Federal Court  Cour fédérale

Date: 20180410

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

Citation: 2018 FC 379

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

[1] The Respondents (Bayer and Sumitomo/Valent for T-1070-16 and Syngenta for T-1071-16) seek leave to admit new evidence on their appeal of the Order of Prothonotary Mandy Aylen, dated July 13, 2017, which dismissed their motion to strike the Application for Judicial Review. The Respondent Minister of Health does not oppose this motion. The Court heard the Appeal on November 15 and 16, 2017 and had not yet issued its decision at the time the Respondents sought the Court's Direction with respect to scheduling the present motion.

[2] The Order and Reasons with respect to the Appeal of the Prothonotary's Order has been issued separately in *David Suzuki Foundation et al. v Minister of Health et al.* 2018 FC 380 [*Suzuki 2*].

[3] For the reasons that follow, the motion to admit new evidence is dismissed. The admission of new evidence on appeal is exceptional. The new evidence does not meet the test established in the jurisprudence for admission. In particular, the new evidence will not assist the

Court in the sense of having an impact on the determination of the Appeal, because it does not sufficiently change the factual basis upon which the Prothonotary reached her conclusion.

I. Background

[4] The extensive background set out in *Suzuki 2* provides greater detail. For the purposes of this Order, the following information provides context.

[5] The Applicants allege that the Pest Management Regulatory Agency [PMRA], which makes decisions with respect to Pest Control Products [PCPs] on behalf of the Respondent Minister of Health, has engaged in an unlawful course of conduct over a period of several years by successively registering or amending the registration of certain PCPs products (all containing the active ingredients Clothianidin or Thiamethoxam [TMX]) without sufficient information regarding the environmental risks posed by the PCPs to pollinators, in particular bees. They argue that this conduct is contrary to the requirements of the *Pest Control Products Act*, SC 2002, c 28 [the PCPA]. The PCPA requires that the PMRA have "reasonable certainty that no harm to human health, future generations, or the environment will result from exposure to or use of the product" *before* a PCP is registered (section 8). The Applicants allege that the PMRA has consistently taken the approach of registering the PCPs and requiring that data be provided pursuant to a section 12 notice after registration, which should have been provided and reviewed before the PCPs were registered. The Applicants seek judicial review of this alleged unlawful course of conduct.

[6] The Respondents brought a joint motion to strike the Applications for Judicial Review. The Respondents argued that the Applications violated subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F7 and Rule 302 of the *Federal Courts Rules* (SOR/98-106) [the Rules]. The Respondents argued that the Application targeted 79 discrete registration decisions, rather than a "course of conduct", and that there was an adequate alternative remedy to judicial review in the form of the review processes established by the PMRA to examine the safety of the PCPs at issue, which were anticipated to be completed by December 2018, with a preliminary report or decision anticipated to be issued in December 2017. The Prothonotary applied the jurisprudence with respect to motions to strike and found that she was not certain that there was a course of conduct at issue, and was not certain that there was an adequate alternative remedy. The Prothonotary found that both of the issues were debatable and, therefore, refused to strike the Applications. The Prothonotary noted that the issues should be addressed by the Judge at the Applications for Judicial Review. The Prothonotary rendered her decision after a two day hearing on July 13, 2017.

[7] On the appeal of the Prothonotary's Order, which was heard on November 15-16, 2017, the Respondents argued that the Prothonotary erred in fact and law and, as a result, the Court should strike the Applications. Many of the same arguments made to the Prothonotary were made again to the Court. The Court reserved its decision [now *Suzuki 2*].

[8] On December 19, 2017, the PMRA issued the anticipated preliminary or proposed decisions respecting the registration status of PCPs which are at issue in this application, as well

as the anticipated proposed decisions respecting the broader re-evaluations of Clothianidin and TMX.

