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## POLLUTION PROBE LEGAL OPINION: BANNING MERCURY THERMOMETERS IN CANADA

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Wednesday, June 29, 2005

Mr. Ken Ogilvie  
Executive Director  
Pollution Probe  
625 Church St., Suite 402  
Toronto ON M4Y 2G1

Dear Ken:

Re: Legal Opinion: Banning Mercury Thermometers in Canada/ Our file 339-4

Thank you very much for the opportunity to provide Pollution Probe with this opinion.

## SUMMARY

You asked us for a legal opinion on whether mercury thermometers can be banned in Canada, and, if so, how. In brief: **Yes, mercury thermometers could readily be banned in Canada, should Pollution Probe have an adequate scientific and political case to do so.** Such bans could be adopted at the federal level and in some provinces and municipalities. We can, if you wish, draft a model municipal bylaw. Please forward information related to your scientific and technical case should you require the bylaw.

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## METHODOLOGY

Within the constraints of your budget, our research methods consisted of web-based research, legal analysis of federal and provincial statutes/regulations, analysis of legislation from other jurisdictions, and telephone interviews with key individuals and organizations working on mercury related projects. We have also provided you with some information about initiatives in the United States and the European Union to ban mercury thermometers.

We have prepared an indexed binder containing our research results, which includes printouts of applicable legislation, key case law relevant to the topic, a model statute, and information about government-run mercury programs. *Please note that these materials are illustrative, but not exhaustive.* That is, we may not have identified all current powers to ban mercury thermometers, or all initiatives to do so, especially at the provincial and municipal levels.

Please also note that most of the powers described below could be applied to a wide variety of products that contain mercury, should adequate substitutes be available for them and should they pose an unreasonable risk to human health or the environment. However, some powers (such as the Medical Devices Regulations) apply only to certain thermometers.

Finally, it has not been our task to assemble the technical and scientific case that mercury-based devices *should* be banned. We understand that you have already done so.

## FEDERAL LEGAL TOOLS

The federal government has clear authority to ban or regulate mercury thermometers, in at least three statutes.

### *Hazardous Products Act*

The *Hazardous Products Act*<sup>1</sup> gives the federal government extremely broad powers to prohibit or restrict (regulate) products that they consider to be a danger to the health or safety of the public. This is an Act administered by the Minister of Health. Among other things, a product may be prohibited or restricted if it contains a poisonous or toxic

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<sup>1</sup> R.S. 1985, c. H-3. This Act does not apply to devices regulated under the *Food and Drugs Act*; see s. 3 [1][b].

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substance.<sup>2</sup> (We assume that you will establish that mercury is a poisonous or toxic substance and that mercury thermometers contain it, but are liable to breakage.) A highlighted copy of the *Hazardous Products Act* is located at Tab 2 (B) of the reference binder.

A product becomes prohibited or restricted by an order made by the Governor in Council<sup>3</sup>, i.e. by the federal Cabinet. The Order simply adds the product to either Part 1 or Part 2 of Schedule 1 to the Act<sup>4</sup>. Anything in Part 1 of Schedule 1 is a *prohibited product*.<sup>5</sup> Anything in Part 2 of Schedule 1 is a *restricted product*.<sup>6</sup>

- If a product is *prohibited*, no person shall advertise, sell or import it in Canada.<sup>7</sup>
- If a product is *restricted*, its advertisement, sale or import can be controlled by regulations.<sup>8</sup>

There are two routes to, in effect, appeal such an order. When the Governor in Council adds a product to the prohibited or restricted lists, the Minister must lay a copy of the order before each House of Parliament<sup>9</sup> and the two Houses of Parliament can by resolution revoke the order.<sup>10</sup>

In addition, the order can be appealed to a Board of Review.<sup>11</sup> Anyone who manufactures, distributes or sells the product may, within 60 days, require the Minister to refer the order to a Board of Review.<sup>12</sup> The Minister of Health then establishes a Board of Review, which conducts an inquiry into the nature and characteristics of the product.<sup>13</sup> Following the hearing, the Board makes a recommendation to the Minister, which is generally made public.<sup>14</sup> The Minister is not bound by the Board's advice, but is likely to take it.

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid* at s. 6.

<sup>4</sup> *Ibid* at Schedule 1.

<sup>5</sup> *Ibid* at s. 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at s. 4.

<sup>8</sup> *Ibid* at s.5 (a).

