Court File No. T-169-23

FEDERAL COURT

BETWEEN:

FRIENDS OF THE EARTH CANADA, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., AND ENVIRONMENTAL DEFENCE CANADA INC.

APPLICANTS

- and -

ATTORNEY GENERAL, MINISTER OF HEALTH, AND LOVELAND PRODUCTS CANADA INC.

RESPONDENTS

RESPONDING MOTION RECORD (Rule 317)

May 26, 2023

ATTORNEY GENERAL OF CANADA
Department of Justice
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Per: Andrea Bourke / Renuka Koilpillai / Karen Lovell
Tel: 647-256-7471 / 416-458-5530 / 647-256-7527
Email: Andrea.Bourke@justice.gc.ca / Renuka.Koilpillai@justice.gc.ca / Karen.Lovell@justice.gc.ca

Solicitors for the Respondents, Attorney General of Canada and Minister of Health

TO: **FEDERAL COURT OF CANDA**
180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

AND TO: **Laura Bowman**
lbowman@ecojustice.ca
416-368-7533 ext 522

Bronwyn Roe
broe@ecojustice.ca
416-368-7533 ext 529

Ali Naraghi
anaraghi@ecojustice.ca
416-368-7533 ext 528

1910 – 777 Bay Street, P.O. Box 106
Toronto, ON M5G 2C8
Fax: 416-363-2746

Solicitors for the Applicants (Moving Parties),
Friends of the Earth Canada, David Suzuki Foundation,
Safe Food Matters Inc., and
Environmental Defence Canada

AND TO: **BORDEN LADNER GERVAIS LLP**
1900, 520 3rd Ave SW
Calgary, AB T2P 0R3

Karen Salmon / Loni da Costa
KSalmon@blg.com / LdaCosta@nlg.com
Tel : 403-232-9500
Fax : 403-266-1395

Counsel for the Respondent,
Loveland Products Canada Inc.

Court File No. T-169-23

FEDERAL COURT

BETWEEN:

FRIENDS OF THE EARTH CANADA, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., AND ENVIRONMENTAL DEFENCE CANADA INC.

APPLICANTS

- and -

ATTORNEY GENERAL, MINISTER OF HEALTH, AND LOVELAND PRODUCTS CANADA INC.

RESPONDENTS

MOTION RECORD INDEX

TAB 1

Court File No. T-169-23

FEDERAL COURT

BETWEEN:

FRIENDS OF THE EARTH CANADA, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., AND ENVIRONMENTAL DEFENCE CANADA INC. V. ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH, AND LOVELAND PRODUCTS CANADA INC.

APPLICANTS

- and -

ATTORNEY GENERAL, MINISTER OF HEALTH, AND LOVELAND PRODUCTS CANADA INC.

RESPONDENTS

AFFIDAVIT OF FATEMAH KHALFAN
(Affirmed May 26, 2023)

I, **FATEMAH KHALFAN**, Legal Assistant at the Department of Justice, of the City of Toronto, in the Province of Ontario, AFFIRM THAT:

1. I am a legal assistant employed with the Ontario Regional Office at the Department of Justice, working with ANDREA BOURKE (**"Ms. Bourke"**), counsel for the Respondents, the Attorney General and the Minister Of Health, in the above noted matter. It is in this capacity that I have knowledge of the matter herein deposed.

2. I am advised by Ms. Bourke and verily believe that on February 22, 2023, Ms. Bourke sent an email to counsel for the Applicants attaching a copy of the Certified Tribunal Record (the **"CTR"**) in this matter and the accompanying Certificate of Lisa Duncan dated February 9, 2023 (the **"Certificate"**). A copy of the CTR is attached as Exhibit "D"

to the affidavit of Charlotte Ireland dated April 28, 2023, contained in the Applicants' Motion Record. A copy of the Certificate is attached hereto and marked as **Exhibit "A"**.

3. I make this Affidavit in support of the Responding Motion Record and for no other or improper use.

AFFIRMED before me in the City of
Toronto, In the Province of Ontario

Commissioner for Taking Oaths

ADAM GILANI
LSO # 74291P

Fatemah Khalfan

EXHIBIT "A"

This is Exhibit "A" referred to in the Affidavit
of Fatemah Khalfan

Affirmed before me in the
City of Toronto, in the Province of Ontario,
this 26th day of May, 2023

Commissioner for Taking Oaths
ADAM GILANI
LSO # 74291P.

