

Good afternoon everyone. Thank you for the opportunity to speak on this panel.

Looking at the topic for this panel, “Pesticides – Act or Else” I am going to look at the four general subject areas noted here.

First I should tell you just briefly about the Canadian Environmental Law Association, if you are not aware of the work that we do. CELA is a legal aid clinic within the Ontario Legal Aid Plan of which there are about approximately 70 clinics across the Province, about 20 or so of which are specialized clinics, specializing in certain areas of law. Obviously ours is environmental. We celebrated our 30th anniversary last year. We look at environmental law and policy issues at the local, provincial, national and international level. This legal aid mandate includes both direct client representation for those who qualify for legal aid and we also have a mandate to advocate for law reform. The notion of advocacy to reform and improve the law fits within the legal aid mandate of improving access to justice, not just for our clients, but for the public at large and as such, it is public interest work.

So, on to the first slide. I’ve chosen a couple of images to provide a flavour for a very large and complex area of research, definitely controversial, and briefly note some of the public policy responses that have occurred in the area of pesticides for the last ten years. The major focus on children and pesticides began with this document, “Pesticides in the Diets of Infants and Children,” which came out in 1993. It was put together by the United States National Research Council, by a panel of experts from the National Academy of Sciences, including representation from the various specialized institutes

within the National Institutes of Health. It presented the evidence of why children are at greater risk and have greater exposure to pesticides. It is an entire presentation to review that evidence and I won't do that in detail today. The point to make in a regulatory context is that this report led to a number of key reforms, including the passage of the U.S. Food Quality Protection Act and Safe Drinking Water Act and a number of other research and policy measures that have constituted a very large agenda for research and policy changes in the United States. We tentatively followed suit in Canada for the past six years and just last month confirmed most of the US approach with the introduction of Bill C-53, the proposed amendments to the Pest Control Products Act.

This National Research Council report focused on food, but the research and policy agenda that has followed on this report has definitely gone beyond into all areas of pesticides, not just those for which exposure occurs from food or agricultural uses.

Next slide please. For the rest of the 1990s, the body of research about childhood exposure and the risks from pesticides continued to grow. This image is the cover of a supplement to the journal, *Environmental Health Perspectives*.. Periodically throughout the year, the monthly Journal is supplemented in this way for large topics, in this case, with a focus on the developing brain and environmental factors. A key point to make here is that even with all these advancements in research our ignorance continues to be very high – what we know is dwarfed by what we do not know about the effects of toxic substances, including on the brain. Dr. Herbert Needleman, who is a well-respected pediatrician and expert on lead toxicity, has made this very chilling statement: “We are

conducting a vast toxicological experiment in our society in which our children and our children's children are the experimental subjects."

My choice of looking at the effects on the nervous system derives from a whole lot of work that I've done over the years on lead and – next slide please – at CELA we, looked at the regulatory lessons, or rather lessons not learned, from the story of lead and gasoline, in a case study to this report, which we published in May of 2000, coauthored with the Ontario College of Family Physicians Environmental Health Committee. This report took a detailed look at children's environmental health and looked at and analyzed whether the law is protective of children's health. So, as I noted, among other things, we looked at the regulatory lesson of lead and asked whether we are making the same mistakes by not adequately ensuring that children are protected from the health effects of pesticides and other contaminants. And I will also refer you to the most recent issue of *Alternatives Journal* for an article that summarizes this report. I brought about ten extra copies or you can access the information on line at the URL noted on the next slide.

Next slide please. These next two slides briefly summarize some of the major findings of our report as they relate to pesticides. First, we found that older standards were rarely child protective. For example, 73% of the active ingredients of pesticides on the market and in use today, that's the equivalent of 1000s of products, were not evaluated with children in mind in terms of their developmental sensitivity or their greater exposure circumstances. The second major finding was that newer or proposed standards are also rarely child protective. It is true that much better evaluations are

happening now than there used to be. However, that has been as a result of all this child-focused research to which I have been referring. This work started with lead and PCBs and has continued with pesticides. However, in our analysis we concluded that even where standard setting is intentionally protective of children, where there is an actual recognition of the need to account for children, the actual standards that are ultimately put in place are also rarely child protective.

These first two findings were found to be the case because the laws and their underlying methods are not protective -- preventatively protective. They are reactive in that they tend to react to problems after they occur. They are often not used or enforced for a whole lot of reasons. But the major reason is the methodology of risk assessment and risk management, within which there is an insistence on a very high scientific standard of proof before we set protective standards.

The second thing is the weakening of standards as the process moves along. For example, we might get protective standards out of a risk assessment process, but then you go through the risk management exercise where you negotiate cost effectiveness and other factors and often the outcome is standards that are not intentionally or actually protective of children – not in all cases, but certainly quite often. So that is a very brief summary.

Next slide please. As you might expect, we recommended that the law should be protective. The greatest challenge is with substances that are already in commercial use and especially those with very high commercial values, for reasons that I am sure you can imagine.

