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CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 12, 2009

Standing Committee on Energy, Environment and Natural Resources
c/o Lynn Gordon, Clerk of the Committee
via email: gordol@sen.parl.gc.ca

Dear Ms. Gordon,

Re: Bill S-212 an Act to amend the *Canadian Environmental Protection Act, 1999*

Please find enclosed a joint submission of Ecojustice and the Canadian Environmental Law Association on the above-mentioned matter, prepared for the presentation before the Senate Committee on November 17, 2009.

If you have any questions or comments, please do not hesitate to contact me anytime at (416) 368-7533, ext. 31.

Yours truly,

Marlene Cashin

Marlene Cashin
Staff Lawyer
Ecojustice

ecojustice.ca
formerly Sierra Legal

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BILL S-212
Ecojustice and Canadian Environmental Law Association Submissions
November 17, 2009

Introduction

These are the joint submissions of Ecojustice Canada ("Ecojustice") and the Canadian Environmental Law Association ("CELA") on Bill S-212, An Act to amend the *Canadian Environmental Protection Act, 1999* ("CEPA" or the "Act").[i]

Ecojustice Canada (formerly Sierra Legal Defence Fund) is an independent, non-profit organization supported by 30,000 Canadians. We have a staff of lawyers and scientists who provide services to citizens and groups working to improve environmental laws. Since forming in 1990, law reform and litigation around the protection of the environment have formed the core of Ecojustice's work. Pollution prevention has been of great concern to many of Ecojustice's clients and Ecojustice is actively engaged in trying to improve and strengthen the laws that will secure the health and environment of Canadian communities.

CELA is a public interest law group founded in 1970 for the purpose of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters, including cases involving pollution prevention. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Ecojustice and CELA support the proposed enactment which would see CEPA amended to:

- remove the requirement that an individual show that an alleged offence under the Act has caused significant harm to the environment in order to proceed with an environmental protection action;
- allow for fine-splitting; and
- permit orders for the recovery of costs in private prosecutions for offences under the Act.

These submissions, while containing some general comments regarding Bill S-212, will primarily respond to concerns raised by the Honourable Hector Daniel Lang during debate on the motion of the Honourable Senator Banks, during the second reading of the bill.[ii]

These submissions will focus on the following four issues:

- Significant Environmental Harm;
- Costly Private Prosecutions;
- Fine Splitting in Private Prosecutions; and
- Limitation Periods.

1. Significant Environmental Harm

Bill S-212 proposes to remove the requirement that an individual show that an alleged offence under the Act caused significant environmental harm to the environment in order to proceed with an environmental protection action. Environmental lawyers have long been of the view that since environmental protection action only arises from an infraction of a CEPA provision, it is arguably implicit that such an infraction has caused significant harm to the environment.[iii] The removal of the requirement to show "significant environmental harm" will effectively remove at least one of the barriers to public participation and the use of environmental protections actions.

2. Costly Private Prosecutions

Private prosecutions are important processes whereby the public is able to become directly involved in protecting the environment. Both federal and provincial legislation contain provisions concerning the ability to bring a private prosecution and authorizing the Attorney General to intervene and stay.[iv] However, numerous obstacles associated with these types of prosecutions stand in the way of pursuing violations of environmental legislation. Commentators have remained consistent in their view that private prosecutions are costly, difficult and loaded with hazards. In his article on individual enforcement of Canada's environmental laws, Roger Proctor notes, "[t]he weak-spirited need not even try."[v]

Various authors have written regarding the inherent value in private prosecution as a viable option for ensuring compliance with environmental laws. Similarly, others have written about the need for strict enforcement and zero tolerance in environmental offences (i.e. an effective threat of prosecution -- and resulting liability -- is really the only thing that influences positive corporate behaviour towards the environment). John Swaigen, for instance, has said that prosecution is underutilized, and emphasises that:

> "prosecuting flagrant environmental offenders is also the right thing to do. It is likely that every prosecution has a ripple effect throughout the industry and that a single prosecution has a much greater deterrent effect on other potential offenders than administrative remedies."[vi]

In the same vein, Dianne Saxe has said:

> Anecdotal experience in Ontario suggests that a vigorous prosecution policy, added to a well-developed system of administrative controls, can have a notable effect upon corporate behaviour. Since 1985, the prospect of prosecution and of

> substantial fines appears to have had a dramatic effect upon the environmental consciousness of numerous corporations and municipalities in Ontario.[vii]

3. Fine Splitting in Private Prosecutions

Bill S-212 proposes, for private prosecutions, a fine-splitting clause that would require that any fine obtained following a private prosecution be split equally between the private prosecutor and the Minister of the Environment, or the provincial government in cases where the provincial government paid the expenses incurred in the prosecution. It also proposes to authorize the court to order the offender to compensate a private prosecutor for the costs of undertaking the prosecution. As a preliminary matter on the issue of fine splitting, we would note that there is absolutely no evidence to support speculation that private prosecutors are "profiting" under existing fine-sharing provisions, or that judges will be tempted to reduce a fine in order to avoid windfalls to private prosecutors.

