

Court File No.: \_\_\_\_\_

**FEDERAL COURT**

**BETWEEN:**

**MUHANNAD MALAS**

**Applicant**

**-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 Applicant. 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 Applicant requests 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 Applicant's 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: July 19, 2019

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office: Thomas D'Arcy McGee Building  
90 Sparks Street, 5th floor  
Ottawa, ON K1A 0H9

**TO:** Nathalie G. Drouin  
Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8  
Tel: (613) 957-4998  
Fax: (613) 941-2279

**Counsel for the Respondent**

## APPLICATION

1. This is an application for judicial review in respect of the failure of the Minister of Environment and Climate Change (“Minister”) to properly report progress on a Public Participation investigation that the Applicant requested under s. 17 of the *Canadian Environmental Protection Act, 1999* (“CEPA”).

2. On July 7, 2017, the Applicant requested four Public Participation investigations into illegal behaviour by Volkswagen AG, its subsidiaries or agents, and its local dealers in the context of the diesel emissions scandal that became public and notorious in September 2015. The Minister responded to this request by opening a single Public Participation investigation into the Applicant’s allegation “[t]hat Volkswagen AG and its local dealers unlawfully resumed sales of 2015 model cars after only completing a ‘half-fix’” to the emissions control systems and declined to open the other three requested investigations. That investigation was assigned to a lead investigator, Emil Bandelj, who reported information up his chain of command to the Minister’s delegate, Ms. Heather McCready, who is at the top of the chain of command and who has authority and control over the investigation file.

3. Under CEPA s. 19, the Minister is obligated to “report to the applicant every 90 days on the progress of the above-mentioned Public Participation investigation and the action, if any, that the Minister has taken or proposes to take”. Further, the Minister is obligated to “include in the report an estimate of the time required to complete the investigation or to implement the action.” In effect, progress shall be demonstrated and reported to the Applicant in two different fashions:

- a) Progress manifested in the actual or proposed action(s) taken in the course of the investigation (or absence of any action, if that is the case); and
- b) Progress manifested in time estimates, both for the completion of the investigation, and for the implementation of each of the specified action(s).

4. The Minister has now provided eight 90-day progress reports, the most recent of which is dated July 12, 2019. While details of each progress report vary, the Applicant alleges that in both areas, the Minister’s reporting has been deficient.

5. With respect to the actions taken or proposed: While the first two reports detailed specific actions that were taken or would be taken, such as to gather the evidence needed to

identify the implicated vehicles, later reports have become less specific such as to state that “the officer has collected evidence” without any detail. Actions are also concealed in opaque language such as to state “investigative strategies are proceeding” without expressing what the underlying actions of those strategies are. Further, all the proposed actions lack time estimates for implementation, and the Minister has provided no reasons for the omission.

6. With respect to completing the investigation: Each of the eight reports to date contains a time estimate for completing the investigation, but none of the time estimates has been honoured, and for approximately a year the time estimates have the same. The four most recent reports, each of which is dated about three months (90 days) from the last, stipulates that another three months would be needed. The Minister has provided no reasons for the time estimates she has promulgated, or why they failed to be met.

7. The Applicant alleges that the Minister’s 90-day progress reports are deficient, inconsistent with the record of the investigation, not reasonable, and arbitrary, possibly for an improper purpose of minimizing disclosure of work. The Minister has also violated procedural fairness obligations owed to the Applicant, because her failures prejudice his ability to exercise his public participation rights in CEPA Part 2 as intended by Parliament or in a purposive interpretation.

8. The Minister’s 90-day progress reports leave the Applicant in doubt whether the investigation of his allegations against Volkswagen is being conducted in a reasonable manner, and that progress is being made on the ultimate decision of charging Volkswagen with the offences he alleged.

9. The Applicant, along with his colleague, Tim Gray, who made a similar (but narrower) s. 17 investigation request to the Minister in 2017, submitted a complaint to the Minister about the 90-day progress reports on June 25, 2019. The Minister never responded to that letter, but instead issued a 90-day progress report to the Applicant dated July 12, 2019, which is verbatim identical to the June 22, 2019 version that she sent to Mr. Gray. The submissions made in the Applicant’s complaint were never considered.