Court File No. T-169-23

FEDERAL COURT

BETWEEN:

FRIENDS OF THE EARTH, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., and ENVIRONMENTAL DEFENCE CANADA INC.

Applicants

- and -

ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH, and LOVELAND PRODUCTS CANADA INC.

Respondents

CERTIFICATE

I, Lisa Duncan, Director, Submission, Information Management and Business Analysis Division of the Pest Management Regulatory Agency ("PMRA") within Health Canada, certify that the enclosed documents, which are being transmitted via Titan Link, are true copies of the material that was considered by PMRA when it made the decision to renew the product registration for Mad Dog Plus (submission 2022-3929), as requested by the Applicants, subject to material that is protected by litigation and/or solicitor client privilege, which material Health Canada objects to producing.

Dated at Ottawa, this 9th day of February 2023.

Digitally signed by Duncan, Lisa
Date: 2023.02.09 16:21:54-05'00'
Foxit PDF Editor Version: 11.2.1

Lisa Duncan

TAB 2

PART I - OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. In the course of a challenge to the Pest Management Regulatory Agency's ("PMRA") decision to renew the registration for the pest control product "Mad Dog Plus," the Applicants seek broad disclosure encompassing PMRA's underlying review of the active ingredient glyphosate over a number of years. The issues raised in their motion record go well beyond the scope of this motion – and beyond the scope of the application itself – and the disclosure sought is beyond the proper scope of Rule 317. PMRA has provided all material that was before the decision-maker in relation to the decision to renew Mad Dog Plus. PMRA confirmed this in the certification accompanying the CTR, and counsel for the Attorney General of Canada ("AGC") reiterated this confirmation in two subsequent letters to the Applicants. This motion should be dismissed.

B. STATEMENT OF FACTS

i. Overview of the *Pest Control Products Act*

2. PMRA, acting on behalf of the Minister of Health ("Minister"), is responsible for the federal regulation of pest control products ("PCPs") in Canada in accordance with the *Pest Control Products Act* ("Act") and regulations thereunder.[1] The Act and regulations provide a detailed and transparent framework governing the use of all PCPs within Canada.

3. The Act prohibits the manufacture, possession, handling, storage, transport, import, distribution or use of a PCP unless the product is registered or otherwise authorized.[2] Contravention of any provision in the Act or regulations is a criminal offence punishable either on summary conviction or on indictment.[3]

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[1] *Pest Control Products Act*, SC 2002, c 28 [Act]

[2] Act, s 6(1)

[3] Act, s 6(9), s 69

4. An applicant seeking to register a new PCP or amend the existing registration of a PCP must submit an application.[4] PMRA is required to register or amend the registration if it considers that the health and environmental risks and the value of the product are "acceptable" after any required consultations and evaluations have been completed.[5] Subsection 2(2) provides that the risks of a PCP are "acceptable" if there is reasonable certainty that no harm to human health, future generations, or the environment will result from exposure or use of the product, taking into account its conditions or proposed conditions of registration.[6]

5. Subsection 8(1) requires PMRA to specify the period for which the registration or amended registration is valid, which period may be either finite or indefinite. The *Pest Control Products Regulations*, promulgated pursuant to section 67 of the Act, provide that PCP registrations are valid for five years, and may be renewed for additional terms not exceeding five years.[7]

6. Once a PCP is registered, there are several post-registration review mechanisms in the Act. PMRA may initiate a "re-evaluation" at any time if it considers that there has been a change in the information required or the procedures used for evaluating health or environmental risks or value since the PCP was registered.[8] In addition to this discretionary post-registration review, PMRA must initiate a re-evaluation of a PCP's registration no later than 16 years after the last major registration decision made in respect of that PCP.[9] PMRA also must initiate a "special review" if, at any time, the Minister has reasonable grounds to believe that the health and environmental risks of the PCP or its value are unacceptable.[10] A special review

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[4] Act, s 7

[5] Act, s 8(1)

[6] Act, s 2(2)

[7] *Pest Control Products Regulations*, SOR 2006-124, s 13, 16 [PCP Regulations]

[8] Act, s 16(1)

[9] Act, s 16(2)

[10] Unless the aspect of concern is included as part of an ongoing special review or re-evaluation, Act, s 17(7), s 17.1.

