



**Environmental
Law Centre**
UNIVERSITY OF VICTORIA

**Submissions on Restricting Cosmetic Pesticide Use in
British Columbia**

By the Environmental Law Centre

Victoria, British Columbia

February 2010

Murray and Anne Fraser Building • University of Victoria
PO Box 2400 STN CSC, Victoria, BC V8W 3H7
Phone: 250.721.8188 • Fax: 250.472.4528 • Email: elc@uvic.ca • Web: www.elc.uvic.ca

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1. Introduction¹

With concern growing over the health and environmental effects of pesticides, the Government of British Columbia (“the BC government”) has committed to consulting citizens on the development of “new statutory protections to further safeguard the environment from cosmetic pesticides.”² The UVic Environmental Law Centre (ELC) welcomes this step. A movement toward banning the use and sale of cosmetic pesticides in Canada has been in the works for many years as evidenced by the 150 ordinances and bylaws in municipalities across Canada,³ including approximately 28 BC municipalities. In addition, provincial legislation has been enacted in Quebec, Ontario, New Brunswick and Prince Edward Island. Public consultation is expected to begin soon in Nova Scotia, and in Alberta the sale of ‘weed and feed’ products will be prohibited as of spring 2010. It is time that BC join the growing momentum and better protect the citizens of this province from exposure to cosmetic pesticides. The ELC believes that the government’s current consultation is an exciting opportunity for BC to revisit and reform its pesticide laws to meet and surpass the steps that have been taken in other jurisdictions.

Restricting pesticide use is important. Pesticides have been linked with various cancers, including prostate, ovarian, brain, leukemia and non-Hodgkin’s lymphoma.⁴ They have also

¹ These submissions were prepared by ELC students and staff: Steven Catania, Morgan Blakely, Ethan Krindle, Szhai, Jill Vivian (Articled Student), Calvin Sandborn (Legal Director), and Deborah Curran (Project Director).

² August 25, 2009 Speech from the Throne - From B.C. Government Consultation Paper, online: <http://www.elp.gov.bc.ca/epd/ipmp/regs/cosmetic-pesticides/pdf/consultation-paper.pdf>.

³ Mike Christie, “Private Property Pesticide Bylaws in Canada,” Up-to-date as of April 15, 2009. Online: <http://www.flora.org/healthyottawa/BylawList.pdf>.

⁴ One study found higher than average rates for prostate and ovarian cancers in agricultural pesticide applicators (“Cancer incidence in the agricultural health study”, Alavanja MC et al., *Scand J Work Environ Health* (2005) 31 Suppl 1:39-45; discussion 5-7). Other studies concluded that occupational pesticide manufacturers and applicators have increased risks of leukemia (Genevieve Van Maele-Fabry, Sophie Duhayon, and Dominique Lison, “A systematic review of myeloid leukemias and occupational pesticide exposure” *Cancer Causes Control* (2007) 18:457–478 at 457) and, again, prostate cancers (Genevieve Van Maele-Fabry et al., “Review and meta-analysis of risk estimates for prostate cancer in pesticide manufacturing workers” *Cancer Causes Control* (2006) 17:353–373 at 369). Also see G. Van Maele-Fabry, J. L. Willems, “Occupation related pesticide exposure and cancer of the prostate: a meta-analysis” *Occup Environ Med* (2003) 60:634–642, which suggests pesticide exposure is not an independent cause but may be a contributing factor. Pesticides have also been linked to childhood cancers, including

been linked to neurological diseases such as Parkinson's disease.⁵ Developing children may be particularly susceptible to such effects,⁶ and childhood exposure has been linked with additional afflictions such as changes to the brain structure of children, autism, asthma, reduced intelligence, and Attention Deficit Disorder.⁷ Pesticide exposure may also later cause premature puberty or fertility problems.⁸

In addition to human impacts, pesticides can also cause environmental damage, affecting non-target species and even inadvertently harming human food supplies and sources of medical compounds. For example, pesticides have been shown to harm salmon by causing changes in their reproductive and sexual characteristics, weakening their immune systems, and changing their survival behaviours.⁹ Pesticides also contributed to the decline in bee populations by one third in the past few years as a result of increasing pesticide concentrations in honeycombs. This has severe implications for human food supplies, of which one third depends on pollination by bees.¹⁰

In light of these concerns, and at the request of the Canadian Cancer Society, BC and Yukon (CCSBCY) and Toxic Free Canada (TFC), the ELC has developed a model law, the

leukemia, non-Hodgkin's lymphoma, and brain, colorectal and testicular cancers (Zahm SH, Ward MH, "Pesticides and childhood cancer" *Environ Health Perspect* (June 1998) 106 Suppl 3:893-908).

⁵ "Why We Need Provincial Legislation Banning the Sale and Use of Pesticides: Background", Toxic Free Canada, online: <http://www.toxicfreecanada.ca/articlefull.asp?uid=78> ("Toxic Free"). See for example Sadie Costello et al., "Parkinson's Disease and Residential Exposure to Maneb and Paraquat From Agricultural Applications in the Central Valley of California" *American Journal of Epidemiology* (2009) 169 (8): 919 DOI: [10.1093/aje/kwp006](https://doi.org/10.1093/aje/kwp006). This study found, among other things, that exposure to agricultural pesticides maneb and paraquat within 500m of one's home increase that person's risk of Parkinson's disease by 75%.

⁶ The magnitude of the risk of cancer from pesticide exposure was observed to be higher in children than in adult populations, suggesting children are particularly vulnerable to the effects of pesticide exposure (Zahm SH, Ward MH, "Pesticides and childhood cancer" *Environ Health Perspect* (1998) Jun;106 Suppl 3:893-908).

⁷ Toxic Free, *supra* note 5. See for example Ted Schettler et al., "In Harm's Way: Toxic Threats to Child Development", Greater Boston Physicians for Social Responsibility (May 2000; updated 2001), online: <http://www.psr.org/chapters/boston/resources/in-harms-way-report-download.html>.

⁸ Toxic Free, *supra* note 5. See for example Kim Harley et al., 2008. "DDT exposure, work in agriculture and time to pregnancy among farmworkers in California", *Journal of Occupational and Environmental Medicine* (2008) 50(12):1335-1342.

⁹ Richard D. Ewing, "Diminishing Returns: Salmon Decline and Pesticides", Oregon Pesticide Education Network (February 1999), online: <http://www.pcffa.org/salpest.pdf>.

¹⁰ Toxic Free, *supra* note 5.

Cosmetic Pesticides Act (hereinafter the “Model Act”) as a blueprint for the regulation of the use of cosmetic pesticides in BC (see Appendix A for a copy of the Model Act). In furtherance of the consideration and adoption of the approaches set out in the Model Act, the ELC has developed these detailed submissions to the BC government’s current consultation on the development of cosmetic pesticide legislation. The submissions will help inform government regulators of best regulatory practices available and how BC can incorporate them. Note that because of exigencies of time in this extremely time-constrained consultation process, the information below has not been fully vetted or explicitly authorized by the CCSBCY or TFC. The opinions and submissions below are those of the ELC and not those of the CCSBY or TFC.

The ELC has examined the following broad aspects of a cosmetic pesticide use statute: scope and application; substances affected and listing of such substances; enforcement; education; and accountability. The following discussion examines these components in relation to the Model Act, and also addresses the consultation questions posed by the Ministry of Environment.

2. Scope & Application

In order to ensure effective legislation, it is important that the BC government develop comprehensive legislation that is wide in scope and strongly limits the sale and use of cosmetic pesticides in this province. The new legislation should be grounded in the Precautionary Principle, which states that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹¹

¹¹ *Rio Declaration on Environment and Development*, Principle 15, online at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>. The Supreme Court of Canada has recognized this principle in the case of *Spraytech v. Town of Hudson*, [2001] 2 S.C.R. 241.

2.1 Definitions

Definitions play an important role in delineating the scope of pesticide legislation, and are found in s.2 of the Model Act. In order to best promote the health and safety of British Columbians and the environment in which they live, a broad, inclusive definition is required for key terms like “cosmetic” and “pesticide”.

Municipal pesticide use is dealt with under s.2(2) of the *Sphere of Concurrent Jurisdiction – Environment and Wildlife Regulation*,¹² but no definition of “pesticide” is provided. An inclusive definition of “pesticide” is, however, provided in BC’s *Integrated Pest Management Act*,¹³ and could provide a basis for new legislation. Under the Act:

“pesticide” means a micro-organism or material that is represented, sold used or intended to be used to prevent, destroy, repel or mitigate a pest, and includes

- a) a plant growth regulator, plant defoliator or plant desiccant,
- b) a control product as defined in the *Pest Control Products Act* (Canada), and
- c) a substance that is classified as a pesticide by regulation.¹⁴

This is also the definition used in the Model Act. Other examples of definitions of “pesticide” are found in Ontario’s *Pesticides Act*,¹⁵ and Quebec’s *Pesticides Management Code*.¹⁶

“Cosmetic” may be defined in different ways, and a clear definition will assist all parties to understand to what the definition applies and how. In Ontario, “cosmetic” is defined as non-

¹² *Sphere of Concurrent Jurisdiction – Environment and Wildlife Regulation*, B.C. Reg. 144/2004.

¹³ *Integrated Pest Management Act*, S.B.C. 2003, c. 58, at s.1.

¹⁴ *Ibid.* Note (c) in original reads “a substance that is classified as a pesticide by regulation, but does not include micro-organisms, materials, substances or control products excluded from this definition by regulation” and has been modified to be more inclusive.

¹⁵ *Pesticides Act*, R.S.O. 1990, c. P.11, at s. 1. “Pesticide” is defined as:

any organism, substance or thing that is manufactured, represented, sold or used as a means of directly or indirectly controlling, preventing, destroying, mitigating, attracting or repelling any pest or of altering the growth, development or characteristics of any plant life that is not a pest and includes any organism, substance or thing registered under the *Pest Control Products Act* (Canada).

