Federal Court  Cour fédérale

Date: 20231212

Docket: T-758-22

Citation: 2023 FC 1676

Ottawa, Ontario, December 12, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ENGLOBE ENVIRONMENT INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT AND REASONS

[1] The Canadian Food Inspection Agency [the Agency] seized soils manufactured by the applicant, Englobe Environment Inc. [Englobe], because they contained certain metals or metalloids in concentrations that exceeded allowable standards. Englobe objected to the seizure on various administrative law grounds. It also argued that the federal statutory and regulatory provisions that authorized the seizure were unconstitutional.

[2] Englobe's application is dismissed. The impugned provisions were validly enacted pursuant to the concurrent jurisdiction over agriculture set out in section 95 of the *Constitution Act, 1867* and the federal jurisdiction over criminal law set out in subsection 91(27) of the same Act. They are not contrary to section 7 of the *Canadian Charter of Rights and Freedoms* for being overbroad. In terms of administrative law, the regulatory provisions at issue do not constitute a prohibited subdelegation or an abdication of power. Lastly, the decisions made by the Agency regarding the seizures are reasonable.

I. Background

[3] For a proper understanding of these reasons, it is first necessary to outline the relevant statutory and regulatory framework. A short description of the facts that gave rise to this application will follow.

A. *Legal Background*

[4] The *Fertilizers Act*, RSC 1985, c F-10 [the Act], was originally enacted in 1885 (SC 1885, c 68). Among other things, its provisions require various types of fertilizers to be registered before they are marketed and set out certain obligations with respect to the labelling of fertilizers. It appears that the Act was initially intended to protect farmers from fraud and poor-quality fertilizers.

[5] In 2015, with a view to reducing the regulatory burden, the Act was amended to remove the requirement for prior registration of various types of fertilizers. Ensuring the safety of

fertilizers then became a key purpose of the Act. It is in this context that Parliament added section 3.1, which reads as follows:

3.1 No person shall manufacture, sell, import or export in contravention of the regulations any fertilizer or supplement that presents a risk of harm to human, animal or plant health or the environment.	**3.1** Il est interdit à toute personne de fabriquer, de vendre, d'importer ou d'exporter, en contravention avec les règlements, tout engrais ou supplément qui présentent un risque de préjudice à la santé humaine, animale ou végétale ou à l'environnement.

[6] Section 5 of the Act was also amended to give the Governor in Council the authority to make regulations to enforce section 3.1, in particular to delineate the prohibited conduct and to govern the evaluation of the risk of harm. In 2020, the Governor in Council exercised this authority by adding section 2.1 to the *Fertilizers Regulations*, CRC, c 666 [the Regulations], which reads as follows:

2.1 A person shall not manufacture, sell, import or export any fertilizer or supplement that contains any substance or mixture of substances in quantities that present a risk of harm to human, animal or plant health or the environment, except pests, if the fertilizer or supplement is used according to its directions for use, or in amounts not in excess of the amount that is necessary to achieve its intended purposes.	**2.1** Il est interdit de fabriquer, de vendre, d'importer ou d'exporter tout engrais ou supplément qui contient une substance ou un mélange de substances en des quantités qui présentent un risque de préjudice à la santé humaine, animale ou végétale ou à l'environnement, à l'exception des parasites, si l'engrais ou le supplément est utilisé selon son mode d'emploi ou appliqué en une quantité qui ne dépasse pas la quantité nécessaire pour atteindre l'objectif visé.

[7] The Agency is responsible for the administration of the Act.

[8] Section 2.1 of the Regulations does not set out specific thresholds beyond which some substances would “present a risk of harm to human, animal or plant health or the environment”. To ensure a certain degree of consistency in enforcing the Act, the Agency relies on the thresholds and the calculation method set forth in a trade memorandum bearing number T-4-93 [Memorandum T-4-93]. For certain chemical elements, such as nickel, molybdenum and selenium, the Memorandum sets out the maximum quantities of the elements that a hectare of land can receive over a period of 45 years. It provides a method for calculating the maximum concentration of these elements in a fertilizer or supplement, based on the quantity and frequency of application indicated by the manufacturer.

B. *Factual Background*

[9] Englobe is a corporation that specializes in treating, composting and repurposing organic materials. One of its facilities is located in Saint-Henri-de-Lévis, Quebec. It produces compost and soils from various raw materials, such as plant waste, food waste, municipal biosolids (i.e., solid waste from the wastewater treatment process), and wood bark and chips.

[10] On May 17, 2021, the Agency took samples of two soil products developed by Englobe: one named “Terre à potager St-Henri” [St-Henri vegetable garden soil] and the other “Multimix pelouse St-Henri” [St-Henri lawn multi-mix]. Englobe also took its own samples. An analysis of the Agency’s samples conducted by its laboratory revealed concentrations of nickel, molybdenum and selenium that were greater than the maximum concentrations indicated in

Memorandum T-4-93. On July 13, 2021, the Agency sent notices of detention under section 9 of the Act, which amounts to a form of seizure. These notices were based on the fact that the Agency's inspector believed on reasonable grounds that the soils in question contravened section 2.1 of the Regulations. It is not disputed that the soils constitute either fertilizers or supplements under the Act.

[11] The Agency and Englobe engaged in discussions in an attempt to resolve the situation. The Agency authorized Englobe to mix some of the detained soils with other soils with the hope of reducing the concentration of the problematic elements. On September 16, 2021, the Agency and Englobe took samples of the new mixture. The analysis conducted by the Agency once again revealed excessively high concentrations of nickel, molybdenum and selenium. On October 21, 2021, the Agency sent new notices of non-compliance regarding this mixture.

[12] Starting in July 2021, Englobe expressed doubts about the reliability of the Agency's laboratory results. After checking with the laboratory, the Agency's inspector replied that no errors had been made in the sampling and analysis process and refused to take new samples. In the fall, Englobe provided the Agency with the results of a private laboratory's analysis of a sample taken in July 2021. The results were lower than those of the Agency's laboratory and were below the standards for molybdenum and selenium set out in Memorandum T-4-93. Englobe also requested confirmation that the Agency's results were presented on a wet basis and not on a dry basis. In December 2021, the Agency confirmed that the results were expressed on a wet basis. In addition, it noted that the laboratory retained by Englobe was not accredited to use the method selected for the analysis.

[13] Subsequent exchanges did not lead to an agreement. In March 2022, Englobe sent a demand letter to the Agency, requesting that the Agency release the products. In its letter, Englobe reiterated its doubts about the reliability of the Agency's laboratory analyses and presented laboratory results from the samples taken from the new mixture in September 2021, as conducted by private laboratories. In addition, Englobe alleged that Memorandum T-4-93 was not an appropriate tool for assessing the safety of soils intended for single use and asserted that the standards in the Memorandum should have been adopted by regulation. In April 2022, Englobe filed this application for judicial review.

[14] It is worth noting how Englobe's arguments challenging the notices of detention have evolved. They initially focused on the validity of the laboratory results, then on the merits of the standards found in Memorandum T-4-93 and then on the invalidity of the Act and the Regulations on constitutional and administrative law grounds. At the hearing, Englobe's oral submissions were dedicated almost exclusively to the allegations that the Act and the Regulations are invalid. These reasons will therefore focus mainly on these issues.

[15] In support of its application for judicial review, Englobe filed a report by agrologist Marc Hébert, which questions the reliability of the Agency's laboratory results, states that Englobe products are safe and criticizes the approach that underpins Memorandum T-4-93. The Agency produced extensive evidence in response and there is no need to describe it in detail at this stage. The Agency also filed a motion to strike Mr. Hébert's report.

