Court File No. A-85-20

FEDERAL COURT OF APPEAL

BETWEEN:

SAFE FOOD MATTERS INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

DAVID SUZUKI FOUNDATION, ENVIRONMENTAL DEFENCE CANADA INC. and FRIENDS OF THE EARTH CANADA/ LES AMIS DE LA TERRE

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENERS

December 15, 2020

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OVERVIEW

1. Friends of the Earth Canada / Les Amis de la Terre, David Suzuki Foundation, and Environmental Defence Canada Inc (**Interveners**) urge this Court to recognize the serious negative practical impacts that flow from the Federal Court's interpretation of "scientifically founded doubt" in s. 3 of the *Review Panel Regulations* – an interpretation that ignores key purposive and contextual legislative constraints under the *Pest Control Products Act* (**PCPA**).

2. By shifting the onus of proof of acceptability of risks onto the public, the Federal Court's interpretation, if upheld, would frustrate the PCPA's primary purpose of preventing unacceptable risks to individuals and the environment from the use of pest control products and conflict with the risk thresholds and statutory onuses that animate the PCPA's operational scheme.

3. The Federal Court's interpretation would also make the PCPA's public objection process ineffective and unusable. This would frustrate the PCPA's objective of facilitating public participation in decision-making and would remove an important tool through which the public holds decision-makers accountable, further undermining the PCPA's primary objective.

PART I – FACTS

4. The Interveners adopt the facts as set out by the Appellant in its memorandum of fact and law.

PART II – ISSUES

5. This appeal raises one issue: whether the Federal Court erred in how it applied the reasonableness standard of review to the Pest Management Regulatory Agency's (**PMRA**) decision not to establish a review panel.

6. The Interveners focus on one aspect of this issue: whether the Federal Court erred in applying the reasonableness standard when it interpreted the term "scientifically founded doubt" in s. 3 of the *Review Panel Regulations*, SOR/2008-22 (**RP Regulations**).

7. The Appellant alleges that the Federal Court erred by concluding that scientifically founded doubt may only be established by "at least one controlled peer reviewed study published in a reputable journal that contradicts or raises a reasonable doubt" and that "neither an absence of studies nor published opinions [from scientists]" can create a scientifically founded doubt.

Notice of Appeal, para 7(c)(i), Appeal Book, Tab 1, p 9;

***McDonald v Canada (Attorney General)*, 2020 FC 242 at para 20, Appeal Book, Tab 2, p 22.**

8. These submissions address the key purposive and contextual legislative constraints that ought to have informed the Federal Court's application of the reasonableness standard, and the PMRA's own decision, on this point and the serious negative practical consequences that will flow from a narrow interpretation of "scientifically founded doubt."

PART III – SUBMISSIONS

9. The practical impact of the Federal Court's interpretation will be to render the PCPA's public objection process ineffective and unusable – an outcome that frustrates the PCPA's core purposes.

10. With respect, while purporting to conduct a reasonableness analysis, the Federal Court applied a novel and unduly narrow interpretation of s. 3 of the RP Regulations without regard for key purposive constraints imposed by the governing statutory scheme and principles of statutory interpretation.

***Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 105, 108-110, 115-124, Book of Authorities [BOA], Tab 1.**

11. The Federal Court adopted its interpretation – which was not advanced in writing by any party below or otherwise included in the record – without considering how the standard for scientifically founded doubt operates within the context of the broader risk prevention scheme of the PCPA, resulting in an

interpretation that conflicts with both the risk prevention objectives and operational scheme of the PCPA.

12. The Federal Court also failed to consider the serious negative practical impacts its interpretation will have on the public's ability to participate meaningfully in decision-making under the PCPA.

A. The PCPA establishes a precautionary, science-based regime for preventing unacceptable risks from pest control products

1) The PCPA's primary objective is to prevent unacceptable risks

13. The PCPA is built on the premise that pest control products pose potential risks to human health and the environment. The PCPA's primary purpose is to "prevent unacceptable risks to individuals and the environment from the use of pest control products."

