Federal Court Cour fédérale

Date: 20240415

Docket: T-2113-22

Citation: 2024 FC 583

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 15, 2024

PRESENT: Madam Justice Walker

BETWEEN:

JACQUES LAMONTAGNE (MANUFACTURER), JACQUES LAMONTAGNE (RECOGNIZED TECHNICIAN) AND C.E.L.L. INSPECTION INC.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, C.E.L.L. Inspection Inc. (CELL), was designated by Measures Canada (MC) as a recognized inspector and accredited service provide (ASP) under the *Agreement for organizations registered to perform examinations pursuant to the Weights and Measures Act*

entered into on September 30, 2014, by CELL and MC (Registration Agreement). An ASP is an organization responsible for examining and certifying measuring devices that are intended for use in trade. Jacques Lamontagne, applicant and director of CELL, is an MC recognized technician and, at the time of the relevant events, Cathy Lamontagne and Éric Potvin were CELL employees. Mr. Lamontagne also manufactures test devices authorized by MC for the inspection of retail fuel dispensers, including the 220L prover. To carry out their duties, CELL and its employees were authorized to examine devices and certify measuring devices pursuant to the *Weights and Measures Act*, RSC 1985, c W-9 (the Act), including gasoline pumps at service stations.

[2] MC is an agency of Innovation, Science and Economic Development Canada responsible for ensuring the accuracy of measurements taken in the selling of measured goods, and approving and inspecting measurement devices. MC is responsible for administering and enforcing the Act and designating ASPs and the inspectors working for the ASPs, as well as for ensuring compliance with the conditions related to these duties.

[3] On September 18, 2018, MC suspended the certificate of registration authorizing CELL to examine and certify measuring devices in accordance with the Act, because of its failure to remedy two violations (Violations) and submit corrective action plans in accordance with MC's requirements (the Suspension). The Violations result from a follow-up examination of Ms. Lamontagne. CELL and Mr. Lamontagne strongly contested the Suspension throughout the three stages of MC's internal appeal.

[4] On September 9, 2022, Ms. Allen, MC President, dismissed the third appeal of the Suspension filed by CELL (the Decision).

[5] The applicants are now seeking judicial review of the Decision. They are asking the court to set aside the Decision and declare CELL to be an MC ASP, and for the applicants' inspection powers to be restored.

II. Factual background

[6] The Suspension, the applicants' three appeals, MC's ensuing decisions and the communications and meetings between the applicants and MC create a complex factual background. It is important to relate certain key events that led to the Decision:

> **February 23, 2018**: Follow-up examination of Ms. Lamontagne in the presence of an MC inspector (Inspector Vanasse), post-inspection oral feedback to identify improvements to be made. According to the inspector's notes, Ms. Lamontagne did not meet six of MC's Standard Test Procedures (STPs). Mr. Potvin had a practical examination that same day, but the Suspension is a result of Ms. Lamontagne's follow-up examination.
>
> **February 28, 2018**: CELL asked the inspector to provide a copy of Ms. Lamontagne's evaluation report.
>
> **March 1, 2018:** F-A Bourdon, Director, Commercial Operations at MC, informed CELL that Ms. Lamontagne would have to submit the results of the February 23, 2018, device examination such that MC could complete the monitoring activity. On the same day, CELL submitted the results of the examination in the Online Reporting Application (ORA), an MC web application.
>
> **March 2, 2028:** Mr. Bourdon informed Mr. Lamontagne that the device examination certificate did not comply with the ORA user manual instructions.
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> **March 5 to April 3, 2018**: Email exchange between MC and CELL to complete the follow-up examination process for Ms. Lamontagne and correct the examination certificate submitted in ORA.
>
> **April 10, 2018**: Through its counsel, CELL again asked MC to send it the results and reports of Ms. Lamontagne's follow up examination.

June 4, 2018: MC replied to counsel's letter. Mr. Bourdon explained that the follow-up examination of Ms. Lamontagne was a follow-up examination for the purpose of evaluating her inspection work and ensuring that she was maintaining the necessary competencies . According to MC, the February 23, 2018, follow-up examination revealed that Ms. Lamontagne had not maintained her competencies. Two violation reports were issued:

> [TRANSLATION]
> Violation 1: 20180528RACIS01R0183 – CELL did not ensure that its technician maintained the level of knowledge required by MC. Six STPs were not completed or performed adequately.
> Violation 2: 20180528RACIS02R0183 – CELL did not accurately determine and record the results of the examination, measurement errors and other non-compliances revealed by the examination. The certificate (10294265) produced further to the February 23, 2018, follow-up examination does not reflect the performance of the device, even after the MC intervention.

June 28, 2018: CELL submitted the first version of its corrective action plan.

July 5, 2018: MC advised CELL that its plan did not comply with the Registration Program requirements because it did not explain the cause of the Violations and did not suggest any solutions to prevent the Violations from reoccurring.

July 12, 2018: CELL submitted its second corrective action plan. According to MC, the second version of the plan still did not comply with the Registration Program because (A) for Violation #1, the plan proposed corrective actions that did not comply with the requirements of the Act, and (B) for Violation #2, CELL had shared with MC its interpretation of the requirements of the Act and STP 7 and had asked that the Violation be withdrawn.

July 19, 2018: Meeting between MC (Mr. Bourdon, P. Lacelle, MC auditor, and Mr. Parent, MC manager) and Mr. Lamontagne. According to the minutes of the meeting, the goal was to [TRANSLATION] "review the details of the [V]iolations and help [CELL] resolve them". In their memorandum of fact and law, the applicants indicate that they saw Inspector Vanasse's notes for the first time at the meeting.