[16] Evidence that was not in the record before the administrative decision-maker is not usually admissible on judicial review: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraphs 86 and 98. In constitutional matters, the approach is more flexible, since, as we will see below, various forms of extrinsic evidence may be relevant in determining the pith and substance of legislation or in understanding how it relates to a head of jurisdiction. Given the evolving position taken by Englobe, the determinative issues do not require a detailed analysis of the evidence. It would therefore be counterproductive to decide the motion to strike. To the extent that these reasons refer to evidence, that evidence is admissible under the rules cited above.

[17] Shortly after the application was heard, the Supreme Court of Canada rendered its decision in the *Reference re Impact Assessment Act*, 2023 SCC 23 [*Impact Assessment Reference*]. The parties were invited to make additional submissions regarding this decision. However, it does not change the basic rules for the division of powers and does not deal with jurisdiction over agriculture and criminal law. Hence, it has little impact on the outcome of this case. Even more recently, this Court rendered judgment in *Responsible Plastic Use Coalition v Canada (Environment and Climate Change)*, 2023 FC 1511. The decision challenged in that case, however, has little in common with the statutory and regulatory provisions that are the focus of this application.

II. Analysis

[18] To explain why the application is being dismissed, Englobe's submissions will be analyzed in the order they were presented, namely, Parliament's jurisdiction to enact the Act, the

alleged overbreadth of the impugned provisions, the validity of the Regulations and the Memorandum in light of administrative law principles and the reasonableness of the Agency's decisions.

A. *Division of Powers*

[19] For the reasons that follow, Parliament had jurisdiction to enact the impugned provisions, including section 3.1 of the Act. The pith and substance of section 3.1 is the prohibition of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment. The pith and substance falls within the concurrent jurisdiction over agriculture set out in section 95 of the *Constitution Act, 1867* and within the federal jurisdiction over criminal law set out in subsection 91(27) of the same act.

(1) Analytical Framework

[20] The Supreme Court of Canada succinctly summarized the two stages of the analytical framework for division of powers cases in its recent decision in *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10, at paragraph 22 [*Murray-Hall*]:

> To decide whether a law or some of its provisions are constitutionally valid under the division of powers, courts must first characterize the law or provisions and then, on that basis, classify them by reference to the heads of power listed in ss. [91 to 95] of the *Constitution Act, 1867*. . .

[21] The first stage aims at ascertaining the "pith and substance" of the law or statutory provisions at issue. To do this, courts analyze both the purpose and effects of the law. In the

Reference re Securities Act, 2011 SCC 66 at paragraph 64, [2011] 3 SCR 837 [*Securities Reference*], the Supreme Court notes that:

> Intrinsic evidence, such as purpose clauses and the general structure of the statute, may reveal the *purpose* of a law. Extrinsic evidence, such as Hansard or other accounts of the legislative process, may also assist in determining a law's purpose. The *effects* of a law include the legal effect of the text as well as practical consequences of the application of the statute . . .

[22] The second stage involves determining whether the pith and substance of the law can fall under one of the heads of power of the enacting level of government. As the Supreme Court notes in the *Securities Reference*, at paragraph 65, "[t]his may require interpretation of the scope of the power". Since *Citizens Insurance Co of Canada v Parsons*, (1881) 7 App Cas 96 (PC), it has been generally accepted that the classes of subjects referred to in sections 91 to 95 of the *Constitution Act, 1867* must be read together. It follows that very broadly worded heads of power (like subsections 91(2) or 92(13)) cannot subsume the more specific heads of power that have been explicitly assigned: *Securities Reference*, at paragraph 72.

[23] Nevertheless, the heads of power listed in sections 91 to 95 must not be narrowly interpreted or confined to the realities known in 1867: *Reference re Same-Sex Marriage*, 2004 SCC 79 at paragraphs 22, 23 and 28, [2004] 3 SCR 698 [*Same-Sex Marriage Reference*]; *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at paragraphs 46–47, [2005] 2 SCR 669.

[24] In some cases, Parliament and the provincial legislatures can enact similar statutory provisions. The Supreme Court explained this situation in the *Securities Reference* at paragraph 66:

> Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction . . . This concept, known as the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation . . .

[25] Consequently, if, through its pith and substance, a law falls under one of the heads of power of the enacting level of government, its effects on the exercise of the other level of government's jurisdiction are irrelevant: *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paragraph 38, [2015] 1 SCR 693 [the *Firearms Registry* case]; *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2020 FCA 88 at paragraph 33, [2020] 3 FCR 645 [*Groupe Maison Candiac*].

[26] The Supreme Court has reiterated on several occasions that the principles governing the interpretation of sections 91 to 95 of the *Constitution Act, 1867* are intended to maintain the balance of federalism: see, for example, *Canadian Western Bank v Alberta*, 2007 SCC 22 at paragraph 24, [2007] 2 SCR 3 [*Canadian Western Bank*]; *R v Comeau*, 2018 SCC 15 at paragraphs 78–83, [2018] 1 SCR 342 [*Comeau*]. The Court has sometimes illustrated this balance by resorting to the principle of subsidiarity, which means that "legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best

position to respond to the citizen's concerns": *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paragraph 183, [2010] 3 SCR 457 (LeBel and Deschamps JJ) [*Assisted Reproduction Reference*]. However, these principles do not allow this Court to set aside the established framework that guides the interpretation of the *Constitution Act, 1867*, by setting out additional requirements that should be met in order for federal legislation to be declared valid.

[27] Lastly, the courts have reiterated time and time again that the merits of a law, its wisdom from a public policy perspective or its effectiveness have no impact on its constitutional validity with regard to the division of powers: *Reference re Firearms Act (Can.)*, 2000 SCC 31 at paragraphs 18 and 57, [2000] 1 SCR 783; *Securities Reference*, at paragraph 90; *Comeau*, at paragraph 83; *Murray-Hall*, at paragraph 44.

(2) Pith and Substance of the Impugned Provisions

[28] In a pith and substance analysis, the impugned provisions must be examined first: *Firearms Registry case*, at paragraph 30; *Murray-Hall*, at paragraph 30. Englobe is challenging the constitutional validity of section 3.1 of the Act and section 2.1 of the Regulations. Englobe is also challenging the definitions of "fertilizer" and "supplement", found in section 2 of the Act, and the regulatory authority conferred on the Governor in Council by section 5. However, Englobe's challenge with respect to the division of powers essentially concerns section 3.1 of the Act.

[29] In its memorandum, Englobe argues that the pith and substance of the impugned provisions is [TRANSLATION] "the strict regulation of the manufacture and sale, at the local level,

of composts, soils and other materials derived from the recycling of safe organic waste". The Agency's memorandum proposes that the Act as a whole may be characterized as [TRANSLATION] "controlling the components, labelling and safety of fertilizers and supplements". The parties did not address this issue at the hearing.

[30] The pith and substance of section 3.1 of the Act can be described as a prohibition of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment. This description flows from the text of the provision, its comparison with the other provisions of the Act, its legal effect and the extrinsic evidence that was filed in the record. It is true that this description is close to the wording of section 3.1, but this is inevitable given the generality of the terms that the latter uses.

