



Court File No. T-564-22

FEDERAL COURT

BETWEEN:

FORBID ROADS OVER GREEN SPACES, RESCUE LAKE SIMCOE CHARITABLE FOUNDATION carrying on business as RESCUE LAKE SIMCOE COALITION, FEDERATION OF ONTARIO NATURALISTS carrying on business as ONTARIO NATURE, WESTERN CANADA WILDERNESS COMMITTEE, WILDLANDS LEAGUE, EARTHROOTS FUND, and ENVIRONMENTAL DEFENCE CANADA INC.

Applicants

- and -

MINISTER OF ENVIRONMENT AND
CLIMATE CHANGE and THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION
Pursuant to section 18.1 of the *Federal Courts Act*

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

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 Toronto, 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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, 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: 14-MAR-2022

Issued by: T.WONG
(Registry Officer)

Address of local office:
200-180 Queen Street West
Toronto, ON M5V 3L6

**TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE CANADA
and the ATTORNEY GENERAL OF CANADA**

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APPLICATION

1. This is an application for judicial review of the Minister of the Environment and Climate Change’s decision declining to designate physical activities known as the Bradford Bypass highway project (**Bypass**) for impact assessment under subsection 9(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 (**Decision**). The Minister made the Decision in response to a designation request submitted pursuant to s. 9(1) of the *Act* by Forbid Roads Over Green Spaces (**FROGS**) on November 9, 2021. Rescue Lake Simcoe Coalition, Earthroots Fund, Environmental Defence Canada Inc., Ontario Nature, Wildlands League, and Wilderness Committee supported FROGS’ designation request. The Minister made the Decision on February 10, 2022 and communicated it to FROGS and Ontario Nature, as the lead author for the supportive groups, the same day.

THE APPLICANT MAKES APPLICATION FOR:

2. An order declaring that the Decision is unlawful and unreasonable because:
- a. the Minister failed to apply the criteria set out in s. 9(1) of the *Act*;
 - b. the Minister instead made the Decision by considering whether there had been a “material change to the project,” when no such criterion exists in law or policy;
 - c. the Minister’s application of the “material change” criterion without notice to the applicants was procedurally unfair; and
 - d. the Minister’s Decision lacks transparency, intelligibility and justification.

3. In the alternative, an order declaring that the Decision is unlawful and unreasonable because the Minister failed to consider material changes, and because the Decision lacks transparency, intelligibility and justification.

4. An order that each party shall bear their own costs; and

5. Such other relief as counsel may advise and the Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

The parties

6. The applicant Forbid Roads Over Green Spaces (**FROGS**) is a federally registered not-for-profit corporation that works to protect and preserve the environment of Lake Simcoe, its watershed, and the surrounding areas. FROGS, along with two other community groups active in the region of the Bypass, made the November 9, 2021 designation request.

7. The applicant Rescue Lake Simcoe Charitable Foundation, which does business as the Rescue Lake Simcoe Coalition (**Rescue Lake Simcoe**), is a not-for-profit corporation in the province of Ontario and a federally registered charity that works to preserve, protect, restore, and improve the environment, particularly surrounding and including Lake Simcoe. Rescue Lake Simcoe was among the 63 environmental, farm and community organizations which supported FROGS' designation request by way of a letter dated December 8, 2021.

8. The applicant Federation of Ontario Naturalists, which does business as Ontario Nature, is a non-profit conservation organization dedicated to protecting wild species and wild spaces through conservation, education and public engagement. Among other

work, Ontario Nature administers a natural areas and landscapes program to address increasing pressures in southern Ontario from population growth, development, and climate change. Ontario Nature wrote the December 8, 2021 letter supporting FROGS' designation request and received separate notice of the Minister's Decision.

9. The applicant Wildlands League is a registered charitable organization that protects wilderness through the establishment of protected areas and the promotion of sustainable natural resource use. Wildlands League signed the December 8, 2021 letter supporting FROGS' designation request.

10. The applicant Western Canada Wilderness Committee (**Wilderness Committee**) is a non-profit environmental interest group and federally registered charity that works to preserve wilderness, protect wildlife, defend parks, safeguard public resources and fight for a stable and healthy climate. Wilderness Committee signed the December 8, 2021 letter supporting FROGS' designation request.

11. The applicant Earthroots Fund (**Earthroots**) is a federally incorporated non-profit organization dedicated to the conservation of wilderness, wildlife and watersheds in Canada, with a focus on Ontario. Earthroots signed the December 8, 2021 letter supporting FROGS' designation request.

