



Issue Date: October 14, 2022
Citation: *FCA Canada Inc. v. Canada (Environment and Climate Change)*, 2022 EPTC 9
EPTC Case Nos.: 0027-2021 to 0071-2021
Case Name: *FCA Canada Inc. v. Canada (Environment and Climate Change)*
Applicant: FCA Canada Inc.
Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 15 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA") of Administrative Monetary Penalties issued under s. 7 of EVAMPA for violations of section 153(1)(g) of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

Heard: September 14, 2022, by videoconference

Appearances:

Parties

FCA Canada Inc.

Minister of Environment and
Climate Change Canada

Counsel

Rosalind H. Cooper

James Stuckey

DECISION DELIVERED BY:

PAUL MULDOON

Overview

[1] FCA Canada Inc., previously known as DaimlerChrysler Canada Inc. (“Applicant” or “FCA”), imports vehicles for sale in Canada with a National Emissions Mark applied. This triggers certain requirements with respect to record keeping and production in order to allow public authorities to determine regulatory compliance with various emissions and performance-based requirements for vehicles and engines.

[2] The Applicant was subject to an enforcement action from Environment and Climate Change Canada (“ECCC” or “the Minister”) under the *Environmental Violations Administrative Monetary Penalties Act*¹ (“EVAMPA”) when certain information was requested by way of a Ministerial Demand Letter concerning the subject vehicle under s. 153(1)(g) of the *Canadian Environmental Protection Act, 1999*² (“CEPA”). ECCC submits that the records were not produced by the Applicant in full within the prescribe timelines. Some of the records were maintained by a supplier of the Applicant, Cummins Inc. (“Cummins”) based in the United States (“U.S.”).

[3] ECCC issued Notices of Violation to FCA for each business day for a 47-day period from June 15, 2021 to August 17, 2021 inclusive. Each Notice of Violation was for \$1000 for one day of violation. However, ECCC conceded to dismissing four Notices of Violation dated June 15, 2021, June 16, 2021, June 17, 2021 and June 18, 2021. These written reasons pertain to the remaining Notices of Violation.

[4] ECCC submits that the elements of the violations have been established and no defences are available to the Applicant.

[5] The Applicant submits that ECCC has not established the elements of the violations, that it is not responsible for the records within the control of a third party, that there has been an abuse of process and a breach of procedural fairness.

[6] For the reasons below, the Tribunal finds that the ECCC has established the elements of the violations. The Tribunal finds that the defences submitted by the Applicant do not apply in the circumstances of this review.

¹ [Environmental Violations Administrative Monetary Penalties Act](#), S.C. 2009, c. 14, s. 126.

² [Canadian Environmental Protection Act, 1999](#), S.C. 1999, c. 33.

Background

[7] The parties submitted an agreed statement of facts in a document dated June 21, 2021. The agreed statement of facts provides a background to the factual basis of this review. Without making any material changes to the content, the chronology of events is summarized in the following paragraphs. The chronology is also summarized in Appendix B.

[8] The Applicant sells various trucks and vehicles in Canada. FCA Canada's registered office is located in Windsor, Ontario.

[9] In June 2003, the Applicant applied for authorization to apply the National Emissions Mark ("NEM") to various classes of vehicles and engines. The application for NEM authorization states that the records referred to in s. 38 of the *On-Road Vehicle and Engine Emission Regulations* ("the Regulations") will be maintained at an address in Windsor, Ontario.

[10] On July 2, 2003, the Applicant obtained Ministerial Authorization to use the NEM pursuant to section 7 of the Regulations. The authorization noted that FCA is required to advise ECCC of any changes to information provided in the application.

[11] The Applicant is the importer of record for 2019 Ram 2500 vehicles of different trims (versions of the same model) into Canada. Among these vehicles is a 2019 Ram 2500, vehicle identification number ("VIN") 3C6MR5BL0KG722120 ("Subject Vehicle") which had a NEM and a U.S. Environmental Protection Agency ("EPA") vehicle emission control information label applied.

[12] By way of letter dated February 24, 2020, ECCC Transportation Division made a request for evidence of conformity in relation to the Subject Vehicle. The Applicant responded on March 16, 2020, seeking additional time to respond, given the declaration of the COVID-19 pandemic at that time.

[13] Certain records that were part of the request from ECCC were in the possession of a third party, Cummins Inc. ("Cummins"), an engine manufacturer in the U.S. Cummins is the holder of the U.S. EPA vehicle emission Certificate of Conformity for the Subject Vehicle.

[14] The Applicant advised ECCC Transportation Division, by letter dated March 30, 2020, that it had reached out to Cummins to advise them of the requests from ECCC and to authorize direct communications between ECCC and Cummins for any requested records.

[15] On October 1, 2020, a Ministerial Demand Letter was issued by ECCC Enforcement Branch to FCA, pursuant to s. 219 of the CEPA, to provide records for the purposes of verifying regulatory compliance for the Subject Vehicle. The Minister Demand

Letter provided a deadline of December 4, 2020, for the provision of the requested records.

[16] By December 2, 2020, ECCC had received records from the Applicant via email, as well as records directly from Cummins by way of a shared drive hosted by McMillan, the agent for Cummins, in response to the Ministerial Demand Letter.

[17] On May 13, 2021 (referenced in the Notices of Violation as May 11, 2021), Officer Vincent Szeto of ECCC Enforcement Branch sent a follow-up request to the Applicant for certain records that had been requested in the Minister Demand Letter but that, in the assessment of ECCC, had not been received, and set a deadline of June 18, 2021 for receipt of those records.

[18] On June 15, 2021, the Applicant was contacted by ECCC Enforcement Branch indicating that it had not received a response by June 14, 2021.

[19] Some additional information was provided to ECCC directly by Cummins and was received by ECCC Enforcement by the June 18, 2021 deadline.

[20] ECCC Enforcement confirmed on June 21, 2021 to the Applicant that the information received from Cummins would be reviewed and that, if follow-up was required, ECCC Enforcement would contact the Applicant. There were no further communications from ECCC Enforcement until August 4, 2021, when ECCC Enforcement requested a meeting with FCA and proposed August 18, 2021 as the meeting date.

[21] At a meeting on August 18, 2021, ECCC Enforcement informed FCA that it intended to issue Notices of Violation for the period from June 15, 2021 to August 17, 2021.

[22] In the assessment of ECCC Enforcement the following records were not received in full by June 14, 2021 with respect to the information requested in the October 1, 2020 Ministerial Demand letter. According to ECCC, the documents not obtained as requested and stated in the Notices of Violation include: Items 3(a)(ii), (f), (g), & (h) and more specifically:

3. Information relating to the sample test vehicle in ECCC's possession:

a. Complete evidence of conformity to satisfy the requirements of subsection 35(1) of the On-Road Vehicle and Engine Emission Regulations (SOR/2003-2), including:

ii. A copy of all of the records submitted to the EPA in support of the application for the EPA certificate in respect of the above referenced vehicle and any application for an amendment to that EPA certificate and any records submitted to the EPA to maintain that EPA certificate. - This is

inclusive of all versions of the certificate applications and records (i.e. U.S. EPA Part 1, Part 2, associated Common Sections and Running Changes)

f. Emission-related PCM Control Strategies Documents

g. Any additional information exchanges (received and sent) with United States Regulators (U.S. Environmental Protection Agency, the U.S. Department of Justice and California Air Resources Board) in relation to the 2019 Ram 2500 and 3500 with the Cummins 6.7L Turbo Diesel engine

h. Any information about the various available emission-related module calibrations since its introduction to the market and include a summary of the modifications between each revised calibration.

[23] Pursuant to ss. 6 and 10(1) of the EVAMPA, Enforcement Officer Vincent Szeto issued Notices of Violation for the period from June 15 to August 17, 2021, citing contraventions of s. 153(1)(g) of CEPA with respect to the Subject Vehicle. They were delivered to FCA by courier on August 18, 2021.

Relevant Legislation and Regulations

[24] One of the key legislative provisions relevant to this review is s. 153(1)(g) of CEPA which reads as follows:

153 (1) No company shall apply a national emissions mark to any vehicle, engine or equipment, sell any vehicle, engine or equipment to which a national emissions mark has been applied or import any vehicle, engine or equipment unless

...

(g) records are maintained and furnished in the prescribed form and manner in relation to the design, manufacture, testing and field performance of the vehicle, engine or equipment, for the purpose of

(i) enabling an enforcement officer to determine whether the vehicle, engine or equipment conforms to all prescribed standards applicable to it, and

(ii) facilitating the identification and analysis of defects referred to in subsection 157(1); and

[25] The relevant sections of EVAMPA include:

7 Every person, ship or vessel that contravenes or fails to comply with a provision, order, direction, obligation or condition designated by regulations made under

paragraph 5(1)(a) commits a violation and is liable to an administrative monetary penalty of an amount to be determined in accordance with the regulations.

