Federal Court Cour fédérale

Date: 20240604

Docket: T-169-23

Ottawa, Ontario, June 4, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

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

Applicants/
Responding Parties

and

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

Respondents/
Responding Parties

and

CROPLIFE CANADA

Proposed Intervenor

ORDER

[1] CropLife Canada ("CropLife"), the proposed intervener, has brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules* (the "*Rules*") for an Order granting it leave pursuant to Rules 109 of the *Rules* to intervene in this proceeding. Croplife seeks leave:

a) to file a memorandum of fact and law of not more than 25 pages;

b) to make oral submissions of not more than 60 minutes at the hearing of the application in this proceeding (the "Application"); and,

c) in the event that leave to intervene is granted, an Order that there shall be no costs awarded against CropLife regardless of the outcome of the proceeding.

[2] The Applicants take the position that CropLife's proposed participation will not be useful in relation to the issues raised in the Notice of Application, will cause prejudice and delay in the proceeding more generally. Their position is that granting CropLife leave to intervene is not in the interests of justice.

[3] The Respondents, the Attorney General of Canada and the Minister of Health (the "Canada Respondents") do not oppose CropLife participating in this proceeding. The Canada Respondents submit that CropLife offers a unique perspective and has assisted the Court in previous judicial review applications. Given the relatively narrow nature of the issue in this application, they propose that CropLife's participation be limited to a 20-page memorandum of fact and law and 30 minutes of oral argument, the latter of which would be subject to the discretion of the hearing judge.

[4] The Respondent Loveland Products Canada Inc. ("Loveland") supports CropLife's motion for leave to intervene.

[5] In reply, CropLife argues that there is no basis to deny it the leave to intervene in this case. CropLife argues that the Court has recently granted it leave to intervene in two analogous applications. These applications concerned decisions made by the PMRA under the *Pest Control Product Act* (the "*Act*"). In both matters, CropLife sought, and was granted, leave to provide an industry perspective on the practical effects that would arise from the Applicants' proposed interpretation of the *Act*.

[6] For the reasons that follow, CropLife's motion for leave to intervene in this proceeding is dismissed.

I. Rule 109 and the Law Applicable to a Motion for Leave to Intervene

[7] Rule 109 is the operative Rule on this motion. The Rule reads as follows:

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall:	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	a) précise les noms et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	a) la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[8] The Federal Court of Appeal's decision in *Le-Vel Brands, LLC v. Canada (Attorney General),* 2023 FCA 66 (CanLII) (*"Le-Vel"*) is the leading case with respect to the test applicable on a motion for leave to intervene pursuant to Rule 109 of the *Rules*.

[9] The applicable test on a motion for leave to intervene pursuant to Rule 109 of the *Rules* was explained in *Le-Vel* as follows:

> [19] Overall, what is the test for intervention in this Court? As mentioned above, it consists of three elements, usefulness, genuine interest, and consistency with the interests of justice:
>
> I. Will the proposed intervener make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:
>
> - What issues have the parties raised?
> - What does the proposed intervener intend to submit concerning those issues?
> - Are the proposed intervener's submissions doomed to fail?
> - Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills, and resources and will dedicate them to the matter before the Court?
>
> III. Is it in the interests of justice that intervention be permitted? A flexible approach is called for. The list of considerations is not closed but includes at least the following questions:
>
> - Is the intervention consistent with the imperative in Rule 3 that the proceeding be conducted "so as to secure the just, most

> expeditious and least expensive outcome"? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?
>
> - Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?
>
> - Has the first-instance court in this matter admitted the party as an intervener?
>
> - Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?
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> *(Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour),* 2022 FCA 67 at para. 10; see also *Canada (Citizenship and Immigration) v. Canadian Council for Refugees,* 2021 FCA 13, 481 C.R.R. (2d) 234, *Alliance for Equality of Blind Canadians v. Canada (Attorney General),* 2022 FCA 131 and *Canada (Environment and Climate Change) v. Ermineskin Cree Nation,* 2022 FCA 36.)

