Court File No. T-169-23

FEDERAL COURT

BETWEEN:

FRIENDS OF THE EARTH CANADA, DAVID SUZUKI FOUNDATION, SAFE FOOD MATTERS INC., and ENVIRONMENTAL DEFENCE CANADA INC.

Applicants

- and -

ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH, and LOVELAND PRODUCTS CANADA INC.

Respondents

NOTICE OF APPLICATION
Pursuant to section 18.1 of the *Federal Courts Act*

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicants request that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitors WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: January 20, 2023 Issued by: "Abigail Grimes"
(Registry Officer)

Address of local office:
Federal Court
200-180 Queen Street West
Toronto, Ontario M5V 3L6

TO: **ATTORNEY GENERAL OF CANADA**
c/o DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
3400 – 130 King St W, Box 36
Toronto, ON M5X 1K6

AND TO: **MINISTER OF HEALTH**
70 Colombine Driveway,
Tunney's Pasture
Postal Location: 0906C
Ottawa, ON K1A 0K9
Phone: (613) 957-0200
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c/o DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
3400 – 130 King St W, Box 36
Toronto, ON M5X 1K6

AND TO: **LOVELAND PRODUCTS CANADA INC.**
789 Donnybrook Drive
Dorchester, ON N0L1G5
Phone: 1-800-328-4678

APPLICATION

1. This case is about Canada's pest management regulator, the Pest Management Regulatory Agency ("**PMRA**"), ignoring measures to protect the health of Canadians and the environment from exposure to a dangerous pesticide.

2. This is an application for judicial review of the decision of the Minister of Health ("**Minister**") through his delegate the PMRA to renew the registration of a product named ***Mad Dog Plus*** ("**the Product**") containing active ingredient glyphosate (present as isopropylamine salt) manufactured by Loveland Products Canada Inc. ("**Registrant**") and intended for agricultural, industrial, recreational and forestry uses.

3. On or about December 22, 2022, the Minister renewed the registration of the Product. The decision to renew the registration for the Product was unreasonable.

4. The Minister's decision to renew and amend the Product did not comply with section 7 of the *Pest Control Products Act* ("**the Act**") or associated sections 6, 8 and 16 of the *Pest Control Products Regulations* ("**the Regulations**"). Section 7 of the Act applies to all amendments to the conditions of registration, including the term of registration.

5. The Minister refused to consider newly published science on the risks of products containing glyphosate since 2017 or to include this information in an updated risk assessment. Further, the Minister failed to require data submissions and other application materials from the registrant required under the Regulations. As a result, the Minister renewed/amended the registration for the Product without having reasonable certainty that no harm will occur to human health and the environment. The renewal and/or amendment was therefore contrary to the requirements set out in section 2(2) and section 7 of the Act rendering the decision unreasonable.

THE APPLICANTS MAKE APPLICATION FOR:

6. The applicants make application for:

(a) A declaration that the Minister's decision to renew registration for the sale and use of the Product for five years is unreasonable;

(b) A declaration that the acceptable risk standard in subsection 2(2) and 7 of the Act applies to renewals of registrations;

(c) An order setting aside the renewal of the Product;

(d) In the alternative an order setting aside the renewal, with or without a suspension period, and remitting the matter back to the PMRA with instructions;

(e) An order that each party shall bear their own costs;

(f) In the alternative, an order for costs in favour of the applicants.

THE GROUNDS FOR THE APPLICATION ARE:

The Parties

7. The applicant Friends of the Earth Canada ("**FOE**") is a non-governmental organization that works to protect the health of the environment by contributing to the development of government policies that limit the use of pest control products and food production technologies that are harmful. It has previously participated in consultations by the PMRA on glyphosate.

8. The applicant Safe Food Matters Inc. ("**SFM**") is a charitable organization and has worked to advocate for government policies which limit the use of harmful pest control products and to ensure Canadians consume safe foods. It has previously participated in consultations conducted by the PMRA on glyphosate.

9. The applicant David Suzuki Foundation ("**DSF**") is a national non-profit organization. Through evidence-based research, education, and policy analysis, it works to conserve and protect the natural environment, and help create a sustainable Canada. DSF has previously participated in consultations on glyphosate.

10. The applicant Environmental Defence Canada Inc. ("**ED**") is a federally registered charity incorporated in the province of Ontario. It operates nation-wide, with a mission to defend clean water, a safe climate, and healthy communities. It has previously participated in consultations by the PMRA on glyphosate.

