



Issue Date: September 29, 2022

Citation: *Groupe Marcelle Inc. and David Cape v. Canada (Environment and Climate Change Canada)*, 2022 EPTC 8

EPTC Case Nos.: 0010-2022 and 0011-2022

Case Names: *Groupe Marcelle Inc. v. Canada (Environment and Climate Change) (0010-2022)*;
David Cape v. Canada (Environment and Climate Change) (0011-2022)

Applicants: Groupe Marcelle Inc. and David Cape

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under section 256 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (“CEPA”) of an Environmental Protection Compliance Order issued under subsection 235(1) of CEPA in respect of subsection 81(4), section 86 and paragraphs 272(1)(a) and 272(1)(b) of CEPA

Heard: September 15, 2022 (by videoconference)

Appearances:

Parties

Groupe Marcelle Inc.
David Cape

Minister of Environment and Climate
Change Canada

Counsel

Mihnea Bantoiu
Charles Sans Cartier
Mélissa Devost

Benjamin Chartrand
Martin Lamoureux

DECISION DELIVERED BY:

HEATHER GIBBS

Background

[1] This decision disposes of the requests by the Applicants, Groupe Marcelle Inc. and David Cape, Director and President of Groupe Marcelle (“Groupe Marcelle”), to the Environmental Protection Tribunal of Canada (“Tribunal”) for review of Environmental Protection Compliance Order No. 8222-2021-04-15-6700 (“Compliance Order” or “EPCO”) issued by Environment and Climate Change Canada (“ECCC”) on June 29, 2022.

[2] The Compliance Order was issued to the Applicants by ECCC Compliance Officer Marc-André Cloutier (“Officer” or “Enforcement Officer”) under subsection 235(1) of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (“CEPA” or “Act”) regarding the alleged contravention of subsection 81(4), section 86 and paragraphs 272(1)(a) and 272(1)(b) of this Act. The Compliance Order directed the Applicants to carry out a series of six measures, including to immediately stop marketing cosmetic products containing Perfluorononyl Dimethicone (CAS 882878-48-0) (“substance”) and, as soon as possible, recover the cosmetic products referred to in the EPCO from their distributors and destroy them.

[3] On July 22, 2022, the Applicants jointly presented the Tribunal with a request to review the order under subsection 256(1) of the CEPA and an application to suspend the EPCO under subsection 258(2) of the CEPA. At a case management conference held by teleconference on September 1, 2022, the Applicants informed the Tribunal of their intention not to apply for a suspension and instead to proceed with the request for review as quickly as possible.

[4] On September 15, 2022, the Tribunal held a hearing by videoconference based on the documents that the parties had filed prior to the videoconference. In addition, each party had the opportunity to present its evidence and make representations during the hearing, in addition to having a right of reply.

[5] This decision addresses the merits of the request for review. Given that this was an expedited proceeding and considering the short time limit under section 266 of CEPA for issuing this decision, these reasons address only the most salient evidence and representations.

[6] According to the ECCC, the marketing of the cosmetic products containing the substance is prohibited by subsection 81(4) of CEPA and Significant New Activity Notice 14673 (Canada Gazette, Part I, Vol. 141, No. 21, May 26, 2007; “Notice”). According to the Applicants, the existence of the Notice is undisputed and indisputable, and they also do not intend to challenge the validity of the order in their request for review of the order.

[7] ECCC requests that the order be confirmed under paragraph 263(a) of CEPA and that an additional measure be added. This seventh measure would direct the Applicants

to notify distributors and purchasers of cosmetic products containing the substance as soon as possible, but no later than October 28, 2022.

[8] The Applicants, for their part, intend to comply with the order but are seeking to have it amended in accordance with paragraph 263(b) of CEPA. Specifically, the Applicants feel that the time limits set out in the order are unjustified and disproportionate to the alleged risk. They are requesting that the Tribunal extend the time limits set out in the order, given its wide discretion. As for the additional measure (seventh measure), the Applicants find that this measure is unnecessary, since they do not object to the Notice.

[9] For the reasons set out below, the Tribunal confirms the Compliance Order under paragraph 263(a) of CEPA. No new measures are added to the Compliance Order.

Facts

[10] The following are the relevant facts that the Tribunal accepts from the evidence filed by the parties. The Tribunal has reproduced some excerpts of facts that are found in the following documents:

- *Plan d'argumentation du Ministre sur la révision de l'ordre d'exécution en matière de protection de l'environnement* [Minister's submissions on review of Environmental Protection Compliance Order] (submitted by the Respondent on September 12)
- *Demande modifiée de révision et de suspension* [amended request for review and application for suspension] (submitted by the Applicant on September 12)

The list of exhibits that were presented during the hearing is in Appendix B.

[11] Groupe Marcelle is a Canadian manufacturer of branded products in the beauty industry. It markets skin care products, makeup, perfumes and accessories under four trademarks: Marcelle, Lise Watier, Annabelle and CW Beggs & Sons.

[12] Groupe Marcelle designs and manufactures its cosmetic products or purchases them directly from other suppliers, as in this case for the products referred to in the Compliance Order, which were sold to it by Schwan, a German company.

[13] Groupe Marcelle then markets 98% of its cosmetic products in Canada through various distribution channels, including 90% in-store through its retailers, such as Walmart, Shoppers Drug Mart and Jean Coutu, and 10% through e-commerce, including approximately 5% on Internet sites under its trademarks and 5% through Amazon.

Applicable law on activities related to substance

[14] Subsection 81(4) of CEPA provides that a new activity subject to a Significant New Activity Notice is formally prohibited until a notice of new activity, accompanied by the prescribed information, has been provided to the Minister, and the assessment period provided under section 83 of CEPA or specified by the Minister has expired.

[15] Since the background to the case is not being challenged by the parties and was clearly set out by the Minister in his submissions, the Tribunal has decided to reproduce the following excerpts, for efficiency:

[TRANSLATION]

31. “Perfluorononyl Dimethicone” is a PFAS linked to CAS Registry Numbers 882878-48-0 and 259725-95-6 (depending on its molecular structure) and is mainly manufactured by Siltech Corporation, a Canadian company. PFAS are a large group of more than 4,700 artificial substances that, because of their unique properties, are used in a wide range of products, such as surfactants, lubricants and repellents (against dust, water and grease). These substances are recognized in particular as sharing the following characteristics:

- They persist and move in the environment.
- They have been detected in humans and wildlife species, and in environments around the world.
- They biomagnify in food webs.
- They are associated with a range of adverse effects for the environment and human health impacts.

...

33. Since May 26, 2007, the “Perfluorononyl Dimethicone” linked to CAS Registry Number 882878-48-0 has been subject to the Significant New Activity Notice published in the Canada Gazette by the Minister in accordance with subsection 85(1) of CEPA, since Ministers suspected at that time that a new activity involving this substance may render it toxic and that preventive measures were appropriate. This type of “Perfluorononyl Dimethicone” is found in various cosmetic products marketed by Groupe Marcelle.

34. In accordance with the Significant New Activity Notice and subsections 81(4) and 85(1) of CEPA, a person that proposes to use any concentration of Perfluorononyl Dimethicone (882878-48-0) for an activity other than importing it or manufacturing it for use as an industrial silicone foam stabilizer shall provide the Minister, at least 90 days prior to the commencement of the proposed activity, a significant new activity notification accompanied by the mandatory information set out in the Significant New Activity Notice and applicable legislative and regulatory

provisions, so that the Minister can determine whether this substance is actually or potentially toxic through this proposed activity.

...

36. According to subsection 81(4) of CEPA, it is prohibited to use a substance referred to in a Significant New Activity Notice—like Perfluorononyl Dimethicone (882878-48-0)—for any activity other than that explicitly set out in this notice **unless** a significant new activity notification accompanied by the mandatory information set out in the Significant New Activity Notice and applicable legislative and regulatory provisions is provided to the Minister and the period provided under section 83 of CEPA or specified by the Minister has expired.

[16] It is important to note that, under subsection 85(1) of CEPA, the Minister of ECCC and the Minister of Health need only **suspect** that a new activity in relation to a substance may make it toxic, in order to publish a notice in the *Canada Gazette* that subsection 81(4) applies to that substance. It is a preventive regulatory system.

