



CANADIAN INSTITUTE FOR
ENVIRONMENTAL LAW AND POLICY

L'INSTITUT CANADIEN DU
DROIT ET DE LA POLITIQUE
DE L'ENVIRONNEMENT

Since/depuis 1970

130 Spadina Avenue Suite 305
Toronto, Ontario M5V 2L4

Tel: (416)923-3529
Fax: (416)923-5949
www.cielap.org

**Submission to
The External Advisory Committee on Smart Regulation**

From

**The Canadian Institute for Environmental Law and Policy
(CIELAP)**

March 2004

**Principles for the Regulation
of the Safety of Foods Derived from
Agricultural Biotechnology**

I About the Canadian Institute for Environmental Law and Policy

Founded in 1970, the Canadian Institute for Environmental Law and Policy (CIELAP) provides leadership in the research and development of environmental law and policy that promotes the public interest and sustainability.

CIELAP has been engaged in the development and review of most of the significant pieces of environmental regulation in Canada and Ontario. CIELAP has also been engaged in biotechnology debate since the mid-1980s when we held the first workshop on the subject in Canada and recommended that there be a comprehensive policy framework for biotechnology as the technology evolved. CIELAP has provided reports and commentary on the food products of biotechnology, published a Citizens' Guide to Biotechnology, worked with Fundacion Ambio in Costa Rica on the development of a model law for the import of living modified organisms, participated in the Biosafety Protocol negotiations and CIELAP's Executive Director is a member of the Canadian Biotechnology Advisory Committee (CBAC).

CIELAP appreciates the opportunity to make this submission to the Advisory Committee on Smart Regulation. CIELAP has decided, due to limited time and limited resources, to focus our submission on the principles for the regulation of the safety of foods derived from agricultural biotechnology. This submission is formed, in part, from a discussion paper on principles for regulating the food products of biotechnology which CIELAP will be releasing shortly. CIELAP believes, however, that these principles, or some version of them, should apply to any 'smart' regulation. We therefore, offer this submission as an example of how 'smart' regulation could be applied in the case of the safety of foods derived from agricultural biotechnology.

II Introduction

As products of agricultural biotechnology proliferate across the landscape and on grocery store shelves, public unease regarding their effects on human health and the environment continues unabated, both in Canada and globally. The debates extend from church meetings in small communities to national capitals to the halls of the World Trade Organization in Geneva.

Recommendations and rule-making regarding these products multiply from the Organization of Economic Cooperation and Development (OECD) and its member countries, the little-known Codex Alimentarius of the UN, and the *Cartagena Protocol on Biosafety*. Model laws have been drafted by Southern countries that differ markedly from current Northern regimes. All proposals for regulation of agricultural biotechnology are purportedly based on "sound science" as the foundational principle.

However, scientists, environmentalists and health advocates continue to express doubts about the environmental and health risks of genetically-modified (GM) foods and the reliability of the Canadian regulatory regime. To assist in responding to these public concerns, the government of Canada appointed the Royal Society Expert Panel on the Future of Food Biotechnology which reported in 2001¹. The Panel made extensive recommendations regarding the regulatory regime. Ottawa has responded to its recommendations² and also continues to consult with international regulatory bodies including the FAO/WHO Codex Alimentarius.

The purpose of the proposed principles below is to ensure protection of the environment and human health by establishing a statutory regime which fully considers the entire range of risks and uncertainties associated with these products, on the basis of credible research and advice from scientists who are independent of producer companies and governments. Further, the principles require government regulators who are fair and independent from industry and are not promoters of these technologies.

III Foundation of the Principles

These principles are based on the recommendations of the Royal Society on science and measures to enhance accountability of regulators, bolstered with pertinent additions from the European regime, the *Cartagena Protocol on Biosafety* and model biosafety laws from Africa and the Third World Network.

The guiding precepts for these Principles are the assertions of the Royal Society Expert Panel that:

The fundamental tenets of the Precautionary Principle should be respected in the management of the risks associated with food biotechnology³

and

The claim that the assessment of biotechnology risks is “science based” is only as valid as the independence, objectivity and quality of the science employed⁴.

IV The Royal Society Expert Panel Report

Substantial equivalence and the Precautionary Principle

Supported by an exhaustive review of the scientific literature, the Royal Society made extensive recommendations for the regulatory regime for GM foods, and included a conservatively reasoned commentary on the application of the concept of “substantial equivalence” (SE) in the regime.

