Federal Court Cour fédérale

Date: 20191204

Docket: T-1252-17

Citation: 2019 FC 1553

Ottawa, Ontario, December 4, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TIM GRAY AND MUHANNAD MALAS

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Background

[1] The Applicants seek judicial review of two decisions that the Minister of Environment and Climate Change [the Minister], via her delegate, made under section 18 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*]. The Minister refused to open investigations into three allegations made by the Applicants relating to the importation and sale in Canada of certain diesel vehicles. An application for judicial review was filed for each

decision; however, by Order of this Court, they were consolidated. I refer herein to both the Minister's refusals using the singular 'decision'.

[2] In September 2015, Environment and Climate Change Canada [ECCC] opened investigations into potential *CEPA* violations from the importation into Canada of certain Volkswagen, Audi, and Porsche vehicle models equipped with prohibited defeat devices. These devices are intended to produce fraudulent results when vehicles undergo emission tests.

[3] The United States' Environmental Protection Agency investigation overtook ECCC's. It resulted in prosecutions and settlements in the US. Volkswagen pled guilty to three criminal felony counts and volunteered to pay approximately USD $1 billion in fines and settlements. A Canadian class action also settled in 2017, after approval by Ontario and Quebec courts.

[4] It is fair to say that environmental groups grew dissatisfied with the time ECCC was and continues to be taking to conduct its investigation, and with the lack of information concerning its progress. Consequently, some individuals from these groups decided to initiate private complaints under *CEPA*.

[5] On June 14, 2017, the Applicant Tim Gray, Executive Director at Environmental Defence, applied for an investigation under *CEPA*'s section 17, alleging that Volkswagen AG's diesel vehicles were noncompliant with *CEPA* [Gray Application]. Specifically, the Gray Application alleged that Volkswagen AG did the following:

a. unlawfully imported non-environmentally-compliant vehicles, contravening *CEPA* section 154, via paragraph 153(1)(a), a criminal offence under paragraph 272(1)(a);

b. unlawfully applied national emissions marks on non-compliant vehicles and sold them, contravening *CEPA* paragraphs 153(1)(a) and 272(1)(a);

c. provided false and misleading information, contravening *CEPA* paragraphs 153(1)(b) and 272(1)(k) & (l), and the *On-Road Vehicle and Engine Emission Regulations*, (SOR/2003-2), sections 35 and 36; and

d. unlawfully resumed sales, through its local dealers, of 2015 model vehicles after completing a "half-fix" of its noncompliance, which it was alleged was beyond *CEPA* jurisdiction under subsection 153(2).

[6] The Minister responded to the Gray Application by letter dated June 30, 2017, refusing to investigate the first three allegations:

> Within your letter you make four allegations:
>
> 1. That Volkswagen AG unlawfully imported noncompliant cars
> 2. That Volkswagen AG unlawfully applied the National Emissions Mark on non compliant diesel cars and sold those cars
> 3. That Volkswagen AG provided false and misleading information
> 4. That Volkswagen AG and its local dealers unlawfully resumed sales of 2015 model cars after only completing a "half-fix"

> With respect to allegations 1-3, an investigation has already been opened by Environment and Climate Change Canada's (ECCC) Enforcement Branch and continues to be conducted into potential violations resulting from the importation into Canada of vehicles equipped with a defeat device. The offences alleged in your application are covered by the current investigation. In light of this, a Ministerial investigation will not be opened for these allegations.
>
> With respect to allegation 4, ECCC will investigate all matters considered necessary to determine the facts relating to the alleged offence. As required under *CEPA*, I will keep you informed of the progress of the investigation every ninety days.

[7] On July 7, 2017, the Applicant Muhannad Malas, Toxic Program Manager at Environmental Defence, also applied for an investigation under *CEPA*'s section 17 [Malas Application]. The Malas Application was identical in form and content to the Gray Application, but with the following differences:

a. The Gray Application was directed at Volkswagen AG's actions, while the Malas Application was directed more broadly to Volkswagen AG and/or its subsidiaries or agents; and

b. The Gray Application alleged that Volkswagen AG "must have imported these affected diesel cars and engines into Canada", while the Malas Application extended that allegation to include the likelihood that Volkswagen Canada must have done so.

