Federal Court of Appeal | Cour d'appel fédérale

Date: 20250825

Docket: A-17-24

Citation: 2025 FCA 150

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY C.J.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

BIOGENIE CANADA INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

and

ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ALBERTA

Interveners

Heard at Québec, Quebec, on March 26, 2025.

Judgment delivered at Ottawa, Ontario, on August 25, 2025.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: GOYETTE J.A.
HECKMAN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20250825

Docket: A-17-24

Citation: 2025 FCA 150

CORAM: **DE MONTIGNY C.J.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

BIOGENIE CANADA INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

and

ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ALBERTA

Interveners

REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] This is an appeal from a decision rendered by the Federal Court, *per* Justice Grammond (the trial judge), dismissing the appellant's application for judicial review of the seizure and detention of two soil products (*Englobe Environment Inc. v. Canada (Canadian Food Inspection*

Agency), 2023 FC 1676 (the Decision)). It is not in dispute that the products in question are fertilizers or supplements as defined in section 2 of the *Fertilizers Act*, R.S.C. (1985), c. F-10 (the Act). In a detailed decision, the trial judge rejected all of the appellant's arguments, both those based on constitutional considerations and those relying on administrative law grounds.

[2] More specifically, the trial judge found that the impugned provisions were validly enacted under the concurrent jurisdiction over agriculture in section 95 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, and the federal jurisdiction over criminal law in subsection 91(27) of the same Act. He also found that they were not contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, 1982 c. 11 (U.K.) (the Charter) for being overbroad. Finally, he held that the regulatory provisions at issue did not constitute a prohibited subdelegation or an abdication of power, and that the decisions made by the Canadian Food Inspection Agency (CFIA or the respondent) in exercising its powers were not unreasonable.

[3] For the reasons that follow, I am of the opinion that the Federal Court did not err in its conclusions, and the appellant has not persuaded me that the appeal should be allowed.

I. Legal framework of this litigation

[4] As the trial judge noted, the Act was originally enacted in 1885. Section 3 of the Act provided that no person could sell fertilizer or supplements in Canada or import them to Canada unless the products were registered, compliant with certain standards, and packaged and labelled

as prescribed by law. It appears from the debates surrounding the statute's enactment that the objective sought was to ensure that fertilizers produced in and imported to Canada were properly analyzed and to prevent fraud by verifying their nutrient contents.

[5] In its most recent amendments to the Act in 2015, Parliament removed the requirement for prior registration of low-risk fertilizers and supplements, with a view to making pre-marketing regulatory oversight better correspond to the product's risk profile and to facilitate access to the market for safe fertilizers and supplements. However, Parliament recognized the use of new technology in fertilizer manufacturing and the increasing interest in recycling nutrients and organic materials from industrial and organic waste, taking pains to guard against the potential safety risks associated with these materials. In this context, it enacted section 3.1, which is at the heart of this litigation. It reads as follows:

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

[6] Section 5 of the Act, which confers on the Governor in Council the power to enact supporting regulations, was also amended to authorize the Governor in Council to regulate the approval of fertilizers and supplements, the duration and cancellation of their approval, the manufacturing, sale, importation or exportation of any fertilizer or supplement that presents a risk of harm to human, animal or plant health or the environment, and the evaluation of fertilizers

and supplements, including their potential impact on, and the risk of harm they pose to, human, animal or plant health or to the environment.

[7] Exercising that power, the Governor in Council added section 2.1 to the *Fertilizers Regulations*, C.R.C. c. 666 (the Regulations), which reads as follows:

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

[8] The Regulations themselves do not specify the thresholds beyond which a substance in a fertilizer or supplement presents a risk of harm to human, animal or plant health or the environment. To make the prohibition operational and its application more foreseeable and consistent, the CFIA, which has primary responsibility for administering the Act, issued about 20 memoranda for use by parties subject to the Act and the Regulations. The one at issue here and that concerns us in particular is Memorandum T-4-93 (the Memorandum), "Safety standards for fertilizers and supplements". It states that a fertilizer or supplement must not contain metals of concern such as nickel, molybdenum and selenium, and sets out the maximum quantities that a hectare of soil can receive over a period of 45 years. It also establishes a method to calculate the

maximum concentration of these substances in a fertilizer or supplement according to the quantity and frequency of application indicated by the manufacturer.

II. Factual background

[9] Englobe Environment Inc. (Englobe) is a Quebec-registered corporation that has specialized in the recycling of organic residual materials since 1979. Since its corporate reorganization in 2024, Englobe has been known under its new corporate name, Biogenie Canada inc. (Biogenie or the appellant): see order of Justice LeBlanc dated October 21, 2024. Its composting sites currently produce more than 100,000 metric tons of compost and soil annually, for use by its horticultural, municipal and commercial clientele.

[10] On May 17, 2021, a CFIA inspector visited Englobe's fertilizer and supplement manufacturing site in Saint-Henri-de-Lévis and, under the authority conferred on her by the Act, took two samples as part of an annual inspection. One of the samples was from "Terre à potager St-Henri" [St-Henri vegetable garden soil], which was composed of compost, humus, sand and organic fertilizer and stored in windrows, while the other was from "Multimix pelouse St-Henri" [St-Henri lawn multi-mix], which was composed of composted biosolids and agrifood sludge, sand and humus, also stored in windrows. On the labels for the two products, Englobe describes them as "fertilizer", because it guarantees the nutrient materials it contains, and "supplements" within the meaning of the Act, while indicating that, among other things, they encourage drainage and good soil aeration.

[11] The sample analysis by the CFIA's laboratory revealed concentrations of molybdenum, nickel and selenium greater than the maximum concentrations indicated in the Memorandum. Englobe was informed of the analysis results in letters of non-compliance on July 8, 2021. On July 13, the inspector decided to seize and detain the two products because she had reasonable grounds to believe that they violated section 3.1 of the Act and section 2.1 of the Regulations.

[12] Englobe subsequently contacted the inspector and attempted to find corrective solutions, including by modifying the maximum application rates for the products. However, the results showed that, even with reduced application rates, the contamination levels in the land-applied soils still exceeded the CFIA's upper limits. Englobe then tried mixing the non-compliant soil product with a compliant product to decrease the contamination level, but without success. Englobe also expressed doubts regarding the reliability of the results of the CFIA's analysis and even provided results from a private laboratory showing levels lower than what the CFIA's lab had found. The CFIA did not accept these results because the laboratory used was not accredited to employ the selected method to test for the presence of certain metals in the samples.

[13] Subsequent discussions did not give rise to an agreement. Therefore, on March 9, 2022, Englobe sent a demand letter to the CFIA, asking for the products to be released and for the certificates of analysis to be forwarded. Finally, Englobe filed an application for judicial review of the CFIA's decision with the Federal Court on April 11, 2022.

III. The impugned decision

[14] In support of its application for judicial review, Englobe challenged the constitutional validity of section 3.1 of the Act and section 2.1 of the Regulations on the grounds that the provisions regulated fertilizer as "articles of trade" and therefore fell within the provincial jurisdiction over property and civil rights, not the concurrent jurisdiction over agriculture in section 95 of the *Constitution Act, 1867*. Englobe also submitted that even if the Court were to find that these provisions fell within the concurrent jurisdiction over agriculture, they would still breach section 7 of the Charter. According to Englobe, the impugned provisions are overbroad because they target fertilizers that are not used for agricultural purposes (for example, on residential lawns or gardens, golf courses, or municipal parks).

