

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

FRIENDS OF TEMAGAMI AND EARTHROOTS COALITION
APPLICANTS

- and -

MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS
(ONTARIO)

RESPONDENT

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

TO THE RESPONDENT:

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

THIS APPLICATION for will come on for a hearing before the Divisional Court on a date and time to be fixed by the Registrar, at the place of hearing requested by the applicant. The applicant requests that this application be heard at Ottawa.

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: _____, 2020

Issued by: _____

Local Registrar

Divisional Court
Superior Court of Justice
191 Elgin Street
Ottawa, ON
K2P 2K1

TO: MINISTER OF THE ENVIRONMENT, CONSERVATION AND
PARKS
Minister's Office
5th Floor, 777 Bay Street
Toronto, ON
M7A 2J3

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

APPLICATION

OVERVIEW

1. This is an application for judicial review challenging the decision of the Ontario Ministry of the Environment, Conservation and Parks (“MECP”) to refuse to grant an individual environmental assessment (“IEA”) of the Temagami Forestry Management Plan (“FMP”).
2. The Temagami region of Ontario is home to a 500-year-old forest, which contains the largest known concentration of old growth red and white pine ecosystems remaining in Canada. The Applicants are conservation groups concerned with protecting the integrity of Temagami’s forest ecosystems.
3. On or about January 22, 2019, Ontario’s Ministry of Natural Resources and Forestry (“MNR”) released a draft ten-year FMP, which governs logging on Crown land within the Temagami forestry management unit from April, 2019 to April 2029.
4. Pursuant to the MNR declaration order MNR-75 (the “Declaration Order”), forestry undertakings are exempt from environmental assessment under the *Environmental Assessment Act*, RSO 1990, c E.18 (“EAA”) subject to the conditions set out in the Declaration Order.
5. Concerned that the draft Temagami FMP did not adequately address climate change, the Applicants requested that the MECP perform an IEA under Part II of the EAA. MECP declined the Applicant’s request for an IEA (the “Decision”).
6. At the time of the Decision, the MNR had not complied with the Declaration Order’s conditions with respect to climate change, both generally and with respect to the Temagami

forest. Accordingly, the draft Temagami FMP (since finalized) was not eligible for an exemption from environmental assessment. The Decision to deny an IEA was therefore unreasonable.

RELIEF SOUGHT

7. The Applicants make application for:
 - (a) A declaration that the MNRF is required to comply with the Declaration Order issued pursuant to the Forest EA Approval.
 - (b) A declaration that an IEA of an FMP is mandatory where a condition or conditions of the Declaration Order are unfulfilled;
 - (c) A declaration that condition 45 of the Declaration Order was not fulfilled at the time of the approval of the Temagami FMP;
 - (d) An order in the nature of *certiorari* to quash the Decision and remit it to the MECP Director for reconsideration;
 - (e) Costs of this application, or, in the alternative, an order that the parties bear their own costs; and
 - (f) Such further and other relief as counsel may advise and this Honourable Court may deem just.

GROUND

MNRF's Forest Management Responsibilities

8. Forest management on Crown land in Ontario is the responsibility of the MNRF acting under the *Crown Forest Sustainability Act, 1994*, SO 1994, c 25 ("CFSA").
9. Ontario's Crown land is currently subdivided into 43 management units ("FMU"), of which the Temagami FMU is one.

10. Section 9(2) of the CFSA provides that logging on Crown land will be governed by a FMP approved by the Minister of the MNRF, who shall not approve it unless he or she is “satisfied that the plan provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest.”

11. The default statutory process to assess the sustainability of an FMP under the authority of the MNRF is through an environmental assessment that the MECP performs under the EAA; the two ministries share responsibility. However, as described in the following paragraphs, forestry in Ontario is normally exempt from the EAA, subject to mandatory conditions.

Environmental Assessment of Forestry Undertakings

12. Forest management on Ontario Crown lands, covering an area consisting of approximately 38.5 million hectares, is an “undertaking” under the EAA and is presumptively subject to environmental assessment under that statute.

13. Pursuant to s. 3.2 of the EAA, the Minister of the Environment, Conservation and Parks (“Minister”) may declare that the EAA does not apply to certain undertakings, or classes of undertakings “if the Minister considers that it is in the public interest to do so having regard to the purpose of this Act and weighing it against the injury, damage or interference that might be caused to any person or property by the application of this Act to the undertaking or class”.

