

Court File No.: _____

FEDERAL COURT

B E T W E E N:

TIM GRAY, MUHANNAD MALAS, AND KIM PERROTTA

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

Pursuant to section 18.1 of the *Federal Courts Act*

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicant. The Applicants request that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: August 2nd, 2017

Issued by: _____
(Registry Officer)

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APPLICATION

1. The Applicants are persons who, in June and July 2017, each submitted to Environment and Climate Change Canada (“ECCC”) a detailed, written request for a Ministerial investigation pursuant to s.17 of the *Canadian Environmental Protection Act* (“CEPA”). The object of their concern was the unlawful importation, sale, and marketing of Volkswagen diesel cars in Canada.
2. The background facts of this Application are notorious: The parent company of Volkswagen in Germany (or “VW AG”, which is the German acronym) for a number of years engineered and built diesel cars fitted with a so-called “defeat device”, whose sole, fraudulent purpose is to selectively and intentionally violate air pollution regulations prescribed by law. The defeat device functions like an on/off switch for legal compliance: it causes the affected cars to comply with tailpipe emissions limits for potentially lethal air pollutants such as nitrogen oxides (“NOx”) while undergoing testing for regulatory purposes, but once the cars are on the open road and driven normally, the defeat device changes its operation and causes the cars to emit NOx at levels of up to 35 times the legal limit.
3. Defeat devices are strictly illegal in Canada under CEPA (specifically, under s.11 (1) of the *On Road Vehicle and Engine Emission Regulations*). Shortly after Volkswagen admitted equipping its diesel cars with a defeat device, on 22 September 2015, ECCC announced that it was opening an investigation. That ECCC investigation is ongoing.
4. However, nearly two years later, ECCC’s investigation has been overtaken by that of its partner, the US Environmental Protection Agency (under CEPA, Canada and the US have a largely harmonized system of regulating automotive emissions). In January 2017, VW AG entered into the United States District Court of Michigan a “Statement of Facts” confessing to the facts summarized above, as part of a larger settlement in which it pleaded

guilty to criminal offences, and admitted civil violations. Overall, VW AG voluntarily paid American governments (federal and state) and consumers nearly US\$15 billion (about C\$19 billion), much of which is earmarked for cleaning up the environment or investing in clean transportation technologies for the public good.

5. The Applicants are Canadian citizens who are concerned by the fact that, relative to the American environmental protection authorities who promptly investigated, prosecuted, and obtained billions of dollars in compensation against Volkswagen, to date ECCC has accomplished none of this. There has been no public update on ECCC's Volkswagen investigation since September 2015, and far from holding Volkswagen accountable, in March 2017 ECCC allowed Volkswagen to resume selling its noncompliant diesel cars to Canadians. ECCC's indiligent (and indulgent) attitude toward enforcing air pollution standards affronts the rule of law, and puts the natural environment and even human life at risk.
6. The Applicants are representatives of Canadian environmental or public health organizations who each invoked their right under CEPA s.17 to request the Minister to investigate four specific criminal allegations that they detailed against Volkswagen. Their requests were worded similarly, save for this important jurisdictional difference: Mr. Gray and Ms. Perrotta each requested a Ministerial investigation of just Volkswagen's German parent company (i.e. VW AG), while Mr. Malas requested a broader Ministerial investigation of VW AG and/or its subsidiaries or agents, so as to capture affiliated entities such as Volkswagen of Canada.
7. On 4 July, the Minister's staff formally acknowledged Mr. Gray's and Ms. Perrotta's requests for four Ministerial investigations. The acknowledgement letter informed them that the Minister would investigate only one of their four criminal allegations against VW AG, but for the other three, "a Ministerial investigation will not be opened." This was said

to be because their latter three allegations are “covered by [ECCC’s] current investigation”.

8. Similarly, on 19 July, the Minister acknowledged Mr. Malas’s four requests for ministerial investigations. Again the Minister refused to open investigations for three of the four allegations, because ostensibly these were “covered by [ECCC’s] current investigation”. The Minister’s acknowledgement letter to Mr. Malas was boilerplate and reiterated the letters sent to Mr. Gray and Ms. Perrotta almost verbatim, without in any way considering the larger jurisdictional scope of Mr. Malas’s request.
9. Shortly after these refusals, ECCC staff clarified that for the three allegations in which Ministerial investigations were not opened, the Minister would not provide the Applicants progress and action reports every 90 days, as required by CEPA s.19.
10. The Minister’s decision to acknowledge all four of the Applicants’ allegations and requests for investigations, but to refuse to open investigations for three of them, is *ultra vires*. Under CEPA ss.17-21, the Applicants have the right to request Ministerial investigations, and once the Minister acknowledged their requests, the Minister must provide them regular progress and action reports and/or reasons for discontinuing her investigation. CEPA does not give the Minister statutory discretion to refuse *ab initio* to open the investigations that the Applicants requested, whether or not ECCC has an allegedly similar investigation currently underway.
11. The Minister’s decision is highly prejudicial to other CEPA rights of the Applicants. Parliament drafted Part 2 of CEPA, which is entitled “Public Participation”, as a comprehensive legislative scheme giving Canadians the rights to initiate environmental investigations, and to litigate environmental enforcement actions against polluters. By refusing to open investigations pursuant to s.17 requests, and refusing to provide progress

and action reports pursuant to s.19, the Minister sets those public participation rights at naught, which is inconsistent with a purposive reading of CEPA, unaccountable to Canadians, and illegal.

The Applicants make application for:

12. An order setting aside the 4 July and 19 July 2017 decisions of the Minister addressed to the Applicants, and directing her pursuant to CEPA s.17 to open investigations per the Applicants' requests;
13. An declaration that the Minister is required pursuant to CEPA s.19 to provide the Applicants with appropriately detailed progress and action reports for the requested Ministerial investigations;
14. Costs of this Application, including costs thrown away on a full indemnity basis if the Minister subsequently re-decides so as to make this Application moot; and
15. Such further and other relief as the Applicant may request and this Honourable Court may permit.

The grounds for the application are:

16. *Federal Courts Act*, RSC 1985, c. F-7, s.18.1;
17. *Canadian Environmental Protection Act, 1999*, SC 1999, c. 33.; and
18. *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2.

The application will be supported by the following material:

19. The Affidavit of Celine Perret, or some such other material or affidavit; and
20. Such further and other materials as the Applicant may advise and this Honourable Court may permit.

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests a copy and that the Registrar receive a certified copy of the following materials and documentation:

21. Having regard to the ratio on R 317 in *Cooke v. Canada*, 2005 FC 712, all material possessed by the Respondent respecting ECCC's "current investigation" referred to in the 4 July and 19 July 2017 decisions; and
22. Any other records possessed by the Respondent respecting Applicants' s.17 requests and the Minister's decisions to open or not to open Ministerial investigations.

Dated: August 2nd, 2017



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