

# THE LAWYERS WEEKLY

## Voice in the wilderness heard in Ottawa

By donalee Moulton

January 20 2012 issue

The Federal Court has ruled that Canada's health minister must reconsider a B.C. environmentalist's request for a special review of a pest control product. The decision proves citizens can have an impact on government — although that impact is likely to be minimal, legal observers say.

"The decision doesn't change much," said Dianne Saxe, founder of Saxe Law Office in Toronto. "It started off grandly, but all of the original grounds except one were abandoned. All the health issues were abandoned. They weren't even argued."

"It ended up being an environmental concern in a very narrow aspect," said Ken Manning, legal counsel with Justice Canada in Vancouver who represented the federal government. "The court even says it is not suggesting a review should happen."

Under the *Pest Control Products Act*, anyone can request a "special review" of the health or environmental risks of a registered pesticide, which according to the court, "the Minister 'shall' perform unless there is reasonable certainty that no harm will result from exposure to the pesticide."

In a 29-page letter she wrote in 2009, Josette Wier, an environmental researcher in Smithers, B.C., and former physician in France, requested just such a review. She was concerned about the effects of glyphosate, a weed-control product that contains the pesticide polyoxyethylene tallow amines (POEA).

Originally, Wier had cited "significant new" evidence indicating POEA poses unacceptable risks to health or to the environment. At the hearing before the Federal Court, however, counsel for the applicant conceded that the evidence does not demonstrate a "health risk" to humans or animals.

"All that was left was the effect of these pesticides on amphibians in ephemeral wetlands, which hadn't been studied. The government admitted there was a data gap there," Saxe observed.

But the issue is significant, she added. "Small ephemeral wetlands are surprisingly important biological engines. Wier was right to be concerned about the pesticides."

The Pest Management Regulatory Agency at Health Canada declined Wier's request for a special review of the pesticide, which was first registered for use in 1976 and sold under the trade name Roundup. The agency concluded that the applicant had failed to bring enough new evidence of unacceptable risk to amphibians to support a special review.

However, Justice Michael Kelen stated in his 43-page decision that, "while the [regulatory agency's] letter mentioned existing mitigation measures for forestry uses of the pesticide, it did not address the risk raised by the BC Literature Review — namely, the risk to amphibians in ephemeral wetlands when the pesticide is aerially sprayed in clear cut areas, which are not currently covered by the existing mitigations measures.

"The Court agrees with the applicant that the Minister had an obligation to consider all of the evidence in determining whether there are reasonable grounds for finding a risk unacceptable," he added. "The Act specifies neither that the evidence presented in the request for a special review be significant nor



[Butterfly by Alexander Potapov / Dreamstime.com, Cattails by Jamcodesign / Dreamstime.com]

new — this was language chosen by the applicant as grounds for initiating the special review.”

The court found that a decision from the health minister will be considered reasonable where it is “based on the evidence, is justified, transparent and intelligible, and where it falls within the range of acceptable outcomes.”

“In this case, there was evidence on both sides of the issue,” Justice Kelen said. “Moreover, the decision is not transparent or intelligible, because the decision does not expressly address the narrow environmental risk at issue in this case.”

While the health minister again ponders Wier’s request for a special review, it has launched another review of its own. Cyclical reviews are conducted every 15 years and glyphosate is currently being investigated, Manning said. “There is an evaluation that is going on.”

The timing is likely no coincidence, Saxe said. “Wier started her case in 2009. Now...the government is just finishing two years’ research to fill the data gap she pointed out. My sense is that the government knew about the data gap beforehand. But Wier gave them a kick in the butt.

“It’s a very good thing there is a process for public-minded people like Wier,” she added. “It shows you can sometimes — with enormous effort — get the government to move. But it’s heartbreaking that it costs so much and takes so long.”

Reasons: *Wier v. Canada (Minister of Health)*, [2011] F.C.J. No. 1583.

 [Close](#)