



**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Sent by fax: (416) 314-2976  
Sent by mail

Dear Mr. Bilyea,

**RE: Banning Cosmetic Pesticide Use in Ontario**

*EBR Registry Number 010-2248 - Notice of intent to introduce legislation that would ban the cosmetic use of pesticides in Ontario.*

CELA is pleased to provide this submission in response to the proposal to introduce legislation that would ban the cosmetic use of pesticides in Ontario. CELA supports this proposal and makes suggestions in this submission for further strengthening of the proposed law.

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization founded in 1970. CELA is an environmental law clinic – within Legal Aid Ontario - dedicated to providing legal services to low income people and disadvantaged communities, and advancing the cause of strong environmental protection through advocacy, education and law reform.

In addition to providing direct legal representation and summary advice, CELA's law reform and public educational mandates include advocacy on ensuring access to environmental justice and protecting public environmental rights. This work occurs at the local, regional, provincial, national and international level.

Members of our staff have worked on pesticides issues for over 25 years. We have been at the forefront of Canadian activity summarizing the research about human health impacts, particularly to children, and were extensively involved in efforts to reform the *Pest Control Products Act*, several progressive revisions to which were proclaimed in June of 2006. We have acted in the courts on behalf of clients adversely affected by pesticides as well as on behalf of multiple groups and individuals who successfully opposed repeated legal challenges to pesticide bylaws in Hudson, Quebec and Toronto, Ontario. Public inquiries to our office are numerous.

For over twenty years, a very large proportion of these inquiries have consistently included questions about pesticides. We have assisted hundreds of groups and individuals across Canada in their efforts to see pesticide bylaws enacted by their local municipalities.

It is therefore with great pleasure that we respond to this policy proposal notice. We strongly support the overall intent and proposed approach. Below, we provide responses to the questions posed in the EBR Registry. However, we first suggest that the proposed law should include a statement of overall rationale firmly grounded in the precautionary approach.

### **Precautionary Rationale for Proposed Law**

The proposed law could reasonably include the following statements of both scientific fact and public aspirations for Ontario:

- Scientific evidence reveals associations between adverse effects on child development and varied pesticide exposures.
- Pesticide risks arise from exposures that occur pre-conception (to either parent), prenatally or during childhood.
- Children are known to be at greater risk from pesticides than adults in terms of both higher exposure and greater vulnerability during multiple developmental stages.
- Pesticides are but one class of many different kinds of chemicals in commercial use to which children are exposed in their indoor and outdoor environment on a daily basis and for which there is public concern about uncertain risks.
- While pesticides are subject to pre-market regulatory risk assessment and approval, they are assessed on an individual basis, in isolation from other pesticides and in isolation from myriad chemical exposures in modern life. Moreover, this assessment provides a determination of “acceptable risk” not safety.
- Broad public support exists in Ontario to reduce risks from chemical exposures and to find inherently safer alternatives, particularly for chemical use that is unnecessary or simply for cosmetic purposes.
- Well understood and validated alternatives exist for the use of chemical pesticides in lawn and garden care.
- A ban on the cosmetic use of pesticides in Ontario is a precautionary action taken in response to scientific uncertainty about risks, in accord with broad-based public support and aspirations for eliminating needless risks, and in recognition of the existence of safe alternatives.

Evidence-based precaution and continuously improving science in a precautionary paradigm are appropriate approaches for a suite of substances which are intended to act as pesticides. By definition, these are substances which are designed to interfere with survival or reproduction of certain organisms.

### **1. Determining the Scope of the Ban**

We support the scope of the ban as described in the EBR notice but also note that it should be extended to include sales, as discussed in response to item 2 below. In the legislative language,

we suggest an approach similar to that used in multiple bylaws across the country whereby pesticide use is banned in the province while allowing for a series of specified exemptions. The exemptions will serve to delineate a series of uses with the default result that pesticide use for simply cosmetic, ornamental or non-essential purposes would be prohibited. This approach works well and avoids the difficulty of having to define “cosmetic” pesticide use.

The EBR notice states that cosmetic uses are “those intended to *improve the appearance* of lawns, ...etc” (emphasis added). It should be noted, that many of the changes in lawn and garden maintenance practices that will be necessary to move towards healthy, non-pesticide dependent systems will equally serve to “improve the appearance” of lawns, etc. without the need for chemical pesticides. CELA recommends therefore an overall prohibition, with specified exemptions.

