Federal Court Cour fédérale

Date: 20251223

Docket: T-2284-23

Citation: 2025 FC 2024

Ottawa, Ontario, December 23, 2025

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ENHANCE ENERGY INC.

Applicant

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Enhance Energy Inc., is a management company operating a project that sequesters carbon dioxide underground near Clive, Alberta (the "Clive Project"). This project is registered to create compliance credits under the *Clean Fuel Regulations*, SOR/2022-140 (the "*Regulations*").

[2] The Applicant seeks judicial review of Environment and Climate Change Canada's ("ECCC") interpretation of the *Regulations*. ECCC's interpretation allows the Clive Project to produce compliance credits beginning the day that the project was recognized, instead of the earlier date on which the *Regulations* came into force. The Applicant submits that this is an unreasonable decision that was rendered in a procedurally unfair manner during its meeting with ECCC in September 2023.

[3] For the following reasons, I find that ECCC's interpretation of the *Regulations* is unreasonable. The application for judicial review is allowed.

II. Background

A. *Legislative Framework*

[4] The *Regulations* were designed to create an incentive structure to reduce the carbon intensity of gasoline and diesel. Primary Suppliers, including oil and gas producers and importers, need to acquire credits to satisfy their carbon intensity reduction requirements (*Regulations*, ss 1(1), 11(1)). To receive these credits, the Primary Suppliers can create them or purchase them from a Registered Creator who engages in one of the activities outlined in sections 19 and 20 of the *Regulations*. These activities can be broken down into three categories:

A. Compliance Category 1 ("CC1"): actions that reduce the carbon intensity of liquid fossil fuels throughout their lifecycle, including carbon capture and storage;

B. Compliance Category 2 ("CC2"): supply of low carbon intensity fuels; and

C. Compliance Category 3 (“CC3”): end-use fuel switching in transportation.

[5] All types of compliance category projects create provisional credits (*Regulations,* s 23(1)), which become credits when they are reported in a credit creation report.

[6] The relevant provision outlining report requirements is section 25 of the *Regulations*. The subsections pertaining to the timing of these reports are below:

> **25** […]
>
> **(2)** A registered creator must not create provisional compliance credits under subsection 19(1) or section 20 until the day after the day on which they become a registered creator.
>
> **(3)** However, a person who submits a registration report to the Minister during the period that begins on the day on which these Regulations are registered and ends 60 days after that day may create provisional compliance credits as of that day.

[7] CC1 projects, like the Clive Project, are subject to a specific quantification method (*Regulations*, ss 31(1), 32(1); Canada, Environment and Climate Change Canada, *Clean Fuel Regulations: Quantification Method for Enhanced Oil Recovery with CO_2 Capture and Permanent Storage* (Ottawa: ECCC, 2022)). This determines the number of credits according to international standards.

[8] A specific quantification method is designed according to several requirements, including a provision identifying the timeline for the credits:

> **32** […]
>
> **(2)** The specific emission-reduction quantification method must […]
>
> > **(d)** establish a period of no less than 10 years, beginning on the later of the day on which the Minister recognizes the project and any preferred day referred to in paragraph 34(2)(b), at the end of which the carrying out of the project ceases to create compliance credits;

[9] The interpretation of the start date for CC1 credit creation outlined either in subsection 25(3) or paragraph 32(2)(d) of the *Regulations* is the subject of this judicial review.

B. *Facts*

[10] The Applicant is a Registered Creator for its Clive Project. This is a CC1 project that sequesters CO_2 in a subsurface reservoir. It has operated since 2020.

[11] On June 21, 2022, the *Regulations* were registered.

[12] On July 15, 2022, the Applicant submitted a request for ECCC to recognize the Clive Project as a credit creation project. On July 29, 2022, the Applicant further requested that ECCC recognize the Clive Project as soon as possible and allow it to create credits starting the day on which the *Regulations* were registered. These emails began a long series of correspondence between the parties.

[13] ECCC responded by confirming receipt and stating that CC1 credit creation starts the day specified in the application for recognition for a specific project, or when the Minister of the Environment recognizes the project.

[14] On August 12, 2022, the Minister recognized the Clive Project.

[15] Between August 2022 and April 2023, the Applicant made requests for clarification and the earlier start date for the Clive Project. ECCC consistently responded that paragraph 32(2)(d) of the *Regulations* specified that the starting date was August 12, 2022, and that this interpretation was firm. This exchange cumulated in a meeting on June 12, 2023, where ECCC maintained that there was no possibility of changing the Clive Project's start date for provisional credits. ECCC reiterated its interpretation of the start date for CC1 projects in an email to the Applicant dated June 18, 2023.

[16] On July 20, 2023, the Applicant provided ECCC with a legal opinion in favour of granting the Clive Project the earlier start date. This legal opinion raised for the first time several arguments about the relevance of other provisions and the legislative history of the *Regulations*.

[17] On July 31, 2023, the Applicant sent an addendum to the legal opinion to ECCC. This addendum raised for the first time that the text of the *Regulations* does not discriminate between the start dates for CC1 projects compared to CC2 and CC3 projects.

