Federal Court of Appeal | Cour d'appel fédérale

**Date: 20170707**

**Docket: A-167-16**

**Citation: 2017 FCA 149**

**CORAM:** **STRATAS J.A.**
**RENNIE J.A.**
**WOODS J.A.**

**BETWEEN:**

**GOODYEAR CANADA INC.**

**Appellant**

**and**

**THE MINISTER OF THE ENVIRONMENT**
**THE MINISTER OF HEALTH**

**Respondents**

Heard at Ottawa, Ontario, on April 4, 2017.

Judgment delivered at Ottawa, Ontario, on July 7, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
WOODS J.A.

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## REASONS FOR JUDGMENT

**RENNIE J.A.**

[1] On October 15, 2011, the Ministers of the Environment and Health published an order in the *Canada Gazette*, Part I, proposing the addition by the Governor in Council of BENPAT, an antioxidant compound used in the production of tires, to the List of Toxic Substances under Schedule 1 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (the Act). As permitted by subsection 332(2), the appellant, Goodyear Canada Inc., filed a notice of objection and requested that a board of review be established under section 333. The mandate of a board of

review is to inquire into the nature and extent of the danger posed by a substance which, in this case, the Ministers recommend and the Governor in Council proposes to add to the List of Toxic Substances in Schedule 1 of the Act.

[2] The Minister of the Environment refused to convene a board of review on the basis that Goodyear's notice of objection "did not bring forth any new scientific data or information that would support a change in the conclusion of the assessment." The Minister also noted that Goodyear had had numerous opportunities to present evidence supporting its position and to challenge the data on which the screening assessment was based, all of which had previously been considered during the consultation process.

[3] Goodyear commenced an application for judicial review, contending that the Minister's decision not to convene a board of review was unreasonable and that the manner in which it was reached breached a duty of procedural fairness owed to Goodyear. With respect to procedural fairness, Goodyear asserted that relevant information was not before the Minister at the time the decision was made and was, in any event, never disclosed to it.

[4] The application for judicial review was dismissed by the Federal Court (2016 FC 466), *per* Justice O'Reilly. Goodyear now appeals.

[5] For the reasons that follow, I would dismiss the appeal with costs.

[6] The applicable standard of review is that outlined in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. This Court must consider whether the Federal Court selected the correct standard of review and applied it correctly. In

other words, this Court steps into the shoes of the first instance court in reviewing a tribunal's decision. The Federal Court correctly determined that the Minister's decision is subject to review on the standard of reasonableness, and that the Federal Court's determinations on procedural fairness are subject to correctness review.

## I. The legislation

[7] The Act gives the Ministers a mandate to prevent and control the use of toxic substances, which include those which may have a harmful effect on the environment or which constitute a danger to human life or health. The supporting statutory mechanisms are complex, establishing procedures for scientific review and public consultation. As all pertinent decisions in this case were taken by the Minister of the Environment, references to the Minister will be to that minister.

[8] Subsection 90(1) of the Act authorizes the Governor in Council to make an order, on the recommendation of the Ministers, adding a substance to the List of Toxic Substances, if he or she is satisfied that the substance is toxic. Any use of substances on this list may be controlled or completely prohibited. Section 64 of the Act provides that a substance is considered toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that are or may be harmful to the environment or its biological diversity, or that constitute or may constitute a danger to human life or health or the environment on which life depends.

[9] A determination of toxicity originates, for present purposes, with the mandate under section 66 of the Act requiring the Minister to maintain a Domestic Substances List identifying substances which were in Canadian commerce, used in commercial manufacturing, or

manufactured or imported into Canada in an amount not less than 100kg in any year from January 1, 1984 to December 31, 1986. Many of these substances had not previously been assessed to determine whether or not they were toxic. Prior to adding a substance to the List of Toxic Substances, section 74 of the Act requires that a screening assessment be conducted of a substance already listed on the Domestic Substances List that, *inter alia*, was categorized as persistent or bioaccumulative and "inherently toxic", or that may present the greatest potential for exposure (section 73).

[10] The screening assessment under section 74 is conducted to determine whether a substance is "toxic" within section 64 of the Act. Where a screening assessment has been conducted, the Act provides that the Ministers shall publish in the *Canada Gazette*, Part I (the *Gazette*) the proposed measure they intend to take with respect to the substance and a summary of the scientific bases for the measure proposed (subsection 77(1)). Publication triggers a 60-day statutory public comment period (subsection 77(5)), following which a final decision on the proposed measure is published in the *Gazette* (subsection 77(6)).

[11] If, after taking into consideration the comments filed during the statutory public comment period, the Ministers are of the view that the substance should be added to the List of Toxic Substances, the Act mandates that the Ministers shall make a recommendation to the Governor in Council for an order that the substance be added (subsections 77(6) and 77(9)).

[12] The publication of a proposed order triggers a further 60 day period for public comment. Any person may also file a notice of objection requesting that the Minister convene a board of review to inquire into the "nature and extent of the danger posed by the substance" in respect of which the order has been proposed (subsections 332(2) and 333(1)).

[13] If the Minister establishes a board of review, the Minister has the discretion to make rules regarding the board's proceedings, including for example, regulating the conduct of hearings or fixing the remuneration of board members (section 341). The board shall allow any person or government to have "a reasonable opportunity, consistent with the rules of procedural fairness and natural justice, of appearing before it, presenting evidence and making representations" (section 335). Following its inquiry, the board of review submits to the Minister a report, along with its recommendations and the evidence presented to it, that is then made public (section 340).

[14] Concurrent with the screening process, the Act requires the identification of measures to prevent and control the risks associated with the substance. If the Minister's final decision regarding the measure it proposes to take is to recommend that the Governor in Council add the substance to the List of Toxic Substances, the Minister is also required to issue a statement indicating the manner in which she or he intends to "develop a proposed regulation or instrument respecting preventive or control actions in relation to the substance" (paragraph 77(6)(*c*)).

[15] This element of the Minister's responsibilities is supported by a non-statutory risk management process. It unfolds parallel to, and at times intersecting with, the screening assessment process, and engages a further set of consultations. It culminates with publication, and eventual finalization, of a proposed regulation or instrument in the *Gazette*. The proposed regulation or instrument respecting preventive or control actions must be published within two years of the Minister's final decision to recommend that the substance be added to the List of Toxic Substances; however, where a board of review is established, that two year period is suspended until the Minister receives the board's report (subsections 91(1) and 91(7)). As we

will see, the conflation of these two procedures – the statutory assessment process and the risk management process – underlies the procedural fairness argument before this Court.

## II. Consideration of BENPAT as a toxic substance

[16] In 2006, the Ministers published a notice under paragraphs 71(1)(*a*) and (*b*) of the Act which required certain persons to provide information for the purpose of assessing whether BENPAT, among other substances, was toxic or capable of becoming toxic. In December of that same year, the Ministers published an additional notice of their plan for the assessment and management of certain substances on the Domestic Substances List, including BENPAT, which had been categorized as, *inter alia*, persistent and/or bioaccumulative. The notice indicated that the categorized substances would be subject to a screening assessment, and if found to meet the definition of toxicity under section 64 of the Act, "may be subject to risk management measures".

[17] A summary of the draft screening assessment was published in the *Gazette* on October 2, 2010 (the draft assessment). The draft assessment concluded that BENPAT met one or more of the criteria for toxicity set out in section 64 of the Act and met the criteria for persistence and bioaccumulation potential. The same day, a risk management report was released by Environment Canada. The risk management report outlined the nature of the regulatory controls under consideration. The statutory 60-day period for public comment on the screening report was triggered, as was a period for public comment on the risk management report. Goodyear provided technical information and met with Environment Canada.

[18] On September 10, 2011 the Ministers issued a final decision after screening assessment, giving notice that they proposed to recommend that the Governor in Council add BENPAT to the List of Toxic Substances as a toxic substance. The screening assessment concluded that BENPAT was toxic within the ambit of section 64. At the same time, the Ministers gave notice that they were releasing a proposed risk management document for BENPAT to facilitate further stakeholder discussions related to proposed regulatory action in the future.

[19] On October 15, 2011, the Minister published a proposed order of the Governor in Council under subsections 90(1) and 332(1) of the Act to the same effect. I note that the question whether BENPAT is, or is not, properly listed as a toxic substance is not before this Court at this time. As of the hearing of this matter, no final order had been made under subsection 90(1) of the Act.

[20] On December 14, 2011, in response to the proposed order, Goodyear filed a notice of objection pursuant to subsection 332(2) of the Act, requesting that the Minister establish a board of review and providing reasons for its objection (the Notice). In September of 2013, the Minister wrote to Goodyear stating that its Notice "did not bring forth any new scientific data or information that would support a change in the conclusion of the assessment," and that she had decided not to establish a board of review.

[21] Two days following the Minister's refusal to convene a board of review, Environment Canada released after a Risk Management Update with respect to BENPAT. The Risk Management Update stated that "[t]he industrial releases of BENPAT…in Canada are expected to be lower than estimated in the screening assessment as indicated by a technical study on rubber conducted in 2012 and information obtained from stakeholders". I will refer to this technical study as the 2012 Study.

