Federal Court Cour fédérale

Date: 20231106

Docket: T-121-22

Citation: 2023 FC 1471

Ottawa, Ontario, November 6, 2023

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

SAFE FOOD MATTERS INC. AND PREVENT CANCER NOW

Applicants

and

ATTORNEY GENERAL OF CANADA AND MINISTER OF HEALTH

Respondents

and

JUSTICE FOR MIGRANT WORKERS CROPLIFE CANADA

Interveners

JUDGMENT AND REASONS

I. Introduction

[1] This case concerns two applications for judicial review of two decisions by the Pest Management Regulatory Agency [PMRA] that were adopted by the Minister of Health [Minister]. The first application concerns a decision dated May 13, 2021 [First Decision]

[judicial review sought in T-956-21]. The second decision is dated December 21, 2021 [Second Decision] [judicial review sought in T-121-22]. Both Decisions cancelled all registrations of a pest control product called chlorpyrifos. However, and to deplete stocks, both decisions allowed the continued use of chlorpyrifos products during a phase-out period.

[2] Cancellations followed by use during phased-out are specifically authorized by paragraph 21(5)(a) of the *Pest Control Products Act*, S.C. 2002, c. 28 [*Act*].

[3] The last permitted use of chlorpyrifos is December 10, 2023 under this phase-out.

[4] The two proceedings were consolidated in this single style of cause by Associate Judge Horne who case managed these matters leading to their hearing. The Court is grateful for his work in this regard.

[5] The hearing took place over three days in Toronto, and considered a record of 17 volumes of evidence and authorities. The memorandum of the Applicants was literally crammed with very numerous references to the very large record, including hundreds of footnotes (172 in the Applicants' Memorandum). Indeed the Applicants had so many footnotes and citations to the record they had no room for their Order Sought: the Applicants referred the Court to their record.

[6] For the most part, the Applicants challenged either the approach taken by this expert decision-maker (the PMRA) to construing and applying its home statute to the record, or invited the Court to review and reweigh the scientific and other data considered by the PMRA, or both.

[7] The Applicants faces two challenges in this respect. In my view these challenges proved unsurmountable.

[8] First, expert decision-makers such as the PMRA are entitled to deference on judicial review in the manner in which they construe and apply their home statutes. Numerous decisions of the Supreme Court of Canada establish the law in this regard.

[9] Second, and with respect, reweighing and reassessing evidence is generally not the role of courts on judicial review. Our job is not to decide whether administrative decisions are "right or wrong", although that is a popular misconception. Instead, on judicial review the Federal Court is required to determine if the decision is reasonable. Many of the errors argued by the Applicants involve factual issues allegedly not considered: I found not merit in them. Perfection is not the standard for administrative reasons which are to be considered holistically and in context. Failure to deal with every evidentiary and other issue arising in a 15 volume record does not constitute reviewable error.

[10] What constitutes a reasonable decision on a reasonableness review has received a great deal of attention from the Supreme Court of Canada and the Federal Court of Appeal. A reasonable decision is defined as one that meets the tests of justification, transparency and intelligibility set out by these appellate courts. And for the purposes of this judgment, they instruct this Court generally that it must not engage in reweighing and reassessing the evidence, and that it must defer to the manner in which this expert decision maker construes and applies its home statute (the *Act*) to the record before it.

[11] In this connection, the PMRA is an expert decision-maker when acting in relation both to its decision to cancel all uses of chlorpyrifos (which was generally accepted and was not the focus of this proceeding) and its determination respecting the phase-out period given cancellation (the focus of this case).

[12] I should note the Minister or their delegate made both Decisions, but they did so on the advice and recommendation of the PMRA. Therefore the terms Minister, PRMA, Health Canada and Respondent are used interchangeably in these Reasons.

II. Background

[13] For the last almost quarter century, Health Canada has been phasing out chlorpyrifos containing pest control products. This process has been going on elsewhere around the globe as well.

[14] In 2000, Health Canada prohibited nearly all residential uses of products containing chlorpyrifos, restricted some agricultural uses, and required new safety labelling.

[15] In 2003, additional agricultural uses chlorpyrifos were made subject to further restrictions.

[16] In 2007, Health Canada implemented a number of further mitigation measures in relation to both agricultural and forestry uses to address environmental and occupational concerns.

[17] For the purpose of background, I accept the Respondent's outline of the various assessments of chlorpyrifos conducted by the PMRA beginning in 2000:

> a) Following a review in 2000, PMRA phased out nearly all commercial and domestic residential uses of products containing chlorpyrifos;
>
> b) While the 2000 review did not focus on agricultural uses, PMRA discontinued use on tomatoes, lowered the maximum residue levels for imported apples and grapes (chlorpyrifos is not registered for use on those crops in Canada) and added a label requirement to address the safety of agricultural workers;
>
> c) In 2003, PMRA conducted a review of the agricultural uses of chlorpyrifos. While PMRA did not find any unacceptable risk to human health, PMRA proposed additional measures to address worker safety and the environment, including a reduction in crop uses and number of applications per season and increased buffer zones;
>
> d) In 2007, PMRA implemented mitigation measures following consultations it undertook on the 2003 proposed decision. PMRA discontinued, reduced or modified several uses to address environmental and occupational concerns; and,
>
> e) In 2019, PMRA published an update to its risk assessments undertaken (and related mitigation measures implemented) in 2003 and 2007, focusing on environmental risks. PMRA issued a final decision in 2020. As a result, […] many remaining uses of chlorpyrifos were cancelled as PMRA was not satisfied that risks to the environment were acceptable.

[18] By virtue of the Second Decision dated December 21, 2021, Health Canada prohibited all Canadian manufacturing and importation of chlorpyrifos, effective that day namely December 21, 2021.

[19] Also by virtue of the Second Decision, all chlorpyrifos registrations were cancelled, all chlorpyrifos product was ordered phased out, and the last permitted use in Canada of all chlorpyrifos products was set at December 10, 2023.

[20] Central to the Second Decision - which is the focus of these Reasons - are the following findings by the PMRA addressing risk during the two-year phase-out period:

> a) Food surveillance data from Canada and the United States shows a very low frequency of chlorpyrifos detection and never over the maximum residue limit;
>
> b) Dietary exposure is expected to decrease given declining sales of chlorpyrifos products in Canada and decreasing use internationally;
>
> c) The recent assessment by the United States Environmental Protection Agency [USEPA] reached the same conclusion as PMRA's 2000 dietary risk assessment, based on more recent health information and a broader use pattern in the United States;
>
> d) The human health reference values for sensitive sub-populations utilized by Health Canada in 2000 are either aligned with or more protective than those used in the most recent assessments of the Australian Pesticide and Veterinary Medicine Authority [APVMA] and USEPA, both of which are based on more recent health information and published scientific literature; and
>
> e) There are no reports of deaths or serious injuries in relation to chlorpyrifos reported in Canada.

