Federal Court  Cour fédérale

Date: 20170713

Docket: T-1070-16

Citation: 2017 FC 682

Ottawa, Ontario, July 13, 2017

PRESENT: Case Management Judge Mandy Aylen

BETWEEN:

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, and WILDERNESS COMMITTEE

Applicants

and

MINISTER OF HEALTH, SUMITOMO CHEMICAL COMPANY LIMITED, BAYER CROPSCIENCE INC and VALENT CANADA INC

Respondents

Docket: T-1071-16

BETWEEN:

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE and WILDERNESS COMMITTEE

Applicants

and

**ATTORNEY GENERAL OF CANADA,
MINISTER OF HEALTH and SYNGENTA
CANADA INC.**

Respondents

ORDER AND REASONS

[1] According to the Applicants, bees in Canada may be at risk from exposure to the pesticides Clothianidin and Thiamethoxam. In these applications, the Applicants assert that the Pest Management Regulatory Agency [PMRA] has engaged in an unlawful course of conduct of improperly successively registering or amending the registration for these pesticides and their end-use products notwithstanding that the corporate Respondents have failed to provide the scientific information required, as a condition of their registrations, to demonstrate that the products' environmental risks are acceptable to pollinators.

[2] The Respondents have brought motions to dismiss the applications at this preliminary stage on the basis that: (a) the applications seek to review a total of 79 distinct decisions of the PMRA – which decisions do not constitute a "continuous course of conduct" - in violation of Rule 302 and the time limitation set out in section 18.1(2) of the *Federal Courts Act*; and (b) the Applicants have an adequate alternative remedy – namely, the PMRA's on-going re-evaluations, special reviews and conversion application assessments related to these pesticides and their end-use products being conducted pursuant to various provisions of the *Pest Control Products Act* [*Act*]. The Applicants oppose these motions.

[3] The issues on these motions are:

A. Should the applications be dismissed at this stage of the proceeding on the basis that they do not seek to review a continuous course of conduct?

B. Should the applications be dismissed at this stage of the proceeding on the basis that the Applicants have an adequate alternative remedy?

[4] For the reasons that follow, the motions are dismissed. I find that it is debatable whether the applications seek to review a course of conduct. It is also debatable whether the Applicants have an adequate alternative remedy. These are both issues that should be determined by the application judge at the hearing of the applications and not on a preliminary motion.

Test for Dismissing an Application on a Preliminary Motion

[5] Applications for judicial review are intended to proceed expeditiously and motions to strike or dismiss applications at a preliminary stage have the potential to unduly and unnecessarily delay their determination. However, the Federal Court of Appeal has recognized that this Court has jurisdiction to grant motions to dismiss an application for judicial review on a summary basis in exceptional circumstances where the application is "so clearly improper as to be bereft of any possibility of success" [see *David Bull Laboratories (Canada) Inc. v Pharmacia Inc*., [1995] 1 FCJ No 588 (FCA)]. There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of the Court's power to entertain the application [see *JP Morgan Asset Management (Canada) Inc. v Minister of National Revenue*, 2013 FCA 250 at para 47].

[6] In considering a motion to dismiss, the Court must read the notice of application with a view to understanding the real essence of the application. The Court must gain a realistic appreciation of the application's essential character by reading it holistically and practically without fastening onto matters of form [see *JP Morgan*, *supra* at para 49-50].

[7] Where the issue raised by the moving party as the basis for dismissing the application is determined to be a debatable issue, the circumstances do not warrant dismissal of the application at a preliminary stage. Rather, the issue should be determined by the application judge [see *David Bull*, *supra* at para 15; *Apotex v Canada (Minister of Health)*, 2010 FC 1310 at paras 12-13].

Issue #1 – Should the applications be dismissed at this stage of the proceeding on the basis that they do not seek to review a continuous course of conduct?