[15] Englobe also challenged the validity of the regulatory framework on the basis of administrative law principles, arguing that section 2.1 of the Regulations illegally subdelegates to the CFIA's employees the exercise of the regulatory power that was conferred on the Governor in Council to establish standards for the maximum concentration of substances. According to Englobe, the Memorandum is therefore a disguised regulation.

[16] Finally, Englobe challenged the reasonableness of the CFIA's decision, in particular because of the methods of sample collection and analysis.

[17] In a judgment rendered on December 12, 2023, the trial judge dismissed the application for judicial review. First, after reviewing the wording of section 3.1 of the Act, its legal effect

and the extrinsic evidence filed in the record, he found that the pith and substance of the Act can be described as “the prohibition of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment”. On the basis of this characterization, he found that section 3.1 falls within the concurrent jurisdiction over agriculture.

[18] To arrive at this conclusion, the trial judge began by noting that fertilizers and supplements are essential to plant growth and therefore necessarily pertain to agriculture. He set aside the appellant’s argument based on the case law whereby the regulation of agricultural product marketing does not fall within the jurisdiction over agriculture or the regulation of trade and commerce under subsection 91(2) of the *Constitution Act, 1867*, since the Act does not seek to regulate prices or set quotas for agricultural products but is instead concerned with operations that occur at an earlier point in production. He also rejected the appellant’s claim that section 3.1 cannot fall within the scope of the jurisdiction over agriculture because it covers fertilizers that may have residential, municipal or commercial uses, since there was nothing to warrant a restrictive interpretation of the notion of agriculture. In any event, the Act concerns all fertilizers and supplements, regardless of their use, and the fact that they can be used for non-agricultural purposes is merely an incidental effect.

[19] The trial judge also accepted the CFIA’s contention that section 3.1 of the Act may also fall within the federal jurisdiction over criminal law. Relying on consistent case law of the Supreme Court, he agreed that protection of the environment is a legitimate criminal law purpose. Even assuming that the courts must determine whether the assertion of criminal law is sufficiently grounded in fact, as was suggested by four judges in the *Reference re Assisted*

Human Reproduction Act, 2010 SCC 61, and in the *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, in his view the evidentiary record sufficiently showed that Parliament was acting on a reasoned apprehension of harm when it enacted section 3.1 of the Act.

[20] With respect to the argument based on section 7 of the Charter, the trial judge agreed with the respondent that the prohibition against the manufacturing, sale, importation or exportation of fertilizer and supplements that present a risk of harm to health or the environment is rationally connected with the purpose of ensuring the safety of fertilizers and supplements. Therefore, section 3.1 of the Act and section 2.1 of the Regulations are not overbroad. Accordingly, he rejected Englobe's arguments that the definition of the terms "fertilizer" and "supplement" were too broad, and that mere proof of a risk is too low a threshold. In his view, overbreadth cannot result from a disagreement as to the threshold of risk or danger that Parliament is prepared to tolerate.

[21] The trial judge upheld the validity of the regulatory framework and rejected the appellant's argument that section 2.1 of the Regulations constituted an illegal subdelegation or abdication of power. After analyzing the relevant case law on this issue, he carefully reviewed the wording of the Act's enabling provision (section 5) and found that the fact that section 2.1 of the Regulations reproduces the substance of section 3.1 (with some clarifications) without setting out any exceptions in no way impedes the application of the Act. As for whether section 3.1 of the Act can be contravened in the absence of regulatory provisions governing the evaluation of a fertilizer or supplement, in his view, there was nothing to prevent it. Although subparagraph 5(1)(*f.1*)(iii) allows for regulations to be adopted on this matter, he found that the risk of harm to

human, animal or plant health or the environment referred to in section 3.1 is an intelligible standard that can be applied independently of any regulations. With regard to the Memorandum, it cannot be characterized as a disguised regulation in that it does not impose a standard of conduct and is not binding on the administrative decision maker. Its purpose is merely to explain how the CFIA intends to apply section 3.1 of the Act and section 2.1 of the Regulations.

[22] Finally, the trial judge rejected Englobe's submissions that the notices of seizure and detention issued by the CFIA were unreasonable. These findings are not challenged in this appeal, and I therefore need not address them here.

IV. Issues

[23] This appeal raises the following issues:

A. Did the Federal Court err in finding that the Act and the Regulations fall within the concurrent jurisdiction over agriculture under section 95 of the *Constitution Act, 1867*?

B. Did the Federal Court err in finding that the Act and the Regulations also fall within the federal jurisdiction over criminal law under section 91(27) of the *Constitution Act, 1867*?

C. Did the Federal Court err in finding that section 3.1 of the Act and section 2.1 of the Regulations are not overbroad and therefore not contrary to section 7 of the Charter?

D. Did the Federal Court err in finding that section 2.1 of the Regulations does not constitute an illegal subdelegation or abdication of power?

E. Did the Federal Court err in finding that the Memorandum is not a disguised regulation?

V. Analysis

[24] It is now well settled that this Court's role in hearing an appeal from a decision disposing of an application for judicial review must begin with a determination of whether the trial judge identified the correct standard of review and applied it properly: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 36; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–47. This principle was not changed by the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[25] The trial judge did not make a specific finding regarding the standards of review applicable to the issues in this case. There nevertheless seems little doubt that the first three issues must be reviewed on the standard of correctness. In *Vavilov*, the Supreme Court clearly established that matters relating to the division of powers between Parliament and the provinces, and constitutional questions more generally, require a "determinate and final" answer. This is an exception to the reasonableness review presumption.

[26] However, the Supreme Court of Canada teaches that this rule is subject to an exception. To the extent that the constitutional analysis is driven by findings of pure fact that can be isolated from the constitutional issues, those findings are owed deference: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 at para. 19; *Consolidated Fastfrate Inc. v. Western Canada*

Council of Teamsters, 2009 SCC 53 at para. 26; *Société des casinos du Québec inc. v. Association des cadres de la corporation des casinos du Québec*, 2024 SCC 13 at para. 97.

[27] As for the fourth and fifth issues, both of which raise administrative law arguments relating to the *vires* of a regulation and a memorandum, the standard of reasonableness must apply. Putting an end to the uncertainty in the case law on such matters, the Supreme Court (*per* Justice Côté) unanimously confirmed in *Auer v. Auer*, 2024 SCC 36 [*Auer*], and *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37 [*TransAlta*], that the reasonableness standard applies in principle to a *vires* review of a regulation or any other subordinate legislation. In so doing, the Court essentially confirmed the principles emerging from *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*], which it summarized in *Auer* as follows:

> [3] I conclude that the reasonableness standard as set out in *Vavilov* presumptively applies when reviewing the *vires* of subordinate legislation. I also conclude that some of the principles from *Katz Group* continue to inform such reasonableness review: (1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; (2) subordinate legislation benefits from a presumption of validity; (3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and (4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

[28] On the other hand, the Supreme Court stated that it was no longer necessary to find that a piece of subordinate legislation is “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose of the Act for it to be declared *ultra vires*. In this respect, the Supreme Court diverged from *Katz* on the basis that this low threshold is inconsistent with a robust

reasonableness review and would undermine the “promise of simplicity, predictability and coherence” made in *Vavilov* (*Auer* at para. 4).

[29] It is therefore up to the reviewing court to ensure that the delegated legislation falls within the limits of the enabling authority provided by Parliament. In this respect, reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute (*Vavilov* at para. 108; *Auer* at para. 59). Given the presumption of validity of regulations and other subordinate legislation, parties challenging the *vires* have a high bar to meet. Not only do they bear the burden of establishing reasonableness, but they must also deal with the premise that, where possible, subordinate legislation must be construed in a manner that renders it *intra vires*.

