Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date: May 17, 2019

Citation: *Kost v. Canada (Environment and Climate Change),* 2019 EPTC 3

EPTC Case Nos.: 0002-2019 and 0003-2019

Case Names: *Kost v. Canada (Environment and Climate Change)* (0002-2019)*;*
Distribution Carworx Inc. v. Canada (Environment and Climate Change) (0003-2019)

Applicants: Andrew Kost and Distribution Carworx Inc.

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Reviews commenced under s. 256 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 ("CEPA") of an Environmental Protection Compliance Order issued under s. 235 of CEPA for a contravention of s. 3(1) and s. 3(2) of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*, SOR/2009-197 made under CEPA and s. 272(1)(h) and 272.1(1)(f) of CEPA.

Heard: May 7, 2019 by telephone conference call

Appearances:

Parties	**Counsel**
Andrew Kost and Distribution Carworx Inc.	Anne-Marie Sheahan and Élise Théorêt
Minister of Environment and Climate Change Canada	Sarom Bahk and Philippe Proulx (student)

DECISION DELIVERED BY: **LESLIE BELLOC-PINDER**
JERRY V. DEMARCO
PAMELA LARGE MORAN

Background

[1] This Decision disposes of requests by the Applicants, Andrew Kost and Distribution Carworx Inc. (“Carworx”), to the Environmental Protection Tribunal of Canada (“Tribunal”) for reviews of Environmental Protection Compliance Order No. 8222-2018-09-18-8017 (“Compliance Order” or “Order”) issued by Environment and Climate Change Canada (“ECCC”) on January 28, 2019.

[2] The Compliance Order was issued by ECCC Enforcement Officer Marc-André Cloutier to the Applicants under s. 235 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (“CEPA”) regarding an alleged contravention of s. 3(1) and s. 3(2) of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*, SOR/2009-197 (“Regulations”) made under CEPA and s. 272(1)(h) and 272.1(1)(f) of CEPA. The Regulations establish VOC concentration limits for car refinishing products, such as coatings and surface cleaners, set out in a schedule. The Regulations restrict the sale and import of such products.

[3] The Compliance Order was issued further to an inspection of Carworx’s activities that took place between September 4, 2018 and January 28, 2019. Mr. Kost is the president of Carworx. Carworx’s business includes car refinishing products as well as industrial coatings. Carworx publishes a catalogue of the products it offers for sale. Carworx’s products include products manufactured in Spain that exceed the VOC concentration limits and thus cannot be sold to customers in Canada for car refinishing purposes. They can be sold for industrial purposes or exported, however, as per the exceptions set out in the Regulations.

[4] The Applicants submitted their joint request for review to the Tribunal on February 27, 2019. At an earlier stage of this proceeding and on consent of the parties, the Chief Review Officer of the Tribunal issued a partial stay of the Compliance Order pending an expedited hearing of the main request for review. Also, at an earlier stage and on consent of the parties, the Tribunal marked certain documents in this proceeding confidential. These are kept separate from the public record file.

[5] This decision addresses the merits of the main request for review. Given that this was an expedited proceeding and given the short timeline for the issuance of this decision set out in s. 266 of CEPA, these reasons address only the most salient evidence and submissions.

[6] The expedited hearing was conducted by telephone conference call (“TCC”) on May 7, 2019 based on written materials filed by the parties in advance of the TCC. ECCC seeks to have the Compliance Order upheld under s. 263(a) of CEPA while the Applicants seek to have it amended under s. 263(b). Neither party seeks to have the duration of the Order extended under s. 263(c).

[7] For the reasons set out below, the Compliance Order is amended under s. 263(b) of CEPA.

Issues

[8] The overarching issue to be determined is whether the Tribunal should confirm or amend the Compliance Order under s. 263 of CEPA. The main sub-issues include whether there are reasonable grounds to believe that there has been a contravention by the Applicants of any provision of CEPA or the Regulations and, if so, what Compliance Order measures are reasonable in the circumstances and consistent with the protection of the environment and public safety under s. 235 of CEPA.