[8] The Minister responded to the Malas Application by letter dated July 19, 2017. The Minister's response was identical to that sent in response to the Gray Application. Notably, the letter responding to the Malas Application made no adjustment to reflect the Malas Application's differences in naming more parties than Volkswagen AG.

Issues

[9] The application raises three issues:

1. What is the standard of review of the Minister's decision?
2. Did the Minister reasonably/correctly interpret her duty to investigate as discretionary?
3. Was the Minister's decision to refuse to investigate reasonable/correct?

[10] The Minister raised the additional issue of whether the Supplemental Affidavit of Emma Billard and the Transcript of the cross-examination of Michael Enns which are both included in the Application Record ought to be struck, as they were not before the decision-maker.

[11] Justice Stratas in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20, summarized the few exceptions to the rule that the only material properly before the Court in an application for judicial review is that which was before the decision-maker.

[12] None of those exceptions apply to the impugned evidence. Accordingly it will be ordered struck from the record.

Analysis

A. *Standard of Review*

[13] The relevant provisions relating to an application by a member of the public for an investigation of an offence under *CEPA* are sections 17 to 21, reproduced at Appendix A.

[14] Section 18 is the critical section in this application. It provides that, if a Canadian resident has made a section 17 application for an investigation, "[t]he Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence." There is no previous judicial interpretation of this provision.

[15] The Applicants submit that section 18 creates two mandatory duties for the Minister to perform: (1) acknowledge receipt of the application, and (2) investigate and determine the facts relating to the alleged offence. The Applicants submit that she has no discretion whether to investigate; her only discretion relates to which matters she considers necessary to determine the facts of the offence alleged by the application. In the matter at hand, the Minister refused to investigate and, it is submitted, that was a decision beyond her jurisdiction and authority.

[16] The Applicants' interpretation of section 18 is based on several submissions.

[17] First, they point to the use of the word 'shall' in section 18, and then to section 11 of the *Interpretation Act*, RSC 1985, c I-21 which provides: "[t]he expression 'shall' is to be construed as imperative and the expression 'may' as permissive."

[18] Second, they point to section 19 of *CEPA*, which provides that "the Minister shall report to the applicant every 90 days on the progress of the investigation" unless the investigation is discontinued before the end of the 90-day period. The Applicants suggest that the mandatory nature of the reporting supports the mandatory requirement to investigate.

[19] Third, they point to the legal opinion of ECCC staff, prepared for the purposes of the Minister's decision, which "confirms that she has the duties." That opinion states:

> S. 17 of CEPA provides the opportunity for Canadian residents to apply to the Minister for an investigation of alleged violations under the Act. The Minister is then required to conduct an investigation, and periodically inform the applicant of the progress, as well as the outcome of any action taken as a result.

[20] Fourth, they point to "Compliance and Enforcement Policy for the *Canadian Environmental Protection Act, 1999*." This policy was prepared by ECCC and it states that "an enforcement officer will conduct an investigation … when an individual of at least 18 years of age, resident in Canada, petitions the Minister to investigate an alleged violation of the Act."

[21] The Applicants submit that there is only one correct interpretation of section 18 of *CEPA*, and it is not that given by the Minister.

[22] The Respondent submits that the Minister's interpretation of section 18 of *CEPA* - that she has a discretion not to open an investigation into an alleged violation of *CEPA* - should be reviewed on the standard of reasonableness.

[23] The Respondent relies on a series of cases holding that decisions made by administrative bodies interpreting their home statute are reviewed on the reasonableness standard: *Groia v Law Society of Upper Canada*, 2018 SCC 27 [*Groia*] at para 46; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 27-28; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*] at paras 21, 31-33 & 40-41; *Barreau de Québec v Québec (Attorney General)*, 2017 SCC 56 at paras 15-16; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 49-50; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 54; and *Canada (Attorney General) v Access Information Agency Inc*, 2018 FCA 18 at para 13. This proposition is stated succinctly by the Supreme Court of Canada in *Groia*:

> This Court's post-*Dunsmuir* jurisprudence has firmly entrenched the notion that decisions of specialized administrative bodies "interpreting [their] own statute or statutes closely connected to [their] function" are entitled to deference from courts, and are thus presumptively reviewed for reasonableness [citations omitted].