July 24, 2018: MC sent a warning letter to CELL asking it to correct the Violations and giving it an additional 15 working days to provide an acceptable corrective action plan.

July 31 and August 7, 2018: CELL submitted a third corrective action plan. MC determined that the third version of the plan did not propose any corrective measures and that CELL was instead asking MC to withdraw Violation #2 and STP 7.

September 18, 2018: MC served the Suspension of CELL's certificate of registration. The suspension letter indicated that CELL had not established the causes that would allow for the implementation of the corrective measures required to remedy the two Violations. As a result, CELL's recognition was suspended and CELL was to cease examining devices under the Act as of September 19, 2018.

August 16, 2019: CELL filed its first appeal of the Suspension.

December 6, 2019: MC dismissed the first appeal and upheld the Suspension. CELL did not correct the Violations, and the proposed corrective action plans were insufficient to assure MC of its competencies. By refusing to address the Violations, Mr. Lamontagne did not show that the competencies to be able to act on behalf of MC were being maintained.

January 2, 2021: CELL filed a second appeal of the Suspension.

May 18, 2021: MC dismissed the second appeal and upheld the Suspension.

September 20, 2021: CELL filed a statement of claim with the Federal Court (T-1433-21) to (1) set aside the decision to suspend CELL's registration rendered on September 18, 2018; (2) order MC to reinstate CELL as an ASP under the Act; and (3) order the Minister of Industry and MC to pay $105,000 in damages and interest. This case has been suspended until a final judgment is rendered in this application for judicial review.

February 23, 2022: CELL filed a third appeal of the Suspension. The appeal contained six specific issues.

September 9, 2022: MC dismissed the third appeal and upheld CELL's Suspension in the Decision under review.

III. Legislative framework

[7] The purpose of the Act is to reduce measurement errors and effectively increase fairness in the Canadian market. Under section 8 of the Act, MC requires every measurement device used in trade, such as gas pumps, to be approved, examined and certified in accordance with the Act and the relevant regulations.

[8] Under section 16.1 of the Act, the Minister of Industry may designate any person as an inspector responsible for examining measurement instruments:

Administration and Enforcement	**Exécution et contrôle d'application**
Designation	**Désignation**
Power to designate	**Pouvoir de désignation**
16.1 (1) For the purposes of the administration and enforcement of this Act, the Minister may designate persons, or classes of persons, to exercise powers in relation to any matter referred to in the designation.	16.1 (1) Le ministre peut, pour l'exécution et le contrôle d'application de la présente loi, désigner toute personne — individuellement ou au titre de son appartenance à une catégorie déterminée — pour exercer des pouvoirs relativement à toute question mentionnée dans la désignation.
Training and qualification	**Formation et qualification**
(1.1) The Minister shall ensure that, for each particular sector, all persons designated under subsection (1) are trained and qualified in the same manner and that all examinations made by these persons are conducted consistently	(1.1) Le ministre veille à ce que, pour chaque secteur, toutes les personnes désignées en vertu du paragraphe (1) soient formées et qualifiées de la même manière et à ce que tous les examens menés par ces personnes soient effectués chaque fois de la même façon
. . .	[. . .]
Suspension and revocation	**Suspension et révocation**
(3) The Minister may suspend or revoke a designation made under subsection (1).	(3) Le ministre peut suspendre ou révoquer toute désignation faite en vertu du paragraphe (1).

[9] MC has implemented a registration program that authorizes ASPs to examine and certify devices used in trade. Under this program, MC created the *Registration Program Terms and Conditions* (Terms and Conditions) and the *Registration Program Terms and Conditions Guide* that establish the conditions under which an organization can become an ASP; the requirements of the program; the follow-up examinations; violations and suspensions; and the appeal process. To be eligible for the registration program and to maintain the registration as an ASP, an organization must respect MC's policies and procedures. Each ASP enters into a registration agreement with MC, which sets out the ASP's scope of application, namely the categories of measurement devices the ASP is authorized to examine and certify.

[10] The examination and certification of measuring devices is done by recognized technicians. A recognized technician is a person employed by an ASP and whose competencies have been successfully assessed and who is recognized by MC to examine measuring devices. When examining a measuring device, a recognized technician must follow the standardized procedures established by MC. MC periodically evaluates the competencies of recognized technicians during follow-up examinations pursuant to the Terms and Conditions (section 1.10). To retain the authority to examine devices, technicians must show that they have maintained their knowledge by achieving satisfactory results in periodic follow-up examinations (section 3.2 of the Terms and Conditions).

[11] During a follow-up examination in the presence of a technician, an MC inspector observes the technician performing an examination of a device within his or her scope. The inspector must verify whether the technician respects the standard test procedures (STPs). STPs are standardized procedures established by MC, to which recognized technicians must refer to

determine how to perform a test for a given category of devices. The goal of STPs is to ensure that recognized technicians and inspectors perform tests the same way. At the end of the follow-up examination, the technician or the ASP must report the results of the test of the device in ORA, which generates an examination certificate. The MC inspector retrieves a copy of the certificate and determines whether it meets the requirements of the ORA conditions of use.

[12] Section 1.4 of the Terms and Conditions defines a violation as "actions or omissions committed by an organization or a technician that contravene [registration] program requirements." A violation can result from a violation of the Act, the *Weights and Measures Regulations*, CR.C, c 1605 (Regulations), the Terms and Conditions or the Registration Agreement between an ASP and MC, or the failure of an ASP or technician to respect MC's policies, bulletins or other directives, including STPs.

