



Issue Date: October 11, 2023

Citation: *Beausite Métal Inc. and Michel Proulx v. Canada (Environment and Climate Change)*, 2023 EPTC 10

EPTC Case Nos.: 0019-2022 and 0020-2022

Case Name: *Beausite Métal Inc. v. Canada (Environment and Climate Change)* (0019-2022);
Michel Proulx v. Canada (Environment and Climate Change) (0020-2022)

Applicants: Beausite Métal Inc. and Michel Proulx

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under section 256 of the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, of an environmental protection compliance order issued under subsection 235(1) of that Act.

Heard: September 26, 2023 (by videoconference)

Appearances:

Parties

Beausite Métal Inc.
Michel Proulx

Minister of Environment and Climate
Change Canada

Counsel

Richard Généreux
Andy Noroozi

Sarom Bahk
Christopher Hadjis Chartrand

DECISION DELIVERED BY:

PAUL DALY

Introduction

[1] The subject of the current request for review is an environmental protection compliance order (“EPCO”) issued by an officer of the Minister of Environment and Climate Change Canada (“ECCC”) against Beausite Métal Inc. and Michel Proulx (“the applicants”) on July 25, 2022. The EPCO was accompanied by a detailed list of observations made by the officer and the officer’s colleagues during several visits to the applicants’ premises. During these visits, ECCC noted several violations of the federal chlorobiphenyl [PCB] rules, that is, the [PCB Regulations](#), SOR/2008-273 (“the Regulations”).

[2] The EPCO was issued under subsection 235(1) of the [Canadian Environmental Protection Act, 1999](#), S.C. 1999, c. 33 (“CEPA”). The applicants have requested a review of the EPCO, in accordance with subsection 256(1) of CEPA.

[3] For the following reasons, the Tribunal confirms the EPCO, with minor amendments. The EPCO can be found in Appendix 1 to this decision.

[4] There are reasonable grounds to believe that the applicants committed multiple offences under the Regulations and that the measures in the EPCO are reasonable in the circumstances (with minor amendments). The applicants took certain measures during the proceeding, but without notifying ECCC or the Tribunal. It is regrettable that the applicants chose to respond unilaterally to the measures in the EPCO given that the Tribunal had suspended it with the parties’ consent. As a result, the applicants’ evidence does not allow the Tribunal to conclude that the applicants have complied with the measures in the EPCO: they are therefore continuing to contravene the Regulations, and the measures in the EPCO are reasonable in the circumstances and consistent with the protection of the environment and public safety in order for the commission of the regulatory contraventions to cease.

[5] The applicants have also raised constitutional arguments regarding the EPCO, sharply criticizing the behaviour of ECCC officers during their many visits before the EPCO at issue here was issued. These arguments have no merit and must be rejected.

Background

[6] It is helpful to start with a review of the regulatory environment: the regulations regarding PCBs and the mechanism for enforcing these regulations.

Relevant statutes and regulations

[7] The Regulations provide a clear framework for permitted and prohibited activities involving PCBs.

[8] Under subsection 16(3) of the Regulations, a person may, as a general rule, use equipment containing a liquid containing PCBs if the PCBs are in a concentration “of 2 mg/kg or more but less than 50 mg/kg in equipment until the day on which the liquid is removed from the equipment”.

[9] Read together, sections 14 and 16 of the Regulations describe the circumstances in which a concentration of 50 mg/kg or more is permitted. These circumstances are irrelevant to this proceeding.

[10] Section 19 imposes obligations on the owners of equipment containing PCBs in concentrations over the legal limit:

<p>A person who owns, controls or possesses PCBs or products containing PCBs shall, within 30 days after the day on which those PCBs or products cease to be processed daily or used or after September 5, 2008, whichever is later, either</p> <ul style="list-style-type: none">(a) send them for destruction to an authorized facility that is authorized for that purpose; or(b) store them at a PCB storage site for the period during which they are not processed daily or used.	<p>Le propriétaire de BPC ou de produits qui en contiennent ou la personne qui en a la possession ou le contrôle est tenu, dans les trente jours suivant la date où ceux-ci cessent d'être transformés quotidiennement ou utilisés ou suivant le 5 septembre 2008, selon la plus tardive de ces dates :</p> <ul style="list-style-type: none">a) soit de les expédier pour qu'ils soient détruits dans une installation agréée à cette fin;b) soit de les stocker dans un dépôt de BPC pendant qu'ils ne sont pas transformés quotidiennement ou utilisés.
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[11] Subsection 5(1) of the Regulations describes the circumstances in which PCBs may not be released:

<p>No person shall release PCBs into the environment, other than from the equipment referred to in subsection (2), in a concentration of</p> <p>(a) 2 mg/kg or more for a liquid containing PCBs; or</p> <p>(b) 50 mg/kg or more for a solid containing PCBs.</p>	<p>Il est interdit de rejeter dans l'environnement, autrement qu'à partir d'une pièce d'équipement visée au paragraphe (2), des BPC de l'une ou l'autre des concentrations suivantes :</p> <p>a) dans le cas d'un liquide qui contient des BPC, une concentration égale ou supérieure à 2 mg/kg;</p> <p>b) dans le cas d'un solide qui contient des BPC, une concentration égale ou supérieure à 50 mg/kg.</p>
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[12] According to section 40 of the Regulations, any release of PCBs in contravention of section 5 of the Regulations must be disclosed to ECCC:

<p>(1) For the purposes of paragraph 95(1)(a) of the Act, where there occurs or is a likelihood of a release into the environment of PCBs in contravention of section 5, the person who is designated to be provided with a written report is the Regional Director, Environmental Enforcement Division, Enforcement Branch of the Department of the Environment in the region where the release occurs or is likely to occur.</p> <p>(2) The report shall include the following information:</p> <p>(a) the name, civic and mailing addresses and telephone number of the person who owns or has the charge, management or control of the PCBs that are released into the environment;</p> <p>(b) the date, time and location of the release;</p> <p>(c) a description of the source of the release; and</p>	<p>(1) Pour l'application de l'alinéa 95(1)a) de la Loi, en cas de rejet dans l'environnement — effectif ou probable — de BPC en violation de l'article 5, la personne désignée pour recevoir le rapport écrit est le directeur régional, Division de l'application de la loi en environnement, Direction générale de l'application de la loi du ministère de l'Environnement, dans la région où a lieu le rejet — effectif ou probable.</p> <p>(2) Le rapport comporte les renseignements suivants :</p> <p>a) les nom, adresses municipale et postale et numéro de téléphone de la personne qui a toute autorité sur les BPC qui ont été rejetés dans l'environnement ou qui en est propriétaire;</p> <p>b) les date, heure et lieu du rejet;</p> <p>c) une description de la source du rejet;</p>
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<p>(d) the quantity of liquids containing PCBs released, expressed in litres, the quantity of solids containing PCBs released, expressed in kilograms, and the concentration of PCBs in the liquids and the solids that are released, expressed in mg/kg.</p>	<p>d) la quantité de liquides qui contiennent des BPC rejetés, exprimée en litres, la quantité de solides qui contiennent des BPC rejetés, exprimée kilogrammes, et la concentration de BPC dans les liquides ou les solides rejetés, exprimée en mg/kg.</p>
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[13] The powers of inspections are governed by subsection 218(1) of CEPA:

<p>Subject to subsection (2), for the purposes of this Act and the regulations, an enforcement officer may, at any reasonable time, enter and inspect any place if the enforcement officer has reasonable grounds to believe that</p> <p>(a) there can be found in the place a substance with respect to which this Act applies, a product that contains such a substance or a product that may release such a substance into the environment;</p> <p>(b) fuels to which this Act applies are being or have been produced or blended, or can be found, in the place;</p> <p>(c) a cleaning product or water conditioner, as defined in section 116, is being or has been produced or can be found in the place;</p> <p>(d) regulations made under section 209 apply to or in respect of the place;</p> <p>(e) the place is a source in respect of which regulations have been made under section 167 or 177 or a place in respect of which regulations have been made under section 200;</p>	<p>Pour l'application de la présente loi et de ses règlements, l'agent de l'autorité peut, sous réserve du paragraphe (2), à toute heure convenable, inspecter un lieu s'il a des motifs raisonnables de croire, selon le cas :</p> <p>a) qu'il s'y trouve soit une substance visée par la présente loi, soit un produit en contenant ou susceptible d'en rejeter dans l'environnement;</p> <p>b) qu'on y produit ou y a produit, qu'on y mélange ou y a mélangé ou qu'il s'y trouve tout combustible visé par la présente loi;</p> <p>c) qu'on y fabrique ou y a fabriqué ou qu'il s'y trouve un produit de nettoyage ou un conditionneur d'eau, au sens de l'article 116;</p> <p>d) que le lieu est régi par des règlements d'application de l'article 209;</p> <p>e) que le lieu est une source visée par des règlements d'application des articles 167 ou 177 ou un lieu régi par des règlements d'application de l'article 200;</p>
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<p>(f) a substance is being loaded for the purpose of disposal at sea or is being disposed of at sea;</p> <p>(g) any vehicle, engine or equipment of a class for which standards for emissions have been prescribed that is owned by or is on the premises of a company or a consignee of imported vehicles or engines or imported equipment can be found in the place;</p> <p>(h) any component to be used in the manufacture of a vehicle, engine or equipment for which standards for emissions have been prescribed can be found in the place;</p> <p>(i) any record in relation to the design, manufacture, testing and field performance of a vehicle, engine or equipment in so far as it relates to emissions can be found in the place; or</p> <p>(j) any books, records, electronic data or other documents relevant to the administration of this Act can be found in the place.</p>	<p>f) qu'on y charge une substance pour immersion ou abandon en mer;</p> <p>g) qu'il s'y trouve des véhicules, moteurs ou équipements appartenant à une catégorie assujettie à des normes d'émissions prévues par règlement et qui sont la propriété ou se trouvent dans les locaux d'une entreprise ou d'un consignataire de véhicules, moteurs ou équipements importés;</p> <p>h) qu'il s'y trouve des pièces destinées à servir à la fabrication de véhicules, moteurs ou équipements ainsi assujettis;</p> <p>i) qu'il s'y trouve des dossiers concernant les émissions et relatifs à la conception, à la fabrication, aux essais ou au rendement sur le terrain des véhicules, moteurs ou équipements;</p> <p>j) qu'il s'y trouve des livres, registres, données électroniques ou autres documents relatifs à l'exécution de la présente loi.</p>
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[14] Under section 235 of CEPA, ECCC may issue environmental protection compliance orders:

<p>(1) Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions are likely to be contravened in the circumstances described in that subsection, the</p>	<p>(1) Lors de l'inspection ou de la perquisition, l'agent de l'autorité qui a des motifs raisonnables de croire qu'une infraction à la présente loi ou aux règlements a été commise par une personne — et continue de l'être — ou le sera vraisemblablement, dans les cas prévus au paragraphe (2), peut ordonner à tout intéressé visé au paragraphe (3) de prendre les mesures prévues au paragraphe (4) et, s'il y a lieu, au</p>
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<p>enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, if applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.</p> <p>...</p> <p>(3) Subsection (1) applies to any person who</p> <ul style="list-style-type: none"> (a) owns or has the charge, management or control of <ul style="list-style-type: none"> (i) the substance — or any product that contains the substance or that may release the substance into the environment — to which the alleged contravention relates, or (ii) the property on which the substance or product is located; (b) causes or contributes to the alleged contravention; or (c) any person who is likely to cause or contribute to the alleged contravention. <p>(4) For the purposes of subsection (1), an order in relation to an alleged contravention of any provision of this Act or the regulations may specify that the person to whom the order is directed take one or more of the following measures:</p> <ul style="list-style-type: none"> (a) refrain from doing anything in contravention of this Act or the regulations, or do anything to 	<p>paragraphe (5) qui sont justifiées en l'espèce et compatibles avec la protection de l'environnement et la sécurité publique pour mettre fin à la perpétration de l'infraction ou s'abstenir de la commettre.</p> <p>[...]</p> <p>(3) Pour l'application du paragraphe (1), les intéressés sont les personnes qui, selon le cas :</p> <ul style="list-style-type: none"> a) sont propriétaires de la substance en cause dans la perpétration de la prétendue infraction, d'un produit en contenant ou susceptible d'en rejeter dans l'environnement, ou du lieu où se trouve cette substance ou ce produit, ou ont toute autorité sur eux; b) causent cette infraction ou y contribuent; c) les personnes qui causeront vraisemblablement la prétendue infraction ou y contribueront vraisemblablement. <p>(4) L'ordre peut enjoindre à l'intéressé de prendre une ou plusieurs des mesures suivantes :</p> <ul style="list-style-type: none"> a) s'abstenir d'agir en violation de la présente loi ou de ses règlements ou, au contraire, faire quoi que ce soit pour s'y conformer; b) cesser une activité ou fermer notamment un ouvrage ou une entreprise, pour une période déterminée; c) cesser l'exercice d'une activité ou l'exploitation d'une partie notamment d'un ouvrage ou d'une entreprise jusqu'à ce que l'agent de
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<p>comply with this Act or the regulations;</p> <p>(b) stop or shut down any activity, work, undertaking or thing for a specified period;</p> <p>(c) cease the operation of any activity or any part of a work, undertaking or thing until the enforcement officer is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;</p> <p>(d) move any conveyance to another location including, in the case of a ship, move the ship into port or, in the case of an aircraft, land the aircraft;</p> <p>(e) unload or re-load the contents of any conveyance; and</p> <p>(f) take any other measure that the enforcement officer considers necessary to facilitate compliance with the order — or to restore the components of the environment damaged by the alleged contravention or to protect the components of the environment put at risk by the alleged contravention — including</p> <p>(i) maintaining records on any relevant matter,</p> <p>(ii) reporting periodically to the enforcement officer, and</p> <p>(iii) submitting to the enforcement officer any information, proposal or plan specified by the enforcement officer setting out any action to be taken by the person with</p>	<p>l'autorité soit convaincu qu'ils sont conformes à la présente loi et aux règlements;</p> <p>d) déplacer un moyen de transport vers un autre lieu, y compris faire entrer un navire au port ou faire atterrir un aéronef;</p> <p>e) décharger un moyen de transport ou le charger;</p> <p>f) prendre toute autre mesure que l'agent de l'autorité estime nécessaire pour favoriser l'exécution de l'ordre — ou rétablir les éléments de l'environnement endommagés par la prétendue infraction ou protéger ceux menacés par la prétendue infraction —, notamment :</p> <p>(i) tenir des registres sur toute question pertinente,</p> <p>(ii) lui faire périodiquement rapport,</p> <p>(iii) lui transmettre les renseignements, propositions ou plans qu'il précise et qui énoncent les mesures à prendre par l'intéressé à l'égard de toute question qui y est précisée.</p> <p>[...]</p>
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... respect to the subject-matter of the order.	
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[15] Under section 256 of CEPA, any person to whom an EPCO is directed may file a request for review with the Tribunal. Through section 263 of CEPA, review officers who represent the Tribunal have discretion over the measures imposed by EPCOs that are subject to review:

<p>The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may</p> <ul style="list-style-type: none"> (a) confirm or cancel the order; (b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or (c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3). 	<p>Après avoir examiné l'ordre, avoir donné aux intéressés et au ministre un avis écrit ou oral suffisant de la tenue d'une audience et leur avoir accordé la possibilité de lui présenter oralement leurs observations, le réviseur peut décider, selon le cas :</p> <ul style="list-style-type: none"> a) de le confirmer ou de l'annuler; b) de modifier, suspendre ou supprimer une condition de l'ordre ou d'en ajouter une; c) de proroger sa validité d'une durée équivalant au plus à cent quatre-vingts jours moins le nombre de jours écoulés depuis sa réception hors suspension.
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[16] However, this discretion is subject to the limitations set out in section 265 of CEPA:

<p>A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in</p> <p>(a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;</p> <p>(b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or</p> <p>(c) danger to the health or safety of any person.</p>	<p>Le réviseur ne peut toutefois exercer les pouvoirs visés à l'article 263 si cela devait occasionner :</p> <p>a) la dégradation ou un risque grave de dégradation de la qualité de l'environnement relativement à tout usage que l'on peut en faire;</p> <p>b) un préjudice ou des dommages — ou un risque grave de préjudice ou de dommages — à des biens, des végétaux ou des animaux;</p> <p>c) un danger pour la santé ou la sécurité de quiconque.</p>
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[17] The Tribunal has already analyzed the scope of its powers in the context of a request for review of an EPCO. In [Kost](#), the Tribunal explained that its role is to examine, on the basis of the documentary evidence filed by the parties and in light of their oral representations, whether, at the time of the hearing, there are (1) reasonable grounds “for the Compliance Order”; and (2) “if so, to determine what measures are reasonable in the circumstances and consistent with the protection of the environment and public safety” (*Kost v. Canada (Environment and Climate Change); Distribution Carworx Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 3, para. 21).

[18] In determining whether an EPCO is reasonable in the circumstances, the Tribunal should be guided by the purpose of CEPA:

In exercising its discretion under [section 263](#) of [CEPA](#), the Tribunal is guided by the purpose of the [Act](#). The Tribunal will then exercise its discretion so as to further the statutory purposes of pollution prevention and the protection of the environment and human health (*Groupe Marcelle Inc. and David Cape v. Canada (Environment and Climate Change Canada)*), 2022 EPTC 8, para. 45).

[19] Failure to comply with an EPCO upheld by the Tribunal may be subject to criminal proceedings: paragraph 272(1)(a).

Factual background

[20] This case has a lengthy history since ECCC has carried out inspections at the applicants' premises since 2016.