[24] I agree with the Respondent's submission that the Minister had to first interpret section 18 of *CEPA* in making the decision not to open an investigation into the Applicants' allegations. I further agree that *CEPA* is the Minister's home statute and, in keeping with the authorities cited above, "draws on the Minister's experience of administering her home statute in a complex regulatory context, where she is best placed to determine the operational consequences of her interpretation." Her interpretation is entitled to deference from this Court and presumptively reviewable for reasonableness.

[25] The Applicants did not identify the presence of any of the *Dunsmuir* exceptions, nor did they suggest any such exception(s) might rebut the presumption of this being reviewable for

reasonableness. Nor did the Applicants argue that under a contextual analysis, "the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters:" *Bradfield v Canada (Indigenous and Northern Affairs),* 2018 FC 682 at para 25.

[26] Accordingly, I find that the Minister's interpretation of section 18 of *CEPA* is reviewable on the reasonableness standard. Similarly, her decision to refuse to open an investigation is also reviewable on that standard.

B. *The Minister's Interpretation of Section 18 of CEPA*

[27] As noted above, the Applicants submit that there is only one reasonable interpretation of section 18: the Minister must open an investigation upon receiving a section 17 *CEPA* application requesting that investigation.

[28] They argue, in part, that an interpretation giving the Minister discretion to open an investigation flies in the face of her advisors' legal opinion reproduced at paragraph 19 above. That opinion states that *CEPA* provides Canadian residents the opportunity to apply for an investigation of alleged *CEPA* violations and the "Minister is then required to conduct an investigation…" The Applicants submit that "[i]t is not reasonable for the Attorney General to argue that the Minister's interpretation of her 'home' statute differs from the interpretation she actually used and relied on in the decision."

[29] With respect, although that document is contained in the certified tribunal record, and thus was before the Minister, there is no evidence that she "relied" on it to make her decision.

While I disagree with the Applicants' interpretation of the document, even if it does state as they assert, an interpretation in conflict with legal advice received is not automatically unreasonable. As counsel knows well, clients do not always take their lawyers' advice; nor should they.

[30] The Applicants also point to the public debates on *CEPA* to support their position, in paragraph 24 of their memorandum. However, I agree with the Respondent that the most relevant portion of the debates relating to section 18 undermines the Applicants' position.

[31] On June 15, 1999, representatives of the Office of the Canadian Environmental Protection Act, Department of the Environment, assisted the Standing Senate Committee on Energy, the Environment and Natural Resources, in doing a clause-by-clause analysis of *CEPA* (then Bill C-31). Senator Taylor, a member of the committee, expressed his concern that an applicant under section 17 of *CEPA* could advance "unsubstantiated or frivolous cases, which have to be answered, according to clause 18, within 20 days", and that will create an administrative burden. Harvey Lerer, Director General, Office of the Canadian Environmental Protection Act, responded:

> Anyone can apply to the minister for an investigation but the minister has the discretion. The minister can decide not to pursue a case if he/she believes that the case is frivolous or that it has been dealt with in some other satisfactory manner. Of course, there is another due process if that individual still believes that he or she has not been listed to. There is always the process of judicial review.

[32] The Applicants' submission based on the mandatory nature of the word 'shall' is attractive; however, as recognized by Elmer Driedger at p 87 of *Construction of Statutes* 2nd ed

(Toronto: Butterworths, 1983), statutory interpretation cannot be founded on the wording of legislation alone:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[33] I endorse the view recently expressed by Justice Grammond in *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251, that the Court's task in cases such as this, is not to decide the "correct" interpretation but to decide if the interpretation given is reasonable:

> In reality, methods of statutory interpretation provide guides, "clues" or "pointers." They provide reasons for preferring one interpretation over another. Their weight depends on the problem at hand. For example, in one situation the literal method may be inconclusive, while the purposive method may provide a strong argument. In some situations all the methods point towards one interpretation; in others, the methods point in different directions. They reduce the uncertainty regarding the meaning of legislation but they cannot eliminate it in all cases. Thus, on judicial review, the methods of statutory interpretation should be used not to determine one correct answer, but to decide whether the interpretation chosen by the decision-maker is one "that the statutory language can reasonably bear" [*Mclean* at para 40].