11 (1) A person, ship or vessel named in a notice of violation does not have a defence by reason that the person or, in the case of a ship or vessel, its owner, operator, master or chief engineer

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

20 (1) After giving the person, ship or vessel that requested the review and the Minister reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for the person, ship or vessel and the Minister to make oral representations, the review officer or panel conducting the review shall determine whether the person, ship or vessel committed a violation.

(2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.

(3) If the review officer or panel determines that the penalty for the violation was not determined in accordance with the regulations, the review officer or panel shall correct the amount of the penalty.

[26] Other relevant provisions with respect to the legislation and regulations are in Appendix A to this Decision.

Issues

[27] ECCC submits that the only issue is whether the violations were committed.

[28] The Applicant submits that the issues in this review are:

1. Did ECCC discharge its onus in establishing that the Applicant committed violations of section 153(1)(g) of the CEPA?

2. Is the Minister's interpretation of section 153(1)(g) contrary to the principles of statutory interpretation?

3. Did ECCC breach its duty of procedural fairness owed to the Applicant?

4. Does the defence of abuse of process apply in the particular circumstances of this case?

[29] The Applicant does not contest the amount of the penalty, if held to be valid, hence, I will not address whether the penalty was properly calculated.

[30] The Tribunal will review each issue as identified by the Applicant. First, however, the Tribunal will consider two preliminary matters: (i) whether the four Notices of Violation bearing incorrect dates should be dismissed and (ii) whether the Tribunal can consider a breach of s. 219 of CEPA.

Preliminary matters

[31] There are two preliminary matters raised in this review. First, ECCC conceded that certain violations alleged in four of the Notices of Violation have not been established. Second, the Applicant submits the Notices of Violation in this review do not pertain to violations with respect to CEPA.

[32] ECCC concedes, and does not challenge the dismissal of, four Notices of Violation issued pursuant to mistaken dates owing to pandemic-related office closures. The Notices of Violation incorrectly refer to the May 11, 2021 letter and the deadline of June 14, 2021, and the continuing violation was assessed to have commenced as of June 15, 2021.

[33] ECCC also submits that the Applicant also contravened s. 219(2) by not furnishing the requested records within the reasonable timeframes provided by the enforcement officer.

[34] FCA, as the Tribunal understands its submissions, does not oppose dismissing the Notices of Violation incorrectly identified by ECCC.

[35] The Applicant submits that, contrary to the ECCC's submissions, there is no issue concerning s. 219 of CEPA as there is no allegation of non-compliance in the Notices of Violation with respect to this provision.

Analysis and Findings on the Preliminary matters

(i) Notices of Violations that were conceded by the Respondent

[36] The Respondent concedes and does not challenge the review of four Notices of Violation issued pursuant to mistaken dates. ECCC explains that a Ministerial Demand letter dated May 11, 2021 was noted in the Notices of Violation that indicated a deadline of June 14, 2021 for the provision of outstanding record. ECCC states that, due to

pandemic-related office closures, the letter was not able to be sent, and subsequent letter was sent on May 13, 2021 indicating a deadline of June 18, 2021. Hence, the Notices of Violation should have included the latter dates. ECCC agrees that the continuing violation began on June 21, 2021 and does not defend the following Notices of Violation: #8300-3826, dated June 15, 2021; #8300-3827, dated June 16, 2021; #8300-3828, dated June 17, 2021; #8300-3829, dated June 18, 2021.

[37] The Tribunal finds that with respect the four Notices of Violation identified above, pursuant to s. 20 of EVAMPA, that there is no evidence to establish that the elements of the violation are established.

(ii) Application of s. 219 of CEPA

[38] ECCC submitted in its submissions that the Applicant is in violation of section 219 of CEPA. The Applicant submits that the Request for Review is only with respect to s. 153(1)(g).

[39] The Tribunal finds that this Decision is with respect to a review concerning the designated provision in the Notices of Violation, namely, s. 153(1)(g) and not under s. 219. Therefore, only the designated provision is under review.

Issue no. 1: Did ECCC discharge its onus in establishing that the Applicant committed violations of section 153(1)(g) of the CEPA?

ECCC's Submissions

[40] ECCC submits that there is no basis for overturning the notices of violation as the elements of the Notices are established on key facts which are not in dispute between the parties.

[41] ECCC submits that:

- The Applicant obtained a Ministerial Authorization to use the NEM pursuant to section 7 of the Regulations;
- The Applicant's application for the NEM authorization states that the records referred to by s. 38 of the Regulations will be maintained at 3939 Rhodes Drive, Windsor, Ontario, N8W 5B5. The authorization indicated that the applicant is required to advise ECCC of any changes to information provided in the application;
- Any company that imports a vehicle or engine with a NEM must maintain and furnish, "in the prescribed form", records that enable an enforcement officer to determine compliance with applicable environmental standards;

- The “prescribed form” regarding the maintenance and furnishing of records referred to in s. 153(1)(g) are provided by s. 38 of the Regulations, which require that records be maintained “in writing or in a readily readable electronic or optical form”;
- The Applicant was subject to this requirement as it imported 2019 Ram 2500 vehicles of different trims, including the Subject Vehicle, which had an NEM and was thus bound to comply with the record keeping requirements of s. 153(1), including that they be “maintained and furnished” and “in the prescribed form”;
- Where records are maintained on behalf of a company, “the company shall keep a record of the name and street address and, if different, the mailing address of the person who maintains those records;” and
- As many documents were held by Cummins, the documents were thus not maintained as required in writing or in a readily readable electronic or optical form by the Applicant.

[42] ECCC submits that, although some additional records or information were provided directly by Cummins to ECCC as a follow-up to ECCC’s letter of May 13, 2021, ECCC determined that certain records subject to the Ministerial Demand Letter still had not been provided by June 18, 2021. The outstanding documents included the items corresponding to 3(a)(ii), (f), (g), & (h) of the Ministerial Demand and follow-up letters. ECCC then issued Notices of Violation for the period from June 15 to August 17, 2021, citing contraventions of s. 153(1)(g) of CEPA.

[43] ECCC submits that the record-keeping requirements of CEPA and the Regulations are not mere formalism but an essential component of Canadian environmental law and regulation for the public benefit. It submits that the largest environmental fine imposed to date in Canada was in relation to violations of CEPA and related provisions of the Regulations in respect of emissions and performance compliance verification.³

[44] ECCC submits that there is no dispute that by the initial deadline of December 4, 2020, records had not been provided in full satisfaction of the Ministerial Demand Letter, in the assessment of ECCC. ECCC submits that the follow-up request specified the portion of the request for records that remained unsatisfied and that ECCC provided an extension for compliance until June 18, 2021. It is also not in dispute that by the extended deadline of June 18, 2021, the records still had not been provided that were responsive in full to the Ministerial Demand Letter and follow-up letter in the assessment of ECCC.

³ [R v Volkswagen AG, 2020 ONCJ 398](#). The Respondent states that the Court held that environmental legislation including the CEPA has “a public purpose of superordinate importance.” In issuing the fine against the company, the Court further recognized the move towards a “new era” of deterrence and denunciation, in line with Canada’s “international obligations in respect of the environment.” at paras. 72-73.

[45] In summary, ECCC submits that the Applicant contravened s. 153(1)(g) of CEPA by failing to comply with the record requirements of s. 38 of the Regulations, thus defeating the ability of the enforcement officer to determine whether the subject case vehicle “conforms to all prescribed standards applicable to it” pursuant to s. 153(1)(g)(i).

Applicant’s Submissions

[46] The Applicant submits that the Minister has failed to prove that the violation alleged in its Notices of Violation occurred by failing to introduce any evidence whatsoever to establish that the Applicant breached section 153(1)(g) of the CEPA.

[47] Contrary to the assertions of ECCC’s submissions, FCA submits that there is no agreement that the requested records under section 153(1)(g) of the CEPA had not been provided by June 18, 2021. The Applicant not only asserts the documents were submitted but submits that there is no evidence of the violations on the record.

[48] The Applicant relies on the *Doyon* case⁴ when it states where the Court recognized the need for a decision-maker, reviewing the penalties, to carefully analyze the elements of the offence and the causal link and ensure that the facts substantiate the commission of the offence. Without such evidence, the Applicant submits that the Tribunal must find that the Minister has failed to prove that the Applicant committed a violation of section 153(1)(g) of the CEPA and, in the result, the Notices of Violation must be struck.

[49] While ECCC has identified certain records which they requested and which is alleged were not furnished under section 153(1)(g) of the CEPA in the Notices of Violation, the Minister has failed to place any evidence before this Tribunal: (i) of the specific records that ECCC Enforcement requested; (ii) that those records were not received by ECCC Enforcement by the June 18, 2021 deadline, (iii) that those records relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment, and (iv) that those records are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of defects related to compliance with applicable standards.

[50] To support its position, the Applicant makes submissions with respect to each category of documents alleged not to be submitted.

Documents relating to Item subparagraph 3(a)(ii)

[51] FCA notes that the Notice of Violation cites subparagraph 3(a)(ii) from the October 1, 2020 Ministerial Demand letter as a basis for the violation as it pertains to copies of records submitted to the EPA in support of the application for the EPA certificate.