[18] On September 29, 2023, the Applicant met with representatives from ECCC (the "September 2023 Meeting"). During the meeting, the Applicant provided an explanation of its

legal opinion and ECCC's Assistant Deputy Minister stated several points addressing its own interpretation. ECCC stated that it retained its position that ECCC lacks the regulatory authority to change the start date for the Clive Project but that they would not close the door to discussions.

[19] Throughout the meeting, the ECCC representative stated that they had taken the Applicant's request "seriously", but that they had maintained their interpretation after a discussion with the Department of Justice. ECCC described that it relied on the same type of statutory interpretation rules as the Applicant but considered paragraph 32(2)(d) to address specifically the issue of early credit creation for projects subject to specific quantification methods. ECCC representatives maintained their interpretation, stating that they needed to apply the *Regulations* consistently. The meeting concluded with ECCC representatives informing the Applicant that they would finalize their discussion in writing.

[20] On October 6, 2023, ECCC sent an email to the Applicant explaining that its interpretation of the *Regulations* remained unchanged.

[21] The September 2023 Meeting, along with the follow up email on October 6, 2023, are the subject of this judicial review.

III. Motion to Strike

[22] The Respondent submitted a motion to strike the proceeding on November 1, 2024. In a decision dated December 17, 2024, Associate Justice Coughlan ordered that the motion to strike would be heard orally as a preliminary motion at the hearing of the Application on its merits.

[23] For the following reasons, the Respondent's motion to strike is dismissed.

A. *Inadmissibility of the October Ryan Affidavit on the Motion Record*

[24] The Respondent submitted an Affidavit from Lisa Ryan dated October 29, 2024, ("October Ryan Affidavit") containing a detailed outline of the *Regulations*.

[25] Affidavits are generally not permitted on motions to strike an application for judicial review because they may delay proceedings that are supposed to be heard in a summary way, facts are presumed to be true in a motion to strike, and the flaw in the pleading must be obvious without further evidence (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 ("*JP Morgan*") at paras 51-52). I find no reason to deviate from the general rule against the admissibility of affidavits on this motion to strike.

[26] Citing several authorities under Rule 221 of the *Federal Court Rules*, SOR/98-106 (the "*Rules*"), the Respondent submits that a moving party can provide an affidavit where it challenges the Court's jurisdiction. I disagree. As the Applicant notes, Rule 221 pertains to actions – not applications for judicial review (*Louie v Ts'kw'aylaxw First Nation*, 2018 CanLII

116818 at paras 8-9 (FC)). Instead, the Federal Court of Appeal has clarified that affidavits addressing jurisdictional issues in an application for judicial review still fall under the general prohibition against affidavits on motions to strike (*JP Morgan* at para 63).

[27] The Respondent further submits that the October Ryan Affidavit provides helpful background context for the *Regulations*. This may be true. Indeed, because this affidavit is virtually the same as the affidavit from Lisa Ryan, dated January 26, 2024 ("January Ryan Affidavit"), I will address later the extent to which this Affidavit is helpful for the merits of this decision. However, for the motion to strike to succeed, the flaw in the Applicant's judicial review application must be obvious (*Bearspaw First Nation v Lefthand*, 2025 FCA 56 at para 22). Although the *Regulations* are complex, they are not so complex as to require nearly 400 pages of explanation for a preliminary review.

B. *The Court Maintains Preliminary Jurisdiction*

[28] The Respondent submits that the Court does not have jurisdiction because there was no decision. This is an argument also raised in the merits of the decision. In the motion to strike, the Respondent must show that the Applicant's case is bereft of any possibility of success (*JP Morgan* at para 47). I am not persuaded that this is the case.

[29] Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, provides that an application for judicial review may be made with regard to a "matter". A matter includes orders, decisions and any other matter where a remedy is available under section 18 of the *Federal Courts Act* (*Global*

Marine Systems Ltd v Canada (Transport), 2020 FC 414 ("*Global Marine*") at para 25, citing *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 24).

[30] The Applicant proposes that the matter in this judicial review is the September 2023 Meeting and subsequent email from October 6, 2023. It submits that ECCC's interpretation affects the Applicant's legal rights and obligations by determining the day on which the Applicant is permitted to start creating compliance credits.

[31] On a preliminary basis, it is not clear that the Applicant's position is bereft of success. Whether the September 2023 Meeting was, in fact, a courtesy response or a fresh exercise of ECCC's discretion is a factual question dependent on the statements made in relation to this meeting and how it was conducted.

[32] The Respondent also submits, in the alternative, that if the Court finds that there was a decision, the Applicant is blocked from judicial review because it did not claim credits for activities undertaken before ECCC recognized the Clive Project. However, even a preliminary review of the evidence shows that the Applicant exchanged various emails with ECCC in an attempt to alter the start date for credit creation. Given this context, the fact that the Applicant did not challenge ECCC's interpretation earlier does not prevent it from doing so now (*Key First Nation v Lavallee*, 2021 FCA 123 at paras 36-38).