[34] It has long been observed, when interpreting statutory language, that it is to be presumed that the legislature did not intend to produce absurd consequences: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 27.

[35] The Respondent notes that the interpretation proposed by the Applicants produces an absurd result. The Applicants interpret section 18 such that it disallows the Minister from acting as a gatekeeper; rather, she must investigate every application, no matter how frivolous or

meritless. They say that the Minister must open an investigation, then investigate, and further still provide 90-day progress reports unless she discontinues the investigation. As the Minister noted, such an interpretation requires responding to and opening numerous duplicative investigations were she to receive many identical applications. In addition to creating a significant burden on Ministerial resources, that result is not in keeping with the purpose and scheme of *CEPA* as a whole.

[36] The Respondent's interpretation places an emphasis on the entire phrase "shall investigate all matters that the Minister considers necessary" in section 18 and says that it specifically gives the Minister discretion to determine if there is actually a matter requiring investigation. Under that interpretation, the Minister used her discretion to determine there were no matters requiring investigation (other than the one new matter which she agreed would be investigated) because ECCC was already investigating those allegations. It would otherwise produce absurd consequences, were the Minister obligated to investigate clearly frivolous or meritless applications.

[37] In my view, while the Minister's interpretation of section 18 is not the only possible interpretation, it is a reasonable interpretation.

C. *The Minister's Decision*

[38] The Minister's decision not to open an investigation is reasonable if it falls into a range of possible, justifiable outcomes.

[39] I note that the parties took no issue with the Minister's partial acceptance of the applications: the pursuit of an investigation on the fourth allegation. The Minister's action in so doing illustrates that she considered the applications and each of the four alleged violations.

[40] The Minister was already investigating the other three allegations and so informed the Applicants. Duplicative, parallel investigations would arguably run contrary to the purpose of section 17 to notify ECCC about possible violations and assist in protecting the environment. Where the subject is already under investigation, it is reasonable to conclude that repetition would waste governmental resources without providing any gain in environmental protection.

[41] Although the Minister's response to the Malas Application failed to specifically address its addition of allegations against other Volkswagen companies, this does not establish to my satisfaction that the Minister failed to fully consider the Malas Application altogether. It is not evident to the Court on the record that the current investigation does not or may not include these additional companies.

[42] I agree with the Minister that there is no merit to the Applicants' arguments relying on the sufficiency of the certified tribunal record or the currency of the investigation. As already argued before Prothonotary Aylen and Justice Kane on appeal, the Applicants did not include the currency or sufficiency of ECCC's ongoing investigation as grounds underlying this judicial review. They are estopped from arguing it here. The Applicants' submissions from paragraphs 77-90 are outside the scope of their Notice of Application.

Disposition

[43] The Minister's decision(s) not to open a new investigation on matters currently under investigation falls into a range of possible, justifiable outcomes and cannot be upset.

[44] If unsuccessful, the Applicants submitted that this is not an appropriate case to award costs against it because it is both a "test case" and public interest litigation.

[45] I am not convinced that costs ought not to be awarded to the successful party. While the Applicants may be frustrated by the ECCC's apparent lack of action and information regarding the ongoing investigation, seeking additional investigations of the same matter is not the appropriate response.

[46] Subsequent to the hearing, the parties informed the Court that they agreed, if costs were awarded, the appropriate award should be fixed at $3,500.00. I agree.

JUDGMENT IN T-1252-17

THIS COURT'S JUDGMENT is that the Supplemental Affidavit of Emma Billard, and the Transcript of Michael Enns's cross-examination are struck from the record, the application is dismissed, and the Respondent is awarded its costs fixed at $3,500.00.

