Federal Court Cour fédérale

**Date: 20191218**

**Docket: T-784-19**

**Citation: 2019 FC 1637**

**Ottawa, Ontario, December 18, 2019**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ÉQUITERRE, and WILDERNESS COMMITTEE**

**Applicants**

**and**

**MINISTER OF HEALTH and SYNGENTA CANADA INC.**

**Respondents**

**and**

**CROPLIFE CANADA**

**Intervener**

# JUDGMENT AND REASONS

## I. Overview

[1] This decision relates to an application for judicial review, challenging a decision by the Pest Management Regulatory Agency [PMRA] dated April 11, 2019 [the Decision] to amend certain registrations for a pest control product following a re-evaluation under section 16 of the

*Pest Control Products Act*, SC 2002, c 28 [the Act]. Specifically, the Applicants challenge the portion of the Decision that provides a 24-month transition period for implementation of the risk mitigation measures required by these amendments.

[2] The Applicants seek an order: (a) declaring that the PMRA lacks the jurisdiction to provide the transition period in the Decision; (b) declaring that the PMRA's practice of providing a transition period in connection with amendments, pursuant to its *Policy on Cancellations and Amendments Following Re-evaluation and Special Review* [the Policy], is *ultra vires* the Act; and (c) quashing the transition period in the Decision.

[3] For the reasons explained in greater detail below, this application is dismissed. I have found to be reasonable both the PMRA's interpretation of the Act, as providing it authority to include the transition period in the Decision, and its decision to include the transition period.

## II. **Background**

[4] The Applicants are the David Suzuki Foundation [Suzuki], Friends of the Earth Canada, Équiterre, and Wilderness Committee. They are all non-governmental organizations that engage in environmental advocacy.

[5] The Respondents are the Minister of Health [the Minister], who is responsible for the Act and has delegated this responsibility to the PMRA, and Syngenta Canada Inc [Syngenta], the registrant of the neonicotinoid pest control product Thiamethoxam Technical Active [TMX] and 17 associated end-use products in which TMX is the active ingredient [together, the TMX

Products]. These products include sprays to be applied to plants and to bare soil (respectively, foliar application and soil application) as well as products used as a coating on crop seeds to prevent insects from eating the seeds when they are planted in the ground and to protect the plants grown from treated seeds (seed treatment).

[6] This proceeding also includes an Intervener, CropLife Canada [CropLife], a trade association representing developers, manufacturers, and distributors of plant science products.

[7] The Act governs the regulation of pest control products in Canada, including both active ingredients and their end-use commercial applications. The provisions of the Act referenced in this Judgment and Reasons are set out in Appendix "A" hereto. Subject to certain exceptions, s 6(1) of the Act prohibits a person from manufacturing, possessing, handling, storing, transporting, importing, distributing, or using a pest control product that is not registered under the Act. For a product to be registered, or for an existing registration to be amended, an application must be made to the Minister, who then conducts any evaluation considered necessary with respect to the health or environmental risks or the value of the pest control product (ss 7(1) and (3) of the Act).

[8] If the Minister then considers that the health and environmental risks and the value of the pest control product are acceptable, the Minister must register the product or amend its registration, as applicable, by, *inter alia*, specifying conditions related to its manufacture, handling, storage, transport, import, export, packaging, distribution, use or disposition, composition, and labelling (s 8(1)(a)). Otherwise, the Minister must deny the application (s 8(4)).

Prior to the events giving rise to this application for judicial review, the TMX Products were registered under the Act upon the application of Syngenta to the PMRA.

[9] After registration, the Minister may initiate the re-evaluation of a registered pest control product if the Minister considers that, since the product was registered, there has been a change in the information required, or the procedures used, for the evaluation of the health or environmental risks or the value such products (s 16(1)). Similar to the initial registration, the Minister conducts any evaluation considered necessary with respect to the health or environmental risks or the value of the product and carries out any public consultation required by s 28 of the Act (s 16(6)).

[10] If 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, the Minister must confirm the registration (s 21(1)). If the Minister does not consider these to be acceptable, the Minister's obligations are provided as follows by s 21(2):

| ***Pest Control Products Act*, SC 2002, c 28** | ***Loi sur les produits antiparasitaires*, LC 2002, ch 28** |
|---|---|
| **Amendment or cancellation** | **Modification ou révocation** |
| **21 (2)** If the Minister does not consider that the health or environmental risks or value of a pest control product are acceptable, the Minister shall | **21 (2)** Dans le cas où il n'arrive pas à cette conclusion, le ministre modifie l'homologation s'il estime qu'à la suite de la modification la valeur du produit et les risques sanitaires et environnementaux qu'il présente seraient acceptables, ou il la révoque. |
| **(a)** amend the registration if the Minister considers that the health and environmental risks and value of the product would be acceptable after the | |

amendment; or

**(b)** cancel the registration. [Blank]

[11] The meaning of acceptable risk is set out in s 2(2), which provides as follows:

| | |
|---|---|
| **Acceptable risks** | **Risques acceptables** |
| **2 (2)** For the purposes of this Act, the health or 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. | **2 (2)** Pour l'application de la présente loi, les risques sanitaires ou environnementaux d'un produit antiparasitaire sont acceptables s'il existe une certitude raisonnable qu'aucun dommage à la santé humaine, aux générations futures ou à l'environnement ne résultera de l'exposition au produit ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées. |

[12] On June 12, 2012, the PMRA gave notice that it was initiating a re-evaluation of TMX and another neonicotinoid, in light of emerging science on neonicotinoids and their potential effects on pollinators, as well as global updates to the pollinator risk assessment framework. This re-evaluation proceeded over the course of five years, following which the PMRA published the results in its Proposed Re-Evaluation Decision dated December 19, 2017 [the Proposed Decision]. The Proposed Decision then underwent a 90-day consultation period under s 28 of the Act, during which the PMRA received comments from various categories of interested parties including Syngenta and other registrants, non-profit organizations including the Applicants Suzuki and Équiterre, and other industry participants, including CropLife.

[13] On April 11, 2019, the PMRA issued the final Decision, which is the subject of this application for judicial review.

## III. **Re-Evaluation Decision**

[14] The Decision is almost 250 pages including appendices and, to be fully understood, must be read in conjunction with the Proposed Decision, which is another 400 pages. However, the PMRA's conclusions are summarized at the beginning of the Decision as follows:

> **Outcome of Science Evaluation**
>
> The risk assessment, conducted according to the *Guidance for Assessing Pesticide Risks to Bees*, determined that there are varying degrees of effects on bees. Some current uses of thiamethoxam are not expected to affect bees. For some uses, mitigation measures (in other words, changes to the conditions of registration) are required to minimize potential exposure to bees. Mitigation measures include changes to the use pattern and label improvements. When thiamethoxam is used in accordance with these new risk reduction measures, the reduced environmental exposure is considered adequate and risks are acceptable. Label statements informing users of the potential for toxicity to pollinators are required on product labels. For other uses, risks to pollinators were not found to be acceptable; therefore, these uses are cancelled.
>
> **Regulatory Decision for Thiamethoxam**
>
> Health Canada has completed the pollinator re-evaluation of thiamethoxam. Under the authority of the *Pest Control Products Act*, Health Canada has determined that, with required amendments, continued registration of products containing thiamethoxam is acceptable; however, certain uses of thiamethoxam are cancelled to address potential risks of concern to pollinators. An evaluation of available scientific information found that some uses of thiamethoxam products meet current standards for protection of pollinators when used according to the conditions of registration, which include required amendments to label directions. Label amendments, as summarized below and listed in Appendix III, are required for all end-use products. No additional data are requested.

**Risk Mitigation Measures to Protect Pollinators**

Registered pesticide product labels include specific directions for use. Directions include risk mitigation measures to protect human health and the environment and must be followed by law. As a result of this re-evaluation of thiamethoxam, further risk mitigation measures for product labels are required.

Certain crops are highly attractive to bees when their flowers are in bloom. Since large numbers of bees are attracted to these crops when they are in bloom and based on an assessment of the risks to bees, the application of pesticides containing thiamethoxam can lead to effects that may have an impact on the survival of bee colonies or solitary bee species.

In order to protect pollinators, **Health Canada is cancelling the following uses of thiamethoxam**:

- Foliar and soil application to ornamental crops that will result in pollinator exposure (in other words, are planted outdoors and are attractive to pollinators)

- Soil application to berry crops, cucurbit crops and fruiting vegetables, and

- Foliar application to orchard trees.

Due to the attractiveness of some crops to bees and based on an assessment of the risks to bees, application of pesticides containing thiamethoxam before and during crop flowering can lead to effects that may have an impact on the survival of bee colonies or solitary bee species.

In order to protect pollinators, **Health Canada is changing the timing of application for the following uses of thiamethoxam**

**The following crops cannot be sprayed before or during bloom:**

- Foliar application to legume and outdoor fruiting vegetables, and

- Foliar application to berry crops (without renovation required for woody berries).

**The following crops cannot be sprayed during bloom:**

- Foliar application to sweet potato and potato

To minimize bee exposure to dust during planting of treated seed, **additional label statements are required for the following use:**

- Seed treatment of cereal and legume crops.

Thiamethoxam has value to crop production in Canada as an insecticide to control a variety of insect pests when applied as a foliar or soil application, as well as a seed treatment. An assessment of the registered products determined a lack of alternatives for the following pests and sites:

- Brown marmorated stink bug on apple, crab apple, pear, and oriental pear;

- Brown marmorated stink bug and obscure root weevil on bushberries;

- Black vine weevil, cranberry weevil and strawberry root weevil on low growing berries (except strawberry and lowbush blueberry); and

- Brown marmorated stink bug and black vine weevils on outdoor ornamentals.

The additional risk mitigation measures described above will be implemented over a 24-month period. The risks identified are not considered imminent because they are not expected to cause irreversible harm over this period. Potential effects include sublethal effects on colonies or solitary bees, but affected pollinator populations are expected to recover following implementation of the additional restrictions which will reduce exposure. Moreover, recovery is expected because risks to pollinators are geographically limited to areas where these products are applied and areas adjacent to application sites. The presence of unaffected solitary bees, bumble bees, and honey bees in areas where products are not being used will further facilitate recovery since unaffected bees in the environment can move back into areas where effects may have occurred. Overall, risk to pollinators is acceptable over the time period required to implement the mitigation measures.

As a result of this decision, growers will be required to change their pest management practices. Pesticides have extensive and precise instructions and often require specialized application and

safety equipment and training. This transition period will allow for an orderly and safe implementation of these new restrictions, and should reduce the risk of product misuse or the improper disposal of products as users switch to alternatives, where required. This approach is consistent with Health Canada's current policy and practice with respect to phase out of uses as a result of a re-evaluation (Regulatory Directive DIR2018-01, *Policy on Cancellations and Amendments Following Re-evaluation and Special Review*) and with the practice of other international regulators.

A small subset of uses were found to lack alternatives for the management of serious pests (the invasive brown marmorated stink bug and certain weevils) on a very few crops present in limited geographical areas of Canada. As a result, the implementation of the re-evaluation decision for these uses will be delayed for an additional year to allow growers to find pest management solutions. During this period, the overall exposure to pollinators will be significantly reduced through both removal of uses to control other pests on these crops and other crops that pose a risk to bees, as well as through implementation of additional restrictions in application timing which will further reduce pollinator exposure. The risks to pollinators are therefore considered acceptable for an additional year for this small subset of uses.

**Next Steps**

To comply with this decision, taking into account Regulatory Directive DIR2018-01, *Policy on Cancellations and Amendments Following Re-evaluation and Special Review*, the required mitigation measures must be implemented on all product labels sold by registrants no later than 24 months after the publication date of this decision document. Appendix I lists the products containing thiamethoxam that are registered under the authority of the *Pest Control Products Act*.

**Other Information**

Any person may file a notice of objection regarding this decision on thiamethoxam within 60 days from the date of publication of this Re-evaluation Decision. For more information regarding the basis for objecting (which must be based on scientific grounds), please refer to the Pesticides section of the Canada.ca website (Request a Reconsideration of Decision) or contact the PMRA's Pest Management Information Service.

> [Internal cites omitted; underlining emphasis added; bold emphasis in original]

## IV. **Policy**

[15] This application seeks relief not only against the portion of the Decision underlined above, but also in relation to the portion of the Policy referenced and relied upon in the Decision. The PMRA published the Policy on March 7, 2018 describing its purpose as follows:

> **1.0 Purpose**
>
> The purpose of this policy is to provide a framework for the cancellation of pesticide products or amendments to pesticide product uses, labels, or other conditions of registration following a re-evaluation or special review decision. The policy also outlines the process, the associated timelines as well as how the timelines for cancellation or amendment of pesticide products are established.
>
> This policy is intended to enhance transparency of the process and associated timelines when regulatory action is required to remove products from the market, change approved uses, or introduce amendments to labels. It is intended to facilitate efficient and effective implementation of re-evaluation and special review decisions. Standardized timelines aim to clarify expectations, obligations and communications around the implementation of regulatory decisions.

[16] The PMRA practice, which the Applicants ask this Court to declare *ultra vires* the Act, is set out in Section 6.2 of the Policy as follows:

> **6.2 Amendment Timelines**
>
> When an amendment to a registration is determined to be necessary as a result of the product not meeting current standards for human health and/or environmental protection, such as the need

for additional risk mitigation measures or the cancellation of certain uses (*refer to Appendix I.a*):

- The PMRA notifies registrants of the need to amend their product registration and update product labels to reflect the required amendments. The PMRA also communicates the required process and implementation timelines.

- Registrants submit an application. The PMRA reviews the applications within the performance standard (i.e., 37 calendar days for completeness check followed by 240 calendar days for review).

