Lead Court File No.: T-1422-13
Other File Nos.: T-1423-13, T-1424-13, T-1431-13, T-426-15

**FEDERAL COURT**

BETWEEN:

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

- and -

MINISTER OF HEALTH

Respondent

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**APPLICANTS' MEMORANDUM OF FACT AND LAW**
**Volume 6 of 6**

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## PART I: STATEMENT OF FACTS

1. This Consolidated Proceeding is test case litigation regarding the nature and extent of the Minister of Health's duties under s. 17(2) of the *Pest Control Products Act.* Subsection 17(2) imposes a mandatory duty on the Minister of Health, or her delegate, to initiate a special review of all registered pest control products containing an active ingredient when a member country of the Organization for Economic Co-operation and Development ("OECD") prohibits all uses of that active ingredient for health or environmental reasons.

2. In summer 2013, the Pest Management Regulatory Agency ("Agency") unlawfully refused to initiate three special reviews of pest control products containing three active ingredients banned in Europe for health or environmental reasons. After this litigation commenced, the Agency initiated 23 special reviews on December 30, 2013. However, the Agency has not conceded that its interpretation was wrong in law. Moreover, the Agency's long-delayed decisions were not made "within a reasonable time" as required by s. 17(5). Judicial intervention is needed to ensure lawful, timely decision-making under s. 17(2) in the future.

3. In February 2015, the Agency unlawfully cancelled one of the 23 special reviews. In purporting to cancel the difenoconazole special review, the Agency lacked jurisdiction and was *functus officio*. Moreover the Agency's cancellation was wrong or unreasonable. Norway continues to ban all uses of difenoconazole as a pest control product – and it told Canada so.

### A. The parties

4. Équiterre is a non-profit organization registered in Quebec. It was initially established in 1993, and changed its name to Équiterre in 1998. Équiterre works to improve the regulation of pesticides, reduce the use of synthetic pesticides and educate about the risks of pesticides.[1] The David Suzuki Foundation is a federally registered charity, established in 1990, focused on human impacts on the environment. Among other activities, the David Suzuki Foundation has worked to raise awareness of the risks of pesticides to human health and the environment, and to encourage policy solutions leading to their reduction and elimination.[2]

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[1] Affidavit of Sidney Ribaux, affirmed October 30, 2013 [Application Record ("AR") Vol 1, Tab 14]

[2] Affidavit of Mara Kerry, affirmed October 9, 2013, at paras 4–8 [AR Vol 1, Tab 15, pp 110–112]

5. The Minister of Health (the "Minister") is the minister responsible for administering the *Pest Control Products Act* (the "*PCPA*") generally and for implementing s. 17 of the *PCPA* specifically.[3] The Minister has delegated responsibility for administering many aspects of the *PCPA* to the Pest Management Regulatory Agency (the "Agency"). Specifically, the Agency is responsible for performing the Minister's duties under s. 17 of the *PCPA*.

**B. The Applicants' request for special reviews**

6. On October 15, 2012, with legal and scientific assistance from Ecojustice, the Applicants submitted to the Minister a request under s. 17(4) of the *PCPA*. The Applicants requested that the Minister initiate 30 special reviews. The request identified 30 active ingredients, found in pest control products registered for use in Canada, that the Applicants understood had been prohibited for all uses by an OECD member country for environmental or health reasons.[4]

7. On October 25, 2012, the Minister acknowledged receipt of the special review request.[5]

**C. The Agency's delay in responding to the special review request, and reasons for delay**

8. After four and a half months without a response from the Agency, on February 27, 2013, out of concerns about delay, Dr. Elaine MacDonald of Ecojustice wrote to the Agency seeking an update and the anticipated timing of the Agency's response to the special review request.[6]

9. On March 18, 2013, the Agency replied. While it acknowledged receipt of Dr. MacDonald's letter, it did not indicate when it anticipated responding to the special review request. The Agency's letter described the processes it claimed were necessary to decide whether a special review must be initiated under s. 17(2) of the *PCPA*. It suggested that, as a precondition to determining if a special review must be initiated, the Agency must go behind the OECD countries' regulatory decisions by gathering and reviewing the scientific reviews underlying those decisions. It also suggested that the Agency is required to investigate previous

[3] SC 2002, c 28, [Applicants' Book of Authorities ("Authorities") Vol 1, Tab 1]

[4] Affidavit of Dr. Elaine MacDonald, affirmed October 8, 2013 ("First MacDonald Affidavit") at para 15 and Ex 1 [AR Vol 2, Tabs 16 and 16.1, pp 119 and 150]

[5] First MacDonald Affidavit at para 16 and Ex 2 [AR Vol 2, Tabs 16 and 16.2, pp 120 and 181]

[6] First MacDonald Affidavit at para 17 and Ex 3 [AR Vol 2, Tabs 16 and 16.3, pp 120 and 182]

Canadian regulatory decisions and evaluate whether the OECD member country decisions were based on scientific information not previously considered by the Agency.[7]

10. On June 17, 2013, the Agency advised that it would provide its decisions for "some" of the 30 requested special reviews in early July 2013.[8]

11. On July 9, 2013, the Applicants again wrote to the Agency expressing concern regarding its delay in determining whether to initiate the special reviews.[9]

12. On July 26, 2013, the Agency responded to the Applicants' letter of July 9, 2013. As in its March 8, 2013 letter, the Agency argued that it needed to conduct an analysis of the scientific information underlying the OECD country decisions. The Agency explained that it would then be able to decide if special reviews of the identified substances were "warranted".[10]

**D. The Agency's refusal to initiate special reviews of products containing trifluralin, chlorthal-dimethyl and trichlorfon**

13. On July 24, 2013, the Agency wrote two letters to advise that it had decided that special reviews of trifluralin and chlorthal-dimethyl were not warranted. In the Agency's reasons for its trifluralin decision, it acknowledged that, in 2010, European Union ("EU") member states had prohibited this active ingredient.[11] In the Agency's reasons for its chlorthal-dimethyl decision, it acknowledged that, in 2009, the EU had prohibited this ingredient. Despite that acknowledgement, the Agency relied on its own re-evaluation of chlorthal-dimethyl, which preceded the EU decision, as a reason not to initiate a chlorthal-dimethyl special review.[12]

14. On August 1, 2013, the Agency likewise advised that it had decided that a special review of trichlorfon was not warranted. Again, the Agency acknowledged that trichlorfon was prohibited in EU member states in 2007. Again, it relied on its own 2008 re-evaluation as a

[7] First MacDonald Affidavit at para 18 and Ex 4 [AR Vol 2, Tab 16, p 120 and Vol 2, Tab 16.4, p 183]

[8] First MacDonald Affidavit at para 19 and Ex 5 [AR Vol 2, Tabs 16 and 16.5, pp 120 and 184]

[9] First MacDonald Affidavit at para 20 and Ex 6 [AR Vol 2, Tabs 16 and 16.6, pp 121 and 185]

[10] First MacDonald Affidavit at para 21 and Ex 7 [AR Vol 2, Tabs 16 and 16.7, pp 121 and 187]

[11] First MacDonald Affidavit at paras 30–31 and Ex 12 [AR Vol 2, Tabs 16 and 16.12, pp 123–124 and 214]

[12] First MacDonald Affidavit at paras 39–40 and Ex 18 [AR Vol 2, Tabs 16 and 16.18, pp 12–13 and 240]

reason not to initiate this special review. It also relied on the fact that trichlorfon had been voluntarily discontinued, with use of products containing trichlorfon being phased out.[13]

**E. The Applicants filed four applications for judicial review**

15. In August 2013, the Applicants filed separate applications for judicial review of the Agency's refusals to initiate special reviews of pest control products containing trifluralin, chlorthal-dimethyl and trichlorfon.[14]

16. On August 23, 2013, the Applicants filed an application challenging the Agency's unreasonable delay, contrary to s. 17(5) of the *PCPA,* in deciding whether to initiate 26 special reviews of pest control products containing the outstanding 26 active ingredients.[15]

17. On September 24, 2013, the four applications were consolidated into a single proceeding.[16]

**F. On December 30, 2013, the Agency initiated special reviews in relation to 23 active ingredients**

18. On December 30, 2013, the Agency decided to initiate 23 special reviews of pest control products containing 23 active ingredients (including special reviews in relation to trifluralin and chlorthal-dimethyl). The Agency also decided not to initiate six special reviews of products containing the six remaining active ingredients. The Applicants learned of the decisions, and received written reasons, by letter on January 9, 2014.[17]

19. There is no suggestion in the published December 30, 2013 decision, or the January 9, 2014 letter, that the Agency's decisions to initiate these 23 special reviews were anything but final. Rather, the intention evidenced is that these s. 17(2) decisions were final. Likewise, there is

[13] First MacDonald Affidavit at paras 49–51 and Exs 24 and 26 [AR Vol 2, Tabs 16, 16.24, and 16.26, at pp 15, 260 and 265]

[14] Notices of Application in file nos. T-1423-13, T-1424-13, and T-1431-13 [AR Vol 1, Tabs 2, 3, and 4]

[15] Notice of Application in file no. T-1422-13 [AR Vol 1, Tab 1]

[16] Order of Prothonotary Aalto, September 24, 2013, Court File No. 1422-13 [AR Vol 1, Tab 10]

[17] Third MacDonald Affidavit at paras 6–7 and Ex A [AR Vol 4, Tabs 19 and 19.A, pp 648–649 and 666]

no indication in the Agency's internal briefing note, dated December 19, 2013, that its decisions to initiate these 23 special reviews would be merely preliminary.[18]

20. Also on December 30, 2013, the Agency initiated the 23 special reviews. It did so by sending statutory notices, under s. 18(1) of the *PCPA,* to registrants of pest control products.[19] The Agency published the s. 18(1) notices on its Pesticide Product Information Database.[20]

21. On December 30, 2013, the Agency published a draft guideline entitled "Proposed Approach to Special Reviews – Consultation Document".[21] On February 14, 2014, the Applicants commented on this draft guideline to raise concerns with the proposed approach. Amongst other concerns, they noted the lack of guidance on what constituted a reasonable time for initiating special reviews.[22] On May 23, 2014, the Agency released a final guideline entitled "Regulatory Directive DIR2014-01, Approach to Special Reviews ("Agency's Guideline").[23]

**G. The consolidated proceeding was placed into abeyance**

22. On February 3, 2014, the Applicants proposed to put the consolidated proceeding into abeyance.[24] Following a partly contested motion, on May 15, 2014, Prothonotary Aalto issued an Amended Order placing the consolidated proceeding into abeyance.[25] Among other terms, paragraph 3 of the Order requires the Respondent to notify the Applicants if it reverses or amends any of the decisions made on December 30, 2013 to initiate special reviews. The Order permitted either party to reactivate the consolidated proceeding for any reason.[26]

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[18] Third MacDonald Affidavit at para 23 and Ex T [AR Vol 4, Tab 19, p 653 and AR Vol 5, Tab 19.T, p 1007]

[19] Third MacDonald Affidavit at paras 12–13 and Ex D [AR Vol 4, Tabs 19 and 19.D, pp 650 and 710]

[20] The Agency maintains this online Database as part of its Register of Pest Control Products established under s. 42 of the *PCPA.* The Database contains information on the regulatory status of pest control products including active ingredients; see Third MacDonald Affidavit at para 15 [AR Vol 4, Tab 19, p 651].

