

**COMMENTS AND PRESENTATION TO THE STANDING
COMMITTEE ON ENVIRONMENT AND SUSTAINABLE
DEVELOPMENT OF THE HOUSE OF COMMONS ON
BILL C-32, THE PROPOSED CANADIAN ENVIRONMENTAL
PROTECTION ACT**

by

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Edmonton, Alberta
September, 1998

Presentation of the Environmental Law Centre to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C- C-32, the *Canadian Environmental Protection Act*

I. Introduction

The Environmental Law Centre (Alberta) Society (ELC) was formed in 1982 to provide Albertans with a source of objective information about environmental and natural resources law. To this day, the Environmental Law Centre is a strong non-profit, charitable organization whose environmental law services are used across Canada and whose environmental law expertise and skills are sought after by governments, industry, environmental organizations and members of the public.

ELC lawyers are advocates for the environment. The balance of nature is fragile. We operate on the principle that to ensure its survival, laws must serve to protect and preserve the environment upon which all living things depend. We advocate and use the power of that law to effect change - for a safe, clean, diverse and healthy environment.

The ELC has been involved in *Canadian Environmental Protection Act* (CEPA) since its beginnings. We participated in consultations on the proposed legislation in the late 1980's. We have a representative on the Canadian Environmental Network (CEN) Toxics Caucus Steering Committee (Arlene Kwasniak) and in the past had a representative working in the area of CEPA biotechnology review (Howard Samoil). We have been involved with the CEPA review process since the first consultations in Ottawa in 1993. We participated in the major briefs to the Committee headed by the CEN Toxics Caucus.

We have read the brief the Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP) and that of the Wildlife Toxicology Program, World Wildlife Fund Canada, and we support their recommendations.

Our brief and presentation focuses on what we believe is the key problem with Bill C-34, -- its near wholesale acceptance and embracing of harmonization. The bulk of our comments focus on this issue. Our comments then address what we identify as priority matters for amendment and change in a new CEPA.

II. Harmonization

The Sunpine Decision and Lessons for CEPA Harmonization/Equivalency

a) Background: The Sunpine Decision and Reaction to It

The recent case, *Friends of the West Country Association v. Minister of Fisheries and Oceans Director, Marine Programs, Canadian Coast Guard*¹ (the "Sunpine Decision") concerned the Canadian Environmental Assessment Act² (CEAA) and not CEPA. Nevertheless, the Decision, or more accurately, reaction to the Decision, offers important lessons for those having power over the final form of the new CEPA.

To briefly summarize the case, under the federal *Navigable Waters Protection Act* Sunpine Forest Products Inc. (Sunpine) needed federal approval in order to construct two bridges over navigable water, in connection with Sunpine's forestry operations in Alberta. Regulations under the *Canadian Environmental Assessment Act* (CEAA) triggered a requirement for an environmental assessment (EA) to proceed consideration of the approvals.³ The Sunpine assessment process resulted in two Screening Environmental Assessment Reports, one for each approval application. The Respondents considered the Reports, and finding no likely significant adverse effects, issued the approvals to build the bridges. Shortly thereafter, Friends of the West Country Association applied for judicial review and on grounds including that in administering the CEAA assessments the Respondents failed to comply with the law. Gibson J., for the federal court trial decision agreed. In brief, Gibson J. found that the Respondent failed to carry out mandatory statutory requirements regarding determining scope of project and cumulative effects. Since the Respondents failed to carry out mandatory statutory duties, he quashed the approvals and sent the matter back for CEAA reassessment, this time in accordance with the law.

The case caused an uproar in Alberta in government and in industry. Much of the uproar concerned the decision and what it means for harmonization. The Alberta Minister of Environmental Protection, Ty Lund reportedly called the decision "ludicrous" and is trying hard to get it appealed and overturned.⁴ Alberta Environmental Protection spokesman Michael Lohner reportedly said that if it is not appealed "...we might as well walk away from the harmonization process, ... Its been a waste of time."⁵ Representatives of the forest⁶ and oil and gas⁷ industries have cried "duplication" in Sunpine's wake.

¹ Docket: T-1893-96, 1998-07-07, F.C.T.D.

² S.C. 1995, c. C-15.2.

³ *Law List Regulation* SOR/94-636.

⁴ R. Henderson, "Lund lobbies feeds to fight bridge ruling", *The Edmonton Journal*, August 13, 1998, at A5.

⁵ B. Weber, *National General News*, August 12, 1998 18:45 EST.