[13] If MC detects a violation, such as during follow-up examinations of technicians, MC will notify the ASP, which must determine the causes of the violation and initiate the required corrective actions needed, to the satisfaction of MC (section 1.10 of the Terms and Conditions). When MC advises an organization that one or more violations have been committed, section 1.11 of the Terms and Conditions requires the organization to implement the corrective actions required to address the situation.

[14] MC will take an enforcement measure when an ASP or technician is no longer able to meet the applicable criteria or requirements and the violations remain outstanding. Depending on (1) the severity of the violation; (2) its impact on the fairness and accuracy of measurement; (3) the fact that it is accidental or intentional; and (4) the number of repetitions or frequency, MC

may suspend or revoke the registration of an ASP with an outstanding violation (subsection 16.1(3) of the Act, and sections 1.8.4 and 1.11 of the Terms and Conditions).

[15] As a registered organization, CELL had to ensure that all its activities and those of its employees were in conformance with MC program requirements, directives, policies and procedures, and with the Act and the *Weights and Measurements Regulations* (section 2.1 of the Terms and Conditions).

IV. The Decision and the analysis report

The Decision

[16] The Decision is in response to the third appeal of CELL's suspension issued in 2018. Ms. Allen, the decision maker, indicated that the Decision was the result of a full review of the suspension file and the information collected during discussions and exchanges with CELL. Moreover, she noted that during the appeal process, MC answered the six questions Mr. Lamontagne asked in his third application for appeal (even though in Ms. Allen's opinion, questions 3, 4 and 5 were not related to the Suspension).

[17] The Appeal Analysis Report (Report) is enclosed with the Decision. The Report lists the points assessed during the review of the file and sets out the detailed explanations linked to the Terms and Conditions that CELL must respect to perform examinations in accordance with the Act. Additionally, four Annexes are enclosed with the Decision: (a) CELL's third appeal; (b) a timeline of events; (c) the technical points discussed during a meeting on August 23, 2022; and (d) MC's reply to the six questions Mr. Lamontagne asked MC in the third appeal.

[18] Ms. Allen advised the applicants that CELL's suspension was justified and upheld the suspension. She explained that the Report provides details of the analysis and explanations on the following points:

- CELL was unable to respect the conditions that would allow it to maintain its designation as inspector: CELL did not accurately identify or record the results of the inspection of the measurement device.
- CELL did not resolve the violations raised by MC according to the requirements for the designation as inspector under the Act: The corrective action plans CELL submitted did not respect the requirements of the registration program despite feedback and advice provided by MC.
- According to the registration program terms and conditions, MC must suspend a technician or registration for all or part of an organization's scope of registration where the organization fails to adhere to the requirements of the Act and the Regulations or the terms and conditions under which registration was granted.

The Report

[19] The Report first states that the scope of MC's analysis in the third appeal was established during a first meeting on May 16, 2022. The appeal analysis aimed to determine whether the decision to suspend CELL's registration should be upheld or reviewed. Although the appeal process allows complaints and disputes from registered organizations, it is not a bargaining or a mediation mechanism.

[20] The Report then sets out the scope of CELL's registration; the two violations and CELL's attempts to correct them; the registration program requirements; the Registration Agreement; the responsibilities of CELL as a registered organization; MC's monitoring for the follow-up examination; and the circumstances that leading to the Suspension. The Violations are:

[TRANSLATION]

- Violation 20180528RACIS01R0183: During the follow-up inspection on February 23, 2018, in the presence of a technician, it was shown that

Ms. Lamontagne's knowledge as required by MC had not been maintained. The STPs were not respected during the examination of the device: (1) STP 22 (wetting and drainage); (2) STP 21 (flow rate determination); (3) STP 4 (slow flow test); (4) STP 10 (price computing); (5) STP 16 (product blending); STP 18 (temperature compensation); (6) STP 15 (delivery cross-over test); and the Notice of Approval (Ms. Lamontagne did not ensure that the device was sealed);

– Violation 20180528RACIS02R0183: Certificate 10294265, produced on March 2, 2018, following Ms. Lamontagne's follow-up examination, does not reflect the performance of the device. CELL did not accurately identify and record the results of the examination, the measurement errors or other non-compliance issues revealed by the examination. The coding CELL used does not reflect either the comments on the certificate or MC's observations during the follow-up examination. The certificate refers to a measurement error while the examination result code indicates a problem with meter use. After exchanges between CELL and MC and explanations provided by MC, the certificate was amended by CELL. However, the coding in the amended certificate makes reference to an error with meter installation, which still does not correspond to the observations made by MC. MC therefore requested clarifications regarding the results, but in an email dated March 19, 2018, Mr. Lamontagne indicated that he would not change the certificate. After further exchanges, MC completed the monitoring activity since CELL did not correct the certificate in accordance with MC's requirements and explanations:

> It is therefore established that the recognized technician Cathy Lamontagne and CELL [did not] adequately or accurately identify and record the examination results, since the certificate does not reflect the performance of the device.

[21] MC concluded that CELL had been unable to correct the Violations. The three versions of the corrective action plans CELL had submitted did not respect either the regulatory requirements or the requirements of the registration program, notwithstanding the additional time CELL had been granted to deal with the Violations and the exchanges between CELL and MC.

[22] The Report describes the scope of the monitoring MC has done since CELL's designation in 2006, including training and theoretical evaluations, 46 follow-up examinations without a technician and 13 follow-up examinations with a technician. According to MC, these activities

allowed the parties to interact and to discuss the technical requirements related to the examination of devices and the registration program conditions. MC states that all these monitoring activities were performed in compliance with the requirements of the registration program and in accordance with the strict processes established in its Quality Management System. As for the follow-up examinations in the presence of a technician, MC's role is to observe the work of the technicians without too much intervention to determine whether technicians have maintained their knowledge. The purpose of the examination is to verify whether the technician is respecting the STPs and has all the documents, equipment and tools required for the examination. For this reason, inspectors generally do not discuss test procedures during an examination. MC inspectors also do not issue certificates at the end of an examination. It is the recognized technician's responsibility to issue the examination certificate in ORA.

