Federal Court  Cour fédérale

Date: 20190405

Docket: T-1071-16

Citation: 2019 FC 411

Ottawa, Ontario, April 5, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH AND SYNGENTA CANADA INC.

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The David Suzuki Foundation, Friends of the Earth Canada, Ontario Nature, and the Wilderness Committee [together as the "David Suzuki Foundation"] are non-governmental organizations engaged in environmental advocacy. In their application for judicial review dated

July 6, 2016, the David Suzuki Foundation submit that the agency responsible for regulating pesticides in Canada, the Pest Management Regulatory Agency [the "PMRA"] has, over a number of years, engaged in an unlawful course of conduct by conditionally registering various Thiamethoxam ["TMX"] based pest-control products, contrary to the regulatory procedure required by statute.

[2] The Respondents are the Attorney General of Canada ["AG"], representing the regulatory agency at issue, and Syngenta Canada Inc. ["Syngenta"] [together as "the Respondents"], which has registered TMX products with the PMRA to sell their products to market.

[3] Whether through the actions of the David Suzuki Foundation in bringing this motion, other external pressures, long term testing studies and monitoring being completed, or information advanced concerning the plight of pollinators, the relevant consultations have taken place, the legislation has now been amended and the impugned regime of conditional registrations have been halted for new product registrations.

[4] Thus, the passage of time may have achieved the practical result that the David Suzuki Foundation were trying to achieve which renders this matter moot.

[5] On August 31, 2018, the David Suzuki Foundation brought a motion to strike a number of paragraphs and exhibits from Dr. Tout's April 13, 2018 affidavit.

[6] Syngenta filed a motion to strike the application for mootness on August 31, 2018, relying on a supplementary affidavit sworn by Dr. Tout on August 24, 2018. The David Suzuki Foundation filed an Amended Notice of Motion on September 19, 2018, where they asked for additional paragraphs and exhibits to be struck in the August 24, 2018 Dr. Tout affidavit.

[7] Both the mootness motion and the motion to strike the affidavits were heard at the commencement of the hearing. The decisions on both of these issues were reserved and the Court then heard the arguments on the merits of the matter.

[8] Confidential materials were filed in this Judicial Review Application. This decision only sourced and referred to matters that were referenced in non-confidential materials so that there was no need for a confidential decision.

II. Background

[9] TMX and its related products [“TMX products”] are systemic insecticides in the “neonicotinoid” group of pesticides. Neonicotinoid pesticides are absorbed by plants and expressed in plants’ pollen, nectar, and other tissues.

[10] The David Suzuki Foundation contend that TMX products can, at variable concentrations, be toxic to bees and to other pollinators. The David Suzuki Foundation’s contention is that there is scientific evidence to suggest that a factor leading to the decline in certain bee populations has been as a result of products like TMX.

[11] As noted above, Syngenta is a manufacturer of pesticides and insecticides including producing TMX products. In order to have their products go to market, Syngenta, like all other producers, must go through a regulatory approval process with the PMRA.

[12] The PMRA is a branch of Health Canada that administers the *Pest Control Products Act*, SC 2002, c 28 [the "*Act*"] on behalf of the Minister of Health. Under section 4(1) of the *Act*, the PMRA's primary objective is to prevent unacceptable risks to individuals and the environment from the use of pest control products ["PCPs"]. All PCPs have to be registered under section 6(1) of the *Act*. The *Act* also prohibits the import, transport, manufacture, distribution, sale, and use of PCPs that are not registered under section 6(1) of the *Act.*

[13] Under section 2(2) of the *Act*, the health or environmental risks of a PCP are acceptable if there is "reasonable certainty" that no harm to human health, future generations, or the environment will result from exposure or use of the product, taking into account its condition or proposed conditions of registration.

[14] This brings us to the question of "conditional registration". While the "conditions of registration" are set out in *Act*, as discussed below, the category of "conditional registration" itself is noted in the *Pest Control Products Regulations*, SOR/2006-124 [the "*Regulations*"].

[15] In certain cases, when it has been determined that the risks of a PCP are acceptable, but where additional information is required for the purpose of confirmation of the risk assessment, the PMRA has the authority to request additional information under section 12 of the *Act*. When

the Minister grants a conditional registration under section 12 of the *Act*, an applicant is required to provide updated information at the behest of the PMRA, after which the registration can be deemed to be complete.

[16] Prior to the repeal of section 14 of the *Regulations* on November 30, 2017, a registration became conditional when a section 12 notice was delivered at the time the registration was granted. The section 12 notice would ask for additional information, testing, monitoring experience, along with a reporting requirement.

[17] Before Syngenta could take their TMX products to market, Syngenta had to obtain the relevant authorization from the PMRA for their PCPs. The PCPs are categorized by the PMRA by their various properties including the class of the PCP, where the PCP is authorized to be used (also called “use site categories” or “USCs”), targeted uses (how the specific crop is to be treated) and the application methods (foliar, soil, seed treatment, or bark/tree applications).

[18] The David Suzuki Foundation originally sought to judicially review registrations for 18 TMX products and the active ingredient with the PMRA (see Annex A). The judicial review application for 12 products that involved seed treatments products was eventually discontinued. Six soil and foliar PCPs, as well as the active ingredient, remain at issue in this application and they are as follows:

- Actara 240SC Insecticide (soil or in furrow)
- Actara 25WG (foliar)
- Endigo Foliar

- Minecto Duo 40WG (in furrow)
- Mainspring X (foliar or drench on ornamentals)
- Flagship 9 (ornamental & greenhouse)
- Thiamethoxam Technical (active ingredient)

[19] While further details about the registration information relating to each product can be found in Annex B, I will broadly outline the regulatory approval process for the remaining products up to the point of the application before me.

[20] The PMRA first registered Thiamethoxam Technical Active (USC 10) on November 27, 2000.

[21] In 2004, Syngenta applied to register further TMX products for new uses. The first was USC 13, Actara 25WG, which is a foliar spray (e.g. on orchard trees). The second was for USC 14, Actara 240SC, which is for soil drenches (e.g. on row crops).

[22] PMRA scientists conducted a preliminary "Level C" review in 2005. They identified "deficiencies" in the scientific data on TMX's risk to bees. In accordance with PMRA policy, the PMRA reviewers placed the 2004 applications on hold. After Syngenta asked the PMRA to accept older studies that Syngenta had previously submitted, the PMRA managers required PMRA scientists to revisit its initial Level C review. Upon a further "Level D" review, the PMRA scientists found that the initial studies were not particularly germane regarding the relevant TMX products toxicity to bees.

[23] Since 2006, all registrations have been “conditional”. The PCPs’ current conditional registrations remain valid until December 31, 2020.

[24] The PMRA issued a section 12 notice requiring Syngenta to provide a chronic toxicity study on TMX’s risks to bees by March 31, 2008.

[25] In 2008, Syngenta attempted to convert the conditional registrations into “full” registrations. While the PMRA did not grant these full registrations, as one of the studies (which the David Suzuki Foundation call the “Nengel study”) was not found to be acceptable on “field hive studies”, the PMRA automatically granted extensions of the registrations until the end of 2010. The conditional registrations were granted these automatic extensions because Syngenta had included some studies in its application.

[26] After being granted further conditional registrations in 2010, Syngenta continued to apply for new TMX products, and it received new section 12 conditional registrations for a number of TMX pesticides, including new end-use products: Endigo Insecticide, Flagship Insecticide, Mainspring X Insecticide, and Minecto Duo.