When there are no imminent and serious risks to human health or environment, registrants will generally have up to two (2) years from the date of the decision to transition to selling the product with the newly amended labels.

Subsequent to the decision, if at any point it is determined that imminent and serious risks to human health and/or the environment may exist, expedited timelines will be determined on a case-by-case basis commensurate with the likelihood and severity of the risk.

[Underlining emphasis added]

## V. **Issues**

[17] The Applicants take issue with the underlined portions of the above paragraphs of the Decision and the Policy, which afford a 24-month transition period for implementation of risk mitigation measures. The Applicants argue that this transition period represents a delay which is outside the PMRA's statutory authority. Their arguments rely significantly on s 21(3) of the Act, which provides as follows:

| **Delay of effective date** | **Report de la modification ou de la révocation** |
|---|---|
| **21 (3)** The Minister may delay the effective | **21 (3)** Le ministre peut différer la modification ou la révocation de l'homologation lorsqu'il |

| | |
|---|---|
| date of the amendment or cancellation if | n'existe aucune solution de rechange satisfaisante à l'utilisation du produit antiparasitaire et qu'il juge que la valeur du produit et les risques sanitaires et environnementaux qu'il présente sont, jusqu'à la date de modification ou de révocation, acceptables. |
| **(a)** no suitable alternative to the use of the pest control product is available; and | |
| **(b)** the Minister considers that the health and environmental risks and value of the product are acceptable until the effective date of the amendment or cancellation. | |

[18] The Applicants do not take issue with the delay of an additional year for the subset of uses that the Decision found lacked alternatives for the management of serious pests [the Subset Uses], as they consider that delay to be permitted by s 21(3).

[19] The Applicants and each of the Respondents articulate the substantive issues for the Court's determination somewhat differently. However, in my view, the following set of issues provides a framework for consideration of the arguments raised by all parties, including the Intervener, in determining whether the Applicants are entitled to any of the relief claimed:

A. Which standard of review applies to the issues raised by the Applicants?

B. Does the PMRA lack the authority to provide a transition period in connection with amendments following a re-evaluation, where the requirements of s 21(3) of the Act are not met?

C. If the PMRA does have such authority, did the PMRA nevertheless commit reviewable error in providing the transition period in the Decision, through either its adoption or its application of the test for acceptable risk employed in the Decision?

D. If the Court concludes that it should quash the portion of the Decision that provides the transition period, should it quash just that portion of the Decision or the entire Decision?

## VI. **Preliminary Issue – Motion to Strike the Syngenta Affidavit**

[20] Before turning to the above issues, it is necessary to address a preliminary issue that the Applicants raise concerning Syngenta's supporting affidavit. Syngenta relies on an affidavit of its Head of Crop Protection Development, Dr. Nancy Tout, sworn on June 21, 2019. On July 3, 2019, the Applicants filed a motion seeking to strike portions of Dr. Tout's affidavit, as well as exhibits thereto. The parties subsequently agreed this motion would be argued at the main hearing of this application for judicial review and could be addressed in this Judgment and Reasons.

[21] The portions of Dr. Tout's affidavit and exhibits the Applicants seek to strike fall broadly into the following categories:

A. Evidence concerning the past, present or intended commercialization of particular TMX Products, which the Applicants submit: (i) represents irrelevant information not before the decision-maker, (ii) is based on information and belief contrary to Rule 81(1) of the *Federal Courts Rules*, and/or (iii) represents argument;

B. Evidence as to categories of information included on TMX Product labels, which the Applicants submit represents unqualified expert opinion and argument; and

C. Evidence as to Syngenta's preparation and submission of draft amended product labels pursuant to the Decision, including copies of such draft labels attached as exhibits, which the Applicants submit represents irrelevant information not before the decision-maker and/or represents argument.

A. ***Evidence of Commercialization of TMX Products***

[22] Dr. Tout deposes that four of Syngenta's seed treatment pest control products, which are registered under the Act, are not currently commercialized for sale and are not intended to be commercialized. She states that Syngenta is moving forward to discontinue these products. Dr. Tout also identifies one of Syngenta's soil and foliar pest control products which, while registered, has never been commercialized for sale in Canada.

[23] In her affidavit, Dr. Tout states that she has knowledge of the matters to which she deposes and that the statements in her affidavit are made to the best of her knowledge, based on her own experience and involvement in the matters which are the subject of the affidavit and her review and knowledge of the contents of documents related to such matters. She also explains that, where her statements are based on information and belief, she has stated the source of that information and believes such information to be true. The only subjects in the affidavit, in relation to which Dr. Tout states a source of information and her belief therein, are the commercialization of the products described above.

[24] The Applicants therefore argue that Dr. Tout's evidence surrounding commercialization of Syngenta's products (found in paragraphs 11, 13, 48 and 50) should be struck from her affidavit, because it offends Rule 81(1). This Rule provides that affidavits shall be confined to facts within the deponent's personal knowledge, except on certain motions. I agree with Syngenta's response to this argument, that this evidence from Dr. Tout constitutes corporate evidence which relevant authority recognizes does not infringe Rule 81(1).

[25] In *Twentieth Century Fox Home Entertainment Canada Ltd v Canada (Attorney General)*, 2012 FC 823 [*Twentieth Century Fox*] at paragraphs 22 to 23, Justice Phelan noted that Rule 81(1) must be considered in light of the Supreme Court's acceptance of hearsay on a principled basis and that this Court has accepted evidence on information and belief. Justice Phelan described the evidence of the deponent in that case as "corporate" evidence, noting that he acted in a supervisory capacity and was responsible for the subordinate who provided information to the deponent, such that he was in a position to know if the facts were true.

[26] In *O'Grady v Canada (Attorney General)*, 2016 FC 9 at paragraphs 19 to 20, Justice LeBlanc relied on *Twentieth Century Fox* in concluding that, while the respondent's affiant had sworn her affidavit on information and belief, her position with Statistics Canada was such that she was probably aware of the particular facts to which she had deposed and was therefore in a position to swear the affidavit. On appeal, the Federal Court of Appeal confirmed that Justice LeBlanc had not erred in considering the admissibility of the affidavit and had correctly determined that the affiant, by virtue of her responsibilities in the Government of Canada, was in a position to depose to the matters in question without necessarily having personal knowledge (2016 FCA 221 at para 10).

[27] The same analysis applies in the present circumstances. Dr. Tout deposes that she has been the Head of Crop Protection Development for Syngenta since March 2016 and describes her responsibilities in that role, including working closely with Syngenta's regulatory team. The individuals, who Dr. Tout states advised her as to the commercialization of the products to which the disputed evidence relates, are the respective Regulatory Portfolio Managers for those

products. Given her role, and the nature of her evidence as corporate evidence, I am satisfied that Rule 81(1) does not preclude admission of this evidence.

[28] The Applicants also argue that this evidence is irrelevant and argumentative. I find no merit to the submission that the evidence is argumentative, as it represents simple statements of fact surrounding the past, present, or future commercialization of certain products. Syngenta submits that the evidence is relevant, because the PMRA would have been aware of the commercialization of the various TMX Products that were the subject of its re-evaluation. Syngenta observes that s 8(5) of the Act requires a registrant of pest control product, as a condition of registration, to report to the Minister information on sales of the product. I accept that the evidence is relevant and find no basis to strike it from Dr. Tout's affidavit. However, I also note that nothing turns on this decision, as this evidence is not material to the analysis of the substantive issues in this application.

### B. ***Evidence of Categories of Information on TMX Product Labels***

[29] Dr. Tout's affidavit includes evidence (in paragraph 16) in which she provides examples of categories of information that are included among the environmental precautionary measures and directions for use on TMX Product labels. The Applicants submit this evidence represents unqualified expert opinion and argument.

[30] I find nothing argumentative about this evidence. While it represents examples of categories of information provided on product labels, and therefore is not an exhaustive list, the

evidence remains factual and is not offered in a manner that I consider to represent advocacy or argument.

[31] Nor is there merit to the Applicants' argument that this paragraph represents unqualified expert opinion. Dr. Tout's affidavit explains that an integral part of her duties at Syngenta includes knowing and understanding the product label requirements of the PMRA and the Act, including identifying what information Syngenta is required to list on its pest control product labels to satisfy applicable statutory, regulatory, and policy requirements. The evidence in the disputed paragraph does not represent opinion but rather is factual testimony based on Dr. Tout's experience with the regulatory process that is the subject of this application for judicial review.

[32] I find no basis to strike this paragraph of the affidavit.

### C. *Evidence of Syngenta's Draft Amended Product Labels*

[33] Dr. Tout's affidavit includes (in paragraphs 21, 23, 29, 35, 38, 42, 46 and 50) evidence surrounding Syngenta's preparation and submission to the PMRA of draft TMX Product labels, in compliance with the requirements of the Decision, and attaches copies of such draft labels as exhibits. The Applicants submit this evidence represents irrelevant information not before the decision-maker and argument.

[34] Again, I find nothing argumentative about this evidence, as it is purely factual. However, the Applicants' submissions, that this evidence is irrelevant and was not before the PMRA when it made its decision, require more detailed consideration. As the Applicants correctly submit, as a

general rule, evidence on judicial review is restricted to the evidentiary record that was before the administrative decision-maker, and evidence that goes to the merits of the matter before the decision-maker is not admissible on judicial review (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19; *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*] at para 42).

[35] There are exceptions to this general rule (see *Access Copyright* at para 20), but the only exception potentially applicable to the present circumstances is the so-called "general background" exception (see *Delios* at para 43 *et seq*). Both the Applicants and the Respondents refer the Court to *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at paras 20 to 23, which describes this exception as follows:

> 20 The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without argumentation, the documents that are key to the reviewing court's understanding of the record.
>
> 21 In *Delios*, above, I put it this way (at paragraph 45):
>
> > The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before

> the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> 22 But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20; *Delios*, above at paragraph 46.
>
> 23 The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

[36] Syngenta takes the position that the disputed evidence was before the PMRA and also that it falls within the general background exception. To be clear, Syngenta is not arguing that the proposed amended labels were actually before the decision-maker in that form. Rather, it submits that the Court should take a broad view of what constitutes information before the decision-maker, including the decision-maker's regulatory experience (see *Bell Canada v 7262591 Canada Ltd*, 2016 FCA 123 at para 15). I understand Syngenta's argument to be that, given the PMRA's experience in administering the regulatory scheme under the Act, it made the

Decision with an understanding of the nature of the product label amendments that would be required as a result of the Decision.

[37] Alternatively, Syngenta submits that provision to the Court of copies of the proposed amended labels falls within the background exception, because it represents a distillation of the amended conditions of registration resulting from the Decision and therefore assists the Court to understand the Decision.

[38] I find merit to both of Syngenta's arguments. As explained in the above passage from *Bernard*, both the general rule and the background exception are intended to respect the differing roles of the administrative decision-maker and the reviewing court. In the present case, the draft labels are provided to the Court for a purpose that respects these differing roles and do not represent an effort to introduce fresh evidence, relevant to the merits, that was not before the PMRA.

[39] The labels appended to Dr. Tout's affidavit are presented in a form which demonstrates through black-lining the proposed changes from the existing labels that predated the Decision. The principal issue the Court must address in this application for judicial review surrounds the PMRA's interpretation of its statutory authority. The arguments advanced by the parties in connection with this issue include submissions that require an understanding of the practical implications of the Decision, such as the requirement to generate amended labels. It is therefore potentially useful for the Court to understand what is required on the ground to implement the Decision through these labels. Presumably, the PMRA had such an understanding, and the

proposed amended labels represent a means by which the Court can develop such an understanding more easily than by attempting to parse the amended conditions of registration set out in the Decision.

[40] In conclusion on the motion, I find no basis to strike any of the impugned portions of Dr. Tout's affidavit. The Applicants' motion is therefore dismissed in its entirety.

## VII. **Analysis**

### A. ***Which standard of review applies to the issues raised by the Applicants?***

[41] Before turning to analysis of the substantive issues in this application, it is necessary to address the applicable standard of review, on which the parties disagree for most of the issues.

[42] Other than in connection with one of its last arguments, surrounding the application of the test for acceptable risk in the Decision, the Applicants take the position that the issues raised in this application are reviewable on a standard of correctness, because they involve statutory interpretation by the PMRA. In contrast, the Respondents take the position that all issues in this application, including those involving statutory interpretation, are reviewable on the reasonableness standard.

[43] The Applicants' arguments on standard of review begin with the Supreme Court's explanation in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*] at para 62, that the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence

has already determined in a satisfactory manner the degree of deference to be afforded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. The Applicants take the position that applicable jurisprudence has already established that questions relating to the Minister's interpretation of the Act are reviewable on a standard of correctness.

[44] The Applicants rely principally on *Équiterre v Canada (Minister of Health)*, 2016 FC 554 [*Équiterre*] at paragraphs 45-48, in which the Federal Court addressed the standard of review applicable to a question of statutory interpretation surrounding s 17 of the Act (relating to the Minister's obligations to conduct a special review of the registration of a pest control product) as follows:

> 45 The Supreme Court of Canada has reiterated that the presumptive standard of review is "reasonableness", including for interpretations of the decision-makers' home statute. The reach of that presumption is more case-dependent. However, the elegantly simple analysis in *Wier v Canada (Minister of Health)*, 2011 FC 1322, 400 FTR 212, that the Minister's interpretation of the legal standards imposed on him by statute is reviewable on the standard of correctness but the performance of the duties rests on reasonableness, does not hold the same force and effect.
>
> 46 The Federal Court of Appeal in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, [2013] 4 FCR 155 [*David Suzuki*], recognized that the presumption can and will be rebutted:
>
> > [88] However, deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law. A standard of review analysis is still required in appropriate

cases. As noted by Justices Bastarache and LeBel at paragraphs 63 and 64 of *Dunsmuir*:

> [63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

47 Recognizing that the Agency is a specialized body and entitled to deference does not equate with any expertise in interpretation of the obligations imposed on the Minister. In my view, the presumption is displaced because, as noted in *David Suzuki*, this is not an administrative tribunal tasked with deciding issues of law; it has no privative clause; the issue is the citizen's right to require the Executive to do what Parliament says it should; and the function required – interpretation of a statute – is not a matter that touches on any area of Agency expertise.

