

April 30, 2002

Ms. Bonnie Brown, M.P.
Chair, Standing Committee on Health
House of Commons
Room 642, Wellington Bldg
Ottawa, Ontario
K1A 0A6

Dear Ms. Brown,

RE: Bill C-53 - *Pest Control Products Act*

I write on behalf of the Canadian Bar Association's National Environmental Law Section (CBA Section) in regard to Bill C-53, *Pest Control Products Act* (PCPA).

The CBA Section has previously commented on a range of national environmental legislation, including the *Canadian Environmental Protection Act* (CEPA) which, among other matters, regulates the life cycles of toxic substances.

The stated intention of the Bill is to improve protection of health and the environment by regulating products used for the control of pests. The CBA Section supports this overarching goal and appreciates the opportunity to comment on Bill C-53. The CBA Section offers its recommendations for improving the legislation so that Canadians can enjoy adequate health and safety protection, while also having access to newer and safer pest control products.

While we support the government's initiative to improve the PCPA, we believe that the proposed legislation falls short of its stated objective in key areas. For example, the legislation provides insufficient accountability of the regulatory agency to either the public or industry. Further, the PCPA does not align with similar health and safety legislation in other jurisdictions, including the United States' *Food Quality Protection Act*. Our comments are intended to address these and other issues to ensure that Bill C-53 is as effective as possible.

Precautionary Principle

In September, 2001, the Canadian government issued a discussion paper entitled *A Canadian Perspective on the Precautionary Approach*, containing an extensive discussion of the origin and application of the precautionary principle in Canada:

Canada supports the statement in Principle 15 of the “1992 Rio Declaration on Environment and Development”,

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capability. 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 environmental degradation.

This language, and the approach it represents, is consistent with Canadian practice in the field of environmental protection and the approach is increasingly reflected in Canadian environmental legislation, such as the *Canadian Environmental Protection Act*. Canada also has a long-standing history of implementing the precautionary approach in science-based programs of health and safety, and natural resources conservation.

The discussion paper goes on to explain that the precautionary approach or principle recognizes that the absence of full scientific certainty should not be reason to postpone decisions where there is a risk of serious or irreversible harm. However, care is required when making such decisions, particularly when there is significant scientific uncertainty about the apprehended risk of serious or irreversible harm. Canada's flexible application of the precautionary approach has allowed it to respond to particular circumstances. While the application of a precautionary approach is often driven by specific circumstances and factors, broad principles apply to all situations. Those “guiding principles” must support overall consistency in applying a precautionary approach to science-based risk decision-making in government, but not direct decision-makers to act in a manner inconsistent with their legal authority.

The *Rio Declaration* and federal environmental legislation such as CEPA support the use of the precautionary principle to avoid the causation of harm. The preamble in Bill C-53 implicitly supports the precautionary principle, but does not explicitly refer to it, although section 22 does include a specific reference. Given its overriding importance to this legislation, the CBA Section supports the explicit inclusion to and endorsement of the precautionary principle in the preamble to the PCPA.

Mandate

The definition for “value” in section 2 of Bill C-53 provides that the Minister will consider the efficacy, health, safety and environmental benefits, in addition to the social and economic impact of the product. We are concerned that this could allow the Minister to make commercial decisions in regard to products, taking the assessment out of the scientific realm and placing it squarely in the commercial and political arena.

It is debatable whether the government should address such issues of commercial viability at all, rather than leaving them to the market. If the PCPA is to incorporate economic, as well as safety and efficacy considerations into risk assessment, this should be clearly stated and very specifically limited. In our view, a legislative shift to require the Minister to balance economic considerations with health and environmental concerns should incorporate more precise guidance on how that balance is to be achieved.

Biotechnology

The current *Pest Control Products Act*¹ definition of a “control product” does not include biotechnology, given that it is only very recent technology. Biotechnology was subsequently added to the definition of a control product in the PCPA Regulations. The CBA Section supports Bill C-53's proposed integration of biotechnology into the PCPA itself, using the same definition as that in CEPA.