> ***Pest Control Products Act*, SC 2002, c 28, Preamble, s 4(1), BOA, Tab 4.**

14. To achieve this goal, the PCPA requires the Minister of Health/PMRA to evaluate risks using a scientifically-based, high-threshold approach.

> ***Pest Control Products Act*, Preamble, ss 7(7), 19(2), 20(2), BOA, Tab 4.**

15. The PCPA reflects that approach in its risk prevention regime through a strong, fundamental presumption against registration. The PCPA prohibits the use, manufacture, sale, and other dealing in any pest control product until the PMRA has determined that the product's risks are acceptable. At the same time, the PCPA imposes an onus on the would-be registrant to provide enough scientific information to establish that the product's risks are acceptable.

> ***Pest Control Products Act*, ss 2(2), 6, 7(6)(a), 8(1), 8(4), 20, 21(1), 21(2), 25, BOA, Tab 4.**

16. Reinforcing its precautionary approach, the PCPA sets a very stringent standard for "acceptable" risks. Under s. 2(2), a product's risks are acceptable only where 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."

***Pest Control Products Act*, s 2(2), BOA, Tab 4.**

17. This extremely high threshold for the registration of pest control products reflects Parliament's concern that only the safest and most useful pest control products should be registered for use in Canada. Parliament adopted this high threshold in the context of pressure from three opposition parties to apply stricter risk standards to pesticides, including recommendations from the Standing Committee on Environment and Sustainable Development to completely phase out cosmetic pesticides.

***House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 163 (8 Apr 2002) pp. 10109-10120, BOA, Tab 7;**

House of Commons, Standing Committee on Environment and Sustainable Development, *Pesticides: Making the Right Choice for the Protection of Health and the Environment* (May 2000), paras 12.7-12.8, BOA, Tab 8.

18. To give effect to its very low tolerance for risk under the PCPA, Parliament intentionally used terms such as "certainty" and "no harm" to define acceptable risk. Its intent, in using those terms, was to impose the highest possible level of protection for human health and the environment, just short of an outright ban.

19. For example, Parliament was advised by officials from the PMRA and Department of Justice that not only did the PCPA take a precautionary approach to protecting human health and the environment, but that its definition of acceptable risk was stronger than the precautionary principle recognized in Supreme Court decisions like *Spraytech* because it used a threshold that did not

require evidence of serious or irreversible harm to deny registration. The threshold adopted in s. 2(2) was repeatedly described in Parliamentary proceedings as the highest level of protection for human health and the environment possible short of an outright ban.

> **Canada, House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 1st Sess, No 79 (21 May 2002) pp. 9-11, BOA, Tab 9;**
>
> **Canada, House of Commons, *Evidence of the Standing Committee on Health*, 37th Parl, 1st Sess, No 80 (23 May 2002), p. 17, BOA, Tab 10;**
>
> ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40 at paras 30-32, BOA, Tab 2.**

20. Thus, the term "no harm" reflects Parliament's intent to impose a stringent standard that does not require evidence of serious or irreversible harm to deny registration. The "no harm"standard can be triggered by any potential harm, not just significant or extremely likely harm, or harm that is a policy priority.

21. Likewise, the term "reasonable certainty" reflects a high degree of scientific confidence. The "certainty" in s. 2(2) must be both "reasonable" and "scientifically based."

> ***Pest Control Products Act*, ss 2(2), 7(7), 19(2), BOA, Tab 4.**

22. The PCPA's scientifically-based, strict reverse-onus approach to pesticide regulation does not end with registration. Rather, the Minister must consider, on an ongoing basis, whether the risks of a pest control product remain acceptable. Pest control products may only be registered for five years and upon renewal must provide acceptable risk information. The Minister can re-evaluate a pest control product where the information required or procedures used to evaluate the product's health or environmental risks have changed. Periodic 15-year re-evaluations of some pest control products are required. Similarly, the

Minister must initiate a special review of a pest control product if there are reasonable grounds to believe that the product poses unacceptable risks or if there is a ban in another Organization for Economic Co-operation and Development country.