### ***Outreach and Education***

There is a need for complementary educational efforts during a phased implementation - another essential ingredient of successful bylaws. For some people, not being able to use pesticides for their lawn and garden care can be brand new information. Experience demonstrates that it can take at least one and perhaps two or three growing seasons to learn about and successfully apply different approaches. People need access to educational resources that support them in a process of changing traditional practices to bring living systems in line with ecologically healthy and sustainable practices that are no longer dependant upon chemical pesticides or pesticide-fertilizer combinations.

## **2. Sale of Cosmetic Pesticides**

CELA strongly recommends that the scope of the proposed legislation include a ban on the sales of cosmetic pesticides.

First, it simply makes sense that a ban on use should include a ban on sales. Provincial action to ban sales is both possible and desirable and fills a gap that progressive municipalities with pesticide bylaws do not have the power to address. Continued access to pesticides in municipalities with bylaws undermines their efforts.

Second, the province should take this opportunity to ensure that any continued retail pesticide sales should not be allowed in concentrated form requiring dilution by consumers.

Third, we recognize that some pesticides will have both cosmetic and non-cosmetic uses. We have long believed that retail sales of pesticides should be more rigorously controlled in a manner analogous to a pharmacy where products are kept behind a counter and qualified staff control sales and provide advice on use and risks. Such retail counters also provide the province and retailers with coordinated locations for providing educational information about alternative practices for lawn and garden care.

We can suggest two examples (and there may well be more) of legislation that contain provisions for controlling sales of products on the basis of intended use. The first example is the *Ontario Liquor Licence Act* at Section 33, excerpted here:

33. No person shall,

(a) drink alcohol in a form that is not a liquor; or

(b) supply alcohol in a form that is not a liquor to another person, if the person supplying the alcohol knows or ought to know that the other person intends it to be used as a drink. R.S.O. 1990, c. L.19, s. 33.

In a second example, the *Government of the Northwest Territories Liquor Act*, places the onus to control certain liquor sales on the vendor, in 76(2). Section 78(2) also references quantities. Sections 76 - 78 are excerpted here:

76. (1) A person may, for medicinal or sacramental purposes, supply or administer liquor to any person.

(2) The burden of proving that the supplying or administering of liquor was for medicinal or sacramental purposes is on the person who supplied or administered it, and a justice who tries a case may draw inferences of fact from the frequency with which the liquor was supplied or administered and from the amount of liquor so used, and from the circumstances under which it was used.

77. Notwithstanding anything in this Act, any person may sell, purchase or consume

(a) any pharmaceutical preparation containing liquor that is prepared by a pharmaceutical chemist according to a formula recognized by the profession of pharmaceutical chemists; or

(b) any proprietary medicine as defined in the regulations made under the Food and Drugs Act (Canada).

78. (1) Where any substance contains alcohol and also contains ingredients or medication that makes it unsuitable as a beverage, a druggist or any person who manufactures or deals in the substance may purchase or use it for any purpose other than a beverage.

(2) Where a justice hearing a complaint in respect of selling, buying or consuming a substance referred to in subsection (1) is of the opinion that an unreasonable quantity of the substance was sold to a person, either once or at intervals, the person selling the substance may be convicted of selling liquor contrary to this Act, and every person who obtains or consumes the substance for beverage purposes, is guilty of an offence.

(3) For the purpose of subsection (2), a justice shall have regard to the legitimate purposes for which the substance was manufactured.

### **3. Exemptions/Restrictions**

Alongside an exemption for protection of public health, the proposed exemptions for agriculture and managed forests are reasonable and in keeping with the intent of this proposed law.

However, we do not agree with the exemption for rural residents. This exemption is not justified for several reasons. First, it would create a differential level of precautionary protection from pesticide exposure for Ontario's rural residents than will be enjoyed by those in towns and cities. Since the purpose of the provincial legislation is to protect and enhance public health, it would not be appropriate for provincial legislation to provide a differential level of protection for some citizens.

Second, rural residents that are alongside farms are potentially more highly exposed to pesticides than people in cities and towns due to pesticide drift and the opportunity for tracking indoors of

pesticide residues on shoes, wheels, etc. There is also a risk of groundwater and related well water contamination.

Third, in keeping with the recommendation that the scope of this law should extend to banning the sale of pesticides for cosmetic purposes, these products should not even be available for retail purchase for rural residential use.