[30] I will therefore take these standards of review into account as I consider the issues before us in this appeal.

A. *Did the Federal Court err in finding that the Act and the Regulations fall within the concurrent jurisdiction over agriculture under section 95 of the Constitution Act, 1867?*

[31] The analytical framework for determining whether a statute falls within the jurisdiction of Parliament or the provincial legislatures is now well established. The Supreme Court has repeatedly affirmed that an impugned legislative or regulatory measure must first be

characterized to ascertain its pith and substance and then be classified among the heads of power enumerated in sections 91 to 95 of the *Constitution Act, 1867*.

[32] At the first stage, the objective is to discern what the Supreme Court has described as the primary purpose, most important characteristic, or main thrust of the law. To do so, both the purpose and effects of the statute must be considered. To determine its purpose, the courts may rely on intrinsic elements such as the legislation's preamble, the provisions setting out its objective, and its title and overall structure. Extrinsic evidence, for its part, refers to evidence that speaks to the legislation's context, such as debates of the House of Commons, minutes of parliamentary committees, and relevant government publications. To analyze the effects of the legislation, both legal and practical effects are considered. On this entire issue, see in particular *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 51; *Reference re Impact Assessment Act*, 2023 SCC 23 at paras. 61–64; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 [*Murray-Hall*] at paras. 23–26; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras. 28–31.

[33] I also note that the Supreme Court has repeatedly emphasized that the stages of characterization and classification are distinct and must remain so. When characterizing legislation, it is important to avoid considering the interpretation that has been given to the different legislative jurisdictions; such an approach would lead to confusion and could influence the process by assigning too much weight to the desired outcome. Similarly, vague and general characterizations of statutes must be avoided; rather, the pith and substance must be identified as precisely as possible, to prevent the statute from being superficially assigned to both heads of

power and to avoid exaggerating the extent to which it extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc*., 2019 SCC 58 at para. 35; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras. 31–32; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras. 190–191; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 52; *Reference re Impact Assessment Act*, 2023 SCC 23 at para. 65.

[34] Once a court has characterized the matter of the law, it must determine the classes of subjects into which the matter falls. If the matter of the law falls under a head of power assigned to the adopting level of government, the legislation is found to be valid. In this respect, a few remarks are warranted.

[35] As the trial judge noted, the heads of power enumerated in sections 91 to 95 must be read together. Except for the powers set out in section 95 over immigration and agriculture, legislative jurisdictions are attributed exclusively to one of the two levels of government; as a result, jurisdictions articulated in more restrictive language must be excluded from heads of power expressed in more general terms. As the Supreme Court stated in *Reference re Securities Act*, 2011 SCC 66 at paras. 70-73, this approach is essential to maintaining a constitutional balance, and a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence.

[36] Although legislative jurisdictions are divided between Parliament and the provincial legislatures in accordance with the principle of exclusiveness (except for the powers under subsection 92A(3) and sections 94A and 95 of the *Constitution Act, 1867*), the case law of the

Supreme Court has made room for a more flexible vision of federalism, moving away from the "watertight compartments" preferred by the Judicial Committee of the Privy Council. Applying what is now known as the principle of cooperative federalism, the Supreme Court has circumscribed the doctrine of interjurisdictional immunity to allow for the possibility of intergovernmental collaboration and overlap between validly exercised provincial and federal powers. Accordingly, the fact that a law touches incidentally on a head of power belonging to the other level of government does not lead to its invalidity. Similarly, it is accepted that some matters may be dealt with from the perspective of a number of heads of power and thus have a "double aspect". This approach does not challenge the exclusiveness of federal or provincial powers *per se*, but it can soften its consequences and introduce greater flexibility in the exercise of federalism. See in particular *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras. 23–25; *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 52; *Reference re Impact Assessment Act*, 2023 SCC 23 at para. 113; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 32; *Murray-Hall* at para. 77, *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 27–29.

[37] It is also important to note, as the trial judge did, that the merits or effectiveness of legislation must not be taken into account in an analysis of constitutional validity. It is for Parliament or the legislatures, not the courts, to decide on a statute's appropriateness. It is true that, in some cases, the effects may suggest a purpose other than that which is stated in the law; in such a case, the law is said to have a colourable motive. See *Reference re Firearms Act (Can.)*, 2000 SCC 31 at paras. 18 and 57; *Reference re Securities Act*, 2011 SCC 66 at para. 90; *Murray-Hall* at para. 44; *R. v. Comeau*, 2018 SCC 15 [*Comeau*] at para. 83.

[38] This is therefore the framework within which I will now consider the *vires* of the impugned provisions in light of the legislative jurisdictions over agriculture and the criminal law.

(1) Pith and substance of the impugned provision

[39] The appellant maintains that the trial judge erred in describing the pith and substance of section 3.1 of the Act as "the prohibition of fertilizers and supplements that present a risk of harm to human, animal or plant health or the environment". In its view, the actual purpose of section 3.1 concerns [TRANSLATION] "the creation of a scheme to regulate labelling and the use of commercial products that are safe, that have a solid history of use and acceptance and that are intended for various markets, to ensure that these products do not carry a risk of harm to health or to the environment" (Memorandum of the appellant at para. 16). The Attorney General of Saskatchewan supports this characterization, while the Attorney General of Alberta emphasizes that section 3.1 aims to expand the scope and extent of the regulatory scheme to include all fertilizers and supplements that present a risk to health or the environment, and to subject manufacturers, vendors, importers and exporters of these products to the scheme's compliance regime. In other words, the appellant and the interveners claim that the main purpose of section 3.1 is to expand the scope of the regulatory scheme set out in paragraph 5(1)(*c.1*), whereas the respondent submits that the primary aim of section 3.1 is to ensure that fertilizer and supplement products produced in, sold in or imported to Canada are safe.

[40] With respect to the intrinsic evidence in particular, the appellant faults the trial judge for not having characterized the pith and substance of section 3.1 as precisely as possible, as required by the Supreme Court in *Reference re Impact Assessment Act*. It alleges that the error

can be explained by the fact that he sidestepped, without explanation, the terms “manufacture” and “sale”, which refer to the notion of trade, and that he did not consider that the prohibition in section 3.1 is subordinate to regulatory requirements. It also alleges that the trial judge erred in finding that the prohibition applied to products that are subject to a registration requirement as well as to products that are not, whereas an attentive reading shows that section 3.1 [TRANSLATION] “through its legal effects, *de facto* targets products exempted from registration” (Memorandum of the appellant at para. 12).

[41] It is true, as the judge himself admits, that the description he accepted of section 3.1 is close to the wording of the provision and may seem quite general. But as the Supreme Court noted in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 (at para. 26), the dominant characteristic of a provision may be apparent from its plain text. In any event, the characterization the appellant proposes is even vaguer, inasmuch as it contends that section 3.1 seeks to create a regulatory scheme for the labelling and use of “commercial products”, instead of limiting itself to fertilizer and supplements, which is what is actually referred to in this provision. I also note that the appellant emphasizes the notions of manufacturing and sale to connect section 3.1 with the marketing of the items concerned and thus more easily fit it within the provincial jurisdiction over local trade, whereas the actual purpose sought is to prohibit trade in fertilizer and supplements that are not safe.