***Pest Control Products Act*, ss 8(1)(c), 16, 17, 19, BOA, Tab 4;**
***Pest Control Products Regulations*, SOR/2006-124, ss 13, 16, BOA, Tab 5.**

23. At all times throughout the regulatory process, the burden of showing that a product's risks are acceptable, to the point of reasonable certainty that no harm will occur, lies with the registrant. The registrant expressly bears this burden when applying to register, amend or renew a pest control product; when the Minister re-evaluates a pest control product; and when the Minister conducts a special review of a pest control product.

***Pest Control Products Act*, ss 2(2), 7(6)(a), 8, 19(1)(b) BOA, Tab 4;**
***Pest Control Products Regulations*, s 16, BOA, Tab 5.**

24. If the registrant cannot meet its burden and show that its product's risks are acceptable, the Minister must deny registration or, following a re-evaluation or special review, must amend the registration to make the product's risks acceptable or else cancel the registration.

***Pest Control Products Act*, ss 8(4), 21(2), BOA, Tab 4.**

2) A comprehensive public participation scheme furthers the PCPA's risk-prevention objective

25. To further its primary purpose of preventing unacceptable risks from pest control products, the PCPA sets out four ancillary objectives, including that of "encourag[ing] 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."

***Pest Control Products Act*, s 4(2)(c) [emphasis added], BOA, Tab 4;**

***House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 163 (8 Apr 2002) pp. 10101, 10103-4, BOA, Tab 7;**

House of Commons, Standing Committee on Environment and Sustainable Development, *Pesticides: Making the Right Choice for the Protection of Health and the Environment* (May 2000), paras 13.30-13.31, BOA, Tab 8.

26. Consistent with the PCPA's ancillary objective, public participation plays an important role in the Minister's decision-making process. Among other public participation opportunities, the Minister must actively consult the public before she decides:

- whether to register a pest control product that is or contains an unregistered active ingredient (s. 28(1)(a)(i));
- whether to register, or amend the registration of, a pest control product where the Minister considers that doing so may result in significantly increased health or environmental risks (s. 28(1)(a)(ii));
- whether to confirm, amend, or cancel the registration of a pest control product on completion of a re-evaluation or special review (s. 28(1)(b)); and
- any other matter if the Minister considers it is in the public interest to consult (s. 28(1)(c)).

***Pest Control Products Act*, ss 10(2), 17(4), 28(1), 28(2), BOA, Tab 4.**

27. These are not merely opportunities for the public to blow off steam: the Minister must consider any comments received. To ensure that she is accountable for her ultimate decision, the Minister must publish a decision statement that summarizes those comments and provides reasons for her decision.

***Pest Control Products Act*, ss 28(4), 28(5), BOA, Tab 4.**

28. The PCPA's public participation scheme culminates in the statutory reconsideration process that lies at the heart of this appeal. Any person can file with the Minister a notice of objection for any "major" registration, re-evaluation and special review decisions which are subject to consultation under ss. 28(1)(a) or (b). The objector must file this notice within 60 days of the decision.

***Pest Control Products Act*, ss 35(1), BOA, Tab 4;**

***House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 163 at p. 10103 (8 Apr 2002), BOA, Tab 7.**

29. In deciding whether or not to establish a review panel in response to a notice of objection, the Minister shall consider two factors:

(a) whether the information in the notice of objection raises scientifically founded doubt as to the validity of the evaluations, on which the decision was based, of the health and environmental risks and the value of the pest control product; and

(b) whether the advice of expert scientists would assist in addressing the subject matter of the objection.

***Review Panel Regulations*, SOR/2008-22, s 3, BOA, Tab 6.**

30. The Minister may, after receiving a notice of objection, establish a review panel to review the decision and to recommend whether it should be confirmed, reversed or varied. If she decides not to establish a review panel, she must provide written reasons to the objector without delay. If she decides to establish a review panel, she must notify the public. The recommendations of a review panel can result in changes to product registrations.