⁶ For example, D. Hryciuk. "Industry alarmed over cost of complying with ruling on logging roads", *Edmonton Journal*, July 22, 1998, at A5, where forest industry spokesperson Larry Skory (Alberta Forests

The curious thing about this reaction to the Sunpine Decision is that the case and its facts have nothing to do with harmonization or duplication. The Sunpine case simply states what is required under federal law to carry out a valid environmental assessment. This does not affect the *Canada-Wide Accord on Environmental Harmonization*, Sub-Agreement on Environmental Assessment nor the Alberta – Canada Bi-Lateral Agreement on Environmental Assessment. Moreover, neither harmonization nor duplication had anything to do with the case. Neither the bridges nor the roads underwent any provincial environmental assessment under the *Environmental Protection Enhancement Act*⁸ and so there was no provincial assessment process that could be duplicated by the federal process.⁹ Finally, even if there had been a harmonized hearing, nothing in the current CEAA, Accord, Sub-agreement nor Bi-Lateral would validate, in effect, the stripping down and removal of one level of government so that only the less demanding mandates of the other level apply.¹⁰

Since the Sunpine Decision had nothing to do with harmonization or duplication, why then the uproar? It must be because of the expectation of industry and the Alberta Government, is that when both levels of governments have jurisdiction over a matter, one process, presumably the federal one, will disappear, and only the provincial one will be carried out. This is the expectation, no matter what law or the harmonization or sub-agreements actually say.

This leads to a further question, which is why Alberta, and probably other provincial governments, would want the federal process to disappear and the provincial process rule? Why doesn't Mr. Lund, for example, say in regards to environmental assessment, that if only the federal government assessed, and it was responsible for looking after

Products Association) is quoted as saying that" the ruling adds duplication to the environmental review process because it requires the federal government to become more involved in projects that already need a provincial review", and that it "flies in the face of efforts to coordinate regulations and requirements".

⁷ For example, the Canadian Association of Petroleum Producers has written to every federal Minister and others voicing their serious concerns over the decision including regarding duplication of federal and provincial assessment processes. A copy of this letter was provided to a number of Alberta environmental groups.

⁸ S.A. 1992. C. 13.3.

⁹ The Alberta/Federal bi-lateral agreement on environmental assessment applies only to federal assessments and assessments under the Alberta *Environmental Protection and Enhancement Act* (EPEA). See *Canada-Alberta Agreement for Environmental Assessment Cooperation*, definition of "environmental assessment". A representative of Friends of the West Country advised that she requested that the Sunpine proposals undergo an EPEA assessment, but government refused the request. Stan Rutwind, Department of Justice, Government of Alberta, on September 22 confirmed that no EPEA assessment was conducted, though the project did undergo some kind of environmental review in connection with a road right of way under provincial legislation,

¹⁰ *Canada-Alberta Agreement for Environmental Assessment Cooperation*, 8-6-93 – 8-6-98 (recently temporarily renewed), paragraph 6.

the province's interests, the provincial coffers certainly would greatly benefit. Why? It must be provincial seeking of power and control, coupled with a desire to minimize the national interest in development in favour of provincial interests. The fear of the Province is that if the Federal Government always administered harmonized processes, federal or national interests would overshadow provincial interests. Provincial interests, for example, might favour development over protection of fish habitat or protection of navigable waters. No doubt the federal government administering harmonized processes would not be acceptable for those who wish to eliminate, as far as possible, the federal involvement in processes that have a provincial component.

b) General Lessons for CEPA

What then are the lessons for CEPA? One lesson is that some industries and some provinces will continue to stretch the application of concepts like "harmonization" and "avoiding duplication" beyond their natural and legal meanings in attempts to erode and eradicate constitutionally and politically valid federal processes. If this sounds alarmist it is because the near irrational reaction to the Sunpine Decision sounded the alarm. The reaction demonstrates how provincial government and industry can inappropriately stretch these concepts.

The second lesson follows from the first. It is that laws that incorporate harmonization concepts, such as CEPA in Bill 32, must both specifically limit the application of these concepts and be entirely clear as to what they mean. If they are not clear and limited, those who wish to push and expand on these concepts to minimize and even eliminate federal authority will do so.

