that the Act's objective and purpose cannot be defeated wholesale by the Regulation. The Act grants no authority to the Lieutenant Governor in Council to make such a regulation. The Applicant challenges the Regulation as *ultra vires* the Act and unlawful.

The Applicant's Attempt to Correct

27. Owing to the Minister's failure to engage in the public notice and comment process required by the *EBR*, on July 23, 2018, the Applicant wrote the Minister expressing opposition to the Regulation in the way it was enacted and the result of the enactment. To this letter, the Applicant attached a July 12, 2018 letter from the Environmental Commissioner of Ontario to the Deputy Minister expressing her view that the Ministry "inappropriate[ly]" exempted the Regulation from the *EBR* notice and comment requirements.

28. The Minister has acknowledged receipt of the Applicant's letter, but has otherwise provided no response to date.

Bill 4:

29. Bill 4 sets out the *Cap and Trade Cancellation Act, 2018*, which repeals the Act and provides for other related matters. Currently the Act legislates greenhouse gas emission reduction targets for Ontario as follows:

6 (1) The following targets are established for reducing the amount of greenhouse gas emissions from the amount of emissions in Ontario calculated for 1990:

1. A reduction of 15 per cent by the end of 2020.
2. A reduction of 37 per cent by the end of 2030.
3. A reduction of 80 per cent by the end of 2050.

30. The Act provides that these targets may be increased by regulation but provides no authority for decreasing the targets.

31. Any decision to increase the targets must take into account the temperature goals recognized by the Conference of the Parties established under Article 7 of the United Nations Framework Convention on Climate Change. The international Paris Agreement, adopted by the Conference of the Parties and ratified by Canada, sets temperature goals of “holding the increase in global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”

32. If enacted in its current form, Bill 4 would repeal the greenhouse gas emission reduction targets legislated in the Act and place a duty on government to establish new targets. However, Bill 4 would not require that any new targets be enshrined in legislation. Nor would Bill 4 require that the new targets be as protective as those repealed. Bill 4 would not ensure the new targets are subject to increase only, including through consideration of the Paris Agreement temperature goals.

33. The legislature resumes sitting on September 24, 2018. Bill 4 is currently at second reading.

Urgency:

34. The Applicant seeks leave to have this application for judicial review heard on an urgent basis. The application primarily concerns the government's failure to adhere to statutory public notice and comment processes that are meant to help protect and conserve Ontario's environment and the "right to a healthful environment" enjoyed by Ontarians. If Bill 4 is enacted before this application can be heard then the Applicant – and every other Ontarian – will have been denied their right to participate in what amounts to a wholesale revision of Ontario's legislative regime for combating climate change. Given the purposes of the *EBR* and the public importance of climate change, the delay required for the application to be heard by a full panel of judges at the Divisional Court would likely involve a failure of justice.

STATUTORY INSTRUMENTS RELIED UPON

1. *Environmental Bill of Rights, 1993*, SO 1993, c 28.
2. *General*, O Reg 73/94.
3. *Climate Change Mitigation and Low-carbon Economy Act, 2016*, SO 2016, c 7.
4. *The Cap and Trade Program*, O Reg 144/16.
5. *Prohibition against the Purchase, Sale and Other Dealings with Emission Allowances and Credits*, O Reg 386/18.
6. *Judicial Review Procedure Act*, RSO 1990, c J.1.

7. *Courts of Justice Act*, RSO 1990, c C.43.
8. *Rules of Civil Procedure*, RRO 1990, Reg 194.
9. Such further and other grounds as counsel may advise and this Honourable Court may deem just.

DOCUMENTARY EVIDENCE

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

- (a) The affidavit of Keith Stewart of Greenpeace Canada, sworn September 6, 2018.
- (b) The record of decision of the Minister's statutory power of decision to (i) exempt the Regulation from the required public notice and comment process under s. 16(1) of the *EBR* by invoking s. 30(1)(a); and to (ii) not subject Bill 4 to the required public notice and comment under s. 15(1) of the *EBR*, to be furnished by the Respondent Minister forthwith and filed with the Court.
- (c) Such other affidavit material and evidence as counsel may advise and this Honourable Court may deem proper.

September 11, 2018

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Court File No.

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SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

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FOR JUDICIAL REVIEW**

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