

Date: 20061214

Docket: T-1658-06

Citation: 2006 FC 1491

[ENGLISH TRANSLATION]

BETWEEN:

FRANÇOIS DERASPE

Applicant

and

THE MINISTER OF ENVIRONMENT CANADA

Respondent

REASONS FOR ORDER

Introduction

[1] This is a motion by the respondent [the Minister] to strike the applicant's application for judicial review [the application].

[2] Alternatively, in the event that the Court refuses to strike the application, the Minister requests that the Court, under Rule 59(c) of the *Federal Courts Rules* [the Rules]:

- a. Declare the service and filing of the applicant's affidavit and record null and void given that i) the affidavit and its supporting evidence are irregular and were never

properly served on the Minister and ii) the applicant's record allegedly violated the rules in several respects;

- b. Order the applicant to serve and file his affidavit and exhibits in accordance with the rules within thirty (30) days of the order to be made on this motion;
- c. Order that the time limits set out in the rules commence as soon as the applicant's affidavit is filed.

[3] I believe, given the context and the analysis that follow, that this motion to strike should be allowed. In general, it appears that the applicant, via his application, is anticipating a future decision by the Minister, under steps provided for by the *Access to Information Act*, R.S.C. 1985, c. A-1, is attempting to impose on the Minister obligations that do not arise from the scheme of the *Canadian Environmental Protection Act* (1999), S.C. (1999), c. 33 (the CEPA) and, finally, is seeking to assert himself and interfere with an ongoing investigation that is to be completed following a request for investigation by the applicant under the CEPA. The request for investigation was made by the applicant because he apparently disagrees with the findings of an inspection report issued by the Minister after a third party released a certain amount of sulfur trioxide into the atmosphere.

Background

[4] On August 9, 2004, the company Zinc Electrolytique du Canada Ltée (hereinafter CEZ), which operates a zinc refinery and sulfuric acid production plant Salaberry-de-Valleyfield, released a certain amount of sulfur trioxide.

[5] This industrial waste resulted in an inspection by the Minister in the days following and an inspection report dated August 24, 2004 (Minister's inspection report), which essentially found that the incident in question did not constitute an environmental emergency because the concentrations of sulfur trioxide and dioxide released into the atmosphere were reportedly below 10%.

[6] It must also be concluded that this inspection report by the Minister found that the incident that occurred on August 9, 2004, did not contravene the CEPA.

[7] Previously, on August 10, 2004, the Salaberry-de-Valleyfield fire department issued an intervention report. This intervention report by the town where the release of sulfur allegedly occurred apparently contained more unfavourable findings than did the Minister's inspection report with respect to the concentrations of sulfur released on August 9, 2004. Furthermore, the Minister allegedly notified the applicant belatedly and, therefore, contrary to the Minister's statutory obligations under the *Access to Information Act*, above.

[8] In June 2006, the applicant filed a request for an investigation to the Minister under section 17 of the CEPA.

[9] On June 27, 2006, a director serving the Minister acknowledged receipt of this request for an investigation for and on behalf of the Minister in accordance with section 18 of the CEPA.

[10] On July 26, 2006, the applicant was informed that an investigation had been initiated under section 17 of the CEPA following his request for an investigation.

[11] On August 30, 2006, the Minister sent the applicant, under section 19 of the CEPA, a letter outlining the progress of the investigation initiated following the applicant's request on June 2006.

[12] On September 13, 2006, the applicant filed his application with this Court's registry.

[13] For the purposes of understanding, sections 17 to 19 of the CEPA read as follows:

INVESTIGATION OF OFFENCES

ENQUÊTES SUR LES
INFRACTIONS

17. (1) An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.

18. The Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.

19. After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take, and the Minister shall include in the report an estimate of the time required to complete the investigation or to implement the action, but a

17. (1) Tout particulier âgé d'au moins dix-huit ans et résidant au Canada peut demander au ministre l'ouverture d'une enquête relative à une infraction prévue par la présente loi qui, selon lui, a été commise.

18. Le ministre accuse réception de la demande dans les vingt jours de sa réception et fait enquête sur tous les points qu'il juge indispensables pour établir les faits afférents à l'infraction reprochée.

19. À intervalles de quatre-vingt-dix jours à partir du moment où il accuse réception de la demande jusqu'à l'interruption de l'enquête, le ministre informe l'auteur de la demande du déroulement de l'enquête et des mesures qu'il a prises ou entend prendre. Il indique le temps qu'il faudra, à son avis, pour compléter l'enquête ou prendre les

report is not required if the investigation is discontinued before the end of the 90 days. mesures en cause selon le cas.

Analysis

[14] When the remedies sought are clearly certain to fail, an application for judicial review, such as the application in this case, may be the subject of an application to strike (see *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. et al.* (1994), 176 N.R. 48, at pages 54–55).

[15] As noted before, I believe that a review of the findings or remedies sought by the applicant in his application clearly leads us to this conclusion.

[16] The remedies sought by the applicant are below (to facilitate the subsequent analysis, the Court itself numbered these remedies 1) to 6):

[TRANSLATION]

1. PROHIBIT the Minister of Environment Canada from making any decision that his failure to act is due to the fact that he was not put in possession of the document entitled *Rapport d'intervention détaillé du service de sécurité incendie de Salaberry-de-Valleyfield* until April 1, 2005, since such a premise is vitiated by fraud under paragraph 18.1(3)(b) of the *Federal Courts Act*;
2. ORDER the Minister of Environment Canada, under section 39 of the CEPA, to disclose to the Court why he concealed the *Rapport d'intervention détaillé du service de sécurité*

incendie de Salaberry-de-Valleyfield completed by the Valleyfield fire department on August 10, 2005;

3. ORDER the Minister of the Environment to send the applicant, from the date of the judgment to be rendered herein until the end of the investigation, a detailed weekly progress report on the progress of the investigation and to implement the findings that the applicant's experts may reach if they consider that certain elements of the investigator's process are unlikely to guarantee scientifically sound results;
4. ORDER the Minister of the Environment to disclose the investigator's protocol, the name of the person in charge of the investigation, as well as the names of the experts or analysts that the investigator used or plans to use, as well as their qualifications;
5. ORDER the Minister of Environment to allow the applicant's experts and those of any other interested party to be physically present during various stages of the investigation;
6. ORDER the provisional execution of the judgment to be rendered, notwithstanding appeal and without guarantee.

[17] With respect to the first remedy, it squarely deals with a hypothetical situation. The Minister has not yet released his investigation report. Furthermore, if the Minister is slow to take action or if the Minister's eventual position is unfavourable to the applicant, he will still be able to appeal the action provided for under section 22 of the CEPA, which states the following:

22. (1) An individual who has applied for an investigation may bring an environmental protection action if

(a) the Minister failed to conduct an investigation and report within a reasonable time; or

(b) the Minister's response to the investigation was unreasonable.

(2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that

(a) was alleged in the application for the investigation; and

(b) caused significant harm to the environment.

(3) In the action, the individual may claim any or all of the following:

(a) a declaratory order;

(b) an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;

(c) an order, including an interlocutory order, requiring the defendant to

22. (1) Le particulier qui a demandé une enquête peut intenter une action en protection de l'environnement dans les cas suivants :

a) le ministre n'a pas procédé à l'enquête ni établi son rapport dans un délai raisonnable;

b) les mesures que le ministre entend prendre à la suite de l'enquête ne sont pas raisonnables.

(2) L'action en protection de l'environnement peut être intentée devant tout tribunal compétent contre la personne qui, selon la demande, aurait commis une infraction prévue à la présente loi, si cette infraction a causé une atteinte importante à l'environnement.

(3) Dans le cadre de son action, le particulier peut demander :

a) un jugement déclaratoire;

b) une ordonnance — y compris une ordonnance provisoire — enjoignant au défendeur de ne pas faire un acte qui, selon le tribunal, pourrait constituer une infraction prévue à la présente loi;

c) une ordonnance — y compris une ordonnance provisoire — enjoignant au

do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;

(d) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and

(e) any other appropriate relief, including the costs of the action, but not including damages.

défendeur de faire un acte qui, selon le tribunal, pourrait empêcher la continuation de l'infraction;

d) une ordonnance enjoignant aux parties de négocier un plan de mesures correctives visant à remédier à l'atteinte à l'environnement, à la vie humaine, animale ou végétale ou à la santé, ou à atténuer l'atteinte, et de faire rapport au tribunal sur l'état des négociations dans le délai fixé par celui-ci;

e) toute autre mesure de redressement indiquée — notamment le paiement des frais de justice — autre que l'attribution de dommages-intérêts.

[18] In this sense, for the moment it must be considered that this first remedy is clearly certain to fail.

[19] With respect to the second remedy, it seeks to revisit a finding that the applicant make access requests under the *Access to Information Act*, above.

[20] If the applicant thought that the Minister had concealed a document from him under this act, namely the town's inspection report, it is pursuant to the *Access to Information Act* that he was required to act.

[21] In any event, the order sought under the second remedy cannot be made under section 39 of the CEPA because this provision provides a remedy to prevent conduct that contravenes the CEPA and is likely to cause damage. Section 39 reads as follows:

39. Any person who suffers, or is about to suffer, loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may seek an injunction from a court of competent jurisdiction ordering the person engaging in the conduct

(a) to refrain from doing anything that it appears to the court causes or will cause the loss or damage; or

(b) to do anything that it appears to the court prevents or will prevent the loss or damage.

39. Quiconque a subi ou est sur le point de subir un préjudice ou une perte par suite d'un comportement allant à l'encontre d'une disposition de la présente loi ou de ses règlements peut solliciter du tribunal compétent une injonction visant à faire cesser ou à empêcher tout fait pouvant lui causer le préjudice ou la perte.

[22] The order sought by the applicant is not intended to cease or prevent conduct contravening the CEPA that is likely to cause damage.

[23] This second remedy must also be seen as clearly certain to fail.

[24] With respect to the third remedy, it must be analyzed in two stages.

[25] The first part states that the Minister be ordered to send the applicant, starting from the date of the judgment on the merits until the completion of the Minister's investigation, a "detailed progress report" on the progress of the investigation.

[26] This part of the remedy refers, in theory, to the application of section 19 of the CEPA, the wording of which is reproduced above, at paragraph [13].

[27] At paragraph 33 of his written submissions submitted against the motion to strike under review, the applicant states that he asked the Minister to inform him of the investigation protocol and to notify him of the names and qualifications of the Minister's investigators.

[28] I do not consider that the scheme of section 19 of the CEPA, which simply requires that the Minister, at intervals of ninety (90) days, notify the applicant of the progress of the investigation and the measures that he has taken or intends to take, requires that the Minister provide the applicant with the desired information, especially at the frequency required by the applicant.

[29] I do not think that the general provisions set out in section 2 of the CEPA, and which are quoted as follows by the applicant, are such as to require the Minister to provide the applicant with the desired information under section 19 of the CEPA:

2.(1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1):

- a) exercise its powers in a manner that **protects the environment and human health, applies the precautionary principle** that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a

reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches;

[...]

- e) **encourage the participation of the people of Canada** in the making of decisions that affect the environment;

[...]

- o) apply and enforce this Act in a **fair, predictable and consistent manner**;

(Emphasis added by applicant).

[30] Therefore, this first part of the third remedy is clearly certain to fail.

[31] Furthermore, the second part of this third remedy, as well as the fourth and fifth remedies of the application, lead the applicant to interfere with the Minister's investigation and place his point of view on it and his investigative procedures. The applicant wishes to force the Minister to accept the participation of his experts in the investigation and to compel the Minister to address the findings of his experts. He wants to force the Minister to disclose his investigative process, as well as the names of his investigators and analysts.

[32] As the Minister stated in his written submissions:

[TRANSLATION]

- 42. The applicant is essentially seeking to interfere with and control the investigation process provided for under the CEPA.
- 43. It is clear that the applicant has no right for the Court to make the orders that he is seeking in this respect.

44. There is no provision in the CEPA that allows such intrusions of an individual into an investigation being conducted under the CEPA. There is no provision requiring the respondent [the Minister] to comply with the applicant's requests. On the contrary, the respondent is the person authorized to conduct investigations under the CEPA 1999 and clearly has the discretion to lead his investigation as he deems appropriate. It is to him, not the applicant, that Parliament as entrusted the task of carrying out investigations under the CEPA.

[...]

46. Furthermore, whether it is a matter of administrative¹² or criminal¹³ investigations, the courts have always recognized that a person authorized to conduct an investigation has the power to control the investigation and holds the discretion to lead it as intended, subject to legislative provisions governing that procedure and the rules of natural justice applicable in certain very specific situations for the benefit of the individuals who are affected by the investigation. The investigators are therefore immune from the intervention of individuals who would like to dictate the procedure or interfere in any way in the investigation.

¹² *Guay v. Lafleur*, [1965] S.C.R. 12; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181; *Terminaux portuaires du Québec Inc. v. CUPE*, [1992] F.C.A. No. 327; *Berthiaume v. M.N.R.*, [1998] A.C.I. No. 1067

¹³ *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* [1989] O.J. No. 471; (*Québec Comité de déontologie policière*) v. *Paradis*, [2000] J.Q. No. 5671; *M.L. v. Monty*, [2005] J.Q. No. 8289

[33] For these reasons, it is therefore clear to me that the second part of the third remedy, as well as the fourth and fifth remedies sought by the applicant, are unfounded in law and certain to fail.

[34] Accordingly, for all the foregoing reasons, I find on the basis of *Pharmacia*, above, that the Minister's motion to strike should be allowed with costs, and the application for judicial review filed by the applicant on September 13, 2006, will therefore be struck.

[35] In light of this finding, it is not necessary for me to decide the Minister's other subsidiary grounds, which arise from the procedural and administrative imbroglio that apparently surrounds the applicant's filing of the affidavit on the merits.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1658-06

STYLE OF CAUSE: FRANÇOIS DERASPE
Applicant
and
THE MINISTER OF ENVIRONMENT CANADA
Respondent

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