12. The applicant Environmental Defence Canada Inc. (**Environmental Defence**) is a federally registered charity incorporated in the province of Ontario. It operates nation-wide, with a mission to defend clean water, a safe climate, and healthy communities. Environmental Defence signed the December 8, 2021 letter supporting FROGS' designation request.

13. The Minister of Environment and Climate Change made the Decision, pursuant to his authority to designate projects for impact assessment under s. 9(1) of the *Impact Assessment Act*.

14. The Attorney General of Canada is responsible for the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada, pursuant to s. 5(d) of the *Department of Justice Act* and s. 18(1)(b) of the *Federal Courts Act*. Further or in the alternative, the Attorney General of Canada is named as respondent pursuant to Rule 303(2) of the *Federal Courts Rules*.

Background

a) The Bradford Bypass

15. The Bypass is a proposed 16.2 kilometre, four-lane freeway that would connect two existing 400-series freeways in Ontario in Simcoe County and York Region.

16. The Bypass underwent a study in the 1990s pursuant to Ontario's *Environmental Assessment Act*. That study, which was completed in 1997, found the Bypass' construction would lead to the removal of approximately 39 hectares of wildlife habitat and large areas of the Holland Marsh, an important wetland and one of Canada's most productive specialty crop agricultural areas. The study also concluded the Bypass would cause adverse effects to fish habitat.

17. The study did not evaluate the Bypass' effects on areas of federal jurisdiction, including migratory birds, climate change, and air pollution.

18. The study received conditional approval from the provincial government in 2002. Among other things, the conditions required the Bypass to undergo further provincial environmental assessment and complete additional studies to the satisfaction of provincial regulators.

19. Those conditions were not met. There has been no impact assessment, federal or provincial, of the Bypass since then.

b) The Impact Assessment Regime

20. The *Impact Assessment Act* establishes a federal impact assessment regime. Under this regime, the federal government can protect against adverse environmental effects on areas of federal jurisdiction that may be caused by certain physical activities, known as “designated projects,” by assessing those activities before they commence.

21. Pursuant to the *Act*, a physical activity such as the construction of a freeway may be designated to undergo an impact assessment in one of two ways:

- a. if it is listed in the *Physical Activities Regulations*, SOR/2019-285; or
- b. if the Minister designates it under s. 9(1) of the *Act*.

22. The Bypass is not a designated project under the *Physical Activities Regulations*.

23. Subsection 9(1) of the *Act* provides:

The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction

or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.

24. Under s. 9(2), the Minister may, before making a designation order, consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada, including Indigenous women, recognized and affirmed by section 35 of the *Constitution Act, 1982*.

25. Under s. 9(4), the Minister must respond, with reasons, to a request for designation received under s. 9(1) within 90 days, and publish the response.

26. Under s. 9(7), the Minister must not designate a physical activity if the carrying out of the physical activity has substantially begun, or if a federal authority has exercised a power or performed a duty or function conferred on it under federal statutes that could permit the physical activity to be carried out, in whole or in part.

c) The First Request

27. On February 3, 2021, a coalition of environmental groups, including Rescue Lake Simcoe, Ontario Nature, Wilderness Committee, and Environmental Defence, requested that the Minister designate the Bypass for impact assessment.

28. The February 2021 sought the designation of the Bypass based on:

- a. its predicted adverse effects on core areas of federal jurisdiction, including fish habitat, migratory birds and species at risk;
- b. the need for assessment of potential greenhouse gas emissions associated with the project, as well as of air pollution and the related health effects of those pollutants;

- c. the lack of an adequate provincial environmental assessment and approval regime, based in part on an Ontario government proposal to exempt the Bypass from further provincial environmental assessment; and
 - d. significant public concerns about the Bypass.
29. On May 3, 2021, the former Minister decided not to designate the Bypass.
30. The Minister's reasons offered two bases for his decision:
- a. the regulatory review processes that apply to the Bypass and related consultations with Indigenous peoples provide a framework to address the potential adverse effects within federal jurisdiction, direct or incidental effects, or impacts on Aboriginal and treaty rights, and public concerns raised in relation to those effects, including provincial approvals and permits pursuant to the *Environmental Assessment Act*, *Endangered Species Act*, *Ontario Heritage Act*, and other provincial laws; and
 - b. the Bypass must comply with relevant provisions of federal legislation, including the *Fisheries Act* and other laws.
31. The Minister based his decision in part on an analysis provided to him in May 2021 by the Impact Assessment Agency of Canada (**May 2021 Analysis**).
32. Although at that time the Ontario government had proposed to exempt the Bypass from provincial assessment requirements, and consulted the public on this proposal, details of the regulation had not been finalized or made public.