**THE APPLICANT MAKES APPLICATION FOR:**

10. The Applicant make application for:
- a) An order of *mandamus* directing the Minister to produce a considered time estimate to conclude her investigation into the allegations made by the Applicant, with reasons;
  - b) An order of *mandamus* directing the Minister to particularize the action(s) or proposed action(s) in the course of her investigation, including considered time estimate(s) for their implementation, with reasons;
  - c) In the alternative, a declaration that one or several of the Minister's 90-day progress reports are deficient, inconsistent with the record of the investigation, unreasonable, arbitrary, motivated by improper purposes, and/or violate the Applicant's right of procedural fairness under Part 2 of CEPA;
  - d) Costs of this Application, including costs thrown away on a full indemnity basis if the Minister takes steps to make this Application moot; and
  - e) Such further and other relief as the Applicant may request and this Honourable Court may permit.

**THE GROUNDS OF THE APPLICATION ARE:**

***Volkswagen emissions scandal***

11. In September 2015, news broke that the German company Volkswagen had for a number of years engineered and built diesel cars fitted with a so-called "defeat device". The defeat device functions like an on/off switch for legal compliance: it causes the emissions control system of the affected cars to operate in "clean" mode and comply with tailpipe emissions limits for potentially lethal air pollutants such as nitrogen oxides ("NOx") while undergoing laboratory testing for regulatory purposes, but once the cars are on the open road and driven normally, the defeat device changes the car's operation to "dirty" mode and causes NOx emissions at levels of up to 35 times the legal limit.

12. In other words, the sole purpose of the defeat device is to selectively and intentionally violate air pollution rules prescribed in CEPA and its regulations. Volkswagen does not dispute the illegality of equipping its cars with the defeat device, but has pleaded guilty to it in other jurisdictions and made admissions that are legally binding upon it in Canada.

13. Other countries like the United States and Germany immediately and aggressively prosecuted Volkswagen for these actions. In the United States, the parent company Volkswagen AG agreed to pay US\$4.3 billion in criminal and civil penalties as part of a settlement entered into in January 2017. Much of this money is earmarked for cleaning up the environment or investing in clean transportation technologies for the public good. As a condition of the settlement, Volkswagen AG agreed to a lengthy “Statement of Facts” which is legally binding on the company, including in litigation in Canada and which precludes resiling from the admission of guilt.

14. Given the alignment between Canadian and US standards for regulating automotive emissions, and the fact that Volkswagen pleaded guilty and made material admissions, it should be simple for the Minister to take enforcement action against it for violating CEPA. Yet the Minister has not charged (much less prosecuted) Volkswagen for any offence, or imposed any other corrective and enforcement measures upon it, in nearly four years since the scandal broke.

15. The Applicant is concerned that the Minister or those conducting the Volkswagen investigation may have actively or tacitly chosen not to proceed. Shortly after Volkswagen admitted equipping its diesel cars with a defeat device, on September 22, 2015, ECCC issued a public “update on the issue” announcing that it had opened an investigation. But in the nearly four years since, ECCC has given no further public update whatsoever. Further, by June 2017 (or perhaps sooner) the website where ECCC places such updates has been “archived” and ECCC states it “will not be updating it”.

16. ECCC admitted at the time of opening its investigation in September 2015 that at least 100,000 affected vehicles were sold in Canada (all were imported). While no estimates have been published on the health effects of the emissions scandal in Canada,

research has linked excess emissions in Germany to 1,200 premature deaths and €4.1 billion in health costs.

***The Applicant's request for investigation***

17. Muhannad Malas, the Applicant, is the Toxics Program Manager at Environmental Defence. He is a Canadian resident who is concerned that, relative to foreign environmental protection authorities who promptly investigated, prosecuted, and obtained billions of dollars in compensation against Volkswagen, to date ECCC has accomplished none of this.