Relevant Legislation and Regulations

[9] The most relevant provisions of CEPA are:

> 235(1). Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions are likely to be contravened in the circumstances described in that subsection, the enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, if applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.
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> 256(1). Any person to whom an order is directed may, by notice in writing given to the Chief Review Officer within 30 days after receipt by the person of a copy of the written order or after the oral order is given, make a request to the Chief Review Officer for a review of the order.
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> 257. On receipt of a request made under subsection 256(1), the Chief Review Officer shall conduct a review of the order, including a hearing, or cause a review and hearing of the order to be conducted by a review officer, or by a panel of three review officers, assigned by the Chief Review Officer. The Chief Review Officer may be a member of that panel.
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> 263. The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may
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> > (a) confirm or cancel the order;
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> > (b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or

(c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).

272(1). Every person commits an offence who […] (h) contravenes any provision of the regulations designated by regulations made under section 286.1 for the purpose of this paragraph…

[10] The most relevant provisions of the Regulations are:

2(2). These Regulations do not apply in respect of automotive refinishing products set out in column 1 of the schedule that are

(a) manufactured, imported, offered for sale or sold for the purposes of export;

(b) used for application in or on the premises of a factory or a shop, for purposes other than automotive refinishing, on products other than motor vehicles, mobile equipment, or their parts;…

3(1). A person must not manufacture or import any automotive refinishing product set out in column 1 of the schedule if its VOC concentration exceeds the limit set out in column 2 of the schedule for that product unless

(a) the product is required to be diluted before use to a VOC concentration equal to or less than that limit set out in column 2 and the manufacturer, importer or seller, as the case may be, specifies the instructions for dilution on the product's label or accompanying documentation, in both official languages; or

(b) the person that manufactures or imports has been issued a permit under section 5.

(2) A person must not sell or offer for sale any automotive refinishing product set out in column 1 of the schedule if its VOC concentration exceeds the limit set out in column 2 for that product unless

(a) the product is required to be diluted before use to a VOC concentration equal to or less than that limit set out in column 2 and the manufacturer, importer or seller, as the case may be, specifies the instructions for dilution on the product's label or accompanying documentation, in both official languages; or

(b) the product was manufactured or imported under a permit issued under section 5 and the sale or offer to sell occurs no later than one year after the day on which the permit expires.

Discussion, Analysis and Findings

Preliminary Questions of Statutory Interpretation

[11] Two general questions of statutory interpretation were raised by the parties in their submissions and discussed during the hearing. One relates to the interpretation of s. 235 of CEPA and the other to s. 263.

[12] With regard to s. 235, the parties differed on what level of proof is necessary to ground an environmental protection compliance order. Section 235(1) uses the wording "reasonable grounds to believe". In this regard, ECCC relies on *Mugesera v. Canada (M.C.I.)*, 2005 SCC 40 at para. 114:

> The first issue raised by s. 19(1)(j) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities… In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information… [citations omitted]

[13] Though the Applicants sought to distinguish this case because it involves other legislation, the Tribunal finds that the "reasonable grounds to believe" phrase ought to be interpreted consistently across statutes when it is used to describe a regularly used evidentiary standard. The Tribunal, therefore, concludes that the above reasoning from the Supreme Court of Canada is equally applicable to s. 235(1) of CEPA. As noted in *Mugesera* at para. 116, this standard applies to questions of fact and is lower than the civil standard of proof.

[14] With regard to s. 263, another legal question arises. Specifically, does the Tribunal, in conducting a review, limit its considerations to whether the enforcement officer had reasonable grounds and whether the measures were reasonable according to the circumstances known to the officer at the time or does the Tribunal reach its own conclusions on the grounds for an order and/or the appropriate measures to be included based on evidence of what the officer knew as well as additional evidence heard at the review hearing? While ECCC appeared to acknowledge that the Tribunal was not "frozen in time" at the point when the Compliance Order was issued, its submissions regularly spoke to the circumstances known to the officer when the Order was issued. The Applicants' position is that the Tribunal is not bound by the circumstances known to the enforcement officer at the time the Order was issued nor is the Tribunal required to defer to the measures selected by the officer even if those measures were reasonable in the circumstances known to the officer at the time.