[17] In April 2021 the Enforcement Officer began conducting inspections under section 218 of CEPA in relation to companies marketing cosmetic products reported to contain “Perfluorononyl Dimethicone”. One of these inspections concerned Groupe Marcelle.

[18] On April 15, 2021, as part of his inspection, the Officer found that the list of ingredients of certain cosmetic products marketed by Groupe Marcelle and sold by several thousand distributors in Canada—under several trademarks—indicated that they contained “Perfluorononyl Dimethicone”.

[19] As a result, the Officer took steps to find an accredited laboratory that was able to conduct certain analyses. Because of the COVID-19 pandemic, the Officer obtained the results of these analyses on March 21, 2022.

[20] On May 18, 2022, the Officer went to the principal place of business of Groupe Marcelle and informed the Applicants that Perfluorononyl Dimethicone (882878-48-0) had been the subject of a Significant New Activity Notice since 2007. The Officer was informed by one of the heads of Groupe Marcelle that the company had already planned to stop importing and marketing cosmetic products containing the substance within 18 months.

[21] Essentially, the products in question are eye, eyebrow and lip liners sold in pencil form. The products in question also have in common the fact that one of their ingredients is the chemical substance known by the name “Perfluorononyl Dimethicone” or “Pecosil FSL-300”. The main function of this substance is to make products waterproof and long-lasting.

[22] According to Groupe Marcelle (information not disputed by ECCC), the substance constitutes no more than 1% to 3% of each of the products in question, such that, on the basis of Groupe Marcelle's sales volumes, it is possible to estimate that a very small quantity (1.8 kg) of the substance at issue is used each year for all products sold by Groupe Marcelle.

[23] During the meeting in May, the Officer gave Groupe Marcelle a Notice of Intent to Issue an Environmental Protection Compliance Order, and a draft of the EPCO, pursuant to section 237 of CEPA.

[24] On May 19, 2022, more than two hundred thousand cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) that had not yet been distributed by Groupe Marcelle were quarantined at its principal place of business, and they remain in quarantine to this day.

[25] Following that meeting and until June 17, Groupe Marcelle conducted several audits and made both oral and written submissions to the Officer. Essentially, Groupe Marcelle presented the following information:

(a) The substance at issue is manufactured in Canada by Siltech Corporation, which obtained ECCC's authorization to manufacture and export it based on information that it provided in accordance with the Significant New Activity Notice.

(b) The substance at issue is distributed through a corporation based in New Jersey in the United States and known as Phoenix Chemical Inc., which Schwan acquired through a second distributor located in Switzerland for the purpose of including it in the products in question.

(c) In 2013, the CAS number assigned to the substance was modified to match that of Perfluorononyl Dimethicone (CAS 882878 48-0).

(d) However, it was only in 2018 that Phoenix informed Schwan of this change.

(e) Schwan did not inform Groupe Marcell of the CAS change such that, despite its diligence and the robustness of its compliance system, Groupe Marcelle could only connect the products in question and the Significant New Activity Notice after being informed about it by the ECCC Officer on or around May 18, 2022.

(f) The losses that would be incurred by Groupe Marcelle are estimated at \$1,600,000 (around 500,000 units imported and sold annually, with a production cost of about \$2 per unit).

[26] On June 29, 2022, the Officer issued the order to the Applicants pursuant to sections 235 *et seq.* of CEPA.

[27] On July 21, 2022, the Applicants submitted a request for review to the Tribunal, accompanied by an application for a suspension.

[28] On September 1, 2022, during a case management conference, the Applicants withdrew their application to suspend the order. Following this conference, the Applicants presented the Tribunal with an amended request for review of the order.

[29] A hearing by videoconference took place on September 15, 2022.

Issues

[30] The main issue to be determined is whether the Tribunal should confirm or amend the Compliance Order under section 263 of CEPA.

[31] In order to decide this issue, the Tribunal must address the following sub-issues:

- I. Are there reasonable grounds to believe that an offence was committed?*
- II. If so, what measures are reasonable in the circumstances and consistent with the protection of the environment and public safety?*
- III. Does section 265 apply in the proceeding?*
- IV. Should the Tribunal amend the order by adding a new measure?*

Relevant Legislation and Regulations

[32] The excerpts of relevant legislation and regulatory provisions are found in Appendix A to this decision. The statutory provisions most relevant to the review of the EPCO are as follows:

Canadian Environmental Protection Act, 1999

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.

235(2) For the purposes of subsection (1), the circumstances in which the alleged contravention has been or will be committed are as follows, namely,

- (a) the exportation, importation, manufacture, transportation, processing or distribution of a substance or product containing a substance;
- (b) the possession, storage, use, sale, offering for sale, advertisement or disposal ...; (Emphasis added)

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

- (a) confirm or cancel the order;
- (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).

265 A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in:

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or
- (c) danger to the health or safety of any person.

Discussion, Analysis and Findings

i) Are there reasonable grounds to believe that an offence was committed?

[33] Since May 27, 2007, the substance in question has been subject to Significant New Activity Notice No. 14673, which is a “regulation” within the meaning of the *Statutory Instruments Act* (RSC 1985, c S-22).

[34] According to Significant New Activity Notice No. 14673, “[a] significant new activity involving the substance is any new activity other than importing it or manufacturing it for use as an industrial silicone foam stabilizer.”

[35] In the Compliance Order, the Officer wrote that he had reasonable grounds to believe that [TRANSLATION] “subsection 81(4), section 86 and paragraphs 272(1)(a) and 272(1)(b) of the *Canadian Environmental Protection Act, 1999* were contravened and continue to be so or will likely be contravened”. According to the Officer, these provisions were contravened in two ways:

- a. Groupe Marcelle Inc. and its officers failed to submit to the Minister a significant new activity notification at least 90 days before commencing the activity for the substance in question and that these provisions continue to be contravened; and
- b. Groupe Marcelle Inc. and its officers failed to notify the purchasers of products containing the substance in question and that these provisions continue to be contravened.

[36] The provisions of CEPA that the Officer alleges were infringed are as follows:

81(4) Where a substance is not specified on the Domestic Substances List and the Minister publishes a notice in the [*Canada Gazette*](#) indicating that this subsection applies with respect to the substance, no person shall use the substance for a significant new activity that is indicated in the notice unless (a) the person has provided the Minister with the prescribed information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and (b) the period for assessing the information specified by the Minister or provided under section 83 has expired.

86 Where a notice is published in the Canada Gazette under subsection 85(1) in respect of a substance, every person who transfers the physical possession or control of the substance shall notify all persons to whom the possession or control is transferred of the obligation to comply with subsection 81(4).

[37] There is no dispute that the use of the substance in question in cosmetic products is a “new activity”. There is also no dispute that the Applicants had a statutory obligation to provide a notification and information before importing and marketing cosmetic products containing Perfluorononyl Dimethicone (882878-48-0). The purpose of this is apparently to allow the Minister to determine whether the activities actually pose a threat to human health and to the environment, as suspected. There is also no dispute that the Applicants did not submit a significant new activity notification, as required.

[38] The Applicants do not dispute that the ECCC Officer had reasonable grounds to believe that the Applicants infringed CEPA by selling cosmetic products containing Perfluorononyl Dimethicone while the Significant New Activity Notice was in force (para 15, Applicants’ Submissions).