[27] On August 29, 2016, the PMRA received applications to convert all TMX foliar and soil products’ registrations from conditional registrations to full registrations.

[28] There are four decisions on TMX PCPs’ risk to pollinators that relate to this judicial review application:

i. *Proposed Re-evaluation Decision for Thiamethoxam and Its Associated End-use Products: Pollinator Re-evaluation* (the "PRVD"), issued December 19, 2017;

ii. *Proposed Registration Decision for Thiamethoxam, Actara 25WG Insecticide, Actara 240SC Insecticide, and other related end-use products* ("A-PRD"), issued August 15, 2018;

iii. *Proposed Registration Decision for Thiamethoxam and Mainspring X Insecticide* ("M-PRD"), issued August 15, 2018; and

iv. *Special Review of Thiamethoxam Risk to Aquatic Invertebrates: Proposed Decision for Consultation* (the "PSRD"), issued August 15, 2018.

[29] I note that all of these occurred after the application for judicial review was filed and contributed to the matter now being moot.

[30] The David Suzuki Foundation explained that these four decisions (see paragraph 28) are published for the purposes of public consultation. Following the proposed pollinator re-evaluation decisions, the period for public consultation has now concluded. Comments received by the PMRA were taken into consideration before the Minister made her final decision, which was slated to be released on December 31, 2018.

III. Procedural History

[31] This matter has a significant procedural history. Two applications were joined as they pertained to the same issues. T-1070-16 relates to the Notice of Application filed on July 6, 2016 by the David Suzuki Foundation relating to the product Clothianidin. T-1070-16 concerned the

Sumitomo Chemical Company Limited, Bayer Cropscience Inc., and Valent Canada Inc., and the registration of Clothianidin based products.

[32] The Notice of Application in T-1071-16, which is relevant to this application, is regarding the product Thiamethoxam.

[33] Both applications have been subjected to significant review arising from the decision of the case manager, Prothonotary Aylen, on a preliminary motion to strike (*David Suzuki Foundation v Canada (Health)*, 2017 FC 682 [“*Suzuki 1*”]). In the motion to strike, the respondents (as they then were) were seeking to strike the application as they argued that the David Suzuki Foundation were seeking to review “a total of 79 distinct decisions of the PMRA” which in their submission did not constitute a continuous course of conduct under Rule 302 of *Federal Court Rules*, SOR/98-106 [the “*Rules*”].

[34] The respondents also argued that there was an adequate alternative remedy for the David Suzuki Foundation. Prothonotary Aylen, in examining the motion to strike, held that on the standard of “so clearly improper as to be bereft of any possibility of success” the issue raised by the moving party is “debateable”. Prothonotary Aylen held that the serious question should be determined by the application judge rather than on a preliminary motion.

[35] The respondents in the joint applications appealed Prothonotary Aylen’s decision. Justice Kane dismissed the appeal in *David Suzuki Foundation v Canada (Health)*, 2018 FC 380

["*Suzuki 2*"]. Justice Kane upheld the decision of Prothonotary Aylen and agreed that the determination should be made by the judge on judicial review.

[36] In a parallel decision, *David Suzuki Foundation v Canada (Health)*, 2018 FC 379, Justice Kane dismissed a motion by the Respondents to admit new evidence. Justice Kane held that the admission of new evidence on appeal is exceptional. The new evidence, which comprised essentially of proposed registration decisions and proposed re-evaluation decisions for TMX products and other PCPs, did not meet the test established in the jurisprudence for admission.

[37] On February 27, 2017, the Respondent, Elanco Canada Ltd was discontinued against in T-1071-16 leaving the current Respondents. Subsequently, on April 18, 2018, the Respondents in T-1070-16 were all discontinued against by the David Suzuki Foundation.

IV. Issues

[38] The issues are:

A. Is this application moot?

B. If the application is not moot, should the affidavits of Dr. Tout be struck?

C. Is the application barred by section 18.1(2) of the *Federal Courts Act*, RSC, 1985, c F-7 ["*FCA*"] and Rule 302?

D. Is there an adequate alternative remedy available such that the Court ought not to determine the application?

E. If reviewable, was the PMRA's "course of conduct" unlawful?

V. The Law

[39] All relevant provisions are listed in Annex C.

VI. Analysis

A. *The Question of Mootness*

(1) Positions of the Parties

(a) *Syngenta and the AG*

[40] Before Prothonotary Aylen, the Respondents in the joined applications argued that the alleged course of conduct must be "on-going" in order to be "continuous", and that the alleged course of conduct was not on-going, given the repeal of section 14 of the *Regulations*. The Respondents asserted that the alleged misuse of the section 12 notices could not be found to be a continuous course of conduct as the conduct must be "on-going" at the time the applications are heard in order to qualify as a course of conduct, relying on the decisions in *Krause v Canada*, [1999] 2 FC 476 (FCA) and *Fisher v Canada (Attorney General)*, 2013 FC 1108. Given the repeal of section 14 of the *Regulations*, they asserted that any alleged misconduct would cease and therefore there would no longer be any on-going impact from the alleged course of conduct.

[41] Some of these submissions characterized the issue as one of "mootness", which the Prothonotary refrained from considering, given that mootness was not specifically raised in the notices of motion:

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

[42] Justice Kane did not comment on the particulars of Prothonotary Aylen's decision that dealt with mootness.

[43] Now after a number of Respondents have been discontinued against, a number of products no longer being at issue as well as the passage of time the matters before this Court have transformed. Thus, Syngenta brought an application for "mootness" to be decided at the hearing.

[44] The AG argued in written and oral submissions that the matter before me is moot, rather than joining with Syngenta on its motion to strike.

[45] Syngenta and the AG make two broad arguments on the question of mootness before me now.

[46] First, Syngenta and the AG note that section 14(1)(b) of the *Regulations* was repealed in 2017. As the David Suzuki Foundation were challenging the *vires* of the *Regulations*, a ruling on the provision's utility would have no practical utility.

[47] Secondly, the PMRA issued new proposed decisions relating to the PCPs in 2017-2018. The PMRA also undertook a comprehensive review of the available scientific studies and engaged in the consultations that the David Suzuki Foundation submitted had not been completed. Therefore, the PMRA's allegedly unlawful conduct has now been cured. The AG and Syngenta argued before me that when the proposed decisions come into effect, they will supersede the registrations that resulted from the course of conduct, and thus a ruling on the validity of the alleged prior course of conduct will have no practical utility.

[48] Prior to November 30, 2017, the conditional registration regime meant that under section 14(1)(b) of the *Regulations*, the PMRA did not have to engage in public consultations if a conditional registration was made, as the need to consult under section 28(1) of the *Act* was vitiated by the conditional registration itself. The AG and Syngenta agree that prior to November 30, 2017, section 14(1)(b) of the *Regulations* provided that the section 12 informational requests would make the accompanying registration a "conditional" one.

[49] The AG and Syngenta point to the fact that the David Suzuki Foundation suggested that the above subsection of the *Regulations* are *vires* because they derogate from the requirements in the *Act* to engage in public consultations. However, as the *Regulations* have been amended to repeal section 14(1)(b), the concern around consultation is no longer a live issue.

[50] In addition to this, the AG and Syngenta point to the PMRA's accompanying Regulatory Impact Analysis Statement when the *Regulations* were amended and note that "[t]he

amendments have the following objectives…To…ensure the transparency (consultation and access to information)…apply to all new registration decisions".