[15] Given the different approaches employed by the parties, it is important to analyze the wording of s. 263 and related provisions. Different types of administrative "reviews" arise under various statutes. Some reviews are restricted to the record before the

original decision-maker and do not involve a typical hearing with oral representations while other reviews are more expansive and include a hearing of evidence. If the Legislature had intended that the Tribunal limit its considerations to only information available to the officer at the time the Compliance Order was issued, there would be little need for the power to summon in s. 260, for example. Moreover, s. 257 would not have included the wording "conduct a review of the order, including a hearing". References to parties having the right to appear in person or through a representative (s. 259) and to oral representations (s. 263) would also likely have been excluded if a narrow review of the record by the Tribunal had been intended by the Legislature. As well, s. 257 or 263 would likely have been drafted to state explicitly that the evidence that the Tribunal is entitled to consider in a review is limited only to the record before the enforcement officer.

[16] Therefore, as a matter of statutory interpretation, the Tribunal finds that, in determining whether to exercise its discretion to do any of the things set out in paragraphs (a), (b) and (c) of s. 263, it is entitled to reach its own conclusions on whether there are reasonable grounds for an order and on what measures are reasonable based on the full record of evidence before it. Thus, the Tribunal can, for example, amend an environmental protection compliance order after a hearing even if the measures in it were reasonable at the time it was issued.

[17] Though the Applicants made some reference to "standard of review" jurisprudence regarding the review of administrative decisions by courts, the Tribunal does not find that such case law is applicable to the question of the Tribunal's role under s. 263. Here, the Tribunal is considering the evidence provided at the hearing and applying that evidence to the tests set out in s. 235 in order to determine if the Compliance Order should stand and, if so, what measures it should contain. While the word "reasonable" is used in s. 235, it is not used in the sense of creating a standard for the Tribunal to apply in assessing the officer's decision. The word is used to describe the evidentiary standard for the grounds and the appropriate measures.

[18] Given the above legal interpretation, the subsidiary question that arises under s. 263 is: What guides the Tribunal in deciding what powers to exercise under s. 263? In exercising that discretion, the Tribunal is guided by the purposes of the Act as well as the wording of the specific provisions at issue. At a broad level, CEPA addresses "pollution prevention and the protection of the environment and human health in order to contribute to sustainable development". The Tribunal will exercise its discretion in a manner that furthers that statutory purpose.

[19] Specific guidance regarding environmental protection compliance orders is found in s. 235, which states that orders may be issued where there are "reasonable grounds" to believe that CEPA has been or is likely to be contravened as described in s. 235(2). Thus, orders are to be made only when the evidence of a contravention or likely future contravention reaches the level of "reasonable grounds". The Tribunal cannot uphold an order if the evidence meets only a standard of a "suspicion" of a possible contravention.

As well, the measures that may be included are those set out in s. 235(4) (and 235(5) if applicable) that are "reasonable in the circumstances and consistent with the protection of the environment and public safety". This guidance applies to enforcement officers in the first instance and to the Tribunal in a review hearing.

[20] As well, the Tribunal's discretion is further structured by the wording of s. 265, such that it cannot, for example, exercise its s. 263 powers in a way that would result in danger to health or safety (s. 265(c); see also s. 265(a) and (b) for other restrictions on discretion).

[21] Thus, the main tasks for the Tribunal in this case are to examine whether there are reasonable grounds for the Compliance Order and, if so, to determine what measures are reasonable in the circumstances and consistent with the protection of the environment and public safety. In disposing of the case, the Tribunal may use the powers provided to it under s. 263. This includes amending an order, as is being done in this case.

The Measures in the Compliance Order

[22] The Compliance Order contains the following measures required to be undertaken by the Applicants:

> 1. As soon as possible, but no later than **February 1st, 2019**, cease to sell and/or offer for sale automotive refinishing products containing volatile organic compound (VOC) in concentration greater than the limit set out in the schedule of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*.
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> 2. As soon as possible, but no later than **February 1st, 2019**, cease to import automotive refinishing products containing volatile organic compound (VOC) in concentration greater than the limit set out in the schedule of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*.
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> 3. As soon as possible, but no later than **March 31st, 2019**, provide to the undersigned enforcement officer a copy of an Environmental Management Plan (EMP) to insure that **Distribution Carworx Inc.** comply with CEPA and its Regulations (including *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations* but not only limited to it). **Mr. Andrew Kost** must endorse the copy (signature required). You also need to provide the list of employees in charge of the EMP including proof they received and read a copy.
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> 4. As soon as possible, but no later than **July 1st, 2019**, retrieve from distributors products sold in contravention to *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*. The

products must be stored in an identified section of the warehouse located at 3800 Felix-Leclerc Highway Pointe-Claire, Quebec.

