

*Ontario's Cosmetic Pesticide Ban and
Dow Chemical's Challenge under
NAFTA to the Quebec Pesticide Code*

**Presentation to Pesticides Webinar
convened by the Canadian Network on
Human Health and the Environment**

May 21, 2009

Kathleen Cooper

Senior Researcher

Canadian Environmental Law Association



Presentation Outline

- **Title change (from email distribution)** to clarify: Ontario “decision” is a modernized *Pesticides Act* that is extremely popular while Dow’s actions are likely not; nor are they a “court” challenge
- **Ontario’s new law** – brief overview
- **Some context and history** – pre- and post-Supreme Court Decision on Hudson by-law
- **The NAFTA challenge**
 - What we know now
 - Implications for other provinces
 - What we can expect



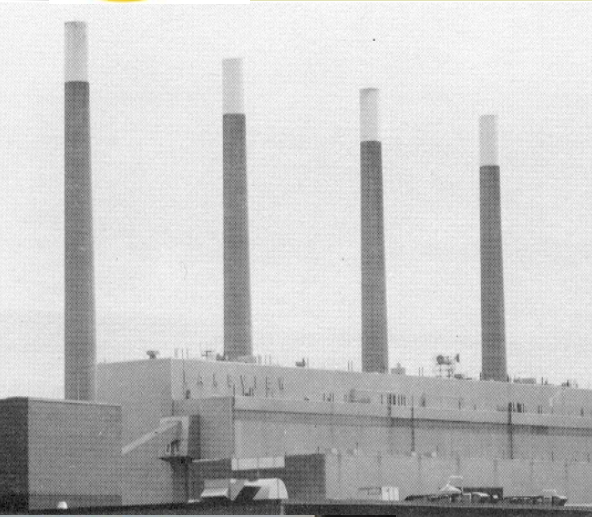
Ontario's Cosmetic Pesticide Ban

- Most progressive pesticide law in North America
- Comprehensive **ban on use and sale** of all but lowest risk products for all cosmetic uses (except golf courses)
- Some **dual-use products** allowed, primarily **for health and safety reasons**
- **Enjoys broad public support**



Context: Eliminating Needless Risk

In a world of **multiple chemical exposures** of varied and often uncertain risk – eliminate needless exposures. Responsible, precautionary action on pesticides, now enshrined in Ontario law.



Early History – Right to Know in Ontario; Leadership in Quebec

Ontario

- 1988 – regulation requiring posting of **warning signs**
- Citizen activism and pesticide limits in parks, schools and other **public** areas

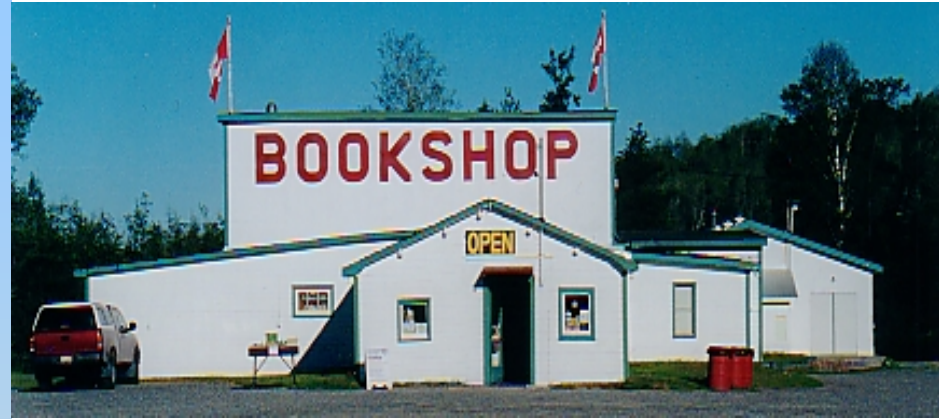
Quebec

- Early 1990s; first municipal bylaws
- Hudson, Quebec: “*The mouse that roared*”.
- Hudson (and some other Quebec bylaws) extended pesticide limits to **private** property. Hudson was sued.