The heavy burden of the high costs of private prosecution can be alleviated to some degree through the introduction of measures such as the proposed fine-splitting provision included in the bill. Similar provisions are currently being utilized in the *Fisheries Act* regulations (SOR/93-53) (Appendix A), which encourage the public to participate in the protection of community resources. The inclusion of a provision to empower courts to order the recovery of costs incurred during the investigation and prosecution of offences under CEPA in relation to private prosecutions, performs a similar function of providing incentives for citizens to pursue this type of case that addresses the rapid and continuing environmental degradation that CEPA is intended to tackle.

Common criticisms of individuals and environmental groups who pursue private prosecutions are that they are bounty hunters, involved in the proceeding in order to obtain some sort of windfall or profit. This description of private prosecutors in environmental cases greatly mischaracterizes the reality of the situation. It is important to highlight that the time and costs associated with bringing a private prosecution are immense. An environmental prosecution includes legal fees associated with the proceeding, as well as costs of private investigations into the offence. A story in an environmental legal newsletter by Dianne Saxe illustrates the time and number of court appearances involved in an average prosecution as follows:

> "Average prosecutions in Toronto now take 239 days, after the charges are laid, and 11.7 court appearances, according to the Ministry of the Attorney General. Unsurprisingly, cases move a little faster outside Toronto. In the Ottawa region, for example, the average charge is resolved in 193 days, after 8.7 court appearances. These statistics are for all criminal cases; environmental charges often take longer than average." [viii]

Suggestions that fine-splitting provisions might motivate the initiation of frivolous litigation where private citizens prosecute in hopes of making a profit do not reflect the realities on the ground. Such criticisms fail to recognize the enormous resources that are required to initiate an investigation and private prosecution and the risks of being unsuccessful or having the prosecution stayed and not receiving any compensation whatsoever.[ix]

In the well-known *R. v. Sault St. Marie*[x] case, where the Supreme Court of Canada delineated the difference between true criminal offences, strict liability offences, and absolute liability offences, the prosecution under the *Ontario Water Resources Act*[xi] actually started out as a private prosecution that then was taken over by the Crown. The case provides a clear example that substantiates our position that private prosecutions are not frivolous and vexatious.

In another example, *Fletcher v. Kingston*[xii] dealt with the depositing of toxic leachate from a landfill into a waterway. This case is regarded as one of the most successful private prosecutions, with $120,000 in fines ordered against the City of Kingston. In spite of this victory, the financial toll that these proceedings took on the citizens was tremendous. After 9 years of investigations and litigation, including subsequent appeals, the private citizens prosecuting the offences ran out of resources and were forced to settle.

In addition to compensating private citizens for their efforts in pursuing environmental prosecutions, awards from fine-splitting provisions may also have the effect of ensuring that future violations are pursued. For example, in the unreported case of *R. v. The Corporation of the City of Hamilton*,[xiii] Lynda Lukasik, a private citizen, laid a charge against the City of Hamilton for letting toxic leachate seep from a dump into the Hamilton Harbour. She was awarded $150,000 (half of a $300,000 fine) under the fine-splitting provisions under the *Fisheries Act*. She pledged at the time, that her share of the money would pay costs of the investigation and prosecution, with the balance going to local environmental protection and advocacy work. The money received was used to create Environment Hamilton, a not-for-profit organization. A small pool remains within an environmental justice fund, set-up to provide financial assistance for community members in the Hamilton area who, for example, may use the fund to hire an expert for an environmental law case, or to send samples to a laboratory to be analyzed.

Senator Lang has raised an issue that we would like to comment on very briefly. Even if CEPA allows for regulations directing where/how proceeds from fines may be distributed, this regulatory authority has not been exercised to date. Since there is no such regulation in existence, it is our view that it cannot be seriously contended that there is operative conflict between Bill S-212 and the current CEPA regulation-making provision.

4. Limitation Period

Senator Lang, in his references to limitation periods for prosecution, seems to prefer the Bill C-16 amendment to s.275 of CEPA, which establishes a 5 year absolute limitation period, subject to a prosecutor/defendant "waiver" of the limitation period.

Ecojustice and CELA prefer the Bill S-212 approach, which provides that the 2 year limitation period only begins to run when the Minister or private prosecutor become aware of the material facts regarding the alleged CEPA contravention. This discoverability principle is well-known in the civil context, and it has not, in our opinion, proven to be a significant barrier to initiating prosecutions in the quasi-criminal context. In our view, it is fair, reasonable and appropriate for the limitation period to run only when the prosecutor knows, or reasonably ought to have known, the material facts.