5. As soon as possible, but no later than **July 26th, 2019**, provide to the undersigned enforcement officer a report about the retrieval of products. The report must detail the actions you deployed, the recipients and the success (including a complete inventory of products retrieved and their origin). **Mr. Andrew Kost** must endorse the copy (signature required).

6. As soon as possible, but no later than **July 26th, 2019**, proceed to the destruction or export back in Spain of all the illegal products imported in Canada and retrieved (as per point #4). Provide a proof of destruction or export to the undersigned enforcement officer at this moment (at the latest). If destruction is choose, an authorized company must perform it (must detained appropriate authorization/permits). By documentation, I refer to invoice(s) certificate of destruction (or treatment) OR manifest(s) of transportation.

Summary of Submissions and Evidence on the Grounds and Measures

[23] The parties filed extensive documentary evidence in the form of affidavits, written exhibits, images and audio. This was supplemented by detailed written and oral submissions that referred to the evidentiary record and the applicable law.

[24] As noted above, the Compliance Order directs the Applicants to take various measures designed to ensure that the Applicants cease to sell and/or offer for sale automotive refinishing products containing VOCs in concentrations greater than the limit set out in the schedule of the Regulations. The Applicants do not dispute those parts of the Compliance Order (which refer to certain product numbers) listed in paragraph 25 of the Applicants' Written Submissions. In respect of the other products described in the "Relevant Facts" portion of the Compliance Order, the Applicants challenge the Compliance Order. In essence, the Applicants want the measures to be limited in their application to only the product numbers listed in the parts of the Compliance Order that they do not dispute. They also seek the correction of a product number referred to in paragraph 24 of the facts portion of the Order. They also seek additional time to complete the Environmental Management Plan.

[25] The Applicants seek to amend the Compliance Order in respect of both the "facts" recited in it and the "measures" required to be followed. They disagree with the broad approach to measures 1 and 2 and seek to limit the measures to a list of specific prohibited products that are referred to in certain parts of the facts portion of the Order. For example, they seek to modify measures 1 and 2 by adding, among other things, the following:

> The cessation to sell, offer for sale and import measures shall apply only to the products listed in paragraphs 10, 11, 12, 13, 16, 17, 24, 25, 28, 29, 30 and 31 of the RELEVANT FACTS…

[26] In support of the proposed changes to the Compliance Order, the Applicants' Written Submissions identify four issues. ECCC's Written Submissions address each of these issues. The issues put forward by the parties may be summarized as follows:

1. Were certain products sold only to customers in the U.S.?

2. Were certain products sold only to pre-approved and educated customers, unable to be ordered from the Applicants' website, and for industrial use only?

3. Were certain products listed in the Compliance Order already discontinued and unavailable for sale?

4. How do ongoing efforts of the Applicant to ensure compliance with some aspects of the Regulations affect this review?

i) Were certain products sold only to customers in the U.S.?

[27] The Applicants submit that their internal sales records and price lists establish that products mentioned in paragraphs 2-9, 14-15, 18-23, and 26-27 of the Compliance Order were sold only to U.S. customers (although the Applicants also concede that two products were mistakenly sent to a customer in Canada). The Applicants seek an order removing the U.S. products from the Compliance Order.

[28] ECCC submits that the Applicants, in offering to sell certain products, did not take sufficient steps to identify restrictions on certain products or note that these products were not available to the Canadian market. Despite assurances made by the Applicants that its website or catalogue would contain an "addendum" identifying products not available in Canada, such clarification was not provided on or before the date the Compliance Order was issued. Further, ECCC does not accept the Applicants' explanation for mistakenly delivering two products to a Canadian customer and notes that two different customers were involved. ECCC also submits that the Applicants' evidence that certain products were sold to U.S. customers does not mean that they were sold exclusively to customers outside Canada. Finally, ECCC notes that the non-compliant products were still being stored for sale in Canada, which is also a breach of the Regulations.

ii) Were certain products sold only to pre-approved and educated customers, unable to be ordered from the Applicants' website, and for industrial use only?

