

Appendix 1

International Legal Obligations

Section 2.0 of the proposed revisions to the PCB Treatment and Destruction Regulations outlines that Canada must comply with Canada's international obligations such as the Stockholm Convention.

This proposal to bring Canadian domestic law in line with international obligations was supported by the Supreme Court of Canada in *Baker v. Canada*¹ which established a domestic responsibility to comply with international treaties to which Canada is a signatory where domestic legislation enables our international commitments. In interpreting Canadian domestic law, the courts will apply the presumption of legislative conformity with international law.² The court also uses international law as an aid to interpreting domestic law. Case law of the Supreme Court of Canada demonstrates the use of ratified (and unratified) international treaties and soft law to interpret and provide a context for Canadian legislation.³ Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, which focus on the contextual approach to interpretation, have been interpreted by Canadian law as the appropriate principles for interpreting ratified treaties.⁴ To be defensible the proposed regulations must meet Canada's obligations with respect to POPs as set out in the Stockholm Convention and other international conventions.

The proposed revisions fail to comply with Canada's Stockholm Convention obligations.

Annex C of the Stockholm Convention identifies waste incinerators as having a high potential for the unintentional production of POPs.

Stockholm Convention Article 5 directs signatories at a minimum to: take the following measures to reduce the total releases derived from anthropogenic sources of each of the chemicals listed in Annex C, with the goal of their continuing minimization and, where feasible, ultimate elimination:

(a) Develop an action plan or, where appropriate, a regional or subregional action plan.

The action plan shall include the following elements:

- (i) An evaluation of current and projected releases, including the development and maintenance of source inventories and release estimates, taking into consideration the source categories identified in Annex C;
- (ii) An evaluation of the efficacy of the laws and policies of the Party relating to the management of such releases;
- (iii) Strategies to meet the obligations of this paragraph, taking into account the evaluations in (i) and (ii);

¹ [1999] 2 S.C.R. 817.

² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429.

⁴ See *Re Regina and Palacios* (1984), O.R. (2d) 269 (C.A.); *Thomson v Thomson*, [1994] 3 S.C.R. 551; *Pushpanathan v. Canada (Minister of Citizen and Immigration)*, [1998] 1 S.C.R. 982.

- (iv) Steps to promote education and training with regard to, and awareness of, those strategies;
 - (v) A review every five years of those strategies and of their success in meeting the obligations of this paragraph; such reviews shall be included in reports submitted pursuant to Article 15;
 - (vi) A schedule for implementation of the action plan, including for the strategies and measures identified therein;
- (b) Promote the application of available, feasible and practical measures that can expeditiously achieve a realistic and meaningful level of release reduction or source elimination;
 - (c) Promote the development and, where it deems appropriate, require the use of substitute or modified materials, products and processes to prevent the formation and release of the chemicals listed in Annex C, taking into consideration the general guidance on prevention and release reduction measures in Annex C and guidelines to be adopted by decision of the Conference of the Parties;
 - (d) Promote and, in accordance with the implementation schedule of its action plan, require the use of best available techniques for new sources within source categories which a Party has identified as warranting such action in its action plan, with a particular initial focus on source categories identified in Part II of Annex C...
 - (e) Promote, in accordance with its action plan, the use of best available techniques and best environmental practices.

The proposed revisions fall short on a number of these obligations. Rather than fulfilling the requirement for an action plan, as set out in Article 5(a), the proposed regulations facilitate deferring federal responsibility to provincial governments. There appears to be no evaluation of the efficacy of the laws and policies relating to releases from PCB destruction. Strategies to meet the obligations of the Convention are absent. The mechanism for ongoing five year reviews of the strategies and their success are absent. The schedule for the implementation of the action plan is absent from the proposed regulations.

Also, the background material to the regulation does not include estimates of the total amounts of POPs that would be released to the environment as a result of this regulation. Article 5(a)(i) requires this.

The requirement under section Article 5(b) to promote the application of available, feasible and practical measures is absent.

There is no mechanism, required under Article 5(c), to promote the development and, where it deems appropriate, require the use of substitute or modified materials, products and processes to prevent the formation and release of the chemicals listed in Annex C.

There is no attempt in the proposed regulations to promote the Best Available Techniques and Best Environmental Practices as set out in Article 5(e) above. The proposed regulations only set limits for PCB incineration.

SECTION I. Introduction 11 A of Article 5, Annex C states that priority should be given to the consideration of approaches to prevent the formation and release of the chemicals listed in Part I. The proposed regulations fail to do this.