¹⁶ *Pesticides Management Code*, R.S.Q. 1987, c. P-9.3, at s. 1. “Pesticide” is defined as:

Any substance, matter or microorganism intended to directly or indirectly control, destroy, mitigate, attract or repel any organism that is injurious to or noxious or troublesome for humans, animal life, vegetation, crops or any other object, or intended for use as a plant growth regulator, except a vaccine or a medication other than a topical medication for external use on animals.

essential.¹⁷ Quebec’s regulation does not provide a definition, because it applies to lawn pesticides and does not use the term “cosmetic”. There is no existing definition of “cosmetic” pesticides in B.C. laws. However, under the *Sphere of Concurrent Jurisdiction – Environment and Wildlife Regulation*, municipalities are not permitted use their concurrent jurisdiction over environmental protection to regulate the use of pesticides:

- a) For the management of pests that transmit human diseases or impact agriculture of forestry,
- b) on the residential areas of farms,
- c) to buildings or inside buildings, or
- d) on land used for agriculture, forestry, transportation, public utilities or pipelines unless the public utility or pipeline is vested in the municipality.¹⁸

These limitations prevent municipal bans on pesticide use pertaining to public health and safety, agriculture, forestry, and public infrastructure. A definition could therefore be derived from these limitations, with all other uses being considered “cosmetic”. Our recommended definition is the one used in the Model Act, which defines cosmetic as “non-essential, or an item used for the intention of improving or maintaining an esthetic quality”.¹⁹

Although the term “cosmetic” has been used in an attempt to clarify the intent of this type of legislation, it is important that the purpose of the legislation does not get lost in suggestive language. Essentially, legislation should define the “cosmetic use of a pesticide” to be the non-essential application of *any* pesticide whose name does not appear on a “white list” (a list of low-risk pesticides that are accepted for cosmetic use, with all other unlisted pesticides prohibited), and which is not being used under one the following exceptions: (1) uses related to agriculture, (2) uses related to managing pests that impact forestry, and (3) uses related to the preservation and promotion of public health and safety (both the white list and the exceptions are discussed in

¹⁷ *Pesticides Act*, *supra* note 15 at s. 1.

¹⁸ *Sphere of Concurrent Jurisdiction – Environment and Wildlife Regulation*, *supra* note 12 at s.2(2).

¹⁹ Model Act, at s.2.

more detail below).²⁰ No other permanent exceptions should apply. Where a vendor or applicator claims they are using a product for an essential (i.e. non-cosmetic use), the onus should be on the vendor or applicator to prove on a balance of probabilities that their use is acceptable under the legislation.

2.2 Restrictions on Pesticide Use and Sale

Unlike municipal pesticide control bylaws, which only apply to the *use* of pesticides, provincial legislation can also restrict the *sale* of pesticides used for cosmetic purposes, and the use of pesticides on non-municipally owned or residential-owned property. Both the Quebec *Pesticides Management Code* and the Ontario *Pesticides Act* restrict the use and sale of such pesticides in their respective provinces. We recommend the BC legislation also regulate at the point of sale. This is the most efficient point for regulation because sales involve a more concentrated regulated group rather than targeting diffuse use on property. Restricting the sale, along with the use of such pesticides, has proven to be more effective in ensuring compliance with restrictions.²¹ Sections 5 and 6 of the Model Act follow this approach and prohibit the sale, transfer and use of pesticides for cosmetic purposes, with the exception of those low-risk pesticides that are white-listed.

Additional specifications can strengthen bans on the sale and use of cosmetic pesticides. For example, restrictions are most effective where they apply to all land under provincial jurisdiction, including industrial, residential, commercial, and public spaces. This ensures broad application of the ban, and recognizes the reality that pesticide drift does not respect property lines or certificates of title.

²⁰ Note that some might argue that using the term “non-essential” implies that forestry and agricultural pesticide use is essential, a questionable premise.

²¹ Simona Untara, Lisa Gue, and Lova Ramanitarivo, “Pesticide Free? Oui! : An Analysis of Quebec’s Pesticide Management Code and Recommendations for Effective Provincial Policy”, David Suzuki Foundation and Equiterre (Revised April 2008), online: David Suzuki Foundation, http://www.davidsuzuki.org/Publications/Pesticide_Free_Oui.asp, at 16.

As well, despite differences in federal evaluation methods, it is recommended that no distinction be drawn between “indoor” and “outdoor” pesticides. The reasons for this are threefold. First, if the province is concerned with health risks associated with use of cosmetic pesticides then restricting the use and sale of both indoor and outdoor pesticides only furthers the government’s aim of protecting its citizens. Second, many of the so-called “indoor” pesticides contain the same dangerous chemicals as outdoor pesticides, and indoor pesticides may lead to more intense human exposure because they are used in confined spaces. In addition, it is easy for products to be labeled “indoor” but it is hard to prevent consumers from buying the “indoor” product and using it outside. This would clearly undermine the purpose of the new legislative regime and put the health and safety of BC and its citizens at risk. Finally, if a pesticide is needed indoors to address problems such as termites or cockroaches, this is not a cosmetic use and would not be prohibited in any case.

In the same vein, a distinction between pesticides used for lawns and those used for gardens is not justified. Many lawn and garden products can be used interchangeably and such a distinction is impractical and impossible to enforce. Restricting all landscaping pesticides is clearer, more consistent, and easier to enforce.²²

Finally, mixed use pesticides, that is pesticides with both cosmetic and non-cosmetic uses, should be subject to point of sale restrictions to ensure the comprehensive application of the ban. For example, keeping mixed use products behind the retail counter is the most effective way of regulating their use and ensuring that public education occurs at point of sale. In this way, the consumer is reminded of the serious nature of the product and retailers can help ensure that the product is not being used as a cosmetic pesticide.

²² This approach has been recommended by other sources, including the David Suzuki Foundation (*Ibid.*, at 18).

2.3 *Excepted Uses and Permit Requirements*

We accept an approach that would exempt pesticide use for agriculture, forestry and public health and safety from the ban. The Model Act suggests allowing such exemptions where the proper permitting process is followed. This system is set out in ss.7 – 15 of the Model Act.

To ensure pesticides otherwise prohibited from cosmetic uses are actually only being used for the authorized excepted uses (agriculture, forestry, public health and safety), we recommend a non-onerous permitting process. A person claiming one of the exceptions noted above should be required to hold a permit and comply with the terms and conditions attached to that permit. The requirement of a permit will reduce the number of illegitimate exception claims; act as a reminder to users about the serious health, safety and environmental dangers posed by pesticide use; and, give clear direction and limitations on the use of pesticides under the exception. Additionally, in order to encourage transparency and accountability within the community, permit administrators should be required to disclose a copy of any permit to any person who requests it.

2.4 *Transition Approach*

For those uses and industries not subject to such exceptions, the ban on the sale and use of pesticide products will motivate companies to find new ways to manage pest problems. Some industries will be affected more than others. An effective education program and a list of available alternatives as contemplated by a white list (again, this is discussed further below) should alleviate many of the difficulties in adjusting to new legislation.

However, the government may wish to consider certain transitional exceptions that would give the golf course industry a three year grace period in order to adjust to new legislation (see, for example, s.7(c) of the Model Act). In considering rules for the transition period, government

may want to take into account a submission to the Ontario Ministry of Environment from the Canadian Environmental Law Association, which made the following recommendations with respect to golf courses for improving cosmetic pesticides regulation in that province²³:

Require that continued use of pesticides by golf courses be limited to those areas where alternatives are not yet readily available. Hence, pesticide use by golf courses should be explicitly limited to putting greens while all other areas in a golf course property should be subject to the same cosmetic use restrictions as this new law and regulation applies to the province as a whole.²⁴

However, any transitional exceptions should be just that – transitional. In no case should they be longer than three years. Many Canadian jurisdictions already have cosmetic pesticide bans in place, and industries can draw on the experience of other jurisdictions where pesticides have been banned in order to reconfigure their landscaping practices to conform to the new restrictions.

2.5 *Municipal Bylaws*

Sections 8(3)(j) and 9(1)(b) of the *Community Charter* enable municipal governments to regulate pesticides concurrently with the BC government.²⁵ Under this authority, local governments have innovated and led the way on this issue. Currently, there are approximately 28 municipal bylaws restricting pesticide use in BC.²⁶ Municipal bylaws are important because they reflect local values with respect to cosmetic pesticide use and add an additional level of enforcement to pesticide bans. Municipal enforcement can be particularly effective in ensuring compliance in residential areas. Bylaws also provide the opportunity for testing important “pilot

²³ Letter from Kathleen Cooper, Senior Researcher at the Canadian Environmental Law Association to Robert Bilyea, Senior Policy Advisor, Ministry of Environment (December 22, 2008) online: Canadian Environmental Law Association, http://s.cela.ca/files/635_EBR010_5080.pdf.

²⁴ *Ibid.*, at 4.

²⁵ *Community Charter*, S.B.C. 2003, c. 26.

²⁶ Cindy Bertram “Cosmetic Use of Pesticide in British Columbia Public Consultation Paper,” (December 2009) British Columbia Ministry of Environment, online: <http://www.env.gov.bc.ca/epd/ipmp/regs/cosmetic-pesticides/pdf/consultation-paper.pdf>, at 4.

projects” in regulating pesticides. However, not all municipalities have bylaws dealing with cosmetic pesticides, and municipal power to create these bylaws is limited (for example, municipalities can only deal with the use, not sale, of pesticides on residential and municipally-owned properties). Provincial legislation will provide an underlying blanket protection for all municipalities throughout BC, as well as effective restrictions targeting the *sale* of cosmetic pesticides.

Given the benefits of both municipal bylaws and provincial pesticide legislation, and given the importance of permitting and facilitating local innovation and solutions, it is important that any new legislation allow municipalities to continue to regulate cosmetic pesticide use where desired. One approach for doing this is laid out in ss.3-4 of the Model Act. Section 3 affirms a municipality’s authority to pass bylaws dealing with “cosmetic pesticides”. Section 4 states that in a situation of conflict, the most restrictive law should prevail. Alternatively, the new legislation could remain silent on the matter, thereby implicitly permitting regulation by municipalities. This option may be less legally contentious. Regardless, the most important point on this issue is that B.C. should not take the short sighted approach used by Ontario in its *Pesticides Act*, which made municipal bylaws inoperative. It is imperative that BC retain the capacity for local innovation and enforcement, be that by explicit legislative provisions or silent but implicit permission.