[29] The Applicants submit that it is "impossible" for anyone to order products from its website and, as a result, it can selectively control the distribution of its products. The Applicants note that it only sells products to pre-approved customers who have first been visited by a company representative who questions the customers on their intended use for the specific products.

[30] The Applicants also characterize the products listed in paragraphs 32-35, 36 (product no. 213.9005 only), 37 and 39-42 of the Compliance Order as "industrial products…for purposes other than automotive refinishing" and submit that there is

insufficient evidence establishing that these products were offered for sale or sold for automotive refinishing. Instead, the Applicants contend that the products were sold for other purposes and should be removed from the Compliance Order.

[31] ECCC disagrees that labels on the products containing the words "industrial" or for "industrial use only" lead directly to the conclusion that they fall within the exception set out in paragraph 2(2)(b) of the Regulations. The Minister submits each of the products were sold in Canada for the purposes of "automotive refinishing" and points to their technical datasheets, which not only describe automotive uses but also demonstrate VOC concentrations higher than the limit(s) set out in the Schedule.

[32] ECCC also states that that the Applicants never mentioned Carworx's process of pre-approving customers, even though they had opportunities to do so in the inspection stage and following ECCC's Notice of Intent to issue the Compliance Order.

iii) Were certain products listed in the EPCO already discontinued and unavailable for sale?

[33] The Applicants submit that certain products identified in the Compliance Order have been discontinued and, as a result, should be removed. ECCC submits that all noted products were listed as available for sale in the Applicants' website and catalogue up to and including the date the Compliance Order was issued. Further, price lists annexed to Mr. Kost's Affidavit contain several of the products listed as discontinued.

iv) How do ongoing efforts of the Applicants to ensure compliance with some aspects of the Regulations affect this review?

[34] While they do not admit general liability within the context of this review proceeding, the Applicants are prepared to comply with some aspects of the Compliance Order while taking issue with other aspects. The Applicants submit that they are improving internal controls and management practices, clarifying Carworx's website and catalogue, and notifying customers about regulatory requirements. They are also engaged in the process of gathering information and documents required by the Compliance Order. The Applicants further state that Carworx is preparing the Environmental Management Plan and verifying whether any products were sold in contravention of the Regulations and retrieving them if they were. ECCC did not take issue with these undertakings or initiatives except to submit that the catalogue and website modification may not yet be sufficiently corrected or modified. The parties appear to acknowledge that an ongoing dialogue will be necessary to achieve regulatory compliance over time. Having said this, their views diverge regarding the appropriate measures to be included in the Compliance Order

Analysis of Grounds and Measures

[35] Many of the above submissions are relevant to the reasonableness of the grounds for the Compliance Order, the reasonableness of the measures contained in the Compliance Order, and/or the consistency of those measures with the protection of

the environment and public safety. Rather than addressing the issues according to the four categories put forward by the parties, the Tribunal will carry out its analysis below according to the key elements of s. 235.

[36] As will be seen, the Tribunal has elected not to frame measures 1 and 2 as broadly as the wording in the issued Compliance Order nor as narrowly as proposed by the Applicants (whereby the measures would be tied only to specific product numbers referred to in an amended version of the "Relevant Facts" portion of the Order). Had the Tribunal agreed with the latter approach, its analysis of the issues may have followed the issue categories used by the parties. However, given that the Tribunal is taking a different approach than that taken by either party, it has elected to use the wording of s. 235 to structure the analysis that follows.

i) Reasonable grounds

[37] Are there reasonable grounds to believe that any provision of CEPA or the Regulations has been contravened or is likely to be contravened in the circumstances set out in s. 235(2)? In this case, the alleged contraventions relate to the import of certain substances and the sale of those substances, as set out in the Regulations. The broad prohibitions in the Regulations are subject to two relevant exceptions, however. If the substances are being imported for subsequent export, then there is no contravention. Similarly, if the substances are being distributed within Canada for industrial uses that are not related to automotive refinishing (as broadly defined in the Regulations), then there is also no contravention.