The Courts and Municipal “Cold Feet”

- 1990s: **Citizen-lead advocacy continued** across the country, especially in Ontario
- Many examples of **success limiting pesticide use on public lands**
- Push for Hudson-style ban on private property – municipal leaders **feared lawsuits** and wanted to “**wait to hear from the Supreme Court**”
- **Exceptions** were Cobalt (first by-law in Ontario; home of the famous “Highway Bookshop”) and Perth (voted “Prettiest town in Ontario”)



Supreme Court Decision on Hudson

- Hudson by-law **unsuccessfully challenged** in two levels of the Quebec courts; then appealed to Supreme Court of Canada
- **Supreme Court of Canada, 2001:**
 - Hudson had **valid authority** to pass by-law for the general health and welfare of the community
 - **endorsed precautionary action by municipalities.**
- Found that **substantially similar powers** exist in seven other provinces, including Ontario (regardless of changes to *Municipal Act* in 2001)



After SCC Decision in Hudson: Strategic focus on Toronto

■ Scientific Literature Review

conducted by Toronto's Medical Officer of Health: "*When risks to human health are unnecessary or uncertain, the wisest course of action is to substitute safer alternatives and methods*"

■ Direction from City Council to **follow Hudson-style bylaw** (bullet-proof in the courts)

■ Three year effort – As of **Spring 2004, Toronto bylaw** in effect

■ Previous Spring of 2003: **Quebec Pesticide Code** (implementation occurred between 2003 and 2006)

■ Groundswell - currently are over **130 municipal bylaws across Canada**



Legal Challenge of Toronto By-law

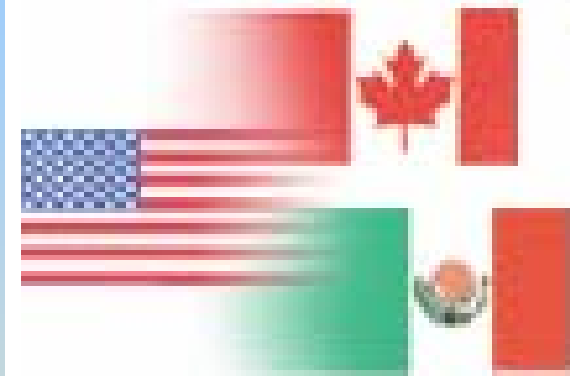
- 2003: **Attempt by pesticide industry to quash Toronto by-law and deter other municipalities.**
- 2003: Echoing the Quebec trial and Appeal Courts in Hudson, the Ontario Superior Court of Justice and the Ontario Court of Appeal up-held Toronto's by-law under Ontario's new *Municipal Act* and applied the SCC Hudson decision.
- 2005: Pesticide industry sought leave to appeal to Supreme Court of Canada. Court refused. **No further legal appeals possible.**



NAFTA Challenge of Quebec Pesticide Code

Another attempt at deterrence?

- During 3 year phase-in of Quebec Code: periodic threats of NAFTA challenge
- Effort towards Ontario's new law spanned 2007-2009
- Law passed in Spring of 2008; with rest of 2008 devoted to preparing regulations
- Effectiveness of new law depended upon strong regulations that banned a comprehensive list of pesticides
- Dow challenge under NAFTA initiated in summer of 2008, made public in fall of 2008, **after** the federal election.



Quebec Pesticide Code

What is Dow Challenging?

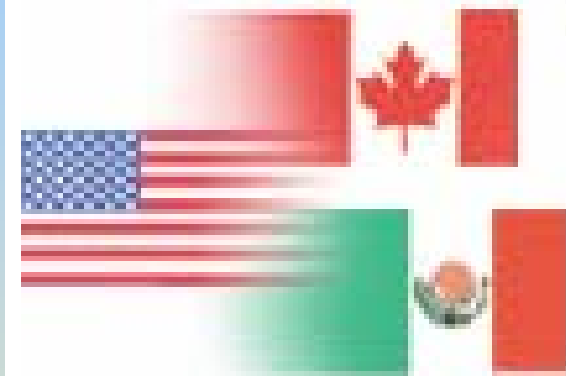
- Quebec ban: use and sale of 20 lawn pesticides, further restricts pesticide use outside schools and public child care
- Basis is precaution, prudence and setting a good example
- Methodology to screen out lawn chemicals assoc'd with increased risks of cancer or endocrine disruption
- Dow challenges scientific basis of Quebec ban and disputes cancer risk of its product 2,4-D
- Dow seeks \$2 million in compensation (plus legal fees and any taxes) from the federal government for revenue lost due to Quebec ban on 2,4-D