[31] Let us start by reviewing the wording of section 3.1. It deals with fertilizers and supplements, which are the two main products regulated by the Act. Unlike other provisions of the Act that require a product to be registered or evaluated or a licence to be obtained before it is manufactured or marketed, section 3.1 sets out a prohibition that applies at any time, whether or not the product is subject to a registration requirement. Although it is part of a regulatory regime, this provision is prohibitive in nature. It prohibits various actions involving a fertilizer or supplement that presents a risk of harm to human, animal or plant health or the environment. That risk is part of the pith and substance of section 3.1, since it defines not only the scope of the prohibition but also its rationale.

[32] Englobe relies on the fact that section 4 of the Act contains a more specific prohibition, aimed at fertilizers and supplements that contain “destructive ingredients” or that are “harmful to plant growth”. According to Englobe, this demonstrates, *a contrario*, that section 3.1 addresses substances that are safe. Such an argument is difficult to understand. It cannot be asserted that, contrary to its wording, section 3.1 is intended to prohibit safe substances. In reality, nothing prevents Parliament from providing for different prohibitions that address broader or narrower ranges of conduct and higher or lower levels of risk or harm.

[33] The extrinsic evidence supports the characterization proposed above. During the debates concerning the bill that included section 3.1, the Minister of Agriculture and Agri-Food, Gerry Ritz, stated that the new provisions of the Act were intended, among other things, to ensure the safety of fertilizers and supplements (House of Commons Debates, March 3, 2014, at 3397):

> This legislation would strengthen the safety of agricultural products, the first link in the food chain, while reducing the regulatory burden for industry and promoting trade in agricultural products.

[34] To the extent that the amendments made to the Act in 2015 and the Regulations in 2020 are part of the same regulatory review process, the Regulatory Impact Analysis Statement [RIAS] that preceded the adoption of the amendments to the Regulations (*Canada Gazette*, Part I, vol 152, no 49, December 8, 2018) may shed some light on the purpose of section 3.1 of the Act. The following excerpts from the RIAS show that, in making the Regulations, the Governor in Council considered the risks that might arise from the use of certain fertilizers, regardless of the precise context of their use:

> The increasing interest in recycling by-products, industrial and/or organic wastes for application as fertilizers and supplements (e.g. soil amendments) can result in benefits through the return of nutrients to soil and the subsequent improvement of its physical condition. However, the use of recycled by-products also presents new and emerging risks due to the potential presence of biological and chemical contaminants. Therefore, the benefits must be carefully balanced against any potential safety hazards associated with these materials. Given that concerns over human, animal or plant health or the environment can be effectively alleviated with adequate treatment, careful consideration of the sources of waste-derived materials and the level of processing and treatment used during their manufacture is essential in determining the risks.
>
> . . .
>
> Finally, the level of regulatory scrutiny varies depending on the use pattern; the majority of fertilizers intended for specialty markets (including nurseries, commercial greenhouse operations, golf courses as well as home and garden products) are exempt from registration. This is rooted in historical precedent that stems from efficacy (i.e. effectiveness) and product performance considerations (e.g. the potential for greater economic losses in agricultural settings than with specialty uses) rather than actual risks. As efficacy is no longer regulated by the CFIA, the Regulations need to be amended to reflect the focus on safety. Despite the smaller volumes of products used in specialty versus agricultural applications, the exposure scenarios are not lacking potential risks.

[35] In the section of its memorandum that deals with the pith and substance of the impugned provisions, Englobe makes a range of submissions regarding the Act being either overbroad or not broad enough, the alleged safety of the products it covers and the change in perspective resulting from the amendments made to the Act in 2015. Englobe did not press these submissions at the hearing. They are not relevant to determining the pith and substance of the impugned provisions. Rather, a disagreement as to the desired scope of the prohibition is a challenge to the merits or effectiveness of the Act, which is irrelevant to the analysis. Englobe also did not

present any evidence that, in enacting section 3.1, Parliament was pursuing a hidden agenda within the meaning of *R v Morgentaler*, [1993] 3 SCR 463.

(3) Classification Under the Concurrent Jurisdiction Over Agriculture

[36] The pith and substance of section 3.1 of the Act is therefore the prohibition of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment. Characterized in this way, section 3.1 falls within the concurrent jurisdiction over agriculture set out in section 95 of the *Constitution Act, 1867*, which reads as follows:

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.	**[TRADUCTION] 95.** La législature de chaque province peut légiférer en matière d'agriculture et d'immigration dans cette province, et le Parlement du Canada peut légiférer en matière d'agriculture et d'immigration dans toutes les provinces ou dans chacune d'elles. Toutefois, les lois édictées en pareille matière par une législature n'ont d'effet, dans les limites de la province et à son égard, que dans la mesure où elles ne sont pas incompatibles avec les lois du Parlement du Canada.

[37] (It should be noted here that only the English version of the *Constitution Act, 1867* has official status. The French translation given here is from the *Final Report of the French*

Constitutional Drafting Committee, which is online at https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/).

[38] At the outset, it is useful to clarify the scope of the concurrent jurisdiction over agriculture. The basic premise of Englobe's submissions is that this head of power is narrow in scope and must be interpreted in a restrictive manner. It is true that, according to long-standing case law, the marketing of agricultural products is considered to fall under other heads of power. Some authors have criticized this case law and argue that the scope of section 95 has been reduced to little: Neil Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed (Toronto: Carswell, 1986) at 500–501; Robert S Fuller, Donald E Buckingham & Robert W Scriven, *Agriculture Law in Canada*, 2nd ed (Toronto: LexisNexis, 2019) at 192–194. In addition, in many cases, provincial laws regarding agriculture may be classified under provincial jurisdiction over "property and civil rights" or "matters of a merely local or private nature" as much as under the concurrent jurisdiction over agriculture: see, for example, *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paragraph 22, [2010] 2 SCR 536. That may explain why the courts have never attempted to precisely define the scope of the latter jurisdiction. In any event, nothing in the foregoing justifies setting aside the principle that each head of power should receive a generous and evolutionary interpretation.

[39] Section 3.1 of the Act falls under the concurrent jurisdiction over agriculture because fertilizers are inseparable from agriculture. Section 2 of the Act defines a fertilizer as a plant nutrient and a supplement as a substance that aids plant growth. The growth of plants is central to agriculture. Thus, if a law pertains to fertilizers, it necessarily pertains to agriculture. In addition,

it stands to reason that, relying on section 95 of the *Constitution Act, 1867*, Parliament can enact laws that deal with substances used for agricultural purposes in order to prevent soil contamination.

[40] The Ontario Court of Appeal recognized this inseparable link between fertilizers and agriculture in a case involving a challenge to the constitutional validity of an earlier version of the Act: *R v Bradford Fertilizer Co Ltd* (1971), 22 DLR (3d) 617 [*Bradford Fertilizer*]. The Court stated as follows at page 621:

> In my opinion it would be impossible to discuss intelligently the application or use of fertilizer and disregard the connotation of agriculture. The most important aspect of the subject would be missing.
>
> I conclude, both from the provisions of the Act and the Regulations, and from the common understanding of "agriculture" and the place of fertilizer in it, that the *Fertilizers Act* is a "law in relation to agriculture". As such, it is a law that s. 95 of the *B.N.A. Act, 1867* empowers Parliament to pass.

[41] It is true that the Court of Appeal focused on the registration requirements that were then central to the Act, whereas section 3.1 sets out a prohibition. The Court of Appeal's statements are still relevant to this case since the focus is on the products at issue, namely, fertilizers and supplements, rather than on the difference between their registration and prohibition.