[9] The Respondents argue that the proposed decisions should be admitted as new evidence on the appeal. They argue that these decisions highlight that the processes underway within the PMRA are adequate alternative remedies to judicial review, and also highlight that the registration histories and status of the PCPs at issue are discrete decisions with many differences, which cannot be judicially reviewed as a course of conduct. The Respondents argue that the new evidence will assist the Court in determining whether the Prothonotary erred in refusing to strike this application.

II. The New Evidence the Respondents Seek to Admit

[10] The Respondents offer the affidavits of Jeffrey Parsons with respect to the Clothianidin PCPs (T-1070-16) and Dr. Nancy Tout with respect to TMX (T-1071-17). The Affiants attach as exhibits the four decisions or reports at issue, which were released on December 19, 2017. The information provided by the affiants is summarized as follows;

- **Proposed Registration Decision [PRD] for certain uses of Clothianidin and associated end-use products.** At present, Clothianidin is fully registered for certain structural uses. Other Clothianidin uses (seed treatments, foliar and soil applications) and the associated end-use products are currently conditionally registered, subject to the submission of data from registrants respecting their risks to pollinators. The Respondents, Bayer and Sumitomo/Valent have submitted data and have applied to convert their conditional registrations to full registrations. The December 19, 2017 PRD is in response

to these applications, concluding that "the conditions of registration relating to the submission of information . . . for Clothianidin and its associated end-use products have been met." The PRD adds that all but one of the end-use products do not present an "unacceptable risk", as that term is defined by the PCPA. Accordingly, the PRD proposes that the conditionally registered PCPs (except for Sepresto 75 WS) become full registrations pursuant to section 8 of the PCPA, valid for 3 years.

- **Proposed Re-Evaluation Decision [PRVD] for Clothianidin and all of its end-use products.** This re-evaluation, which has been ongoing since 2012, is assessing the potential risks of Clothianidin on pollinators (primarily bees). It is conducted pursuant to section 16 of the PCPA. It addresses Clothianidin and all of the end-use products at issue in this application. The PRVD concludes that some current uses are not expected to affect bees, while others may, in which case mitigation measures are required. Accordingly, the PRVD proposes the continued registration for products containing Clothianidin, along with the implementation of certain mitigation measures for some uses.

- **PRD for the use of TMX in seed treatment.** Some uses of TMX are conditionally registered, subject to the submission of data respecting its risks to bees. Sygenta has submitted data and has applied to convert its conditional registration with respect to seed usage into a full registration. This PRD concludes that, based on the data submitted, these PCPs do not present an unacceptable risk to pollinators. Accordingly, the PRD proposes three-year full registrations.

- **PRVD for TMX and all associated end-use products.** This re-evaluation is assessing the potential risks of TMX and all of its end-use products on pollinators. Like the parallel

PRVD for Clothianidin, this PRVD proposes that the PCPs be deemed “continued registrations”, subject to certain mitigation measures.

[11] The affiants also explain that the PRDs with respect to Clothianidin and TMX are subject to a 90-day consultation period conducted in accordance with paragraph 28(1)(c) of the PCPA. As a result, the PRDs are not subject to the Notice of Objection process set out in subsection 35(1) of the PCPA. The PRVDs are subject to a 90-day consultation period pursuant to paragraph 28(1)(b). [Although not stated by the affiants, the PVRDs would be subject to the Notice of Objection process in section 35].

III. The Issues

[12] The motion raises two issues: whether the Court has jurisdiction to admit new evidence on an Appeal of a Prothonotary’s decision; and, whether the Court should admit the new evidence on this Appeal.

IV. The Court Has Jurisdiction to Admit New Evidence on an Appeal of a Prothonotary's Order

[13] The Respondents acknowledge that the Rules do not address the admission of new evidence on an appeal of a Prothonotary’s order. However, they argue that this new evidence can be admitted, either because the documents are on the public record or by analogy to Rule 351, which governs the admission of new evidence at the Court of Appeal.