2.6 Recommendations

- **Implement a ban on the use of pesticides for a cosmetic purpose, and limit any exceptions.**

- **Define “cosmetic” as “non-essential, or an item used for the intention of improving or maintaining an esthetic quality”. Adopt the definition of “pesticide” used in the *BC Integrated Pest Management Act*.**
- **Where a vendor or applicator claims they are using a product for an essential (i.e. non-cosmetic use) purpose, the onus should be on the vendor or applicator to prove on a balance of probabilities that their use is acceptable under the legislation.**
- **Apply the ban to pesticides for use on industrial, commercial, public and residential properties.**
- **Apply the cosmetic pesticide ban to both indoor and outdoor use pesticides.**
- **No distinction between garden and lawn pesticides is warranted.**
- **Legislation is strongest where it applies to both cosmetic and mixed use pesticides, mixed use pesticides being those with both cosmetic and non-cosmetic uses.**
- **Exceptions should be limited to agricultural, forestry, and health and safety uses, confirmed through a non-onerous permitting process.**
- **Golf courses should also be subject to the ban, following a three year grace period.**
- **Municipalities should not be pre-empted from maintaining or developing their own pesticide bans.**

3. Listed Products

Determining how to best evaluate and list pesticides implicated by a ban is critical to meeting the objectives of such legislation. The Model Act deals with this matter under ss.26-28. It uses a “white list” approach, that is, a list or class of low-risk pesticides that are acceptable for cosmetic use, with all other unlisted pesticides prohibited. The white list is set out in Schedule 1 of the Model Act. Sections 26-28 provide for the creation of an independent multistakeholder

body to assist the Minister of Environment in determining which products are eligible for the white list. This should add expertise and diverse community knowledge to the decision-making regarding products that should be listed. To promote transparency, the names and occupations of Committee members must be publicly disclosed.

To better explore potential approaches to listing, we have provided an analysis of the important sections of the Federal, Quebec, and Ontario acts and regulations, and an analysis of the issues regarding the use of white lists. We have also provided recommendations towards building a white list to successfully implement the objectives of a cosmetic pesticide ban.

3.1 Current Approaches to Listing in Canadian Legislation

Federal control over pesticides is legislated in the *Pest Control Products Act*²⁷ (*PCPA*) and *Pest Control Product Regulations*²⁸ (*PCPR*). The *PCPA* is administered by the Pest Management Regulatory Agency (PMRA). Section 6 of the *PCPA* deals with product registration, labeling, and concomitant enforcement. Section 6(1) places a ban on pesticides not registered under the *PCPA*, stating:

no person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under this Act, except as otherwise authorized under subsection 21(5) or 41(1), any of sections 53 to 59 or the regulations.²⁹

The registration and evaluation of pest control products are dealt with under s.7 of the *PCPA*. Applications to register or amend the registration of a pest control product are made to the Minister,³⁰ who also conducts product evaluations where deemed necessary (by the Minister)

²⁷ *Pest Control Products Act*, S.C. 2002, c. 28 (*PCPA*).

²⁸ *Pest Control Products Regulations*, SOR/2006-124 (*PCPR*).

²⁹ *PCPA*, *supra* note 27 at s.6(1). The exceptions listed in s.6(1) provide as follows. Section 21(5) allows the minister to seize, recall, or allow storage when the minister cancels the registration of a pest control product. Section 41(1) allows the Minister to authorize the use of an unregistered pesticide for a specified purpose. Sections 53 to 59 are enforcement, disposal and risk-control measures for pest control products.

³⁰ *PCPA*, *supra* note 27 at s.7(1).

to determine health and environmental risks and the value of the product.³¹ Section 7(3)(b) requires the Minister to expedite evaluations of products that may reasonably be expected to pose lower health and environmental risks. Section 7(6) states that the applicant must persuade the minister that “the health and environmental risks and the value of the pest control product are acceptable”. Such risks are considered acceptable “if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product...”³² Section 7(7) requires the Minister to use a scientific approach in evaluating products and has mandatory considerations including cumulative effects and dietary exposure. Evaluations for products for use in or around the home are more stringent, with s.7(7)(b)(iii) requiring that the margin of safety for such products be ten times greater than otherwise applicable. Of concern is s.7(8) which allows government policy to be considered in evaluating health and environmental effects.

Turning to the regulations, s.5 of the *PCPR* breaks pest control products into four categories:

- 1) Domestic: If the pest control product is to be distributed primarily to the general public for personal use in or around their homes;
- 2) Commercial: if the pest control product is to be distributed for use in commercial activities that are specified on the label;
- 3) Restricted: if the pest control product is one for which the Minister, out of concern for health or environmental risks, has set out additional information to be shown on the label concerning essential conditions respecting the display, distribution or limitations on use of, or qualifications of persons who may use, the product; and

³¹ *Ibid.*, at s.7(3)(a).

³² *Ibid.*, at s.2(2).

- 4) Manufacturing: if the pest control product is to be used only in the manufacture of another pest control product or a product regulated under the *Feeds Act* or the *Fertilizers Act*.

This federal classification system has been incorporated by Ontario into its *Pesticides Act*, under which it lists banned substances.³³ The Ontario classification system combines the federal listing of manufacturing, commercial, residential, and restricted pesticides, with a hazardousness rating based on regulations. The hazard ratings are: very hazardous, moderately hazardous, less or least hazardous. These ratings derive from the description in s.4(5) of the “Pesticide Classification Guideline for Ontario”, which is published separately from the regulations.

The Ontario act bans the use of any cosmetic pesticide, defined broadly, with exceptions. Although the ban appears very strong, it is tempered by the extent of its exceptions. These exceptions are golf courses, agriculture, forestry, public health and safety, and “other prescribed uses”.³⁴

The Quebec government chose to use its own classification based primarily on the labeling requirements under the federal regime. The classes of pesticides in Quebec derive from the *Regulation respecting permits and certificates for the sale and use of pesticides*.³⁵ There are five categories of pesticides under this regulation. Class 1 pesticides are composed of one or more of certain listed ingredients. Class 3 pesticides are those that include the word “commercial”, “industrial”, or “agricultural”. Class 2 are those pesticides that fit neither within class 1 nor class 3, and the label says “restricted”. Class 4 represents “domestic” pesticides. Class 5 represents domestic pesticides that include premixed pesticides or specific pesticides in

³³ *Pesticides Act*, *supra* note 15.

³⁴ *Ibid.*, at s. 7.1(2).

³⁵ *Regulation respecting permits and certificates for the sale and use of pesticides*, R.Q. c. P-9.3, r.0.1.

small volumes, and pesticides which require use for specific purposes.

In summary, under federal legislation the federal government is in charge of accepting or rejecting pesticides for manufacture, distribution and use in Canada through its registration process. That process can include an evaluation of health and environmental impacts as well as product benefits, where deemed necessary. This evaluation may be subject to government policy considerations. Pesticides accepted for registration are then given different classifications. Ontario legislation builds on the federal classification system, adding additional classifications based on hazardousness. It imposes a broad ban on cosmetic pesticide use through its extensive list of banned products, but also provides fairly large exceptions to that ban. Quebec has its own classification system, which is based largely on federal labeling.

3.2 *The Use of White Lists*

We recommend new BC legislation identify banned cosmetic use pesticides by using a white list. This will best meet health and safety objectives and also incorporate the Precautionary Principle by banning the sale of all cosmetic pesticides that do not meet established health and safety criteria for inclusion on the white list. The primary problem with the alternative approach of using a black list (i.e. a list of banned products) is that under that approach new products can be used until they are recognized as being so unsafe that the list is amended. The black listing system is contrary to the Precautionary Principle and creates undue burdens on the government and individuals or organizations concerned with the health and environmental effects of substances used as pesticides. It would be onerous and unresponsive for individuals or organizations to have to generate administrative and scientific support to add each chemical to a black list, and the government would have to expend extra resources to modify the black list. An effective black list requires “an efficient process for adding new active ingredients

and products to the ban.”³⁶ For the process to be efficient, proper funding will be necessary. In the budgetary restraint needed to return BC to fiscal balance, it will be difficult to ensure proper funding for black list administration.

Our recommendation of a white list places the onus on applicants to prove that their product is benign before it can be used. This creates a robust ban consistent with the Precautionary Principle, and ensures that only the safest products are available for use. The reduced costs of administration and greater margin of safety weigh heavily in favour of utilizing a white list. Furthermore, a white list clearly communicates to the public what they *can* use, making the safe solutions available under the law focused and easier to understand. It will promote the use of safe and effective pest control. This cost-effective and user-friendly approach should therefore garner public support and, by ensuring a high level of product safety, meet the purpose and goals of the legislation.

Two examples of classification systems that use white lists are the Quebec *Pesticides Management Code*,³⁷ which uses a white list for child-centred areas, and the Ontario *Pesticides Act*,³⁸ which specifies prohibited substances in reference to a white list. White lists are also used in most of the existing pesticide bylaws in BC.

Assuming then that a white list should be used, a specific approach must be selected for adding products to the list. We recommend basing regulatory restrictions on a white list of inherently low-risk active ingredients to which restrictions do not apply, specifically low-risk, naturally occurring biopesticides.³⁹ The PMRA list of biopesticides is a useful reference.

³⁶ Comments on Proposed Legislative Amendments to the Pesticides Act to Ban the Use and Sale of Pesticides for Cosmetic Purposes, EBR Registry No. 010-3348, at 2 (“Comments on Legislative Amendments”).

³⁷ *Pesticides Management Code*, *supra* note 16.

³⁸ *Pesticides Act*, *supra* note 15.

³⁹ “Biopesticides” are “pesticides derived from such natural materials as animals, plants, bacteria, and certain minerals” (“What are biopesticides?”, Environmental Protection Agency, online: <http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm>). There are three general types of

Cosmetic pesticides containing active ingredients *not* in this class are then banned. Listing ingredients is preferable to listing products. If products are listed, then an equivalency clause is needed to state that any equivalent products to those listed are subject to the same classification. This white list approach is more robust than the alternatives, which can become quickly outdated as new chemical pesticides are introduced.

In addition to having a white list of low risk, naturally occurring biopesticides acceptable for cosmetic use, it may also be useful to establish a second class of banned active ingredients and/or products that contain all active ingredients not included on the white list or all products containing active ingredients not on the white list. This will provide greater certainty.

Furthermore, if regulatory restrictions allow for the use of otherwise banned pesticides when necessary to protect public health and safety, it may be useful to set out a limited class of pesticides that can be used and sold under this exemption and establish conditions for their retail display and sale.