The Royal Society noted the origins of the concept of SE in the conventional breeding process, in which the development of new varieties from varieties with relative genetic uniformity usually do not result in harmful progeny. However, in Canada, when invoked regarding a new GM variety, the concept “essentially pre-empts any requirement...to assess further the new variety for unanticipated characteristics....If a plant or food is judged to be substantially equivalent to one present in the Canadian diet, passage of this step in the decision tree spells success for its approval” It is “the most critical element in the current approval process.”⁵

Government agencies use the concept as a decision procedure for facilitating approval of products, but it can instead be interpreted as **requiring scientific investigation to establish** that “the new food does not differ from its existing counterpart in any way other than the presence of the single new gene and its predicted phenotypic change. In every other way, phenotypically and in terms of its impacts on health and environment, it **will have been demonstrated to be identical** to the existing food.”⁶ (emphasis added)

The Panel found that the Canadian authorities’ use of the concept to exempt new crops from full environmental safety assessment is an inappropriate use. Rather, what is required in order to use substantial equivalence as a regulatory tool, is a “rigorous demonstration” that the novel trait in the GM organism is harmless in the tested genetic and environmental context, before one can conclude that the food is as safe as the original variety from which it was derived. Such a “rigorous demonstration” should be premised on a prediction that “the impacts of expression of a new gene (and its products) within a transgenic organism ...will be accompanied by a range of collateral changes in expression of other genes in the pattern of proteins produced and/or in metabolic activities.”⁷

The Society recommends testing for harmful effects on health (short and long term testing for human toxicity, allergenicity or other health effects) and on the environment. The screening of GM organisms should include examination of the DNA structure, gene expression, protein profiling, and metabolic profiling. The testing regimes should be designed and executed in consultation with scientific experts, with results monitored by “arms-length” experts from all sectors, and decisions and rationale reported to the public⁸.

The Royal Society also recommended respect for the fundamental tenets of the Precautionary Principle in management of risks associated with GM foods.

The Precautionary Principle, however variously applied, is fundamentally a rule about how technology developers, regulators and users should handle [scientific] uncertainties when assessing and managing the associated risks. ...One simple expression of the PP is that it counsels restraint in proceeding with the deployment of a technology in the "absence of evidence," and requires that the greater the potential risks, the stronger and more reliable be the 'evidence of their absence.'"⁹

The Royal Society adopts these implications of the Precautionary Principle:

- if society's best predictions of the risks (of new technologies) turn out to be wrong, it is better to err on the side of safety;
- in the development of technology, it is necessary to conduct research to identify potential risks, withhold deployment of the technologies until the uncertainties of risk are reduced, and employ designs to minimize health and environmental risks;
- it is appropriate to shift at least part of the burden of proof that the technology is safe to the proponents of the technology and/or accept a lesser level of evidence as demonstration of risk.

The Royal Society concluded that if the standard of substantial equivalence were applied to GMOs to involve appropriate tests to **show** (not assume) that the GMOs' types and magnitudes of environment and health risks were "substantially equivalent" to those of its conventional alternative, the concept of substantial equivalence would be a "fairly rigorous precautionary safety standard."¹⁰

Practical implementation of the Principle requires that:

- regulators not use "substantial equivalence" as a decision threshold to exempt GMOs from full safety assessment;
- the primary burden of proof is on proponents of agricultural biotechnology to carry out the full range of tests necessary to demonstrate reliably that they do not pose unacceptable risks;
- if scientifically reasonable theory or evidence indicate the possibility of serious harm to the environment, human or animal health, a lack of "high confidence" in the existence or level of risk should lead regulators to require the proponents to conduct further research to establish that the technology does not cause unacceptable levels of risk;
- Approval of products with potentially serious risks should not occur unless the scientific uncertainty is reduced to "minimum" levels. These risks include

serious risks to human health, such as potential allergens in food; extensive, irreparable disruptions to natural ecosystems such as aggressive, invasive weed species; or serious diminution of biodiversity;

- Risks that are potentially catastrophic (e.g. global warming) require regulators to use more conservative safety standards, such as "zero-risk" standards, meaning no tolerance for an increase in the already present background risk.

Independence, objectivity and quality of science: problems related to regulatory conflict of interest

The Royal Society acknowledged several problems which contribute to public unease regarding the Canadian biotechnology regulatory regime. The Government of Canada is a significant promoter and funder of these technologies, creating the potential for conflict of interest in the departments which regulate them, a conflict that was apparent in the Society's discussions with federal officials.