[14] The Respondents add that this Court has acknowledged that it can admit new evidence in similar contexts, using similar principles to those developed under Rule 351 (*James River Corp. of Virginia v Hallmark Cards, Inc.*, [1997] FCJ No 152 (QL), 126 FTR 1 (TD) [*James Rive*r, cited to FCJ]).

[15] The Applicants respond that the Rules' silence on the admission of new evidence in the Appeal of a Prothonotary's decision signals that motions to adduce new evidence are a departure from the Court's practice and should not be encouraged. Rule 51 motions and judicial proceedings, more generally, are meant to proceed summarily.

[16] I agree that the jurisprudence establishes that new evidence may be admitted on a Rule 51 motion to appeal a Prothonotary's Order in exceptional circumstances (*Tahmourpour v Canada (Canada Human Rights Commission)*, 2013 FC 1131 at paras 35-36, 442 FTR 159 [*Tahmourpour*], *Carten v Canada*, 2010 FC 857 at para 23 [*Carten*], [2010] FCJ No 1063 (QL), *Graham v HMQ*, 2007 FC 210 at para 12, [2007] FCJ No 282 (QL) [*Graham*], *James River* at para 33).

[17] In *James River*, the Court noted at para 32, that the appeal of a Prothonotary's decision and any de novo hearing is based on the material that was before the Prothonotary. The Court added at para 33 :

> Despite this seeming ambiguity in the *Federal Court Rules*, I understand the procedure established thereby to be, as noted above, an appeal based on the material that was before the prothonotary. This is consistent with the decisions in *Woods Canada Ltd. v. Harvey Woods Inc.* (November 30, 1994), F.C.J. No. 1795, and *Symbol Yachts Ltd. v. Pearson*, [1996] 2 F.C. 391, 107 F.T.R. 295.

> In some circumstances new evidence may of course be entertained, see *Federal Court Rule* 1102 [now Rule 351] and the jurisprudence thereunder. Such circumstances do not, however, exist in the present case.
>
> [Emphasis added]

[18] In *Graham*, the Court stated the same principle, noting the criteria for the admission of new evidence, at para 12:

> Exceptionally, new evidence may be admissible in circumstances where: it could not have been made available earlier; it will serve the interests of justice; it will assist the court; and it will not seriously prejudice the other side: *Mazhero v. Canada (Industrial Relations Board)* (2002), 292 N.R. 187 (F.C.A.). None of the criteria have been met in this case

[19] In *Carten*, the Court cited the same jurisprudence and reiterated the same principles, noting at para 23:

> Generally, an appeal of a Prothonotary's Order is to be decided based on what was before that decision maker; no new evidence is admitted; *James River Corporation v. Hallmark Cards Inc.* [1997] 72 C.P.R. (3d) 157 (F.C.T.D.). Exceptionally, new evidence may be admissible in circumstances where: it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; and it will not seriously prejudice the other side (*Mazhero v. Canada (Industrial Relations Board)* (2002) 292 N.R. 187 (F.C.A.); *Graham v. Canada*, 2007 FC 210 at para. 12; *Sandiford v. Canada*, 2007 FC 225).

[20] I also agree with the Respondents, that although the Appeal has been heard, the Court's decision has not been rendered and, therefore, the Court is not *functus* and may determine this motion.

[21] There is no need to pursue the Respondents submission, relying on *Apotex Inc. v Wellcome Foundation Ltd.*, 2003 FC 1229, 241 FTR 174 [*Wellcome*], that documents which are part of the public record can be considered or examined by the Court regardless of whether they are formally admitted. In this case, given that the documents have been provided by the affiants and the parties have made submissions about their significance to this appeal, regardless of whether the new evidence is admitted, it has by necessity been considered by the Court.

V. Should the new evidence be admitted?

A. *The Respondents' Submissions*

[22] The Respondents submit that new evidence can be admitted in a Rule 51 appeal in accordance with *Carten* and *Graham*. In addition, the considerations for admitting new evidence in appeals to the Court of Appeal should apply. These considerations are: whether the evidence is credible; whether the evidence could not have been previously discovered or tendered without reasonable diligence; whether the information is "relevant", in the sense of bearing on a decisive or potentially decisive issue, or practically conclusive of an issue on appeal, or of assistance to the Court; and, whether admission would unduly delay the proceedings or cause prejudice.

[23] The Respondent Syngenta submits that "practically conclusive" does not mean dispositive, but rather "that it likely would have influenced the decision" (citing *BC Tel v Seabird Island Indian Band*, 2002 FCA 288, 216 DLR (4th) 70 [*BC Tel*]). Syngenta submits that the question is whether the evidence would be valuable to have the fullest version of the "facts,

circumstances and events possible" before the Court in order to facilitate the Court's task (*BC Tel*).

[24] The Respondents further submit that the Court retains residual discretion to admit new evidence, even where the test is not met, particularly where the interests of judicial efficiency would be served (citing *BC Tel*).

[25] The Respondents' position is that the new evidence meets all the criteria for admission and can only assist the Court. The evidence only came into existence on December 19, 2017, and thus could not have been made available earlier. The evidence is credible and relevant and, combined with the other evidence, determinative of the main issues raised on appeal. The Respondents add that the admission of the evidence will not delay the determination of the Application for Judicial Review, given that a schedule for next steps has been determined. Nor will the admission of the evidence cause any prejudice to the Applicants which could not be compensated for in costs.

[26] The Respondents argue that the evidence is highly relevant, in particular, to the adequate alternative remedy issue. The Respondents point to the Prothonotary's concern that these "other proceedings will not be expeditious. . . [and the] applications will proceed to a hearing before" the re-evaluations conclude. The Respondents assert that the new evidence proves that the Prothonotary's concerns are "clearly wrong".

[27] The Respondents also submit that the Prothonotary's concern about the Notice of Objection process – namely that it did not appear to be an expeditious process, given the Applicant's past experience with it – is no longer valid. The PRDs make it clear that there will be public consultations pursuant to paragraph 28(1)(c) of the PCPA, which is not subject to the Notice of Objection process. The PRDs can, therefore, be judicially reviewed as soon as the decision is final, which is anticipated to be in December 2018.

[28] The Respondents also submit that the new evidence will be practically conclusive as it would have changed the outcome if it had been before the Prothonotary. The PRD and PVRD for Clothianidin and TMX provide a complete answer to the Applicant's challenge, given that all the studies about the risks to pollinators have now been reviewed. With respect to the Applicants' submission that an application for judicial review of the final PRDs would be materially different from this Application, the Respondents argue that both will, by necessity, focus on whether the PMRA had the requisite scientific information to support its decisions. The Respondents add that, once final, the PRDs will result in full registrations for the products at issue. Therefore, any declaration that the issuance of section 12 notices was unlawful will have no practical effect on registrations.

[29] The Respondents also argue that the new evidence is relevant to the issue of whether the Prothonotary erred in finding that the existence of a course of conduct was debatable. The Respondents submit that the new evidence demonstrates the many differences between the PCPs at issue in this Application, which further highlights why each PCP should be examined separately rather than as a course of conduct.

B. *The Applicants' Submissions*

[30] The Applicants submit that the Respondents are seeking to bolster their previous submissions with this new evidence. The Applicants argue that the new evidence does not meet the test for admission; it is of marginal relevance and could not impact the outcome of the appeal.

[31] The Applicants note that the Prothonotary considered several factors with respect to the adequacy of the alternative remedy and noted particular concerns, one of which was the expeditiousness of the alternative processes. The Prothonotary was also particularly concerned that the alternative remedy – the PMRA's re-evaluation process (now the PRVD) and the conversion applications (now the PRD) – would not provide the "central remedy" sought by the Applicants, namely a declaration of an unlawful course of conduct.

[32] The Applicants submit that the only change resulting from the new evidence is with respect to the extent of the delay that may have resulted from the Notice of Objection process. However, this change is of no significance. Although the final decision on the PRDs may now be subject to an application for judicial review, without an intervening Notice of Objection, there will still not be a final decision before the targeted date of December 2018. The Prothonotary's concerns about expeditiousness were more general in nature, and the Notice of Objection process was one consideration, among others, leading to this concern. The Applicants further note that, as found by the Prothonotary, this Application will be heard by December 2018; this has not changed.

[33] The Applicants add that in considering the adequacy of an alternative remedy in the context of a motion to strike, the present circumstances differ from those addressed in the jurisprudence. The Respondents are asking the Applicants to treat a future judicial review of other future decisions as an alternative remedy to this judicial review of an alleged unlawful course of conduct. That alternative remedy will not address the course of conduct now alleged. In addition, the nature of the judicial review of the PRDs and, at some point, of the PVRD, may differ. A substantive challenge to the science relied on to base the decisions would be different from the Application now before the Court in which the Applicants seek a declaration of an unlawful course of conduct.

[34] The Applicants submit that the new evidence, at most, points in the same direction as the existing evidence, with respect to the course of conduct issue, and would not impact the outcome of the Appeal. The Applicants note that the parties made extensive arguments to the Prothonotary and on the Appeal regarding the nature of the decisions and the similarities and differences. The new evidence does not change the underlying facts considered by the Prothonotary.

[35] The Applicants further submit that it is not in the interests of justice to admit the evidence, noting that judicial review applications are intended to be summary in nature and that the Rules do not contemplate post-hearing motions to adduce fresh evidence. The PRDs and PRVDs can be considered by the judge on the Application for Judicial Review, who can determine what impact they may have on the applications.

VI. The New Evidence is Not Admitted

[36] The general principle remains that an appeal of a Prothonotary's Order is to be decided on the basis of what was before the Prothonotary (*James River* at para 32). Only in "exceptional" circumstances, may new evidence be admitted (*Carten* at para 23).

[37] The approach identified in *Carten* and *Graham*, both of which addressed whether new evidence should be admitted on an Appeal of a Prothonotary's decision regarding a motion to strike a statement of claim, is most applicable to the circumstances. New evidence may be admissible, "exceptionally" where: it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; and, it will not seriously prejudice the other side. (*Graham* at para 10; *Carten* at para 23; *Shaw v Canada*, 2010 FC 577 at para 9, [2010] FCJ No 684 (QL)).

[38] Although consideration of whether the new evidence will assist the Court suggests a fairly low threshold, the jurisprudence provides further guidance. For example, in *Graham*, at para 13, the Court considered whether the evidence could "impact the outcome". In *Carten*, at para 24, the Court considered whether the evidence "could have any impact whatsoever on the merits of this appeal". The appellate jurisprudence also supports a higher threshold. In *Brace v Canada*, 2014 FCA 92 at para 11, 68 CPC (7th) 81 [*Brace*], the Court of Appeal noted with respect to the consideration of relevance, that the evidence should:

> […] *bear(s) upon a decisive or potentially decisive issue in the trial" and with respect to impact, that "[T]he evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result*.

[Emphasis in original]

[39] Syngenta's submission, relying on *BC Tel*, that the Court should admit new evidence where it would be "valuable to have before the Court the fullest version of the facts…" (*BC Tel* at para 31) is not, in my view, an element of the test for the admission of new evidence. In the passage cited, the Court was explaining its reason for relying on its residual discretion to admit new evidence in circumstances where the Court was tasked with interpreting a document on a factual record that it noted was deficient.

[40] In the present case, it is apparent that the evidence could not have been made available earlier as it did not exist until December 19, 2017. The Prothonotary heard the motion to strike the Applications in July 2017 and the Appeal was heard by this Court in November 2017. At the time of the motion and the Appeal, the preliminary decisions of the PMRA were expected by the end of December 2017. The Respondent sought to introduce the new evidence shortly after the release of the decisions.