[10] *Le-Vel* emphasizes that the proposed intervener must, as set out in Rule 109, show how its participation will assist the Court in the determination of the legal issues in the proceeding (*Le-Vel,* at para. 15). As guided by the Federal Court of Appeal, the Court's analysis of a party's request for leave to intervene must be focused, firstly, on the legal issues before the Court in the particular proceeding and how the proposed intervener's representations would be useful to the Court with respect to those issues and not on new issues. Usefulness is central to Rule 109 (*Le-Vel,* at para. 15; (*Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour),* 2022 FCA 67 (CanLII), at para. 9 ("*Right to Life"*); *Canada (Attorney General) v Kattenburg,* 2020 FCA 164 (CanLII), at para. 8 ("*Kattenburg"*).

[11] As was held in *Le-Vel* at para. 15, “If a proposed intervener cannot persuade the Court that its participation is useful to the actual debate before the Court, the Court is legally bound to dismiss the motion for leave to intervene.”

[12] Although it may be that a moving party may be interested in the development of the law because it and others like it might be affected by the Court’s decision in a proceeding, that type of interest without more is insufficient to meet the test for intervention (*Right to Life*, at para. 24). Similarly, interventions that seek to speak to wider policy issues that surround the broader issues framed by a Notice of Application but do not assist with respect to the specific issues in the litigation do not meet the test for intervention (*Right to Life,* at para. 23). Those interventions are doomed to fail because they are irrelevant to the issues the Court must determine (*Thompson v Canada*, 2024 FC 215 (CanLII), at para. 28; *Kattenburg*, at para. 9(4)).

[13] It is trite law that the grounds alleged in a Notice of Motion as the basis upon which the relief sought on a motion ought to be granted must be substantiated by the evidence filed on the motion as well as supported by the law relied upon. Evidence that fails to substantiate the grounds alleged leads to the conclusion that the moving party has not met its burden to establish its case by the preponderance of admitted evidence and can’t justify the Order being granted (*Avon v R.*, 1971 CanLII 133 (SCC), [1971] SCR 650, at page 655; *R. v Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 SCR 449, at para. 37). Similarly, a failure to meet the legal requirements for an Order to issue must lead to the dismissal of the motion.

II. **The Notice of Application and the Legal Issues in the Proceeding**

[14] The Applicants commenced this proceeding way of Notice of Application issued on January 20, 2023.

[15] The Applicants seek the judicial review of the Respondent Minister of Health's ("Minister") decision through his delegate the Pest Management Regulatory Agency (the "PMRA"), to renew the registration of a product named Mad Dog Plus ("the Product") containing the active ingredient glyphosate (present as isopropylamine salt) manufactured by the Respondent Loveland for intended agricultural, industrial, recreational and forestry uses.

[16] The Product was registered by the PMRA on April 21, 2011, and was renewed in 2017 for a period of five years ending on December 31, 2022.

[17] The PMRA renewed the registration for the Product on December 22, 2022, following Loveland's application for the registration's renewal. The Product is currently registered until December 31, 2027.

[18] The Applicants allege that they sent a letter to the PMRA on February 17, 2022 that outlined some of the new science since 2017 on the risks of glyphosate. This letter allegedly asked the PMRA to consider new science relevant to their 2017 notices of objection to the Product's renewal to reconsider its response to the notices of objection. The PMRA declined to further review these issues with the Applicants.

[19] The Applicants allege that on October 27, 2022, a coalition of organizations including the Applicants submitted another letter to the PMRA requesting that it consider up-to-date science in evaluating glyphosate registration renewals and requesting that no registrations be renewed until the new science has been reviewed. The PMRA acknowledged the letter but did not provide a substantive response to it. The Product was renewed after the letter was received.

[20] The Applicants plead the following issues in their Notice of Application:

1. The PMRA's decision to renew and amend the Product's registration was unreasonable because the PMRA acted in a manner that is contrary to the requirements of section 7 of the *Act* and to sections 6, 8 and 16 of the *Pest Control Products Regulations* (the "*Regulations"*) by:

    a) not considering, nor requiring Loveland to provide, complete and up-to-date information on potential environmental and health risks from products containing glyphosate, including but not limited to current published science, new registrant-led science and incident reports;

    b) treating the renewal of the Product as an administrative process and did not require the Loveland to submit new data on the potential impacts of its Product; and,

    c) not updating its human health and environmental risk assessment of the Product.

2. The PMRA's decision to renew the registration was unreasonable and is non-compliant with the *Act* and the *Regulations* because the PMRA lacked reasonable certainty that no harm to human health and the environment would occur upon the renewal of the Product due to not having considered up-to-date science and other evidence.