(a) *Fertilizers as "Articles of Trade"?*

[42] To avoid this conclusion, Englobe argues that section 3.1 is not related to agriculture but to the regulation of fertilizers considered as "articles of trade". Englobe relies on well-established case law, according to which regulation of agricultural product marketing falls under neither the

general component of the federal power over "the regulation of trade and commerce" in subsection 91(2) of the *Constitution Act, 1867,* nor the concurrent jurisdiction over agriculture in section 95: see, for example, *R v Eastern Terminal Elevator Co*, [1925] SCR 434; *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Limited*, [1933] AC 168 (PC) [*Crystal Dairy*]; *Reference re Natural Products Marketing Act, 1934*, [1936] SCR 398, [1937] AC 377 (PC); *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1, [1951] AC 179 (PC) [the *Margarine Reference*]. Englobe adds that the prohibition in section 3.1 of the Act targets fertilizer manufacturers and not farmers.

[43] Such reasoning cannot stand. The prohibition set out in section 3.1 bears no resemblance to the marketing schemes discussed in the cases cited above. The Act does not seek to regulate prices, set quotas or centralize the marketing of fertilizers. The fertilizers covered by section 3.1 play a role in agriculture itself, given their role in plant growth.

[44] There is no precedent that supports extending the principles related to the marketing of agricultural products to operations that occur at an earlier point in production. On the contrary, the Ontario Court of Appeal rejected a similar argument in *Bradford Fertilizer*. After reviewing the Supreme Court and Privy Council decisions cited above, the Court of Appeal stated at page 624:

> . . . the *Fertilizers Act* was passed to benefit agriculture, by requiring the very essential plant nutrients and soil conditioners used in agriculture to be of prescribed standards, safe to use, and so described and labelled as to enable purchasers to know what they are getting and how to use it. The object of the Act is not to "regulate the fertilizer trade", although some regulation of that trade and its manufacturers and vendors is an obvious effect of the Act.

[45] By way of comparison, the Privy Council held that Parliament could, under its jurisdiction over "bankruptcy and insolvency", pass legislation regarding arrangements between farmers and their creditors, even if this legislation applied prior to the bankruptcy and was in fact intended to prevent bankruptcy: *British Columbia (Attorney General) v Canada (Attorney General)*, [1937] AC 391 (PC) [*Re Farmers' Creditors Arrangement Act*].

[46] Englobe also relies on *Saskatchewan (Attorney General) v Canada (Attorney General)*, [1949] AC 110 (PC), in which the Privy Council declared provincial legislation regarding loans to farmers to be invalid. In that case, however, the legislation was invalid because its pith and substance fell under the federal jurisdiction over interest, which prevented its classification under the provincial jurisdiction over property and civil rights or the concurrent jurisdiction over agriculture. No inference can be drawn from this as to the scope of the latter jurisdiction.

[47] Englobe is presenting its arguments from a slightly different angle by arguing that section 3.1 of the Act is beyond the concurrent jurisdiction conferred by section 95 because it targets fertilizer manufacturers and not farmers. Thus, it would not "interfere with the agricultural operations of the farmers", as the Privy Council said in *Crystal Dairy* at page 174. Such a contention does not withstand analysis. Section 3.1 most certainly affects farmers' operations by prohibiting certain types of fertilizers from being sold to them. Englobe counters that farmers can circumvent this prohibition by obtaining such fertilizers for free (which it asserts would often be the case with municipal biosolids) or by spreading manure (although manure is not exempt from the application of section 3.1 of the Act and section 2.1 of the Regulations; see paragraph 3(1)(a) of the Regulations). However, the fact that a law is ineffective or can be

circumvented has no impact on its constitutional validity; instead, these are considerations relating to the merits of the law: see the decisions cited at paragraph [27].

(b) *Overbreadth and the Classification Under Agriculture*

[48] Englobe also argues that section 3.1 of the Act falls outside the scope of the concurrent jurisdiction over agriculture since it covers fertilizers that are not used for agricultural purposes. Specifically, the products it manufactures are intended for residential uses (e.g., for a lawn or garden), municipal uses (e.g., for a park) or commercial uses (e.g., for a golf course). Until 2020, the Regulations designated these fertilizers as "special fertilizers". The excerpts from the RIAS cited above instead used the expressions "specialty uses" and "specialty markets".

[49] According to Englobe, section 95 of the *Constitution Act, 1867* applies only to "agricultural operations" or "agricultural producers", as those terms are commonly understood, and excludes "specialty" uses. Although Englobe did not provide further clarification, it can be inferred that agriculture would include only commercial activities aimed at food production on farms or in fields.

[50] However, nothing warrants such restrictions on the common meaning of the word agriculture as used in section 95 of the *Constitution Act, 1867*. As explained above, the heads of power listed in sections 91 to 95 of the *Constitution Act, 1867* must be given a broad and evolving interpretation. They must not be confined to their ideal type, most common or most well-known meaning: *Re Farmers' Creditors Arrangement Act* at 402–403; *Same-Sex Marriage*

Reference at paragraphs 22 to 29. Moreover, the words used in these provisions should not be given a narrower meaning than their common meaning.

[51] Dictionary definitions give us an idea of the meaning commonly associated with the word "agriculture". The Académie française defines agriculture as an [TRANSLATION] "activity whose purpose is to exploit the land by growing plants and raising animals". According to *Merriam-Webster*, it is "the science or occupation of cultivating the soil, producing crops, and raising livestock". The *Oxford English Dictionary* refers to "the practice of growing crops, rearing livestock, and producing animal products". According to the *Petit Larousse*, the word "agriculture" denotes an [TRANSLATION] "economic activity with the purpose of transforming and exploiting the natural environment to obtain plant and animal products that are useful to humans, esp. those intended for food". In a more pithy formulation, the *Multi-Dictionnaire de la langue française* simply renders agriculture as [TRANSLATION] "the art of cultivating the land".

[52] With the exception of the *Petit Larousse*, none of the above definitions confine agriculture to a commercial or economic activity. Hence, nothing justifies excluding a person who grows vegetables for personal consumption or a group of neighbours who tend to a community garden from the scope of the concurrent jurisdiction over agriculture. In addition, none of these definitions requires that the agricultural products be intended for food; we need only think of the cultivation of cotton or tobacco. It follows that agriculture, in the common sense of the word, may include the production of plants for ornamental or decorative purposes.

[53] The few decisions that have applied section 95 support a broad interpretation, rather than the one proposed by Englobe. The Alberta Court of Appeal has held that the *Animal Pedigree Act*, RSC 1985, c 8 (4th Supp), falls within the concurrent jurisdiction over agriculture, in the context of a dispute over the breeding of purebred dogs: *R v Neuman*, 1998 ABCA 261. An earlier version of that law was held to be valid in *R v Davenport*, [1928] 2 DLR 852 (Alberta CA), which dealt with the breeding of racehorses. It can be assumed that the forms of agriculture in question did not involve food production. In the latter, at page 854, the Court also rejected the claim that agriculture was restricted to "the cultivation of the fields".

[54] In any case, even if a narrow definition of agriculture were adopted, one that excluded certain so-called "specialty" uses, this would not affect the validity of section 3.1 of the Act, since its pith and substance—the prohibition of certain fertilizers—is related to agriculture. The fact that some of these fertilizers can be used for non-agricultural purposes would constitute only an incidental effect. In fact, the Act covers all fertilizers and supplements, regardless of the context of their use. However, the incidental effects of the impugned provision on the jurisdictions of the other level of government do not change its pith and substance and are not relevant to the analysis: *A-G Ontario v Barfried Enterprises Ltd*, [1963] SCR 570 at 577–580; *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21 at paragraph 23, [2000] 1 SCR 494; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 SCR 146; *Canadian Western Bank*, at paragraphs 30–31; *Impact Assessment Reference*, at paragraph 113.