[51] Based on the repeal of the relevant subsection, and the clear policy of the PMRA to engage in relevant consultation and to ensure that there will be no new conditional registrations granted as a matter of policy, the AG and Syngenta submit that the concerns of the David Suzuki Foundation around inadequate studies on the chronic toxicity of TMX products is no longer at issue and the impugned conduct cannot occur in the future.

[52] The AG and Syngenta further argue that, arising out of the June 2012 re-evaluation under section 16 of the *Act*, the PMRA released a proposed decision on December 19, 2017, that related to the impact of TMX products on pollinators, as well as a proposed registration decision.

[53] The re-evaluation decisions proposed the continued use of some TMX products, and mitigation measures for some TMX products in respect of pollinators. The AG and Syngenta argue that information that was gleaned going into the decision was taken from a review of a large number of requested studies, and as per the requirement of the *Act*, the re-evaluation was subject to a 90 day public consultation period that ended on March 19, 2018.

[54] Now that the relevant consultations have taken place, the AG and Syngenta suggest that the second ground of judicial review is now moot.

[55] The AG and Syngenta additionally direct me to the 2014 registrations of Seed Treatment Pest Control Products. By Order dated April 13, 2018, the David Suzuki Foundation withdrew the application for judicial review in relation to the 12 seed treatment PCPs and the use of TMX in them. In other words, as canvassed above, the David Suzuki Foundation have gone from applying to review registrations for 18 products and the active ingredient to 6 products and the active ingredient.

[56] The AG and Syngenta suggest that the discontinuance of the other products is the natural progression that has taken place over time. Now that the sections are repealed and the public consultations have taken place of the remaining products, this judicial review is also moot.

[57] On August 15, 2018, the PMRA released a proposed decision arising out of a special review relating to TMX. The special review decision proposes the cancellation of all outdoor uses of the TMX products listed above. The proposed decision suggests the continued registration of only two soil and foliar control products, and only Flagship Insecticide and Mainspring Insecticide for indoor use.

[58] Comments following the consultation will be taken into consideration in the final re-evaluation, targeted for publication by December 31, 2018.

[59] The AG and Syngenta suggest that when the public consultations are completed and the decisions are finalized, the PMRA will apply the decisions to all the remaining TMX products at issue in the application.

[60] Therefore, the AG and Syngenta submit that under the test in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], it is clear that there is no longer any live controversy, there is no adversarial context, the application will undermine judicial economy, and the Court is being asked to assume a non-judicial role.

(b) *The David Suzuki Foundation's Position*

[61] On October 5, 2018, the David Suzuki Foundation filed a responding record to Syngenta's motion to strike for mootness.

[62] In essence, the David Suzuki Foundation argue that the PMRA has consistently abused its statutory requirement. In their view, the PMRA is required by law to make the risk assessment with all the necessary studies before it prior to registering PCPs, in order to ensure that the risks posed by the products are acceptable. However, the agency's practice has been to conditionally register the products, and request that this necessary information be provided after registration.

[63] The David Suzuki Foundation argue that Syngenta is fundamentally mischaracterizing the nature of the applications before me.

[64] The David Suzuki Foundation argue that the amended regulation in force as of November 30, 2017 did not discontinue the practice of conditional registrations. The conditional registration provisions of the former *Regulations* continue in force to this day due to the operation of transitional provisions.

[65] Section 11(3) of the transitional provisions, *Regulations Amending the Pest Control Products Regulations (Statement, Notice and Conditional Registration)*, SOR/2017-91, provides that the conditional registrations made under section 14 of the former PCP *Regulations* can be continued until the end of their validity periods and may be extended under former sections 14(6) or 14(7). The amending regulation provides that sections 14(6) and (7) of the current *Regulations* will remain in effect for existing conditional registrations after the amending regulation comes into force. This would allow the validity periods of certain existing conditional registrations to be extended for up to two years where a registrant complies, in the PMRA's opinion, with the requirements of a section 12 notice (section 14(6)), or for "a period of sufficient duration" to facilitate required public consultation on an application to amend or renew a product's conditional registration (section 14(7)).

[66] The David Suzuki Foundation also mention that the PMRA, relying on section 14(7) of the former PCP *Regulations*, made a decision to extend the conditional registrations of Thiamethoxam, Actara 25WG Insecticide, Actara 240SC Insecticide, and other related end-use products for two more years as recently as July 2018.

[67] The David Suzuki Foundation submit that the Respondents mischaracterize the above proposals as "decisions", suggesting that they are somehow akin to final decisions, and that the AG and Syngenta are simply speculating that they will be implemented.

[68] The David Suzuki Foundation note that the four proposed decisions on TMX's risk to pollinators are just that - merely proposed decisions. Proposed decisions are published for the

purposes of public consultation; these may be modified as a result of public consultations. The David Suzuki Foundation further argue that these decisions do not have any effect on TMX registrations until they are finalized and implemented.

[69] This is a problem from the perspective of the David Suzuki Foundation, as the PMRA has no statutory deadline for a final decision on the PRVD or the PSRD. There are many examples from the PMRA's history suggesting final decisions on the PRVD or PRSD could take years, or could be delayed indefinitely. This situation contrasts with proposed registration decisions for already registered pesticides, which must be implemented at the time the section 8 risk assessment is completed and before the pesticide's validity period expires.

[70] While the PSRD suggests a "phase out" of TMX from all outdoor and ornamental uses over a 3 to 5 year period, and the PRVD suggests additional use restrictions for many TMX uses, this process the David Suzuki Foundation say could be delayed indefinitely due to a lack of a statutory deadline. The PSRD states that "the PMRA is unable to conclude that the risks to aquatic invertebrates are acceptable from outdoor agricultural and ornamental uses …" and therefore proposes to phase out all outdoor and ornamental uses over a 3 to 5 year period.

[71] The David Suzuki Foundation point to the fact that all TMX products at issue in this application continue to rely on conditional registrations until the PMRA makes and implements final decisions on the A-PRD and M-PRD, or until the end of 2020, whichever comes first. The David Suzuki Foundation suggest that unless the current conditional registrations are cancelled,

the PMRA has no statutory imperative to make final decisions on the above proposed registration decisions. The PMRA has no statutory deadline for a final decision on the PRVD or the PSRD.

[72] The David Suzuki Foundation suggest that the proposed decisions have inconsistent risk conclusions in relying on phase out provisions for re-evaluations and special reviews. For example, in the A-PRD, the PMRA found that "[o]verall there are risks to pollinators, other beneficial arthropods and aquatic invertebrates. As such, mitigation, including cancellation of some uses, has been proposed in [PRVD and PSRD]".

[73] The David Suzuki Foundation presented that the PMRA stated in the A-PRD that "[t]he risks to pollinators and aquatic invertebrates from outdoor uses of Thiamethoxam have not been shown to be acceptable". As the David Suzuki Foundation note, notwithstanding the above, the PMRA concludes the opposite elsewhere in the A-PRD: namely, that for outdoor foliar and soil uses of TMX (USCs 13, 14 and 27), the risk is acceptable "for the time period of the registration". The PRDs do not rely on the use cancellations, restrictions and other risk reduction measures proposed in the PRVD or PSRD for this conclusion.

[74] Thus, the David Suzuki Foundation argue that the proposed registration decisions are a form of legal double speak - the proposed decisions find that TMXs' risk to pollinators are unacceptable without risk reduction, but also find that the risks are acceptable without incorporating any mitigation measures.

