



***Force of Nature Media Report :
The Environmental Movement
in the Media from an
Independent Perspective.***

Quebec Prohibition of Pest Control Products.

Part 6.

Briefing Note

Potential **NAFTA** Challenge to Quebec's Ban of **2,4-D** Lawn Pesticides

March 24th, 2009

Media Release

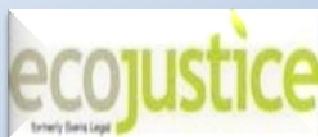
David Suzuki Foundation

Équiterre

University of Ottawa–Ecojustice Environmental Law Clinic

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ISSUE SUMMARY



U.S. chemical manufacturer **Dow AgroSciences** LLC ("**Dow**") intends to challenge the legality of **Quebec's** ban on the lawn herbicide **2,4-D** under **Chapter 11** of the **North American Free Trade Agreement (NAFTA)**. The **David Suzuki Foundation** and **Équiterre**, represented by **legal counsel** at **Ecojustice**, call upon the Government of Canada to vigorously defend **Quebec's** ban on lawn chemicals. We call on all federal parties to officially declare support for **Quebec's precautionary approach** and to examine how the federal **Pesticide Management Regulatory Agency (PMRA)** could more effectively apply this principle when it comes to registration of pesticides used on lawns and gardens.

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RECOMMENDATIONS :

1. The federal government should vigorously defend **Quebec's** ban on **2,4-D** lawn pesticides if **Dow** proceeds to seek arbitration. The federal minister of international trade should immediately and publicly announce Canada's intentions in this regard and acknowledge the appropriate precautionary basis for **Quebec's** action.
2. The federal government should ensure more robust application of the precautionary principle in **PMRA** risk assessments of pesticides.
3. The federal government should assert the position that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process are not, under international law, expropriations or violations of the minimum standard of treatment rules. As such, such regulatory measures are not subject to any compensation.

BACKGROUND

Quebec's Pesticides Management Code was phased into effect between 2003 and 2006. It prohibits the use and sale of 20 active ingredients (**1**) in lawn pesticides and prescribes additional restrictions on pesticide use outside public daycares and schools. The Code is grounded in the precautionary principle.

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The advisory group whose recommendations formed the basis for development of the Code explicitly recognized this orientation :

*Deux principes importants ont guidé la réflexion du groupe, soit le principe de précaution qui implique qu'en l'absence de certitude scientifique sur la toxicité des pesticides il faut être prudent quant à leur utilisation, ainsi que le principe d'exemplarité. (**2**)*

(**1**) The active ingredient in a pesticide is the substance that controls the targeted pest.

(**2**) Rapport du groupe de réflexion sur les pesticides en milieu urbain, March 2002.

<http://www.mddep.gouv.qc.ca/pesticides/reflexion/rapport-pesticide.pdf>

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In determining which pesticides to ban, **Quebec** developed a methodology to screen for lawn chemicals that are associated with increased risks of cancer or endocrine disruption. All forms of **2,4-D** were included in the ban on the basis of the International Agency for Research on Cancer (IARC) classification of chlorophenoxy herbicides as possible human carcinogens. Chlorophenoxy herbicides are a class of chemicals that includes **2,4-D**.

Ontario recently became the second Canadian province to ban the use and sale of lawn and garden pesticides — including **2,4-D** — with new regulations that will enter into force in April 2009. Several other provinces are considering cosmetic pesticide bans.

LEGAL PROCESS

On August 25, 2008, **Dow** filed a notice of intent to seek compensation from the Government of Canada for lost profits resulting from the ban on **2,4-D** lawn herbicides in **Quebec**. **Dow's** claim will be brought under **NAFTA** article 1105 (minimum standard of treatment, including fair and equitable treatment in accordance with international law) and article 1110 (expropriation or measure tantamount to expropriation). **Dow** is seeking **\$2 million** in damages, as well as “ *further relief including additional damages* ”.

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Dow argues that the **Quebec** ban was imposed without scientific justification and disputes the cancer risk associated with **2,4-D**. **Dow** suggests that the ban was not based on scientific criteria but rather on a **precautionary approach** that was only supposed to apply until recognized organizations had completed their assessments. Pointing to the recent **PMRA** decision to continue federal registration of **2,4-D**, **Dow** claims that the ban ought to have been lifted, and that it is arbitrary, irrelevant and unfair.