[55] Adopting a narrow interpretation of what constitutes “agriculture” for the purposes of section 95 of the *Constitution Act, 1867* would also give rise to considerable practical problems. It would be difficult to determine whether laws enacted under this head of power would apply to those who do not fit the ideal type of the commercial farmer engaged in food production. This may include those who tend to community gardens, those who run hobby farms or farmers who produce materials for biofuels. In addition, some so-called “specialty” uses may be for food production. For example, one of Englobe’s products is called “vegetable garden soil”. It may well be that such a use would raise concerns about not only the environment but also human health.

[56] Lastly, Englobe claims that section 3.1 of the Act is unconstitutional because it covers a wide range of products that are generally recognized as safe. Such an argument is fallacious. It is the risk of harm that triggers the prohibition in section 3.1. The evidentiary record shows the scientific community’s concerns regarding the effects of high concentrations of nickel, molybdenum and selenium. Whether the maximum concentrations set by the Agency are too low or too high or whether the underlying philosophy is liberal or conservative are questions related to the wisdom of the Act that have no impact on its constitutional validity. In other words, since fertilizers fall under the concurrent jurisdiction over agriculture, Parliament is free to determine the maximum concentrations of certain substances or to delegate this power to a subordinate body.

(c) *"From Time to Time"*

[57] Relying on an article by Jesse Hartery, "La compétence concurrente en matière d'immigration : rendre aux provinces canadiennes ce qu'elles ont perdu", (2018) 63 McGill LJ 487, Englobe argues that section 95 of the *Constitution Act, 1867* should be interpreted as conferring jurisdiction mainly on the provinces and that Parliament may intervene only when there is an issue that transcends local interests. Mr. Hartery's argument is based on the expression "from time to time", which modifies the power that section 95 confers on Parliament, but not on the provinces.

[58] In a legal context, the expression "from time to time" means as occasion may arise: *Fischbach and Moore of Canada Ltd v Noranda Mines Ltd* (1978), 84 DLR (3d) 465 (Sask CA). It is often used to indicate that a faculty or power can be exercised more than once: *Lawrie v Lees* (1881), 7 App Cas 19 (HL). It does not impose substantive limits on the exercise of the power in question.

[59] Therefore, with respect to the contrary view, the expression "from time to time" cannot be interpreted as establishing a substantive limit on the power that section 95 confers on Parliament without stretching the meaning of the words beyond the breaking point. Moreover, section 95 contains an explicit clause that gives paramountcy to federal legislation, which is difficult to reconcile with an alleged implied limit on federal intervention. In particular, the expression "from time to time" cannot justify imposing a subsidiarity test like that applied by the

Supreme Court to heads of power whose potential scope is broader, such as jurisdiction over the regulation of trade and commerce: see the *Securities Reference*.

[60] Mr. Hartery also bases his argument on a speech given by the Secretary of State for the Colonies during the debate leading up to the enactment of the *Constitution Act, 1867* by the Imperial Parliament. The Secretary of State expressed the view that the powers conferred by section 95 would likely be exercised by the provinces in most cases. However, a prediction regarding how a power will be exercised does not amount to a limit on its exercise. In the end, there is nothing to support the interpretation Englobe proposes.

(4) Classification Under Federal Jurisdiction Over Criminal Law

[61] The Agency argues that section 3.1 of the Act may also fall under federal jurisdiction regarding "criminal law" as set out in subsection 91(27) of the *Constitution Act, 1867*. Englobe opposes this view. It argues that section 3.1 is not a valid criminal law measure because the test used by Parliament to define the offence, namely, the risk of harm, is not sufficiently precise to circumscribe actual harm. In addition, Englobe argues that a criminal law measure cannot target a product that is recognized as safe.

[62] For the following reasons, section 3.1 of the Act is a valid criminal law measure.

[63] Since the *Margarine Reference*, it has been established that, to fall under federal jurisdiction over criminal law, federal legislation must not only provide for a prohibition with sanctions but also serve a valid criminal law purpose. In that case, Justice Rand gave examples of

such purposes: “public peace, order, security, health, morality” (at 50). In subsequent decisions, the Supreme Court has held that preventing harm to health caused by tobacco or marijuana use were examples of health-related public purposes that warranted the implementation of criminal sanctions; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 [*Malmo-Levine*]. In *R v Hydro-Québec*, [1997] 3 SCR 213, at paragraph 130 [*Hydro-Québec*], the Supreme Court went a step further and found that:

> . . . Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances.

[64] In recent decisions, the Federal Court of Appeal reiterated that protection of the environment is a legitimate criminal law purpose: *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at paragraph 49 [*Syncrude*]; *Groupe Maison Candiac*, at paragraphs 52–55.

[65] In the *Assisted Reproduction Reference*, at paragraph 240, Justices LeBel and Deschamps stated that “the requirement of a real evil and a reasonable apprehension of harm constitutes an essential element of the substantive component of the definition of criminal law”. According to this view, courts would need to determine whether the assertion of criminal law power is sufficiently grounded in fact. This view is not unanimous. In that case, Justices LeBel and Deschamps wrote on behalf of two of their colleagues. The Chief Justice gave a dissenting opinion on this issue, supported by three of her colleagues. Justice Cromwell did not directly address the issue. In a subsequent decision, the *Reference re Genetic Non-Discrimination Act*,

2020 SCC 17, [2020] 2 SCR 283 [*Genetic Non-Discrimination Reference*], four judges stated that Justices LeBel and Deschamps's opinion was the state of the law, and two other judges stated that the issue had not been decided (see paragraphs 138, 269).

[66] Even assuming that the applicable test is the one set out by Justices LeBel and Deschamps, the evidentiary record sufficiently shows that Parliament was acting on a reasoned apprehension of harm when it enacted section 3.1 of the Act. Accordingly, this provision has a valid criminal law purpose.

[67] The report from Professor Whalen, the Agency's expert, describes how the use of fertilizers and supplements can contribute to an accumulation of contaminants, including metals and metalloids, in the soil. These substances are then likely to be absorbed into crops or to contaminate adjacent waterways, which will eventually lead to their absorption by humans. Composting municipal biosolids to manufacture fertilizers and supplements is likely to result in high concentrations of metals and metalloids. This concern was also raised in the excerpt from the RIAS cited above.

[68] Moreover, there is no doubt that metals and metalloids pose risks to human health even if scientific research results do not paint a complete picture of the situation or specify toxicity thresholds. This is true even though, in very small quantities, these elements are essential to plant and animal life. The evidentiary record includes a report prepared by Health Canada that lists the studies dealing with the harmful effects of various metals or metalloids, including nickel, molybdenum and selenium. The presence of metals in the environment is subject to various

forms of regulation. Specifically, the Quebec standards put forward by Mr. Hébert, Englobe's expert, establish maximum concentrations of nickel, molybdenum and selenium.

[69] Englobe's arguments against section 3.1 of the Act falling under the federal jurisdiction over criminal law boil down to a criticism of the overbreadth of the provision. However, where the impugned provision has a valid criminal law purpose, it is not for the courts to assess the degree of harm resulting from the prohibited conduct or the efficacy of the prohibition. Justice Karakatsanis explains this as follows in the *Reference re Genetic Non-Discrimination* at paragraph 79:

> As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law. The court does not determine whether Parliament's criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.