[8] Pursuant to Rule 302, an application for judicial review must be limited to the review of a single decision unless the Court orders otherwise or the Applicants can show that the decisions at issue form part of a "continuous course of conduct" [see *Servier Canada Inc. v Canada (Minister of Health)*, 2007 FC 196 at para 17]. Where the subject-matter of the judicial review is a "matter" which consists of a continuous course of conduct (as opposed to a review of a decision or order), the 30-day time limit set out in section 18.1(2) of the *Federal Courts Act* does not apply. A matter is distinguished from a decision or order by considering whether what is at issue is a "singular decision" or instead "part of a course of conduct, all of which the applicant challenges" [see *Apotex*, *supra* at para 10; *Airth v Minister of National Revenue*, 2006 FC 1442 at para 9].

[9] The determination of whether the underlying applications are directed to a continuous course of conduct – as opposes to multiple, discrete decisions - is a fact-based determination. In making such determinations, this Court and the Federal Court of Appeal have considered whether the decisions at issue were made by the same or different decision-makers, at different or similar times, under different or similar statutory regimes, relating to different or similar factual situations, raising different or similar allegations, with a different or similar focus, and seeking different or similar relief [see *Servier*, *supra*; *Truehope Nutritional Support Ltd. v Canada (Attorney General)*, 2004 FC 658; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270; *Khadr v Canada (Minister of Foreign Affairs)*, 2004 FC 1145; *Krause v Canada (CA)*, [1999] 2 FC 476].

[10] This Court has held that where the similarities in the decisions outweigh their differences, the decisions should be reviewed in one application as it would be a waste of time and effort to require more than one judicial review [see *Truehope, supra* at para 19; *Whitehead*, *supra* at para 52].

[11] I now turn to consider the applications at issue. By way of context, under section 8(1) of the *Act*, the Minister (acting through the PMRA) must register a pest control product where the Minister considers that the health and environmental risks and the value of the pest control product are "acceptable" after any required evaluations and consultations have been completed. For the purpose of making this determination, section 2(2) of the *Act* provides that the environmental risks of a pest control product are acceptable if "there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration".

[12] At the time of registration, the PMRA may issue to the registrant a notice under section 12 of the *Act* that requires a registrant to compile information, conduct tests, or monitor experience with the pest control product, and to report the additional information related to the pest control product to the Minister within a set period of time as detailed in the notice. A requirement detailed in a section 12 notice becomes a condition of registration of the product.

[13] Pursuant to section 14 of the *Pest Control Products Regulations* [*Regulations*], if a section 12 notice is delivered to a registrant at the time of registration of the product, the registration becomes a conditional registration with a limited validity period of approximately three years. The *Regulations* provide that the validity period of a conditional registration may only be extended in specific circumstances. The validity period may be extended for two years when the registrant complies with the requirements of the section 12 notice, which extension permits the PMRA an opportunity to consider, for example, any additional test data provided by the registrant. As discussed more fully below, section 14 of the *Regulations* was repealed following the commencement of these applications.

[14] In these applications, the Applicants assert that the PMRA issued section 12 notices for Clothianidin and Thiamethoxam and their end-use products that required the corporate Respondents to provide various chronic toxicity hive studies for honey bees. The data provided by the corporate Respondents in response to the section 12 notices was determined, at various points in time, to be deficient, invalid or limited due to uncertainties. On some occasions, the required information was not provided within the timeline prescribed by the section 12 notice. On one occasion in 2010, the PMRA remarked that “to date, no valid Hive studies have been submitted to the PMRA. This represents a critical data gap in the risk assessment of

Clothianidin". Similar findings of a "critical data gap" were repeated in at least three other section 12 notices issued by the PMRA to the corporate Respondents.