[39] The Tribunal finds that there are reasonable grounds to believe that subsection 81(4), section 86 and paragraphs 272(1)(a) and 272(1)(b) of the *Canadian Environmental Protection Act, 1999* were infringed. In fact, the Groupe Marcelle products in question have not yet been recovered and destroyed, and Groupe Marcelle has not provided the Minister with the regulatory information, meaning that the offence continues to this day.

ii) *What measures are reasonable in the circumstances and consistent with the protection of the environment and public safety?*

[40] The second part of the analysis under section 235 of CEPA is to determine what measures of the Compliance Order are reasonable in the circumstances and consistent with the protection of the environment and public safety. This part of the analysis will be organized as follows:

A. Measures in EPCO

B. Measures proposed by Groupe Marcelle

C. Are the measures consistent with the protection of the environment and public safety?

a. Applicable law

b. Submissions of parties

c. Analysis and conclusion on consistency of EPCO measures 1 to 6

d. Analysis and conclusion on consistency of measures proposed by Groupe Marcelle

D. Are the measures reasonable in the circumstances?

- a. Applicable law
- b. Submissions of parties
- c. Analysis and conclusion on reasonableness of EPCO measures 1 to 6
- d. Analysis and conclusion on reasonableness of measures proposed by Groupe Marcelle

A. Measures in Compliance Order

[41] Essentially, the measures are intended to end the contravention of CEPA. The measures read as follows:

[TRANSLATION]

1. As of **June 29, 2022**, cease all new activity set out under a notice, for the substance Siloxanes and Silicones, dimethyl, methyl-3,3,4,4,5,5,6,6,6-nonafluorohexyl, (CAS 882878-48-0), which may also be known as “Perfluorononyl Dimethicone”, in accordance with *Significant New Activity Notice 14673*.
2. As soon as possible, but no later than **September 30, 2022**, develop and implement, and provide the undersigned a copy of, an environmental management system to ensure that **Groupe Marcelle Inc.** complies with CEPA at all times, including by preventing **Groupe Marcelle Inc.** from importing, manufacturing, offering for sale and/or selling products that do not comply with CEPA, its orders and its regulations.
3. As soon as possible, but no later than **October 28, 2022**, recover from the distributors of **Groupe Marcelle Inc.** any product containing the substance Siloxanes and Silicones, dimethyl, methyl-3,3,4,4,5,5,6,6,6-nonafluorohexyl (CAS 882878-48-0), also known under the INCI designation “Perfluorononyl Dimethicone” (including demonstrators and samples).
4. As soon as possible, but no later than **November 18, 2022**, provide the undersigned with a report detailing the action taken to recover the products to be processed (as defined at item No. 3 of the measures to be taken in this EPCO). The report will also need to include a complete inventory of the recovered products and their origin. In addition, the report will need to be approved and sent by **David Cape**.

5. As soon as possible, but no later than **December 9, 2022**, and using a process that ensures the appropriate elimination of perfluoroalkylated and polyfluoroalkylated substances, destroy the recovered products (as defined in item No. 3 of the measures to be taken in this EPCO).
6. As soon as possible, but no later than **December 23, 2022**, provide the undersigned with a report detailing the elimination of the recovered products (as defined at item No. 5 of the measures to be taken in this EPCO). The report will need to detail what happened to the recovered products. Invoices, collection orders, transport manifests, incineration/destruction orders and any other relevant document will need to be attached to the report to be signed by **David Cape**.

B. Measures proposed by Groupe Marcelle

[42] Groupe Marcelle requests that the Tribunal amend the orders made under the Compliance Order so that it provides that

- (a) marketing of the Products in question ends on December 31, 2022, by means of a prior communication to the Groupe's retailers, beginning the collection of the Products in question by its teams in the following days;
- (b) the recall of the Products in question shall take place no later than February 10, 2023, with the production of a report detailing the steps taken no later than February 24, 2023; and
- (c) the destruction of the Products in question shall be completed by March 17, 2023, with the production of a report detailing the steps taken no later than March 31, 2023.

C. Are the measures consistent with the protection of the environment and public safety?

a. Applicable law

[43] The *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (CEPA) is an “[a]ct respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development”.

[44] CEPA incorporates the principles of precaution and prevention (CEPA, s. 2(1); see also *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para 31):

2(1) ... in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches...

[45] In exercising its discretion under section 263 of CEPA, the Tribunal is guided by the purpose of the Act. The Tribunal will then exercise its discretion so as to further the statutory purposes of pollution prevention and the protection of the environment and human health (see also *Kost v. Canada (Environment and Climate Change Canada)*, 2019 EPTC 3, at para 18 (“*Kost*”).

[46] Section 235 of CEPA provides as follows:

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. (Emphasis added.)

[47] The measures ordered in the EPCO must therefore be (1) reasonable in the circumstances **and (2)** consistent with the protection of the environment and public safety.

Burden of proof

[48] Each party has the burden of proving that the imposed or proposed measures are consistent with the two factors highlighted by the Tribunal in the previous paragraph.

[49] The Tribunal will first determine whether the Minister has demonstrated that the measures in the EPCO are consistent with these two factors. The Tribunal will then determine whether the amendments suggested by the Applicants are in turn consistent with these two factors.

[50] Despite the burden of proof, the Tribunal cannot rule on the reasonableness of the measures in this case without considering all the relevant arguments of both parties.

b. Submissions of parties

Minister's submissions

[51] The Minister argues that, through this request for review, the Applicants are essentially asking the Tribunal to amend the EPCO [TRANSLATION] “in order to allow them to import and sell illegally for several months and not, as soon as possible, recover and destroy hundreds of thousands of cosmetic products containing Perfluorononyl Dimethicone (882878-48-0), of which the danger to human health and the environment has been empirically proven”.

[52] The Minister stresses that CEPA is a public policy statute and that compliance with the provisions of CEPA is a major issue in Canada [TRANSLATION] “given the harmful, irreparable and unacceptable consequences that contraventions of this Act may have with regard to human health and the environment”.

[53] The Minister submits that the applicable legal framework is consistent with the principles of precaution and prevention. According to the legal framework, [TRANSLATION] “**unless** a significant new activity notification accompanied by the mandatory information set out in the Significant New Activity Notice and applicable legislative and regulatory provisions is provided to the Minister and the time period provided in section 83 of CEPA or specified by the Minister has expired, a new activity covered by a Significant New Activity Notice is formally prohibited”. The Minister claims that this prohibition is therefore consistent with the protection of the environment and public safety.

[54] The Minister claims that measures Nos. 5 and 6 of the EPCO are consistent with the protection of the environment and public safety, since Groupe Marcelle has not provided evidence of serious efforts to present the Minister with a significant new activity notification with the mandatory information set out in the Significant New Activity Notice.

[55] The Minister points out that it is the Minister alone who has the discretion to determine whether the marketing of the cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) makes this substance toxic or potentially toxic and whether this commercial activity should be permitted in light of the careful and comprehensive assessment of the risks it poses to human health and the environment. He claims that the review of an EPCO before the Tribunal is not the right forum for challenging the basis and the effects of the Significant New Activity Notice.

[56] Despite his argument that the Tribunal lacks the jurisdiction to examine the risks posed by the substance, the Minister presented evidence to establish that this substance does in fact pose a risk to the environment and human health, and is not simply suspected to be toxic, as required by section 85.

[57] The Minister raised several points about the level of risk posed by the substance. The following is a summary:

- The Ministers' suspicions that underpin the Significant New Activity Notice are sufficient in themselves to justify this measure in this case, since according to them, any concentration of Perfluorononyl Dimethicone (882878-48-0) can degrade into PFBA, a substance recognized as posing an unacceptable danger to human health and the environment even in mere trace amounts, particularly when found in cosmetic products.
- The results of the analyses obtained by the Enforcement Officer during his inspection show that the Perfluorononyl Dimethicone (882878-48-0) in particular, contained in the cosmetic products marketed by Groupe Marcelle, does in fact degrade into PFBA and other PFAS.
- The affidavits of Marc-André Cloutier, Allison McLaughlin and Vincent Dionne-Dumont and their attached documents show, first, that these PFAS are partially absorbed by their users' bodies and, second, that the concentrations of these PFAS in these products are significantly higher—up to several hundred times—than what contemporary scientific studies and government reports state may present an unacceptable risk to human health when absorption is regular (i.e., impacts on metabolism, fertility, fetal development, the immune system and the development of cancer) and may be harmful to the environment.
- The evidence submitted by the Applicants includes no analysis of the consequences for human health and for the environment from the degradation of the Perfluorononyl Dimethicone (882878-48-0) found in the cosmetic products marketed by Groupe Marcelle into PFBA and other PFAS, in particular as a result of its natural degradation.