<sup>9</sup> *Ibid* at s. 6

<sup>10</sup> *Ibid* at s. 7.

<sup>11</sup> *Ibid* at s. 8.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at s. 9.

<sup>14</sup> *Ibid* at s. 9 (5).

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There is no prescribed process for deciding which products should be designated as prohibited or restricted. I suspect that the usual trigger is a tragedy of some sort, perhaps via a coroner's report or some similarly authoritative recommendation. In this case, a request from the Canadian Medical Association and other respected bodies would probably go a long way.

The Minister would likely have his/her staff enquire into such a recommendation, evaluating the degree of the hazard posed, the medical, economic and political effects of a ban, etc. If the Minister wishes to do so, he /she can require information on a potentially hazardous product from the manufacturer.<sup>15</sup>

Part 1 of Schedule 1 of the *Hazardous Products Act*, the Prohibited Products List, is found at Tab 2 (B). You will see that it already includes approximately 40 items, e.g. flammable children's pyjamas, yo-yo's with long cords, kite strings that conduct electricity, and a mysterious product known as sneezing powder. The inclusion of mercury thermometers on this list would not be a substantial stretch.<sup>16</sup>

Note: The remainder of the *Hazardous Products Act* provides a system of material safety data sheets that must be used to disclose the risks associated with the use of a controlled product in a workplace. A controlled product means any product, material or substance that is listed in any of the classes listed in Schedule 2 under the *Hazardous Products Act*.<sup>17</sup> Schedule 2 consists of several classes, one of which is Class D: poisonous and infectious material.<sup>18</sup> We have not investigated whether MSDS must be provided when mercury thermometers are used in a workplace.

In fact, the federal government has just adopted a products ban under Schedule 1 of the *Hazardous Products Act*. On May 10, 2005, the federal Cabinet, on the advice of the Minister of Health, ordered a ban on children's jewellery that contained specified concentrations of lead. This Order appeared in the June 1 edition of the *Canada Gazette*.<sup>19</sup> A copy of it, together with the supporting Regulatory Impact Analysis Statement (RIAS), can be found at Tab 2 (b) of the reference binder. I presume that the Order has, as required, been laid before Parliament, and has not been revoked by them.

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<sup>15</sup> *Ibid* at s. 10 (1).

<sup>16</sup> *Ibid* at Schedule 1, Part I.

<sup>17</sup> *Ibid* at s. 2.

<sup>18</sup> *Ibid* at Schedule 2, Class D.

<sup>19</sup> Children's Jewellery Regulations – Regulatory Impact Analysis Statement, C. Gaz. 2005. Vol. 139, No. 11.

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As you will see, the RIAS contains three key elements:

1. a detailed evaluation of the degree of hazard posed by such jewellery, together with the medical and economic effects of a ban. There were two documented cases of elevated lead blood levels in children from sucking such jewellery: one in Canada and one in the US. The remaining evidence of hazard came from the high levels of lead measured in much jewellery, and in medical evidence that even slightly elevated blood lead levels can be harmful to children;
2. elaborate attempts over six years to avoid the need for regulation, including extensive industry consultation and the failure of a voluntary labelling / restraint program that included three letters to the relevant industries; and
3. a policy foundation in the form of a Health Canada "hazard-based Lead Risk Reduction Strategy".

Similar elements would likely be necessary for any campaign to ban mercury-containing devices.

## *Canadian Environmental Protection Act*

Under Part 5<sup>20</sup> of the *Canadian Environmental Protection Act, 1999*,<sup>21</sup> the federal government has clear authority to ban or regulate products containing substances that are listed on the Toxic Substances List ("TSL").<sup>22</sup> Mercury is item 8 on the TSL.<sup>23</sup> Please see Tab 2 (A) for copies of the relevant sections of *CEPA* discussed in this opinion.

Section 93 of *CEPA*,<sup>24</sup> copy enclosed, authorizes the Governor in Council to make extensive regulations for a product that contains a substance on the TSL. Such regulations could control, among other things:

93 (1) (e) the quantity of [mercury] that may be manufactured, processed, used, offered for sale or sold in Canada;

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<sup>20</sup> Controlling Toxic Substances.

<sup>21</sup> S.C. 1999, c. 33, Part 5 ["*CEPA*"].

<sup>22</sup> *Ibid* at s. 90 (1).

<sup>23</sup> *Ibid* at Schedule 1.