11. The applicants have public interest standing. They each have a genuine interest in protecting the health of Canadians and Canada's environment from the risk of harm due to herbicides and pesticides. These organizations have a significant history of engagement with the PMRA on glyphosate regulation. They have no personal, proprietary, or pecuniary interests in the outcome of this application.

12. The applicants have genuine interests in the registration of glyphosate products, the lawful administration of the Act, and the PMRA's compliance with the Act's standards for the protection of human health and the environment.

13. The Minister of Health is the authority tasked with the registration and renewal of products containing glyphosate under the Act. The PMRA is an agency of Health Canada and performs the duties assigned to the Minister under the Act.

14. Loveland Products Canada Inc. is the registrant of the Product under the Act.

Regulation of pest control products in Canada

15. Subsection 4(1) of the Act provides that the "primary" purpose of the Act is the prevention of "unacceptable risks" to people and the environment from the use of pesticides. Acceptable risk is defined in subsection 2(2) of the Act, which provides that "the health or environmental risks of a pest control product are acceptable if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration."

16. Under subsection 8(4), the Minister must deny an application for registration or for the amendment of a registration if the Minister does not consider the health or environmental risks of a pest control product to be acceptable. Subsection 7(7)(a)

provides that in evaluating health and environmental risks and in determining acceptable risk, the Minister shall apply a scientifically based approach. Subsection 7(6) provides that the applicant has the burden of persuading the Minister that the health and environmental risks and the value of the product are acceptable.

17. Under subsection 7(7)(b)(i) in relation to health risks, the Minister shall consider, among other relevant factors, available information on aggregate exposure to the pest control product, namely dietary exposure, and exposure from other non-occupational sources, including drinking water and use in and around homes and schools, and cumulative effects of the pest control product and other pest control products that have a common mechanism of toxicity.

18. Renewals are an amendment to the term of registration and as such trigger the PMRA's obligations to conduct a scientifically based assessment of acceptable risk under section 7 of the Act. It is the registrant's onus to establish that any product containing glyphosate poses acceptable risks after considering the most recent scientific findings on the potential risks of glyphosate under the Act as well as any incidents that have been reported since the most recent evaluations in their renewal requests.

19. Under subsections 6, 8 and 16 of the Regulations, the registrant must provide information on the risks posed by the product in a renewal application. The registrant is required to include a statement that the information provided is accurate and complete. The PMRA must evaluate this information and determine whether it has reasonable certainty that no harm will occur to the environment or human health from the renewals of registrations. The PMRA must also consider incident reports.

History of the Product

20. The Product is a water-soluble herbicide for non-selective weed control in cropland systems and in non-cropland areas. It is manufactured by the Registrant and has the PMRA registration number 30076.

21. Cropland uses of the Product include: in cropping systems before planting of all crops; in minimum tillage systems; post-emergent in glyphosate-tolerant canola, soybean and corn i.e., varieties with the Roundup Ready™ gene; preharvest applications in wheat, barley, oats, canola (rapeseed), flax (including low linolenic acid varieties), peas, lentils, dry beans, soybeans and forages; in pasture renovation; in forage, legume and grass establishments; in tree crops including apple, pear, cherry, plum, peach, apricot, filbert, hazelnut, walnut, chestnut and Japanese heartnut; in grapes, cranberries, blueberries and strawberry; in sugar beets; in asparagus; in North American ginseng; in tree plantings; and grasses for seed production.

22. Non-cropland uses of the Product include industrial, recreational, rights-of-way, public areas, and turf grass renovation.

23. The PMRA registered the Product on April 21, 2011 and renewed the registration in 2017 for a period of five years with an expiration date of December 31, 2022.

24. According to the PMRA's public registry, in August 2022, the Registrant applied to renew the registration of the Product under application number 2022-3929.

25. On or about December 22, 2022, the PMRA renewed the Product registration, allowing it to be sold, used, stored, possessed, and manufactured for five more years. The PMRA's public registry then listed the expiration date as December 31, 2027.

26. The registry also discloses that the application for renewal was treated as a "Category D" application, meaning that the PMRA did not require any data from the registrant.

The registration context for the Product

27. The PMRA's most recent assessment of the human health and environmental risks of products containing the active ingredient glyphosate took place prior to 2015 and was finalized in 2017. In 2017 the PMRA made a re-evaluation decision under the

Act which granted continued registration of all products containing glyphosate as the active ingredient, with label amendment requirements for some products.