***Pest Control Products Act*, ss 35(3), 35(4), 35(5), 39, BOA, Tab 4.**

B. The interpretation of "scientifically founded doubt" must align with the overall risk prevention regime

31. The PCPA's overall risk prevention regime is an important constraint on the interpretation of, and the Minister's discretion under, s. 3 of the RP Regulations.

32. This regime requires the PMRA to answer a fundamental question when making risk prevention decisions under the PCPA: whether the registrant has established, through scientific information, that the risks of its product are acceptable, such that there is reasonable certainty that no harm will occur to both environment and human health.

> ***Pest Control Products Act*, ss 2(2), 7(6), 7(7), 8(1), 8(4), 11(1), 17(1), 19(1), 19(2), 20, 21, BOA, Tab 4.**

33. The answer to this question depends, in turn, on whether the registrant has provided sufficient information (1) to understand all of the potential risks of harm that its product might cause and, (2) where a potential risk is identified, to prove that there is reasonable certainty that no harm will occur, based on reliable science.

34. Hypothetically, for example, based on a product's mechanism for harming target insect pests (e.g., by attacking a particular enzyme), the PMRA could infer that this product would also plausibly harm non-target insects with similar biology. In that case, if the registrant has provided no information about this scientifically plausible risk, PMRA scientists might request follow-up studies to understand what the product does to non-target insects with similar biology in relevant conditions. Various provisions of the PCPA allow or in some instances require the PMRA to conduct any evaluations necessary or require further information from registrants.

> ***Pest Control Products Act*, ss 7(2), 7(3)(a), 12, 13, 16(3), 16(4), 16(5), 18, BOA, Tab 4.**
>
> ***Pest Control Products Regulations*, ss 6, 8, 11, BOA, Tab 5.**

35. The PMRA must also determine whether the information that addresses the likely risk is sufficient for it to have "reasonable certainty" that no harm will occur. To do so, PMRA assesses the quality of the studies, their methodology and whether they are relevant to the application of the product in real-world conditions, whether they use controls, whether the conclusions are supported by the data and other relevant factors.

1) The Federal Court's interpretation would make s. 3 of the Regulations inconsistent with the onus on registrants and the general operation of the risk thresholds for PMRA decisions

36. The broader statutory context demonstrates that Parliament did not intend to require objectors to provide a peer-reviewed study or a "new" study to make a successful objection under s. 35. The PCPA's primary purpose is to prevent environmental risks, and the scheme aims to ensure that registrants provide the PMRA with enough information to achieve reasonable certainty.

37. In light of this overall scheme, objections are likely to engage the question of whether the existing evidence before the PMRA, provided by the registrant, meets the PCPA's high risk prevention threshold for all known potential risks.

38. A high threshold for "scientifically founded doubt," requiring new information, would preclude an objection even on the basis that the PMRA had no scientific information on an acknowledged credible potential risk, and registered the product anyway. This cannot be what Parliament intended.

39. Such a result would be absurd. It would directly conflict with the PCPA's overall scheme requiring the registrant to demonstrate with scientific evidence that a product's risks are acceptable, i.e. that there is reasonable certainty that no harm will occur. The Federal Court's interpretation would flip this scheme on its head. Where a registrant fails to provide sufficient information and the PMRA nevertheless registers the product, the Federal Court would require a public objector to provide evidence that the product's risks are unacceptable to successfully object.

40. The Federal Court's interpretation would impose a higher evidentiary standard on objectors than is imposed on registrants by limiting the PMRA's jurisdiction to establish a review panel only to circumstances where the objector provides a controlled, peer-reviewed study.

41. The Interveners take the position that the PMRA should rely on reliable peer-reviewed science when determining whether a product meets s. 2(2)'s high threshold of "reasonable certainty" that no harm will occur. However, it is clear on the record of this decision that the PMRA does not exclusively do so. The record reveals that the PMRA routinely relies on unpublished studies and data which have not been peer reviewed.

42. In this case, the PMRA relied extensively on unpublished science at four key stages of its re-evaluation process:

- the Food Residue and Dietary Risk Assessment for Glyphosate;
- the July 2, 2014 internal memorandum concerning the re-evaluation of glyphosate occupational and residential exposure assessment;
- the Proposed Re-evaluation Decision for Glyphosate; and
- the Re-evaluation Decision to which Safe Food Matters objected.