<sup>24</sup> *Ibid* at s. 93 (1).

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(f) the purposes for which [mercury] or a product containing it may be imported, manufactured, processed, used, offered for sale or sold;

(l) **the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of [mercury] or a product containing it;**

(o) the manner in which, conditions under which and the purposes for which [mercury] or a product containing it may be advertised or offered for sale; etc.

These powers must be used in accordance with the principles set out in section 2<sup>25</sup>, which include the importance of preventative measures to protect human health and the environment:

2 (1) In the administration of this Act, the Government of Canada shall...

(a) **exercise its powers in a manner that protects the environment and human health**, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable **pollution prevention** approaches;

(a.1) take **preventive** and remedial **measures** to protect, enhance and restore the environment;

(b) take the necessity of protecting the environment into account in making social and economic decisions;

(j) **protect the environment**, including its biological diversity, **and human health, from the risk of any adverse effects of the use and release of toxic substances**, pollutants and wastes....

(1.1) The Government of Canada shall consider the following before taking any measure under paragraph (1)(a.1):

(a) the short- and long-term human and ecological benefits arising from the environmental protection measure;

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<sup>25</sup> *Ibid* at s. 2.

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(b) the positive economic impacts arising from the measure, including those cost-savings arising from health, environmental and technological advances and innovation, among others; and

(c) any other benefits accruing from the measure.<sup>26</sup>

Environment Canada therefore has clear authority under this part of *CEPA* to regulate or ban products that contain mercury, if there is a scientific case to do so, and if the human and ecological benefit of a ban outweigh its cost.

## *Food and Drugs Act*

The *Food and Drugs Act*<sup>27</sup> provides for the prohibition and regulation of medical devices, including measuring devices such as medical or veterinary thermometers or sphygmomanometers. It authorizes the Governor in Council to control devices that pose an unacceptable risk to human health. We do not know whether you would be able to persuade the Minister of Health to invoke this statute (it should be much easier to persuade him/her to invoke the *Hazardous Products Act*). However, we provide this information for completeness. Please note that the *FDA* would not apply to thermometers used in laboratories or for other non-medical purposes, or to other mercury-containing products intended for non-medical purposes. Please see Tab 2 (C) for a copy of the *FDA* and relevant regulations.

Under s. 19 of the *FDA*, *no person shall sell any device that, when used...under such conditions as are customary or usual, may cause injury to the health of the purchaser or user thereof.*<sup>28</sup> To the best of our knowledge, this prohibition has not been applied to mercury thermometers.

Under section 30 of the *FDA*<sup>29</sup>, the Governor in Council can regulate the use of any substance as an ingredient in a device, to prevent injury to the health of the purchaser or consumer.<sup>30</sup> Such regulations could also require those importing or selling a device to assess the effect on the environment or on human life/health of releasing the device<sup>31</sup> into the environment.<sup>32</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> R.S. 1985, c. F-27 ["*FDA*"].

<sup>28</sup> *Ibid* at s. 19.

<sup>29</sup> *Ibid* at s.30.

<sup>30</sup> *Ibid* at s.30 (1)(b)(iv).

<sup>31</sup> Although not, expressly, what it contains.

<sup>32</sup> *Ibid* at s.30 (1)(L.1).

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## *Medical Devices Regulations*

Some *Medical Devices Regulations*<sup>33</sup> already exist under the *FDA*. They provide some authority for the Governor in Council to restrict the sale of mercury thermometers, if the evidence of danger to human health is sufficiently strong, and if adequate alternate thermometers are available to do the same job at lower risk. The regulation can be found at Tab 2 (C).

All medical devices are subject to “safety and effectiveness requirements” which are set out in sections 10 to 20 of the *Medical Devices Regulations*.<sup>34</sup> Please note sections 10, 11, and 16:

- Section 10 requires the manufacturer of a medical device to eliminate the risks inherent in the device to the extent possible.<sup>35</sup> *Pollution Probe may be able to assemble a case that the use of mercury in a thermometer poses an unnecessary risk because alternative materials do an equivalent job without creating the health risks associated with mercury.*
- Section 11 applies the same risk-benefit analysis to those selling or advertising the device.<sup>36</sup>
- Section 16 requires the design, manufacture and packaging of a medical device to minimize any risk to a patient, user or other person from reasonably foreseeable hazards, including *the presence of a contaminant or fluid leaking from the device*.<sup>37</sup>

Section 9 requires each manufacturer to ensure that a medical device meets the safety and effectiveness requirements and to keep objective evidence of this.<sup>38</sup> These obligations apply to the manufacturer of the device and not to its sale. However, we could argue that a medical device such as a mercury thermometer that does not meet the safety and effectiveness requirements is also in breach of section 19 of the *FDA*.<sup>39</sup> If so, it cannot be sold in Canada.