C. *Remedies are Available to the Applicant*

[33] The Respondent submits that the Applicant requested remedies that cannot be granted, including an order of *mandamus* and a declaration. It submits that there is no legal duty triggered by subsection 25(3) of the *Regulations*, forming a fatal flaw in the Applicant's submission for an order of *mandamus*. The Respondent further submits that the Court should not grant declaratory relief because it will not resolve a live issue once the other relief fails.

[34] I agree with the Applicant that this argument is irrelevant. The Respondent's attack on two of the several remedies sought cannot provide a basis to strike the Application.

D. *No Enhanced Costs*

[35] The Applicant requested enhanced costs because the Respondent filed the motion to strike later in the proceedings. The Respondent submits that it was reasonable to file a motion to strike after the Applicant submitted late affidavit evidence.

[36] The timing of this motion to strike was far from ideal and it has caused redundancies in court procedure. Yet, I do not find this to be a basis for enhanced costs. This Court has previously awarded enhanced costs for dishonesty, malice, and bad faith (*Remitbee Incorporated v Remitly, Inc*, 2024 FC 1211 at para 41). The Respondent was not accused of any such behaviour. In fact, I do not fault solely the Respondent for the poor timing of this motion. Given the lengthy history of this proceeding due to submissions and motions from both parties, which

were not always timed perfectly, I find no reason to alter the normal course of costs, which I will address proceeding the merits.

IV. Preliminary Issues

[37] Before proceeding to the merits, I must address several preliminary concerns that both parties raised. First, the Applicant raised that the January Ryan Affidavit engaged in advocacy and thus should not be admitted. The Respondent then questioned the admissibility of various policy statements from ECCC that the Applicant used to cross examine Lisa Ryan. For the reasons that follow, I admit both parties' documents in part.

[38] The Respondent also challenges the Court's jurisdiction of this issue. Based on the analysis below, I find that the matter is properly before the Court.

A. *Partial Admissibility of the January Ryan Affidavit*

[39] Similar to the motion to strike, the Respondent submitted the January Ryan Affidavit detailing the operations of the *Regulations.*

[40] The Applicant submits that portions of the January Ryan Affidavit should be struck out or given no weight because they improperly engage in advocacy or spin, assert legal conclusions, and provide new information that was not previously before the decision maker. The Applicant submits that paragraphs 14, 17, 18, 21 to 25, 27, and 29 to 33 all engage in legal spin and attempt to buttress ECCC's original reasoning.

[41] The Respondent maintains that the January Ryan Affidavit is admissible to assist in determining whether the September 2023 Meeting is subject to judicial review and as background information about the *Regulations* and steps taken towards procedural fairness. According to the Respondent, the paragraphs at issue are necessary for understanding the highly technical *Regulations*. To the extent that the Court finds that the January Ryan Affidavit engaged in advocacy or spin, the Respondent submits that the Court should understand it as the Respondent's position and weigh it accordingly.

[42] In my view, the January Ryan Affidavit is admissible in part. Despite the general prohibition against accepting evidence that was not before the decision maker, the majority of the affidavit is permissible because it facilitates understanding of the *Regulations* without undermining ECCC's role as an administrative decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 28).

[43] This Court has previously accepted parts of affidavits that describe the decision-making process (*Photocure ASA v Canada (Health)*, 2015 FC 959 at paras 35, 90). This can be especially useful where the decision-making record is very limited and the affidavits provide credible, cross-examined materials, without which judicial review may be frustrated (*Canadian Union of Public Employees v Canada (Transport)*, 2016 FC 120 at para 24). The majority of the information provided in paragraphs 14 to 33 in the January Ryan Affidavit describes how the *Regulations* function, the process for submitting a registration report for credits, the provisional credit system, the timing of annual reports, the definition and operation of CO_2 equivalent emission reduction projects, special quantification methods, and oversight. Other paragraphs,

like paragraphs 71 and 73 are in response to the evidence that the Applicant raised in the first affidavit from Candice Paton.

[44] Still, affidavits must address only the facts within the deponent's personal knowledge (*Rules*, s 81(1)). The Federal Court of Appeal has found that affidavits are improper if they engage in advocacy (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 16).

[45] The impugned paragraphs mix both helpful, relevant information on the operation of the *Regulations* with inadmissible legal opinions on the matters directly at issue in this case. These include the last sentence of paragraph 14, the first sentence of paragraph 27, and all of paragraph 33. Consequentially, these sections are struck from the January Ryan Affidavit.

[46] I further agree with the Applicant that paragraph 50 engages almost entirely in advocacy, which should be left to the legal memorandum. As such, I also strike this paragraph from the January Ryan Affidavit.

B. *The Admissibility of Exhibits Attached to the Lisa Ryan Cross Examination*

[47] The Respondent submits that the five exhibits attached to the cross-examination transcript of Lisa Ryan should be omitted because they are irrelevant. Exhibit 2 and Exhibit A are not at issue as neither party seeks to rely on them.

[48] The Applicant submits that the rest of the exhibits should be admitted because they are relevant for interpreting the *Regulations* and understanding ECCC officials' knowledge at the September 2023 Meeting.

[49] Extrinsic evidence is sometimes admitted into evidence for the purpose of statutory interpretation where it is relevant and reliable (*Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 156 (dissenting but not on this point); *Nematollahi v Canada (Citizenship and Immigration)*, 2017 FC 755 at paras 8-10). Neither party challenges the reliability of the documents, as ECCC produced all the exhibits. Both parties discuss legislative history in their submissions, but the relevance of each exhibit varies.

[50] I find that both Exhibit 1, the *Clean Fuel Regulations: Proposed Regulatory Approach*, published in June 2019 ("Proposed Approach"), and Exhibit 4, *Clean Fuel Regulations: Implementation*, published in June 2023 ("2023 Presentation"), are admissible. At several points in the Proposed Approach, it discusses the provisions at issue and provides a snapshot of the development of these provisions. The 2023 Presentation offers a view of how ECCC communicates to regulated entities about the *Regulations* and thus contributes to the Court's understanding of how the *Regulations* operate. While I note that this presentation does not formally define how the *Regulations* operate or constitute legislative history of the *Regulations*, ECCC's explanation to regulated parties about its application of the *Regulations* informs how ECCC applies the final version of the *Regulations*.

[51] Exhibit 3 is the *Clean Fuel Regulations – Credit Market Data Report*, published in June 2024. I agree with the Respondent that this document should not be admitted. It is not relevant to the alleged decision as it was published almost a year after the September 2023 Meeting.

C. *ECCC's Discretion is Subject to Judicial Review*

[52] The Respondent submits that the September 2023 Meeting cannot be reviewed because it was not a decision. Instead, the Respondent maintains that the September 2023 Meeting was ECCC's attempt to help the Applicant feel heard and to understand why the start date for its Clive Project was not earlier. Consequentially, the Respondent submits that the September 2023 Meeting should be treated as a courtesy response instead of an exercise of administrative decision making.

[53] The Applicant submits that ECCC's interpretation was a decision because it denied the Applicant the right to create provisional credits from the day on which the *Regulations* were registered. Considering the new legal opinion that the Applicant provided to the Respondent prior to and during the September 2023 Meeting, the Applicant submits that the meeting was a renewed exercise of administrative discretion subject to judicial review.

[54] In my view, the September 2023 Meeting is a decision properly before the Court.

[55] The reconsideration of a previous decision may be subject to judicial review if the decision maker exercises fresh discretion by agreeing to reevaluate the decision based on new facts or submissions (*Dumbrava v Canada (Minister of Citizenship & Immigration)*, 1995

CanLII 19399 at para 15 (FC)). This is the case regardless of whether the outcome of the second decision remains the same as the previous decision. Whether new evidence or submissions actually cause a decision maker to reconsider depends on the facts of each case (*1594418 Ontario Inc v Canada (National Revenue)*, 2021 FC 157 ("*Ontario 159*") at para 46. A letter or new arguments intended to provoke a reply do not constitute a new exercise of discretion on their own (*Philipps v Canada (Librarian and Archivist)(FC)*, 2006 FC 1378 ("*Philipps*") at para 32). Instead, the applicant must show that the decision maker actually exercised fresh discretion (*Ontario 159* at para 46). In this proceeding, the Applicant relies on two cases to establish that there was a new exercise of discretion: *Philipps* and *Global Marine*.

[56] In *Philipps*, the decision maker received new arguments from the applicant and replied that they needed time to consider the possibility of granting the applicant's request. Justice Noël (as he was then) found that this communication along with the eventual decision letter indicating the decision maker had reviewed the new submissions, amounted to a new exercise of discretion (at para 36).

[57] In *Global Marine*, the decision maker exercised new discretion when it invited and considered new information from the applicant and determined that its final letter to the applicant concluded the matter (at paras 56-57).

[58] Here, ECCC was initially firm in its emails to the Applicant on its own interpretation, but then signalled in the September 2023 Meeting and the subsequent email that it had undertaken a fresh exercise of its own discretion. Although the Applicant's legal opinion was unsolicited, the Assistant Deputy Minister of ECCC stated that ECCC had taken the Applicant's request

"seriously" and that they had "looked into" the matter and confirmed ECCC's interpretation with the Department of Justice. In addition, ECCC's email after the September 2023 Meeting stated it had reviewed the legal opinion. These phrases signal more than mere receipt of the legal opinion, but rather a fresh exercise of discretion considering these new arguments.

[59] Despite ECCC stating at the outset of the September 2023 Meeting that it did not have the authority to alter the Applicant's start date for credit creation, this statement does not show ECCC had refused to exercise its discretion. Instead, taken together with other statements during the September 2023 Meeting, the statement communicates ECCC's initial position in response to the Applicant's submissions.

[60] Further, like in *Global Marine*, the officials in ECCC signalled that this meeting and subsequent email was a final point in their discussions with the Applicant, stating that their October 6, 2023, email "close[d] the loop" on the discussion.

[61] Considering all of the circumstances between the parties, including their communication and the evidence provided, the September 2023 Meeting and October 6, 2023, email, show a renewed exercise of ECCC's discretion, which is subject to judicial review.

V. Issues and Standards of Review

[62] The issues in this matter are whether the decision was procedurally fair and reasonable. If the decision was not reasonable, the issue becomes whether the decision should be remitted.

[63] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 at paras 37-56 ("*Canadian Pacific Railway Company*"); *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16 to 17.

[64] Correctness is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (at paras 21-28; see also *Canadian Pacific Railway Company* at para 54).

[65] In this case, considering the discretionary process that permits ECCC to interpret its own statute, without any formal or quasi-judicial proceedings, I find that the requirements for procedural fairness rest at the lower end of the spectrum. The Applicant conceded that only a low level of procedural fairness was required.

[66] The parties submit that the applicable standard of review for the merits of the decision is that of reasonableness (*Vavilov* at paras 25, 86-87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 ("*Mason*") at paras 39-44). I agree. The Supreme Court of Canada confirmed that the applicable standard of review for an administrative decision maker's statutory

interpretation decision is reasonableness unless one of the exceptions applies (*Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 ("*Pepa*") at paras 38-39).

[67] The reasonableness standard, as applied to a statutory interpretive decision, is the same standard as any other question of law (*Vavilov* at para 115). It is robust yet deferential (*Vavilov* at paras 12-13). A reasonable interpretive 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 (*Pepa* at para 46; *Vavilov* at para 85). Based on a reasons-first approach, the reviewing Court examines whether the administrative decision maker's interpretation was alive to the essential elements of the modern principle of statutory interpretation (*Pepa* at paras 47, 62; *Vavilov* at para 120). As such, the decision maker's statutory interpretation must be consistent with the text, context and purpose of the statute, leveraging their particular insight on the statutory scheme (*Vavilov* at paras 120-121).

[68] The form that this decision takes does not need to be formal. The reviewing Court's role is not to hold the decision to a standard of perfection, rather it is to determine whether both the rationale and outcome of a decision were unreasonable (*Pepa* at para 48; *Vavilov* at para 83). Depending on the history and context of the proceeding, the evidence before the decision maker, policies and guidelines, and past decisions, the decision maker may choose not to include all of the arguments, statutory provisions, jurisprudence or other details that may otherwise be preferred (*Pepa* at para 47).

[69] For a particular statutory interpretation from a decision maker to be unreasonable, the applicant must establish that the decision did not grapple with an essential element of the

provision (*Vavilov* at para 122). The flaw must be "fundamental" and should amount to a failure of rationality or justification given the factual or legal constraints (*Pepa* at para 49; *Vavilov* at para 101). This may be the case where the decision maker did not consider a key element of the statutory text, context or purpose that may well have cause it to arrive at a different interpretation (*Pepa* at para 51; *Vavilov* at para 122).

[70] The role of the reviewing court is not to create its own interpretation. But there are instances where, in the process of conducting a reasonableness review, the Court may find a particular outcome is inevitable and that there would be no use in remitting the decision (*Pepa* at para 121, citing *Vavilov* at para 142). This may occur where a review of the factual and legal constraints applicable to the interpretive decision incidentally eliminate all other options (*Pepa* at para 125). This is more likely to be the case where the interpretive question is narrow and the legislation uses precise language, resulting in highly restrained discretion (*Pepa* at para 125).

[71] Even where remitting the matter would serve no useful purpose, courts should pause before refusing to remit the matter to the decision maker, whom the legislature entrusted with the decision (*Vavilov* at para 124). In this process, courts must be mindful of avoiding disguised correctness review (*Nova Tube Inc/Nova Steel Inc v Conares Metal Supply Ltd*, 2019 FCA 52 at para 61).

VI. Analysis

A. *There was no Legitimate Expectation*

[72] The Applicant submits that ECCC's emails prior to the September 2023 Meeting and the attendance of high-level ECCC officials at the meeting provoked a legitimate expectation that it would receive an opportunity to elaborate on its position and respond to ECCC's concerns.

[73] The Respondent submits that the communication with the Applicant was not clear enough to have provided a legitimate expectation of specific considerations or procedures.

[74] I agree with the Respondent.

[75] Legitimate expectations arise from official practice or assurances that are clear, unambiguous, and unqualified (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 ("*Agraira*") at para 95).

[76] The precision required for establishing legitimate expectations is often compared to the formation of a contract: with an offer and acceptance mirroring one another (*Agraira* at para 96; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 69). This is not the case here. At the hearing, the Applicant cited an email chain which began with its own representative offering to have a further conversation with the author of the legal opinion. ECCC did not confirm that it would like to have such a conversation. Instead, it merely confirmed receipt of the Applicant's email. The Applicant then sent two more follow up emails offering to walk through its legal opinion. To these requests, ECCC again simply confirmed receipt.

[77] The Applicant relies on selective quotes from emails leading up to the September 2023 Meeting. Principally, the Applicant relies on the last line of an email from the Director General

of ECCC sent in reply to its legal opinion on August 22, 2023, which stated that ECCC would respond with "a potential follow up meeting if needed". The Applicant argues that, because the meeting was subsequently booked, ECCC "needed" to hear the legal opinion explained during the September 2023 Meeting.