⁴ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152 at paras. 27 and 28

[52] In the Notices of Violation, the Applicant states that ECCC refers to several records that it submits were not furnished to ECCC. First, the Notice of Violation does not provide further details as to what documents were not submitted. The ECCC's May 13, 2021 letter only refers to "potentially missing documents" and "clarification is required on potentially missing information". FCA submits that ECCC received records in relation to this item but believed that there were "potentially" missing documents relating to the items mentioned in their response. FCA submits that there is no other evidence on the record about what records are missing, nor does ECCC seem certain that records are actually missing. While ECCC refers to providing further details to Cummins, the Applicant was not privy to those discussions. Based on evidence submitted by the Applicant, Cummins did provide additional information to ECCC after the letter dated May 13, 2021 and by the deadline of June 18, 2021 and sought on multiple occasions to seek clarification from and confirm that ECCC Enforcement had received the requested information between June 18, 2021 and August 17, 2021, but received no substantive response from ECCC.

[53] As such, FCA submits that there is no evidence that the Applicant did not furnish the requested records to ECCC in relation to item 3(a)(ii) by the deadline of June 18, 2021 and submits that there are no specific records identified as missing, only the "potential" for such records to be missing, which falls significantly short of proof that requested records were not provided.

[54] FCA submits that there is no evidence on the record proving that such "potentially missing" documents relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment and that they are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of defects related to compliance with applicable standards, as required under s. 153(1)(g) of the CEPA.

Documents relating to Item paragraph 3(f)

[55] In the Notices of Violation, FCA notes that ECCC refers to item 3(f) – "Emission-related PCM Control Strategies Documents Changes." FCA submits that the Notices of Violation do not provide further details but the ECCC's May 13, 2021 letter refers to receipt of documents from Cummins relating to other records requested and states that "ECCC wishes to receive documents with a greater level of detail to verify compliance with the applicable standards". FCA submits that it appears, therefore, that ECCC received records that provided it with relevant information, but that it did not believe that those records were sufficiently detailed. There is no guidance provided as to what detail is lacking. The only evidence on the record is that Cummins did provide additional information to ECCC by the deadline of June 18, 2021 and sought on multiple occasions to seek clarification from and confirm that ECCC had received the requested information between June 18, 2021 and August 17, 2021, but received no substantive response. FCA

submits that there is no evidence that the Applicant did not furnish the requested records to ECCC by the deadline.

[56] FCA submits that there is no evidence on the record proving that the additional details requested relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment and that they are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of defects related to compliance with applicable standards.

Documents relating to Item paragraph 3(g)

[57] In the Notices of Violation, FCA notes that ECCC refers to item 3(g) – “Any additional information exchanges (received and sent) with United States Regulators (U.S. Environmental Protection Agency, the U.S. Department of Justice and California Air Resources Board) in relation to the 2019 Ram 2500 and 3500 with the Cummins 6.7L Turbo Diesel engine.”.

[58] FCA submits that the Notices of Violation do not provide further details as to what documents are missing but ECCC’s May 13, 2021 letter refers to receipt of “some documents” from Cummins “that would be considered relevant to this requested item, “but it is suspected that there are possibly more documents based on other references found in the information provided to ECCC.” ECCC refers to previously encountering exchanges that related to discussions with U.S. regulators but does not specify if those are in relation to this file or other unrelated files and concludes that “it is unlikely that we have received all the information requested for this item.”

[59] FCA submits that it appears, therefore, that ECCC Enforcement received records that provided it with information, but “suspected” that there were more records. The only evidence on the record is that Cummins did provide additional information to ECCC after the letter dated May 13, 2021 and by the deadline of June 18, 2021 and sought on multiple occasions to seek clarification from and confirm that ECCC had received the requested information with no response. FCA submits that there is no evidence that the additional records actually do exist and, therefore, no evidence that the requested records were not furnished to ECCC.

[60] FCA submits that there is no evidence on the record proving that the information exchanges requested (which are not even restricted to compliance matters) relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment and that those exchanges are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of compliance with applicable standards.

Documents relating to Item paragraph 3(h)

[61] In the Notices of Violation, FCA notes that ECCC refers to item 3(h) – “Any information about the various available emission-related module calibrations since its introduction to the market and include a summary of the modifications between each revised calibration.” FCA submits that the Notices of Violation do not provide further details, but ECCC’s May 13, 2021 letter refers to receipt of “limited information” from Cummins including a summary of the engine calibration changes and alleges that there are “multiple other calibration changes” where no additional information was provided other than records under 3(a)(ii). FCA submits that ECCC does not specify why the records it did receive in response to this item as part of the response to item 3(a)(ii) are insufficient. It submits that the only evidence on the record is that Cummins did provide additional information by the deadline of June 18, 2021. FCA submits that there is no evidence that the additional records were not furnished to ECCC by the deadline.

[62] FCA submits that there is no evidence on the record proving that the calibration changes relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment and that those changes are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of compliance with applicable standards.

[63] In summary, the FCA submits that, while the Minister has identified certain records which ECCC requested and which it is alleged were not furnished under section 153(1)(g) of the CEPA, the Minister has failed to place any evidence before this Tribunal: (i) of the specific records that ECCC; (ii) that those records were not received by ECCC by the June 18, 2021 deadline; (iii) that those records relate to the design, manufacture, testing and field performance of the vehicle, engine or equipment; and (iv) that they are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of defects related to compliance with applicable standards.

Analysis and Findings for Issue No. 1

Has ECCC met its evidentiary burden for each of the four categories of documents listed in the Notices of Violation on a balance of probabilities?

Overview

[64] It is not contested between the parties that ECCC requested four categories of documents as outlined in the Notices of Violation. The Applicant states that ECCC has not met its evidentiary burden to establish that the stated violations have been committed for any of the four categories of documents. ECCC submits it has met its onus.

[65] Both EVAMPA⁵ and the jurisprudence⁶ provides that the role of Review Officers is to determine whether a violation was committed and whether the AMP was calculated properly. As noted, whether the AMP was properly calculated is not an issue in this review.

[66] Section 20(2) of EVAMPA states that the burden is on ECCC to demonstrate, on a balance of probabilities, that the elements of the violation are present.

[67] The Tribunal's role, therefore, is to determine whether ECCC has established, on a balance of probabilities, that the Applicant has violated s. 153(1)(g) of CEPA, that is, applying a NEM to, selling an item bearing a mark or importing an item, without maintaining and furnishing specific records. Put simply, the issue is whether ECCC established that FCA, on a balance of probabilities, failed to maintain and furnish the records in the prescribed form, to enable enforcement officers to determine whether the equipment conforms to the prescribed standards pursuant to the request under s. 153(1)(g) of CEPA.

[68] For the reasons below, the Tribunal find that ECCC has established, on a balance of probabilities that specified records remain outstanding from the records requested in the October 1, 2021 Ministerial Demand letter. Although there may be some lack of clarity of what records were outstanding, the Tribunal finds, based on the evidentiary record and on balance of probabilities, that there are documents that were not submitted prior to the June 18, 2021 deadline imposed by ECCC.

Three questions to be addressed to respond to Issue No. 1

[69] The basis of the FCA's submissions is that ECCC has not established the violations were committed. More specifically, the Applicant states that ECCC has not established that the records requested were not furnished under s. 153(1)(g) of CEPA in that ECCC has not established:

- (i) the records requested by ECCC on May 13, 2021, were identified with sufficient specificity so that the Applicant knows what was being requested by ECCC;

⁵ [EVAMPA](#), s. 20.

⁶ [Hoang v. Canada \(Environment and Climate Change\)](#), 2019 EPTC 2, at paras 19–21; [Fontaine v. Canada \(Environment and Climate Change\)](#), 2020 EPTC 5, at para 28; [Sirois v. Canada \(Environment and Climate Change\)](#), 2020 EPTC 6, at para 18.

(ii) which requested records were not provided by the deadline of June 18, 2021 so that this Tribunal can assess whether those records were furnished to ECCC;

(iii) that the identified records are in relation to “design, manufacture, testing and field performance of the vehicle, engine or equipment”; and

(iv) that the identified records are necessary to enable an enforcement officer to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards, and to facilitate the identification and analysis of defects relating to compliance with applicable standards.

[70] In order to address these submissions, the Tribunal frames these four points into three questions:

Question 1: Did ECCC provide sufficient clarity to identify what documents remain outstanding?

Question 2: Did ECCC establish that there remained outstanding documents considering that FCA and /or Cummins contend that documents were submitted by the June 18, 2021, deadline that adequately responded to the Ministerial Demand letter?

Question 3: Has ECCC met the onus that the information requested is needed for its intended purpose of assessing conformity to Canadian law?