[15] The Applicants assert that notwithstanding the corporate Respondents' failure to meet the requirements of the section 12 notices and to fill the "critical data gap" in a timely manner, the PMRA repeatedly extended the validity period of the conditional registrations for Clothianidin, Thiamethoxam and their end-use products and deferred the requirement to provide chronic toxicity hive studies by issuing further section 12 notices at the time the conditional registrations were extended. These further section 12 notices compelled the corporate Respondents to produce the identical scientific data originally sought by the PMRA or similar data related to the chronic toxicity risk to pollinators.

[16] The Applicants assert that these applications challenge the PMRA's unlawful course of conduct in issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the risk of Clothianidin, Thiamethoxam and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies relating to their chronic toxicity risk to pollinators.

[17] The Applicants assert that the main relief sought on the applications are the declarations that this eleven-year long course of conduct by the PMRA is unlawful. The relief that flows from such declarations are orders declaring that the registrations of the pesticides and their end-use products, obtained as a result of the unlawful conduct, are invalid. While 79 registration decisions are impacted by the relief sought, the Applicants assert that the target of the applications is the unlawful conduct and not the registration decisions. The Applicants assert that

this is evident from the fact that the majority of the 79 registration decisions have already expired or been superseded by subsequent registration decisions.

[18] The Respondents make the preliminary argument that the Applicants are improperly attempting to re-characterize their pleadings to change the "continuous course of conduct" being challenged in these applications. They assert that the prayer for the relief and the description of the course of conduct in the notices of application make no specific reference to the improper use of section 12 notices and that the Applicants are only now changing their position in an attempt to survive these motions.

[19] I reject this argument. In my view, the Applicants have accurately characterized their pleadings in responding to these motions. The issuance of repeated section 12 notices and the PMRA's extension of the validity period of conditional registrations notwithstanding the corporate Respondents' alleged failure to meet the requirements set out in the section 12 notices is clearly pleaded in the notices of application and would fall both within the described course of conduct and the prayers for relief set out in those pleadings.

[20] As such, I find that what is being challenged in these applications, and what has been characterized by the Applicants as a course of conduct, is the PMRA's alleged unlawful practice of issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the chronic toxicity risk of Clothianidin, Thiamethoxam and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies.

[21] The Respondents assert that even accepting the Applicant's characterization of the course of conduct being challenged, the true essence of the applications remains as the Respondents initially framed it - a challenge to the 79 distinct section 8 decisions made by the PMRA to approve the registrations of the pesticides and their end-use products. They assert that the Court will have to determine on these applications whether each of the 79 section 8 decisions were reasonable, notwithstanding the data gap identified in the section 12 notices.

[22] The Respondents assert that the review of 79 individual decisions by way of two applications for judicial review offends Rule 302 and that the majority of the decisions are no longer reviewable pursuant to section 18.1(2) of the *Federal Courts Act*, as the decisions were made more than 30 days before the commencement of the applications. The Respondents argue that the Applicants should have judicially reviewed each decision when they were made and they cannot now save these applications by asserting that what is being challenged is actually a "continuous course of conduct".

[23] The Respondents assert that the case law has established that a course of conduct can only be found where it would be difficult to pinpoint a single decision from which relief could be sought by way of judicial review, relying on a statement made at paragraph 10 in *Mahmood v Canada*, [1998] FCJ No 1345. As there are 79 identifiable decisions at issue in these applications, the Respondents assert that the Court cannot accept that they constitute a course of conduct.

[24] I disagree with the Respondents' characterization of the statement in *Mahmood*. While it may be, that in some circumstances, the fact that a discrete decision may be difficult to pinpoint has been a basis to find a "course of conduct", this Court has repeatedly found courses of

conduct in situations where discrete decisions have been, or could easily have been, pinpointed. For example, in *Sweet v R*, [1999] FCJ No 1539, the Court had before it a challenge to a correctional facility's use of an involuntary double-bunking policy. There would have been no difficulty in locating discretion decision to double-bunk inmates that could have been challenged on an application for judicial review, yet the Court still found that the double-bunking policy was properly reviewable. Moreover, this Court has clearly stated that a course of conduct could involve a situation "where a number of decisions are taken" under a policy [see *Truehope, supra* at para 7]. As such, the fact that there are discernable decisions made by the PMRA that underlie the alleged course of conduct is not a basis upon which to reject the Applicant's contention that what is truly being challenged is an unlawful course of conduct.