[21] The issue raised by the Applicants, stated simply, is whether the PMRA's interpretation of the section 7 of the *Act* and of sections 6, 8 and 16 in the context of an application for the renewal of Products' registration is reasonable.

III. **The Proposed Intervenor**

[22] The following is a summary of the manner in which CropLife described itself in its evidence.

[23] CropLife is a trade association established in 1952 that represents the manufacturers, developers, and distributors of plant science innovations, including plant biotechnology products and pest control products, for use in agriculture, urban and public health settings. CropLife's members include a wide variety of industry participants regulated under the *Act* including developers, manufacturers, and distributors, each of which have their unique perspective represented by CropLife. CropLife's main purpose is to advance the collective interests of its members and the users of pest control products and plant biotechnology in Canada.

[24] CropLife regularly engages with the PMRA to consult and advocate on behalf of its members and to support a reasonable and science-based regulatory environment. Once CropLife's members develop an industry-wide position on issues of importance, CropLife is designated by its members to be the primary industry advocate of these positions to government and the general public. CropLife's role as the unified voice for the vast majority of regulated parties under the *Act* and its long-standing working relationship with national-level trade associations representing pest control product users have led the PMRA to proactively engage with it as a key industry stakeholder.

[25] CropLife is a member of the PMRA's Transformation Steering Committee and has recently participated and continues to participate as a member of a number of its technical working groups ("TWGs"), including PMRA's Water Monitoring TWG, Transparency TWG, Modernized Business Process TWG, IT Modernization TWG, Maximum Residue Limit, TWG, and Pesticide Use Information TWG. CropLife is also a member of the PMRA's Pest Management Advisory Committee that reports directly to the Minister of Health.

[26] CropLife has previously been granted leave to intervene in *David Suzuki Foundation v. Canada (Health)*, T-784-19, and in *Safe Food Matters Inc. v. Canada (Attorney General)*, docket nos.: T-121-22, T-956-21 and T-1412-21, on conditions as set out in the Orders granting them leave to intervene

IV. **The Proposed Intervenor's Perspective**

[27] CropLife's perspective is that the Applicants' interpretation of the *Act* and the *Regulations*, which would compel the PMRA to request additional data and conduct a full reassessment of risk at each renewal, undermines the PMRA's discretion to establish administrative processes that efficiently meet its statutory objectives, and will instead threaten the objectives set out in the *Act*.

[28] CropLife believes that this proceeding raises serious implications around pesticide regulation that go well beyond glyphosate. CropLife says that it will, as an intervenor, be able to speak to these concerns from the perspective of its members.

[29] CropLife also believes that the Court's judgment in this proceeding will have a direct impact on the integrity of the renewal process established by the PMRA and future renewal

decisions concerning CropLife members, both of which are of significant importance to the industry.

[30] CropLife believes that the impact of the Applicants' proposed interpretation would include significantly increased regulatory burden not contemplated by the *Act* or *Regulations* and administrative delay potentially leading to the expiry of pest control product registrations. This poses economic risks to growers left without access to suitable alternative pest control measures, risks associated with unforeseen disruptions to Canada's food supply, increased regulatory risk undermining willingness from manufacturers to bring new innovative pest control products to market in Canada, and health and environmental risks associated with the rapid disposal of existing product.

[31] CropLife argues that there is no party or intervener in these proceedings that represents the interests, and offers the unique perspective, of the pest control product industry as a whole. It also argues that the Respondent Loveland, a manufacturer of agricultural pest control products, cannot speak to the impact the Applicants' proposed interpretation will have on distributors of these products, or on manufacturers of non-agricultural pest control products. CropLife represents the totality of the pest control industry including manufacturers, developers and distributors of agricultural, industrial and household pest control products and regularly engages with end-users, including grower groups, relative to pest control regulatory issues.

V. **What the Proposed Intervenor seeks to do as an Intervenor**

[32] CropLife seeks to intervene because, it argues, without its participation this Court will be deciding on the interpretation of the *Act* and the legality of the PMRA's renewal process in the

absence of the participation of the pest control product industry at large and without the benefit of CropLife' significant practical experience working within the relevant statutory framework.

[33] If granted leave to intervene, CropLife argues that it would be in a position to assist the Court by drawing on its experience and that of its members and users of pest control products in presenting a unique perspective on the practical implications that would arise from the Applicants' proposed interpretation of the *Act* and its *Regulations*.