Lack of transparency of the test data submitted by companies in risk assessments of GMOs and the poor quality of data accepted by Ottawa undermine the integrity of the risk assessments of the products. For example, the data used to evaluate the invasiveness of RR Canola were "scientifically inadequate for either a rational regulatory decision-making process or a peer-reviewed scientific publication."¹¹ The data is not available to the public for scientific peer review due to departmental policy favouring promotion of biotechnology. The claim that the regulatory process is science-based is compromised by the lack of openness since the scientific method requires transparency, peer review and independent corroboration of all aspects of research.¹²

The Royal Society recommends that:

- regulatory departments institutionally separate their role as promoter from the role as regulator;
- data on environmental and ecological consequences not be proprietary;
- regulatory officials maintain a neutral stance in the public debate;
- regulators provide increased transparency of scientific data and rationales for regulatory decisions; and
- regulators institute regular peer review of the Risk Assessments for approval by external, independent panels of experts, with access to data and rationales for decisions.

These recommendations of the Royal Society provide a basis for principles for regulation of GM agricultural products based on “sound science.”

Labelling requirement

The Royal Society considered whether there is a scientific reason to require food labels on GM products when they are not required for novel or exotic foods produced by conventional processes, and concluded that "there was not at this time sufficient scientific justification for a general mandatory labelling requirement."¹³ basing these recommendations on an expectation that the Panel's recommendations regarding regulation of GMOs are fully implemented. The Panel supports voluntary labelling.

However, the recommendations of the Royal Society regarding risk assessment have not been implemented and there is another basis for requiring mandatory labelling of these products, namely, widespread consumer support for such labels. For example, a Consumers' Association of Canada poll released December 3, 2003 records that 91% of those surveyed want labels listing GMO content and 88% believe such labels should be mandatory¹⁴.

A regulatory approach founded on transparency is incompatible with a lack of transparency regarding the presence of GMOs in food, given broad public support for labelling. Mandatory labelling is therefore proposed in these principles.

V Principles for the Regulation of Products Derived from Agricultural Biotechnology

1. Requirement for Approvals

Regulatory approval shall be required for the introduction of genetically modified organisms of agricultural biotechnology and products derived from them for release in the environment and market or for contained use. Regulators may provide approval with or without conditions or deny approval.

2. Scope and definition

The law shall apply to agricultural products of modern biotechnology, as defined by the *Cartagena Protocol on Biosafety*.¹⁵

3. Consolidated agency and regulation

A consolidated regulatory agency, responsible for assessing the safety of these products for human and animal health and the environment shall be authorized by a consolidated law. The agency shall operate at arms-length and

independently of government agencies promoting or funding biotechnology industries.

4. Risk Assessment

The agency shall assess the safety of all GMOs. It shall require proponents to provide a rigorous demonstration of the level of risk for human and animal health and the environment, based on appropriate scientific testing protocols and parameters in order to determine whether or not the potential risks associated with the product are substantially equivalent to those of the organism from which it was derived.¹⁶

5. Independent scientific advice and peer review

Testing protocols, data requirements, and review of test data shall be conducted with independent scientific advisors with full transparency. The protocols shall mandate research and data that satisfy standards for publication in peer-reviewed journals.

6. Application of the Precautionary Principle

Regulatory decisions shall be based on the application of the Precautionary Principle including:

- Testing of each GMO to establish if it is substantially equivalent in its health and environmental effects to its conventional predecessor;
- Shift of the burden of proof to the proponents of the technologies to test and demonstrate that they do not pose unacceptable risks;
- If scientifically reasonable theory or evidence indicate the possibility of serious harm to the environment, human or animal health, but uncertainty exists regarding the existence or level of the risk, regulators shall require the proponents to conduct further research to establish that the technology does not cause unacceptable levels of risk;
- Approval of products with potentially serious risks shall not occur unless the scientific uncertainty is reduced to minimum levels. These risks include serious risks to human health, such as potential allergens in food; extensive, irremediable disruptions to natural ecosystems such as gene flow and aggressive, invasive weed species; or serious diminution of biodiversity;
- Regarding risks that are potentially irreversible and/or catastrophic, regulators shall use more conservative safety standards, such as "zero-risk" standards, meaning no tolerance for an increase in risk relative to risk from conventional products.