[25] Valent and Sumitomo similarly argue that the case law demonstrates that there can only be a course of conduct where there has been a unilateral adoption of a government policy that is not in response to a particular application of a party (such as an application to register a pesticide). Where there are individual application decisions that can be judicially reviewed (such as was the case here), they argue that Applicants had to review those individual decisions and cannot review them as a course of conduct in applying a particular policy.

[26] I also reject this argument. In *Fisher v Canada*, 2013 FC 1108, the Court considered the issue of reviewing a course of conduct in applying a particular policy versus reviewing each decision made when the policy was applied and stated:

> *Krause* is authority that a general decision does not trigger a time limit that prevents the review of the implementation steps, on the unassailable logic that one should not be barred from relief "solely because the alleged... unlawful act stemmed from a decision to take the alleged unlawful step." *Krause* does not state that the

> general decision is itself reviewable. However, subsequent cases have applied *Krause* in a manner that permits a reviewing court to focus on the general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action vis-à-vis the applicant.

[27] Accordingly, I find that the Applicants are not foreclosed from reviewing an alleged course of conduct by virtue of the fact that they could have judicially reviewed the implicated underlying decision.

[28] The Respondents also assert that the alleged misuse of the section 12 notices could not be found to be a continuous course of conduct as the conduct must be "on-going" at the time the applications are heard in order to qualify as a course of conduct, relying on the decisions in *Krause* and *Fisher*. Given the recent repeal of section 14 of the *Regulations*, they assert that any alleged misconduct will cease and therefore there will no longer be any on-going impact from the alleged course of conduct. I disagree with the Respondents' characterization of the law. Neither *Krause* nor *Fisher* states that the course of conduct must be on-going at the time that an application for judicial review is heard. The Respondents pointed me to no authority that directly stands for the proposition that they assert and I am not prepared to accept such a narrow construction of "continuous course of conduct". To do so would permit a federal board, for example, to evade the Court's scrutiny of a long-standing course of conduct by merely ceasing the course of conduct days before the hearing.

[29] I note that in making her "continuous course of conduct" submissions, the Attorney General argued that there is no practical purpose in determining the issues raised on these applications as section 14 of the *Regulations*, which permitted conditional registrations, has been repealed, with the amendment to the *Regulations* coming into force on November 30, 2017.

After that date, there will be no new conditional registrations of Clothianidin, Thiamethoxam and their end-use products and there will be no renewals of conditional registrations. Only products with validity periods expiring in 2017 will receive extensions. Accordingly, the Attorney General asserts that the alleged improper course of conduct can no longer occur following the amendments to the statutory scheme and the relief sought is effectively moot.

[30] In T-1071-16, the Applicants seek declarations that section 14(1)(b) of the *Regulations* is *ultra vires* and of no force and effect, and that the PMRA has acted without jurisdiction by relying on section 14(1)(b) of the *Regulations* to justify its failure to conduct public consultations in relation to the registration and amendments to the registrations of Thiamethoxam and its end-use products. The Attorney General argues that as section 14 of the *Regulations* has been repealed and the PMRA is remedying its error in not conducting certain public consultations involving Thiamethoxam, this portion of the application is also moot.

[31] Notwithstanding the Attorney General's submissions touching upon the issue of mootness, none of the Respondents pleaded mootness in their notices of motion and none of the parties provided any written submissions on the applicability of the *Borowski* test. As such, I will not consider whether these applications should be dismissed in whole, or in part, on the basis of mootness. Rather, I have considered these submissions in the context of the Attorney General's submission that the continuous course of conduct must be on-going at the time the applications are heard.