[21] Third MacDonald Affidavit at paras 7–8 and Ex A [AR Vol 4, Tabs 19 and 19.A, pp 649 and 666]

[22] Third MacDonald Affidavit at para 9 and Ex B [AR Vol 4, Tabs 19 and 19.B, pp 649 and 689]

[23] Third MacDonald Affidavit at para 10 and Ex C [AR Vol 4, Tabs 19 and 19.C, pp 649 and 695]

[24] Third MacDonald Affidavit at para 15 and Ex F [AR Vol 4, Tabs 19 and 19.F, pp 651 and 744]

[25] Third MacDonald Affidavit at paras 16–17 and Exs G and H [AR Vol 4, Tabs 19, 19.G, and 19.H, pp 651, 748 and 772]

[26] Order of Prothonotary Aalto, May 15, 2014, Court File No. 1422-13 [AR Vol 1, Tab 11]

23. Unbeknownst to the Applicants at the time, on February 4, 2014, the registrant Syngenta Canada Inc. ("Syngenta") wrote to the Agency about five of the special reviews involving its pest control products. Syngenta provided the Agency with information from Norway and urged that, based on this, the difenoconazole special review was not required under s. 17(2).[27]

24. Since the spring of 2013, the Agency has released a small number of proposed special review decisions as well as one final decision. The Applicants have commented on those special reviews, expressing concern with the narrow approach taken by the Agency.[28]

## H. The Agency reversed its decision to initiate a special review of products containing difenoconazole

25. On February 19, 2015, the Agency reversed its decision that a special review of all registered pesticide products containing the active ingredient difenoconazole was required by s. 17(2), and cancelled the special review. The Agency announced its decision in a letter to the Applicants and in a document on its website (collectively the "Decision Documents").[29]

26. The Agency had learned that "seed treated with difenoconazole (for sowing) was granted import authorization in Norway in 2013". On that basis, the Agency "determined that the criteria for initiating a special review pursuant to subsection 17(2) of the *Pest Control Products Act* are not met (i.e. not all uses are prohibited in Norway)."[30]

## I. The Agency rejected Norway's explanations of its ban of all uses of difenoconazole and failed to disclose Norway's explanations at the time of its reversal decision

27. In the Decision Documents, the Agency stated that it had "verified" information concerning Norway's 2013 import authorization with the Norwegian Food Safety Authority."[31] In fact,

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[27] Third MacDonald Affidavit at para 25 and Ex O [AR Vol 4, Tab 19, p 654 and Vol 5, Tab 19.O, p 908]

[28] Affidavit of Lisa Gue affirmed April 15, 2015, at paras 5–13 and Exs B–H [AR Vol 4, Tab 18].

[29] Third MacDonald Affidavit at paras 18–19 and Exs I and J [AR Vol 4, Tabs 19, 19.I and 19.J, pp 652, 773 and 779]

[30] Third MacDonald Affidavit at paras 18–19 and Ex J (p 3) [AR Vol 4, Tabs 19 and 19.J, pp 652 and 781]

[31] Third MacDonald Affidavit at paras 18–19 and Ex I (at p 1) and Ex J (at p 3) [AR Vol 4, Tabs 19, 19.I and 19.J, pp 652, 773 and 781]

however, the Norwegian Food Safety Authority had advised the Agency that all uses of difenoconazole as a pest control product remained prohibited in Norway.

28. Specifically, on September 29, 2014, Tor Erik Jørgensen, a Norwegian Food Safety Authority official, had emailed Margherita Conti, an Agency official. His email had replied to the Agency's requests for information about Norway's import authorization decision.[32]

29. Mr. Jørgensen's email had confirmed that Syngenta's translation of the import authorization decision was a valid representation (but for the date of the decision). In that import authorization decision, Norway had approved the import of sowing seed that had been treated with a pest control product containing difenoconazole called Celest Extra Formula M.

30. Mr. Jørgensen's email had also enclosed a document entitled "Difenoconazole – status in Norway" dated May 15, 2014 ("Difenoconazole Status Note"). As he noted, the Norwegian Food Safety Authority had already transmitted the Difenoconazole Status Note to the Agency on May 15, 2014. The Difenoconazole Status Note explains that:

> [a]ccording to the Norwegian Regulation relating to plant protection products, national authorisation is required for the use of a plant protection product for seed treatment. However, the treated seeds are not considered as plant protection products. Instead, treated seeds are covered by another regulation (Regulation related to seeds).

31. The Difenoconazole Status Note explains that Norway decided in 1998 to deny registration to all products containing the active ingredient difenoconazole. Regarding the import authorization decision, the Difenoconazole Status Note concluded as follows:

> Please note that this does not mean that we still have uses of difenoconazole allowed in Norway. Our decision from 1998 is still in effect, that is, it is prohibited to sell, stock, store or use difenoconazole as a pesticide.

32. The Agency did not obtain any further opinion on how Norwegian law applies to pest control products containing difenoconazole. Nor did it obtain copies of the relevant Norwegian laws. When it cancelled the difenoconazole special review, the Agency rejected Norway's

[32] Third MacDonald Affidavit at paras 27-29, 55, and Ex P [AR Vol 4, Tab 19, pp 654-655 and 662, and Vol 5, Tab 19.P, p 951]

explanation of its laws and their effect. Further, the Agency did not disclose the existence or content of Norway's contrary opinion in its Decision Documents.[33]

## J. Norway has subsequently re-confirmed that difenoconazole is banned for all uses

33. Mr. Jørgensen confirmed directly to Dr. MacDonald that all uses of difenoconazole as a pest control product are prohibited in Norway. Consistent with the Norwegian Food Safety Authority's advice to the Agency, he confirmed to her that "Norway's decision from 1998 is still in effect, that is, it is prohibited to use difenoconazole as a plant protection product".[34]

34. An identical explanation was provided in an April 20, 2015 email from Marit Randall, who serves as a Norwegian Designated National Authority under the *Rotterdam Convention*.[35]

## K. Norway has informed the international community under the *Rotterdam Convention* that difenoconazole is banned for all uses

35. Norway is party to the *Rotterdam Convention.*[36] Through a PIC Form, Norway has notified the Convention Secretariat that it has banned all uses of difenoconazole. Signed by Ms. Randall on October 15, 2010, the PIC Form states that "[d]ifenoconazole was never registered for use in Norway" and that "[a]ll uses are prohibited". The PIC Form indicates that that Norway's decision was made on May 29, 1998 and the reasons for Norway's ban were environmental.[37]

36. Notice of Norway's ban was then circulated by the Secretariat to the parties through PIC Circular XXXII – December 2010 ("PIC Circular XXXII"). PIC Circular XXXII states that

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[33] Third MacDonald Affidavit at paras 18–19 and Exs I–J [AR Vol 4, Tabs 19, 19.I and 19.J, pp 652, 773 and 779]

[34] Affidavit of Elaine MacDonald affirmed on April 29, 2015 ("Fourth MacDonald Affidavit") at para 2 and Ex A [AR Vol 5, Tabs 20 and 20.A, pp 1213 and 1215]

[35] Fourth MacDonald Affidavit at para 4 and Ex B [AR Vol 5, Tabs 20 and 20.B, pp 1214 and 1219].

[36] *Rotterdam Convention the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (*"Rotterdam Convention")* 10 September 1998, 2244 UNTS at 337, (entered into force 24 February 2004). The legal requirements of the *Rotterdam Convention* are addressed in paras 138-144 below.

[37] Third MacDonald Affidavit at para 30 and Ex R [AR Vol 4, Tab 19, p 655 and Vol 5, Tab 19.R, p 991]

difenoconazole is banned for "all uses" in Norway. It summarizes Norway's final regulatory action as: "It is prohibited to sell, stock, store or use difenoconazole as a pesticide."[38]

37. Since 2010, Norway has not informed parties to the *Rotterdam Convention* of any change to its ban on all uses of difenoconazole.[39] Put another way, Norway's ban is still in effect.

**L. Difenoconazole poses environmental risks that need to be evaluated**

38. Difenoconazole is a fungicide that has been registered for use as a pest control product in Canada since 1998.[40] As of April 14, 2015, 23 products containing difenoconazole were registered for use, including 15 seed treatment products. 21 of the 23 products contain at least one other active ingredient. There were 27 applications pending relating to difenoconazole.[41]

39. Norway's ban was for environmental reasons including persistence, high bioaccumulation in fish, and significant toxic effects on aquatic organisms.[42] Despite reaching similar scientific findings,[43] the Agency has still allowed uses of difenoconazole in Canada to expand.

40. These expanded uses raise new environmental concerns. Notably, one common use of difenoconazole is as an ingredient in seed treatment products. In particular, it is commonly "bundled" in seed treatments with the active ingredient thiamethoxam. Thiamethoxam is a neonicotinoid insecticide. Neonicotinoid seed treatment used on seeds have recently been found to contribute to bee mortalities. When Norway assessed difenoconazole over 15 years ago, the impacts of neonic pesticide products on bee species had not yet been confirmed.[44]

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[38] Third MacDonald Affidavit at para 21 and Ex L [AR Vol 4, Tabs 19 and 19.L, pp 652 and 839]

[39] Third MacDonald Affidavit at paras 26–31 [AR Vol 4, Tab 19, p 654]

[40] Third MacDonald Affidavit at para 32 and Ex T [AR Vol 4, Tab 19, p 656 and Vol 5, Tab 19.T, p 1007]

[41] Third MacDonald Affidavit at paras 46, 49 and Ex X [AR Vol 4, Tab 19, p 660 and Vol 5, Tab 19.X, p 1056]

[42] Third MacDonald Affidavit at para 33 and Exs L and R [AR Vol 4, Tabs 19 and 19.L, pp 656 and 839 and Vol 5, Tab 19.R, p 991]

[43] Third MacDonald Affidavit at paras 37–42 and Exs T and U [AR Vol 4, Tab 19, pp 657–659 and Vol 5, Tabs 19.T and 19.U, pp 1007 and 1030]

[44] Third MacDonald Affidavit at paras 32, 40–41 and 50 and Exs T and U [AR Vol 4, Tab 19, pp 656, 658, and 661 and Vol 5, Tabs 19.T and 19.U, pp 1007 and 1030]

## PART II: THE POINTS IN ISSUE

41. The four questions at issue in this Consolidated Proceeding, distilled from the five underlying applications for judicial review, are as follows:

**1)** Did the Agency act unlawfully when deciding in July-August 2013 that special reviews were not required, pursuant to s. 17(2) of the *PCPA,* of the registration of pest control products containing trifluralin, chlorthal-dimethyl and trichlorfon?[45] Does s. 17(2), lawfully interpreted, give rise to the following legal propositions:

a. the Minister lacks jurisdiction to refuse to initiate a special review of the registration of a pest control product or to conclude that a special review is "not warranted", when an OECD country prohibits all uses of an active ingredient contained in that product for health or environmental reasons;

b. the Minister has a continuing duty to initiate a special review of the registration of a pest control product, when an OECD country prohibits all uses of an active ingredient contained in that product for environmental or health reasons, regardless of whether a person requests a special review; and

c. the Minister's duties to initiate a special review are not limited in any way by s. 18.

**2)** Did the Agency unreasonably delay and fail to decide "within a reasonable time," under s. 17(5) of the *PCPA*, whether to initiate special reviews under s. 17(2)?[46]

**3)** On February 19, 2015, did the Agency unlawfully reconsider, reverse or cancel its decision made on December 30, 2013 to initiate a special review of registered pest control products containing difenoconazole? Was the Agency *functus officio*?[47]

**4)** On February 19, 2015, did the Agency unlawfully decide that the special review of registered pest control products containing difenoconazole was "no longer required" under s. 17(2) of the *PCPA*?[48]

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[45] Notices of Application in file nos. T-1423-13, T-1424-13 and T-1431-13 [AR Vol 1, Tabs 2, 3 and 4]

[46] Notice of Application in file no. T-1422-13 [AR Vol 1, Tab 1]

[47] Notice of Application in file no. T-426-15 [AR Vol 1, Tab 5]

[48] *Ibid.*

42. Arising from these four issues are two related questions. First, what is the standard of review (if any) that applies to these four issues? This question is addressed immediately below.

43. Second, should the Court exercise its discretion to grant the relief sought by the Applicants, including any of the relief sought on Issues 1 and 2, where some of that relief may technically be moot? This question is addressed after the Applicants' submissions on the four issues.

## PART III: STATEMENT OF SUBMISSIONS

### A. The standard of review applicable to each of the four issues

44. As held in *Dunsmuir v New Brunswick,* the first step that courts must take in determining the standard of review is to assess whether existing case law has determined, in a satisfactory manner, the standard of review applicable to the question at issue. Only if existing case law is unhelpful do courts then proceed to analyze the factors relevant to the standard of review.[49]

45. As submitted below, the jurisprudence has already satisfactorily resolved the standard of review for many of the questions at issue in this Consolidated Proceeding.