[58] With respect to amendment (a) proposed by Groupe Marcelle, the Minister argues that, under section 263 of CEPA, the Tribunal cannot legally authorize the Applicants to contravene subsection 81(4) of CEPA by allowing them to continue marketing various cosmetic products containing the substance in question. In addition, the Minister argues that the amendments proposed by the Applicants would also condone a contravention of section 16 of the *Food and Drugs Act*, which essentially prohibits the sale of a cosmetic product that “*has in or on it any substance that may cause injury to the health of the user when the cosmetic is used*”.

Applicants' submissions

[59] The Applicants do not claim that the measures ordered to stop the commission of the offence are inconsistent with the protection of the environment and public safety.

[60] In their submissions, they instead submit that **the time limits** to fulfill the measures set out in the EPCO are neither reasonable in the circumstances nor consistent with the purposes of CEPA.

[61] They claim that the time limits given to the Applicants to comply with the Significant New Activity Notice are unreasonable and disproportionate in this case. The Applicants claim that they [TRANSLATION] “are not asking for permission to contravene the Significant New Activity Notice in force, but are instead asking the Tribunal to exercise its powers under section 263 to review the time limits granted by the Minister to fulfill the measures in the EPCO”.

[62] Groupe Marcelle’s claim that the time limits are inconsistent with protection of the environment is based on the assertion that there are no harmful effects or danger [TRANSLATION] “to human life or health that are known to result from the normal or typical use of the products concerned in the Compliance Order” (Submissions, para v).

Products in question do not represent danger to human health or life

[63] The Applicants submit that the evidence on file shows an absence of any known harmful effect or danger to human health or life resulting from the normal or typical use of the products in question. They contend that the toxicological studies submitted by the Respondent demonstrate the safety of the products in question.

[64] The affidavit of Dr. Britta Linner-Krcmar contains her conclusions in response to the opinion expressed by Officer Cloutier:

[TRANSLATION]

...[T]he level of exposure to PFBA and PFHxA, traces of which appear to have been found by SGS in one of the Groupe Marcelle products, is, depending on the case, hundreds, thousands or even tens of thousands of times lower than the no-risk exposure thresholds calculated or identified in the studies cited by it.

[65] The Applicants submit that the quantity of Perfluorononyl Dimethicone that is likely to be found in the environment by December 31, 2022, is negligible and it is unreasonable to assert that a quantity of around 0.3 kg of Perfluorononyl Dimethicone distributed across the country is likely to contaminate Canadian watercourses enough that they will reach a concentration of PFBA or PFHxA that is significant enough to cause a serious risk to the environment or human health.

[66] The Applicants argue that the products containing Perfluorononyl Dimethicone have been sold on the Canadian market for more than 15 years without Health Canada expressing any particular concern about their use in cosmetic products.

[67] The absence of harmful effects by the products in question would support the proposed amendments being consistent with the protection of the environment and public safety.

[68] Given the fact that the substance in question is only present in very small quantities in the cosmetic products concerned, the Applicants claim that the Minister has not demonstrated that an extension of the deadline would have any effect on human health or the protection of the environment.

Lack of urgency

[69] The Applicants also argue that there is no urgent need to halt the sale of these products. They note that products containing Perfluorononyl Dimethicone have been sold on the Canadian market for more than 15 years without Health Canada expressing any particular concern about their use in cosmetic products.

[70] They point out that Officer Cloutier showed flexibility at the May 18, 2022 meeting, stating that he [TRANSLATION] “would not prevent the retailers from continuing to sell the Products in question, provided that the deadline set out in the Compliance Order that he planned to issue was met”. In addition, it appears from Mr. Simard’s information that a number of products similar to those subject to the Compliance Order continue to be sold by Groupe Marcelle’s competitors in several stores, including pharmacies and on the companies’ websites.

[71] The Applicants submit that the short time limits set out in the Compliance Order are unreasonable and disproportionate considering that they are not based on any serious and tangible danger. In their view, the evidence on record shows that the toxicological studies filed by the Respondent attest to the harmlessness of the products in question, and it appears from the evidence on record that the quantity of Perfluorononyl Dimethicone likely to be found in the environment by December 31, 2022, is negligible. The Applicants criticize the Minister for not explaining why the time limit extension sought by the Applicants would cause a **serious risk** of environmental degradation.

c. Analysis and conclusion on consistency of EPCO measures 1 to 6

[72] Measure No. 1 orders the Applicants, as of June 29, 2022, to cease any new activity set out in the Significant New Activity Notice for the substance in question. The importation, manufacture, offering for sale and/or sale of products that do not comply with CEPA are all new activities according to the Notice (which has the weight of a regulation). Any contravention of CEPA is inconsistent with the protection of the environment (given the purpose of the Act) and therefore any measure aimed at halting a contravention of the Act is consistent with the protection of the environment.

[73] The purpose of Measure No. 1, which is to immediately halt any new activity subject to a Significant New Activity Notice (i.e. activities prohibited under CEPA) is in itself consistent with the protection of the environment.

[74] Measure No. 3 orders the Applicants to recover all products containing the substance in question from Groupe Marcelle's distributors as soon as possible, but no later than October 28, 2022. Once again, this is a direct measure to end the contravention of CEPA, and any contravention of the Act is inconsistent with the protection of the environment (given the purpose of the Act). Therefore, this measure is consistent with the protection of the environment.

[75] Measure No. 5 orders the Applicants to destroy the recovered products as soon as possible, but no later than December 9, 2022. The sale and export of the substance are prohibited by law. This is again a direct measure to stop the contravention of CEPA, making it consistent with the protection of the environment.

[76] Measures 2, 4 and 6 order the Applicants to submit reports to the Minister when measures 1, 3 and 5 have been completed. The time limits for measures 2, 4 and 6 are intrinsically linked to the measures associated with them. They are therefore consistent with the protection of the environment.

[77] Measures 1 to 6 in the Compliance Order are intended to protect Canadians from products that may be toxic, in circumstances where no request for a scientific study has yet been filed, and the Minister has not been provided with the information required by regulation to determine whether or not the products are dangerous.

[78] Officer Cloutier found that [TRANSLATION] “[a]ccording to the Government of Canada, there is insufficient information on most PFAS currently in use in Canada to be able to assess their toxicity; simultaneous exposure to several PFAS and their cumulative effects might cause, in light of current scientific knowledge, adverse impacts to the health of Canadians and the environment” (para 94 of the Cloutier affidavit dated August 17, 2022).

[79] Although there are disagreements with respect to the risks or absence of risks associated with the substance, there is no doubt that measures 1 to 6 seek to promote

compliance with the *Canadian Environmental Protection Act* and are therefore consistent with the protection of the environment and public safety.

[80] Measures 1 to 6 of the EPCO are consistent with the general purpose of CEPA, which is the prevention of pollution and the protection of the environment and human health, and with the precautionary principle in accordance with *Spraytech*. The Tribunal therefore concludes that the Minister has established that the ordered measures are consistent with the protection of the environment and public safety.

d. Analysis and conclusion on consistency of measures proposed by Groupe Marcelle

[81] The Applicants request that the Tribunal amend the measures in the Compliance Order so that the marketing of the products in question can continue until December 31, 2022, with the products in question being recalled and destroyed in the following months.

[82] It is not unreasonable for a for-profit company to seek to minimize its economic losses. However, for the Tribunal to accept the proposed amendments, they must also be consistent with the protection of the environment and public health (*Kost*). To be consistent with the protection of the environment and public health, a measure must at minimum not be detrimental to the purpose of CEPA. In this case, however, proposed amendment (a) would be directly contrary to the purpose of CEPA, despite the small quantity of the substance in the products in question.

