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Energy & Environmental Law

December 16, 2019

FEDERAL COURT DISMISSES DEMAND FOR INVESTIGATION OF CEPA VIOLATIONS RELATING TO DIESEL VEHICLES EQUIPPED WITH DEFEAT DEVICES

By Stanley Berger

In *Gray and Malas v. Attorney General of Canada* 2019 FC 1553 the Federal Court dismissed an application for judicial review of two decisions by the Minister of Environment and Climate Change.

The Minister's delegate had refused to open investigations into allegations made by the applicants relating to the importation and sale in Canada of Volkswagen, Audi and Porsche diesel vehicles equipped with prohibited defeat devices intended to produce fraudulent results when the vehicles underwent emission tests. The applicants were frustrated by the time it was taking for the Ministry to pursue its investigations and the lack of information concerning the investigations' progress.

Their demand for an investigation which was already underway by the Ministry was not simply a publicity stunt. If an investigation was required following an application under the *Canadian Environmental Protection Act* (C.E.P.A.), section 19 of the Act required the Minister to report to the applicants every 90 days both on the progress of the investigation and what if any action was taken or proposed. Further the minister would have to estimate the time required to complete the investigation or to implement the action taken or proposed. Further, under section 21, if the Minister chose to discontinue the investigation she would be required to prepare a report in writing describing the information obtained, the reasons for discontinuation and a copy of the report would have to be sent to the applicants as well as those whose conduct was investigated.

The applicants argued that under section 18 of C.E.P.A. the Minister had no discretion whether to investigate the allegations pursuant to the procedures under the Act since section 18 employed the mandatory language "shall investigate". The Minister, according to the applicants, did retain a discretion under section 18 to decide which matters were necessary to determine the facts of the offence alleged by the application.

The Court rejected this interpretation and agreed with the Minister. Citing *Groia v Law Society of Upper Canada* 2018 SCC 27 the Court reasoned that C.E.P.A. was the Minister's home statute and the Minister could draw on her experience of administering her home statute in a complex regulatory context where she is best placed to determine the operational consequences of her interpretation. Her interpretation was entitled to deference from the Court and was presumptively reviewable for reasonableness. (at par.24)

Stanley D. Berger
Partner

t: 416.864.7626
sberger@foglers.com

Tom Brett
Partner

t: 416.941.8861
tbrett@foglers.com

Albert M. Engel
Partner

t: 416.864.7602
aengel@foglers.com

In that regard, the Court deferred to the Minister's interpretation of s.18 concluding that the words "shall investigate all matters that the Minister considers necessary" gave the Minister the discretion to determine if there was actually a matter requiring investigation. In this case, "Where the subject is already under investigation, it is reasonable to conclude that repetition would waste governmental resources without providing any gain in environmental protection" (at par.40)

While the deference paid to specialized administrative bodies in interpreting their legislation is really nothing new, the right of private Canadian residents to apply to the Minister for investigation of violations under C.E.P.A. can instigate or speed up enforcement action. It was reported earlier this week that a settlement of the Canadian connection to the vehicle emissions scandal was imminent. It's unclear whether the demand for an investigation or the judicial review precipitated those settlement discussions.