

Secretariat of the Commission for Environmental Cooperation

**Secretariat determination in accordance with Article 14(1)
of the North American Agreement on Environmental Cooperation**

Submitters: The Saint-Adolphe-D’Howard Citizens Advisory Committee,
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Represented by: Felipe Morales, Semperlex Avocats

Party: Canada

Submission: 7 December 2018

Date of the determination: 17 January 2019

Submission No.: **SEM-18-005 (*Grand-Brûlé—Saint Sauveur Power Line*)**

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide for a process allowing any person residing in or nongovernmental organization established in North America to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” or the “CEC”)¹ initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances exist, it then proceeds no further with the submission. The Secretariat prepares a factual record only when the Council decides, by a two-thirds vote, to instruct the Secretariat to do so.²
2. On 7 December 2018, the Saint-Adolphe-D’Howard Citizens Advisory Committee (“Committee”) and the above-named individuals (collectively, the “Submitters”), filed a

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC or Agreement) signed by Canada, Mexico, and the United States (the “Parties”). The bodies which comprise the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The NAAEC remains in effective despite the Parties recent renegotiations concerning NAFTA resulting in a revised trade agreement and a new Environmental Cooperation Agreement, neither of which has yet to be implemented.

² Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <www.cec.org/submissions>.

NAAEC Article 14(1) submission with the Secretariat. The Submitters assert that the Province of Quebec in Canada³ is failing to effectively enforce its environmental law because Quebec's law does not fulfill the commitments Quebec made under the NAAEC; specifically, Submitters assert that in providing for exemptions and immunity for the Quebec-owned Hydro Quebec, Quebec's electric utility, under the Environmental Quality Act, Quebec fails to provide sufficient public input on environmental matters. The Submitters make this assertion with respect to the environmental documentation and approval for a specific project: a 120 kV double circuit transmission line from the Grand-Brûlé substation to the Saint-Sauveur substation in the Laurentian mountains of Quebec.⁴

3. The Secretariat has determined that the submission does not meet all of the requirements of Article 14(1). Therefore, the Submitters have 60 working days from the receipt of this determination to submit a revised submission that conforms to the criteria of Article 14(1).⁵ The Secretariat's reasons for this determination are set forth below in Section II.

II. ANALYSIS

A. Opening paragraph of Article 14(1)

4. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission" meets the admissibility criteria in Article 14(1)(a) to (f).
5. In determining whether a submission meets the requirements of Article 14(1) of the NAAEC, the Secretariat does not view the admissibility criteria to be an insurmountable procedural screening device.⁶ The Secretariat reviewed the submission with that perspective in mind.
6. The Secretariat finds that the Submitters are comprised of both a nongovernmental organization, in the form of a citizen's advisory committee, and persons who are residents of North America; the submission clearly identifies the Submitters and asserts they are citizens of Quebec⁷. There is no information in the submission to suggest that the Submitters belongs to the government or are under its direction.
7. The next criteria to determine are whether the Submitter has identified an "environmental law" as defined in the NAAEC and whether the Submitter has alleged that a Party is "effectively failing to enforce" that law.
8. NAAEC Article 45(2) defines "environmental law" as follows:

³ Although Canada is the Party which signed the NAAEC, three Canadian provinces, including Quebec, ratified the NAAEC under Canadian and provincial law. See discussion, page 4.

⁴ SEM-18-005 (*Grand-Brûlé—Saint Sauveur Power Line*), Submission under Article 14(1) 7 December 2018) [Submission], at 2-4.

⁵ Guidelines, para. 6.2.

⁶ See SEM-97-005 (*Biodiversity*), Determination under Article 14(1) (26 May 1998); SEM-98-003 (*Great Lakes*), Determination under Article 14(1)(2) (8 September 1999).

⁷ Submission, p. 13.

“2. For purposes of Article 14(1) and Part Five:

- (a) "environmental law" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.”

B. Environmental law in question

- 9. As noted above in paragraph 2, the Submitters contend that the manner in which Quebec has enacted its environmental law, specifically the Environmental Quality Act and the Sustainable Development Act, and the manner in which it implements these laws with respect to hydro-electric projects carried out by Hydro Quebec, fails to meet certain obligations to which all the Parties to the NAAEC agreed. Thus, for purposes of its submission, the Submitters assert that the NAAEC is the “environmental law” which Quebec is not effectively enforcing.
- 10. The Submitters, for example, argue that the government’s absolute discretion to determine which projects must undergo a formal environmental impact assessment analysis, including obtaining and considering public input, and the fact that the project in question was not subject to these requirements, is evidence of Quebec’s failure to meet a general obligation of the NAAEC that each Party shall “assess, as appropriate, environmental impacts.”⁸ The Submitters also assert that Hydro Quebec’s immunity from judicial review, including injunctions, breaches Quebec’s commitment under the NAAEC Article 6 (Private Access to Remedies). Further, the Submitters assert that since the Quebec government owns Hydro Quebec, a conflict of interest is created because the government cannot impartially assess environmental impacts from a project which will

⁸ See, Submission, pp. 3, 5, and 8, and NAAEC Article 2 (1)(e).

generate income for the government.⁹ Therefore, the Submitters assert that Quebec is failing to meet the NAAEC obligations with respect to ensuring high levels of environmental protections under Article 3 (Levels of Protection).¹⁰