I do not know whether mercury thermometers do meet the safety and effectiveness requirements. If the Minister of Health is not sure, he/she can demand information to

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<sup>33</sup> SOR/ 98-282.

<sup>34</sup> *Ibid* at ss. 10-20.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at s. 9 (1)(2).

<sup>39</sup> *Supra* note 26 at s. 19.

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confirm whether a medical device meets the safety and effectiveness requirements.<sup>40</sup> If, having considered this information, the Minister determines that the device does not meet the safety and effectiveness requirements, the Minister may direct a manufacturer to stop the sale of a medical device.<sup>41</sup>

Under the *Medical Devices Regulations*, a mercury thermometer that is designed for oral use would be classified as a Class One<sup>42</sup> medical device; thermometers designed for rectal use would be classified as Class Two.<sup>43</sup> Class Two medical devices, such as a rectal thermometer, cannot be imported or sold in Canada without a medical device license.<sup>44</sup> Applications for a medical device license require substantial supporting evidence, including evidence that the device meets the safety and effectiveness requirements.<sup>45</sup> If the device is manufactured outside of Canada, a certificate of a conformity assessment by the foreign country certifying that the medical device meets the safety and effectiveness requirements is also accepted.<sup>46</sup> Medical devices for which licenses have been granted are listed on the Medical Devices Active Licence Listing (MDALL).<sup>47</sup>

## PROVINCIAL/TERRITORIAL LEGAL TOOLS

We have reviewed the primary environmental statutes for all of the Canadian provinces and territories in an effort to find regulatory authority to ban products, such as mercury thermometers. Our research resulted in us finding eight good examples of provincial regulatory authority to ban products/devices. As indicated above, there may be other statutes that we could find through a more thorough search. The relevant sections of these statutes can be found at Tab 3 of the reference binder.

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<sup>40</sup> *Supra* note 32 at s. 25 (1).

<sup>41</sup> *Ibid* at s.25 (2)(b).

<sup>42</sup> *Ibid* at Schedule 1, Rule 2 (1).

<sup>43</sup> *Ibid* at Schedule 1, Rule 2 (2).

<sup>44</sup> *Ibid* at s. 26.

<sup>45</sup> *Ibid* at s. 32.

<sup>46</sup> *Ibid* at s. 33.

<sup>47</sup> The listing is available to the public at [www.mdall.ca](http://www.mdall.ca).

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## *Alberta*

Section 162 of the *Environmental Protection and Enhancement Act*<sup>48</sup> authorizes the Lieutenant Governor in Council (the provincial Cabinet) to make regulations respecting and prohibiting the importation into Alberta or the manufacturing, processing, use or sale of a hazardous substance or a product containing a hazardous substance.<sup>49</sup> A hazardous substance is defined as a "substance or mixture of substances, other than a pesticide, that exhibits characteristics of ... toxicity..."<sup>50</sup>, and anything else designated as hazardous by the Lieutenant Governor. This could include mercury. The regulations could establish numerous conditions relevant to the potential release of mercury into the natural environment.

## *Manitoba*

Section 41 of the *Environment Act*<sup>51</sup> authorizes the Lieutenant Governor in Council to make regulations respecting the use, restriction, or prohibition of use of any product or substance that may pollute or damage the environment. This could include mercury thermometers.

## *Northwest Territories*

Included for information purposes only, section 5 of the *Waste Reduction and Recovery Act*,<sup>52</sup> which is not proclaimed or in force, would allow the Commissioner in Executive Council to prohibit a manufactured product from being sold or distributed in the Northwest Territories upon being satisfied that the product will cause a significant impairment of the natural environment that cannot otherwise be prevented or mitigated.

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<sup>48</sup> R.S.A. 2000, c. E-12.

<sup>49</sup> *Ibid* at s. 162.

<sup>50</sup> *Ibid* at s. 1(aa).

<sup>51</sup> C.C.S.M. c. E125, s. 41 (1)(o).

<sup>52</sup> S.N.W.T. 2003, c. 29, s. 5.