[42] The appellant also maintains that the scheme is purely regulatory. In my view, this statement is misleading because the Act can very well be applied in the absence of regulations, as we will see below, but also, because it is admitted that regulatory as opposed to legislative

action is better suited for the oversight of certain activities that develop quickly or that require technical and specialized standards. In any event, this issue has no impact on the identification of the pith and substance of the Act or, for that matter, on the question as to whether section 3.1 is overbroad or, on the contrary, too limited in scope. The desired scope of a prohibition, its merits or its effectiveness is not relevant at this stage of the analysis. In this respect, I note that the trial judge did not misinterpret section 3.1 in finding that it applied not only to products that are exempt from registration (and therefore safe), but to all products, whether subject to a registration requirement or not. Indeed, it was open to the CFIA to monitor the safety of all products including, as in this case, individual batches of fertilizer.

[43] In terms of the extrinsic evidence, the trial judge was right to maintain that the parliamentary debates surrounding the enactment of the *Agricultural Growth Act*, R.S.C. (1985), c. F-10, s. 65, under which section 3.1 was enacted, support his characterization of the provision. These debates indicate that the objective of the bill was to "strengthen the safety of agricultural products, the first link in the food chain, while reducing the regulatory burden for industry and promoting trade in agricultural products". The rules regarding fertilizer were amended to "provide an even more effective approach to ensuring that products meet safety standards, while providing greater flexibility and efficiency for the industries involved" (House of Commons Debates, Vol. 147, No. 55 at 3397–3398; affidavit of Linda Webster, exhibit LW-7, Appeal Book at 5582–5583).

[44] In my opinion, the trial judge could also rely on the summary of the Regulatory Impact Analysis Statement (RIAS) that preceded the enactment of the amendments to the Regulations in

2020. Upon reviewing that document, it is clear that the Governor in Council was concerned about the potential risks of using certain fertilizers derived from recycling by-products that might contain organic or chemical contaminants. It is true, as the Attorney General of Alberta points out, that a RIAS from 2018 cannot be invoked to interpret the purpose of a legislative provision enacted three years earlier. However, the trial judge did not rely on this argument alone, and he was correct to note that the 2020 amendments to the Regulations were part of the same review of the scheme that had begun with the 2015 amendments to the Act.

[45] Ultimately, the appellants and the interveners have not persuaded me that the trial judge erred in his characterization of section 3.1 of the Act. Contrary to what they argued at trial and before us, the purpose and effect of section 3.1 are not to expand the scope of the applicable regulatory scheme to include fertilizers and supplements that are exempt from registration and to subject manufacturers, vendors, importers and exporters of these products to all of the marketing requirements. Focusing on section 3.1, which is the only provision of the Act at issue, it is clear that its pith and substance is to prohibit fertilizer and supplements that present a risk of harm to health or the environment. This provision does not constitute an expansion of the regulatory scheme; rather, it is a safety net, inasmuch as it allows for the safety of all products to be monitored, whether or not they are exempt from registration.

(2) Jurisdiction over agriculture

[46] The appellant submits that the trial judge erred in his interpretation of the jurisdiction over agriculture by assigning too broad a scope to what constitutes agriculture for the purposes of the division of powers, and by diverging from the interpretation given to this jurisdiction by

the Judicial Committee of the Privy Council and the Supreme Court of Canada. As it did before the Federal Court, the appellant conducted a lengthy review of decisions concerning essentially the regulation of agricultural marketing, including *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited*, 1932 CanLII 313 (UK JCPC), [1933] 1 D.L.R. 82, *Saskatchewan (Attorney General) v. Canada (Attorney General)*, 1948 CanLII 317 (UK JCPC), [1949] 2 D.L.R. 145, *Canadian Federation of Agriculture v. Quebec (Attorney General)*, 1950 CanLII 342 (UK JCPC), [1950] 4 D.L.R. 689, and *Dominion Stores Ltd. v. R.*, [1980] 1 S.C.R. 844. According to the appellant, those decisions establish that the test to determine if a law falls within the scope of agriculture is not whether it concerns a product inherently related to agriculture, but whether, in its pith and substance, it interferes with the operations of farm operators and consequently whether it applies first to farm operators acting in that capacity.

[47] Therefore, based on what it considers the purpose of section 3.1—i.e., regulating the activities of fertilizer and supplement merchants—the appellant (with the support of the interveners) submits that this provision does not fall within the jurisdiction over agriculture because it does not interfere with the agricultural operations of farmers. It does not directly concern the activities of farm operators “inside the farm gate” but merely limits the possibility of farmers contracting with manufacturers, vendors, or importers of fertilizers or supplements. The appellant also alleges that the trial judge erred in giving the notion of agriculture a broad and evolving interpretation, since that approach considerably expands this head of power to include its application to a multitude of actors, such as ornamental horticulturists, landscapers and forest

managers, amateur gardeners, soil manufacturers, municipalities, golf course owners and others that have nothing to do with agriculture.

[48] In my opinion, these arguments are without merit, do not reflect the state of the case law, and have already been rejected by the Court of Appeal for Ontario in *Regina v. Bradford Fertilizer Co. Ltd*., [1971] 22 D.L.R. (3d) 617 [*Bradford*].

[49] In that case, the respondent claimed that the Act could not be considered a valid exercise of the federal power over agriculture to the extent that it was an effort to regulate fertilizers as articles of trade or to regulate the trade of manufacturing and dealing in fertilizer. The respondent, like the appellant in this case, submitted that such regulation fell within the provincial property and civil rights power under subsection 92(13) of the *Constitution Act, 1867*. After reviewing the main provisions of the Act, Justice Arnup (for a unanimous Court) categorically and unequivocally rejected this argument:

> In my opinion it would be impossible to discuss intelligently the application or use of fertilizer and disregard the connotation of agriculture. The most important aspect of the subject would be missing.
>
> I conclude, both from the provisions of the Act and the Regulations, and from the common understanding of "agriculture" and the place of fertilizer in it, that the *Fertilizers Act* is a "law in relation to agriculture". As such, it is a law that s. 95 of the [*Constitution Act, 1867*] empowers Parliament to pass.
>
> *Bradford* at 621.

[50] Interestingly, the respondent in that case relied on the same decisions cited by the appellant (above at para. 42), which determined that agricultural products, once marketed, fall within provincial jurisdiction. In this respect, the Court of Appeal for Ontario found that those

decisions did not exhaust the federal jurisdiction over agriculture and were no more than illustrations of and guidelines for the use that can be made of this power. In concluding its reasons, the Court of Appeal reiterated the following:

> In summary, therefore, I conclude that the *Fertilizers Act* was passed to benefit agriculture, by requiring the very essential plant nutrients and soil conditioners used in agriculture to be of prescribed standards, safe to use, and as described and labelled as to enable purchasers to know what they are getting and how to use it. The object of the Act is not to "regulate the fertilizer trade", although some regulation of that trade and its manufactures and vendors is an obvious effect of the Act. The Act is therefore a law in relation to agriculture, and s. 95 of the [*Constitution Act, 1867*] empowered Parliament to pass it.
>
> *Bradford* at 624

[51] While that decision of the Court of Appeal for Ontario does not bind this Court, the appellant and the interveners have not persuaded me that we must diverge from it because it was fundamentally flawed. First, I do not see how the fact that section 3.1 of the Act contains a prohibition, whereas section 3 of the prior version, on which the Court of Appeal for Ontario focused, was more concerned with registration, is significant to the constitutional analysis. After all, section 9 of the former version (now in section 4 of the Act) also set out a prohibition against fertilizers and substances that were harmful to plant growth. And in any event, as the trial judge noted, the decision to subject the marketing of a product to certain standards or conditions or to prohibit its sale does not play a decisive role in its classification within one of the categories of subject matters enumerated in sections 91 to 95 of the *Constitution Act, 1867*. What is important is the subject matter of the legislation, not the means of intervention chosen by Parliament.