[21] In my respectful view, the Second Decision is reasonable in that it is justified, transparent and intelligible as required by jurisprudence from the Supreme Court of Canada and Federal Court of Appeal. This Court respectfully defers to the PMRA in its interpretation and application to the record of its home statute, namely the *Act*.

[22] The First Decision will not be considered because it is moot: it is an administrative matter that was intentionally superseded by the Second Decision that doesn't warrant further consideration given principles of mootness and judicial economy.

[23] Therefore as set out herein, the applications for judicial review in respect of both the First and Second Decisions will be dismissed.

III. Additional facts

A. *Chlorpyrifos*

[24] Chlorpyrifos is a useful but toxic organophosphate pesticide first registered for agricultural use in Canada in 1969. Chlorpyrifos has been used successfully to control insects in various settings and is currently applied to a wide variety of crops including canola, flax, lentil, corn, strawberry, celery, cucumber, green peppers and others. Its application may result in human exposure to chlorpyrifos in food and drinking water, and skin contact with agricultural workers (migrant and domestic) particularly those who handle and apply it.

[25] Organophosphate pesticides were originally developed as nerve agents during World War II. Chlorpyrifos as already noted is toxic; in particular it has the potential to inhibit acetylcholinesterase, an enzyme necessary for the proper functioning of the nervous system. It has the potential to affect brain development by altering several cellular processes. In occupational settings, exposure to chlorpyrifos may occur during handling prior to, during and after its application. Exposure occurs through oral, inhalation or derma (skin contact) routes.

B. *Re-evaluation process: section 16 of the Act*

[26] As per section 16 of the *Act*, the PMRA must initiate a re-evaluation of every registered pesticide product no later than 16 years from the most recent major decision affecting that product's registration. Re-evaluations reassess the available scientific information and consider whether the product continues to pose an acceptable risk.

[27] Following a re-evaluation, the PMRA must confirm the registration of the product if it deems the health and environmental risks acceptable. If not, PMRA must amend the registration to bring permitted matters relating to the product within acceptable risk, or cancel the registration.

[28] If the PMRA cancels the registration of a pesticide product (as it did here), it is specifically authorized by paragraph 21(5)(a) to allow continued possession, handling, storage, distribution, and use of stocks during a phase-out period, subject to conditions the PMRA deems necessary to carry out the purpose of the *Act*.

[29] This is what happened in this case. The re-evaluation of chlorpyrifos started some time before the Decisions were made. Indeed, in a decision dated December 10, 2020, the PMRA reported that re-evaluation of chlorpyrifos in Canada was "ongoing." It appears re-evaluations of chlorpyrifos started at least before or around January 2016, according to meeting notes: A.E. vol. 13, CTR 400, p. 121.

[30] As set out in more detail below, in December 2020, the PMRA released a re-evaluation decision based on an updated scientific environmental risk assessment. This led the PMRA to cancel some chlorpyrifos registrations. The PMRA also prohibited almost all agricultural uses due to environmental risks of concern.

[31] PMRA's further ongoing re-evaluation resulted in both the First and Second Decisions: each resulted from the registrants' failure to supply data requested in the re-evaluations. The Second Decision cancelled the registrations for all chlorpyrifos. In addition, and to deplete remaining stockpiles and minimize potential risks associated with disposing of existing products all at once, the PMRA authorized a phase-out period during which the continued use, possession, handling, storage, and distribution of chlorpyrifos products could continue until December 10, 2023.

[32] The PMRA's policy titled *Cancellations and Amendments Following Re-evaluation and Special Review* [Cancellation Policy], contemplates a three-year timeline to phase out pesticide products.

IV. Decisions under reviews

[33] On May 13, 2021, the PMRA released a decision entitled "Update on the Re-evaluation of Chlorpyrifos" [First Decision]. The First Decision cancelled all remaining registrations of pest control products containing chlorpyrifos, and pursuant to paragraph 21(5)(a) of the *Act*, ordered all existing stocks of chlorpyrifos products to be phased out within the following timelines:

- Last date of sale by registrant: 10 December 2021;
- Last date of sale by retailers: 10 December 2022; and
- Last date of use for all chlorpyrifos uses/products: 10 December 2023.

[34] The First Decision provided that the registrations were cancelled because of the registrants' failure to fulfill mandatory data requirements under the *Act*. That is, data was requested by the PMRA but not provided, contrary to paragraph 19(1)(a) of the *Act*.

[35] This Applicants disagreed with the First Decision taking the position it was unreasonable because of inadequate reasons. The Applicants filed an application for judicial review dated June 14, 2021, in Court file T-956-21.

[36] In October 2021, the Respondent proposed to set aside both the cancellation and phase-out decisions in the First Decisions by motion to the Court. The Applicants declined to consent.

[37] On December 21, 2021, the PMRA released a new decision, "Cancellation of remaining chlorpyrifos registrations under paragraph 20(1)(a) of the Pest Control Products Act" [Second Decision].

[38] The Second Decision was expressly designed to replace the First Decision.

[39] The Second Decision cancelled all remaining registrations for chlorpyrifos pest control products effective December 21, 2021, and established a phase-out period terminating all use by December 10, 2023.

[40] The phase-out allowed users and registrants to deplete existing stocks of chlorpyrifos products.

[41] The Second Decision acknowledged the First Decision did not contain reasons for applying the specific phase-out period, i.e., the PMRA essentially acknowledged submissions of the Applicants in their first application (T-956-21).

[42] The Second Decision relied upon paragraph 21(5)(a) of the *Act* which allows Health Canada to permit the continued use of cancelled products during a phase-out period. This meant they remain authorized for continued use, possession, handling, storage, and distribution, during the phase-out period, subject to necessary conditions for carrying out the purpose of the *Act.*

[43] No one doubts a phase-out is what paragraph 21(5)(a) authorizes when a registration is cancelled, as in this case.

[44] Specifically, in terms of a decision to cancel a registration, Parliament gave the Minister three options: a phase–out under paragraph 21(5)(a), a recall under paragraph 21(5)(b) or a seizure under paragraph 21(5)(b). Paragraph 21(5)(a) of the *Act* in context provides:

Continued possession, etc., of existing stocks	**Produits existant à la date de révocation**
21(5) When cancelling the registration of a pest control product under this section or any other provision of this Act, the Minister may	**21 (5)** Lorsqu'il révoque l'homologation, en application du présent article ou de toute autre disposition de la présente loi, le ministre peut :
(a) allow the continued possession, handling, storage, distribution and use of stocks of the product in Canada at the time of cancellation, subject to any conditions, including disposal procedures, that the Minister considers necessary for carrying out the purposes of this Act;	**a)** soit, aux conditions qu'il estime nécessaires pour l'application de la présente loi — notamment quant à la façon d'éliminer le produit — autoriser que se poursuivent la possession, la manipulation, le stockage, la distribution ou l'utilisation des stocks du produit se trouvant au Canada à la date de la révocation;
(b) require the registrant to recall and dispose of the product in a manner specified by the Minister; or	**b)** soit obliger le titulaire à faire le rappel du produit et à procéder à sa disposition de la manière qu'il précise;
(c) seize and dispose of the product.	**c)** soit confisquer le produit et procéder à sa disposition.