[23] The Report also refers to the fact that MC collaborated with CELL to resolve the situation. During an in-person meeting, MC noted that CELL did not properly understand some of the STPs and the applicable regulatory requirements. MC further explained the requirements but, according to MC, Mr. Lamontagne asked that the STPs be changed. After the meeting, MC sent a warning letter to CELL to grant it additional time to correct the Violations in a manner satisfactory to MC. The last attempts to resolve the Violations were received on August 2 and 7, 2018. MC considers that the resolution of the first Violation had progressed even though there were still shortcomings. However, CELL was still asking for the second Violation to be withdrawn. According to CELL, the Violation resulted from a difference in interpretation between MC and CELL.

[24] The Report makes note of CELL's responsibility to correct the Violations raised in accordance with the registration program.

[25] To conclude, the Report confirms that the analysis of the file during the third appeal showed that the decision to suspend CELL's registration was justified. MC therefore upheld the Suspension:

> [TRANSLATION]
> The suspension of CELL's registration is the result of serious breaches by the organization, which did not implement the required corrective actions to remedy the violations raised. The requirements were explained to the organization's senior official, who did not correct the violations, he asked for violation number 20180528RACIS01R0183 to be withdrawn since his interpretation differed from MC's: MC being the regulatory agency that developed and instituted the requirements.

V. Issues

[26] The applicants raise several arguments to challenge the merits of the Decision. They submit that the decision to suspend CELL is unreasonable because, in doing so, MC relied on erroneous data, and the Suspension is the result of a random process and procedure, and a lack of a standardized procedure. The applicants also allege that MC did not consider their third corrective action plan when it made its decision to uphold the Suspension. In their opinion this omission is a violation of the *audi alteram partem* rule.

[27] For the purposes of my analysis, I have reformulated the applicants' arguments as follows:

1. Is the Decision unreasonable?

2. Did Ms. Allen's decision-making process comply with the principles of procedural fairness?

VI. Preliminary issues

Inadmissibility of some of the applicants' arguments

[28] The respondent submits that some of the applicants' arguments are inadmissible because they are not included in the notice of application for judicial review submitted on October 12, 2022, contrary to paragraph 301(e) of the *Federal Courts Rules*, SOR/98-106 (the Rules). Paragraph 301(e) requires that a notice of application set out "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on". According to the respondent, the applicants are barred from raising the following arguments:

(i) The decision to suspend CELL is unreasonable because it is based on a random process and procedure;

(ii) The decision to suspend CELL is unreasonable because it is based on the lack of a standardized procedure; and

(iii) The decision to uphold the suspension is unreasonable because it was rendered without addressing CELL's third corrective action plan and violates the *audi alteram partem* rule.

[29] The respondent states that he was [TRANSLATION] "caught off guard" and was unable to respond to these grounds in his affidavits. The applicants' memorandum was only filed on May 31, 2023, while the affidavits of MC's representatives, Mr. Bourdon and Mr. Parent, were affirmed and filed on January 27, 2023.

[30] In turn, during the hearing of this case on November 8, 2023, the applicants pointed out that the respondent had had ample time to formulate his responses to the arguments as the arguments were included in their memorandum. The applicants noted that if the Court accepted the respondent's argument, they intended to submit an oral motion under Section 75 of the Rules in order to amend their notice of application for judicial review. They submitted that the modification of their pleadings should be authorized to better identify the issues at the hearing (Paragraph 75(2)(a) of the Rules).

[31] The respondent noted that the lack of clarity about the issues in the notice of application caused him prejudice regarding the evidence. According to the respondent, the applicants' motion at the hearing to amend their notice of application was too late.

[32] I must note that the decision being reviewed is not the decision to suspend CELL. The impugned decision is Ms. Allen's decision in response to CELL's third appeal of the Suspension. I will examine the applicants' arguments and the reasonableness of the Decision in my analysis.

[33] The grounds for review raised by the applicants are not stated clearly and specifically in the notice of application. However, throughout the notice, the applicants note their concerns and doubts about the follow-up examination process (described as a [TRANSLATION] "random" process in their memorandum) and Inspector Vanasse's training; the feedback the inspector provided to Ms. Lamontagne; MC's application of specific STPs; and the appropriateness of a full suspension considering all the circumstances. This last concern underlies their argument

about MC's lack of a standardized procedure for imposing a suspension. The applicants also mention their third corrective action plan in the notice of application.

[34] Moreover, the respondent reviewed the applicants' questions on May 31, 2023, and addressed them in his own memorandum of fact and law on June 29, 2023. The respondent could have submitted a motion to strike out the three arguments being challenged (section 221 of the Rules) or a motion for leave to file additional affidavits (section 312 of the Rules). Similarly, since June 29, 2023, and their receipt of the respondent's memorandum, the applicants had also been entitled to submit a motion for leave to amend their notice of application under section 75 of the Rules.

[35] In light of the information and the arguments presented in the notice of application, the arguments of both parties, the scope of information in the Court record, and the advanced stage of this case, I will address the basis of the applicants' arguments to better serve the interests of justice with no additional delay. Neither the applicants nor the respondent wants an adjournment in order to further their arguments.