3.4 List Recommendations

In conclusion, we recommend the following steps in listing pesticides implicated by a cosmetic pesticide ban:

- **Use a “white-list” approach, that is, a list of low-risk pesticides that are acceptable for cosmetic use, with all other unlisted cosmetic pesticides prohibited. A white list is**

biopesticides (both naturally and unnaturally occurring):

- (1) microbial pesticides, which “consist of a microorganism (e.g., a bacterium, fungus, virus or protozoan) as the active ingredient. Microbial pesticides can control many different kinds of pests, although each separate active ingredient is relatively specific for its target pest[s]”;
- (2) plant pesticides, which are “pesticidal substances that plants produce from genetic material that has been added to the plant”; and
- (3) biochemical pesticides, which are “naturally occurring substances that control pests by non-toxic mechanisms. Conventional pesticides, by contrast, are generally synthetic materials that directly kill or inactivate the pest. Biochemical pesticides include substances, such as insect sex pheromones, that interfere with mating, as well as various scented plant extracts that attract insect pests to traps”.

(“What are biopesticides?”, Environmental Protection Agency, online:
<http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm>)

the most effective method for listing pesticides implicated by the ban, and is strongly recommended for both its fiscal and safety advantages.

- **Establish an independent multistakeholder body to assist the Minister of Environment in determining which products are eligible for the white list. This should add expertise and diverse community knowledge to the decision-making regarding products that should be listed.**
- **Consider establishing a second class of banned active ingredients and/or products that contain all active ingredients not included on the “white list” or all products containing active ingredients not on the “white list.”**
- **Consider a limited class of pesticides that may be sold for the excepted use of protecting public health and safety.**

4. Enforcement

Effective enforcement is essential to a functional pesticide regulation scheme. According to a 2003 Organization for Economic Co-Operation and Development report, enforcement schemes that are underfunded, inconsistent or otherwise ineffective become one of the primary factors leading to non-compliance with pesticide regulations.⁴⁰ For this reason, it is important to design enforcement strategies that take a realistic view of the resources available, and focus them where they will have the most impact.

Banning the sale of pesticides has been shown to be more effective than merely banning their use because it sends a more consistent message to consumers,⁴¹ and offers the opportunity for enforcement at point of sale. Enforcing sale regulations is often less resource-intensive than

⁴⁰ *Report of the OECD Pesticide Risk Reduction Steering Group Seminar on Compliance and Risk Reduction*, Organization for Economic Co-Operation and Development (OECD), online: OECD, <http://www.oecd.org/dataoecd/11/55/33659404.pdf>, at 11.

⁴¹ Untara et al., *supra* note 21 at 16.

the inspections and testing required to establish that a violation has occurred at the point where a pesticide is used. It also creates an opportunity to promote good consumer habits through in-store public education, and through the replacement of harmful pesticides with friendlier alternatives on store shelves.⁴²

The Model Act provides for the appointment of enforcement officers and for fines to be issued where persons sell or use pesticides in contravention to the Act. Maximum fine amounts are increased for subsequent offences, and also where contraventions occur in child centred areas such as school yards or daycares. The Act also allows the Attorney General to apply for a court injunction to stop the sale, transfer or use of pesticides in contravention of the Act.⁴³ Finally, it provides for the compliance provisions in B.C.'s *Integrated Pest Management Act* to apply.⁴⁴

What follows is a more detailed discussion on alternatives to the traditional "site inspection" model of enforcement, drawing on point-of-sale and other enforcement mechanisms used in various Canadian legislative schemes.

4.1 Point of Sale Enforcement – Existing Regimes

There are various Canadian regimes outside the context of pesticides that provide useful examples of ways to regulate the point of sale.

Firearms

Under federal *Firearms Act* regulations (the "Firearms Regulations"),⁴⁵ firearms sales are subject to a strict lock-and-key regime that specifies the manner in which firearms are to be stored, displayed and transported. A lock-and-key system typically means that goods must be

⁴² *Ibid.*, at 17.

⁴³ See ss.16-21 of the Model Act.

⁴⁴ Model Act, at s.17.

⁴⁵ *Storage, Display and Transportation of Firearms and Other Weapons by Businesses Regulations*, S.O.R./98-210 ("Firearms Regulations").

kept in an area inaccessible to the public, or else otherwise secured. The idea is that a customer cannot simply “pick up” the goods from the shelf, but must instead request employee assistance.

Key features of the Firearms Regulations include:

- When stored, firearms must be kept in a securely locked container, such as a cabinet or safe, or else must be kept in an area to which only the owner or employees have ready access.⁴⁶
- The premises on which the firearms are stored must have an electronic burglar alarm system, and the doors and windows must be securely locked.⁴⁷
- A business may be excused from the foregoing requirements if they have secured their firearms using a different but superior method, and the Chief Firearms Officer who licensed the business has given written approval.⁴⁸
- Firearms kept for the purpose of storage must be stored separately from those being offered for sale, and in a location where they cannot be seen from any area that non-employees have access to.⁴⁹
- Restricted firearms may only be displayed inside a locked display case or cabinet. Businesses are specifically prohibited from displaying them in store windows.⁵⁰
- Non-restricted firearms may be displayed outside of a locked cabinet or cabinet display case, but only if they are secured by a chain, metal cable or metal bar that prevents their removal by non-employees.⁵¹

Pharmaceuticals

⁴⁶ *Ibid.*, at s.5(1)(b).

⁴⁷ *Ibid.*, at s.5(1)(c).

⁴⁸ *Ibid.*, at s.5(2).

⁴⁹ *Ibid.*, at s.7(b).

⁵⁰ *Ibid.*, at s.10.

⁵¹ *Ibid.*, at s.9.

Under the B.C. *Drug Schedules Regulation*,⁵² pharmaceuticals are separated into various classes and listed on corresponding schedules. This allows for different point of sale requirements depending on the nature of the pharmaceutical in question. The *Pharmacy Operations and Drug Scheduling Act* (“the *Pharmacy Act*”)⁵³ allows for business inspections so as to ensure compliance with these requirements.

Key features of the *Pharmacy Act* and the *Drug Schedules Regulation* include:

- “Prescription” drugs may only be sold with a prescription for sale.⁵⁴ (This would be analogous to a pesticide that required a license for purchase, such as an agricultural license.)
- “Professional Service Area” drugs may be sold without a prescription, but must be stored in a Professional Service Area where there is no public access, and where customers cannot self-select products.⁵⁵
- “Professional Products Area” drugs may be self-selected by the customer, but must still be sold by a pharmacist.⁵⁶
- “Non-pharmacy Sale” drugs are any drugs not listed in the schedules, and may be sold by non-pharmacists to any person.⁵⁷
- Inspectors are empowered to carry out inspections of pharmacies at any reasonable time, without a court order. Inspectors may, among other things, inspect the drug

⁵² *Drug Schedules Regulation*, B.C. Reg. 9/98 (“*Drug Schedules Regulation*”).

⁵³ *Pharmacy Operations and Drug Scheduling Act*, R.S.B.C. 2003, c. 77 (“*Pharmacy Act*”).

⁵⁴ *Drug Schedules Regulation*, *supra* note 52 at s.2(3).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

inventory or pharmacy records, remove samples for analysis, or observe pharmacy practice.⁵⁸

- Penalties for non-compliance with the *Pharmacy Act* or *Drug Schedules Regulation* may include suspension or cancellation of the pharmacy license.⁵⁹
- The *Pharmacy Act* includes provisions for director and employee liability where a corporation commits an offence under the *Act*.⁶⁰

Pepper Spray

Manitoba recently amended its *Pesticides and Fertilizers License Regulation* (“the *Manitoba Pesticide Regulation*”)⁶¹ to include special provisions concerning the sale of sprays containing capsaicin, such as pepper spray or bear spray, in response to public concern about the use of these products in violent crimes. The amendment combines numerous features of point-of-sale regulation, including restrictions on product display, customer education, and sales tracking.

Key features of the *Manitoba Pesticide Regulation* are:

- Capsaicin-containing products must be stored in an area to which the public does not have access.⁶²
- The business must be so arranged that customers wanting to buy a product containing capsaicin are required to ask an employee for assistance.⁶³
- Customers who purchase capsaicin-containing products are required to fill out a form.⁶⁴ This form serves two purposes: first, it provides customer education via a

⁵⁸ *Pharmacy Act*, *supra* note 53 at s.17(1).

⁵⁹ *Ibid.*, at s.20(3).

⁶⁰ *Ibid.*, at s.29(1).

⁶¹ *Pesticides and Fertilizers License Regulation*, Man. Reg. 216/87R (“*Manitoba Pesticide Regulation*”).

⁶² *Ibid.*, at s.5.1(1)(a).

⁶³ *Ibid.*, at s.5.1(1)(b).

brief description of the product, its proper mode of use, and the legal regime governing its use; and second, it collects the personal information of the purchaser, allowing for sales tracking.⁶⁵

Non-beverage alcohols

The Northwest Territory's *Liquor Act* requires that non-beverage alcohol products be sold only for their intended use.⁶⁶ A vendor is prohibited from selling such a product to another person "if he or she knows or should know that the other person intends to use it as a beverage".⁶⁷ This places an onus on the vendor to ensure products are not used in a prohibited manner.

To summarize, possible formats for point of sale enforcement schemes include current management schemes for the sale of firearms, pharmaceuticals, hazardous sprays and non-beverage alcohols. The federal Firearms Regulations take a lock-and-key approach, with restrictions on display and public access. B.C. pharmaceutical laws vary public access requirements by the class of drug being dealt with. Thorough on site inspections are allowed, and there are serious penalties for non-compliance, including the suspension or cancellation of licences. Manitoba regulation of hazardous sprays requires such sprays be secured from the public and purchases require interaction with sales staff and completion of an information form. Finally, Northwest Territory liquor laws put the onus on vendors to ensure non-beverage alcohols are only sold where they will be used for their intended purpose. These four regimes all provide useful examples of ways in which B.C. can enforce a cosmetic pesticide ban at the point of sale.

⁶⁴ *Ibid.*, at s.6(2)(b).

⁶⁵ *Ibid.*, at Form 7.

⁶⁶ *Liquor Act*, S.N.W.T. 2007, c. 15, at s.76(1).

⁶⁷ *Ibid.* at s.76(2).