[45] The Second Decision expressly relies on paragraph 21(5)(a). It also imposes conditions the Minister considers necessary for carrying out the purposes of the *Act*. The Second Decision provides the rationale for this phase-out period: it "allows existing stocks of chlorpyrifos to be exhausted in an orderly manner, to minimize potential risks associated with disposing of existing product all at once, and to minimize potential confusion for the users."

[46] In its reasons, the Second Decision provides what I consider detailed and adequate reasons based on the record as to why the expert decision maker decided to advise the Minister as it did. The PMRA found risks posed by continued use of chlorpyrifos during the cancellation and phase-out are not imminent and serious – the statutory test.

[47] Specifically, the PMRA determined the risks entailed in continuing use were not imminent and serious taking into account the following nine factors based on its assessment of the evidence before it:

- Since 2000, there is no residential use by homeowners in Canada;
- Since 2007, mitigation measures were put in place for workers;
- The product was seldom detected in food;
- There was low health concern from food;
- There is low health concern from drinking water;
- Health Canada assessments continue to protect the Canadian public;
- Declining sales with the cancellation of all registrations;
- Decreasing use internationally; and
- Between 2007-2021 there were no serious incident reports in Canada.

[48] With regard to the length of the phase-out period, the Second Decision reasoned the timeline allowed “existing stocks of chlorpyrifos products in Canada to be exhausted in an orderly manner, to minimize potential risks associated with disposing of existing product all at once, and to minimize potential confusion for the users.”

[49] Notably also, the Second Decision included consideration of both the Canadian and international status of chlorpyrifos, citing to the European Union, Australia, and the United States in comparison to Canada.

[50] To note also is that Health Canada's current human health reference values - otherwise known as acceptable level of exposure- were aligned with those of the APVMA and USEPA for sensitive subpopulations such as women of childbearing age, infants, and children.

[51] The Second Decision concludes by re-iterating that "all remaining registrations of pest control products containing chlorpyrifos are cancelled immediately due to failure to fulfill the mandatory data requirements to update the human health risk assessment for the final phase of the re-evaluation." It concluded that uses of chlorpyrifos during the phase-out period will not pose imminent and serious risks.

V. Issues

[52] The Applicants submit the following issues:

1. What is the "decision" of the Minister?
2. Did the Minister comply with his duties under the *Act*?
    a. Did the Minister unreasonably fail to consider the criteria in s. 21(5)?
    b. Did the Minister unreasonably interpret s. 21(5) and the Policy as limiting his discretion?

c. Was the Minister's decision unreasonable in light of the constraints in ss.19 and 20 of the *Act*?

d. Did the Minister fail to consult the public and provide reasons under s.28 of the *Act*?

3. Did the Minister misapprehend or ignore the evidence before him that chlorpyrifos posed potential unacceptable risks during the phase-out?

[53] The Respondent submit the following issues:

1. Is the Applicants' challenge to the Cancellation Update moot?

2. Was the Minister *functus officio* after the Cancellation Update?

3. Is the Cancellation Decision reasonable?

4. If the Cancellation Decision is not reasonable, what is the appropriate remedy?

[54] The Intervener, CropLife Canada, submits:

1. PMRA's application of the Cancellation Policy to the cancellation was lawful and consistent with the appropriate interpretation of the relationship between subsections 20(1) and 21(5) of the *Act*;

2. Subsection 21(5) gives the Minister broad discretion in determining which conditions should be imposed on a cancellation, which is essential to registrants and users, consistent with the *Act* and the proper interpretation of subsections 20(1) and 21(5) of the *Act* and aligned with the correct application of the precautionary principle in the *Act*; and

3. The Applicants' interpretation of the *Act*, which unduly restricts the PMRA's discretion, has important practical issues and illogical results.

[55] The Intervener, Justice for Migrant Workers, submits the following issues:

> 1. Was the PMRA's decision made without regard to the purposes of the *Act* or without regard to relevant legal constraints in the *Act* which apply to cancellations of registrations?
>
> 2. Was the PMRA's decision to allow the sale and use of Chlorpyrifos over a three-year period unreasonable?

[56] Respectfully, the main issue is whether the Second Decision is reasonable in terms of its findings in respect of the record and the construction and application of the PMRA's home statute, namely the *Act*.

[57] I wish at this point to acknowledge the contributions by both interveners, Justice for Migrant Workers and Crop Life Canada. Counsel brought the additional and useful perspectives not only of foreign but domestic agricultural workers, and the pest control product industry as a whole.

VI. Standard of Review

[58] The applicable standard of review for the Second Decision is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting

> reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[59] Very recently, in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*], per Justice Jamal, the Supreme Court of Canada reiterates the "reasons first" approach when conducting judicial review on reasonableness:

> [61] Under *Vavilov*'s "reasons first" approach, the reviewing court should remember that "the written reasons given by an administrative body must not be assessed against a standard of perfection", and need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (para. 91). The reviewing judge must read the administrator's reasons "holistically and contextually" (para. 97), "in light of the history and context of the proceedings in which they were rendered", including "the evidence before the decision

> maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body" (para. 94). Reasons must be read "in light of the record and with due sensitivity to the administrative regime in which they were given" (para. 103). Such factors may "explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency" (para. 94).
>
> [62] A reviewing court should also avoid engaging in "disguised correctness review", or correctness in the guise of reasonableness (para. 294, per Abella and Karakatsanis JJ., concurring in the result; see also *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 27, citing D. Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 Adv. Q. 1, at pp. 76-81). Because "[t]he role of courts in these circumstances is to review", they should, as a general rule, "refrain from deciding the issue themselves" (*Vavilov*, at para. 83 (emphasis in original)). A reviewing court should not create its "own yardstick and then use [it] to measure what the administrator did" (para. 83, and *Canada Post*, at para. 40, both citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28). Nor should a reviewing court ask "what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the 'correct' solution to the problem" (*Vavilov*, at para. 83; see also *Canada Post*, at para. 40). Rather, a "reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov*, at para. 83).

[60] *Vavilov* also instructs reviewing courts that reasons must not be assessed against a standard of perfection. At paragraph 91, the Supreme Court of Canada states "that the reasons given for a decision do 'not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred,' is not on its own a basis to set the

decision aside: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16".

[61] Furthermore, at paragraph 97 of *Vavilov*:

> [97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[62] *Vavilov* makes clear that administrative decision makers are not required to respond to every argument of line of possible analysis although they should meaningfully grapple with key issues: failure to do so may call into question whether the decision maker was alert and alive to the matter before it, at paragraph 128:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit

> finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[63] The Supreme Court of Canada in *Vavilov* instructs that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". There are no such circumstances in the case at bar. The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[64] To the same effect is the judgment of the Federal Court of Appeal in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] which teaches the role of this Court is not to reweigh or second guess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
>
> [Emphasis added]

VII. Relevant legislation

[65] Subsection 2(2) of the *Act* outlines environmental and health risks that are acceptable:

Acceptable risks	**Risques acceptables**
2(2) For the purposes of this Act, the health or environmental risks of a pest control product are acceptable if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration.	**(2)** Pour l'application de la présente loi, les risques sanitaires ou environnementaux d'un produit antiparasitaire sont acceptables s'il existe une certitude raisonnable qu'aucun dommage à la santé humaine, aux générations futures ou à l'environnement ne résultera de l'exposition au produit ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées.

[66] Subsection 4(1) provides the primary objective of the legislation is to prevent unacceptable risks:

Primary objective	**Objectif premier**
4 (1) In the administration of this Act, the Minister's primary objective is to prevent unacceptable risks to individuals and the environment from the use of pest control products.	**4 (1)** Pour l'application de la présente loi, le ministre a comme objectif premier de prévenir les risques inacceptables pour les individus et l'environnement que présente l'utilisation des produits antiparasitaires.
[Emphasis added]	[Je souligne]

[67] Subsection 4(2) sets out ancillary objectives:

Ancillary objectives	**Objectifs connexes**
4 (2) Consistent with, and in furtherance of, the primary objective, the Minister shall	**4 (2)** À cet égard, le ministre doit
(a) support sustainable development designed to enable the needs of the present to be met without compromising the ability of future generations to meet their own needs;	**a)** promouvoir le développement durable, soit un développement qui permet de répondre aux besoins du présent sans compromettre la possibilité pour les générations futures de satisfaire les leurs;
(b) seek to minimize health and environmental risks posed by pest control products and encourage the development and implementation of innovative, sustainable pest management strategies by facilitating access to pest control products that pose	**b)** tenter de réduire au minimum les risques sanitaires et environnementaux que présentent les produits antiparasitaires et d'encourager le développement et la mise en oeuvre de stratégies de lutte antiparasitaire

lower risks and by other appropriate measures;	durables et innovatrices — en facilitant l'accès à des produits antiparasitaires à risque réduit — et d'autres mesures indiquées;
(c) encourage public awareness in relation to pest control products by informing the public, facilitating public access to relevant information and public participation in the decision-making process; and	**c)** sensibiliser le public aux produits antiparasitaires en l'informant, en favorisant son accès aux renseignements pertinents et en encourageant sa participation au processus de prise de décision;
(d) ensure that only those pest control products that are determined to be of acceptable value are approved for use in Canada.	**d)** veiller à ce que seuls les produits antiparasitaires dont la valeur a été déterminée comme acceptable soient approuvés pour utilisation au Canada.

[68] Subsection 19(1) sets out the requirement on a registrant "during an evaluation that is done in the course of a re-evaluation" (as taking place at material times) to provide date requested:

Burden of persuasion and consideration of information	**Charge de la preuve et renseignements pris en compte**
19 (1) During an evaluation that is done in the course of a re-evaluation or special review,	**19 (1)** Lors de l'évaluation du produit antiparasitaire dans le cadre d'une réévaluation ou d'un examen spécial :
(a) the Minister may, by delivering a notice in writing, require the registrant to provide, in the form and within the period	**a)** le ministre peut, par avis écrit, exiger du titulaire qu'il lui fournisse, en la forme et dans le délai qui y sont prévus, les

specified in the notice, additional information that the Minister considers necessary for the evaluation;	renseignements supplémentaires qu'il juge nécessaires pour l'évaluation;
(b) the registrant has the burden of persuading the Minister that the health and environmental risks and the value of the pest control product are acceptable; and	**b)** il incombe au titulaire de convaincre le ministre que la valeur du produit et les risques sanitaires et environnementaux qu'il présente sont acceptables;
(c) the Minister shall consider the information provided by the registrant in support of the product and may consider any additional information, but the Minister shall give the registrant a reasonable opportunity to make representations in respect of the additional information before completing the evaluation.	**c)** le ministre prend en compte tout renseignement fourni par le titulaire à l'égard du produit et peut prendre en compte tout autre renseignement à condition, dans ce cas, de donner au titulaire, avant de terminer ses évaluations, la possibilité de présenter ses observations.
[Emphasis added]	[Je souligne]

[69] Subsection 19(2) requires the PMRA to apply a scientifically based approach when "evaluating" risks:

Scientific approach	**Approche scientifique**
19 (2) In evaluating the health and environmental risks of a pest control product and in determining whether those risks are acceptable, the Minister shall	**19 (2)** Lorsqu'il évalue les risques sanitaires et environnementaux d'un produit antiparasitaire et détermine s'ils sont acceptables, le ministre :

(a) apply a scientifically based approach; and	**a)** adopte une approche qui s’appuie sur une base scientifique;
(b) in relation to health risks,	**b)** à l’égard des risques sanitaires :
(i) among other relevant factors, consider available information on aggregate exposure to the pest control product, namely dietary exposure and exposure from other non-occupational sources, including drinking water and use in and around homes and schools, and cumulative effects of the pest control product and other pest control products that have a common mechanism of toxicity,	**(i)** prend notamment en considération les renseignements disponibles sur l’exposition globale au produit antiparasitaire, soit l’exposition alimentaire et l’exposition d’autres sources ne provenant pas du milieu de travail, notamment l’eau potable et l’utilisation du produit dans les maisons et les écoles et autour de celles-ci, ainsi que les effets cumulatifs du produit antiparasitaire et d’autres produits antiparasitaires ayant un mécanisme de toxicité commun,
(ii) apply appropriate margins of safety to take into account, among other relevant factors, the use of animal experimentation data and the different sensitivities to pest control products of major identifiable subgroups, including pregnant women, infants, children, women and seniors, and	**(ii)** applique des marges de sécurité appropriées pour prendre notamment en compte l’utilisation de données d’expérimentation sur les animaux et les différentes sensibilités aux produits antiparasitaires des principaux sous-groupes identifiables, notamment les femmes enceintes, les nourrissons, les enfants, les femmes et les personnes âgées,

(iii) in the case of a threshold effect, if the product is used in or around homes or schools, apply a margin of safety that is ten times greater than the margin of safety that would otherwise be applicable under subparagraph (ii) in respect of that threshold effect, to take into account potential pre- and post-natal toxicity and completeness of the data with respect to the exposure of, and toxicity to, infants and children, unless, on the basis of reliable scientific data, the Minister has determined that a different margin of safety would be appropriate.	**(iii)** dans le cas d'un effet de seuil et si le produit est utilisé dans les maisons ou les écoles ou autour de celles-ci, applique une marge de sécurité supérieure de dix fois à celle qui serait autrement applicable en vertu du sous-alinéa (ii) relativement à cet effet de seuil pour tenir compte de la toxicité prénatale et postnatale potentielle et du degré de complétude des données d'exposition et de toxicité relatives aux nourrissons et aux enfants, à moins que, sur la base de données scientifiques fiables, il ait jugé qu'une marge de sécurité différente conviendrait mieux.

[70] Paragraph 20(1)(a) provides the Minister's authority to cancel a registration for failure to satisfy certain requirements including the failure to provide data requested by the PMRA. This is what happened here – the registrants failed to provide data required by the PMRA thereby failing to satisfy paragraph 19(1)(a). This failure authorized the PMRA to cancel their registrations, which it did under 20(1)(a). Thus the title of the Second Decision refers to paragraph 20(1)(a). As already noted, the decision to cancel is not the focus of this proceeding.

[71] Instead, these Reasons focus on the concomitant phase-out subsequent to cancellation authorized by paragraph 21(5)(a) (to which considerable further reference will be made). Paragraph 20(1)(a) provides:

Cancellation or amendment	**Révocation ou modification**
20 (1) The Minister may cancel or amend the registration of a pest control product if	**20 (1)** Le ministre peut révoquer l'homologation ou la modifier dans les cas suivants:
(a) the registrant fails to satisfy a requirement under subsection 16(3) or 18(1) or paragraph 19(1)(a); or […]	**a)** le titulaire ne satisfait pas à une des exigences posées par les paragraphes 16(3) ou 18(1) ou l'alinéa 19(1)a);
[Emphasis added]	[Je souligne]

[72] Subsection 20(2) sets out what is called the precautionary principle:

Precautionary principle	**Principe de prudence**
(2) 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 adverse health impact or environmental degradation.	**(2)** En cas de risques de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard la prise de mesures rentables visant à prévenir toute conséquence néfaste pour la santé ou la dégradation de l'environnement.

[73] Subsection 21(3) of the *Act* permits the Minister to delay the effective date of cancellation where health and environmental risks are acceptable (this provision is not engaged in this case, but is included for completeness):

Delay of effective date	**Report de la modification ou de la révocation**
21 (3) The Minister may delay the effective date of the amendment or cancellation if	**21 (3)** Le ministre peut différer la modification ou la révocation de l'homologation lorsqu'il n'existe aucune solution de rechange satisfaisante à l'utilisation du produit antiparasitaire et qu'il juge que la valeur du produit et les risques sanitaires et environnementaux qu'il présente sont, jusqu'à la date de modification ou de révocation, acceptables.
(a) no suitable alternative to the use of the pest control product is available; and	
(b) the Minister considers that the health and environmental risks and value of the product are acceptable until the effective date of the amendment or cancellation.	
[Emphasis added]	[Je souligne]

[74] In my view, subsection 21(5) is central to this application. It gives the Minister three options when cancelling a registration: allow a phase-out period under paragraph 21(5)(a), order a product recall and disposal by registrants under paragraph 21(5)(b), or order the product seized and disposed under paragraph 21(5)(c).

[75] In this case, the Minister accepted the expert scientific advice of PMRA and ordered a phase-out period with conditions under paragraph 21(5)(a):

Continued possession, etc., of existing stocks	**Produits existant à la date de révocation**
(5) When cancelling the registration of a pest control product under this section or any other provision of this Act, the Minister may	**(5)** Lorsqu'il révoque l'homologation, en application du présent article ou de toute autre disposition de la présente loi, le ministre peut :
(a) allow the continued possession, handling, storage, distribution and use of stocks of the product in Canada at the time of cancellation, subject to any conditions, including disposal procedures, that the Minister considers necessary for carrying out the purposes of this Act;	**a)** soit, aux conditions qu'il estime nécessaires pour l'application de la présente loi — notamment quant à la façon d'éliminer le produit — autoriser que se poursuivent la possession, la manipulation, le stockage, la distribution ou l'utilisation des stocks du produit se trouvant au Canada à la date de la révocation;
(b) require the registrant to recall and dispose of the product in a manner specified by the Minister; or	**b)** soit obliger le titulaire à faire le rappel du produit et à procéder à sa disposition de la manière qu'il précise;
(c) seize and dispose of the product.	**c)** soit confisquer le produit et procéder à sa disposition.
[Emphasis added]	[Je souligne]

VIII. Analysis

A. *Which Decision should be judicially reviewed?*

[76] Applicants argue that once the registrations were cancelled by the First Decision, the Minister became *functus officio*, which refers to the legal principle that a legal body loses

jurisdiction over a matter once it has rendered a decision (see *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 33).

[77] On the other hand, the Respondent submits, and I respectfully agree, the Minister was not *functus officio* before making the Second Decision.

[78] In my view, *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 [per Justice Layden-Stevenson] applies and answers the Applicants' argument:

> [3] We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision. The Minister and the Intervener agreed in this regard on this appeal (Minister's memorandum of fact and law at paragraphs 1, 24-26; Intervener's memorandum of fact and law at paragraphs 24, 25, 33, 36, 47). However, in our view, a definitive list of the specific circumstances in which a decision-maker has such discretion to reconsider is neither necessary nor advisable.

[79] In my respectful view, the PMRA was not acting in an adjudicative role, but was functioning in its administrative role regulating pest control products, in respect of which there is no need for finality. Indeed as will be seen such administrative product regulation may be ongoing, as in the case at bar. This also answers the claim of *functus officio*.

[80] However, Justice Barnes in *Gil v Canada (Citizenship and Immigration)*, 2014 FC 370 held an assessment should be conducted to decide whether the application of the *functus* principles would promote or hinder the efficiency or fairness of the administrative process.

[81] However, accepting this further approach does not advance the Applicants' case. I say this because in this administrative context there is no value in confining the PMRA to its First Decision. If it was made unreasonably, such as without reasons, it makes no sense to require the First Decision to remain in force. It is far more efficient and salutary for all concerned, to allow the PMRA to concede its reasons were inadequate and issue a further determination compliant with *Vavilov* and *Mason*. This is what it did in the Second Decision. To hold otherwise elevates process over substance.

[82] I also note the PMRA had been re-evaluating chlorpyrifos since at least 2016, and indeed had issued at least one additional previous re-evaluation decision dated December 10, 2020: "Re-evaluation Decision (RVD 2020-14) Chlorpyrifos and its Associated End-Uses Products (Environment)."

[83] In any event, as the Respondent submits, the legislative scheme does not support the strict application of *functus officio*. As just seen, in this regulatory regime the fulfilment of the objectives of the *Act* is an ongoing iterative process. It is not a one-shot up or down matter as the Applicants seem to submit.

[84] In my respectful view, the application of *functus officio* would also defeat a fundamental purpose of the *Act* by depriving the PMRA of what I consider Parliament intended it to have, namely necessary flexibility to take immediate action to protect health and or the environment by, for example, expediting the phase-out or recalling a product in light of new evidence and changing circumstances.

[85] I also agree the application of *functus officio* would hinder the efficiency of judicial review. It would make the Second Decision a nullity, and force a new Second Decision after delays attendant on judicially reviewing the First Decision.

B. *Mootness*

[86] On the other hand, the Respondent submit the Applicants' challenge to the First Decision is moot. The Respondent says there is no longer any live controversy as to the reasonableness of the First Decision because the Respondent concedes it should be set aside for failing to provide adequate reasons.

[87] In this case, I accept the First Decision is superseded by the Second Decision, which Second Decision is based on what the Court considers adequate reasons, as set out in greater detail below.