Applicants' oral motion to submit Mr. Lamontagne's additional affidavit

[36] The applicants presented an oral motion to file an additional affidavit, signed by Mr. Lamontagne during a break in the hearing; attached were the notes he had taken during the meetings with MC's representatives. The affidavit and its attachment were supposed to be a response to a question from the Court aimed at determining whether the applicants had, during their third appeal, presented a question to Ms. Allen regarding their allegation that Inspector

Vanasse had committed a factual error (a reference to [TRANSLATION] “the drip valve” of the prover Ms. Lamontagne had used).

[37] As expected, the respondent objected to the late presentation of these documents. The respondent described this evidence as self-serving evidence that could have been revealed in Mr. Lamontagne’s first affidavit.

[38] I agree with the respondent. A party may, with leave of the Court, file an additional affidavit under section 312 of the Rules. This rule does not specify how the Court is to exercise its discretion, but the case law has identified a number of principles, summarized by Justice Stratas in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88, at paras 4-6 (*Forest Ethics*); (*Bossé c Canada (Agence de la santé publique)*, 2023 CAF 199 at para 16). First, the party seeking to introduce new evidence must meet two preliminary requirements, namely show that the evidence is admissible and relevant. With regard to admissibility, if it has been established that “normally the record before the reviewing court consists of the material that was before the decision-maker” (*Forest Ethics* at para 4). If these two requirements have been met, the Court must then consider the following (*Forest Ethics* at para 6):

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under section 306 or 308 of the Rules, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

[39] I conclude, for several reasons, that Mr. Lamontagne's additional affidavit does not meet the conditions required to be admissible under section 312 of the Rules. The exhibit included with the additional affidavit was not in Ms. Allen's hands when she made the Decision. There is no doubt that the evidence sought to be adduced was available when the applicants filed Mr. Lamontagne's initial affidavit on November 28, 2022. Moreover, I am not satisfied that the additional evidence is sufficiently probative to justify granting the applicants' motion. Lastly, and as a secondary matter, I accept the respondent's argument that he would suffer some prejudice if the Court were to consider the new evidence presented by the applicants at this advanced stage.

[40] I therefore dismiss the applicants' oral motion to submit Mr. Lamontagne's affidavit and its attachment, which was made at the hearing before the Court.

VII. Analysis

Reasonableness of the Decision

[41] The applicants base the essence of their arguments on allegations that Inspector Vanasse's training was deficient (and that she made factual errors because of this). They also challenge the [TRANSLATION] "random" process the inspector followed and the lack of standardized procedures for deciding on a suspension. In their memorandum, the applicants conclude each argument by stating that [TRANSLATION] "MC's decision is unreasonable because it is based on" erroneous data, random procedures and processes, or a non-standardized procedure. They do not specify which decision is at issue.

[42] I must note that the Decision under review is Ms. Allen's decision to uphold the Suspension, and not the 2018 decision to impose the Suspension. It necessarily follows that the ultimate question for the Court is whether the reasons set out in the Decision transparently and intelligibly address the arguments raised by CELL in its third appeal. I will therefore examine whether the applicants' factual concerns and arguments undermine the reasonableness of the Decision.

[43] It is well understood that the standard of review that applies to administrative decisions is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23–32 (*Vavilov*)).

[44] When the applicable standard of review is reasonableness, the role of the reviewing court is to examine the reasons provided by the administrative decision maker and determine whether the decision is based "on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). To make this determination, the reviewing court asks whether "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[45] Having carefully considered the applicants' arguments, the respondent's replies and the evidence on the record, I conclude that the applicants did not identify a reviewable error in the Decision based on an allegation of the inadequate training of Inspector Vanasse.

[46] The applicants first submit that Inspector Vanasse did not receive the training required to conduct the February 23, 2018, follow-up examination in a competent manner. They note that MC did not provide any details on the inspector's training or ability to recognize the proper implementation of the 220L prover Ms. Lamontagne used during the follow-up examination. The applicants submit that this resulted in a suspension based on factual errors because MC based its decisions regarding the violation and the effectiveness of CELL's corrective plans on information provided by an unqualified person.

[47] At the hearing, the applicants explained that their concerns were based on the fact that the Report erroneously referred to a [TRANSLATION] "drip valve." The applicants stated that on the contrary, the 220L prover did not have a drip valve and that there were clearly errors in the inspector's report on the results of the follow-up examination.

[48] The issue of Inspector Vanasse's training was also part of the first two appeals of the Suspension, during which Mr. Lamontagne discussed and criticized her work method. In his opinion, the inspector had not been adequately prepared for the follow-up examination. The issue of the inspector's training was not raised in the CELL's third appeal but it was nonetheless the subject of discussions between the parties during that appeal, including during cross-examinations.

[49] That said, the specific argument that Inspector Vanasse and MC erred by making reference to a drip valve appears for the first time in the applicants' notice of application. The applicants argued that the 220L prover did not have a drip valve, only a drain valve. Moreover,

the fact the prover does not have a drip valve has become one of the main arguments presented by the applicants to show that Inspector Vanasse had not received the necessary training to conduct the follow-up examination in February 2018.

[50] The applicants did not challenge the existence of a drip valve or release/drainage valve in their three appeals of the Suspension. Neither did they raise this point in their memorandum. In an email to Ms. Allen, Mr. Lamontagne indicated that Inspector Vanasse [TRANSLATION] "was not familiar with [his] prover cart," but he did not raise the issue of the lack of a drip valve.

[51] I also note that the words [TRANSLATION] "drip valve" do not appear anywhere in Inspector Vanasse's notes. When describing her observations of the work of Ms. Lamontagne, the inspector first evaluated STP 22 (wetting and drainage) and found that the drainage had not been executed in accordance with the procedure. The inspector noted that [TRANSLATION] "several times, the valve remained open", that Ms. Lamontagne [TRANSLATION] "only mentioned the length of the drain time" and that she had [TRANSLATION] "drained the two provers simultaneously". At the hearing, counsel for the applicants stated that a drip valve and a drainage valve are not synonymous. However, only MC and CELL mentioned a drip valve, not Inspector Vanasse.