considers the aspect of concern of the PCP that prompted the special review.[11]

7. At the conclusion of a re-evaluation or special review, PMRA must confirm the registration if it determines that the health and environmental risks and the value of the pesticide are acceptable.[12] If PMRA does not consider the health or environmental risks to be acceptable, it must either amend the registration, if the risks would be acceptable after the amendment, or cancel the registration.[13]

8. Public consultation is required in respect of certain registration decisions (including where a new active ingredient is registered or a major new use for a registered PCP is approved), and during a re-evaluation or special review.[14] In these instances, PMRA publishes a proposed decision, along with reasons for the decision and a summary of any evaluation reports it prepared or considered.[15] The Minister must consider any comments received during the public consultation and the final decision must include a summary of the public comments received.[16] Where public consultation is required under the Act, any person may file a notice of objection within 60 days of the final decision.[17] PMRA must then either establish a panel to review the decision or provide written reasons to the objector indicating why it did not do so.[18]

9. No public consultation is required in respect of decisions to renew a registration pursuant to section 16 of the Regulations nor is PMRA required to provide reasons for renewal decisions. Notice of renewal decisions, including the updated validity period, are published on the public registry.[19]

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[11] Act, s 17

[12] Act, s 21(1)

[13] Act s 21(2)

[14] Act, s 28(1)(b) and (4)

[15] Act, s 28(2),(3)

[16] Act, s 28(4) and (5)

[17] Act, s 35(1)

[18] Act, s 35(3) and (5)

[19] Act, s 42(2)(h)

ii. The Regulation of Glyphosate

10. The Applicants' motion materials set out their understanding of the registration history of glyphosate, along with their concerns about the health and environmental risks of glyphosate, which concerns they have shared with PMRA in the course of PMRA's regulatory decision-making. The majority of this information is beyond the scope of both this motion and, in many cases, the underlying application (although the latter will be an issue to be argued before the Application Judge). The uncontested background facts are as follows:

(a) Glyphosate is an active ingredient that has been registered for use in Canada since 1970;[20]

(b) PMRA completed a cyclical re-evaluation of glyphosate, publishing a proposed re-evaluation decision for public consultation in 2015 and the final re-evaluation decision, which decision summarized the public comments and PMRA's responses to those comments, in 2017. That decision concluded that products containing glyphosate do not present risks of concern to human health or the environment when used according to the label instructions;[21]

(c) The Applicant, Safe Food Matters Inc ("SFM"), delivered a notice of objection in respect of the 2017 re-evaluation decision;[22]

(d) The Co-respondent, Loveland Products Canada Inc ("Loveland") submitted an application to renew the registration of Mad Dog Plus, a PCP containing glyphosate, on August 8, 2022 (Submission 2022-3929);[23]

(e) PMRA decided not to appoint a review panel in response to SFM's notice of objection to the final re-evaluation decision and provided SFM

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[20] Affidavit of Beatrice Olivastri affirmed May 4, 2023 [Olivastri Affidavit] at para 5, **Applicants' Motion Record [AMR], Tab 3, p 574**

[21] Proposed Re-evaluation Decision, PRVD2015-01 dated April 13, 2015; Final Re-evaluation Decision, RVD2017-01 dated April 28, 2017, CTR Documents, Ex D-1, D-2 to the Affidavit of Charlotte Ireland affirmed April 28, 2023 [Ireland Affidavit], **AMR, Tab 2D, pp 35-472**; see also: Affidavit of Mary Lou MacDonald affirmed May 3, 2023 [MacDonald Affidavit] at para 5, **AMR, Tab 4, p 1700**

[22] MacDonald Affidavit at para 5, **AMR, Tab 4, p 1700**

[23] Application for Renewal, CTR Documents, Ex D-4 to Ireland Affidavit, **AMR, Tab 2D, pp 477-478**

with its reasons for that decision. The reasonableness of that decision is pending before this Court in a separate application and PMRA delivered a CTR in respect of that decision;[24]

(f) Counsel for the Applicants wrote to PMRA in October, 2022 outlining its concerns regarding glyphosate and setting out their understanding of PMRA's regulatory responsibilities;[25]

(g) On December 22, 2022, PMRA granted Loveland's application to renew Mad Dog Plus;[26]