[70] Thus, the mere fact that section 3.1 of the Act prohibits conduct associated with a risk of harm does not make it invalid. Clearly, Parliament is not required to wait until a risk of harm has materialized to prohibit an activity. In claiming that the standards applied by the Agency are too high, comparing them to the Quebec standards and disputing the validity of the approach used by the Agency to determine maximum concentrations, Mr. Hébert is merely questioning the necessity or merits of the prohibition set forth in section 3.1. Such arguments do not bear upon the constitutional validity of legislation.

[71] Relying on Mr. Hébert's report, Englobe argues that some substances prohibited by section 3.1 of the Act are safe. The evidence filed by the Agency contradicts this. As seen above,

Parliament relied on a reasoned apprehension of harm when it adopted section 3.1. It is not for the courts to substitute their opinion for that of Parliament in this respect, nor to settle scientific controversies. Scientific uncertainty is not an obstacle to the exercise of the criminal law power: *Malmo-Levine*, at paragraph 78. Whether the impugned provision falls within the criminal law power also does not depend on an assessment of its effectiveness: *Syncrude*, at paragraphs 52–60.

[72] In this regard, this case is similar to *Malmo-Levine*. The Supreme Court held that prohibiting cannabis was linked to a valid criminal law purpose, despite some evidence suggesting that cannabis use had no adverse effects for most users and that only some categories of users were exposed to significant health risks. This shows that controversies as to the scope or degree of seriousness of harm do not prevent a prohibition from falling under the criminal law power.

[73] Englobe argues that this case is distinguishable from *Hydro-Québec* since the scope of section 3.1 of the Act is not circumscribed by an elaborate mechanism for identifying harmful substances like the one found in the *Canadian Environmental Protection Act*, RSC 1985, c 16 (4th Supp), which was at issue in that case. However, it is well established that Parliament can subject a prohibition to exceptions. It is for Parliament, not the courts, to choose the mechanism for defining the scope of a prohibition or of exceptions. In this case, Parliament chose to authorize the Governor in Council to make regulations to specify the scope of the prohibition set out in section 3.1 of the Act. Choosing this method over one similar to that at issue in *Hydro-*

Québec does not mean that Parliament is not seeking to suppress an evil or pursuing a valid criminal law purpose.

[74] Englobe also notes that, in *Bradford Fertilizer*, the Ontario Court of Appeal held that the Act did not fall within the criminal law power. However, the Court of Appeal was ruling on a previous version of the Act, which did not include the prohibition set out in section 3.1.

[75] In short, section 3.1 of the Act falls under the federal criminal law power, since the prohibition that it sets out pursues valid criminal law purposes, namely, the protection of health and the environment.

B. *Overbreadth and Section 7 of the Charter*

[76] Since section 3.1 of the Act and section 2.1 of the Regulations were enacted in compliance with the constraints flowing from the constitutional division of powers, it is now appropriate to address Englobe's submission that these provisions are nevertheless contrary to section 7 of the *Canadian Charter of Rights and Freedoms* due to their overbreadth.

[77] Englobe has the standing to raise this issue. It is true that a corporation cannot usually invoke section 7 of the Charter, since it protects rights that only natural persons can hold: *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1004. Nevertheless, a corporation charged with a criminal offence may still argue that law that created the offence is unconstitutional, even if it cannot hold the right on which it relies: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 313–314. The scope of this exception was expanded to include corporations

against which the Crown has initiated legal proceedings to enforce a regulatory regime: *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157. The same is true when a corporation asks a court to invalidate administrative action taken against it: *Canada v Stanley J Tessmer Law Corporation*, 2013 FCA 290 at paragraphs 5–7*; Prairies Tubulars (2015) Inc. v Canada (Border Services Agency)*, 2021 FC 36 at paragraphs 67–69, [2021] 2 FCR 57; aff'd on other grounds 2022 FCA 92. This is the case of Englobe, whose products were seized under the Act. It therefore has standing to argue that the impugned provisions violate section 7 of the Charter.

[78] The Agency nevertheless argues that the Court should not decide this issue, as it would be moot because Englobe is not currently facing criminal prosecution. The Agency relies on *Friedman v Canada (National Revenue)*, 2021 FCA 101. However, that case dealt with the specific issue of protection against self-incrimination in an administrative investigation that could potentially give rise to criminal prosecution. The Court held that section 7 of the Charter only applied when the investigation is truly aimed at criminal prosecution. In that case, the issue was moot because of a lack of evidence that criminal prosecution was contemplated. However, Englobe's arguments are unrelated to protection against self-incrimination. Englobe's situation is no more moot than those of the applicants in the cases cited in the paragraph above. Englobe's arguments should therefore be addressed.

[79] A legislative provision is overbroad if "there is no rational connection between the purposes of the law and *some*, but not all, of its impacts": *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraph 112, [2013] 3 SCR 1101; see also *R v Ndhlovu*, 2022 SCC 38;

Canadian Council for Refugees v Canada (Citizenship and Immigration), 2023 SCC 17. The purpose of the law must be articulated at an appropriate level of generality, as the Supreme Court explains in *R v Moriarity*, 2015 SCC 55 at paragraph 28, [2015] 3 SCR 485:

> The appropriate level of generality, therefore, resides between the statement of an "animating social value" — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific . . . An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.

[80] The purpose of section 3.1 of the Act and section 2.1 of the Regulations is to ensure that fertilizers and supplements are safe. This purpose is revealed by the wording of the relevant provisions, the emphasis on safety in the amendments made to the Act in 2015, the comments made by the Minister when introducing the bill and the excerpts from the RIAS cited above.

[81] Clearly, the means chosen, that is, prohibiting the manufacture, sale, importation or exportation of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment, has a rational link to fulfilling the purpose of the impugned provisions. These provisions are not overbroad.

[82] Nevertheless, Englobe argues that, because of the wide scope of the terms "fertilizer" and "supplement" in section 2 of the Act, section 3.1 of the Act and section 2.1 of the Regulations can apply to substances that are not hazardous, which makes them overbroad. However, the wording of these provisions states precisely the opposite: only fertilizers and supplements that

present a risk of harm are prohibited. The impugned provisions cannot be said to provide the opposite of what they state.

[83] According to Englobe, section 3.1 is also overbroad because it uses too low a threshold, the risk of harm, to circumscribe the scope of the prohibition. Since merely proving a risk is sufficient, a person may contravene section 3.1 even in the absence of proven harm. Section 3.1 therefore prohibits products that do not present any significant danger. However, overbreadth cannot result from a disagreement as to the threshold of risk or danger that Parliament is prepared to tolerate. For example, it cannot be argued that the speed limits set by the *Highway Safety Code*, CQLR c C-24.2, are overbroad because it is possible, in certain circumstances, to drive a car safely at a speed greater than 100 km/h or because other provinces have set different limits. Ultimately, it is a matter of drawing a line—in this case, with words rather than numbers. A disagreement regarding the exact place to draw the line does not eliminate the rational link between the end and the means.