[75] The David Suzuki Foundation suggest that the language only makes sense if the PMRA is relying on the final re-evaluation of TMX to supersede the full three-year registrations of all previously permitted uses. Accordingly, the course of conduct of deferring risk assessments and the application of the acceptable risk standard would likely be continued by the PRDs if they are finalized.

[76] The David Suzuki Foundation contend that the narrowing of the applications for judicial review (in terms of the products) was not a concession of mootness. The David Suzuki Foundation said that they did not rely on the proposed registration decisions as a basis for the narrowing of their claims. The David Suzuki Foundation submit that the narrowing of the applications for judicial review was done for tactical reasons, and to diminish the sheer volume of evidence that the David Suzuki Foundation would have been essentially buried under in the application before me now.

[77] The David Suzuki Foundation further submit that the application before me is "effectively the fourth opportunity the respondents have had to raise mootness". At the hearing, the David Suzuki Foundation argued that the motion may have been brought to give the Respondents more pages to present their argument. I do not accept that argument as having any validity, and note that the David Suzuki Foundation filed a responding motion record also, so even if that was the end goal of Syngenta, then the David Suzuki Foundation also benefited equally with more pages of argument to put before the Court.

(2) Test for Motion to Strike

(a) *David Bull* Test

[78] The David Suzuki Foundation submitted that the test to determine if this matter is moot is found in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA) [“*David Bull*”].

[79] In *David Bull*, above, it was held that this Court may strike out and dismiss an application for judicial review by way of preliminary motion where the application is bereft of any possibility of success.

[80] At paragraph 130 of *Suzuki 2*, Justice Kane held, in considering the *David Bull* test, that there is a high bar to strike a case on a preliminary motion. The Court should strike a notice of application on a preliminary motion only where it is “so clearly improper as to be bereft of any possibility of success”. This must be an “obvious, fatal flaw striking at the root of the Court’s power to entertain the application”.

[81] I do not agree with the David Suzuki Foundation that the test that I am applying now should be the *David Bull* test, as I am determining mootness on the record and not on a preliminary motion to strike. I am making this determination within the context of the judicial review application and the benefit of having the merits of the case argued before me.

[82] Mootness could arise on the record before me even without the specific motion by Syngenta to strike. In *Snieder v Canada (Attorney General)*, 2016 FC 468, Justice Boswell found that an application was moot, despite the fact that the responding party did not make a motion prior to the hearing of the matter to have the application dismissed by reason of mootness (para 16). Justice Boswell found, in the absence of a preliminary motion to strike, that the application was still moot. In doing so, Justice Boswell did not consider the "high bar" set in *David Bull* to strike the judicial review application. I find further support for this holding in *Shariff v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 640 at para 21; *0769449 BC Ltd (Kimberly Transport) v Vancouver Fraser (Port Authority)*, 2016 FC 645 at para 26; and *Gladue v Duncan's First Nation*, 2015 FC 1194.

[83] The test on judicial review to determine whether this matter is moot is not the *David Bull* test, then, but is rather the test set out by the Supreme Court of Canada in *Borowski*, (above).

(b) *Borowski Test*

[84] The Federal Court of Appeal recently applied the *Borowksi* test in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 ["*Democracy Watch*"]. In *Democracy Watch*, the Federal Court of Appeal was examining whether there was a breach of conflict of interest rules as to whether Minister Morneau had appropriately divested his shares in Morneau-Shepell. In that case, Justice Laskin, writing for the Court, described the test for mootness below:

> [10] As the leading authority on mootness – the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-363, 1989 CanLII 123 (SCC), 1989 CanLII 123 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot:

> whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[85] Therefore, I must first decide as to whether this dispute has disappeared and the issues between the parties have become academic, and thus as to whether there is still a "live controversy" between the parties that requires the Court's intervention. If I find that the application before me is moot, then I will examine whether to exercise my discretion as to whether I should still decide it.

(3) Live Controversy

[86] Subsequent to *Borowski*, this Court, the Federal Court of Appeal, and the Supreme Court of Canada have provided a clear approach to how the first branch of the *Borowski* test should be approached.

[87] In *R v Adams*, [1995] 4 SCR 707, the Supreme Court reaffirmed the *Borowski* test, re-stating the question of "live controversy" at paragraph 20:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties.

[88] In *Democracy Watch*, above, the Federal Court of Appeal held at paragraph 12 that the disposition of shares by Minister Morneau in November 2017 rendered the application moot on

the first branch of the test, "[w]ith the sale of the shares 'the substratum of [the proceeding] has disappeared' (*Borowski* at 357), and a decision of this Court on whether the Commissioner should have called for divestment would have no practical effect".

[89] It has been established, if the relevance of an impugned legislative provision can be established to the application, that the repeal of the legislative provision in question will render the application moot.

[90] Indeed, under section 18.1 of the *FCA*, judicial review applications must be tailored to specifically address a defective decision (or decisions, if a course of conduct can be demonstrated) under the statutory timelines set out in the *FCA*.

[91] Therefore, if time, circumstances, or other changes render the decision moot, the Court should properly strike the application for mootness.

[92] This Court has found that if an application under section 18.1 is moot, the Court has the ability to dismiss the judicial review application in question. Indeed, as was noted in *Strickland v Canada (Attorney General)*, 2015 SCC 37, judicial review can be barred given particular fact circumstances as, "the discretionary nature of [judicial review] reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals" (para 48).

[93] In *Borowski*, Justice Sopinka noted:

> The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.
>
> …
>
> A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), 1891 CanLII 36 (SCC), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs.

[94] Therefore, if it is clear that the impugned relevant legislative provision has been repealed and where the appealing party no longer has any interest, I must find an application moot.

[95] Further, if it can be established that subsequent decisions have caused the concrete dispute to effectively disappear, then an application on judicial review may serve no practical purpose if granted. At paragraph 15 in *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, the Supreme Court held that if the impugned decision of the decision maker has "been overtaken by subsequent orders", then there is no "live controversy" between the parties as per the *Borowski* test.

[96] The holding above - that is, that subsequent decisions of a decision maker may render an application moot under the first branch of the *Borowski* test - has been upheld numerous times at the Federal Court of Appeal, including in *Butler v Canada (National Parole Board)*, 2006 FCA 76 at para 4, and in *Société Radio-Canada v Syndicat des communications de Radio-Canada*, 2016 FCA 198 at para 12.

[97] In *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185, the Federal Court of Appeal determined that even if there is a possibility that the issue may reoccur, that does "not in itself warrant our hearing a moot case" (para 4).

[98] I find that there is no live controversy here. The dispute has disappeared and the issues between the parties have become academic for a number of reasons including: i) the legislation has been repealed; ii) as time passes a number of other steps in the process such as public consultation have taken place; and iii) even if there is the possibility of the issue reoccurring it is best to be dealt with at that time. I find it clear that the David Suzuki Foundation cannot succeed on the first bar of the *Borowski* test for the reasons below.

(a) *Product Re-Evaluation*

[99] As the AG and Syngenta noted, the Notice of Application asserts that every one of the PMRA's decisions regarding TMX and the TMX products since 2006 was unlawful, including all 6 end-use products that are currently active registrations held by Syngenta, along with the active ingredient. When the PRVD was released in December 2017, the PMRA released a proposed registration decision which concluded that the conditions relating to additional information required under section 12 of the *Act* for the seed treatment PCPs and the TMX used in them had been met by Syngenta, and that their registrations should be converted from conditional into full ones. This was followed by a 90 day consultation period under the *Act* that began on December 19, 2017 and ended on March 19, 2018.