[78] This argument is meritless. The communication between the Applicant and ECCC is simply not clear or unambiguous in its intention (*Chinatown & Area Business Association v Canada (Attorney General)*, 2019 FC 236 at paras 105-106). Only after the Applicant offers to book a meeting without specifically mentioning a discussion of the legal opinion did ECCC agree to book a meeting in general. Several emails were exchanged, none of which included an agenda for the meeting or identified particular matters to be discussed. The fact that high-level officials from ECCC were included does not clarify the intention of the meeting.

B. *The Decision is Unreasonable*

[79] The Applicant submits that ECCC did not account for its key submissions. Specifically, the Applicant maintains that ECCC did not address its legal opinion stating that ECCC's interpretation creates a conflict in the start date of credits and does not account for the purpose of the provision, as shown by its legislative history. The Applicant also submits that ECCC's decision lacked transparency and intelligibility because it did not grapple with its submissions and considered irrelevant factors, such as consistency in applying the *Regulations*.

[80] Looking at the entirety of the September 2023 Meeting and follow up email, the Respondent submits that ECCC's reasoning accounted for the Applicant's key submissions.

According to the Respondent, ECCC's interpretation does not create a conflict between the start dates for credit creation; rather, it distinguishes between types of credit creation projects. The Respondent further submits that considering consistency in the application of regulations is not sufficient to render a decision unreasonable.

[81] In my view, ECCC's interpretation was not sufficiently alive to the text, context, and purpose of the legislation as to reach a defensible interpretation (*Le-Vel Brands, LLC v Canada (Attorney General),* 2023 FCA 66 at para 16). In particular, ECCC's interpretation did not account for the Applicant's key arguments about the text of the *Regulations* (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 ("*CISSS A*") at para 24).

[82] To be clear, I do not agree with the Applicant that ECCC had closed its mind to the Applicant's submissions. The Applicant relies on the statement from ECCC's representative at the outset of the September 2023 Meeting that he could not discuss regulatory interpretation. This allegation is baseless. Moments after this statement, the same ECCC representative said that ECCC "won't close the door to ongoing discussion" and that ECCC would listen to the Applicant's statements on the *Regulations*' interpretation.

[83] I also do not agree with the Applicant that ECCC's consideration for consistency in applying the regulations was misplaced. Reviewing courts encourage consistency in administrative decision-making (*Mason* at para 75; *Vavilov* at paras 129-130). This is especially the case when interpreting *Regulations* that have the potential to be widely applied. Including this consideration in ECCC's reasoning does not affect the reasonableness of ECCC's decision.

[84] Still, ECCC failed to reasonably address key arguments the Applicant provided regarding the text of subsection 25(3) of the *Regulations*. The text of subsection 25(3) does not indicate that it would be limited to only certain types of projects. This subsection is textually linked to subsection 25(2), which explicitly refers to sections 19(1) and 20 of the *Regulations*, both of which include all categories of compliance credit projects. The Applicant cited this to support its argument to ECCC that subsection 25(3) was the applicable provision relating specifically to early credit creation. ECCC did not address the broad language of the provision in the September 2023 Meeting or follow-up email.

[85] Instead, ECCC stated that subsection 25(3) of the *Regulations* does not apply because the earliest start date for projects subject to a specific quantification method is set out in paragraph 32(2)(d).

[86] I am not persuaded that ECCC's understanding of the language in subsection 25(3) or paragraph 32(2)(d) reflects the meaning of the words in their grammatical and ordinary sense (*Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 21; *Piekut v Canada (National Revenue)*, 2025 SCC 13 ("*Piekut*") at para 42). ECCC provided no explanation for interpreting that the text of subsection 25(3) applied to only a subset of project compliance categories or why it found paragraph 32(2)(d) to be more specific for evaluating early credit creation.

[87] In support of ECCC's interpretation, the Respondent argued that subsection 25(3) states credit creators "may" create provisional compliance credits starting the day on which the *Regulations* are registered. In contrast, paragraph 32(2)(d) provides that the specific

quantification method applicable to CC1 projects "must", among other requirements, run for a minimum time of 10 years starting the later of the day on which the Minister of Environment recognizes the project and any preferred day. The mandatory language use in paragraph 32(2)(d), according to the Respondent, supports that it is the specific provision outlining the earliest start date for CC1 projects.

[88] I do not find that the Respondent's explanation is implicit in ECCC's reasoning (*Mason* at paras 96-97; *Sedki v Canada (Citizenship and Immigration)*, 2021 FC 1071 at para 26). Further, as the Applicant noted at the hearing, the permissive language in subsection 25(3) does not indicate a more general provision, rather it reflects the fact that the scheme is voluntary and early credit creation is optional. Additionally, paragraph 32(2)(d) specifies the criteria required for projects subject to a specific quantification method, including CC1 projects, but it does not purport to set specific start and end dates. Instead, subsection 36(1) of the *Regulations* sets out the conditions for recognition of this type of project and subsection 36(4) of the *Regulations* sets the end dates for projects subject to specific quantification methods.

[89] I am similarly not convinced that ECCC rejected the Applicant's interpretation because it would violate the presumption of tautology, as the Respondent had suggested. The presumption against tautology means that interpretations that render any portion of the legislation meaningless or redundant should be avoided because the legislature does not speak in vain (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 37; *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2021 FC 723 at para 87). However, ECCC never mentioned this issue in the September 2023 Meeting or subsequent email. Further, an understanding that subsection 25(3)

applies to all compliance category types does not render any part of paragraph 32(2)(d) meaningless. Although paragraph 32(2)(d) specifies a timeline "beginning" on the later of the day on which the Minister of the Environment recognizes the project and any preferred day, this provision is still applicable to all projects that did not submit a registration report in the 60 days after the *Regulations* were registered, as provided in subsection 25(3).

[90] Moreover, ECCC's analysis misapprehended the legal constraints within the *Regulations* when addressing the Applicant's submission on the conflict within the legislation. Specifically, the Applicant submits that ECCC's interpretation of paragraph 32(2)(d) restricting CC1 projects to a later start date would conflict with the plain reading of subsection 25(3), which allows all three types of credit creation projects to start when the *Regulations* were registered.

[91] In the October 6, 2023, email, ECCC appears to have considered this submission when it wrote that subsection 25(3) was the first day on which credit creation may start but "[s]ubsequent provisions then set out rule for each specific type of credit creation." However, at the hearing, both the Applicant and Respondent admitted that subsequent provisions in the *Regulations* do not address start or end dates for CC2 and CC3 projects. The Respondent submitted at the hearing that this was because CC2 and CC3 projects are dealt with differently, so the omission of start dates for CC2 and CC3 projects in the *Regulations* does not reveal anything regarding CC1 project start dates.

[92] In my view, the Respondent's explanation contradicts ECCC's reasons provided to the Applicant in the October 6, 2023, email. The email appeared to base its reasons on the fact that

subsequent provisions in the regulations address start dates for each type of project. The Respondent accurately stated at the hearing that this is not the case. Given this context, I find that the reasons for ECCC's decision did not reflect the legal context which it purported to interpret.

[93] I further agree with the Applicant that ECCC's interpretation does not reflect the purpose of subsection 25(3) of the *Regulations*. The legislative purpose can be informed by its history from a variety of sources (*Piekut* at para 75).

[94] The Applicant submitted to ECCC in its legal opinion that the Regulatory Impact Analysis Statement ("RIAS") shows that all credit creators can generate credits once the *Regulations* are registered. In an addendum to its legal opinion to ECCC, the Applicant submitted that, when the RIAS distinguishes between CC1 projects and the two other project types, it conflicts with the text of the *Regulations* and thus cannot stand. During the hearing, the Applicant elaborated on the legislative history applicable to the provision. Of note, the Applicant drew attention to the 2020 RIAS, which discussed CC1 categories and stated that credits could be created as of the date of registration of the final *Regulations*.

[95] ECCC never addressed the purpose of the *Regulations* or the legislative history of the provisions. Given that some of the legislative history directly contradicts ECCC's interpretation, I have sufficient reason to doubt that ECCC was alive to an essential element of statutory interpretation (*Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 at para 48, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at para 16 (FC)).

[96] I nonetheless find it useful to address the Respondent's submissions on the legislative purpose. The Respondent submits that the RIAS the Applicant relies on are older and do not reflect the intentions in the final *Regulations*. Instead, it proposes that the 2022 RIAS allowed for an early start date for credit creation for CC2 and CC3 but not for CC1.

[97] However, the 2022 RIAS distinguishes between CC1 and the two other compliance categories when it is attempting to address the request from stakeholders for ECCC to allow more flexibility when the *Regulations* are registered. The RIAS attempts to address this concern by allowing early credit creation for two of the three project categories, but this does not foreclose that CC1 projects may obtain early credits as of the final version of the *Regulations*. In fact, the 2023 Presentation did not distinguish between compliance categories, stating simply that early credit creation began upon registration of the *Regulations*. ECCC's communication to regulated parties that it does not distinguish between compliance categories for early credit creation reinforces the text of subsection 25(3) of the *Regulations*, which signals that all compliance category projects were intended to be allowed to develop early credits.

[98] Considering that the text, context, and purpose of subsection 25(3) of the *Regulations* offer support for a contradictory interpretation to the one ECCC provided, I do not find that ECCC was alive to the material issues that the Applicant raised with its interpretation that may well have caused it to alter its interpretation (*Pepa* at para 51; *Vavilov* at para 122). For this reason, ECCC's interpretation is unreasonable.

C. *The Decision should be Remitted in Part*

[99] Generally, the remedy for an application for judicial review is to set aside the decision and remit the matter (*Vavilov* at para 142). However, relying primarily on *Pepa*, the Applicant submits that there is no utility in remitting the matter to ECCC because subsection 25(3) of the *Regulations* has only one reasonable interpretation. Consequently, the Applicant requests that the Court direct ECCC to receive, grant, and process the Applicant's credit creation report for the period between when the *Regulations* were registered and when the Clive Project was recognized.

[100] Although the Respondent preferred a different interpretation, the Respondent agreed at the hearing for this matter that the provision has only one reasonable interpretation. The Respondent nonetheless submits that it would be inappropriate to direct ECCC to register the Applicant's early credit creation report because there is uncertainty around how to apply the specific quantification method to the early credits and the potential for unintended consequences.

[101] The parties submitted only two possible interpretations of subsection 25(3) of the *Regulations*. The analysis above reveals that restricting subsection 25(3) to include only CC2 and CC3 projects is inconsistent with the text, context, and purpose of the *Regulations*. The binary nature of this decision leaves only one reasonable interpretation available: that subsection 25(3) of the *Regulations* includes CC1 projects. As such, I direct ECCC to receive the Applicant's credit creation report for the period between when the *Regulations* were registered, and the Clive Project was recognized.

[102] But it is for ECCC—not this Court—to determine whether to grant these credits and the process to follow. This case differs from other cases where the existence of only one reasonable interpretation of regulations has led the Court to refuse to remit a decision. For example, in *Peters First Nation v Engstrom*, 2021 FCA 243, the Federal Court of Appeal refused to remit the decision on whether to grant an individual membership to the Peters First Nation Indian Band because the only reasonable interpretation of the applicable code was that it *required* membership to include individuals who were born to those registered on the Band List (at para 31). Once the Federal Court of Appeal had determined the meaning of the provision, there was no residual discretion left for the band. This contrasts with *Lin v Canada (Attorney General)*, 2025 FC 1663, where this Court refused to determine the decision because the outcome was not inevitable (at para 31).

[103] In this case, the outcome of the Applicant's report for these credits is not a foregone conclusion. Subsection 25(3) of the *Regulations* states that a person who submits a registration report within the given time "may" create provisional compliance credits as of the day the *Regulations* were registered. This discretionary language may refer to the voluntary nature of the scheme, but it may also refer to the interplay of multiple sections in the *Regulations* that must all be met in order to grant credits to a particular creator. Additionally, the Applicant submits that there is no need for any factual inquiry into the Clive Project because it remained the same both before and after the date on which the project was recognized. This may well be the case, but it is not for this Court to determine whether the Clive Project met the requirements prior to the date of recognition. Although I have determined that subsection 25(3) of the *Regulations* applies to CC1 projects, ECCC is the proper decision maker in order to respect the operational

implications of the decision and align with the *Regulations*' broader statutory framework (*Mason* at para 70).

VII. Costs

[104] In its submissions on the motion to strike, the Applicant requested $7,500 in costs. The Respondent submits that, if the motion to strike is denied, no costs should be awarded to either party. If the motion were allowed, the Respondent stated that costs should be awarded in the amount of $1,620. I have already determined that the motion to strike does not merit enhanced costs. The Court maintains discretion to award costs on a motion (*Rules,* Rule 401(1)). I find that $1,620 is reasonable for the motion to strike and award this amount to the Applicant.

[105] At the hearing, the Applicant requested costs in a lump sum payment of $15,000 for the decision on the merits of this matter. The Respondent submits that costs should be evaluated based on column III of the table in Tariff B of the *Rules*, which it submits amounts to $4,000.

[106] Costs are ultimately at the discretion of the Court (*Rules*, Rule 400), and I do not find support for the substantial award the Applicant requests. Requests for a lump sum in excess of the tariff schedule should generally be accompanied by a bill of costs and disbursements (*Nova Chemicals Corporation v Dow Chemical Company,* 2017 FCA 25 at para 18). The Applicant has provided no such document nor any evidence of disbursements.

[107] I agree with the Respondent that costs should be calculated in this matter in accordance with column III of the table in Tariff B of the *Rules*. But I do not find a basis to support the

Respondent's calculation of costs under column III. Based on my assessment, I award the Applicant $8,700 in addition to the costs awarded to the Applicant on the motion to strike.

VIII. Conclusion

[108] For these reasons, the application for judicial review is allowed, with costs. I agree with the Applicant that ECCC's interpretation of subsection 25(3) of the *Regulations* was not anchored in the text, or alive to the context and purpose of the *Regulations* (*CISSS A* at para 24; *Pepa* at paras 47). Although this review has revealed only one reasonable interpretation of subsection 25(3) of the *Regulations* that requires ECCC to receive the Applicant's credit creation report, ECCC is the proper decision maker to determine whether to grant the Applicant provisional credits for the relevant time period.

JUDGMENT in T-2284-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. ECCC's decision is set aside.

3. ECCC shall receive the Applicant's credit creation report for the period between June 21, 2022, and August 12, 2022, which the Applicant may submit within thirty (30) days of the release of this Judgement.

4. The matter on whether to grant the Applicant's provisional credits between the period of June 21, 2022, and August 12, 2022, is remitted to ECCC.

5. Costs are awarded to the Applicant in the amount of $10,320.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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