#### 1. The standard of review for Issue 1 is correctness, as determined in *Wier*

46. This Court has resolved the standard of review applicable to a Minister's duty to initiate a special review under the *PCPA*. In *Wier v Canada (Minister of Health)*, the Court held that "the Minister's interpretation of the legal standards applicable to him" under s.17 should be reviewed on a standard of correctness.[50] Importantly, beyond s. 17, a Minister's interpretation of the requirements of the *PCPA* was held to be reviewable on a correctness standard.[51]

47. While *Wier* was in the context of s. 17(1), it decides in a "satisfactory manner" the approach taken to reviewing the performance of s. 17 duties. That standard of review analysis has been performed and need not be repeated.[52] Indeed, the reasoning in *Wier* resonates even more

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[49] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para 62 [Authorities Vol 2, Tab 22]

[50] *Wier v Canada (Health)*, 2011 FC 1322 ("*Wier*") at paras 63–66 [Authorities Vol 2, Tab 37]

[51] *Ibid* at para 68. See also *Canada (Fisheries and Oceans) v David Suzuki Foundation,* 2012 FCA 40 ("*David Suzuki Foundation*") at paras 6 and 88-105 [Authorities Vol 1, Tab 19]

[52] *Dunsmuir,* supra note 49 at paras 57 and 62.

strongly for s. 17(2), where the Minister has no discretion. Rather, she has a mandatory duty to initiate a special review of pest control products containing an active ingredient if an OECD country prohibits all uses of that ingredient for health or environmental reasons.

### 2. For Issue 2, the Court should apply common law tests for unreasonable delay

48. Under Issue 2, the Applicants allege that the Agency unreasonably delayed making any decisions under s. 17(2). Courts do not employ a standard of review analysis when assessing if a decision-maker has unreasonably delayed. Rather, when assessing whether the Agency complied with its duty to act "within a reasonable time" under s. 17(5), the Court should simply apply the applicable common law tests from the unreasonable delay jurisprudence.

### 3. Issue 3 is a question of true jurisdiction attracting a correctness standard

49. Under Issue 3, the Court must ask whether the Agency has the jurisdiction to reconsider its decisions, under s. 17(2), to initiate special reviews of registered pest control products. Put another way, once the Agency initiates a special review, is the Agency *functus officio*?

50. The Applicants submit that this question is one of true jurisdiction. It turns solely on interpreting whether Parliament granted the Minister authority to reverse s. 17 decisions. As submitted above,[53] the Minister's interpretation of the *PCPA* attracts a correctness standard.

51. Beyond the *PCPA,* the case law on the standard of review applicable to the question of whether administrative decision-makers are *functus* is divided. Notably, the case law tends to diverge depending on which of the five exemptions to the *functus* doctrine is alleged to apply.

52. This Court has often held that a correctness standard applies to the question of whether a statutory decision-maker is *functus*.[54]

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[53] At paragraphs 46-47. See also *Wier*, supra note 50 at para 68.

[54] *Hiltz v Canada (Human Resources Development),* 2009 FC 508 ("*Hiltz*") at para 15 [Authorities Vol 2, Tab 26]; *IMP Group Limited v Public Service Alliance of Canada*, 2007 FC 517 ("*IMP Group Limited*") at paras 14-27 [Authorities Vol 2, Tab 27]; *Tinney v Canada (Attorney General)*, 2010 FC 605 at para 12 [Authorities Vol 2, Tab 34]

53. However, a recent decision of this Court departs from this authority. In *St Amour v Canada*,[55] the Court applied a reasonableness standard to the question at issue in that case. Notably, that question primarily concerned whether the "manifest intent" exception to the *functus* doctrine applied. Whether the decision-maker's decision gave effect to its own "manifest intent" was an issue of mixed fact and law, and thus reviewable on a reasonableness standard.[56]

54. Here, the question is not whether the December 30, 2013 decision to initiate a difenoconazole special review failed to give effect to the Agency's manifest intent. The Agency manifestly intended, on December 30, 2013, to initiate a difenoconazole special review. In this case, whether the *PCPA* authorizes the reversal of s. 17 decisions is a question of law alone.

55. If this Court concludes that the standard of review applicable to this question is unresolved, it must analyze the relevant contextual factors. Doing so supports applying a correctness standard. First, the *PCPA* has no privative clause.[57] Second, Agency scientists lack expertise in interpreting whether the *PCPA* confers authority to reverse statutory decisions or applying the *functus* doctrine. Indeed, there is no evidence that the Agency has ever considered the doctrine.[58] Third, the Minister's primary purpose in administering the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products, and s. 17(2) seeks to implement this important protective purpose. Finally, the nature of the question is one of pure statutory interpretation. It does not involve any question of fact, mixed fact and law, policy or discretion. Nor does it "give rise to a number of possible, reasonable conclusions".[59] It allows for only one answer: either the *PCPA* grants the Agency the jurisdiction to reverse s. 17 decisions, or it does not. The Agency must be correct in such "determinations of true questions of jurisdiction or *vires*."[60]

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[55] 2014 FC 103 [Authorities Vol 2, Tab 33]

[56] *Ibid* at paras 17–23 and para 35.

[57] *Dunsmuir*, supra note 49 at para 52; *David Suzuki Foundation*, supra note 51 at paras 75–81 and 101.

[58] *Dunsmuir*, supra note 49 at para 54–55; *David Suzuki Foundation*, supra note 51 at paras 103–104

[59] *Dunsmuir*, supra note 49 at 47, 51, 53; *David Suzuki Foundation*, supra note 51 at paras 80–81 and 102.

[60] *Dunsmuir*, supra note 49 at para 59.

56. Further, courts cannot review decisions for reasonableness if decisions were never actually made. Unlike cases in which courts review arbitrators' decisions on whether they are *functus,* here the Agency never asked itself if it was *functus.* The Court has no decision to review. Instead, the Court must apply the common law *functus officio* doctrine at first instance.

#### 4. The standard for Issue 4 is correctness or, in the alternative, reasonableness

57. As noted, this Court has resolved that the standard of review for the Minister's interpretation of the requirements of the *PCPA* generally, and for s. 17 specifically, is correctness.[61] Under Issue 4, the Agency's interpretation of the words "prohibits all uses of an active ingredient" must be reviewed on a correctness standard. The Applicants say that the Agency erroneously construed these words to include "the import or sowing of a seed treated in another country."

58. In the alternative, or additionally, provided the Agency has correctly interpreted the scope of its duties under s. 17(2), then the Court should apply a reasonableness standard to the Agency's "evaluation of the evidence and application of the evidence to the law".[62]

59. For Issue 4, such evidence includes explanation of a foreign country's laws. In *Xiao v Canada (Minister of Citizenship and Immigration)*, this Court appears to have held that a decision-maker's interpretation of foreign law was reviewable on a correctness standard.[63] Yet in effect, the Court applied a reasonableness standard, holding that a visa officer "could not reasonably conclude as he did" as evidence before him was contrary to his conclusion.[64]

### B. Brief overview of the statutory scheme of the *PCPA*

60. The Applicants provide this brief overview of the relevant aspects of the statutory scheme.

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[61] *Wier*, supra note 50, at para 68.

[62] *Ibid* at paras 66–67.

[63] 2009 FC 195 ("*Xiao*") at paras 20–22 [Authorities Vol 2, Tab 38]

[64] *Ibid* at paras 26–28 and 36–37. Likewise, in *Kenne v Canada (Citizenship and Immigration)*, 2010 FC 1079 ("*Kenne*"), at paras 21 and 45-47, a reasonableness standard was used to review a tribunal's evaluation of evidence of foreign law [Authorities Vol 2, Tab 29]

61. The *PCPA* aims to protect human health, and the environment, by regulating pesticides in Canada. The Minister's primary objective in administering the Act is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)].

62. The *PCPA* creates and employs the concept of a "pest control product", which is defined as:

> (a) a product, an organism or substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;
>
> (b) an active ingredient that is used to manufacture anything described in paragraph (a); or
>
> (c) any other thing that is prescribed to be a pest control product. (emphasis added)

63. Further, "active ingredient" is also a defined term at s. 2(1), meaning:

> A component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluents, emulsifier or other component that is not primarily responsible for those effects.

64. The Part of the *PCPA* that governs the evaluation and registration of pest control products is found at ss. 7 - 32. In summary, this Part sets out the following processes and requirements:

- applications for the registration of pest control products (or amendments thereto) including requirements to evaluate health risks, environmental risks and value, and including public consultation requirements [ss. 7-8, s. 28];
- processes that apply at the time of or following registration, including requirements governing maximum residue limits, and powers to require the compilation and reporting of additional information by registrants [ss. 9-14];
- processes for the subsequent re-evaluation or special review of registered pest control products, including requirements to evaluate health risks, environmental risks and value, and including public consultation requirements [ss. 16-22, s. 28];
- cancellation or amendment of the registration of pest control products [ss. 22-27]; and
- related offences [ss. 29-32].

65. In addition, s. 67(z.4) empowers regulations that exempt pest control products from the requirement to be registered as pest control products – and thus from all of the registration and evaluation processes noted above. A pest control product may be exempted where, *inter alia,* the Governor in Council is satisfied that the exempted products are sufficiently regulated under another Act. In 2006, Cabinet made the *Pest Control Products Regulations*.[65] Among other things, these *PCP Regulations* exempt treated seeds, which are regulated under the *Seeds Act*,[66] from the requirement to be registered or evaluated as pest control products.[67]

## C. Issue 1 – The Agency erred in deciding special reviews were not required by s. 17(2)

66. The Applicants submit that the Agency made numerous interpretation errors when it decided, in the summer of 2013, not to initiate special reviews of registered pest control products containing trifluralin, chlorthal-dimethyl and trichlorfon. A correct interpretation of s. 17(2) that is consistent with the text and context of the provision, the scheme of the Act and the Act's purpose,[68] necessarily gives rise to the following propositions:

    a. the Minister must initiate a special review of registered pest control products, and has no jurisdiction to conclude that a special review is "not warranted", when an OECD member country prohibits all uses of an active ingredient contained in those products for health or environmental reasons;

    b. the Minister has a continuing duty to initiate a special review of registered pest control products, when an OECD country prohibits all uses of an active ingredient contained in those products for environmental or health reasons, regardless of whether a person has requested a special review; and

    c. the Minister's duties to initiate a special review are not limited in any way by s. 18.

67. The Applicants respectfully ask this Court to confirm these straightforward propositions. These propositions are pleaded in the four notices of application filed in August 2013.[69]

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[65] SOR/2006-124 ("*PCP Regulations*") [Authorities Vol 1, Tab 2]

[66] *Seeds Act,* RSC 1985, c S-8 [Authorities, Tab 1, Tab 4]

[67] *PCP Regulations,* supra note 65, s 4(1) and Schedule 2.

[68] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at paras 21-23 [Authorities Vol 2, Tab 31]

[69] Notice of Application in file no. T-1422-13 at paras 11-21 [AR Vol 1, Tab 1, pp 5-7]; Notice of Application in file no. T-1423-13 at paras 11-21 [AR Vol 1, Tab 2, pp 17-19]; Notice of Application in file

68. The Agency has never conceded any of these propositions. At most, the Agency has only impliedly conceded just the first one, when it decided on December 30, 2013 to initiate special reviews of pest control products containing trifluralin and chlorthal-dimethyl (but not of products containing trichlorfon, for which approved use in Canada expired the next day).

69. However, the Agency has never conceded that it has a continuing duty to initiate a special reviews, when an OECD country prohibits all uses of an active ingredient contained in a pest control product registered in Canada for environmental or health reasons, regardless of whether any person has made a request under s. 17(4). Troublingly, the Agency's Guideline released on May 23, 2014 implies the opposite, despite the Applicants' expressed concerns.[70]

70. The Agency has also not resiled from its position that s. 18 limits its special review duties.

## D. Issue 2 – The Agency unreasonably delayed its decisions whether to initiate requested special reviews under s. 17(2), contrary to its duty under s. 17(5) of the *PCPA*

71. The Agency is required both by statutory and common law to respond in a reasonably timely manner to requests for special reviews. In the circumstances of this case, the Applicants submit that the Agency unreasonably delayed performing its duties to make timely decisions on whether to initiate the Applicants' requested special reviews.