Affidavit of Isabelle Pilote, Exhibit 1, Appeal Book, Tab 8, pp. 1080-1113;

Occupational and Residential Exposure Assessment, Certified Tribunal Record [CTR], Tab 39, Appeal Book, Tab 27, pp. 1981-1983;

Proposed Re-evaluation Decision, CTR, Tab 41, Appeal Book, Tab 29, pp. 2178, 2408-2409;

Re-Evaluation Decision, CTR, Tab 43, Appeal Book, Tab 31, pp. 2506, 2541, 2568.

43. This evidence informed the PMRA's ultimate decision that the risks of glyphosate were acceptable. If unpublished, un-peer-reviewed science cannot suffice to meet the lower standard of "scientifically founded doubt" at the objection stage, then it follows logically that this same science cannot establish the far higher threshold of reasonable certainty that no harm would occur. It is difficult to reconcile the Federal Court's decision that only published, peer-reviewed science can raise a scientifically founded doubt with its conclusion that the PMRA's decision not to establish a review panel was reasonable on these facts.

2) Parliament did not intend s. 35 to shift the onus onto the public to prove harm

44. Parliament did not intend to shift the onus to prove harm from pesticides onto the public when it enacted s. 35. The public's role under the PCPA is not to provide "new" information about whether a risk is acceptable, or supplement insufficient information provided by the registrant. Such a role would be inconsistent with the registrant's clear onus to establish acceptable risk and the PMRA's clear obligation to ensure that this threshold is met.

45. Such a role would also be inconsistent with past jurisprudence on public participation under the PCPA. For example, in *Wier*, the Federal Court held that a citizen requesting a special review of a product's risks under the PCPA is not required to provide new evidence, nor even significant evidence. Instead, the Minister must consider all the evidence before her in determining if she has "reasonable grounds" to believe that a product's risks are unacceptable.

> ***Wier v Canada (Health)*, 2011 FC 1322 at paras 87-88, BOA, Tab 3;**
> ***Pest Control Products Act*, ss 17(1), (4), BOA, Tab 4.**

46. There is no reason that a higher standard should apply when the PMRA considers whether there is "scientifically founded doubt" in a review panel request through a notice of objection. If this type of evidence can trigger the initiation of a regulatory process (a special review), it must surely suffice in the

objection process – both are mechanisms designed to ensure the propriety and adequacy of risk prevention decisions the PMRA has already made.

47. The notice of objection process provides an opportunity to highlight areas for the PMRA to reconsider; for example, where it may have decided not to require further information but there is a scientifically-founded, objective basis for a risk of harm.

48. This process provides an opportunity for an independent and transparent examination of the PMRA's risk analysis. Such a review can play an important role in ensuring that the PMRA has not simply been worn down or out-resourced by the registrant through a complex registration or re-evaluation process, or that the PMRA has not ignored or failed to require information on potential risks simply because it deems them of lesser significance or a low policy priority. It also helps guard against potential regulatory capture.

49. Consistent with these objectives, the term "scientifically founded doubt" must be read harmoniously with the overall process of risk prevention in the PCPA, including the clear onus on the registrant and the definition of "acceptable risk" in s. 2(2).

50. The issue at the objection stage, or any other stage in the PCPA, is not whether there is proof of harm, but whether there is a high degree of scientific confidence that no harm will occur. A harmonious interpretation of the PCPA's overall scheme would require an objector to meet a low threshold. Read in context, "scientifically founded doubt" is simply a credible doubt, based on available information, about whether the PMRA has met the very high acceptable risk threshold. This may include questioning the validity of the methods the PMRA used in its evaluations, its conclusions, or the quality or completeness of the information it relied on.

51. The objection threshold should be read generously such that the PMRA has the broadest possible jurisdiction to correct its mistakes and ensure its risk acceptability standards are met through independent review panels under s. 35.