48 Further, the issue of standard of review is largely academic. Even on a reasonableness standard, the interpretation of s 17(2) admits of only one answer.

[45] The Applicants submit that, as in *Équiterre*, the exercise of interpreting the Minister's authority surrounding timing of the implementation of an amendment does not depend on the technical and specialized expertise of the PMRA. The Applicants also argue that the correctness standard applies in this case, because it involves a question of true jurisdiction. They rely on *United Taxicab Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, in which the question whether a City of Calgary bylaw was *ultra vires* the provincial legislation was a question of true jurisdiction reviewable on the standard of correctness.

[46] In contrast, the Respondents rely on the decision of the Supreme Court of Canada in *Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*], which the Respondents argue has overtaken the standard of review analysis performed in *Équiterre*, requiring this Court to revisit that analysis and pointing to a conclusion that the standard of review applicable to the PMRA's interpretation of the Act in the case at hand is reasonableness.

[47] In *CHRC*, the majority of the Supreme Court explains that the Court has for years attempted to simplify the standard of review analysis in order to prompt litigants to argue the substantive merits of their cases rather than tests for standard of review. To that end, there is a well-established presumption that, where an administrative tribunal interprets its home statute, the reasonableness standard applies (at para 27). *CHRC* states this presumption may be rebutted, and the correctness standard applied, where one of the following categories can be established: (a) true questions of *vires*; (b) issues relating to the constitutional division of powers; (c) issues of competing jurisdiction between tribunals; and (d) questions that are of central importance to

the legal system *and* outside the expertise of the decision-maker. *CHRC* also states that, exceptionally, the presumption can be rebutted where a contextual inquiry shows a clear legislative intent that the correctness standard be applied (at para 28).

[48] *CHRC* describes true questions of *vires* or jurisdiction as a narrow and exceptional category of correctness review (at para 31) The Supreme Court notes that, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], a majority of the Court considered eliminating this category (at para 34); and, since *Alberta Teachers*, the Court has not identified a single instance where this category was applicable (at para 37). It describes this category as being "on life support" (at para 41).

[49] *CHRC* also explains that true questions of *vires* are questions that determine whether one has authority to enter into an inquiry, as opposed to simple questions of jurisdiction, involving questions that determine the scope of one's authority (at para 38). It is clear to me that the principal question raised in the present application, whether the PMRA has the jurisdiction or authority to provide a transition period in connection with amendments following a re-evaluation, involves the scope of the PMRA's authority, not whether it has authority to enter into the inquiry giving rise to the Decision. It is not a true question of *vires*.

[50] However, the *Équiterre* decision, upon which the Applicants rely, did not turn on the category of true question of *vires*. Rather, the conclusion in *Équiterre* resulted from a contextual inquiry, taking into account the absence of a privative clause in the Act and the fact the tribunal was not tasked with deciding issues of law and had no expertise in statutory interpretation.

[51] In *CHRC*, the Supreme Court described the contextual approach as playing a subordinate role in the standard of review analysis where the presumption of reasonableness applies (at paras 45, 47). While a contextual inquiry can occasionally rebut this presumption, this will occur in the "exceptional other case" (at para 45). The Supreme Court also notes that, in the past, this has been limited to circumstances where determinative factors have shown a clear legislative intent justifying the rebuttal of the presumption (at para 46).

[52] I recognize the guidance in *Dunsmuir* that it is unnecessary to conduct a standard of review analysis in relation to a category of question where the jurisprudence has already determined in a satisfactory manner the degree of deference to be afforded to that category (at para 62). However, I agree with the Respondents' submissions that the Supreme Court's relatively recent pronouncements in *CHRC* militate in favour of revisiting the standard of review analysis, as performed in *Équiterre* and the jurisprudence upon which it relied, applicable to the PMRA's interpretation of the Act.

[53] The statutory interpretation question before the Court involves the PMRA's interpretation of its home statute. The presumption of reasonableness therefore applies. None of the categories, in which the presumption is rebutted in favour of correctness, applies in this case. As noted in *CHRC*, in explaining that the contextual approach should be used sparingly, the presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard (at para 46). While this guidance suggests no need to turn to the contextual approach in the case at hand, I have nevertheless considered the effect of the contextual approach, because it was employed in the standard of review analysis in *Équiterre.*

[54] Employing that approach, and considering the factors that influenced the finding in *Équiterre*, but with the benefit of the subsequent guidance in *CHRC*, I find no clear legislative intent justifying rebuttal of the presumption of reasonableness. As noted in *CHRC*, the absence of a privative clause does not rebut the presumption of deference (at para 50). I appreciate that the PMRA is not principally tasked with deciding issues of law or broadly an expert in statutory interpretation. However, the presumption of reasonableness, in the context of an administrative tribunal interpreting its home statute, is premised on the tribunal having expertise relevant to interpreting that particular statute.

[55] In *McLean v British Columbia* (Securities Commission), 2013 SCC 67 [*McLean*] at paragraphs 30-33, the Supreme Court explained that the modern approach to judicial review does not allow for a neat division between what one might call a "lawyer's question" and a "bureaucrat's question". This is because the choice between multiple reasonable interpretations of an administrative decision-maker's home statute will often involve policy considerations that we presume the legislature intended the decision-maker, not the courts, to make. The exercise of that interpretive discretion is part of an administrative decision-maker's expertise. In my view, there is nothing about the nature of the PMRA, or the particular question currently before the Court (involving an aspect of the scope of the PMRA's authority when making a re-evaluation decision), that takes this matter outside the circumstances where this presumption as to the legislature's intent applies. I will therefore apply the standard of reasonableness to that question.

[56] As noted in the list of issues set out earlier in these Reasons, the Applicants argue that, even if the PMRA does have the disputed authority, it nevertheless committed reviewable error

in providing the transition period in the Decision, through either its adoption of the test for acceptable risk employed in the Decision or its application of that test. While the Applicants acknowledge that application of the test is subject to a reasonableness review, they argue that whether the PMRA erred in the test it adopted requires a correctness review, as it necessarily involves a question of statutory interpretation. Applying the same reasoning as I applied to the question of the PMRA's authority to provide a transition period, I find this question to be reviewable on the standard of reasonableness. It involves the PMRA's interpretation of its home statue and forms part of the risk analysis with which it is tasked under the Act. No categorical exceptions or contextual analysis factors warrant application of the correctness standard.

[57] I therefore find that all substantive issues in this application are reviewable on the standard of reasonableness.

### B. *Does the PMRA lack the authority to provide a transition period in connection with amendments following a re-evaluation, where the requirements of s 21(3) of the Act are not met?*

#### (1) Framework for Reasonableness Review of Statutory Interpretation

[58] The Applicants take the position that the Act does not provide the PMRA with the authority to employ a transition period in connection with the amendment of a registration following a re-evaluation—either as contemplated by the Policy, or as included in the Decision. They submit that, in the event I found this issue to be reviewable on a standard reasonableness, the PMRA's interpretation of the Act as providing it with this authority is not reasonable. The Applicants refer to *McLean*, in which the Supreme Court explained it will not always be the case

that a particular statutory provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision-maker adopts a different one, its interpretation will necessarily be unreasonable (at para 38).

[59] The parties agree on the applicable principles of statutory interpretation. As summarized in the Applicants' Memorandum of Fact in Law (citing, e.g., *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21, 31, 35):

> The modern approach to statutory interpretation requires that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Legislative purpose and intent provide important context in discerning the meaning of the legislation. Legislative history, including Hansard evidence to a limited extent, can provide insight into legislative purpose and intent.

[60] The Applicants also refer the Court to Justice Grammond's recent decision in *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251 [*Mason*], which provides a very thoughtful analysis of how the Court might approach the task of conducting reasonableness review of an issue of statutory interpretation by an administrative tribunal. Justice Grammond concludes that modern principles of statutory interpretation, requiring attention to the text, context, and purpose of the provision to be interpreted, should be applied when conducting such a review. Such principles are not incompatible with deference, and their use does not necessarily lead to what had been termed "disguised correctness review". Rather, a deferential review of statutory interpretation decisions is possible if the reviewing judge keeps in mind that: (a) many statutory interpretation problems admit of more than one reasonable answer; and (b) the methods

of statutory interpretation are not binding rules that dictate a particular outcome (at paras 17 to 21).

[61] However, *Mason* also emphasizes that, while deference forbids courts from substituting their own views for those of the decision-maker, it does not permit decision-makers to subvert Parliament's intent (at para 11). Justice Grammond uses the language of a "knock-out punch" to refer to a statutory interpretation argument that is internally consistent, that withstands scrutiny, and that is not met by an argument of similar force. Such an argument, which may be based on any of the recognized methods of statutory interpretation, may be conclusive evidence of Parliament's intent and a basis for finding an administrative decision-maker's interpretation unreasonable. Where the reviewing court does not find a "knock-out punch", the decision-maker's interpretation should be considered to be reasonable, even if it is not the reviewing judge's preferred interpretation (at paras 25-31).

[62] I note that some of the framework set out in *Mason* involves consideration of the arguments taken into account by a tribunal in arriving at a given statutory interpretation. This aspect of the *Mason* framework is not directly applicable to the present case, as the Decision does not contain an express statutory interpretation analysis. The Minister argues that, in such circumstances, the guidance provided by *Alberta Teachers* applies (at paras 51-54):

> 51 In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of an inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.

52 In *Dunsmuir*, the majority explained (at paras. 47-48):

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

53 However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.

54 I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada*

> *(Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g., *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.

[63] The Applicants disagree the principles in *Alberta Teachers* set out above are applicable, because these principles were premised on the disputed question not having been raised at all before the tribunal in that case. The Applicants note that, in the present case, the Policy includes a section entitled "Context and Legal Framework", as well as an appendix entitled "Legislative Authority." The Applicants argue this content should be construed as the PMRA's reasons for the statutory interpretation demonstrated by the Policy and subsequently the Decision, such that the arguments presented by the Respondents in this application, to extent they vary from the reasons contained in the Policy, represent inappropriate bolstering of those reasons.

[64] The Context and Legal Framework section of the Policy refers to the re-evaluation and special review processes for post-market review of registered pest control products, provided respectively by ss 16 and 17 of the Act, and concludes with the following paragraphs:

> During a re-evaluation or special review, pursuant to s. 20(1), the Minister may amend or cancel the registration if a registrant fails to provide information required under s. 16(3), s. 18(1) or para. 19(1)(a) of the *Pest Control Products Act*, or if the Minister has

> reasonable grounds to believe that the amendment or cancellation is necessary to deal with a situation that endangers human health or safety or the environment, taking into account the precautionary principle (s. 20(1)(b); s. 20(2)). The *Pest Control Products Act* also provides the authority to amend or cancel the registration of a pest control product when, after considering the necessary scientific evaluations and consultations, the Minister does not consider the risks or value of the product to be acceptable (para. 21(2)(a) and (b)). In these circumstances a phase-out may be implemented as part of the decision, commensurate with the level of risk.
>
> When the re-evaluation or special review decision is to cancel a registration of a pest control product, continued possession, handling, storage, distribution and use of stocks may be allowed, subject to any conditions considered necessary (para. 21(5)(a)). The implementation date of cancellation may be delayed if no suitable alternatives to the use of the pesticide is available, and a determination is made that human health and environmental risks and value of the product are considered acceptable until the effective date of the amendment or cancellation (s. 21(3)).
>
> This policy has undergone a 60-day public consultation as Regulatory Proposal PRO2016-04, *Policy on Cancellations and Amendments Following Re-valuation and Special Review* which was published on 21 December 2016. Comments received during this consultation were taken into consideration for the preparation of this document.
>
> [Underlining emphasis added]

[65] The Legislative Authority appendix states that it lists the sections of the Act that are relevant to the amendment or cancellation of registration of pest control products in the context of re-evaluation or special review. The appendix then sets out the text of certain section of the Act (ss 7(1), 16(1)-(3), 17(1)-(4), 18(1), 19(1)(a), 20, 21(2)-(5), and 22).

[66] It is clear from the sentence in the Context and Legal Framework section emphasized above, and indeed from the Decision itself, that the PMRA interprets the Act as conferring upon it the authority, when amending a registration under s 21(2)(a), to implement a phase-out or

transition period between the original and amended conditions of registration. While the Legislative Authority appendix cites certain provisions of the Act, the Policy provides no particular analysis, of those provisions or otherwise, in support of its interpretation.

[67] I acknowledge that section 6.2 of the Policy, reproduced earlier in these Reasons, explains the activities involved in a transition period and provides some insight into the PMRA's rationale for such a period. However, this section does not set out a statutory interpretation analysis. There is no evidence that the statutory interpretation question presently at issue was raised before the PMRA when issuing the Policy or Decision. While the Policy states that it was the subject of a public consultation, the comments received as part of that consultation are not part of the record before the Court. In my view, the content of the Policy does not detract from the application of the principles from *Alberta Teachers* described above.

### (2) **The Applicants' Position**

[68] The Applicants' principal arguments, in support of their position that the PMRA lacks authority for the impugned transition periods contemplated by the Policy and included in the Decision, are as follows.

[69] First, the Applicants emphasize s 4(1) of the Act states that, in the administration of the Act, the Minister's primary objective is to prevent unacceptable risks to individuals and the environment from the use of pest control products. The Applicants also cite multiple Hansard references supporting their submission that the purpose of the Act is to protect Canadians and their environment from the risks associated with pesticides.