[34] If granted leave to intervene, CropLife would make submissions on the following topics, each being refined under the five sub-headings considered later in this Order:

a) the pest control products industry's perspective on the important distinction between registration, renewal, re-evaluation and special review decisions

b) the industry perspective on issues which give rise to very real and serious practical consequences for CropLife's members, agricultural growers, and other users of pest control products;

c) the untenable nature of the Applicants' proposed interpretation of the *Act* and its *Regulations*;

d) the industry perspective on the important distinction between registration, amendment, renewal, re-evaluation and special review decisions and how the Applicants' approach is inconsistent with the regulatory scheme established for each of these processes;

e) the Applicants' attempt through their suggested interpretation of the *Act* and the *Regulations* to create a new form of post-market risk assessment not contemplated by the *Act* but instead conducted by PMRA as part of other regulatory processes

f) why the Applicants' position could lead to delay and the unanticipated expiry of pest control product registrations. This in turn could lead to serious consequences for the industry and users of pest control products.

g) why there is no legislative basis for the Applicants' submission that receipt of scientific literature from a third party by the PMRA requires it to suspend all renewals of glyphosate products until it completes a full reassessment of risk.

h) If granted leave to intervene, CropLife would submit the industry view on why deference is owed to the PMRA's interpretation of the *Act* and *Regulations* and the processes it sets to implement their objectives.

[35] On the whole, CropLife argues that its submission will be useful to the Court because CropLife's experience and practical industry perspective will help the Court assess the interpretation advanced by the Applicants. CropLife will address issues of central importance, including the governing statutory scheme and principles of statutory interpretation that are key considerations in assessing the reasonableness of the PMRA's decision.

VI. **Analysis**

[36] Motions for leave to intervene turn on their facts and submissions and must be judged on their own merits (*Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FC 915 (CanLII), at para 47). That the proposed intervenor has been granted leave to intervene in other proceedings is not binding on the Court on this motion. Those motions for leave to intervene were determined prior to the release of the *Le-Vel* decision in March 2023 and the binding nature of the threshold issue of intervenor usefulness articulated therein. Those prior decisions granting CropLife leave to intervene are of no assistance to the proposed intervenor on this motion.

[37] CropLife submits that the Court may weigh its proposed intervention's usefulness, its genuine interest, and the interests of justice as it sees fit in light of the circumstances and facts of this proceeding. I disagree. CropLife must as a threshold issue demonstrate to the Court that its proposed intervention would be useful and would assist the Court in determining the factual and legal issues raised by the parties in their pleadings. Absent such demonstration of usefulness, I am bound to dismiss CropLife's motion (*Le-Vel*, at para 15).

[38] CropLife argues that its submissions will be useful to the Court in determining the legal issues raised by the Applicants in their Notice of Application.

[39] The legal issues before Court as framed by the Notice of Application in this proceeding are narrow. The true legal question before the Court is whether the PMRA's interpretation of the section 7 of the *Act* and of sections 6, 8 and 16 of the *Regulations* in the context of Loveland's application for the renewal of the Products' registration is reasonable.

[40] The legal question before the Court requires consideration of what the PMRA did and why in light of the statutory environment in which it was operating at the time of its decision. This requires the Court to examine the PMRA's decision in light of the documents before it at the time of its decision and whether its decision is consistent with the text, context and purpose of the provisions at issue (*Vavilov*, at para. 120). As noted by Justice Stratas in *Le-Vel*, at para 17, a reviewing court engaged in a reasonableness review will not develop its own interpretation of the *Act* and of the *Regulations* and use it as a yardstick to see whether the PMRA's interpretation measures up, nor will it impose its interpretation over that of the PMRA (*Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; see also *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 31-33).

[41] Keeping the purpose and function of judicial review front of mind on this motion makes it clear that the Court cannot not adopt the Applicants' particular interpretation of section 7 of the *Act* and of sections 6, 8 and 16 of the *Regulations* and impose it upon the PMRA through its judgment. The same can be said for any statutory interpretation the proposed intervenor may suggest the Court should consider in its reasonableness review, regardless of whether it is merely

contra the Applicants' suggested interpretation as its submissions suggest or is supporting the interpretation the PMRA has followed in its renewal process of the Product.

