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Dockets: T-1070-16
T-1071-16

Citation: 2018 FC 380

Ottawa, Ontario, April 10, 2018

PRESENT: The Honourable Madam Justice Kane

Docket: T-1070-16

BETWEEN:

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, and WILDERNESS COMMITTEE

Applicants

and

MINISTER OF HEALTH, SUMITOMO CHEMICAL COMPANY LIMITED, BAYER CROPSCIENCE and VALENT CANADA

Respondents

Docket: T-1071-16

AND BETWEEN:

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, AND WILDERNESS COMMITTEE

Applicants

and

**ATTORNEY GENERAL OF CANADA,
MINISTER OF HEALTH AND SYNGENTA
CANADA INC.**

Respondents

ORDER AND REASONS

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I. Overview

[1] The Respondents appeal the Order of Prothonotary Mandy Aylen [the Prothonotary], dated July 13, 2017, which dismissed their motions to strike the Applicants' Applications for Judicial Review (reported at *David Suzuki Foundation v Canada (Health)*, 2017 FC 682).

[2] The Applicants (who were the Respondents on the Motion and are the Respondents on this Appeal) are a group of non-governmental organizations engaged in environmental advocacy. In their Applications for Judicial Review, they allege that the Pest Management Regulatory Agency [PMRA], a branch of Health Canada which administers the *Pest Control Products Act*, SC 2002, c 28 [the Act or the PCPA] as well as the *Pest Control Products Regulations*, SOR/2006-124 [the Regulations] and makes decisions as the delegated authority of the Minister of Health, has engaged in an unlawful course of conduct over several years by successively registering or amending the registration of certain pest-control products [PCPs] in the absence of

necessary information regarding the environmental risks posed, in particular regarding the long-term toxicity risks to pollinators, primarily bees.

[3] The Prothonotary captured the Applicants' allegations in the first paragraph or her Order as follows:

> According to the Applicants, bees in Canada may be at risk from exposure to the pesticides Clothianidin and Thiamethoxam. In these applications, the Applicants assert that the Pest Management Regulatory Agency [PMRA] has engaged in an unlawful course of conduct of improperly successively registering or amending the registration for these pesticides and their end-use products notwithstanding that the corporate Respondents have failed to provide the scientific information required, as a condition of their registrations, to demonstrate that the products' environmental risks are acceptable to pollinators.

[4] Two Applications have been joined as they raise the same issues. **T-1070-16** pertains to the product Clothianidin. The Respondents are: the Attorney General of Canada [AGC], Bayer Cropscience Inc. [Bayer], Sumitomo Chemical Company Limited and Valent Canada Inc. [Sumitomo]. Sumitomo is the registrant of Clothianidin Active. Valent is Sumitomo's Canadian agent for the purpose of managing its registration of Clothianidin Active, and is itself a registrant of five Clothianidin-based "end use" products. Bayer is also a registrant of Clothianidin end-use products.

[5] **T-1071-16** pertains to the product Thiamethoxam [TMX]. The Respondents are the AGC and Syngenta Canada Inc. [Syngenta]. Syngenta is the registrant for all TMX products.

[6] The Applicants allege that the PMRA has consistently misused its statutory powers. The PMRA is required by law to collect certain information *before* registering PCPs, in order to ensure that the risks posed by the products are acceptable, in accordance with section 8 of the PCPA. The Applicants submit, however, that the PMRA's consistent practice has been to register the products and request, through the use of a notice issued pursuant to section 12 of the PCPA, that information about the risks be provided *after* registration. According to the Applicants, this has resulted in the continued registration of PCPs in the absence of necessary studies regarding the long-term risks those PCPs pose to pollinators.

[7] On the motion to strike before the Prothonotary, as Case Management Judge, the Respondents argued that the Applications for Judicial Review did not target a course of conduct, but were instead an attempt to review 79 discrete registration decisions. The Respondents argued that this violated both Rule 302 of the *Federal Courts Rules*, SOR/98-106 [*Federal Court Rules*] which provides that an application for judicial review is limited to a single decision unless the Court orders otherwise, and subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], which prescribes a 30-day limitation period to bring a Notice of Application for Judicial Review. They also argued that there was an adequate alternative remedy for the Applicants, which were the ongoing review processes launched by the PMRA in 2012.

[8] In response, the Applicants argued that they were not seeking to review discrete registration decisions, but rather the PMRA's consistent practice of using section 12 of the Act to register PCPs as conditional registrations while deferring the receipt and review of necessary studies on their risks to bees, which should have been reviewed before the PCP was registered

pursuant to section 8. They argued that this was a challenge to a course of conduct, rather than individual decisions, and was, therefore, not subject to Rule 302 or the limitation period in subsection 18.1(2). The Applicants also submitted that the PMRA's review processes would not provide an adequate alternative remedy because, among other things, they would not examine the lawfulness of the PMRA's conduct to date, and would not be expeditious.

[9] The Prothonotary found that both issues were debatable and, therefore, should be determined by the judge on the Applications for Judicial Review, rather than on a preliminary motion.

[10] The Prothonotary was presented with a voluminous record, which is not the norm on a motion to strike an application for judicial review. The Applicants presented evidence about the similarities of the registration histories of the PCPs at issue, highlighting what they allege is a consistent, ongoing practice (i.e. a course of conduct) of misusing section 12 of the Act. In turn, the Respondents submitted evidence about the various differences in the registrations at issue, which they submit highlights that there is no course of conduct, but rather that the Applicants are seeking to review a number of highly discrete decisions which were made by the PMRA at different times, in different contexts, and based on different information.

[11] The starting point is that the facts pleaded are true. It is not the role of the Court on a motion to strike or on this Appeal to delve into this record more fully to determine which narrative reflects reality.

[12] On this Appeal, the Respondents argue that the Prothonotary erred in several ways and, as a result of these errors, the Prothonotary erred in ultimately finding that it was debatable whether there was a course of conduct and whether there was an adequate alternative remedy. The Respondents reiterate that clearly there was no course of conduct and clearly there is an adequate alternative remedy.

[13] The Respondents submit, among other things, that the Prothonotary failed to address specific arguments, certain cases cited, and elements of various tests. However, the jurisprudence has established that it is not necessary for a decision-maker to refer to each argument and each case cited by a party and that the reasons must be read in context (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 68-69, [2017] FCJ No 728 [*Mahjoub*]). In my view, the Prothonotary succinctly captured the key principles from the jurisprudence, key issues and key facts. The present decision, in comparison, will be criticized as unnecessarily long in its attempt to cover all the nuanced arguments of five Respondents and the collective Applicants.

[14] For the reasons that follow, I find that the Prothonotary did not err in concluding that the issues raised on the motion were debatable, and, therefore, in refusing to strike the Applications for Judicial Review.

II. The Motion to Admit New Evidence

[15] Following the hearing of this Appeal and while this decision was under reserve, the Respondents sought Directions with respect to their intention to bring a motion to seek leave to

admit new evidence. The proposed new evidence is comprised of proposed registration decisions arising from applications by the Respondents to convert conditional registrations to full registrations, referred to as the PRDs, and the preliminary decision on the PMRA's re-evaluation of neonicotinoids, launched in 2012, referred to as the PRVD, both of which were issued on December 19, 2017. The Respondents argued that this evidence supports their claim that these processes present an adequate alternative remedy to these Applications, as well as their claim that these Applications do not target a course of conduct. As a result, the determination of this Appeal and the issuance of this decision were held in abeyance pending the scheduling and determination of the Respondents' motion.

[16] The Respondents' motion to admit new evidence was heard on February 7, 2018 and dismissed. The Order and Reasons have been issued separately as *David Suzuki Foundation et al. v Minister of Health et al.*, 2018 FC 379 [*Suzuki 1*].

[17] In *Suzuki 1*, the Court found that the new evidence did not meet the test established in the jurisprudence for the admission of new evidence as it would not have an impact on the determination of the Appeal. The new evidence does not provide certainty that the alternative remedy would be adequate, nor does it provide certainty that the Applicants' allegations do not relate to a course of conduct. However, as noted in the Order, the Court was required to consider the new evidence to determine if it could be admitted. Despite that the new evidence was not admitted, there are references to its content in this decision.

III. The Background

[18] The parties are in general agreement about the plain wording of the Act and its Regulations. They acknowledge that there is no jurisprudence on the interpretation of the provisions at issue. However, the Applicants argue that the way in which the Act is supposed to operate differs from how it actually operates in practice.

[19] A more detailed overview of the Act and the Regulations is provided in Annex A for context. In a nutshell, in order to register a PCP pursuant to section 8 of the PCPA, the PMRA requires reasonable certainty that the PCP poses no safety risks, including to the environment. At the same time of registration pursuant to section 8, the PMRA can request additional data from the registrant by issuing a notice pursuant to section 12. If a section 12 notice is issued, the registration of the PCP is deemed to be conditional, in accordance with the Regulations, on the receipt of the information requested.

[20] The Applicants allege that the PMRA has consistently misused section 12 notices to defer the receipt and review of studies which are necessary in order to be reasonably certain that the PCPs at issue do not pose an unacceptable risk. The Applicants allege that the PMRA has maintained the conditional registrations of the PCPs at issue in the absence of this necessary data since at least 2006 by issuing section 12 notices.

[21] The Respondents deny that the PMRA has misused section 12 notices. The Respondents submit that all registrations were made pursuant to section 8 and that the PMRA was satisfied that the PCPs did not pose an unacceptable risk.

IV. The Decision of the Prothonotary

[22] As noted above, the Prothonotary dismissed the Respondents' motion to strike the Applications for Judicial Review based on finding that it was debatable whether the Applications seek to review a course of conduct and that it was debatable whether the Applicants have an adequate alternative remedy. She found that both issues should be determined by the judge on the Application for Judicial Review.

[23] The Prothonotary summarized the statutory scheme, the submissions of the parties and the principles from the jurisprudence. More detail of the Prothonotary's decision is provided below with reference to the issues raised on this Appeal.

[24] The Prothonotary referred to the governing principles in the jurisprudence. She noted that, in order to grant the motion to strike, an application must be "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) v Pharmacia Inc.*, [1994] FCJ No 1629 at para 15, [1995] 1 FCR 588(CA) [*David Bull*]). The Prothonotary also noted that there must be a "show stopper", i.e. an obvious, fatal flaw (*JP Morgan Assert Management (Canada) Inc. v Minister of National Revenue*, 2013 FCA 250 at para 47, [2014] 2 FCR 557 [*JP Morgan*]). The Prothonotary added that if an issue is debatable it should be determined by the judge at the application stage (*David Bull* at paras 12-13).

[25] The Prothonotary acknowledged the need to read a notice of application with a view to understanding its essence and to "gain a realistic appreciation of the application's essential

character by reading it holistically and practically without fastening onto matters of form" (at para 6, citing *JP Morgan* at paras 49-50).

[26] The Prothonotary rejected the Respondents' preliminary argument, that the Applicants had re-characterized their pleadings in attempt to survive the motion to strike. The Respondents had argued that the Notices of Application clearly sought to challenge 79 individual registration decisions under section 8, and that the alleged course of conduct regarding the use of section 12 notices had not been pleaded. The Prothonotary disagreed, finding that the Applicants' response to the motion accurately characterized their pleadings. She found that a course of conduct was being challenged and described it at paragraph 20 of her decision:

> [20] As such, I find that what is being challenged in these applications, and what has been characterized by the Applicants as a course of conduct, is the PMRA's alleged unlawful practice of issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the chronic toxicity risk of Clothianidin, Thiamethoxam and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies.

[27] The Prothonotary then addressed the Respondents' main arguments. The Respondents had argued that – regardless of how the pleadings were characterized – the Applicants were really seeking to review 79 distinct decisions of the PMRA, beyond the 30-day limitation period, which violated both Rule 302 of the *Federal Courts Rules* and subsection 18.1(2) of the *Federal Courts Act*. The Respondents also argued that the PMRA's re-evaluation of the PCPs pursuant to section 16 of the Act (now referred to as the PRVD) and outstanding conversion applications

respecting the PCPs at issue (now referred to as the PRD), provided an adequate alternative remedy to judicial review.

[28] The Prothonotary noted that pursuant to Rule 302, applications for judicial review must be limited to a review of a single decision, unless it can be shown that the decisions at issue form part of a continuous course of conduct. The Prothonotary also noted that pursuant to subsection 18.1(2), reviews of a decision or order were subject to a 30-day limitation period, but that this rule did not apply where the subject matter of the judicial review is a matter that forms a continuous course of conduct. The Prothonotary referred to the relevant considerations set out in the jurisprudence, noting that the determination of whether a course of conduct is at issue, as opposed to multiple, discrete decisions, is a largely fact-based determination.

[29] The Prothonotary considered the relevant jurisprudence, addressed the Respondents' arguments and, among other things, noted the various differences in the registration decisions as identified by the Respondents and the similarities identified by the Applicants. The Prothonotary concluded that whether the Applicants were seeking to challenge a course of conduct was debatable and should be left for the judge to determine on the Applications for Judicial Review.

[30] The Prothonotary also addressed the Respondents' argument that the ongoing re-evaluation initiated by the PMRA (PRVD) and existing applications to convert conditional registrations to full registrations (PRD) provided an adequate alternative remedy.

[31] The Respondents had argued that if the Applicants' primary goal is to fill the data gap respecting the PCPs risks to pollinators, these processes would be an adequate remedy. They also noted that these processes could result in the denial of registration to the PCPs. The Respondent, AGC, had also argued that it would be a waste of judicial resources to consider the Applications for Judicial Review because, even if successful, the likely remedy would be for the Court to remit the matter to the PMRA for redetermination, which is what the re-evaluations would accomplish. The Prothonotary disagreed, noting that the Applicants were not requesting a redetermination of the decisions. The Prothonotary was not convinced that the likely outcome of the Applications, if successful, would be to remit them to the PMRA for redetermination.

[32] The Prothonotary noted that there were several factors to consider to determine whether the alternative remedy was adequate, citing *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 [*Strickland*]. She expressed a particular concern that the other proceedings would not afford the Applicants the central remedy that they seek, which was a declaration of unlawful conduct by the PMRA, and that they would not be expeditious, given that public consultation would not begin until after the PMRA's final decision, which was anticipated to be December 31, 2018. She also noted that the public consultation and objection processes had not been shown to be expeditious for the Applicants in the past. The Prothonotary concluded that it was debatable whether the re-evaluations would afford adequate and effective relief, when compared to the Applications for Judicial Review.

V. The Respondents' (Appellants') Overall Position

[33] It appears that the arguments made to the Prothonotary were again made to the Court on this Appeal. The Respondents argue that due to the Prothonotary's errors – which they submit are palpable and overriding and include extricable errors of law – no deference is owed and the Court should make the Order that the Prothonotary should have made and dismiss the Applications.

[34] All of the Respondents make similar arguments with some individual variations. The Respondents' position is generally that the Prothonotary: misunderstood the statutory regime for the registration of PCPs; misunderstood and mischaracterized the nature of the Applicants' claims, which properly construed, cannot be characterized as targeting a course of conduct; confused and misapplied the jurisprudence governing subsection 18.1(2) and Rule 302 and, as a result, erred in finding that it was debatable whether there was a course of conduct that was not subject to Rule 302 or subsection 18.1(2); and, erred in applying the legal test to determine whether there was an adequate alternative remedy. Each Respondent provided the Court with a detailed history of the registration status of the PCPs at issue. The Respondents again emphasize that these Applications implicate a number of highly discrete decisions made by the PMRA at different times, in different contexts, and based upon different information, which cannot form a course of conduct.

A. *The Respondent, The Attorney General of Canada's, Submissions*

(1) Overview

[35] The AGC provided an overview of the PCPA and Regulations, and elaborated on the history of the registrations of Clothianidin and TMX. The AGC described the history of Clothianidin and TMX registration decisions and highlighted various differences, including that some PCPs were first registered under the previous Act and that PCPs have different proposed uses and different data requirements.

[36] The AGC explained that the current re-evaluation process regarding neonicotinoids (which include Clothianidin and TMX) and the risks they pose to pollinators, which is being conducted pursuant to section 16 of the Act, was commenced in 2012 and is anticipated to be finalized by December 2018. The AGC explained that such evaluations usually take several years.

(2) Mischaracterization of the Notices of Application

[37] The AGC argues that the Prothonotary both erred in law and made palpable and overriding errors in her characterization of the Notices of Application as a continuing course of conduct. In particular, the AGC argues that the Prothonotary failed to gain a realistic appreciation of the essential character of the claims; and, that she did not understand the difference between section 8 and section 12. Pointing to the evidence of its affiant, Ms. Sterkenburg, the AGC explains that the PMRA will only register a PCP where there is no unacceptable risk, and that the issuance of a section 12 notice occurs *after* the finding that there is no unacceptable risk. The AGC stated that the section 12 notice is intended to provide additional information to confirm the results of the risk assessment.

[38] The AGC submits that the course of conduct found by the Prothonotary is inconsistent with the Notices of Application. The AGC submits that neither of the Notices of Application seek relief in relation to the PMRA's issuance of section 12 notices, nor do they limit the challenge to the impact on pollinators. The AGC argues that even a successful judicial review of the PMRA's issuance of section 12 notices and the setting aside of the section 12 notices would not invalidate the underlying PCPs' registrations, which were registered in accordance with section 8 and based on a determination that there was no unacceptable risk.

[39] The AGC also notes that in their Notices of Application, the Applicants seek a declaration of invalidity of the registrations under section 8. The AGC submits that this would require the review of 79 discrete decisions made pursuant to section 8 all the way back to 2006, which cannot be reviewed as a course of conduct. The AGC argues that the Prothonotary ignored relevant evidence which showed the differences in the various decisions and in the section 12 notices and, therefore, erred in presuming commonality between the decisions.

[40] The AGC points to the information provided by its affiant, Ms. Sterkenburg, which notes the differences between the registration decisions. Ms. Sterkenburg explains that the decisions implicate different PCPs in different contexts. The data necessary to be reasonably certain that the PCPs pose no risk varies widely depending on these differences. The AGC adds that registration decisions involved different active ingredients (Clothianidin and TMX) and 31 separate end-use products (33 PCPs in total). According to the AGC, each of these individual decisions involved a determination under section 8 by the PMRA, based on separate records, that

the registration, renewal, continuation or reinstatement of the product (as the case may be) did not present an unacceptable risk to human health or the environment.

[41] The AGC adds that section 12 notices were not issued for all decisions, rather for 55 of the 79 decisions. However, the AGC acknowledges that the other 24 decisions were linked to registrations which did have such a notice due to the operation of section 15 of the Regulations (as explained in the Annex) and were, therefore, also conditional registrations.

[42] With respect to the Court's observation that throughout the entire registration history of the PCPs at issue there was always an outstanding request via a section 12 notice for a study on the toxicity risks to bees, the AGC responded that the same section 12 notice was not issued in each case; the section 12 notices are specific to each decision, which reflects that the science evolves over time as do the protocols for the evaluation of the risks posed to pollinators.

(3) Course of Conduct – Subsection 18.1(2) and Rule 302

[43] The AGC argues that the Notices of Application must be struck because they violate subsection 18.1(2), and no extension of time was requested, nor would such an extension be justified as it would hinder the principle of finality.

[44] The AGC further argues that the Notices of Application challenge more than one decision, contrary to Rule 302 and its purpose of efficiency. The AGC again notes no exemption was requested nor would it be justified.

[45] The AGC submits that the allegations do not constitute a course of conduct because they do not challenge any policy, but rather seek to invalidate a number of individual registrations which, among other differences, were made at different times and on different records, and all of which could have been the subject of judicial review in a timely manner. In addition, the Prothonotary failed to consider whether it was difficult to pinpoint a single decision, which is a relevant indicia of a course of conduct.

[46] The AGC further submits that, unlike the present circumstances, in the cases where the Federal Courts have allowed challenges to courses to conduct, the applications were about a discrete challenge to the legality of decision-making, the factual distinctions between the decisions were insignificant, the relief sought was forward looking, and the reasonableness of individual decisions was not in issue.

(4) Adequate Alternative Remedy

[47] The AGC argues that the Prothonotary erred in her application of the legal test to determine the adequateness of the alternative remedy. The Prothonotary based her finding on her conclusion that the PMRA re-evaluation and the conversion application would not afford the "central remedy" sought by the Applicants, namely declarations of unlawful conduct. The AGC submits that the Prothonotary's reference to the "central remedy" is synonymous with a "preferred" remedy. However, whether an alternative remedy is an applicant's preferred remedy is not determinative of its adequateness (*Strickland* at para 59). The AGC further submits that the Prothonotary also erred by: focussing exclusively on expeditiousness and the remedial capacity of the alternative; failing to apply all of the relevant elements of the test, such as consideration of

the expertise of the PMRA, which is in a better position to determine whether the impugned decisions were made with insufficient scientific information; and, failing to consider that allowing the Applications to proceed would be an inefficient use of judicial resources.

B. *The Respondent, Bayer's, Submissions*

[48] Bayer argues that the Prothonotary made three key errors. First, the Prothonotary confused sections 8 and 12 of the Act, which led her to mischaracterize the nature of the Applicants' claims and the course of conduct alleged. This led her to err in finding that the registration decisions were implicated. Second, the Prothonotary erred by conflating the analysis for a course of conduct under subsection 18.1(2) and Rule 302, and by only conducting the Rule 302 analysis and, then, only in part. Third, the Prothonotary erred in applying the test for an adequate alternative remedy, including by focussing only on the alternative remedy and not on the appropriateness of judicial review as sought.

(1) Mischaracterization of the Notices of Application

[49] Bayer argues that the construction of the pleadings is a legal determination and the Prothonotary's error is, therefore, an error of law. Bayer submits that the Notices of Application clearly focus on the registration decisions made under section 8, and not the issuance of the section 12 notices.

[50] Bayer points to the Notice of Application with respect to Clothianidin, which seeks judicial review of the PMRA's course of conduct in "successively registering" PCPs without the

necessary scientific information to be reasonably certain of the environmental risks and by "unlawfully extending the validity periods" of PCPs. Bayer argues that both these allegations are about registration decisions made pursuant to section 8. In addition, the relief sought in the Notice of Application is to declare the course of conduct of successively registering and of extending the validity of the Clothianidin products unlawful, which also focuses on the section 8 decisions. Bayer adds that the requested declaration of invalidity would also only target section 8 decisions.

[51] Bayer submits that the Notice of Application seeks to declare every aspect of Clothianidin Active and its end-use products' registrations unlawful, not just the risks the PCPs cause to pollinators. Bayer adds that both Notices of Application contain almost no reference to section 12 notices, adding that section 12 is not even referred to under the sub-heading "PMRA's course of conduct is unlawful". Bayer points to other parts of the Notices of Application and submits that all the allegations relate to the decision-making power under section 8, without any mention of unlawfully issuing or improperly using section 12 notices. Bayer argues that the relief now sought and the course of conduct now asserted is not the same as pleaded in the Notices of Application.

[52] Bayer submits that the Applicants re-characterized their Notices of Application in response to the Respondents' motion to strike and then focussed on the PMRA's unlawful practice of issuing section 12 notices to maintain conditional registrations without sufficient studies.

[53] Bayer submits that the Applicants' allegations regarding a critical data gap target the decisions made pursuant to section 8. However, contrary to the Applicants' allegations, the available evidence shows that for each registration decision, the PMRA had sufficient data to determine that the risks were acceptable. In cases where section 12 notices were issued, the Respondents complied and provided the requested chronic toxicity studies, which were assessed by the PMRA. Bayer emphasizes that as the products were registered, or where requests were made to convert conditional registrations to full registrations, new and different section 12 notices were issued by the PMRA seeking additional information.

[54] Bayer argues that if the Court finds that there is a misuse of section 12 notices, any resulting declaration would only invalidate those section 12 notices; the PCP's registration would continue, but would no longer be conditional on providing the additional information requested in the section 12 notice.

(2) Course of Conduct – Subsection 18.1(2) and Rule 302

[55] Bayer submits that although the jurisprudence under subsection 18.1(2) and Rule 302 both use the term "course of conduct", the analysis of what constitutes a course of conduct differs because the purpose of the two provisions differs. Bayer argues that the Prothonotary conflated the legal tests applicable to subsection 18.1(2) and Rule 302, and only conducted the analysis with respect to Rule 302.

[56] With respect to subsection 18.1(2), Bayer argues that there is no course of conduct and no policy of general application at issue. Bayer submits that the Applicants' assertion that they seek

to review a practice is an after-the-fact attempt to connect 35 disparate decisions based on the issuance of section 12 notices, which is an attempt to "plead around" subsection 18.1(2). Rather, there are 35 discrete decisions regarding Clothianidin at issue, of which 21 were made between 2 and 10 years beyond the 30-day limitation period, and no extension of time was requested by the Applicants.

[57] Bayer submits that labelling the decisions at issue as a policy cannot avoid subsection 18.1(2). The only evidence before the Court is the affidavit of Ms. Sterkenburg who answered on cross-examination that there is no policy or guidelines regarding the use of section 12 notices. Bayer submits that the case law relied on by the Applicants (discussed below) does not assist them, because those cases deal with a formal policy or its implementation, which are not present here.

[58] Bayer argues that the Prothonotary really only conducted the analysis to determine whether an exemption from Rule 302 should apply, but erred by focussing only on the similarities and differences in the decisions and by failing to consider whether reviewing all 35 Clothianidin decisions would advance judicial efficiency. Bayer submits that the test in *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658, 251 FTR 155 [*Truehope*] governs, which considers whether the similarities between the decisions outweigh the differences such that requiring two or more applications would be a waste of time and effort, or whether the time and effort of the parties and Court would be conserved by a single application.

[59] Bayer submits that the exceptions to Rule 302 in the case law are few and have generally been limited to no more than four decisions which were not spread out over years, but a much shorter period.

[60] Bayer argues that it would not be efficient to review 35 discrete decisions together. Bayer points to the registration history of one product as an example. For this product, a section 12 notice was issued after registration requesting a full study on toxicity to honey bees, a protocol was developed for the study, it was conducted and submitted. The product was again registered and a new section 12 notice was issued requesting a new hive study. Bayer submits that in each case, the risks were found to be acceptable. Bayer submits that if these Applications were to proceed, each decision would have to be reviewed on the record before the PMRA at the time; each record would be different and likely voluminous; and the review would be long and resource intensive, contrary to the purpose of Rule 302 and the requirement that judicial reviews be heard without delay.

[61] Bayer further argues that, even if a course of conduct is found pursuant to the Rule 302 analysis, this does not exempt an applicant from subsection 18.1(2) because a separate analysis and determination under subsection 18.1(2) is required. Bayer relies on *James Richardson International Ltd v Canada*, 2004 FC 1577 at para 22, [2005] 2 FCR 534 [*James Richardson*] to assert that the test for a continuing course of conduct pursuant to Rule 302 cannot be used to allow an applicant to overcome the 30-day limitation period in subsection 18.1(2) and states that "*yet this is what occurred here*".

[62] Bayer adds that an application to judicially review multiple orders could comply with subsection 18.1(2) (i.e. as a course of conduct or policy) yet still breach Rule 302, again because a separate analysis is required. Bayer also notes that a party could be granted leave to challenge more than one decision under Rule 302 (i.e. because the decisions were all very similar) but still not be granted an extension of time under subsection 18.1(2) (relying on *Whitehead v Pelican Lake First Nation*, 2009 FC 1270 at para 54, 360 FTR 274 [*Whitehead*]).

[63] Bayer acknowledges that the test on a motion to strike is high but submits that the "knock-out punch" in this case is that the Notices of Application seek to review 79 decisions beyond the 30-day limitation period, without an extension of time being granted, and, therefore, in contravention of subsection 18.1(2). Similarly, they seek to review more than one decision contrary to Rule 302; the decisions differ and it would be contrary to judicial efficiency for the decisions to be reviewed together.

(3) Adequate Alternative Remedy

[64] Bayer argues that the Prothonotary erred in focussing only on whether the re-evaluation launched by the PMRA in 2012 will provide the Applicants with the declaratory relief they seek and whether it will be expeditious. According to Bayer, the alternative remedy need not be identical to that sought by the Applicants and need not be equally expeditious.

[65] Bayer also argues that the Prothonotary further erred by not considering whether the Applications for Judicial Review would be suitable and appropriate as required by *Strickland*, and erred in not assessing the balance of convenience between the proposed alternative and the

Applications for Judicial Review. Bayer submits that judicial review is not appropriate because it duplicates the PMRA's ongoing re-evaluations and raises the possibility of conflicting decisions.

C. *The Respondent, Sumitomo/Valent's, Submissions*

[66] Sumitomo also provided an overview of the PCPA, emphasizing that all registration decisions are made pursuant to section 8 and require a determination of whether the risks posed are acceptable, and that section 12 notices are only issued after this assessment has already been made.

(1) Mischaracterization of the Notices of Application

[67] Sumitomo submits that in determining a motion to strike an application for judicial review, the first step is to identify the essential character of the claims. However, the Prothonotary's fundamental misconception about sections 8 and 12 resulted in her failure to appreciate the essential character of the claims as set out in the Notices of Application.

[68] Sumitomo argues that paragraph 20 of the Prothonotary's decision demonstrates that she mischaracterized the effect of a section 12 notice. Section 12 notices do not defer the receipt of necessary studies. Rather, pursuant to section 14 of the Regulations, the effect of a section 12 notice is to shorten the validity period of the registration to three years and to defer the public consultation process and Notice of Objection. Sumitomo adds that the section 12 notices did not result in the continued registration of Clothianidin products; the PMRA's decisions under section 8 did so.

[69] Sumitomo submits that the Prothonotary's characterization of the claims does not reflect the relief sought by the Applicants, which is to invalidate the registration decisions. Sumitomo argues that if the Applications were really about an unlawful practice of issuing section 12 notices, the relief sought should target the consequences of section 12, such as the suspension of public consultation.

(2) Course of Conduct – Subsection 18.1(2) and Rule 302

[70] Sumitomo argues that whether there is a course of conduct is not debatable, and that clearly there is no course of conduct. The Prothonotary erred in her interpretation of the jurisprudence regarding subsection 18.1(2) and Rule 302 and in her analysis.

[71] Sumitomo submits that where decisions are made at different times and involve a different focus, they do not constitute a course of conduct. Sumitomo adds that these Notices of Application do not challenge a policy in the PMRA regarding section 12, but rather a number of distinct decisions, made at different times about different products, any of which could have been judicially reviewed. Sumitomo adds that in the present case, the differences in the decisions outweigh their similarities and there is no difficulty pinpointing an individual decision for review.

[72] Sumitomo submits that to allow the Applications to proceed would undermine principles of finality and efficiency which inform subsection 18.1(2) and Rule 302, and would signal to litigants that wide-ranging attacks on historical administrative decisions can be pursued under the guise of an alleged course of conduct.

(3) Adequate Alternative Remedy

[73] Sumitomo argues that this issue is also not debatable; clearly there is an adequate alternative remedy. The Prothonotary erred in law by failing to consider the essential elements set out in *Strickland* to determine whether there is an adequate alternative remedy, and as a result, no deference is owed.

[74] Sumitomo submits that in *Strickland,* the Supreme Court of Canada established that many factors must be considered. Sumitomo argues that the Prothonotary focused on only two factors – expeditiousness and the "identicality" or sameness of the alternative remedy – which is what the Prothonotary meant by "central remedy". They submit that the alternative need only be adequate, not identical to that available on judicial review.

[75] Sumitomo points to case law to argue that expeditiousness cannot outweigh other factors (*Girourard v. Canada (Attorney General)*, 2017 FC 449, [2017] FCJ No 675) and that applications for judicial review should not proceed where they would interfere with ongoing administrative processes before they are completed (*Canada (Canada Border Services Agency) v CB Powell*, 2010 FCA 61, [2011] 2 FCR 332 [*CB Powell*]).

[76] Sumitomo further argues that the Prothonotary failed to consider other relevant factors in her analysis of an adequate alternate remedy, including the expertise of the PMRA, the economical use of judicial resources, the possibility of inconsistent findings between the re-evaluation and judicial review, and more generally, whether judicial review would be

appropriate. Sumitomo submits that it would not be appropriate because it would entail the review of 79 decisions with their own records and would duplicate the ongoing re-evaluation process.

[77] Sumitomo submits that the PMRA's re-evaluation process is adequate because the Applications are really about whether the environmental risks posed by the PCPs are acceptable, which will be assessed in the re-evaluation. The re-evaluation will result in the registrations being either cancelled, amended or confirmed by the PMRA. At the conclusion of this process, the Applicants could then seek judicial review of the final decisions. Awaiting the outcome of the re-evaluation before pursuing judicial review is more prudent, because it would provide the Court with the benefit of the most recent scientific analysis and conclusions of the PMRA based on its expertise. Sumitomo also notes that the Applicants could achieve the results they seek in the re-evaluation, making a subsequent judicial review unnecessary.

D. *The Respondent, Syngenta's, Submissions*

(1) Mischaracterization of the Notices of Application

[78] Syngenta notes the registration history of TMX as described by its affiant, Ms. Tout: 44 discrete registration decisions were made over 10 years; 19 registrations are at issue; and, in each case, the PMRA made independent decisions based on a risk assessment, and a determination that there were no unacceptable risks. Syngenta also notes that the history described by the Applicants for Clothianidin is not the same as the history of registration for TMX. In particular, there was never any mention of a "critical data gap" with respect to TMX.

[79] Syngenta points to paragraph 20 of the Prothonotary's decision, as did the other Respondents, and submits that the Prothonotary misunderstood the role of sections 8 and 12. The Prothonotary's description of the unlawful course of conduct – i.e. the unlawful practice of issuing section 12 notices "that had the effect of deferring the receipt and review of necessary studies…thereby maintaining for over a decade the resulting conditional registrations" – is untenable, because the issuance of section 12 notices is not unlawful. Syngenta argues that judicial review can only be sought with respect to unlawful decisions or conduct.

[80] Syngenta submits that the use of section 12 notices does not result in continuing the registration of PCPs without an assessment of the risk, because registration is always based on a determination made under section 8 that there are no unacceptable risks. Syngenta submits that the Applicants are really alleging that the PMRA acted unlawfully in making 44 decisions pursuant to section 8.

[81] Syngenta points to the exhibits to demonstrate the registration history of its own products. In some cases, upon receipt of data in response to a section 12 notice, a subsequent and different section 12 notice was issued requesting other specific information or studies. Syngenta also points to the data it was required to submit in response to a section 12 notice as part of various requests for conversion to full registration following a conditional registration, registrations for new use-sites, and extensions of registrations to permit data to be generated as examples of how section 12 notices are unique and how, in every case, Syngenta complied and the product's registration was found not to pose unacceptable risks in accordance with section 8. Syngenta submits that: the nature of the risk assessment for each was distinct; scientific evidence was

considered by the PMRA, including about pollinators, to permit the PMRA to make a determination under section 8; the PMRA considered the information that was current at the relevant time; and, the PMRA decision process was transparent, with all decisions posted on the Public Registry.

(2) Course of Conduct – Subsection 18.1(2) and Rule 302

[82] Syngenta argues that the Applicants sought to avoid the obstacle created by their own pleadings by reformulating their theory of an unlawful course of conduct to focus on the issuance of section 12 notices rather than the registration decisions made pursuant to section 8.

[83] Syngenta points to the Notice of Application with respect to TMX, and submits that it alleges an unlawful course of conduct that is specific to each of the 44 TMX decisions.

[84] Syngenta argues that the section 8 registrations cannot constitute a course of conduct because the differences between the decisions significantly outweigh their similarities. Syngenta notes that: the 44 decisions related to TMX pertain to 18 products with different chemical formulations and concentrations; the risk profile differs for each depending on the mix of active ingredients; each decision is about different use-sites, applications and products; the data requirements differed and evolved over time, along with the state of the science; the decisions involved different decision-makers within the PMRA; and, different label restrictions were applied to different products and varied with the application method and other factors. Syngenta submits that the Application for Judicial Review would require an examination of each registration decision, which was made under different circumstances, involved different

products, invoked different statutory provisions (depending, for example, on whether a registration was continued, renewed or reinstated), and was based on a separate determination of whether the risk was acceptable. Syngenta adds that the review would include over 50,000 pages of information regarding TMX and all the other scientific data and information held by the PMRA.

[85] Syngenta adds that it has spent hundreds of millions of dollars to provide the necessary studies to the PMRA, and farmers have relied on its products for years. It submits that these registrations should not be invalidated years later, adding that this is the mischief designed to be prevented by subsection 18.1(2).

(3) Adequate Alternative Remedy

[86] Syngenta argues, as did Sumitomo, that the Prothonotary erred in her analysis by focusing solely on whether the proposed alternatives would provide the central remedy and would be comparable to judicial review, without considering the appropriateness of judicial review. Syngenta submits that judicial review is neither appropriate nor respectful of the normal process for challenging decisions of the PMRA. It will require the Court to review decisions that date back more than 10 years and involve hundreds of thousands of pages of scientific material that has evolved over time. This would entail a massive expenditure of judicial resources and raise issues that are beyond the technical expertise of the Court.

VI. The Applicants' Submissions

(1) Overview

[87] The Applicants submit that the Respondents have argued this appeal as if it were a *de novo* motion to strike. However, they point out that the first issue is not whether this Court should strike the Applications, but rather whether the Prothonotary erred in refusing to do so. The Applicants stress that in the decision under review the Prothonotary did not definitively decide the issues raised by the Respondents; rather, she found that they were debatable.

[88] The Applicants argue that the Prothonotary's discretionary decision should be reviewed for palpable and overriding error (*Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331 [*Hospira*]). As Case Management Judge since the time these Applications were filed in July 2016, the Prothonotary has held four case management conferences and fully understands the issues. Contrary to the Respondents' position, there is no extricable legal issue or principle and no palpable and overriding error has been demonstrated.

[89] The Applicants note the high threshold the Respondents must meet to succeed to strike out a notice of application (*JP Morgan*). The extensive motion record before the Prothonotary is exceptional and all this evidence belies the Respondents' submissions that there is an obvious flaw in the Notices of Application.

[90] The Applicants submit that their Notices of Application and the relief sought focus on an alleged unlawful course of conduct. The Applicants explain that section 12 notices have been the means by which the PMRA has deferred the receipt and review of necessary studies relating to the PCPs' impact on pollinators, which the PMRA has itself referred to as a "critical data gap".

The Applicants allege that without the data requested in the section 12 notices it is impossible for the PMRA to assess whether the risks posed by the PCPs are acceptable, yet the PMRA has purported to do so consistently since 2006. They also allege that section 12 notices have been used to circumvent the PMRA's public consultation duty, particularly with respect to TMX, which has not been the subject of any consultation since 2006.

[91] The Applicants acknowledge that section 8 governs whether the registration of a PCP will be granted or denied, based on whether the risk is acceptable. However, they question how the risk can be found to be acceptable where a critical data gap is identified and additional information is consistently requested as a condition of registration. The Applicants point to the exhibits in the affidavit of its affiant, Dr. Elaine MacDonald, which set out the chronology of registrations of the PCPs at issue, including requests for studies on toxicity as conditions of registration, the PMRA's determination that the studies submitted were not sufficient, and subsequent section 12 notices requesting other studies, all of which focussed on the toxicity risks to pollinators. The exhibits include original registrations, renewals and conversion to full registration applications, which are accompanied by successive section 12 notices (not all identical) seeking additional information regarding the toxicity risks to pollinators.

[92] The Applicants also point to examples where the registration of a PCP was continued although the section 12 requirement had not been complied with, or where the information or study provided to fulfill the previous section 12 notice was found to be unsatisfactory.

[93] The Applicants submit that there is no evidence that any conditional registration has ever expired. Instead, the PCPs' registration has been continued due to conversion applications or renewals, with a further section 12 notice requesting additional information and resulting in another conditional registration. Each time an expiry date approached, the PMRA made a decision pursuant to section 8 (to renew, continue, or extend) despite the persistent critical data gap, and issued another section 12 notice asking for additional information regarding long-term toxicity risks for pollinators.

[94] The Applicants acknowledge that as the science evolves, the requests for additional information also evolve and that, accordingly, the section 12 notices have not requested exactly the same information in each case. However, the section 12 notices have repeatedly requested studies to address the toxicity risks to pollinators based on the state of the science at the relevant time.

[95] With respect to the Respondents' submissions that section 12 notices were not issued for each PCP at issue, the Applicants note that the PMRA used section 15 to conditionally register several new end-use products by linking them with previously issued section 12 notices with the same active ingredients or with related end-use products. As a result, each PCP at issue is conditional on the submission of further data with respect of their risk to pollinators, which was requested via a section 12 notice. (As noted above, the Respondent, AGC, acknowledged that although not all 79 registration decisions at issue were accompanied by section 12 notices, those that were not were linked in this manner.)

[96] The Applicants note that there is no jurisprudence on the interpretation of the provisions of the PCPA at issue. The Applicants submit that the provisions of the PCPA do not appear to accord with the PMRA's conduct over the years. The concept of a conditional registration is not in the Act. The effect of a conditional registration is discerned only from the Regulations, which were promulgated after the Act was brought into force. Although the Respondent, AGC, described section 12 as allowing for confirmatory information, this is not described in the Act nor is it reflected in the history of registrations of the products at issue.

[97] The Applicants also note that the PMRA extended the registrations of PCPs in December 2015 without any statutory authority. The PMRA wrote to registrants advising them that the validity of registrations would be extended from 2015 for two additional years to align with the target date of completion of the evaluation of neonicotinoids. Ms. Sterkenburg, the AGC's affiant, explained on cross-examination that the PMRA purportedly rectified this in June 2016 by issuing new section 12 notices and reinstating the registrations of the products at issue.

(2) No Mischaracterization of the Notices of Application

[98] The Applicants submit that the Prothonotary's reasons demonstrate that she fully understood the statutory scheme and did not confuse sections 8 and 12.

[99] The Applicants submit that the alleged improper use of section 12 Notices, although not elaborated on in detail in the Notices of Application, was fully explained in the motion record before the Prothonotary. The Applicants note the presumption that the Prothonotary considered everything before her applies and has not been rebutted (*Mahjoub* at para 67).

[100] The Applicants acknowledge that the issuance of section 12 notices is not itself unlawful. The Applicants explain that their position has never been that the course of conduct alleged to be unlawful is only about section 12 or only about section 8. Rather, it is about the interaction between sections 8 and 12 in the registration process. The Applicants submit that the Prothonotary read the Notices of Application holistically and did not err in finding that the Applications are about the PMRA's practice of issuing section 12 Notices, which had the effect of deferring the receipt and review of necessary studies on the PCPs effect on pollinators, resulting in conditional registrations of those PCPs for over a decade without necessary information. The Applicants argue that the Prothonotary understood that the alleged course of conduct was this practice of melding section 12 notices into the Act's registration process in a way that undermines the Act's objectives, which require the PMRA to be reasonably certain about products' environmental risks when making registration decisions.

[101] The Applicants respond that, contrary to the Respondents' submissions, they did not make up a theory to survive the motion to strike. Although the Notices of Application say less about section 12 than other provisions, the Notices describe the interaction between section 8 and section 12 that the PMRA relied on to continue to register PCPs without the data it had identified as a "critical data gap". The Applicants add that the Prothonotary's reasons convey that she understood that section 12 notices are what makes a registration conditional, and are central to the unlawful conduct alleged.

[102] The Applicants emphasize that the main relief sought in the Applications is a declaration of unlawful conduct, not the invalidation of registration decisions, although that would be a

consequence of the declaration and that relief is also sought. The pleadings properly seek relief addressing the alleged course of conduct.

(3) Course of Conduct – Subsection 18.1(2) and Rule 302

[103] The Applicants highlight that the Prothonotary did not decide that there was a continuing course of conduct. Rather, she was uncertain.

[104] The Applicants submit that the Prothonotary did not confuse the purposes of Rule 302 and subsection 18.1(2). The Applicants also dispute that separate analyses are required for Rule 302 and subsection 18.1(2). They submit that a fact-based assessment is required with respect to both.

[105] The Applicants submit although the PMRA may not have an explicit policy, the PMRA's consistent approach to issue section 12 notices and to continue the registrations of the PCPs shows an ongoing practice which constitutes a course of conduct as exemplified in the case law. The Applicants point to *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2016 FC 933, [2017] 2 FCR 304 [*CBC*], where the Court found that there was no specific policy at issue, rather an ongoing practice, and found that this constituted a course of conduct and was not subject to the time limit in subsection 18.1(2).

[106] The Applicants also point to *Fisher v Canada (Attorney General)*, 2013 FC 1108, 441 FTR 273 [*Fisher*], where the Court found that it could review a "general decision, the implementation steps, or a combination of the two where they combine to result in unlawful

government action". The Applicants note that, as in *Fisher* (at para 79*)*, their Applications seek to restrain a "closely connected course of allegedly unlawful government action" by way of declaratory relief.

[107] The Applicants submit that the Prothonotary addressed the Respondents' argument that the essence of the Applicants' claims is a challenge to 79 decisions of the PMRA pursuant to section 8. The Prothonotary considered the jurisprudence, noting that a course of conduct could be found even where discrete decisions could be pinpointed.

(4) Adequate Alternative Remedy

[108] The Applicants note that, in accordance with *JP Morgan*, an application should not be prematurely struck on the basis of an adequate alternative remedy unless it is certain that there is recourse elsewhere and that it is adequate. The Prothonotary was not certain that there would be an adequate alternative remedy. This issue should be determined by the judge on the Applications for Judicial Review.

[109] The Applicants also note that the PMRA's re-evaluation of neonicotinoids was launched in 2012, an interim report was expected in December 2017 and a final report is expected in December 2018. They point out that this is a substantive review, i.e., a science-based process, intended to globally assess neonicotinoids, which will not address the PMRA's regulatory practices or the registration process or the practice of using section 12 notices to fill the data gaps.

[110] The Applicants support a science-based re-evaluation, but question how the PMRA's re-evaluation can be considered as an alternative remedy, or how a Notice of Objection to the findings of the re-evaluation could result in the relief requested in these Applications for Judicial Review.

[111] The Applicants submit that their past experience supports their argument that the PMRA's internal review processes are not adequate alternatives. The Applicants note that public consultation by the PMRA is the trigger for a party's right to file a Notice of Objection to a registration decision. They add that given the PMRA's persistent use of section 12 notices, which suspend the requirement for consultation, their right to file a Notice of Objection in respect of a decision dealing directly with the PCPs at issue was triggered only once, in 2013, with respect to the PMRA's decision to renew "Clothianidin foliar/soil product registrations". The Applicants' objection was focussed on the PMRA granting the renewals without having received chronic toxicity and other studies required by the section 12 notices. In other words, the Notice of Objection was based both on a regulatory practice, (the outstanding critical data gap), and on substantive grounds, (that the scientific literature impugns the science relied on by the PMRA). The Applicants note that the PMRA took 3 years to decide **not** to establish a review panel. The PMRA refused to consider the objection and explained that objections that concern regulatory practice are not normally referred to a panel. The Applicants add that the PMRA's decision was made after the conditional registration at issue had theoretically expired (in early 2016). The Applicants also note that they were informed of the decision one day after they filed the current Applications for Judicial Review.

[112] The Applicants dispute that the Supreme Court of Canada set out essential elements of a legal test in *Strickland,* or that the Prothonotary failed to consider any essential elements. They submit that this is an attempt by the Respondents to frame a question of mixed fact and law as a question of law, which the Supreme Court of Canada cautioned against in *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 45, [2017] 1 SCR 688 [*Teal Cedar*].

[113] The Applicants submit that the Prothonotary's reasons convey that she considered all of the submissions and all the relevant factors from *Strickland* in the context of this case. The Prothonotary did not limit her consideration to only two factors. Rather, she found that two factors were of particular concern – the expeditiousness and the remedial capacity of the alternative remedy proposed - and gave them more weight. She did not find that a perfect or identical remedy was required.

[114] The Applicants acknowledge that the new evidence the Respondents sought to admit, which is comprised of the December 2017 proposed decisions of the PMRA, clarifies that the Notice of Objection process will still apply to the re-evaluation of neonicotinoids (the PRVDs), but will not apply to the decisions regarding the conversion of conditional registrations to full registrations (the PRDs). The PRDs will be the subject of a public consultation process and may result in final decisions by December 2018, and at that time, an interested party could pursue an application for judicial review of the final decision. The Applicants submit that regardless of this new evidence, the adequacy of the alternative remedy remains debateable as the change to the consultation process affects only the PRDs, and even then, only modestly. Moreover, the Applications for Judicial Review can be heard before December 2018.

[115] The Applicants also dispute the Respondents' submissions that the record of each of the 79 decisions at issue would be required to be reviewed, making it complex and lengthy. The Applicants submit that the record would not be as large as suggested because the allegations pertain to specific data about pollinators and not the several other risks that may have been considered by the PMRA in registering the PCPs at issue. Although judicial review will be complex, it will not be unmanageable. The Prothonotary, as Case Management Judge, is clearly aware of the issues and the scope.

VII. The Issues

[116] The issue on this Appeal is whether the Prothonotary erred in finding that it was *debatable* whether the Applications for Judicial Review relate to an alleged course of conduct and that it was *debatable* whether there was an adequate alternative remedy for the Applicants, and, therefore, erred in refusing to strike the Applicants' Notices of Application. The Respondents appear to have reiterated to the Court the same arguments made to the Prothonotary.

[117] Based on the arguments advanced, the following issues must be addressed:

- What is the applicable the standard of review?
- Did the Prothonotary err in her understanding and application of the test to strike an Application for Judicial Review?
- Did the Prothonotary err in her understanding of the statutory regime and did she confuse the purpose and effect of section 8 and section 12?

- Did the Prothonotary err in characterizing the Applicants' claims?

- Did the Prothonotary err in her understanding of the jurisprudence governing subsection 18.1(2) and Rule 302 and in her determination that it was debatable whether the allegations for which the Applicants seek judicial review relate to a course of conduct?

- Did the Prothonotary err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants?

VIII. The Standard of Review

[118] The Respondents argue that the issues at stake are legal issues for which the standard of review is correctness and/or that the Prothonotary's discretionary decision is based on palpable and overriding errors. The Respondents also argue that some errors arise from extricable questions of law, and no deference is owed. For example, Bayer argues that the Prothonotary mischaracterized the pleadings, which it submits is an extricable error of law that led to other errors. Sumitomo argues that the Prothonotary failed to consider a required element of the legal test to determine whether there was an adequate alternative remedy, resulting in an error of law.

[119] The Respondent, AGC, takes the position that whether the issues are characterized as questions of law or of mixed law and fact is immaterial because the errors are so significant, they are palpable and overriding and no deference is owed.

[120] The Applicants argue that the Respondents' are attempting to characterize the alleged errors as extricable questions of law to achieve a particular result; however, the alleged errors should be reviewed on a palpable and overriding error standard.

[121] The Applicants submit that, as Case Management Judge, the Prothonotary is very familiar with the particular circumstances and issues and, as a result, an enhanced level of deference is warranted (*Hospira*). They note that there is a rebuttable presumption that the Prothonotary considered and assessed all the material before her, and that her reasons should be read holistically when determining whether she committed a palpable and overriding error (*Mahjoub*).

[122] There is no dispute that the applicable test for reviewing discretionary orders of motions judges, including case management judges, is set out in *Hospira*. Such orders are to be reviewed on the ordinary civil appellate standard set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. Questions of law are to be reviewed on a correctness standard, and questions of fact are owed deference unless there is a palpable and overriding error. Questions of mixed fact and law are also owed deference absent palpable and overriding error, unless the analysis contains an extricable error of law or legal principle. If so, no deference is owed (*Hospira* at para 66).

[123] An extricable error of law or principle would include the "application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle" (*Housen* at para 36). More recently, in *Teal Cedar*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting that "mixed questions, by

definition, will involve aspects of law", adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

[124] Justice Stratas explained "palpable and overriding error" in *Mahjoub* at para 61,

> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.

[125] Justice Stratas described "palpable" as an error that is obvious (at para 62) and "overriding" (at para 64), as "an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place."

[126] Justice Stratas also clarified the standard of review for exercises of discretion by a first-instance court, which would include decisions of the Case Management Judge, noting that exercises of discretion involve applying legal standards to the facts as found and are questions of mixed fact and law (*Mahjoub* at para 72). He explained at para 74:

> [74] Under the *Housen* framework, questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error—the high standard described above—unless an error on an extricable question of law or legal principle is present. So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of

> discretion on account of that error. Another way of putting this is whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen* at para. 35.

[127] A judge's characterization of the notice of application was also found to be a conclusion of mixed fact and law in *Apotex Inc v Canada (Minister of Health)*, 2012 FCA 322 at para 9, 443 NR 291 [*Apotex FCA*].

[128] Contrary to the Respondents' submissions, the Prothonotary's characterization of these pleadings is a conclusion of mixed fact and law. The other issues in this Appeal, as explained below, are also questions of mixed fact and law. Unless the Prothonotary made an extricable error of law (such as failing to consider a required element of a legal test) the issue is whether the Prothonotary made a palpable and overriding error – i.e., an obvious error that affects the outcome.

IX. Did the Prothonotary err in her understanding and application of the test to strike an Application for Judicial Review?

[129] In *JP Morgan* the Court of Appeal set out the requirements for notices of application for judicial review, as well as the correct approach for motions to strike applications for judicial review.

[130] The Court of Appeal reiterated that the threshold to strike out a notice of application for judicial review is high, at para 47 ,

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v.*

> *Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf.*. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[131] In *David Bull*, the Federal Court of Appeal noted that such instances are "very exceptional and cannot include cases…where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion" (emphasis added).

[132] In *JP Morgan*, at para 48, the Court of Appeal explained the reason for this high threshold: the jurisdiction to strike a notice is based on the Court's plenary jurisdiction rather than a specific Rule; and, applications for judicial review should proceed without delay and in a summary way. The Court added that "An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective".

[133] The Court also highlighted the importance of reading the notice of application "with a view to understanding the real essence of the application", noting that "The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form…" (at paras 49-50, internal citations omitted).

[134] In addition, the Court addressed the issue of the admissibility of affidavits on a motion to strike, confirming that the general rule is that affidavits are not admissible (at para 51). The Court explained the rationale: affidavits have the potential to trigger cross-examinations and refused questions which can delay applications for judicial review; and, because the facts alleged

in the notice of application are taken as true, there is no need for an affidavit to supply the facts. The Court added that a respondent must identify an obvious and fatal flaw on the face of the application, and "[] flaw that can be shown only with the assistance of an affidavit is not obvious" (at para 52).

[135] In the present case, affidavit evidence was admitted before the Prothonotary, each with many exhibits. The receipt of such evidence on a motion to strike is unusual and exceptional. The voluminous evidence submitted to support the positions of the Applicants and the Respondents highlights the debate between them, but it does not rebut the principle that, on a motion to strike, the facts alleged in the Notices are taken as true.

[136] As noted, the threshold to strike pleadings – including a notice of application – is high. The "knock-out punch" or "obvious fatal flaw" cannot be found where there is no certainty (i.e. where the issues at stake are debatable). The Prothonotary clearly understood these principles. She considered whether the Notices of Application and the claims therein were "so clearly improper as to be bereft of any possibility of success", and found that they were not. As explained below, based on her findings, the Prothonotary did not err in refusing to strike the Notices of Application.

X. Did the Prothonotary err in her understanding of the statutory regime and did she confuse the purpose and effect of section 8 and section 12?

[137] The Respondents all argue that the Prothonotary misunderstood the statutory scheme, and did not appreciate that section 12 notices are only used *after* a PCP has been registered under

section 8 (i.e. after a finding that the risks posed are acceptable). The Respondents submit that this misunderstanding led the Prothonotary to accept that there was a course of conduct with respect to the section 12 notices, despite the fact that the course of conduct alleged has no relation to the relief sought (i.e. the invalidation of the PCPs at issue), because a successful challenge to the PMRA's issuance of a section 12 notice will not invalidate the registrations under section 8.

[138] I do not agree that the Prothonotary misunderstood the statutory regime. The Prothonotary acknowledged at paragraph 11 of her decision that "under section 8(1) of the *Act*, the Minister (acting through the PMRA), must register a [PCP] where the [risks posed] are "acceptable"". The Prothonotary elaborated, at paragraph 12:

> At the time of registration, the PMRA may issue to the registrant a notice under s.12 of the Act that requires a registrant to compile information, conduct tests, or monitor experience with the pest control product, and to report the additional information within a set period of time as detailed in the notice. A requirement detailed in a section 12 notice becomes a condition of registration of the product.
>
> [Emphasis added]

At paragraph 13, she added:

> Pursuant to section 14 of the [Regulations], if a section 12 notice is delivered to a registrant at the time of registration of the product, the registration becomes a conditional registration with a limited validity period of approximately three years.
>
> [Emphasis added]

[139] The Prothonotary's use of the words "additional information" required of a "registrant", "at the time of registration", shows that she was not confused about the temporal application of section 12. Her description of the process is accurate. The reasons clearly convey that the Prothonotary understood that registration decisions were made pursuant to section 8, and that requests for additional information via a section 12 notice were made at the time of registration, i.e., simultaneously with registration.

XI. Did the Prothonotary err by mischaracterizing the Applicants' claims?

[140] The Respondents argue that the Prothonotary failed to gain a realistic appreciation of the Notices of Application and that this led her to err in finding an alleged course of unlawful conduct, which was not described in the Notices of Application. The Respondents argue that a true appreciation of the Notices of Application reveals that they target many highly distinct decisions made under section 8.

[141] As noted above, the Prothonotary's appreciation of the Notices of Application raises questions of mixed fact and law, which are reviewed on the palpable and overriding error standard unless the Respondents can identify an extricable error of law (*Apotex FCA* at para 9, *Mahjoub* at para 74). The Respondents have not identified any extricable error of law. The Prothonotary's reasons convey that she understood the applicable law and applied it. Nothing in the Prothonotary's reasons suggests that she lost sight of the principles governing how to read pleadings. As a result, her characterization of the Notices of Application is owed deference unless there is a palpable and overriding error (i.e. an obvious error that affects the outcome of

the case (*Mahjoub* at paras 62 and 64)). In my view, the Prothonotary's characterization of the Notices of Application contains no such error.

[142] The Notices of Application explain that the PMRA can only register products under section 8 when assured that the risks posed by the PCPs are acceptable. The Notices also state that the PMRA may require registrants to provide additional information on the products' risks via a section 12 notice, which transforms the registration into a conditional registration. The Notices state that the PCPA does not define the term "conditional registration"; rather, the Regulations provide that certain provisions of the Act do not apply to conditional registrations. They also accurately characterize the impact of a section 12 notice on a registered PCP, including that otherwise mandatory requirements for public consultation are suspended, and that the registration is deemed valid for three years, subject to an extension where the requirements set out in the section 12 notice are met. In outlining the registration history of the products, the Notices allege, at paragraphs 15-20, among other things, that:

- The PCPs at issue were conditional registrations.
- The outstanding data represents "a critical data gap in the risk assessment" of the PCPs. The Applicants allege that this should have been required *before* a decision was made under section 8.
- The registrants have sought to convert their conditional registrations to full registrations upon submission of the data requested via a section 12 notice. Full registrations were not granted because the data remains outstanding. Instead, the PMRA established new deadlines for the outstanding information and granted further conditional registrations (which would be conditional on receipt of the information, as requested in a new section 12 notice).
- The PMRA has "successively continued the registrations of [the PCPs], and registered new [PCPs], all without [the necessary information]".

[143] As noted above, the Prothonotary found (at para 20) that the Applicants were challenging:

> … the PMRA's alleged unlawful practice of issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the chronic toxicity risk of Clothianidin, Thiamethoxam, and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies.

[144] The Prothonotary found that the misuse of section 12 notices was clearly pleaded and that this fell within the described course of conduct and the prayers for relief in the pleadings. The Prothonotary's characterization is consistent with the conduct alleged in the Notices of Application.

[145] As the Respondents point out and as the Applicants acknowledge, the Notices of Application contain only a few specific references to section 12 notices. However, when the Notices of Application are read holistically and practically, as required by the case law, the central role of section 12 to the allegations, and the interaction between sections 12 and 8, are apparent.

[146] Further, the fact that there is not a specific section 12 notice for each registration decision is irrelevant. As explained above, section 15 of the Regulations provides that a section 12 notice issued for one PCP also applies to linked or related PCPs.

[147] The Respondents' reliance on the fact that there is no reference to section 12 under the heading "The PMRA's conduct is unlawful", focuses on form over substance. This heading is

followed by a description of how the registration scheme has operated, which contains the allegation that "the PMRA has registered and successively continued the registrations…without sufficient information" to know whether the risks posed by the PCPs are acceptable. Although this part does not cite section 12, it does not cite other provisions of the Act either (i.e. section 8). Rather, it sets out the alleged course of conduct based on the description of the Act and the registration history of the PCPs in the preceding paragraphs of the Notices of Application.

[148] The argument of the Respondents, the AGC and Bayer, that a successful judicial challenge to the PMRA's issuance of a section 12 notice will not invalidate the section 8 registrations, was not overlooked by the Prothonotary. The Prothonotary addressed this argument in the context of the Respondents' argument that the Applicants had re-characterized their pleadings in response to the motion to strike. The Respondents' argument that even a successful judicial review of section 12 notices will not invalidate the section 8 registrations misses the point of the Applicants' allegations, which are about the interaction between section 8 and section 12. In other words, the Applications allege that section 12 was misused in order to permit a PCP to be registered under section 8 which should not have been registered. If a finding were made that section 12 was used for this purpose, it would implicate (and perhaps invalidate) individual registration decisions made pursuant to section 8.

[149] Moreover, the primary relief sought by the Applicants is not the invalidation of section 8 decisions, but as set out in paragraph 1A of the Notices of Application, orders "declaring unlawful the PMRA's course of conduct in the manner of successively registering, or amending the registrations of [the PCPs]…while failing to ensure it had [the outstanding, necessary

information]". As noted, while each section 8 decision would be implicated by such a declaration, and while invalidation of the decisions is also specifically sought, this does not transform the essential character of the Applications to an attack on each of the registration decisions made pursuant to section 8, as the Respondents suggest.

[150] In *CBC* the applicants sought a declaration that the respondent's consistent practice of refusing to provide unredacted Court Martial decisions was unlawful. They also sought to set aside each of the implicated refusal decisions. The Court nonetheless found that the applicants were challenging a course of conduct. In the present case, as in *CBC*, the fact that the Applicants also seek to invalidate decisions does not take away from their challenge to a course of conduct.

[151] The Prothonotary's characterization of the pleadings does not contain any palpable and overriding error, regardless of the fact that the Applicants also seek the invalidation of the registration of the PCPs. The essential nature of the applications is a challenge to a course of conduct. The Prothonotary understood the essential nature of the claims and described this succinctly in her decision.

XII. Did the Prothonotary err in her understanding of the jurisprudence governing subsection 18.1(2) and Rule 302 and in her determination that it was debatable whether the Notices of Application allege a course of conduct?

[152] All the Respondents argue that the Prothonotary erred in her application of the relevant jurisprudence and in her determination that it was debatable whether the Applicants' allegations could be described as a course of conduct. The Respondents argue that there is no debate and, and as a result, the requirements of subsection 18.1(2), which imposes a 30-day limitation period,

and Rule 302, which provides that only a single decision can be the subject of one application for judicial review, govern.

A. *The Relevant Statutory Provisions*

[153] Subsections 18.1(1) and (2) of the *Federal Courts Act*:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	**(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[154] Rule 302 of the *Federal Courts Rules*:

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**302** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une

réparation est demandée.

B. *The Principles from the Jurisprudence*

(1) Subsection 18.1(2)

[155] Generally, issues of timeliness (subsection 18.1(2)) are addressed at the application stage, and not on a motion to strike (*Hamilton-Wentworth (Regional Municipality) v Canada (Minister of the Environment)* (2000), 187 FTR 287, [2000] FCJ No 440) [*Hamilton-Wentworth*]; see also *James Richardson* at para 14).

[156] The jurisprudence has established that the word "matter" in subsection 18.1(1) is broader than "decision or order" in subsection 18.1(2). The 30-day limitation period set out in subsection 18.1 (2) does not apply where an applicant is seeking to review a "matter" which is not a "decision or order" (*Krause v Canada (Attorney General)*, [1999] FCJ No 476 at para 21, [1999] 2 FC 476 (CA) [*Krause*]; *Fisher* at para 72, *CBC* at para 23).

[157] The jurisprudence provides guidance about what constitutes a "matter". A "matter" includes a policy or a course of conduct. For example, challenges to the lawfulness of ongoing governmental policies are matters which are not subject to the 30-day limitation period (see *Sweet v R*, [1999] FCJ No 1539 at para 11, 249 NR 17 (CA) [*Sweet*] involving a challenge to a double-bunking policy in prisons; *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273, [2008] 2 FCR 341 [*Moresby*], involving a challenge to a policy regarding a park reserve; *May v CBC/Radio Canada*, 2011 FCA 130, 420 NR 23, involving a challenge to a

Canadian Radio-television Telecommunications Commission policy excluding a party leader from a televised debate). Such policies can be challenged at any time, even *before* they are applied specifically to an applicant (*Moresby* at para 24).

[158] In *Krause,* the applicants challenged the respondent's consistent failure to meet its statutory duties by not crediting the Public Service Superannuation Account with certain moneys each fiscal year, as required by the *Public Service Superannuation Act*. The respondent's failure to do so was a result of the implementation of an accounting procedure. The Federal Court struck the application for timeliness, finding that the implementation of the accounting procedure was a "decision", subject to subsection 18.1 (2). On Appeal, the Court of Appeal disagreed and found that the application targeted the decisions which implemented the accounting procedure in each fiscal year, and this constituted a course of conduct which was not subject to subsection 18.1 (2). The Court explained, at para 23,

> It is true that at some point in time an internal departmental decision was taken to adopt [accounting procedures] and to implement those recommendations in each fiscal year thereafter. It is not, however, this general decision that is sought to be reached by the appellants here. It is the *acts* of the responsible Minister in implementing that decision that are now claimed to be invalid and unlawful…The charge is that by acting as they have in 1993-1994 and subsequent fiscal years the Ministers have contravened the relevant provisions of two statutes thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rule of law. The merit of this contention can only be determined after the judicial review application is heard in the Trial Division.

[159] Similarly, in *Airth v Canada (Minister of National Revenue)*, 2006 FC 1442, [2007] 2 CTC 149 [*Airth*], the applicants sought to challenge 42 Requests for Information issued by the respondent. The respondent moved to strike the application on the basis that it contravened

subsection 18.1(2). The Court relied on *Krause* and found that although the application for judicial review targeted several decisions, each decision was one part of a course of conduct challenged by the applicants and was a matter not subject to subsection 18.1(2). The Court also noted the high threshold required to strike an application (citing *David Bull*) and "cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion" (at para 11). The Court acknowledged that the motion arose at the early stages of the proceedings and that its conclusion was, "…without prejudice to the ability of the judge hearing this judicial review to consider the matter afresh, which is the usual and preferred way to attack deficiencies in a notice of application for judicial review" (at para 13).

[160] Although the Court in *Airth* did not refer to Rule 302, the Court added at para 12, "to the extent that judicial economy is a factor in this decision, I can see no advantage to striking this judicial review only to have the very same conduct come back before this Court when some next step is taken as a result of the RFIs." The Court also noted that the judicial review of 42 decisions may be difficult to manage and found that case management was appropriate (at para 14).

[161] Subsequent decisions have expanded on what may be considered a course of conduct. In *Fisher*, the applicant, a parolee, was affected by a resolution of the Parole Board made in 1996 which imposed restrictions from which the applicant had previously been exempt. The applicant sought judicial review of the 1996 resolution many years later, arguing that he was not challenging a decision, but an ongoing policy. The Court relied on *Krause* and the cases that had applied it, and described the impact of *Krause* at para 73:

> *Krause* is authority that a general decision does not trigger a time limit that prevents the review of the implementation steps, on the unassailable logic that one should not be barred from relief "solely because the alleged… unlawful act stemmed from a decision to take the alleged unlawful step." *Krause* does not state that the general decision is itself reviewable. However, subsequent cases have applied *Krause* in a manner that permits a reviewing court to focus on the general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action vis-à-vis the applicant.
>
> [Emphasis added]

[162] In *Fisher*, the Court also noted that other cases, including *Airth*, had captured the intent of *Krause* by making it clear that "the important point is not whether the policy itself or individual steps to implement it are challenged, but whether there is a closely connected course of allegedly unlawful government action that the applicant seeks to restrain" (at para 79). The Court found that there was such a connected course of action, therefore, subsection18.1 (2) did not apply to the applicant's challenge of the resolution.

[163] In *CBC*, the applicants sought to review the Courts Martial Administrator's ("CMA") continued refusal to provide unredacted copies of decisions subject to a publication ban. The applicants alleged that this was an unlawful ongoing practice. In finding that the alleged ongoing practice was a course of conduct and not subject to the 30-day limitation period, the Court stated at paras 26- 27:

> [26] The application for judicial review does not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times, and on each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case. In my view, it is the ongoing practice of the CMA to redact

> the court martial decisions subject to a publication ban that is alleged to be unlawful and subject to judicial review.
>
> [27] Moreover, the relief sought by the CBC in its Notice of Application for judicial review also confirms that it is a course of conduct that is at issue: the relief sought includes a declaration that the *Privacy A*ct does not apply to the court records of the courts martial, as well as an order of *mandamus* for the CMA to provide the CBC with unredacted copies of the requested decisions. While I recognize that the CBC is also seeking an order setting aside the decision of the CMA refusing to release unredacted copies of the fourteen (14) court martial decisions, I do not think this particular relief takes away from the conclusion that it is a course of conduct that is at issue. Fundamentally, the CBC is contesting the CMA's practice of redacting court martial decisions that are subject to a publication ban.

(2) Rule 302

[164] The jurisprudence has also established the circumstances that may justify an exception to Rule 302 to permit judicial review of more than a single order. The exceptions are found where an applicant challenges continuing acts or a course of conduct.

[165] In *Mahmood v Canada*, [1998] FCJ No 1345, 154 FTR 102 (TD) [*Mahmood*], the applicant sought to challenge both the revocation of his passport *and* the denial of consular services by Canadian officials. The Court granted the respondent's motion to strike the application, noting, at para 10:

> While the rule states that only one decision ("order" solely, now) may be attacked, the Trial Division has also recognized that continuing "acts" or decisions may also be reviewed under s.18.1 of the *Federal Court Act* without contravening rule 1602(4) [now Rule 302] (see for example *Puccini v. Canada (Department of Agriculture*), 1993 CanLII 2973 (FC), [1993] 3 F.C. 557). However, in those cases, the acts in question were of a continuing nature, making it difficult for the applicant to pinpoint a single decision from which relief could be sought by this Court. They did

> not involve, as in the facts here, two different fact situations, two different types of relief sought and two different decision-making bodies. The Court found that the two issues did not amount to a "continuing decision by the same body". The Court added that the applicant could seek to file a separate notice of application after seeking leave for an extension of time to do so.

[166] In *Truehope*, the Court reviewed the jurisprudence and found on the facts before it that an exemption from Rule 302 was warranted. The Court noted that Rule 302 "reflects the policy of ensuring an expeditious and focussed process for challenging a single decision or order" (at para 5). The Court stated, at para 6:

> Continuing acts or decisions may be reviewed under s.18.1 of the *Federal Court Act* without offending Rule 1602(4) [now Rule 302], however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies *(Mahmood* … [citation omitted]).

[167] In *Mahmood,* the Court, in noting the similarities and differences in the two decisions, appears to have been simply making factual findings regarding whether the application targeted a continuing act. However, in *Truehope,* the Court appears to have adopted elements of *Mahmood* as a rule. The Court in *Truehope* concluded that the two decisions at issue could be challenged in one application (i.e., exempt from Rule 302), based on the similarities between the decisions, including the decision-maker, the basis for the decisions, and the legal issues involved (at para 18). The Court elaborated at para 19:

> In my opinion, the distinctions between the two decisions as argued by the Respondents do not outweigh the similarities, the distinctions are not so complex as to create confusion, and to require two separate judicial review applications to be made, given the similarities, would be a waste of time and effort.

[168] In *Khadr v Canada (Foreign Affairs)*, 2004 FC 1145, 266 FTR 20 [*Khadr*] the applicant sought to challenge two decisions, one alleging the Minister's failure to provide him consular services, and the other about interviews conducted by ministerial officials while the applicant was at Guantanamo. The Court cited *Truehope* for the proposition that an applicant cannot challenge two decisions within one application "unless it can be shown that the decisions formed part of a 'continuing course of conduct'" (at para 9). The Court found that the two decisions could not be challenged in the same application as a continuing course of conduct because they "were made at different times and involve a different focus" (at para 10). The Court also found that there were parallel proceedings seeking the same relief.

(3) Rule 302 and subsection 18.1(2)

[169] Both Rule 302 and subsection 18.1(2) were addressed in *Canadian Association of the Deaf v Canada*, 2006 FC 971, [2007] 2 FCR 323 [*Canadian Association of the Deaf*]. The Court noted at the outset that the application sought judicial review of several alleged acts of discrimination on different occasions by different people employed by different departments. The Court considered whether the decisions were closely connected so as to constitute a course of conduct or a matter. The Court noted the jurisprudence regarding Rule 302, including *Khadr* and *Truehope*, and regarding subsection 18.1(2), including *Sweet* and *Puccini v Canada (Department of Agriculture)*, 1993 CanLII 2973, [1993] 3 FC 557 (TD) (which was also cited in *Mahmood*).

[170] With respect to Rule 302, the Court found at para 66:

> In this case, the commonality among the four applicants is that their situations arose out of the application of the same set of guidelines for the provision of interpretation services. While each incident involved its own facts and decision-makers (different government departments and different employees), the heart of the matter is the application of the same policy to the same interested community. Accordingly, I agree that it would be unreasonable to split the application.

[171] With respect to subsection 18.1(2), the Court regarded the closely connected decisions as an ongoing policy, noting at para 72:

> I accept the applicants' contention that where the judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation does not apply. As stated by the Federal Court of Appeal in *Sweet v. Canada* (1999), 249 N.R. 17 at para. 11, [1999] F.C.J. No. 1539 (QL) concerning a "double-bunking" policy in a correctional institute "[t]hat policy is an ongoing one which may be challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive relief is the proper way to bring that challenge to this Court."

[172] The Court's analysis of the course of conduct alleged by the applicants, which was the systemic denial of sign language interpretation, guided both the subsection 18.1(2) and Rule 302 findings. The Court acknowledged that unreasonable or undue delay in bringing the application could still be a bar to judicial review (at para 73). However, the Court concluded that "the heart of the matter is the application of the same policy to the same interested community". Despite that there were different decision-makers and the decisions were made at different times, the Court found that the same policy was at issue and the application for judicial review could proceed.

(4) Summary

[173] To summarize, the jurisprudence noted above highlights the following:

- Issues of timeliness (i.e. the application of subsection 18.1(2)) are generally addressed at the application stage, and not on a motion to strike (*Hamilton-Wentworth;* see also *James Richardson* at para 14, *Airth* at para 13).

- The 30-day limitation period in subsection 18.1(2) does not apply where the applicant is seeking to review a matter, which is not a decision or order (*Krause, CBC*).

- A matter includes a policy or a course of conduct (*Airth, Sweet, Moresby*).

- A course of conduct includes a "general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action" (*Krause, Fisher*).

- In the context of government decisions and actions, the focus is on whether there is a "closely connected course of allegedly unlawful government action" (*Fisher* at para 79).

- A course of conduct may also include an ongoing practice (*CBC* at para 26).

- Both the Rule 302 and subsection 18.1(2) jurisprudence tend to use the term "course of conduct", and both consider whether there are closely connected decisions.

- More than one decision may be reviewed in a single application – as an exception to Rule 302 – where it is a continuing act (*Mahmood, Truehope*) or, as it was characterized in *Khadr,* a continuing court of conduct. The factors to consider in determining whether

there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort (*Mahmood*, *Truehope*).

C. *The Prothonotary did not err by conflating Rule 302 and subsection 18.1(2) or in her determination that whether there was a course of conduct was debatable.*

(1) The Prothonotary did not conflate the analysis for subsection 18.1(2) and Rule 302

[174] The Respondents submit that, despite the fact that the term "course of conduct" is used in the jurisprudence for both Rule 302 and subsection 18.1(2), the rationales for the two provisions are different and a separate analysis is required for each. They submit that Rule 302 is concerned with judicial efficiency, whereas subsection 18.1(2) is concerned with finality. Accordingly, a "course of conduct" found under one provision cannot determine the outcome on the other.

[175] Contrary to the Respondents' submission, the jurisprudence has not established as a clear principle that the required analyses are completely different. Rather the jurisprudence has focused on the issue before it – i.e., whether subsection 18.1(2) is at issue or whether Rule 302 is at issue.

[176] The factors to assess whether the Applications relate to separate decisions, or a course of conduct for the purpose of an exception to Rule 302 and/or subsection 18.1(2) are similar, and depend on the facts. In some cases, a finding of a course of conduct under subsection 18.1(2) appears to lead to the same conclusion under Rule 302. For example, in the Case Management Judge's [CMJ] Decision in *Apotex Inc v Canada (Minister of Health)*, 2010 FC 1310, [2010] FCJ No 1634, the Court found that it was debatable whether the matter was a course of conduct for the purpose of subsection 18.1(2) (at para 12). The Court then proceeded with its Rule 302 analysis, noting that in view of the conclusion that the subject-matter of the application "is a debatable issue which must be determined by the application judge, it follows that that the question concerning the application of Rule 302 also ought to be left to the application judge" (at para 14). At the application stage, the Court found that the application violated *both* subsection 18.1(2) and Rule 302, but did not challenge the CMJ's singular treatment of the issue, or distinguish between the two provisions in its analysis (*Apotex Inc v Canada (Minister of Health)*, 2011 FC 1308 at para 21, 400 FTR 28).

[177] In some cases, the factors typically considered under one provision are considered under the other, suggesting that the analyses are not highly distinct. This occurred in *Airth*, where the Court considered the application of subsection 18.1(2) and did not specifically consider Rule 302. The Court found that the complexity of judicial review of several (42) decisions was a relevant factor, (which is generally considered with respect to Rule 302), noting that this could be addressed by case management.

[178] In my view, where the Court finds that an application challenges a "closely connected course of allegedly unlawful government action", which may impugn "a policy, the implementing decisions, or a combination of the two" (as in *Airth*, *Fisher*, or *Krause*) – i.e. cases where Courts find that subsection 18.1(2) does not apply – it may, in some cases, be duplicative and redundant to conduct a completely separate analysis of whether the conduct at issue relates to closely connected decisions for the purpose of Rule 302. Despite that the purposes of the two provisions are different, the alleged course of conduct would be the same.

[179] As noted, the Respondents argue that the Prothonotary erred by confusing or blending the analysis under subsection 18.1(2) and Rule 302. The Respondent, Bayer, further argues that the Prothonotary really only performed the Rule 302 analysis. The Respondents' arguments are not supported by a reading of the Prothonotary's reasons. The Prothonotary specifically noted the Respondents' argument that the review of 79 decisions offends Rule 302 and that most of the section 8 decisions were beyond the 30-day time limit and offended subsection 18.1(2). The Prothonotary conveyed her understanding of the different purposes of the two provisions, and referred to the jurisprudence that has addressed whether a course of conduct could be found in the context of both Rule 302 and subsection 18.1(2), noting that the term "continuing course of conduct" is used for both. She also referred to the relevant considerations with respect to both subsection 18.1(2) and Rule 302 (at paras 8-9).

[180] The Prothonotary noted at para 34 that, "the determination of whether the underlying applications are directed to a continuous course of conduct – as opposed to multiple, discrete decisions – is a fact-based determination."

[181] She then assessed the facts, including by addressing in detail (at paras 34 and 35 of her decision) the submissions of the Applicants and Respondents regarding the similarities and differences of the registration decisions.

[182] While much of the Prothonotary's analysis consists of noting the differences and similarities of the impugned registration decisions – which is typically a consideration under Rule 302 – her decision cannot be read as *only* considering Rule 302. The Prothonotary also considered and applied the jurisprudence governing subsection18.1 (2), including *Krause* and *Fisher*. Moreover, in finding that it was debatable whether the Applications targeted a course of conduct, the Prothonotary's analysis clearly went beyond a consideration of the similarities and differences of the impugned decisions. The Prothonotary noted the Applicants' allegation that the PMRA was consistently "taking the same approach" over the years and that the "conditional registrations of the Clothianidin and Thiamethoxam end-use products have been inextricably linked in various ways since 2006…" (at para 35). These are considerations about the method or practice of making these decisions, and whether there is a "closely connected course of allegedly unlawful government action that the applicant seeks to restrain" (*Fisher*), which are relevant to the subsection 18.1(2) analysis.

[183] Although the Prothonotary did not compartmentalize her analysis with respect to the application of subsection 18.1(2) and Rule 302, she clearly did not ignore subsection 18.1(2); she considered both provisions. Her analysis of whether the Applicants were seeking to challenge a course of conduct applied to both Rule 302 *and* subsection 18.1(2) because many of the same factors were relevant to both provisions.

(2) The Prothonotary did not err by conducting only part of the Rule 302 analysis; she conducted the full analysis

[184] The Respondent, Bayer, further argues that the Prothonotary erred in her analysis to determine whether Rule 302 applied, including by only considering the similarities and differences of the decisions, and failing to consider judicial efficiency.

[185] The argument that the Prothonotary erred in her Rule 302 analysis is without merit. The Prothonotary thoroughly considered the differences and similarities in the decisions. The differences noted by the Respondents emphasize that each decision was made based on the record before the PMRA at the time, and with respect to the particular features of the registration application. However, the similarities in the decisions cannot be overlooked: including that the same decision-maker made all the decisions; two active ingredients are at issue despite the various uses; the registrants are the four corporate Respondents; and the data requested repeatedly and consistently via section 12 notices is very similar, although not identical. These factors reflect those noted in the jurisprudence where a course of conduct – or "a closely connected course of alleged unlawful government actions" – were found.

[186] The Prothonotary addressed the Respondents' arguments that a course of conduct could not be found because the decisions were too many and too varied, there was no policy at issue, and individual decisions could be pinpointed. The Prothonotary referred to the same jurisprudence which the Respondents cite to the Court.

[187] With respect to the Respondent, Bayer's, argument that the Prothonotary only conducted the Rule 302 analysis in part – by comparing the similarities and differences, but failing to consider judicial efficiency – this is not the case. The Prothonotary specifically referred to *Truehop*e and *Whitehead*, noting that the Court has held that where the similarities in the decisions outweigh the differences, the decisions should be reviewed in one application, as it would be a waste of time and effort (i.e. inefficient) to pursue more than one judicial review. Both *Truehope* and *Whitehead* note that the consideration of whether it would be a waste of time and effort is linked to and arises from the assessment of similarities and differences, which the Prothonotary acknowledged.

[188] The Prothonotary also addressed whether it would be a waste of judicial resources to pursue the Applications for Judicial Review in the context of assessing the adequacy of the alternative remedy (at para 45).

(3) The Prothonotary did not err in other ways

[189] In response to the Respondents' argument that there cannot be a course of conduct because there is no evidence of any general decision of the PMRA or of any policy regarding the issuance of section 12 notices, the Prothonotary did not err in finding that the absence of a stated or formal policy is not fatal. In *Krause*, the applicants maintained that they were challenging an "ongoing policy or practice" (at para 11, emphasis added). In *Airth*, the applicants challenged the Minister's issuance of 42 Requests for Information as a course of conduct, arguing that they sought to impugn the "method of proceeding by way of RFIs" against the applicants. No ongoing policy was at issue in *Airth*. Rather, the applicants were challenging an alleged unlawful practice

of issuing RFIs against them. The Court found, relying on *Krause*, that the application properly challenged a course of conduct (at para 9).

[190] *CBC* also supports the proposition that an ongoing practice may constitute a course of conduct. In that case, the CBC challenged the respondent's "continued refusal to provide unredacted copies of court martial decisions", based on its understanding that the *Privacy Act* barred it from doing so (at para 27). The CBC sought a declaration that the *Privacy Act* did not apply, *and* an order setting aside each of the impugned refusal decisions. The parties acknowledged that there was no policy *per se* which governed the respondent's approach. The Court found that the applicants had properly challenged an ongoing practice that was a course of conduct, which was, therefore, not subject to the limitation period in subsection 18.1(2). The Court reached this conclusion despite the fact that the applicants were also challenging the individual decisions, which the Court found did not "take away" from the fact that, "[f]undamentally, the CBC is contesting the CMA's practice of redacting court martial decisions…". Similarly, in the present case, the Applicants seek a declaration that the alleged course of conduct – which is described as a practice – is unlawful, as well as orders declaring that the registrations of the products are invalid.

[191] In *CBC* and *Airth* the Court considered challenges to a practice and a method, respectively, and not an explicit policy. In the present case, the Prothonotary found that the Applicants were challenging an allegedly "unlawful *practice* of issuing section 12 Notices that had the effect of deferring the receipt and review of necessary studies" (at para 20, emphasis added). In *Fisher* the Court noted that the focus is on whether there is a "closely connected

course of allegedly unlawful government action". In *Canadian Association of the Deaf* the Court found that "the heart of the matter is the application of the same policy …" even though there were different decision-makers. In the present case, the same decision-maker, the PMRA, on behalf of the Minister of Health, is alleged to have taken the same approach or followed the same practice in at least 55 of 79 decisions (with the others being linked).

[192] Despite the unusual feature of voluminous evidence on this motion to strike, the Court still presumes that the facts alleged are true. The evidence does not rebut the presumption. The Notices of Application allege that registration decisions were made with insufficient information, via the use of section 12. The question is whether it is debatable that this constitutes an alleged course of conduct. While there is no evidence in this voluminous record to establish that there is a stated policy with respect to the use of section 12 notices, the evidence of all parties demonstrates that the history of the registrations of the PCPs at issue includes many section 12 notices which were issued to seek additional information about the toxicity risks to pollinators. The specific information varied as the registrations were considered, whether as conversion applications or otherwise, but in almost every case, some additional information pursuant to section 12 was sought to address the long term toxicity risks to pollinators, and the registrations were continued as conditional – not full – registrations. The Prothonotary's conclusion that this is a practice or consistent approach, even if there is no stated policy, which could *debatably* be a course of conduct is supported by the facts alleged in the Notices of Application, the evidence she considered, and the jurisprudence.

[193] I do not accept the Respondents' argument that the Prothonotary erred by not considering that individual decisions could be pinpointed, or that this factor points away from finding a course of conduct. In *Khadr* and *Mahmood*, the focus was on whether there was a continuing act or course of conduct, and the ability to pinpoint a single decision was mentioned as a factor within that consideration. However, the jurisprudence does not establish that the ability to pinpoint a decision is the decisive factor. Moreover, the Prothonotary specifically considered the Respondents' same argument at paras 23-24 and rejected it, noting that the Court has found a course of conduct in situations where individual decisions could have been easily pinpointed, including *Sweet, Krause* and *Fisher.* In *Airth*, also considered by the Prothonotary, a challenge was allowed to proceed despite the fact that 42 individual decisions could be identified. In *CBC* each refusal to issue an unredacted decision could have been reviewed, yet the Court found that the alleged course of conduct could be reviewed.

[194] I also do not accept the Respondent, Syngenta's, argument that the Prothonotary erred in finding that there could be a course of conduct pertaining to section 12 notices because there is nothing unlawful about the use of section 12 notices and that a course of conduct cannot be judicially reviewed unless the conduct is contrary to law. This overlooks the nature of the course of conduct alleged, which is the *misuse* of section 12 notices. The Applicants acknowledge that the issuance of section 12 notices *per se* is not unlawful. Their allegations are that section 12 notices were used in a manner, for which they were not intended, which was unlawful, and specifically that section 12 notices were the mechanism by which the receipt of necessary studies and data was deferred until *after* registration.

[195] Syngenta argues that the requirement of unlawfulness in the course of conduct itself is apparent from *Krause*. However, the jurisprudence that has applied *Krause* does not reflect this view. The nature of a Notice of Application for judicial review is to allege that a decision or course of conduct is unreasonable, incorrect or made without statutory authority – i.e. unlawful. The determination of whether it is unlawful is made at the application stage.

[196] For example, in *Airth*, there was nothing unlawful about the use of a request for information *per se*. The applicants' challenge to the respondent's "method of proceeding"; i.e., the manner in which requests for information were used against them, was found to be the course of conduct. In the present case, the Applicants challenge the method or manner in which section 12 notices were used and allege that it was unlawful.

[197] The Respondent, Bayer, also argues that a finding made with respect to Rule 302 cannot justify an exemption to subsection 18.1(2) – which appears to be related to Bayer's argument that the Prothonotary only conducted the analysis for Rule 302. As noted above, I do not agree that the Prothonotary only conducted the Rule 302 analysis or erred in doing so. I also do not agree that the jurisprudence has established as a clear principle that a separate analysis is required in all cases pursuant to subsection 18.1(2) and Rule 302 where both provisions are at issue. Regardless, in the present case, the Prothonotary addressed both subsection 18.1(2) and Rule 302 and found that it was debatable whether there was a course of conduct with respect to both.

[198] *James Richardson*, relied on by Bayer to argue that separate assessments and determinations are required, and to argue that a finding of a course of conduct pursuant to

Rule 302 cannot be used to overcome the 30-day limitation period, does not set out such clear principles. In *James Richardson*, the Court stated at para 22:

> The jurisprudence is clear: an order under Rule 302 of the *Federal Court Rules* can be refused where it would allow an applicant to overcome the 30-day limitation period fixed by section 18.1(2) of the *Federal CourtsAct*: see *Lavoie v. Canada (Correctional Service)*, [2000] F.C.J. No. 1564. The question, then, is whether the continuing nature of the process under scrutiny here should operate to relieve [the applicant] from its obligation to seek judicial review in a timely fashion.

[199] The Court did not state that an exemption from Rule 302 cannot, or even should not, be granted where it would also allow an applicant to overcome the 30-day limitation period. The Court stated only that it *can* be refused where it would do so – i.e., there is discretion. On appeal, the Court of Appeal dealt only with the extension of time pursuant to subsection 18.1(2) and found that the Court should have considered additional factors to allow an extension. In my view, the passage in *James Richardson* supports the view that where there are grounds for an exemption to consider two or more decisions in the same application, the Court could either grant or refuse the exemption if the time limit had passed depending on the relevant considerations. In the present case, the Prothonotary considered both Rule 302 and subsection 18.1(2) – she did not rely on Rule 302 to dictate the timeliness issue.

[200] In *Whitehead*, also relied on by the Respondents, the Court, on the application for judicial review, agreed to review four decisions together due to similarities, i.e., as an exception to Rule 302. With respect to subsection 18.1(2), the Court simply stated, at para 54, “that it is duly noted that no extension was sought or supported by affidavits”. Although the application was out of time, the Court addressed the merits but dismissed the application. The Respondents’ reliance

on *Whitehead* for its argument that a Rule 302 exemption will not justify an exemption for subsection 18.1(2) reads far more into para 54 than is there. Moreover, this issue is not in dispute.

[201] With respect to Bayer's argument that a course of conduct or matter could comply with subsection 18.1(2), yet still breach Rule 302, or *vice versa* – is also not the issue nor is this in dispute.

[202] Moreover, the jurisprudence has repeatedly emphasized that issues of timeliness are best left for consideration at the applications stage. For example, in *Airth*, the Court acknowledged that the motion arose at the early stages of the proceedings and that its conclusion was "…without prejudice to the ability of the judge hearing this judicial review to consider the matter afresh, which is the usual and preferred way to attack deficiencies in a notice of application for judicial review" (at para 13; see also *Hamilton Wentworth*) (. In the present case, the Prothonotary correctly noted that the assessment of a course of conduct under both provisions is a factual assessment. That factual assessment was conducted with respect to both provisions, with several of the same considerations applying to both. The Prothonotary found that the issue was debatable, and therefore should be determined on the Application for Judicial Review.

[203] The Prothonotary concluded her analysis stating at para 36:

> Having weighed the similarities and differences of the implicated decisions, I find that there is certainly a debatable issue as to whether the Applicants are properly seeking to challenge a continuous course of conduct. As this remains a live issue, I do not see how it can be said that the applications are bereft of any chance of success on the basis that they offend Rule 302 and the time

> limitation set out in section 18.1(2) of the *Federal Courts Act*. The serious question of whether the proper approach is to view the underlying applications as directed to a continuous course of conduct is a question that ought to be determined by the application judge [see *Apotex, supra* at paras 12-13].

[204] I do not find any palpable and overriding error in this finding. If I were to do a *de novo* review, I would reach the same conclusion that there is no certainty – i.e., it is debatable whether the Applicants' claims relate to a course of conduct that warrants an exemption from subsection 18.1(2) or Rule 302. Accordingly, I would also find that these issues are best left to be determined on the Application for Judicial Review.

XIII. Did the Prothonotary err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants?

[205] The Respondents argue that the adequacy of the alternative remedy is not debatable because there clearly is an adequate alternative remedy (i.e., the re-evaluation (the PRVD) and the conversion applications (the PRDs)) and, if the Prothonotary had properly applied the jurisprudence, she would have so found. Therefore, they submit that the Prothonotary erred in finding that the adequacy of the alternative remedy was debatable.

A. *Principles from the Jurisprudence*

[206] The consideration of whether there is an alternative remedy is related to the principle that the "normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted", (*CB Powell* at para 31). The Court of Appeal explained at para 31*:*

> ... This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[207] As noted above, a motion to strike should not be granted unless there is an "obvious, fatal flaw" in the application (*JP Morgan* at para 91). In *JP Morgan*, the Court noted that, if after ascertaining the true character of the application, the Court is not certain that: there is recourse elsewhere, now or later; the recourse is adequate and effective; and, the "circumstances pleaded are the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto", the Court cannot strike the application for judicial review.

[208] The Supreme Court of Canada's decision in *Strickland* guides the analysis to be conducted to determine the adequacy of an alternative remedy. The Respondents and the Applicants both rely on *Strickland*, but interpret it differently.

[209] In *Strickland* the Court reviewed the relevant jurisprudence and identified the relevant factors that courts should consider, at para 42, which include:

- The convenience of the alternative remedy;
- The nature of the alleged error;
- The nature of the other forum which could deal with the issue, including its remedial capacity;
- The existence of adequate and effective recourse in the forum in which litigation is already taking place;

- Expeditiousness;
- The relative expertise of the alternative decision-maker;
- Economical use of judicial resources; and
- Cost.

[210] The Court stated that "neither the process nor the remedy need be identical to those available on judicial review" in order to be adequate and that the basic test is whether "the alternative remedy [is] adequate in all the circumstances to address the applicant's grievance" (at para 42, emphasis added).

[211] The Court elaborated, at paras 43-45, emphasizing that there is no checklist, the inquiry is broader than a summary of differences and similarities, and the appropriateness of both the available alternative and the application for judicial review should be considered, which calls for a type of balance of convenience analysis. The relevant passages are set out in their entirety below:

> [43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the

> factors which are relevant . . .” (*Canada (Auditor General)*, at p. 96).
>
> [44] This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:
>
> > While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief. [Emphasis added; p. 447.]
>
> [45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

B. *The Prothonotary did not err in finding that it was debatable whether there was an adequate alternative remedy*

[212] The Respondents argue that the Prothonotary erred in law by failing to apply essential elements of a legal test as set out in *Strickland*. The Applicants respond that this is an attempt to reframe a question of fact as a question of law.

[213] As noted above, in *Teal Cedar*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting that “mixed questions, by definition,

will involve aspects of law", and adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

[214] I have heeded the caution in *Teal Cedar*. Contrary to the submissions of the Respondents, I do not agree that *Strickland* set out essential elements of a legal test that a court must consider in every case and that the Prothonotary erred in law in not applying each essential element of such a test. Rather, the Court repeatedly stated that there is no checklist and that all relevant factors are to be considered in the context of the particular case.

[215] The Prothonotary stated that she considered the factors detailed in *Strickland* at para 48 of her decision. Although she did not cite every single factor, she identified the relevant factors at para 39 of her decision. This approach accords with *Strickland*, which makes it clear that the relevant factors will depend on the context, and that the list of factors is neither closed nor a rigid checklist.

[216] The Prothonotary addressed the parties' submissions on the adequacy of the alternative remedy at paras 39-47, before noting two particular concerns, at para 48:

> [48] Having considered the factors detailed in Strickland and the submissions of the parties, I am not certain that the Applicants have recourse to adequate and effective relief through the PMRA's on-going proceedings. I am particularly concerned that these other proceedings will not afford the Applicants the central remedy that they seek before this Court – namely, declarations of unlawful conduct by the PMRA – and that these other proceedings will not be expeditious.

[217] The Prothonotary's reasons do not suggest that she considered only two factors or found only two factors to be relevant. When read as a whole, it is clear that she addressed all the submissions of the parties, considered several relevant factors – which include the remedial capacity of the alternative forum and its expeditiousness – and identified the remedial capacity and expeditiousness as particular concerns. Weighing the relevance of the various factors identified in *Strickland* and giving some factors more weight than others, in the context of the particular case, is exactly what the Supreme Court of Canada has guided decision-makers to do in *Strickland.*

[218] The Prothonotary's concern about expeditiousness was based on the submissions made to her. The Respondents explained that once the PMRA re-evaluation (the PRVD) was finalized, which was expected in December 2018, there would be a Notice of Objection process which would precede any ability to pursue judicial review of a final decision. The Prothonotary considered the Applicants' past experience with a Notice of Objection process and also noted that this Application for Judicial Review would be heard before December 2018 (at para 48).

[219] The Respondents also argue that the Prothonotary applied the wrong legal test when she expressed concern over whether the Applicants could obtain the "central remedy they seek" via the re-evaluation or conversion applications. In their submissions, this is akin to seeking an identical remedy or the preferred remedy, which *Strickland* states is not determinative.

[220] Contrary to the Respondents' view, the Prothonotary did not look for an identical or a preferred remedy. Rather, she viewed the declaration of unlawful conduct as the central (i.e, the

primary or main) remedy sought and concluded that it was debatable whether this would be addressed effectively in the proposed alternative processes (the re-evaluation and conversion applications). The Prothonotary's finding follows her detailed summary of the parties' submissions, including the Applicants' concerns that the alternative processes would not address the lawfulness of the PMRA's conduct. At para 44 of her decision, the Prothonotary squarely addressed this argument, noting that the remedies need not be identical, but they need to be adequate.

[221] Although the Prothonotary did not make an explicit finding regarding the appropriateness of judicial review, this factor was not ignored. Reading the reasons as a whole, it is apparent that the Prothonotary questioned whether judicial review would be appropriate, just as she questioned whether the alternative remedy would be appropriate. For example, at para 45, the Prothonotary addressed the Respondent, AGC's, argument that the application was a waste of judicial resources because the ultimate relief would be the same as the re-evaluation process. She was not convinced by this argument, because the Applicants were not seeking a re-evaluation of the registration decisions.

[222] The Prothonotary acknowledged that the issues were complex, but despite this, the Applications for Judicial Review could be heard before December 2018. At para 48, the Prothonotary stated:

> Notwithstanding the complexity of the issues raised on these applications, the applications will proceed to a hearing before the currently-proposed December 31, 2018 deadline for the release of the final decision in the pollinator re-evaluations. Even then, there would be further delays past December 31, 2018 before the Applicants could have recourse before this Court to challenge the

> outcome of the PMRA's on-going proceedings, as the Applicants would have to proceed through the notice of objection process first, which, from the evidence before me, has not been established to be an expeditious process.

[223] This reflects both the Prothonotary's consideration of the alternative remedy, including its expeditiousness, and the appropriateness of judicial review. As the Case Management Judge, the Prothonotary is well positioned to gauge how the judicial reviews could unfold and be managed, and she was clearly not daunted by their scope or complexity.

[224] Contrary to the Respondents' argument that the Prothonotary failed to consider the principle that normal or ongoing administrative processes should be permitted to run their course before resorting to judicial review, the Prothonotary squarely addressed this, noting that the present circumstances were not analogous to the cases relied on by the Respondents, on which this principle is based. She stated at para 47:

> The Applicants have not come before the Court seeking to review an interim decision rendering in an on-going administrative tribunal matter, nor have they come before this Court without having first followed a clearly prescribed appeal route in the applicable statutory regime. Rather, the alternative processes that the Respondents urge this Court to accept as providing an adequate remedy were commenced independent of the Applicants, and are distinct from the conduct that is being challenged in these applications.

[225] The Respondents made similar submissions regarding the need to respect ongoing administrative process on this Appeal and on the motion to admit the new evidence. This is a relevant consideration in assessing whether the alternative remedy would be adequate, and whether the principle that administrative processes should be allowed to reach completion.

[226] However, as the Applicants note, the review initiated by the PMRA differs from a review of the course of conduct alleged by the Applicants. Although the PVRD may address the data gap complained of, it will not necessarily address the unlawful conduct alleged here, and it will not be as expeditious as these Applications. The Prothonotary considered this in concluding that the adequacy of the alternative remedy was debatable.

[227] In addition, the alternative process – the PMRA re-evaluation (the PRVD and PRDs) – which the Respondents characterize as the "normal process", is not disrupted by the current Applications for Judicial Review, since the PMRA re-evaluation process has been ongoing for five years and is not expected to be finalized until December 2018.

[228] The new evidence, which the Respondents sought to admit on this Appeal, and which the Court considered in the course of determining whether it should be admitted, clarifies that the Notice of Objection process still applies to the re-evaluation (the PRVD) but does not apply to the PRDs (the applications to convert conditional registrations to full registrations) [see *Suzuki 1*].

[229] As found in *Suzuki 1*, although the PRD decisions will not require the Notice of Objection process and the final PRD could be the subject of an application for judicial review once it is final, which is anticipated to be in December 2018, this change does not provide certainty that the alternative remedy would be expeditious, nor does it speak to the issue of remedial capacity. The issue would remain debatable.

[230] The jurisprudence speaks of “effective remedies” or “effective recourse” (*JP Morgan, CB Powell, Strickland).* The Prothonotary found that there was no certainty that the proposed alternative remedy – (i.e., the PMRA re-evaluation which, as noted, has been ongoing since 2012, as well as the conversion applications) – would offer an effective remedy for the Applicants. The Respondents are the only ones who are certain. In my view, the Prothonotary’s finding that it is not certain is amply supported by the evidence before her, and this would remain so even if the new evidence were admitted.

[231] In conclusion, I do not find that the Prothonotary erred in finding that it was debatable whether there is an adequate alternative remedy. The Prothonotary did not err in failing to apply an element of a legal test. The Prothonotary considered a range of factors and identified two particular concerns. In the course of her assessment, the Prothonotary considered the appropriateness of judicial review, finding that, although it would be complex, it could be managed and it would be heard by December 2018, before the other process had even triggered an opportunity to seek judicial review.

[232] Moreover, if I had found an error of law or a palpable and overriding error and had conducted a *de novo* review of the motion to strike, I would reach the same conclusion. The relevant factors from the jurisprudence as applied to the present circumstances do not provide certainty. For example, the convenience of the alternative remedy would favour the Respondents only; the remedial capacity of the alternative differs from that of judicial review and will not necessarily address the conduct alleged; the expertise of the PMRA could favour the alternative remedy, but the expertise of the PMRA has been at issue in every decision challenged as part of

the alleged course of conduct; and, the economical use of judicial resources may be a factor at the next stages of these proceedings, but judicial resources have already been spent on three rounds of motions. The Applications for Judicial Review, on the other hand, although complex, are being case managed and are on track to be heard before the final decisions in the alternative processes are issued.

XIV. Conclusion

[233] The Prothonotary did not misunderstand the statutory regime set out in the PCPA nor did she confuse the purpose and effect of section 8 and section 12. She understood that registration decisions were made pursuant to section 8, and that notices under section 12 were issued at the time of registration requesting additional information, which resulted in the registration decisions being conditional registrations.

[234] The Prothonotary did not err in characterizing the Applicants' claims. The characterization of the claims is a question of mixed law and fact. As such, unless there is palpable and overriding error, the Prothonotary's findings are owed deference. The Prothonotary's characterization reflects the essential nature of the Applicants' claims which was aptly captured at para 20 of her decision.

[235] The Prothonotary did not err in her understanding or application of the jurisprudence governing subsection 18.1(2) and Rule 302. The Prothonotary conducted a factual assessment to assess whether there was a course of conduct alleged with respect to subsection 18.1(2) and Rule 302. As noted above, she addressed all the arguments raised by the Respondents and did not

fail to apply the relevant considerations from the jurisprudence. Her finding that it was debatable whether the conduct alleged is a course of conduct, and that this issue should be determined by the Judge on the Applications for Judicial Review, is supported by the allegations in the Notices of Application and the jurisprudence.

[236] Finally, the Prothonotary did not err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants. The Prothonotary did not commit any error of law by failing to apply an element of a legal test. Rather, she applied the relevant factors from the jurisprudence and was left uncertain, due in particular to her concerns about whether the alternative remedy was expeditious or would address the central remedy sought, and reasonably concluded that it was debatable whether the alternative remedy would be adequate.

[237] The new evidence, which was not admitted, but which was considered in the context of determining the Respondents' motion to admit that evidence, clarifies that one aspect of the re-evaluation process, the PRD, will permit judicial review following a final decision, anticipated in December 2018. However, this evidence does not change the facts considered by the Prothonotary that would have provided her with certainty regarding the adequacy of the alternative remedy.

[238] The Prothonotary did not err in her application of the test to strike an Application for Judicial Review and in finding that the Notices of Application were "not so clearly improper to be bereft of any possibility of success" (*David Bull*). The "knock-out punch" required to warrant striking the pleadings is not possible where the issues are debatable.

[239] In the present case, the Respondents have microscopically dissected the Prothonotary's decision and offered interpretations of the jurisprudence that stretch it beyond its meaning. The issues at stake were found to be debatable. The carefully crafted and extensive submissions of both parties, the voluminous record, the oral submissions over two days before the Prothonotary, and the oral submissions over two days before the Court on this Appeal, highlight that the issues are indeed debatable.

[240] The Applicants are entitled to their costs on this Appeal which also include their costs on the motion to admit new evidence. In the event that the parties are unable to reach an agreement on the amount of costs and how they are to be paid, written submissions shall be provided to the Court according to the timetable set out below:

1. The Applicants shall serve and file costs submissions not to exceed three pages within 10 days of issuance of this Order;

2. The Respondents shall serve and file responding submissions, not to exceed three pages, within 7 days of receipt of the Applicants' submissions;

3. The Applicants shall file reply costs submissions, if any, not to exceed two pages, within 7 days of receipt of the Respondents' submissions; and,

4. The parties may modify the timetable set out above, on consent, and, if so, shall notify the Court of the revised timetable.

ORDER

THIS COURT ORDERS that:

1. The Appeal of the Order of Prothonotary Aylen dated July 13, 2017 is dismissed.

2. The Respondents shall pay the Applicants their costs of this Appeal, which include their costs on the motion to admit new evidence.

"Catherine M. Kane"
Judge

ANNEX A

The Statutory Scheme

The PMRA is responsible for the registration of pest control products [PCPs]. A PCP, which includes both an active ingredient and an end-use product, cannot be used in Canada unless it is first validly registered under the Act (section 6). An applicant seeking to register a PCP must submit an application to the PMRA (section 7). Section 8 provides that the PMRA shall register the PCP if it considers that the risks posed by the PCP are "acceptable", which is defined in subsection 2(2) as, "if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration". If the risk is determined to be unacceptable, the PMRA shall refuse the application. The same basic process applies when a registrant applies to amend, renew or reinstate a previously registered PCP. A registration under section 8 can be valid for up to five years, although the PMRA may stipulate a shorter validity period (Regulations, section 13).

The process established by the PMRA for determining whether or not a PCP poses an acceptable risk varies depending on the specific nature of each application. However, in all cases, the PMRA must consider whether the applicant has provided sufficient information to make a determination as to the acceptability of the risk (subsections 7(1)-(2)). If the information is not sufficient, the PMRA may request other information before making a registration decision (subsection 7(4)).

The extent of the evaluations conducted by the PMRA vary depending on several factors, including: whether the PCP is a new "active ingredient" or an end-use product containing a previously registered "active ingredient", the PCP's intended use, and whether the application seeks to register a new PCP or simply amend an existing one.

Public consultation may be required as part of the process, for example, where an applicant seeks to register a previously unregistered active ingredient, or where it is determined that the PCP poses a significantly increased risk (subsection 28(1)(a)).

Where the PMRA considers that the risks are acceptable, and therefore decides that the PCP will be registered pursuant to section 8, it may also request additional information about the risks posed by the PCP by way of a notice pursuant to section 12. Where additional information is required, this request becomes a condition of registration (subsection 12(2)), and the registration is deemed to be a conditional registration (Regulations, section 14). A conditional registration is only valid for up to three years, rather than the maximum five years where the registration is not conditional (Regulations, subsection 14(1)(a)). In addition, as explained by the AGC's affiant, Neilda Sterkenburg, the requirement for public consultation is suspended *until* "such time as the registration is renewed, continued, or converted to a full registration, whichever comes first." (Regulations, subsection 14(1)(b)).

Where the registrant complies with the section 12 notice and provides the additional information to the PMRA's satisfaction, the PCP's validity is then extended from three years to five years (Regulations, subsection 14(6)). The validity period of a conditional registration may also be

extended by PMRA to allow it to undergo public consultations (Regulations, subsection 14(7)). Otherwise, the validity period of a conditional registration may not be extended (Regulations, subsection 14(5)).

The Regulations also provide that registrations and conditional registrations may be renewed (Regulations, subsection 16(1)-(2)). An application to renew requires the same information as required to register a new PCP (or to amend an existing one) (Regulations, subsection 16(4)). In other words, the PMRA must receive sufficient information to satisfy itself that the risk posed from granting the application for renewal is acceptable under section 8 of the Act. If a conditional registration is renewed under section 16, the Regulations require that a new section 12 notice be issued to the registrant, and the three year validity period for the renewed conditional registrations begins anew (Regulations, subsection 16(2)). A conditional registration may also be continued after the evaluation of data through the delivery of a further section 12 notice. This continued conditional registration is valid for three years (Regulations, subsection 14(2)). The PMRA may also reinstate an expired conditional registration by delivering further section 12 notices. A reinstated conditional registration is valid for three years (Regulations, subsection 14(2)). Whether the application is to renew, continue or reinstate a PCP, the PMRA must first determine that the risks posed by the PCP remain acceptable in accordance with section 8.

Paragraph 28(1) (a) of the Act provides that the PMRA must consult the public in respect of proposed decisions where the applicant seeks to register a previously unregistered active ingredient or where it is determined that the PCP poses a significantly increased risk.

Compliance with this public consultation duty is the trigger for a person's right to file a notice of objection to a registration decision. After an objection has been made, the PMRA must first decide whether to establish a review panel. If established, the review panel would ultimately recommend whether the decision should be confirmed, reversed, or varied (PCPA, section 35).

Section 16 of the Act provides that the PMRA *may* initiate a "re-evaluation" of a PCP if it is of the opinion that there has been a change in the information required to assess the risks. The PMRA is also required to conduct a re-evaluation no later than 16 years after the most recent decision relating to the PCP that was subject to public consultation. Both types of re-evaluations must allow for public consultation (subsection 28(1)(b)). This type of consultation will also be subject to the notice of objection procedure in section 35 of the Act.

Paragraph 28(1)(c) allows the PMRA to consult about "any other matter if the Minster considers it in the public interest to do so". Consultation conducted pursuant to this provision is *not* subject to the notice of objection procedure in section 35 of the Act.

As explained above, A PCP can become a conditional registration due to the issuance of a section 12 notice. However, a PCP can also become a conditional registration indirectly, via a "linked" PCP. Where a section 12 notice has been issued with respect to an active ingredient, any registered PCP that contains that active ingredient is deemed conditional (Regulations, subsection 15(1)). Similarly, where a section 12 notice is issued in respect of an end-use product, the active ingredient contained within it is deemed a conditional registration (subsection 15(2)). Therefore, multiple PCPs can become conditional registrations via a single section 12 notice.

Section 14 of the Regulations, which sets out the effect of conditional registrations, was repealed effective November 30, 2017.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1070-16
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, AND WILDERNESS COMMITTEE v MINISTER OF HEALTH, SUMITOMO CHEMICAL COMPANY LIMITED, BAYER CROPSCIENCE AND VALENT CANADA
AND DOCKET:	T-1071-16
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, AND WILDERNESS COMMITTEE v ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH AND SYNGENTA CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 15 AND 16, 2017
REASONS FOR ORDER AND ORDER:	KANE J.
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