72. While the Agency did ultimately make these decisions after this litigation commenced, the Applicants submit that a live controversy remains as to whether the Agency decided "within a reasonable time" as required by law, such that this issue is not moot. Alternatively, if moot, the issue should nonetheless be heard and resolved. (The Applicants' submissions responding to the Agency's allegations of mootness begin at paragraph 151 below.)

### 1. Under s. 17(5), the Agency must decide "within a reasonable time"

73. Parliament has strongly signalled, in s. 17(5), that it puts heightened importance on the need for the Agency to respond expeditiously to special review requests by the public. In

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no. T-1424-13 at paras 11-21 [AR Vol 1, Tab 3, pp 30-32]; and file no. T-1431-14 at paras 11–21 [AR Vol 1, Tab 4, pp 43-45]

[70] Third MacDonald Affidavit at paras 8–10 and Exs B and C [AR Vol 4, Tab 19, 19.B and 19.C, pp 649, 689 and 685]

particular, s. 17(5) mandates that, where a person requests a special review of the registration of a pest control product, then "[w]ithin a reasonable time after receiving a request, the Minister shall decide whether to initiate a special review and shall respond to the request with written reasons for the decision." Two key conclusions should be drawn from this language.

74. First, s. 17(5) is unique within the statutory scheme as a whole, sending a strong legislative signal that Parliament sought to defeat delay in responses to special review requests. With only one exception discussed below, no other provision of the *PCPA* imposes any express duty on the Minister to make any particular statutory decision in a timely fashion. Rather, Parliament intentionally singled out the Minister's duties under s. 17(5) for special treatment.

75. Subsection 35(5) imposes a somewhat similar duty on the Minister, namely to communicate written reasons for a decision in a timely fashion. Section 35 provides that a member of the public may file a "notice of objection" to certain decisions by the Agency and, on receipt of a notice, the Minister must decide whether to establish a review panel to review the decision. Similar to s. 17(5), if the Minister decides not to establish a review panel, then she "shall provide written reasons without delay to the person who filed the notice of objection". Yet unlike s. 17(5), the Minister is not assigned any express duty to *make* her decision in a timely fashion – she is only directed to provide reasons without delay for a decision, after it is made.

76. From this, the appropriate conclusion is that Parliament was resolved to combat an identified mischief – namely, the Agency may delay making decisions on the public's special review requests. Just as "justice delayed is justice denied" in other contexts, Parliament recognized that the utility of the special request mechanism would be defeated by untimely responses.

77. Second, s. 17(5) shows Parliament's intention to require timely decisions on special review requests regardless that the requester may not be personally affected by unreasonable delay. In this respect, the Act overrides the common law on unreasonable delay; more specifically, it outweighs the emphasis in one line of authority on the impact of delay on the applicant.

### 2. In assessing unreasonable delay, courts consider time inherently required for the decision, and the reasons for the delay

78. Generally, this Court assesses the reasonableness of delay by administrative decision-makers with reference to two main lines of authority. In *Blencoe v British Columbia (Human Rights Commission)*,[71] LeBel J. held that the three main factors that courts should balance when assessing the reasonableness of administrative delay are as follows:

    1) the time taken compared to the inherent time requirements of the matter;
    2) the causes of delay beyond the inherent time requirements of the matter, including consideration of whether the affected individual contributed to the delay; and
    3) the impact of the delay on the person affected.[72]

79. As submitted above at paragraph 77, this third factor need not be weighed in the case at bar. In s. 17(5), Parliament has provided a statutory right to any person making a special review request to receive the Minister's decision within a reasonable time – regardless of whether the person would be directly or personally affected by a special review.

80. The second line of authority flows from this Court's decision in *Conille v Canada (Minister of Citizenship and Immigration)*.[73] It also creates a three-pronged test for unreasonable delay:

    1) the delay has been longer that the nature of the process *prima facie* required;
    2) the applicant is not responsible for the delay; and
    3) the authority responsible for the delay has not provided satisfactory justification.

81. As is apparent, the first factors used in *Blencoe* and *Conille* are substantially similar. Further, the second factor set out in *Blencoe* is substantially similar to the second and third factors in *Conille*. Thus, in applying this law to the facts, the Applicants first address the inherent or *prima facie* time required, and then address the causes of delay in deciding their requests.

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[71] 2000 SCC 44 ("*Blencoe*") per LeBel J. in partial dissent [Authorities Vol 1, Tab 9]

[72] *Ibid* at para 160.

[73] [1999] 2 FC 33 (FCTD) ("*Conille*") at para 23 [Authorities Vol 1, Tab 17]

### 3. The Agency's delay was longer than the inherent or *prima facie* time requirements under s. 17(2)

82. For registered pest control products containing the 26 active ingredients, the Agency delayed deciding whether to initiate a special review for over ten months. The Applicants say that this delay is demonstrably longer than was *prima facie* required to make the s. 17(2) decisions.

83. First, in considering the time required, *prima facie,* to decide if a special review is required by s. 17(2), the Court should recall the Minister's primary objective in administering the Act. Her primary objective is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. Further, the Minister is obliged to encourage – and thus not to discourage – public participation in the decision-making process [s. 4(2)(c)].

84. Second, special reviews are intended to allow the Agency to respond quickly to emerging scientific and regulatory developments. According to testimony before Parliament by the then-Executive Director of the Agency, once initiated, special reviews are intended to allow "very quick action" and "can be done in an even shorter time than a year."[74] The Agency should not need as much time to initiate a special review as it actually takes to conduct one.

85. Third and most importantly, as set out in detail in the Notice of Application,[75] the time required by the Agency to make the s. 17(2) decisions was inherently short. It did not need to locate scientific information, obtain expert advice or balance competing factors. To decide if special reviews were required by s. 17(2), the Agency needed merely to confirm three facts:

    1) was the active ingredient contained in pest control products registered in Canada;
    2) had another OECD country prohibited all uses of that active ingredient; and
    3) if so, was that prohibition for human health or environmental reasons?

86. Confirming these three facts should be straightforward for the Agency. Its staff can quickly check the Pesticide Product Information Database to confirm if an active ingredient is registered in Canada. They can confirm, using public databases like those used by the

[74] Bill C-53, An Act to protect human health and safety and the environment by regulating products used for the control of pests", *Standing Committee on Health*, 37th Parl, 1 Sess, No 83 (28 May 2002) at 1710 (Claire Franklin) [Authorities Vol 2, Tab 45]

[75] Notice of Application in file no. T-1422-13 at paras 41–56 [AR Vol 1, Tab 1, pp 10–12]

Applicants, the existence of OECD country decisions. They can read those regulatory decisions and their reasons. Here, all of the regulatory decisions that the Applicants relied were cited in their special review request, so the Agency could confirm the facts with minimal effort. Nothing about this fact-checking exercise is factually or legally complex.

87. In these circumstances, the time required by the Agency to decide whether to initiate special reviews and to respond with reasons was no more than three months. Indeed, it did not take the Applicants this long. After detailing her process for reviewing the regulatory status of what was then 125 active ingredients, Dr. MacDonald estimates that, if she had reviewed only the status of the 30 active ingredients ultimately included in the special review request, this review would have taken her about two days. [76] It is unreasonable for the Agency to take ten months to do a review that takes a charity's employee two days. Even adding time to write and translate written reasons, the process did not require more than three months.

88. This view is supported by events after the commencement of this litigation. In August 2013, the Applicants filed a Notice of Application alleging unreasonable delay for 26 special reviews. Four months later, the Agency made all 26 decisions, complete with written reasons.

### 4. The delay was caused solely by the Agency's unlawful consideration of irrelevant factors

89. Turning to the second factor in *Blencoe* and the second and third factors in *Conille,* the Applicants submit that the Agency was entirely responsible for its unreasonable delay, and that the cause of the delay was the Agency's own unlawful interpretation of s. 17(2).

90. When after nearly five months the Agency had not responded to their special review request, the Applicants asked the Agency to advise when it expected to make its s. 17(2) decisions. The Agency's response was telling. It did not identify any challenges to confirming the three facts that trigger a special review under s. 17(2). Rather, it claimed that it needed to analyse scientific information underlying OECD countries' decisions, so as to decide whether special

[76] First MacDonald Affidavit at paras 13-14 [AR Vol 2, Tab 16, pp 118-119]. See also paras 12-14 [AR Vol 2, Tab 16, pp 115-117]

reviews were "warranted". Further, the Agency incorrectly relied on s. 18 as creating a further limitation upon the initiation of a special review.

91. The Applicants submit that these justifications were clearly unsatisfactory. The Agency's delay was caused by it misinterpreting the nature of its legal duties under s. 17(2).

92. In this litigation, the Agency has chosen not to tender any evidence providing any further explanation of, or justification for, its delay. For example, it does not give evidence that it could not locate any of the OECD member countries' regulatory decisions or the reasons for those decisions, or that any of those decisions were not available in English. There is no evidence that any excessive workload or administrative backlog contributed to the delay.

93. The Applicants had no role in causing the delay, nor has the Agency ever suggested otherwise. To the contrary, the Applicants diligently sought updates from the Agency.

94. Finally, the Agency has taken the position that by making special review decisions and publishing a draft guideline, it rendered moot the Applicants' delay allegations. However, the Agency has never conceded that it unreasonably delayed and failed to make those decisions "within a reasonable time". Thus the Agency's position is disingenuous – in particular because the Agency's Guideline is entirely silent on the question of what is "a reasonable time" under s. 17(5). As submitted in detail below in the Applicants' mootness submissions, the public interest requires that this question be resolved.

## E. Issue 3 – The Agency was *functus officio* or without jurisdiction when it purported to reconsider, reverse and cancel the difenoconazole special review

95. As set out above, on December 30, 2013, the Agency decided to initiate a special review of pest control products containing difenoconazole. That same day, the Agency implemented that decision by sending a statutory notice under s. 18(1) to the registrant, thereby initiating the review. Neither the December 30, 2013 decision nor the s. 18(1) notice indicated, in any way, that the decision was preliminary, subject to change, or otherwise not final in nature.

96. The Applicants submit that the Agency was *functus* and acted without jurisdiction when it purported to reverse its earlier statutory decision to initiate a special review of pest control products containing difenoconazole, and when it purported to cancel that special review.

97. This question is of significant importance, both to the Applicants and to the public generally. The Applicants are concerned that the special reviews that they have caused to be initiated, through this litigation, may now be cancelled at any time. Further, if the Agency may reverse s. 17 decisions, the public's ability to secure special reviews could be weakened.

98. Importantly, there is no evidence that the Agency ever considered whether it had jurisdiction to reconsider its decision when it purported to cancel the difenconazole special review, or whether it was *functus officio*. This question is thus one of first instance.

### 1. The doctrine of *functus officio* restrains administrative decision-makers from changing their mind on final decisions, even if circumstances have changed

99. The doctrine of *functus officio* is aimed at ensuring finality of decisions by preventing decision-makers from revisiting decisions after they are finalized, with some exceptions.

100. In *Chandler v Alberta Association of Architects*, the Supreme Court of Canada held that *functus officio* applies to administrative tribunals.[77] The *functus* rule allows two exceptions where a decision-maker may revisit a decision: where there has been a clerical slip in the decision, or where there has been an error in expressing the decision-maker's manifest intention.[78] In addition, in *Chandler,* the Court confirmed that tribunals may reconsider their decisions where such reconsideration is authorized by statute. The Court confirmed that final decisions cannot, however, be revisited simply because the decision-maker has changed its mind, made an error within its jurisdiction, or because of a change in circumstances.

101. Here, the Agency's reversal of its decision to initiate the difenoconazole special review does not fit within the exceptions to the doctrine of *functus officio*. The Agency was not

[77] [1989] 2 SCR 848 ("*Chandler*") [Authorities Vol 1, Tab 15]

[78] *Ibid* at p 860.

seeking to correct a clerical error or clarify its manifest intention. The Agency simply changed its mind, based on information brought to its attention after its decision was made.