Preliminary Finding – Whether ECCC only need to establish some documents as alleged were not submitted, not necessarily all of them

[71] During oral submissions, the Tribunal requested submissions on whether ECCC must establish that there are records missing for each category of information or just one category. In other words, was it necessary for ECCC to establish that all of the documents were not provided, or is it sufficient to meet the burden of proof if ECCC can demonstrate that only some of the documents have not been provided?

[72] The Tribunal understands the Applicant’s submissions to be that ECCC must establish that all of the documents identified must be provided because they are all inter-related in that all of them are needed in order to establish compliance with the applicable standards.

[73] ECCC submits that the allegations in the Notices of Violation are established so long as the Tribunal finds that one of the documents requested was not submitted. ECCC states that it needs to assess the record as a whole to determine if the case is made out, hence, if it is found that there is one document missing, it would be sufficient to establish the violations.

Findings - ECCC only need to establish some documents as alleged were not submitted

[74] The Tribunal finds that it is sufficient that, in order to establish the violations, ECCC only needs to establish that some of the records that were requested by ECCC and identified in each of the Notices of Violation were not provided by the required time. Each Notice of Violation stated that a request for records was made under CEPA on October 1, 2021, by the deadline of December 4, 2020, the “information submitted was determined to be incomplete.”.

[75] As such, the Tribunal finds it is sufficient to respond to the questions posed above with respect to only two of the four categories of information. The Tribunal will focus on the following two categories of information, namely, Items 3(f) and 3(g):

3. Information relating to the sample test vehicle in ECCC’s possession:

f. Emission-related PCM Control Strategies Documents

g. Any additional information exchanges (received and sent) with United States Regulators (U.S. Environmental Protection Agency, the U.S. Department of Justice and California Air Resources Board) in relation to the 2019 Ram 2500 and 3500 with the Cummins 6.7L Turbo Diesel engine

Question 1: Did ECCC provide sufficient clarity to identify what documents remain outstanding?

[76] The October 1, 2020 letter from ECCC Enforcement, referred to Ministerial Demand Letter, outlined a list of documents requested by ECCC in order to verify that compliance with applicable standards are being met.

[77] ECCC then forwarded a follow-up letter on May 13, 2021. For present purposes, ECCC’s letter of May 13, 2021 is important because it provides ECCC’s response as to what documents remained outstanding and had to be submitted by the June 18, 2021 deadline. It is also important because, for each category of documents requested, it is this letter that the Applicant relies upon to argue that ECCC has failed to meet its onus of establishing the violations because it does not provide sufficient clarity as to what documents, if any, remained outstanding.

Findings with respect to Item 3(f) – “Emission-related PCM Control Strategies Documents”

[78] On October 1, 2020, ECCC’s Ministerial Demand Letter requested from FCA documents under Item 3(f), namely “Emission-related PCM Control Strategies Documents.” On May 13, 2021, ECCC wrote to the Applicant outlining the documents that have not been submitted in response to its October 1, 2020 Demand letter. With respect to Item 3(f), the follow-up letter with a revised and apparently final deadline read:

"These documents were not provided by either FCA Canada nor MacMillan. Instead of providing the requested documents, Macmillan referenced documents requested and provided under item 3. a) ii) of this request but ECCC wishes to receive documents with a greater level of detail to verify compliance with the applicable standards."

[79] The Applicant submits that ECCC's onus is not met because it argues that Cummins did forward records to ECCC to satisfy the request, but ECCC failed to provide sufficient guidance to identify what further documents, if any, were required. FCA submits that there is no evidence that the Applicant did not furnish the requested records to ECCC in relation to Item 3(f) by the deadline of June 18, 2021.

[80] The Tribunal finds that for this category of documents, there is sufficient clarity for the Applicant to know what documents were requested, or put another way, what documents have not been filed in response to the Ministerial Demand Letter.

[81] The Ministerial Demand Letter outlined the category of documents required by ECCC and reflected in the Notices of Violation. The May 13, 2021 letter from ECCC, quoted above, sought to provide guidance as to what documents remain outstanding. It noted that the documents were not provided and further stated "*Instead of providing the requested documents, Macmillan referenced documents requested and provided under item 3. a) ii) of this request but ECCC wishes to receive documents with greater level of detail to verify compliance with the applicable standards.*" (emphasis added) Although the wording could have been more precise, the Tribunal finds that there is sufficient certainty to enable compliance with the request. ECCC clearly states that it is requesting the documents referenced by Macmillan, and such documents will provide greater detail to verify compliance with applicable standards.

Findings with respect to Item 3(g) - Any additional information exchanges (received and sent) with United States Regulators (U.S. Environmental Protection Agency, the U.S. Department of Justice and California Air Resources Board) in relation to the 2019 Ram 2500 and 3500 with the Cummins 6.7L Turbo Diesel engine

[82] The October 1, 2020 Ministerial Demand Letter requested from FCA documents under Item 3 (g), namely "Emission-related PCM Control Strategies Documents." On May 13, 2021, ECCC wrote to the Applicant outlining the documents that had not been submitted in response to its October 1, 2020 Demand letter. With respect to Item 3 (f), ECCC's May 13, 2021 follow-up letter with a revised and final deadline read:

FCA Canada referenced the following on Dec. 1, 2020 letter:

With respect to the remaining requests at item #3 of your correspondence, we understand that you have been contacted by Cummins Inc. and further understand

that Cummins is compiling that information and will be forwarding same to you directly under separate cover.

However, MacMillan, who responded on behalf of Cummins Inc., did not reference this requested item g. in their Dec. 2 2020 letter. MacMillan did provide some documents that would be considered relevant to this requested item but it is suspected there are possibly more documents based on other references found in the information provided to ECCC. ECCC has previously encountered written exchanges such as letter with questions and/or answers, presentation slides, etc. that related to discussions with U.S. regulators, which form part this request. It is therefore unlikely that we have received all the information requested for this item.

[83] The Tribunal disagrees with the FCA's submissions that ECCC has not established the violation because it is only "suspected" that some documents are missing and that the ECCC has not established additional records do exist and the requested records were not furnished to ECCC.

[84] While the Applicant identify specific words or phrases, such "suspected there are possibly more documents..." that may indicate some uncertainty on ECCC's part as to what documents remain outstanding, the Tribunal finds that the May 13, 2021 letter provides sufficient clarity so as to identify what documents are needed to satisfy the category of documents required in the October 1, 2020 Demand Letter. More specifically, ECCC points out that there are documents "based on other references found in the information provided to ECCC," and that it "has encountered written exchanges such as letters and/or answers, presentation slides, etc. that related to discussions with U.S. regulators..."

[85] While ECCC could have been more precise or explained the expectations in a more precise manner, the Tribunal finds that, more likely than not, the text of the May 13, 2021 letter in combination with the title of the category as "Emission-related PCM Control Strategies Documents," provides sufficient information to establish that there are outstanding documents from the Ministerial Demand Letter. The Tribunal recognizes that the Applicant argues that some documents were submitted within that timeframe, but that ECCC did not provide further clarification as to what further documents were required. As discussed below in Issue no. 4, whether the documents submitted by FCA or Cummins were sufficient to establish compliance is a question pertaining to the exercise of discretion by the enforcement branch, and not one the Tribunal will determine.

[86] The Tribunal finds, therefore, that for document categories Items 3 (f) and 3 (g), ECCC provided sufficient certainty so as to allow the Applicant to know what documents were required to be submitted in furtherance of ECCC's request under s. 153(1)(g) of CEPA.

Question 2: Did ECCC establish that there remained outstanding documents considering that FCA and /or Cummins contend that documents were submitted by the June 18, 2021 deadline that adequately responded to the Ministerial Demand letter?

[87] Another part of the Applicant's argument is that many documents were submitted by the deadline of June 18, 2021 and based on the submission of those documents, compliance had occurred. The Applicant submits that the requested documents were submitted, and without any communication from ECCC, the ECCC has not met its onus to establish that there remained outstanding documents. FCA argues that it believed that ECCC had all the documents it needed to establish compliance by the due date and if ECCC was not satisfied with the additional documents, it should have notified FCA prior to or at the time of the deadline.

[88] The Tribunal finds that the Applicant knew or ought to have known that there remained outstanding documents. This finding is based in part on the affidavit⁷ from the Cummins' counsel filed into evidence that provided more details as to the interactions between Cummins and ECCC prior to the June 18, 2021 deadline. According to a letter filed attached to the affidavit, FCA informed Cummins on May 18, 2021 that further responses were due to ECCC by June 18, 2021. The letter states that on June 1, 2021, ECCC forwarded a document with thirteen follow-up questions. The letter noted that ECCC's request seeking Cummins's highly confidential, trade secret source code data for the "MY19 RAM Pickup," "among other follow requests." The document goes on to state:

On June 18, 2021, Cummins, through McMillan, substantively responded to ten of ECCC's thirteen follow-up questions, and delivered 2,666 pages of documents. Having assessed the remaining questions to be either very broad or ambiguous as to what ECCC wanted and, with respect to the source code request, challenging to deliver from a technical standpoint, Cummins requested a call with ECCC to discuss two of those remaining questions. In that same correspondence, Cummins advised ECCC that further inquiry at Cummins was needed to formulate a response in respect to the third question, which requested copies of exchanges with U.S. regulators.