[100] The PRVD rendered the application moot in relation to the 12 seed treatment PCPs and the use of TMX in them, and therefore by order dated April 13, 2018, the David Suzuki Foundation withdrew the application for judicial review in regards to these 12 products. While the David Suzuki Foundation contend that I should draw no conclusions from this, because the David Suzuki Foundation are entitled to limit the scope of judicial review before me, I can only draw the conclusion that they are no longer part of the judicial review because there is no longer a live issue with these products.

[101] It is clear on the record before me on judicial review that the conditional registrations on the products at issue are now subject to a similar review process that mirrored the process for the other 12 products. In my assessment, it is clear that there is no live issue for me to adjudicate on.

[102] Stepping back for a moment, if I accepted that the discrete decisions relating to each product over the course of many years is subject to review, I find that there is no live issue relating to any of the products. On December 31, 2018, the pollinator re-evaluation and the subsequent proposed registration decisions will supersede the current decisions. A public consultation has now taken place to remedy any concern about the lack of consultation.

[103] The David Suzuki Foundation chose not to individually judicially review each of the seven product registrations, where the registrations spanned from the early 2000s to 2018, and instead brought the application on a course of conduct and sought a number of declarations as their remedies.

[104] Thus, I find that on the question of the six end-use products and the active ingredient before me in this application, there is no live issue at hand that I should examine on judicial review.

(b) *The Regime of Conditional Registrations-Transition*

[105] The David Suzuki Foundation acknowledge that the original concerns around the operation of section 14 are no longer at play here as the impugned section has been repealed. However, the David Suzuki Foundation argue that even though section 14 is no longer *vires*, the conditional registrations schema is still in play.

[106] While I agree that the transitional regulations have been used to grant extensions, I find that it is quite clear that these extensions are for the purpose of granting the extensions to allow for the end of the consultative period that ended on December 31, 2018. The language in the PRDs proposes three-year registrations of TMX pesticides that have been appropriately consulted on. There is no indication in the record that new products are being granted conditional registrations under the same regime.

[107] It is also critical to note that the repeal of the impugned sections came after the PMRA's prior policy statement that no new conditional registrations will be granted as of June 1, 2016.

[108] Therefore, what is in front of me is a matter that is at the last stages of being dealt with by a decision maker. The impugned regime has now been amended. While the transitional regulations have been used to grant extensions, this ground alone does not suffice to make this

matter judicially reviewable on its merits. The matter is still moot, notwithstanding the David Suzuki Foundation's conjecture that the final approval on the re-evaluation may last for years.

[109] The reality is that when the Seed Treatment Products went through the final approval, the David Suzuki Foundation dropped those products from being judicially reviewed. As the final approval on the re-evaluation is also imminent for these products, I see no significant reason as to why this application before me is not moot.

(c) *Repealed Legislation*

[110] In the matter before me, there is an impugned section that has now been repealed. As per *Borowski*, Justice Sopinka noted that a challenged by-law that has been repealed renders the matter moot. Justice Sopinka also noted that the Privy Council refused to address the constitutionality of challenged legislation in question when the two statutes in question were repealed prior to the hearing (*Attorney-General for Alberta v Attorney-General for Canada*, [1939] AC 117 (Judicial Committee of the Privy Council)). Similarly, the section at issue now being repealed makes this matter moot.

[111] In conclusion, I find that that the combination of the legislation being repealed, and the conditional registrations being in the last stages of the transition as evidenced by similar products once at issue in the application, the elements of the impugned conduct are no longer at issue.

[112] Therefore, on the first branch of the *Borowski* test, I find that the application before me is moot.

(4) Second Branch of *Borowski*: Exercise of Discretion

[113] Notwithstanding my finding above, if I find that there is no live controversy, I must still decide whether to utilize my discretion to hear the application.

[114] In *Borowski*, Justice Sopinka underlined the fact that there are three factors to be considered in determining whether or not a moot proceeding should nevertheless continue: (i) the existence of an adversary system; (ii) the concern for judicial economy; and (iii) the obligation for the Court to be aware of its law-making function (*Ficek v Canada (Attorney General)*, 2013 FC 430 at para 17; *Collin v Canada (Attorney General)*, 2006 FC 544 at para 11 [“*Collin*”]).

(a) *Existence of an Adversarial Relationship*

[115] In *Collin*, as cited above, the Court held that when a vegetarian in jail was given a vegetarian diet, his judicial review application was moot, and that the adversarial debate between the applicant and the institution had ceased (para 12).

[116] In *Équiterre v Canada (Health)*, 2016 FC 554 [“*Équiterre*”], Justice Phelan was looking at an application from *Équiterre* and the David Suzuki Foundation around the various decisions of the PMRA regarding the initiation “special reviews” of certain PCPs pursuant to sections 17(2) and (5) of the *Act*. In that case, Justice Phelan held that there was an existing adversarial relationship during the mootness application by the respondent (para 39).

[117] However, I find that the matter before me is distinguishable from *Équiterre*. *Équiterre* was also a test case for ministerial powers and the initiation of "special reviews". In *Équiterre,* however, it was clear that there still existed an adversarial context, as the question of the exact nature and meaning of the legislative scheme as to when a Minister is obligated to initiate a special review was in question.

[118] Here, however, there is no such adversarial context anymore. The relevant legislative scheme has been removed, the relevant consultations have taken place, and a final decision is impending. There is no clear contention on the meaning of the old section 14(1)(b). Given all of that, I am not satisfied that there is an adversarial context.

(b) *Judicial Economy*

[119] In *Eli Lilly Canada Inc v Novopharm Limited*, 2007 FCA 359, the Federal Court of Appeal further examined the question of "judicial economy" under the *Borowski* test. Justice Sexton, writing for the majority, reaffirmed at paragraph 36 that the concept of judicial economy means that, "courts must weigh the expenditure of scarce judicial resources against 'the social cost of continued uncertainty in the law' (*Borowski* at page 361)".

[120] In *Azhaev v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 219, Justice Manson made the following notation on the concern for judicial economy at paragraph 23:

> …judicial economy is related to **being mindful of expending scarce judicial resources to hear an academic argument** (*Borowski* at para 34). This is not relevant in the instant

> application, as Court resources have already been allocated. However, *Borowski* does refer to judicial economy in another way: **to resolve ongoing uncertainty in the law to facilitate the expeditious resolution of similar cases in the future** (*Borowski* at para 35). The Applicant's argument for this Court to exercise its discretion is based largely on this principle. **He argues that it will help future litigants**, including himself, to develop the jurisprudence on what "personal exigencies" justify a deferral of removal. **However, the Court in *Borowski* at para 36 specifically warned against the application of this factor in the manner suggested by the Applicant:**
>
> > The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. **It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.**
>
> [Emphasis added]

[121] In *Osakpamwan v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 267, Justice Southcott reaffirmed Justice Manson's approach, noting at paragraphs 30-31 on the question of judicial economy that it is, "preferable to wait and determine the issues raised by the Applicants in a genuine adversarial context if they do arise again."

[122] Ultimately, I have heard all of the submissions prepared by excellent counsel from the David Suzuki Foundation and from the Respondents. However, as noted by Justice Manson's caution, it is preferable to wait to determine the question if and when a genuine issue arises. This type of judicial economy argument is similar to the David Suzuki Foundation asking me to hear the matter to resolve ongoing uncertainty in the law. The question of judicial economy on these facts does not weigh in favoring answering the question of whether I should exercise my

discretion in not dismissing the matter for mootness. I have heard the arguments and do find them to be academic in nature. In this case, it is favorable to determine the question if and when a genuine question arises.