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Having filed a notice of intent, **Dow** was required to wait at least 90 days to file its notice of arbitration, which officially initiates the claim process and results in the nomination of an arbitration panel. The 90-day period has expired, with no apparent resolution of the matter. The Department of Foreign Affairs and International Trade (DFAIT) website does not show any subsequent filings to that of August 25. In order for **Équiterre** and **David Suzuki Foundation** to seek leave to intervene as “ *non-disputing parties* ” in this matter and to file an *amicus curiae* submission, a notice of arbitration must first be filed by **Dow**. In terms of the investor–state dispute resolution process, we are particularly concerned about two issues.

First, even where matters of public interest are engaged, **NAFTA Chapter 11** only guarantees legal standing to eligible investors, leaving other civil society actors to engage in a limited fashion (in writing only) at the discretion of the arbitrators. Given how the *amicus curiae* process has developed in the **NAFTA Chapter 11** case law, we have no confidence that a future **Dow** panel will have the discretion to benefit from oral submissions from non-disputing parties with a distinct interest and expertise in the matter. This lack of inclusiveness contrasts sharply with the rules of practice before the Supreme Court of Canada.

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Second, we are concerned about the imbalance that **NAFTA Chapter 11** establishes between investor protection and the Parties’ sovereign duty to protect the environment and public health. Over the past several years, a series of investor claims in each of the **NAFTA** Parties have filed claims alleging that certain domestic environmental and/or public health measures conflict with the terms of **NAFTA Chapter 11**. While we are sensitive to the potential for environmental trade protectionism, the uncertainty that **Chapter 11** (and other bilateral investment treaties) has generated regarding the requirement to compensate investors for legitimate, non-discriminatory regulatory measures is an overriding concern. Despite this underlying legal risk, provinces and municipalities are moving forward to protect human health and the environment against the unnecessary risks associated with cosmetic pesticides. However, we believe that all jurisdictions across Canada would benefit from greater certainty that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process are not, under international law, expropriations or violations of the minimum standard of treatment rules.

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ANALYSIS

A central argument in the **Dow** filing is that the IARC classification of chlorophenoxy herbicides does not establish the carcinogenicity of **2,4-D** in particular. Several authorities have indeed pointed to a scarcity of evidence concerning **2,4-D**, as cited by **Dow**. In the absence of sufficient evidence to definitively establish the cancer risks (or lack thereof) associated with **2,4-D**, reference to the IARC classification of chlorophenoxy herbicides as a group is entirely appropriate. Lack of evidence does not necessarily equate to lack of hazard nor justify abandoning precautionary measures given the documented risks associated with closely related chemicals.

Furthermore, the European Union Strategy for Endocrine Disrupters classifies **2,4-D** in Category II on its priority list of suspected endocrine disrupting chemicals. (3) **Quebec**'s methodology for determining which pesticides to ban included consideration of endocrine disrupting potential, but international reference lists were not available at the time. Were **Quebec** to review its classification of **2,4-D** under the **Pesticides Management Code**, the chemical could be banned on the basis of its endocrine disrupting potential as well as cancer risk.

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2,4-D is also associated with other serious illnesses, including neurological disorders, neurodevelopmental problems, and damage to the immune and reproductive systems.

A second argument advanced by **Dow** is that the **Quebec** ban on **2,4-D** lawn chemicals is inconsistent with the **PMRA** decision to continue registration of this pesticide. The **PMRA** re-evaluation, completed in May 2008, concluded that products containing **2,4-D** do not pose unacceptable risks to human health or the environment if used according to directions. In Canada, federal and provincial governments share jurisdiction for pesticide regulation. Provinces have the authority to impose regulations that are more restrictive of pesticide use than federal laws and regulations in consideration of the public interest and general welfare. The inconsistency between the **PMRA** registration decision and the ban on **2,4-D** lawn chemicals in **Quebec** and now Ontario is concerning, but points to a weakness in the federal risk assessment. A Notice of Objection to the **PMRA**'s re-evaluation decision for **2,4-D** is currently pending.

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Also, the Washington-based Natural Resources Defence Council has filed a petition to cancel the U.S. registration of **2,4-D**. The petitioner argues that published, scientific information about exposure factors and health effects were not properly considered in the U.S. decision to re-register **2,4-D**. The Canadian re-evaluation decision relied in on the same data set used in this disputed U.S. assessment. Denmark, Norway, and Sweden have discontinued registration of **2,4-D**.

It should be noted, as well, that all pesticides banned in **Quebec** (and Ontario) are federally registered.

Quebec did not need to consider banning chemicals that are not approved by the **PMRA**. “ **Inconsistency** ” between federal and provincial standards is an inherent and appropriate feature of provincial pesticide bans : **Quebec** applies a higher standard of precaution when it comes to the use and sale of lawn pesticides.

