



**Environmental  
Law Centre**  
UNIVERSITY OF VICTORIA



# Presentation to Special Committee on Cosmetic Pesticides

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# Key Points

- ◆ Who we are: our perspective and mandate
- ◆ Legal Context: *Spraytech v Town of Hudson* (SCC, 2001)
- ◆ The Precautionary Principle & taking regulatory precaution seriously
- ◆ The ELC's model bill

# The Environmental Law Centre

- ◆ ELC: a non profit society that operates, in partnership with the UVic Faculty of Law, Canada's first public interest environmental law clinic
  - ◆ Give students hands-on advocacy experience in public interest environmental law
  - ◆ Provide advice & representation to NGOs, community & environmental groups, and First Nations
  - ◆ Advocate for thoughtful, pragmatic & scientifically sound environmental law reform
  - ◆ Promote access to justice for clients & causes that might otherwise go unrepresented
- ◆ Today: speak for ELC; drawing on Feb 2010 Discussion Paper prepared for our clients Canadian Cancer Society (BC & Yukon) & Toxics Free Canada

# The Legal Context

- ◆ *Spraytech v. Hudson* [2001: SCC]
  - ◆ a test case brought to challenge authority of local gov'ts (creatures of provincial law) to regulate cosmetic pesticides
  - ◆ *Outcome?* bylaw consistent with enabling provision; and not inoperative due to alleged inconsistency with federal or provincial laws
  - ◆ the *subsidiary* principle: regulation often best pursued at level closest to citizens affected bearing in mind need for multi-level action
  - ◆ the *precautionary* principle (discuss later)

# Post-*Spraytech* developments

- ◆ Dramatic expansion in provincial and local govt initiatives around cosmetic pesticides issue
  - ◆ At local level, 150 ordinances & bylaws across Canada; 28 in BC (as of 2010)
- ◆ *Dow Chemicals* case under Chapter 11 of the NAFTA in connection with Quebec ban of 2,4D: filed in 2009; abandoned without costs in spring 2011

# The Precautionary Principle: its Rise to Prominence

- ◆ *Rio Declaration on Environment & Development (1992) Principle 15*

- ◆ Turns maxim 'better safe than sorry' into a regulatory obligation in the face of uncertainty

- ◆ P-15 is a relatively permissive version:

*...where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation...*

# Precautionary Principle: Current Status & Implications

- ◆ Growing incorporation into environmental laws worldwide (including SARA, CEPA, CEAA etc)
- ◆ Interpretive doctrine: *Spraytech*
- ◆ Arguably a customary principle of int'l law; and an emerging 'domestic' common law principle
- ◆ In its modest guise:
  - 1) reverses burden of uncertainty where significant potential risks; and
  - 2) compels regulators to respond proportionally to risk, and in way that adapts response as more knowledge comes to light

# Incorporating a precautionary approach into environmental regulation

- ◆ Rethinking who bears burden of uncertainty
- ◆ Proportional regulatory responses based on magnitude of the risk, and assessment of costs/benefits
- ◆ Adaptive learning (harvesting knowledge from and developing solutions for diverse communities)
- ◆ Balancing subsidiarity with need for a cooperative, multi-level approach
- ◆ Transparency
- ◆ Facilitating regulatory transition

# The ELC's Model Law: I

## ◆ *Scope & Application:*

- ◆ cosmetic = non-essential use of any non-white-listed pesticide
- ◆ additive features include regulation of sales & use on non-municipal/residential property
- ◆ Continued exceptions for agriculture, forestry & health and safety uses regulated through permitting regime; some limited transitional provisions
- ◆ no pre-emption of local gov't bylaws
- ◆ *Proportionality & subsidiarity*

# The ELC's Model Law: II

## ◆ *Listed Products:*

- ◆ adopt a 'white-list' approach that identifies low risk pesticides; akin to that used in Ontario & Quebec
- ◆ complements federal regulation of manufacture, distribution & use
- ◆ *revisiting burden of uncertainty; transparency*

# The ELC's Model Law: III

- ◆ **Enforcement:** employ point of sale (as opposed to use ban) approach combined with reporting and recording requirements; align with public education efforts  
*(subsidiarity/complementarity; proportionality)*
- ◆ **Public Education:** training for vendors/dispensers/applicators/users  
*(proportionality; adaptive learning)*
- ◆ **Public Accountability:** impose data gathering & reporting duties across the board  
*(transparency; adaptive learning; proportionality)*

# References

- ◆ ELC, “Submissions on Restricting Cosmetic Pesticide Use in British Columbia” (February 2010) available at [www.elc.uvic.ca](http://www.elc.uvic.ca)
- ◆ C. Tollefson and J. Thornback, “Litigating the Precautionary Principle in Domestic Courts” (2008) 19 *Journal of Environmental Law and Practice* 33-58 available

[http://law.uvic.ca/faculty\\_staff/faculty\\_directory/tollefson.php#section0-11](http://law.uvic.ca/faculty_staff/faculty_directory/tollefson.php#section0-11)