[83] The Minister submits the following:

[TRANSLATION]

It is the Minister who has the discretion to determine whether the marketing of the cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) makes this substance toxic or potentially toxic and whether this commercial activity should be permitted in light of the careful and comprehensive assessment of the risks it poses to human health and the environment. Accordingly, even if the Applicants were correct in asserting that the marketing of cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) did not constitute a danger to human health and the environment, something that is categorically denied by the Minister, it is not up to either the Applicants, the Enforcement Officer or, with respect, the Tribunal to determine that. In fact, under the Significant New Activity Notice and subsections 81(4) and 85(1) of CEPA, it is the Minister alone who has this discretion. In other words, the review of an EPCO before the Tribunal is not the right forum for challenging the basis and the effects of the Significant New Activity Notice, as the Applicants have done here. (para 57, Minister's Submissions)

[84] The Tribunal agrees with the Minister's observation. It is not up to the Tribunal to determine whether the substance in question is a danger to human health and the environment. The expedited nature of a compliance order review by the Tribunal shows that it is not the appropriate forum for an in-depth examination of such an issue. The process seeks a quick resolution when a party subject to a compliance order objects to the measures included in it. The following provisions are examples of this quick process: subsection 258(1) of CEPA, which states that "the request for a review by a review officer does not suspend the operation of an [EPCO]"; paragraph 263(c), which limits the authority of the review officer to "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"; and section 266, which states that "[t]he review officer or the panel, as the case may be, shall, within 15 days after the completion of the review of an order, render a decision".

[85] The Tribunal is obligated to apply the law, and therefore in this case the Significant New Activity Notice and subsections 81(4) and 85(1) of CEPA. As a result of these provisions, and in accordance with the precautionary principle, any new use of the substance in question is prohibited until the Minister has had the required time and information to study it.

[86] In his affidavit dated August 17, 2022, Officer Cloutier explains at para 12:

[TRANSLATION]

In accordance with the precautionary principle, this new activity cannot be undertaken before the expiry of the assessment period and the Minister's decision. Such an activity remains prohibited until the Minister has completed a thorough assessment of the risks associated with the use of the substance in the reported activity. With respect to Perfluorononyl Dimethicone in particular, a new activity is, according to the wording of Significant New Activity Notice No. 14673, any new activity other than importing it or manufacturing it for use as an industrial silicone foam stabilizer. This definition of a new activity does not include the concentration or the threshold beyond which reporting would be required.

[87] By allowing the Applicants to continue selling the products in question until December 31, 2022, despite the fact that this activity is prohibited by the Significant New Activity Notice, the Tribunal would thus be allowing them to continue to contravene the Act. The time limits in proposed amendments (b) and (c) go hand in hand with the proposed date to end the marketing of the products in question.

[88] For this reason, the Tribunal finds that the Applicants have not established that the proposed amendments are consistent with the protection of the environment and public health.

Are the measures reasonable in the circumstances?

[89] At this stage of the analysis, the Tribunal has found that measures 1 to 6 of the EPCO are consistent with the protection of the environment and public health and that the measures proposed by the Applicants are not. The Tribunal would like to stress that section 235 requires that both criteria be met, and that one of the two criteria is not met in the proposed measures. Nevertheless, the Tribunal will proceed to analyze the criterion of *reasonableness in the circumstances*.

a. Applicable law

[90] The relevant legal provisions are the same for both the reasonableness of the measures, and the consistency of the measures.

b. Parties' submissions as to reasonableness

Minister's submissions – reasonableness in circumstances

[91] The Minister submits that all the measures are reasonable in the circumstances.

[92] The purpose of measure No. 1 is to stop the contraventions of subsection 81(4) of CEPA. The Minister points out that, according to the provisions of the Act, the Ministers' suspicions that there is a danger to human health and the environment are sufficient to justify this measure.

[93] According to the Minister's submissions, the marketing of cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) effectively renders this substance toxic within the meaning of section 64 of CEPA. These products allegedly pose an unacceptable risk to human health when absorption is regular (that is, impacts on metabolism, fertility, fetal development, the immune system and cancer development) and may harm the environment. Consequently, Groupe Marcelle's recall of these products from its distributors as soon as possible, and no later than October 28, 2022, is reasonable in the circumstances.

[94] The Minister submits that the destruction of the cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) within the time limits prescribed in the EPCO (measures 5 and 6) is reasonable in the circumstances because Groupe Marcelle has not given evidence of serious efforts to provide the Minister with a significant new activity notification in due form accompanied by the mandatory information set out in the Significant New Activity Notice and applicable legislative and regulatory provisions.

[95] The Minister claims that the Officer's very choice to issue a Compliance Order demonstrates a reasonable approach in light of the *CEPA Compliance and Enforcement Policy*, since he could have used a more coercive measure.

[96] With respect to the economic impact that the measures would have on Groupe Marcelle, the Minister points out that these arguments are not supported by evidence.

[97] The Minister notes that five other Canadian companies have also received EPCOs almost simultaneously to stop the importation and marketing of similar cosmetic products and to recall and destroy them, despite, according to the Minister's claims, economic consequences that are sometimes greater than those alleged by the Applicants.

[98] The Minister submits that more coercive measures were ruled out by the Enforcement Officer to avoid additional economic consequences to Groupe Marcelle, such as issuing a recall order under section 99 of CEPA. Lastly, the Minister submits that the cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) represent a small proportion of all the cosmetic products marketed by Groupe Marcelle.

Applicant's submissions – reasonableness in circumstances

[99] The Applicants claim that the time limits set out in measures 1 to 6 of the EPCO are not reasonable in the circumstances. They dispute the reasonable and proportionate nature of the measures set out in the EPCO. Specifically, they argue that the short time limits set out in the EPCO are unreasonable and disproportionate in the circumstances.

Applicants did not knowingly contravene Significant New Activity Notice

[100] The products in question in the Compliance Order have been imported from the manufacturer, Schwan, and sold on the Canadian market by Groupe Marcelle since 2012. Perfluorononyl Dimethicone has been used by Schwan since 2005 and was found in many cosmetic pencils sold by several cosmetic companies carrying on business in Canada. The Applicants assert that these products have been approved in several major countries around the world.

[101] In conducting its due diligence with respect to the ingredients in the products in question, Groupe Marcelle used the Chemical Abstracts Service (CAS) Registry Number of the substance in question that was provided to it by Schwan (259725-95-6) and did not detect any new activity regarding it. In 2013, the CAS number assigned to the substance was changed to match that of Perfluorononyl Dimethicone (CAS 882878 48-0). That information was not conveyed to Groupe Marcelle by Schwan. Groupe Marcelle was then

able to make the connection between the products in question and the Significant New Activity Notice only after being informed about it by the ECCC Officer on May 18, 2022.

[102] It is notable that other cosmetics companies , as well as Cosmetics Alliance Canada, Canada's leading trade association that represents the collective interests of various players in the cosmetics and personal care product industry in Canada, were also unaware that the Notice existed.

History of compliance and behaviour in this case

[103] Groupe Marcelle submits that it was diligent and serious in responding to the situation from the moment when the ECCC Officer informed it of the Significant New Activity Notice. As of May 18, 2022, Groupe Marcelle stopped the sale of the products in question on its Internet sites, stopped all resupply orders of the products in question from Schwan, and quarantined the products that were in its warehouse.

[104] Groupe Marcelle also stresses that it has an exemplary record of compliance with both Health Canada and ECCC.

[105] There is jurisprudence interpreting language of similar statutory provisions, which will assist with interpretation in this case.

Lack of urgency justifying time limits in Compliance Order

[106] The Applicants are of the view that there is no urgent need to withdraw the products in question from the market, as they pose no risk of harm to the environment or human health. They submit that the ECCC Officer himself demonstrated a lack of urgency, given that more than a year passed between the time he learned of the problem and the date the Notice of an intention to issue a compliance order was sent.

[107] The Applicants also submit that they always understood, during discussions with the ECCC Officers, that they were not required to immediately recall the products in question. Luc Simard, a chemical engineer and Vice-President of Operations for Groupe Marcelle Inc., states in his affidavit that during the meeting on May 18, 2022, Officer Cloutier told him that he would be flexible with Groupe Marcelle and that he would not prevent its retailers from continuing to sell the products in question, provided that Groupe Marcelle complied with the deadline included in the Compliance Order he planned to issue.

[108] Mr. Simard also states in his affidavit that several products that are similar to those referred to in the Compliance Order are still marketed by Groupe Marcelle's competitors

in several stores, including pharmacies, and on the Internet sites of the companies concerned.