(c) *Law-Making Function*

[123] In *Collin*, it was held at paragraph 14 that the "law-making function" factor is only engaged when there is a question of general importance to be decided.

[124] In *R v Smith*, 2004 SCC 14, Justice Binnie, writing for the court, held that a continuation of the appeal would invade the law-making function of the legislature.

[125] In *British Columbia Native Women's Society v Canada*, [2000] FCJ No 588 (FC), Prothonotary Hargrave further examined a challenge to a government assistance program. Prothonotary Hargrave noted in finding the application moot:

> [17] Third, is the concept of the need to demonstrate the Court's proper law making function. Put another way, is there any need for the Court demonstrate a certain awareness of its law making function? If the Court were to hear the 1998 actions, in the clear absence of a dispute, and given that the Crown is engaged in putting into place agreements under the current AHRDS program, that might be viewed as an intrusion into the role of the legislative branch of government, rather than a proper function of the Court.

[126] Here, as noted above, I find that there is no question of general importance to be decided. I agree with the Respondents that this is not a case where there are far-ranging constitutional questions. While the David Suzuki Foundation proposed in oral argument that this case should proceed, as it is akin to how the courts must protect the *Charter* rights of vulnerable minorities

(which in this case, the David Suzuki Foundation argued are a corollary to pollinators), I do not find this to be a persuasive argument.

[127] That is not to say that the PMRA's compliance with the *Act* is not an important issue. Rather, and following *Borowski*, I am satisfied that it is preferable to wait until it is clear that there is a genuine adversarial context where the matters at play have not already been dealt with.

B. *Relief - Moving Target*

[128] Somewhat related to the mootness issue is that the relief sought had changed significantly since the time of the Notice of Application to the hearing.

[129] Much was made out at the hearing concerning the morphing of the relief without the amendment of the Application. Although I have dismissed the application for mootness, I feel it necessary to comment on the issue.

[130] The David Suzuki Foundation, in their Notice of Application dated July 6, 2016, asked for the following relief:

> 1A. An order declaring s. 14(l)(b) of the Regulations is *ultra vires* under the Act and of no force or effect;
>
> 1B. An order declaring that the PMRA has acted without jurisdiction in the matter of successively registering, or amending the registrations of Thiamethoxam Active and the Thiamethoxam end-use products under the Act without ever conducting public consultation, in reliance on s. 14(l)(b) of the Regulations.

1C. An order declaring that the registrations of Thiamethoxam Active and the Thiamethoxam end-use products are invalid for having been made by the PMRA without jurisdiction;

1D. An order prohibiting the PMRA from renewing, amending, or otherwise extending the invalid registrations of Thiamethoxam Active and the Thiamethoxam end-use products;

2. An order declaring unlawful the PMRA's course of conduct in the matter of successively registering, or amending the registrations of, Thiamethoxam Active and the Thiamethoxam end-use products under the Act while failing to ensure it has the scientific information necessary to be reasonably certain that Thiamethoxam's environmental risks are acceptable.

3. An order that this application be heard together with a closely related application filed by the applicants on July 6, 2016.

4. Costs.

5. Such further and other relief as this Court deems just.

[131] In oral argument, the David Suzuki Foundation made clear that they sought declaratory relief and specifically did not want any of the matters sent back for re-evaluation. In the David Suzuki Foundation's Memorandum of Fact and Law dated August 31, 2018, the David Suzuki Foundation sought relief that is different than what was sought in the Notice of Application.

[132] It was canvased at the hearing and confirmed that the David Suzuki Foundation chose (a strategic decision) not to amend the Notice of Application. In any event, the David Suzuki Foundation confirmed (against the protests of the AG and Syngenta) that they at this point in time seek the relief in the Memorandum of Fact and Law (see above at para 130) as well as the currently applicable grounds of relief from the Notice of Application.

[133] In their Memorandum of Fact and Law dated August 31, 2018, the David Suzuki Foundation sought the following declarations, or in the alternative that:

> 118. The Applicants request declarations set out in their notices of application or in the alternative that:
>
> 1) The PMRA acted without jurisdiction and engaged in an unlawful course of conduct in registering, continuing, renewing and extending the registrations of Thiamethoxam pesticides in Use Site Categories 5,6,13 & 14 from 2004- 2016, as a result of:
>
> a) failure to complete required public consultation prior to registration in accordance with s.28 and 8(1) of the Act;
>
> b) failure to correctly and reasonably interpret and apply the acceptable risk threshold in s.8 of the Act to the scientific information before it; and
>
> c) Reliance on s.12. and 16 of the act to defer the review of information necessary for the completion of the risk assessment required in s.8 of the Act until after registration of the products.
>
> 2) Section 67 of the Act does not authorize regulatory exemptions from the public consultation requirements in s.28 of the Act.
>
> 119. The Applicants request an order prohibiting the PMRA from renewing, amending, or otherwise extending the invalid conditional registrations of the above pesticides.
>
> 120. Costs in favour of the Applicants, with leave for further submissions.
>
> 121. Such further and other relief as the Applicants may request and the Court deems just.

[134] At the hearing, I asked for clarification on exactly what relief the David Suzuki Foundation were seeking, given the discrepancies between the Notice of Application and their Memorandum. The David Suzuki Foundation clarified they were seeking what was set out in

their Memorandum (above at para 133) as well as paragraph 1(c) from the Notice of Application. The David Suzuki Foundation then indicated that in the alternative, if I do not grant the relief sought as it was not properly pled, then I should grant the David Suzuki Foundation all of the relief in the Notice of Application.

[135] The Respondents disputed the attempt by the David Suzuki Foundation to seek different relief at this stage without an Amended Notice of Application, and the relief being only set out in the Memorandum, given the extensive case management and hearing that has already taken place.

[136] It is clear that the David Suzuki Foundation are no longer challenging the *vires* of section 14(1)(b) of the *Regulations*. However, the David Suzuki Foundation argue that the regime of conditional registrations is still active, given that sections 14(6) and (7) of the *Regulations* are still being used in transition to grant renewals to conditional registrations.

[137] The Respondents argue that the attempt by the David Suzuki Foundation here is improper, as the relief is ultimately a moving target. Indeed, the concern around section 67 of the *Act* as not authorizing regulatory exemptions is not even mentioned in the Notice of Application, and yet now relief is being sought against it.

[138] I find that the subsequent relief sought, as of August 2018, has changed substantially and reflects that much of what the application was about is now clearly moot. For example, sections that the David Suzuki Foundation wished to have struck down as *vires* in the initial Notice of

Application are no longer part of the regulatory scheme, and appropriate consultations have taken place.

[139] The changing scope of the application before me highlights the difficulty of an application not seeking review of a specific decision or a specific policy on judicial review and in this context arguing it is a course of conduct. This is in relation to Rule 302 limiting an application for judicial review to a single decision unless the Court orders otherwise.

[140] The David Suzuki Foundation presented an ever-evolving target, which is not the nature of a judicial review based on a certified tribunal record. The David Suzuki Foundation when asked why they did not amend indicated that it was a decision made in the course of the litigation. On these facts, this decision contributed to the matter being moot.

[141] Because I have found the matter to be moot, I will not make a determination on the Rule 302 course of conduct issue, adequate alternative remedy or whether the PMRA's "course of conduct" is unlawful.

[142] In addition, I do not need to decide the motion to strike the Dr. Tout affidavits. I will note that out of caution when making the decision finding the application moot, no evidence found in the impugned paragraphs or exhibits of the Dr. Tout affidavits at issue was relied on.