[38] On an individual product number basis, the evidence varies on the reasonable grounds for believing that there was a contravention. In some instances, there is sufficient evidence to conclude that there are reasonable grounds. In other situations, it is more debatable. While the parties provided extensive evidence and submissions about each product number or group of product numbers, the Tribunal finds that s. 235 does not necessitate this type of individualized analysis (and therefore the extensive evidence about each product is not summarized in this decision). The first part of s. 235(1) looks at the evidence of a contravention or likely future contravention. Evidence demonstrating reasonable grounds to believe that there has been a contravention of <u>any</u> provision of CEPA or the regulations (or a likely future contravention) in any of the circumstances set out in s. 235(2) is sufficient to ground an environmental protection compliance order. The Tribunal does not need to go through each allegation regarding each product number or group of products as if they were separate "counts" in a prosecution. Rather, the Tribunal is tasked with looking at the evidence of a contravention or likely future contravention of <u>any</u> provision of CEPA or the Regulations.

[39] In this case, this step of the analysis is straightforward because the Applicants readily admit that they mistakenly distributed two regulated products in Canada even though such is prohibited by the Regulations. This is evidence of a contravention in the circumstances set out in s. 235(2)(a) or (b) that is sufficient to meet the "reasonable grounds to believe" standard in s. 235(1). The Tribunal also accepts that several other

portions of the evidence of Mr. Cloutier meet that standard. For example, the distribution of products within Canada that are not permitted for use in car refinishing was made to entities that are clearly in that line of business rather than other industrial businesses that are subject to the Regulations' industrial exception. This is also sufficient evidence of a reasonable belief of a contravention. Similarly, the Applicants' activities in "offering to sell" car refinishing products via its catalogue and website without restricting such offers to customers outside Canada was also sufficient evidence of a reasonable belief of a contravention of the Regulations. Accordingly, it is not necessary to analyze other situations where the evidence is less clear or where the affidavit evidence from each side is at odds with one another. The first step of the s. 235 analysis has been passed on the evidence provided to the Tribunal.

ii) Reasonableness of the measures

[40] Section 235(1) also requires the measures to be "reasonable in the circumstances". For measure 3 (i.e., the Environmental Management Plan or EMP), ECCC acceded to the Applicants' request that the deadline for that measure be changed to 15 days after the issuance of this decision. The Tribunal agrees that this is reasonable in the circumstances, especially given that measure 3 was stayed at an earlier stage of this proceeding. It is thus reasonable to provide the Applicants with additional time to now complete that measure.

[41] The situation is different for measures 1, 2 and 6. As alluded to above, the parties take very different approaches to how these measures should be drafted. ECCC proposes the retention of the current very broad wording while the Applicants propose a targeted list of prohibited substances in measures 1 and 2 and a more flexible approach to measure 6. The Tribunal opts for a different approach for measures 1 and 2 that it believes best suits the ongoing issues between the Applicants and ECCC and that would be reasonable in the particular circumstances in this case. The Tribunal largely follows the suggested amendments to measure 6 proposed by the Applicants.

[42] The Tribunal concludes that the EMP will be an essential element in resolving the differences between ECCC and the Applicants on an ongoing basis. It is not feasible for the Tribunal, at this stage, to accurately predict exactly which product numbers may give rise to compliance issues in the future. A well-crafted EMP will be crucial in putting into place adequate safeguards for future compliance. The Tribunal urges the parties to work constructively in the implementation of the EMP, such that no further environmental protection compliance orders or other enforcement action will be needed. The development and implementation of the EMP is a suitable vehicle to address possible future contraventions.