[32] The Applicants assert that the repeal of section 14 of the *Regulations* has not impacted section 12 of the *Act* and how the PMRA may use section 12 notices in the future. As such, there is the potential for on-going unlawful conduct by the PMRA. On that basis, the applications

cannot be seen as moot or of no practical utility. Moreover, there may be a public interest in the Court's consideration of whether the PMRA has acted in an unlawful manner, even if there is a possibility that the alleged unlawful conduct has ceased or will cease. Declarations of unlawful conduct, and the analysis that would have to underpin the granting of any such relief, could serve to guide future decision-making by the PMRA in it use of section 12 notices and therefore would serve a useful purpose.

[33] As the Respondents have failed to plead mootness as a basis for striking these applications and as I have rejected the assertion that the continuous course of conduct must be on-going at the time the applications are heard, there is no reason for me to further consider the Attorney General's arguments regarding the practical utility served by continuing with the applications. It will be open to the parties to make submissions on the issue of mootness before the application judge and it will be for the application judge to determine whether, at the time of the hearing of the applications, the circumstances warrant that he or she determines all of the issues raised in the applications.

[34] As I stated at the outset, the determination of whether the underlying applications are directed to a continuous course of conduct – as opposed to multiple, discrete decisions - is a fact-based determination. Drawing on the factors enunciated in the case law, the Respondents submit that the 79 discrete registration decisions cannot constitute a continuous course of conduct as:

A. The decisions were made at different times over a period of 11 years from 2006 to 2016;

B. The decisions involved four different companies;

C. The decisions involved separate evaluations of scientific and non-scientific evidence specific to each end-use product and each decision;

D. The decisions involved 31 different end-use products with differing chemical formulations and compositions, differing functional properties, for different applications (i.e. seed or foliar/soil) on different crops and for different pests;

E. The decisions involved different data requirements and evaluative frameworks that changed over time;

F. While all of the decisions were made under the *Act* and *Regulations*, different provisions were engaged depending on the nature of the decision at issue – be it a renewal, amendment, continuation or reinstatement; and

G. The decisions imposed different labelling conditions and conditions of registrations specific to each end-use product.

[35] The Applicants assert that these applications challenge a course of conduct related to "how" the PMRA made decisions and are not a direct challenge of those decisions. Notwithstanding, the Applicants assert that the similarities of the implicated decisions are extensive and far outweigh any differences. Specifically:

A. Each decision involved the same statutory framework;

B. Each decision involved the same decision-maker – the PMRA;

C. Each decision involved a conditional registration requiring more data from the corporate Respondents pursuant to a section 12 notice;

D. Each decision involved an identified data gap related to the chronic toxicity risk of the pesticides and their end-use products to pollinators;

E. Each decision involved only a limited number of applications of the active ingredient – namely, seed treatments and foliar treatment use;

F. The end-use products at issue all have the same two active ingredients – Clothianidin and Thiamethoxam;

G. Each decision involved the PMRA taking the same approach to the *Act* and the *Regulations* – namely, improperly using a section 12 notice that resulted in the extension of the validity period of a conditional registration in the absence of satisfactory data being provided by the corporate Respondents to fill the identified data gap; and

H. The conditional registrations of the Clothianidin and Thiamethoxam end-use products have been inextricably linked in various ways since 2006, with the product registration history best understood by viewing the active ingredients and end-use products together.

[36] Having weighed the similarities and differences of the implicated decisions, I find that there is certainly a debatable issue as to whether the Applicants are properly seeking to challenge a continuous course of conduct. As this remains a live issue, I do not see how it can be said that the applications are bereft of any chance of success on the basis that they offend Rule 302 and the time limitation set out in section 18.1(2) of the *Federal Courts Act*. The serious question of

whether the proper approach is to view the underlying applications as directed to a continuous course of conduct is a question that ought to be determined by the application judge [see *Apotex, supra* at paras 12-13].

