Federal Court Cour fédérale

Date: 20191120

Docket: T-784-19

Citation: 2019 FC 1473

Ottawa, Ontario, November 20, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

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

Applicants

and

MINISTER OF HEALTH and SYNGENTA CANADA INC.

Respondents

and

CROPLIFE CANADA

Intervener

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion by the Applicants filed October 30, 2019, seeking to strike certain portions of the Memorandum of Fact and Law [Memorandum] of the Intervener, CropLife Canada [CropLife], and certain materials from the Intervener's Book of Authorities

[Authorities]. CropLife was granted leave to intervene in this application for judicial review by Order issued by Prothonotary Tabib on October 4, 2019 [the Intervention Order].

[2] As explained in greater detail below, this motion is granted in part. I agree with the Applicants that portions of the Intervener's Memorandum of Fact and Law exceed the terms on which intervention was granted in the Intervention Order by: (a) relying on new evidence included in the Intervener's Book of Authorities and referenced in footnotes in the Memorandum; and (b) including arguments that CropLife was not granted leave to advance. My Order strikes such evidence from the Authorities and footnotes and strikes the paragraphs of the Memorandum advancing the arguments that exceed the scope of the Intervention Order.

[3] I am not striking the paragraphs of the Memorandum that reference the evidence being struck. Nor am I striking other paragraphs the Applicants argue are unsupported by any evidence at all or represent an effort by CropLife to give evidence through the Memorandum. The parties can argue these points at the hearing of the application, when the Court will have the benefit of the full record on the application.

II. **Background**

[4] The Applicants are the David Suzuki Foundation, Friends of the Earth Canada, Équiterre, and Wilderness Committee. They are all non-governmental organizations that engage in environmental advocacy.

[5] In the application for judicial review underlying this motion, the Applicants challenge a decision by the Pest Management Regulatory Agency [PMRA] dated April 11, 2019 [the Decision] to amend certain registrations for the pest control product thiamethoxam following a re-evaluation under section 16 of the *Pest Control Products Act*, SC 2002, c 28 [the Act]. Specifically, the Applicants challenge the portion of the Decision that delays implementation of these amendments by two years. They seek an order quashing such delay, declaring that the PMRA lacks the jurisdiction to impose such a delay, and declaring that the PMRA's practice of imposing such a delay, pursuant to its *Policy on Cancellations and Amendments Following Re-evaluation and Special Review* [the PMRA Policy] is *ultra vires* the Act. I am scheduled to hear the application on December 5 and 6, 2019.

[6] The Respondents are the Minister of Health, who is responsible for the Act and has delegated this responsibility to the PMRA, and Syngenta Canada Inc, the registrant of thiamethoxam. The Intervener, CropLife, is a trade association representing developers, manufacturers, and distributors of plant science products.

[7] The Applicants unsuccessfully opposed CropLife's intervention motion. All parties sought leave to file responding submissions, which the Court denied in the Intervention Order. Following issuance of the Intervention Order, CropLife filed its Memorandum, setting out the arguments it intends to advance at the hearing of this application, accompanied by its Authorities. The Applicants then filed the present motion, seeking to strike portions of the Memorandum and Authorities on the basis that they exceed the terms of the Intervention Order in three respects. The Applicant's argue that CropLife's Memorandum:

A. contains factual statements unsupported by evidence in the record before the Court, representing an effort to give testimony through the Memorandum and to rely improperly on extraneous materials;

B. contains arguments on issues for which it was not granted leave to intervene; and

C. raises new issues not advanced by any of the parties.

[8] The Applicants originally filed their motion returnable at General Sittings in Toronto on November 5, 2019. Following receipt of the motion materials, CropLife objected to a hearing of the motion on that date on several bases, including counsel's unavailability, the likely length of the motion, and CropLife's position that the motion should be heard at the main hearing of the application. I convened a case management conference on November 1, 2019, and scheduled the motion to be heard at a Special Sitting on November 15, 2019, a date when all parties were available. The Respondents' counsel attended the hearing but did not make submissions.

[9] I explain this procedural history to the motion, because CropLife maintains that the concerns raised by the Applicants about CropLife's Memorandum and Authorities are better addressed at the application hearing. At the hearing of the motion, the parties agreed in the interests of time and efficiency that I would consider and adjudicate this argument as part of my overall decision on the motion, as opposed to ruling on that argument as a preliminary matter, and then proceeding to consider other issues raised on the motion only if that argument failed. As such, notwithstanding that a hearing of the Applicants' motion has taken place, the question

whether the Applicants' substantive concerns about CropLife's filings should be addressed in this decision, or through the main application hearing, remains a live issue.

III. **Issues**

[10] Taking into account the parties' respective arguments, the issues raised by this motion are as follows:

A. Does the Court have the authority to strike portions of CropLife's Memorandum and Authorities?

B. Are the issues raised in the motion *res judicata*?

C. Are the issues raised by the motion best considered at the hearing of the application?

D. Should portions of the Memorandum and Authorities be struck out because they exceed the terms of the Intervention Order?

IV. **Analysis**

A. ***Does the Court have the authority to strike portions of the Memorandum and Authorities?***

[11] CropLife submits the particular sections of the *Federal Courts Rules*, SOR/98-106 [the Rules] upon which the Applicants rely in support of their motion do not afford the Court authority to strike portions of a memorandum of fact and law, particularly in the context of an application rather than an action. While the Applicants advance arguments in response to these

submissions, their principal position is that the Court has the inherent jurisdiction to grant the relief they request. I need not address the parties' respective arguments on particular Rules, as I agree with the Applicants' principal position that the Court has the necessary inherent jurisdiction.

[12] In one of the authorities cited by CropLife, *Ermineskin First Nation v Canada (Attorney General)*, 2006 FCA 423 [*Ermineskin*], the Federal Court of Appeal addressed a motion seeking to strike portions of the appellant's memorandum of fact and law on appeal, on the basis that it advanced a ground of appeal that was not raised in the appellant's notice of appeal. Similar to the present case, the appellant took the position there was no authority under the *Federal Courts Act*, RSC 1985, c F-7, for a motion to strike a memorandum of fact and law. The appellant acknowledged the Court's inherent jurisdiction to strike a memorandum but argued that such jurisdiction should be exercised sparingly.

[13] CropLife relies on *Ermineskin* for Chief Justice Richard's statement at paragraph 14 that he was not prepared to grant the broad order sought by the respondent, to delete references to evidence in the form of documents or reports, as those objections could be raised more appropriately before the Court on the hearing of the appeal. I will consider that portion of the reasoning in *Ermineskin* later in this Analysis. However, CropLife also notes the following statement by Chief Justice Richard at paragraph 12, which I consider to be significant for the jurisdictional question:

> 12 The Court of Appeal should not be called upon to intervene at this stage of the proceedings, except to enforce compliance with any applicable statutory or regulatory provisions, the rules of court and any order that may have been made in the proceeding.

[14] The Court proceeded to strike a paragraph from the appellant's memorandum that advanced the impugned ground of appeal. In arriving at that result, the Court noted the appellant had previously brought a motion seeking to amend its notice of appeal to add that ground. That motion was dismissed. Chief Justice Richard therefore concluded it was appropriate to strike the relevant paragraph from the appellant's memorandum, because it failed to comply with an order of the Court concerning its grounds of appeal.

[15] In my view, *Ermineskin* represents authority that the Federal Courts have inherent jurisdiction to strike portions of a memorandum of fact and law on appeal to enforce compliance with a Court Order. That jurisdiction is invoked by the present motion, where the Applicants seek relief from this Court to strike portions of CropLife's Memorandum to enforce compliance with the Intervention Order.

B. ***Are the issues raised in the motion res judicata?***

[16] CropLife takes the position that the issues raised in this motion are *res judicata*, because they were already decided through the Intervention Order. CropLife asserts that Prothonotary Tabib granted CropLife's motion for leave to intervene without any restrictions and that the present motion represents an effort by the Applicants to re-litigate the intervention motion.

[17] The operative paragraphs in the Intervention Order grant CropLife leave to intervene under Rule 109, to file a memorandum of fact and law and to make oral submissions at the hearing of the application. They also provide that no costs shall be awarded either to or against CropLife, regardless of the outcome of these proceedings, and amend the style of cause to add

CropLife as an intervener. None of these paragraphs expressly places any restrictions upon CropLife's role as an intervener.

[18] However, it is clear from Prothonotary Tabib's reasoning that the intended effect of the Intervention Order was to grant CropLife leave to intervene on the terms it requested in its intervention motion. Even in the absence of such reasoning, I would find it difficult to accept that an order granting intervener status should be read as permitting intervention on terms broader than those requested by the proposed intervener. However, the reasoning in the Intervention Order in the present case made this limit abundantly clear. The Prothonotary noted that CropLife's motion record identified with specificity the issues it intended to address and the position it would take on these issues; she also expressed the Court's satisfaction that these issues did not expand the scope of the issues raised by the application and stated the inclusion of CropLife as an intervener on the terms that CropLife proposed is well circumscribed.

[19] I therefore find no merit to CropLife's argument that the present motion is *res judicata* or an effort by the Applicants to impose restrictions on a previously unrestricted intervention. Rather, this motion raises whether CropLife's Memorandum and Authorities exceed the terms on which it requested and was granted intervention status.

C. ***Are the issues raised by the motion best considered at the hearing of the application?***

[20] CropLife submits the applicable jurisprudence has consistently recognized that interlocutory motions should be the exception in applications. Applications are intended to be

summary processes, and it is usually unnecessary, expensive, and duplicative for motions, including motions to strike, to be heard on an interlocutory basis in advance of the hearing of an application. I agree with CropLife's explanation of these principles, which are supported by the authorities CropLife cites (see *Canada (Justice) v Khadr*, 2008 SCC 29 [*Khadr*] at paras 10, 13, 17; *Ermineskin* at para 14; *AstraZeneca Canada Inc v Apotex Inc*, 2003 FCA 487 [*AstraZeneca*] at para 12). The question for the Court's consideration is whether this motion presents circumstances that, taking into account the applicable authorities, warrant departure from the usual practice.

[21] In my view, the content of the Invention Order is relevant to the analysis in this particular case. As CropLife notes, during the intervention motion the Applicants and Respondents sought leave to file submissions in response to CropLife's submissions, in the event intervention was allowed. Prothonotary Tabib was not satisfied that such leave was necessary, concluding the time scheduled for the hearing of the application should be sufficient to allow both the Applicants and Respondents to address, as necessary, the arguments CropLife may make in its memorandum of fact and law. However, the Prothonotary's analysis of this point concludes with the following paragraph:

> In the event CropLife's memorandum of fact and law, when served, is found to truly raise complex new issues that would justify a written response ahead of the hearing, the parties are, as always, at liberty to seek appropriate relief from the hearing Judge.

[22] This paragraph of the Intervention Order contemplates the possibility of a party bringing an interlocutory motion in advance of the main hearing, seeking an opportunity to file further written material prior to the hearing. The present motion by the Applicants can be characterized

in part as such a motion. In the event the Court does not strike the impugned portions of CropLife's Memorandum and Authorities, the motion seeks alternative relief granting the Applicants leave to file additional materials and a reply memorandum. This aspect of the motion militates in favour of the motion being addressed, at least in part, in advance of the main hearing, as it would obviously be impossible for the Court to grant that alternative relief if the motion was not considered until that hearing.

[23] Such an approach is also consistent with the authorities. In *AstraZeneca*, the Federal Court of Appeal explained that an exception may be made to the usual practice, where the moving party would be prejudiced by leaving the matter for disposition by the trier of fact. The Court reasoned that, if the admissibility of evidence sought to be struck was deferred to the main hearing in that case, the moving party would be prejudiced by attending the hearing without knowing whether that evidence would be included and without being able to respond thereto. In my view, that analysis applies to the Applicants' request to strike certain materials CropLife included in its Authorities and footnotes. Such materials include PMRA guidance documents and comments submitted by CropLife to the PMRA during public consultation related to the Decision.

[24] However, I have also taken into account the reasoning of the Supreme Court of Canada in *Khadr*, where the appellants sought to strike portions of the facta of the respondent and interveners, submitting there was an insufficient factual basis for the arguments advanced therein. The Supreme Court rejected this motion, based in part on the fact that there was a pending fresh evidence motion, but also based on the following analysis (at para 10):

> 10 The alleged lack of a factual basis for these arguments is not a reason to strike out paragraphs from the factums. The appellants may argue on the main appeal that the impugned arguments of the respondent and interveners should fail for an insufficient factual basis.

[25] I conclude that I should proceed to consider the Applicants' motion on its merits, but I will return to the principles derived from the above authorities to consider whether portions of the requested relief should be left to the application hearing.

D. ***Should portions of the Memorandum and Authorities be struck out because they exceed the terms of the Intervention Order?***

[26] As noted above, the Applicants seek to strike portions of the Memorandum and Authorities on the basis that they exceed the terms of the Intervention Order in three different respects. I will address each of these separately.

(1) Factual Statements Unsupported by Evidence on the Record

[27] The Applicants argue that CropLife's Memorandum contains factual statements unsupported by evidence in the record before the Court, representing an effort to give testimony through the Memorandum and to rely improperly on PRMA guidance documents included in their Authorities, as well as CropLife's submitted comments referenced in footnote 30 of the Memorandum. The Applicants focus most significantly upon the role of the PRMA guidance documents, which includes five documents promulgated by PRMA between 2003 and 2019. CropLife describes these documents as outlining the application a registrant must complete and submit upon receiving a re-evaluation decision; the PRMA's service standard for processing

such an application; how the PRMA processes the application; and the process for submitting and reviewing changes to an approved product label.

[28] CropLife wishes to rely on these documents to support its position in the main application that, if the Act were interpreted as the Applicants argue, so as to restrict the PMRA's authority to delay the implementation of an amendment, this interpretation would result in serious adverse practical implications for CropLife's members, agricultural growers, and other users of pest control products. CropLife will be arguing that the amendment implementation process is complex and time-consuming, and absurd results will follow if the PMRA is not able to delay the implementation to allow such process to run its course. CropLife submits the guidance documents, which provide details of the implementation process, are central to providing the Court with a full picture of the practical impacts of different interpretations of the Act.

[29] As a preliminary point, I note that CropLife's counsel identified at the hearing of this motion that one of the guidance documents (Regulatory Directive DIR2017-01, entitled "Management of Submissions Policy", dated March 8, 2017, and found at tab 15 of its Authorities) is referenced in the PMRA Policy that is being challenged, in part, in this application for judicial review. On that basis, the Applicants' counsel advised that they were withdrawing their objection to CropLife's reliance on that particular guidance document.

[30] With respect to the other four guidance documents (found at tabs 13, 14, 19 and 20 of the Authorities) and CropLife's submitted comments (found at footnote 30 of the Memorandum), the Applicants submit CropLife's inclusion of these documents represents an improper attempt to

add evidence to the record before the Court. That is, the documents are unsupported by an affidavit and in contravention of the Intervention Order, which did not permit CropLife to file evidence.

[31] CropLife's position in response is that the Court should take judicial notice of these policies. It submits the guidance documents constitute legislative facts, i.e. facts that establish the purpose and background of legislation. CropLife notes the usual vehicle for reception of legislative facts is judicial notice, which requires that facts be so notorious or uncontroversial that evidence of their existence is unnecessary (see *Public School Boards' Association of Alberta v Alberta (Attorney General)*, 2000 SCC 2 [*School Boards' Association*] at para 5). It also asserts that legislative facts are subject to less stringent admissibility requirements than adjudicative facts, which concern the immediate parties (see *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1099).

[32] CropLife relies in particular upon the recent decision in *Robinson v Canada (Attorney General)*, 2019 FC 876 [*Robinson*] at paragraphs 52 to 54, in which Justice Gascon took judicial notice of a fisheries licensing policy underlying a decision of which the applicant sought judicial review. However, as the Applicants point out, Justice Gascon identified the explanation by the Federal Court of Appeal in *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 [*Leahy*] at paragraph 143, that courts cannot normally take judicial notice of policies or instructional documents. Rather, if such policies, documents, or administrative guidelines are relevant, they need to be treated similarly to other facts and will normally have to be identified in and appended to a supporting affidavit in order for the Court to consider them. Justice Gascon

then considered the circumstances in which the court may take judicial notice of facts. Taking into account those principles, the fact that the relevant policy and its contents were not contested in that particular case, and the agreement expressed by counsel for both parties that the Court could take judicial notice of the policy, Justice Gascon was satisfied that he could do so.

[33] The Applicants argue, and I agree, that *Robinson* is distinguishable from the facts of the present case. Most significantly, the circumstances differ because the Applicants oppose the Court taking judicial notice of the policy documents upon which CropLife wishes to rely. In the absence of the agreement between the parties underlying the decision in *Robinson*, I consider *Leahy* to be the more applicable authority.

[34] The Applicants also note the Supreme Court's explanation in *School Boards' Association* that the concept of a legislative fact does not provide an excuse to put before the Court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested. The Applicants note that one of policies upon which CropLife wishes to rely is labelled "Archived", suggesting that it may no longer be current. They argue that, at this stage in the proceeding, they would have no opportunity to test or respond to the evidence represented by the policies.

[35] I find these arguments compelling. While I do not understand the Applicants to be arguing the impugned guidance documents are not accurate copies of policies that either exist or existed at some point in time, the Applicants have no opportunity to test the currency of the policies or to explore or present other evidence relevant to the facts CropLife wishes to establish

through the policies, i.e. the process for implementation of an amendment following a re-evaluation under the Act.

[36] Arguably, the Applicants could be afforded such an opportunity through the alternative relief they have raised in this motion, if the Court declined to strike the policies from the Authorities and instead afforded the Applicants an opportunity to assemble and submit evidence in response, potentially with an adjournment of the impending hearing dates, if required. However, such a result would not be consistent with the terms on which CropLife sought and was granted intervener status.

[37] It is clear that CropLife is entitled to present arguments as to adverse practical implications for CropLife's members, agricultural growers, and other users of pest control products if the Act were interpreted as the Applicants argue. Its intervention motion expressly raised this point as one of the topics on which it proposed to make submissions. However, its written representations in support of that motion also expressly stated that no additional evidence would be filed. In the Intervention Order, Prothonotary Tabib referred to the role of evidence in CropLife's intervention as follows:

> […] CropLife's ability to make submissions as to the practical effects of a particular interpretation of the Act might be constrained by the absence of an evidentiary record; however, the Court does not doubt that CropLife's expertise and experience in relation to the statute at issue will enable it to make useful submissions as to the potential impact and effects of a given interpretation of the Act that could shed light on the legislative purpose, without having to introduce evidence or having to "smuggle in" extraneous materials under the guise of authorities.
>
> [Emphasis added]

[38] The Prothonotary's reference to not smuggling in extraneous materials under the guise of authorities is consistent with the point expressed by the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v Zaric*, 2016 FCA 36: recent cases suggest parties moving to intervene should be barred where they intend to add controversial evidence to the record by smuggling extraneous materials as submissions in their memoranda, or as "authorities" in their books of authorities, or by making factual assertions in the hope the Court will improperly take judicial notice of them (at para 14).

[39] It is clear the Intervention Order does not permit CropLife to expand the evidentiary record. Adding the four PMRA guidance documents that remain at issue, and CropLife's submitted comments, would represent such an expansion. Returning to *Ermineskin*, I note CropLife's argument that the Court in that case declined to strike from the appellant's memorandum references to evidence in the form of documents or other reports, preferring to leave those objections to the hearing of the appeal. However, the Court struck the portion of the memorandum necessary to enforce compliance with a previous Court order. In my view, the reasoning in *Ermineskin* supports the conclusion that the Court should strike the four policies from CropLife's Authorities.

[40] In arriving at that conclusion, I am conscious of CropLife's position that striking these documents would deprive it of the ability to offer submissions it was granted leave to present, as to the practical effect of restricting the PMRA's ability to delay implementation of an amendment. However, there is no inconsistency between my conclusion and the Intervention Order, as Prothonotary Tabib expressly noted the possibility that such submissions would be

constrained by the lack of an evidentiary record. Moreover, I note Croplife's submission on this motion that the statements in its Memorandum, which the Applicants seek to strike in conjunction with the four policies in the Authorities, flow by and large from the Act itself and regulations made thereunder. CropLife asserts that, while some of these statements reference the four policies in footnotes, this is intended to be illustrative and the statements are not dependent on the policies. If Croplife can support its submission as to the practical effects of the legislative interpretation argued by the Applicants, relying on the Act and regulations, it will not be unduly inhibited by the striking of the policies.

[41] This brings me to the question whether to strike the paragraphs of the Memorandum which the Applicants argue containing factual statements unsupported by evidence in the record before the Court. These are paragraphs 18-20, 25-26, and parts of paragraphs 28, 30, 33 and 34. In keeping with the reasoning in *Khadr*, I decline to grant this relief on an interlocutory basis. Consistent with CropLife's submission on the motion, some of these paragraphs reference not only the four guidance documents and the submitted comments, but also the Act, the regulations, and the PMRA Policy, which are part of the record and central to this application, as well as the Management of Submissions Policy, the inclusion of which the Applicants no longer oppose. It will remain available to the Applicants to argue at the application hearing that there is insufficient support in the record for CropLife's submissions. However, it is preferable for the Court to make any such determination once it has the benefit of the full record following the hearing of the application.

[42] Referring specifically to paragraphs 28, 30, 33, and 34, I note the impugned portions of these paragraphs do not rely upon the four guidance documents; rather, the Applicants argue these statements are unsupported by any evidence at all, or they represent an effort by CropLife to give evidence through the Memorandum. Obviously, it is not available to CropLife to give evidence through its Memorandum. If the impugned statements in the Memorandum are properly characterized as an effort to give evidence, they will not be taken into account in deciding the application. As with the paragraphs that reference the policies, in my view it is better left to the hearing to assess, with the benefit of the full record, whether the impugned statements represent an inappropriate effort to give evidence, as opposed to argument— and if the latter, whether any necessary factual foundation for the argument exists.

[43] In conclusion on this component of the motion, my Order will strike the four guidance documents at issue from the Authorities, as well as the references to those policies and the submitted comments from the footnotes of the Memorandum. However, I will not strike the impugned paragraphs or portions thereof in the Memorandum. As the Applicants have prevailed only in part on this aspect of its motion, I have considered whether it is appropriate to grant the alternative relief they claim, i.e. leave to file additional materials and a reply memorandum. I decline to grant that relief. There is no new evidence to which the Applicants must respond and, adopting the same reasoning as in the Intervention Order, the oral hearing on the merits of this application will afford the Applicants sufficient opportunity to respond to the paragraphs in the Memorandum I have declined to strike.

(2) Arguments on Issues for which CropLife was not Granted Leave to Intervene

[44] Under this heading, the Applicants seek to strike paragraphs 39-40, 46-50, 51 (in part), and 52-57 of CropLife's Memorandum. In these paragraphs, CropLife advances arguments to the effect that the PMRA has implied authority under the Act to set implementation timelines for amendments following a re-evaluation, including arguments as to how certain provisions of the Act support that interpretation. The Applicants submit CropLife 's intervention motion did not seek leave to advance arguments of this nature and that such arguments therefore exceed the terms of the Intervention Order. They note CropLife's Notice of Motion sought leave to present submissions on only the following three topics:

a) the very real and serious practical implications to CropLife's members, agricultural growers, and other users of pest control products of adopting a narrow view of the PMRA's authority to delay amendment implementation, and the absurd results and unworkable incoherence between the Act and its regulations that would result;

b) the need for the notions of "risk" and "harm" at s. 2(2) of the Act to be defined narrowly and in a manner consistent with the scheme and purpose of the Act to avoid the practical implications mentioned above;

c) the PMRA's expertise and the deference owed to its interpretation of the Act, its home statute, and its assessment of risk in a given case.

[45] CropLife responds that the Court should look beyond its Notice of Motion, considering both its written representations on the motion and the Intervention Order itself, to understand the terms on which it was granted leave. In relation to the first topic identified in its Notice of

Motion, I find little substantive difference between CropLife's articulation of its intended submissions in its Notice of Motion and its articulation of same in its written representations on the motion. It also points to the following language from the Intervention Order (set out previously in these Reasons, but now with different emphasis):

> […] CropLife's ability to make submissions as to the practical effects of a particular interpretation of the Act might be constrained by the absence of an evidentiary record; however, the Court does not doubt that CropLife's expertise and experience in relation to the statute at issue will enable it to make useful submissions as to the potential impact and effects of a given interpretation of the Act that could shed light on the legislative purpose, without having to introduce evidence or having to "smuggle in" extraneous materials under the guise of authorities.
>
> [Emphasis added]

[46] CropLife argues that it is apparent that it sought and was granted leave to address the statutory interpretations offered by the parties, including making submissions in support of alternative interpretations that would avoid the absurd results it says would flow from the interpretation proposed by the Applicants. I find neither CropLife's motion record nor the Intervention Order supports this conclusion. Neither contemplates CropLife making submissions, in relation to the first topic described above, as to how the provisions of the Act should be construed so as to support an implied authority for the PMRA to set implementation timelines for amendments. Instead, it was granted leave to make submissions as to the effect that a given interpretation of the Act would have upon its members and other industry participants. It does not follow therefrom that it is entitled to make submissions as to how the provisions of the Act support a particular interpretation.

[47] CropLife also relies on the third topic on which it sought (and was granted) leave to make submissions. It notes that its written submissions in relation to that topic on the intervention motion explained its intentions as follows:

> 20 CropLife and its members are required to deal with the PMRA on a regular basis and are uniquely positioned to speak to its expertise in assessing risk and in interpreting its home statute. The pest control product industry relies on the PMRA for consistent and clear guidance with respect to the interpretation and application of the Act and its regulations. If courts are permitted to regularly interfere with the PMRA's exercise of its authority, this will undermine the PMRA's statutory mandate and will result in the unpredictable application of the Act, in a manner contrary to its purposes. As a representative of the whole of the pest control industry, CropLife has specialized knowledge of the Act and may speak to the manner in which its text, context and purpose affirm the PMRA's expertise to decide questions of fact and law.
>
> [Emphasis added]

[48] While this submission refers an intention to speak to the Act's "text, context and purpose", it relates to CropLife's argument as to the PMRA's expertise and the deference that should therefore be afforded to the PMRA's interpretation of the Act. It does not refer to an intention to advance arguments, relying on the text of the Act, to support a particular interpretation of the Act.

[49] CropLife refers the Court to the statement by the Supreme Court in *Khadr* that interveners must have some latitude to approach legal arguments from a perspective different from the parties, given the requirement that interveners present a new and different perspective (at para 18). While I accept that principle, the conclusion in *Khadr* that the interveners were not raising new issues was based on the Court's analysis that the interveners' arguments were the

arguments they said they would make when they sought leave to intervene. This is not the case in the present matter.

[50] I agree with the Applicants' position that the impugned portions of the Memorandum advance arguments outside the scope of CropLife's permitted intervention under the Intervention Order. Consistent with the reasoning in *Ermineskin*, I consider it appropriate to strike these paragraphs from the Memorandum.

(3) New Issues not Advanced by the Parties

[51] Finally, the Applicants seek to strike paragraphs 60-63 and 64 (in part) of CropLife's Memorandum. In these paragraphs, CropLife advances arguments to the effect that the PMRA has explicit authority under the Act to set implementation timelines for amendments following a re-evaluation, based on a particular construction of s 21(3) of the Act. This is not an argument that either of the Respondents has advanced in support of the Decision.

[52] At the hearing, the parties expressed their respective positions on whether CropLife's proposed construction of s 21(3) represents a new issue or merely a new argument on an issue that has already been raised by the other parties. In this particular case, nothing turns on this characterization. Even if CropLife's proposed s 21(3) construction is better characterized as an argument on an existing issue, it does not fall within the areas for which CropLife sought and was granted leave to intervene. As with the other paragraphs that advance arguments outside the scope of CropLife's permitted intervention, I consider it appropriate to strike these paragraphs from the Memorandum.

V. **Costs**

[53] The Intervention Order provides that no costs shall be awarded either to or against CropLife regardless of the outcome of these proceedings. However, at the hearing of this motion, the Applicants and CropLife each took the position that this motion falls outside what was contemplated by the Intervention Order with respect to costs and that, if they prevailed on the motion, a costs award in their favour was appropriate. However, each of the parties also requested a further opportunity to make submissions on costs before any costs were awarded against them. My Order will afford each of the parties a short period of time to make brief written submissions on costs.

ORDER IN T-784-19

THIS COURT ORDERS that:

1. The Applicants' motion is granted in part.

2. The documents found at tabs 13, 14, 19 and 20 of the Intervener's Book of Authorities filed in support of this application for judicial review are hereby struck. References to those documents in footnotes in the Intervener's Memorandum of Fact and Law filed in support of this application for judicial review are also struck.

3. The following are struck from the Intervener's Memorandum of Fact and Law filed in support of this application for judicial review:

    a. footnote 30;

    b. paragraphs 39-40, 46-50, 52-57, and 60-63;

    c. in paragraph 51, the words, "A similar distinction should be made between the effective date of the amendment and the power to impose a transitional period for labelling and other requirements flowing from the amendments. A failure to make this distinction is not only not in keeping with the overall scheme of the Act, it also leads to absurd results."; and

    d. in paragraph 64, the words, "Subsection 21(3) is only concerned with whether a delay to the effective date of amendment would pose health and environmental risks in and of itself."

4. The Applicants shall serve and file written submissions on costs of this motion, limited to two pages in length, within two days of the date of this Order. The Intervener shall serve and file written submissions on costs of this motion, limited to two pages in length, within two days of the service of the Applicants' submissions.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-784-19
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ÉQUITERRE, and WILDERNESS COMMITTEE v THE MINISTER OF HEALTH and SYNGENTA CANADA and CROPLIFE CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2019
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	NOVEMBER 20, 2019

APPEARANCES:

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Andrea Bourke Karen Lovell	FOR THE RESPONDENTS (Representing Minister of Health)
John P. Brown Stephanie Sugar Leah Ostler	FOR THE RESPONDENTS (Representing Syngenta Canada Inc.)
Benedict Wray	FOR THE INTERVENOR (Representing CropLife Canada)

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