[89] While the Tribunal recognizes Cummins' efforts to comply with ECCC's request, two comments should be emphasized. First, information in the affidavit confirms that Cummins recognized or acknowledged that there remained outstanding documents, albeit challenging from both a legal and technical point of view to be able to submit them to ECCC. Nevertheless, it should be recalled the Ministerial Demand Letter was dated October 1, 2020 with a 40-day deadline. Those deadlines had now been extended to 6 months. It is apparent that ECCC considered June 18, 2021 as the final date for the submission in fulfilment of its original request for document under s. 153(1)(g). This is the

⁷ Affidavit of Teresa Dufort, April 20, 2022.

date ECCC decided there would be no more extensions as part of its enforcement discretion. Put another way, it appears that ECCC was no longer willing to negotiate or cooperate in discussing what further documents were required to be submitted in fulfillment of its formal request for documents.

[90] Second, as the Tribunal found under Issue No. 2 below, the Applicant, not Cummins, is vested with the legal responsibility to submit the records under s. 153(1) of CEPA, even if a third party has possession of those documents. FCA has the obligation to retain the required documents pursuant to the Ministerial Authorization use NEM pursuant to section 7 of the Regulations. This application states that the records referred by s. 38 of the Regulations will be maintained at a specific location in Windsor, Ontario. In short, although Cummins possessed the information and even interacted with ECCC, the ultimate responsibility to comply with s. 153(1)(g) of CEPA rests with FCA.

[91] The Tribunal finds that ECCC has established that there were documents outstanding by June 18, 2021. Cummins knew that some documents and information was outstanding, and as noted above, FCA was ultimately responsible for ensuring the requests under s. 153(1)(g) were satisfied.

Question 3: Has ECCC met the onus that the information requested is needed for its intended purpose of assessing conformity to Canadian law?

[92] FCA argues that ECCC's onus is not met because there is no evidence on the record establishing that the additional documents requested are required to determine whether the vehicle, engine or equipment conforms to all prescribed applicable standards and to facilitate the identification and analysis of defects related to compliance with applicable standards.

[93] The Tribunal disagrees that the FCA's argument. ECCC's Ministerial Demand Letter and the May 13, 2021 follow-up letter both noted that the "information is required to verify compliance of Part 7 Division 5 under the *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33) and the *On-Road Vehicle and Engine Emission Regulations* (SOR/2003-2)."

[94] In reviewing the evidentiary record, the issue of whether all of the documents were needed to verify compliance was not raised in any serious way in the correspondence between ECCC and FCA from the time the initial request was made in October 2019 until the last documents were submitted on June 18, 2021. Rather than challenging the need for the information at first instance when ECCC notified FCA of the potential requests, or when the Demand Letter was sent in October 2020, FCA only challenges ECCC to establish the need for the information after the deadline for final submission. There is no evidence of a direct challenge to ECCC's request prior to the issuance of the Notices.

[95] Section 153 requires the Applicant to maintain and furnish records in a prescribed form in order that enforcement officers can determine whether the equipment conforms to the prescribed standards. It is reasonable to presume all of documents required are required for a proper legislative purpose. If the parties wish to challenge a request for the documents, it is reasonable that such challenges occur prior to the final timeline for filing the requested records they commit an infraction by failing to file the documents by the deadline. The Tribunal finds the Applicants should have made such a challenge from October 2019 to June 18, 2021. The Tribunal finds that there is a presumption that the documents requested are for the proper legislative purpose.

Issue No. 2 – Is the Minister’s interpretation of CEPA section 153(1)(g) contrary to the principles of statutory interpretation?

Applicant’s submissions

[96] The Applicant submits that a company can “maintain and furnish” records by having the third party that owns the proprietary information supply the information. It argues that the Minister’s interpretation of CEPA 153(1)(g), whereby the Applicant must maintain all the records itself, is inconsistent with the reality of this industry.

[97] The Applicant submits that public welfare legislation is generally to be interpreted liberally in a manner that gives effect to its broad purpose and objective. It submits that broad wording can sometimes lead to an extension of the legislation beyond the reach of what was intended by the legislature and provide the government with greatly expanded powers beyond what is necessary. The Applicant relies on *Re Rizzo & Rizzo Shoes Ltd.*⁸ where the Court stated that it is important to consider the principles set out in the *Interpretation Act*, that every Act shall be deemed to be remedial and that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

[98] The Applicant submits that section 153(1)(g) of the CEPA must be interpreted in a manner that is consistent with these principles of interpretation and having regard to the effects of its interpretation. The Applicant disagrees with ECCC’s position that it is the obligation of the Applicant to personally maintain and furnish all of the records set out in section 153(1)(g) of the CEPA. It submits that this obligation is inconsistent with the reality of the car and truck industry in Canada where a significant number of companies utilize engines and other components manufactured by companies that reside outside of Canada. FCA states that the records required to be maintained under s.153(1)(g) of CEPA contain highly confidential and proprietary information. It submits that the owners of that information will not release or provide others with those records under any circumstances. That is the case with Cummins. A company can “maintain and furnish” records by having the third party that owns the proprietary information supply the information.

⁸ [*Rizzo & Rizzo Shoes Ltd. \(Re\)*, \[1998\] 1 SCR 27](#)

[99] FCA submits that ECCC recognized the inherent difficulty in dealing with such confidential information and agreed to engage directly with Cummins, which also was beneficial for ECCC Enforcement in that it was able to interact directly with the creator of the records, ask questions and better understand the records. It is submitted that ECCC would not have interacted with a third party with respect to the information if that were not the case. The Applicant states that it promptly sought and secured the cooperation of Cummins to respond to ECCC Enforcement's requests and Cummins has likewise been responsive to all of ECCC's requests.

[100] FCA submits that any interpretation of s. 153(1)(g) that requires the Applicant to maintain and furnish confidential records that are in the possession of a third-party manufacturer must be rejected as being an impossibility, inconsistent with the scheme of the CEPA and would lead to an absurdity. FCA states the vast majority of vehicle manufacturers and importers in Canada utilize engines or equipment manufactured by third parties, all of whom carefully guard their confidential proprietary records in respect of the engines and equipment and would never disclose such information to third parties. It submits that the effect of such an interpretation would be no Canadian vehicle vendor could utilize an engine produced by a third party notwithstanding that the engine has a valid Certificate of Conformity issued by the US EPA. This cannot have been the intent of the CEPA and would effectively put many Canadian vehicle manufacturers and importers in violation of the CEPA because they cannot personally maintain or furnish the records.

ECCC's submissions

[101] ECCC submits that much of the Applicant's argument has regard to the fact that, in its own admission, the "vast majority" of the records were in the possession of Cummins and not the Applicant. ECCC submits that this simply reflects that the Applicant contravened CEPA and s. 38 of the Regulations by failing to maintain the records referred to in CEPA, s. 153(1)(g).

[102] ECCC submits that Cummins is not regulated by ECCC or responsible for producing and providing any information to ECCC. It is the regulated party in Canada which bears the onus of complying with Canadian regulation, including CEPA. As such, there is nothing unfair, unjustified, or capricious, in requiring that the Applicant satisfy its own requirements for regulatory compliance. Relying on *R v Canadian Tire Corp. Ltd.*,⁹ ECCC submits that the case supports the proposition that the dilution of public protection by laying responsibility to a third party for regulation compliance should be taken with "suspicion." ECCC relies on the *Canadian Tire* case which drew upon *R. v. Sault Ste. Marie (City)* (1978), which stands for the proposition that a regulated party may not rely on having passed off responsibility for regulatory compliance on a third party. Rather than passing off control, the Supreme Court held that "those in charge of business activities" must nevertheless exercise control by "supervision or inspection, by improvement of his

⁹ *R. v Canadian Tire Corp. Ltd.*, [2004] O.J. No. 3129

business methods or by exhorting those whom he may be expected to influence or control.”

[103] ECCC submits that the Applicant at all times remained responsible for complying with CEPA and Regulations.

Analysis and Findings for Issue No. 2

[104] Although the Tribunal recognizes that Canadian industry may be challenged in responding to requests pursuant to s. 153(1)(g) of CEPA, it does not agree with the Applicant’s interpretation of that provision.

[105] The core element of s. 153(1)(f) of CEPA is that a company cannot apply a national emissions mark to any vehicle, engine or equipment, or sell or import a vehicle, engine or equipment with such a mark unless certain records are maintained in a prescribed form and manner. The Tribunal notes that the Applicant obtained a Ministerial Authorization to use the NEM pursuant to section 7 of the Regulations. As the Applicant points out, the implication of this section is that a Canadian company may require access to confidential or proprietary records held by a third party (such in this case, a foreign engine supplier) in order to comply with the Ministerial Authorization.