11. The Secretariat has found that where the obligations contained in international instruments have been incorporated into the domestic legal system of the Party in question, they may qualify for review within an NAAEC Article 14–15 process.¹¹ The Secretariat's view, however, with respect to the NAAEC has always been that to the extent that the NAAEC, including Articles 2, 3 and 6, create obligations on the part of the Parties, the remedy for a Party's purported failure to fulfill its obligations lies only with the other Parties under Part 5 of the NAAEC (Consultation and Resolution of Disputes). This view has been consistent in other submissions filed with respect to Canada, Mexico and US.¹² Further, the Secretariat has recognized that Article 14 of the NAAEC provides the exclusive process for non-governmental organizations and individuals relating to allegations that a Party is failing to enforce its "environmental laws" effectively.¹³ Thus, the Secretariat has dismissed previous submissions which have asserted that the NAAEC is the "environmental law" which a Party is not effectively enforcing.
12. The Secretariat notes that its previous determinations were also based, in part, on the fact that Canada had not incorporated its NAAEC obligations into its domestic law and, thus, the NAAEC remained a purely international obligation and did not qualify as a statute of a Party under the NAAEC's definition of an "environmental law." As noted above, Quebec is a party to the NAAEC and is bound by its terms and obligations. Quebec initially agreed to the NAAEC's terms by signing the *Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation*¹⁴; Article 2 of this agreement binds Quebec, and Article 13 makes it effective upon signature by the federal government and at least one province. The stated purpose of this agreement is to provide "a mechanism that will provide for the full participation of the provincial and territorial governments with the federal government in the implementation ... of the NAAEC."¹⁵ Article 8 of the intergovernmental agreement recognizes that a Canadian province would subsequently enact legislation with respect to the NAAEC but only within the context of a province taking "all necessary measures within its jurisdiction to implement any action plan or ensure payment of any monetary

⁹ Submission, p. 8.

¹⁰ Submission, p. 12. The Submitters also contend that failure of Quebec to protect the habitat of the Monarch butterfly violates the obligations in the NAAEC, Article 3 (Submission, p. 14).

¹¹ See SEM-01-002 (*AAA Packaging*), Article 14(1) Determination (24 April 2001), at 3.

¹² See SEM-98-001 (*Guadalajara*), Article 14(1) Determination (13 September 1999); SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §12; SEM-18-002 (*Metrobús Reforma*), Article 14(1)(2) Determination (1 May 2018), §32 See also *infra* note 13.

¹³ SEM-00-04 (*B.C. Logging*), Determination under Articles 14(1) and 14(2) (8 May 2000). SEM-01-002 (*AAA Packaging*), Secretariat 14(1) Determination (April 24, 2001).

¹⁴ In addition to Quebec, Alberta and Manitoba are also parties to the NAAEC and signed this intergovernmental agreement.

¹⁵ *Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation*, Article 1.

enforcement assessment, with respect to the non-enforcement of its environmental law, imposed by an arbitral panel pursuant to the NAAEC [Part 5 dispute resolution process].”

13. Quebec has enacted a provincial law¹⁶ relating to the NAAEC and other international trade agreements, as the Submitters note in their submission.¹⁷ This law contains a number of provisions, including a section implementing the Part 5 dispute resolution process (section 8) and a privileges and immunities provision for officials of the Secretariat (section 9). The Secretariat does not interpret the Quebec statute to go beyond the scope of the NAAEC and provide a remedy in Quebec which is not provided in any other NAAEC jurisdiction.¹⁸ In other words, the Secretariat does not interpret this statute to make the NAAEC a domestic environmental law in Quebec.¹⁹
14. For all of the foregoing reasons, and because the Secretariat finds that the NAAEC is not an environmental law for purposes of the Articles 14 and 15 submissions process, the Secretariat dismisses these assertions.
15. The Secretariat notes that although the submission’s assertions regarding failure to effectively enforce are based on the NAAEC, the submission does imply that there may be specific provisions of the Quebec Environmental Quality Act or Sustainability Act which are applicable to this project and which were not allegedly enforced by the Government of Quebec. A revised submission would need to address these provisions in particular and how Quebec did not specifically abide by them. The Secretariat notes that its review of assertions made by a Submitter of failure to effectively enforce a particular provision of environmental law does not take into account the effectiveness of a law as written.²⁰
16. Since the submission does not meet the opening paragraph of Article 14(1), the Secretariat will not determine if it meets the remaining admissibility criteria of Article 14(1)(a)-(f). The Secretariat notes, however, that from a cursory review, it appears that the submission would meet these criteria.

III. DETERMINATION

17. Having conducted its NAAEC Article 14(1) review of submission SEM-18-005 (*Grand-Brûlé—Saint Sauveur Power Line*), the Secretariat finds that it does not meet the requirements of that article for the reasons set out herein.

¹⁶ *Act respecting the implementation of international trade agreements*, LRQ c M-35.2

¹⁷ Submission, at 4.

¹⁸ The Secretariat notes that section 6 of the Quebec law specifically states that nothing in the law, except as specifically provided to a person under the NAAEC, gives any person a cause of action based on the commitments made by the government of Quebec in the law. *Id.*, at 35.2(6).

¹⁹ See also, SEM-97-005 (Biodiversity), Determination under Article 14(1), at p. 4, which found that Canada’s ratification instrument for the Convention on Biological Diversity did not constitute an environmental law for purposes of the NAAEC.

²⁰ SEM-97-003 (*Quebec Hog Farms*), Determination under Article 15(1), (October 29, 1999), p. 8; SEM-11-002 (*Sumidero Canyon II*), Determination under Articles 14(1) and (2) (September 6, 2012), p. 6.

18. Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, will terminate the Article 14 process with respect to this submission, unless the Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) within 60 working days after receipt of this Determination, or by 11 April 2019.

Secretariat of the Commission for Environmental Cooperation



Per: Robert Moyer
Head, Submissions on Enforcement Matters Unit

cc: Ms. Isabelle Bérard, Alternate Representative, Canada
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