7. Transparency

Full transparency shall apply to applications for approval, testing protocols, test data requirements, test data results regarding effects on the environment or human and animal health effects, and rationales for regulatory decisions.

8. Public participation

Citizens shall have the benefits of full transparency regarding regulation of these products, including access to applications for approval, testing protocols, test data, and rationales for regulatory decisions. They shall have opportunities to make submissions to the regulatory authority prior to a decision, and the regulatory authority shall consider these submissions.

9. Risk Management

Regulators shall establish appropriate strategies for the management of risks from GMOs which are approved for release, which may include pre-release observation, post-release monitoring, conditions to govern releases, powers of intervention to prevent harm, and other necessary risk management strategies. The regulator shall have the authority to make orders necessary to prevent risks of harm to human and animal health and the environment from GM organisms, and orders to reverse such harms, including by environmental remediation.

10. Protected disclosures (Whistleblower protection)

Individuals shall be protected from employer or other reprisals if they disclose to the regulatory authority information regarding any conditions that create risks from GMOs or actions that may reasonably conflict with these regulations, or if they seek to obtain enforcement of the regulations by the authority. They shall have access to a legal tribunal for relief.

11. Liability regime

Producers of GMOs shall be strictly liable for harm to the environment, human and animal health from the development and use of these products. The producer liability shall continue throughout the use of the product and its progeny, regardless of the contractual relationships between producers, suppliers and purchasers (farmers and consumers) of the products. Contractual agreements between the producers, suppliers and farmers to limit producer liability shall not be permitted.

Available remedies shall include, but not be limited to, compensation and environmental remediation. Recovery will be facilitated by mechanisms such as requirements for insurance or posting of bonds by GMO developers prior to

deployment of the technologies and limitation periods commensurate with the time span of emergence of harm.

12. Administrative provisions:

The regulation shall provide that:

Proponents have a duty to provide correct and complete information to the regulator and to provide relevant new information regarding potential risks after the initial regulatory decision;

Unintentional releases or accidents involving GM organisms shall be promptly reported to the regulator;

The regulator may review, vary or revoke approvals upon receipt of relevant new information regarding potential risks of a GM organism;

Non compliance with the law shall be an offence subject to penalty.

13. Labelling and traceability:

Foods containing or derived from GMOs shall be labelled and traceable through all stages of the production and distribution systems.

14. Import and export:

Transboundary movements of living GMOs shall be in accordance with the provisions of the *Cartagena Protocol on Biosafety*¹⁷, and its elaboration in Meetings and Conferences of the Parties to the Protocol.

Non-living GMOs, when exported and imported, shall be accompanied by information providing labelling and traceability.

¹ *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada*, An Expert Panel Report on the Future of Food Biotechnology prepared by the Royal Society of Canada, (Ottawa: January, 2001).

² Action Plan of the Government of Canada in Response to the Royal Society of Canada Expert Panel Report, (Ottawa 2001), www.hc-sc.gc.ca/english/protection/royalsociety/intro.htm.

³ Op. Cit p.205

⁴ Op. Cit p.212

⁵ Op. Cit p.180

⁶ Op. Cit p.182

⁷ Op. Cit p.185

⁸ Op. Cit p.191

⁹ Op. Cit p.198

¹⁰ Op. Cit p.205

¹¹ Op. Cit p.215

¹² Op. Cit p.212-213

¹³ Op. Cit p.225

¹⁴ Globe and Mail, December 3, 2003

¹⁵ The Biosafety Protocol defines modern biotechnology in Article 3(i) as: “the application of: (a) In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or (b) fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.

¹⁶ The Royal Society made extensive recommendations regarding the categories of data necessary for credible assessment of risks of various GMOs. Detailed lists of risk assessment requirements for living GMOs appear in Annex III to the *Cartagena Protocol on Biosafety*. Further proposals are included in the proposed model biosafety laws from Africa and from Gurdial Singh of the Third World Network. Some of these data are currently required in the Canadian regulatory system. With the advice of independent scientists and a commitment to peer review quality testing protocols and decision-making, risk assessment in Canada, depending on the product, may draw on data requirements from any of these sources of recommendations.

¹⁷ These provisions include (but are not limited to) the right of governments of importing countries to assess living GMOs and decide whether or not import will be permitted, and if so on what terms; the application of the precautionary principle to these movements; and requirements for information to accompany shipments.