

Federal Court



Cour fédérale

Date: 20231030

Docket: T-169-23

Citation: 2023 FC 1438

Ottawa, Ontario, October 30, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**FRIENDS OF THE EARTH CANADA
DAVID SUZUKI FOUNDATION
SAFE FOOD MATTERS INC.
ENVIRONMENTAL DEFENCE CANADA INC.**

Applicants

and

**ATTORNEY GENERAL OF CANADA
MINISTER OF HEALTH
LOVELAND PRODUCTS CANADA INC.**

Respondents

ORDER AND REASONS

[1] Friends of the Earth Canada, David Suzuki Foundation, Safe Food Matters Inc, and Environmental Defence Canada [Applicants] have brought a motion for a further and better certified tribunal record [CTR] pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106.

The underlying application for judicial review concerns a decision of Health Canada's Pest

Management Regulatory Agency [PMRA] to renew the registration of Loveland Products Canada Inc for the pesticide Mad Dog Plus.

[2] Mad Dog Plus is a pest control product whose active ingredient is glyphosate. It was first approved for use by the PMRA in 2011. Glyphosate has been registered in Canada since the 1970s and is the most commonly used active ingredient in pesticides in this country.

[3] On October 27, 2022, Ecojustice, a non-profit environmental law organization, wrote to the PMRA requesting a moratorium on registration renewals for all products that contain glyphosate pending the agency's review and consideration of recent scientific literature pertaining to its potential harm to human health and the environment [Ecojustice Letter]. At the time, the PMRA was processing several registration renewal applications, including the one submitted by Loveland (submission 2022-3929).

[4] Loveland's renewal submission was approved on December 22, 2022 by Jennifer Beckman, Regulatory Affairs Manager, PMRA. Ms. Beckman did not provide written reasons for her decision.

[5] On January 20, 2022, the Applicants sought judicial review of the PMRA's decision to renew Loveland's registration for Mad Dog Plus. The Notice of Application included the following request pursuant to Rule 317:

- (a) The renewal application for [Mad Dog Plus] under submission number 2022-3929.

- (b) All briefing notes prepared for PMRA decision makers and all decision documents prepared by PMRA decision [sic] about application/submission number 2022-3929.
- (c) All renewal team or science team monographs, memoranda, and emails, prepared in respect of the decision to grant application/submission number 2022-3929, including documents regarding the applicants['] October 27, 2022 letter.
- (d) Formal and informal policy decisions relied on by the PMRA in making decisions about the renewal.

[6] On February 9, 2023, the PMRA issued a Certificate confirming that it had transmitted to the Applicants “true copies of the material that was considered by PMRA when it made the decision to renew the product registration for Mad Dog Plus (submission 2022-3929), as requested by the Applicants, subject to material that is protected by litigation and/or solicitor client privilege, which material Health Canada objects to producing”.

[7] The Applicants say that the CTR transmitted by the PMRA does not disclose the rationale for the decision. They seek a further and better CTR in respect of items (b) and (c), above. In oral submissions, counsel for the Applicants clarified that the additional documentation sought is limited to written materials prepared by the PRMA specifically in relation to Loveland’s renewal submission 2022-3929 that address the scientific publications cited in the Ecojustice Letter.

[8] Rule 317(1) provides as follows:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu’elle n’a pas mais qui

possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[9] As the Federal Court of Appeal explained in *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 [*Access Copyright*] (per Stratas JA at para 15):

Parties before the administrative decision maker will often have in their possession all of the material the administrative decision maker considered in making its decision. But not always. And sometimes parties may be unsure whether they do. Sometimes they wish to confirm exactly what the administrative decision maker actually considered in making its decision. Rule 317 of the *Federal Courts Rules* provides a means by which parties can achieve those ends.

[10] Where a decision maker does not produce formal written reasons, a reviewing court must look to the record as a whole to understand the decision. In doing so, the court will often uncover a clear rationale for the decision. It is possible for the record and the context to reveal whether a decision was made on the basis of an improper motive or for another impermissible reason (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 137).

[11] If the reviewing court does not have evidence of what the administrative decision maker has relied upon, it may be impossible to detect reviewable error (*Access Copyright* at para 14). The overarching consideration is whether the disclosure sought will permit meaningful judicial review of the decision (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2021 FC 624 at para 26).

[12] Material relevant to a Rule 317 request is material that was before the decision maker at the time the decision was made (*Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 at para 12; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] at paras 111-114). Here, the Certificate issued by the PMRA on February 9, 2023 refers to “material that was considered by PMRA when it made the decision”, not just the material that was before Ms. Beckman when she approved Loveland’s submission. In oral submissions, counsel for the Attorney General of Canada acknowledged that all written materials prepared by the PMRA specifically in relation to Loveland’s submission 2022-3929 are producible.

[13] Rule 317 is not equivalent to discovery, and cannot justify a fishing expedition (*Tsleil-Waututh* at para 115; *Ron W Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175 at para 47). However, as Justice David Stratas observed in *Tsleil-Waututh* at paragraph 79:

In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element – situations where in effect the administrative decision-maker says on an essential element, “Trust us, we got it right” – have seen their decisions quashed [...]. The test would seem to be that if a particular evidentiary record – even if bolstered by permissible inferences and any evidentiary presumptions – disables the reviewing court from assessing reasonableness under an acceptable methodology [...], the decision must be quashed [citations omitted].