"Russel W. Zinn"
Judge

Appendix A

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

Investigation of Offences

Application for investigation by Minister

17 (1) An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.

Statement to accompany application

(2) The application shall include a solemn affirmation or declaration

(a) stating the name and address of the applicant;

(b) stating that the applicant is at least 18 years old and a resident of Canada;

(c) stating the nature of the alleged offence and the name of each person alleged to have contravened, or to have done something in contravention of, this Act or the regulations; and

(d) containing a concise statement of the evidence supporting the allegations of the applicant.

Form

(3) The Minister may prescribe the form in which an application under this section is required to be made.

Investigation by Minister

18 The Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.

Progress reports

19 After acknowledging receipt of the application, the Minister shall report to the

Enquêtes sur les infractions

Demande d'enquête

17 (1) Tout particulier âgé d'au moins dix-huit ans et résidant au Canada peut demander au ministre l'ouverture d'une enquête relative à une infraction prévue par la présente loi qui, selon lui, a été commise.

Teneur

(2) La demande est accompagnée d'une affirmation ou déclaration solennelle qui énonce :

a) les nom et adresse de son auteur;

b) le fait que le demandeur a au moins dix-huit ans et réside au Canada;

c) la nature de l'infraction reprochée et le nom des personnes qui auraient contrevenu à la présente loi ou à ses règlements ou auraient accompli un acte contraire à la présente loi ou à ses règlements;

d) un bref exposé des éléments de preuve à l'appui de la demande.

Forme

(3) Le ministre peut fixer, par règlement, la forme de la demande.

Enquête

18 Le ministre accuse réception de la demande dans les vingt jours de sa réception et fait enquête sur tous les points qu'il juge indispensables pour établir les faits afférents à l'infraction reprochée.

Information des intéressés

19 À intervalles de quatre-vingt-dix jours à partir du moment où il accuse réception de la

applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take, and the Minister shall include in the report an estimate of the time required to complete the investigation or to implement the action, but a report is not required if the investigation is discontinued before the end of the 90 days.

Minister may send evidence to Attorney General of Canada

20 At any stage of an investigation, the Minister may send any documents or other evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed under this Act and for any action that the Attorney General may wish to take.

Discontinuation of investigation

21 (1) The Minister may discontinue the investigation if the Minister is of the opinion that

(a) the alleged offence does not require further investigation; or

(b) the investigation does not substantiate the alleged offence.

Report

(2) If the investigation is discontinued, the Minister shall

(a) prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and

(b) send a copy of the report to the applicant and to any person whose conduct was investigated.

A copy of the report sent to a person whose conduct was investigated must not disclose the name or address of the applicant or any other personal information about them.

demande jusqu'à l'interruption de l'enquête, le ministre informe l'auteur de la demande du déroulement de l'enquête et des mesures qu'il a prises ou entend prendre. Il indique le temps qu'il faudra, à son avis, pour compléter l'enquête ou prendre les mesures en cause selon le cas.

Communication de documents au procureur général du Canada

20 Il peut, à toute étape de l'enquête, transmettre des documents ou autres éléments de preuve au procureur général du Canada pour lui permettre de déterminer si une infraction prévue à la présente loi a été commise ou est sur le point de l'être et de prendre les mesures de son choix.

Interruption de l'enquête

21 (1) Le ministre peut interrompre l'enquête s'il estime que l'infraction reprochée ne justifie plus sa poursuite ou que ses résultats ne permettent pas de conclure à la perpétration de l'infraction.

Rapport

(2) En cas d'interruption de l'enquête, il établit un rapport exposant l'information recueillie et les motifs de l'interruption et en envoie un exemplaire à l'auteur de la demande et aux personnes dont le comportement fait l'objet de l'enquête. La copie du rapport envoyée à ces dernières ne doit comporter ni les nom et adresse de l'auteur de la demande ni aucun autre renseignement personnel à son sujet.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1252-17
STYLE OF CAUSE:	TIM GRAY AND MUHANNAD MALAS v ATTORNY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 21, 2019
JUDGMENT AND EASONS:	ZINN J.
DATED:	DECEMBER 4, 2019

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