4.2 *Citizen Enforcement – Existing Regimes*

Another alternative to government monitoring of pesticide use is to allow citizens to participate in the monitoring and enforcement process. This may reduce costs and allows those closest to and most directly affected by pesticide use to play a cooperative role in ensuring compliance. An example of this sort of public participation scheme is found in the *Canadian Environmental Protection Act* (“*CEPA*”).⁶⁸

Key features of *CEPA* include:

- Citizens may make voluntary reports to enforcement officers regarding offences that have occurred or are likely to occur.⁶⁹
- Citizens making reports may request that their identity remain confidential.⁷⁰
- Employees who make voluntary reports are protected by *CEPA* against dismissal, harassment, or other forms of retaliation.⁷¹
- Citizens may also apply to the Minister of Environment for investigation of offences.⁷² The citizen must make a solemn affirmation or declaration as to the nature of the offence, the identity of the offender, and the evidence supporting these allegations.⁷³
- The Minister is required to acknowledge receipt of an application for investigation within 20 days.⁷⁴ The minister is also required to investigate “...all matters that the Minister considers necessary to determine the facts relating to the alleged offence”.⁷⁵

⁶⁸ *Canadian Environmental Protection Act*, R.S.C. 1999, c. 33 (“*CEPA*”).

⁶⁹ *Ibid.*, at s.16(1).

⁷⁰ *Ibid.*, at s.16(2) and (3).

⁷¹ *Ibid.*, at s.16(4).

⁷² *Ibid.*, at s.17(1).

⁷³ *Ibid.*, at s.17(2).

⁷⁴ *Ibid.*, at s.18.

⁷⁵ *Ibid.*

CEPA therefore facilitates citizen enforcement by providing two avenues for concerned citizens to report offences, and by offering protections to those citizens.

Another way of encouraging citizen enforcement is by the creation of financial incentives. An example of such incentives is s.62 of the *Fishery (General) Regulations*,⁷⁶ under the federal *Fisheries Act*.⁷⁷ This section provides that where a citizen commences a private prosecution (i.e. lays an information) for an offence under the *Fisheries Act*, the proceeds from any resulting fines and / or sale of forfeited goods will be split equally between the government and the citizen who commenced the prosecution. A further example is s.40 of *CEPA*, which allows citizens to sue a person who breaches the Act for damages in civil court.⁷⁸

4.3 Approach to Enforcement in Other Pesticide Regulation Regimes

Quebec

The Quebec *Pesticides Management Code*⁷⁹ largely limits itself to prohibiting the sale and use of certain specific pesticides. However, it does require that pesticides in certain classes be offered for sale in such a way that restricts customers' access.⁸⁰

The enforcement program in Quebec is administered by the *Ministere du Developement Durable de l'Environnement des Parcs* ("MDDEP"). Each summer, the MDDEP hires student inspectors and focuses its inspections on a different sector (retail stores, daycares, lawn care companies, etc).⁸¹ Although the MDDEP had received nearly 200 pesticide-related complaints as of summer 2007, no fines had been levied as of that time.⁸²

Ontario

⁷⁶ *Regulations Respecting Fishing and Fish Habitat in General and the Payment of Penalty and Forfeiture Proceeds Under the Fisheries Act*, SOR/93-53.

⁷⁷ *Fisheries Act*, R.S.C. 1985, c. F-14.

⁷⁸ *CEPA*, *supra* note 68 at s.40.

⁷⁹ *Pesticide Management Code*, *supra* note 16.

⁸⁰ *Ibid.*, at s.27.

⁸¹ Untara et al., *supra* note 21 at 15.

⁸² *Ibid.*

Ontario's *Pesticides Act* uses a licensing scheme which requires those who obtain licenses to sell pesticides obtain the necessary education.⁸³ There is also a requirement that the sale of certain pesticide classes be tracked.⁸⁴ While the *Pesticides Act* does place requirements on the manner of pesticide storage and display, these requirements deal primarily with health and safety precautions rather than limiting a customer's ability to self-select the product.⁸⁵ Enforcement appears to rely primarily on inspections rather than point-of-sale control; provincial officers are empowered, without warrant or court order, to enter "...any place in which [they] reasonably believe a pesticide can be found"⁸⁶ or "has been or may be discharged into the environment"⁸⁷, and may take samples and conduct tests as needed.⁸⁸

4.4 Recommendations

The ELC advocates for an enforcement regime that synthesizes aspects of those described above, focusing primarily on comprehensive point-of-sale enforcement. A point-of-sale enforcement regime is to be preferred over one focusing on enforcement at the point of use owing to the inherent difficulty, time and expense involved in monitoring the use of pesticides by non-professionals. Another distinct advantage of point-of-sale regulations is the opportunity to coordinate with public education initiatives.

Specifically, we recommend that the enforcement scheme have the following features:

- **In general, the sale of cosmetic pesticides that are not white-listed should be banned.**

⁸³ *Pesticides Act*, *supra* note 15 at s.99(2)(e).

⁸⁴ *Ibid.*, at s.102.

⁸⁵ *Ibid.*, at s.109(1).

⁸⁶ *Ibid.*, at s.19(1)(a).

⁸⁷ *Ibid.*, at s.19(1)(b).

⁸⁸ *Ibid.*, at s.19(2).

- **Vendors should be required to collect information from customers who purchase excepted pesticides (i.e. cosmetic pesticides, used with a permit, for agriculture, forestry and public health and safety uses) and mixed use pesticides (i.e. pesticides with both cosmetic and non-cosmetic uses), for the purposes of sales tracking, as well as to gather statistical data for government reports. This information should include, at minimum, the name and address of the purchaser and the name and quantity of product purchased, as well as the number of the permit which allows the purchaser to buy the banned pesticide under the statutory exceptions. Recording the permit number also ensures persons purchasing pesticide for excepted uses are authorized to do so.**
- **Access and display restrictions requiring these controlled pesticides be kept behind the counter out and of public sight are also recommended, although this is a broader issue.⁸⁹**
- **The purchase of pesticides for excepted uses and mixed use pesticides should coincide with public education efforts. Customers should be required to read and sign a clear, concise summary of the permitted uses and best practices of the pesticide they are purchasing. An employee should ensure that the customer has read and understood this information, and should also be able to answer further questions. This is to ensure that the customer is aware of the restrictions on that**

⁸⁹ In the context of pesticides, such restrictions may stray beyond the scope of a cosmetic pesticide ban because they would affect the display and access of mixed use products – that is, products that also have non-cosmetic uses. Issues of scope aside, in terms of effective regulation, we recommend that vendors be required to store controlled pesticides in an area which non-employees cannot readily access, and where said pesticides are not visible to the public. Vendors should arrange their businesses such that customers seeking to purchase pesticides for excepted uses or mixed use pesticides are required to ask for employee assistance. Such restrictions would help limit prohibited pesticide use. They would also ensure that some public education occurs at point of sale. In this way, the consumer is reminded of the serious nature of the product and retailers can help ensure that the product is not being used for a prohibited purpose.

- product's use, and does not purchase it for another purposes but then use it in a prohibited manner.
- Vendors should provide educational brochures that outline the pesticide's acceptable and unacceptable uses and remind the consumer about the newly legislated restrictions, as well as the health and environmental dangers posed by the product. Information can also be provided on alternative pest control strategies.
 - For further clarity, the above conditions should apply equally to mixed use products. This ensures that the customer is aware of the restrictions on that product's use, and does not purchase it for another purpose but then use it as a cosmetic pesticide.
 - A citizen enforcement regime similar to that under *CEPA* may facilitate enforcement and take some of the pressure off of inspectors, but only if citizen complaints can be realistically expected to lead to investigation and enforcement. Otherwise such provisions may simply frustrate citizens, and create the impression that the government is not "serious" about the ban.
 - Inspectors should be empowered to conduct unscheduled inspections, without court order or warrant, particularly with respect to vendors and lawn care companies. It is vital that inspectors receive adequate training in effectively enforcing the cosmetic pesticide ban, particularly regarding the legal requirements for sample collection. In Quebec, many cases have been thrown out as a result of inconsistent sampling.⁹⁰

⁹⁰ Untara et al., *supra* note 21 at 28.

5. **Public Education**

Legislated prohibitions will not succeed without an effective public education campaign that shows citizens that there is a better way to deal with cosmetic problems in their yards. The regulation of cosmetic use of pesticides must include a robust public education program about what the law is, why the public should obey the law, and how to act in accordance with the law, as well as how to have attractive and healthy yards without using toxins. Furthermore, application of pesticides on private property is difficult to monitor or enforce. Public education efforts aimed at deterring the public from applying restricted pesticides and encouraging use of safer alternatives is a more cost-effective method of ensuring compliance. Topics that should be addressed include the reasons for pesticide restrictions, including health and environmental impacts, and information on alternatives to restricted substances, including authorized white list ingredients and sustainable landscape management practices.

The Model Act requires the government to develop and implement an ongoing public education and awareness campaign, focusing on the health and environmental reasons for a cosmetic pesticide ban, sustainable landscaping practices, and permitted pesticides listed under Schedule 1.⁹¹ This information will increase public acceptance and compliance by persuading the public of the important rationales for restricting pesticide use, and providing realistic alternatives to such use. The Model Act also allows for the provision of “any other ongoing education deemed helpful in fulfilling the purposes of this Act”.⁹²

To develop an effective campaign relating to both aspects of the Model Act’s educational requirements, we submit that public education needs to occur in three forms: training for pesticide vendors and dispensers, vocational training for commercial applicators, and education

⁹¹ Model Act, at s.23.

⁹² *Ibid.*

for residential users. The following is a more detailed review of what each of these educational components could look like.

5.1(i) Training for Vendors/Dispensers

The Federal, Provincial, Territorial Committee on Pest Management and Pesticides (FPT Committee) is responsible for creating the Standard for Pesticide Education, Training and Certification in Canada (referred to as the National Standard).⁹³ The National Standard outlines the structure and criteria for provincial/territorial certification programs and is made up of three main parts: the Framework, the Applicator Basic Knowledge Requirements and the Vendor/Dispenser Basic Knowledge Requirements. It is not a training manual itself but is used by provincial pesticide regulators for developing their own courses, training manuals and examinations. Most Canadian provinces, including B.C., use the National Standard as guidance in developing their own pesticide certification requirements.