[22] At the risk of disrupting the chronology of events, I note that it is uncontested that the 2012 Study referred to in the Risk Management Update was not before the Minister at the time of her decision not to convene a board of review. It is also uncontested that the 2012 Study had not been disclosed to Goodyear.

[23] After reviewing Goodyear's Notice and representations, officials in Environment Canada prepared a document that would form the basis of advice to the Minister as to whether or not a board should be convened (the Technical Analysis). Amongst other sources and data, the Technical Analysis incorporated emissions data that had been included in the 2012 Study, although it did not reference it directly. The Technical Analysis was not produced to Goodyear.

[24] The Minister asserts that the 2012 Study relied on data from a study by ChemRisk LLC prepared in 2010 for the European Tyre and Rubber Manufacturers' Association (the 2010 Study). The Minister submits on that basis that the 2010 Study was also the source of the statement in the Risk Management Update that emissions would not be as high as anticipated in the screening assessment. However, rather than citing the 2010 Study as the source, the Risk Management Update cited the 2012 Study and other information obtained from stakeholders.

[25] The 2012 Study had not been produced to Goodyear, and was not before the Minister when she made her decision to refuse to convene a board of review. The 2010 Study however, was known to Goodyear. In fact, Goodyear had drawn it to the Minister's attention during the screening assessment consultation process and again in its Notice.

## III. Goodyear's position

[26] Two legal consequences are said to flow from this chain of events. First, the fact that the 2012 Study was not produced to Goodyear underlies its arguments that procedural fairness was breached. Second, the fact that the Risk Management Update states that emissions levels were lower than anticipated in 2010 underscores Goodyear's argument that the decision of the Minister not to convene a board was unreasonable.

[27] Goodyear also contends that, in rejecting the request to appoint a board of review on the ground that it did not supply new evidence that would support a change in the conclusion, the Minister imposed a test that was both unreasonable and constituted a fettering of discretion.

## IV. Analysis

[28] Goodyear contends that it was owed a duty of fairness and that this duty was breached when the 2012 Study was not provided to Goodyear. Goodyear also argues that it should have been entitled to challenge or verify whether the 2012 Study would have affected the advice in the Technical Analysis which recommended against convening a board of review. It notes further that the Risk Management Update referred to ongoing experiments being conducted by Environment Canada, the results of which would not be available until 2015, well after the September 2013 decision of the Minister to decline to convene a board of review. Goodyear says that this "black box" of non-disclosure offends procedural fairness.

[29] These arguments fail from both an evidentiary and legal standpoint.

[30] While Goodyear is correct in stating that the 2012 Study was not before the Minister when the decision was made not to convene a board of review, the Federal Court found that "the

2012 tire study was based on data contained in an earlier 2010 study that was provided to Goodyear and taken into account by the Minister." I agree with this finding.

[31] Goodyear was aware of the data in the 2010 Study and had the opportunity to make comments on it. Indeed, Goodyear drew the 2010 Study to the attention of the Minister during the screening assessment. Further, the recommendation in the Technical Analysis not to convene a board of review included a review of the final screening assessment, in which Goodyear had participated. Goodyear was thus aware of the 2010 emissions data relied upon in the advice to the Minister. Therefore, it cannot be argued that Goodyear's interests had been prejudiced or compromised by the fact that the 2012 Study was not produced.

[32] Goodyear argues that the decision to decline to convene a board of review "amounts to a decision to add BENPAT to the List of Toxic Substances," a final decision which directly affects its rights and commercial interest as the primary user of BENPAT in Canada (Goodyear's Memorandum of Fact and Law, at para. 58). Goodyear also contends that the Minister made a decision not to convene a board of review without giving it an opportunity to make submissions and be heard. In response, the Minister argues on the basis of *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2014 FC 776 [*Syncrude*], that the decision not to convene a board of review is part of a legislative process, and therefore immune from review. Goodyear maintains that the Federal Court "erred in not recognizing that a 'legislative' step has not yet occurred," as BENPAT has not been added to the List of Toxic Substances and asks this Court to distinguish *Syncrude* on that basis (Goodyear's Memorandum of Fact and Law, at para. 63).

[33] The decision not to convene a board of inquiry and the decision to add a substance to the List of Toxic Substances are separate and discrete. While both are reviewable and subject to the

requirements of procedural fairness appropriate to their context, at issue in this appeal is the decision not to convene a board of review, which is a decision about whether further scientific inquiry is warranted. This is a decision which, in some circumstances can affect rights and interests and trigger procedural fairness obligations: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1; *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44.

[34] Parliament recognized, in section 335, that the full sweep of procedural fairness obligations applied to a board once established. In contrast, the Minister's argument that there is no right to procedural fairness when considering whether to establish a board does not mesh with Parliament's recognition of the importance of the issues at play before boards of inquiry. Nor does the Minister's argument fit with the fact that Goodyear's specific rights and interests are potentially affected by the order. However, on the facts of this case, Goodyear had available to it all the information it needed to make submissions on the matter.

[35] I do not think, given the extensive statutory and non-statutory consultation which occurred prior to the publication in the *Gazette*, that the failure to produce the 2012 Study, or to give Goodyear an opportunity to respond to the Technical Analysis, breached any entitlement to procedural fairness that it might otherwise have been owed. Further, Goodyear has not argued any basis for additional procedural fairness outside of the statement that its rights and interests will be affected by the ultimate decision to List of Toxic Substances, a decision which is not before this Court.

[36] Goodyear argues that the Minister's decision not to convene a board of review should be treated as the final decision to add BENPAT to the List of Toxic Substances. Further, Goodyear argues that it was an error for the Federal Court to fail to recognize that a "legislative" step has not yet occurred. It appears to argue both that the decision to decline to convene a board of review is effectively the decision to amend Schedule 1 of the Act to add BENPAT to the List of Toxic Substances, and at the same time, asks this Court to find that, because no order has been made adding BENPAT to the List of Toxic Substances, the decision under review is not legislative in nature. Goodyear cannot have it both ways.

[37] At the very least, Goodyear appears to concede that its rights and interests, should they be sufficient to engage procedural fairness concerns, would not be engaged until there is a final decision to add BENPAT to the List of Toxic Substances. Thus, even if any additional procedural fairness is owed to Goodyear in the process, on its own reasoning the issue does not yet arise.

[38] To conclude, given the evidence that the emissions data in the 2012 Study and the Technical Analysis originated in other materials to which Goodyear had access, and the lengthy history of consultation, Goodyear was not deprived of any disclosure or opportunity to make submissions as alleged. Goodyear, as the largest user of BENPAT in Canada, participated throughout the screening assessment process and was not prejudiced by the non-disclosure of the 2012 Study.

[39] I turn to the challenge of the decision not convene a board of review.

[40] Goodyear's argument is premised on its contention that the decision not to convene a board of review is unreasonable given the statement in the Risk Management Update that emissions of BENPAT are now projected to be less than those stated in the screening assessment.

[41] This argument conflates the screening assessment process and the risk management process. As discussed earlier, they are discrete. The former is statutory, the latter is not. The screening assessment under section 74 of the Act is a statutorily mandated scientific evaluation of a chemical substance to determine whether it is toxic or capable of becoming toxic. Once a decision has been made to add a substance to Schedule 1, section 91 of the Act requires the Minister to publish, within twenty four months of the proposal, either the proposed regulation, or another instrument describing the "preventive or control actions" for managing the substance.

[42] The statement in the Risk Management Update that the levels of emissions may be less than anticipated relates to the risk management measures, and not to toxicity. The determination of the appropriate preventive or control actions to manage the risk posed by a substance is a separate and distinct function from the assessment of whether a substance is toxic as defined in section 64.

[43] The statement in the Risk Management Update that emissions of BENPAT will be lower than anticipated does not necessarily undermine the reasonableness of the decision not to convene a board of review. The fact that the extent of the risk may not be as great as contemplated does not mean that an inquiry "into the nature and extent of the danger posed by the substance" is required. The statutory process is directed to determining whether a substance is a danger. The risk management process is directed to the management of that danger. That said, I agree with Goodyear that if a substance were listed as toxic, and there were no regulatory

response whatsoever, the decision to list a substance as toxic might be challenged. This however, is not the case here.

[44] Goodyear also contends that in rejecting the request to convene a board of review on the basis that it had not brought forth any scientific data or information that would support a change in the screening assessment, the Minister adopted a test not contemplated by the language of section 333 and fettered her discretion.

[45] The purpose of establishing a board of review under section 333 is to inquire into the "nature and extent" of a danger posed by a substance. It is the Minister's discretion to determine whether there is sufficient uncertainty or doubt in the underlying science that a board of review is warranted. Based on the record before this Court, it cannot be said that the science was so uncertain or that deficiencies in the underlying analysis rendered the Minister's decision not to convene a board unreasonable. Indeed, the contrary would appear to be the case. The question of BENPAT's toxicity and effect on the environment has been the subject of considerable study over the four years prior to notice of the proposed order being published in the *Gazette*.

[46] Section 333 of the Act is discretionary, and the "test" to which Goodyear refers - the existence of new information - is just one factor the Minister may consider in deciding whether or not to exercise her discretion to establish a board. The Act does not set any criteria by which the Minister may decide whether or not to establish a board. In fact, there are provisions in the Act which address circumstances in which the Minister *must* establish a board, such as when the Minister decides not to list a substance as toxic in the face of a recommendation to list in the final screening assessment. Outside of those mandatory circumstances, Parliament intended to give the Minister a discretion to determine whether or not to establish a board of review.

[47] Even if there was evidence that was "new", it is for the Minister to decide whether it is contradictory to the conclusions in its assessment and, if so, the weight to be given to it. Similarly, the fact that the Risk Management Update referred to ongoing experiments, the results of which would not be available until after the decision was taken not to convene a board of review, does not render the decision unreasonable. It is reasonable to assume that, as a matter of course, monitoring, evaluation and experimentation may take place subsequent to a decision to list a substance as toxic. A commitment to further inquiry does not negate the decision not to convene a board of review.

[48] Goodyear also points to the affidavit evidence questioning the validity of the analytical methods used in the screening assessment, raising the criticisms of the Siloxane D5 board of review related to an analytical model relied upon by the Minister in the screening assessment. The Minister counters by pointing to the many articles and publications relied on by Environment Canada in the screening assessment, and notes that Goodyear only brought four new articles to the table. This argument requires comment.

[49] The reasonableness of a Ministerial decision is not determined by the number of academic papers cited or relied upon. The Court is concerned about other criteria – transparency, justification, intelligibility, acceptability and defensibility. The essence of a decision not to convene a board under section 333 is the Minister's assessment as to the sufficiency of the science in support of the proposed order. Consistent with standard of review principles, the Court is reluctant to second-guess decisions of this nature. Suffice to say at this stage that the decision not to convene a board was one which was reasonably open to the Minister.

[50] Goodyear contends that, if this Court does not intervene at this stage, the decision not to convene a board of review, the regulatory action will effectively be immunized from review. To accept that the cloak of legislative immunity covers all steps preceding the publication of the proposed order or regulation in Part I of the *Gazette* would leave parties like Goodyear with no recourse in the light of a measure which will have direct impact or bearing on its interests.

[51] I do not agree. It is a well-established tenet of administrative law that subordinate legislation may be challenged on several grounds. Subordinate legislation must be within the boundary of the legislative grant, both as to the content and purpose: *Canada (Attorney General) v. Canadian Wheat Board*, 2009 FCA 214, [2010] 3 F.C.R. 374, at para. 37 *per* Noel J.A. (as he then was). The short-hand label for this type of challenge is the "*ultra vires*" ground of review. Subordinate legislation may also be challenged on judicial review where the Governor in Council did not comply with statutory pre-conditions to promulgation; *Attorney General of Canada v. Inuit Tapirisat et al.*, [1980] 2 S.C.R 735, at p. 752, 115 D.L.R. (3d) 1.

[52] Even decisions of broad social and economic public policy may be subject to a limited review on the basis of bad faith, no reasonable basis in fact or that the regulation was motivated by or directed to ulterior or collateral purposes: *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, p. 111, 143 D.L.R. (3d) 577. Subordinate legislation may be attacked for reasonableness, albeit according to the decision-maker a broad margin of appreciation: *Green v. Law Society of Manitoba*, 2017 SCC 20, 407 D.L.R. (4th) 573; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5. As noted by this Court in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737, at paragraph 67, *per* Stratas J.A., the fact that the subordinate legislation may reflect a

broader policy or economic decision goes to the degree of deference, not to the question whether the regulation is subject to review.

[53] In light of these principles, should a final order to add BENPAT to the List of Toxic Substances be made, Goodyear is not without recourse. In making this point, I am of course, passing no comment on the merits.

[54] I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
David Stratas J.A."

"I agree
J. Woods J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED APRIL 25, 2016, DOCKET NO. T-1707-13 (2016 FC 466)**

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| **DOCKET:** | A-167-16 |
| **STYLE OF CAUSE:** | GOODYEAR CANADA INC. V. THE MINISTER OF THE ENVIRONMENT, THE MINISTER OF HEALTH |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 4, 2017 |
| **REASONS FOR JUDGMENT BY:** | RENNIE J.A. |
| **CONCURRED IN BY:** | STRATAS J.A.<br>WOODS J.A. |
| **DATED:** | JULY 7, 2017 |

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