[42] CropLife argues that its proposed submissions would be useful because they would provide the pest control industry's perspective on:

a) the important distinction between registration, amendment, renewal, re-evaluation and special review decisions;

b) the practical implications of the Applicants' approach to the renewal procedures;

c) the lack of any obligation on the PMRA to suspend the renewal process upon receipt of public submissions; and,

d) on the expertise of the PMRA.

[43] The submissions contemplated in item a) above, are more developed in CropLife's written representations and are stated being to allow the Court to appreciate the industry perspective on the PMRA's approach to renewals as understood within the entire context of the scheme of the *Act* and the *Regulations* as a whole. These submissions are irrelevant to the legal issues set out in the Notice of Application. The pest control industry perspective on how PMRA approaches renewals under the *Act* and the *Regulations* is far too broad to be helpful when the issues before the Court deal with a specific renewal that does not involve CropLife at all.

[44] CropLife suggests that it will be able to explain the history of the regulatory provisions relating to renewals and how PMRA's policies and practices on renewal are consistent with the *Act*'s requirements because it has "on the ground" experience that will assist the Court in understanding the practical steps taken in relation to each regulated process. These submissions are irrelevant to the legal issues set out in the Notice of Application also. There are no "practical steps", PMRA practices of PMRA policies raised in the Notice of Application other than as a

described document in connection with a Rule 317 request by the Applicants. There is also no evidence in the record before me that any party to the application has raised any of these issues. Submissions on these issues would not be helpful to the Court in resolving the issues raised in the Notice of Application.

[45] The submissions contemplated under item b) are proverbial “slippery slope” arguments that insist that a chain reaction resulting in undesirable ends would follow the acceptance of the Applicants’ proposed interpretation of the *Act* and the *Regulations*. The Applicants’ proposed interpretation of the *Act* and of the *Regulations* is not an issue in this proceeding; whether the PMRA made an unreasonable decision to renew the Product’s registration in light of its interpretation of the *Act* and of the *Regulations* is at issue. These intended submissions miss the mark and are not demonstrated by CropLife to be helpful to the Court in deciding the issues at hand in this proceeding.

[46] The submissions under item c) are intended to show the Court why there is no basis in the *Act* or in the *Regulations* to support the argument that the PMRA is or was required to suspend all renewals of glyphosate products until it had completed a full reassessment of risk after it received scientific literature from a third party. The Applicants have not raised a suspension of renewals of glyphosate products as an issue in the Notice of Application. The sole mention of any suspension period in the Notice of Application is alternative sought Order in the Applicants’ prayer for relief. The suspension period referred to by the Applicants is in the context of the remedy sought and is wholly disconnected from the notion of suspension triggered by the receipt of public submissions. The intended submissions are unrelated to the issues raised in the Notice of Application.

[47] Finally, the submissions under item d) are intended to provide the industry view on why deference is owed to the PMRA interpretation of the *Act* and *Regulations* and the processes it sets to implement their objectives. These intended submissions are irrelevant to the issues before the Court. As noted by Justice Brown in *Safe Food Matters Inc. v. Canada (Attorney General*), 2023 FC 1471 (CanLII), at para 99, "[…] the Court also owes deference to the PMRA's interpretation of its home statute for the policy enunciated by the Supreme Court in *Edmonton East*, at paragraph 22". Deference to the PMRA's interpretation of its home statue and regulations is mandated by law within the limits circumscribed by jurisprudence. Whatever the pest control industry's view of the reasons for which the Court should defer to the PMRA interpretation of its home statute and associated regulations is irrelevant to this issue.

[48] The proposed intervenor has not persuaded the Court that its intended submissions and participation would be helpful to the Court in resolving the issues raised in the Notice of Application that form the actual debate before the Court. The Court is therefore legally bound to dismiss CropLife's motion for leave to intervene (*Le-Vel*, at para 15).

[49] Considering that the proposed intervenor has not met the threshold issue of usefulness and that its motion must be dismissed as a result, the Court does not need to consider whether CropLife has a genuine interest in this proceeding and whether permitting it to intervene in the proceeding would be consistent with the interests of justice.

THIS COURT ORDERS that:

1. The proposed intervenor CropLife Canada's motion for leave to intervene in this proceeding is dismissed.

2. Neither the Applicants nor the Respondents have not sought their costs of this motion. No costs are awarded on this motion.

"Benoit M. Duchesne"
Associate Judge