Currently in BC, a pesticide vendor/dispenser must obtain a corresponding vendor/dispenser certificate under the *Integrated Pest Management Act* and Regulation.⁹⁴ Vendors can apply for a licence as long as the business employs at least one employee with a current pesticide Dispenser Certificate. Dispensers must pass a provincial dispenser exam to obtain a Dispenser Certificate. The certificates are valid for 1 year or 5 years, depending on exam marks. Applicants can study for the exam by ordering the study kits from the Ministry of Environment. There is no mandatory training course for obtaining either a Vendor Certificate or a Dispenser Certificate. Note that the BC *Integrated Pest Management Regulation* excludes

⁹³ “Pesticide Education, Training and Safety”, *Health Canada*, online: <http://www.hc-sc.gc.ca/cps-spc/pest/part/fpt/educ-cert-eng.php>.

⁹⁴ In the BC *Integrated Pest Management Act*, *supra* note 13, stores that sell pesticide are called “vendors”; a person who is trained and certified to sell pesticide is called a “dispenser”.

certain products from vendor licensing requirements. As such, vendors selling only excluded products do not currently require licences.⁹⁵

With the proposed cosmetic pesticide ban, the best practice is to require *all* vendors/dispensers to complete a multi-day training course and pass an examination. Multi-day training courses are not a new phenomenon. Ontario implemented a two-day Pesticide Vendor Certification Course after its cosmetic pesticide ban came into effect in April 2009.⁹⁶ A report by the Environmental Advisory Council on regulation of pesticides in Prince Edward Island similarly recommended a multi-day training course for vendor/dispenser certification.⁹⁷ We urge BC to implement a similar requirement.

A multi-day training format is necessary to provide sufficient time to address all aspects of pesticide safety and use. A dispenser should learn about:

- 1) The risks of using pesticides and the reasons behind prohibiting certain pesticides from cosmetic use;
- 2) The white list of pesticides allowed for cosmetic use under the new legislation;
- 3) The exceptions under the cosmetic pesticide ban and their application (i.e. a customer purchasing a prohibited pesticide for an excepted use must present a valid permit);
- 4) Interpretation of information on a pesticide label for proper handling at the vendor site and for advising customers;

⁹⁵ Section 44(2) of the BC *Integrated Pest Management Regulation*, B.C. Reg. 604/2004, states that “a person must hold a pesticide vendor licence who (a) sells or offers to sell a pesticide, or (b) purchases, directly or indirectly, a pesticide for the purpose of selling the pesticide.” “Pesticide” is defined broadly in the BC *Integrated Pest Management Act* as any micro-organism or material that is used to “prevent, destroy, repel or mitigate a pest,” but a list of 46 ingredients are excluded from this definition by regulation. So currently, if a vendor only sells pesticides that are among the exclusions from the definition, then that vendor does not require a licence.

⁹⁶ *Ontario Regulation made under the Pesticides Act*, O. Reg. 63/09, at s.99(2)(e) (“Ontario Regulations”).

⁹⁷ “Recommendations for the Regulation of Pesticides in Prince Edward Island”, Environmental Advisory Council, Ministry of Environment and Energy, Prince Edward Island (2004), online: http://www.gov.pe.ca/photos/original/ee_pesticides04.pdf.

- 5) How to legally and safely sell, handle and store pesticides to minimize risks.

The training course for dispensers should continue to use the National Standard as a guideline in order to maintain harmonization with the rest of Canada.

5.1(ii) Training for Applicators

A 2004 survey of federal, provincial and territorial regulators identified lack of understanding of label use instructions and precautionary measures as the primary cause for non-compliance with existing pesticide legislation.⁹⁸ This survey shows that the existing certification process does not provide the necessary education applicators require to safely use pesticides. Yet only people applying Restricted Pesticides (which are not generally used for cosmetic purposes) are currently required to be certified by the BC Ministry of Environment.⁹⁹ Similar to the dispenser certification process, no training course is required. Applicants can pass an exam by self-studying materials made available by the Ministry of Environment. The Applicator Certificate is available to both farmers and commercial pesticide applicators, such as landscaping professionals. Law reform measures should be considered to expand training requirements to those that apply cosmetic pesticides. Improvements to the training material and examination process are also recommended.¹⁰⁰

⁹⁸ “Report of the FPT Committee on Pest Management and Pesticides Workshop on User Compliance”, Health Canada, September 29, 2005, online: <http://www.hc-sc.gc.ca/cps-spc/pest/part/fpt/fpt-workshop-atelier-eng.php#user> (“FTP Committee Report”).

⁹⁹ *Integrated Pest Management Act*, *supra* note 13. “Restricted Pesticides” are a defined class of pesticides under the federal *PCPA* (*supra* note 27).

¹⁰⁰ It is recommended that the BC government improve the training material and examination process to ensure that applicators have an adequate understanding of the following issues:

- 1) The legal restriction on the use of pesticides and the exceptions;
- 2) Pesticide selection and application;
- 3) Interpretation of pesticide labels, and the Material Safety Data Sheet;
- 4) Integrated pest management;
- 5) Equipment selection and calibration;
- 6) Human health and environmental safety issues.

There should also be a voluntary multi-day training course available to applicators. The course would emphasize the human and environmental issues involved with pesticide use. Regulators should aim to reduce the use of all pesticides through training and education and a comprehensive ban on the use and sale of cosmetic pesticides.

5.1(iii) Education for Residential Users

Enforcing regulations by invoking penalty provisions at diffuse points of use of pesticides is costly and inefficient. This is why we need strong public education campaigns and a comprehensive ban on the retail sale of prohibited products.

An education campaign would provide information on:

- 1) The health and environmental risks of using pesticides;
- 2) The particular vulnerability of children to toxic chemicals;
- 3) The pesticides that are allowed through the white list;
- 4) Any safer alternatives; and
- 5) The beauty of a natural lawn.

The education campaign may be carried out through television and radio advertising, fact sheets/brochures, and new media such as advertisements on Facebook. Demonstration sites that showcase beautiful yards maintained without pesticides may also be a useful tool.

Neighbourhood-based workshops are also beneficial and can further teach people hands-on skills on how to maintain a beautiful yard naturally. To ensure this information reaches BC's diverse population, such educational initiatives should be provided in a variety of languages where possible.

Public education should also occur at the point of sale. Education methods at the point of sale should be designed carefully so as to ensure maximum effectiveness. One of the criticisms

of regulations under the Ontario *Pesticides Act* is that when a customer purchases a Controlled Sales Pesticide, only a written notice of restrictions needs to be given at the time of purchase.¹⁰¹ In practice, this written notice is generally on the bottom of the sales receipt and is seldom read. The result is that customers purchasing a Controlled Sales Pesticide are often not even aware that the product is only allowed for certain uses.

Pesticide vendors should be trained to advise customers on safer alternatives to pesticides. As suggested above, customers purchasing a pesticide for non-cosmetic use, or use under one of the legislated exceptions, should be required to read and sign a written statement that explains the risks of using such a pesticide. The sales clerk should also be required to verbally explain to the customer the legal prohibition attached to the product and any additional information on its application and safety. At time of sale, brochures about safe alternatives should be provided.

5.2 Labeling

The BC government should implement hazard labelling for pesticides prohibited for cosmetic use. The federal government imposes generic labeling requirements that apply to all pre-packaged consumer products under the *Consumer Packaging and Labeling Act*.¹⁰² However, federal legislation does not currently require labelling to fully reveal chronic health hazards. Provinces have jurisdiction to regulate pesticide labels. For example, section 35(1) of the Ontario *Pesticides Act* and sections 22(g) and (n) of the PEI *Pesticides Control Act* empower

¹⁰¹ *Ontario Regulations*, supra note 96 at s.101.

¹⁰² *Consumer Packaging and Labelling Act*, R.S. 1985, c. C-38.

regulation of pesticide labels, but both provinces chose to simply impose the same labelling requirements as the federal *PCPA*.¹⁰³

Currently, the B.C. *Integrated Pest Management Regulation* only requires a label to display the trade name of the pesticide, the name and the concentration of the active ingredient in the pesticide, and the pesticide's registration number under the *PCPA*.¹⁰⁴ If a pesticide contains an active ingredient that is prohibited for cosmetic use under the new legislation, the pesticide label should clearly indicate the prohibition. Pesticide labels should also state chronic health hazards.

5.3 *Landscaping*

Finally, public education can address landscaping practices that encourage or deter the growth of weeds and other plants or organisms for which pesticides are used. Municipalities can play a role in changing current landscaping practices. A lawn requires at least four inches of topsoil to remain healthy without pesticide application.¹⁰⁵ Soil contains a variety of beneficial organisms that naturally create conditions for a healthy lawn. The more topsoil there is, the less chance for a serious weed infestation. Under section 909 of the *Local Government Act*, a municipality may, through bylaw, establish landscaping standards to preserve, protect, restore or enhance the natural environment.¹⁰⁶ Municipalities should be encouraged to pass bylaws that require at least four inches of topsoil underneath new lawn installations.

¹⁰³ *Pesticides Act*, *supra* note 15, and *Pesticides Control Act*, R.S.P.E.I. 1988, c. P-4. See also *Labatt Breweries v. Canada*, [1980] 1 S.C.R. 914, where the Supreme Court of Canada held that the federal government does not have jurisdiction to impose labeling requirements specific to a single trade or industry. It is instead up to the province to do so.

¹⁰⁴ *Integrated Pest Management Regulation*, *supra* note 95 at s. 65.

¹⁰⁵ "Let's Curb Pesticides", Waterloo Region Public Education Initiative, online: <http://www.letscurbpesticides.ca/en/qa/index.asp>.

¹⁰⁶ *Local Government Act*, R.S.B.C. 1996, c. 323, at s.9.

5.4 *Recommendations*

Based on the forgoing discussion of educational options, the ELC recommends that the following steps be taken:

- **Require all vendors/dispensers to complete multiday training courses. Courses should be based on the National Standard. They should address: the new restrictions, exceptions and permitting scheme under the new legislation; the rationales for the new legislation; label interpretation; and the safe and legal handling of pesticides.**
- **Expand applicator training requirements to apply to applicators of cosmetic pesticides. Consider improving material and examination processes. Also provide voluntary multiday training courses.**
- **Implement an education and awareness campaign for residential users that addresses pesticide risks, restrictions and alternatives. Design point of sale requirements to provide opportunity to further public education.**
- **Implement additional labelling requirements which identify the hazardousness of the product and the legal restrictions on product use; and**
- **Facilitate alternative landscaping practices through public education, and by encouraging municipalities to pass bylaws requiring at least four inches of topsoil underneath new lawn installations.**

6. **Public Accountability**

BC should implement public accountability measures to increase transparency of enforcement and compliance. Suggested accountability measures in the Model Act include s.24, which requires the Minister of Environment to collect and maintain enforcement statistics and

make semi-annual recommendations on how to improve the effectiveness of the Act. Section 25 builds on this, requiring the Minister to issue a public report semi-annually providing statistics and discussion on enforcement and the effectiveness of the legislation, as well as the recommendations for improvement contained in the s.24 report. To facilitate the collection of information on pesticide usage rates and prohibition enforcement (and by implication the effectiveness of the prohibition in curbing pesticide use), we further recommend that both pesticide vendors and applicators should be required to keep records of sales and use.