[52] The Attorney General of Saskatchewan (Saskatchewan), supported by the Attorney General of Alberta, submits that the Federal Court applied an unduly broad interpretation of the

federal agriculture power, arguing that the jurisdiction over agriculture, although concurrent, falls first within the provincial power and may be exercised by the federal government only in cases involving a national economic interest. According to Saskatchewan, the ordinary meaning of the term agriculture is the business of growing crops or of raising livestock. It does not comprise activities undertaken for aesthetic purposes or the private use of fertilizer in, for example, residential lawns, golf courses or urban gardening. Saskatchewan also criticizes the Federal Court for relying exclusively on definitions from various dictionaries to determine that agriculture is not limited to commercial activities, without taking into consideration the context in which the term is used. Saskatchewan points in particular to the fact that section 95 of the *Constitution Act, 1867* confers the power to legislate in respect of agriculture and immigration to the provinces and then to Parliament, and states that the latter may exercise this power "from time to time". Finally, Saskatchewan relies on an article by a law student putting forward a literal interpretation of section 95 that limits the exercise of the federal power (Jesse Hartery, "La compétence concurrente en matière d'immigration : Rendre aux provinces canadiennes ce qu'elles ont perdu" (2018) 63:3 McGill L.J. 48), on the history of the enactment of section 95, and on excerpts from speeches by certain members of the Canadian and British Parliaments prior to the enactment of the *Constitution Act, 1867* to support its position that section 95 confers jurisdiction "mainly" on the provinces.

[53] In my view, these submissions have no merit, and the trial judge was right to reject them. I note that Mr. Hartery's theory has never been accepted by the Canadian courts, as he himself admits (at 532), and that his article concerns solely the power over immigration. The trial judge was also right to emphasize that, in the speech quoted by Mr. Hartery, the Secretary of State for

the Colonies merely made a prediction regarding how the power over agriculture and immigration would be exercised, and that this therefore did not constitute a legal analysis of the meaning and scope of section 95.

[54] Furthermore, it must also be noted that the historical evidence on which the interveners rely, specifically the excerpts from the speeches and debates that were cited before us, was not included in the evidence at trial and was not based on an expert historian's analysis. There is therefore no justification to conclude that the quotations chosen by the Attorney General of Saskatchewan draw an accurate and complete portrait of the historical context. In any event, it is now well established that the originalist interpretation put forward by the interveners, according to which the Constitution, like any other law, should be interpreted in light of the understanding its drafters had at the time, is not accepted in Canada. Although historical evidence may help place a provision in its context, evidence of the drafters' intent is never conclusive, as the Supreme Court has noted on several occasions: *Comeau* at para. 55; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 30; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 508–509.

[55] With respect to the scope the appellant would like to give to the expression "from time to time", it is, in my view, without foundation. As the Attorney General of Canada argues, this expression appears no less than 24 times in the *Constitution Act, 1867*, including in sections 24 and 38 (power of the Governor in Council to appoint senators and convene the House of Commons), section 82 (power to convene the legislative assemblies of Ontario and Quebec), and section 101 (power of Parliament to constitute a General Court of Appeal for Canada and other courts). It would not occur to anyone that this expression might restrict or limit the number of times the power to which it refers may be used. The trial judge was therefore right to find that it

simply means “as occasion may arise” (Decision at para. 58). As he wrote, “section 95 contains an explicit clause that gives paramountcy to federal legislation, which is difficult to reconcile with an alleged implied limit on federal intervention” (Decision at para. 59). The decisions he cites in support (*Fischbach and Moore of Canada Ltd v. Noranda Mines Ltd.*, (1978) 84 D.L.R. (3d) 465 (Sask. C.A.) and *Lawrie v. Lees* (1881), 7 A.C. 19 H.L.) have also never been challenged.

[56] The Attorney General of Alberta, for its part, maintains that the jurisdiction over agriculture must be interpreted restrictively. It relies on the case law relating to the marketing of agricultural products cited by the appellant to argue that only laws that interfere with agricultural operations inside the farm gate can be enacted under section 95 of the *Constitution Act, 1867*. Inasmuch as section 3.1 does not regulate the activities of farmers but aims instead to limit the activities of producers, vendors and importers of fertilizer and supplements, it cannot be considered to be in relation to agriculture. According to this logic, section 3.1 relates more to the activities of farmers as consumers and should therefore be analyzed as a legislative provision respecting the purchase and sale of a product, which is an exclusive power of the provinces. According to the Attorney General of Alberta, it is not appropriate to distinguish between products that leave the farm and those that enter it: agriculture is limited to what happens inside the farm gate, and it excludes the regulation and marketing of products that farmers both purchase and sell.

[57] Here again, I find that the trial judge correctly disposed of the argument. Initially, no serious argument was advanced to support the position that the jurisdiction over agriculture and immigration must receive a less generous or evolutionary interpretation than the enumerated powers in sections 91 and 92 of the *Constitution Act, 1867*. Furthermore, in *Bradford*, the Court

of Appeal for Ontario recognized the inseparable link between fertilizer and agriculture, and in my opinion, it is no great stretch to include products that favour plant growth.

[58] I would add that, as the Attorney General of Canada argued, the main purpose of a provision seeking to prohibit the sale, production, importation and exportation of fertilizer or supplements that present risks of harm to health or the environment is not to control the marketing of these products but to prevent their use. By that reasoning, it is difficult to argue that section 3.1 relates to the regulation of local trade or property and civil rights. As the Supreme Court recognized in *Ward v. Canada (Attorney General)*, 2002 SCC 17, a measure prohibiting the sale of a product need not always be analyzed in relation to the jurisdiction over property and civil rights. In that case, it was found that a scheme prohibiting the sale of seals fell within federal jurisdiction over fisheries because the objective and the pith and substance of the scheme was not to regulate or even control trade, but rather to protect the fisheries as an economic resource. Similarly, section 3.1 does not seek to regulate trade in fertilizer, but to prohibit products intended for consumption that could be harmful to health or the environment. Contrary to what is asserted by the Attorney General of Alberta, I see nothing in this approach that has the potential to erode provincial jurisdiction over property and civil rights.

[59] Therefore, for all of these reasons, I am of the opinion that the trial judge did not err in finding that section 3.1 of the Act is a measure validly adopted by Parliament under its concurrent power over agriculture.

B. *Did the Federal Court err in finding that the Act and the Regulations also fall within the federal jurisdiction over criminal law under section 91(27) of the Constitution Act, 1867?*

[60] Given my finding that the concurrent jurisdiction of both levels of government over agriculture authorized Parliament to enact section 3.1 of the Act, I am of the opinion that it is not necessary to answer this question. In constitutional matters, the courts should not decide issues that need not be resolved to dispose of the case: see, for example, *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territoires (Education, Culture and Employment)*, 2023 SCC 31 at para. 108, and *R. v. McGregor*, 2023 SCC 4 at para. 24, and the cases cited therein. I will therefore refrain from expressing any opinion on the matter.

C. *Did the Federal Court err in finding that section 3.1 of the Act and section 2.1 of the Regulations are not overbroad and therefore not contrary to section 7 of the Charter?*

[61] As it did before the Federal Court, the appellant argued that section 3.1 of the Act and section 2.1 of the Regulations are overbroad inasmuch as the concept of “risk of harm” and the expansive definitions of “fertilizer” and “supplement” in section 2 of the Act may include substances that are not dangerous and punish conduct that is beneficial to the environment. It also

criticizes the trial judge for finding that the provisions contained an intelligible standard, and it reiterates that they are so imprecise as to violate the principles of fundamental justice.