[43] The Tribunal concludes that changes to measures 1 and 2 should be made. While ECCC argues that the Regulations' exceptions (such as regarding export and industrial use) continue to apply (an issue that has been addressed recently by the enforcement officer and in the parties' agreement concerning a partial stay of the Compliance Order), the Tribunal concludes that the current wording of measures 1 and

2 could reasonably be interpreted to mean that the Applicants cannot avail themselves of the Regulations' exceptions while the Order is in force. The Tribunal agrees that such an interpretation of the current wording is entirely possible, even if it was not intended. The Tribunal finds that there is no need for such a broad and unclear approach to the measures, especially since ECCC readily admits that it did not intend for measures 1 and 2 to override the exceptions in the Regulations.

[44] One aspect of the Applicants' proposed solution to the lack of clarity of measures 1 and 2 is to substantially redraft the Compliance Order, including the "Relevant Facts" portion, so that only certain product numbers are subject to the prohibitions in measures 1 and 2. The Tribunal does not agree with that approach but does agree that the underlying problem identified by the Applicants exists (i.e., because measures 1 and 2 are worded so broadly it is not clear that the Applicants are legally permitted to avail themselves of the exceptions in the Regulations while the Compliance Order is in effect). In this regard, the Applicants wish measures 1 and 2 to be clarified so that they only apply to the extent that sale, offer for sale and import are in violation of the Regulations. The Tribunal agrees with this general submission.

[45] As required under CEPA, the Compliance Order is aimed at ensuring compliance with the Regulations (see the closing words of s. 235(1): "in order to cease or refrain from committing the alleged contravention"). The Compliance Order is not intended to restrict these Applicants from engaging in activities that other regulated entities would continue to be allowed to do under the exceptions set out in the Regulations, such as export or distribution for industrial use. There is no evidence of a need to shut down those aspects of the Applicants' business that would normally be permitted to continue under the Regulations' exceptions. What needs to be addressed are activities that are prohibited by the Regulations and for which no exception applies. The Tribunal, therefore, finds that a reasonable approach to measures 1 and 2 would be to amend their wording to make it clear that full compliance with the Regulations is required but that the Applicants can continue to engage in export and/or distribution of products to industrial users as per the exceptions in the Regulation. The Tribunal has, therefore, amended measures 1 and 2 to achieve this goal, as set out at the end of this decision. The Tribunal finds that these amendments are reasonable in the circumstances here.

[46] It should be noted that the Applicants also sought a change to measures 1 and 2 such that their effective date would be the date of this decision rather than February 1, 2019. Given the Tribunal's chosen approach to amending measures 1 and 2, the Tribunal finds that no date is now required in measures 1 and 2. The obligation to comply with the Regulations was in place before the Compliance Order was issued, remains while it is in effect and continues after it expires.

[47] Measure 6 also suffers from the same potential problem as measures 1 and 2, in that the wording may restrict more than just contraventions. As noted by the Applicants, there is no need to restrict the export of substances solely to their point of origin (i.e., Spain). They can be lawfully exported elsewhere under the exception set out in the

Regulations. Similarly, they can be distributed for industrial use in Canada (rather than car refinishing) under the other exception in the Regulations. The Tribunal has, therefore, amended measure 6 so that the Applicants can still avail themselves of the exceptions in the Regulations. The Tribunal finds that these amendments, as set out at the end of this decision, are reasonable in the circumstances here.

[48] It should be noted that the Tribunal has also made minor wording improvements to the amended measures to increase clarity. The full text of amended measures 1, 2, 3 and 6 is set out below.

iii) Consistency of the measures with the protection of the environment and public safety

[49] As set out in s. 235(1), the measures in an environmental protection compliance order must also be "consistent with the protection of the environment and public safety". This is in keeping with the overall purpose of CEPA. The measures in the Compliance Order, as amended by this decision, relate to limiting VOC emissions.

[50] The Tribunal accepts the evidence of Alexander Cavadias that air pollution causes serious health effects in Canada, including thousands of premature deaths, hospital admissions and emergency room visits each year. The Tribunal also accepts the evidence that air pollution can also have a detrimental impact on the environment. Mr. Cavadias notes that VOCs are precursor pollutants to ground-level ozone and particulate matter and were added to the CEPA List of Toxic Substances as a result.