[84] Allegations of overbreadth should be examined realistically, especially when protection of health and the environment are at stake. Quite often, the state of scientific knowledge does not allow for certainty when predicting future harm, but only allows for greater or lesser accuracy in the assessment of the degree of risk. According to the precautionary principle, lack of scientific certainty regarding the effects of an activity should not prevent action from being taken to minimize the risks associated with that activity: *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paragraph 31, [2001] 2 SCR 241. The principle of fundamental justice related to overbreadth of legislation should not be applied in a way that

would prevent the implementation of the precautionary principle: see, by way of analogy, the *Impact Assessment Reference* at paragraph 146.

[85] Relying on *R v Heywood*, [1994] 2 SCR 761 at paragraph 62, Englobe argues that reasonable hypothetical scenarios can be used to assess whether the impugned provisions are overbroad. It states that someone who manufactures their own soil by composting food waste could commit an offence under section 3.1 of the Act and be threatened with imprisonment if the soil does not comply with the standards in Memorandum T-4-93. However, such a scenario is not reasonable. It is far from certain that individuals who compost their own food waste "manufacture" ("*fabrique*", in French) a fertilizer or a supplement. There is no evidence to support the idea that the prohibition in section 3.1 applies to individuals who compost food waste for personal use. In addition, there is no evidence that home composting could give rise to a risk of harm to human, animal or plant health or the environment. In fact, both the excerpt from the RIAS cited at paragraph [34] and Professor Whalen's report (at 33) indicate that the use of municipal biosolids or similar substances is the main potential source of metals and metalloids in concentrations that present a risk of harm to human, animal or plant health or the environment.

[86] The impugned provisions are therefore not overbroad and not contrary to section 7 of the Charter.

C. *Validity of the Regulatory Framework on Administrative Law Grounds*

[87] Englobe's challenge is not based only on grounds related to constitutional law. Englobe also relies on principles of administrative law to assert that section 2.1 of the Regulations and Memorandum T-4-93 are invalid. Let us now analyze these submissions.

(1) Does Section 2.1 of the Regulations Give Rise to an Illegal Subdelegation or an Abdication of Power?

[88] Englobe argues that section 2.1 of the Regulations is invalid because it only reproduces the text of section 3.1 of the Act, with some minor variations that do not affect the analysis. Therefore, the Governor in Council has "abdicated" its power or, in other words, subdelegated the exercise of its regulatory power to the Agency's employees. In substance, Englobe claims that the Governor in Council should have specified in the Regulations the maximum concentrations of harmful substances or set out a specific method for determining those concentrations.

[89] To support this argument, Englobe cites *Attorney-General of Canada v Brent*, [1956] SCR 318 [*Brent*]; *Brant Dairy Co v Milk Commission of Ontario*, [1973] SCR 131 [*Brant Dairy*]; *Canadian Institute of Public Real Estate Companies v Corporation of the City of Toronto*, [1979] 2 SCR 2 [*Canadian Institute*]. The Federal Court of Appeal summarized this line of cases in *Actton Transport Ltd v Steeves*, 2004 FCA 182 at paragraph 22:

> The principle established in these cases is that where a delegated decision-maker is authorized to decide certain questions by regulation, the regulations which it promulgates in the exercise of that power must actually decide the questions. They cannot simply

> confer upon the delegated decision-maker the power to decide administratively that which the legislation requires it to decide legislatively.

[90] This is simply a consequence of the principle whereby a body exercising delegated powers cannot in turn delegate these powers ("*delegatus non potest delegare*"). However, this principle is not an inflexible rule but an interpretive presumption that may have to give way to the express or implied intention of Parliament: *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243 at paragraph 74, [2009] 2 FCR 466; *Re Peralta and the Queen* (1985), 16 DLR (4th) 259 (ONCA), aff'd by [1988] 2 SCR 1045.

[91] The Act must therefore be carefully examined to ascertain Parliament's expectations regarding the exercise of the Governor in Council's regulatory power. Section 3.1 and the provisions that confer regulatory power are reproduced below:

3.1 No person shall manufacture, sell, import or export in contravention of the regulations any fertilizer or supplement that presents a risk of harm to human, animal or plant health or the environment.	**3.1** Il est interdit à toute personne de fabriquer, de vendre, d'importer ou d'exporter, en contravention avec les règlements, tout engrais ou supplément qui présentent un risque de préjudice à la santé humaine, animale ou végétale ou à l'environnement.
5 (1) The Governor in Council may make regulations	**5 (1)** Le gouverneur en conseil peut, par règlement :
[. .]	[…]
(c.1) respecting the manufacturing, sale, importation or exportation of any fertilizer or supplement	**c.1)** régir la fabrication, la vente, l'importation et l'exportation des engrais et des suppléments qui

that presents a risk of harm to human, animal or plant health or the environment;	présentent un risque de préjudice à la santé humaine, animale ou végétale ou à l'environnement;
[. . .]	[…]
(f.1) respecting the evaluation of a fertilizer or supplement, including regulations respecting	**f.1)** régir l'évaluation des engrais et des suppléments et, notamment :
(i) the provision of samples of the fertilizer or supplement,	**(i)** la fourniture d'échantillons de ces engrais ou de ces suppléments,
[. . .]	[…]
(iii) the evaluation of the potential impact of the fertilizer or supplement on, and the risk of harm posed by the fertilizer or supplement to, human, animal or plant health or the environment;	**(iii)** l'évaluation de leur impact potentiel et du risque de préjudice qu'ils présentent à l'égard de la santé humaine, animale ou végétale, ou de l'environnement;

[92] From the outset, one aspect of section 5 must be emphasized. The "manufacturing, sale, importation and exportation of any fertilizer or supplement" that is harmful and the "evaluation of the potential impact of the fertilizer or supplement . . . and the risk of harm posed by the fertilizer or supplement" are two separate purposes of the regulatory power conferred on the Governor in Council. This duality is also reflected in section 3.1 itself. In fact, because of its position in the sentence, the phrase "in contravention of the regulations" relates to the prohibition against manufacturing, selling, importing or exporting. It does not relate to the issue of whether a fertilizer or supplement poses a risk of harm.

[93] The manner in which the Governor in Council exercised its regulatory power regarding these two aspects of section 3.1 must now be examined.

[94] It seems clear that section 3.1 cannot be contravened in the absence of regulations made under paragraph 5(1)(c.1). In the absence of such regulations, a fertilizer or supplement cannot be manufactured, sold, imported or exported "in contravention of the regulations". However, that is not the issue, since section 2.1 of the Regulations exists. Rather, the issue is whether the Governor in Council can prohibit any form of manufacture, sale, importation or exportation of a fertilizer or supplement that presents a risk of harm or whether, on the contrary, it is obliged to circumscribe the scope of the prohibition set out in section 3.1, as in *Brent*, *Brant Dairy* and *Canadian Institute*.

[95] The purpose of paragraph 5(1)(c.1) is to allow the Governor in Council to make exceptions to the activities prohibited by section 3.1. This is illustrated by subsection 5(1.1), which allows this power to be exercised to provide for "preclearance or in-transit requirements" for importation. Parliament therefore considered that the Governor in Council could authorize, under paragraph 5(1)(c.1), the importation of harmful fertilizers or supplements under certain conditions. In summary, paragraph 5(1)(c.1) provides a form of dispensing power or a power to make exceptions to section 3.1. However, there is nothing in the text, scheme or purpose of the Act to indicate that the Governor in Council must provide for such exceptions. The fact that section 2.1 of the Regulations limits itself to reproducing, with some clarifications, the substance of section 3.1 of the Act and that it does not set out categories of exceptions in no way impedes the application of the Act.