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(3) The E.U. Strategy for Endocrine Disrupters classified the priority list of suspected endocrine disrupters in three categories on the basis of the strength of evidence. Expert reviewers identified at least some in vitro evidence of biological activity related to endocrine disruption for chemicals in Category 2.

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We agree with the conclusions of the Institut national de santé publique du Québec (INSPQ) in this regard :

En considérant les données disponibles, les éléments qui demeurent moins connus et la vulnérabilité des groupes d'individus plus sensibles, il y a assez d'éléments pour justifier la prudence et préconiser l'application du principe de précaution dans le cas de l'utilisation de pesticides pour des raisons esthétiques. (4)

CONCLUSION

1. There is a legitimate concern that chlorophenoxy herbicides — a class of chemicals that includes **2,4-D** — may cause cancer. In keeping with the precautionary principle, the scarcity of data on the carcinogenicity of **2,4-D** specifically should not be used as an excuse to postpone measures to protect public health and the environment.
2. **2,4-D** exposure is also associated with a number of other serious health risks. **Quebec**'s published methodology for determining which pesticides to ban includes consideration of endocrine disrupting potential, in addition to carcinogenicity. Although no international reference lists to identify endocrine disruptors were available at the time, the European Union has since developed a priority list of suspected endocrine disrupting chemicals which includes **2,4-D** in Category II.
3. Federal registration of **2,4-D** points to a weakness in the **PMRA** risk assessment and does not undermine the precautionary basis for **Quebec**'s ban. Denmark, Norway, and Sweden have banned **2,4-D** and a petition pending in the U.S. calls for all registrations of the chemical to be cancelled.
4. The ban on **2,4-D** lawn chemicals in **Quebec** (and Ontario) is a legitimate exercise of the provincial power to impose regulations that are more restrictive of pesticide use than federal standards, in consideration of the public interest and general welfare.

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(4) Institut national de santé publique du Québec, Réflexions sur l'utilisation des pesticides en milieu urbain, Décembre 2001

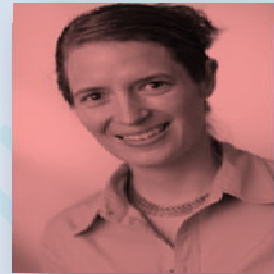
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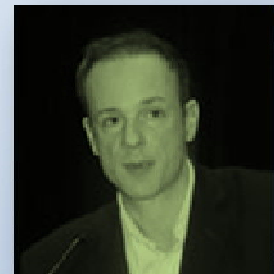
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Civil society groups defend **Quebec** pesticide ban in Parliament

March 24th, 2009

Media Release



U.S. company attempts to override public health decision with **NAFTA**

Équiterre and **Ecojustice Canada** will appear today before the Standing Committee on International Trade to defend **Quebec's** right to ban lawn chemicals. Joined by the **David Suzuki Foundation**, the **Environmental Law Clinic** and the **Canadian Environmental Law Association**, the groups oppose **Dow AgroSciences** challenge of **Quebec's** ban under the **North American Free Trade Agreement (NAFTA) Chapter 11**.

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All five groups are calling upon the Government of Canada to vigorously defend **Quebec's** ban on the herbicide **2,4-D**. They also want federal government to acknowledge that it makes sense to eliminate unnecessary chemical exposure to protect human health and the environment.

*" We cannot allow U.S. businesses to handcuff provinces from applying the precautionary principle when it comes to protecting residents from potentially cancer-causing chemicals, " says **Will Amos**, staff lawyer with the **University of Ottawa-Ecojustice Environmental Law Clinic**. " If the **NAFTA** challenge proceeds, we will seek to intervene and submit the viewpoint of environmental groups. "*



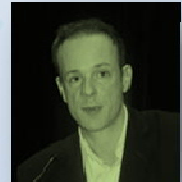
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Quebec's Pesticides Management Code came into effect between 2003 and 2006. It prohibits the use and sale of 20 active ingredients in lawn pesticides and prescribes additional restrictions on pesticide use outside public daycares and schools. The pesticides were banned based on associations with increased risks of cancer and endocrine disruption. All forms of **2,4-D** were included in the ban. The group of chlorophenoxy herbicides that includes **2,4-D** has been classified by the International Agency for Research on Cancer as a possible human carcinogen.