### 2. The doctrine of *functus officio* restrains administrative decision-makers from reconsidering final decisions, unless the power to reconsider arises from statute

102. As noted, the general rule is that the authority to reconsider or vary a final statutory decision is not inherent. Rather, such authority must generally be provided for in the statute.[79]

103. The Supreme Court examined a minister's authority to reconsider a statutory decision in *Comeau's Sea Foods v Canada (Minister of Fisheries and Oceans).*[80] The question was whether the Minister of Fisheries and Oceans, having decided to authorize the granting of fishing licences, still had the authority to revoke that authorization before those licences were issued.[81] To answer this question, the Court construed the *Fisheries Act,* which "expressly provides for the circumstances in which an issued licence may be revoked but…is silent on the circumstances in which the Minister may cancel an authorization to issue a licence."[82] The Court held that Parliament intended two distinct powers: authorizing the issuance of a licence, and issuing a licence. While the Minister had continuing power to revoke a decision to authorize the issuance of a licence under s. 7, that power ended once the Minister issued a licence under s.9. Once a licence was issued, the ability to revoke it was governed by s. 9.[83]

104. As with s. 9 of the *Fisheries Act,* when Parliament intended to create a reconsideration mechanism under the *PCPA,* it did so expressly and clearly. Section 35 of the *PCPA* provides a reconsideration mechanism for special review decisions referred to in s. 28(1)(a) and (b). Such decisions are subject to mandatory public consultation; for example, a registration decision resulting from a special review would be captured by s. 28(1)(b) and consequently by the s. 35 reconsideration mechanism. Pursuant to s. 35 any member of the public can file a

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[79] *Ibid* at p 861. See also *Comeau's Sea Foods, infra* note 80 at para 44.

[80] [1997] 1 SCR 12 ("*Comeau's Sea Foods*") [Authorities Vol 1, Tab 16]

[81] *Ibid* at para 21.

[82] *Ibid* at para 27; see generally paras 22–27.

[83] *Ibid* at paras 39–51.

notice of objection of such a decision with the Minister. The Minister may establish a panel to review the decision and recommend whether it should be confirmed, varied or reversed.

105. By implication, the Minister or her delegates have no power to reconsider s. 17 decisions. Other than the reconsideration mechanism created in ss. 35 to 39, there are no provisions in the *PCPA* that allow for the reconsideration of decisions. There are no provisions in the *PCPA* that provide authority to reverse a special review once it has been initiated, nor that permit reconsideration without the benefit of review by a panel. The fact that Parliament opted not make the initiation of a special review subject to the Act's reconsideration scheme indicates that the Minister does not have the authority to reverse such a decision.

106. Put another way, it is trite that to express one thing in a statute implies the exclusion of another. In *Saskatchewan Wheat Pool v Canada (Canadian Grain Commission)*,[84] this Court noted that s. 34 of the *Canada Grain Act* authorizes the Commission to cancel a certificate in certain circumstances. Given that, the Court held that unless there was an express provision in the Act or Regulations permitting a certificate's cancellation in different circumstances, it was implied that a final certificate could not be cancelled under the Act or Regulations.[85]

107. The Federal Court has also applied the general rule that decision-makers require statutory authority to re-open a decision.[86] For example, in *Canadian Museum of Civilization Corp v PSAC, Local 70396*, the Court held that the Canadian Human Rights Commission does not have authority to unilaterally withdraw a complaint that it had already screened and then referred to the Canadian Human Rights Tribunal.[87] In performing its complaint screening function under ss. 40-44 of the *Canadian Human Rights Act*, the Commission first decides to initiate a complaint under s. 40(3). It then conducts an investigation. It ultimately makes a final decision to refer the matter to the Tribunal to initiate an inquiry under s. 44(3)(a). Based

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[84] 2004 FC 1307 [Authorities Vol 2, Tab 32]

[85] *Ibid* at para 27.

[86] *Hiltz*, supra note 54 at paras 23 and 27; *IMP Group Limited* supra note 54 at paras 29–30; *Imperial Oil Resources Ltd v Canada (Minister of Indian Affairs & Northern Development)*, 2003 FCT 478 at paras 22–26; [Authorities Vol 2, Tab 28]

[87] *Canadian Museum of Civilization Corp v PSAC, Local 70396*, 2006 FC 703 at paras 57–60 and 70 [Authorities Vol 1, Tab 14]

on this scheme, the Court held that, subject to judicial review quashing that final decision, the Commission was *functus* with respect to its complaint screening role. The Court rejected the argument that the Commission has a "continuing duty" to screen complaints after referral.[88]

108. The *PCPA* likewise bestows no "continuing duty" on the Agency in determining whether the requirements of s. 17(2) are met, once a special review has been initiated under s. 18(1).

109. In the case at bar, the core function of the Agency is to ensure that the health or environmental risks or value of a pest control product are acceptable for registration in Canada. In light of that purpose, it is counterproductive and risky for Agency to cancel special reviews once initiated.

110. In summary, there are no indications in the *PCPA,* either express or implied, that decisions to initiate special reviews under s. 17 may be re-opened. Parliament intentionally provided a different mechanism, by permitting any person to seek under s. 35 a reconsideration of the resulting registration decision at the *end* of a special review.

### 3. The doctrine of *functus officio* restrains administrative decision-makers from reconsidering final decisions, where those decisions have already been implemented

111. Canadian courts have held that the doctrine of *functus officio* should not be as strictly applied to decisions of administrative decision-makers, but rather more flexibly applied.[89] However, the Supreme Court has also held that administrative decision-makers do not have discretion to re-visit decisions once the decisions have been both finalized and implemented.

112. In particular, in *Comeau's Sea Foods Ltd.,* the Supreme Court held that the Minister of Fisheries and Oceans may lawfully revoke a decision under s. 7 of the *Fisheries Act* to *authorize* the issuance of a fishing licence. However, the Court held that once the Minister has implemented the decision by *issuing* the licence under s. 9 of the Act, then the Minister no longer has any continuing power to revoke the s. 7 decision authorizing its issuance.[90]

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[88] *Ibid* at paras 60–70.

[89] *Chandler*, supra note 77 at 862; *Saskatchewan Wheat Pool, supra* note 84 at para 24; *Kurukkal v Canada (Minister of Citizenship and Immigration),* 2010 FCA 230 [Authorities Vol 2, Tab 30]

[90] *Comeau's Sea Foods,* supra note 80 at paras 39–40; see also paras 41–51.

113. In the case at bar, ss. 17 and 18(1) are analogous to ss. 7 and 9 of the *Fisheries Act.* Once the Agency issues a s. 18(1) notice, which implements a s. 17(2) decision to initiate a special review, the ability to revoke or reconsider that special review becomes governed by s. 35.

114. Similarly, in *Brochu v Grande Prairie (City)*,[91] the Alberta Court of Queen's Bench found that the City's Chief Administrative Officer ("CAO") was *functus* after he issued a document declaring a landowner petition to be sufficient. He was not legally entitled to issue a second document, two weeks later, declaring the petition insufficient because it had less than the required number of signatures. Regardless that he had received a legal opinion indicating that his first decision was in error, "the CAO's decision had been made and he could not go back on it."[92] Further, he had implemented his first decision, because he had given notice of his declaration to the municipal council.[93]

115. The Agency's decisions to initiate the 23 special reviews were finalized and implemented upon it sending notice to the registrants under s. 18(1). After that, the Agency was *functus*, lacking express or implied statutory authority to reconsider the initiation of special reviews.

### 4. The Agency did not make any "jurisdictional error" on December 30, 2013

116. In *Chandler,* the Supreme Court held that where a decision is a nullity on "jurisdictional grounds" the decision-maker is not *functus officio* in making a new decision within the bounds of its jurisdiction.[94]

117. In this case, however, the power to make s. 17 decisions is squarely within the Agency's jurisdiction. While the Agency could act incorrectly or unreasonably in making any particular s. 17 decision, any such legal error would not necessarily amount to a jurisdictional error.

118. If the Agency submits that it cancelled the difenoconazole special review in order to correct a "jurisdictional error" in its December 30, 2013 decision, this has implications for any standard of review analysis. Specifically, if an erroneous or unreasonable s. 17(2)

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[91] 2004 ABQB 182 at para 6 [Authorities Vol 1, Tab 12]

[92] *Ibid* at para 25, see also paras 1–6 and 23-32.

[93] *Ibid* at paras 27–31.

[94] *Chandler,* supra note 77 at pp 861–863.

decision amounts to an error of jurisdiction for the purpose of the *functus* analysis, it must also be a question of "true jurisdiction" for the purpose of a standard of review analysis.

119. Further, if the Agency claims that it made a jurisdictional error in deciding to initiate a difenoconazole special review under s. 17(2), the Applicants submit that jurisdictional errors are best resolved by this Court. Despite this, the registrant opted not to seek judicial review. Instead of pursuing its legal options for remedying any alleged jurisdictional error, within the timeline legislated under s. 18.1(2) of the *Federal Courts Act,* Syngenta quietly urged the Agency to reconsider. In the Applicants' view, to allow the Agency to reconsider such decisions would encourage registrants to lobby the Agency to reverse its final statutory decisions, after the limitation periods for judicial review have expired.[95] To interpret the *PCPA* in this way would, in effect, encourage registrants to do an end run around the *Federal Courts Act* and cut against the policy objective of finality in administrative decision-making.

## F. Issue 4 – The Agency's decision to cancel the special review of pest control products containing difenoconazole was unlawful

120. The Applicants submit that the Agency's decision to cancel the difenoconazole special review was based on an incorrect interpretation of s. 17(2), in the context of the *PCPA* scheme as a whole. Further, the decision was unreasonable in the face of uncontroverted evidence that Norway has prohibited all uses of difenoconazole as a pest control product.

### 1. The Agency incorrectly interpreted subsection 17(2)

121. The Applicants submit that neither importing nor planting seeds that have been treated with pest control products equates to the use of an active ingredient within the meaning of the words of s. 17(2). The Agency's interpretation ignores the broader context of the Act. Specifically, it ignores that treated seeds are exempted from the Act's application. Further, it misconstrues the words within the phrase "uses of an active ingredient" in s. 17(2).

[95] *Hiltz*, supra note 54 at para 17.

### *i) Treated seeds are not regulated as pest control products, but rather are regulated under the Seeds Act and exempted from the PCPA*

122. Subsection 6(1) of the *PCPA* provides that "[n]o person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product" that is not registered pursuant to the *PCPA*, except as authorized by certain provisions or by regulation.[96]

123. Under s. 4(1)(b) and Schedule 2 of the *PCP Regulations*, most treated seeds are exempt from requirements to be registered or evaluated as pest control products. More specifically, s. 4(1)(b) exempts from the application of s. 6(1) of the Act any pest control product:

> (i) that is of a type described in Schedule 2 and that meets the applicable conditions set out in that Schedule, and
>
> (ii) the active ingredient of which is registered under the Act.

124. Schedule 2 prescribes pest control products exempt from registration. At item 3, it exempts "[s]eed that has been treated with a pest control product that is registered for the purpose of treating such seed," if certain labelling requirements are met.

125. The *PCP Regulations* were made pursuant to s. 67 of the *PCPA*, and specifically pursuant to s. 67(1)(z.4), which is the only provision empowering any pest control products to be exempted from the Act. Under s. 67(1)(z.4)(ii), the Governor in Council may make regulations exempting products from the application of any and all provisions of the *PCPA,* if satisfied *inter alia* that the exempted products are sufficiently regulated under another Act.