18. Indeed, far from holding Volkswagen accountable, in March 2017 ECCC allowed Volkswagen to resume selling noncompliant, "half fixed" 2015 model year diesel cars to Canadians. Volkswagen has since admitted that those cars, even after a full fix of both hardware and software that it performed later, remain noncompliant with the emissions standards to which they were certified—and those cars are operating illegally on Canada's roads today, with ECCC's knowledge. As stated earlier: ECCC has failed to take action law enforcement action against Volkswagen for its original offences, or the subsequent offences of selling noncompliant "half fixed" cars.

19. The Applicant is concerned that ECCC's lax approach toward enforcing air pollution standards puts the natural environment and human health at risk, and affronts the rule of law. The Applicant has no financial interest in the matter of the investigation, but only the interest of protecting these public values.

20. For these reasons, on July 7, 2017 the Applicant submitted to ECCC a detailed, written request for an investigation pursuant to s.17 of CEPA. CEPA's public participation regime allows any individual who is at least 18 years old and a resident of Canada to request an investigation into an alleged offence. This then triggers a requirement that the Minister conduct the investigation (s. 18) and send progress reports to the applicant on the investigation's status (s. 19).

21. The Applicant requested that ECCC open an investigation into four allegations:

1. That Volkswagen AG unlawfully imported noncompliant cars;

2. That Volkswagen AG unlawfully applied the National Emissions Mark on noncompliant diesel cars and sold those cars;
3. That Volkswagen AG provided false and misleading information; and
4. That Volkswagen AG and its local dealers unlawfully resumed sales of 2015 model cars after only completing a "half-fix" to the emissions system.

22. These allegations are covered by s. 11(1) of the *On Road Vehicle and Engine Emission Regulations*, which prohibits defeat devices; by s. 153 of CEPA, which criminalizes the importation or marketing of non-conforming cars, and criminalizes providing false or misleading representations of a car's conformity; and by various provisions of the *Criminal Code* on fraud and conspiracy which ECCC can refer to the Public Prosecution Service of Canada.

#### ***The Minister's response and related proceedings***

23. On July 19, 2019, the Applicant received a letter response from Heather McCready, Director General of the Environmental Enforcement Directorate. The letter informed the Applicant that ECCC opened a Public Participation investigation for allegation #4 only. No Public Participation investigation was opened for allegations #1-3 because, according to Ms. McCready, internally to ECCC "an investigation [had] already been opened [...] and continues to be conducted" for these allegations.

24. On August 2, 2017, the Applicant filed an application for judicial review challenging the Minister's decision to refuse to open Public Participation investigations for allegations #1-3. On September 15, 2017, that application was consolidated with a similar application filed by Tim Gray (Court File No. T-1252-17). The merits hearing of this judicial review is scheduled for October 21, 2019.

#### ***Progress reports***

25. For allegation #4, the Minister, through her delegate Ms. McCready, has been providing the Applicant with written reports every 90 days as she is required under s. 19.



However, the content of these written reports is deficient relative to the statutory obligation to report progress, actions, and time estimates in s. 19.

26. The early reports provide some particulars about the investigative actions that were taken or would be taken. For example, the first report states that the “request has been assigned to a senior enforcement officer in ECCC’s Enforcement Branch - Ontario Region”. It provides an overview of the relevant legislative provisions and the proof required for ECCC to undertake enforcement action. The second report states that the enforcement officer “has conducted interviews with VW”, “is reviewing data on the affected vehicles imported and sold” and “is continuing to collect information”.

27. In contrast, the later reports lack particulars about the investigative actions. For example, the Minister has ceased divulging the identity of those interviewed.

28. The early reports also gave plausible estimates of the time required to complete the Applicant’s investigation. The time estimates provided in the first three 90-day progress reports are: (i) one year or more; (ii) nine months, and; (iii) six months. These time estimates indicate that the investigation was on a steady timeline to be completed by November 2018. It is certainly feasible that the investigation could have been concluded by this time, given that countries like the US and Germany have brought not just investigations but prosecutions to completion in less time.

29. In contrast, the fifth, sixth and seventh reports gave identical, false estimates of the time required to complete the Applicant’s investigation. All of these reports state that the investigation’s end is only three months away—until the next report comes three months later announcing, yet again, that the end is three months away.