14. In anticipation of a possible declaration exempting forestry from the EAA, forestry in Ontario was examined by the Ontario Environmental Assessment Board in public hearings

spanning four years between 1988 and 1992. Those hearings informed the Decision of the Environmental Assessment Class Environmental Assessment for Timber Management on Crown Lands in Ontario, dated April 5, 1994 (“Forest EA Approval”). The Forest EA Approval is a “class environmental assessment” under Part II.1 of the EAA.

15. There is a general statutory discretion to apply, or not apply, a class environmental assessment. Section 16 (1) of the EAA provides that the Minister may, by order, require a proponent to comply with Part II of the EAA (which sets out the procedure for IEAs) before proceeding with a proposed undertaking to which a class environmental assessment would otherwise apply.

16. Further, notwithstanding the Forest EA Approval, the “undertaking” is not automatically exempt from environmental assessment on a blanket basis; on the contrary, there are specific conditions precedent that first must be satisfied. These are detailed in the Declaration Order, which has the force of law pursuant to the Order of the Executive Council 1126/2015 (approved August 25, 2015). Only when the conditions precedent enumerated in the Declaration Order are satisfied does s. 3.2 of the EAA come into play, such that in the statutory words of Executive Council Order 1126/2015 “section 5 and 38 of the [EAA] do not apply to the undertaking described in the [Declaration] order, subject to the conditions therein”. Conversely, if the conditions precedent are not satisfied, then the proponent is subject to sections 5 and 38 of the EAA. (In either case, proponents remain subject to the other sections of the EAA.)

17. Among the conditions precedent in the Declaration Order is one on climate change: Condition 45 stipulates that to avail of the Forest EA Approval and to release forestry proponents from sections 5 and 38 of the EAA, “MNR shall”—the statutory language is

mandatory—“support Ontario’s efforts towards climate change mitigation” in the following two ways:

- (a) MNRF shall share information with MECP on current and projected forest carbon balances, related to forest harvesting, forest age, species composition, and the amount of harvested wood converted into wood products. The information shared must be prepared on a management unit by management unit basis and for the entire area of Ontario in which forestry is permitted.
- (b) MNRF shall work with MECP to develop an approach to report on current and projected forest carbon balances and describe how the approach considers any available international best practices.

The 2019-2029 Temagami FMP

18. With respect to climate change carbon balancing in the Temagami FMP, the public record contains only this statement in the Supplementary Documentation For the 2019-2029 Temagami Management Unit FMP (“Supplementary Documentation”):

The methodologies associated with carbon accounting, project scenarios, carbon dynamics and carbon offsets are not within the scope of this FMP. Ontario is currently developing the methodologies for carbon management in the Improved Forest Management Protocol for Forest Carbon Offset Projects. However, this document is currently being developed and cannot be applied in this FMP. Once available to forest planners, it will then be possible to produce verifiable results based on consistent assumptions, scope and inputs.

Individual Environmental Assessment Request and Response

19. In their petition to the MECP for an IEA dated February 21, 2019, the Applicants noted that the draft Temagami FMP omitted to consider or address climate change, and gave a number of illustrations where it ought to have been considered.

20. In its response to the Applicant’s request for an IEA dated May 3, 2019, the Director of the MECP found, among other things, that the “MNRF properly considered climate change and an IEA is not a better mechanism for assessing and addressing concerns about climate change.” The Director also asserted—unreasonably, it is alleged, having regard to the prescriptions of Condition 45—that the “MNRF has demonstrated that it has planned and developed the Temagami FMP in accordance with the provisions of the Declaration Order.” The IEA request having been rejected, the FMP came into full effect.

21. After the MECP declined its request for an IEA of the Temagami FMP, the Applicants were advised on or about August 22, 2019, and confirmed with the MECP on September 10, 2019, that in June 2018 Ontario suspended work on the “Improved Forest Management Protocol for Forest Carbon Offset Projects” (the “Carbon Offset Projects Document”) that is mentioned in the Temagami FMP, and cancelled it altogether in February 2019, approximately seven months before the draft FMP was released and two months before its effective date. In addition, prior to cancelling work on the Carbon Offset Projects Document, Ontario was in the early stages of partnering with a Los Angeles-based organization called Climate Action Reserve in order to prepare a forest carbon protocol based on international best practices. This partnership was also abandoned before the Temagami FMP was approved.