The third lesson is that if we in Canada are to engage in harmonized federal/provincial processes in order to facilitate more economically feasible development, while maintaining and respecting federal, national and provincial interests, then some independent agency must administer and monitor harmonization. Neither the federal nor the provincial governments are objective and politically non-involved enough to administer or otherwise carry out harmonized processes. If Sunpine is any indication, provincial administration of harmonized processes will lead to the erosion and perhaps even the elimination of the federal/national interest in the processes. If the federal government administers the processes, there likely will be a natural federal tendency to favour the federal/national interests and a corresponding provincial and industry outcry of impeding harmonization and accusations of duplication. The expected federal reaction will be to back off. In both cases, the federal and national interests suffer.¹¹

¹¹ This brief offers no suggestions as to what form an independent administrator of harmonization would take.

Specific Application to Bill C-32 and Recommendations

a) Bill C-32, clause 2(1) (I) – Virtual Elimination of Federal Processes

The clause states that in administering CEPA, “... the Government of Canada shall ... act in a manner that is consistent with the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada.”

The Vision statement of the *Canada-Wide Accord on Environmental Harmonization* is “Governments working together to achieve the highest level of environmental quality for all Canadians”. Obviously, clause 2(1)(I) was drafted with the Accord in mind.

What does it mean to say that the Government of Canada shall act in a manner consistent with the intent of the Accord? As indicated in above, there is little doubt that in this political climate this clause will be given a most broad interpretation to compel, shall we say, virtual elimination of federal processes in favor of provincial ones. Objective 2 of the Accord – “delineating the respective roles and responsibilities of the Federal, Provincial and Territorial governments within an environmental partnership by ensuring that specific roles and responsibilities will generally be undertaken by one order of government only” – will overshadow and rule other objectives.

One must recall that the Supreme Court of Canada in *R. v. Hydro-Quebec*¹² did more than confirm the federal government’s right to regulate under CEPA. The Court specifically refrained from finding this power to be based in the constitution’s peace, order and good government clause, which would have given the federal government exclusive jurisdiction. Instead it based its decision on the criminal power, emphasizing that the federal government and provinces share jurisdiction over CEPA matters. For harmonization enthusiasts, the phrase “share jurisdiction” means, only the provinces should regulate.

The lion’s share of CEPA can be seen as addressing matters over which the federal and provincial governments share jurisdiction. We believe that clause 2(1) can be used to, in effect, eliminate federal authority wherever it is asserted in an area of shared jurisdiction. For example, for the most part, the control and regulation of toxic substances within Canada is a matter of shared jurisdiction and accordingly, clause 2(1)(I) could be used to wipe out the federal role. This is unacceptable.

We have heard that a recommendation has been made to the Committee that clause 2(1)(I) be amended to read:

¹² R. v. Hydro Quebec S.C.C. File No.:24652

" ... the Government of Canada shall ... endeavor to operate in a manner that is consistent with the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada."

We find this proposed change to be unacceptable as it does little, if anything, to release the federal government of the responsibility to act in accordance with the Accord.

Recommendation for Legislative Change re clause 2(1)(l)

To better assure that the federal government retains its autonomy and may freely exercise its constitutional authority, we recommend one of the two following ways of dealing with clause 2(1)(l):

(a). Delete clause 2(1)(l)

(b). Failing (a), amend clause 2(1)(l) as follows:

" ... the Government of Canada shall:

2(1)(l) Have regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada. However, nothing in this clause 2(1)(l) shall be construed so as to abrogate or diminish Canada's right or authority to pass or implement legislation, policies or programs within any areas of federal constitutional authority.

III. Other Priority Areas for Change or Amendment

In addition to the changes regarding harmonization the Environmental Law Centre urges that the following changes and amendments be made (no specific order of priority)

1. Residualization

Clauses 2(1)(m), (n) and subsection 2(2) in effect require CEPA to become a residual statute. In other words, they will compel CEPA not to apply wherever other federal legislation may apply.

It is essential to the health and welfare of Canadians that the federal environmental statute not be precluded from regulating environmental matters just because they may also be regulated under another statute. This is especially so then the other Act is a special interest statute, for example, one concerning agriculture.

Recommendation re Clauses 2(1)(m), (n) and subsection 2(2)

Delete these clauses and this subsection.

2. Assessment for CEPA toxicity, inherent toxicity and endocrine disrupters

Section 65 of Bill C-32 sets forth a definition of “toxicity”. This section should be amended to specifically allow for a finding of inherent toxicity and accommodate inherent toxicity and to facilitate finding endocrine disrupters as toxic.

An acceptable framework for assessment of toxicity must incorporate and accept the following:

- That a substance by substance approach is not sufficient as chemicals can act cumulatively or synergistically.¹³
- That science cannot always ascertain at what level exposure to a chemical becomes a risk.¹⁴
- That human and other animal health and the systems on which they rely for survival and quality of life must receive the benefit of the doubt over likely, though not provable harmful chemical use.