[21] However, it is not necessary to describe in detail how the facts have evolved over the years. In fact, the issues before the Tribunal are fairly straightforward.

[22] It is not disputed that ECCC took many samples at the applicants' premises during its inspections in 2022 and that, on several occasions, samples revealed the presence of liquids with high concentrations of PCBs. In some cases, the concentration was 16 times the maximum concentration allowed by the Regulations. The EPCO correctly identifies all the non-compliant equipment, mostly by serial number. Moreover, at the applicants' premises, ECCC saw liquid spilled on the ground around equipment containing liquids with a high concentration of PCBs. To support the EPCO, ECCC sent the applicants a 105-paragraph description of the observed regulatory contraventions.

[23] Furthermore, a facility on the applicants' premises was being used as a PCB storage site, but the applicants did not attempt to establish that it was actually a "PCB storage site" that meets the requirements of the Regulations. The applicants must therefore send non-compliant equipment to an authorized facility, in accordance with paragraph 19(a) of the Regulations.

[24] The EPCO imposes 18 measures that can be divided into three categories.

[25] First, destruction measures: equipment for which oil samples indicated a high concentration of PCBs (EPCO, measures 1 to 5, 7, 8, 9 and 12) and any other equipment not complying with the Regulations (EPCO, measures 13 and 14) were to be destroyed.

[26] Second, information measures: the applicants were to produce reports about the spilling of liquid containing PCBs (EPCO, Measure 6), carry out tests (EPCO, measures 10 and 15) and assemble some equipment in the same location (EPCO, Measure 11).

[27] Third, communication measures: the applicants were to keep ECCC informed (by notifying them for example) before destroying equipment and providing ECCC with destruction evidence (EPCO, measures 16 to 18).

[28] While the proceeding was suspended, the applicants sampled some pieces of equipment and destroyed others. The applicants now claim that, in light of their actions, most of the EPCO measures have become moot, either because the equipment has been destroyed or because, according to their sampling of some of the equipment affected by the EPCO, all the equipment now complies with the Regulations. The communication measures are also now moot. The only measure that the applicants have not yet addressed, and for which they have requested an extension to June 30, 2024, is that concerning seven transformer carcasses.

[29] As mentioned, the EPCO was suspended during the proceeding. After the applicants raised constitutional arguments that were inherently linked to the facts underlying the substance of the offences identified by ECCC, the parties agreed that the EPCO should be suspended until the Tribunal renders its decision on the merits. The Tribunal therefore suspended all the measures in the EPCO. The parties also agreed on a proceeding protocol. The applicants subsequently made two requests to amend the protocol. In two orders, to be found in appendices 2 and 3, respectively, the Tribunal refused to amend the protocol on the ground that the applicants had failed to respect it and had misunderstood the nature of a request for review and the role of the Tribunal.

Issues

[30] It is worth repeating the succinct definition of the Tribunal's role in *Kost*, at paragraph 21:

... the main tasks for the Tribunal ... are to examine whether there are reasonable grounds for the Compliance Order and, if so, to determine what measures are reasonable in the circumstances and consistent with the protection of the environment and public safety.

[31] The applicants have also raised constitutional arguments. There are therefore three issues:

1. Were there reasonable grounds to believe that an offence had been committed and to issue an EPCO?
2. Which measures are reasonable in the circumstances and consistent with the protection of the environment and public safety?
3. Should the EPCO be cancelled because ECCC violated the applicants' constitutional rights?

[32] For the first two issues, the burden is on ECCC, but for the third issue, the burden is on the applicants to establish that their constitutional rights have been violated. We will examine, first, whether there were reasonable grounds to issue an EPCO and, second, which measures are appropriate, and then dispose of the constitutional questions.

Analysis

[33] To begin with, it should be noted that the Tribunal has to deal with the appropriateness of the unilateral action taken by the applicants while the EPCO was suspended with the parties' consent. In their oral argument, the applicants submitted that

most of the measures in the EPCO are now moot. But they ignored the legislative framework because they failed to explain whether they were disputing that there were reasonable grounds to issue an EPCO or that the measures in the EPCO were justified. The Tribunal therefore has to consider their arguments as best as possible within the legislative framework to be applied. It should be noted that, even if the arguments were analyzed in a different order, we would arrive at the same outcome (see paras 51, 65, below).

[34] The applicants took two types of unilateral action.

[35] On the one hand, they arranged for the sampling of certain equipment and provided certificates of analysis showing PCB concentrations in compliance with the Regulations. The Tribunal will analyze the appropriateness of this approach on the basis of the reasonable grounds for issuing an EPCO, since the applicants argue that some of the equipment should not have been targeted by the EPCO.

[36] On the other hand, the applicants submit that they appointed an authorized company under the Regulations to destroy the other equipment covered by the EPCO. The appropriateness of this approach will be examined in light of the reasonable measures in the circumstances.

[37] The Tribunal wishes to point out that the applicants never informed ECCC of the measures they were planning to take. They explain this by the fact that all the measures in the EPCO, including the communication measures, had been suspended. However, as we will explain, in light of the applicable legislative framework, acting unilaterally harmed the applicants.

Reasonable grounds to issue an EPCO

ECCC's evidence

[38] The Tribunal finds that there is ample evidence that, when the EPCO was issued, several pieces of equipment on the applicants' premises contained oil with a concentration of PCBs well over the regulatory limits. For example, a Westinghouse transformer at the so-called PCB storage site contained oil containing PCBs in a concentration of 778,000 mg/kg, the ballasts and capacitors referred to in Measure 5 of the EPCO recorded concentrations of 840,000 mg/kg and 779,000 mg/kg, respectively, and the capacitors referred to in Measure 13 of the EPCO had high rates of 765,000 mg/kg, 758,000 mg/kg, 788,000 mg/kg, 855,000 mg/kg and 790,000 mg/kg. The regulatory limit is 50 mg/kg. The Tribunal finds this to be compelling evidence.