30. The most recent progress report (dated July 12, 2019) states that the Minister is reviewing investigative evidence with the Public Prosecution Service of Canada, but as ECCC has not laid any charges for offences under CEPA, that statement offers no insight into the investigation’s progress. It too states that the completion date is three months away.

31. The progress reports suggest that the Minister is not acting diligently to advance and complete the Public Participation investigation requested by the Applicant. CEPA s.

18 states that the Minister “shall investigate” when she receives a request to open a Public Participation investigation under s. 17. The Minister’s issuance of four successive progress reports within 12 months, all of which are deficient of particulars and reiterate exactly the same false time estimate—just three more months—to complete the investigation, gives the Applicant reason to believe that the investigation is moribund, pretextual, or proceeding unreasonably slowly while the affected cars continue to operate in Canada and violate the law.

32. The 90-day “progress reports” that the Minister has provided the Applicant are insufficient to meet her obligations under s. 19, having regard to the statutory purpose and Parliamentary intent to foster Public Participation and transparency in the CEPA enforcement process. It is unreasonable of the Minister to interpret s. 19 as allowing her to produce reports lacking particulars of investigative actions and lacking credible and reasoned time estimates, because these deficiencies result in reports that fall short of the statutory purpose and Parliament’s intent that the Minister illuminate the true “progress” of the investigation for the Applicant.

33. A purposive interpretation of CEPA Part 2 on Public Participation, and consideration of Parliament’s intent, requires the Minister’s reports to give the Applicant meaningful insight into, and confidence in, the steps ECCC is taking to advance his s. 17 investigation.

***Additional grounds***

34. *Federal Courts Act*, RSC 1985, c. F-7, s.18.1;

35. *Canadian Environmental Protection Act, 1999*, SC 1999, c. 33.;

36. *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2; and

37. Such further and additional grounds as counsel may advise and the Court may allow.

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

38. The Affidavit of Emma Billard, Tim Gray, Muhannad Malas, or some such other material or affidavit; and

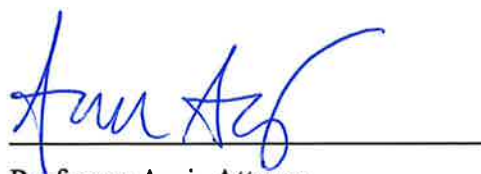
39. Such further and other materials as the Applicant may advise and this Honourable Court may permit.

***Rule 317 Request***

40. The Applicant requests that the Minister send a certified copy of the following material not in the Applicant's possession, but in the possession of the Minister or her delegates, to the Applicant and to the Registry:

- a) All documents relied on by the Minister or her delegates in preparing the CEPA s. 19 reports sent to the Applicant; and
- b) Any other documents respecting the "action" taken or proposed in the course of the investigation, and the time estimates for their implementation or the completion of the investigation, as those are probative of the reasonableness of the Minister's reporting under CEPA s. 19.
- c) Any documents reflecting the Minister's or ECCC's standard operating procedures for handling Public Participation investigations under CEPA Part 2.

Dated: July 19, 2019



Professor Amir Attaran  
Barrister & Solicitor  
Ecojustice Environmental Law Clinic  
at the University of Ottawa  
1 Stewart Street, Suite 216  
Ottawa, ON K1N 6N5  
T. 613-562-5800 ext. 3382  
F.613-562-5319  
Email: [aattaran@ecojustice.ca](mailto:aattaran@ecojustice.ca)

Randy Christensen  
Barrister & Solicitor  
Ecojustice  
425 Carrall Street, Suite 390  
Vancouver, BC V6B 6E3  
T.604-685-5618 ext.234  
F. 604-685-7813  
Email: [rchristensen@ecojustice.ca](mailto:rchristensen@ecojustice.ca)

Anna McIntosh  
Barrister & Solicitor  
Ecojustice Environmental Law Clinic  
at the University of Ottawa  
1 Stewart Street, Suite 216  
Ottawa, ON K1N 6N5  
T. 613-562-5800 ext. 3378  
F.613-562-5319  
Email: [amcintosh@ecojustice.ca](mailto:amcintosh@ecojustice.ca)