Recommendation re section 65:

(a) Change the numbering of 65 to 65(1).

(b) Add a new section 65(2) which reads:

65(2) Notwithstanding subsection 65(1), for the purposes of this Part or Part 6, the Minister may designate any substance or combination of substances to be toxic if in the Minister’s reasonable opinion the substance or combination poses a risk to health OR environment and exhibits one or more inherent or intrinsic toxic properties such as acute lethality, chronic/sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, or hormone disrupting.

¹³ For example, regarding hormone disrupting chemicals, a non-estrogenic chemical (e.g. chlordane) may increase the potency of an estrogenic chemical (e.g. endosulfane). regarding potentially harm to endocrine systems, It is not meaningful to determine the risk of either chemical alone. See M. O’Brien, “Our Current Toxic Framework, *Our Stolen Future* and Our Options”, *Journal of Environmental Law and Litigation*, Volume 11(2) (1996) at 349.

¹⁴ For example, overexposure to some chemicals may produce intolerance to others. Many north Americans suffers from chemical sensitivities and intolerance and accordingly “safe” exposure amounts may be meaningless. As well, it may be pointless to attempt to determine risk related to endocrine disrupting chemicals since they may act in any number of combinations with varying, and sometimes subtle but serious declines in functional abilities. *Ibid*, especially at 346-7.

3. Environmental Protection Action

Sections 22-38 establish an environmental protection action. These sections, however, place so many nearly insurmountable barriers that in our view, any citizens' right to action is illusory. These barriers are set out in sections 22-30 and there is no need to repeat them here. We do, however, focus on what we find to be the most insurmountable barriers, those found in clauses 22(1)(a) and (b).

These clauses limit the right to commence an environmental protection action to circumstances in which the Minister broke the law by failing to act within jurisdiction. Regarding clause 22(1)(a) the Minister would have broken the law by not complying with statutory duties to commence investigatory actions on request (Bill C-32 section 18). Regarding clause 22(1)(b) the Minister would have broken the law by acting outside of jurisdiction by acting unreasonably in accordance with principles of administrative law, natural justice and duty to be fair. In either case it is highly unlikely that a Minister would simply admit to breaking the law to enable an environmental protection action to proceed. So, a person wishing to commence such action would have to go to the expense, trouble and time consuming aggravation of going to a court to establish that a Minister acted without jurisdiction. Given Canadian Courts practice of deference to statutory delegates, no court would easily find a Minister to have acted without jurisdiction unless the Minister flagrantly and rashly ignored statutory or other legal duties. Such circumstances are not likely to occur, and accordingly, the "right" to action is all but a ruse.

Recommendation re sections 22-38:

(a). Drastically amend these sections to remove impediments to commencement of an environmental protection action. In particular, delete section 22.

(b). Failing (a), delete sections 22-38.

4. Pollution Prevention

Part 4 of Bill C-32 deals with pollution prevention. Although we commend the Bill's emphasis on pollution prevention we agree with the Standing Committee's report *It's About Our health* that pollution plans should be mandatory and not discretionary.

As well, we point out that Environment Canada represented in the past that it would require reporting of pollution prevention plans or activities along with regular reporting for the National Pollutant Reporting Inventory ("NPRI"). CEPA should include specific reference to this requirement.

Recommendations re Pollution Prevention:

(a). Amend Part 4 to add a provision reading:

“The Minister shall require a pollution prevention plan in respect of facilities using, manufacturing or generating any substance determined to be toxic in accordance with this statute.”

(b). Amend Part 4, or alternatively Part 3 so as to require pollution prevention activities relating to NPRI substances to be reported on the National Pollutant Reporting Inventory.

5. Virtual Elimination Definition

Bill C-32 contains provisions that would require the Minister to propose virtual elimination of Toxic Substances List substances. The strength of these provisions is dependent on the definition of “virtual elimination”. Unfortunately this very important definition is seriously flawed.

Section 64 of the Bill’s characterization of “virtual elimination” requires the following elements. “Virtual elimination “:

- (1) applies only to a substance released into the environment
- (2) applies only to releases resulting from human activity
- (3) relates only to the reduction of such releases to a quantity below measurable quantity or concentration as defined in the regulations
- (4) applies only to substances that have been specified by the Ministers or have been prescribed
- (5) applies only to substances that in the opinion of the Ministers, results or may result in a harmful effect on the environment or human life or health.