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## *Nova Scotia*

Section 66 of the *Environment Act*<sup>53</sup> authorizes the Governor in Council (here, the Nova Scotia Cabinet) to make regulations governing and prohibiting the use of any thing for the protection of the environment including regulations governing the design, construction, maintenance or use of the thing.<sup>54</sup> As well, section 66 states that the Governor in Council may make regulations governing and prohibiting the manufacture, sale or use of any equipment or device designed or provided for any purpose related to the protection of the environment.<sup>55</sup>

Note: Due to poor drafting, these powers are somewhat ambiguous. It is possible that they are restricted to regulating things *intended* for the protection of the environment. However, a broader interpretation is probably what was intended, and is likely to be upheld by a court. A broader interpretation would allow these sections to be used to govern mercury thermometers in order to protect the environment.

## *Ontario*

Section 175.1(b) of the *Environmental Protection Act*<sup>56</sup> authorizes the Lieutenant Governor in Council to make regulations prohibiting, regulating or controlling the making, use, sale, display, advertising, transfer, transportation, operation, maintenance, storage, recycling, disposal, or discharge or any manner thereof of any product.<sup>57</sup> This could include mercury thermometers.

## *Prince Edward Island*

Section 25 (1)(j) of the *Environmental Protection Act*<sup>58</sup> authorizes the Lieutenant Governor in Council to make regulations regulating or prohibiting the use of any product that may adversely affect the environment. Supported by your scientific case, this section could be used to ban mercury thermometers.

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<sup>53</sup> S.N.S. 1994-95, c. 1.

<sup>54</sup> *Ibid* at s. 66 (1)(c).

<sup>55</sup> *Ibid* at s. 66 (1)(d).

<sup>56</sup> R.S.O. 1990, c. E.19, s. 175.1 (b) ["EPA"].

<sup>57</sup> We have also included a copy of R.R.O. 1990. Reg., *Designated Substance – Mercury*. This regulation is enabled under the *Occupational Health and Safety Act*, R.S.O. 190, c. 0.1 and may be of interest. See Tab 4.

<sup>58</sup> R.S.P.E.I. 1998, c. E-9, s. 25 (1)(j).

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## *Quebec*

Section 31 of the *Environment Quality Act*<sup>59</sup> authorizes the government to make regulations to "regulate or prohibit the use of any contaminants and the presence of any contaminants in products sold, distributed or utilized in Quebec."<sup>60</sup>

Contaminant is defined as "a solid, liquid or gaseous matter, a micro-organism, a sound, a vibration, rays, heat, an odour, a radiation or a combination of any of them likely to alter the quality of the environment in any way."<sup>61</sup> This would include mercury.

## *Yukon*

Section 110(1) of the *Environment Act*<sup>62</sup> authorizes the Minister, if satisfied that the normal use of a manufactured product will cause significant impairment of the natural environment, to ban the sale of the product. This is very similar to the unproclaimed provisions of the Northwest Territories' *Waste Reduction and Recovery Act*

Thus, each of these sections would provide the respective province with authority to ban the sale and use of measuring devices or other products containing mercury, should they choose to do so on the basis of appropriate scientific evidence.

## **MUNICIPAL TOOLS**

Municipalities can ban the sale or use of mercury-containing devices, if there is satisfactory evidence that they pose a material hazard. Municipalities have a new, independent authority to protect their residents from material threats to their health and welfare, even where these threats are acceptable to other levels of government.

For most of the twentieth century, judges kept municipalities on a short leash. Municipalities have no constitutional status, and therefore have only those powers that are expressly given to them by their province. Judges usually interpreted those powers narrowly, sometimes astoundingly so. But, in the last decade, provinces across Canada have downloaded many responsibilities onto municipalities. With these responsibilities have come greater powers and more respect.

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<sup>59</sup> R.S.Q., c. Q-2, s. 31(1).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at s. 1(5).

<sup>62</sup> R.S.Y. 20002, c.76, s. 110.