Issue #2 - Should the applications be dismissed at this stage of the proceeding on the basis that the Applicants have an adequate alternative remedy?

[37] A judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained, subject to unusual or exceptional circumstances supportable in the case law. This principle prevents improper or premature recourse to judicial review which would have the effect of frustrating specialized statutory schemes enacted by Parliament [see *JP Morgan*, *supra* at para 84-85].

[38] In order to grant a preliminary motion to strike an application for judicial review on the basis of the availability of an adequate alternative remedy, the Court must be certain that: (i) there is recourse elsewhere (now or later); (ii) the recourse is adequate and effective; and (iii) the circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto [*JP Morgan, supra* at para. 91].

[39] In determining whether the recourse is adequate, the Courts have identified a number of relevant consideration, including the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost [see *Strickland v Canada (Attorney General)*, 2014 FCA 33 at para 42].

[40] The Respondents assert that the Applicants have available to them adequate alternative remedies in on-going proceedings initiated under the *Act*. The Respondents assert that the first such adequate alternative remedy arises in the on-going re-evaluations being conducted by the PMRA. The first re-evaluation is specific to pollinators and was initiated in June 2012 pursuant to section 16(1) of the *Act*. The pollinator re-evaluation encompasses all agricultural uses for Clothianidin and Thiamethoxam and will determine whether the health and environmental risks and the value of the pest control product are acceptable to the PMRA. It is presently anticipated that the PMRA will release its initial decision by December 31, 2017, followed thereafter by a public consultation in which the Applicants will be able to participate. A final decision should be released by December 31, 2018, although there is no statutory timeframe required for the completion of the pollinator re-evaluation and the deadlines announced by the PMRA during the course of the pollinator re-evaluation have not been met in relation to two steps thus far. The PMRA's final decision on the pollinator re-evaluation may be challenged by the Applicants through the filing of a notice of objection pursuant to section 35 of the *Act* and following the notice of objection process, by way of a potential application for judicial review.

[41] The second re-evaluation is a cyclical re-evaluation required pursuant to section 16(2) of the *Act*, which was commenced in November of 2016. The final decision on this re-evaluation may also be challenged by the notice of objection process and thereafter by way of a potential application for judicial review.

[42] The Respondents assert that the second adequate alternative remedy arises in the context of the corporate Respondents' existing applications to convert their various registrations from conditional registrations to full registrations. These conversion applications are being determined

by the PMRA simultaneously with the pollinator re-evaluation. The Respondents assert that the Applicants will have an opportunity to participate in public consultations in relation to certain conversion applications, to file a notice of objection if they are dissatisfied with the decisions made on the conversion applications and thereafter, have the option of filing an application for judicial review if they are unsatisfied with the outcome of the notice of objection process.

[43] Syngenta asserts that the Applicants also have recourse to an adequate alternative remedy through participation in two special reviews that have been initiated by the PMRA: (a) a special review of Thiamethoxam products initiated in 2014 to assess the potential environmental risk to squash bees from exposure to Thiamethoxam when used on cucurbits, which has a proposed decision date of December 2018; and (b) a special review of 15 Thiamethoxam products and the active ingredient initiated in November 2016 to assess the potential risk to aquatic invertebrates exposed to Thiamethoxam as a seed, foliar or soil treatment, which will result in public consultations.

[44] The Respondents assert that the criteria detailed in *Strickland* all weigh in favour of compelling the Applicants to seek relief through the PMRA's on-going proceedings. The Respondents assert that the Applicants' primary goal is to fill the data gap arising from the absence of a satisfactory chronic toxicity to honey bee study. This will be accomplished in the re-evaluation and conversion application proceedings. While the Applicants may not be able to secure all of the relief sought in these applications through the PMRA's on-going proceedings, the remedies need not be identical – they only need to be adequate. The Respondents assert that the re-evaluation and conversion applications will determine whether there is a reasonable certainty that no harm to pollinators will result from exposure to Clothianidin, Thiamethoxam

and their end-use products taking into account conditions or proposed conditions of registration, and may result in a decision to deny the registrations of these pesticides and their end-use products, which is the key relief sought by the Applicants on these applications. According to the Respondents, the alternative relief is therefore clearly adequate.

