Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date: December 19, 2023

Citation: *Estée Lauder Cosmetics Ltd., Sephora Beauty Canada, Inc. v. Canada (Environment and Climate Change)***,** 2023 EPTC 14

EPTC Case No: 0013-2023 and 0025-2023

Case Name: *Estée Lauder Cosmetics Ltd. v. Canada (Environment and Climate Change)* Tribunal File No. 0013-2023

Sephora Beauty Canada, Inc. v. Canada (Environment and Climate Change) Tribunal File No. 0025-2023

Applicants: Estée Lauder Cosmetics Ltd.
Sephora Beauty Canada, Inc.

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 257 of the *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33) of an Environmental Protection Compliance Order issued under subsection 235(1) of *CEPA*, based on the alleged contravention of subsections 3(1) and 3(2) of the *Microbeads in Toiletries Regulations*, SOR/2017-111 and paragraph 272(1)(h) of *CEPA*.

Heard: December 4, 2023 (by videoconference)

Appearances:

Parties	**Counsel**
Estée Lauder Cosmetics Ltd.	Mark Youden Quinn Rochon
Sephora Beauty Canada, Inc.	Ryan McNamara Jonathan Kahn
Minister of Environment and Climate Change Canada	Ryan Deshpande Sarom Bahk Benjamin Chartrand

DECISION DELIVERED BY: **HEATHER GIBBS, PAUL DALY, HEATHER MCLEOD-KILMURRAY**

Amended Decision: An amended decision was issued on January 10, 2024, to specify the duration of the Environmental Protection Compliance Orders and the new timeframes of the measures they provide. (paras. 124-125)

Introduction

[1] This decision pertains to two Environmental Protection Compliance Orders ("EPCOs") that were issued for violation of the *Microbeads in Toiletries Regulations* SOR/2017-111 (the "*Regulations*") made pursuant to the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("*CEPA*"). One EPCO was issued to Estée Lauder Cosmetics Ltd. ("ELC") on March 8, 2023, and one to Sephora Beauty Canada, Inc. ("Sephora") on May 16, 2023. In the case of the latter, the EPCO also related to violations of the Significant New Activities provisions of *CEPA*: the measures related to these violations are not contested but nonetheless form part of the background context.

[2] Both Applicants filed Requests for Review of the EPCOs. At the request of the Applicants, the Tribunal combined Files 0013-2023 and 0025-2023 following a pre-hearing conference on July 11, 2023. The files were combined because there is an important common issue relating to the application of the *Regulations*. Both ELC and Sephora claim that the testing process used to determine a violation of the *Regulations* is flawed in various ways, and they also claim that they were treated procedurally unfairly in the lead-up to the issuing of the EPCOs. In addition, Sephora claims that the EPCO issued in relation to its activities improperly includes officers of the company.

[3] We are grateful to counsel on both sides for their excellent submissions. Based on the written submissions and oral arguments, and for the reasons that follow, the Tribunal confirms the EPCOs issued to ELC and Sephora but cancels the EPCO issued to Sephora to the extent that it includes officers of the company. In brief, our findings can be summarized as follows.

- The Tribunal finds that reasonable grounds existed to support the issuing of the EPCOs: the prescribed testing process was followed and the resulting laboratory analyses furnish the required reasonable grounds to issue the EPCOs.

- The Tribunal finds that the measures in the EPCOs were reasonable in the circumstances and consistent with the protection of the environment and public safety.

- The Tribunal does not accept ELC and Sephora's arguments on procedural fairness, as no breach of procedural fairness has been made out on the facts and, more importantly, the Tribunal does not have jurisdiction to confirm, cancel, amend, modify or suspend an EPCO on the basis of a breach of procedural fairness.

- The Tribunal does not have jurisdiction to consider whether an EPCO has become moot due to compliance efforts undertaken between the issuing of an EPCO and the Tribunal's hearing of a Request for Review of an EPCO.

Facts

ELC EPCO

[4] ELC is a Canadian corporation which manufactures and sells cosmetics. Among the brands it markets is the “Clinique” brand. ELC products are sold by online retailers and in physical stores.

[5] On May 10, 2022, as part of compliance measures for the *Regulations*, Environment and Climate Change Canada (“ECCC" or “the Minister”) Enforcement Officer Vincent Szeto bought one unit of Clinique – Take the Day Off Cleansing Balm (the “Product”) from the Hudson’s Bay Company online. On May 18, 2022, he shipped a sample of the Product (sample #OR-19533) to ECCC’s Prairie Northern Laboratory for Environmental Testing (“PNLET”) for testing and analysis for the presence of microbeads. PNELT tested the Product using “Method 623.1 Microbeads in Toiletries, Prairie & Northern Laboratory for Environmental Testing, Revision No 1, June 24, 2022” (“Method 623.1, Rev., 1”). On June 3, 2022, PNLET concluded that the Product did contain microbeads and provided a Report of Analysis.

[6] At that point, ECCC Enforcement Officer Douglas Laing (“Officer Laing”) assumed carriage of the matter and had a number of conversations with ELC representatives. On January 31, 2023, he received approval to share the internal version of Method 623.1, which he shared with ELC on that day. He also sent a redacted copy of PNLET’s Report of Analysis to ELC.

[7] Officer Laing issued a formal Notice of Intent to Issue an EPCO on March 1, 2023. He also discussed the Notice of Intent to Issue an EPCO with in-house counsel for ELC. On March 8, 2023, ECCC issued an EPCO to ELC under s. 235(1) of *CEPA* alleging that ELC contravened s. 3(1) and (2) of the *Regulations* and s. 272(1)(h) of *CEPA* by importing and selling Clinique - Take the Day Off - Cleansing Balm containing plastic microbeads. The EPCO requires ELC to carry out 6 measures itemized in the EPCO. These are reproduced in Appendix A to this decision.

[8] On April 6, 2023, ELC filed a Request for Review of the EPCO.

[9] On April 24, 2023, ECCC and ELC agreed to an interim suspension of Measures 2-6 of the EPCO pending the outcome of this Review.

Sephora EPCO

[10] Sephora is a retailer of personal care and cosmetic products through 105 retails stores in Canada and on its website Sephora.com/ca.

[11] Between January 29, 2021 and May 16, 2023, ECCC Enforcement Officer Marc-André Cloutier ("EO Cloutier") carried out an inspection of Sephora's activities, pursuant to his powers under s. 218 of *CEPA*.

[12] The inspection was to determine whether the products imported and sold by Sephora violated the *Prohibition of Certain Toxic Substances Regulations, 2012* or the Significant New Activity ("SNAc") provisions of *CEPA.* His inspection revealed that the list of ingredients of several products sold by Sephora on its website indicated that they contained any of 8 substances identified as prohibited by the *Regulations* or SNAcs.

[13] EO Cloutier concluded that "the import, sale, offer for sale or export" of the products containing those substances constituted 'significant new activities' by Sephora and that Notifications of SNAc were not submitted before these activities were undertaken, as required by s. 81(3) and (4) of *CEPA*. He further concluded that Sephora had "omitted to notify the persons to whom the possession or control of the products was transferred of the obligation to comply with s. 81(4), contrary to s. 86 of *CEPA*." (ECCC Submissions, para 7).

[14] Between February 13 and May 16, 2023, EO Charles-Olivier Frégeau also conducted an inspection of Sephora's activities. He found that Sephora's website included several toiletries that included ingredients associated with the presence of plastic microbeads; (i) body scrubs containing Polylactic Acid (PLA) and (ii) cleansing balms containing Polyethylene (PE).

[15] Based on 19 laboratory analyses from PNLET of samples of body scrubs containing PLA which confirmed the presence of plastic microbeads, he concluded that Sephora's body scrubs containing PLA in the list of ingredients would meet the definition of "toiletries that contain microbeads" in the *Regulations*. He followed a similar process to conclude that cleansing balms containing PE would also meet that definition, since they had in previous PNLET analyses.

[16] On Feb. 21, 2023, EOs Cloutier and Frégeau issued a Notice of Intent to Issue an EPCO.

[17] EO Frégeau requested 12 samples of toiletries sold by Sephora containing the suspected ingredients. Nine of these were received on March 8, 2023 and sent to PNLET for analysis. On March 14, 2023, Sephora's counsel requested a copy of Method 623.1, the testing method used by PNLET. This was provided on March 15, 2023. Sephora's counsel made oral representations to EOs Cloutier and Frégeau on March 21, 2023.

[18] On May 16, 2023, ECCC issued an EPCO to Sephora, its President Jean-André Rougeot, and its General Manager Thomas Haupt. The EPCO alleges that Sephora contravened and is contravening subsections 3(1) and 3(2) of the *Regulations*, and subsections 81(3) and (4), 86, 272(1)(a), (b) and (h) of *CEPA* by importing and selling toiletries that contain microbeads. The EPCO contained 15 measures to be complied with. It is attached as Appendix B to this decision.

[19] Sephora submitted a written Request for Review of the EPCO on June 13, 2023.

[20] On July 18, 2023, pursuant to a joint proposal by the parties, the Tribunal suspended the operation of Measures 10-15, pursuant to s. 258(2) of *CEPA*.

Statutory and Regulatory Framework

[21] The primary statute relevant to these proceedings is *CEPA*. *CEPA* contains, before its Preamble, a declaration in the following terms:

> It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.

[22] *CEPA* vests significant regulatory authority in the Governor in Council. Section 90 empowers the Governor in Council, "if satisfied that a substance is toxic", to add the substance to the List of Toxic Substances in Schedule 1 of *CEPA*. Plastic microbeads were added to the Schedule in 2016: Canada Gazette Part II, Vol. 150, no. 13, at p. 1861. ECCC's submissions in the Sephora file at paras. 33-34 accurately capture the reasoning behind the addition of plastic microbeads to the Schedule:

> Plastic microbeads have shown adverse short-term and long-term effects in aquatic organisms. Additionally, microbeads can absorb persistent organic pollutants such as polychlorinated biphenyls (PCBs) and dichlorodiphenyltrichloroethane (DDT) from the marine environment and are harmful to organisms that eat these microbeads. Plastic microbeads may reside in the environment for a long time, and continuous release of the substance to the environment may result in long-term effects on biological diversity and ecosystems.
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> Due to their physical and chemical properties, plastic microbeads in personal care products may slip through wastewater treatment plants and end up in rivers, lakes, seas, and oceans. Once in the environment, microbeads can be ingested by a wide range of organisms such as fish, seals, and birds. As a result, it is possible for microbeads to enter the food chain. Scientific documents indicate that plastic microbeads contribute to the volume of plastic litter in the environment and that their continued use in personal care products will result in their increased presence in the

environment. Microplastics, which include microbeads, have been measured in Canadian waters and sediments.

[23] Once a substance has been added to Schedule 1, the Governor in Council has extensive regulation-making powers under s. 93 of *CEPA*. Using these powers, the Governor in Council promulgated the *Regulations*.

[24] Section 1 of the *Regulations* defines microbeads as “the plastic microbeads set out in item 133 of the List of Toxic Substances in Schedule 1 to the *Canadian Environmental Protection Act, 1999*”. Toiletries are defined by the same provision as meaning “any personal hair, skin, teeth or mouth care products for cleansing or hygiene, including exfoliants”. There is no difference between the English and French versions of these definitions.

[25] As of July 1, 2018, s. 3 of the *Regulations* prohibits the manufacture, sale and importation of “any toiletries that contain microbeads”. Again, the English and French versions are identical.

[26] Section 5 of the *Regulations*, to be considered in more detail below, makes provision (again, in the same terms in both official languages) for “analysis performed to determine the presence of microbeads for the purposes of these *Regulations*”. The mode of analysis described in s. 5 is not fixed at a particular point in time. Indeed, the mode of analysis evolves: PNLET originally used Method 445 but changed approach around June 2022 to Method 623.1, Rev. 1, which is the current method; Method 623 has itself undergone various iterations. All of the testing relevant to these proceedings was conducted under Method 623.1, Rev. 1.

[27] The other aspect of *CEPA* relevant to these proceedings (though, again, only as background) is the provision for notification of Significant New Activity in respect of a substance on the Domestic Substances List. Under s. 66(1), the Minister must maintain this List. Subsection 81(3) prohibits “use, manufacture or [importation of] the substance for a significant new activity that is indicated on the List” without provision of prescribed information. Subsection 81(4) makes similar provision in respect of substances that are not on the List.

[28] *CEPA* also makes provision for EPCOs. It is worth reproducing s. 235 in its entirety:

Order	**Ordres**
(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)	**(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

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 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.

Circumstances

(2) For the purposes of subsection (1), the circumstances in which the alleged contravention has been or will be committed are as follows, namely,

(a) the exportation, importation, manufacture, transportation, processing or distribution of a substance, a product that contains a substance or a product that may release a substance into the environment;

(b) the possession, storage, use, sale, offering for sale, advertisement or disposal of a substance, a product that contains a substance or a product that may release a substance into the environment;

(c) the use, in a commercial manufacturing or processing activity, of a substance, a product that contains a

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 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.

Cas

(2) Les cas de contravention sont :

a) l'importation, l'exportation, la fabrication, le transport, la transformation ou la distribution d'une substance ou d'un produit en contenant ou susceptible d'en rejeter dans l'environnement;

b) leur possession, entreposage, utilisation, vente, mise en vente, publicité ou élimination;

c) leur utilisation au cours d'une activité de fabrication ou de transformation commerciale;

d) un acte ou une omission en ce qui touche une autorisation — notamment un avis, permis, agrément ou certificat — ou une condition de celle-ci, ou un acte ou une omission en l'absence d'une telle autorisation ou condition.

Personnes visées

(3) Pour l'application du paragraphe (1), les intéressés sont les personnes qui, selon le cas :

substance or a product that may release a substance into the environment; or

(d) an act or omission in relation to or in the absence of a notice, permit, approval, licence, certificate, allowance or other authorization or a term or condition thereof.

Application

(3) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of

(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.

Specific measures

(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:

(a) refrain from doing anything in contravention of this Act or the

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.

Mesures

(4) L'ordre peut enjoindre à l'intéressé de prendre une ou plusieurs des mesures suivantes :

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 l'autorité soit convaincu qu'ils sont conformes à la présente loi et aux règlements;

d) déplacer un moyen de transport vers un autre lieu, y compris faire entrer un navire au port ou faire atterrir un aéronef;

regulations, or do anything to comply with this Act or the regulations;

(b) stop or shut down any activity, work, undertaking or thing for a specified period;

(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;

(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;

(e) unload or re-load the contents of any conveyance; and

(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

(i) maintaining records on any relevant matter,

(ii) reporting periodically to the enforcement officer, and

(iii) submitting to the enforcement officer any information, proposal or plan specified by the enforcement officer setting out any action to be

e) décharger un moyen de transport ou le charger;

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 :

(i) tenir des registres sur toute question pertinente,

(ii) lui faire périodiquement rapport,

(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.

Mesures supplémentaires pour certaines infractions

(5) Pour l’application du paragraphe (1), s’il vise une infraction aux articles 124 ou 125 ou aux règlements d’application de l’article 135, l’ordre peut de plus enjoindre à l’intéressé — non titulaire d’un permis ou contrevenant à une condition de son permis — de prendre les mesures suivantes :

a) cesser l’immersion ou le chargement d’une substance;

b) s’abstenir de procéder au sabordage d’un navire ou d’un aéronef ou à l’immersion d’une plate-forme ou de tout autre ouvrage.

taken by the person with respect to the subject-matter of the order.

Additional measures for certain alleged offences

(5) For the purposes of subsection (1), an order in relation to an alleged contravention of section 124 or 125 or any regulations made under section 135 may specify that the person to whom the order is directed, whether that person is not a permit holder or is contravening a condition of a permit, take any of the following measures, in addition to any of the measures referred to in subsection (4):

(a) cease dumping or cease loading a substance; or

(b) refrain from disposing of any ship, aircraft, platform or structure.

Contents of order

(6) Subject to section 236, an order must be made in writing and must set out

(a) the names of the persons to whom the order is directed;

(b) the provision of this Act or the regulations that is alleged to have been or that is likely to be contravened;

(c) the relevant facts surrounding the alleged contravention;

(d) the measures to be taken;

Teneur de l'ordre

(6) Sous réserve de l'article 236, l'ordre est donné par écrit et énonce :

a) le nom des personnes à qui il est adressé;

b) les dispositions de la présente loi ou des règlements qui auraient été enfreintes ou le seront vraisemblablement;

c) les faits pertinents entourant la perpétration de la prétendue infraction;

d) les mesures à prendre;

e) le moment où chaque mesure doit prendre effet ou son délai d'exécution;

f) sous réserve du paragraphe (7), la durée pendant laquelle il est valable;

g) le fait qu'une révision peut être demandée au réviseur-chef;

h) le délai pour faire cette demande.

Période de validité

(7) L'ordre est valide pour une période maximale de cent quatre-vingts jours.

Omission de fournir un rapport

(8) Pour l'application du paragraphe (1), il est compté une infraction distincte pour chacun des jours au cours desquels se commet ou se continue l'infraction consistant à omettre de fournir un rapport exigé en vertu de la présente loi ou des règlements.

(e) the time or the day when each measure is to begin or the period during which it is to be carried out; **(f)** subject to subsection (7), the duration of the order; **(g)** a statement that a request for a review may be made to the Chief Review Officer; and **(h)** the period within which a request for a review may be made. **Duration of order** **(7)** An order may not be in force for a period of more than 180 days. **Failing to file report** **(8)** For the purposes of subsection (1), a person who commits an offence by failing to file a report required by this Act or the regulations is deemed to be continuing the commission of the offence each day that the report is not filed. ***Statutory Instruments Act*** **(9)** An order is not a statutory instrument for the purposes of the *Statutory Instruments Act*.	**Non-application de la *Loi sur les textes réglementaires*** **(9)** L'ordre n'est pas un texte réglementaire au sens de la *Loi sur les textes réglementaires.*

[29] Enforcement officers are designated as such by the Minister under s. 217 and, under Part 10 of *CEPA*, have general responsibility for enforcement of federal environmental legislation and regulations.

[30] EPCOs are one of the tools at the disposal of enforcement officers. EPCOs are administrative in nature: they impose no penal sanction (although failure to comply with an EPCO can lead to criminal liability: *CEPA*, s. 272.1). They are designed to ensure that

regulated entities comply with the law: where a regulated entity has strayed from the path dictated by legal requirements, an EPCO points them back on track.

[31] EPCOs are contained within a procedural superstructure. Section 218 of *CEPA* sets out the investigatory powers that enforcement officers may exercise in enforcing the legislation and associated regulations. Section 237 provides for the issuing of a Notice of Intent to issue an EPCO, which underscores the 'return to compliance' rationale of the EPCO regime: the idea is that the issuing of a Notice of Intent will put a regulated entity on notice and encourage them to voluntarily return to compliance without the enforcement officer having to take the formal step of issuing an EPCO. Section 237 also provides for a measure of procedural fairness in that it envisages an opportunity to make oral submissions prior to an EPCO being issued. Once an EPCO is issued, immediate compliance is required (s. 238) and an enforcement officer may even take steps themselves to ensure compliance where the recipient of an EPCO fails to take any measures specified in the EPCO (s. 239).

[32] Subsection 256(1) provides that a person who has received an EPCO may make a request for review to a panel of the roster of review officers established under s. 243. The review officers operate under the name of the Environmental Protection Tribunal of Canada.

[33] Section 263 describes the powers of the Tribunal:

263 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 **(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	**263** 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 : **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.

the order, not counting the days during which the order was suspended under subsection 258(3).	

[34] These powers are limited by s. 265, which prevents, for example, the Tribunal from exercising the powers in s. 263 “if doing so would result in…danger to the health or safety of any person”.

[35] The Tribunal must render a decision within 15 days of completing the hearing provided for by s. 263.

[36] The role of the Tribunal is to adjudicate *de novo* on whether there were reasonable grounds for the issuing of an EPCO and, if so, whether the measures contained in the EPCO 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.

[37] The Tribunal’s decision in *Kost v. Canada (Environment and Climate Change); Distribution Carworx Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 3 (“*Kost*”) is authoritative in this regard and the parties do not take issue with the description of the Tribunal’s role:

> [16] as a matter of statutory interpretation, the Tribunal finds that, in determining whether to exercise its discretion to do any of the things set out in paragraphs (a), (b) and (c) of s. 263, it is entitled to reach its own conclusions on whether there are reasonable grounds for an order and on what measures are reasonable based on the full record of evidence before it. Thus, the Tribunal can, for example, amend an environmental protection compliance order after a hearing even if the measures in it were reasonable at the time it was issued.
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> …
>
> [18] Given the above legal interpretation, the subsidiary question that arises under s. 263 is: What guides the Tribunal in deciding what powers to exercise under s. 263? In exercising that discretion, the Tribunal is guided by the purposes of the Act as well as the wording of the specific provisions at issue. At a broad level, *CEPA* addresses “pollution prevention and the protection of the environment and human health in order to contribute to sustainable development”. The Tribunal will exercise its discretion in a manner that furthers that statutory purpose.
>
> [19] Specific guidance regarding environmental protection compliance orders is found in s. 235, which states that orders may be issued where there are “reasonable grounds” to believe that *CEPA* has been or is likely to be contravened as described in s. 235(2). Thus, orders are to be made only when the evidence of a contravention or

> likely future contravention reaches the level of "reasonable grounds". The Tribunal cannot uphold an order if the evidence meets only a standard of a "suspicion" of a possible contravention. As well, the measures that may be included are those set out in s. 235(4) (and 235(5) if applicable) that are "reasonable in the circumstances and consistent with the protection of the environment and public safety". This guidance applies to enforcement officers in the first instance and to the Tribunal in a review hearing.
>
> [21] Thus, the main tasks for the Tribunal in this case 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. In disposing of the case, the Tribunal may use the powers provided to it under s. 263. This includes amending an order, as is being done in this case.

[38] The Tribunal in *Kost* also clarified (at para. 12) that "reasonable grounds" has the meaning ascribed to it by the Supreme Court of Canada in *Mugesera v. Canada (M.C.I.)*, 2005 SCC 40 at para. 114:

> The first issue raised by s. 19(1)(j) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities… In essence, *reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information*… (citations omitted, emphasis added).

[39] We will, therefore, consider in these proceedings whether there were reasonable grounds to issue the EPCOs and whether the measures are reasonable in the circumstances and consistent with the protection of the environment and public safety. In doing so, we will consider all of the evidence introduced in the proceeding. In that regard, we note that ELC submitted a late affidavit, outside the strict timelines agreed to by the parties and memorialized by the Tribunal in a procedural direction. In keeping with the expedited nature of a Request for Review of an EPCO, the Tribunal has, in the past, refused to admit late affidavits: *Beausite Métal inc. et Michel Proulx c. Canada (Environnement et Changement climatique Canada)*, 2023 TPEC 10 ("*Beausite Métal*"). In this case, we admitted the affidavit at the hearing but given our conclusions below in relation to mootness, we can give it no weight.

Analysis and Findings

[40] There are four questions in issue:

(1) Were there reasonable grounds to support the EPCOs?

(2) Should the EPCOs be cancelled for breach of procedural fairness?

(3) Were the measures in the EPCO reasonable?

(4) Are the EPCOs moot?

(1) There were reasonable grounds to support the EPCOs, save in respect of Sephora's officers

(i) The Tribunal's role is to determine the existence of reasonable grounds

[41] The Tribunal's role is to assess, *de novo*, the existence of reasonable grounds to support an EPCO. This assessment is mostly backward looking: it is directed to the state of affairs at the time the EPCO was issued. However, this assessment can take into account new information that has become available since the EPCO was issued. New information may strengthen or undermine the reasonable grounds required to be present.

[42] In one respect the assessment of reasonable grounds is forward looking. As s. 235 of *CEPA* makes clear, an EPCO may be issued where there has been a contravention and the contravention is continuing, or where the Act is likely to be contravened. In that sense, the reasonable grounds assessment looks to the state of affairs at the time the EPCO was issued, from a forward-looking perspective.

[43] The Tribunal has remarked in previous decisions that its role in assessing reasonable grounds is not to ensure scientific certainty: *Groupe Marcelle Inc. and David Cape v. Canada (Environment and Climate Change Canada)*, 2022 EPTC 8, at paras. 72-80; *Beausite Métal inc. et Michel Proulx c. Canada (Environnement et Changement climatique Canada)*, 2023 TPEC 10, at para. 48. This remark is based on the role played by the Tribunal; the current request for review provides a neat example. Whilst ELC and Sephora essentially treat the presence of plastic microbeads in toiletries as an objective question of scientific fact to be determined by the Tribunal, the Tribunal's prescribed statutory role is considerably narrower than the applicants' submissions suggest.

[44] Here, s. 3 of the *Regulations* prohibits the importation or sale of toiletries that contain microbeads, that is (according to s. 1) the plastic microbeads set out in item 133 of the List of Toxic Substances in Schedule 1 to *CEPA*.

[45] In theory, the presence or absence of plastic microbeads could be determined scientifically with perfect accuracy: it would be possible, in theory, to analyze any toiletry and determine definitively whether the physical properties of the toiletries include plastic microbeads.

[46] However, in the context of a request for review of an EPCO, the question for the Tribunal is a different one: whether there were reasonable grounds to conclude that the physical properties of the toiletries targeted by the EPCO include the presence of plastic microbeads. The statutory test is not directed to the presence of plastic microbeads as such but to the existence of reasonable grounds to believe that plastic microbeads are present.

[47] Hence the remarks of the Tribunal that its role is not to ensure scientific certainty. These remarks are underscored by the statutory direction in *CEPA*, s. 2(1)(a)(ii) that the Government of Canada should abide by the precautionary principle, which is well accepted as a principle of international environmental law that can inform the interpretation of Canadian regulatory law: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241, at para. 32.

(ii) The Regulations prescribe a methodology for determining the presence of plastic microbeads in toiletries

[48] In the context of the *Regulations*, there is an additional difficulty for the applicants. The presence of plastic microbeads is to be determined in accordance with s. 5 of the *Regulations*. That is to say, the legislative and regulatory scheme — which binds the Tribunal — does not simply prohibit plastic microbeads in toiletries: it also prescribes a methodology for identifying plastic microbeads in toiletries.

[49] The question for the Tribunal therefore becomes whether there were reasonable grounds to believe that toiletries targeted by the EPCO would, if tested in accordance with the method prescribed in the *Regulations*, contain plastic microbeads.

[50] To answer this question it is necessary, first, to consider whether the testing undertaken by ECCC complied with the statutory and legislative framework.

[51] We begin, therefore, by turning to s. 5 of the *Regulations*:

Accredited laboratory	**Laboratoire accrédité**
(1) Any analysis performed to determine the presence of microbeads for the purposes of these Regulations must be performed by a laboratory that meets the	**(1)** Pour l'application du présent règlement, l'analyse visant à déterminer la présence de microbilles est effectuée par un laboratoire qui, au moment de cette

following conditions at the time of the analysis: **(a)** it is accredited **(i)** under the International Organization for Standardization standard ISO/IEC 17025, entitled *General requirements for the competence of testing and calibration laboratories*, by an accrediting body that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement, or **(ii)** under the *Environment Quality Act*, CQLR, c. Q-2; and **(b)** subject to subsection (2), the scope of its accreditation includes the analysis performed to determine the presence of microbeads. **Standards of good practice** **(2)** If no method has been recognized by a standards development organization in respect of the analysis performed to determine the presence of microbeads and the scope of the laboratory's accreditation does not therefore include that analysis, the analysis must be performed in accordance with standards of good scientific practice that are generally accepted at the time that it is performed.	détermination, répond aux conditions suivantes : **a)** il est accrédité : **(i)** soit selon la norme ISO/CEI 17025 de l'Organisation internationale de normalisation, intitulée *Exigences générales concernant la compétence des laboratoires d'étalonnages et d'essais*, par un organisme d'accréditation signataire de l'accord intitulé International Laboratory Accreditation Cooperation Mutual Recognition Arrangement, **(ii)** soit en vertu de la *Loi sur la qualité de l'environnement*, RLRQ, ch. Q-2; **b)** sous réserve du paragraphe (2), la portée de son accréditation comprend l'analyse visant à déterminer la présence de microbilles. **Normes de bonnes pratiques** **(2)** Lorsqu'aucune méthode n'est reconnue par un organisme de normalisation eu égard à l'analyse visant à déterminer la présence de microbilles et que, par conséquent, la portée de l'accréditation du laboratoire ne comprend pas cette analyse, la détermination est effectuée conformément aux normes de bonnes pratiques scientifiques généralement reconnues au moment où elle est effectuée.

[52] This provision is poorly drafted and confusing. The relationship between s. 5(1)(b) and s. 5(2) is unclear.

[53] Let us begin, however, with what is clear. The PNLET laboratory that performed the testing of products relevant to this request for review is accredited within the meaning of s. 5(1)(a): Affidavit of Charles-Olivier Frégeau, at para. 31. The scope of its accreditation includes the testing of microbeads within the meaning of s. 5(1)(b): Affidavit of Charles-Olivier Frégeau, at para. 31.

[54] An interpretive difficulty is presented by s. 5(2). The parties agree that, at present, there is no "method…recognized by a standards development organization" within the meaning of the subsection. Does this mean, as the applicants contend, that s. 5(2) applies and the testing process must conform to "standards of good scientific practice that are generally accepted"? Or does it mean, as the Minister argues, that the requirement of conforming to generally accepted scientific practice only applies where (a) there is no international standard *and* (b) the scope of the laboratory's accreditation does not include microbead testing? On the Minister's interpretation, there are two conditions — (a) and (b) — that must be met before the generally accepted scientific practice requirement is triggered. If the Minister's interpretation is correct, then s. 5(2) is not relevant to the current review, because condition (b) is not met.

[55] The Minister's interpretation is correct, in our view. We will explain why momentarily. Before doing so, however, we will explain why, even if the applicants' interpretation is correct, it would not assist their case.

[56] The evidence before us establishes that the PNLET testing process is in accordance with generally accepted scientific standards. Paragraphs 32 to 35 of the affidavit of Charles-Olivier Frégeau speak explicitly to this point:

> En date des présentes, aucun renseignement n'a été porté à mon attention me permettant de conclure que les déterminations des analystes du PNLET n'ont pas été effectuées conformément aux normes de bonnes pratiques scientifiques généralement reconnues au moment où elles ont été effectuées ou de croire que les résultats présentés dans ces certificats analytiques pourraient ne pas être valides et fiables. À ma connaissance, les analyses des analystes du PNLET sur lesquelles mes motifs raisonnables de croire sont basés ont toutes été réalisées selon les règles de l'art et sont dignes de confiance.
>
> …
>
> Conséquemment, aucune analyse d'un tel laboratoire contredisant les déterminations du PNLET n'a été portée à ma connaissance par Sephora, ni d'ailleurs aucun élément

de preuve, probant ou non, appuyant les allégations des procureurs de Sephora selon lesquelles la Méthode 445.0 et la Méthode 623.1 ne seraient pas fiables.

[57] The applicants offered expert evidence critical of the PNLET testing process. For ELC, Dr Christian Sood challenged Method 445. For Sephora, Dr Jericho Moll doubted Method 623. In both instances, however, the applicants' experts do not speak to whether the PNLET testing process complies with generally accepted scientific standards. Taking their evidence at its highest, they demonstrate that the PNLET testing process may generate erroneous results, albeit that neither the Sood affidavit nor the Moll affidavit states how often the testing process is likely to err (nor, crucially, that any error occurred during the testing of products relevant to this review). This does not demonstrate that the PNLET testing process fails to comply with generally accepted scientific methodology. The Tribunal finds, therefore, that the PNLET testing process meets the requirements of s. 5, even on the applicants' interpretation of that provision.

[58] In any event, the Minister's interpretation is correct. We begin with the previous version of the *Regulations* (Canada Gazette Part II, Vol. 151, No. 12, at p.1351):

Accreditation	**Accréditation**
(2) The accreditation must	**(2)** L'accréditation doit :
(a) be valid at the time the determination of the presence of microbeads is performed; and	**a)** être valide au moment où la détermination de la présence de microbilles est effectuée;
(b) if a method has been recognized by a standards development organization in respect of the determination of the presence of microbeads, include that determination within its scope.	**b)** s'il existe une méthode reconnue par un organisme de normalisation eu égard à cette détermination, porter sur cette dernière.
Standards of good practice	**Normes de bonnes pratiques**
(3) If there is no method that has been recognized by a standards development organization in respect of the determination of the presence of microbeads, the determination must be performed in accordance with generally accepted standards of good scientific practice at the time that it is performed.	**(3)** S'il n'existe aucune une méthode reconnue par un organisme de normalisation eu égard à la détermination de la présence de microbilles, la détermination est effectuée conformément aux normes de bonnes pratiques scientifiques généralement reconnues au moment de la détermination.

[59] This previous version mirrors the Minister's interpretation: the requirement to meet generally accepted scientific standards only applies where two conditions are met. These conditions are conjunctive: both must be met. Here, the scope of PNLET's accreditation includes testing for microbeads, therefore one of the two conditions is not met and the requirement to meet generally accepted scientific standards is not triggered.

[60] The only substantive textual change to the *Regulations* between that previous version and the current version is the introduction of the word "therefore". As the Minister submits, it cannot be the case that the introduction of this word changed the meaning of the *Regulations*. In addition, the Regulatory Impact Analysis Statement accompanying the *Regulations* made clear that the intention was to clarify that "where" an international standard exists, it must be included within the scope of the accreditation (Canada Gazette Part II, Vol. 155, No. 7, at p. 686). Understood in light of the legislative history, the introduction of "therefore" must have been intended to make the link between the two conditions more explicit. Indeed, this is the most plausible interpretation of the word "therefore".

[61] We find that the Minister's interpretation of s. 5 is correct.

(iii) There were reasonable grounds to believe that the products targeted by the EPCOs contain plastic microbeads within the meaning of the Regulations

[62] We can now return to the question at issue in this review, which, to repeat, is whether there were reasonable grounds to believe that the toiletries targeted by the EPCOs would, if tested in accordance with the method prescribed in the *Regulations*, be found to contain plastic microbeads.

[63] The answer to this question is "yes". There is credible and compelling evidence in the record to support the EPCOs targeting toiletries. Many of the toiletries targeted by the EPCOs were tested by PNLET and found to contain plastic microbeads before the EPCO was issued. There were, therefore, reasonable grounds for believing that these products contained plastic microbeads. Other toiletries targeted by the EPCOs contain ingredients similar to those that tested positive for plastic microbeads in the past. The Tribunal finds that there are also reasonable grounds for believing that those products contain plastic microbeads. The evidence of Charles-Olivier Frégeau speaks to this point. Based on his work as the official responsible for implementing the *Regulations*, he avers at paragraph 38 of his affidavit:

> Ces recherches m'ont permis de dresser une liste non exhaustive des ingrédients associés à la présence de Microbille, qui me sert d'outil lors de mes inspections depuis 2019 (pièce COF-21). Les ingrédients sur cette liste sont les suivants : « Polyéthylène » (PE) ou « Polyéthylène haute densité » (PEHD), « Polypropylène » (PP), « Polystyrène » (PS), « Nylon 6 » ou « 12 » (ou tout autre polyamide), « Polytéréphtalate d'Éthylène » ou « Polyéthylène Téréphtalate » (PET), « Poly-méthyllacrylate » ou «

> Poly-méthacrylate de Méthyle » (PMA), « Polytétrafluoroéthylène » (Téflon ou PTFE), « Polychlorure de Vinyle » (PVC), « Polytéréphtalate de Butylène » ou « Polybutylène Téréphtalate » (PBT), « Acide polylactique » (PLA), « Polyhydroxyalcanoate » (PHA) et « Polyhydroxybutanoate » (PHB).

[64] He further states that 19 analyses have been conducted by PNLET of toiletries containing polylactic acid and 5 analyses of toiletries containing polyethylene. On each occasion, the product containing polylactic acid has tested positive for plastic microbeads (Frégeau affidavit, at paras. 43-44). The same is true of products containing polyethylene (Frégeau affidavit, at paras. 51-52). On no occasion has a toiletry containing polylactic acid or polyethylene on its list of ingredients tested negative for plastic microbeads.

[65] Again, the purpose of this review is not to establish as a matter of scientific fact whether all of the toiletries targeted by the EPCOs actually contain plastic microbeads; it is to determine whether there are reasonable grounds for believing that the toiletries targeted by the EPCOs actually contain plastic microbeads. The Tribunal finds that toiletries containing polylactic acid and polyethylene have overwhelmingly tested positive for plastic microbeads and have never tested negative. There are, therefore, reasonable grounds for believing that toiletries with these ingredients contain plastic microbeads. As a result, the Tribunal confirms the EPCOs targeting these products.

(iv) The applicants' interpretive arguments are an attack on the substantive reasonableness of the Regulations, which the Tribunal cannot entertain

[66] There is one last interpretive matter to address. The applicants argue, building on the Sood and Moll affidavits, that PNLET's testing method does not identify "plastic" microbeads. They accept, as do Sood and Moll, that the testing process identifies microbeads. But they do not accept that they are "plastic" microbeads. Rather, in their view, the microbeads identified are made up of other material.

[67] Even if we agreed with the applicants' interpretation, we would not allow the request for review. The question for the Tribunal is not whether the presence of "plastic" microbeads can be proved as a matter of scientific fact; it is whether there are reasonable grounds for believing that "plastic" microbeads are present. In that regard, the fact that the PNLET testing process produces solid plastic-like particles ("polymeric compounds that are consistent with use in plastics manufacturing": Affidavit of Paul Houle, at para. 15) when analyzing toiletries containing ingredients such as polylactic acid and polyethylene furnishes the reasonable grounds necessary to support the EPCO. Indeed, the evil at which the *Regulations* aim — the washing of microbeads into the ecosystem where they harm wildlife — is squarely engaged on the facts before us: Affidavit of Paul Houle, at paras. 14 and 16; Regulatory Impact Analysis Statement, Canada Gazette Part II, Vol. 151, No. 12, at pp. 1354, 1373-1374.

[68] In any event, the applicants' arguments on this point cannot be accepted in these proceedings. They amount, in substance, to an attack on the substantive reasonableness of the *Regulations*. The Sood and Moll affidavits make the point that the PNLET testing process involves diluting and filtering toiletries and then analyzing whether the residue is a microbead by comparing it to a library of microbeads. A match with a designated degree of confidence is recorded as a positive result. There is no other way to determine whether a toiletry contains microbeads. Indeed, there is no other way to determine that a particular microbead is "plastic". It is not possible to extract microbeads from toiletries otherwise than by a process of dilution and filtration; and it is not possible to determine whether the residue is a microbead (plastic or otherwise) without comparing it to other samples with a specified degree of confidence. Put very simply, a "plastic" microbead is not like a plastic bead on a child's necklace or bracelet that can be removed and analyzed: the testing process for microbeads is, of necessity, highly complex, and a choice of process must be made (Regulatory Impact Analysis Statement, Canada Gazette Part II, Vol. 151, No. 12, at pp. 1358, 1568). In the *Regulations*, that choice of process was made. The Tribunal has to take the legislative and regulatory framework as it finds it. Section 5 of the *Regulations* is presumptively valid unless and until it is set aside by a court of competent jurisdiction: *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](), at para. 54. It is binding on the Tribunal.

[69] It follows that what the applicants are really seeking to put in issue is the substantive reasonableness and fairness of the PNLET testing process. They would prefer — and explained to the Tribunal at length their sound commercial reasons for preferring — a different test, with different methods of dilution, filtration and residue analysis. Arguments about whether s. 5 is invalid because it is void for vagueness, makes regulatory compliance impossible or is inherently unfair for regulatees would have to be addressed to the Federal Court in judicial review proceedings. It is not within the Tribunal's jurisdiction to accept any such arguments.

[70] Furthermore, given that the *Regulations* are presumptively valid, it is far from clear that the Tribunal can proceed on the basis that the *Regulations* might be unenforceable. For example, ELC's expert evidence attacks Method 445, which was the original method of analysis used to determine the presence of plastic microbeads: when it was put to counsel in oral argument that the result of accepting its evidence would be that the *Regulations* would be unenforceable, counsel properly acknowledged that this was the logical consequence of ELC's position. But it is difficult to see how it is open to a Tribunal with limited statutory jurisdiction and tasked with applying a presumptively valid regulation to entertain the possibility that the regulation should not be enforced. To be fair, this was not the principal position advanced by ELC. Nonetheless, the Tribunal cannot ignore the implications of the applicants' arguments, which as we have said seek to put the substantive reasonableness and fairness of the legislative and regulatory framework in issue. These are arguments that the Tribunal cannot entertain.

(v) There are no reasonable grounds for targeting the officers of Sephora identified in the EPCO

[71] In one respect, the Tribunal accepts that the Sephora EPCO lacks reasonable grounds. The EPCO targets two officers of Sephora. However, the only evidence that ECCC has adduced in relation to these two officers are contained in paragraphs 233-235 of the affidavit of Marc-André Cloutier:

> 233. Malgré les représentations orales de Sephora à cet égard, j'ai également adressé l'OEPE à M. Rougeot et à M. Haupt. Conformément à l'article 280.1 de la LCPE, ces derniers ont le devoir, à titre de dirigeant et d'administrateur de Sephora, de faire preuve de la diligence nécessaire pour faire en sorte que Sephora se conforme à l'OEPE et, de façon plus large, à la LCPE et à ses règlements. Ainsi, M. Rougeot et M. Haupt contribuent aux infractions alléguées et contribueront vraisemblablement aux infractions futures alléguées.
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> 234. Selon mes connaissances, M. Rougeot et M. Haupt ont un contrôle considérable sur l'ensemble des activités de Sephora, notamment concernant l'importation, la mise en vente et la vente de cosmétiques. Ces personnes, ont également l'autorité pour faire modifier les pratiques de Sephora et d'allouer des ressources pour procéder à l'embauche ou à la consultation de personnes qualifiées pour s'assurer que Sephora respecte à l'avenir ses obligations en vertu de la LCPE.
>
> 235. À cet égard, il est pertinent de souligner que je n'ai pas connaissance qu'un employé de Sephora au Canada est responsable de la conformité des produits à la LCPE et à ses règlements, alors que cette personne aurait normalement dû être l'intervenant de Sephora auprès d'ECCC pour ce genre de dossier.

[72] This evidence is insufficient. Subsection 235(3) of *CEPA* defines the categories of person to whom an EPCO can be issued: those who have charge, management or control or those who caused or contributed to the identified contravention (or those who are likely to cause or contribute a contravention that is yet to occur). In many cases of non-compliance with *CEPA* and associated regulations, the corporate entity may be closely identified with an identifiable person who is an officer, or sometimes its directing mind. In such situations, the EPCO itself will often furnish a basis for believing that the person satisfies the requirements of s. 235(3) and ECCC can straightforwardly adduce affidavit or other evidence that demonstrates charge, management or control or a causal link.

[73] Here, however, Sephora is a complex corporate entity. Other than the quoted passages, ECCC's evidence is silent on the requirements of s. 235(3). And the quoted passages lack a factual foundation in this particular context. As Sephora justly put it in its written submissions, "This is speculation unsupported by fact" (Sephora Written Submissions, at para. 83).

[74] The Tribunal finds that this evidence is not credible and compelling as the reasonable grounds standard requires. The Sephora EPCO must therefore be amended to remove the individuals identified.

(2) The Tribunal Cannot Set an EPCO Aside Because of a Breach of Procedural Fairness

[75] Both ELC and Sephora complain that they were treated unfairly by ECCC and submit that the Tribunal should set the EPCOs aside as a consequence of this procedural unfairness. The essence of the complaint is that ECCC's testing process is procedurally flawed because it relies on undisclosed testing methods, the testing methods can change without advance notice and because ECCC's definition of what constitutes a "plastic microbead" is vague.

[76] The Tribunal cannot set EPCOs aside because of breaches of procedural fairness. The applicants' complaints about procedural unfairness are, in reality, complaints about the substantive reasonableness of the *Regulations*; these are complaints that the Tribunal cannot entertain. Moreover, there was no breach of procedural fairness.

(i) The Tribunal has no jurisdiction to adjudicate breaches of procedural fairness at common law

[77] The Tribunal's role is, as explained above, to assess whether there were reasonable grounds to issue an EPCO and, if so, whether the measures in the EPCO 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. Depending on the Tribunal's assessment of these questions, the Tribunal may then exercise the remedial powers set out in s. 263 (subject to the limitations imposed by s. 265). This is a carefully tailored statutory scheme that confines the scope of the Tribunal's review.

[78] Adjudicating on alleged breaches of procedural fairness in the process leading up to the issuing of an EPCO is simply not part of the Tribunal's role, outside (perhaps) compliance with explicit statutory requirements. For example, s. 237 of *CEPA* requires an enforcement officer, "wherever practicable" provide oral or written notice to the intended target of an EPCO and give them a reasonable opportunity to make submissions. However, there is no complaint here that s. 237 (or any other statutory provision) was not complied with and so we need not address the Tribunal's jurisdiction to monitor compliance with explicit statutory requirements. We raise s. 237 only to underscore the point that the applicants' arguments are based entirely on the common law of procedural fairness.

[79] In that regard, the Tribunal has no jurisdiction to allow a request for review on the basis of a breach of procedural fairness. The difficulty, to put it starkly, is that even if there were a breach of procedural fairness, reasonable grounds to issue an EPCO could still exist.

Similarly, a breach of procedural fairness has no bearing on whether the measures in an EPCO 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. The relevant questions for the Tribunal are prescribed by the statutory scheme and do not include compliance with the common law of procedural fairness.

(ii) The applicants' procedural arguments are, in reality, an attack on the substantive reasonableness of the Regulations

[80] Parliament added plastic microbeads to the Schedule to *CEPA* because of their dangerous effects on the environment. By regulations made under *CEPA* – which are presumptively valid and thus bind this Tribunal – a testing process has been prescribed.

[81] This testing process can change from time to time. Section 5 of the *Regulations* simply states that the laboratory conducting a test to ascertain the presence of microbeads must meet a set of conditions. These conditions, as explained above, are met when the laboratory is accredited and its accreditation includes the analysis to detect the presence of microbeads.

[82] For present purposes, the most important words in s. 5 stipulate that the conditions must be met "at the time of the analysis".

[83] It is inherent in s. 5 that the method of analysis can change from time to time: all that matters is that the analysis used to detect microbeads is within the scope of the laboratory's accreditation "at the time of the analysis". Any such changes may well involve changes to operational definitions used by ECCC. As explained above, there is no scientific method which can establish beyond all doubt that a toiletry contains microbeads. The toiletry must be tested and the resulting particles matched against a database of particles. As science and scientific methods improve – and the ingredients and manufacturing processes used by the cosmetics industry evolve – it is inevitable that the testing process, and the various components that make up the testing process, will change.

[84] Section 5 of the *Regulations* does not fix the testing process in aspic as of the moment the *Regulations* were adopted. Far from it: the *Regulations* envisage that the testing method might change. Change is baked into the *Regulations*. But the question for this Tribunal will always be: did the testing method "at the time of the analysis" meet the conditions of s. 5 of the *Regulations* and furnish reasonable grounds for imposing an EPCO?

[85] The applicants' complaints about undisclosed testing methods that rely on vague definitions and that change without advance notice are, in reality, an attack on the substantive reasonableness of the legislative and regulatory framework. The applicants would prefer a framework that fixed the testing process and the operational definitions used by ECCC in aspic at a particular point in time. But this Tribunal is bound by the framework that was created:

it is not a court of competent jurisdiction for assessing the applicants' complaints about the substantive reasonableness of the framework.

(iii) The curative principle does not permit the Tribunal to assume the jurisdiction to remedy breaches of procedural fairness at common law

[86] ELC also argues that the curative principle requires the Tribunal to intervene to cure the procedural unfairness it suffered. As ELC observes, in *British Columbia (Attorney General) v. 992704 Ontario Limited*, 2023 BCCA 346 ("*992704 Ontario Limited*"), the Court of Appeal for British Columbia stated "it is well-established that a full and fair hearing *de novo* before an appellate body will generally cure breaches of procedural fairness by an original administrative tribunal where, as here, its prejudicial effects will not permeate the rehearing" (at para. 68). ELC submits that the prejudicial effects of its treatment by ECCC permeates this process.

[87] ELC's submission cannot be accepted. The curative principle is addressed to courts of law, not administrative tribunals. The legal significance of the curative principle is that a court may determine, on judicial review, that an administrative appeal or review process 'cured' a procedural defect that occurred earlier in the administrative process. The leading case is *Harelkin v. University of Regina*, [1979] 2 SCR 561, which is accurately summarized in that recent Court of Appeal decision in *992704 Ontario Limited* as follows:

> [66] In *Harelkin*, a university required a student to discontinue his studies. The student appealed to a university committee, which heard from the university in the absence of the student, and then dismissed his application to continue his studies. The student requested a rehearing in order to present evidence, but the committee denied the request. Rather than appealing the committee's decision to the university senate, which was empowered to conduct a de novo hearing on appeal, the student brought an application for judicial review seeking orders setting aside the committee's decision and directing a rehearing of the student's application.
>
> [67] The majority of the Supreme Court of Canada concluded that the committee's breach of the rules of natural justice could have been cured by a de novo hearing before the senate, and, because an adequate alternative remedy existed, the court should exercise its discretion to decline to grant relief by way of prerogative writs. In explaining its conclusion, the Court outlined various factors to be considered when determining whether an appellate remedy is adequate for judicial review purposes: i) the procedure on the appeal; ii) the composition of the appellate body; iii) the body's powers and how they would probably be exercised; iv) the "burden of a previous finding"; v) expeditiousness; and vi) costs: *Harelkin* at 588.

[88] The point in *Harelkin* was that the student should not have sought judicial review: he should have exercised his right of *de novo* appeal because that appeal would cure the procedural defect he complained of.

[89] But whether an appeal is an adequate remedy, or whether an appeal cured a procedural defect, is a question for a court on judicial review. An administrative tribunal might, by exercising its jurisdiction, cure a procedural defect. But this is not because the administrative tribunal explicitly set out to cure the procedural defect. Rather, it is the byproduct of the administrative tribunal performing its role. The appeal body in *Harelkin* would, simply by virtue of holding a *de novo* hearing, cure the defect complained of, not because it would examine the procedural defect but because the procedural defect would be rendered irrelevant by the *de novo* hearing.

[90] Indeed, an administrative tribunal can only exercise its statutory jurisdiction: it cannot arrogate to itself ancillary powers to cure procedural defects. In the context of this review, where the Tribunal's statutory role is to inquire into the existence of reasonable grounds and the reasonableness of the measures contained in the EPCOs, the point applies with particular force. All the Tribunal can do is examine, *de novo*, the two matters Parliament has charged it with examining. Whether, by doing so, the Tribunal has cured any procedural defects that existed is a matter for the courts, pursuant to the appropriate procedure (appeal or judicial review as the case may be). The Tribunal cannot, however, raise and address issues that fall outside the scope of its statutory authority.

(iv) The applicants were treated fairly

[91] Even if the Tribunal did have jurisdiction, by virtue of the curative principle or otherwise, to address issues of procedural unfairness, it would not be appropriate to exercise that jurisdiction in this case.

[92] The applicants have not been denied any procedural rights.

[93] The *Regulations* are a public document: the applicants were on notice of the standards their products had to meet.

[94] The applicants were given ample opportunity to make submissions to ECCC. ECCC officers met and communicated with representatives of the applicants on numerous occasions. The affidavits and exhibits filed with the Tribunal document a lengthy dialogue about the testing process. Throughout the process, the applicants were represented by in-house and external counsel, with whom ECCC engaged.

[95] Details of the testing process were disclosed to the applicants. It is true that the testing process was not disclosed in advance. The applicants did not identify any jurisprudence in support of the proposition that advance disclosure of a testing method is required by the

common law of procedural fairness and it is difficult to see why advance disclosure would be so required. The testing process applies to all toiletries containing microbeads and the scope of the *Regulations* catches all manufacturers, importers and retailers. The adoption and subsequent modification of a testing process is a legislative-type decision which does not single out any particular product or market actor and, accordingly, does not trigger any procedural rights at common law: *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381, at paras. 88-94. Moreover, to require respect for the duty of fairness whenever adopting or modifying a testing process would be impractical given the range of actors who would need to be consulted: *Canada (Attorney General) v. Inuit Tapirisat*, [1980] 2 SCR 735.

[96] The applicants pointed to internal ECCC correspondence expressing concern that publishing details of the testing process could be "complicated" if the test changes too often (ELC Written Submissions, at para. 102). But this serves to underscore the point about the impracticality of recognizing a right to disclosure: the ECCC correspondence demonstrates concern that disclosure might complicate the enforcement of the *Regulations*. In the final analysis, in terms of disclosure, the applicants had access to all of the information they needed to make a full answer and defence at the hearing.

[97] Ultimately, the applicants cannot point to any particular procedural right that they were denied. Accordingly, and assuming for the sake of argument that the Tribunal does have jurisdiction to consider issues of procedural fairness, there would be no basis for the Tribunal to exercise its remedial powers in respect of the EPCO.

[98] Our conclusion on the procedural fairness argument buttresses our view that the applicants' true complaint is with the substantive reasonableness of the *Regulations*, which they see as administratively unworkable and burdensome. This is not a matter of procedural fairness at all. It is a matter of substantive reasonableness: but the substantive reasonableness of the *Regulations* is not a matter for this Tribunal.

(3) The measures were reasonable in the circumstances and consistent with the protection of the environment and public safety

[99] The Tribunal has found that the Enforcement Officers had reasonable grounds to issue the EPCOs, save in respect of the individuals identified in the Sephora EPCO. The next step in the analysis is to decide whether the measures ordered in the EPCOs were reasonable in the circumstances at the time they were issued. The Tribunal finds that the measures were reasonable in the circumstances and consistent with the protection of the environment and public safety.

(i) The measures in the ELC EPCO were reasonable in the circumstances and consistent with the protection of the environment and public safety

[100] ELC does not challenge the reasonableness of the measures in the EPCO as such: it argues, rather, that the measures have become moot. We address this argument separately below. For the record, we find that the measures in the ELC EPCO were reasonable in the circumstances and consistent with the protection of the environment and public safety because they identify specified products that do not comply with the *Regulations* and set out a process for their removal from the market. This is a textbook example of an EPCO identifying non-compliance with the *Regulations* and remedying it.

(ii) Sephora's challenge to the reasonableness of the measures

[101] Sephora does challenge the reasonableness of the measures in the EPCO. However, it does not take issue at all in these proceedings with the aspects of the EPCO targeting compliance with the Significant New Activities regime. And it does not challenge, either, the reasonableness of aspects of the EPCO that target specified toiletries. Again, for the record, we find that these measures were reasonable in the circumstances and consistent with the protection of the environment and public safety, as they identify regulatory breaches and a path back to compliance.

[102] Sephora focused its attack on three measures contained in the EPCO on the basis, essentially, that the measures are too broadly drawn.

[103] At the heart of Sephora's challenge to the reasonableness of three of the measures contained in the EPCO is Measure 6, which reads as follows:

> 6. As soon as possible but no later than May 16, 2023, comply with all regulatory requirements of the Microbeads in Toiletries *Regulations* including the offer for sale, the sale and the importation of toiletries containing microbeads.

[104] Sephora also seeks a review of measures 8(f) and 14, which read as follows:

> 8. As soon as possible but no later than June 30, 2023, recover from Canadian stores operated by SEPHORA Beauty Canada, Inc. and keep, under control of SEPHORA Beauty Canada, Inc. in its distribution centers, the following:
>
> (f) Any "toiletries" containing "microbeads" as defined by the Microbeads in Toiletries *Regulations*.
>
> 14. As soon as possible, but no later than October 27, 2023, proceed to the proper disposal or exportation if the products are legal in the jurisdiction to which they are returned of all the recovered products (as per measure to be taken # 8(f) of this EPCO). The proper disposal must be made by a certified company.

[105] Sephora argues that Measures 6, 8(f) and 14 are unreasonable "in light of how ECCC has *interpreted*, *administered* and *enforced* the *Regulations*" (Sephora Written Submissions, at para. 55, emphasis in original). In part, Sephora's argument is based on the way in which the *Regulations* have been interpreted: that part of Sephora's argument has been addressed above. The argument addressed in this section of our reasons relates to the administration and enforcement of the *Regulations*.

[106] In a nutshell, Sephora's position is that the impugned measures are overbroad, vague and impossible to comply with given the way in which the *Regulations* are administered and enforced. Measure 6 of the EPCO requires Sephora to immediately "comply with all regulatory requirements of the Microbeads in Toiletries *Regulations* including the offer for sale, the sale and the importation of toiletries containing microbeads". This measure simply restates what Sephora is already legally obligated to do insofar as it is importer and retailer of toiletries. In doing so, Sephora argues, it imposes a second 'layer' of potential liability on Sephora since a breach of the *Regulations* would, by definition, also constitute a breach of the EPCO. Further, Sephora observes, Measures 8(f) and 14 do not provide any specificity about which products should be quarantined, disposed of or exported. Ultimately, Sephora argues, the EPCO simply creates another layer of legal jeopardy.

(iii) The measures requiring compliance with the law are reasonable

[107] The Tribunal finds that the measures in the Sephora EPCO are reasonable. The only way that a government ministry can effectively regulate an industry such as the cosmetics industry, which is constantly developing and marketing new products with a potential impact on human health and the environment, is through self-regulation. Producers and retailers have, accordingly, statutory and regulatory responsibility to ensure their products are legal in the jurisdiction where they operate, thereby protecting the health and safety of their customers, and the health of the natural environment where their customers live. This is the purpose of the legislative and regulatory provisions that triggered the issuing of the EPCOs which are the subject of these proceedings.

[108] An order to comply with the law is *prima facie* reasonable. As ECCC submits, where there is a contravention of *CEPA* or its regulations, any measure in an EPCO that calls for the prohibited activity to cease is inherently consistent with the protection of the environment and public safety. This Tribunal has upheld EPCOs in the past that included measures to generally comply with relevant legislation (*BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2, para 51; *Bell Canada v. Canada (Environment and Climate Change)*, 2022 EPTC 6, para 90; *Kost* (supra), paras 52, 56).

(iv) Section 235 of CEPA does not require that an EPCO contain textually specific measures

[109] Sephora submits that the imposition of vague measures that are bald restatements of what the law already requires is inconsistent with the requirements of subsection 235(4) of *CEPA*, which requires "specific measures" to be set out in an environmental protection compliance order. However, the Tribunal finds that the heading "Specific measures" in s. 235(4) does not mean that general measures are invalid. Such an interpretation is inconsistent with the French language version of that provision, with its heading as simply "Mesures". The focus must be on what Parliament intended to convey in s. 235(4): *R. v. Daoust*, 2004 SCC 6, [2004] 1 SCR 217, at para. 65. In our view, the goal of the measures specified in s. 235(4) is to ensure a return to compliance.

[110] Sephora notes that the purpose of an EPCO is to "direct the alleged violator to take the measure required to return to compliance" (Compliance and Enforcement Policy for the *Canadian Environmental Protection Act, 1999*, at p. 28). In order for this to be achieved, it argues, the EPCO must set out specific measures that the recipient of the EPCO must take to return to compliance. We disagree. The language of an internal ECCC policy document cannot import an additional statutory requirement into *CEPA*. In any event, the policy document is consistent with the purpose of s. 235(4), which is to provide measures for a return to compliance. Whether measures contained in an EPCO are reasonable in any given case must depend on an analysis of the facts.

(v) The measures in the Sephora EPCO are consistent with a return to compliance

[111] When the facts are analyzed we find that it is clear that the EPCO does not simply order Sephora to baldly comply with the law. The EPCO must be read as a whole, with the impugned measures included as a result of the Enforcement Officer having a reasonable belief that the law has been or will be contravened in some specific way. Here, the EPCO recounts numerous violations of the Significant New Activities regime. Sephora's materials do not speak in any way to these violations. In addition, as it pointed out in its written and oral submissions, Sephora is a retailer. As such, it is in the position of relying on others, principally through contractual relationships, to ensure that the toiletries it sells are compliant with the

applicable statutory and regulatory framework. Sephora points to its experience with Strivectin Crepe Control, a product which ECCC found, as a result of testing, to contain plastic microbeads. Sephora removed the product from its shelves as requested, but notes that the manufacturer-provided ingredient list did not contain any polymers previously identified by ECCC as associated with microbeads. In such a context, general measures requiring compliance constitute a useful reminder to Sephora of its statutory and regulatory obligations. Indeed, one of the requirements of the EPCO is to produce a management plan on a go-forward basis: it is plain and obvious that an appreciation of Sephora's regulatory obligations must factor into this plan and the impugned measures play a role in this regard. They are not, therefore, bald orders to comply with the law but, rather, are grounded in and related to specific past violations.

[112] This case is therefore distinguishable from the authority cited by Sephora: *Tembec Industries Inc. (Timmins Sawmill) v. Peddie ("Tembec")* 2005 CanLII 38039 (ON LRB) at paras. 14, 17. In that case, the Ontario Labour Relations Board (OLRB) suspended an order that it found to be *prima facie* unenforceable due to vagueness, and found that suspending the Order would result in no diminution of worker safety because "the obligation to follow the provisions of the act and *Regulations* continues in full force and effect even if the Order is suspended". The decision of a provincial administrative tribunal has only persuasive force before the Tribunal, which is a creature of federal law, and is also distinguishable on the facts. As we have explained, the measures in this EPCO are not unenforceable due to vagueness. The EPCO identifies particular products that Sephora is to quarantine and remove from the country and is based upon a detailed factual record that sets the framework for Sephora's return to regulatory compliance and future compliance.

[113] The Tribunal accepts the submissions of ECCC that the measures as crafted provide flexibility to the orderee to comply in a way that best suits their business. The Tribunal does not accept Sephora's submissions about impossibility of compliance. Sephora is under a legal duty to comply with the *Regulations*. Achieving compliance may be difficult, but this is the result of policy choices made by Parliament and the Governor in Council that this Tribunal has neither the institutional nor constitutional legitimacy to question. In the end, as ECCC rightly submits, the modalities of compliance are up to Sephora and its business partners to work out.

[114] As ECCC accurately observes, Sephora's argument with respect to the reasonableness of the measures imposed by the EPCO rests fundamentally on the concepts espoused in the reasonable grounds portion of the analysis: i.e. that the definition of microbeads applied by ECCC is unclear. We have already addressed this argument in our discussion of the existence of reasonable grounds and reiterate our finding that the interpretive arguments are, in pith and substance, an attack on the reasonableness of the *Regulations* that the Tribunal lacks jurisdiction to entertain.

The measures in the ELC EPCO are not moot

[115] In its submissions ELC argues that Measures 2-6 in their EPCO are no longer reasonable in the circumstances because they have been essentially complied with. To that end, ELC sought to introduce affidavit evidence up to the date of hearing on December 4, 2023 to establish compliance with these measures. ELC is submitting that the Tribunal must determine whether an EPCO is reasonable *at the time of hearing*.

[116] The Tribunal finds that determining compliance with an EPCO is not within the Tribunal's jurisdiction, and is irrelevant to the review of whether the EPCO was reasonable.

(i) The fact that the Tribunal hearing is de novo does not mean that the Tribunal can assess compliance

[117] A review by the Tribunal under s. 235 of *CEPA* is *de novo* in the sense that parties may adduce additional evidence that was not before the regulator at the time the EPCO was issued. However, it does not follow that the Tribunal must consider whether the measures remain reasonable at the time of review. That the hearing is *de novo* speaks only to the Tribunal's capacity to admit new evidence: it does not define the questions that the Tribunal must answer.

(ii) The text, context and purpose of CEPA demonstrate that the Tribunal has no jurisdiction to assess compliance

[118] The text of s. 235 is expressly backward looking: it speaks to the enforcement officer's determination at the moment of inspection and determines this as the point at which it must be decided if the measures "are reasonable". On a request for review, the Tribunal essentially steps into the shoes of the enforcement officer and determines, on the evidence put before it, whether there were reasonable grounds to issue an EPCO and the reasonableness of the measures in the circumstances.

[119] It is telling that there is no suggestion in the text of *CEPA* that the Tribunal can cancel or otherwise modify an EPCO because a measure is no longer necessary or because the Tribunal is satisfied that compliance has been achieved. Indeed, of the measures mentioned in s. 235(4), para. 235(4)(c) expressly states that compliance has been achieved when the enforcement officer is "satisfied": *a contrario*, it is not the role of the Tribunal to determine compliance.

[120] The broader context supports this interpretation. The statutory scheme provides for an accelerated procedure. Requests for review must be made within 30 days: s. 256(1). The Tribunal is under an obligation to deliver its reasons within 15 days of the hearing: s. 266.

Furthermore, the statutory scheme takes as its starting point that there will be compliance during the review process. Subsection 238(1) requires "immediate" compliance with an EPCO. Subsection 239 even envisages the personal intervention of an enforcement officer to ensure compliance. Subsection 258(1) states that a request for review "does not suspend the operation of an order". Some of the measures in an EPCO can be forward-looking, such as ceasing activity for a "specified period" (s. 235(b)) or "reporting periodically to the enforcement officer" (s. 235(f)(ii)), and can remain in place for up to 180 days (s. 235(7)), conceivably after the Request for Review process has terminated – but if this is so, then the Tribunal would be incapable of assessing compliance.

[121] There are exceptions to some of these provisions. The time for making a Request for Review can be extended (s. 256(2)) and an order may be suspended during a proceeding (s. 258(2)). In addition, the Tribunal's practice is to engage in active case management of Requests for Review, generally allowing the parties time to gather evidence, in keeping with the *de novo* nature of the hearing. This can lead to longer timelines than those envisaged by *CEPA*.

[122] However, the Tribunal's practice is not 'law'. It cannot change the meaning of *CEPA*. And the question raised by ELC is a classic question of statutory interpretation. The celerity of the process provided for indicates, in and of itself, that the time the EPCO was issued should be the focus of the Request for Review, not the efficacy of subsequent compliance measures.

[123] The Tribunal concludes that, properly interpreted, the Request for Review process envisages quick decisions, based on a more comprehensive evidentiary record than that before the enforcement officer but nonetheless based on the state of affairs at the time the EPCO was issued.

[124] If it were otherwise, the recipient of an EPCO could request a review of an EPCO by the Tribunal simply for the purpose of granting themselves additional time to comply with an Order, and subsequently have the Order vitiated (or, as occurred in *Beausite Métal*, undertake unilateral measures that fail to achieve compliance and result in a deadweight loss). This is not consistent with the purpose of the EPCO regime (including the Request for Review process), which is to promote timely compliance.

Conclusion

[125] The EPCOs are confirmed, save in respect of Sephora's officers. Under s. 263(c) of CEPA, the duration of the Sephora EPCO is extended to the date on which the above-identified measures are met, with acknowledgement from ECCC, or April 15, 2024, whichever date is earlier. Under s. 263(b) of CEPA, the Sephora EPCO is amended by replacing measures 10 to 15 with the following:

> **Measure 10**: As soon as possible but no later than **January 26, 2024**, provide to the undersigned enforcement officer a copy of an Environmental Management Plan (EMP) to ensure that Sephora Beauty Canada, Inc. complies with CEPA and prevents the import, offer for sale and/or sale of products in contravention to CEPA, its Regulations and significant new activity notices/orders.
>
> **Measure 11**: As soon as possible, but no later than **March 29, 2024**, proceed to the proper disposal (incineration or any approved method for proper destruction of PFAS) of all the recovered products as per measure to be taken # 8(a) and 8(e) of this EPCO). The proper disposal must be made by a certified company.
>
> **Measure 12**: As soon as possible, but no later than **March 29, 2024,** proceed to the proper disposal (incineration, destruction or any approved methods) of all the recovered products as per measure to be taken # 8(b) and 8(d) of this EPCO). The proper disposal must be made by a certified company.
>
> **Measure 13:** As soon as possible, but no later than **March 29, 2024**, proceed to the proper disposal or exportation of all the recovered products (as per measure to be taken # 8(c) of this EPCO). The proper disposal must be made by a certified company.
>
> **Measure 14**: As soon as possible, but no later than **March 29, 2024**, proceed to the proper disposal or exportation if the products are legal in the jurisdiction to which they are returned of all the recovered products (as per measure to be taken # 8(f) of this EPCO). The proper disposal must be made by a certified company.
>
> **Measure 15**: As soon as possible, but no later than **April 15, 2024**, provide to the undersigned enforcement officer a detailed report about the proper disposal of all recovered products (as per measure to be taken #11, 12, 13 and 14 of this EPCO).
>
> The report should include documentation to support what happened to every products such as invoice(s), manifest(s), certificate(s) of destruction, and/or any other applicable documentation pertinent for the matter. A Sephora Beauty Canada, Inc. official must sign/endorse that report.

[126] Additionally, under s. 263(c) of CEPA, the duration of the ELC EPCO is extended to the date on which the identified measures are met, with acknowledgement from Environment Canada, or May 20, 2024, whichever date is earlier. Under s. 263(b) of CEPA, the ELC EPCO is amended by replacing Measures 5 and 6 with the following:

> **Measure 5**: By **November 9, 2023**, dispose or export all units of Clinique - Take The Day Off – Cleansing Balm that contain plastic microbeads in accordance with the plan provided in Measure #4. The proper disposal must be made by a certified company.
>
> **Measure 6**: By **January 8, 2024**, provide me with documentation establishing that all units of Clinique - Take The Day Off - Cleansing Balm that contain plastic microbeads have been disposed of or exported from Canada, in accordance with the plan provided in Measure #4, by a certified company (e.g. waste manifests, certificates of destruction, etc.).

“Heather Gibbs”
HEATHER GIBBS
CHIEF REVIEW OFFICER

“Paul Daly”
PAUL DALY
REVIEW OFFICER

“Heather McLeod-Kilmurray”
HEATHER MCLEOD-KILMURRAY
REVIEW OFFICER

Appendix A – Estée Lauder EPCO dated March 8, 2023

Appendix B – Sephora EPCO dated May 16, 2023