[70] Pursuant to s 2(2), the health or 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. The Applicants emphasize the reference to "no harm" in s 2(2), which they refer to as the "no harm standard". They submit that this standard is incorporated into the analysis the PMRA must perform in connection with a re-evaluation under s 21. The authority for the PMRA's Decision to amend the registrations in the case at hand is conferred by s 21(2), the text of which is set out earlier in these Reasons.

[71] The Applicants submit that, in order to have decided to amend the registrations under s 21(2)(a), the PMRA must have concluded, first, that the health or environmental risks or value of the product were not acceptable (within the s 2(2) definition) under the registrations with their existing conditions and, second, that these would be acceptable after the amendment. The Applicants therefore take the position that the PMRA was required by 21(2)(a) to make the amended conditions of registration effective immediately at the time of its Decision. Otherwise, the presence of an unacceptable risk, which the PMRA found to be present under the existing conditions, would continue until the future effective date of the amended conditions. The Applicants submit that authority to introduce a transition period of this nature is not contemplated by, and would be contrary to, the wording of s 21(2)(a), and that it would be inconsistent with the Act's primary objective to conclude that the Act confers upon the PMRA implied authority of this sort.

[72] The Applicants also argue that their interpretation of s 21(2)(a) is supported by s 21(3) of the Act, the text of which is set out earlier in these Reasons. The Applicants submit that Parliament provided limited authority for the Minister (acting through the PMRA) to delay implementing amendments or cancellations to a pest control product, solely in the circumstances where the two-part conjunctive test prescribed by s 21(3) is met: (a) no suitable alternative to the use of the product is available; and (b) the Minister considers that the health and environmental risks and value of the product are acceptable until the effective date of the amendment or cancellation. The PMRA's inclusion of a 24-month transition in the Decision is not premised on the application of s 21(3). The PMRA relies on s 21(3) only in connection with the delay of an additional year for the Subset Uses. The Applicants argue that an implied authority to introduce a transition period for amendments under s 21(2)(a), when the two-part s 21(3) test is not met, would render s 21(3) redundant, which cannot have been Parliament's intent.

[73] The Applicants also rely upon s 21(5) to support their interpretation of the Act. Section 21(5) provides as follows:

| | |
|---|---|
| **Continued possession, etc., of existing stocks** | **Produits existant à la date de révocation** |
| **21 (5)** When cancelling the registration of a pest control product under this section or any other provision of this Act, the Minister may | **21 (5)** Lorsqu'il révoque l'homologation, en application du présent article ou de toute autre disposition de la présente loi, le ministre peut : |
| **(a)** allow the continued possession, handling, storage, distribution and use of stocks of the product in Canada at the time of cancellation, subject to any conditions, including disposal procedures, that the Minister considers necessary for carrying out the purposes of this Act; | **a)** soit, aux conditions qu'il estime nécessaires pour l'application de la présente loi — notamment quant à la façon d'éliminer le produit — autoriser que se poursuivent la possession, la manipulation, le stockage, la distribution ou l'utilisation des stocks du produit se trouvant au Canada à la date de la révocation; |

| | |
|---|---|
| **(b)** require the registrant to recall and dispose of the product in a manner specified by the Minister; or | **b)** soit obliger le titulaire à faire le rappel du produit et à procéder à sa disposition de la manière qu'il précise; |
| **(c)** seize and dispose of the product. | **c)** soit confisquer le produit et procéder à sa disposition. |

[74] The Applicants note that s 21(5)(a) confers upon the Minister discretion to allow transitional activities with pest control products, but only when cancelling the registration of a product after a re-evaluation or special review (under s 21(2)(b)). There is no equivalent provision providing the Minister with such discretion following an amendment of a registration (under s 21(2)(a)). The Applicants argue that this precision indicates Parliament intended the discretion afforded to cancellations not apply to amendments and that the sort of transition period contemplated by the Policy and employed in the Decision is inconsistent with such intention.

[75] The Applicants also note that s 35 of the Act creates a process whereby, within 60 days of publication of a re-evaluation decision, any person may file a notice of objection to the decision. Under s 36, this objection does not suspend the decision under review, but the Minister may suspend the decision until a final decision is made on completion of the review. The Applicants argue that this power to suspend the decision exists because the decision takes effect immediately upon publication.

### (3) **The Respondents' Position**

[76] While the arguments of the two respondents, Syngenta and the Minister, are not identical, they are aligned and support the same position. As such, these Reasons will not draw distinctions, to negligible effect, between the two Respondents' respective arguments. Both

Respondents emphasize that, pursuant to the reasonableness standard, the PMRA's interpretation of the Act is entitled to deference. They argue that the PMRA's interpretation, that s 21(2)(a) of the Act does not require that amendments following a re-evaluation be implemented with an immediate effective date, is reasonable. The Respondents submit that s 21(2)(a) is silent on this issue and, as a matter of practical necessity and taking into account other provisions of the Act, it is reasonable to conclude that the statute provides the Minister (and therefore the PMRA) implied authority to employ a transition period in connection with amendment of a registration following a re-evaluation.

[77] The Respondents take no issue with principles of statutory interpretation upon which the Applicants rely. In relation to the purpose of the Act, they emphasize that the primary objective described by s 4(1) involves the prevention of unacceptable risks to individuals and the environment from the use of pest control products, but not the ban of such products. The Respondents also rely on the recitals at the beginning of the Act which, in addition to recognizing this primary objective, recognize other purposes.

[78] The recitals acknowledge, *inter alia*, that pest management plays a significant role in diverse areas of the economy and other aspects of the quality of life throughout Canada; and that the goals of sustainable pest management are to meet society's needs for human health protection, food and fibre production, and resource utilization and to conserve or enhance natural resources and the quality of the environment for future generations, in an economically viable manner. The Respondents also note the recitals' reference to a national interest in the federal regulatory system being administered efficiently and effectively in accordance with the

principles and objectives set out in the recitals, in a manner that recognizes the various interests and concerns affected and, where consistent with the primary objective of the system, minimizes the negative impact on economic viability and competitiveness. As such, the Respondents submit that the purpose of the Act is to achieve a balance between various objectives and interests.

[79] The Respondents argue that, in the absence of language in s 21(2)(a) requiring that an amendment take immediate effect, it is reasonable for the PMRA to interpret the Act as not imposing any such requirement. They argue that it is reasonable for the PMRA to conclude that it has implied authority to apply a transition period because, taking into account other provisions of the Act, a requirement that amendments take immediate effect would lead to highly disruptive and absurd results which could not have been intended by Parliament.

[80] Section 6 of the Act sets out various prohibitions, contravention of which is prescribed by s 6(9) to constitute an offence punishable by a fine up to $200,000 or imprisonment up to six months (on summary conviction); or a fine up to $500,000 or imprisonment up to three years (on conviction on indictment). The Respondents' arguments focus in particular on ss 6(3) and (5), which provide as follows:

| **Prohibitions** | **Interdictions** |
|---|---|
| […] | […] |
| **Packaging and labelling** | **Emballage et étiquetage** |
| **(3)** Except as otherwise authorized under section 53, 53.3 or 54, no person shall store, import, export or distribute a pest control product that is not packaged and labelled in accordance with the regulations and, if it is | **(3)** Sauf dans les cas autorisés par les articles 53, 53.3 et 54, il est interdit de stocker, d'importer, d'exporter ou de distribuer un produit antiparasitaire s'il n'est pas emballé et étiqueté conformément aux règlements et, dans le cas où il est homologué, aux conditions |

| | |
|---|---|
| registered, the conditions of registration. | d'homologation. |
| […] | […] |
| **Misuse of pest control products** | **Utilisation non conforme** |
| **(5)** No person shall handle, store, transport, use or dispose of a pest control product in a way that is inconsistent with | **(5)** Il est interdit de manipuler, de stocker, de transporter ou d'utiliser un produit antiparasitaire, ou d'en disposer, d'une manière non conforme : |
| **(a)** the regulations; or | **a)** soit aux règlements; |
| **(b)** if the product is registered, the directions on the label recorded in the Register, subject to the regulations. | **b)** soit, si le produit est homologué, aux instructions de l'étiquette figurant dans le Registre, sous réserve des règlements. |

[81] The Respondents emphasize in particular that storage of a pest control product that is not labelled in accordance with its conditions of registration constitutes an offence (s 6(3)). It is also an offence to handle, store, transport, use, or dispose of a pest control product in a way that is inconsistent with the directions on the label recorded in the Register of Pest Control Products, created under s 42 of the Act (s 6(5)). The Respondents submit that, if s 21(2) required amendments to take immediate effect, the labels on relevant products would be immediately outdated. Anyone in possession of these products would be automatically and immediately in breach of the Act as soon the PMRA's decision was issued. Similarly, users of the products would be in breach unless they were immediately aware of the amended label directions so as to be able to follow them accurately. The Respondents argue that Parliament could not have intended such consequences.

[82] In relation to s 21(3), the Respondents note that its language is permissive, i.e. it does not state that the Minister can delay an amendment only if the conditions in the section are met. The

Respondents also observe that s 21(3) refers to delay of an amendment's "effective" date, which they argue contemplates the possibility of the date for implementation of an amendment being selected by the PMRA in its decision and then subsequently delaying that date if the s 21(3) test is met. That is, s 21(3) fulfills a different function than the implied authority to set the original effective date for an amendment, which can be some time following the date of issuance of the relevant decision so as to achieve an orderly transition.

[83] Like the Applicants, the Respondents also rely on s 21(5) as supporting the interpretation of the Act for which they advocate. They note that s 21(5) permits the PMRA to allow continued possession, handling, storage, distribution and use of stocks of pest management products existing in the event of cancellation of a registration, i.e. in circumstances where the PMRA has concluded that the risks are not and cannot be made acceptable. Therefore, say the Respondents, it is surely consistent with the Act to permit the PMRA to allow such practices when a registration is merely being amended so as to make its risks acceptable.

[84] In relation to ss 35 and 36, the Respondents submit that the PMRA's interpretation of its authority is consistent with the existence of the post-decision objection process. If the PMRA was unable to suspend implementation of an amendment, the industry could face a confusing patchwork of changing instructions as an amendment is implemented, challenged, potentially suspended pending consideration of the challenge, and then potentially re-implemented following adjudication of the challenge.

### (4) **The Intervener's Position**

[85] The scope of CropLife's participation in this application is limited by the Order that permitted its intervention. CropLife supports the position taken by the Respondents on the interpretation of the PMRA's authority under the Act. As the industry representative of developers, manufacturers, and distributors of relevant products, its submissions in large measure focus upon the potential impact upon its members and users of such products, under the prohibitions contained in s 6 of the Act, if the Applicants' interpretation of the PMRA's authority were to be adopted. Like the Respondents, CropLife argues that the Applicants' interpretation would result in immediate contraventions of the Act following issuance of an amendment decision, which CropLife submits is an absurd result that could not have been intended by Parliament.

[86] CropLife supplements these arguments through submissions as to the steps and associated time frames required to implement registration amendments, involving development and approval of amended labels following issuance of a re-evaluation decision. It also submits that a transition period is required to educate users of relevant pest control products as to amended use and labelling, which it argues is consistent with the public education mandate that is prescribed by s 4(2) as an ancillary objective of the Act.

### (5) **Purpose of the Act**

[87] In assessing the merits of the parties' respective arguments on the application of the relevant principles of statutory interpretation, I have considered first the purpose of the Act. As

the Applicants submit, the statute's primary objective is expressly set out in s 4(1). That objective, which is also referenced in the recitals, is to prevent unacceptable risks to individuals and the environment from the use of pest control products. The Applicants also advance submissions as to the meaning of unacceptable risk, to which I will return later in these Reasons when considering the reference in s 21(2) to risks being acceptable. However, in terms of the Act's broader purpose, I accept the Applicants' submissions that it is a precautionary statute, designed to prevent harm before it occurs (see Canada, House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 1st Sess, No 79 (21 May 2011) at 1135 (Basil Stapleton (Legal Counsel, Department of Justice)), and that the purpose of federal pest management regulation is to protect Canadians and their environment from the risks associated with pesticides (see *House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 163 (8 April 2002) at 1600 (Hon Anne McLellan (Minister of Health))).

[88] The Respondents submit the purpose of the Act is to achieve a balance between various objectives and interests. I agree with that position, with an important qualification. It is clear the Act's primary objective is the prevention of unacceptable risks, and other objectives and interests are to be accounted for only to the extent consistent with that primary objective. Therefore, while the Act is intended to address interests including the Canadian economy, the objective of meeting society's need for food production, and the need for regulatory efficiency, its purpose is to do so in a manner which, above all else, protects Canadians and their environment from the risks associated with pesticides.

[89] Does the PMRA's interpretation of the Act, conferring upon it the authority to introduce a transition period in connection with an amendment, conflict with the Act's purpose, such that principles of purposive statutory interpretation represent a "knock-out punch" of the sort described in *Mason*? In my view, it does not. The PMRA concluded in the Decision that, overall, risk to pollinators is acceptable over the time period required to implement the mitigation measures that were the subject of the amendment. It also reasoned that, taking into account the effect the amendment would have upon growers, this transition period would allow for an orderly and safe implementation of these measures.

[90] I appreciate that the Applicants take issue with these conclusions, and I will address the parties' respective arguments on that issue later in these Reasons. However, I do not consider it inconsistent with the purpose of the Act, as described above, for the PMRA to have interpreted its mandate as including authority to phase-in the new conditions of registration, in the interests of a practicable and safe transition from the old regime to the new, provided the risks it was assessing were acceptable during the transition.