[41] The key question is whether the new evidence will assist the court in the sense that it could have an impact on the merits of this Appeal, which is an appeal of the decision of the Prothonotary which refused to strike the Applications for Judicial Review. It must be recalled that the test to grant a motion to strike an application is high. As noted above, the Prothonotary applied the well-settled principles from the jurisprudence and found that it was debatable whether the alleged unlawful conduct was a course of conduct, and that it was debatable whether there was an adequate alternative remedy.

[42] The focus is on whether the new evidence impacts the Court's assessment of whether the Prothonotary erred in concluding that these two issues are debatable. The Prothonotary fully considered the parties' extensive submissions on both issues and considered voluminous documentary evidence, which is not the norm on a motion to strike. This included evidence regarding the history of the registrations of the PCPs and the pending PRDs and PRVDs.

[43] The Prothonotary considered whether ongoing administrative processes (the PRD or the PRVD) would provide an adequate alternative remedy to the present Applications for Judicial Review. The Prothonotary noted that she had considered a range of factors. She concluded that she was not certain that the alternative remedy would be adequate.

[44] In concluding that this issue was debatable, the Prothonotary stated that she was "particularly concerned" that the proposed alternative remedies would not be expeditious *and* would "not afford the central remedy that [the Applicants seek]" (at para 48). The new evidence only addresses the concern about expeditiousness, and only with respect to the PRDs.

[45] The Applicants acknowledge that some of the evidence which was presented to the Prothonotary regarding the expeditiousness of the Notice of Objection process has now changed, because there will no longer be a Notice of Objection process with respect to the PRDs. Instead, an interested party could seek judicial review of the PRDs as soon as they are finalized, which is anticipated to be in December 2018. However, the Prothonotary's concerns about expeditiousness were not limited to the PRDs, or to the Notice of Objection process.

[46] The Prothonotary was also concerned with the expeditiousness of the PRVDs. The PRVDs, once finalized, will be subject to the Notice of Objection process. As a result, any judicial review of the PVRDs would be delayed beyond December 2018 until the completion of that process. The new evidence does not change this.

[47] In addition, the Prothonotary's concern was not focussed only on the Notice of Objection process. She was concerned that, regardless of any Notice of Objection process, there would not be a final decision in either the PRDs or PRVDs until December 2018. She noted that this Application for Judicial Review would be heard before either of the final decisions is released. The new evidence does not change this.

[48] The Notice of Objection process was one of several factors which led to the Prothonotary's concern about expeditiousness. The Notice of Objection process was not the decisive issue, nor was expeditiousness the decisive issue with respect to the adequacy of the alternative remedy. The new evidence does not provide certainty on a decisive issue as the Respondents assert.

[49] The timing or expeditiousness of the alternative process was not the only reason that the Prothonotary was not certain that the alternative remedy was adequate. As noted above, the Prothonotary was also particularly concerned that the alternative processes would not provide the central remedy – i.e., the declaration of an unlawful course of conduct – sought by the Applicants. This has not changed.

[50] In my view, with the new evidence, the issue of the adequacy of the alternative remedy would remain debatable. The new evidence does not provide the certainty that the alternative remedy will be adequate. The issue should, therefore, be determined by the judge hearing the Applications for Judicial Review with the full record, including the new evidence.

[51] With respect to the Respondents' argument that the final PRDs will result in full registrations for the PCPs at issue, and, therefore, the Applicants request for declarations that the issuance of section 12 notices was unlawful will have no impact on registrations, it must be recalled that the Applications seek broader relief.

[52] With respect to the Respondents' submissions that the new evidence is also relevant to the Prothonotary's determination that it was debatable whether a course of conduct is at issue, the new evidence does not sufficiently change the facts. The Respondents' arguments that the Applications targeted a number of discrete and different decisions were extensively advanced at the hearing before the Prothonotary and at the hearing of this Appeal. The new evidence is more of the same type. The Prothonotary found that it was debatable whether the several decisions could be considered a course of conduct after considering all these arguments. The PRDs and PRVDs are similar evidence about the registration decisions that are part of the alleged course of conduct. As the Applicants note, evidence which "points in the same direction" falls short of the threshold required to admit new evidence (*BBM Canada v Research In Motion Ltd,* 2012 FCA 292 at paras 8-9, 441 NR 207; see *also Korki v Canada,* 2011 FCA 287 at para 13, 207 ACWS (3d) 597, and *Carten* at para 22). The PRDs and PVRDs do not bring certainty to the issue of

whether the decisions can be considered as a course of conduct. The issue is still debatable and should, therefore, be determined by the judge hearing the Applications for Judicial Review.

[53] With respect to the consideration of the interests of justice, as the Applicants note, there is no risk of a miscarriage of justice and the parties can address the importance of the PRDs and the PRVDs at the Application for Judicial Review. Clearly the interests of justice do not demand that the evidence be admitted. However, it would also not be contrary to the interests of justice to admit the evidence.

[54] With respect to the prejudice factor, the admission of the new evidence will not delay the determination of the appeal further, as it has already been delayed to some extent by the Court's agreement to hear this motion. The hearing of the Application for Judicial Review will not be delayed by the admission of new evidence, as long as the parties continue to adhere to the schedule established. As the Respondents note, the prejudice caused to the Applicants, including by the need to respond to this motion, can be addressed in costs.

[55] As noted, the issue in dispute on this motion is whether the new evidence would have had an impact on the Prothonotary’s findings, and accordingly, on the Court's determination of whether the Prothonotary erred.

[56] In summary, in applying the jurisprudence governing whether to admit new evidence on appeal, I find that, on one hand, the new evidence could not have been made available to the Prothonotary; the evidence is credible and relevant; and, the receipt of the evidence would not be

contrary to the interests of justice. On the other hand, the new evidence would not be "practically conclusive of an issue on appeal" nor will the new evidence assist the Court in the sense of having an impact on the determination of the Appeal, because it does not sufficiently change the factual basis upon which the Prothonotary concluded, in determining whether to strike the Application for Judicial Review and in applying the governing jurisprudence, that two issues were debatable. Given that the admission of new evidence on Appeal is exceptional, applying all the considerations leads to the conclusion that the new evidence should not be admitted.

[57] Although the new evidence does not meet the test for admission, and therefore will not be admitted, a few observations are noted. Unlike most other motions to admit new evidence, this Court had already heard the appeal before the motion to admit the new evidence was brought. In this motion, the Court has been provided with the new evidence and has received the affidavits, which explain the new evidence, and has heard the submissions of all parties regarding why this evidence will or will not impact the outcome of the appeal. At the hearing of the Appeal, extensive arguments were made with respect to both issues that the Prothonotary found debatable. These arguments have been reconsidered – by necessity – in the context of determining whether the new evidence could have an impact on the outcome of the Appeal. The reality is that, even though the new evidence is not admitted, it has been considered.

[58] If I had reached a different conclusion with respect to the admission of the new evidence, or if I had found this to be one of the "clearest of cases" warranting an exercise of my residual discretion to admit the new evidence (*Shire v Canada*, 2011 FCA 10 at para 89, 414 NR 270), the conclusion in *Suzuki 2* would remain the same. The Prothonotary did not err.

[59] In conclusion, the Respondents' motion to admit new evidence is dismissed. The Applicant is entitled to their costs of this motion, which shall be determined together with the costs in the Appeal of the Prothonotary's decision.

ORDER

THIS COURT ORDERS that:

1. The Motion is dismissed.

2. The Applicants are entitled to costs, which shall be determined together with the costs in the Appeal of the Prothonotary's decision.

"Catherine M. Kane"
Judge

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
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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 6, 2018
ORDER AND REASONS:	KANE J.
DATED:	APRIL 10, 2018

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