Credibility of ECCC's main witness

[39] In their written arguments and at the hearing, the applicants tried to attack the credibility of ECCC's main witness, Officer Pascal Bélanger. These attempts puzzle the Tribunal. Officer Bélanger produced two very detailed affidavits with supporting evidence, carefully explaining the steps he followed during the inspections, the justification for the measures in the EPCO and (in the second affidavit) the deficient efforts made by the applicants while the EPCO was suspended. Officer Bélanger had already produced, in support of the EPCO, a detailed description of the facts underlying the EPCO, which he provided to the applicants. The applicants did not identify the slightest contradiction between this description and the officer's testimony. Having read Officer Bélanger's affidavits, the Tribunal finds that they are the result of painstaking, conscientious and highly professional work.

[40] The applicants cross-examined Officer Bélanger on the contents of his first affidavit. The cross-examination transcript is about a hundred pages long (even though a good chunk covers the discussions between counsel for the two parties regarding the relevance of some of Officer Bélanger's answers). According to the Tribunal, Officer Bélanger answered the questions of counsel for the applicants throughout the cross-examination both honestly and convincingly.

[41] The applicants argue that there were contradictions in Officer Bélanger's testimony. But the alleged contradictions only concern peripheral factors. The Tribunal therefore finds that Officer Bélanger was credible.

There were reasonable grounds to issue an EPCO in the circumstances

[42] In any event, even if there were contradictions in Officer Bélanger's testimony (which the Tribunal doesn't believe), the applicants were unable to explain their relevance or impact in the context of a request for review. Officer Bélanger gathered ample evidence of flagrantly obvious violations of the Regulations—evidence that provided reasonable grounds to believe that regulatory offences had been committed. The applicants have completely failed to cast doubt on this evidence; in fact, they did not even attempt to do so.

[43] There were therefore reasonable grounds to issue an EPCO in the circumstances. As the Tribunal explained in *Kost*, at paragraph 38:

The first part of s. 235(1) looks at the evidence of a contravention or likely future contravention. Evidence demonstrating reasonable grounds to believe that there has been a contravention of any provision of [CEPA](#) or the regulations (or a likely future contravention) in any of the circumstances set out in s. 235(2) is sufficient to ground an environmental protection compliance order.

Sampling

[44] In terms of sampling, the applicants provide certificates of analysis, an affidavit from Michel Proulx and a video of a man (probably Dr. Lawrence Hoy) taking a sample on a piece of equipment.

[45] Neither ECCC nor the Tribunal were able to verify the sampling method or the points where samples were taken. Even though the Tribunal accepts that samples were taken, it is unable to say whether the obtained test results contradict the results obtained by Officer Bélanger.

[46] By filing supposedly contradictory evidence, the applicants are asking the Tribunal to choose between their method and that of ECCC. But their evidence is not contradictory because it does not contradict ECCC's evidence. The applicants are asking the Tribunal to compare apples with oranges.

[47] In addition, they are not attacking the methods used by ECCC. They have focused their attack on Officer Bélanger's credibility, an attack the Tribunal has rejected.

[48] In any event, the applicants misunderstand the Tribunal's role in suggesting that the Tribunal must decide which of the two proposed sampling methods is the best. It is not for the Tribunal to resolve scientific questions about sampling methods or other technical questions ([Groupe Marcelle Inc. and David Cape v. Canada \(Environment and](#)

[Climate Change Canada](#)), 2022 EPTC 8, at paras. 72–80). Scientific certainty is not the purpose of a request for review. At issue rather is whether there are reasonable grounds to believe that the Regulations were violated and whether the measures in the EPCO are reasonable in light of the facts.

[49] The Tribunal has before it ample evidence that the pieces of equipment referred to in the EPCO do not comply with the Regulations, far from it in fact. The Tribunal finds that the evidence of the sampling measures taken by the applicants does not change this.

[50] The same is true of the land characterization undertaken by the applicants. It is unclear whether this exercise could meet the requirements of the EPCO. Measure 15 identifies certain areas, but the work done by the applicants does not explain how it was carried out in these areas. The evidence provided by Michel Proulx is insufficient because it is not accompanied by an explanation of how the work meets the EPCO requirements.

[51] The Tribunal therefore concludes that, when the EPCO was issued, there were reasonable grounds to believe that regulatory offences had been committed. The unilateral sampling measures taken by the applicants do not change this. As we will explain in paragraphs 55 to 63, the same is true of the unilateral measures taken to destroy equipment. Moreover, the regulatory offences ECCC discovered on the applicants' premises are continuing.

[52] The only reproach the Tribunal can make of Officer Bélanger's work is that he failed to take soil samples to support Measure 15. Measure 15 concerns areas with damaged equipment and discharges from a liquid on the ground. Given that Officer Bélanger testified that this equipment probably contained liquids with a high concentration of PCBs (and his testimony regarding this has not been questioned), it was reasonable to conclude that the discharged liquid contained PCBs. In this regard, there were reasonable grounds to believe that substances containing PCBs had indeed been released even though no samples were taken. But Measure 15 does not concern only the areas identified in the EPCO; it says that the EPCO includes those areas but is not limited to them. Without samples or other indicators to identify the relevant areas, Measure 15 is too broad and should be confined to the areas identified by Officer Bélanger. It will therefore be amended slightly.

Which measures are reasonable in the circumstances and consistent with the protection of the environment and public safety?

[53] The applicants argue that most of the measures in the EPCO have become moot as a result of the unilateral measures they took during the suspension.

[54] In the Tribunal's view, the EPCO is not moot. Indeed, the Tribunal finds that all the measures in the EPCO are reasonable in the circumstances and consistent with the protection of the environment and public safety (with minor amendments). Here's why.

Destruction

[55] According to Michel Proulx's affidavit, the applicants hired an authorized company to destroy the equipment referred to in the EPCO.

[56] However, the affidavit contains little information on the contractual relationship between the applicants and the authorized company or the steps taken by that company to destroy the equipment.

[57] Michel Proulx provided evidence in support of the affidavit. This evidence essentially consists of movement documents/manifests, of which an example can be seen in Appendix 4. The documents contain little information, such as serial numbers, to confirm that the pieces of equipment are actually those referred to in the EPCO.

[58] There are also no invoices or other documents to confirm that the authorized company carried out the work. For example, in the evidence reproduced in Appendix 4, which is representative of the other pieces of evidence, only a note towards the bottom of the page says, "Send to Sebastien for invoicing".

[59] Even worse, the "shipper/consignor" is An Pro Demolition Ltée. Neither this company nor its relationship with the applicants are discussed anywhere in the evidence provided by the applicants.

[60] The applicants' deficient evidence does not allow the Tribunal to believe an authorized company did destroy the equipment. The Tribunal must therefore conclude that the equipment was not destroyed in compliance with the Regulations.

[61] In fact, the evidence reveals that the applicants owned the equipment referred to in the EPCO in 2022. Nothing in the evidence provided by the applicants suggests that this is no longer the case. The Tribunal is of the view that the applicants still own the equipment non-compliant with the Regulations. The Tribunal therefore finds that the measures in the EPCO are reasonable in the circumstances and consistent with the protection of the environment and public safety.

[62] It is true that Michel Proulx's credibility was not disputed. But the Tribunal cannot give much weight to the information in Michel Proulx's affidavit given the lack of relevant evidence. If, as the affidavit says, the equipment was destroyed in compliance with the Regulations, it would be very easy to disclose the required evidence to ECCC. Under section 38 of the Regulations, an authorized company must provide an annual report

listing, among other things, any equipment destroyed in that year. If the affidavit is true, proof of the destruction by an authorized company must exist.

[63] The EPCO is therefore not moot. The measures in the EPCO are therefore highly appropriate for ensuring that the equipment referred to in the EPCO—containing concentrations of PCBs well over the legal limit—was dealt with in accordance with the Regulations.

Sampling

[64] As explained earlier, in paragraphs 44 to 51, the unilateral sampling measures taken by the applicants do not cast doubt on the fact that there were reasonable grounds to issue an EPCO. The same analysis applies to the relevance of the sampling measures in determining whether the measures in the EPCO are reasonable: the measures are reasonable in the circumstances and consistent with the protection of the environment and public safety notwithstanding the samples taken by the applicants.

Request for more time for seven transformer carcasses

[65] The applicants admit that seven transformer carcasses no longer containing any oil remain on their premises.

[66] The applicants accept that the carcasses must be destroyed by an authorized company in accordance with Measure 7 of the EPCO. However, they are asking to have until June 30, 2024, to do so and have requested that the Tribunal amend the EPCO, using its discretion under paragraph 263(b) of CEPA. ECCC is objecting to this on the ground that financial considerations do not justify regulatory non-compliance.

[67] There is no reason to allow this request.

[68] First, the Tribunal was unable to verify whether the carcasses in question still contain oil. As regards the destruction of the equipment, Michel Proulx's affidavit and evidence are not detailed enough. The Tribunal must therefore rely on ECCC's evidence, according to which the seven carcasses were at the applicants' so-called "PCB storage site". The Tribunal finds that the carcasses were there because they contained liquids well above the regulatory limit. In the absence of evidence to the contrary, the Tribunal finds that the seven carcasses still contain oil with a high concentration of PCBs.

[69] Moreover, the applicants have not provided any explanation for the additional time they have requested. They submitted no evidence of injury, financial or otherwise.

[70] The limitations of the Tribunal's jurisdiction, set out in section 265 of CEPA, are helpful here. In the case of equipment that does not comply with the Regulations because of it containing oil with a high concentration of PCBs, the existence of this equipment must necessarily result in "impairment or serious risk of impairment of the quality of the environment for any use that can be made of it", "injury or damage or serious risk of injury or damage to any property or to any plant or animal life" or "danger to the health or safety of any person". In this regard, ECCC filed an uncontradicted affidavit stating that PCBs pose [translation] "a risk to health and the environment" because of their persistence and toxicity (Affidavit of Lyne Potvin, para. 9).

[71] As the Tribunal noted in *Groupe Marcelle*, at paragraph 45, in exercising its discretion, the Tribunal must be guided by the will of Parliament, that is, to further the statutory purposes of pollution prevention and the protection of the environment and human health. The applicants have not explained how an extension would comply with this purpose. There is every reason to believe that an extension would not comply with it.

[72] In light of this uncontradicted evidence, the fact that the seven carcasses do not comply with the Regulations, the applicants' failure to establish any injury and Parliament's intent, the Tribunal concludes that there is no reason to amend Measure 7.

Numbering error in Measure 10

[73] ECCC admits that there is a numbering error in Measure 10. The applicants have requested that the measure be cancelled. There is no reason for cancelling it. The item in question has been properly identified in ECCC's evidence. Measure 10 will be amended to correct the numbering error.

Communication measures

[74] Given the applicants' unilateral behaviour during the proceeding, the communication measures in the EPCO remain reasonable in the circumstances and consistent with the protection of the environment and public safety. ECCC must be given at least seven days' notice of any action the applicants intend to take.

All the measures are reasonable in the circumstances and consistent with the protection of the environment and public safety

[75] The purpose of all the measures in the EPCO is compliance with the applicable regulations: First affidavit of Pascale Bélanger, paras. 198–203. They are therefore consistent with the protection of the environment for the reasons explained in

Lyne Potvin's affidavit. For the same reasons, the measures are also consistent with public safety.

[76] The Tribunal therefore finds that all the measures in the EPCO are reasonable in the circumstances and consistent with the protection of the environment and public safety (with minor amendments).

Applicants' constitutional arguments

[77] The applicants raise several constitutional arguments, alleging that their rights under sections 7, 8 and 9 of the *Canadian Charter of Rights and Freedoms* have been infringed by the inspection process leading to the EPCO. They are asking the Tribunal to cancel the EPCO under the authority of section 24 of the *Charter*, which allows a court of competent jurisdiction to grant "such remedy as the court considers appropriate and just in the circumstances".

[78] The applicants' arguments are unfounded.

[79] To begin with, it is important to clarify that the Tribunal is a body of limited jurisdiction, which has a significant effect as far as section 24 of the *Charter* is concerned.

[80] The parties do not dispute that the Tribunal may consider constitutional questions. Indeed, section 29 of the EPTC [Tribunal] Draft Rules of Procedure gives the Tribunal jurisdiction in this regard. The Tribunal agrees: the test for jurisdiction to consider constitutional questions, which the Supreme Court established in [*Nova Scotia \(Workers' Compensation Board\) v. Martin; Nova Scotia \(Workers' Compensation Board\) v. Laseur*](#), 2003 SCC 54, is a very generous one, and the Tribunal satisfies it easily, given that it interprets many legislative and regulatory provisions. The same test has applied to section 24 since [*Conway \(R. v. Conway\)*](#), 2010 SCC 22, and, in principle, the Tribunal may grant remedies for *Charter* violations.

[81] However, *Conway* also holds that another question is "whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme" (at para. 82). More specifically:

Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*). [at para. 82]

[82] Section 265 of CEPA is an important clue to legislative intent. Since the Tribunal may not amend an EPCO if the conditions set out in section 265 exist, it seems even

more certain that the Tribunal may not cancel an EPCO as a remedy under section 24 of the *Charter*. In other words, in light of the legislative scheme, the Tribunal is not empowered to allow the continuation of conditions that do not comply with the Regulations and that harm the environment. This is what the applicants are seeking, but the desired remedy is outside the statutory framework governing the Tribunal.

[83] In any event, the applicants' constitutional arguments are bound to fail. The burden to establish a constitutional violation is on the applicants, and they failed to meet it.

Section 7

[84] Section 7 of the *Charter* is simply not relevant in this case. The provision stipulates that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[85] But neither life, liberty nor security of the person are at issue here. ECCC carried out an inspection, in accordance with the powers conferred on it by CEPA, and issued an EPCO. The EPCO is not a criminal sanction that could deprive someone of their liberty. It does not affect anyone's life or security (given that section 7 does not protect economic interests: [Re B.C. Motor Vehicle Act](#), [1985] 2 SCR 486).

[86] The applicants claim that CEPA is criminal by its very nature because its validity arises from the federal law power ([R. v. Hydro-Québec](#), [1997] 3 SCR 213). This claim is based on a blurring of lines. The mere fact that the validity of a federal law is based on the criminal law power does not mean that all aspects of that law are criminal in nature. Provided a federal law satisfies the requirements of the criminal law power (that is, prohibitions, sanctions and public purpose), that law may also incorporate related provisions that are not criminal in nature ([Reference re Firearms Act \(Can.\)](#), 2000 SCC 31, [2000] 1 SCR 783, para. 37; [Reference re Assisted Human Reproduction Act](#), 2010 SCC 61, [2010] 3 SCR 457, para. 36). The applicants failed to identify any authority to support the claim that measures taken under a law enacted under the jurisdiction to enact criminal legislation would infringe the rights safeguarded by section 7 of the *Charter*.

[87] Relying on [R. v. Jarvis](#), 2002 SCC 73, [2002] 3 SCR 757, the applicants allege that ECCC conducted a disguised criminal investigation. Aside from the fact that the applicants did not provide any facts to support this claim, *Jarvis* does not even support their position.

[88] First, *Jarvis* concerned the [Income Tax Act](#), R.S.C. 1985, c. 1 (5th Supp.), which clearly distinguishes between the audit and investigation functions. When the Tribunal asked them to identify the provisions of CEPA establishing a similar distinction, the applicants were unable to do so. In fact, the key concept in CEPA is that of reasonable grounds justifying an inspection (section 218) and the issuance of an EPCO

(section 235): the Act does not make a distinction between different functions resembling the central distinction in *Jarvis*. Carrying out inspections and issuing EPCOs are both purely administrative measures.

[89] Second, a criminal proceeding had been instituted in *Jarvis*. Section 7 was therefore relevant. No penal or criminal proceedings have been initiated in this case. Failure to comply with an EPCO can lead to penal sanctions. In such a case, it would be up to the trial judge to establish to what extent *Charter* rights come into play in determining the penal liability of the persons in question. The distinction between the administrative process and the penal process under CEPA does resemble the distinction drawn in *Jarvis*, but we are not there yet (and we won't get there if the applicants comply with the EPCO).

Section 8

[90] The applicants also raise the “right to be secure against unreasonable search or seizure” under section 8 of the *Charter*. In [R. v. Collins](#), [1987] 1 SCR 265, para. 23, the Supreme Court explained that a search “will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable”.

[91] First, it is common ground that section 8 has to be analyzed contextually to determine whether the person raising it had a reasonable expectation of privacy. In this case, the premises visited by ECCC officers were industrial premises housing large quantities of equipment containing liquids with high concentrations of PCBs. According to the Supreme Court, “there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course” ([Thomson Newspapers Ltd. v. Canada \(Director of Investigation and Research, Restrictive Trade Practices Commission\)](#), [1990] 1 SCR 425, at p. 507). That is the case here.

[92] Moreover, in light of the test summarized in [R. v. Cole, 2012 SCC 53](#), [2012] 3 SCR 34, para. 40, the Tribunal finds that the expectation could not have been very high because the premises and equipment inspected by ECCC are heavily regulated and all of ECCC's actions were motivated by enforcing the Regulations. Even though the applicants had rights in the subject matter of the ECCC inspections, their expectation of privacy was minimal because, objectively, the inspections targeted regulated subject matters in commercial premises.

[93] In addition, the manner in which the ECCC officers visited the premises was reasonable. On several occasions, Michel Proulx accompanied them. On only one occasion, did they enter through a collapsed fence. But the goal of their visit was to ensure the site's regulatory compliance. The ECCC officers conducted themselves in accordance

with section 218—which sets out broad powers of inspection for sites matching the applicants’ premises—at all times.

[94] With their creative interpretation of section 218, especially subsection 218(4), the applicants suggest that officers must notify owners before entering their premises. There is nothing in the wording of section 218 to support such a claim. A search warrant is only required (section 218(4)) when entry has been refused, which has never been the case here. The applicants allege that refusal requires notice. We do not agree, because entry can be refused without a request having been made. In any event, when Parliament wanted to make notice a condition for exercising a power conferred by CEPA, it did so expressly: see, for example, subparagraph 223(4)(b)(iii), subsection 224(2) and section 237. Since Parliament knew how to do this explicitly, we cannot conclude that it did so implicitly in section 218.

[95] As for the collapsed fence, section 218 is clear: if the enforcement officer is able to enter a place without the use of force, as was the case here, a search warrant is not required. The ECCC officers therefore satisfied CEPA requirements at all times. Given the applicants’ low expectation of privacy, their section 8 arguments must be rejected. This case is not even close to an unreasonable inspection scenario as in [*Brochu c. Agence du revenu du Québec*](#), 2018 QCCS 722.

Section 9

[96] The applicants have also raised section 9 of the *Charter*: “Everyone has the right not to be arbitrarily detained or imprisoned.”

[97] They did not argue any of the elements of the test for detention, and there is nothing in the evidence on the record to suggest that the applicants were detained at any time whatsoever. In fact, Michel Proulx accompanied and helped ECCC voluntarily on several occasions.

[98] Also, this was an administrative process to ensure regulatory compliance. The applicants provided no examples of how section 9 of the *Charter* would apply to an administrative process. Their arguments on this subject must therefore be rejected.

Conclusion

[99] The EPCO is confirmed, with minor amendments as indicated.

Order

[100] The EPCO applies as follows, as of today. It must be read with the relevant facts, as provided with the EPCO on July 25, 2022, by Officer Bélanger.

1. As soon as possible, but not later than December 6, 2023, provide proof of elimination by an authorized company and/or inform the officer responsible of the location of the Westinghouse transformer manufactured in 1954, serial number 267205, and its oil content. As described in item 18 of the relevant facts, this transformer was located at substations 2 and 3.
2. As soon as possible, but not later than December 6, 2023, provide proof of elimination by an authorized company and/or inform the officer responsible of the location of the Canadian General Electric Company Limited transformer, manufacturer serial number 414438, and its insulating fluid content. As described in item 30 of the relevant facts, this transformer was initially located at the Saint-Luc Boulevard gate and had been moved to the warehouse.
3. As soon as possible, but not later than December 6, 2023, provide proof of elimination by an authorized company and/or inform the officer responsible of the location of the oil drum described in item 65 of the relevant facts.
4. As soon as possible, but not later than December 6, 2023, provide proof of elimination by an authorized company and/or inform the officer responsible of the location of the capacitors described in items 49 and 90 of the relevant facts.
5. As soon as possible, but not later than December 6, 2023, provide proof of elimination by an authorized company and/or inform the officer responsible of all the ballasts and PCB capacitors located on the site at 65 Route 255, Wotton, Quebec.
6. As soon as possible, but not later than December 6, 2023, produce a report of all releases into the environment in connection with the factors described in items 94 and 95 of the relevant facts, in accordance with section 40 of the *PCB Regulations*.
7. As soon as possible, but not later than January 10, 2024, arrange for an authorized company to eliminate all transformers, capacitors and ballasts stored in the open area of the machine shop.
8. As soon as possible, but not later than January 10, 2024, arrange for an authorized company to eliminate the Westinghouse circuit breaker, serial number 42S389, at electrical substations 2 and 3.

9. As soon as possible, but not later than January 10, 2024, arrange for an authorized company to eliminate the oil filtration system that was located at electrical substations 2 and 3 and its oil content.
10. As soon as possible, but not later than January 10, 2024, arrange for a qualified electrical contractor to sample, in the presence of Environment and Climate Change Canada officers, the Canadian General Electric transformer, serial number 287686, that is still connected to electrical substation 5 and provide a sample to Environment and Climate Change Canada officers for analysis.
11. As soon as possible, but not later than January 10, 2024, remove all pole-top electrical transformers no longer being used on the site and gather them in a common location. Inform an Environment and Climate Change Canada officer at least seven days before the transformers are removed.
12. As soon as possible, but not later than March 13, 2024, eliminate the Canadian General Electric transformer, serial number 287687, and the Westinghouse transformer, serial number A-3S6204, and their oil contents. As described in item 37 of the relevant facts, these transformers are located at substation 5.
13. As soon as possible, but not later than March 13, 2024, eliminate all unused equipment containing PCBs in a concentration of 50 mg/kg or more, in accordance with the *PCB Regulations*. This equipment includes but is not confined to all unused ballasts, capacitors and pole-top transformers located indoors, outdoors and on decommissioned power lines.
14. As soon as possible, but not later than March 13, 2024, stop using and eliminate any equipment used in contravention of the *PCB Regulations*.
15. As soon as possible, but not later than March 13, 2024, arrange for an authorized company to characterize the soil of the areas where oil was spilled on the ground during dismantling work or as a result of inadequate storage or equipment breaks ~~including in, but not limited to,~~ the areas described in items 93 and 94 of the relevant facts. The characterization report should be followed by an adequate rehabilitation plan. These documents must be submitted to an Environment and Climate Change Canada officer.
16. Notify an Environment and Climate Change Canada officer of the planned date of elimination at least seven days before any elimination.
17. As soon as possible, but not later than March 25, 2024, arrange for Michel Proulx to provide the undersigned with the documents confirming the management and transportation of any unused equipment containing PCBs in a concentration of 50 mg/kg or more.

18. As soon as possible, but not later than March 25, 2024, arrange for Michel Proulx to provide the undersigned with the documents confirming the management and transportation of any unused equipment containing PCBs in a concentration of 500 mg/kg or more.

"Paul Daly"

PAUL DALY
REVIEW OFFICER