33. In communicating his reasons to the requesters, the Minister stated:

In making my determination, I considered that existing federal, provincial, and municipal legislative and regulatory processes, along with the application of standard mitigation measures will address the potential adverse effects and public concerns associated with the Project. It is my understanding that the provincial environmental assessment process will provide opportunities for the public to share their views.

d) The Second Request

34. In the months following the Minister's May 2021 decision, public concerns about the Bypass grew significantly. Six municipalities passed resolutions supporting additional provincial or federal impact assessment for the Bypass, the media reported frequently on concerns about the Bypass, and over 9,000 people signed a petition supporting the need for a federal impact assessment.

35. Then, on October 7, 2021, Ontario promulgated Ontario Regulation 697/21, which exempted the Bypass from the requirements of the *Environmental Assessment Act* if certain conditions were met (**Exemption Regulation**).

36. In light of these changes in circumstance, on November 9, 2021, FROGS and two other community groups submitted a second designation request for the Bypass project to the Minister.

37. Among other things, the FROGS designation request provided new information about:

- a. the ways in which the now-promulgated Exemption Regulation differed from the Minister's previously expressed understanding of the proposed exemption;

- b. factual errors in the May 2021 Analysis and decision; and
- c. the substantial increase in public concerns.

38. FROGS' submission detailed the significant ways that the Exemption Regulation differed from the Minister's previously expressed understanding of the proposal for it. These differences included:

- a. public consultation (other than for directly affected landowners) would now only occur at the sole discretion of the provincial Ministry of Transportation;
- b. separate assessment processes for early works (including an interchange and bridge) and the rest of the Bypass split the project and allow for major construction before environmental studies for the full project are complete. This means that irreversible construction decisions will be made before the full impacts of those decisions are identified, and without public consultation;
- c. certain studies and mitigation plans no longer require approval from the provincial Ministry of the Environment, Conservation and Parks, so the Bypass can proceed regardless of their content or whether identified impacts are mitigated;
- d. some provincial permits, including under the *Endangered Species Act*, can be granted without any further assessment, even under the limited assessment process created by the Exemption Regulation; and

- e. a mechanism to update the 1997 provincial environmental assessment, and to consider alternatives to the Bypass, no longer applies.

39. FROGS also identified several factual errors underpinning the May 2021 Analysis and decision. These include the failure to address transboundary greenhouse gas emissions and air quality impacts, critical habitat for an endangered migratory bird species, and chloride pollution impacts on aquatic habitat and fisheries.

40. On December 8, 2021, 63 environmental groups representing tens of thousands of Ontarians wrote to the Minister to support the FROGS designation request. Rescue Lake Simcoe, Ontario Nature, Earthroots, Wilderness Committee, Wildlands League, and Environmental Defence all signed this letter.

41. On December 9, 2021, FROGS and the two other community groups wrote to the Minister to update their November 9 request with additional information about the significant increase in public concerns about the Bypass.

42. On February 10, 2022, the Minister decided not to designate the Bypass in response to FROGS' request and communicated this decision and his reasons for it to FROGS and the other signatories. He also communicated this decision to Ontario Nature, the lead author of the December 8, 2021 letter of support.

43. The Minister's reasons refer to the former Minister's decision and conclude that, "[s]ince there has been no material changes to the Project, there is no basis to revisit the former Minister's determination".

44. In reaching that conclusion, the reasons reference the now-promulgated O Reg 697/21:

Ontario Regulation 697/21 sets the exemption and the conditions for the assessment process going forward. I understand that the Proponent will be required to undergo a streamlined provincial assessment process for the Project, informed by consultation with Indigenous communities and interested members of the public, that includes an early works assessment process and preparation of an environmental conditions report and an environmental impact assessment report. I also understand that the Proponent will be required to follow all other relevant legislative requirements, standards, and practices for the Project.

45. With the exception of one reference to the critical habitat of a migratory bird species, the Minister's reasons do not refer to the adverse effects within federal jurisdiction, direct and incidental effects, and public concerns raised in FROGS' request.

The Decision to deny FROGS' designation request was unreasonable

a) The Decision did not address the factors set out in the Act

46. In making the Decision, the Minister failed to apply the factors set out in s. 9(1) of the *Act*. His Decision is unreasonable in that regard.