[51] Significant reductions in VOCs can be achieved by minimizing the use of solvents. Solvents are added to car refinishing products. VOCs are emitted when these products are applied. The Regulations are one strategy for achieving the objective of minimizing solvent use and to the extent that the Compliance Order seeks to promote compliance with the Regulations, then it can be concluded that the Order is "consistent with the protection of the environment and public safety". Thus, this aspect of s. 235 is met on the facts of this case.

iv) Permitted measures

[52] It should also be noted that the nature of the measures set out in the Compliance Order, as amended below, also clearly fall within the scope of permitted measures under s. 235(4) of CEPA.

v) "Relevant Facts" portion of the Compliance Order

[53] As noted above, the Applicants propose changes to the "Relevant Facts" portion of the Compliance Order. That portion of the Order amounts to ten pages. While the Tribunal does not completely foreclose the possibility of amending the facts parts of an environmental protection compliance order in a future case (if it could be shown that such is needed and that such parts fall within the ambit of a "term or condition" under s. 263(b) of CEPA), it has elected not to do so here. The reasons are twofold.

[54] First, this was an expedited proceeding that was based on affidavit evidence that was not subject to cross-examination. The Tribunal has received ample evidence to discharge its statutory duty to conduct the requested review but does not see any utility in attempting to resolve every disputed fact between the parties and making any resulting amendments to the “Relevant Facts”. That portion of the Compliance Order summarizes the enforcement officer’s reasons for the measures he imposed. This decision sets out the Tribunal’s reasons for amending some of those measures. There is no need to try to amend the enforcement officer’s reasons, as they are an adequate summary of his beliefs at the time the Compliance Order was issued.

[55] Second, the Applicants’ proposed changes to the “Relevant Facts” portion of the Compliance Order were part of its overall approach of seeking to have the Order amended so that it would apply to only certain product numbers. That approach included having the measures refer back to, and incorporate by reference, certain paragraphs of the “Relevant Facts”, effectively making them in part a “term or condition” of the Order. The Tribunal has elected to pursue a different approach to amending the Compliance Order to achieve clarity and there is no need for the measures as amended to refer back to certain paragraphs in the “Relevant Facts”. The measures, as amended here, stand on their own and do not incorporate by reference any of the “Relevant Facts” paragraphs of the Compliance Order.

Decision

[56] The Tribunal grants the review in part. Under s. 263(b) of CEPA, the Compliance Order is amended by replacing measures 1, 2, 3 and 6 with the following (measures 4 and 5 are not amended and remain in force as is):

> 1. Except where an exception set out in s. 2(2) of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations* applies, cease to sell and/or offer for sale automotive refinishing products containing volatile organic compound (VOC) in concentration greater than the limit set out in the schedule of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*.
>
> 2. Except where an exception set out in s. 2(2) of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations* applies, cease to import automotive refinishing products containing volatile organic compound (VOC) in concentration greater than the limit set out in the schedule of the *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations*.
>
> 3. No later than **15 days** after the issuance of the Environmental Protection Tribunal of Canada’s Decision in EPTC Case Nos.: 0002-2019 and 0003-2019, provide to the undersigned enforcement officer a copy of an Environmental Management Plan (EMP) to ensure that **Distribution Carworx Inc.** complies

with CEPA and its Regulations (including *Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations* but not only limited to it). **Mr. Andrew Kost** must endorse the copy (signature required). You also need to provide the list of employees in charge of the EMP, including proof they received and read a copy.

6. As soon as possible, but no later than **July 26th, 2019**, proceed to the destruction, lawful export, or lawful sale in Canada for industrial use of all the products imported in Canada and retrieved (as per point #4). Provide proof of destruction, lawful export, or lawful sale in Canada for industrial use to the undersigned enforcement officer at this moment (at the latest). If destruction is chosen, an authorized company must perform it (with appropriate authorization/permits). By documentation, I refer to invoice(s), certificate of destruction (or treatment), manifest(s) of transportation or other documentation acceptable to me.

Review Granted in Part

Compliance Order Amended

"Leslie Belloc-Pinder"

LESLIE BELLOC-PINDER
REVIEW OFFICER

"Jerry V. DeMarco"

JERRY V. DEMARCO
CHIEF REVIEW OFFICER

"Pamela Large Moran"

PAMELA LARGE MORAN
REVIEW OFFICER