[45] The Attorney General asserts that it would also be a waste of judicial resources to hear these applications as the PMRA is in the process of considering the same issues that the Court would have to consider. If the Applicants are successful on the applications, she argues that the Court would likely send the matter back to the PMRA for a re-determination and that is what is effectively already being done in the re-evaluations. I note, however, that the relief requested by the Applicants does not include a request for a re-determination of any of the registration decisions by the PMRA. As such, I am not convinced that a re-determination is necessarily the likely outcome in these applications.

[46] The Applicants deny that the PMRA's on-going proceedings provide an adequate alternative remedy that warrants the dismissal of these applications at a preliminary stage of the proceedings. Specifically, the Applicants assert:

A. The PMRA's on-going proceedings will not address the lawfulness of the PMRA's conduct, which is the central focus of these applications. The re-evaluations and conversation application proceedings are restricted to a scientific analysis of whether the health and environmental risks and the value of the pest control products are acceptable to the PMRA. Even if the Applicants were to raise the issue of the unlawfulness of the PMRA's conduct in these other proceedings, the PMRA has historically refused to address its regulatory practices through the notice of objection process. As such, a

declaration regarding the unlawfulness of the PMRA's conduct is not a remedy available to the Applicants through these alternative proceedings, which renders these other proceedings entirely inadequate.

B. The alternative proceedings are not expeditious. The re-evaluations and the determination of the conversion applications are being undertaken simultaneously. Notwithstanding that the pollinator re-evaluation has been on-going for over five years, it is not slated to be completed for another 17 months. Moreover, the Applicants raise doubts as to whether the December 2018 final decision deadline will be met given that interim pollinator re-evaluation deadlines have not been met. Even if the deadline for the final decision is met, the Applicants would then have to participate in a notice of objection process, which from their experience, has proven to be anything but expeditious. In the circumstances, it is only the Court that can offer an expeditious determination of the issues raised on these applications.

C. The notice of objection procedure is inconvenient and ineffective. Three of the Applicants previously exercised their rights pursuant to section 35 of the *Act* and filed a notice of objection of the PMRA's decision to renew the conditional registration of the Clothianidin foliar/soil end-use products. The PMRA took three years to make its threshold decision as to whether to establish a review panel. By that time, the extended registration was already set to expire and recourse to the Court through an application for judicial review would have been futile, as the issues raised in any application would have been rendered moot by the time the application was heard.

D. Were the PMRA to find in the re-evaluation and conversion application proceedings that the health and environmental risks and the value of the pest control products are acceptable to the PMRA, yet issue further section 12 notices requiring additional chronic toxicity studies, the Applicants would be in the same position that they are in now and any resulting judicial review would merely duplicate the existing applications. As such, the alternative proceedings may afford no remedy at all.

E. The applications concern the proper interpretation and application of legislation, which are matters amenable to the Court and not the PMRA.

[47] I have considered the submissions made by the parties as to whether the PMRA's on-going proceedings afford the Applicants an adequate alternative remedy. I find that the circumstances of this case differ in a significant way from those in the majority of the precedents provided by the parties on this issue. The Applicants have not come before the Court seeking to review an interim decision rendering in an on-going administrative tribunal matter, nor have they come before this Court without having first followed a clearly prescribed appeal route in the applicable statutory regime. Rather, the alternative processes that the Respondents urge this Court to accept as providing an adequate remedy were commenced independent of the Applicants, and are distinct from the conduct that is being challenged in these applications.