However, it is unclear how the Pest Management Regulatory Agency (PMRA) will regulate these products. Currently, the Canadian Food Inspection Agency (CFIA) regulates herbicide tolerant crops. It should be clarified whether and how the CFIA and the PMRA are to operate together, if that is the intention, or whether the PMRA is to have any role at all in evaluating these biotechnology products.

Advisory Council

Section 5(1) of Bill C-53 states:

In carrying out duties under this Act, the Minister may establish an advisory council of persons whose interests and concerns are affected by this Act, and may specify the functions of the council and the means by which it is to perform those functions.

We are concerned by the absence of any specified need for scientific expertise or other qualifications in the persons selected for the advisory council. To have the necessary credibility, the advisory council should comprise experts in the field, although those experts may represent differing policy perspectives. The membership of the advisory council should not be seen as biased, either towards government, industry or particular public interest perspectives.

Reduced Risk Products

The preamble to Bill C-53 provides that the Minister must take into account the goals of sustainable pest management 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. Given this expansive agenda and the proscriptive nature of the proposed legislation, the required details and timelines for establishing a process for reduced risk products ought to be provided. The details should be set out in the PCPA itself to ensure a more effective review and opportunity for public consultation than if promulgated through the regulations. While an expedited review is advantageous for reduced risk and safer

¹ R.S.C. 1985, c. P-9.

pesticides, a proper assessment process for all products should still be clearly outlined in the PCPA.

Public Consultation

Section 28 of Bill C-53 prescribes public consultation for:

- a) registration of a new active ingredient or an amended registration that may significantly increase risks;
- b) completion of a re-evaluation or a special review;
- c) any other matter the Minister considers to be in the public interest.

The CBA Section has consistently supported broad and effective public consultation, particularly for important legislation affecting human health and the environment.² In our view, the consultation process proposed in Bill C-53 is too limited.

The Canadian PMRA is attempting to harmonize its policies with the U.S. Environmental Protection Agency (EPA), given that most companies now operate in a North American market. The EPA solicits public comments in analogous situations. Given this, we suggest that the processes should be similar, or at least not needlessly different. In the U.S., preliminary human health and ecological risk assessments are sent by the EPA to registrants of the pesticide and the U.S. Department of Agriculture (USDA) for a 30-day review. Any errors that EPA may have made in developing its preliminary assessment of the pesticide's risks are addressed. EPA then summarizes and considers comments from registrants and USDA. Following that, the agency opens a Public Docket for the pesticide. The EPA then provides a 60-day public review and comment period after which a summary is sent to the USDA for review and public meetings and technical briefings are held. Risk management proposals follow, allowing for a further 60-days for public comment.

Accountability and Timelines

In our view, the Bill lacks clear and measurable timelines for process. The CBA Section has previously stressed the need for Ministerial accountability and transparent legislation, including timelines where appropriate. Methods of accountability by the Minister must be visible, and the processes followed by the agency in dealing with the evaluation of pest products must be transparent. This accountability and transparency should apply for the benefit of both industry

² For example, see the Section's previous submissions supporting broad and effective participation in the *Canadian Environmental Protection Act*, the *Canadian Environmental Assessment Act*, and the proposed *Species at Risk Act*. See also past Section resolutions adopted by CBA National Council, attached.

and the public at large. We recommend that time limits be established for public consultation and decision-making and that the disclosure of non-confidential information in the public registry be mandated.

Public Registry and Transparency

In our view, the public registry proposed in section 42 of Bill C-53 is not sufficiently comprehensive. Further, we believe that the particulars of the registry and its contents should be set out in the PCPA itself, rather than the regulations. An effective and complete public registry is necessary to facilitate public information and consultation. The CBA supports extensive public registries under both CEPA and the *Canadian Environmental Assessment Act* as an impartial mechanism for providing all those effected with access to pertinent information. The PCPA should similarly provide for a complete public registry system with disclosure of all non-confidential documents, including government documents.

Confidential Business Information

Bill C-53 gives the Minister discretion to disclose most, if not all, of the submitted information. The challenge is to balance a company's needs for the protection of proprietary information with the public's need for full, timely and accurate disclosure. Levels of disclosure may also be elevated in response to levels of public concern. Section 43 addresses disclosure of confidential business information by the Minister:

- (6) If the Minister decides that information designated under subsection (4) or (5) does not meet the requirements of that subsection, the information is not confidential business information for the purposes of this Act.
- (7) If the Minister decides that designated information is not confidential business information, the Minister shall give written notice to the person who provided the information of the decision and the reasons for it.