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In 1994, Alberta's *Municipal Government Act*<sup>63</sup> pioneered a broader approach to municipal authority. Other provinces have since followed suit, including Nova Scotia, Quebec and Ontario. Rather than granting a long list of express but very detailed powers, the Alberta Act declared municipalities to be "natural persons" in some ways. It also gave municipalities a generalized power to pass bylaws, in order:

*(a) [to] give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate within the jurisdiction given to them...and*

*(b)[to] enhance the ability of councils to respond to present and future issues in their municipalities."*<sup>64</sup>

Since that time, the Supreme Court of Canada has made a major shift in its approach to municipal powers, reflecting "the true nature of modern municipalities, which require greater flexibility in fulfilling their statutory purposes."<sup>65</sup> The Alberta statute was upheld in 2004, in a challenge to Calgary's freeze of taxi licences.

Meanwhile, in *Spraytech v. Hudson*<sup>66</sup>, the Supreme Court of Canada upheld a bylaw of the Town of Hudson prohibiting the cosmetic use of pesticides. These pesticides were lawful under federal and provincial laws. Nevertheless, the court agreed that the municipality could, to protect public health and welfare, make bylaws that were more stringent, as long as the bylaws did not require any actual breach of federal or provincial law and were not expressly overruled by them. This decision was made under the "general welfare" provision in Quebec's *Cities and Towns Act*.<sup>67</sup>

On May 13, 2005, the Ontario Court of Appeal upheld a similar bylaw in Toronto, thus extending this decision to the common law provinces.<sup>68</sup> In *Croplife*, the pesticide industry again challenged a municipal bylaw prohibiting the cosmetic use of pesticides. Toronto enacted the bylaw in 2003 under s. 130 of the *Municipal Act, 2001*:<sup>69</sup>

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<sup>63</sup> R.S.A. 2000, c. M-26.

<sup>64</sup> *Ibid* at s. 9.

<sup>65</sup> *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at para 6. See Tab 11.

<sup>66</sup> [2001] 2 S.C.R. 241 [*"Spraytech"*]. See Tab 11.

<sup>67</sup> R.S.Q., c. C-19, s. 410 (1).

<sup>68</sup> *CropLife Canada v. City of Toronto* (May 13, 2005), Toronto C41220 (Ont. C.A.) [*"Croplife"*]. See Tab 11.

<sup>69</sup> S.O. 2001, c. 25, s. 130.

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*A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.*

Similar wording appears in other provinces.<sup>70</sup>

CropLife Canada – an association of pesticide producers – argued unsuccessfully that s. 130 provided narrow powers that should be reserved for emergencies. Despite lots of precedents in CropLife's favour, the Court of Appeal was unanimous:

*"it would be a retrograde step to apply the former, restrictive approach to interpret the...Municipal Act, 2001...when the goal of modernizing the Act ... was to give municipalities in Ontario the 'tools they need to tackle the challenges of governing in the 21<sup>st</sup> century."*<sup>71</sup>

Absent a specific statutory limit, municipal powers, including general welfare powers, must now "be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants."<sup>72</sup> While a further appeal is still possible, there is no reason to think that the Supreme Court would rule differently than it did in *Spraytech*.

Thus, municipalities in all provinces now have dazzling new powers, and must now decide what to do with them. The court did insist that municipalities have a "credible research basis"<sup>73</sup> for any ban. The precautionary principle alone is not enough. Bylaws cannot expressly contradict federal or provincial laws, or make it impossible for those laws to operate. And municipalities cannot use general powers, such as s. 130 of the Ontario Act, if they already have specific bylaw-making powers for the same "matter". But within these rather generous limits, there is lots of room for creativity. And this could readily include bans on mercury-based measuring devices. We will provide you with a model bylaw that Ontario municipalities could adopt for this purpose.<sup>74</sup>

In addition to residual language, such as s. 130 of the Ontario *Municipal Act, 2001*<sup>75</sup>, some jurisdictions provide their municipalities with specific authority to ban products.

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<sup>70</sup> *Municipal Government Act*, S.N.S. 1998, c. 18, s. 172(1)(a).

<sup>71</sup> *Supra* note 64 at para 34. Ontario Legislative Assembly, Debates (Hansard) 53, (18 October 2001) at 1350.

<sup>72</sup> *Ibid* at para 17.

<sup>73</sup> *Ibid* at para 71.

<sup>74</sup> Tab 12 has a space for the sample bylaw. We will provide it to you in the next few weeks.

<sup>75</sup> *Supra* note 65.

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For example, section 100 of the Nunavut *Cities, Towns and Villages Act*<sup>76</sup> authorizes a municipal council to, by bylaw, “prohibit or regulate the manufacture, processing, storage, sale, transport or use of dangerous products.”<sup>77</sup>

At Tab 8, we have included a collection of local ordinances to restrict mercury-based products that have been passed in some US communities.