[106] While relying on the *Rizzo* case, the Applicant invites the Tribunal to take a remedial interpretation that will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. Contrary to the Applicant’s submissions, the Tribunal is not convinced that Parliament was unaware of the implications of this section in CEPA. No evidence was presented to suggest that Parliament intended to exclude the information-gathering powers under CEPA to foreign interests. The Tribunal prefers to rely upon the plain and literal meaning of the words in s. 153 (1)(f) which states “No company shall...” There are no qualifications as to the nationality of the term “company.”

[107] Further, the Tribunal finds that there is no need to take a remedial approach to statutory interpretation, as invited to by the Applicant, because the broad, inclusive interpretation of “company” is more in line with the objectives and purposes of the CEPA. In its lengthy preamble, CEPA outlines its context:

Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;

Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

...

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

...

Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the “polluter pays” principle

[108] These principles are repeated under s. 2(1) of the Act that pertains to administrative duties, for example:

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

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

[109] Moreover, the Supreme Court of Canada has been called upon in interpreting CEPA and prefaced their analysis that measures relating to protecting the environment relate “to a public purpose of superordinate importance” and that the protection of the environment is a major challenge of time.”¹⁰

[110] The Tribunal does not agree with the submission that once ECCC started to communicate with Cummins, the matter then rested solely with Cummins and ECCC. I agree with the Respondent’s submissions that ECCC’s communication with Cummins was an effort to expedite or clarify what documents were required. It was not intended to absolve FCA of its legal duty to ensure the information request was fulfilled.

[111] In summary, the Tribunal agrees with ECCC’s submissions that it is the regulated party in Canada that bears the onus of complying with Canadian law and the Tribunal finds that this was in the intent of Parliament with purposes and objectives of CEPA as a whole.

¹⁰ [*Canada \(Procureure générale\) v. Hydro-Québec*, \[1997\] 3 SCR 213](#) at paras, 84 and 127.

Issue No. 3: Did ECCC breach its duty of procedural fairness owed to the Applicant?

Applicant's submissions

[112] The Applicant submits that this Tribunal does have the inherent jurisdiction to consider ECCC Enforcement's exercise of discretion in issuing the Notices of Violation. While the Minister refers to several decisions of this Tribunal where it refused to exercise such jurisdiction, the Applicant submits that the Tribunal was not presented with the argument that follows and is not bound, in any event, by other Tribunal decisions.

[113] The Applicant states that in *Chu v Minister of Public Safety and Emergency Preparedness*,¹¹ the Canada Agricultural Review Tribunal (CART) considered whether it had the jurisdiction to review an Officer's exercise of discretion to decide under which legislative provision to issue a Notice and impose a penalty. The Applicant submits that section 15 of the EVAMPA similarly references a review of the "facts of the alleged violation". It is submitted that the Tribunal ought to recognize that a review of the proper exercise of discretion and the duty of procedural fairness is not only entirely compatible with the EVAMPA, but consistent with the Supreme Court of Canada's ruling in *Baker v. Canada (Minister of Citizenship and Immigration)*,¹² wherein the Court stated that if a claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.

[114] FCA submits that the circumstances of ECCC's conduct constitutes a breach of procedural fairness and the Tribunal should review ECCC's conduct in issuing the Notices of Violation in the circumstances of this case for the reasons that follow: (a) Cummins and the Applicant responded to by the deadline of June 18, 2021 and provided voluminous information; (b) ECCC took from June 18, 2021 to August 4, 2021 (47 days) to review the information provided by Cummins and never advised of any concerns or deficiencies during that time; (c) During the 47 days, Cummins contacted ECCC to ensure that the information it had provided was satisfactory and to follow up on its request for additional discussions; (d) ECCC reached out to the Applicant on August 4, 2021 to request a meeting and proposed August 18, 2021. FCA states that ECCC did not indicate the purpose of the meeting and expressed no urgency and advised that it was to report on the "progress of the inspection." (e) At the meeting on August 18, 2021, for the first time, ECCC informed the Applicant that it intended to issue Notices of Violation from June 15, 2021 to August 17, 2021, including the two-week period from August 4, 2021 to August 17, 2021, when ECCC first requested a meeting with the Applicant and finally had that meeting.

¹¹ [*Chu v Minister of Public Safety and Emergency Preparedness*, 2021 CART 19.](#)

¹² [*Baker v. Canada \(Minister of Citizenship and Immigration\)*, 1999 CanLII 699 \(SCC\), \[1999\] 2 SCR 817](#), at para. 26.

Analysis and Findings for Issue No. 3

[115] Although the Applicant invites the Tribunal to revisit the issue of whether the Tribunal has jurisdiction to review the discretion of enforcement officers, it declines to do so. The Tribunal's jurisprudence has been consistent in its decisions that it lacks the authority to review the discretion of enforcement officers and the Tribunal finds that there is no reason to depart from it.¹³

[116] In *BCE Inc. v. Canada (Environment Canada and Climate Change)* ("BCE"),¹⁴ the Tribunal provided an extensive review of its decisions to establish that the Tribunal has no authority to review the discretion of enforcement officers. The Tribunal noted:

[48] In *Hoang v Canada (Environment and Climate Change)*, 2019 EPTC 2, the applicant did not dispute that a violation had occurred but argued that the imposition of an administrative monetary penalty was unfair and that the appropriate penalty in that case was a warning. After citing the relevant statutory and regulatory provisions, the Chief Review Officer found that the review of an enforcement officer's discretion to issue a notice of violation is not within the Tribunal's jurisdiction:

Review Officers are not given the authority under EVAMPA to determine whether enforcement officers' exercises of discretion were properly or reasonably carried out. Officers review "the facts of the alleged violation" and the determination of the correct penalty under s. 15 and s. 20 of EVAMPA. Review Officers do not review the exercise of enforcement officers' discretion to issue AMPs in the first place. . . . Accordingly, while the Chief Review Officer understands the Applicant's concerns in this case, EVAMPA does not provide recourse when the ground for a review goes to the exercise of an enforcement officer's discretion as opposed to the facts of the alleged violation. . . . It is not for the Review Officer to consider setting aside the AMP once the elements of the violation have been demonstrated (at paras 21-22).

[49] The decision in *F. Legault v Canada (Environment and Climate Change)*; *R. Legault v Canada (Environment and Climate Change)*, 2021 EPTC 1, is to the same effect. In that case, the Applicants argued that they had been entrapped by enforcement officers. Nevertheless, the Tribunal could not intervene in respect of the officers' enforcement discretion:

. . . the officers' decision to issue a notice of violation is immune from oversight by this Tribunal. As the Tribunal has now observed on a number

¹³ *Rice v. Canada (Environment and Climate Change)*, 2020 EPTC 4, at para. 20, 22 and 40; *Bhaiyat v. Canada (Environment and Climate Change)*, 2019 EPTC 1, at para. 44.

¹⁴ *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2.

of occasions, its role is simply to verify whether the violation alleged in the notice was committed and if so, whether the amount of the penalty imposed is correct. Nothing more, and certainly not to review the discretionary power of the Minister's officer (at para 54).

[50] See also *Fontaine v Canada (Environment and Climate Change)*, 2020 EPTC 5, at para 28 ("it is now well established in the Tribunal's jurisprudence that the Tribunal's role is (1) to determine whether the violation alleged by the Notice of Violation has occurred and (2) to determine whether the amount of the administrative monetary penalty, if any, has been calculated in accordance with the [EVAMP Regulations]"); *Sirois v Canada (Environment and Climate Change)*, 2020 EPTC 6, at para 38; ("The Tribunal's role is circumscribed by the [EVAMPA]. It is essentially to verify that the violation as alleged in the Notice of Violation was in fact committed by the Applicant and that the penalty, if any, was properly calculated"); *Nyobe v Canada (Environment and Climate Change)*, 2020 EPTC 7, at para 21 ("The role of the Tribunal is to verify that the violation as alleged in the Notice of Violation was actually committed by the Applicant and that the penalty, if any, was properly calculated").

[117] As in that case, the Applicant has asked the Tribunal to depart from the Tribunal's jurisprudence. As stated in the *BCE* case, although the Tribunal is not bound to follow previous its decisions, the fostering of a "harmonized decision-making culture" is preferred and Review Officers should only depart where it is necessary.¹⁵ As noted above, the Tribunal in this Request for Review sees no reason to depart from the Tribunal's jurisprudence in the regard.

[118] Further, the Applicant relies on the *Chu* decision, where CART found it had the authority to review the discretion of enforcement officers. However, that decision was recently reviewed by the Federal Court of Appeal.¹⁶ In that decision, the Court found that the CART decision was incorrect as it found:

[8] Further, it was unreasonable for the Tribunal to review the Minister's discretion to issue the notice of violation and the applicable penalty. Parliament has clearly limited the Tribunal's powers to determining whether a violation has been proven and if so, and if applicable, whether the amount of the penalty has been imposed in accordance with the Regulations (the Act, ss. 14(1); *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102, 459 NR 134 at para. 42). By reviewing the Minister's discretion, the Tribunal unreasonably interpreted its statutory powers and exercised authority contrary to the text of the Act.¹⁷

¹⁵ *Ibid.*, at para. 51.