52. S. 2(c) of the RP Regulations requires a "scientific basis" for the objection; s. 2(d) requires that basis to be supported with evidence. That evidence can include – but is not limited to – "scientific reports" or "test data." The term "scientific reports" is not defined, but the PCPA defines "test data" as "scientific or technical information respecting the health or environmental risks or the value of a pest control product." Nowhere in the PCPA or RP Regulations is a specific type of scientific information, such as published peer-reviewed science, required or prescribed.

53. Furthermore, s. 3(a) of the RP Regulations specifically requires the Minister to consider whether the information raises doubt about the validity of the evaluations on which the decision was based. This further demonstrates that Parliament intended to permit the public to object based on the quality, completeness, credibility or validity of existing evaluations undertaken by the PMRA, without needing to rely on the provision of new data or studies which the registrant or the PMRA failed to produce or review.

54. Therefore, on a reading of the RP Regulations consistent with the modern principle of statutory interpretation, a doubt could be "scientifically founded" if the existing research (including research already considered by the PMRA and identified in the objection) provides an objective basis for a likely risk, without sufficient study of that risk to determine with a high degree of scientific confidence (i.e. "reasonable certainty") that the harm will not occur.

55. Moreover, although the threshold for acceptable risk determinations is high, it does not follow that the standard for "scientifically founded doubt" imposed on objectors is the same standard imposed on the regulator and the registrant. The PCPA makes clear that the onus is not on the public to establish harm, but is on the registrant to establish acceptable risk. A high threshold for objections conflicts strongly with this express onus, as well as the PCPA's primary objective of preventing risks.

56. Forcing the public to prove harm to a high standard under s. 35 would create another absurdity in that the review panel itself, if appointed, would be rendered redundant and would serve no clear purpose.

3) The Federal Court's interpretation risks creating a perverse incentive to withhold information

57. From a practical standpoint, the Federal Court's decision may create a perverse incentive for registrants to withhold information they may have about a pest control product's risks.

58. Registrants will often have the most information about the risks posed by their products – risks that the PMRA must be aware of and understand when determining whether there is reasonable certainty that no harm will occur from the product.

59. Recognizing this, the PCPA creates two mechanisms to protect against a situation where a savvy registrant may provide just enough information to satisfy the PMRA, but not enough to clearly demonstrate potentially serious risks. First, the PCPA gives the PMRA the power to require further information. Second, the PCPA gives members of the public the right to object to major decisions.

> ***Pest Control Products Act*, ss 7(4), 12, 13, 16(3), 18(1), 19(1)(a), 35, BOA, Tab 4;**
>
> ***Pest Control Products Regulations*, s 8, BOA, Tab 5.**

60. Both of these mechanisms operate to achieve the PCPA's primary purpose of preventing unacceptable risks. However, the Federal Court's narrow interpretation of the PMRA's discretion to appoint a review panel under s. 35 of the PCPA significantly undercuts the second mechanism. As a result, that narrow interpretation protects registrants who have relied on the PMRA overlooking a risk altogether, misunderstanding data or studies provided or failing to require further and more scientifically reliable information. Where a

member of the public identified such a concern, a narrow interpretation would prevent the PMRA from correcting its mistake.

61. A narrow interpretation of the PMRA's discretion to appoint a review panel further undermines the PCPA's risk prevention objective by ensuring that the reasons where a review panel is not appointed will likely turn on jurisdiction, rather than the substance of the objection. It would also undermine the PCPA's public participation objectives.

C. Narrowly interpreting "scientifically founded doubt" will have serious negative practical impacts on the PCPA's public participation scheme

62. By requiring an objector to raise scientifically founded doubt only through a controlled, peer-reviewed study published in a reputable journal, and not by pointing to an absence of evidence, the Federal Court's interpretation of s. 3 of the RP Regulations adopts criteria that are incompatible with the 60-day period in s. 35(1) of the PCPA. Coupled with the PMRA's apparent view that information provided in an objection must be new, these criteria would frustrate the PCPA's public participation objectives.