Pesticide vendors should maintain records of sales and transfers. The PMRA currently collects wholesale pesticide data available in an annual report.¹⁰⁷ However, wholesale data alone is insufficient for the purpose of monitoring the effectiveness of retail restrictions on the sale of cosmetic pesticides. Retailers should be required to record individual sales of prohibited pesticides to ensure that these products are only sold to licensed applicators for the purposes exempted under the legislation, as required in Ontario.¹⁰⁸

Data collection requirements should also apply to pesticide applicators, who should be required to maintain a record of pesticide use that includes what was used, how much, where it was used, and other details as recommended by the Environmental Advisory Council of Prince

¹⁰⁷ “Pest Management Regulatory Agency”, Health Canada, online: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/pmra-arla/index-eng.php>.

¹⁰⁸ See the *Ontario Regulations*, *supra* note 94 at s.102(1), which requires vendors to collect data including:

- 1) A description of the pesticide sold or transferred, including the pesticide’s name, the pesticide’s registration number assigned to it under the federal *PCPA* or *Fertilizers Act* (Canada), the class into which the pesticide has been classified, the pesticide’s container size and the quantity of containers sold or transferred;
- 2) The name and address of the purchaser or transferee;
- 3) The date of the sale or transfer;
- 4) The type, class, number and expiry date of the licence held by the purchaser;
- 5) If the purchaser or transferee is a farmer, the number and expiry date of the farmer’s grower’s licence. (Ontario Regulations, *supra* note 96 at s.102(1))

Note that although these requirements do not apply to retail sales of cosmetic pesticides, they still provide a useful guideline of requirements that could be applied to all vendors in BC, including retail vendors.

Edward Island.¹⁰⁹ The Council arrived at their recommendation after extensive consultation with the public and industry stakeholders.

The data submitted by pesticide vendors and applicators should be made available to the public on a semi-annual basis to provide information on pesticides use, improve transparency of enforcement activities and encourage public participation in the enforcement process.

6.1 Recommendations

The ELC recommends the following actions be taken to facilitate public accountability:

- **Require the Minister of Environment to collect and maintain statistics and make regular reports to the government and public on enforcement, effectiveness and opportunities for improvement.**
- **Require all vendors to record data from individual sales of prohibited pesticides.**
- **Require applicators to keep records of pesticide use.**
- **Make vendor and applicator data available to the public on a regular basis.**

7. Conclusion

Following on its successful empowerment of local government regulation and prohibition of the use of cosmetic pesticides on residential and municipally-owner properties, BC has taken the first step towards strengthening its pesticide laws by opening the issue of cosmetic pesticide use for public comment. We strongly urge the province to take the next step and develop new legislation creating a ban on the sale, transfer and use of pesticides for non-essential and esthetic purposes. To assist in the development of an effective ban, we have provided a Model Act, as well as the above detailed discussion of the components of such legislation.

¹⁰⁹ FTP Committee Report, *supra* note 98. The P.E.I. Environmental Advisory Council considered such applicator recording requirements to be necessary for addressing suspected human or livestock pesticide poisoning incidents, fish kill accidents, public complaints, and other personal or environmental concerns.

We recommend the government adopt a wide scope and application for the ban, applying it to the indoor and outdoor use of pesticides for use on industrial, commercial, public and residential properties. Exceptions should be limited to agricultural, forestry and health and safety uses, confirmed through a non-onerous permitting process. Golf courses should also be subject to the ban following a three year grace period. Municipalities should not be pre-empted from maintaining or developing their own pesticide bans. A white list system is the most effective way to define and list acceptable and non-acceptable pesticides. We recommend only low risk, naturally occurring biopesticides be listed.

Enforcement officers should be appointed and provided sufficient investigatory powers, and enforcement efforts should target the point of sale in order to maximize effectiveness and available resources. Citizen enforcement should also be considered, but only if citizen complaints will be treated seriously and acted on. Limits to public access and information collection requirements at the point of sale will also assist in enforcement.

Public education will be critical to the success of a ban. Information provided should address topics such as the health and environmental reasons for limiting pesticide use and the available alternatives to the use of banned products. It should also target three streams of pesticide handlers: vendors, applicators and residential users.

Finally, public accountability measures should be put in place. These should include reporting requirements for the Minister as well as vendors and applicators. By assessing the successes and pitfalls of other jurisdictions, and by drawing on the Model Act and recommendations provided in this submission, we believe BC can develop a progressive and successful ban on the use of cosmetic pesticides.

Appendix A: The Model Act

THE COSMETIC PESTICIDES ACT

A LAW TO REGULATE, RESTRICT, AND PROHIBIT THE SALE AND USE OF POTENTIALLY HARMFUL PESTICIDES USED FOR COSMETIC PURPOSES WITHIN THE PROVINCE OF BRITISH COLUMBIA

WHEREAS cosmetic pesticides are known to expose humans and animals to harmful carcinogens; and

WHEREAS cosmetic pesticides are known to contain neurotoxins and endocrine disrupting chemicals; and

WHEREAS cosmetic pesticides are known to have detrimental health effects on non-target animals, plants, and their habitats;

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Short Title

1. This Act may be cited as “The Cosmetic Pesticides Act”.

Interpretation

2. In this Act and Schedule I,

“**agriculture**” means the production of crops for commercial trade.

“**child-centered area**” means a child care facility, park, playground, schoolyard, or sports field.

“**cosmetic**” means non-essential, or an item used for the intention of improving or maintaining an esthetic quality.

“**enforcement officer**” means an enforcement officer designated in Section 16.

“**minister**” means the Minister of Environment or someone designated to act on the Minister of Environment’s behalf.

“**person**” includes a corporation.

“**pesticide**” means a micro-organism or material that is represented, sold, used or intended to be used to prevent, destroy, repel or mitigate a pest, and includes

- (a) a plant growth regulator, plant defoliator or plant desiccant,
- (b) a control product as defined in the *Pest Control Products Act* (Canada), and
- (c) a substance that is classified as a pesticide by regulation.

“**sell**” includes barter or distribute, offer, expose, advertise or possess for the purpose of selling.

“**use**” means the placement or application of a pesticide, or the mixing, dilution, or loading of a pesticide for the purpose of placing or applying it.

Bylaws are Operative

3. Nothing in this Act affects a municipality’s or regional district’s power to make bylaws to regulate, restrict, or prohibit the sale or use of pesticides used for a cosmetic purpose.

4. Where there is a conflict between a provision of this Act and a provision of a municipal or regional district bylaw that regulates, restricts, or prohibits the sale or use of pesticides used for a cosmetic purpose, the more restrictive provision prevails.

Prohibition on Sale, Transfer, and Use

5. No person shall sell or transfer a pesticide used for a cosmetic purpose other than a low-risk pesticide prescribed in Schedule I of this Act.

6. No person shall use a pesticide for a cosmetic purpose other than a low-risk pesticide prescribed in Schedule I of this Act.

Excepted Uses

7. Subject to any regulation enacted for the purposes of this section, sections 5 and 6 do not apply to the following uses:

- (a) Uses related to agriculture
- (b) Uses related to managing pests that impact forestry
- (c) Uses related to maintaining golf courses for a period of three years beginning on the day that this Act comes into effect, after which Sections 5 and 6 will apply
- (d) Uses related to the preservation and promotion of public health and safety

8. A person claiming an exception under Section 7 shall hold a permit required for that purpose and shall comply with the terms and conditions in or attached to that permit.

Permits for Excepted Uses

9. The minister shall designate administrators for the purposes of this Act.

10. A person applying for a permit shall submit to an administrator a permit application that

- (a) is in the form specified by the administrator,
- (b) contains the information required by the administrator, and
- (c) is accompanied by a prescribed fee.

11. An administrator may issue a permit to a person if the administrator is satisfied that the permit application is for a use enumerated in Section 7 and complies with Section 10.

12. An administrator may refuse to grant a permit.

13. If the administrator issues a permit to a person, the administrator shall specify the terms and conditions in or attached to the permit, including

- (a) the name of the permit holder,
- (b) the date on which the permit expires, and
- (c) any other conditions the administrator considers appropriate in the circumstances.

14. An administrator may revoke a permit at any time.

15. An administrator shall disclose a copy of any permit to any person who requests it.

Enforcement and Powers of an Enforcement Officer

16. The minister shall designate enforcement officers for the purposes of this Act.

17. Sections 15 to 24 of the *Integrated Pest Management Act* shall apply, *mutatis mutandis*.

Offences

18. A person who contravenes Section 5 of this Act is liable for a fine not exceeding \$1000 for a first offence. For each subsequent contravention of Section 5, that person is liable for a fine not exceeding \$20 000.

19. A person who contravenes Section 6 of this Act is liable for a fine not exceeding \$500 for the first offense. For each subsequent contravention of Section 6, that person is liable for a fine not exceeding \$10 000.

20. A person who contravenes Section 6 of this Act while in a location the enforcement officer determines to be a child-centered area is liable for a fine listed in Section 19 and an upward variation of not more than 30% of that fine.

21. In addition to a fine, the Attorney General may apply to the Supreme Court for an injunction against any person who, having been convicted of an offence against this Act, continues to contravene this Act or any related regulation, ordering the to cease selling, transferring, or using pesticides for a cosmetic purpose in British Columbia until the person complies with this Act or any related regulation.

Appeals to the Environmental Appeal Board

22. Section 14 of the *Integrated Pest Management Act* shall apply, *mutatis mutandis*.

Education

23. The provincial government shall develop and execute ongoing public education and awareness-raising programs providing information to the public on

- (a) why restrictions exist on the sale and use of pesticides for cosmetic purposes, including health and environmental impacts of use,
- (b) sustainable landscape management practices,
- (c) authorized active ingredients as prescribed in Schedule I,

and shall provide any other ongoing education deemed helpful in fulfilling the purposes of this Act.

