



[2021] 3 F.C.R. D-20

## HEALTH AND WELFARE

Appeal from Federal Court decision dismissing judicial review of Pest Management Regulatory Agency (PMRA) re-evaluation decision on registration for use of glyphosate, pest control product — In 2002, Parliament overhauled regulation of pest control products; passed *Pest Control Products Act*, S.C. 2002, c. 28 (Act), regulations thereunder — Created comprehensive regulatory scheme for registration, use of pesticides in Canada — Purpose of Act to protect human health, safety, environment by regulating products used for control of pests — Appellant, non-profit organization dedicated to promoting public health, protecting environment by educating Canadians about safety of food production technologies — Respondent representing PMRA, branch of Health Canada responsible for regulation of pesticides under Act — PMRA acting on behalf of Minister of Health — In 1976, glyphosate, registered for use in Canada, has been continuously registered for use since then — In 2005, PMRA gave approval to label expansion allowing glyphosate to be used as pre-harvest desiccant on variety of crops — In 2009, PMRA gave notice of its intention to re-evaluate glyphosate to determine whether it should remain registered for use — In April 2015, PMRA made public a proposed re-evaluation decision — In response, appellant provided written comments, participated in public consultation process — After completing public consultation process, PMRA issued re-evaluation decision permitting continued registration of glyphosate products for use in Canada — PMRA not agreeing with appellant's written comments — Subsequently, appellant filing notice of objection (NOO) to PMRA's re-evaluation decision; presented nine objections raising "scientifically founded doubt" about validity of PMRA's evaluations concerning glyphosate products; hoping PMRA would exercise its statutory discretion to appoint review panel in accordance with Act, s. 35(3) to consider subject matter of objections raised in NOO, with view to confirming, reversing or varying re-evaluation decision — PMRA finding issues raised in appellant's NOO not meeting criteria outlined in *Review Panel Regulations*, SOR/2008-22 (Regulations), s. 3 (PMRA Decision) — Appellant then applied to Federal Court for judicial review of PMRA Decision — Federal Court dismissed application (2020 FC 242) — In decision, Federal Court noted that meaning of term "scientifically founded doubt" found in Regulations, s. 3(a) not previously defined in case law; therefore, proceeded with own statutory interpretation of this term — Conducted its own detailed analysis of whether objections put forward in appellant's NOO raised scientifically founded doubt about validity of PMRA's risk evaluations; found that they did not — Thus, Federal Court determined that PMRA Decision not to establish review panel reasonable — Appellant submitting PMRA Decision unreasonable in particular because it failed to interpret statutory scheme governing criteria for assessing NOO; it did not comply with statutory scheme as properly interpreted [30(1), (2)] — Whether PMRA Decision reasonable, having regard to reasonableness standard of review — PMRA Decision unreasonable — Present matter first time PMRA decision reviewed — PMRA tasked with interpretation of Act, Regulations in context of scientifically-based objections in NOO, record — In coming to decision whether it should exercise its discretion to establish review panel, PMRA must look to relevant provisions of Act that will inform its decision — Must also take into account two factors set out in Regulations, ss. 3(a),(b) which are: (a) whether information in notice of objection raising scientifically founded doubt as to validity of evaluations, on which decision based, of health, environmental risks, value of pest control product; (b) whether advice of expert scientists would assist in addressing subject matter of objection — While PMRA having discretion, it can only exercise such discretion once both of these factors considered — Therefore, even where decision maker like PMRA having discretion to make particular decision, such as whether it is necessary to establish review panel, exercise of discretion must comply with rationale, purview of Act —

Furthermore, PMRA's discretion further constrained by Regulations, s. 3, which limits PMRA's discretion by dictating factors that it must consider in arriving at its decision as to whether it is necessary to establish review panel — While PMRA can consider other factors, it must consider at least two factors listed in s. 3 — PMRA Decision in present matter falling short of these fundamental requirements — PMRA not justifying its decision by looking to preamble of Act, which outlines need to prevent unacceptable risks to public from use of pest control products — PMRA Decision failing to consider definitions of “health risk”, “acceptable risks” set out in Act, ss. 2(1),(2); also silent on primary objective of legislation — In its decision not to establish review panel, PMRA simply providing conclusory statement that NOO not meeting either factor set out in Regulations, s. 3 — Not discernable from PMRA Decision why PMRA concluded that objections raised in NOO not meeting either of those factors — This was particularly important given statutory requirement for PMRA to provide written reasons under Act, s. 35(5) — Here, PMRA not demonstrating through its reasons that it was alive to need to interpret Act, Regulations — Failure to provide legislative interpretation rendering PMRA Decision unreasonable — Moreover, record not assisting in discerning basis for PMRA Decision — From reasons offered, in light of record, no way of knowing why review panel might not assist in this case in considering whether re-evaluation decision should be confirmed, reversed or varied in some way — PMRA not explicitly or implicitly considering text, purpose or context of Act, s. 35 or Regulations, s. 3 — PMRA Decision thus unreasonable since failing to meet requisite standard of justification, transparency, intelligibility — Finally, Federal Court erring when providing own interpretation of term “scientifically founded doubt” — How such term to be interpreted is job of PMRA, not Federal Court — Federal Court is reviewing court, not merits-decider — Making judgment Federal Court should have made, appellant's application for judicial review thus granted, PMRA Decision quashed, matter remitted back to PMRA for redetermination in light of guidance provided herein — Appeal allowed.

SAFE FOOD MATTERS INC. V. CANADA (ATTORNEY GENERAL) (A-85-20, 2022 FCA 19, Rivoalen J.A., reasons for judgment dated February 2, 2022, 25 pp.)