[62] In my view, the trial judge correctly rejected these submissions, and there is no need to consider them in any detail, especially since the appellant dealt with them only briefly in its memorandum and at the hearing.

[63] A provision is said to be so broad that it violates the principles of fundamental justice when it interferes with conduct that bears no connection to its objective and goes further than required to achieve its purpose: see *R. v. Heywood*, [1994] 3 S.C.R. 761 [*Heywood*] at 794; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*] at para. 101. In other words, as the Supreme Court states in *Bedford*, "overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose" (at para. 112, emphasis in original). In such a case, the provision is said to be arbitrary in part. The Supreme Court nevertheless found it appropriate to point out that the courts must show deference to the means selected by the legislature, which must have the power to make policy choices (*Heywood* at 793).

[64] In this case, Parliament wished to guarantee the safety of fertilizer and supplements, and to that end, it chose to prohibit fertilizer and supplements that present a risk of harm. Contrary to the appellant's argument, it cannot be said that there is no rational connection between the prohibited conduct and the objective sought. As the trial judge stated, the impugned provisions do not apply to substances that pose no danger, and they therefore cannot be said to prohibit safe products and interfere with conduct that bears no connection to the objective.

[65] Furthermore, section 3.1 of the Act and section 2.1 of the Regulations are not so vague or imprecise as to violate the principles of fundamental justice. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, the Supreme Court established that the vagueness doctrine should not be used to prevent State action in furtherance of valid social objectives by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. What is important is that the law be sufficiently precise to give rise to legal debate and to delineate an area of risk within which citizens may make their decisions.

[66] Legislatures have applied the concepts of risk and the prevention of future harm on several occasions, and the courts have found them to be intelligible legal standards: see, for example, *R. v. Katigbak*, 2011 SCC 48 at paras. 64–71; *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 595–598; and *Sanchez v. Canada (Citizenship and Immigration)*, 2007 FCA 99 at paras. 14 and 20. The Courts have been particularly tolerant in environmental matters and sensitive to the fact that it is not always possible to precisely determine all potential harmful conduct in advance.

[67] The decision in *Ontario v. Canadian Pacific Ltd*., [1995] 2 S.C.R. 1031, provides an interesting illustration of this principle. At issue in that case was a provision of Ontario's *Environmental Protection Act*, R.S.O. 1980, c. 141, paragraph 13(1)(*a*), that prohibited the emission into the environment of a contaminant that caused or was likely to cause the "impairment of the quality of the natural environment for any use that can be made of it". The appellant claimed that the provision was so vague as to violate the principles of fundamental justice. Justice LaForest, for the majority, first noted that environmental protection laws are framed in a manner capable of responding to a wide variety of environmentally harmful scenarios and that none of those laws had

been declared void for vagueness. He then described the two choices available to legislators in the area of environmental protection: to enact detailed provisions which prohibit the release of particular quantities of enumerated substances into the natural environment, or to choose a more general prohibition and rely on the courts to determine when the release of a substance violates the prohibition of pollution. He added, at paragraph 53:

> … The latter option is, of course, more flexible and better able to accommodate developments in our knowledge about environmental protection. However, a general enactment may be challenged (as in the instant case) for failing to provide adequate notice to citizens of prohibited conduct. Is a very detailed enactment preferable? In my view, in the field of environmental protection, detail is not necessarily the best means of notifying citizens of prohibited conduct. If a citizen requires a chemistry degree to figure out whether an activity releases a particular contaminant in sufficient quantities to trigger a statutory prohibition, then that prohibition provides no better fair notice than a more general enactment. The notice aspect of the vagueness analysis must be approached from an objective point of view: would the average citizen, with an average understanding of the subject matter of the prohibition, receive adequate notice of prohibited conduct? If specialized knowledge is required to understand a legislative provision, then citizens may be baffled.

[68] I find that these remarks ring true in the case before us. Statutes do not always require precision and scientific certainty, which are often unattainable and could in addition undermine effectiveness, particularly in matters as complex as environmental protection or public health. The case law teaches that it is sufficient to provide an intelligible standard that may be debated before the courts. This is all the more true when, as in the case before us, an administrative document like the Memorandum specifies how the powers conferred on the CFIA will be exercised and how the notion of risk of harm will be interpreted. For these reasons, I am of the view that the appellant's contentions that section 3.1 of the Act and section 2.1 of the Regulations are overbroad or imprecise must be rejected.

D. *Did the Federal Court err in finding that section 2.1 of the Regulations does not constitute an illegal subdelegation or abdication of power?*

[69] At trial, the appellant submitted that section 2.1 of the Regulations was invalid because it merely reproduces the substance of section 3.1 of the Act and that, consequently, the exercise of the Governor in Council's regulatory power was abdicated and essentially subdelegated to the CFIA's employees, thereby violating settled case law establishing that a body exercising delegated powers cannot delegate those same powers in turn.

[70] The trial judge rejected this argument, stating that the principles established in *Attorney General of Canada v. Brent*, [1956] S.C.R. 318 [*Brent*], *Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131 [*Brant Dairy*] and *Canadian Institute of Public Real Estate Companies v. Toronto*, [1979] 2 S.C.R. 2 [*Canadian Institute*] do not apply in the context of this regulatory scheme. The principle arising from those decisions is that a body on which a regulatory power is conferred cannot transform a legislative power into an administrative one. When the legislature confers a regulatory authority on a body, that body must adopt general standards in the matters over which it exercises its power, rather than make decisions on a case-by-case and discretionary basis. Chief Justice Laskin, for the majority in *Brant Dairy*, correctly identified this principle of legislative interpretation in the following passage (at 132–133):

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in [*Brent*].

[71] It is interesting to note that the subdelegation in *Brent* had been carried out for the benefit of a third party. The Governor in Council had been delegated the power to make regulations to define the reasons enumerated in the *Immigration Act*, R.S.C. 1952, c. 325, permitting it to prohibit or limit the admission of persons into Canada. Instead of setting out standards to guide immigration officers, the Governor in Council merely incorporated into the regulation the very terms of his enabling authority, thereby conferring on every immigration officer the task of determining a person's admissibility on the basis of the criteria in the Act. This manner of proceeding was found to be an invalid subdelegation, inasmuch as the opinion of the Governor in Council that was supposed to be expressed in the form of a standard was replaced by the opinion of each immigration agent responsible for applying the law.

[72] In *Brant Dairy*, the Supreme Court found that the principle is the same when the body required to legislate by regulation gives itself random power to make decisions without any reference point in standards fixed by regulation. The Supreme Court came to the same conclusion in *Canadian Institute*, reiterating that an administrative body (in that case, a municipal council) to whom the power to enact regulations has been delegated may not merely repeat the power in a regulation in the words in which it was conferred and thus assign itself an entirely discretionary power.

[73] What distinguishes those three cases from the one before us, according to the trial judge, is that section 3.1 of the Act includes a prohibition that can apply independently from the exercise of the regulatory power. He arrives at this conclusion following an analysis of sections 3.1 and 5 of the Act and the intent of Parliament that emerges from those provisions.

[74] In his view, the "manufacturing, sale, importation or exportation of any fertilizer or supplement" that is harmful and the "evaluation of the potential impact of the fertilizer or supplement … and the risk of harm posed by the fertilizer or supplement" constitute two separate purposes of the regulatory power conferred on the Governor in Council. Therefore, the ways in which the Governor in Council has used that regulatory power must be examined separately.