VII. Conclusion

[143] In this case, the David Suzuki Foundation propose that they are leading a test case about whether the government can expose Canada's environment to potentially dangerous pesticides without the scientific information and relevant consultative process that is legally required to assess environmental risk. Unfortunately for the David Suzuki Foundation, I find that the application is now moot.

[144] I thank counsel for their passionate and remarkable advocacy in providing the Court with their clients' positions.

VIII. Costs

[145] Bills of costs were filed at the conclusion of the hearing. The parties were asked to attempt to come to an agreement regarding costs. To their credit, the parties reached an agreement and provided that agreement to the Court.

[146] Out of an abundance of caution, I would ask that the parties confirm exactly which party will receive what costs and if each lump sum figures are to be payable forthwith and inclusive of fees, disbursements and taxes. The parties shall inform the Court by joint correspondence filed within 7 days of the date of this decision. An order regarding costs will be made upon receipt of that correspondence.

JUDGMENT IN T-1071-16

THIS COURT'S JUDGMENT is that:

1. This application is dismissed; and
2. The parties shall inform the Court by joint correspondence filed within 7 days of the date of this decision the specifics of their agreement on costs. Costs will be awarded in a separate order.

"Glennys L. McVeigh"
Judge

ANNEX A

Original Products Under Review:

1. Cruiser 5FS
2. Helix Liquid Seed
3. Helix Xtra Seed
4. Actara 240
5. Actara 25
6. Cruiser 350 FS
7. Cruiser Maxx Beans
8. Cruiser Maxx Cereals(29127)
9. Cruiser Maxx Vibrance
10. A18046A Seed
11. Endigo
12. Flagship
13. Cruiser Maxx Cereals (29192)
14. Mainspring
15. Cruiser Maxx Potato
16. Cruiser Vibrance Quattro
17. Helix Vibrance
18. Minecto Duo
19. TMX Technical (Active Ingredient)

As of April 30, 2018, by Order:

1. Actara 240
2. Actara 25
3. Endigo
4. Minecto
5. Mainspring (foliar or drench on ornamental)
6. Flagship (ornamental & greenhouse)
7. Thiamethoxam Technical (active ingredient)

ANNEX B

Name	Usage	Timeline
Thiamethoxam Technical Active	Active Ingredient	- Applied to register TMX Technical Active in November 1998. - PMRA granted temporary registration of TMX Technical Active on November 27, 2000. - On August 25, 2004, Category A (major new use) submission to register TMX Technical Active for foliar and in-furrow use for Actara 25WG and Actara240 SC. - On July 25, 2006, PMRA approved the Category A registration in relation to TMX Technical Active for USC 13 and 14. In doing so, PMRA a) advised that it had carried out an evaluation of the available information in accordance with the Act b) concluded that the use of TMX in accordance with the approved label would not pose unacceptable health or environmental risk, and c) advised that the conditional registration of TMX Technical active was amended under section 14 of the Regulations. - On October 19, 2006, PMRA send a letter to Sygenta advising Sygenta that conditional registration would be valid until December 31, 2008. - On October 19, 2006, PMRA published an evaluation report relating to the 2003 submission of Sygenta to convert TMX Technical Active to full registration. - On December 15, 2007, Sygenta

		submitted an application to register TMX Technical Active use for USC 30, and to convert USC 13 and 14 to full registration. - On April 25, 2008, PMRA extended registration validity until December 31, 2010. - On April 21, 2010, PMRA granted Sygenta's submission to convert TMX Technical Active to full registration for USC 20. - On January 15, 2014, the PMRA granted Sygenta's request to extend conditional registration for TMX Active for USC 10. - On August 29, 2016, PMRA received applications to convert all TMX foliar/soil products registrations from conditional registrations to full registrations. - On September 15, 2016, PMRA granted an extension of the conditional registrations. - On December 19, 2017, *Proposed Re-evaluation Decision for Thiamethoxam and Its Associated End-use Products: Pollinator Re-evaluation* ["PRVD"] was published.
Actara 25 WG Insecticide Actara 240SC	USCs 13 and 14: Actara 25WG is for foliar use on potatoes, apples and pears. Actara 240SC is for soil or in-furrow use on potatoes.	- On July 25, 2006, PMRA granted Actara 25WG and Actara 240SC conditional registration. - Conversion application on February 1, 2008 to convert Actara products from conditional to full registrations. PMRA extended registration validity

		to December 2010. - On September 27, 2013, Sygenta applied for an extension of the conditional registrations for Actara products. - On December 31, 2014, renewals of conditional registrations were granted. - Conversion application for Actara products on August 26, 2016. - August 15, 2018, *Proposed Registration Decision for Thiamethoxam, Actara 25WG Insecticide, Actara 240SC Insecticide, and other related end-use products* ("A-PRD"), issued August 15, 2018. Validity period of the products extended until December 31, 2020.
Endigo Insecticide	Endigo is a foliar product designed for use on soybeans and dry shelled beans.	- December 1, 2010, Sygenta submitted Category B application for Endigo to PMRA. - May 2, 2012, Endigo granted conditional registration to December 31, 2013. - August 15, 2018: In A-PRD, Endigo renewed until December 31, 2020.
Minecto Duo	Minecto Duo is an in-furrow spray during seeding or transplanting. USCs 13 and 14.	- June 30, 2011: Sygenta applies for Minecto under Category A. - March 28, 2013: PMRA gives conditional registration as per section 14/15 of the PCPR. - April 5, 2016- Sygenta seeks guidance on how to proceed with conversion on Minecto Duo.

		- August 15, 2018: A-PRD decision, Minecto given extension until December 31, 2020.
Mainspring X	Mainspring X is used to control a broad spectrum of biting/chewing and piercing/sucking insects. It is in USC 6.	- June 30, 2011: Sygenta submits a Category A application to register a new TMX product, Mainspring X. - March 28, 2013: PMRA conditionally registers Mainspring X. - August 26, 2016: Sygenta applies for conversion to full registration for Mainspring. - August 15, 2018: M-PRD decision (PRD 2018-13), clarifies that in order to undertake decision, validity period of Mainspring X will be extended under the transitional regulations until December 31, 2020.
Flagship	Flagship is designed for ornamental and greenhouse uses in Canada.	- June 1, 2012: Syngenta applies for Flagship - June 3, 2013: Flagship is conditionally registered. - August 15, 2018: In A-PRD, Flagship renewed until December 31, 2020.

ANNEX C

Pest Control Products Act, SC 2002, c 28

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.	**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.
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.	**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.
Additional Information and Mandatory Reporting **Additional information** 12 (1) The Minister may, by delivering a notice in writing, require a registrant (a) to compile information, conduct tests and monitor experience with the pest control product for the purpose of obtaining additional information with respect to its effects on human health and safety or the environment or with respect to its value; and (b) to report the additional information to the Minister within the time and in the form specified in the notice.	**Renseignements supplémentaires et obligation de communiquer** **Renseignements supplémentaires** 12 (1) Le ministre peut, par remise au titulaire d'un avis écrit, exiger de celui-ci : a) qu'il effectue des essais, accumule des renseignements et surveille l'expérimentation du produit antiparasitaire en vue d'obtenir des renseignements supplémentaires quant à la valeur du produit ou quant à ses effets sur la santé et la sécurité humaines ou sur l'environnement; b) qu'il lui communique les renseignements en la forme et dans le délai qu'il y précise.