### (6) **Statutory Text and Context**

[91] I therefore turn to the text of the statutory provision at issue, s 21(2)(a), which I will assess in conjunction with contextual considerations derived from other provisions of the Act, as some of the parties' arguments, even in relation to the express language of s 21(2)(a), draw upon the language and effect of other provisions.

[92] It is common ground that there is no express authority in s 21(2)(a) for the PMRA to introduce a transition period. The Respondents' position is that the requisite authority is implicit in that section, because the section is silent on the point and because, taking into account several other provisions of the Act, the ability to phase in mitigation measures, introduced through an amendment following a re-evaluation, is a matter of practical necessity. In contrast, the Applicants argue that no such necessity arises and that it is clear from the express language in s 21(2)(a) that Parliament did not intend that the PMRA have authority to introduce a transition period.

(a) *Language of Section 21(2)(a)*

[93] Analyzing first its express language, s 21(2)(a) employs the concept of acceptable risks, which invokes the meaning prescribed by s 2(2), that health or environmental risks are acceptable if there is a reasonable certainty that no harm to human health, future generations, or the environment will result from exposure to or use of a product, taking into account its conditions or proposed conditions of registration. As s 2(2) refers to health or environmental risks, it is also useful to consider the definitions afforded to those terms in s 2(1):

| **Definitions** | **Définitions** |
|---|---|
| **2 (1)** The definitions in this subsection apply in this Act. | **2 (1)** Les définitions qui suivent s'appliquent à la présente loi. |
| […] | […] |
| ***environmental risk***, in respect of a pest control product, means the possibility of harm to the environment, including its biological diversity, resulting from exposure to or use of the product, taking into account its conditions or proposed conditions of registration. (*risque* | ***risque environnemental*** Risque de dommage à l'environnement, notamment à sa diversité biologique, résultant de l'exposition au produit antiparasitaire ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation |

*environnemental*)

[…]

***health risk***, in respect of a pest control product, means the possibility of harm to human health resulting from exposure to or use of the product, taking into account its conditions or proposed conditions of registration. (*risque sanitaire*)

proposées ou fixées. (*environmental risk*)

[…]

***risque sanitaire*** Risque pour la santé humaine résultant de l'exposition au produit antiparasitaire ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées. (*health risk*)

[94] The definition of "environmental risk" further imports the term "environment", which is defined as follows:

***environment*** means the components of the Earth and includes

**(a)** air, land and water;

**(b)** all layers of the atmosphere;

**(c)** all organic and inorganic matter and living organisms; and

**(d)** the interacting natural systems that include components referred to in paragraphs (a) to (c). (*environnement*)

***environnement*** Ensemble des conditions et éléments naturels de la terre, notamment :

**a)** l'air, l'eau et le sol;

**b)** les couches de l'atmosphère;

**c)** les matières organiques et inorganiques ainsi que les êtres vivants;

**d)** les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas a) à c). (*environment*)

[95] Notably, the term "harm", which is employed both in the definitions of "environmental risk" and "health risk" and in s 2(2) of the Act, is not itself defined. The Respondents therefore submit that it was Parliament's intention that the determination of what constitutes harm be a matter of scientific expertise left to the PMRA, the body responsible for regulating the sale and use of pesticides. I find this submission compelling, particularly as ss 7(7)(a) and 19(2)(a) (in relation to, respectively, applications for registration of a pest control product and re-evaluations

thereof) require the Minister to apply a scientifically-based approach in determining whether the health and environmental risks of a pest control product are acceptable.

[96] However, even accepting that the assessment of harm engages the PMRA's scientific expertise, one must still consider the statutorily prescribed standard or threshold against which that assessment is to be performed. While the Applicants argue that s 2(2) creates a "no harm" standard, because it expressly employs that phrase, it is necessary to consider the meaning of that phrase, both in the immediate context in which it is used and in the broader context of the Act. As the Minister submits, the phrase in its immediate context in s 2(2) is "…reasonable certainty that no harm […] will result […]." As such, the concept of acceptable risk does not require the complete elimination of all risk of harm.

[97] More significantly, in the broader context of the Act, the Respondents note that the definition of "environment" includes all living organisms. It must therefore include the living organisms, defined as "pests" in the Act, which are targeted by pest control products. The definition of "pest control products" in turn includes products used as a means for destroying pests. It is clear that the purpose of the Act is the regulation, not the prohibition, of pest control products. As such, the Respondents submits that "no harm" cannot be interpreted as meaning no harm to any individual organism in the environment, be it pest or pollinator, and that it was open to the PMRA to interpret the Act as requiring more than a risk of any harm to individual bees in order to find that a risk was unacceptable.

[98] I accept the logic of the Respondents' statutory interpretation argument. More to the point, I agree it is an available interpretation within the range of outcomes contemplated by the reasonableness standard of review. As explained below, it also appears this interpretation is indeed the underpinning of the PMRA's conclusion that risks during the transition period are acceptable.

[99] The Decision states that potential effects during the transition period include sublethal effects on colonies or solitary bees, but that affected pollinator populations are expected to recover following implementation of the additional restrictions provided by the amended conditions of registration. The PMRA further explains that recovery is expected, because risks to pollinators are geographically limited to areas where the relevant products are applied and areas adjacent to application sites. The presence of unaffected solitary bees, bumble bees, and honey bees in areas where products are not being used will further facilitate recovery, because unaffected bees in the environment can move back into areas where effects may have occurred.

[100] This analysis indicates that the PMRA interpreted the "no harm" standard prescribed by the Act as focusing upon pollinator populations rather than upon individual members or subsets thereof. I also note that, even in relation to such subsets, the PMRA describes the potential effects during the transition period as "sublethal." Given the logic of the statutory interpretation argument canvassed above, I do not find the language of s 21(2)(a), considered in conjunction with the other provisions directly applicable to its meaning, to represent a "knock-out punch" undermining the reasonableness of the PMRA's interpretation of its authority.

[101] In arriving at this conclusion, I have considered an argument advanced by the Applicants, in their reply oral submissions at the hearing of this application for judicial review, to the effect that the Court should consider the implications of applying the PMRA's interpretation to an assessment of risks to human health. In the case at hand, the PMRA's analysis involves an assessment of environmental risks. However, s 21(2)(a) also applies to consideration of health risks in the context of a re-evaluation. The Applicants submit that it would not be reasonable to interpret s 21(2)(a) to permit the PMRA to introduce a transition period for an amendment, on the basis that individuals suffering adverse health effects during the transition period would eventually recover.

[102] I find this argument by the Applicants compelling and, in the parlance of the *Mason* framework, it could be characterized as a "clue" pointing away from the interpretation adopted by the PMRA. However, I do not regard the argument as a "knock-out punch." The PMRA's interpretation of its authority at issue in the present case, in the context of environmental risk, does not necessarily mean that it would adopt a parallel interpretation in the context of health risk.

[103] I am conscious of the fact that the Applicants raised this argument for the first time in oral reply, as a result of which the Respondents had no opportunity to respond to it. Indeed, the Applicants' counsel himself observed that there are other provisions in the Act which relate specifically to health risks. I note, for instance, that s 19(2) prescribes relevant factors, including aggregate exposure and cumulative effects, margins of safety, and threshold effects, which are to be considered or applied when evaluating health risks in particular. In the absence of more

complete submissions on this argument, I do not regard it as logically conclusive that the PMRA would be required to apply the same interpretive analysis to both environmental and health risks.

[104] The Applicants also emphasize the PMRA's authority to amend a registration under s 21(2)(a) applies only where it arrives at two conclusions. The first is that the health or environmental risks or value of the product are not acceptable under the existing conditions of registration, and the second is that such risks or value would be acceptable "after the amendment". They argue that, against the backdrop of the first conclusion that risks are unacceptable under the existing conditions, the phrase "after the amendment" precludes the PMRA arriving at the second conclusion, being that the risks are acceptable pending the changes to the conditions of registration.

[105] Again, I find this is a sound argument, but it is not the only compelling interpretation of the relevant language. In concluding that the risk to pollinators will be acceptable over the time period required to implement the mitigation measures in the Decision, the PMRA clearly considered its conclusion to satisfy the requirements of s 21(2)(a). That is, it interpreted s 21(2)(a) as being satisfied by taking into account both the effect of the mitigation measures and the timeline for implementing those measures. Section 2(2) explains that conditions of registration and proposed conditions of registration are to be taken into account in assessing whether risks are acceptable. In my view, it is an available interpretation of the language in s 21(2)(a), as informed by s 2(2), that there can be a temporal component to a condition of registration. The PMRA considered whether the amendments would address relevant risks,

including taking into account the time before their effective date, and concluded that the overall effect of the new conditions of registration would render the relevant risks acceptable.

(b) *Doctrine of Jurisdiction by Necessary Implication*

[106] Turning to the Respondents' practical necessity argument, relying on the so-called "doctrine of jurisdiction by necessary implication," I note their reference to the succinct articulation of this doctrine in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 51:

> 51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.
>
> *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

[107] The parties' respective arguments in relation to this doctrine focus principally upon the labeling requirements resulting from an amendment to the registration of a pest control product. As the Respondents submit, labelling is integral to the pest management regulatory regime, because it is the means by which conditions of registration that impose restrictions upon handling and use of pest control products are communicated to users. The Respondents argue that, without the PMRA having the ability to afford time for preparation, approval, and distribution of amended labels following a re-evaluation decision that amends a registration, the regulatory regime becomes unworkable. They submit that, if the Applicants' interpretation of the PMRA's authority were accepted, not only would the effectiveness of the regime be frustrated, but participants in the pest control product industry and users of its products that would face prosecution for noncompliance with the Act. The Respondents argue that this would be an absurd result which cannot reflect Parliament's intention. This is also the argument to which the Intervener's submissions were principally directed.

[108] Submissions by the Respondents and the Intervener identify various prohibitions in s 6 of the Act, which they argue would be immediately contravened following a registration amendment decision, if the PMRA was required to make all amended conditions of registration effective immediately upon issuance of the decision. However, as the Intervener observes, it is not necessary to identify multiple circumstances of this sort in order to conclude that the doctrine of jurisdiction by necessary implication applies. Section 6(3) of the Act provides that no person shall store, import, export or distribute a pest control product that is not packaged and labelled in accordance with its conditions of registration. The Intervener focuses in particular upon the prohibition against storage of a product that is improperly labelled. In its submission, it is simply

not possible for distributors, retailers, and end-users of pest control products, which are storing quantities of a registered pest control product labelled in accordance with the original conditions of registration, to avoid non-compliance following issuance of a re-evaluation decision without a transitional period to allow re-labelling or proper disposal, as necessary.

[109] In response to these submissions, the Applicants take the position a person facing prosecution under s 6(3), in the circumstances identified by the Respondents and Intervener, would have a number of available defences. The Applicants submit that the word "store" in s 6(3) is capable of a narrow interpretation. They refer the Court to the definition of "store" in *Black's Law Dictionary*, 9th ed, being "[t]o keep (goods, etc.) in safekeeping for future delivery in an unchanged condition." The Applicants argue that merely having possession of a pest control product with an outdated label, without an intention to enter into commercial activity with that product in its existing condition, would not represent storage within the meaning of the s 6(3) prohibition. In the Applicants' submission, this argument is bolstered by the fact that the prohibited activities in s 6(1) include the terms "possess" and "store", meaning that storage must mean more than simple possession.

[110] The Applicants also note that s 57, which confers powers upon an inspector responsible for the administration and enforcement of the Act, includes enforcement mechanisms short of prosecution, such as ordering a person contravening the Act to take measures to prevent further contravention, such as modifying a product's labelling. Finally, the Applicants submit that a person facing prosecution in the circumstances raised by the Respondents and Intervener could mount a due diligence defence under s 69.1.

[111] I accept that the Act contemplates a measure of prosecutorial discretion, such that a person contravening prohibitions in s 6 may not face prosecution, and that there are defence arguments that could be mustered if a prosecution were pursued. However, these submissions do not persuade me that the Respondent's practical necessity argument fails to support the reasonableness of the PMRA's interpretation of its authority.

[112] In the Decision, the PMRA recognizes that growers will be required to change their pest management practices, including noting that pesticides have extensive and precise instructions and often require specialized application and safety equipment and training. The PMRA concludes that the 24-month transition period will allow for an orderly and safe implementation of the new restrictions, and should reduce the risk of product misuse or the improper disposal of products, as users switch to alternatives where required. The PMRA also notes this approach to be consistent with the Policy and with the practice of other international regulators.

[113] The Policy in turn describes the PMRA's practice, following a re-evaluation decision identifying need for an amendment, by which the required amendment of product labels is achieved. The PMRA notifies registrants of the need to amend their product registration and update product labels to reflect the required amendments, along with the required process and implementation timelines. The registrants then submit an application for amendment of the labels, for review and approval by the PMRA.

[114] As previously noted, the nature of the Decision is that it does not contain an express statutory interpretation analysis. As such, it does not include an express invocation of the

doctrine of jurisdiction by necessary application. Nor does it canvas arguments related to the s 6 prohibitions of the sort advanced by the parties on this judicial review. However, it is apparent from the portions of the Decision and Policy referenced above that the PMRA regarded a transition period as necessary to fulfil its mandate in connection with an amended registration. The arguments advanced by the Respondents and Intervener lend support to this conclusion, and the Applicants' arguments in response canvassed above do not constitute a "knock-out punch" of the sort that would render this conclusion unreasonable.

[115] The Applicants also argue that there is no need for a transition period, because the preparation and approval of amended labels could be performed during the re-evaluation process, perhaps contemporaneous with the s 28 public consultation period between the time of publication of the proposed decision and the issuance of the final decision. In support of this position, the Applicants submit that the PMRA's practice identified in the Policy, requiring registrants to submit an application for approval of draft amended labels following a re-evaluation decision, is not mandated by the Act or the *Pest Control Products Regulations*, SOR/2006-124 [the Regulations] made thereunder.