[96] As for the second component of section 3.1, the issue is whether this provision can be contravened in the absence of regulatory provisions governing "the evaluation of a fertilizer or supplement". There is nothing in the text of section 3.1 that requires the adoption of regulations that deal with these matters. Section 3.1 does not prohibit the marketing of fertilizers and supplements that contain certain substances in concentrations that exceed prescribed standards. Instead, this provision is worded in a way that allows its enforcement despite the absence of regulations under subparagraph 5(1)(f.1)(iii). The "risk of harm to human, animal or plant health or the environment" set out in section 3.1 is an intelligible standard that can be applied independently of any regulations. See, by analogy, *Irving Oil Ltd v Provincial Secretary of New Brunswick*, [1980] 1 SCR 787 at 794; *Groupe Maison Candiac*, at paragraph 74.

[97] By way of analogy, subparagraph 5(1)(f.1)(i) of the Act allows the Governor in Council to regulate the provision of samples of fertilizers or supplements. The absence of regulations made under that subparagraph does not fetter the power of an inspector to take a fertilizer sample set out in paragraph 7(1)(c) of the Act.

[98] Consequently, the fact that the wording of section 2.1 of the Regulations partially repeats that of section 3.1 of the Act does not result in a subdelegation or abdication of power that Parliament would have wished to avoid.

[99] The *Brent*, *Brant Dairy* and *Canadian Institute* decisions can be distinguished from this case. Given the nature of the regulatory schemes at issue in those cases, it was clear that Parliament could not have intended for the delegated administrative authority to enact

regulations that merely reproduced the terms of the enabling provision. Taking *Canadian Institute* as an example, a zoning bylaw cannot simply authorize a city council to subject real estate projects to a broad set of conditions determined on a case-by-case basis. Unlike section 3.1 of the Act, the legislation at issue in those cases did not include any prohibitions that could have applied independently of the exercise of the regulatory power at issue.

[100] Hence, the absence of a definition of what constitutes a risk of harm in section 2.1 of the Regulations does not render it invalid and does not prevent its application.

(2) Is the Memorandum a Disguised Regulation?

[101] Englobe also seeks a declaration that Memorandum T-4-93 is invalid on the ground that it constitutes a form of regulation not authorized by the Act.

[102] A trade memorandum or directive issued by an administrative body, without statutory authorization, cannot affect citizens' rights. The courts have sometimes invalidated such directives when it was clear that they were intended to impose a standard of conduct in the absence of any statutory authorization: *Dlugosz c Québec (Procureur général)*, [1987] RJQ 2312 (CA) [*Dlugosz*].

[103] However, a directive can indicate how an administrative decision-maker intends to exercise a discretionary power conferred on it by law. The courts have recognized the validity of such a process, provided that the administrative decision-maker considers the particular facts of each case before making a decision: *Maple Lodge Farms Ltd v Government of Canada*, [1982]

2 SCR 2 at 6–7; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 32, [2015] 3 SCR 909. It is only when the decision-maker "fetters his or her discretion", that is, mechanistically applies the criteria of the directive without examining the particular circumstances of the case at hand, that a decision will be found to be unreasonable: *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paragraph 93; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299. In such a case, it is the decision that is invalidated and not the directive.

[104] In this case, the Memorandum is a guide that explains how the Agency intends to apply section 3.1 of the Act and section 2.1 of the Regulations. There is no evidence to demonstrate that the Agency's inspector fettered her discretion by blindly applying the standards in Memorandum T-4-93. Before Englobe sent its letter of demand and filed its application for judicial review, it had never mentioned to the inspector that the maximum concentrations in the Memorandum were inappropriate or that the circumstances required deviating from them.

[105] Moreover, the Memorandum does not attempt to impose a standard of conduct on citizens. It is clear that it is only intended to specify the circumstances in which the Agency will find that the provisions of the Act and the Regulations have been contravened. Unlike the directive at issue in *Dlugosz*, it does not seek to impose a standard of conduct on citizens in the absence of statutory authorization. These are not grounds to declare it invalid.

D. *Reasonableness of the Agency's Decisions*

[106] In its memorandum, Englobe also disputed the reasonableness of the notices of detention issued by the Agency, independently of the issue of the validity of the relevant provisions of the Act and the Regulations. Englobe placed little emphasis on these issues at the hearing. Nevertheless, they should be briefly addressed.

(1) Validity of the Laboratory Results

[107] Initially, Englobe questioned the validity of the Agency's laboratory results. It obtained second opinions from private laboratories, the results of which were lower overall than those of the Agency. It speculated that the Agency's laboratory had presented its results on a dry basis rather than a wet basis. This issue figured prominently in the application for judicial review and in Mr. Hébert's expert report.

[108] In response to the application, the Agency filed the extremely detailed affidavit of Tyler Spencer. He described in great detail the analysis methods used by the Agency's laboratory and the laboratories retained by Englobe. He stated that, in many cases, the latter did not have the required certification to use those methods. Most importantly, he explained how the methods used by the laboratories retained by Englobe were less accurate and less reliable than those of the Agency's laboratory, particularly when detecting low concentrations of nickel, molybdenum or selenium.

[109] At the hearing, when confronted with this evidence, Englobe essentially abandoned this argument. It only contended that the Agency should have taken additional samples so that the laboratory results could be more representative. However, nothing in the Act or the Regulations requires the Agency to do so. The samples taken were sufficient to give the Agency reasonable grounds to believe that a breach of the Act had taken place.

(2) Frequency of Application

[110] Englobe also maintained that the standards in Memorandum T-4-93 were not appropriate for evaluating the safety of a single-use product, like the soils that it manufactures. These standards are instead designed to apply to fertilizers or supplements that are used every year over a 45-year reference period.

[111] The formula for calculating the maximum allowable concentrations found in Memorandum T-4-93 is based, among other variables, on the frequency of use. Questions could have been raised about the reasonableness of applying this formula based on an annual use of Englobe’s products over a 45-year period when they are intended for single use. However, at the hearing, the parties confirmed that the Agency performed the calculation with the assumption that Englobe’s products would only be used once in 45 years on the same land, which essentially amounts to a single use. Therefore, this issue no longer arises.

(3) Selective Seizure of Certain Batches of Soils

[112] Lastly, Englobe insisted that the Agency issued notices of detention regarding two batches of soil, but did not do so for a third batch, which, in all likelihood, has the same chemical characteristics. It concluded that its products are not really dangerous; if they were, the Agency would surely have seized this third batch.

[113] No conclusions can be drawn from the Agency's failure to seize this third batch. The evidence does not reveal what priorities and strategies the Agency uses to enforce the Act. The Agency's resources may be limited. In the absence of additional information, it is impossible to draw the inference that Englobe has put forward.

III. Conclusion

[114] For these reasons, Englobe's application for judicial review is dismissed. The impugned provisions of the Act and the Regulations are valid from the perspective of both constitutional and administrative law. Englobe has not demonstrated that the Agency's decisions in this case were unreasonable.

[115] The parties made no specific submissions as to costs. There is no reason to depart from the usual rule that costs are awarded to the successful party.

JUDGMENT in T-758-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs are awarded in favour of the respondent.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ENGLOBE ENVIRONMENT INC v CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	QUÉBEC, QUEBEC
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APPEARANCES:

Guillaume Lemieux Nicolas Gagné Elsa Chouinard	FOR THE APPLICANT
Frédéric Paquin Mathieu Laliberté Thomas Swerdfager	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gravel Bernier Vaillancourt Barristers and Solicitors Québec, Quebec	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT