Federal Court Cour fédérale

Date: 20140805

Docket: T-1307-13

Citation: 2014 FC 775

Ottawa, Ontario, August 5, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ATLANTIC INDUSTRIAL SERVICES

Respondent

JUDGMENT AND REASONS

I. BACKGROUND

[1] This is an appeal, pursuant to the *Canadian Environmental Protection Act*, SC 1999, c 33, s 269 [CEPA], and Part 6 of the *Federal Courts Rules*, of a July 7, 2013 decision by which a Chief Review Officer set aside Environmental Protection Compliance Order 1008-2013-03-22-007.

[2] Canada is party to international agreements which require controls on the export and import and conveyance of hazardous products that may harm the environment, in particular the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* and the *Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste.*

[3] Canada complies with these agreements through CEPA and regulations enacted under the authority of that statute including the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2005-149, [the Export and Import Regulations], which are enforced by officers employed by Environment Canada.

[4] Atlantic Industrial Services (AIS) operates waste petroleum management facilities in Nova Scotia and New Brunswick. It has Certificates of Approval from the New Brunswick and Nova Scotia governments authorizing it to handle petroleum waste products (e.g., used oils, hydrocarbon contaminated waste water, oil filters, oily rags, waste plastics, oil absorbents). The Certificates permit AIS to accept, collect, transport, store and process used oil products at its facilities. The provincial certificates do not authorize exports of such products to other countries including the United States.

[5] Véolia Environmental Services (VES), a Quebec company, is one of AIS's feed sources for used oil. VES collects used lubricating, transmission and engine oil from automotive garages and processes it to some extent by reducing the water content, filtering out objects and reducing the heavy metals content before selling it to AIS. To reach the appropriate metal levels, it may

co-mix products from different sources. The finished product is then tested by a third party laboratory to ensure it meets Quebec government parameters to be sold as fuel. VES has supplied such oil to AIS for 8 or 9 years.

[6] AIS sells this product to customers as a fuel source. It holds a fuel wholesales license issued by the Government of New Brunswick. One of AIS's customers is Lincoln Pulp & Paper (Lincoln), which is located in the State of Maine. AIS has supplied it with two to three shipments of fuel per week for "many years", some of which is oil collected and shipped to AIS by VES. On average, AIS delivers three to four million litres a year to Lincoln in Maine. The trans-border shipment of the used oil implicates the Export and Import Regulations.

[7] As a result of a routine "border blitz" on March 14, 2013 at the Saint Stephen crossing in New Brunswick, an empty truck returning to Canada was inspected by the Environment Canada District Manager for enforcement, Robert Robichaud. The trucker provided paperwork that described the exported substance as Re-refined Industrial Fuel (RIF), No. 6 Heavy fuel oil, and Re-refined fuel. The Bill of Lading completed by the trucker referred to the product as 30,000 litres of "Re-refined Waste Fuel Oil" delivered to Lincoln. In addition, the truck bore a "placard" or diamond shaped sign used to identify dangerous goods as required by the *Transportation of Dangerous Goods Regulations* SOR/2001-286 [the Transport Regulations].

[8] The tank trailer placard and documentation provided to Mr. Robichaud indicated that the trailer had been transporting a Class 3 flammable liquid, as defined in the Transport Regulations

and included in the definition of hazardous recyclable materials in the Export and Import Regulations.

[9] On March 21, 2013, Charles Richard, an Enforcement Officer, visited the AIS facility in Saint John. During the course of that visit, the local Operations Manager for AIS, Ms. Amanda Tobin, stated that the oil they were shipping to Lincoln had been purchased from VES. She was not sure what VES had done to the oil other than to remove some of the water content.

[10] On March 22, 2013, Mr. Richard spoke with Mr. Pierre Potvin of VES. Mr. Potvin indicated that the oil delivered by VES to AIS was used oil from garages that perform oil changes, and that the used oil was not transformed prior to shipping it to AIS. Mr. Potvin also indicated that VES had been sending waste oil to AIS in Saint John for 8-9 years. On March 25, 2013, Mr. Richard consulted Mr. Robin Tremblay, a Senior Program Scientist from the Waste Reduction and Management Division at Environment Canada. Mr. Tremblay confirmed Mr. Richard's understanding that used lubricating oil is a controlled substance under the Regulations. Mr. Tremblay also confirmed by email that AIS does not have a permit under the Act to export used oil to the United States.

[11] On April 10, 2013, a Notice of Intent to Issue an Environmental Protection Compliance Order (Notice of Intent) was issued to AIS by Mr. Richard. AIS officials were given an opportunity to provide submissions as to why the Export and Import Regulations did not apply to their product and did so. The Order was then issued stating that there were reasonable grounds to believe that AIS had contravened and was continuing to contravene paragraph 185(1)(a),

subparagraph 185(1)(b)(i) and paragraph 185(1)(c) of the CEPA, as well as subsection 7(1) of the Export and Import Regulations. Subsection 7(1) requires prior notice to the Minister in writing of intent to export, import or convey in transit a hazardous waste or hazardous recyclable material.

[12] The Order directed that AIS cease all export of a controlled substance, namely, waste oil, into the United States until an export permit has been issued as required by the Export and Import Regulations. The Order also notified AIS of the requirement, pursuant to subsection 238(1) of the *CEPA*, to comply with the Order, that failure to comply is an offence pursuant to paragraph 272(1)(a) of the *CEPA*, and that the penalties for contravening the Order are set out at subsection 272(4) of the *CEPA*. These penalties, for a first offence, are a fine of $75,000 to $4,000,000 on a conviction on indictment, and a fine of $25,000 to $2,000,000 on a summary conviction. AIS was informed that they could request a review of the Order under the statute, but that a request for review did not suspend the operation of the Order.

[13] In a letter dated May 2, 2013, AIS requested the Chief Review Officer review the Order. A review hearing took place on Wednesday, June 26, 2013 at Moncton, New Brunswick at which evidence was received from Mr. Robichaud, Mr. Richard, Mr. John Henderson, a consulting engineer retained by AIS, and Mr. Andre Lachevrotière, General Manager for AIS.

[14] Mr Lachevrotière described the long-standing arrangements that AIS had with VES and Lincoln and the processing carried out at the Saint John facility. The used oil received from VES was filtered to remove any objects that remained in it such as nuts, bolts, gloves etc as it flowed

into the AIS holding tanks, water was drawn off and sediment was allowed to settle prior to transport to customers such as Lincoln. Apart from filtration, gravitational settlement and water removal the substance was not subjected to any refining process.

[15] In his evidence, Mr Henderson expressed views on the intent of the Export and Import Regulations and the Transport Regulations. He discussed the processing carried out by AIS on used oil at its facility at Debert, Nova Scotia. Mr. Henderson understood that the Saint John facility was being decommissioned and that AIS was particularly interested in getting advice from his firm on the correct interpretation of the Regulations for the purposes of their future business. He acknowledged that the processing carried out by AIS at Saint John consisted merely of the removal of water and sediment and did not involve re-refining.

[16] At the request of the respondent, the Chief Review Officer agreed to receive the parties' closing submissions in writing indicating that he was leaning in favour of the position of the respondent and expressing concern about the economic impact of the Order on the firm.

II. **DECISION UNDER APPEAL**

[17] Following a brief review of the background to the proceeding, the Chief Review Officer made the following determination:

> I find that, for the purposes of the regulations and the export permit requirement contained therein, the product is and will be a recycled and reprocessed fuel and not subject to the regulation. It is not being exported for disposal as waste nor for recycling but for consumption as a fuel for industrial use. It has been recycled to a fuel and therefore is not a recyclable product. It is not subject to the Transportation of Dangerous Goods Regulations for as Mr.

> Henderson stated in his expert testimony the product in question has a flashpoint of 67 degrees Celsius, outside the environmental standard of 60 degrees Celsius or less. Environment Canada also conceded that the issue of leachate was not explored nor was it the basis of the issuance of the Enforcement Order in question.
>
> The product is neither hazardous waste nor hazardous recyclable material but a re-refined or recycled fuel exported for consumption as a fuel, not for disposal as waste nor for recycling into some other product. The regulations are therefore not applicable. I therefore cancel and set aside Enforcement Order 1008-2013-03-22-007. In the event of any appeal and pending any other final disposition of this matter I also suspend the Order by reason of the clear and uncontradicted evidence of the significant economic impact of the Order upon AIS.

III. **ISSUES**

[18] The applicable legislation is attached as Annex “A” to these reasons.

[19] The appellant submits that the issues are whether the Chief Review Officer: a) erred in failing to apply the statutory definition of “hazardous recyclable material”; b) erred in concluding that the substance is not subject to the CEPA and the Regulations; and c) erred in rendering a decision which is at odds with the purpose and objectives of the CEPA, the Regulations, and Canada’s international commitments.

[20] The respondent wishes the Court to focus primarily on whether the substance exported by AIS is a “hazardous recyclable material” in the context of the CEPA and the Regulations. In my view, it is not for the Court to make that decision but to determine whether the Chief Review Officer erred in his application of the legislation and regulations to the evidence.

[21] Accordingly, the issues as I see them are:

1. What is the applicable standard of review?

2. Did the Chief Review Officer err in finding that the substance exported by AIS is not a "hazardous recyclable material" in the context of CEPA and the Regulations by incorrectly interpreting the legislative provisions?

IV. **ANALYSIS**

A. *Standard of Review*

[22] The parties disagree on the applicable standard of review. The appellant submits that correctness is the proper standard based on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] and *Canada (Environment) v Custom Environmental Services Ltd.*, 2008 FC 615, [2008] FCJ no 781 [*CESL*] at paras 15-27. The respondent submits that consideration of the *Dunsmuir* criteria leads to a conclusion that reasonableness is the standard.

[23] In *CESL*, above, Justice Carolyn Layden-Stevenson noted the lack of prior jurisprudence regarding the appropriate standard of review regarding a decision of a Chief Review Officer appointed under the CEPA as the enabling legislation was relatively recent. She therefore conducted the second part of the inquiry called for in *Dunsmuir*, an analysis of these factors: 1) the presence or absence of a privative clause; 2) the purpose of the tribunal as determined by interpretation of the enabling legislation; 3) the nature of the question at issue; and 4) the expertise of the tribunal.

[24] The issue in *CESL* was the application of the legislative provisions to undisputed facts; a question of mixed fact and law presumptively reviewable for unreasonableness. Applying the *Dunsmuir* factors, Justice Layden-Stevenson noted that there is no privative clause; s 269 of CEPA provides for a statutory right of appeal to the Federal Court and s 270 provides that the appellant has the right to be heard on all questions of fact and law. This is a broad appeal provision and is indicative of Parliament's intent that a decision taken under the legislation is to be subject to judicial oversight.

[25] While individuals appointed as Chief Review Officers must, according to s 247 of the Act, be knowledgeable regarding the Canadian environment, environmental and human health, administrative law <u>or</u> traditional aboriginal ecological knowledge, Justice Layden-Stevenson noted that the statute does not require expertise.

[26] In this instance, the parties were unable to assist me with reference to any indication in the record that the Chief Review Officer in this instance has expertise in the interpretation and application of the regulations under CEPA. The Chief Review Officer performs administrative functions, assigns review officers to conduct hearings and, in certain cases, such as in *CESL* and this matter, conducts review hearings. The appointments are not full time positions as the review officers “shall not engage” in employment that is inconsistent with their CEPA function (s 248). This does not favour deference.

[27] In balancing the factors in *CESL,* Justice Layden-Stevenson determined that the appropriate standard of review was correctness. This was supported by jurisprudence in the

broader environmental context: *West Vancouver v. British Columbia*, 2005 FC 593, 273 FTR. 253. *Friends of the West Country Association v. Canada* (*Minister of Fisheries and Oceans*), [1999] FCJ. No. 1515, [2000] 2 FC 263 (C.A.); *Atomic Energy Control Board v. Inter-Church Uranium Committee Educational Co-Operative*, 2004 FCA 218, [2005] 1 FCR. 372.

[28] The respondent contends that *CESL* should be distinguished as the present matter primarily raises the issue of the Chief Review Officer's interpretation of a provision of his home statute namely the meaning of "hazardous recyclable material" in the context of section 185(1) of the *CEPA,* the Chief Review Officer's enabling legislation, not a provision of a regulation enacted thereunder; the issues raised on review were sufficiently technical and scientific to require expert evidence, the assessment of which should be accorded deference; the role of Chief Review Officers, as determined by *CEPA*, is to further environmental protection in the public interest and the wording of *CEPA* and the *Regulations* at issue in this case explicitly requires consideration of the intention of the exporter and end user.

[29] I am not convinced that deference is called for in reviewing decisions of Chief Review Officer's. It is clear that in conducting a review and making a determination, the Chief Review Officer may be called upon to interpret the enabling statute and one or more of the 46 regulations made under *CEPA*. There is no indication in the record before me that the Chief Review Officer in this instance had acquired expertise analogous to that of institutional tribunals where a body of jurisprudence has been established with which the tribunal members are well acquainted.

[30] However, this is not a judicial review application but an appeal under s 269 of the *CEPA* and Part 6 of the *Federal Courts Rules.*

[31] The standard of review on appeals is set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR. 235 at paras 1, 8, 10, 36:

> 1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.
>
> […]
>
> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, supra, at p. 90.
>
> […]
>
> 10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K*", [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd*., [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.
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> […]
>
> 36 […] Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts

> must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[32] I consider that I am bound by the palpable and overriding error standard with respect to the Chief Review Officer's findings of fact and on findings of mixed questions of fact and law. I am not bound by that standard with respect to the Chief Review Officer's interpretation of the law which I am entitled to overturn if I consider that it was not correct.

(1) *Did the Chief Review Officer err in finding that the substance exported by AIS is not a "hazardous recyclable material" in the context of CEPA and the Regulations by incorrectly interpreting the legislative provisions?*

[33] Section 185 of CEPA provides that "[n]o person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal…" unless the person has notified the Minister, paid the prescribed fee, obtained the appropriate permit and complies with the conditions set out therein.

[34] The term "hazardous recyclable material" is defined at s 2 of the Export and Import Regulations which incorporate by reference provisions of the Transport Regulations.

Export and Import of Hazardous Waste and Hazardous Recyclable	*Règlement sur l'exportation et l'importation de déchets dangereux et de matières*

Material Regulations,
SOR/2005-149

Definition of "hazardous recyclable material"

2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that

(a) is set out in column 2 of Schedule 3;

(b) is included in at least one of Classes 2 to 6, 8 or 9 of the Transportation of Dangerous Goods Regulations;

recyclables dangereuses,
DORS/2005-149

Définition de« matière recyclable dangereuse »

2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes

a) elle figure à la colonne 2 de l'annexe 3;

b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du Règlement sur le transport des marchandises dangereuses;

[35] Schedule 2 of the Export and Import Regulations assigns a recycling code, or "R code" to various operations including the following:

> R1 – Use as a fuel in an energy recovery system, where the net heating value of the material is at least 12, 780 kJ/kg.
>
> R9 – Re-refining or re-use of used oil, other than by operation R1
>
> R14 – Recovery or regeneration of a substance or use or re-use of a recyclable material, other than by any of operations R1 to R10.

[36] Paragraph 2(1)(a) refers to Schedule 3 which identifies hazardous waste and hazardous recyclable material. "HAZ 2" is described as:

> Used lubricating oils in quantities of 500 L or more, from internal combustion engines or gear boxes, transmissions, transformers, hydraulic systems or other equipment associated with such engines.

[37] To determine whether a substance falls within the definition and is thereby subject to the notification and permitting requirements in subsection 185(1) of the CEPA, s 2 of the Export and Import Regulations and the relevant classes of the Transport Regulations must be read together as a single legislative text. These provisions apply to substances that are being imported and exported, not to substances that originate and remain in Canada.

[38] Pursuant to these provisions, a "hazardous recyclable material" in the context of this proceeding is a substance that is in the process of being exported abroad, is intended to be recycled in the receiving jurisdiction using one of the operations set out in Schedule 2, and meets one of the criteria set out at paragraphs 2(1)(a) through (g) of the Export and Import Regulations. It is irrelevant that the substance may have been "refined" or "recycled", as AIS argues, by screening, gravitational separation and water removal, in Canada prior to export. Even if that could be said to constitute refining, which in my view is doubtful, the substance would still be captured by the R9 or R14 codes which cover "re-refining or re-us of used oil" and "recovery or regeneration of a substance or re-use of a recyclable material" respectively.

[39] The operations listed in Column 2 of Schedule 2 must be considered in light of the substance's intended use in the receiving jurisdiction. In this context it was to be used as "fuel in an energy recovery system where the net heating value of the material is at least 12,780 kJ/kg" as set out at item 1 (R1) of that column. There is no dispute that burning the substance at the pulp

mill in Maine would generate at least that net heating value in an energy recovery system i.e., the mill's boilers. The heating value of the used oil obtained from VES was certified as 42,723 kJ/kg.

[40] While the definition is somewhat circuitous, there is no doubt in my view that it captures the AIS product exported from their Saint John facility to Lincoln.

[41] The Chief Review Officer held that "for the purposes of the regulations and the export permit requirement contained therein, the product is and will be a recycled and reprocessed fuel and not subject to the regulation. It is not being exported for disposal as waste nor for recycling but for consumption as a fuel for industrial use. It has been recycled to a fuel and therefore is not a recyclable product".

[42] I agree with the appellant that it is unclear what definition of "hazardous recyclable material", if any, the Chief Review Officer applied in rendering his decision as there is no reference in the reasons provided to the statutory or regulatory meaning of the term. The fact that the intended use of the substance was to be in one of the forms of recycling contemplated by the Export and Import Regulations does not mean that it had been recycled when it left the Saint John facility, as the Chief Review Officer appears to have concluded.

[43] The Export and Import Regulations do not distinguish between materials that have undergone some form of processing prior to export and those which are unprocessed. Rather, they focus on the intended use of the substance in the receiving jurisdiction. In this case, it is

clear that the substance was intended to be used in the United States using one of the operations set out in Schedule 2 and met at least two of the criteria set out at paragraphs 2(1)(a) through (g) of the Regulations; specifically, paragraphs 2(1)(a) and 2(1)(b).

[44] With respect to paragraph 2 (1) (a), the substance meets the criterion of HAZ 2 pursuant to column 2 of Schedule 3. Despite the respondent's valiant efforts to persuade me to the contrary, the substance in question retains its "used" character notwithstanding filtration, gravitational settlement and removal of the water content by AIS prior to delivery to its customers. Counsel conceded during the hearing that such oil could never be re-sold as new. It is not a "virgin product" as AIS argued in its closing submissions before the Chief Review Officer. Indeed the Chief Review Officer clearly recognized that as he referred to the substance as "used oil" or "used motor oil products".

[45] The Chief Review Officer accepted Mr Henderson's testimony that the substance is not subject to the Transport Regulations because it has a flashpoint of greater than 60 degrees Celsius. However, the evidence before Environment Canada when the order was issued suggested otherwise. For example, two documents provided to Mr. Robichaud at the border identified the substance as a "Class 3, UN 1993" substance. "UN numbers" are assigned to hazardous substances by the United Nations Committee of Experts on the Transport of Dangerous Goods. "UN 1993" corresponds to a Class 3 substance under the Transport Regulations. Mr Henderson's evidence was to the effect that the flashpoint would vary depending on the metals in the used oil and he based his opinion on the substance produced by the Debert facility, not that shipped from Saint John.

[46] Environment Canada, therefore, had reasonable grounds to believe that the substance was included "in at least one of Classes 2 to 6" of the Transport Regulations, thus satisfying the criterion set out in paragraph 2(1)(b) of the Export and Import Regulations. This supported their conclusion that the substance met the definition of a "hazardous recyclable material" under the Regulations. It met the Schedule 2 requirement as well as two of the criteria set out at paragraphs 2(1)(a) through (g), where only one of those criteria is required to satisfy the test.

[47] The Chief Review Officer also appears to have given considerable weight to the respondent's intention to decommission the Saint John facility and to rely on its Debert, Nova Scotia facility which will use high temperature evaporation or distillation process in addition to screening and gravitational separation to remove impurities and water removal to improve the quality of the used motor oil products. While this may be a desirable development for the company's future operations, it was not material to the issue of the Order that was before the Chief Review Officer.

[48] I would also note that the Chief Review Officer suggested in remarks at the close of the review hearing that his primary concern was with the economic impact of the Order on the respondent's business interests. The appellant submits, and I agree, that the decision under appeal was inconsistent with the objectives and remedial purpose of the legislation as set out in s 2(1) of CEPA as well as the principles enshrined in the Basel Convention and the Canada/U.S. Agreement. The practical effect of the Order was not that the respondent would have been prohibited from exporting the substance but that the company would have been required to obtain a permit prior to export to the United States. This was acknowledged by Mr.

Lachevrotiere at the hearing. While it may have been administratively inconvenient to him it would not have adversely affected his business.

[49] In conclusion, I agree with the appellant that the Chief Review Officer's failure to apply the statutory definition of "hazardous recyclable material" led him to conclude, erroneously, that the Export and Import Regulations did not apply to the product exported by AIS from Saint John. This constituted a palpable and overriding error. Had the Chief Review Officer correctly applied the statutory and regulatory definition, he would have found that the product was a "harzardous recyclable material" and upheld the Order. For these reasons I will set aside his decision and restore the order.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is allowed with costs. The decision of the Chief Review Officer is set aside and the environmental protection compliance order is restored.

"Richard G. Mosley"
Judge

ANNEX "A"

Canadian Environmental Protection Act, SC 1999, c 33

Import, export and transit

185. (1) No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except

(a) after notifying the Minister and paying the prescribed fee;

(b) after receiving from the Minister whichever one of the following permits is applicable:

(i) an import permit or export permit that, except in the case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material,

Loi canadienne sur la protection de l'environnement, LC 1999, c 33

Importation, exportation et transit

185. (1) L'importation, l'exportation et le transit de déchets dangereux, de matières recyclables dangereuses et de déchets non dangereux régis devant être éliminés définitivement sont subordonnés :

a) à la notification préalable du mouvement au ministre et au paiement des droits réglementaires;

b) à la délivrance préalable par le ministre, selon le cas :

(i) d'un permis d'importation ou d'exportation attestant, sous réserve du paragraphe (4), que les autorités du pays de destination et, le cas échéant, du pays de transit ont autorisé le mouvement et celles du territoire de destination, l'élimination définitive ou le recyclage,

or

[…]

(c) in accordance with the prescribed conditions.

[…]

c) à l'observation des conditions réglementaires.

Order

235. (1) Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions are likely to be contravened in the circumstances described in that subsection, the enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, if applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.

Ordres

235. (1) Lors de l'inspection ou de la perquisition, l'agent de l'autorité qui a des motifs raisonnables de croire qu'une infraction à la présente loi ou aux règlements a été commise par une personne — et continue de l'être — ou le sera vraisemblablement, dans les cas prévus au paragraphe (2), peut ordonner à tout intéressé visé au paragraphe (3) de prendre les mesures prévues au paragraphe (4) et, s'il y a lieu, au paragraphe (5) qui sont justifiées en l'espèce et compatibles avec la protection de l'environnement et la sécurité publique pour mettre fin à la perpétration de l'infraction ou s'abstenir de la commettre.

Circumstances

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

Cas

(2) Les cas de contravention sont :

follows, namely,

(a) the exportation, importation, manufacture, transportation, processing or distribution of a substance or product containing a substance;

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

[…]

[…]

Application

Personnes visées

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

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

(a) owns or has the charge, management or control of the substance or any product containing the substance to which the alleged contravention relates or the property on which the substance or product is located;

a) sont propriétaires de la substance en cause dans la perpétration de la prétendue infraction, d'un produit la contenant ou du lieu où se trouve cette substance ou ce produit, ou ont toute autorité sur eux;

[…]

[…]

Specific measures

Mesures

(4) For the purposes of subsection (1), an order in relation to an alleged contravention of any provision of this Act or the regulations may specify that the person to whom the order is directed take one or more of the following measures:

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

(a) refrain from doing anything in contravention of this Act or the regulations, or do anything to comply with this Act or

a) s'abstenir d'agir en violation de la présente loi ou de ses règlements ou, au contraire, faire quoi que

the regulations;

ce soit pour s'y conformer;

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

b) cesser une activité ou fermer notamment un ouvrage ou une entreprise, pour une période déterminée;

(c) cease the operation of any activity or any part of a work, undertaking or thing until the enforcement officer is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;

c) cesser l'exercice d'une activité ou l'exploitation d'une partie notamment d'un ouvrage ou d'une entreprise jusqu'à ce que l'agent de l'autorité soit convaincu qu'ils sont conformes à la présente loi et aux règlements;

(d) move any conveyance to another location including, in the case of a ship, move the ship into port or, in the case of an aircraft, land the aircraft;

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

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

e) décharger un moyen de transport ou le charger;

(f) take any other measure that the enforcement officer considers necessary to facilitate compliance with the order — or to restore the components of the environment damaged by the alleged contravention or to protect the components of the environment put at risk by the alleged contravention — including

f) prendre toute autre mesure que l'agent de l'autorité estime nécessaire pour favoriser l'exécution de l'ordre — ou rétablir les éléments de l'environnement endommagés par la prétendue infraction ou protéger ceux menacés par la prétendue infraction —, notamment :

(i) maintaining records on any relevant matter,

(i) tenir des registres sur toute question pertinente,

(ii) reporting

(ii) lui faire

periodically to the enforcement officer, and	périodiquement rapport,
(iii) submitting to the enforcement officer any information, proposal or plan specified by the enforcement officer setting out any action to be taken by the person with respect to the subject-matter of the order.	(iii) lui transmettre les renseignements, propositions ou plans qu'il précise et qui énoncent les mesures à prendre par l'intéressé à l'égard de toute question qui y est précisée.
Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, SOR/2005-149.	*Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, DORS/2005-149.
Definition of "hazardous recyclable material"	Définition de« matière recyclable dangereuse »
2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that	2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes :
(a) is set out in column 2 of Schedule 3;	a) elle figure à la colonne 2 de l'annexe 3;
(b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;	b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;

(c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;	c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
(d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;	d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
(e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure, July 1992, in Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;	e) elle produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C : Laboratory Manual, Physical/Chemical Methods*, 3e édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;

(f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or

(g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

[…]

Delivery of notice

7. (1) Every person that proposes to export, import or convey in transit a hazardous waste or hazardous recyclable material must personally submit a notice to the Minister in writing within 12 months before the export, import or transit.

Transportation of Dangerous Goods Regulations, SOR/2001-286

Class 3, Flammable Liquids

B. 2.18 General

(1) Substances that are liquids or liquids containing solids in solution or suspension are included in Class 3, Flammable Liquids, if they

f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;

g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

[…]

Notification

7. (1) Quiconque projette d'exporter, d'importer ou de faire transiter des déchets dangereux ou des matières recyclables dangereuses doit personnellement présenter au ministre une notification écrite, dans les douze mois précédant l'exportation, l'importation ou le transit.

Règlement sur le transport des marchandises dangereuses, DORS/2001-286

Classe 3, Liquides inflammables

B. 2.18 Généralités

1) Sont incluses dans la classe 3, Liquides inflammables, les matières qui sont des liquides ou des liquides contenant des solides en solution ou en suspension si, selon le cas :

(a) have a flash point less than or equal to 60°C using the closed-cup test method referred to in Chapter 2.3 of the UN Recommendations; or
SOR/2008-34

a) leur point d'éclair est inférieur ou égal à 60 °C en utilisant la méthode d'épreuve en creuset fermé visée au chapitre 2.3 des Recommandations de l'ONU;
DORS/2008-34

A flash point of 65.6°C, using the open-cup test method referred to in Chapter 2.3 of the UN Recommendations, is equivalent to 60°Cusing the closed-cup test.
SOR/2008-34

Un point d'éclair de 65,6 °C en utilisant la méthode d'épreuve en creuset ouvert visée au chapitre 2.3 des Recommandations de l'ONU est équivalent à 60 °C en utilisant la méthode d'épreuve en creuset fermé.
DORS/2008-34

(b) are intended or expected to be at a temperature that is greater than or equal to their flash point at any time while the substances are in transport.

b) elles sont destinées à être, ou sont censées être, à une température supérieure ou égale à leur point d'éclair à n'importe quel moment pendant qu'elles sont en transport.

The UN number and shipping name for the dangerous goods referred to in paragraph (b) are UN3256, ELEVATED TEMPERATURE LIQUID, FLAMMABLE, N.O.S.

Le numéro UN et l'appellation réglementaire des marchandises dangereuses mentionnées à l'alinéa b) sont UN3256, LIQUIDE TRANSPORTÉ À CHAUD, INFLAMMABLE, N.S.A.

(2) Despite paragraph (1)(a), liquids that have a flash point greater than 35°C are not included in Class 3, Flammable Liquids, if they

2) Malgré l'alinéa (1)a), ne sont pas inclus dans la classe 3, Liquides inflammables, les liquides dont le point d'éclair est supérieur à 35 °C et qui, selon le cas

(a) do not sustain combustion, as determined in accordance with the

a) n'entretiennent pas la combustion, tel qu'il est déterminé conformément à

sustained combustibility test referred to in section 2.3.1.3 of Chapter 2.3 of the UN Recommendations;	l'épreuve de combustibilité entretenue visée à l'article 2.3.1.3 du chapitre 2.3 des Recommandations de l'ONU;
(b) have a fire point greater than 100°C, as determined in accordance with ISO 2592; or	b) ont un point d'inflammation supérieur à 100 °C, tel qu'il est déterminé conformément à la norme ISO 2592;
(c) are water-miscible solutions with a water content greater than 90 per cent by mass.	c) sont des solutions miscibles avec l'eau dont la teneur en eau est supérieure à 90 pour cent (masse).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1307-13
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v ATLANTIC INDUSTRIAL SERVICES
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	APRIL 14, 2014
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	AUGUST 5, 2014

APPEARANCES:

Sarah Drodge	FOR THE APPELLANT
Josie H. Marks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE APPELLANT
Josie H. Marks Stewart McKelvey Lawyers Moncton, New Brunswick	FOR THE RESPONDENT