There does not appear to be any recourse for registrants to object to a decision of the Minister after having received notice of that decision. In addition, it appears that the public has no right to oppose the finding of "confidentiality". The CBA Section believes that these deficiencies should be addressed. We suggest that the disclosure of information be addressed in the same manner as is set out in the *Access to Information Act*.

Contravention of regulations and related provisions

Section 75(2) allows a certificate of analysis to be unsigned and yet still be valid for a determination of wrongdoing. Any document tracing for evidentiary proceedings should have

the signature on the document and the accused should be able to obtain the attendance of the analyst without applying for leave of the court. This is a matter of simple procedural fairness to the accused.

Conclusion

The CBA National Environmental Law Section appreciates the opportunity to comment on Bill C-53. We support the federal government's initiative to re-enact the *Pest Control Products Act* in accordance with our various recommendations.

Yours truly,

A handwritten signature in black ink, reading "John Stefaniuk". The signature is written in a cursive style with a large, looping initial "J" and a horizontal line across the middle of the name.

John Stefaniuk
Chair, National Environmental Law Section

Encls. - CBA Resolutions

86-21-A

FEDERAL ROLE IN ENVIRONMENTAL PROTECTION

Environmental Law Section

CARRIED

WHEREAS accounts of an un-released report for the Nielsen Task Force (the Desfosses report) cast doubt on federal jurisdiction over environmental issues and proposed the dismantling of Environment Canada's regulatory and advocacy functions; and WHEREAS it is reported that such down grading of Environment Canada

is happening already; and

WHEREAS numerous studies and opinion polls have shown that Canadians place a high priority on protection of a clean environment; and

WHEREAS Environment Canada plays an increasingly important regulatory and advocacy role in areas such as acid rain and other air pollution, Great Lakes water quality, and PCBs and other toxics; and

WHEREAS the Royal Commission on the Economic Union and Development

Prospects for Canada (the MacDonald Commission) anticipated "a quantum leap in the size of the environmental task facing Canadians" and concluded that "the environmental field is one in which greater government intervention will prove to be necessary";

and

WHEREAS the original report on Environment Canada for the Nielsen Task Force called for "a stronger commitment of the federal government to environmental issues and a more effective role at the

federal level for the Department of the Environment in addressing these issues"; and

WHEREAS a strong federal role in environmental issues has been advocated by other reports such as:

- * Crimes Against the Environment, Working Paper No. 44 of the Law Reform Commission of Canada;
- * Soil At Risk: Canada' Eroding Future, A Report on Soil Conservation by the Standing Committee on Agriculture, Fisheries, and Forestry to the Senate of Canada;
- * Current of Change: Final Report, Inquiry on Federal Water Quality;

THEREFORE, BE IT RESOLVED THAT:

- (1) the Canadian Bar Association affirms its support for strong federal leadership by Environment Canada on environmental issues facing Canadians;
- (2) the Canadian Bar Association appoint a Task Force to be chaired by a member of the executive of the Environmental Law Section to advise the Executive Committee of the Canadian Bar Association on a plan of action to study the federal regulatory and administrative mechanisms for environmental protection in Canada, with particular

- reference to the respective constitutional roles of the federal and provincial governments;
- (3) the Canadian Bar Association calls for immediate public release of the Desfosses report to allow full public discussion on the appropriate role of the federal Department of the Environment.