(h) In February 2023, PMRA responded to Ecojustice's correspondence concerning PMRA's general regulation of glyphosate. [27]

iii. The Notice of Application

11. In their Notice of Application, the Applicants challenge PMRA's decision in respect of Submission 2022-3929, namely the decision to renew the registration of Mad Dog Plus.[28] The Applicants allege that PMRA failed to comply with sections 6, 7, and 8 of the Act and section 16 of the Regulations in deciding to renew the Mad Dog Plus registration.[29] The Applicants assert that PMRA failed to consider newly published science on the human health and environmental risks of products containing glyphosate, such that it was unreasonable to renew the product.[30]

12. On February 23, 2023, PMRA provided all materials that were before the decision-maker regarding the renewal of Mad Dog Plus.[31] Lisa Duncan, the

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[24] MacDonald Affidavit at paras 5-10, **AMR, Tab 4, pp 1700-1701**

[25] Letter dated October 27, 2022 from Laura Bowman to Frederic Bisonette, CTR Documents, Ex D-5 to Ireland Affidavit, **AMR, Tab 2d, pp 479-491**

[26] Email to Registrant dated December 28, 2022, enclosing signed registration certificate dated December 22, 2022, CTR Documents, Ex D-13 to Ireland Affidavit, **AMR, Tab 2D, pp 504-505**

[27] Letter dated February 23, 2023 to Laura Bowman from Frederic Bisonnette, Ex C to Ireland Affidavit, **AMR, Tab 2C, pp 30-32**

[28] Notice of Application

[29] Notice of Application at para 4

[30] Notice of Application at para 5

[31] CTR Documents, Ex D to Ireland Affidavit, **AMR, Tab 2D**

Director of the Submission, Information Management and Business Analysis Division within PMRA certified that the CTR contained the material considered by PMRA when it made the decision to renew the product registration for Mad Dog Plus.[32]

13. The 14 documents in the CTR included the registrant's application for renewal, the proposed and final re-evaluation decisions for glyphosate dated April 3, 2015 and April 28, 2017 respectively, several internal PMRA memos, and the signed registration certificate, confirming renewal of the product with an expiry date of December 31, 2027.[33] As indicated in the certification and in two subsequent letters to the Applicants, these 14 documents were the only documents put before the decision-maker in respect of the challenged renewal decision.[34]

PART II - ISSUES

14. The sole issue in this motion is whether PMRA has fulfilled its obligation to produce documents in relation to its decision to renew Mad Dog Plus pursuant to Rule 317.

PART III - LAW AND SUBMISSIONS

A. RULE 317 IS NOT DOCUMENTARY DISCOVERY

15. Rule 317 of the *Federal Courts Rules* requires a decision-maker, upon request from a party, to produce only relevant documents on which the decision-maker relied. This Rule is a tool that facilitates disclosure, acting as a mechanism that allows applicants to obtain the evidentiary record that was before the administrative decision-maker.[35] Materials requested under the Rule are restricted to those which were before

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[32] Affidavit of Fatemah Khalfan affirmed May 26, 2023 [Khalfan Affidavit], **AGC's Responding Motion Record, Tab 1**

[33] CTR Documents, Ex D to Ireland Affidavit, **AMR, Tab 2D**

[34] CTR Certificate , Ex A to Khalfan Affidavit, **AGC's Responding Motion Record, Tab 1A;** Letters from the AGC, Ex F and I to Ireland Affidavit, **AMR, Tabs 2F, 2I, pp 560-561, 569-570**

[35] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 89 and 91 [*Tsleil-Waututh Nation*]

he decision-maker at the time they made the impugned decision "and nothing more."[36] The requested materials must be both relevant, and in the possession of the administrative decision-maker.[37] Rule 317 does not serve the same function as documentary discovery in an action and is not a fishing expedition.[38] It does not establish a requirement to produce all material.[39] Such a use of the Rule would be incompatible with the "summary nature of judicial review."[40]

16. Relevance is defined by the grounds of review in the notice of application.[41] These grounds are to be read holistically and practically for the purpose of understanding their "essential character."[42] Material is relevant if it may affect the reviewing Court's decision on the application.[43] Material is not relevant under Rule 317 if it "could be relevant in the hopes of later establishing relevance."[44]

17. The material requested under Rule 317 must have been before the decision-maker at the time they made the impugned decision.[45] The Federal Court of Appeal has held that "[a]ttempts in the first-instance reviewing court to file evidence that goes to the merits of the administrative decision and that was not before the