[75] The trial judge went on to assert his view that the phrase "in contravention of the regulations" refers to the prohibition against manufacturing, selling, importing or exporting, not to whether a fertilizer or supplement poses a risk of harm. The enactment of a regulation under paragraph 5(1)(*c.1*) of the Act was therefore essential for there to be a contravention of section 3.1. This requirement is satisfied here, because a regulation was indeed enacted. The fact that section 2.1 of the Regulations essentially reproduces the substance of section 3.1 of the Act in no way hampers the application of the Act; although paragraph 5(1)(*c.1*) authorizes the Governor in Council to provide for exceptions to section 3.1, it is not mandatory to do so. Further, section 3.1 is worded in such a way that it may be applied despite the absence of regulations enacted under subparagraph 5(1)(*f.1*)(iii), since the risk of harm to human, animal or plant health or the environment is an intelligible standard, independent of any regulations.

[76] The appellant objects to this reading of the impugned provisions and submits that the trial judge erred in law in finding that section 2.1 of the Regulations does not constitute an abdication of power, an attempt to transform a regulatory power into administrative discretion or an illegal subdelegation of that power. Although it acknowledges that the judge correctly identified the applicable test—namely, that the Act must be examined to ascertain Parliament's expectations

regarding the exercise of the discretionary power—it alleges that he erred in his interpretation of sections 3.1 and 5 of the Act by reading them in isolation and not in the context of all the other provisions. More specifically, it alleges that the judge erred in considering paragraph 5(1)(*c.1*) and subparagraph 5(1)(*f.1*)(iii) separately and consequently inferring a duality between the manufacturing, sale, importation and exportation of fertilizers on the one hand, and the evaluation of the risk they represent on the other.

[77] The appellant also criticizes the trial judge for interpreting the phrase "in contravention of the regulations" as relating only to the prohibition against manufacturing, selling, importing or exporting in section 3.1, with the result that there can be no contravention of this provision in the absence of a regulation enacted under paragraph 5(1)(*c.1*), even though nothing requires the enactment of a regulation to govern the evaluation of the risk of harm of fertilizers and supplements. In the appellant's view, section 3.1 must be read holistically, and the power to regulate does not have two distinct purposes but a single one, which is to set standards that apply to the manufacturing, sale, importation and exportation of fertilizer and supplements that present a risk of harm to human, animal or plant health or the environment.

[78] According to the appellant, these errors of interpretation led to three erroneous conclusions, namely, that the reproduction, with some clarifications, of the substance of section 3.1 of the Act in section 2.1 of the Regulations (1) does not impede the application of the Act, (2) does not represent an illegal subdelegation or abdication of power, and (3) does not have the effect of conferring a discretionary power on the respondent.

[79] Once again, I find that these arguments are without merit and that the trial judge was right to reject them. The appellant has not persuaded me that the judge erred in his interpretation of the Act and the Regulations, or that *Brent*, *Brant Dairy* and *Canadian Institute* can be distinguished from this case.

[80] This is not a situation where the regulatory authority, in this case the Governor in Council, conferred on a third party the power to adopt standards that Parliament had empowered the regulatory authority to prescribe under section 5 of the Act. The Regulations do not simply repeat the wording of paragraph 5(1)(*c.1*) of the Act and confer application to the CFIA, as was the case in *Brent*. On the contrary, the Regulations specify how to apply the prohibition in section 3.1 of the Act: the prohibition against the manufacturing, sale, exportation or importation of a fertilizer or supplement is triggered only if the product contains any substance or mixture of substances that presents a risk of harm when the fertilizer or substance is used according to its directions for use or in amounts not in excess of the amount that is necessary to be effective. Section 2.1 of the Regulations provides that the existence of a risk of harm to pests is not relevant to determining whether the prohibition in section 3.1 applies. This case therefore does not involve a prohibited subdelegation: the standard was indeed set out in the Regulations and the CFIA's employees merely apply it.

[81] Although the case before us does not involve a formal or express subdelegation, the appellant appears to contend that the lack of precision in the Regulations as to the risk of harm makes them *ultra vires* inasmuch as they do not sufficiently circumscribe the CFIA's power and essentially transform a normative power into an administrative one.

[82] Undeniably, the Governor in Council could have made regulations to further clarify what constitutes a risk of harm and even provided a list of substances and the concentration thresholds beyond which they would be considered harmful. Subparagraph 5(1)(*f.1*)(iii) provides for that possibility, in fact. The issue, however, is whether the Governor in Council was required to govern the notion of risk of harm and impose specific parameters to circumscribe it, and whether, in the absence of such an intervention, the power exercised by the CFIA is discretionary to such a point that it transforms the legislative power conferred on the Governor in Council into an administrative one.

[83] In my view, it was open to the trial judge to conclude, based on the wording of section 3.1 and its general scheme, that Parliament did not wish to make the contravention of this provision conditional on the enactment of a regulation governing the evaluation of the potential impact and the risk of harm of fertilizers and supplements. First, the placement of the expression “in contravention of the regulations” in section 3 in both the French and English versions clearly suggests that the terms qualify only the prohibition against the manufacturing, sale, importation, and exportation of fertilizer or supplements. Second, it seems self-evident that Parliament did not intend to prohibit all manufacturing, sale, importation or exportation of fertilizer or supplements as it simultaneously removed the obligation to register and made market access easier for low-risk fertilizers and supplements. It was therefore absolutely necessary for a regulation to be enacted to give effect to that intention.

[84] Conversely, it is entirely possible to ascertain whether a fertilizer or supplement presents a risk of harm to health or the environment in the absence of a regulation. This is an intelligible

standard, which can be interpreted even if not quantified and defined according to certain indicators in a regulation. At a time where problems are increasingly complex and science is evolving ever more quickly, it is often inevitable, even necessary, for those responsible for applying legislative and regulatory standards to be allowed a degree of flexibility. There is without a doubt a certain connection between the prohibition against the subdelegation that takes place when a legislative power is transformed into a discretionary power and the doctrine of vagueness. I will not repeat what I wrote in paragraphs 65 to 68 of these reasons on this topic. I will simply reproduce here the remarks of Professors Issalys and Lemieux, who in my view accurately express the relationship between these two concepts:

> [TRANSLATION]
>
> The issue therefore is whether the contents of the regulation are sufficiently precise and defined for individualized decisions based on its provisions to truly apply the standard—through the interpretation of its terms, if needed—and not involve the creation of a new, specific standard through the exercise of a discretionary power. It must therefore be considered whether the contents of the regulation sufficiently develop the contents of the law by providing greater precision: we are therefore faced with a question of degree, which calls for nuanced answers.
>
> P. Issalys & D. Lemieux, *L'action gouvernementale : précis de droit des institutions administratives*, 4th ed. (Montreal: Yvon Blais, 2020) at 682.

[85] Like the trial judge, I find that section 2.1 of the Regulations does not confer an unallowable discretion on the CFIA in the exercise of the mandate it is assigned under the Act. Undeniably, the CFIA is afforded a certain margin of appreciation in applying the Regulations, but this is a far cry from the near-absolute discretion the courts condemned in *Brent*, *Brant Dairy* and *Canadian Institute*. Section 2.1 is also not analogous to the considerable power the council of the city of Montreal conferred on its director of police as in *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58. While the *Charter of the City of Montreal* conferred on the council the power to

impose the conditions and formalities for the issuing of permits authorizing the operation of various businesses, the impugned by-law in that case subjected the issuing of a restaurant operating licence to the approval of the director of the police department, with no further guidance. The majority of the Supreme Court had no hesitation in finding that this portion of the by-law was "fatally defective" because the director of police was provided no standard rule or condition to guide the exercise of his discretion.