[116] As previously noted, the Policy contemplates a registrant submitting to PMRA an application for approval of label amendments, following a re-evaluation decision that requires such amendments. In oral argument, Syngenta submitted that the statutory authority for this process is found in s 6 of the Regulations, which prescribes the information that must be included in an application either to register, or to amend the registration of, a pest control product. Section 6(2) requires the applicant to include an electronic copy of the proposed label

with such an application. In response, the Applicants argue that s 6 of the Regulations relates only to amendments sought by a registrant proactively, through an application under ss 7 and 8 of the Act, and does not apply to an amendment resulting from a re-evaluation initiated by the PMRA.

[117] I agree with Applicants' position on this process point. Section 6 of the Regulations prescribes the information that must be included in "[a]n application to register or amend the registration of a pest control product [...]." In the Act, s 7 provides for an application to register or amend the registration of a pest control product, and s 8 provides the Minister the authority to determine the outcome of the application, including deciding to amend a registration. This authority, while governed by similar requirements, is distinct from the Minister's authority under s 21 to amend a registration following a re-evaluation. I therefore agree with the Applicants' characterization of the PMRA's process for amending labels following a s 21 decision as a process adopted through the Policy (perhaps because it parallels the statutory process applicable to a s 6 amendment application). It is not itself a statutorily prescribed process.

[118] Against this backdrop, the Applicants submit that the PMRA could potentially prepare the amended versions of relevant labels itself such that, once the public consultation process is complete, the approved amended labels could released as part of the final re-evaluation decision. In other words, if s 6(2) of the Regulations does not apply to the re-evaluation process, then there is no requirement that the registrant prepare the proposed form of label. Alternatively, during the public consultation process, the registrant could be required to submit draft labels consistent with

the draft decision, and the PMRA could approve these (or make necessary corrections) in the final decision.

[119] Again, I agree with the Applicants that s 6(2) of the Regulations does not represent an impediment to the PMRA adopting a process of the sort the Applicants propose. However, the Respondents also identify other aspects of the statutory scheme which they argue would conflict with such a process. In particular, the Minister submits it would be inconsistent with the s 28 public consultation requirement for the re-evaluation process to advance to the preparation of labels, based on the proposed decision, before the consultation process is conducted. Such an approach could be interpreted as pre-supposing that the consultation would not change the proposed decision. At a minimum, this approach has the potential to be very inefficient, if the work is done to prepare labels consistent with the proposed decision, and the draft label must subsequently be redrafted to conform with a different final decision resulting from comments received though the consultation.

[120] I find these arguments, particularly in relation to process efficiency, to be compelling. More importantly, conscious of the standard of review, I regard it as within the reasonable range for the PMRA to have adopted a process which avoids the potential inefficiency of amended labels being drafted and then revisited and which imposes on the registrant the task of preparing amended labels, consistent with, even if not required by, s 6 of the Regulations.

[121] If the process proposed by the Applicants served to eliminate the concerns about pest control product industry participants and users being in violation of the Act, upon issuance of a

re-evaluation decision amending a registration with immediate effect, this might narrow the range of process options reasonably available to the PMRA. However, even the Applicants' proposed process would not eliminate these concerns. Even if a final re-evaluation decision amending a registration was accompanied by an approved form of label, it would still take time to generate and distribute copies of this label to persons storing the relevant products. Those persons would still be in violation of the Act until there was time to physically re-label the products they are storing.

[122] Returning to the framework for application of the reasonableness standard of review to statutory interpretation, I find the practical necessities of the re-evaluation process, considered in the context of the doctrine of jurisdiction by necessary implication, to represent an argument favouring the interpretation of its authority adopted by the PMRA.

(c) *Section 21(5) of the Act*

[123] In considering the statutory context represented by other provisions of the Act that may inform the interpretation to be afforded to s 21(2)(a), all parties rely on s 21(5), reproduced earlier in these Reasons. The parties agree on the immediate effect of that subsection, which is to allow the Minister, when cancelling a registration following a re-evaluation, to allow certain ongoing activities in relation to existing stocks of the cancelled product. In other words, the Minister is expressly afforded authority to introduce measures of a transitional nature, but only following a cancellation. It is common ground that s 21(5) has no application following an amendment.

[124] The Applicants' argue that s 21(5)(a) favours their position, precisely because it does not apply to an amendment following a re-evaluation. In contrast, the Respondents argue that s 21(5)(a) favours their position. They submit it is illogical that the Minister would be provided with less (or indeed no) discretion to address transitional issues in the context of a registration amendment (where the risk can be mitigated sufficiently that it can be made acceptable), when such discretion is afforded in the context of the arguably more serious circumstance of a cancellation (where the risk cannot be made acceptable).

[125] In my view, the Respondents' argument is the far stronger. The Applicants have advanced no compelling submission as to why Parliament would provide the Minister with authority to allow transitional measures in connection with cancellations and not in connection with amendments. Clearly, the effect of s 21(5) is to provide such authority only in the context of cancellations. It would therefore be reasonable to conclude that similar authority is found elsewhere in the statute, through the ability to include temporal components in conditions of registration under s 21(2)(a), provided of course the PMRA concludes the effect of the conditions including the temporal components is to render the relevant risk acceptable.

[126] I find the context afforded by s 21(5)(a) to strongly favour the Respondents' position in defence of the reasonableness of the PMRA's interpretation of its statutory authority.

(d) *Sections 35 and 36 of the Act*

[127] I have considered each party's argument to the effect that the right to object to a decision, and the Minister's ability to suspend the decision pending adjudication of the objection, favours

its position on whether the Minister also has the authority to introduce a transition period in the decision itself. I find these arguments inconclusive. Therefore, the argument advanced by the Applicants does not undermine the reasonableness of the PMRA's interpretation of its authority.

(e) *Section 21(3) of the Act*

[128] I have left this set of arguments to the conclusion of this analysis, as I consider it to be perhaps the sharpest arrow in the Applicants' quiver. None of the arguments canvassed thus far dislodge the deference due to the PMRA's interpretation of the scope of its authority. However, I must consider whether the impact of the Applicants' argument in relation to s 21(3) represents a "knock-out punch" that has that effect.

[129] Section 21(3), reproduced earlier in these Reasons, entitles the Minister to "delay the effective date" of an amendment (or a cancellation), if both requirements of a conjunctive test are met. First, there must be no suitable alternative to the use of the relevant pest control product. Second, the Minister must consider that the health and environmental risks and value of the product are acceptable until the effective date of the amendment.

[130] The Applicants argue that the interpretation of the PMRA's authority under s 21(2)(a), for which the Respondents advocate, would make s 21(3) redundant. If s 21(2)(a) permits the PMRA to introduce a transition period in connection with an amendment, where it concludes (as in the Decision) that environmental risk is acceptable over the time period required to implement the mitigation measures, then there is no role for s 21(3), which requires <u>both</u> a conclusion to the same effect and a finding that no suitable alternative is available. As the Applicants observe, it is

presumed that legislatures avoid superfluous or meaningless words and do not pointlessly repeat themselves or speak in vain (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 211-212).

[131] I find this to be the strongest of the Applicants' arguments. If s 21(3) is indeed to be interpreted to apply as the Applicants submit, and if this is the only reasonable interpretation, then this argument could well be a knock-out punch. However, the Respondents submit that s 21(3) addresses different circumstances than the implied authority they argue is found in s 21(2). They argue that the implied authority to employ a transition period relates to the ability to fix the initial implementation date (i.e., the "effective date") of an amendment, while the s 21(3) power relates to an ongoing ability to delay that effective date once set. The Respondents note that the term "effective date," employed in s 21(3), is defined by *Black's Law Dictionary*, 10th ed, as "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect. This date sometimes differs from the date on which the instrument was enacted or signed. […]."

[132] The Applicants have advanced no compelling response to the Respondents' submission. I find that both parties' positions on the intended effect of s 21(3) represent available interpretations. It is not the Court's role in conducting a reasonableness review to choose between two available interpretations. When I consider these competing interpretations in the broader context of the other textual, contextual and purposive arguments canvassed above, I conclude that the Applicants' argument has been met by arguments of similar force in favour of the PMRA's interpretation of its authority. As such, my overall conclusion is that the PMRA's

interpretation is reasonable and should not be disturbed by the Court on judicial review. This conclusion applies to the PMRA's reliance upon that interpretation both in support of the Decision and in adopting the Policy.

C. ***If the PMRA does have such authority, did the PMRA nevertheless commit reviewable error in providing the transition period in the Decision, through either its adoption or its application of the test for acceptable risk employed in the Decision?***

[133] The Applicants take the position that, even if the PMRA does have the disputed authority to employ a transition period, it erred in its use of that authority in the present case. The Applicants submit both that the PMRA erred in the test that it adopted in exercising its authority, and that its decision is unsupported by the evidence before it. I have previously identified that these argument are all reviewable on a standard of reasonableness.

[134] In asserting that the PMRA erred in the test it adopted, the Applicants refer to the conclusion in the Decision that the risks identified "[…] are not considered imminent because they are not expected to cause irreversible harm over this period." The Applicants also rely on the following language in Section 6.2 of the Policy:

> When there are no imminent and serious risks to human health or environment, registrants will generally have up to two (2) years from the date of the decision to transition to selling the product with the newly amended labels.

[135] The Applicants submit that the Decision and Policy demonstrate the PMRA employing a "no irreversible harm" or "no imminent and serious risk" standard, which conflicts with the "no harm" standard prescribed by s 2(2) of the Act for the assessment of acceptable risk. The

Applicants argue that the standards employed by the PMRA are its own invention, possibly drawn from the language of s 20(2) of the Act. Section 20, which provides the Minister with particular authority to take interim measures in the course of conducting a re-evaluation, reads as follows:

| | |
|---|---|
| **Cancellation or amendment** | **Révocation ou modification** |
| **20 (1)** The Minister may cancel or amend the registration of a pest control product if | **20 (1)** Le ministre peut révoquer l'homologation ou la modifier dans les cas suivants : |
| **(a)** the registrant fails to satisfy a requirement under subsection 16(3) or 18(1) or paragraph 19(1)(a); or | **a)** le titulaire ne satisfait pas à une des exigences posées par les paragraphes 16(3) ou 18(1) ou l'alinéa 19(1)a); |
| **(b)** in the course of a re-evaluation or special review, the Minister has reasonable grounds to believe that the cancellation or amendment is necessary to deal with a situation that endangers human health or safety or the environment, taking into account the precautionary principle set out in subsection (2). | **b)** le ministre a des motifs raisonnables de croire que ces mesures sont nécessaires, dans le cadre du processus de réévaluation ou d'examen spécial, pour régler une situation qui présente un danger pour la santé ou la sécurité humaines ou pour l'environnement, en prenant en compte le principe de prudence. |
| **Precautionary principle** | **Principe de prudence** |
| **(2)** Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent adverse health impact or environmental degradation. | **(2)** En cas de risques de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard la prise de mesures rentables visant à prévenir toute conséquence néfaste pour la santé ou la dégradation de l'environnement. |

[136] The Applicants submit that the references to "irreversible" harm and "serious" risks, found in the Decision and the Policy, are reminiscent of terms employed in s 20(2) and suggest that the PMRA improperly imported tests from s 20 into its analysis under s 21.

[137] I disagree that the Decision demonstrates a conflation of the tests applicable under ss 20 and 21. The PMRA concludes that, overall, risk to pollinators is acceptable over the time period required to implement the mitigation measures. In arriving at this conclusion, the PMRA finds the risks identified are not considered imminent because they are not expected to cause irreversible harm over the transition period. I do not read this finding, as the Applicants contend, as adopting a particular standard or test. Rather, it represents a portion of the PMRA's analysis underlying its conclusion, that the risk to pollinators is acceptable as a result of the proposed amendments. I recognize that section 6.2 of the Policy does not expressly note the requirement to confirm that risks will be acceptable as a result of the proposed amendments. However, as the PMRA addressed that requirement in the portion of the Decision applying s 6.2 of the Policy, there is again no basis to conclude that the PMRA has adopted a practice that departs from the s 21(2) test.

[138] Finally, the Applicants submit that the PMRA's adoption of a 24-month transition period in the Decision is unsupported by the evidence before it. The Applicants argue there is no explanation in the Decision or the Policy as to why a two-year transition period is required to ensure orderly and safe implementation of the risk mitigation measures. They take the position that the timeframes contemplated by the Policy and underlying the length of the transition period in the Decision are unreasonable.

[139] As a threshold point on this issue, the Respondents take the position that such arguments are outside the parameters of this application for judicial review. The Minister notes that, in paragraph 57 of its Notice of Application in this matter, the Applicants state that this application

does not challenge the PMRA's scientific conclusions in the Decision. The Applicants respond that their arguments as to the reasonableness of the Decision do not rely on challenging its scientific conclusions, but rather assert that there is no evidence underlying this aspect of the Decision.

[140] The Respondents argue that the Applicants are simply challenging the sufficiency of the PMRA's reasons and that its analysis surrounding the transition period cannot be divorced from its scientific conclusions. The Respondents emphasize that, because of the parameters of the Notice of Application, neither party requested generation of a certified tribunal record that would include the scientific record underlying the Decision. As such, the Court does not have before it the record necessary to review the PMRA's scientific analysis.

[141] I agree with the Respondents' position on this point. In concluding that the risk of pollinators is acceptable over the transition period, the PMRA referred to potential effects on colonies or solitary bees during that period, expectations as to recovery following the transition period, and reasons for that expectation. I read this portion of the Decision as drawing upon the overall risk analysis, applying the scientifically-based approach prescribed by s 19(2), which is the subject of the Decision. The Applicants' argument that there is no evidentiary support for the PMRA's adoption of the transition necessarily involves a challenge to its scientific conclusions, which the Applicants' Notice of Application stated would not form part of this application for judicial review.