## **BEYOND THE BAN: TAKE-BACK AND DISPOSAL**

Banning the sale of measuring devices is only one of the steps that Pollution Probe may wish to urge government to take. A second relevant problem is the question of how to dispose safely of those mercury-containing devices that are already in use. Legislation from the State of Oregon<sup>78</sup>, copy enclosed at Tab 7, is notable for requiring manufacturers of mercury thermostats to create a program for the safe collection of such used thermostats.<sup>79</sup>

Most Canadian jurisdictions restrict the disposal of hazardous waste to specially licensed facilities with appropriate precautions. However, mercury thermometers and other measuring devices normally fall within the small quantity exemptions and can therefore be lawfully disposed of in domestic garbage. For example, Ontario's *Regulation 347, General – Waste Management*<sup>80</sup>, declares mercury to be a hazardous waste. Mercury is listed on Schedule 2, Part B: Hazardous Waste Chemicals, and is therefore a hazardous industrial waste. However, hazardous industrial waste is subject to a small quantity exemption: any waste that is produced or accumulated in an amount less than 5 kilograms.<sup>81</sup>

It would be possible for Regulation 347 to be amended to remove the small quantity exemption for products containing mercury but this would present enforcement challenges. At least for consumers, a takeback system with public information and outreach (and maybe a financial incentive) would probably be more effective than a ban.

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<sup>76</sup> R.S.N.W.T. 1988, c. C-8. See Tab 4.

<sup>77</sup> *Ibid* at s. 100.

<sup>78</sup> *An Act, House Bill 3007*, c. 924, 2001 Oregon Laws.

<sup>79</sup> *Ibid* at s. 1 (1)(a).

<sup>80</sup> R.R.O. 1990, Reg. 347, made under the *EPA*.

<sup>81</sup> *Ibid* at s. 1.

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## WHAT ARE OTHER FOLKS DOING?

### *United States*

There has been quite a lot of activity in the United States related to banning mercury products, and specifically, mercury thermometers.

Health Care Without Harm<sup>82</sup>, an international NGO, has spearheaded a successful campaign promoting legislative reform in order to ban the manufacturing, selling, and distribution of mercury-containing devices. Several states<sup>83</sup> have passed laws banning the use of and/or the manufacturing, selling, importing of mercury thermometers. In addition, a number of local municipalities have passed ordinances banning mercury thermometers. Samples of the state laws and local ordinances are included in the binder at Tabs 7 & 8. Despite the growing number of state laws, we understand that there is currently no federal law that deals directly with banning mercury thermometers or mercury-containing devices, except for the *Battery Act*.<sup>84</sup>

Please note that the information we reviewed on mercury related legislation in the United States is current to July 1, 2004. Should you wish us to canvass the US law further, please contact our office.

### *European Union*

The European Union has proposed a comprehensive strategy to reduce mercury pollution, in a massive study released January 31, 2005. This strategy includes restricting the marketing of measuring devices that use mercury. A copy of the strategy is enclosed at Tab 5.

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<sup>82</sup> Health Care Without Harm is an international coalition of hospitals and health care systems, medical professionals, community groups, health-affected constituencies, labor unions, environmental and environmental health organizations and religious groups.

<sup>83</sup> Source: Health Care Without Harm [[www.noharm.org](http://www.noharm.org)], see Tab 7.

<sup>84</sup> Source: the United States Environment Protection Agency. *Mercury-Containing and Rechargeable Battery Management Act*, Pub. L. No. 104-142, 110 Stat. 1329 (1996) [*"Battery Act"*]. The goal of the *Battery Act* is to phase out the use of mercury in batteries and provide for the efficient and cost-effective collection and recycling/or proper disposal of used batteries.

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## NEXT STEPS

Again, thank you for the opportunity to prepare this legal opinion. During the research stage of preparing this opinion we spoke with various individuals who were interested in what steps Canada is taking to ban mercury thermometers. One individual, Mr. Jamie Harvey, was particularly interested in being updated on any legislative reform related to mercury thermometers in Canada.

Mr. Harvey headed up Health Care Without Harm's mercury thermometer campaign. We have provided his contact information in the bibliography located at Tab 13.

We wish you great success with your campaign to ban mercury thermometers. Please contact us if we can be of any further help.

Many thanks.

Yours very truly,

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