[52] The applicants submitted three corrective action plans to MC. In its observations on the second version of the plan, MC used the phrase [TRANSLATION] "drip valve" in reference to STP 22 and it appears that the parties adopted it.

[53] CELL did not challenge the existence of a drip valve in the third version of its plan. Instead it questioned the requirements and procedures established by MC with regard to the use of the prover and the drip time. Additionally, I note the following excerpt from CELL's second appeal:

> [TRANSLATION]
> Moreover, this statement is completely absurd! There is a big problem with this allegation: <u>if the prover valve</u> had indeed been left open during filling, the liquid would have emptied out at the same time through the bottom and it would therefore have been impossible to take a reading of the liquid using the graduation on the neck of the prover, since the prover would have been empty. (Emphasis added)

[54] During the hearing, I asked counsel for the applicants several times if, during the third appeal, the applicants had drawn Ms. Allen's attention to this issue of the drip valve. He replied that it was clear that the 220L prover had no drip valve. I explained that the Court cannot determine whether a prover has or uses a drip valve (or a release or drain valve). The Court is not qualified or mandated to do this. The role of the Court is to determine whether this issue was raised before the decision maker and, if so, whether the decision maker addressed the issue reasonably. Counsel responded that the issue of Inspector Vanasse's training was brought up in the third appeal. He noted that the applicants had asked for a full review of the file in the third appeal and that Ms. Allen had been able to read the documents and see for herself that the prover did not have a drip valve.

[55] I do not agree. It was the applicants' responsibility to raise their arguments against the Suspension in their third appeal. The applicants cannot present an argument for the first time before the Court, in particular a technical argument. It is not enough to request a full review of

the file and, after receiving a negative decision, raise specific new arguments before the reviewing court against the impugned decision. At the very least, if their main concern regarding the Suspension was an error in Inspector Vanasse's notes, the applicants should have raised this argument in their third appeal. At the risk of repeating myself, the inspector's notes do not mention any drip valve. They report on the valve and the length of the drain time. I will therefore not address this argument.

[56] I will now return to the general issue of Inspector Vanasse's training. Mr. Lamontagne raised concerns about Inspector Vanasse's training and qualifications in all three appeals. In the third appeal, the applicants note that the inspector was not trained on the 220L prover (because Mr. Lamontagne is the only person able to provide this training) and that, as a result, she had not received the training required to properly conduct the inspections on February 23, 2018. MC replied that all its inspectors receive the necessary training. The applicants state that MC did not produce any evidence of Inspector Vanasse's training.

[57] The applicants' argument is not persuasive. The applicants rely on specific excerpts from the cross-examinations of Mr. Parent and Mr. Bourdon but do not consider the two men's full answers. The applicants allege that Mr. Parent could not say whether Inspector Vanasse had received training on the 220L prover, but the respondent notes that Mr. Parent did not only state that there is no training for Mr. Lamontagne's prover, but also that it is not necessary. All provers are different. Indeed, Mr. Parent explained that, even trained, Inspector Vanasse cannot know how all the various provers function and operate, and she does not need to know everything because provers are operated by technicians. The inspector's role is to ensure

[TRANSLATION] “that the operation respects the standardized test procedures, for example, drain time”. Mr. Parent also explained that the STP is identical for all provers: [TRANSLATION] “it is always a prover that is calibrated to receive a particular quantity with a way to drain the prover.”

[58] Mr. Bourdon confirmed that no training was required to conduct Ms. Lamontagne’s follow-up examination when he stated that Inspector Vanasse [TRANSLATION] “had reviewed the specific characteristics of the prover, which was sufficient for the follow-up examination.” He repeated that the inspector was not using the prover. It is the technicians who use them in follow-up examinations.

[59] The applicants also submit that the February 23, 2028, follow-up examination was conducted using defective fuel pumps. They state that another ASP had repaired the pumps. In their third appeal the applicants asked Ms. Allen the following (Question #5):

> [TRANSLATION]
> Why did MC suspend [CELL] in 2018 instead of the ASP that was actually responsible for the violations that already existed on the pumps during the follow-up examinations on February 23, 2018?

[60] Ms. Allen provided a detailed answer to this question on July 18, 2022. After explaining that there was a distinction between [TRANSLATION] “violations regarding the registration program and device non-compliance” and [TRANSLATION] “the examination work that could be performed only by recognized technicians and the calibration that can be done by all technicians (not only technicians recognized by MC),” Ms. Allen stated the following:

> [TRANSLATION]
> The monitoring MC conducts does not evaluate the compliance of the devices alone, the purpose is to confirm that the work of the technicians complies with the requirements of the registration

> program. For these reasons, MC did not indicate that the ASP, which you mention in your application to appeal, is responsible for the non-compliances that were present on the device at the time of the follow-up examination on February 23, 2018.
>
> CELL was not suspended for the non-compliances identified on the pumps, but for the failure to meet the requirements of the registration program as indicated in the violation reports.

[61] In my opinion, Ms. Allen's response is intelligible and transparent.