FEDERAL ACTION FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE
DEVELOPMENT

Environmental Law Section
CARRIED AS AMENDED

WHEREAS The Canadian Bar Association at its Annual Meeting in Vancouver in August 1989 confirmed a strong commitment to promoting sustainable development in Canada, resolving to:

- (1) endorse the goal of sustainable development;
- (2) commit itself to ensure that its law reform activities promote the goal of sustainable development;
- (3) encourage its Branches, Sections and Members to participate actively in efforts towards sustainable development;
- (4) urge the federal, provincial, territorial and municipal governments in Canada to review and reform their legislation, regulations, policies and programs in order to promote sustainable development; and
- (5) call on other professional associations, industry, academia, labour, governments and the public to work together to foster sustainable development in Canada and worldwide;

WHEREAS The Canadian Bar Association formed a Sustainable Development Committee consisting of forty-three participants from across Canada, and the Committee has prepared a Report identifying key national and international law reform issues entitled Sustainable Development in Canada: Options for Law Reform;

WHEREAS a motion to receive the Report of the Sustainable Development Committee was passed at the Annual Meeting of The Canadian Bar Association in London, England in September 1990;
BE IT RESOLVED THAT The Canadian Bar Association urge the adoption of the following measures to promote sustainable development:

- (1) that the Government of Canada take strong measures to protect the environment and promote sustainable development to the full extent of its constitutional authority, including, where appropriate, under its peace, order and good government power;
- (2) that the Government of Canada demonstrate its commitment to promoting sustainable development by legislating an environmental impact assessment process which:
 - a) ensures full public participation;
 - b) covers all areas of federal responsibility, all types of new and existing initiatives (including policy, planning and expenditures) as well as regulatory activities and

- permitting practices, and;
- c) which provides for:
 - i) an independent review agency with authority to grant or deny approval of initiatives;
 - ii) intervenor funding and awards of costs during the course of public hearings; and
 - iii) mandatory environmental impact analyses regarding proposed cabinet decisions;
- (3) that the Government of Canada demonstrate its commitment to improving public access to environmental justice by modifying relevant federal statutes:
 - a) to broaden the rules of standing in environmental matters, including in respect of civil liability, injunctive and declaratory relief and upon judicial review;
 - b) to improve citizen suits and civil remedies for the violation of environmental statutes and regulations;
 - c) to remove statutory limits on the quantum of civil liability for environmental damages where they currently exist; and
 - d) to legislate a rule-making process for the development of environmental regulations to enhance the opportunities for public input;
- (4) that the Government of Canada affirm its commitment to reducing solid wastes in Canada by:
 - a) adopting federal procurement policies which give preference to products and materials that are recyclable, contain recycled material or are otherwise environmentally sound; and
 - b) requiring labelling of products and materials in Canada to communicate whether the product or material is recyclable or otherwise environmentally sound and other relevant information, including recommendations as to environmentally sound use and disposal;
- (5) that the Government of Canada adopt a national strategy to address the problem of toxic contamination and set a national regulatory goal of zero discharge for persistent toxic chemicals;
- (6) that the Government of Canada strengthen the enforcement of federal environmental legislation in Canada, especially by:
 - a) promulgating clear standards to enable precise verification of compliance;
 - b) legislating expanded investigation and enforcement powers, including a wide array of sanctions; and
 - c) formulating and submitting for public review and comment written enforcement and compliance policies and the details of any proposed or existing

- federal-provincial agreements for the administration and enforcement of federal environmental statutes;
- (7) that the Government of Canada show its commitment to conservation of the marine environment by:
 - a) developing regional action plans for internationally shared marine areas and specific protocols for the setting of regional standards and to address land-based pollution, ocean dumping, special-areas protection, and liability and compensation for marine spills; and
 - b) adopting an Oceans Act, launching a national coastal-zone management program, and establishing a coordinated and integrated process for designating and managing protected marine areas;
 - (8) that the Government of Canada:
 - a) participate actively in the formulation of international agreements on biodiversity and forestry within the framework of the United Nations and its 1992 Conference on Environment and Development, and future treaties on wildlife and habitat;
 - b) implement the North American Waterfowl Management Plan on migratory birds agreed to by Canada and the U.S.A. in 1986, and accede to the 1979 UNEP Convention on the Conservation of Migratory Species of Wild Animals; and
 - c) adopt legislation within the scope of federal jurisdiction to conserve efficaciously Canadian and foreign wildlife, endangered species and their habitat subject to the recognition of the traditional use by aboriginal people of wildlife habitat for harvesting and subsistence activities;
 - (9) that the Government of Canada demonstrate its commitment to the conservation of the Arctic environment by developing an international strategy which recognizes the rights of aboriginal people and includes:
 - a) review of existing and development of new international agreements to regulate internationally shared resources according to the principle of sustainable development; and
 - b) reaching agreement with the United States, the Soviet Union and other circumpolar states to ensure the environmental and socioeconomic assessment and ongoing regulation of projects which have or may have an impact on Arctic ecosystems and Indigenous people;
 - (10) that the Government of Canada take a leading role in the development and implementation into domestic law of international instruments, including conventions and protocols, regarding the protection of the atmosphere and the regulation of climate change.