126. Here, the Governor in Council has exempted treated seeds from the registration and evaluation requirements of the Act. Instead, the *Seeds Act* scheme applies to treated seeds. Further, the *Seeds Regulations* specifically create marking and labelling requirements for "seed treated with a pest control product."[97]

127. Indeed, in Canada, treated seeds have long been regulated under the *Seeds Act,* before either the *PCPA* or the current *PCP Regulations* came into effect in 2006. This is confirmed in the Agency's 2003 Regulatory Directive entitled *Harmonization of Regulation of Pesticide*

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[96] *PCPA*, s 6(1)

[97] *Seeds Regulations*, ss. 20(2)–(4) [Authorities Vol 1, Tab 5]

*Seed Treatment in Canada and the United States* (the "Regulatory Directive"). The Regulatory Directive states that, in the United States, seeds treated with pest control products are considered to be pesticides.[98] Notably however, in a side-by-side comparison, the Regulatory Directive does not say the same about Canadian seed regulation. It confirms that Canadian law distinguishes between "seed treatments", which are pest control products governed by the *PCPA*, versus "treated seeds", which are governed by the *Seeds Act*. It states that the *PCPA* "exempts from registration seeds […] that have been treated with pest control products under certain conditions specified in Schedule II of the regulations", while "[t]he *Seeds Act* (SA) regulates all seeds, including those treated with pest control products".[99]

128. When the *PCP Regulations* were made a few years later, in 2006, Canada made a deliberate choice to continue exempting treated seeds from registration and evaluation under the *PCPA*. The Regulatory Impact Analysis Statement for the current *PCP Regulations* states that the Agency received comments requesting a new requirement to include the word "pesticide" on labels for certain products listed in Schedule 2 of the *PCP Regulations*, including fertilizer mixtures and treated seeds. However, "[i]n keeping with the objective of not introducing new policies at this time in the revised PCPR, no revisions were made."[100]

### *ii) Neither the import nor the sowing of a treated seed constitutes the use of an active ingredient or the use of a pest control product*

129. Additionally, even disregarding the exemption for treated seeds, neither the import nor the sowing of a seed treated with a pest control product containing difenoconazole constitutes the use of the active ingredient difenoconazole. In the terms of the facts of this case, neither the import by Norway, nor the sowing in Norway, of a seed treated in another country with the pest control product Celest Extra Formula M constitutes use of difenoconzole in Norway.

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[98] Third MacDonald Affidavit at para 57 and Ex CC (p 4) [AR Vol 4, Tab 19, p 663 and Vol 5, Tab CC, p 1192]

[99] Third MacDonald Affidavit at para 57 and Ex CC (pp 6–7) [AR Vol 4, Tab 19, p 663 and Vol 5, Tab 19.CC, pp 1194–1195]

[100] Registration SOR/2006-124 (Pest Control Products Regulations), (2006) C Gaz II, p 694 (Regulatory Impact Analysis Statement) [Authorities Vol 1, Tab 3]

130. In layman's terms, an "active ingredient" is simply a chemical found in a pest control product. The same is true in legal terms. As shown by its definition in s. 2, an "active ingredient" is a *component* of a pest control product. As shown by the definition of "pest control product", an active ingredient is used to manufacture a pest control product.

131. A treated seed *itself* cannot meet the statutory definition of an "active ingredient". An active ingredient is "a component of a pest control product to which the intended effects of the product are attributed".[101] Clearly, a seed is not a component part of some larger pest control product. Therefore, a seed cannot be an active ingredient.

132. Furthermore, neither the import nor the sowing of treated seed constitutes a "use" of an active ingredient.

133. Regarding import, this is distinct from use. Many provisions of the *PCPA,* like s. 6(1), address "import" and "use" of pest control products together in the same list of activities.[102] This suggests that "use" must have a different meaning from the word "import".[103] Further, other provisions of the *PCPA*, like ss. 6(5) and (8), list activities that include "use" but that exclude "import".[104] One must conclude that "import" was deliberately excluded from those provisions and that "import" must be different than "use".[105]

134. Regarding sowing, planting a seed is not the use of an active ingredient. Rather, planting a treated seed constitutes the use of a seed. If it were otherwise, then to eat a strawberry that had been sprayed with a pest control product before it was imported from Mexico would be a use of an active ingredient. Like seeds, strawberries are regulated under different federal legislation (namely, the *Food and Drugs Act*). Despite that strawberries have pest control products sprayed onto them before they are imported to Canada, strawberries themselves remain food, not pest control products.

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[101] *PCPA*, s 2(1)

[102] *PCPA*, ss 6(1)-(3), 8(1)(a), 67(1)(o), (t)

[103] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, Inc, 2014) ("*Sullivan*") at p 230 [Authorities Vol 2, Tab 48]

[104] *PCPA,* ss 6(5), (8)

[105] *Sullivan*, supra note 103 at p 248–251 (regarding the *expressio unius* or "implied exclusion" rule)

135. A "use" in the context of s. 17(2) has its ordinary meaning: an application or employment of a pest control product containing an active ingredient. Use is defined as "[t]he application or employment of something" or "[t]he employment of a thing to achieve a purpose".[106]

136. Put simply, seed treatment products containing difenoconazole are not "applied" by planting a seed. These products are applied or employed when spraying or treating a seed. A product like Celest Extra Formala M was used when it was sprayed on or otherwise applied to seeds, before those seeds were ever imported by Norway. It is in that other country, where the seed treatment product was applied or sprayed, that the pest control product was used.

137. The distinction between a "treated seed" and a "seed treatment product" is well-illustrated by the facts of this case.[107] In contrast to difenoconazole, Norway has informed parties to the *Rotterdam Convention* that it has "severely restricted" the use of thiabendazole. Thiabendazole is likewise a fungicide used in many seed treatment products registered in Canada.[108] Seed treatment products containing thaibendazole are still authorized for use in Norway – specifically, it remains authorized as a seed dressing to be applied to potatoes.[109]

### 2. The Agency unlawfully misconstrued how Norway regulates difenoconazole

#### *i) If Norway had reversed its ban on difenoconazole, it would have be obliged notify the Secretariat of the Rotterdam Convention*

138. Norway and Canada are parties to the *Rotterdam Convention*. Under this treaty, parties must facilitate the provision of information on their domestic regulatory actions that are relevant to the *Rotterdam Convention*'s objectives.[110]

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[106] See, respectively, Bryan A Garner, *Black's Law Dictionary*, 10th ed, *sub verbo* "use", p 1775 [Authorities Vol 2, Tab 47] and Daphne A. Dukelow, *The Dictionary of Canadian Law*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2011) *sub verbo* "use", p 1348 [Authorities Vol 2, Tab 46]

[107] Third MacDonald Affidavit at paras 61–62 [AR Vol 4, Tab 19, pp 663–664]

[108] Third MacDonald Affidavit at paras 59 and 63 and Exs DD and EE [AR Vol 4, Tab 19, pp 663 and 664 and Vol 5, Tabs 19.DD–19.EE, pp 1208–1212]

[109] Third MacDonald Affidavit at paras 60-61 and Ex A (p 16) [AR Vol 4, Tabs 19 and 19.A, pp 664 and Vol 4, Tab 19.A, p 681]

[110] *Rotterdam Convention*, art 14(1)(b) [Authorities Vol 2, Tab 39]

139. More particularly, the *Rotterdam Convention* obligates its parties to notify the Secretariat of any "final regulatory action", defined as an action taken "to ban or severely restrict a chemical". The Secretariat must then circulate information to the parties about such notifications within six months, which it does in the form of a semi-annual PIC Circular.[111]

140. When the Secretariat receives notifications of final regulatory actions concerning the same chemical from two parties, it forwards them to the Chemical Review Committee for consideration for inclusion in Annex III.[112] Listing in Annex III imposes a Prior Informed Consent procedure for import and export of listed chemicals.[113] If a party submits to the Secretariat new information that indicates its listing in Annex III may no longer be justified, the Chemical Review Committee must review the listing, and may recommend removal.[114]

141. It is important that the Secretariat is notified of any reversals of final regulatory actions. Otherwise, it could mistakenly forward a chemical to the Committee for Annex III listing on receipt of a second notification, not knowing the first notification had become out of date.

142. Secretariat guidance indicates that, if a country has previously notified it of a ban but then subsequently re-approves uses of the chemical, "[t]his constitutes a change in the final regulatory action and should be communicated to the Secretariat."[115] This guidance specifically applies to non-Annex III chemicals such as difenoconazole, so that the chemical is no longer considered a potential candidate for listing in Annex III.[116]

143. If Norway's Import Authorization is interpreted to mean that difenoconazole was no longer banned for all uses in Norway, Norway would be required to notify the Secretariat.

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[111] *Rotterdam Convention*, arts 5, 2(e)

[112] *Rotterdam Convention*, art 5(5)–(6)

[113] *Rotterdam Convention*, art 7(2)

[114] *Rotterdam Convention*, art 9(1) – (2)

[115] Secretariat of the Rotterdam Convention, "Frequently Asked Questions about the Rotterdam Convention", online: (2010) Rotterdam Convention [Authorities Vol 2, Tab 41]

[116] *Ibid.* In other guidance material at p 20, the Secretariat states "When revising a final regulatory action please provide a new notification that replaces all previous notifications"; Secretariat of the Rotterdam Convention, *Forms and Instructions: Implementation Documents*, online: (2008) Rotterdam Convention > [Authorities Vol 2, Tab 42]

144. The Agency's determination that uses of difenoconazole are permitted in Norway implies that Norway has failed to fulfill its *Rotterdam Convention* obligations to notify the Secretariat of a change to a final regulatory action. For the Agency to imply that Norway is violating its international treaty law commitments is scandalous. It did so contrary to the evidence. This Court should avoid implying that Norway is breaching international obligations, by rejecting the Agency's unreasonable position that uses of difenoconazole are permitted in Norway.

***ii) The Agency unreasonably failed to accept evidence of Norwegian law***

145. In *Xiao v Canada (Citizenship and Immigration)*, this Court held that when a conclusion on foreign law is supported by "credible and well-articulated opinion authored by an expert whose credentials are not in dispute, it will most likely be unreasonable to come to an opposite conclusion without the benefit of any expert evidence to the contrary." It held that a visa officer's conclusion was unreasonable because it was contrary to the only expert evidence before him and based solely on his own understanding of the foreign law.[117]

146. Similarly, in *Kenne v Canada (Citizenship and Immigration),* this Court held that a tribunal erred in its interpretation of Cameroonian law by setting aside opinions of two Cameroonian lawyers due to its failure to understand the opinions or law and by failing to consider evidence contradicting its interpretation. The findings were based solely on the tribunal's own understanding, whose conclusion was unreasonable in light of the evidence.[118]

147. Here, the Agency reached a conclusion concerning Norwegian law that was opposite to the credible, clear opinion of the Norwegian Food Safety Authority. This opinion was the only evidence before the Agency regarding the operation of Norwegian law. In the 12 months after Syngenta urged the Agency to reconsider the difenoconazole special review and before the Agency cancelled it, the Agency did not obtain any foreign law evidence on Norway's pesticide or seed regulations. It did not obtain copies of Norwegian legislation (which, in any event, the Agency's lawyers are not qualified to interpret). The Agency's own understanding was unreasonable in light of Norway's opinion, which its decision declined to disclose.

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[117] *Xiao*, supra note 63 at paras 36–37

[118] *Kenne*, supra note 64, at paras 39, 45, and 47.

## G. The Court should exercise its discretion to hear moot issues and grant the relief sought

148. The Applicants submit that this Court should exercise its discretion to grant the relief sought. First, declaratory relief would provide useful guidance and would remedy systemic failures by the Agency. Second, while some issues in this Consolidated Proceeding are arguably moot, resolution of those issues would be efficient and in the interests of justice.

### 1. The Court should exercise its remedial discretion to grant the relief sought

149. The Applicants submit that all of the declaratory relief sought would provide useful guidance on the nature and scope of the Minister's legal duties under s. 17(2) and s. 17(5).

150. In *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*,[119] public interest litigants sought declarations regarding the respondent ministers' ongoing delays in releasing recovery strategies for four species under the *Species at Risk Act.* The ministers admitted the breach and argued that declaratory relief should not be granted. For the Court, MacTavish J. issued declarations. While the litigation had caused the ministers to put the four delayed recovery strategies "on the top of the file", such that by the time of the hearing there had been progress towards finalizing these strategies, this did not address any harm that the four species may have faced during the time that the ministers were in breach of their duties. Declaratory relief was appropriate "as an expression of judicial disapproval of the current situation and to encourage future compliance with the statute by the competent ministers."[120]

### 2. The Court should decide any moot issues in the Consolidated Proceeding

151. The Agency intends to argue that the first and second issue are moot. Specifically, it has taken the position in correspondence that, with respect to the 29 special review requests (presumably excepting difenoconazole), "the Applicants' requests for certiorari and mandamus are now moot". However, the Respondent has acknowledged that the Applicants may still seek declaratory relief (although it has questioned the usefulness of doing so).[121]

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[119] 2014 FC 148 [Authorities Vol 2, Tab 36]

[120] *Ibid* at paras 63–94.