[62] I therefore conclude that the applicants did not show that the Decision was based on erroneous data resulting from the follow-up examination in 2018 and have therefore not identified any reviewable error for this reason. MC addressed the applicants' questions about Inspector Vanasse's training. Mr. Parent and Mr. Bourdon answered the questions about this clearly and convincingly during their respective cross-examinations. Ms. Allen was not examined on the alleged error in the inspector's notes on the ground that they referred to a drip valve instead of a drain valve. It is clear that the applicants do not agree with the findings of the decision maker and MC, but it is not the role of this Court to reassess and reweigh the evidence in order to reach a conclusion that would favour them. Nor is it up to the Court to determine whether Inspector Vanasse received the necessary training or whether there is a difference between a drip valve and a drain valve.

[63] Secondly, the applicants submit that the decision to suspend CELL was unreasonable because the follow-up examination was conducted using random processes and procedures. They allege that the MC inspectors did not use a standardized form or checklist and that it is therefore impossible for each examination to be done the same way. According to the applicants,

Mr. Bourdon confirmed in the February 27, 2023, cross-examination that [TRANSLATION] "there is no standard method and it is random and the method of communication is also random." They also state that Mr. Bourdon indicated that MC had not provided CELL with any training or assistance. The applicants conclude their arguments by stating that [TRANSLATION] "based on the evidence provided by MC, MC's decision is unreasonable because it is based on … random … procedures and processes". However, the applicants do not specify the decision to which they are referring.

[64] The applicants have again selected certain excerpts from the cross-examinations and omitted the rest. The applicants submit that Mr. Bourdon indicated that the applicants had not received any training or assistance from MC. Mr. Bourdon in fact stated the contrary when he said, [TRANSLATION] "I personally tried to help Mr. Lamontagne address the violations that were raised". Mr. Bourdon also stated the contrary in his affidavit (at paras 24, 26, 28, 33 and 38). The applicants submit that Mr. Bourdon talked about a non-standard and random method in response to a question about using a standardized form for inspections. According to my reading of the transcript, Mr. Bourdon simply confirmed that an inspector's report can be recorded in Word, Excel or another program. Mr. Parent explained that even if MC inspectors do not use a standardized form, they are required to comply with the process set out in MC's system and ensure that all the examination steps are completed in the same order.

[65] During his cross-examination, Mr. Parent also confirmed that CELL and Mr. Lamontagne had received assistance. The timeline of events in the applicants' memorandum and Annex 2 of the Decision show the assistance MC provided to the applicants. In their own memorandum, they wrote: [TRANSLATION] "On March 5, 2018, the applicant asked for guidance and explanations

from Mr. Bourdon in reference to the inspector's manual, STP 7 and the registration program terms and conditions in order to proceed according to common practice and received answers from Mr. Bourdon."

[66] Moreover, other than their reference at the hearing to the lack of a standardized form and their allegations that they were not helped, the applicants do not explain which parts of the examination were random. Even more importantly, they did not show how these alleged shortcomings rendered the Decision unreasonable. I therefore conclude that the applicants did not persuasively raise a reviewable error in the Decision.

[67] Thirdly, the applicants allege that MC did not follow a standardized procedure to lead to the Suspension. They submit that Mr. Parent indicated in his cross-examination that there is no exact process that leads to a suspension and that MC uses partial and full suspensions randomly. According to the applicants, the Violations were minor and MC could have taken other reasonable measures.

[68] I have read the relevant excerpts of Mr. Parent's cross-examinations. He explained that very serious violations, those with a direct impact on trade, could lead directly to a suspension. He talked about minor and major violations. Mr. Parent indicated that MC considered several elements before imposing a partial or full suspension.

[69] The applicants did not persuade me that the Suspension resulted from a non-standardized and unreasonable procedure. They are unaware of subsection 16.1(3) of the Act and

sections 1.8.4 and 1.11 of the Terms and Conditions, which provide for a suspension in cases of serious violations:

> The application of this measure will depend on:
>
> - the severity of the violation
> - its impact on the fairness and accuracy of the measurement
> - the fact that it is accidental or intentional
> - the number of repetitions or frequency.

[70] In her reply to Question #2 from Mr. Lamontagne in the third appeal, Ms. Allen provided details of the Violations and explained that CELL [TRANSLATION] "was suspended because the violations identified by MC were not resolved by the organization despite several exchanges, explanations and discussions". The Suspension clearly notes the relevant STPs and MC's reasons with regard to the two Violations. The Court must focus its analysis on the Decision rendered. It "must not re-weigh the evidence or come to its own conclusion" (*Lalonde v Canada (Revenue Agency)*, 2023 FC 41 at para 29).

[71] To conclude, the applicants' arguments broadly challenge MC's September 8, 2018, decision to suspend CELL and only indirectly attack the Decision. However, I have reviewed each argument in the third appeal as well as the six questions raised by Mr. Lamontagne, Ms. Allen's responses, and the evidence on the record including the transcripts of the cross-examinations, the parties' written and oral arguments, and the Decision and Report.

[72] Ms. Allen conducted a thorough analysis of the file before concluding that the Suspension was justified and would be upheld. She carefully explained the scope of the analysis

of the appeal and clearly presented her reasons in the Decision and the Report. Her assessment of the evidence on the record supports her findings and is "based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Thus, I find that the Decision more than meets the requirements of the Supreme Court of Canada, according to which an administrative decision is reasonable if it is transparent, intelligible and justified (*Vavilov* at paras 15, 99).

Breach of procedural fairness

[73] The applicants submit in their memorandum that Ms. Allen's decision to uphold the Suspension without considering or following up on their third corrective action plan is a violation of the *audi alteram partem* rule. The applicants state that the Decision prevents CELL from operating its business and Mr. Lamontage from earning a living, thereby highlighting the importance of the Decision.

[74] Issues of procedural fairness and the duty to act fairly do not involve the merits of a decision rendered, but relate to the process the administrative decision maker followed. Procedural fairness has two components: the right to be heard and the opportunity to respond to the evidence that must be rebutted; and the right to a fair and impartial hearing before an independent tribunal (*Re Therrien*, 2001 SCC 35 at para 82).