We need a legal framework that is intentionally protective of children and other sensitive populations. It's not so with environmental standards because it has been skewed by risk assessment. I don't mean to imply that we need to throw out risk assessments, but we do need to revise our expectations. We tend to emphasize the scientific credibility of risk assessment, rather than adequately recognize how much it relies on a lot of value laden judgments because of the problem, as I said, that we have far less information – scientific information – than we need to be able to come up with standards based on scientific proof. As a result, we end up waiting for literally tens of thousands of controlled, or carefully done scientific experiments and instead we have this on-going massive uncontrolled experiment on children that Dr. Needleman talks about.

Before getting into the details about the Hudson by-law, I will review the major changes that are in Bill C-53, the proposed amendments to the Pest Control Products Act. In response to the concerns that we raised in our report and concerns raised by many others over the past ten years, the federal government has finally introduced amendments to this 33 year-old law. The first point to make is, after waiting so long, the government is acting very quickly. This bill could be law before the house rises for the summer – more likely it will wind up during the fall session. There is a new focus on preventing human health and environmental risks and the bill clearly requires applicants seeking to register new products to demonstrate that health and environmental risks are acceptable. They have made a good start in protecting children by putting in place most of the measures that have been in the US Food Quality Protection Act since 1996 and which Canada has been playing catch-up on since 1996 and for which we are also harmonizing with as a result of

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NAFTA anyway. New pesticides will have to be re-evaluated within 15 years. This timeframe is not impressive, 10 years would be better. However, there is a huge backlog of pesticides that were approved, in some cases, decades ago, that still require reevaluation, so 15 years for new ones is likely the only tack that would be manageable. None of this work – either the backlog or the new 15 year requirement – is going to happen without more money injected into the Pest Management Regulatory Agency to get this job done. Weaknesses of the bill include a lack of any overall goal of pesticide reduction, an extremely weak provision for the Precautionary Principle and little improvement towards post-registration monitoring, adverse effects reporting or public disclosure of pesticide useage information. There are a lot of gains in the area of public access to information and decision making (this was a serious weakness in the existing law) but absent from these new rights is explicit access to the pesticide useage information that the pesticide industry will be required to report annually to the Minister. It is very difficult to obtain accurate information in Canada about how much pesticides are actually used for different purposes. (Bieifing Note)

Next slide please. In the context of all of these concerns about pesticides and health, including children's health, and, until recently, the extreme reluctance of the federal government to modernize pesticide legislation, enter the Town of Hudson, Quebec. I would like to encourage you to read the actual text of the by-law. It is available at the URL provided here and this website is a very useful tool anyway for information on pesticides and especially on alternatives to pesticides.

The Hudson by-law is often referred to as a ban. It is not. It states that within the town, pesticide use is prohibited with these series of permitted uses. And they have to do, first of all, with public health, so that these areas are allowed for pesticide use: swimming pools, water purification, any danger to people including public health issues or emergencies such as to protect people with allergies, or if there's a need to spray for something like West Nile Virus or any other unforeseen public health emergencies. The by-law does not apply to indoor use. It has exemptions for agriculture and horticulture, but there is a registration requirement if pesticides are going to be used. The by-law contains a phased approach to golf courses. It does not apply to biological pesticides, which the by-law defines, and it also says that if there's a threat to health or agriculture from weeds growing in the town, you can use pesticides to control them if they are within the provincial rules on noxious weeds or pests. A comparable set of controls in Ontario exists within the requirements to control noxious weeds under the Weed Control Act.

On to the Supreme Court decision. As you likely know, the Hudson By-law was challenged unsuccessfully by two pesticide spraying companies in two levels of Quebec courts. It went to the Supreme Court of Canada so the highest court in Canada could decide whether Hudson had the authority to pass the by-law. That was the point of law that was being determined. The case was between Hudson and the two companies, but the court granted intervention status to a number of groups. These groups were allowed to participate in the case by introducing arguments to assist with the court's review of the case. So, at CELA, we intervened on our own behalf and represented ten citizen groups from across Ontario. The other group of intervenors was represented by the Sierra Legal

Defense Fund and included World Wild Life Fund, a citizens group in Quebec and the Federation of Canadian Municipalities. The court granted these interventions for, among other reasons, the fact that the decision in this case would have implications for municipalities across Canada. The court agreed with that point and we entered evidence to that effect. So I've included the URL (current?) for the decision for your reference. It's a very interesting document and it's reasonably understandable. There's not a lot of legalese. It's quite a worthwhile read.

On to the next slide please. So looking at some of the highlights of the decision. On the point of law in question, the court found that the authority to pass a by-law was found in the Quebec municipal legislation, in the Quebec *Cities and Towns Act*. I won't go into the details of how that worked out, but I've brought about 25 copies of a commentary that one of our lawyers did on this and *The Municipal Act* which I'll get into in a minute. This article summarizes a much larger analysis which you can obtain on our website if you are interested.

The second major point in the decision was the court agreed that its decision on this by-law would affect municipal powers in other provinces, particularly since many of the provinces have, or provide for municipalities, the same powers used by the Town of Hudson. Ontario is specifically included here. Ontario municipalities are similarly empowered to pass pesticide control by-laws.