> ***McDonald v Canada (Attorney General)*, 2020 FC 242 at paras 19-20, Appeal Book, Tab 2, p. 22;**
>
> **Notice of Objection Presentation, CTR, Tab 45, Appeal Book, Tab 33, pp. 2594, 2616.**

63. In practice, it would simply not be possible for public objectors to design, fund, conduct, and publish an original controlled, peer-reviewed study and bring it to the PMRA's attention within 60 days.

64. A peer-reviewed study published in a reputable journal is resource-intensive, gold-standard science. The evidence on the record before the court below includes several such studies. Each took more than 60 days to complete, as each involved multi-month or multi-year field studies. Each took more than 60 days to be peer-reviewed and accepted for publication.

Affidavit of Mary Lou McDonald, Exhibits L1, L2, L3, L7, L12, Appeal Book, Tab 6, pp. 391, 399, 408-410, 458, 600;

Cessna et al paper, CTR, Tab 49, Appeal Book, Tab 35, p. 2632.

65. The 60-day period for preparing a notice of objection reflects Parliament's intent that it does not require new science or new information, whether peer-reviewed or otherwise. A narrow interpretation that only new evidence can raise a scientifically founded doubt warranting a review panel would, in practice, immunize PMRA decisions from any possibility of independent review under the PCPA.

66. Registration, special review and re-evaluation decisions such as the one in the record before this Court involve thousands of pages of documents, data, and studies.

67. Identifying "new" information – including information that did not exist as well as information that did exist but was not considered by the PMRA – is not a straightforward matter for a member of the public. The member of the public must rely on the sometimes incomplete description of "other published information" in the PMRA's decision documents, or obtain the data or research from a variety of sources. The member of the public must also write the objection and describe the concerns. All of this must take place within a 60 day period. The burden for a member of the public of reviewing even existing information used in the PMRA's analysis should not be treated lightly by this Court.

68. Parliament made a conscious decision to include public participation mechanisms, including s. 35, in the PCPA, rather than in regulations. It did so recognizing their importance to scientific integrity, transparency and accountability:

> It is essential that these measures be set out in the Act rather than the regulations. Provisions regarding the right of Canadians to receive notice, to comment on and to appeal decisions that might materially

affect them are too fundamental to be relegated to the regulations, where they might be readily changed at the discretion of the Governor in Council.

***House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 163 at pp. 10101, 10103-10104 (8 Apr 2002), BOA, Tab 7;**

House of Commons, Standing Committee on Environment and Sustainable Development, *Pesticides: Making the Right Choice for the Protection of Health and the Environment* (May 2000) at paras 13.30-13.31, BOA, Tab 8.

69. Interpreting the RP Regulations narrowly in a manner that severely restricts, if not outright eliminates, the availability of review panels, as did the Federal Court, would result in the very harm that Parliament explicitly sought to avoid when it enacted s. 35.

70. Reasonable people may disagree about whether, for example, unpublished, uncontrolled studies or data that the PMRA relied on to establish acceptable risk for glyphosate can meet s. 2(2)'s standard of reasonable certainty. Expressing such disagreement with the sufficiency of existing information to meet thresholds required by the PCPA is an important and proper role for public commenters and objectors. Giving voice to and providing accountability for PMRA decisions in light of this type of disagreement – including requiring reasons from the PMRA – is precisely what Parliament intended in enacting s. 35.

71. By effectively nullifying the objection process, the Federal Court's narrow interpretation of "scientifically founded doubt" frustrates the use of s. 35 by members of the public. The impact will be a lack of mechanisms under the PCPA to hold the PMRA accountable for registration, re-evaluation and special review decisions which might be made without scientific evidence reaching the acceptable risk thresholds in the PCPA. The PMRA will also have fewer options to correct oversights or mistakes in the risk assessment process. This

will undermine public confidence in pesticide registrations, which in turn undermines the goals of Parliament in enhancing public participation in the PCPA.

PART IV – ORDER SOUGHT

72. The Interveners take no position on the outcome in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 15th day of December, 2020

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PART V – LIST OF AUTHORITIES

Case Law

1. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
2. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40
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