Serious and disproportionate harm

[109] The Applicants submit that, in light of the importance of retail to the sale of Groupe Marcelle's products, the particularities of its distribution chain are relevant to understand and measure the impact of the Compliance Order measures on its activities. In the amended Request for Review and Application to Suspend Enforcement of an Environmental Protection Compliance Order, Groupe Marcelle states the following at paragraph 48:

[TRANSLATION]

- (a) In the cosmetics industry, planograms can be upgraded only twice a year: in January for the spring-summer season and in July for the fall-winter season.
- (b) Any such upgrade requires weeks, even months of planning and therefore cannot be done at an inopportune moment.
- (c) From the moment a product is included in a planogram, as in the case of the Products in question, it can no longer be removed or replaced except at the times provided in paragraph (a) above.
- (d) Thus, the failure to provide retailers with the products that Groupe Marcelle has committed to deliver will inevitably expose it to a number of consequences whose financial impact cannot be quantified, such as having empty shelves, losing shelf space over time due to its inability to provide consumers with the products in question or a replacement product, weakening its competitive position and its brand image in the eyes of consumers or even paying significant penalties resulting from its inability to deliver the products that it has committed to supplying.
- (e) As an example, a major multinational company charges its suppliers a penalty calculated as a percentage applied to the cost of the goods sold when the supply rate is lower than 97.5% of the quantity ordered by that retailer in a given month (Exhibit P-11, Supplier Information Manual, Wal-Mart).
- (f) Lastly, it is important to clarify that Groupe Marcelle does not currently have any products available that could replace the products in question. Schwan expects to be able to design and produce one with similar characteristics by late 2022, but there is no guarantee.

[110] The Applicants argue that Groupe Marcelle estimates the impact of the Compliance Order at approximately \$3 million, from being unable to sell the products in stock and in the possession of its retailers. This assessment excludes any future loss of

market share from the loss of shelf space in particular, along with the cost associated with the recall of the products in question from the 3,500 retailers that market them, and the subsequent destruction of the products.

[111] The Applicants argue that the harm to Groupe Marcelle from a refusal to amend the deadlines outweighs any risk that the suspension may cause to health and the environment, as follows (excerpt from the *Demande modifiée de révision et de suspension de l'application d'un ordre d'exécution en matière de protection de l'environnement* [Amended Request for Review and Application to Suspend Enforcement of an Environmental Protection Compliance Order], paragraph 55):

[TRANSLATION]

- The substance at issue has never been reported as a concern by Health Canada, even though its use in cosmetic products in Canada has been known for at least 15 years.
- The concentration of the substance in question in the Products in question is minimal, ranging from 1% to 3%, depending on the Product.
- The total volume of substance used annually by Groupe Marcelle in the Products in question is only around 1.8 kg.
- The tests conducted by Schwan on the standard formulas used to manufacture the Products in question and the substance at issue demonstrate that their use poses no risk to human health or life.
- The post-marketing experience from the sale of several hundred million products containing the substance at issue has not revealed any harmful effects or any danger to human health or life.
- The orders to force Groupe Marcelle to recall and destroy the products in question as soon as possible are unreasonable and inconsistent with the factual situation that has existed in the Canadian market for more than a decade.
- Groupe Marcelle took concrete action to comply with the Compliance Order in the interim. Following receipt of the Notice of Intent, the Applicants informed the ECCC Officers that they intended to comply with the Significant New Activity Notice and permanently remove Perfluorononyl Dimethicone from their products.

[112] The Applicants submit that their approach is balanced and intended to strike a fair balance between the various interests at stake.

c. Analyses and conclusion on the reasonableness of EPCO measures 1 to 6

[113] The parties' arguments regarding the compliance deadlines for the measures are relevant to the analysis of their reasonableness.

[114] A compliance order is, by its very nature, intended to prevent harm to the environment or human health. At first glance, when there is a contravention of the law, an order to stop the contravention [TRANSLATION] "as soon as possible" seems reasonable. Measure No. 1 of the EPCO calls for the prohibited activity to cease immediately. The other measures include deadlines that modify [TRANSLATION] "as soon as possible".

[115] The only limitation on the Tribunal's jurisdiction to amend and cancel EPCO measures is found in section 265 of CEPA, where doing so "would result in impairment or serious risk of impairment of the quality of the environment for any use that can be made of it or danger to the health or safety of any person". Apart from this constraint, there is no limitation in CEPA of the factors that the Tribunal must consider when determining whether a measure is "reasonable in the circumstances".

Good faith

[116] I accept that the Applicants acted in good faith. Groupe Marcelle seems to have followed its internal procedures, but, because of an error regarding the CAS number (of the substance) provided by Schwan, it could not comply with the Significant New Activity Notice by filing the application required under CEPA. According to the evidence, the substance at issue has been an ingredient in cosmetic products of several manufacturers and retailers for over a decade. Even the Cosmetics Alliance Canada was not aware of the Significant New Activity Notice regarding Perfluorononyl Dimethicone before the start of the Officer's inspections in 2021, inspections that led to the issuance of the EPCO.

[117] The Applicants also demonstrated good faith after receiving the Notice of Intent. They informed the ECCC Officers that they intended to comply with the Significant New Activity Notice and permanently remove Perfluorononyl Dimethicone from their products. They provided all the information requested by the Officer so that he could complete the Order the day after the meeting on May 18.

[118] The Applicants immediately stopped supplying the products in question to retailers and quarantined all undistributed products. They immediately stopped selling the products in question on their website.

[119] According to the Applicants, they believed that, as of May 18, 2022, ECCC Officers would not require Groupe Marcelle to immediately recall the products in question that were already in retailers' possession and that they could continue to sell them.

[120] An EPCO is not a fault-based contravention. The presence of good faith would have no effect on the question of whether an offence was committed. It may be considered relevant, however, with respect to the reasonableness of the measures. Officer Cloutier considered Groupe Marcelle's diligence when he prepared the EPCO:

[TRANSLATION]

I also considered Groupe Marcelle Inc.'s history of compliance, its diligence with respect to the alleged offences and the effectiveness of the measure to ensure a return to compliance as quickly as possible in order to ensure the protection of the environment and human health. (Marc-André Cloutier, September 6, 2022, para 19)

Amendments by ECCO Officer

[121] It appears from Officer Cloutier's affidavits that, during the meeting with Groupe Marcelle, he considered their representations on the particular circumstances of this case before issuing the final EPCO. He showed flexibility when drafting the measures in order to facilitate compliance. The following were noted in his affidavits:

- The deadlines for recovering the illegally imported and distributed products were extended beyond what was in the initial draft. This extension was granted because of logistical problems that are currently occurring in Canada and the summer holidays (affidavit dated September 6, 2022, para 42);
- The deadlines in the EPCO had been amended to allow products to be recalled as late as possible...; the requirement to submit a significant new activity notification had been deleted, as it would have been difficult to submit it within 180 days (para 90).

[122] Measure No. 1 of the EPCO required that any new activity covered by a Notice (including the sale of the products in question) had to cease immediately. Officer Cloutier, however, included a degree of flexibility in measures 2 to 6 of the EPCO. In fact, the recovery of the products in question from retailers (measure 3) was required to be [TRANSLATION] "as soon as possible, but no later than October 28, 2022", which is a time period of four months. The destruction of the recovered products was planned [TRANSLATION] "as soon as possible, but no later than December 9, 2022", six weeks after the latest recall of the products.

[123] The Applicants did not try to establish that they needed additional time to recover the products in accordance with measure 3. On the contrary, it appears from the evidence before the Tribunal that they were able to recover the products within five weeks, instead of the four months offered by the Officer (from the date of the EPCO on June 29, 2022, until October 28, 2022). The deadlines proposed in their amendment request

demonstrate this fact. Groupe Marcelle proposed that if the Tribunal allowed the Applicants to continue to sell the products in question until December 31, 2022, it would be able to recall the unsold products in question no later than February 10, 2023.

[124] The Applicants say that the proposed deadlines in their amended measures are reasonable in the circumstances because they [TRANSLATION] “would enable them to avoid suffering serious and disproportionate harm, particularly due to the absence in the short term of any replacement product with similar characteristics...”. On the date of the hearing, however, replacement products were not yet available from Schwan.

[125] The Tribunal accepts that Officer Cloutier drafted the deadlines for the measures in the EPCO having regard to the points submitted by Groupe Marcelle, including good faith. The measures take account of operational needs and the Applicants’ history of compliance.