[121] Third MacDonald Affidavit at para 6 and Ex A (pp 2–3) [AR Vol 4, Tab 19 and 19.A, pp 648 and 667–668]

152. To be clear, the Agency does not allege that the third or fourth issues are moot.

153. It may be tempting to look at the first and second issues in a vacuum. However the first and second issues are closely related to and overlap significantly, both legally and factually, with the third and fourth issues in this Consolidated Proceeding. Importantly, all four issues require interpretation of s. 17(2) of the *PCPA*. As s. 17(2) must already be interpreted in order to resolve the third and fourth issues, the Applicants submit that it would be an efficient use of judicial resources for the Court to resolve all four issues involving s. 17(2) together, even if some aspects of the first and second issues may arguably be moot.

154. Further, there is a fundamental inconsistency in the Agency's position. On the one hand, it has insisted that any order of *mandamus* requiring initiation of these 23 special reviews is moot. On the other hand, it insists it may cancel the special reviews at any time if it changes its mind on whether s. 17(2) applies. The risk that the Agency may still terminate the ongoing special reviews strongly confirms the need for this Court to dispose of all four issues.

155. Mootness is analyzed under the Supreme Court's two-step test in *Borowski v Canada (Attorney General)*.[122] First, courts must ask if the required tangible dispute has disappeared, such that there is no longer a live controversy. If that answer is yes, and the matter is moot, courts must then consider whether to exercise their discretion to hear the case regardless.[123]

156. Under the second step of the *Borowski* analysis, courts generally assess three factors: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need for the court to be sensitive to its role as the adjudicative branch. The factors must not be applied mechanically; in different situations, some factors are more relevant than others.[124]

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[122] [1989] 1 SCR 342 ("*Borowski*") [Authorities Vol 1, Tab 10]

[123] *Ibid* at p 353.

[124] *Ibid* at pp 358–363; see also *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 ("*Doucet-Boudreau*") at paras 18–22 [Authorities Vol 1, Tab 21]

### *i) A live controversy remains for all four issues raised in this proceeding, such that they are not moot*

157. It appears that the Agency intends to argue that the first and second issue are moot.[125] The Agency does not allege that the third or fourth issues are moot. Notably, all four issues require interpretation of s. 17 generally and s. 17(2) specifically.

158. This Court has held that a live controversy can exist "where a question arises as to the Minister's lawful exercise of its power". Even where a key element of the relief sought is no longer at issue, a continued dispute over a decision's legality suggests a matter is not moot.[126]

159. Only the first issue is conceded by the Applicants to be moot – and only in part. While the Agency has initiated the 23 required special reviews (excepting difenoconazole, which it initiated then cancelled), a live controversy remains. The parties disagree on whether the Agency's interpretation of s. 17(2) was lawful in 2013, and whether it is lawful now. Absent declaratory relief, the Agency is not constrained from making the same errors in the future.

160. The Agency's Guideline in some respects corrects this unlawful conduct, albeit only impliedly.[127] However, in other respects, it advances unlawful interpretations of s. 17. It continues to advance the position that s. 17(2) only applies when a person has requested a special review under s. 17(5).[128] As pleaded, when an OECD country prohibits all uses of an active ingredient contained in that product for health or environmental reasons, the Agency must initiate a special review regardless of whether a person has so requested.[129]

161. The second issue of unreasonable delay is unresolved by the December 30, 2013 decisions or the Agency's Guideline, which is silent on what constitutes a "reasonable time"

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[125] Third MacDonald Affidavit at para 6 and Ex A (pp 2–3) [AR Vol 4, Tab 19 and 19.A, pp 648–649 and 667–668]

[126] *Dehcho First Nations v Canada (Attorney General)*, 2012 FC 1043 at para 40 [Authorities Vol 1, Tab 20]

[127] Third MacDonald Affidavit at para 10 and Ex C [AR Vol 4, Tab 19 and 19.C, pp 649 and 695]

[128] Third MacDonald Affidavit at paras 9–10, Ex B (pp 3–4) and Ex C (pp 2–3) [AR Vol 4, Tab 19, 19.B, and 19.C, pp 649, 691-692 and 698-699].

[129] Notice of Application in file no. T-1422-13 (paras 18–21) [AR Vol 1, Tab 1, pp 6–7]; Notice of Application in file no. T-1423-13 (paras 18–21) [AR Vol 1, Tab 2, p 19]; Notice of Application in file no. T-1424-13, (paras 18–21) [AR Vol 1, Tab 3,]; Notice of Application in file no. T-1431-13, (paras 18–21) [AR Vol 1, Tab 4, p 19]

under s. 17(5). The Applicants commented that the draft guideline "does not remedy our concern that the PMRA is not committed to timely decision making under section 17."[130] There remains a live dispute about whether the Agency acted within a reasonable time.

162. In this respect, this case is analogous to *Attaran v Canada (Attorney General).*[131] The Canadian Human Rights Commission dismissed Dr. Attaran's complaint regarding delays in processing immigration applications for sponsored parents and grandparents, finding that newly announced government procedures had addressed it. On judicial review, the Court held that, while there was no longer a live controversy as between the applicant personally and CIC, his complaint of systemic discrimination was not moot. While the government had made policy changes following Dr. Attaran's complaint, the respondent had not pointed to any evidence indicated that processing times were significantly changed.[132]

163. It should be noted that another line of authority in this Court holds that, in cases where *mandamus* relief has become moot, any unresolved declaratory relief does not point to a live controversy. This case law suggests that the Court should, in that situation, instead consider whether to grant declaratory relief under the second step of the *Borowski* test.[133] Thus, in the alternative, if this Court decides that either the first or second issue is moot, the Applicants submit that the Court should still resolve those issues for the reasons set out below.

***ii) An adversarial context is present, such that the issues should be decided***

164. The parties continue to dispute the nature and scope of the Agency's duties under s. 17, with respect to both s. 17(2) and s. 17(5).

165. The instant case is analogous to *David Suzuki Foundation v Canada (Minister of Fisheries and Oceans).* There, four months after litigation commenced, the respondents reversed an unlawful decision to not issue a Protection Order under s. 58 of the *Species at Risk Act.* However, once the respondents made submissions on the merits, it was apparent

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[130] Third MacDonald Affidavit at Exhibit B (p 6)

[131] 2013 FC 1132 [Authorities Vol 1, Tab 7. The Federal Court decision on the merits was overturned in *Attaran v Canada (Attorney General),* 2015 FCA 37.

[132] *Ibid* at paras 44–47.

[133] *Ficek v Canada (Attorney General),* 2013 FC 430 ("*Ficek*") at paras 11-16 [Authorities Vol 2, Tab 24]

that they still held onto an unlawful interpretation of s. 58. Thus, Russell J. held that an adversarial context was still present.[134] The same is true here of the first issue under s. 17(2).

166. Further, and in the alternative to the position that the issue of unreasonable delay is not moot, an adversarial context is present on the second issue. The Agency has never conceded that a ten month delay violated the Applicants' s. 17(5) right to a decision within a reasonable time. The Agency's Guideline declined to give guidance on what constitutes "within a reasonable time". In this litigation, the Agency tendered no evidence of any inability to decide within the three month period that the Applicants plead is reasonable. It tendered no evidence suggesting that it intends to take a more expeditious approach in the future. Nothing on the record supports a finding that what constitutes "a reasonable time" is resolved. The Agency should not be allowed to evade judicial review simply by staying silent on the issue.

***iii) The Court will not waste judicial resources in hearing this case***

167. In deciding whether hearing a moot case would raise concerns about judicial economy, courts must consider if the case raises issues of public importance that are evasive of review.

168. In *Doucet-Boudreau*, the Supreme Court held that courts must weigh the expenditure of scarce judicial resources against "the social cost of continued uncertainty in the law."[135] In *Esquega v Canada*, this Court held that arguments regarding the scarcity of judicial resources may be trumped where the issue at hand is sufficiently important and evasive of review.[136]

169. This proceeding raises issues of public importance. To not resolve these issues risks that the Canadians will remain exposed to pest control products banned in Europe, without any

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[134] 2010 FC 1233 at paras 236-245 [Authorities Vol 1, Tab 18]. The Federal Court was upheld by the Federal Court of Appeal on this point; see *David Suzuki Foundation*, supra note 51, at paras 53–63.

[135] *Doucet-Boudreau*, supra note 124 at paras 20–21.

[136] *Esquega v Canada (Attorney General)*, 2007 FC 878 at paragraphs 52–56 [Authorities Vol 2, Tab 23]. See also *David Suzuki Foundation v Canada (Minister of Fisheries and Oceans)*, supra note 134 at paras 246–251; *David Suzuki Foundation,* supra note 51, at paras 62–63; *Canada v Canada*, infra note 140 at paras 47–51; and *Ficek*, supra note 133 at paras 17–28.

special review. The concern is not hypothetical. These active ingredients, have been banned for reasons including that they may be genotoxic, carcinogenic and endocrine-disrupting.[137]

170. The Agency's duties to initiate timely special reviews under ss. 17(2) or (5) can be demonstrably evasive of review. Here, four months after being sued, the Agency reversed its unlawful s. 17(2) decisions for trifluralin, chlorthal dimethyl and trichlorfon, and released delayed decisions on the remaining 26 special reviews. Given the timelines associated with judicial review, a s. 17(2) decision that is unlawful in content (or timing) can be retracted (or made) before the case is heard – thus shielding the broader practice from scrutiny.

171. In *Ficek v Canada*,[138] Ms. Ficek sought to compel the Canada Revenue Agency ("CRA") to issue an assessment. She also sought a declaration that the CRA's delay was unlawful, as it failed to meet a duty to assess "with all due dispatch". After litigation began, the CRA issued an assessment and sought to dismiss the case for mootness. Phelan J. found the case moot as the assessment had been obtained, and declaratory relief was adjunct to this relief. However, he exercised discretion to hear the case. The duty to assess "with all due dispatch" was an issue of public importance unresolved by the CRA's subsequent new policy.[139]

172. The Applicants say the same reasoning applies here, with respect to the need to interpret "within a reasonable time" in s. 17(5).

173. Équiterre and David Suzuki Foundation cannot hold the Agency to account for all of its future s. 17(2) decisions. They cannot challenge every delay by the Agency under s. 17(5). Non-profit groups face financial and other barriers to litigation. Individual Canadians using the special review request mechanism face even greater barriers to legal action.

174. Since this litigation began two years ago, the Court has expended resources guiding it through motions, in and out of abeyance, and through case management. All that remains is a

[137] First McDonald Affidavit at para 15 and Ex 1 [AR Vol 2, Tab 16, p 119 and Vol 2, Tab 16.1, p 151]

[138] *Ficek*, supra note 133.

[139] *Ibid* at paras 13–14 and 20–28.

final hearing. As Kane J. noted in *Canada (Information Commissioner) v Canada (National Defence),* by that time, concern for judicial resources is to some extent theoretical.[140]

175. Respectfully, deferring consideration of ss. 17(2) or (5) to future lawsuits would be a "penny wise and pound foolish" approach to judicial economy. Resolving these four closely-related issues in full, in the present proceeding, would be an efficient use of judicial resources.

#### *iv) The issues in this case are within the Court's adjudicative function*

176. The first and second issues in this case are squarely within this Court's function. These issues raise traditional adjudicative questions of statutory interpretation. In resolving such question, the Court does not overstep its role into the legislative or executive spheres.[141]

### H. The public interest in litigating this matter should be reflected in any costs order

177. Given the public interest nature of this litigation, it may be appropriate that costs submissions follow disposition. However, the Applicants summarize their costs submissions here in writing, in the event the Court should wish costs submissions prior to disposition.

#### 1. In the event the Applicants are successful, they seek their costs under Column IV of Tariff B and a direction for second counsel fees

178. Should the Court grant the relief sought by the Applicants, or the balance of this relief, the Applicants seek an order granting them their costs at Column IV of Tariff B.