The Temagami FMP does not Adequately Consider Climate Change

22. Contrary to Condition 45 of the Declaration Order, there is no evidence that the MNRF has shared information regarding current and projected forest carbon balances for the Temagami FMU with the MECP. To the contrary, the MNRF stated that carbon balancing was outside the scope of the Temagami FMP.

23. Contrary to Condition 45 of the Declaration Order, there is no evidence that MNRF developed an approach, or was working to develop an approach, to report on current and projected forest carbon balances, nor has it described how the approach considers any available international best practices. To the contrary, MNRF cancelled its efforts to develop such an approach prior to the approval of the Temagami FMP or the Decision rejecting the IEA.

24. In the circumstances, it was unreasonable for the MECP to decline to perform an IEA. The conditions precedent of the Declaration Order, which are binding on the MECP, were not fulfilled at the time of the MECP Director's Decision refusing the Applicant's IEA request.

25. Further, section 13(3) of the EAA prohibited forestry activities in the Temagami FMP to proceed unless: (i) the conditions precedent of the Declaration Order were satisfied so as to disapply ss. 5 of the EAA, or; (ii) the Minister acceded to the IEA request and subsequently approved a forestry activity after considering an application for an environmental assessment under s. 5 of the EAA. The MECP has the duty to verify that forestry undertakings proceed in either fashion, but on this occasion, it did neither.

The MECP Director's Reasons for Refusing the Request for an IEA are Inadequate

26. The MECP Director's reasons for the Decision are inadequate in light of the evidence before the MECP Director and the requirements of the CFSA, the Declaration Order, and the Manual. Specifically, the reasons do not adequately explain the bases for the MECP Director's Decision and do not meet the required level of justification, transparency, and intelligibility.

27. The reasons provided by the MECP Director do not provide justification for how the MNRF adequately met its obligation to consider climate change in planning the Temagami FMP. It is not clear how the MECP Director reached the conclusion that the MNRF properly assessed the draft Temagami FMP to have met the forest sustainability criteria as required by the CFSA, the Manual, and the Declaration Order.

The Decision was based on inaccurate information

28. The Decision was unreasonable because it is predicated on false information and pretenses that MNRF held out to the Director, whether by error or bad faith. Specifically, MNRF asserted in the Supplementary Documentation for the FMP that was released on or about January 22, 2019 that “Ontario is currently developing the methodologies for carbon management”. That assertion is false because work on the Carbon Offset Projects Document ceased approximately seven months before that date, having been suspended in June 2018 and entirely cancelled in February 2019, the same month that the Decision was made.

29. The MECP Director’s reliance on the Supplementary Documentation, which falsely or erroneously referred to the development of a carbon management initiative, as evidence that the MNRF has adequately considered climate change in the planning of the Temagami FMP renders the Decision unreasonable.

30. Such further and other grounds as counsel may advise and this Honourable Court may permit.

STATUTORY INSTRUMENTS RELIED UPON

31. The following statutory instruments will be relied upon:

- (a) *Crown Forest Sustainability Act, 1994*, SO 1994, c 25;

- (b) *Environmental Assessment Act*, RSO 1990, c E.18;
- (c) *Declaration Order MNR-75*, O.C. No. 1126/2015;
- (d) *Judicial Review Procedure Act*, RSO 1990, c J.1;
- (e) *Courts of Justice Act*, RSO 1990, c C.43;
- (f) *Rules of Civil Procedure*, RRO 1990, Reg 194; and
- (g) Such further and other statutory instruments as counsel may advise and this Honourable Court may permit.

DOCUMENTARY EVIDENCE

32. The following documentary evidence will be used at the hearing of the application:
- (a) The 2019-2029 Temagami Management Unit FMP;
 - (b) The Supplementary Documentation for the 2019-2029 Temagami Management Unit FMP;
 - (c) The MNRF's *Forest Management Planning Manual* (March 2017);
 - (d) The MECP Director's reasons for the Decision, and record of proceedings in which the Decision was made; and
 - (e) Such other affidavit material and evidence as counsel may advise and this Honourable Court may permit.

February 6, 2020

Joshua Ginsberg, LSO No. 62190A
Amir Attaran, LSO No. 503660
Ecojustice Environmental Law Clinic
at the University of Ottawa
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

Tel: 613-562-5800 ext. 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca
aattaran@ecojustice.ca

**Counsel for the Applicants, Friends of
Temagami and Earthroots Coalition**

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Tel: 613-562-5800 ext. 3399
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**Counsel for the Applicants, Friends of
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