[86] In the case before us, the CFIA's powers are circumscribed by a coherent and intelligible standard. The prohibition against manufacturing, selling, importing or exporting targets only fertilizers or supplements that contain any substance or mixture of substances "in quantities that present a risk" of harm to health or the environment when used according to its directions for use or in amounts not in excess of the amount that is necessary to achieve its intended purpose. As in *Actton Transport Ltd. v. Steeves*, 2004 FCA 182, *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2025 FCA 82 [*CCFR*] and *Commission des normes, de l'équité, de la santé et de la sécurité du travail c. Association des entrepreneurs spécialisés en procédé industriel du Québec*, 2025 QCCA 587, the fact that the CFIA's employees must rely on their judgment and assessment when exercising their discretion does not mean that they are exercising a legislative or regulatory power. It is now well established that officers of the State often have a critical role to play in implementing complex policies and programs that require constant adaptation to account for rapid changes in the circumstances in which they must be applied. This is recognized by the authors Garant, Garant and Garant, who write:

> [TRANSLATION]
>
> As previously discussed, what is officially prohibited is the attribution by regulation of a purely discretionary power. It is not prohibited, however, to allow the person who will have to apply the regulation to exercise a certain discretion,

> provided that sufficiently precise standards exist in the law and the regulation as a whole. There are sectors requiring the government's intervention where it is practically impossible to set out in the laws and regulations with any great precision what standards will be applied to citizens. We must rely on the judgment of officers who, under the supervision of the higher authority, will have to exercise this measure of discretionary power. The courts may also intervene to review specific decisions alleged to be arbitrary, unreasonable and contrary to the purpose sought in the law or regulation.
>
> Patrice Garant, with the collaboration of Philippe Garant & Jérôme Garant, *Droit administratif*, 7th ed. (Montréal: Yvon Blais, 2017) at 330.

[87] Given that a review of the *vires* of a regulation is now subject to the standard of reasonableness and subordinate legislation benefits from a presumption of validity (*Auer* at para. 35; *TransAlta* at para. 15), I see no reason to intervene to reverse the trial judge's conclusion that section 2.1 of the Regulations does not constitute an illegal subdelegation. It is not enough to simply contend that this conclusion is in error; the appellant must also show that the Regulations are unreasonable. The appellant has not discharged this onerous burden.

E. *Did the Federal Cour err in finding that the Memorandum is not a disguised regulation?*

[88] The appellant submits that the trial judge erred in finding that the Memorandum is merely a guide the only purpose of which is to guide the exercise of the discretionary power conferred on the CFIA. It maintains that, on the contrary, the Memorandum seeks to impose a standard of conduct and thus constitutes a regulation that is not authorized under the Act. In support, it cites section 1 of the Memorandum, which states that it is a "single source" for all standards used by the respondent to evaluate the safety of fertilizers and supplements. It also relies on several pieces of evidence, including the letters of non-compliance and the affidavits and examinations of the

respondent's employees, to show that the respondent applies the Memorandum rigidly and has assigned it the value of a regulation allowing for no exceptions.

[89] The appellant also contends that the decisions on which the trial judge relies are not relevant, because the issues in those cases concerned whether the public authority had fettered the exercise of its discretionary power by applying a directive, whereas in this case the issue is whether a directive can impose a standard of conduct in the absence of statutory authorization. In the appellant's view, more relevant decisions can be found in *Dlugosz c. Québec (Procureur général)*, [1987] R.J.Q. 2312 and *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 194, in which the Court of Appeal of Quebec and the Federal Court of Appeal ruled that a directive should be deemed a regulation because it imposed standards of conduct.

[90] In my view, these arguments cannot succeed. There is no longer any doubt that an administrative decision maker may, through a directive, memorandum, interpretation guide or other similar text, indicate to citizens how it intends to exercise the discretionary power conferred on it by law, and at the same time guide the actions of its officers in exercising their duties. Such a practice is in fact often desirable, particularly in a technical field where it is difficult to define in a statute or even a regulation all the ways the power will be exercised. As long as these various instruments do not fetter the discretion of administrative decision makers and do not prevent them from considering the specific circumstances of the case, these tools will not be considered disguised attempts to impose a standard of conduct in the absence of authorizing legislation: see *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 at 6–7; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 32; *Commission scolaire francophone des*

Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment), 2023 SCC 31 at para. 93; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299; *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 at para. 28; *Thermophore v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*, 2007 FCA 198 at paras. 55–64. Ultimately, we must not lose sight of the fact that it will be up to the courts to determine whether the measures taken by the CFIA are reasonable, in light of the Regulations and the other legal and factual constraints upon it: see, by analogy, *CCFR* at paras. 70–71.

[91] The trial judge properly directed himself in law and did not err in applying the principles outlined above in this dispute. He noted that the purpose of the Memorandum itself was not to impose a standard of conduct on citizens, but merely to provide a guideline for application. He also considered the evidence and found that the CFIA inspector did not apply the standards in the Memorandum blindly; in fact, it appears that, before filing its application for judicial review, the appellant never questioned the maximum concentrations appearing in the Memorandum or argued that special circumstances justified diverging from them. Merely asserting that the CFIA inspectors claim to have followed the guidelines in the Memorandum or that its first provision states that it is a single source for the standards used by the CFIA is not sufficient to establish that the CFIA abdicated the discretion it is afforded in the Regulations or that it applied those standards blindly in exercising its duties. On the contrary, the evidence submitted by the appellant establishes that the Memorandum had the expected effect of increasing the level of consistency and foreseeability for citizens in the implementation of the Regulations.

[92] In light of the foregoing, I am of the opinion that the trial judge did not commit a reviewable error and that there is therefore no basis for accepting the appellant's arguments on this point.

VI. Conclusion

[93] For all of these reasons, I would dismiss this appeal, with costs to the respondent.

"Yves de Montigny"
Chief Justice

"I agree.
Nathalie Goyette J.A."

"I agree.
Gerald Heckman J.A."

Certified true translation
Vera Roy, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-17-24
STYLE OF CAUSE:	BIOGENIE CANADA INC. v. CANADIAN FOOD INSPECTION AGENCY AND ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF SASKATCHEWAN
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	MARCH 26, 2025
REASONS FOR JUDGMENT BY:	DE MONTIGNY C.J.
CONCURRED IN BY:	GOYETTE J.A. HECKMAN J.A.
DATED:	AUGUST 25, 2025

APPEARANCES:

Marc-André Gravel Guillaume Lemieux	FOR THE APPELLANT
Caroline Laverdière Thomas Swerdfager Mathieu Laliberté	FOR THE RESPONDENT
Barbara Mysko	FOR THE INTERVENER ATTORNEY GENERAL OF SASKATCHEWAN
Ryan L. Martin	FOR THE INTERVENER ATTORNEY GENERAL OF ALBERTA

SOLICITORS OF RECORD:

Gravel Bernier Vaillancourt, Avocats Québec, Quebec	FOR THE APPELLANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT
Ministry of Justice and Attorney General of Saskatchewan Regina, Saskatchewan	FOR THE INTERVENER ATTORNEY GENERAL OF SASKATCHEWAN
Minister of Justice and Solicitor General of Alberta Edmonton, Alberta	FOR THE INTERVENER ATTORNEY GENERAL OF ALBERTA