Court File Number: T-1424-13

FEDERAL COURT

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: AUG 23 2013

Issued by: _____

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REGISTRY OFFICER
AGENT DU GREFFE

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APPLICATION

This is an application for judicial review seeking to quash the unlawful decision of the Pest Management Regulatory Agency ("the Agency") to refuse to initiate a mandatory special review, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"), of the registration of pest control products containing trifluralin. The Agency communicated this decision to the applicants in writing on July 24, 2013. Reference number 2012-4494 dlll.

The application further seeks to order the Minister of Health or the Agency to initiate a special review of registered pest control products containing trifluralin.

The applicants apply for the following orders:

1. An order declaring that the Agency erred in law when it refused to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

2. An order in the nature of *certiorari* quashing and setting aside the Agency's decision refusing to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

3. An order in the nature of *mandamus* ordering the Minister of Health or her delegate the Agency to immediately initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

4. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this application be consolidated or heard together with three other closely related applications issued by these applicants on or about August 23, 2013.

5. An order requiring the respondent to pay the applicants' costs of this application.

6. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing section 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to the Agency. The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA*.

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA*.

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review. These four applications share common parties, legal issues and factual issues.

7. The four applications all arise out of the applicants' request on October 15, 2012, to the Minister of Health. That request addressed 30 active ingredients contained in various registered pest control products. This application regarding trifluralin, and two other applications regarding chlorthal-dimethyl and trichlorfon, seek orders in the nature of *certiorari* and *mandamus,* quashing the Agency's decisions refusing to initiate mandatory special reviews in relation to these 3 of the 30 active ingredients and requiring the Minister or her delegate to initiate these special reviews. The fourth application seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate mandatory special reviews in relation to 26 of the 30 active ingredients.

The Agency assigned the closely related decisions the same reference number. dll

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a 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.

10. An "active ingredient" is defined, in section 2, to mean 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, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency, when an OECD country prohibits all uses of an active ingredient for health or environmental reasons, to initiate a special review of registered pest control products containing that active ingredient.

13. If an active ingredient in a pest control product that is registered for use in Canada has been banned by an OECD country for all uses, for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty under subsection 17(2) to initiate a special review is not limited by subsection 17(1) or by section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate a special review under subsection 17(2) is not limited by section 18 of the *PCPA*. Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has submitted a request to the Agency to initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review and must respond to the person with written reasons for its decision within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012, in relation to trifluralin

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that these 30 active ingredients, including trifluralin, were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients, including for trifluralin, and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information that is legally irrelevant to a determination under subsection 17(2)—such as scientific studies relied on by OECD countries when banning these active ingredients for environmental or health reasons or any previous re-evaluations by the Agency.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of their request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health, and advising that the applicants would be notified, in due course, of the Agency's determination.

In July 2013, the Agency refused to initiate a mandatory special review in relation to trifluralin

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate the anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied, acknowledging receipt of the applicants' letter dated February 27, 2013. It did not indicate any date by which it anticipated responding to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly suggested that, as a precondition to determining if a special review must be initiated under subsection 17(2), the Agency was required to go behind OECD countries' regulatory decisions by gathering and reviewing the scientific reviews forming the basis for those decisions. It also incorrectly asserted that the Agency was first required to investigate previous Canadian regulatory decisions and whether the OECD countries' decisions were based on new scientific evidence.