[75] The Federal Court of Appeal states that issues of procedural fairness are not truly decided according to a specific standard of review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway*

Company v Canada (Attorney General), 2018 FCA 69 at paras 33–56 (*CPR*)). The reviewing court is instead tasked with determining whether the decision-making procedure was fair having regard to all of the circumstances (*CPR* at para 54). This analysis includes assessing the five non-exhaustive contextual factors set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*); *Vavilov* at para 77).

[76] The applicants' argument that MC and Ms. Allen did not consider CELL's third corrective action plan is without merit. In the Decision, Ms. Allen indicates that the Report was enclosed with her letter in order to inform CELL [TRANSLATION] "of the items that were evaluated" by MC in the third appeal. The Report indicates that the three versions of the corrective action plan submitted by CELL did not meet the regulatory requirements or the requirements of the registration program:

> [TRANSLATION]
> CELL submitted 3 versions of the action plan, and, since they did not meet the requirements, MC provided explanations and advice for each to assist Mr. Jacques Lamontagne in correcting the violations.

[77] Ms. Allen also confirmed in the Report that she considered [translation] "the last attempt" by CELL to resolve the Violations: the third version of the corrective action plan, received in two parts on August 2, 2018 (20180528RACIS01R0183), and August 7, 2018 (20180528RACIS02R0183). She notes that there had been some progress with regard to the first violation, but that CELL was still asking for the second violation to be withdrawn because of differing interpretations by CELL and MC. The evidence on the record, in particular Mr. Parent's affidavit and the transcript of his March 27, 2023, cross-examination, also documents MC's evaluation of CELL's third plan.

[78] It is therefore clear that MC considered CELL's third plan. Additionally, the sequence of events that led to the Suspension indicate an interactive process during which CELL had several opportunities to present its arguments, submit relevant evidence and receive and understand MC's reasoning and position. The appeal scheme provides three levels of appeal. During the third appeal, the applicants were able to submit written questions to MC, and Ms. Allen answered these questions. There were several meetings with the representatives of CELL and MC, as well as several written communications. Although the applicants did not receive any feedback after the third corrective action plan was filed, I conclude that the process Ms. Allen followed in considering the third appeal of the Suspension was fair and participatory. CELL and Mr. Lamontagne knew the case to meet and had a full and fair chance to respond (*CPR* at para 56). In my opinion, it was not MC's duty to provide other feedback or to grant CELL yet another opportunity to revise their corrective action plan.

[79] At the hearing, the applicants suggested that MC had already made its decision at the start of the process. They allege that the decision makers did not consider the evidence CELL provided because they had already decided that they would not accept Mr. Lamontagne's arguments. According to the applicants, this point raises an issue of bias.

[80] The applicants raised their allegation of bias at the last minute. I acknowledge that in their memorandum, the applicants refer to paragraph 45 of *Baker* and the importance for an administrative decision maker to act impartially. However, this reference appears in the middle of allegations of erroneous data.

[81] Moreover, the test to apply to apprehensions of bias (real or perceived) is well established and the threshold is high. The test for reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude" and whether that person would think that it is more likely than not that the decision maker, "whether consciously or unconsciously, would not decide fairly" (*Baker* at para 46). An allegation of bias cannot be based solely on the applicant's impressions or suspicions. It is a serious allegation that challenges the integrity of the officer and must be supported by material evidence (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8). The burden of proof rests on the party alleging the reasonable apprehension of bias (*Zhou v Canada (Citizenship and Immigration*), 2020 FC 633 at para 39).

[82] The applicants did not produce any evidence to support their accusation of bias. They simply state that Mr. Parent was always present and that he [TRANSLATION] "had Ms. Allen's ear," but an allegation of bias cannot be raised lightly. It requires the support of material evidence (*Alvarez v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 185 at para 49). Here, the applicants did not submit any such evidence.

[83] I therefore dismiss the applicants' allegation of bias.

VIII. Conclusion

[84] For all these reasons, the applicants' application for judicial review is dismissed.

[85] With the parties' consent and in accordance with subsection 303(1) of the Rules, the style of cause is amended to correctly name the respondent, namely the Attorney General of Canada.

IX. Costs

[86] At the conclusion of the hearing, the parties agreed to consult with each other and to advise the Court if they were able to agree on the amount of costs payable.

[87] In a letter dated December 12, 2023, the parties informed the Court of their agreement, under which the successful party would receive costs in the amount of $4,000, payable by the unsuccessful party.

[88] I see no reason to deviate from the general rule that costs shall be in the cause. Considering all of the circumstances, I agree with the parties that the lump-sum payment amount of $4,000 to which the parties have agreed is reasonable and justified.

[89] I will therefore award costs in the amount of $4,000 to the respondent.

JUDGMENT IN T-2113-22

THIS COURT'S JUDGMENT is as follows:

1. The applicants' application for judicial review is dismissed.

2. The style of cause is amended to indicate that the respondent is the Attorney General of Canada.

3. Cost of $4,000 are awarded to the respondent.

"Elizabeth Walker"
Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2113-22
STYLE OF CAUSE:	JACQUES LAMONTAGNE (MANUFACTURER), JACQUES LAMONTAGNE (RECOGNIZED TECHNICIAN) AND C.E.L.L. INSPECTION INC. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 8, 2023
JUDGMENT AND REASONS:	WALKER J
DATED:	APRIL 15, 2024

APPEARANCES:

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Jean-Robert Noiseux	FOR THE RESPONDENT

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Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT