



Department of Justice
Canada

Ministère de la Justice
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Our File Number: 9183279

BY EMAIL

Professor Amir Attaran
Barrister and Solicitor
Ecojustice Environmental Law Clinic at
University of Ottawa
1 Stewart Street, Suite 216
Ottawa, ON K1N 6N5

Dear Professor Attaran:

Re: MALAS, Muhannad v. AGC-CFN-T-1252-17

In advance of the hearing of phase one of the Applicants' Rule 318 motion, the Respondent has reviewed its claims for privilege asserted over Tab 20 of the Certified Tribunal Record ("CTR"). In that regard, we are prepared to disclose the attached redacted Tab 20 of the CTR. The redacted Tab 20 contains claims for solicitor-client privilege in blue and public interest privileged claims in red that the Respondent is maintaining, as well as Volkswagen's potentially confidential information in green.

We will also be providing a copy of the redacted Tab 20 to Madam Justice Aylen.

Yours truly,

Michael Roach
General Counsel

Canada

VW, Audi and Porsche Investigation - Request under Section 17 of CEPA

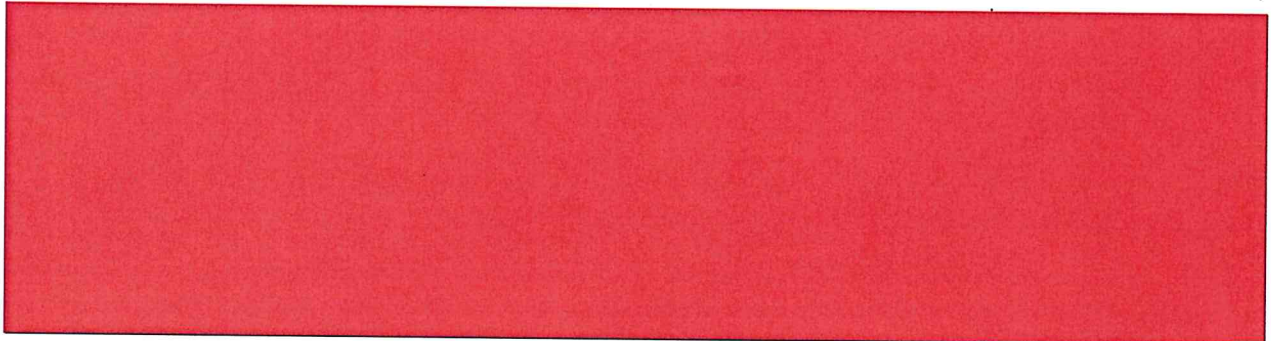
Section 17 request:

- On June 14, 2017 a representative of Ecojustice submitted applications on behalf of three individuals representing Environmental Defense, the Canadian Association of Physicians for the Environment, and Equiterre, for an investigation under Section 17 of CEPA.
- The applicants contend that ECCC should pursue prosecution of VW AG (The international organization located in Germany) immediately for a first group of alleged offences, and investigate them for a second group of offences.
 - GROUP 1- VW AG violated section 153 of CEPA by: 1) importing non-complaint cars; 2) affixing national emissions marks to non-compliant cars; and 3) providing false and misleading information with respect to the non-complaint imports. According to the applicants, VW AG has already admitted non-compliance, and nothing prevents ECCC from charging a foreign organizations and compelling its appearance in a Canadian court.
 - GROUP 2 – VW Canada and its local dealers violated section 153 of CEPA when they sold non-complaints cars. CEPA's jurisdiction extends beyond the first retail sale due to the expansive definition of manufacturer in section 149 of CEPA.

Section 17 obligations:

- S. 17 of CEPA provides the opportunity for Canadian residents to apply to the Minister for an investigation of alleged violations under the Act. The Minister is then required to conduct an investigation, and periodically inform the applicant of the progress, as well as the outcome and any action taken as a result.
- Should the investigation be discontinued, the applicant could proceed with an environmental protection action by virtue of s.22 of CEPA and/or apply for judicial review of the decision to close the file. Both processes could be initiated if the applicant finds the decision to be unreasonable.
- Should the applicants successfully obtain an environmental protection order the applicants it would be against VW AG, and the court could order a series of relief measures.

Analysis:



- With respect to the claim that VW Canada and its local dealers violated section 153 of CEPA when they sold non-complaint vehicles, [REDACTED]

ECCC's options:

- ECCC must respond to the applicants by July 4, 2017.
- It is likely that the applicants will dispute any option under section 22 of CEPA that does not include a comprehensive investigation of everything that they allege.

OPTION 1: Decline to open new investigations as ECCC is already investigating the importation of vehicles, [REDACTED]

PROs- Allows ECCC to continue its work without additional obligations to conduct duplicative investigations.

OPTION 2: Accept to open an investigation on the basis of the s. 17 request into VW AG and the sale of "half-fixed" cars in Canada.

PROs- would satisfy the applicants in the short-term.

CONS- Additional resources would be required to add to an already lengthy and expensive investigation. The applicants would have to be satisfied with the outcome of the investigation, or they would dispute it under s. 22 of CEPA. [REDACTED]

OPTION 3 (Recommended): Investigate the sale of VW vehicles only, and decline to investigate the rest as ECCC's investigation is ongoing.

PROs- Places ECCC in the strongest possible position in the event of judicial review w/o requiring a duplicative investigation. If ECCC does have the jurisdiction to take action for illegal sale of "half-fixed" vehicles, it should. If it doesn't, ECCC has the basis for a strong response to the applicants.

CONS- Some additional resources would be required to add to an already lengthy and expensive investigation, but less than for option 2. Much of the work that is required is detailed examination of our legal authorities, not field work.

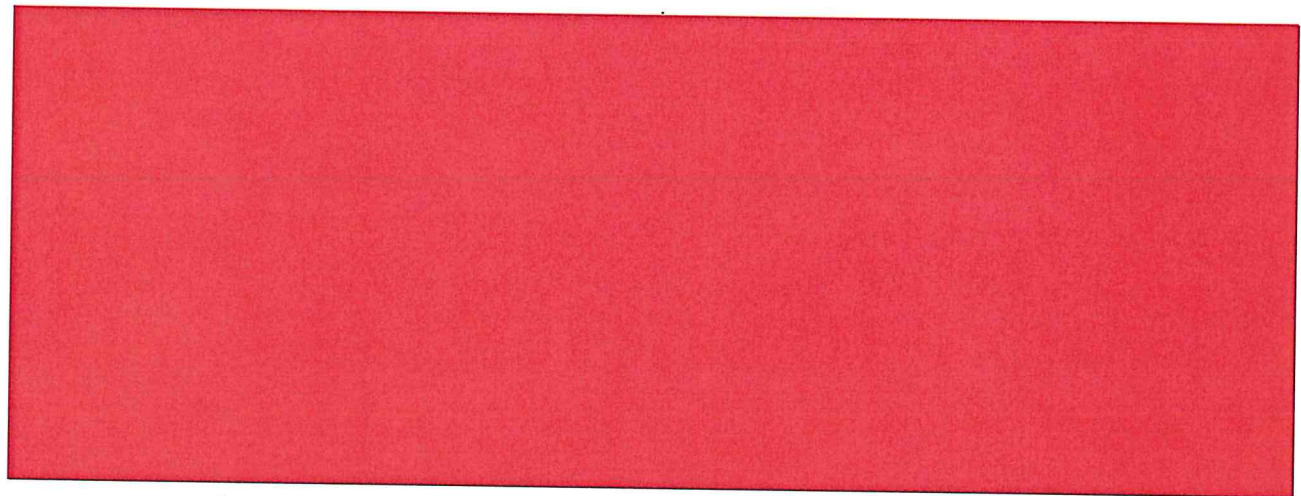
Annex I: Background of Events:

US Investigation:

- On September 18th, 2015, the US EPA issued a Notice of Violation to Volkswagen AG, Audi AG and Volkswagen Group of America Inc. alleging violation of the Clean Air Act. US federal courts subsequently approved civil settlements including at least \$14.7B in restitution for consumers and environmental damage.
- On Jan. 11, 2017, the US Attorney General and EPA announced additional civil and criminal resolutions including a \$4.3 billion penalty and an extensive plea agreement. Six former high ranking VW executives were also indicted for conspiracy to defraud the US, violations of the Clean Air Act, and wire fraud.
- The US EPA's criminal investigation is still officially underway.

ECCC's Investigation:

- On September 22nd, 2015, ECCC opened its investigation of the alleged importation of certain models of Volkswagen, Audi, and Porsche equipped with prohibited defeat devices. An estimated 120,000 diesel vehicles subject to the investigation were sold in Canada.
- Offences under CEPA with respect to importation of vehicles are strict liability, which require the Crown to prove beyond a reasonable doubt that the accused contravened the legislation, but an accused may avoid conviction by proving due diligence was exercised.



Other Canadian legal proceedings:

- On Dec. 19, 2016, the Competition Bureau announced a \$15 million consent agreement (civil) with Volkswagen Canada and Audi Canada to address false or misleading environmental claims.
- Ontario and Quebec courts in March, 2017 approved a class action settlement agreement with Volkswagen and Canadian consumers including \$2.1 billion in buybacks and restitution payments.

Annex II: Analysis of options

Option	ECCC's position	Likely response	
Decline to open new investigations	<p>ECCC's investigation is sufficient to meet the Minister's s. 17 responsibilities</p> <p></p>	<p>The complaints will dispute this decision under s. 22 1 (a), (b). No investigation was conducted; the Minister's decision was unreasonable.</p>	
Investigate the sale of VW vehicles <u>only</u> , and decline to investigate the rest as ECCC's investigation is ongoing.	<p>ECCC's investigation is sufficient to meet the Minister's s. 17 responsibilities</p> <p>ECCC will investigate to determine the validity of VW sale of "half-fixed" vehicles.</p>	<p>The complainants would expect updates every 90 days. Anything that doesn't lead to prosecution would likely be disputed.</p> <p>The complaints will still dispute that ECCC's investigation is sufficient to meet the Minister's responsibilities.</p>	
Accept to open an investigation on the basis of the s. 17 request.	<p>ECCC will review the material provided by the complaints and determine if it has relevance.</p>	<p>The complainants would expect updates every 90 days. Anything that doesn't lead to prosecution would likely be disputed as unreasonable.</p>	<p>Can ECCC reasonably open a parallel investigation?</p> <p>Would the investigation be considered in good faith?</p> <p></p>