179. Rule 400(3) confirms factors that the Court considers in the amount and allocation of a costs award. These factors include the importance and complexity of the issues, and whether the public interest in having the proceeding litigated justifies a particular award of costs.[142]

180. There can be no doubt that Équiterre and David Suzuki Foundation bring this proceeding in the public interest, or that it raises important, novel issues. The Applicants are gravely

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[140] *Canada (Information Commissioner) v Canada (National Defence)*, 2014 FC 205 at para 49 [Authorities Vol 1, Tab 13]

[141] *Ibid* at para 52; see also e.g. *David Suzuki Foundation*, supra note 51, at para 64.

[142] *Federal Courts Rules*, SOR/98-106, rr 400(3)(c) and (h) [Authorities Vol 1, Tab 6]

concerned that Canadians are exposed to pesticides banned in Europe. They seek to ensure that the Agency lawfully implements its duties under s. 17, to the benefit of all Canadians.

181. This litigation has already resulted in a measure of success, insofar as it forced the Agency to initiate 23 special reviews (albeit without declarations that will ensure the Agency complies with the law in the future). Normally where litigants achieve part of what they seek, they can expect some costs compensation. Here, the Applicants were not compensated for their partial success. Instead the Agency threatened that, if the Applicants did not discontinue their applications on a without costs basis, it would seek its costs at Column IV or V.[143]

182. With respect to Column IV costs, this case is distinguishable from *Wier*. The Court held that *Wier* was public interest litigation, under s. 17(1) of the *PCPA,* raising complex and important issues. Despite that, this Court granted costs only at the normal mid-range of Column III, relying on the fact that "most of the grounds for the applicant's request for special review were abandoned before this Court at the hearing of the application."[144]

183. The Applicants seek a direction under Item 14B, Tariff B granting second counsel fees. Having regard to Rule 400(3),[145] it is reasonable to conclude that two counsel were required.

### 2. In the event that the Applicants are unsuccessful only in their efforts to have any moot issues resolved, they should still be granted their costs

184. Should the Applicants are denied relief for certain issues on the basis that the Agency's decisions to initiate 23 special reviews rendered those issues moot, and should they otherwise be successful in this litigation, they respectfully request their full costs of the consolidated case. In that circumstance, these public interest litigants should be rewarded, not penalized, for successful litigation efforts to ensure those special reviews were lawfully initiated.

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[143] Third MacDonald Affidavit, at para 6 and Ex A (p 3) [AR Vol 4, Tab 19 and 19.A, pp 648–649 and 668]

[144] *Wier*, supra note 50 at para 109.

[145] See e.g. *Tradition Fine Foods Ltd. v Oshawa Group Ltd*., 2006 FC 93 at para 8 [Authorities Vol 2, Tab 35]

### 3. In the event the Applicants are unsuccessful, they should be exempted from costs

185. If the Applicants are denied the relief sought in the five underlying applications, the Applicants respectfully request an order exempting them from any liability for adverse costs.

186. The Supreme Court has confirmed judicial discretion to depart from the default costs rule where a different approach is justified in the public interest.[146] When exercising discretion, this Court is guided by criteria first adopted in *Harris v Canada*.[147] The Court has since adapted the *Harris* test,[148] into four criteria guiding costs discretion in public interest cases:

> 1. The case involves matters of public importance that transcend the immediate interests of the named parties, and which had not been previously resolved;
>
> 2. The claimant has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
>
> 3. The party opposing the claimant has a superior capacity to bear the cost of the proceeding; and
>
> 4. The claimant has not conducted the litigation in an abusive, vexatious or frivolous manner.

187. The Applicants demonstrably satisfy all four of these criteria. They submit that this Court should exercise its discretion to relieve them from any potential adverse costs award.

## PART IV: THE ORDER SOUGHT

188. The Applicants seek the majority of the relief sought in the five notices of applications underlying this Consolidated Proceeding, although they have abandoned some relief.

189. With respect to the three applications specific to trifluralin, chlorthal dimethyl and trichlorfon, filed in August 2013,[149] the Applicants seek the following relief:

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[146] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 27-30 [Authorities, Vol 1, Tab 11]

[147] *Harris v Canada,* 2001 FCT 1408 at paras 217–223 [Authorities, Vol 2, Tab 25]

[148] *Bielli v Canada (Attorney General)*, 2013 FC 953 at paras 13–14 [Authorities, Vol 1, Tab 8]

[149] Notice of Application in file no. T-1423-13 (p 3) [AR Vol 1, Tab 2, p 16]; Notice of Application in file no. T-1424-13, (p 3) [AR Vol 1, Tab 3, p 29]; Notice of Application in file no. T-1431-13, (p 3) [AR Vol 1, Tab 4, p 42]

a. An order declaring that the Agency erred in law when it refused to initiate three mandatory special reviews, under s. 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin, chlorthal dimethyl and trichlorfon respectively;

b. An order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate three mandatory special reviews, under s. 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin and chlorthal dimethyl.

190. The use of trichlorfon in Canada has now been phased out. As such, the Applicants abandon their request for an order of *mandamus* compelling a trichlorfon special review.

191. With respect to the request for an order of *mandamus* compelling the trifluralin and chlorthal dimethyl special reviews, the Applicants acknowledge that obviously the Agency did initiate the 23 remaining special reviews in December 2013. Thus, at the time of these submissions, this *mandamus* relief is clearly moot.

192. However, the Applicants feel unable to abandon this *mandamus* relief. Since February 2015, it has been apparent that the Agency may purport to cancel any of the special reviews initiated on December 30, 2013. *Mandamus* or at least declaratory relief remains necessary.

193. With respect to the application alleging unreasonable delay in initiating 26 special reviews, filed in August 2013,[150] and adopting the submission made in the three preceding paragraphs, the Applicants seek the following further orders:

a. An order declaring that the Minister of Health or her delegate failed, refused and unreasonably delayed the performance of her mandatory duty to initiate a special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons; and

b. An order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate special reviews, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

[150] Notice of Application in file no. T-1422-13 (pp 3–4) [AR Vol 1, Tab 1, pp 3–4]

194. To be clear, the Applicants have long abandoned all *mandamus* and declaratory relief for six of these 26 special reviews. Specifically, the Applicants do not seek this relief for petroleum oil CAS No. 92062-35-6, thiabendazole, amitraz, ethylene oxide or permethrin.

195. The Applicants also abandon this relief for the aminopyralid special review, as that review has now concluded.

196. Finally, with respect to the difenoconazole application, filed in March 2015,[151] the Applicants continue to seek all declaratory and *mandamus* relief pleaded therein, namely:

a. An order declaring that the Agency, as delegate of the Minister of Health, was *functus officio* or acted without jurisdiction when it purported to reconsider, reverse or cancel its statutory decision, made on December 30, 2013, to initiate a special review of registered pest control products containing difenoconazole.

b. An order declaring that the Agency's decision purporting to reconsider, reverse or cancel its statutory decision, made on December 30, 2013, to initiate a special review of registered pest control products containing difenoconazole is of no force and effect.

c. Additionally, an order declaring that the Minister of Health or her delegate has unlawfully failed or refused to perform her duty to initiate a special review, under subsection 17(2), of the registration of pest control products containing difenoconazole.

d. Additionally, an order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate a special review, under subsection 17(2) of the *PCPA,* of the registration of pest control products containing difenoconazole.

197. With respect to the costs order sought, the Applicants refer to their submissions above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2015

| | | |
|---|---|---|
| Lara Tessaro | Tanya Nayler | Dyna Tuytel |
| Counsel for the Applicants | Counsel for the Applicants | Counsel for the Applicants |

[151] Notice of Application in file no. T-426-15 (pp 3–4) [AR Vol 1, Tab 5, pp 55–56]

## PART V: LIST OF AUTHORITIES

### Appendix A: Statutes and Regulations

***Statutes and Regulations***

*Pest Control Products Act*, SC 2002, c 28

*Pest Control Products Regulations*, SOR/2006-124 (excerpted)

Registration SOR/2006-124 (Pest Control Products Regulations), (2006) C Gaz II, 694 (Regulatory Impact Analysis Statement) (excerpted)

*Seeds Act,* RSC 1985, c S-8

*Seeds Regulations*, CRC, c 1400 (excerpted)

*Federal Courts Rules*, SOR/98-106 (excerpted)

### Appendix B: Case Law and Authorities

***Case Law***

*Attaran v Canada (Attorney General)*, 2013 FC 1132, [2013] FCJ No 1229 (excerpted)

*Bielli v Canada (Attorney General)*, 2013 FC 953, [2013] FCJ No 976

*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] SCJ No 43 (excerpted)

*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14 (excerpted)

*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] SCJ No 76 (excerpted)

*Brochu v Grande Prairie (City)*, 2004 ABQB 182, [2004] AJ No 277

*Canada (Information Commissioner) v Canada (National Defence)*, 2014 FC 205, [2014] FCJ No 248 (excerpted)

*Canadian Museum of Civilization Corp v PSAC, Local 70396*, 2006 FC 703, [2006] FCJ No 884

*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, [1989] SCJ No 102

*Comeau's Sea Foods v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, [1997] SCJ No 5

*Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, [1998] FCJ No 1553 (FCTD)

*David Suzuki Foundation v Canada (Minister of Fisheries and Oceans)*, 2010 FC 1233, [2010] FCJ No 1471 (excerpted)

*David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40, [2012] FCJ No 157

*Dehcho First Nations v Canada (Attorney General)*, 2012 FC 1043, [2012] FCJ No 1141

*Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] SCJ No 63 (excerpted)

*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 (excerpted)

*Esquega v Canada (Attorney General)*, 2007 FC 878, [2007] FCJ No 1128 (excerpted)

*Ficek v Canada (Attorney General),* 2013 FC 430, [2013] FCJ No 676

*Harris v Canada,* 2001 FCT 1408, [2001] FCJ No 1876 (excerpted)

*Hiltz v Canada (Human Resources Development)*, 2009 FC 508, [2009] FCJ No 683

*IMP Group Ltd v Public Service Alliance of Canada*, 2007 FC 517, [2007] FCJ No 698

*Imperial Oil Resources Ltd v Canada (Minister of Indian Affairs & Northern Development)*, 2003 FCT 478, [2003] FCJ No 660

*Kenne v Canada (Citizenship and Immigration)*, 2010 FC 1079, [2010] FCJ No 1349

*Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230, [2010] FCJ No 1159

*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, [1998] SCJ No 2

*Saskatchewan Wheat Pool v Canada (Canadian Grain Commission)*, 2004 FC 1307, [2004] FCJ No 1568

*St Amour v Canada*, 2014 FC 103, [2014] FCJ No 1069

*Tinney v Canada (Attorney General)*, 2010 FC 605, [2010] FCJ No 744

*Tradition Fine Foods Ltd v Oshawa Group Ltd*, 2006 FC 93, [2006] FCJ No 120

*Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148, [2014] FCJ No 151

*Wier v Canada (Minister of Health)*, 2011 FC 1322, [2011] FCJ No 1583

*Xiao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195, [2009] FCJ No 264

***International Law and Guidance Materials***

*Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337, (entered into force 24 February 2004)

Secretariat of the Rotterdam Convention, *Forms and Instructions: Implementation Documents*, online: (2008) Rotterdam Convention <http://wwwpicint/Portals/5/ResourceKit/C_Implementation%20document/Forms%20and%20instructions/Forms%20and%20inst2008_Epdf>

Secretariat of the Rotterdam Convention, "Frequently Asked Questions about the Rotterdam Convention", online: (2010) Rotterdam Convention <http://wwwpicint/TheConvention/Overview/FrequentlyAskedQuestions/tabid/1062/language/en-US/Defaultaspx>

***Foreign Statutes and Regulations***

*Forskrift om plantevernmidler*, 26 July 2004, No 1138

*Forskrift om såvarer*, 13 September 1999, No 1052

***Hansard Debates***

"Bill C-53, An Act to protect human health and safety and the environment by regulating products used for the control of pests", *Standing Committee on Health*, 37th Parl, 1 Sess, No 82 (28 May 2002)

"Bill C-53, An Act to protect human health and safety and the environment by regulating products used for the control of pests", *Standing Committee on Health*, 37th Parl, 1 Sess, No 83 (28 May 2002)

***Secondary Materials***

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Bryan A Garner, *Black's Law Dictionary*, 10th ed, (St Paul: Thomson Reuters, 2014) *sub verbo* "use"

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, Inc, 2014) (excerpted)