The third thing is the court had to specifically consider the limits on the powers that Hudson used because of particular limitations with the Quebec *Cities and Towns Act*, and in particular, whether or not the by-law was consistent with relevant provincial and

federal legislation. The court found that the by-law was consistent with the provincial and federal legislation; in fact, it described it as a tri-level regulatory regime in a complimentary way. They were not overlapping. The court went further and said that the by-law respects international laws with the respect to the precautionary principle.

Next slide please. It is useful to summarize these three areas of jurisdiction in one spot. These are the Federal Government's responsibilities with respect to pesticides. Registration is the key one -- basically, whether or not you can use a pesticide at all and how it's evaluated. The Province deals with how you can use registered pesticides, licensing, who can use them, when, under what circumstances -- those different variables. Then municipalities, among other things, have, in seven out of ten provinces, have the power to enact by-laws for the general welfare of the community in response to local challenges and concerns. It is worth noting here that during the announcements and discussion around the introduction of Bill C-53, federal Health Minister Anne McClelland responded to questions about the federal bill by confirming these municipal powers.

Finally, on the fourth area of jurisdiction, the Supreme Court took great pains to spell out how the issue of Hudson's By-law fit within precautionary principles in international law. The Court cited the Bergen Declaration on Sustainable Development drafted back in 1990 (next slide please). This was one of the first statements of the precautionary principle. I won't read it since you have it on paper. In discussing this declaration, the court looked at the precautionary principle and domestic law and international law, and

the court said: "In the context of the precautionary principle tenants, the town's concerns about pesticides fit well under their rubric of preventive action."

Next slide please. So before finishing up with some comments on how Ontario municipalities can take the same kind of precautionary measures, I want to dispel this mythology that I hope is gradually fading, that the changes to the *Municipal Act* interfere with municipal powers as described by the Supreme Court.

As you likely know, the *Municipal Act* was changed last fall by Bill 111. That Bill received royal assent in December; it will come into effect January 2003. As I mentioned before, we did a detailed commentary on the Bill and have provided a summary of that analysis in the handouts. The *Municipal Act 2001* will revise the *Municipal Act*, but it is not substantially different. This analysis is not a legal opinion about a particular by-law or proposed by-law. Specific legal opinions will need to be done for each on a case-by-case basis to ensure specific by-laws fit within the powers confirmed in the Hudson decision. Rather, our analysis is a general comment on the fact that there continues to be the authority within the new *Municipal Act* to do substantially the same thing that the Supreme Court laid out. It is within the jurisdiction of Ontario municipalities. To summarize, there are key provisions still in the new *Municipal Act*. They are still there. They empower municipalities to act. There is no language added to undermine the authority to pass pesticide by-laws and was no language removed to undermine municipal authority. For more details I refer you to the legal opinion.

To finish up I want to make several points about what the scientific evidence can and cannot tell us about pesticides and how various players in this debate are responding.

Next slide please. I want to emphasize that it is quite true that we have very little information about the long-term toxic effects of environmental contaminants, including pesticides. We probably have more about pesticides than we have about other contaminants because they have to be so stringently evaluated, particularly new ones.

But the stakes are very high. To put our information base in context consider this: for the tens of thousands of chemicals – including, but not limited to pesticides - that are in high volume commercial use today, we have developmental toxicity information for less than 10% of them. That's a staggeringly small amount of information to be able to make informed decisions about whether these chemicals are developmentally toxic to children, but exposure continues. And what little we know about, for example, the effects of these substances on children's developing brains or other systems, what little we know is deeply troubling.

So when we can take action to remove this risk, we should, especially when we are talking about chemicals that aren't necessary, or so-called non-essential. In the Hudson decision the Supreme Court said:

“This case [the Hudson Case] arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. The protection of our environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels.”

The Court emphasized the phrase, “governments at all levels.” And quoting a passage from *Our Common Future*, the Court noted:

“that local government should be empowered to exceed, not to lower, national norms.”

And finally, the court agreed with the lower court judge in Quebec, that the Town of Hudson:

“faced with a situation involving health and the environment, was addressing a need of their community and in so doing was attempting to fulfill its role, as what the Ontario Court of Appeal has called the Trustee of the Environment.”

Many people want their municipality to take the same kind of precautionary action as Hudson did. They are asking these kinds of questions, “Why should we jeopardize a child’s ability to learn?”

Next slide please. This list of organizations is growing. These are groups that have passed various forms of resolutions calling upon municipalities to pass by-laws to control the cosmetic use of pesticides. Their audience is municipal councils and all of you.

Next slide please. Finally, the kinds of actions taken by some municipal councils so far have included this kind of list. They have passed council motions that generally agree on the need to reduce the non-essential use of pesticides. They are working not towards whether they will act but when and how. They are conducting, as they should, extensive public consultations, they are considering cost implications and they recognizing that public education about the implications of a ban, about how pesticides

can still be used and most important, about non-chemical alternatives, is an essential part of their pesticide control strategies.