#### **4. Exemptions for Golf Courses**

Our experience from efforts to enact municipal by-laws tells us that many golf course operations are highly dependent on certain pesticide uses and face difficulties in phasing down and phasing out these practices. While we have accepted that such difficulties exist, they are not insurmountable as evidenced by golf course operations that have been able to phase-out pesticides. A phased approach, with a requirement for planned reductions in pesticide use, as suggested in the EBR notice, is reasonable so long as there is a clearly specified deadline for full phase-out. Five to seven years would seem reasonable.

#### **5. Timing**

We strongly support the proposed timeline for swift introduction of legislation this spring and a phased-in implementation. Like successful efforts to implement municipal bylaws, a phased approach will allow for public understanding and acceptance to develop across several growing seasons. Resources must be spent on educational and training activities. Fortunately, municipalities have already done much of the work and their efforts can be easily transferred to a province-wide effort. However, the law must also include provisions for an effective enforcement regime.

#### ***Canadian Context***

Pesticide regulation in Canada is dealt with, to varying degrees, by all three levels of government: federal, provincial and municipal. Each of the jurisdictions have an appropriate role to play, an approach that was reinforced by the Supreme Court of Canada issued in the year 2000, in the *Hudson* decision involving a municipal pesticide by-law passed by that community.

Provinces (and by extension municipalities) generally have a more ‘hands-on’ role in the regulation of pesticides than does the federal government. Generally speaking, “[w]hile the federal government regulates the approval of pesticides for sale in Canada, the provincial government regulates what happens once a pesticide has entered Canadian markets including the sale, transport, storage, disposal and application of pesticides.”<sup>1</sup> If Ontario implements the law banning the cosmetic use of pesticides, it would be the second Canadian province to do so after Quebec's enactment of its *Pesticides Management Code* in 2003.<sup>2</sup>

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<sup>1</sup> West Coast Environmental Law, *A Citizen's Guide to Pesticide Use and the Law in B.C.*, 2007. <http://www.wcel.org/wcelpub/2007/14256.pdf>

<sup>2</sup> For more information on the Quebec Pesticide Management code, see Government of Quebec, “The Pesticide Management Code”, online at: <http://www.menv.gouv.qc.ca/pesticides/permis-en/code-gestion-en/activites-vente.htm>.

Municipal regulation of pesticides has, until now, arguably had the greatest effect of all government action on the prevention of the unnecessary cosmetic use of pesticides. As of June 2007 there were 34 municipalities in Ontario whose residents were protected by some form of pesticide use bylaw and 135 municipalities in Canada (including those in Ontario) protected by some form of municipal pesticide bylaw.<sup>3</sup> Municipal pesticide by-laws have been consistently upheld by the courts as appropriate and *intra vires* exercises of the municipal power to regulate based on the “health, safety or well being” of the inhabitants of the municipality and a similar provincial law would likely receive the same protection from challenge.<sup>4</sup>

### ***International Trade***

In 2002, a group of U.S. pesticide manufacturers threatened a NAFTA challenge to a similar Quebec law that banned cosmetic pesticides province-wide but later abandoned the claim. Should such a claim be made in response to Ontario’s legislation, CELA is of the opinion that the proposed law, even with the inclusion of a retail sales ban as recommended in these submissions, is consistent with Canada’s international trade obligations – if international trade law even applies to this type of regulation. In particular, since the proposed law is based on extensive scientific consensus about the dangers of pesticides, will not be applied in an arbitrary or discriminatory manner and is the least trade restrictive means of achieving the legitimate public health goals of the law (i.e. reducing unnecessary exposure to pesticides), it is CELA’s opinion that the proposed law would not conflict with any of Canada’s international trade obligations.

All of which is respectfully submitted.

Yours very truly,

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<sup>3</sup> See Christie, M. (2007). Pesticide Bylaws in Canada – Population Statistics by Municipality. Regularly updated list. On-line at: [http://www.healthyenvironmentforkids.ca/english/resources/card\\_file.shtml?x=915](http://www.healthyenvironmentforkids.ca/english/resources/card_file.shtml?x=915)

<sup>4</sup> For example, Toronto’s pesticide by-law was upheld by the Ontario Court of Appeal in *Croplife Canada v. Toronto (City)*, (2005), 75 O.R. (3d) 357 leave to appeal to S.C.C. dismissed with costs May 13, 2005.