47. The Minister's two-page Decision does not reference the potential adverse effects in areas of federal jurisdiction or direct and incidental effects raised by the requesters (other than by reference to the first request) or related public concerns. Rather, the Minister based his Decision on whether there had been any material changes to the Bypass.

48. In so doing, the Minister applied a novel threshold test: whether FROGS had demonstrated a "material change to the Project" sufficient to revisit the first designation

decision. There is no support in the *Act* for a requiring a threshold ‘material change’ before considering subsequent requests.

49. To the contrary, requiring a threshold of material change unreasonably fetters the Minister’s discretion under section 9(1) of the *Act*. It ignores the clear wording of the statutory scheme, principles of statutory interpretation, and relevant policies, including the Impact Assessment Agency of Canada’s *Operational Guide: Designating a Project under the Impact Assessment Act (Operational Guide)*.

50. The applicants had no knowledge of any requirement to demonstrate a material change to the Bypass in making their request. The Operational Guide describes the process the Minister will follow for considering whether to designate a project under section 9(1) of the *Act*, and the process that a requester should follow in making a request under section 9(1). Nowhere does it state that “material change” is a factor in the Minister’s consideration of a designation request.

51. At no time did the Minister or the Agency inform the applicants that their request would be assessed with respect to whether there had been a material change to the project. In that regard, the Decision was procedurally unfair and unreasonable.

52. The Minister’s reasons lack transparency, intelligibility and justification. They do not explain whether or how the Minister assessed the factors set out in s. 9(1) of the *Act* or why he concluded that the former Minister’s determination could not be revisited absent material changes to the Bypass.

b) In the alternative, the Minister failed to consider material changes

53. In the alternative, if the Court finds that the Minister reasonably interpreted the legal test for considering designation requests, he unreasonably applied it when making the Decision.

54. In particular, the Minister unreasonably failed to consider material changes since the first decision, including the change in Ontario's regulatory regime following the promulgation of O Reg 697/21, the factual errors identified concerning adverse effects within federal jurisdiction and direct and incidental effects, and the significant increase in public concerns about the Bypass.

55. The Minister based the Decision on his understanding that, under the Exemption Regulation, "the Proponent will be required to undergo a streamlined provincial assessment process for the [Bypass], informed by consultation with Indigenous communities and interested members of the public...[and] that the Proponent will be required to follow all other relevant legislative requirements, standards, and practices for the Project".

56. In reaching this understanding, the Minister failed to grapple with the applicants' submissions about the effect of the Exemption Regulation.

57. The Minister also failed to grapple with several of the applicants' submissions, either adequately or at all. The Decision does not refer to the applicants' submissions about transboundary greenhouse gas emissions or air quality impacts, or aquatic habitat and fisheries. The Decision also lacks transparency, intelligibility and justification with respect to effects on migratory birds and species at risk.

58. The Minister failed to grapple with the applicants' submissions about the significant increase in public concerns after May 2021.

Costs

59. The applicants bring this application in the public interest. The application raises issues of public importance. The application provides the first opportunity for judicial scrutiny of a novel and previously undisclosed test applied by the Minister to subsequent designation decisions under s. 9(1) of the *Act*. An order pursuant to Rule 400 that each party bear its own costs is just and appropriate in the circumstances, regardless of the outcome of this application.

60. *Impact Assessment Act*, SC 2019, c 28, s 1.

61. *Federal Courts Act*, RSC 1985, c F-7.

62. *Federal Courts Rules*, SOR/98-106.

63. *Bradford Bypass Project*, O Reg 697/21.

64. *Environmental Assessment Act*, RSO 1990, c E.18

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

65. Affidavit of C William D Foster;

66. Affidavit of Claire Malcolmson;

67. Affidavit of Caroline Schultz;

68. Affidavit of Kathleen Krelove;

69. Affidavit of Janet Sumner;

70. Affidavit of Franz Hartmann;
71. Affidavit of Tim Gray;
72. Materials from the certified tribunal record produced under Rules 317-318 of the *Federal Courts Rules*; and
73. Other affidavits and evidence that the applicants may seek leave to file and this Court may see fit to consider.

RULE 317 REQUEST

Pursuant to Rules 317 and 318 of the *Federal Courts Rules*, the applicants request that the Minister send to the applicants and to the Federal Court Registry certified copies of the following material that is not in the possession of the applicant but is in the possession of the Minister: all materials that were in the possession of the Ministry or the Agency that were placed before and/or considered by the Minister in making the February 10, 2022 decision not to designate.

Date: March 14, 2022



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