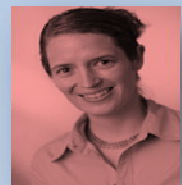
*" Public health concerns should override the search for profits. There are enough concerns around the issue of chemical pesticides to justify a ban, " says **Hugo Sequin**, coordinator with **Équiterre**. " For example, there are suspected associations between 2,4-D and serious illnesses, like neurological disorders, neuro-developmental problems, and damage to the immune and reproductive systems. "*



Ontario recently became the second Canadian province to ban the use and sale of lawn and garden pesticides — including **2,4-D** — with new regulations that will enter into force in April 2009. Several other provinces are also considering cosmetic pesticide bans.

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"The Government of Canada's stance on this issue could have serious implications outside of Quebec. We believe provinces and citizens are on the right side of this issue, and encourage the federal government to take a leadership role and set a high standard for protection of human health and the environment in this country," said **Lisa Gue**, environmental health policy analyst for the **David Suzuki Foundation**.



Hugo Seguin and **Will Amos** will present to the Standing Committee on International Affairs from 9 a.m. to 11 a.m. EST on March 24, 2009 in the House of Commons, Room 209, West Block.



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For more information, please visit ecojustice.ca or contact :

Civil society groups defend **Quebec** pesticide ban in Parliament — **Ecojustice**

<http://www.ecojustice.ca/media-centre/press-releases/civil-society-groups-defend-quebec-pesti...>

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Background Information from a Independent Perspective.

Alliance for defending the Quebec prohibition.

In 2009, an alliance was formed between seven environmental groups to challenge the threat against the Quebec prohibition of pest control products. The head of this alliance is the « *PUPPET MASTER* » himself and his foundation, David Suzuki. The alliance was set up to pool expertise and to increase public awareness regarding the threat to the « *ENVIRONMENTAL MOVEMENT* ». This alliance is also designed to give everyone the impression that the « *ENVIRONMENTAL MOVEMENT* » has considerable size and power against this threat to them, when in fact, it does not.

The seven following organizations are calling upon the « *GOVERNMENT OF CANADA* » to vigorously defend Quebec's prohibition on pest control products. These groups oppose the « *DOW AGROSCIENCES* » lawful challenge of Quebec's prohibition under the « *NORTH AMERICAN FREE TRADE AGREEMENT* » (N.A.F.T.A.) Chapter 11. They also want federal government to acknowledge that it makes sense to eliminate unnecessary chemical exposure to allegedly « *PROTECT* » human health and the environment. —

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- « *CANADIAN ENVIRONMENTAL LAW ASSOCIATION* » (C.E.L.A.).
- « *DAVID SUZUKI FOUNDATION* ».
- « *ECOJUSTICE CANADA* ».
- « *ÉQUITERRE* » (Suzuki's ambassador in the Province of Quebec).
- « *NEW DEMOCRATIC PARTY OF CANADA* » (the third federal opposition party).
- « *SIERRA CLUB OF CANADA* »
- « *UNIVERSITY OF OTTAWA—ECOJUSTICE ENVIRONMENTAL LAW CLINIC* »
(U.O.E.E.L.C.)

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In fact, only three groups are supporting this cause since the other groups are a redundant repetition of another, using the same people under a different group name. **C.E.L.A., Ecojustice, and Suzuki.**

Ecojustice and U.O.E.E.L.C. — In 2007, « *ECOJUSTICE CANADA* » partnered with « *UNIVERSITY OF OTTAWA* » to establish the first interdisciplinary clinic of its kind in Canada. The result was the creation of a shield **tandem** organization called « *UNIVERSITY OF OTTAWA-ECOJUSTICE ENVIRONMENTAL LAW CLINIC* » (U.O.E.E.L.C.). **Ecojustice and U.O.E.E.L.C. are basically one-in-the-same group.**

Ecojustice, N.D.P., and Équiterre. — In 2001, when the prohibition of the « *TOWN OF HUDSON* » was being challenged before « *THE SUPREME COURT OF CANADA* », « *ECOJUSTICE CANADA* » provided legal counsel for the « *FEDERATION OF CANADIAN MUNICIPALITIES* » (managed by some of the same people that now run « *NEW DEMOCRATIC PARTY OF CANADA* » (N.D.P.)), « *NATURE-ACTION QUEBEC* » (an early version of « *ÉQUITERRE* ») and « *WORLD WILDLIFE FUND* » (W.W.F.). **Ecojustice, N.D.P., and Équiterre are basically one-in-the-same group.**

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Suzuki and Équiterre. — In 1992-1993, « *ÉQUITERRE* » was established as an **ambassabor** and **public policy** shield organization for « *DAVID SUZUKI FOUNDATION* » in the « *PROVINCE OF QUEBEC* ». **Suzuki and Équiterre are basically one-in-the-same group.**