¹⁶ *Canada (Attorney General) v. Chu*, 2022 FCA 105

¹⁷ *Ibid.*, at para. 8.

[119] In summary, the Tribunal finds that it does not have the jurisdiction to review the discretion of enforcement officers and hence will not assess whether such discretion breached the rules of procedural fairness as alleged.

Issue No. 4: In the further alternative, does the defence of abuse of process apply in the particular circumstances of this case?

Applicant's submissions

[120] Relying on the *Doyon* case,¹⁸ the Applicant submits that section 11(2) of the EVAMPA makes it clear that certain defences are available despite EVAMPA being an absolute liability regime, including the abuse of process defence.

[121] FCA states that ECCC set a deadline of June 18, 2021 to receive certain requested records and ECCC did, in fact, receive voluminous and extensive documentation by June 18, 2021. However, FCA submits that, despite having the cooperation of both the Applicant and Cummins, and receiving copious amounts of documents, ECCC proceeded to issue Notices of Violation on the basis of “potentially missing” documents, suspicions that additional records existed, and wanting “greater detail” in respect of other records. FCA submits that ECCC did not provide any information that documents were missing or that there were deficiencies. As set out in *R. v. Clothier*,¹⁹ such conduct on the part of ECCC offends a sense of “decency and fair play” that is expected of government officials. The Applicant submits that ECCC’s conduct in this matter goes beyond offending a sense of “decency and fair play” and enters the realm of capricious and egregious conduct.

[122] The Applicant submits that once ECCC engaged with Cummins, it had a duty to keep the Applicant, as the regulated party, informed of what was happening in terms of its request for records. In this case, FCA submits that ECCC kept both the Applicant and Cummins in the dark about whether the records were satisfactory. FCA submits that the ECCC requests for documents were complex and involved a large number of documents and therefore the need for communication and transparency is entirely reasonable and is consistent with the legislative scheme.

[123] FCA submits that ECCC did not identify any missing information or deficiencies or otherwise indicate to the Applicant that any records were not furnished after receiving the voluminous documentation on June 18, 2021 until more than two months later, on August 17, 2021, at a meeting between ECCC representatives and the Applicant. The evidence shows that Cummins reached out to ECCC on several occasions to seek clarification but ECCC did not respond substantively. The Applicant states that ECCC advised, on July 13, 2021, that there had been no feedback from ECCC’s engineering team, but that many of them were on vacation.

¹⁸ [Doyon v. Canada \(Attorney General\), 2009 FCA 152](#).

¹⁹ [R. v. Clothier, 2011 ONCA 27](#) (CanLII).

[124] The Applicant submits that in issuing the Notices of Violation, ECCC chose to include the period from June 18, 2021 to August 17, 2021, which is the entire two-month period during which ECCC was reviewing the records and before the Applicant had any knowledge of whether the records were deficient. FCA submits that it would have been impossible for the Applicant to have known that the voluminous material, including the 2666 pages of documents provided to ECCC by Cummins, would be deemed to be inadequate or insufficient by ECCC prior to it being informed by ECCC.

ECCC's submissions

[125] ECCC submits that there is no basis for the Applicant's arguments that the issuance of the Notices of Violation was unfair, unjustified, and capricious, and on that basis the Notices of Violation should be overturned.

[126] Although the Applicant states that it is unfair that Notices of Violation started running from June 18, 2021, ECCC submits that the decision as to when to issue a monetary penalty in respect of a contravention under EVAMPA is a matter of an enforcement officer's discretion. There is nothing in law to suggest that Notices of Violation may not begin to accrue from the earliest point at which a contravention is established by an enforcement officer. This is notwithstanding that there may be further interactions between the Applicant and ECCC.

[127] ECCC disagrees with the FCA's submissions that Cummins may have lacked clarity as to the request for records, or that ECCC was not sufficiently responsive to Cummins requests of June 25, 2021, and July 13, 2021, "to discuss ECCC's requests". The Applicant points to nothing in the case law that provides that Notices of Violation may not be issued, and accrue, notwithstanding an applicant's lack of understanding, or desire for further explanation, as to the nature or cause of the contravention, or requirements in support of this position. It further submits that the Applicant has no defence by virtue of any reasonable efforts taken to engage, and cooperate with, ECCC, or any belief that Cummins was acting on its behalf to successfully ensure compliance with the Regulations. Even if such was the case—which the Respondent does not admit—the final result is that the records were not provided pursuant to the Ministerial Demand Letter.

[128] ECCC submits that the cooperative nature of its engagement on this matter is reflected in the very fact that the enforcement officer made efforts to interact directly with Cummins to obtain the records, notwithstanding that the onus was always on the Applicant to satisfy its obligations under Canadian environmental law and regulation.

[129] ECCC submits that at every stage of ECCC's dealings with the Applicant in this matter, the Applicant was provided with ample opportunity to satisfy the request for records with respect to the subject case vehicle without recourse to monetary penalty. This is reflected in the fact that the Applicant was provided with an extension of over six

months (from December 4, 2020, to June 18, 2021) in order to respond in full to the Minister's Demand Letter.

Analysis and Findings for Issue No.4

[130] The Tribunal is not convinced that abuse of process can properly be considered in section 11(2) of EVAMPA as a means of voiding the Notices of Violation. It would not be proper to invoke the abuse of process doctrine in such a way to invite the Tribunal by implication to review the discretion of the enforcement officers. The doctrine of "abuse of process" cannot allow the Tribunal to review exercises of discretion by the back door, as this would be inconsistent with EVAMPA. Under s. 11(2) those defences are only available to the extent they are consistent with the statute. As the Tribunal held under Issue no. 3, Parliament has clearly provided that Review Officers cannot review an enforcement officer's discretionary decisions. The defence of abuse of process would therefore not be consistent with the statute if its effect were to permit the review that discretion. To the extent abuse of process is an available defence, therefore, it is rarely if ever available before the Tribunal.

[131] I agree with the finding in *Cameron Wildlife Solutions v Canada (Environment and Climate Change)*²⁰ that the availability of common law defences must be "strictly controlled and scrupulously limited."

[132] However, rather than deciding whether the abuse of process doctrine is available as a common law defence under section 11(2) of EVAMPA, the Tribunal finds that, even if the defence is available, the defence has not been made out on the facts of this case for the following reasons. As held by the Supreme Court of Canada, the doctrine of abuse of process protects proceedings that are unfair to the point that they are contrary to the interests of justice or constitute an oppressive treatment.²¹ The Tribunal does not find that the sequence of events leading to the issuance of the Notices of Violation are contrary to the interests of justice or constitute oppressive treatment.

[133] First, it is important to review the history of the matter. In Appendix B, I have provided a table that summarizes, from the Parties' *Agreed Statement of Facts*, the chronology that led to the issuance of the Notices of Violation. I will not repeat each chronological event, but I will highlight certain milestones:

- On October 30, 2019, ECCC requested information from FCA that potential certification and compliance issues existed involving certain trucks equipped with engines supplied by Cummins, while FCA responded that such information was between Cummins and U.S. EPA.

²⁰ [*Cameron Wildlife Solutions v Canada \(Environment and Climate Change\)*, 2022 EPTC 2](#), at para 45

²¹ [*Toronto \(City\) v. C.U.P.E., Local 70*, 2003 SCC 63](#), at para. 35.

- On February 24, 2020, ECCC requested evidence of conformity in relation to the subject case vehicle as the vehicle was selected for Emissions Compliance Verification and Testing in accordance with CEPA and its regulations, with records to be provided within 40 days. With no records forthcoming, ECCC repeated its request on March 9, 2020 and the FCA replied the information was held by Cummins on March 30, 2020.
- On October 1, 2020 ECCC issued its Demand Letter outlining the records requested with December 4, 2020 deadline for the submission of the information.
- On December 2, 2020, ECCC acknowledged certain records were received but information outlined in the Demand Letter was still outstanding.
- On May 13, 2021, ECCC provided guidance on what records were outstanding and requested that the documents be submitted by June 18, 2021.
- On August 18, 2021, the Notices of Violations were issued for the period from June 18, 2021 to August 18, 2021.

[134] I note that ECCC issued its formal request for the documents on February 20, 2020 and gave the final deadline, after interchanges with FCA and Cummins concerning the documents that were submitted, to June 18, 2021. While the initial request required the records be submitted within 40 days, the timeline was extended to approximately six months.