[48] Having considered the factors detailed in *Strickland* and the submissions of the parties, I am not certain that the Applicants have recourse to adequate and effective relief through the PMRA's on-going proceedings. I am particularly concerned that these other proceedings will not afford the Applicants the central remedy that they seek before this Court – namely, declarations of unlawful conduct by the PMRA – and that these other proceedings will not be expeditious.

Notwithstanding the complexity of the issues raised on these applications, the applications will proceed to a hearing before the currently-proposed December 31, 2018 deadline for the release of the final decision in the pollinator re-evaluations. Even then, there would be further delays past December 31, 2018 before the Applicants could have recourse before this Court to challenge the outcome of the PMRA's on-going proceedings, as the Applicants would have to proceed through the notice of objection process first, which, from the evidence before me, has not been established to be an expeditious process.

[49] Therefore, I find that it is debatable as to whether the PMRA's on-going proceedings provide an adequate alternative remedy to the Applicants. This serious question ought to be determined by the application judge.

Costs

[50] As the Applicants were successful in resisting the motions, I find that they are entitled to their costs of the motions payable by all of the Respondents. The parties indicated at the hearing of the motions that their preference was to make cost submissions following the outcome of the motions. As such, the parties shall discuss the Applicants' entitlement to costs to determine if a resolution can be reached. If not, the parties shall serve and file cost submissions in accordance with the schedule detailed below.

ORDER in T-1070-16 and T-1071-16

THIS COURT ORDERS that:

1. The motions are dismissed.

2. The Respondents shall pay to the Applicants their costs of these motions. In the event that the parties are unable to reach an agreement on the quantum of costs, the parties shall provide written submissions to the Court as follows:

    a. The Applicants shall serve and file cost submissions, not to exceed 3 pages, by July 28, 2017.

    b. The Respondents shall serve and file responding cost submissions, not to exceed 3 pages, by August 4, 2017.

    c. The Applicants shall serve and file reply cost submissions, if any, not to exceed 2 pages, by August 11, 2017.

    d. The parties may, on consent, agree to modify the timetable for these costs submissions provided that written notification of any amendment is provided to the Court.

3. The parties shall, by no later than July 31, 2017, provide the Court with their availability for a case management conference during the month of August to discuss the timetable for next steps in these proceedings.

"Mandy Aylen"

Case Management Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1070-16 AND T-1071-16
DOCKET:	T-1070-16
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, AND WILDERNESS COMMITTEE v MINISTER OF HEALTH, SUMITOMO CHEMICAL COMPANY LIMITED, BAYER CROPSCIENCE INC AND VALENT CANADA INC
AND DOCKET:	T-1071-16
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE AND WILDERNESS COMMITTEE v ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH AND SYNGENTA CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 6 - 7, 2017
ORDER AND REASONS:	AYLEN P.
DATED:	JULY 13, 2017

APPEARANCES:

Julia Croome Charles Hatt	FOR THE APPLICANTS
Christine Mohr Andrea Bourke	FOR THE RESPONDENTS ATTORNEY GENERAL OF CANADA AND MINISTER OH HEALTH

Grant Worden Tosh Weyman	FOR THE RESPONDENT BAYER CROPSCIENCE INC.
Matthew Fleming Soloman Lam	FOR THE RESPONDENTS SUMITOMO CHEMICAL COMPANY LIMITED AND VALENT CANADA INC.
Kara Smythe John P. Brown Brandon Kain	FOR THE RESPONDENT SYNGENTA CANADA INC.

SOLICITORS OF RECORD:

ECOJUSTICE Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS ATTORNEY GENERAL OF CANADA AND MINISTER OH HEALTH
Torys LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT BAYER CROPSCIENCE INC.
Dentons LLP Canada Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENTS SUMITOMO CHEMICAL COMPANY LIMITED AND VALENT CANADA INC.
McCarthy Tetrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT SYNGENTA CANADA INC.