WHEREAS in 1990 the Sustainable Development Committee of the Canadian Bar Association prepared a Report entitled "Sustainable Development in Canada: Options for Law Reform" (the "Report");

WHEREAS the Report noted that information respecting the prosecution of environmental offences is not available or is inadequate in most jurisdictions of the country;

BE IT RESOLVED that The Canadian Bar Association urge federal, provincial and territorial Ministers of Justice and the Environment to provide the public with information respecting the prosecution of environmental offences, by:

- a) preparing a list of those charged with environmental infractions, the specific charge, the time and location of the alleged offence and the final disposition of the case;
- b) preparing a disposition sheet for each unreported conviction, stating those convicted, counsel, the specific offence, the time and location of the offence, the date of the decision and the decision and any Order of the Court;
- c) releasing the list and disposition sheets at least on a quarterly basis; and
- d) advising the legal profession and the public of the availability and cost of the lists and disposition sheets.

**CERTIFIED TRUE COPY OF A RESOLUTION CARRIED
BY THE COUNCIL OF THE CANADIAN BAR ASSOCIATION AT THE
ANNUAL MEETING HELD IN WINNIPEG, MB ON AUGUST 19-23, 1995.**

**STEPHEN BRESOLIN
ACTING EXECUTIVE DIRECTOR**

Resolution 97-02-A

Federal Enforcement of Environmental Laws

WHEREAS the Canadian Council of Ministers of the Environment has recently approved the *Canada-wide Accord on Environmental Harmonization*;

WHEREAS the National Environmental Law Section has indicated its support for federal/provincial/territorial harmonization of environmental laws, but wishes to ensure that the federal government maintains and enhances its role in enforcing Canada's national environmental laws;

WHEREAS the federal government has repeatedly promised to enhance enforcement, but has not yet done so;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada to reaffirm its commitment to environmental enforcement by:

- maintaining or increasing Environment Canada's staff of investigators and inspectors;
- increasing enforcement activity in areas of federal jurisdiction; and
- using a flexible range of compliance promotion and enforcement tools, including warning letters and tickets.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the 1997 Annual Meeting held in Ottawa ON, August 23-24, 1997.

*John D.V. Hoyles
Executive Director*

Implementation of International Environmental Conventions

Mise en vigueur des conventions environnementales internationales

WHEREAS Canada is entering into an increasing number of international agreements addressing environmental issues which need timely implementation and enforcement of laws and regulations at all levels of government and cooperative arrangements between those governments;

ATTENDU QUE le Canada ratifie un nombre croissant d'ententes internationales portant sur des aspects environnementaux, qui nécessitent une mise en vigueur par la mise en oeuvre et l'application des promulgations, aux tous niveaux de gouvernement, et d'ententes intergouvernementales;

BE IT RESOLVED THAT the Canadian Bar Association urge the federal, provincial and territorial governments to implement these international agreements in a timely and complete manner within their area of jurisdiction and in cooperation with other levels of government.

QU'IL SOIT RÉSOLU QUE L'Association du Barreau canadien exhorte les gouvernements fédéral, provinciaux et territoriaux à mettre en oeuvre ces ententes internationales en temps opportun et intégralement, dans les secteurs de leur compétence et en collaboration avec les autres niveaux de gouvernements.

*Certified true copy of a resolution carried by the
Council of the Canadian Bar Association at the Annual
Meeting held in Saskatoon, SK,
August 11-12, 2001.*

*Copie certifiée d'une résolution adoptée par le Conseil de
l'Association du Barreau canadien, lors de son
Assemblée annuelle, à Saskatoon, SK les 11 et
12 août 2001.*

John D.V. Hoyles
Executive Director/Directeur exécutif