[88] In response, the Applicants say this case is not moot, but rather the relief sought is forward-looking and not tied to the end of the phase-out period in December 2023, which in any event, has not yet occurred (although it is approaching). Moreover, the Applicants say this case is distinguishable from *David Suzuki Foundation v Canada (Health)*, 2019 FC 1637 [per Justice Southcott], where the impugned provisions and legislative scheme had been repealed.

[89] Even if this Court were to find aspects of this claim moot, the Applicants say the Court should exercise its discretion to grant the declarations anyway as per the test enunciated in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231 [*Borowski*].

Borowski requires an assessment of a Court's adversarial roots, judicial economy, and the proper lawmaking function of the Court where mootness is found.

[90] This decision-maker concedes its First Decision was flawed by lack of reasons. It issued its Second Decision. In my view, as detailed below, the Second Decision contains adequate reasons in terms of justification, transparency and intelligibility.

[91] I fail to see a live controversy. The First Decision is therefore moot. Proceeding to the second step of *Borowski*, and asking if the Court should exercise its discretion to hear the application notwithstanding mootness, I am not persuaded based on the principles of judicial economy, that the First Decision warrants any further consideration. It will be dismissed.

C. *Minister's compliance with the Act*

(1) Paragraph 21(5)(a)

[92] The parties divided on the test the PMRA should apply in making a decision under the phase-out provisions, namely paragraph 21(5)(a). The Applicants articulate the legal test as follows:

> Subsection 21(5)(a) of the Act is discretionary; this exercise of discretion is expressly "subject to" conditions the Minister considers necessary for carrying out the purposes of the Act – the primary purpose being prevention of unacceptable risks. The Minister must exercise his discretion with attention to whether he has reasonable certainty that no harm will occur under subsection 2(2) of the Act, and if not, what conditions might be necessary to prevent unacceptable risks to human health.

[93] The Respondent articulates the applicable legal test as:

> Subsection 21(5) of the Act gives the Minister certain powers upon the cancellation of a pest control product's registration under any provision of the Act. The Minister may: (a) allow the continued possession, handling, storage, distribution and use of stocks of a cancelled product ("possession, etc."), subject to any conditions, including disposal procedures, that the Minister considers necessary for carrying out the purposes of the Act; (b) require the registrant to recall and dispose of the product in a manner specified by the Minister; or (c) seize and dispose of the product.
>
> Unlike other provisions of the Act, including s. 21(3), which permits the Minister to delay a cancellation decision only if the Minister is satisfied the risks are acceptable during the period of delay, the exercise of the Minister's discretion under s. 21(5)(a) is not conditional on a finding of acceptability of risk. The absence of this requirement is deliberate and fitting, as the decision to cancel will often arise under circumstances in which PMRA is unable to determine that a PCP's risks are acceptable (as that term is defined in the Act). To illustrate, the Act provides that the Minister may cancel a product without finding acceptable risk where a registrant: fails to provide requested information; provides notification of discontinued sale; does not pay an annual charge; or has committed a violation or offence under the Act.

[94] This raises the issue of how this Court on judicial review should assess the interpretation by the PMRA of its home statute. The law in this respect is established by the Supreme Court of Canada in *Vavilov*, recently affirmed by the Supreme Court in *Mason*. I consider myself instructed to judicially review the PMRA's legal approach (1) on the standard of reasonableness and (2) by giving the PMRA deference in its interpretation of its home statute.

[95] Firstly, on judicial review, this Court proceeds on the presumption it is to conduct a reasonableness review, which extends to how this expert administrative decision maker deals with the record and how it interprets its home statutes. This is settled by *Vavilov* at para 25:

> [25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.
>
> [Emphasis added]

[96] This issue was raised and considered again in *Mason*, which affirmed the *Vavilov* approach. This was in line with other decisions of our highest Court going back to *Dunsmui*r, and including as *Vavilov* itself notes, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61[*Alberta Teachers*], *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*], and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 [*Edmonton East*].

[97] The relevant extracts of these cases are set out in *Vavilov* at paragraph 25 above, and in addition:

> *Dunsmuir* at paragraph 54:
>
> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, 1995 CanLII 148 (SCC), [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC),

[1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, 1974 CanLII 12 (SCC), [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

Alberta Teachers at paragraph 30:

[30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[Emphasis added]

Saguenay at paragraph 46:

[46] Deference is in order where the Tribunal Acts within its specialized area of expertise, interprets the Quebec Charter and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against *(Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a

> specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is *reasonableness* *(Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("NGC"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd*., 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54). In such situations, deference should normally be shown, although this presumption can sometimes be rebutted. One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is an important factor in this regard (Tervita, at paras. 35-36 and 38-39; *McLean*, at para. 22; *Rogers*, at para. 15).
>
> [Emphasis added]
>
> *Edmonton East* at paragraph 22:
>
> [22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness *(Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision-making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision-making.
>
> [Emphasis added]

[98] I am asked to determine which legal test is correct. However and with respect this is not what this Court should determine at the outset, given the deference the Court must give to the manner in which this expert decision-maker construed and applied its home statute, as set out above in *Dunsmuir* at paragraph 54, *Alberta Teachers* at paragraph 30, *Saguenay* at paragraph 46

and *Edmonton East* at paragraph 22. Notably this approach is also approved by *Vavilov* at para 25.

[99] In my view, the Court also owes deference to the PMRA's interpretation of its home statute for the policy enunciated by the Supreme Court in *Edmonton East*, at paragraph 22. In the case at bar, giving deference to the PMRA best respects the principle of legislative supremacy and the choice Parliament made to delegate decision-making to a this decision maker, rather than the courts. In addition, the presumption of deference in this case fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert decision-maker provides parties with a speedier and less expensive form of decision-making.

[100] I am far from persuaded the presumption of deference ought to be discarded. The *Act* per subsection 19(2) requires the PMRA to apply a scientifically based approach, as the Applicants note. It seems incongruous for the Applicants to ask this Court - without any duly qualified expert evidence of their own - to determine what legal test the PMRA should apply in carrying out its statutory power, or how the PMRA should assess and weigh the voluminous record before it. This expert administrative panel has experience in the technical and scientific issues not only of scientific analysis and in respect of risk. The PMRA also has access to pest product control regulation regimes in North America, Europe and elsewhere.

[101] These considerations confirm my respectful conclusion this Court should and will defer to the PMRA's interpretation and application of its home statute to the very voluminous record in this case.

[102] In this connection, I am bound to and follow the direction of the Supreme Court to defer to a decision maker interpreting its home statute where it has "specialized expertise" per *Dunsmuir* at para 54, "particular familiarity" per *Alberta Teachers* at 30, and where it is dealing within its "special area of expertise" per *Saguenay* at paragraph 46, all of which describe the PMRA.

[103] In other words, on this aspect of reasonableness review, I have concluded the PMRA is entitled to deference in the construction of its home statute because, as the Supreme Court put it in *Edmonton East*, the PMRA is the "expert decision-maker" - at paragraph 22.

[104] The Applicants cite the Federal Court of Appeal's decision in *Safe Food Matters Inc. v Canada (Attorney General)*, 2022 FCA 19, where the Court of Appeal stated:

> [47] Therefore, even where a decision-maker like the PMRA has the discretion to make a particular decision, such as whether it is necessary to establish a review panel, its discretion is not untrammeled. The exercise of discretion must comply with the rationale and purview of the Act (*Vavilov* at para. 108).

[105] I agree with this statement, but am not persuaded the Federal Court of Appeal is at odds with the governing jurisprudence from the Supreme Court of Canada just reviewed.

[106] To deal with the flaws alleged, the Applicants say the reporting conditions added to the Second Decision do not serve the *Act's* primary preventative purpose. In the Applicants' view, the Minister still failed to consider whether the risks of the continued use of chlorpyrifos was acceptable and what conditions might be necessary to render them acceptable, instead focusing

on other objectives. Moreover, the Applicants submit the Minister's limited findings of "low risk" in the Second Decision, which are not made for occupational risk, cannot be equated with an overall finding that the continued use of chlorpyrifos posed acceptable risks.

[107] These assertions invite the Court to review and reweigh the evidence which it will not do. Nor am I persuaded the PMRA erred in the risk assessments referred to: they lie well within its remit and I have no reason to doubt these considerations were considered.

[108] The Applicants allege if the Minister could confidently determine the risks associated with continued use of chlorpyrifos was acceptable, he would not have issued a data call-in for wide-ranging toxicology data submitted to foreign reviewers with the express purpose of revisiting the hazards of and safe exposure levels of chlorpyrifos. Drawing on this, the Applicants submit since the data was not provided and the human health evaluation was left incomplete, the Minister could not have had "reasonable certainty that no harm would occur" and, therefore, deliberately chose to not make any findings of acceptable risk.

[109] This is speculative and again there is no duty on the PMRA to refer to every argument or evidentiary matter that might have been raised.

[110] The Respondent says that in these arguments the Applicants improperly seek to import other provisions of the *Act* into subsection 21(5), namely the requirement to apply a scientifically based approach and the precautionary principle. It is not necessary for me to address that issue for several reasons. I am persuaded the PMRA adequately applied its scientific expertise and

judgment in crafting a reasonable phase-out period focussed on the evidence and science in Canada and the United States in particular, and did so within its discretion and scientific principles. Likewise I am not persuaded the PMRA failed to apply the precautionary approach: it considered the seriousness of risk, taking into account various factors including the potential magnitude of harm. In both these respect the PMRA is construing and applying its interpretation of its home statute (the *Act*) to this record and I am not persuaded to deny it the deference owed the expert decision maker in these respects.

[111] In this context, I am satisfied the PMRA used a scientifically based approach and satisfied the precautionary principle. In my view, to hold otherwise, would substitute the Court's assessments with those of the expert decision maker and impermissibly drift into correctness review. The PMRA is undoubtedly an expert authority and entitled not only to deference in determining its approach to its home statutes and very considerable deference in its factual determinations on this reasonableness review.

[112] The Applicants submit the Minister never considered applying any approach to the cancellation other than the default three year phase-out in the PMRA Cancellation Policy. I am not pointed to any basis for this submission, except that both First and Second Decisions had the same cancellation and last permitted phase-out dates. There is no unreasonableness in those decisions, which are well within the PMRA's remit, nor is there reviewable error.

[113] The Applicants suggest the Minister applied and interpreted the Cancellation Policy without regard to the purpose or context of the *Act* or the constraints on his discretion under

subsection 21(5). This is a speculative argument, which also overlooks governing law requiring this Court to how the PMRA construes and applies its home statute. I note this is not judicial review of the Cancellation Policy.

[114] The Applicants submit the Minister must consider more than just one part of subsection 21(5). In the Applicants' view, the Minister does not explain why allowing continued use and sale meets the objectives of the *Act* than other options, including seizure, recall and disposal.

[115] But and with respect these and other similar submissions have no merit because they overlook the deference owed to the PMRA, and the principle that decision makers, expert or otherwise, are not obliged to set out there consideration of every issue before them.

[116] More generally, as indicated earlier, the Applicants fail to take into account that paragraph 21(5)(a) very specifically permits the PMRA as expert decision maker to do what it did in this case, that is, to cancel a registration because required data was not filed, while at the same time, to permit continued use throughout a phase-out period based on the PMRA's assessment of risk. It gave detailed reasons. It is entitled to deference in interpreting and applying its home statute.

[117] In terms of drinking water assessment, a point argued at some length, the Respondent does not dispute the general proposition that unavailability of data may be relevant to a Minister's discretion.

[118] However, I am satisfied the PMRA considered the impact of the absence of a fully updated drinking water assessment for chlorpyrifos. I say this because in its reasons the PMRA found risks from drinking water posed over the phase-out period were not imminent and serious because drinking water monitoring data shows chlorpyrifos has rarely been detected in Canadian drinking water samples. With respect that determination was for the PMRA to make and will not be second-guessed by this Court.

[119] I should note that during the hearing, the Respondent's asked the Court to consider certain new evidence concerning the withdrawal of select guidelines of Canadian drinking water quality. This evidence was not in the record before the PMRA. The Applicants' opposed the new evidence submitting it was not relevant and was not before the decision maker. In my view this is impermissible new evidence which does not come within the narrow exceptions in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22. Therefore it is not considered.

[120] The Applicants also argue the Minister failed to meaningfully grapple with the requirements under section 19 because it did not acknowledge the existence of specific modelling showing unacceptable risks from aggregate exposure in diet and drinking water, and relies on monitoring data that PMRA scientists had rejected as deficient and unreliable.

[121] With respect there is no merit in this submission. The PMRA was under no duty to specifically reference every submission or argument or issue it considered in its risk assessment. That is trite law: see *Vavilov* at paragraph 128 for example. In this case, the PMRA was entitled

to prefer and rely on actual factual risk-relevant data as it did, over modelling projections also in the record before it. This is what administrative tribunals do. They consider, weigh, balance and assess the sometimes competing opinions and date in the record and come to a conclusion. There certainly was evidence before the PMRA in this respect to justify its assessment of drinking water safety as transparent and intelligible. There is no fatal flaw or reviewable error warranting judicial review in this respect.

[122] The Applicants also allege the Minister failed to assess the cumulative effects of organophosphates. In particular, the Applicants say the Second Decision does not specifically acknowledge the significant knowledge gaps on occupational risks from greenhouse or mosquito uses. Once again the Applicants argue judicial review should be granted because of what the decision maker does not say. That fails to recognize that no decision maker, the PMRA included, is under a duty to specifically reference every submission, argument or issue it considered: again, see *Vavilov* at para 128.

[123] For the same reasons, there is no merit in the Applicants argument the PMRA failed to grapple with key parts of the PMRA Cancellation Policy that would further the *Act's* purposes as well as the precautionary principle in respect of possible damage to children and the potential for reproductive or genotoxic effects and occupational risks. As already noted, risk to children was indeed considered by the PMRA which found that Health Canada's current human health reference values - otherwise known as acceptable level of exposure- were aligned with those of the American APVMA and USEPA for sensitive subpopulations such as women of childbearing age, infants, and children. Authority (APVMA). Further, the PMRA concluded Health Canada's

reference values established in 2000 continue to be either aligned with those of APVMA and USEPA for sensitive subpopulations including women of child-bearing age, or more conservative (in other words, more protective) in the case of infants and children. Thus, this indicated that Health Canada's existing assessment would still be protective of the Canadian population, or even more protective in the case of infants and children.

[124] While the Court has not previously quoted the detailed and careful reasons of the PMRA in the foregoing discussions, I will in this case set out the following extract from the PMRA's reasons which confirms this objection must be rejected. Those wishing to read the entirety of the Second Decision may find it on the internet at Re-evaluation Note REV2021-04 (canada.ca). Here is part of what the PMRA concluded in relation to sensitive subpopulations such as women of childbearing age, infants, and children:

> **Health Canada's assessment continues to be protective of the Canadian population:**
>
> As previously noted, Health Canada's most recent human health mitigation measures were published in 2007 (REV2007-01). At the time the cancellation notice for Canadian registrations of chlorpyrifos (REV2021-02) was published in May 2021 (now superseded by this current decision), the most recent (2019)11 international, risk-based decision on chlorpyrifos had been issued by the Australian Pesticide and Veterinary Medicine. To note also is that Health Canada's current human health reference values - otherwise known as acceptable level of exposure- were aligned with those of the APVMA and USEPA for sensitive subpopulations such as women of childbearing age, infants, and children. Authority (APVMA). In addition, as noted above, the USEPA posted a more recent assessment in December 2020 (which was a proposed decision). Both the APVMA and USEPA assessments took into consideration the more recent health information including epidemiology data and published scientific literature, on which they based updated human health reference values (that is, acceptable human exposure levels) for use in their risk assessments. While Health Canada has not updated the human

> health reference values in consideration of this additional information prior to the cancellation of all uses in Canada, it is important to note that Health Canada's reference values established in 2000 continue to be either aligned with those of APVMA and USEPA for sensitive subpopulations including women of child-bearing age, or more conservative (in other words, more protective) in the case of infants and children. Thus, this indicated that Health Canada's existing assessment would still be protective of the Canadian population, or even more protective in the case of infants and children.
>
> [Emphasis added]

[125] As noted this submission is without merit.

[126] Finally for the purposes of these Reasons, the Applicants disagree with the Minister's reliance on a dietary risk assessment conducted in 2000 in the face of certain staff comments suggesting this assessment should be updated. Once again, and again in my respectful view, the Applicants' fail to take into account the totality of the Minister's reasonable decision regarding dietary risk, which was based a number of additional factors including:

> a) Food surveillance data from Canada and the United States shows a very low frequency of chlorpyrifos detection and never over the maximum residue limit;
>
> b) Dietary exposure is expected to decrease given declining sales of chlorpyrifos products in Canada and decreasing use internationally;
>
> c) The recent assessment by the EPA reached the same conclusion as PMRA's 2000 dietary risk assessment, based on more recent health information and a broader use pattern in the United States;
>
> d) The human health reference values for sensitive sub-populations utilized by Health Canada in 2000 are either aligned with or more protective than those used in the most recent assessments of the APVMA and EPA, both of which

are based on more recent health information and published scientific literature; and

e) There are no reports of deaths or serious injuries in relation to chlorpyrifos reported in Canada.

[127] These reasons in my view are justified, transparent and intelligible. As noted before, the PMRA is not obligated to deal with every argument considered, nor is it obliged to expressly deal with every evidentiary issue on this reasonableness review. The PMRA's decision is not to be assessed against a standard of perfection: *Vavilov* at para 91. The Court declines to engage in reassessing and reweighing the evidence (*Vavilov* at para 128, *Doyle* at paras 3-4) because it is not persuaded they exhibit fundamental flaw.

(2) Duty to consult

[128] Paragraph 28(1)(b) of *Act* states:

Minister to consult	**Consultation publique**
28 (1) The Minister shall consult the public and federal and provincial government departments and agencies whose interests and concerns are affected by the federal regulatory system before making a decision	**28 (1)** Le ministre consulte le public et les ministères et organismes publics fédéraux et provinciaux dont les intérêts et préoccupations sont en jeu avant de prendre une décision concernant :
[…]	[…]
(b) about the registration of a pest control product on completion of a re-evaluation or special review.	**b)** l'homologation d'un produit après une réévaluation ou un examen spécial.

[Emphasis added] [Je souligne]

[129] With respect, I am not persuaded the *Act* requires public and intergovernmental consultation before a decision to cancel a registration is made, because paragraph 28(1)(b) only requires consultation on the registration of a product on completion of a re-evaluation or special review. This case was not a case of special review, nor is it one of re-evaluation. The re-valuation terminated on cancellation. In addition, the registrants had notice they were at risk of cancellation and indeed were asked to provide additional data to PMRA – which they did not do. Cancellation of all chlorpyrifos products prevented the re-revaluation of the four remaining products from being completed.

[130] In any event, I find no merit in the Applicants' insistence on a dubious right to public consultation regarding cancellation decisions which might impede and delay the PMRA taking steps it considered necessary to deal with risk to human health or the environment.

IX. Conclusion

[131] In my view and as set out above, the Second Decision meets the tests of reasonableness in that it is justified, transparent and intelligible. For the foregoing reasons both applications for judicial review will be dismissed without costs.

X. Costs

[132] The Court was advised at the hearing that neither party requested costs. Therefore no costs will be ordered.

JUDGMENT in T-121-22

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Court files T-956-21 and T-121-22 are dismissed without costs.

2. A copy of these Reasons are to be filed in both Court files.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-121-22
STYLE OF CAUSE:	SAFE FOOD MATTERS INC. AND PREVENT CANCER NOW v ATTORNEY GENERAL OF CANADA AND MINISTER OF HEALTH v JUSTICE FOR MIGRANT WORKERS CROPLIFE CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 12-14, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 6, 2023

APPEARANCES:

Laura Bowman Daniel Cheater	FOR THE APPLICANTS
Andrea Bourke Elizabeth Koudys	FOR THE RESPONDENTS
Ilija Dimeski Rashin Alizadeh-Dimeski Shane Martinez	FOR THE INTERVENERS (Justice for Migrant Workers)
Martin Masse Jenna Anne de Jong Jean-Simon Shoenholz Brenden Carruthers	FOR THE INTERVENERS (CropLife Canada)

SOLICITORS OF RECORD:

ECOJUSTICE Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS

Dimeski Law Barristers & Solicitors Chatham, Ontario	FOR THE INERVENERS (Justice for Migrant Workers)
Martinez Law Toronto, Ontario	
Norton Rose Fulbright Canada LLP Barristers and Solicitors Ottawa, Ontario	FOR THE INTERVENERS (CropLife Canada)