Chapter 11 (Investment) of NAFTA

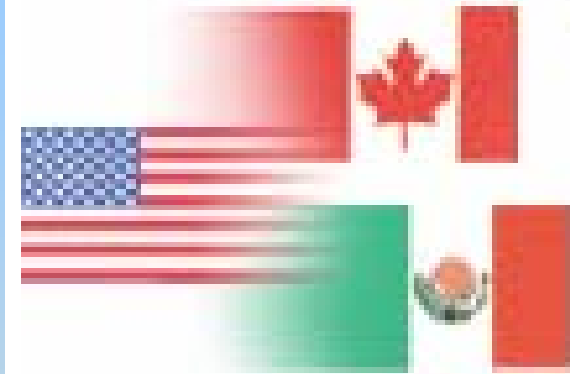
- Allows foreign companies to seek compensation for lost profits
- Can seek compensation where profits are lost due to domestic actions that are seen as discriminatory or “indirect expropriation”
- Archaic provision in NAFTA that has been clearly and intentionally left out of more recent trade agreements.
- E.g., recent bilateral agreements between Canada and Chile, Singapore, Australia, etc., state:

“Non-discriminatory regulatory action designed for legitimate public welfare objects, public health, safety and the environment do not constitute indirect expropriation”



NAFTA Legal Process

- Aug, 2008 – Dow filed **Notice of Intent** to seek arbitration on matter in dispute.
- March, 2009 – Dow took next step with formal **Notice of Arbitration**.
- Three-member arbitration panel chosen by Dow and Canadian government (one each); mutually agree on third who chairs the panel.
- **Not a court proceeding**. Not subject to previous NAFTA decisions.
- Legal standing only to “eligible investors.”
- Others must seek permission of the panel to intervene as “non-disputing parties.” If granted, can only make written submissions.
- No guarantee (via standard court rules) that panel will seek and hear informed testimony on non-trade issues, i.e., health and safety, or application of precaution.
- Entire exercise can be held in secret.



Should NAFTA Challenge Create Provincial “Cold Feet”?

Not in Ontario

- Environment Minister John Gerretson: “Bring it on”

New Brunswick? British Columbia?

- If so, is a convenient excuse for inaction, since threat of legal challenge is largely hollow

Quebec

- Even in the unlikely event that the Dow NAFTA challenge is successful, it is the feds problem; Quebec is under no obligation to rescind its ban
- Can anyone with even a rudimentary knowledge of fed’l-prov’l relations in Canada imagine our federal government trying to force any province, but especially Quebec, to rescind an enormously popular provincial law????



March, 2009: Parliamentary Committee on International Trade

- Committee Motion: “ that the Government vigorously defend Quebec's Pesticides Management Code in the case opposing Dow Agrosience and the Government of Canada in order to safeguard Quebec's right to enact legislation and make regulations in the public interest.”
- Motion referred to the House. Tabled April 1st but likely will go to a vote (pending)
- Contact your MP with your views:

<http://www.parl.gc.ca/common/index.asp?Language=E>



What's Next?

- **Timing:** Likely at least a year for Dow and Canada to agree on the membership of the arbitration panel
- Environmental groups intend to seek leave to intervene on basis of:
 - concerns about 2,4-D risks (regardless of federal registration decision)
 - legitimate exercise of provincial power to apply greater controls on pesticides than federal standards in consideration of public interest and desire for application of precaution.
- Revisions to NAFTA?
- Publicly available documents posted to DFAIT website:

http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/agrosciences_archive.aspx?lang=en





Thanks! More Information

Thanks to:

- Canadian Network on Human Health and the Environment
- Colleagues at CELA, David Suzuki Foundation, Ecojustice Canada, Equiterre

More information at:

www.cela.ca

www.ecojustice.ca

www.davidsuzuki.org

www.equiterre.org/en/