28. In 2017 several environmental and health organizations submitted notices of objection under the Act to that re-evaluation decision, highlighting gaps in the risk assessment related to scientific evidence known at the time. The PMRA subsequently rejected all of those notices of objection.

29. Since 2017, there have been significant developments in the science identifying human health risks from products containing glyphosate. This includes new research on the potential impacts of glyphosate-based herbicides on the microbiome (the microorganisms that live inside animals); the discovery of evidence of additional links between glyphosate and cancers including evidence that glyphosate causes kidney tumors and malignant lymphomas in rats and mice; evidence showing a compelling link between exposures to glyphosate-based herbicides and increased risk of non-Hodgkin's lymphoma; and evidence linking glyphosate to an increase in neurodegenerative disorders in humans as it infiltrates the brain.

30. With respect to environmental risks, since 2017 there is new evidence showing declines of pollinators from habitat loss caused by permitted uses of products containing glyphosate. There are also new lines of evidence linking ecological harms to freshwater ecosystems arising from use of products containing glyphosate. Furthermore, there is an emerging line of evidence that products containing glyphosate cause indirect environmental harm by adding phosphorus to agricultural landscapes, and by influencing the accumulation and cycling of phosphorus in soil and nearby surface waters. Moreover, new evidence points to glyphosate's propensity in forestry to contribute to ecological harm and forest fires. Products containing glyphosate herbicide used in forested areas may persist in the environment for years and can prompt morphological changes in perennial flowers that reduce their fertility and may make them less attractive to pollinators.

31. Some of this new scientific information as well as other new scientific information was submitted to the PMRA by the applicant organizations and other

organizations in response to a 2021 application to increase the maximum residue limits for glyphosate on food and commodities allowed to be consumed and imported into Canada. The PMRA has not yet approved that application.

32. On February 17, 2022, Ecojustice, Friends of the Earth, David Suzuki Foundation and Environmental Defence submitted a letter to the PMRA outlining some of the new science on the risks of glyphosate since 2017. This letter asked the PMRA to consider new science relevant to their 2017 notices of objection and to reconsider its response to the notices of objection. The PMRA declined to further review these issues.

33. On October 27, 2022, a coalition of organizations including all the applicants in this application for judicial review, submitted a letter to the PMRA requesting that it consider up-to-date science in evaluating glyphosate registration renewals requesting that no registrations be renewed until new science has been reviewed. The PMRA has acknowledged, but not provided a substantive response to the letter as of the date of this application. The Product was renewed and amended after the letter was received.

The registration decision was unreasonable

34. In deciding to renew and amend the registration of the Product, the PMRA has not considered, nor did it require the registrant to provide, complete and up-to-date information on potential environmental and health risks from products containing glyphosate, including but not limited to current published science, new registrant-led science and incident reports. This is contrary to the requirements in section 7 of the Act and sections 6, 8 and 16 of the Regulations.

35. Despite the concerning new science on the risks of products containing glyphosate, and the requirements of the Act and the Regulations, the PMRA treated the renewal of the Product as an administrative process and did not require the registrant to submit new data on the potential impacts of the Product. The PMRA did not update its human health and environmental risk assessment of the Product.

36. Without considering up-to-date science and other evidence, the PMRA lacks reasonable certainty that no harm to human health and the environment will occur. As

such, the decision to renew the registration of the Product until December 31, 2027 is non-compliant with the requirements of the Act and Regulations and is unreasonable.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

37. An affidavit from a representative of each applicant, to be served;

38. Material Requested pursuant to Rule 317 and produced to the applicants and to the Court pursuant to Rule 318 of the *Federal Courts Rules*; and

39. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 Request

40. The applicants request that the Minister send a certified copy of the following material not in the applicants' possession, but in the possession of the Minister, or the PMRA as the Minister's delegate, to the applicants and to the Registry:

(a) The renewal application for the Product under submission number 2022-3929.

(b) All briefing notes prepared for PMRA decision makers and all decision documents prepared by PMRA decision about application/submission number 2022-3929.

(c) All renewal team or science team monographs, memoranda, and emails, prepared in respect of the decision to grant application/submission number 2022-3929, including documents regarding the applicants October 27, 2022 letter.

(d) Formal and informal policy decisions relied on by the PMRA in making decisions about the renewal.

Date: January 20, 2023

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