



[2022] 4 F.C.R. D-7

AGRICULTURE

Related subjects: Environment; Administrative Law; Constitutional Law; Health and Welfare

Application for judicial review of respondent's seizure of soils manufactured by applicant because they contained certain metals or metalloids in concentrations that exceeded allowable standards — Applicant objected to seizure on various administrative law grounds; also argued that federal statutory, regulatory provisions that authorized seizure were unconstitutional — Applicant is corporation that specializes in treating, composting, repurposing organic materials — It produces compost, soils from various raw materials — In May 2021, respondent took samples of two soil products developed by applicant who also took its own samples — Analysis of respondent's samples conducted by its laboratory revealed concentrations of nickel, molybdenum, selenium that were greater than maximum concentrations indicated in Trade Memorandum T-4-93 — Respondent then sent notices of detention under *Fertilizers Act*, R.S.C., 1985, c. F-10 (Act), s. 9, which amounts to form of seizure — Notices based on fact that respondent's inspector believed on reasonable grounds that soils in question contravened *Fertilizers Regulations*, C.R.C., c. 666 (Regulations), s. 2.1 — Although respondent, applicant engaged in discussion to try to resolve situation, exchanges not leading to agreement — Applicant then sent demand letter to respondent, requesting that respondent release products — Applicant reiterated its doubts about reliability of respondent's laboratory analyses, presented laboratory results from samples taken from new mixture in September 2021, as conducted by private laboratories — In addition, applicant alleged that Memorandum T-4-93 was not appropriate tool for assessing safety of soils intended for single use, asserted that standards in Memorandum should have been adopted by regulation — Act originally enacted in 1885 — Among other things, its provisions require various types of fertilizers to be registered before they are marketed, set out certain obligations with respect to labelling of fertilizers — Later, Governor in Council adding Regulations, s. 2.1 to enforce Act, s. 3.1 — Respondent is responsible for administration of Act — Regulations, s. 2.1 not setting out specific thresholds beyond which some substances would "present a risk of harm to human, animal or plant health or the environment" — To ensure degree of consistency in enforcing Act, respondent relying on thresholds, calculation method set forth in Memorandum T-4-93 — Issues herein whether impugned provisions were validly enacted pursuant to concurrent jurisdiction over agriculture set out in *Constitution Act, 1867*, s. 95, federal jurisdiction over criminal law set out in *Constitution Act, 1867*, s. 91(27); whether impugned provisions contrary to Charter, s. 7 for being overbroad; whether regulatory provisions at issue constituting prohibited subdelegation or abdication of power; and whether decisions made by respondent regarding seizures were reasonable — Parliament had jurisdiction to enact impugned provisions, including Act, s. 3.1 — Pith, substance of s. 3.1 is prohibition of fertilizers, supplements that present risk of harm to human, animal or plant health or environment — Pith, substance falling within concurrent jurisdiction over agriculture set out in *Constitution Act, 1867*, s. 95, within federal jurisdiction over criminal law set out in *Constitution Act, 1867*, s. 91(27) — Two stages of analytical framework for division of powers involves: ascertaining "pith and substance" of law or statutory provisions at issue (purpose, effects of law); determining whether pith, substance of law can fall under one of heads of power of enacting level of government — Pith, substance of Act, s. 3.1 is prohibition of fertilizers, supplements that present risk of harm to human, animal or plant health or environment — Thus, s. 3.1 falling within concurrent

jurisdiction over agriculture set out *Constitution Act, 1867*, s. 95 — Also, Act, s. 3.1 is valid criminal law measure — Protection of health, environment is legitimate criminal law purpose — Parliament relied on reasoned apprehension of harm when it adopted Act, s. 3.1 — Is not for courts to substitute their opinion for that of Parliament in this respect nor to settle scientific controversies — Impugned provisions also not overbroad, not contrary to Charter, s. 7 — Here, means chosen, i.e. prohibiting manufacture, sale, importation or exportation of fertilizers, supplements that present risk of harm to human, animal or plant health or environment) having rational link to fulfilling purpose of impugned provisions — Regarding administrative law grounds, applicant's argument that Regulations, s. 2.1 is invalid because only reproduces text of Act, s. 3.1 with minor variations that do not affect analysis; that Governor in Council therefore subdelegated exercise of its regulatory power to respondent's employees rejected — Pursuant to Act, s. 5(1)(c.1), Governor in Council allowed to make exceptions to activities prohibited by Act, s. 3 — Act, s. 5(1)(c.1) providing form of dispensing power to make exceptions to section 3.1 — However, there is nothing in text, scheme or purpose of Act to indicate that Governor in Council must provide for such exceptions — Nothing in text of s. 3.1 requires adoption of regulations that deal with evaluation of fertilizer or supplement — Provision worded in way that allows its enforcement despite absence of regulations under Act s. 5(1)(f.1)(iii) — Fact that wording of Regulations, s. 2.1 partially repeating that of Act, s. 3.1 not resulting in subdelegation or abdication of power that Parliament would have wished to avoid — Memorandum at issue not disguised regulation — Is guide that explains how respondent intends to apply Act, s. 3.1, Regulations, s. 2.1 — Intended to specify circumstances in which respondent will find provisions of Act, Regulations have been contravened — Finally, respondent's decisions (including notices of detention, lab results, standards in Memorandum) in this case not unreasonable — Application dismissed.

ENGLOBE ENVIRONMENT INC. V. CANADA (CANADIAN FOOD INSPECTION AGENCY) (T-758-22, 2023 FC 1676, Grammond J., reasons for judgment dated December 12, 2023, 45 pp.)