[14] The CTR transmitted to the Applicants on February 9, 2023 includes four internal memoranda prepared by PMRA officials in relation to numerous registration renewal applications, including the one submitted by Loveland:

- (a) memorandum dated December 2022 to the Renewal Coordinator, Registration Directorate from the Senior Scientific Evaluator, Toxicology Re-evaluation Section 2, Health Evaluation Directorate;
- (b) memorandum dated December 7, 2022 to the Renewal Coordinator, Registration Directorate from the Senior Evaluator, Environmental Division;
- (c) memorandum dated December 7, 2022 to the Renewal Coordinator, Registration Directorate from the Acting Section Head of the Incident Reporting Program, Health Evaluation Directorate (this memorandum also provides a supporting analysis for the conclusion respecting adverse incident reports, which are not at issue in this motion); and
- (d) memorandum dated December 15, 2022 to the Renewal Coordinator, Registration Directorate from the Section Head, Cumulative Health Assessment Section, Health Evaluation Directorate.

[15] All four memoranda contain the following identical language concerning the scientific publications cited in the Ecojustice Letter:

The purpose of this memo is to confirm that the information provided by Ecojustice, on October 27, 2022, in a letter addressed to PMRA's CRO (*L. Bowman to F. Bissonnette*), does not change the current assessment on file that risks are acceptable when label directions are followed. No labels were submitted with the applications.

Health Canada's PMRA has been monitoring the significant recent and ongoing scientific research and publications on glyphosate and

continues to monitor for any new credible scientific information that becomes available in the scientific literature. Therefore, as part of this surveillance and monitoring of scientific literature, PMRA is aware of the scientific publications cited in the letter.

[16] I agree with the Applicants that it is impossible to discern from these memoranda the basis upon which the PRMA, including Ms. Beckman, reached the conclusion that the scientific publications cited in the Ecojustice Letter did not change the PRMA's assessment that the risks associated with glyphosate are acceptable.

[17] The Attorney General of Canada notes that a registration renewal, such as the one challenged in the underlying application for judicial review, is not the same as an initial application. It is even further removed from a re-evaluation or a special review (citing the *Pest Control Products Regulations*, SOR/2006-124, ss 6 to 12 (applications), s 16 (renewals), and s 17 (re-evaluations and special reviews)).

[18] The Attorney General of Canada emphasizes the common statement in the four memoranda provided to the Renewal Coordinator that the "PMRA has been monitoring the significant recent and ongoing scientific research and publications on glyphosate and continues to monitor for any new credible scientific information that becomes available in the scientific literature". It is in this context that the PMRA has become aware of the publications cited in the Ecojustice Letter. According to counsel for the Attorney General:

Requiring PMRA to produce all records within its possession concerning the health and environmental risks of glyphosate, irrespective of whether the information from previous foundational decisions (such as the re-evaluation) or from its broader regulatory oversight activities were expressly in front of the decision-maker

for the particular decision at issue is impractical and judicially unmanageable. Such relief ignores the summary nature of judicial review and effectively invites the Court to step into the role of the administrative decision-maker.

[19] This is an overstatement of what is sought in the Applicants' request pursuant to Rule 317. Complying with the request would not require the PRMA to produce "all records within its possession concerning the health and environmental risks of glyphosate, irrespective of whether the information [was] expressly in front of the decision-maker". The Applicants are seeking only materials in the possession of the PRMA that pertain to its assessment of the publications cited in the Ecojustice Letter, specifically in relation to Loveland's submission 2022-3929. The Attorney General has adduced no evidence to suggest that it would be onerous to produce this documentation, assuming it exists.

[20] The Court cannot engage in meaningful judicial review of the PRMA's decision to renew Loveland's submission 2022-3929 without understanding the rationale for the conclusion that the information provided in the Ecojustice Letter did not change the PRMA's current assessment that the risks associated with glyphosate are acceptable. The motion for a further and better CTR will therefore be granted.

[21] Within 30 days of the date of this Order and Reasons:

- (a) the PRMA shall transmit to the Applicants true copies of all written materials prepared specifically in relation to Loveland's renewal submission 2022-3929 that address the scientific publications cited in the Ecojustice Letter; or

- (b) if no such materials exist, the PRMA shall advise the parties and the Court accordingly.

[22] Costs of this motion shall be in the cause.

ORDER

THIS COURT ORDERS that:

1. Within 30 days of the date of this Order:
 - (a) the Pest Management Regulatory Agency shall transmit to the Applicants true copies of all written materials prepared specifically in relation to Loveland Canada Products Inc's renewal submission 2022-3929 that address the scientific publications cited in the letter from Ecojustice dated October 27, 2022 (L. Bowman to F. Bissonnette); or
 - (b) if no such materials exist, the PRMA shall advise the parties and the Court accordingly.
2. Costs of this motion shall be in the cause.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-169-23

STYLE OF CAUSE: FRIENDS OF THE EARTH CANADA, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., AND ENVIRONMENTAL DEFENCE CANADA INC. v ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH, AND LOVELAND PRODUCTS CANADA INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 24, 2023

ORDER AND REASONS: FOTHERGILL J.

DATED: OCTOBER 30, 2023

APPEARANCES:

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