[142] Syngenta also submits that, even within the Proposed Decision itself, there are references to temporal components of the scientific analysis which demonstrate the existence of an evidentiary basis for the PMRA's conclusion on acceptable risk. For instance, the risk assessment takes into account both a product's degree of toxicity and the length of time of pollinator exposure to that product. There are also references to time periods within which recovery in pollinator colonies was observed following termination of a study. Even if I were to have concluded that the parameters of the Notice of Application did not prevent the Applicants from asserting a lack of evidentiary foundation for a transition period, the limited portions of the available record to which the Court has been referred would not support a finding that the Decision is unreasonable.

[143] The Applicants also take issue with the particular length of the transition period adopted by the PMRA, arguing that there is no evidentiary or analytical support for the conclusion that a 24-month period is required to ensure safe and orderly implementation of the risk mitigation measures. I note that the Policy, which provides that registrants will generally have a transition period of up to two years, was adopted after taking into account comments received during a 60-day public consultation. Those comments are not part of the record before the Court. More significantly, I am not convinced that the particular transition period length adopted by the PMRA represents a basis to challenge the reasonableness of a re-evaluation decision in the absence of an error in its assessment of acceptable risk. I have found that: (a) the PMRA reasonably interpreted the Act as providing it authority to employ a transition period in connection with an amendment; and (b) the PMRA applying the applicable test reasonably concluded, taking into account the transition period it adopted, that the amendment rendered the

risk to pollinators acceptable. There is therefore no basis for the Court to interfere with the Decision.

## VIII. **Conclusion and Costs**

[144] Having found that the impugned portion of the Decision is reasonable, this application for judicial review must be dismissed. There is therefore no need for the Court to consider the final issue, whether the Court should quash just the impugned portion of the Decision or the entire Decision.

[145] At the hearing of this application, the Applicants and Respondents requested a short period to make post-hearing written submissions on costs. Those parties subsequently provided such submissions on a joint basis, advising that they had agreed that: (a) costs of the motion to strike Dr. Tout's affidavit be awarded either to the Applicants or to Syngenta, in the all-inclusive amount of $2000.00, in the event of clear success on the motion; and (b) costs of the main application be awarded to the winning side in the amount of $8000.00 (representing, in the case of success by the Respondents, $4000.00 payable to each of the Respondents).

[146] I accept these submissions, and my Judgment will award costs accordingly. As provided in the Order that granted CropLife intervener status in this matter, it is neither entitled nor subject to an award of costs following this application.

## IX. Appendix A – Relevant Provisions

| ***Pest Control Products Act*, SC 2002, c 28** | **Loi sur les produits antiparasitaires, *LC 2002, ch 28*** |
|---|---|
| ***Interpretation*** | ***Définitions et interprétation*** |
| **Definitions** | **Définitions** |
| **2 (1)** The definitions in this subsection apply in this Act. | **2 (1)** Les définitions qui suivent s'appliquent à la présente loi. |
| […] | […] |
| ***environment*** means the components of the Earth and includes<br>**(a)** air, land and water;<br>**(b)** all layers of the atmosphere;<br>**(c)** all organic and inorganic matter and living organisms; and<br>**(d)** the interacting natural systems that include components referred to in paragraphs (a) to (c). (*environnement*) | ***environnement*** Ensemble des conditions et éléments naturels de la terre, notamment :<br>**a)** l'air, l'eau et le sol;<br>**b)** les couches de l'atmosphère;<br>**c)** les matières organiques et inorganiques ainsi que les êtres vivants;<br>**d)** les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas a) à c). (*environment*) |
| ***environmental risk***, in respect of a pest control product, means the possibility of harm to the environment, including its biological diversity, resulting from exposure to or use of the product, taking into account its conditions or proposed conditions of registration. (*risque environnemental*) | ***risque environnemental*** Risque de dommage à l'environnement, notamment à sa diversité biologique, résultant de l'exposition au produit antiparasitaire ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées. (*environmental risk*) |
| […] | […] |
| ***health risk***, in respect of a pest control product, means the possibility of harm to human health resulting from exposure to or use of the product, taking into account its conditions or proposed conditions of registration. (*risque sanitaire*) | ***risque sanitaire*** Risque pour la santé humaine résultant de l'exposition au produit antiparasitaire ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées. (*health risk*) |
| […] | […] |
| ***pest*** means an animal, a plant or other | ***parasite*** Animal, plante ou autre organisme |

organism that is injurious, noxious or troublesome, whether directly or indirectly, and an injurious, noxious or troublesome condition or organic function of an animal, a plant or other organism. (*parasite*)

***pest control product*** means

**(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. (*produit antiparasitaire*)

[…]

***Register*** means the Register of Pest Control Products established and maintained under section 42. (*Registre)*

qui est, directement ou non, nuisible, nocif ou gênant, ainsi que toute fonction organique ou condition nuisible, nocive ou gênante d'un animal, d'une plante ou d'un autre organisme. (*pest*)

***produit antiparasitaire***

**a)** Produit, substance ou organisme — notamment ceux résultant de la biotechnologie — constitué d'un principe actif ainsi que de formulants et de contaminants et fabriqué, présenté, distribué ou utilisé comme moyen de lutte direct ou indirect contre les parasites par destruction, attraction ou répulsion, ou encore par atténuation ou prévention de leurs effets nuisibles, nocifs ou gênants;

**b)** tout principe actif servant à la fabrication de ces éléments;

**c)** toute chose désignée comme tel par règlement. (*pest control product*)

[…]

***Registre*** Le Registre des produits antiparasitaires établi et tenu en application de l'article 42. (*Register)*

**Acceptable risks**

**(2)** For the purposes of this Act, the health or 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.

**Risques acceptables**

**(2)** Pour l'application de la présente loi, les risques sanitaires ou environnementaux d'un produit antiparasitaire sont acceptables s'il existe une certitude raisonnable qu'aucun dommage à la santé humaine, aux générations futures ou à l'environnement ne résultera de l'exposition au produit ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées.

[…]

***Mandate***

**Primary objective**

**4 (1)** In the administration of this Act, the Minister's primary objective is to prevent unacceptable risks to individuals and the environment from the use of pest control products.

**Ancillary objectives**

**(2)** Consistent with, and in furtherance of, the primary objective, the Minister shall

**(a)** support sustainable development designed to enable the needs of the present to be met without compromising the ability of future generations to meet their own needs;

**(b)** seek to minimize health and environmental risks posed by pest control products and encourage the development and implementation of innovative, sustainable pest management strategies by facilitating access to pest control products that pose lower risks and by other appropriate measures;

**(c)** encourage public awareness in relation to pest control products by informing the public, facilitating public access to relevant information and public participation in the decision-making process; and

**(d)** ensure that only those pest control products that are determined to be of acceptable value are approved for use in Canada.

[…]

[…]

***Mission***

**Objectif premier**

**4 (1)** Pour l'application de la présente loi, le ministre a comme objectif premier de prévenir les risques inacceptables pour les individus et l'environnement que présente l'utilisation des produits antiparasitaires.

**Objectifs connexes**

**(2)** À cet égard, le ministre doit :

**a)** promouvoir le développement durable, soit un développement qui permet de répondre aux besoins du présent sans compromettre la possibilité pour les générations futures de satisfaire les leurs;

**b)** tenter de réduire au minimum les risques sanitaires et environnementaux que présentent les produits antiparasitaires et d'encourager le développement et la mise en oeuvre de stratégies de lutte antiparasitaire durables et innovatrices — en facilitant l'accès à des produits antiparasitaires à risque réduit — et d'autres mesures indiquées;

**c)** sensibiliser le public aux produits antiparasitaires en l'informant, en favorisant son accès aux renseignements pertinents et en encourageant sa participation au processus de prise de décision;

**d)** veiller à ce que seuls les produits antiparasitaires dont la valeur a été déterminée comme acceptable soient approuvés pour utilisation au Canada.

[…]

**Prohibitions**

**Unregistered pest control products**

**6 (1)** No person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under this Act, except as otherwise authorized under subsection 21(5) or 41(1), section 48 or 51, any of sections 53 to 59 or the regulations.

[…]

**Packaging and labelling**

**(3)** Except as otherwise authorized under section 53, 53.3 or 54, no person shall store, import, export or distribute a pest control product that is not packaged and labelled in accordance with the regulations and, if it is registered, the conditions of registration.

[…]

**Misuse of pest control products**

**(5)** No person shall handle, store, transport, use or dispose of a pest control product in a way that is inconsistent with

**(a)** the regulations; or

**(b)** if the product is registered, the directions on the label recorded in the Register, subject to the regulations.

[…]

**Offence and punishment**

**(9)** A person who contravenes any provision of this section is guilty of an offence and liable

**Interdictions**

**Produits antiparasitaires non homologués**

**6 (1)** Sauf dans les cas autorisés par les paragraphes 21(5) et 41(1), les articles 48 et 51 et 53 à 59 et les règlements, il est interdit de fabriquer, de posséder, de manipuler, de stocker, de transporter, d'importer, de distribuer ou d'utiliser un produit antiparasitaire non homologué en vertu de la présente loi.

[…]

**Emballage et étiquetage**

**(3)** Sauf dans les cas autorisés par les articles 53, 53.3 et 54, il est interdit de stocker, d'importer, d'exporter ou de distribuer un produit antiparasitaire s'il n'est pas emballé et étiqueté conformément aux règlements et, dans le cas où il est homologué, aux conditions d'homologation.

[…]

**Utilisation non conforme**

**(5)** Il est interdit de manipuler, de stocker, de transporter ou d'utiliser un produit antiparasitaire, ou d'en disposer, d'une manière non conforme :

**a)** soit aux règlements;

**b)** soit, si le produit est homologué, aux instructions de l'étiquette figurant dans le Registre, sous réserve des règlements.

[…]

**Infraction et peine**

**(9)** Quiconque contrevient à toute disposition du présent article commet une infraction et encourt, sur déclaration de culpabilité :

**(a)** on summary conviction, to a fine of not more than $200,000 or to imprisonment for a term of not more than six months, or to both; or

**(b)** on conviction on indictment, to a fine of not more than $500,000 or to imprisonment for a term of not more than three years, or to both.

***Registration of Pest Control Products***

***Applications for Registration or Amendment***

**Application to Minister**

**7 (1)** An application to register a pest control product or to amend the product's registration must be made to the Minister in the form and manner directed by the Minister and must include any information or other thing that is required by the regulations to accompany the application.

[…]

**Evaluation of pest control product**

**(3)** If the Minister is satisfied that the application has been made in accordance with subsection (1), (2) or (2.1), the Minister shall

**(a)** in accordance with the Regulations, if any, conduct any evaluations that the Minister considers necessary with respect to the health or environmental risks or the value of the pest control product;

**(b)** expedite evaluations with respect to a pest control product that may reasonably be expected to pose lower health or environmental risks; and

**(c)** carry out any consultation required by section 28.

**a)** par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal de six mois, ou l'une de ces peines;

**b)** par mise en accusation, une amende maximale de 500 000 $ et un emprisonnement maximal de trois ans, ou l'une de ces peines.

***Homologation des produits antiparasitaires***

***Demande d'homologation ou de modification d'homologation***

**Demande au ministre**

**7 (1)** Les demandes d'homologation ou de modification d'homologation d'un produit antiparasitaire sont présentées au ministre, selon les modalités qu'il précise, et doivent être accompagnées des renseignements et autres éléments prévus par règlement.

[…]

**Évaluation du produit**

**(3)** Si le ministre est convaincu que la demande a été faite conformément aux paragraphes (1), (2) ou (2.1), il procède :

**a)** en conformité avec les éventuels règlements, aux évaluations qu'il juge nécessaires en ce qui concerne la valeur du produit ou les risques sanitaires ou environnementaux qu'il présente;

**b)** à l'exécution rapide des évaluations qui concernent un produit antiparasitaire dont il peut raisonnablement prévoir des risques sanitaires ou environnementaux réduits;

**c)** s'il y a lieu, aux consultations exigées par l'article 28.

[…]

**(7)** In evaluating the health and environmental risks of a pest control product and in determining whether those risks are acceptable, the Minister shall

**(a)** apply a scientifically based approach; and

[…]

**Registration or amendment**

**8 (1)** If 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, the Minister shall register the product or amend its registration in accordance with the Regulations, if any, by

**(a)** specifying the conditions relating to its manufacture, handling, storage, transport, import, export, packaging, distribution, use or disposition, including conditions relating to its composition, and, subject to subsection (2), the conditions relating to its label;

[…]

**Denial of application**

**(4)** The Minister shall deny an application referred to in subsection 7(1) if the Minister does not consider that the health or environmental risks of a pest control product are, or its value is, acceptable.

[…]

***Re-evaluation and Special Review***

[…]

**(7)** Lorsqu'il évalue les risques sanitaires et environnementaux d'un produit antiparasitaire et détermine s'ils sont acceptables, le ministre :

**a)** adopte une approche qui s'appuie sur une base scientifique;

[…]

**Délivrance et modification de l'homologation**

**8 (1)** Si, au terme des évaluations et des consultations requises, il conclut que la valeur du produit antiparasitaire ainsi que les risques sanitaires et environnementaux qu'il présente sont acceptables, le ministre homologue le produit ou apporte les modifications demandées, en conformité avec les éventuels règlements, et pour ce faire :

**a)** il détermine les conditions relatives à la fabrication, à la manipulation, au stockage, au transport, à l'importation, à l'exportation, à l'emballage, à la distribution, à l'utilisation ou à la disposition du produit, notamment celles relatives à sa composition, et, sous réserve du paragraphe (2), les conditions relatives à son étiquette;

[…]

**Rejet de la demande**

**(4)** Le ministre rejette la demande visée au paragraphe 7(1) s'il n'arrive pas aux conclusions visées au paragraphe (1).