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[36] *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1232 at para 14 [*CCF*]; *Tsleil-Waututh Nation* at para 112

[37] *Tsleil-Waututh Nation* at para 107; *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455; *Democracy Watch v Canada (Attorney General)*, 2021 FC 1417 at para 15 [*Democracy Watch*]

[38] *Tsleil-Waututh Nation* at paras 108 and 115; *CCF* at para 14

[39] *Democracy Watch* at para 15

[40] *Access to Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at para 21 [*Access to Information Agency Inc*]

[41] *Tsleil-Waututh Nation* at para 109

[42] *Tsleil-Waututh Nation* at para 110 citing *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 50 and 102.

[43] *Tsleil-Waututh Nation* at para 109

[44] *Tsleil-Waututh Nation* at para 108, citing *Access to Information Agency Inc* at para 21

[45] *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41 at paras 24 and 29

administrative decision-maker must be rebuffed."[46] Refusing such evidence preserves the different roles that administrative decision-makers and reviewing courts have, which should not be confused.[47]

B. PMRA HAS PRODUCED ALL MATERIAL REQUIRED BY RULE 317

18. The Applicants' motion materials set out their understanding of the entire regulatory history of the active ingredient glyphosate, and outline their concerns regarding the regulation of glyphosate. These issues are well beyond the scope of this application, including:

(a) PMRA's statutory re-evaluation of the health and environmental risks of glyphosate, including the timing of that review. This re-evaluation occurred over a number of years, involved the review of hundreds of studies, was the subject of public consultation, and resulted in a final decision on April 28, 2017;

(b) Safe Food Matters', one of the Applicants, filed a notice of objection in relation to the glyphosate re-evaluation decision, the response to which is currently being challenged before this Court in a different application; and

(c) The exchange of correspondence between the Applicants and PMRA regarding PMRA's regulatory approach to glyphosate, which is not a decision at all, let alone one that could be subject to judicial review – it is simply an exchange with a stakeholder.

19. This application challenges PMRA's decision to renew a single PCP. As the Applicants' voluminous affidavit evidence confirms, PMRA does not conduct the same level of review in relation to renewal decisions as PMRA conducts in relation to registration decisions, re-evaluations and special reviews. Nor are renewal decisions subject to public consultation. Accordingly, the material before the decision-maker in relation to the decision at issue was more limited.

20. The question of whether the decision to renew Mad Dog Plus was

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[46] *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7

[47] *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17

reasonable based on the information before the decision-maker, including whether the decision-maker was required to perform a more detailed review prior to renewing the PCP, will be an issue for the Application Judge. In contrast, the question of whether PMRA has acted reasonably in relation to the registration of all products containing glyphosate will not be. No material in addition to the current CTR is required for the Court to answer the narrow question put to it. Accordingly, the material sought by the Applicants will not affect the Court's decision on the application.

21. The Applicants' motion seeks to blur the line between PMRA as an agency with expertise engaged in its broader ongoing regulatory oversight role and PMRA as decision maker engaged in the specific regulatory process of renewing a single PCP. As the re-evaluation decision demonstrates, PMRA considers voluminous materials in relation to a PCP during the initial registration and the re-evaluation process. PMRA also monitors PCPs in cooperation with other regulators as part of its ongoing regulatory oversight and can initiate a special review at any time if there is an area of concern.

22. Requiring PMRA to produce all records within its possession concerning the health and environmental risks of glyphosate, irrespective of whether the information from previous foundational decisions (such as the re-evaluation) or from its broader regulatory oversight activities were expressly in front of the decision-maker for the particular decision at issue is impractical and judicially unmanageable. Such relief ignores the summary nature of judicial review and effectively invites the Court to step into the role of the administrative decision-maker. PMRA has met its obligation pursuant to Rule 317. This motion should be dismissed.

PART IV - ORDER SOUGHT

23. The AGC asks that the Applicants' motion for further disclosure be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 26th day of May, 2023.

Karen Lovell / Andrea Bourke / Renuka Koilipllai

PART V - LIST OF AUTHORITIES

1. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128
2. *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1232
3. *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455
4. *Democracy Watch v Canada (Attorney General)*, 2021 FC 1417
5. *Access to Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224
6. *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250
7. *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41
8. *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149
9. *Bernard v Canada (Revenue Agency)*, 2015 FCA 263