There are several problems with this definition, including

Re (1) and (2) could admit unwanted exclusions. For example, (1) and (2) could be interpreted to exclude releases that do not directly result from human activity. For example, they could exclude releases that result from natural leaching processes or chemical and organic breakdown. Or, there could be squabbles as to what constitutes the “environment”.

Re (3); first, this aspect would allow release of substances up to a detectable amount using current technology. The public interest community has long been urging a concept of virtual elimination that requires elimination of production, use and release. This more restrictive concept is even more necessary to be adopted than when first proposed by the public interest community in view of evidence that hormonal level

alteration and endocrine disruption can occur as a result of exposure to substances at a much lower level than previously thought to pose a danger. Indeed, there is evidence that there is no safe level of release of many toxic chemicals. Virtual elimination should mean elimination, as far as is physically and technically possible and not simply reduction.¹⁵

Second, this aspect would allow a regulation to define “measurable release”. There is no restriction on how this phrase is to be defined and given our courts’ deference to statutory exercises of discretion any ball park definition likely would do. Accordingly a “measurable release” might be quite a high quantity or concentration.

Re (4), this element poses another hurdle to setting virtual elimination requirements in motion.

Re (5), this element likely would require establishment of a causal relationship between releases under a measurable amount and human health or environmental effects. If this is even possible, it flies in the face of the precautionary principle and ignores findings on endocrine disrupting chemicals.

Recommendation re “Virtual Elimination”

Delete section 64(1) and replace it with the following:

64(1) In this Part, “virtual elimination” means the elimination of the production, use, release, export, distribution or import of a substance or classes of substances, by virtue of human activity, whether direct or indirect.

6. Biotechnology and Equivalency

The current CEPA requires that any new product of biotechnology regulated under any other federal Act undergo an assessment of human health and environment effects at least equivalent to that under CEPA. Subsections 106(6)-(9) severely weaken the current equivalency provisions by stating that the notification and assessment provisions of CEPA not apply in respect of biotechnology product assessed under any other federal Act for toxicity. The need for specific CEPA equivalency has been dropped and moreover, the minister administering the other Act may determine whether the weakened equivalency provisions apply.

CEPA is an environmental statute and not, for example an agricultural statute, which also might regulate biotechnology products. We believe that all biotechnology products should fall under CEPA because of potential adverse environmental and health impacts, regardless of agricultural or other economic benefits

¹⁵ See Comments on Bill C-32 of the World Wildlife Fund Canada, especially at 14-15.

Recommendations re subsections 106(6)-(9)

Delete subsections 106(6)-(9) so that all new biotechnology products fall under CEPA, or at minimum, delete these sub-sections and restore current CEPA's equivalency provisions for biotechnology.

7. Screening the Domestic Substances List (DSL)

Bill C-32 provides new CEPA provisions to screen the DSL for persistent, bioaccumulative and inherently toxic substances (subsection 77(3)). Although this provision is a welcome addition to CEPA, it should be amended to add screening for substances that are potentially hormone disrupting.

Recommendation re subsection 77(3)

Add a new clause to 77(3)(a) as follows:

- (iv) disrupts hormones or potentially disrupts hormones.

8. The Precautionary Principle

The sixth paragraph of the preamble to Bill C-32 contains a modified version of this principle. The precautionary principle provides that where there are serious, especially potentially irreversible environmental or health effects, lack of scientific certainty may not be used as a reason not to proceed. The sixth paragraph of Bill C-32 states in effect that the precautionary principle may be applied only where it is cost effective to do so.

The "cost effective" aspect of this paragraph disparages the precautionary principle and makes it nearly impossible to apply. It likely will be impossible to weigh the costs of, for example, changing industrial technologies to eliminate releases of a chemical (a quantifiable amount) against the costs of potential, serious, and even irreversible effects on ecosystem and health (largely unquantifiable), for example, of decreased sperm count or other sexual adversities.

Moreover, actual incorporation of the precautionary principle is sadly lacking in the Bill. Stringent, cumbersome definitions and strict criteria pervade the Bill (eg. for "toxicity" and "virtual elimination" among others) making CEPA more of a pollution industry protection statute than a cautious environment and health protection legislation. Operationalizing the precautionary principle, in the ways suggested in this brief, would go far to making this act, an environmental protection act.

Recommendations re Precautionary Principle

(a). Delete “cost effective” from paragraph 5 of the Preamble.

(b). Operationalize the precautionary principle, as amended by (a) above, by incorporating it throughout the legislation, for example in:

- definition of toxicity
- definition of virtual elimination
- screening the DSL
- requirements for pollution prevention.