Proportionality

[126] In large part, the Applicants base their argument on the proportionality of the measures set out in the EPCO. [TRANSLATION] “[T]he Applicants are attempting to have deadlines set that are reasonable and proportionate to the risks anticipated by the Respondent, all in consideration of the factual situation that has existed in the industry for more than 15 years and with the objective of permanently removing Perfluorononyl Dimethicone from its products by January 1, 2023” (Applicants’ Submissions, para iv). The Applicants cite *Trans Mountain Pipeline ULC et al v. Canada (Environment and Climate Change)*, 2021 EPTC 7, paras 91 to 98 (*Trans Mountain*), to support their argument that the Tribunal should order measures that are proportionate in this case.

[127] The Tribunal accepts that in principle, the proportionality of the measures plays a role in determining their reasonableness in the circumstances.

[128] The Tribunal notes that there are important distinctions to be made between the issue of proportionality involved in this case and that of *Trans Mountain*. In the latter, it was not a purely economic issue but one of public interest (para 93):

...[T]he scale of the extensive consultation and CER regulatory process which resulted in approval of the Project, along with its environmental impact mitigation measures, is an important consideration. That it resulted in approval deemed to be in the public interest warrants respect.

[129] And again, at para 96: “It is uncontested that the stop work order against Trans Mountain due to incidental take has an extremely significant impact”.

[130] In *Trans Mountain*, the issue was the duration of the Compliance Order and whether it was consistent with the duration of the contravention of the law. Thus, once the

migratory birds had left the site, the company was no longer bothering them and no longer contravened the *Migratory Birds Convention Act*.

[131] The Applicants cite *Ritchie Bros. Auctioneers (Canada) Ltd. v. Canada (Environment and Climate Change)*, 2021 EPTC 8 (*Ritchie Bros.*) to support their argument that the Tribunal is allowed to consider grounds of fairness when exercising the discretion afforded it by CEPA. *Ritchie Bros.* does not assist in the analysis of the case at hand. That was a decision made under section 15 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s. 126 (“EVAMPA”), where the question involved the exercise of the Tribunal’s discretion to receive a late request for review of an administrative penalty. There is no reference to the protection of the environment in the discretion granted to the Tribunal under section 15 of EVAMPA, unlike section 263 of CEPA.

[132] Groupe Marcelle submits that the Tribunal should take a balanced approach. Groupe Marcelle is asking us to compare, on the one hand, the Applicant’s anticipated risks and, on the other, the risk to human health and the protection of the environment during the extension of the compliance deadline.

[133] However, the Tribunal finds that this is not an appropriate comparison. The Tribunal’s task in this proceeding is not to calculate the risk presented by the substance in question. As already mentioned, only the Minister has that jurisdiction. The undisputed fact before the Tribunal is that the sale of the products in question is currently prohibited under the Significant New Activity Notice. By operation of the law, and in accordance with the precautionary principle, the substance is considered to be potentially dangerous until the authorized Ministers decide otherwise.

[134] After considering all the Applicants’ arguments, the Tribunal finds that the Minister has established that measures 1 to 6 of the EPCO are reasonable in the circumstances.

d. Analysis and conclusion on reasonableness of measures proposed by Groupe Marcelle

[135] As mentioned above, despite the burden of proof, the Tribunal had to consider all the relevant arguments of both parties before ruling on the reasonableness of the measures in the circumstances. This is a balanced approach. Thus, in its analysis of the reasonableness of measures 1 to 6 (the burden of which is on the Minister), the Tribunal also considered the arguments of Groupe Marcelle that these are unreasonable. The Tribunal finds that Groupe Marcelle’s arguments did not prevail over those of the Minister and that the measures in the EPCO, including their time limits, are therefore reasonable in the circumstances.

[136] The Tribunal therefore concludes that the measures proposed by Groupe Marcelle are not reasonable in the circumstances.

I. Tribunal's discretion and application of section 265

[137] Section 265 of CEPA restricts the Tribunal's discretionary authority so that it cannot exercise its powers under section 263 of CEPA if it would lead to results such as impairment of the environment (paragraph 265(a) of CEPA) or a danger to the health of any person (paragraph 265(c) of CEPA).

[138] If the Tribunal had decided to amend the measures of the EPCO, it would have considered and analyzed the parties' arguments regarding the applicability of section 265 in this case.

[139] However, given that the Tribunal decided to confirm the Compliance Order, it will not exercise its discretion to amend the Order, and the restrictions in section 265 are therefore not at issue.

II. Addition of another measure

[140] The Minister requests that the Tribunal add a seventh measure to the EPCO:

[TRANSLATION]

In addition, in light of the evidence presented to the Tribunal, the addition of a measure that directs the Applicants to comply with section 86 of CEPA, by notifying distributors and purchasers of cosmetic products containing Perfluorononyl Dimethicone (882878-48-0) as soon as possible that they are subject to the Significant New Activity Notice, now appears reasonable in the circumstances.

[141] Section 86 of CEPA provides that where a notice is published in the *Canada Gazette* under subsection 85(1) in respect of a substance—like Perfluorononyl Dimethicone (882878-48-0)—every person who transfers the physical possession or control of the substance shall notify all persons to whom possession or control is transferred of the obligation to comply with subsection 81(4).

[142] The Officer did not include this measure in the EPCO despite the fact that he found in the Order that he had reasonable grounds to believe that section 86 of CEPA had been contravened.

[143] The Tribunal finds that adding a new measure at this stage is unreasonable, since it would result in the Applicants being punished for exercising their right of review before the Tribunal without adding anything to the protection of the environment or public safety.

[144] The Tribunal is of the view that the Minister has not proven that the addition of a measure would be reasonable in the circumstances and consistent with the protection of the environment and public safety.

Decision

[145] The Tribunal concludes that measures 1 to 6 of the Compliance Order are reasonable in the circumstances and consistent with the protection of the environment and public safety.

[146] The Tribunal concludes that the measures proposed by the Applicants are neither reasonable in the circumstances nor consistent with the protection of the environment and public safety.

[147] The Tribunal concludes that the addition of a new measure is not reasonable.

[148] For all these reasons, the Tribunal confirms Environmental Protection Compliance Order No. 8222-2021-04-15-6700 pursuant to paragraph 263(a) of CEPA.

"Heather Gibbs"

HEATHER GIBBS
CHIEF REVIEW OFFICER

Appendix A – Relevant Statutory Provisions

Canadian Environmental Protection Act, 1999 (SC 1999, c 33)

Duties of the Government of Canada

2(1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

(a) exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches;

(a.1) take preventive and remedial measures to protect, enhance and restore the environment;

Notification of significant new activity in respect of substance not on List

81(4) Where a substance is not specified on the Domestic Substances List and the Minister publishes a notice in the [Canada Gazette](#) indicating that this subsection applies with respect to the substance, no person shall use the substance for a significant new activity that is indicated in the notice unless (a) the person has provided the Minister with the prescribed information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and (b) the period for assessing the information specified by the Minister or provided under section 83 has expired.

Significant new activity

85 (1) Where the Ministers have assessed any information under section 83 in respect of a substance that is not on the Domestic Substances List and they suspect that a significant new activity in relation to the substance may result in the substance becoming toxic, the Minister may, within 90 days after the expiry of the period for assessing the information, publish in the [Canada Gazette](#), and in any other manner that the Minister considers appropriate, a notice indicating that subsection 81(4) applies with respect to the substance.

Notification of persons required to comply

86 Where a notice is published in the Canada Gazette under subsection 85(1) in respect of a substance, every person who transfers the physical possession or control of the substance shall notify all persons to whom the possession or control is transferred of the obligation to comply with subsection 81(4).

Environmental Protection Compliance Orders

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.

Powers of review officer

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

- (a) confirm or cancel the order;
- (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).

Limitations on exercise of review officer's powers

265 A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or
- (c) danger to the health or safety of any person.

Decision

266 The review officer or the panel, as the case may be, shall, within 15 days after the completion of the review of an order, render a decision, with written reasons, and

provide all persons to whom the order was directed and the Minister with a copy of the decision and the reasons.