[…]

***Réévaluation et examen spécial***

**Minister's discretion to initiate re-evaluation**

**16 (1)** The Minister may initiate the re-evaluation of a registered pest control product if the Minister considers that, since the product was registered, there has been a change in the information required, or the procedures used, for the evaluation of the health or environmental risks or the value of pest control products of the same class or kind.

[…]

**Scientific approach**

**19 (2)** In evaluating the health and environmental risks of a pest control product and in determining whether those risks are acceptable, the Minister shall

**(a)** apply a scientifically based approach; and

**(b)** in relation to health risks,

**(i)** among other relevant factors, consider available information on aggregate exposure to the pest control product, namely dietary exposure and exposure from other non-occupational sources, including drinking water and use in and around homes and schools, and cumulative effects of the pest control product and other pest control products that have a common mechanism of toxicity,

**(ii)** apply appropriate margins of safety to take into account, among other relevant factors, the use of animal experimentation data and the different sensitivities to pest

**Réévaluation**

**16 (1)** Le ministre peut procéder à la réévaluation d'un produit antiparasitaire homologué s'il estime que, depuis son homologation, il y a eu un changement en ce qui touche les renseignements exigés ou la procédure à suivre pour l'évaluation de la valeur des produits de même catégorie ou de même nature ou des risques sanitaires ou environnementaux qu'ils présentent.

[…]

**Approche scientifique**

**19 (2)** Lorsqu'il évalue les risques sanitaires et environnementaux d'un produit antiparasitaire et détermine s'ils sont acceptables, le ministre :

**a)** adopte une approche qui s'appuie sur une base scientifique;

**b)** à l'égard des risques sanitaires :

**(i)** prend notamment en considération les renseignements disponibles sur l'exposition globale au produit antiparasitaire, soit l'exposition alimentaire et l'exposition d'autres sources ne provenant pas du milieu de travail, notamment l'eau potable et l'utilisation du produit dans les maisons et les écoles et autour de celles-ci, ainsi que les effets cumulatifs du produit antiparasitaire et d'autres produits antiparasitaires ayant un mécanisme de toxicité commun,

**(ii)** applique des marges de sécurité appropriées pour prendre notamment en compte l'utilisation de données d'expérimentation sur les animaux et les différentes

control products of major identifiable subgroups, including pregnant women, infants, children, women and seniors, and

**(iii)** in the case of a threshold effect, if the product is used in or around homes or schools, apply a margin of safety that is ten times greater than the margin of safety that would otherwise be applicable under subparagraph (ii) in respect of that threshold effect, to take into account potential pre- and post-natal toxicity and completeness of the data with respect to the exposure of, and toxicity to, infants and children, unless, on the basis of reliable scientific data, the Minister has determined that a different margin of safety would be appropriate.

[…]

**Cancellation or amendment**

**20 (1)** The Minister may cancel or amend the registration of a pest control product if

**(a)** the registrant fails to satisfy a requirement under subsection 16(3) or 18(1) or paragraph 19(1)(a); or

**(b)** in the course of a re-evaluation or special review, the Minister has reasonable grounds to believe that the cancellation or amendment is necessary to deal with a situation that endangers human health or safety or the environment, taking into account the precautionary principle set out in subsection (2).

sensibilités aux produits antiparasitaires des principaux sous-groupes identifiables, notamment les femmes enceintes, les nourrissons, les enfants, les femmes et les personnes âgées,

**(iii)** dans le cas d'un effet de seuil et si le produit est utilisé dans les maisons ou les écoles ou autour de celles-ci, applique une marge de sécurité supérieure de dix fois à celle qui serait autrement applicable en vertu du sous-alinéa (ii) relativement à cet effet de seuil pour tenir compte de la toxicité prénatale et postnatale potentielle et du degré de complétude des données d'exposition et de toxicité relatives aux nourrissons et aux enfants, à moins que, sur la base de données scientifiques fiables, il ait jugé qu'une marge de sécurité différente conviendrait mieux.

[…]

**Révocation ou modification**

**20 (1)** Le ministre peut révoquer l'homologation ou la modifier dans les cas suivants :

**a)** le titulaire ne satisfait pas à une des exigences posées par les paragraphes 16(3) ou 18(1) ou l'alinéa 19(1)a);

**b)** le ministre a des motifs raisonnables de croire que ces mesures sont nécessaires, dans le cadre du processus de réévaluation ou d'examen spécial, pour régler une situation qui présente un danger pour la santé ou la sécurité humaines ou pour l'environnement, en prenant en compte le principe de prudence.

**Precautionary principle**

**(2)** Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent adverse health impact or environmental degradation.

[…]

**Confirmation**

**21 (1)** If the Minister considers that the health and environmental risks and the value of a pest control product are acceptable after any required evaluations and consultations have been completed, the Minister shall confirm the registration.

**Amendment or cancellation**

**(2)** If the Minister does not consider that the health or environmental risks or value of a pest control product are acceptable, the Minister shall

**(a)** amend the registration if the Minister considers that the health and environmental risks and value of the product would be acceptable after the amendment; or

**(b)** cancel the registration.

**Delay of effective date**

**(3)** The Minister may delay the effective date of the amendment or cancellation if

**Principe de prudence**

**(2)** En cas de risques de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard la prise de mesures rentables visant à prévenir toute conséquence néfaste pour la santé ou la dégradation de l'environnement.

[…]

**Confirmation**

**21 (1)** Si, au terme des évaluations et des consultations requises, il conclut que la valeur du produit antiparasitaire et les risques sanitaires et environnementaux qu'il présente sont acceptables, le ministre confirme l'homologation.

**Modification ou révocation**

**(2)** Dans le cas où il n'arrive pas à cette conclusion, le ministre modifie l'homologation s'il estime qu'à la suite de la modification la valeur du produit et les risques sanitaires et environnementaux qu'il présente seraient acceptables, ou il la révoque.

**Report de la modification ou de la révocation**

**(3)** Le ministre peut différer la modification ou la révocation de l'homologation lorsqu'il n'existe aucune solution de rechange satisfaisante à l'utilisation du produit antiparasitaire et qu'il juge que la valeur du produit et les risques sanitaires et environnementaux qu'il présente sont, jusqu'à

la date de modification ou de révocation, acceptables.

**(a)** no suitable alternative to the use of the pest control product is available; and

**(b)** the Minister considers that the health and environmental risks and value of the product are acceptable until the effective date of the amendment or cancellation.

[…]

[…]

**Continued possession, etc., of existing stocks**

**(5)** When cancelling the registration of a pest control product under this section or any other provision of this Act, the Minister may

**(a)** allow the continued possession, handling, storage, distribution and use of stocks of the product in Canada at the time of cancellation, subject to any conditions, including disposal procedures, that the Minister considers necessary for carrying out the purposes of this Act;

**(b)** require the registrant to recall and dispose of the product in a manner specified by the Minister; or

**(c)** seize and dispose of the product.

**Produits existant à la date de révocation**

**(5)** Lorsqu'il révoque l'homologation, en application du présent article ou de toute autre disposition de la présente loi, le ministre peut :

**a)** soit, aux conditions qu'il estime nécessaires pour l'application de la présente loi — notamment quant à la façon d'éliminer le produit — autoriser que se poursuivent la possession, la manipulation, le stockage, la distribution ou l'utilisation des stocks du produit se trouvant au Canada à la date de la révocation;

**b)** soit obliger le titulaire à faire le rappel du produit et à procéder à sa disposition de la manière qu'il précise;

**c)** soit confisquer le produit et procéder à sa disposition.

[…]

[…]

**Minister to consult**

**28 (1)** The Minister shall consult the public and federal and provincial government departments and agencies whose interests and concerns are affected by the federal regulatory system before making a decision

**(a)** to grant or deny an application

**Consultation publique**

**28 (1)** Le ministre consulte le public et les ministères et organismes publics fédéraux et provinciaux dont les intérêts et préoccupations sont en jeu avant de prendre une décision concernant :

**a)** l'acceptation ou le rejet :

**(i)** to register a pest control product that is or contains an unregistered active ingredient, or

**(ii)** to register, or amend the registration of, a pest control product if the Minister considers that registration or amendment of the registration may result in significantly increased health or environmental risks;

**(b)** about the registration of a pest control product on completion of a re-evaluation or special review; or

**(c)** about any other matter if the Minister considers it in the public interest to do so.

[…]

***Compliance Measures***

**Inspector may order measures**

**57 (1)** If an inspector has reasonable grounds to believe that a person has contravened this Act or the regulations, he or she may order the person

**(a)** to stop or shut down any activity or thing involved in the contravention; and

**(b)** to take any other measures that the inspector considers necessary to prevent further contravention, including

**(i)** modifying a pest control product or its labelling or disposing of the product so as to comply with this Act and the regulations, and

**(ii)** manufacturing, handling,

**(i)** d'une demande d'homologation d'un produit antiparasitaire qui est ou contient un principe actif non homologué,

**(ii)** d'une demande d'homologation ou de modification de l'homologation d'un produit antiparasitaire, s'il est d'avis que l'homologation ou sa modification risque d'augmenter sensiblement les risques sanitaires ou environnementaux;

**b)** l'homologation d'un produit après une réévaluation ou un examen spécial;

**c)** toute autre question, s'il juge qu'il est dans l'intérêt public de tenir une telle consultation.

[…]

***Mesures pour faire observer la loi***

**Mesures requises par l'inspecteur**

**57 (1)** S'il a des motifs raisonnables de croire qu'il y a eu contravention à la présente loi ou aux règlements, l'inspecteur peut ordonner au contrevenant :

**a)** d'une part, d'arrêter ou de cesser les activités ou choses qui font l'objet de la contravention;

**b)** d'autre part, de prendre les correctifs qui, à son avis, sont nécessaires pour prévenir toute récidive, notamment :

**(i)** modifier un produit antiparasitaire ou son étiquetage, ou en disposer, de façon à se conformer à la présente loi ou aux règlements,

**(ii)** fabriquer, manipuler, stocker,

storing, transporting, importing, exporting, packaging, labelling, distributing or using a registered pest control product in accordance with the conditions of registration.

transporter, importer, exporter, emballer, étiqueter, distribuer ou utiliser un produit homologué en conformité avec les conditions d'homologation.

[…]

[…]

**Due diligence**

**69.1** A person is not to be found guilty of an offence under this Act — other than an offence under section 30 or subsection 33(8), 40(1) or 44(7), an offence under subsection 47(4) as it relates to a contravention of subsection 47(3) or an offence under subsection 68(3) or 70(3) — if they establish that they exercised all due diligence to prevent the commission of the offence.

**Disculpation — précautions voulues**

**69.1** Nul ne peut être déclaré coupable d'une infraction prévue par la présente loi — autre qu'une infraction prévue à l'article 30 ou aux paragraphes 33(8), 40(1) ou 44(7), une infraction prévue au paragraphe 47(4) en ce qui concerne une contravention au paragraphe 47(3) ou une infraction prévue aux paragraphes 68(3) ou 70(3) — s'il prouve qu'il a pris toutes les précautions voulues pour prévenir sa perpétration.

***Pest Control Products Regulations*, SOR/2006-124**

***Application for Registration***

**Electronic copy of label**

**6 (2)** The applicant must include an electronic copy of the proposed label with every application to register a pest control product and with any application to amend the registration of a pest control product that would result in a change to the label.

**Règlement sur les produits antiparasitaires, *DORS/2006-124***

***Demande d'homologation***

**Copie électronique de l'étiquette**

**6 (2)** Le demandeur joint à la demande d'homologation une copie électronique de l'étiquette proposée pour le produit antiparasitaire. Il fait de même pour la demande de modification d'homologation, si celle-ci entraîne une modification de l'étiquette.

***Federal Courts Rules*, SOR/98-106**

**Content of affidavits**

**81 (1)** Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for

**Règles des Cours fédérales, *DORS/98-106***

**Contenu**

**81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête

summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

– autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

**Affidavits on belief**

**(2)** Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

**Poids de l'affidavit**

**(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

**JUDGMENT IN T-784-19**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.

2. The Applicants shall pay the Respondent, Syngenta Canada Inc., costs in the all-inclusive amount of $2000.00 in relation to the Applicants' motion to strike the affidavit of Dr. Tout.

3. The Applicants shall also pay costs in relation to this application for judicial review in the all-inclusive amount of $8000.00, as follow:

    a. $4000.00 to the Respondent, Syngenta Canada Inc., and

    b. $4000.00 to the Respondent, the Minister of Health.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-784-19 |
| **STYLE OF CAUSE:** | DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ÉQUITERRE, and WILDERNESS COMMITTEE v THE MINISTER OF HEALTH and SYNGENTA CANADA and CROPLIFE CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 5-6, 2019 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | DECEMBER 18, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Robert Wright<br>Sue Tan | FOR THE APPLICANTS |
| Andrea Bourke<br>Karen Lovell | FOR THE RESPONDENTS<br>(Representing Minister of Health) |
| John P. Brown<br>Stephanie Sugar | FOR THE RESPONDENTS<br>(Representing Syngenta Canada Inc.) |
| Martin Masse<br>Benedict Wray | FOR THE INTERVENER<br>(Representing CropLife Canada) |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Ecojustice<br>Toronto, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENTS<br>(Representing Minister of Health) |
| McCarthy Tetrault LLP<br>Toronto, Ontario | FOR THE RESPONDENTS<br>(Representing Syngenta Canada Inc.) |
| Norton Rose Fulbright<br>Ottawa, Ontario | FOR THE INTERVENER<br>(Representing CropLife Canada) |