Condition of registration (2) A requirement under subsection (1) is a condition of registration.	**Condition d'homologation** (2) L'exécution de l'obligation visée au paragraphe (1) constitue une condition d'homologation.
Re-evaluation and Special Review **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.	**Réévaluation et examen spécial** **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.

Regulations Amending the Pest Control Products Regulations (Statement, Notice and Conditional Registration), SOR/2017-91

Transitional Provisions 11 (1) In this section, *former Regulations* means the *Pest Control Products Regulations* as they read immediately before the day on which these Regulations come into force. (2) The validity period of a conditional registration that is in effect before the coming into force of these Regulations continues to be in effect until the end of that period. (3) The validity period of a conditional registration that continues to be in effect after the coming into force of these Regulations may be extended under subsection 14(6) or (7) of the former Regulations.	**Dispositions transitoires** 11 (1) Pour l'application du présent article, *règlement* antérieur s'entend du *Règlement sur les produits antiparasitaires*, dans sa version antérieure à la date d'entrée en vigueur du présent règlement. (2) L'homologation conditionnelle qui est valide avant l'entrée en vigueur du présent règlement continue de l'être jusqu'à la fin de sa période de validité. (3) La période de validité de l'homologation conditionnelle qui demeure valide après la date d'entrée en vigueur du présent règlement peut être prolongée en vertu des paragraphes 14(6) ou (7) du règlement antérieur.
12 The requirements in these Regulations respecting the information that must be shown on the label of a pest control product do not apply until the day on which the first	12 Les exigences prévues par le présent règlement concernant les renseignements devant figurer sur l'étiquette ne s'appliquent pas, à l'égard d'un produit antiparasitaire, avant

of the following occurs: (a) the registration of the pest control product, if it occurs on or after the day on which these Regulations come into force, (b) the reprinting of the label, (c) the modification of the information on the label, or (d) the manufacture of the pest control product, if it occurs on or after the tenth anniversary of the day on which these Regulations come into force.	le premier en date des évènements suivants : a) l'homologation du produit, si elle a lieu à compter de la date d'entrée en vigueur du présent règlement; b) la réimpression d'une étiquette; c) la modification des renseignements figurant sur l'étiquette; d) la fabrication du produit, si elle a lieu à compter du dixième anniversaire de l'entrée en vigueur du présent règlement.

Pest Control Products Regulations, SOR/2006-124 (prior to repeal)

14 (1) Despite section 13 and subject to subsection (2), if a notice is delivered to the registrant under section 12 of the Act when a pest control product is registered or the registration of a pest control product is amended under subsection 8(1) of the Act, the registration becomes a conditional registration and (a) the validity period must end no later than December 31 in the third year after the year in which the product is registered or the registration is amended; and (b) subsections 28(1) and 35(1) and paragraphs 42(2)(c) to (e) of the Act do not apply. **Further notices under section 12 of the Act** (2) When a notice is delivered to the registrant under section 12 of the Act in relation to the reinstatement of an expired conditional registration or the continuation of a conditional registration after the evaluation of data, paragraph (1)(a) applies.	14 (1) Malgré l'article 13 et sous réserve du paragraphe (2), si un avis est remis au titulaire en vertu de l'article 12 de la Loi lors de l'homologation d'un produit antiparasitaire ou de la modification de celle-ci aux termes du paragraphe 8(1) de la Loi, l'homologation est conditionnelle et est assujettie aux exigences suivantes : a) la période de validité se termine au plus tard le 31 décembre de la troisième année qui suit l'année d'homologation ou de modification de l'homologation; b) les paragraphes 28(1) et 35(1) et les alinéas 42(2)c) à e) de la Loi ne s'appliquent pas. **Nouvel avis aux termes de l'article 12 de la Loi** (2) Lorsqu'un avis est remis en vertu de l'article 12 de la Loi relativement au rétablissement d'une homologation conditionnelle périmée ou à la prolongation d'une homologation conditionnelle après évaluation des données, l'alinéa (1)a) s'applique.

Amendment (3) Paragraphs (1)(a) and (b) apply to an amendment of a conditional registration. **Exemption** (4) Despite subsection 81(2) of the Act, paragraph 42(2)(f) of the Act applies to all registrations referred to in that subsection if a registration decision of a type described in paragraph 28(1)(a) of the Act has been made and the validity period has been fixed. **No extension** (5) Subject to subsections (6) and (7), the validity period of a conditional registration may not be extended. **Automatic extension** (6) The validity period of a conditional registration is extended for a period of two years when the registrant complies with the requirements of the notice delivered under section 12 of the Act. **Extension for consultation** (7) The Minister may extend the validity period for a period of sufficient duration to allow the Minister to carry out the consultation required by section 28 of the Act, if the application to amend or renew is made before the end of the validity period.	**Modification** (3) Les alinéas (1)a) et b) s'appliquent à la modification d'une homologation conditionnelle. **Exemption** (4) Malgré le paragraphe 81(2) de la Loi, l'alinéa 42(2)f) de la Loi s'applique aux agréments visés par ce paragraphe lorsqu'une décision d'homologation mentionnée à l'alinéa 28(1)a) de la Loi a été rendue à leur égard et que la période de validité a été fixée. **Aucune prolongation** (5) Sous réserve des paragraphes (6) et (7), la période de validité de l'homologation conditionnelle ne peut être prolongée. **Prolongation automatique** (6) La période de validité de l'homologation conditionnelle est prolongée de deux ans lorsque le titulaire se conforme aux exigences de l'avis visé à l'article 12 de la Loi. **Prolongation pour consultation** (7) Le ministre peut prolonger la période de validité de la période nécessaire pour lui permettre de mener la consultation prévue à l'article 28 de la Loi, à condition que la demande de modification ou de renouvellement ait été faite avant la fin de la période de validité.
Expanded scope of section 14 — associated products 15 (1) Paragraphs 14(1)(a) and (b) apply to the registration of any pest control product that contains an active ingredient in respect of whose registration a notice has been delivered under section 12 of the Act.	**Élargissement de la portée de l'article 14 — produit associé** 15 (1) Les alinéas 14(1)a) et b) s'appliquent à l'homologation de tout produit antiparasitaire contenant un principe actif dont l'homologation a fait l'objet de l'avis prévu à l'article 12 de la Loi.

Expanded scope of section 14 — associated active ingredients (2) Paragraphs 14(1)(a) and (b) apply to the registration of an active ingredient that is contained only in a registered pest control product in respect of which a notice has been delivered under section 12 of the Act.	**Élargissement de la portée de l'article 14 — principe actif associé** (2) Les alinéas 14(1)a) et b) s'appliquent à l'homologation d'un principe actif contenu uniquement dans un produit antiparasitaire homologué ayant fait l'objet de l'avis prévu à l'article 12 de la Loi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1071-16
STYLE OF CAUSE:	DAVID SUZUKI FOUNDATION ET AL v GOVERNOR IN COUNCIL ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	MCVEIGH J.
DATED:	APRIL 5, 2019

APPEARANCES:

Laura Bowman, Charles Hatt, Bronwyn Roe	FOR THE APPLICANTS
Andrea Bourke, Andrew Law, Jonathan Roth	FOR THE RESPONDENT [ATTORNEY GENERAL OF CANADA]
John P. Brown, Brandon Kain, Stephanie Sugar	FOR THE RESPONDENT [SYNGENTA CANADA INC.]

SOLICITORS OF RECORD:

EcoJustice Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT [ATTORNEY GENERAL OF CANADA]
McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT [SYNGENTA CANADA INC.]