Sierra and U.O.E.E.L.C. — Will Amos. This fellow works for two organizations. Board Member and Secretary. « *SIERRA CLUB OF CANADA* ». Also Staff Lawyer. « *UNIVERSITY OF OTTAWA-ECOJUSTICE ENVIRONMENTAL LAW CLINIC* » (U.O.E.E.L.C.). **Sierra and U.O.E.E.L.C. are basically one-in-the-same group.**

N.D.P., Suzuki, Ecojustice, Sierra. — Jack Layton. Leader. « *NEW DEMOCRATIC PARTY OF CANADA* » (N.D.P.). The third federal opposition party. Before his days with the N.D.P., Mister Layton was leader of the « *FEDERATION OF CANADIAN MUNICIPALITIES* », a group that was granted intervener status before « *THE SUPREME COURT OF CANADA* », which upheld the by-law enacted by the « *TOWN OF HUDSON* ». The goal of this federation was to support the prohibition on « *COSMETIC PESTICIDES* ». **N.D.P., Suzuki, Ecojustice, Sierra and all are basically one-in-the-same group.**

The Puppet Master says ...



*... we have to stop this
NAFTA thing now,
or we are doomed.*

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Force of Nature was launched for continuous transmission on the Internet on January 1st, 2009. It is a series of e-newsletters destined for the **Green Space Industry**, the **environmental movement**, politicians, municipalities, and the media, nation-wide across Canada, and parts of the United States. **Force of Nature** is produced in two parts. First. The **Media Report** itself that reports on the current events affecting the future of the **Green Space Industry**.. Second. **Independent Perspective**., which is a running commentary, sometimes also of a more technical in nature.

Force of Nature is the brainchild of William H. Gathercole and his entourage. The opinions expressed in these e-newsletters, even though from an independent perspective, may not reflect those of everyone in the **Green Space Industry**, or Mr. Gathercole's many associates. Be warned ! Mr. Gathercole and his team may sometimes be very irreverent and fearless with these e-newsletters.

William H. Gathercole holds a degree in Horticulture from the **University of Guelph**, and another pure and applied science degree from **McGill University**. He has worked in virtually all aspects of the **Green Space Industry**, including public affairs, personal safety, and environmental issues. Mr. Gathercole has been a consultant and instructor for decades. Mr. Gathercole has been following the evolution of **environmental terrorism** for over a quarter-century. His involvement in environmental issues reached a fevered pitch in the 1990s, when he orchestrated, with others, legal action against unethical and excessive municipal regulations restricting the use of pest control products. (i.e. the Town of Hudson.) Although he can be accused of being **anti-environment-movement**, he is, in fact, simply a strong advocate for the **Green Space Industry**. However, this position has not precluded him from criticizing the industry itself. Nonetheless, his vast knowledge of our long journey with environmental issues is **undeniable**. (Hopefully !) For many years, Mr. Gathercole has been a contributing columnist for **TURF & Recreation Magazine**, Canada's Turf and Grounds Maintenance Authority.

All pictures contained in **Force of Nature** were found somewhere on the Internet. We believe that they are in the public domain, as either educational tools, industry archives, promotional stills, publicity photos, or press media stock.

Information presented in **Force of Nature** has been developed for the education and entertainment of the reader. The events, characters, companies, and organizations, depicted in this document are not always fictitious. Any similarity to actual persons, living or dead, may not be coincidental.

The following titles are currently available. (Or, will be available in the near future.) ● Alberta Prohibition. ● British Columbia Prohibition. ● Burnaby B.C. Prohibition. ● Canadian Association of Physicians for the Environment. ● David Suzuki Foundation. ● Death and the Environmental Movement. ● Golf and Landscape Trade Industries. ● Kazimiera Jean Cottam. ● Kelowna B.C. Prohibition. ● New Brunswick Prohibition. ● Ontario Prohibition. ● Organic Fertilizers. ● Pets and Lawn Care Chemicals. ● Prince Edward Island Prohibition. ● Quebec Prohibition. ● Richmond B.C. Prohibition. ● Saint Catharines Ontario. ● Salmon Arm B.C. Prohibition. ● The 9/11 Era of the Green Space Industry. ● The Failure of Integrated Pest Management. ● The Wisdom of the Solomons. ● Victoria B.C. Prohibition. ● White Rock B.C. Prohibition. ● Wisconsin Fertilizer Prohibition. ● **ASK FOR A COPY OF ANY BACK ISSUE TODAY.**

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