[135] From this timeline, the Tribunal makes the following observations. First, ECCC gave the initial request for information, with a deadline for 40 days. With extensions, it was not until 18 months later that a final deadline was established. Second, while the Applicant submits that ECCC did not provide sufficient guidance, there is no doubt that the Applicant, Cummins and ECCC had discussions that pervaded this period of time. While the Applicant may be dissatisfied with the course of those discussions, it is apparent that attempts were made by ECCC, FCA and Cummins to agree what documents were required and not yet submitted. However, those efforts were unsuccessful. Third, the Tribunal recognizes that the Applicant argues that it did submit documents on or before June 18, 2021 and ECCC failed to acknowledge what documents were missing. However, June 18, 2021 appears to be the final timeline where no more extensions would be granted by ECCC. It appears that ECCC had, after 18 months, drawn the line in the sand with respect to that date. The Tribunal can understand why the Applicant would want more time, feel aggrieved with lack of immediate feedback from ECCC and complain about the burden the requests put on it. However, the Tribunal finds that the history of the matter does not suggest that the actions or conduct of ECCC rise to the level that are contrary to the interests of justice considering that ECCC had legislative responsibilities under CEPA to request and acquire the information needed to verify compliance with the appropriate standards.

[136] As outlined above, the Tribunal does not agree with the submission that once ECCC started to communicate with Cummins, the matter then rested solely with Cummins

and ECCC. The direct communication between FCA and Cummins does not absolve FCA of its legal duty to ensure the information request was fulfilled.

[137] There is neither any allegation nor evidence to suggest that either FCA or Cummins were acting in bad faith or attempting to intentionally avoid their responsibilities. However, this Tribunal has held that an applicant's good intentions are simply not relevant to a Request for Review.²²

[138] The Tribunal finds that the Applicant has not provided sufficient evidence to establish that there has been an abuse of process.

Decision

[139] I find that four Notices of Violation, namely, #8300-3826, dated June 15, 2021; #8300-3827, dated June 16, 2021; #8300-3828, dated June 17, 2021; #8300-3829, dated June 18, 2021 have not been established and they are cancelled.

[140] The remaining Notices of Violations with dates from June 21, 2021 to August 17, 2021 are upheld and the review is dismissed.

"Paul Muldoon"

PAUL MULDOON
REVIEW OFFICER

²² [BCE Inc. v. Canada \(Environment Canada and Climate Change\), 2021 EPTC 2](#) at para. 38; and to [s. EVAMPA 11\(1\)\(a\) and \(b\)](#).

APPENDIX A – Relevant Legislation and Regulations

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33

153 (1) No company shall apply a national emissions mark to any vehicle, engine or equipment, sell any vehicle, engine or equipment to which a national emissions mark has been applied or import any vehicle, engine or equipment unless

...

(g) records are maintained and furnished in the prescribed form and manner in relation to the design, manufacture, testing and field performance of the vehicle, engine or equipment, for the purpose of

(i) enabling an enforcement officer to determine whether the vehicle, engine or equipment conforms to all prescribed standards applicable to it, and

(ii) facilitating the identification and analysis of defects referred to in subsection 157(1); and

219 (1) The Minister may, for the purposes of this Act and the regulations, by registered letter or by a demand served personally, require any person to produce at a place specified by the Minister anything referred to in paragraph 218(10)(c) or any samples referred to in paragraph 218(10)(d) within any reasonable time and in any reasonable manner that may be stipulated therein.

(2) Any person who is required to produce anything under subsection (1) shall, despite any other law to the contrary, do so as required.

On-Road Vehicle and Engine Emission Regulations, SOR/2003-2

38 (1) A company shall maintain, in writing or in a readily readable electronic or optical form

(a) the records referred to in paragraph 153(1)(g) of the Act and the evidence of conformity referred to in paragraphs 35(1)(a) to (c), subsection 35(1.1), paragraphs 35.1(1)(a) to (c) and, if applicable, (e) and subsection 36(1) for a period of

(i) at least eight years after the date of manufacture, for engines and vehicles, other than motorcycles, and

(ii) at least six years after the date of manufacture, for motorcycles;

(b) for light-duty vehicles, light-duty trucks and medium-duty passenger vehicles, in respect of each model year, the records referred to in section 37 and a copy of its end of model year report under section 32, for a period of eight years after the end of the model year; and

(c) for **motorcycles**, in respect of each model year, the records referred to in section 37.1 and a copy of its end of model year report under section 32.7, for a period of three years after the due date of the end of model year report.

(2) If the evidence of conformity and records referred to in subsection (1) are maintained on behalf of a company, the company shall keep a record of the name and street address and, if different, the mailing address of the person who maintains those records.

(3) If the Minister makes a written request for the evidence of conformity or the records referred to in subsections (1) and (2), or a summary of any of them, the company shall provide the Minister with the evidence of conformity, records or summary, in either official language, within

(a) 40 days after the request is delivered to the company; or

(b) if the evidence of conformity or records referred to in section 35, 35.1 or 36 must be translated from a language other than French or English, 60 days after the request is delivered to the company.

Environmental Violations Administrative Monetary Penalties Act, S.C. 2009, c. 14, s. 126

6 The Minister may

(a) establish the form of notices of violation;

(b) designate persons, or classes of persons, who are authorized to issue notices of violation; and

(c) establish, in respect of each violation, a short-form description to be used in notices of violation.

7 Every person, ship or vessel that contravenes or fails to comply with a provision, order, direction, obligation or condition designated by regulations made under paragraph 5(1)(a) commits a violation and is liable to an administrative monetary penalty of an amount to be determined in accordance with the regulations.

11 (1) A person, ship or vessel named in a notice of violation does not have a defence by reason that the person or, in the case of a ship or vessel, its owner, operator, master or chief engineer

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

20 (1) After giving the person, ship or vessel that requested the review and the Minister reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for the person, ship or vessel and the Minister to make oral representations, the review officer or panel conducting the review shall determine whether the person, ship or vessel committed a violation.

(2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.

(3) If the review officer or panel determines that the penalty for the violation was not determined in accordance with the regulations, the review officer or panel shall correct the amount of the penalty.

22 If the review officer or panel determines that a person, ship or vessel has committed a violation, the person, ship or vessel is liable for the amount of the penalty as set out in the decision.

***Environmental Violations Administrative Monetary Penalties Regulations,
SOR/2017-109***

4 (1) The amount of the penalty for each violation is to be determined by the formula

$$W + X + Y + Z$$

where

W is the baseline penalty amount determined under section 5;

X is the history of non-compliance amount, if any, as determined under section 6;

Y is the environmental harm amount, if any, as determined under section 7; and

Z is the economic gain amount, if any, as determined under section 8.

5 The baseline penalty amount for a violation is the amount set out in column 3 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

APPENDIX B – Chronology

| Pre-Enforcement Actions | |
|--------------------------------|--|
| October 30, 2019 | ECCC, Transportation Division, requested information from the Applicant noting potential certification and compliance issues involving 2019 RAM 2500 and 3500 trucks equipped with engines supplied by Cummins. The Applicant responded that any such information was between Cummins and the United States Environmental Protection Agency (“EPA”) and that the Canadian trucks “continue to be covered by the EPA Certificate of Conformity. |
| February 24, 2020 | ECCC, Transportation Division followed-up with a request for evidence of conformity in relation to the subject case vehicle. The request indicated that the subject case vehicle had been selected for Emissions Compliance Verification and Testing in accordance with Part 7, Division 5 of CEPA and that related information be provided within 40 days, pursuant to subsection 38(3) of the Regulations. |
| March 9, 2020 | Receiving no response, ECCC Transportation Division again requested the relevant information from the Applicant, on a voluntary basis, to support compliance verification. |
| March 30, 2020 | The Applicant responded stating that the information sought by ECCC concerned vehicles equipped with Cummins engines covered by an EPA Certificate of Conformity and that such information was, in its majority, held by Cummins. |
| Enforcement Actions | |
| October 1, 2020 | ECCC Enforcement Branch issued a Ministerial Demand Letter to the Applicant, pursuant to s. 219 of CEPA, for the production of records for the purposes of verifying regulatory compliance for the subject case vehicle. The Ministerial Demand Letter provided a deadline of December 4, 2020, for the production of the requested records. |
| December 2, 2020 | ECCC Enforcement Branch had received records from the Applicant via email, as well as records directly from Cummins by way of a shared drive hosted by McMillan, in |

| | |
|-----------------|--|
| | response to the Ministerial Demand Letter. ECCC submits that the records were not responsive in full to the Ministerial Demand Letter. |
| May 13, 2021 | Enforcement Branch sent a follow-up request to the Applicant for certain outstanding records. A deadline of June 18, 2021 was given. |
| June 18, 2022 | Cummins submit additional records to ECCC |
| August 4, 2021 | ECCC requests a meeting with the Applicant |
| August 18, 2021 | <p>Although some additional records or information were provided directly by Cummins to ECCC, ECCC determined that certain records subject to the Ministerial demand still had not been provided by June 18, 2021: namely, the items corresponding to 3(a)(ii), (f), (g), & (h) of the Ministerial Demand and follow-up letters.</p> <p>Pursuant to ss. 6 and 10(1) of the <i>Environmental Violations Administrative Monetary Penalties Act</i> ("EVAMPA"), the enforcement officer issued Notices of Violation for the period from June 15 to August 17, 2021, citing contraventions of paragraph 153(1)(g) of CEPA.</p> |
| September 2021 | FCA files Requests for Review with the EPTC |