Monitoring Act Effectiveness

24. The minister shall collect and maintain statistics related to enforcement of this Act, including names of persons found to be in violation of this Act, and semi-annually make recommendations to the government for improving the effectiveness of this Act.

Public Accountability

25. The minister shall semi-annually deliver a report to the public discussing the effectiveness of this Act and recommendations for improving the effectiveness of this Act. The report shall

include the statistics, names of persons found to be in violation of this Act, and recommendations contained in the report to government mandated by Section 24.

Creation and Revision of Schedule I

26. The minister shall create Schedule I, which shall list authorized low-risk pesticides.
27. The minister may add low-risk pesticides to Schedule I at any time.
28. The minister shall establish a funded multi-stakeholder committee that shall semi-annually
 - a) add to Schedule I low-risk pesticides as they emerge on the market or are discovered,
 - b) remove from Schedule I any item that could contravene the purposes of this Act, and
 - c) publicly disclose the names and occupations of the committee's members.

Severability

29. If any provision or provisions of this Act shall be held to be invalid, illegal, unenforceable, or in conflict with a law of provincial or federal jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.

Commencement

30. This Act comes into force by regulation of the Lieutenant Governor in Council.

SCHEDULE I AUTHORIZED LOW-RISK PESTICIDES

Schedule I shall be created from the low-risk pesticides designated as biopesticides by the Pest Management Regulatory Agency. As mentioned in sections 26 to 28 of the Cosmetic Pesticides Act, the minister or multi-stakeholder committee may add low-risk pesticides to this list. Only the multi-stakeholder committee may remove items from Schedule I.

Appendix B: NAFTA Implications on Bans: Dow Chemical NAFTA Challenge

The Claim

Currently, U.S. chemical manufacturer Dow AgroSciences LLC (“Dow”) is challenging the legality of Quebec’s ban on lawn herbicide 2,4-D under Chapter 11 of the North American Free Trade Agreement (NAFTA). Dow wishes to hold Canada, as a party to NAFTA, responsible for the allegedly inconsistent conduct of Quebec.¹¹⁰ In a Notice of Arbitration, dated March 31st 2009, counsel for Dow laid out arguments for initiating arbitration.¹¹¹ Dow alleges that it suffered damages from measures undertaken by Quebec when it enacted its legislation banning lawn herbicide 2,4-D. Dow is seeking over \$2 million dollars in damages with respect to loss of sales, profits, goodwill, and additional costs associated with the proceedings.¹¹²

Dow claims that Canada, through measures implemented by Quebec, breached its obligations under Section A of Chapter 11 of NAFTA, under the following provisions¹¹³:

- Article 1105 (Fair and Equitable Treatment in Accordance with International Law), and
- Article 1110 (Expropriation).

More specifically, Dow alleges that Canada breached its obligations by failing to provide due process, failing to act in a transparent manner, breaching the legitimate expectations of Dow, breaching its obligations of good faith and natural justice, and enacting measures that constitute an unlawful expropriation of Dow’s investment.¹¹⁴

¹¹⁰ Dow AgroSciences LLC v. Government of Canada, (Notice of Arbitration, 31 March 2009), online: Foreign Affairs and International Trade Canada, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf> (“NOA”), at para. 7.

¹¹¹ *Ibid* (no specific paragraph).

¹¹² *Ibid.*, at para. 56.

¹¹³ Dow AgroSciences LLC v. Government of Canada, (Notice of Intent, August 25 2008), online: Foreign Affairs and International Trade Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC.pdf> (“NOI”), at para. 1.

¹¹⁴ NOA, *supra* note 110 at para. 9.

Dow's argument is based primarily on its claim that Quebec has never had a scientific basis for banning the sale of 2,4-D based products.¹¹⁵ The details of this claim are complex, but essentially Quebec methodology incorporates the Precautionary Principle, and the ban was imposed based on cancer risks associated with the *class* of chemical to which 2,4-D belongs.¹¹⁶ Dow disputes claims that 2,4-D poses a cancer risk,¹¹⁷ and says the Precautionary Principle was only to be employed on an interim basis until recognized organizations completed product assessments. The claim stated that the PMRA and U.S. Environmental Protection Agency have since done such assessments, and neither organization found an unacceptable risk where 2,4-D is handled properly.¹¹⁸

There are several weaknesses in Dow's claims. For one, as the David Suzuki Foundation argues,

[i]n the absence of sufficient evidence to definitively establish the cancer risks (or lack thereof) associated with 2,4-D, reference to ... [the class of chemicals to which 2,4-D belongs] ... is entirely appropriate. Lack of evidence does not necessarily equate to lack of hazard nor justify abandoning precautionary measures given the documented risks associated with closely related chemicals.¹¹⁹

Secondly, Quebec criteria for imposing a ban also include consideration of endocrine disrupting potential. 2,4-D has since been shown to have such potential, providing an additional, legitimate basis for the ban.¹²⁰ It has also been linked to other serious illnesses.¹²¹ Finally, Dow's reliance

¹¹⁵ *Ibid.*, at para 19.

¹¹⁶ Quebec's *Pesticides Management Code* (*supra* note 16), phased in between 2003 and 2006, prohibits the use and sale of 20 active ingredients in lawn pesticides. Grounded in the precautionary principle, the *Code* was developed using a methodology that screened chemicals associated with increased risks of cancer and endocrine disruption. 2,4-D falls under a class of chemicals called chlorophenoxy herbicides. Quebec banned all forms of 2,4-D on the basis that the International Agency for Research on Cancer (IARC) classified chlorophenoxy herbicides as possible human carcinogens ("David Suzuki Foundation," Briefing Note, "NAFTA Challenge To Quebec's Ban on 2,4-D Lawn Pesticides" (April 9, 2009), online: David Suzuki Foundation, http://www.davidsuzuki.org/files/SWAG/Health/DOW_Briefing--EN.pdf ["Suzuki Briefing Note"]).

¹¹⁷ Dow suggests the IARC classification does not establish the carcinogenicity of 2,4-D in particular (*Ibid.*, at 3).

¹¹⁸ NOA, *supra* note 110 at paras. 32-33.

¹¹⁹ Suzuki Briefing Note, *supra* note 116 at 3.

¹²⁰ *Ibid.*

on the PMRA's approval of 2,4-D as evidence that Quebec lacks scientific reasons for banning the product should carry little weight. Under Canada's federal system pesticide regulation is a matter of shared provincial and federal jurisdiction, and provinces are allowed to impose higher standards of precaution when considering the safety of potentially harmful chemicals. Since all pesticides must be federally registered to even be considered for use in provinces, any pesticides affected by a provincial ban will have been PMRA approved. That is simply a product of the system of dual jurisdiction. Quebec would not have had to consider banning chemicals not approved by the PMRA.¹²² Lastly, from a broader viewpoint it is also notable that Quebec is not alone in taking the precautionary measure of banning 2,4-D. The province of Ontario has similar legislation that restricts the use of 2,4-D and countries such as Denmark, Norway and Sweden have all banned the product.¹²³

The Canadian Government's Response

The federal government has vowed a "vigorous defense" of Quebec's ban on lawn pesticides, stating: "[s]hould this claim proceed, the government of Canada will continue to work with the government of Quebec to vigorously defend our interests... The NAFTA preserves the state's ability to regulate in the public interest including issues related to pesticides".¹²⁴

Unfortunately, the government of Canada will be put in an awkward position of having to defend the ban on 2,4-D even though the PMRA declared the product safe if used as directed.¹²⁵

Nevertheless, it is important that the Canadian government not back down on this issue.

¹²¹ 2,4-D has been linked to neurodevelopment problems, neurological disorders, and damage to reproductive and immune systems (*Ibid*).

¹²² *Ibid.*, at 3-4.

¹²³ *Ibid.*, at 4.

¹²⁴ Juliet O'Neill, "NAFTA challenge won't stop pesticide ban: Day; Trade minister vows to back Quebec action" CanWestNews Service - *The Ottawa Citizen* (30 March, 2009), online: ProQuest, ID #1671415871, <http://proquest.umi.com/pqdweb?did=1671415871&sid=1&Fmt=3-&clientId=3916&ROT=309&VName=POD>.

¹²⁵ *Ibid*.

Critics have contended that Dow is trying to stop pesticides bans from spreading around the country¹²⁶ and “undermine the decisions of democratically elected governments.”¹²⁷

According to such critics, what is at stake is the ability of a democratically elected government to make decisions to protect the public from health and environmental dangers. The public would be poorly served if companies selling potentially dangerous chemicals could use provisions in NAFTA to override and intimidate democratically elected decision makers trying to protect the public. Further examination of this issue is beyond the scope of these submissions, but the matter is of considerable importance and something that legislators should be aware of.

Lessons Learned

Lessons that BC can draw from this dispute are:

- 1) The federal government has communicated its support for pesticide restrictions protecting the health and safety of its citizens;
- 2) BC will be joining a growing group of provinces including Quebec and Ontario willing to exercise the use of the Precautionary Principle in restricting the use and sale of potentially harmful chemicals;
- 3) BC should emphasize the role of the Precautionary Principle when designing its methodology for the determination of banned substances. This will help to preclude arguments based on legitimate expectations;
- 4) Arguments regarding a lack of scientific evidence are not substantiated. There is enough sound scientific evidence (over 100 studies, and evaluations by the World Health Organization’s International Agency for Research on Cancer and the U.S. National

¹²⁶ Attributed to Rick Smith, executive director of Environmental Defence in article by Martin Mittestaedt, and Luke Eric Peterson, “Ban on pesticides may face NAFTA Test,” *The Globe and Mail* (Oct 22nd 2008), online: ProQuest ID #1580319841, <http://proquest.umi.com/pqdweb?did=1580319841&sid=4&Fmt=3-&clientId=3916&RQT=309&VName=PQ>.

¹²⁷ Attributed to Kathleen Cooper, senior researcher with the Canadian Environmental Law Association, *Ibid*.

Toxicology Program) to support the BC government's decision to regulate cosmetic pesticides.

The vast majority of British Columbians want a law to regulate cosmetic use of pesticides. A single multi-national corporation should not be allowed to thwart democracy. Fortunately, if the law is properly implemented, there should be no legal basis for allowing a corporation to veto a decision of the people of BC.