Appendix B – List of Exhibits

Groupe Marcelle

- 1) Amended Request for Review and Application to Suspend Enforcement of an Environmental Protection Compliance Order
- 2) Applicants' Submissions
- 3) List of exhibits supporting the request:
 - **Exhibit P-1:** Compliance Order
 - **Exhibit P-2:** Significant New Activity Notice
 - **Exhibit P-3:** List of Products in Question
 - **Exhibit P-4:** Waiver request and appendices, in a bundle
 - **Exhibit P-5:** Sample of CNFs sent to Health Canada regarding the Products in Question
 - **Exhibit P-6:** Compliance Process Flowchart
 - **Exhibit P-7:** Notice of Intent
 - **Exhibit P-8:** PowerPoint document presented during meeting on June 10, 2022
 - **Exhibit P-9:** Letter dated June 17, 2022
 - **Exhibit P-10:** CEPA Compliance and Enforcement Policy
 - **Exhibit P-11:** Walmart Penalties
- 4) Affidavit of Luc Simard
- 5) Supplementary affidavit of Luc Simard
- 6) List of exhibits in support of affidavit:
 - **Exhibit P-12:** Table prepared by Groupe Marcelle listing sales of the products in question, all distribution channels combined
 - **Exhibit P-13:** Table prepared by Groupe Marcelle listing purchase orders made
 - **Exhibit P-14:** Excerpt from the U.S. Food & Drug Administration on PFAS in cosmetics
- 7) Affidavit of Dr. Britta Linner-Krcmar
- 8) List of exhibits in support of affidavit:
 - **Exhibit A:** IFS HPC Audit Report and Certificate
 - **Exhibit B:** GMP Certificate
 - **Exhibit C:** Product Certificate for Precise Formula

- **Exhibit D:** Excerpt of Safety Evaluation of Precise Formula – Pecosil FSL 300
- **Exhibit E:** Sample Test Results
- **Exhibit F:** Complaints and Recalls Policy

9) Complementary affidavit of Dr. Britta Linner-Krcmar

10) List of exhibits in support of affidavit:

- **Exhibit A:** SCCS Notes of Guidance for the testing of cosmetic ingredients and their safety evaluation – 11th revision
- **Exhibit B:** Health Canada – Use of margins of exposure and risk quotients in risk assessment

11) Affidavit of Juan Manuel Montiel

12) List of exhibits in support of affidavit:

- **Appendix 1:** Newsletter distributed by Environment and Climate Change Canada in May 2022
- **Appendix 2:** Stockholm Convention
- **Appendix 3:** Government of Canada Proposal to Add Substances

13) Affidavit of Beta Montemayor

ECCC

1) Minister's Submissions

2) Relevant contents of Minister's file:

- **Exhibit D-1:** Statement of Information of a Legal Person in the Québec Enterprise Register – Groupe Marcelle Inc., dated April 15, 2021
- **Exhibit D-2:** Excerpt from the Canadian Trademarks Database for the trademark “Marcelle”
- **Exhibit D-3:** Excerpt from the Canadian Trademarks Database for the trademark “Annabelle”
- **Exhibit D-4:** Excerpt from the Canadian Trademarks Database for the trademark “Lise Watier”
- **Exhibit D-5:** Handwritten notes dated April 19, 2021, by Sandra Giguères, ECCC, regarding screen captures
- **Exhibit D-6:** Documents for captures done using the “Hunchly” computer tool
- **Exhibit D-7:** Documents for captures done using the “Snag it” computer tool
- **Exhibit D-8:** Documents for captures done using the “Who.ls” computer tool
- **Exhibit D-9:** Handwritten notes dated December 3, 2021, by Marc-André Cloutier, ECCC
- **Exhibit D-10:** Handwritten note dated December 3, 2021, by Aurélie Beauregard Caillot, ECCC
- **Exhibit D-11:** Photos dated December 3, 2021, of Annabelle products, in a bundle
- **Exhibit D-12:** Purchase receipt for Annabelle product “Stay Sharp Metallic Waterproof Kohl Eyeliner”, Ocean colour
- **Exhibit D-13:** Certificate No. WG80260 dated March 21, 2022, on post-oxidation PFAS, raw data and the document “Summary of SGS AXYS Method MLA-111 Rev 03 Ver 03”, in a bundle
- **Exhibit D-14:** Certificate No. WG80259 dated March 21, 2022, on PFAS, raw data and the document “Analytical procedure for the Analysis”, in a bundle
- **Exhibit D-15:** Notice of Intent to Issue an Environmental Protection Compliance Order under the *Canadian Environmental Protection Act, 1999*, from ECCC, dated May 18, 2022
- **Exhibit D-16:** Draft of Environmental Protection Compliance Order under the *Canadian Environmental Protection Act, 1999*
- **Exhibit D-17:** Handwritten notes dated May 18, 2022, by Charles-Olivier Fregeau, ECCC

- **Exhibit D-18:** Handwritten notes dated May 18, 2022, by Marc-André Cloutier, ECCC
- **Exhibit D-19:** Email dated May 18, 2022, from Jean-François Ménard to Dominique Frappier et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-20:** Email dated May 19, 2022, from Marc-André Cloutier to Luc Simard et al. re: analysis results
- **Exhibit D-21:** Email dated May 20, 2022, from Luc Simard to Marc-André Cloutier et al. re: analysis results
- **Exhibit D-22:** Email dated May 24, 2022, at 10:45 a.m., from Jean-François Ménard to Marc-André Cloutier et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-23:** Email dated May 24, 2022, at 12:06 p.m., from Charles-Olivier Fregeau to Jean-François Ménard et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-24:** Email dated May 24, 2022, at 6:06 p.m., from Jean-François Ménard to Charles-Olivier Fregeau et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-25:** Email dated May 24, 2022, at 8:36 p.m., from Charles-Olivier Fregeau to Jean-François Ménard et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-26:** Email dated May 25, 2022, at 12:21 p.m., from Jean-François Ménard to Charles-Olivier Fregeau et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-27:** Email dated May 25, 2022, at 1:26 p.m., from Charles-Olivier Fregeau to Jean-François Ménard et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-28:** Email dated May 26, 2022, from Jean-François Ménard to Charles-Olivier Fregeau et al. re: halting the sale of products containing Perfluorononyl Dimethicone
- **Exhibit D-29:** Handwritten notes dated June 10, 2022, by Charles-Olivier Fregeau, ECCC
- **Exhibit D-30:** Handwritten notes dated June 10, 2022, by Marc-André Cloutier, ECCC
- **Exhibit D-31:** Document entitled *Conformité des substances dans matières premières pour un lancement de produit* [compliance of substances in raw materials for a product launch] submitted on June 10, 2022

- **Exhibit D-32:** Document entitled *Agenda: rencontre avec Environnement Canada June 10th, 2022* [agenda: meeting with Environment Canada June 10th, 2022]
 - **Exhibit D-33:** Email dated June 17, 2022, from Mélissa Devost to Marc-André Cloutier et al. re: comments on the Notice of Intent to Issue a Compliance Order
 - **Exhibit D-34:** Handwritten notes dated June 29, 2022, by Marc-André Cloutier, ECCC
 - **Exhibit D-35:** Handwritten notes dated June 29, 2022, by Charles-Olivier Fregeau, ECCC
 - **Exhibit D-36:** Environmental Protection Compliance Order under the *Canadian Environmental Protection Act, 1999* from ECCC dated June 29, 2022
 - **Exhibit D-37:** Email dated June 29, 2022, from Marc-André Cloutier to Luc Simard et al. re: Environmental Protection Compliance Order
- 3) Affidavit of Alison McLaughlin and exhibits, August 17, 2022
 - 4) Affidavit of Marc-André Cloutier and exhibits, August 17, 2022
 - 5) Supplementary affidavit of Marc-André Cloutier, August 22, 2022
 - 6) Supplementary affidavit of Marc-André Cloutier and exhibits, September 6, 2022
 - 7) Affidavit of Michel Lortie, August 22, 2022
 - 8) Supplementary affidavit of Michel Lortie and exhibits, September 6, 2022
 - 9) Affidavit of Vincent Dionne-Dumont and exhibits, August 17, 2022