There are at least two major problems, as we see it, with the Bill C-16 amendment to s.275:

(i) the timeframe is longer, but the fixed 5 year term is both arbitrary and provides a perverse incentive to defendants to conceal the offence for the duration of the limitation period. As long as the defendant can hold out for 5 years plus 1 day, then the defendant cannot be prosecuted under CEPA; and

(ii) it is completely unrealistic to expect any well-advised defendant to voluntarily waive a limitation period defence, especially given the steep penalties (i.e. large fines and jail terms) available under CEPA.

So, in our view, protestations about the Bill S-212 limitation period are unpersuasive and contrary to the public interest. Surely, using discoverability as the trigger for the running of the limitation period is a fairer and more balanced approach which is more consistent with the overall purpose of CEPA, which is to ensure environmental protection.

By way of comparison, it is worth noting that the limitation period under Ontario's *Environmental Protection Act* is 2 years after the offence was committed *and* after evidence of the offence came to the attention of Ministry of Environment officials.[xiv] So, if discoverability can work in Ontario, where environmental prosecutions are more frequent than what we've seen under CEPA, there seems to be no reason why it can't work under Bill S-212.

Conclusion

As mentioned earlier, a fine-sharing regulation already exists under the *Fisheries Act*. The existence of such legislation, in place for some 30 years or so now, has not resulted in a flood of numerous (or frivolous) private prosecutions. Furthermore, without a mechanism to facilitate private prosecutions (i.e. fine-sharing to help defray the costs of these expert-intensive prosecutions), such prosecutions are less likely to proceed, and the societal objectives of punishment/rehabilitation/deterrence of environmental wrongdoers are less likely to be achieved, especially when federal prosecutions under CEPA are increasingly rare.[xv]

CELA and Ecojustice are firmly of the view that both Environment Canada’s and the public's capacity to enforce CEPA should be strengthened. Bill S-212 provides for amendments that will add tools to assist in the removal of barriers to environmental protection actions.

Appendix A

Regulations Respecting Fishing and Fish Habitat in General and the Payment of Penalty and Forfeiture Proceeds Under the Fisheries Act (SOR/93-53):

To Persons
62. (1) Where an information is laid by a person in circumstances other than those referred to in section 60 or 61 relating to an offence under the Act, the payment of the proceeds of any penalty imposed arising from a conviction for the offence shall be made
(*a*) one half to the person; and
(*b*) one half to the Minister or, where all of the expenses incurred in the prosecution of the offence are paid by a provincial government, to that provincial government.

(2) Where an information is laid by a person in circumstances other than those referred to in section 60 or 61 relating to an offence under the Act, the payment of any proceeds of the sale of any forfeited articles arising from a conviction for the offence shall be made, net of any expenses incurred in connection with the custody and sale of the forfeited articles,
(*a*) one half to the person; and
(*b*) one half to the Minister or, where all of the expenses incurred in the prosecution of the offence are paid by a provincial government, to that provincial government.

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[i] Written submissions prepared by Marlene Cashin of Ecojustice, Richard Lindgren of the Canadian Environmental Law Association, with research assistance from Student-at-Law, Natalie Jacyk.

[ii] *Debates of the Senate (Hansard)*, 40th Parl. 2d sess., vol. 146 (29 October 2009) at 1450 (Hon. Hector Daniel Lang)

[iii] See generally, Robert Wright (Testimony to the Senate Standing Committee on Environment and Sustainable Development 6 June 2006), online: <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/enrg-e/03evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=5>.

[iv] Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" (2004), 13 *JELP* 153 at 156-157 [Ferguson].

[v] Proctor, Roger, Individual Enforcement of Canada's Environmental Laws: The Weak-Spirited Need Not Try. 1991 Dal. L.J. 14, 112.

[vi] John Z. Swaigen, "A Case for Strict Enforcement of Environmental Statutes" in Elaine L. Hughes, Alastair R. Lucas & William A. Tilleman II, eds., *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Ltd., 1993) 311.

[vii] Dianne Saxe, "The Impact of Prosecution of Corporations and Their Officers and Directors Upon Regulator Compliance by Corporations" (1990) 1:1 J.E.L.P. 91.

[viii] Saxe Environmental Law and Litigation, (November 11, 2009), online at <http://envirolaw.com/2009/11/04/long-prosecution/#page=1>.

[ix] Taken from Hugh Wilkins, "Response to the Senate Committee Questions on Mercury", 15 December 2006.

[x] *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

[xi] *Ontario Water Resources Act*, R.S.O. 1990, c. O-40.

[xii] See *Fletcher v. Kingston (City)* (2004), 70 O.R. (3d) 577 and *Fletcher v. Kingston (City)*, [2004] S.C.C.A. No. 347 (Q.L.).

[xiii] *R. v. The Corporation of the City of Hamilton* (18 September 2000), unreported.

[xiv] *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 195. See also s.94 of OWRA.

[xv] Despite there being 38 different regulations, (19 since 1998) there have only been 34 convictions [under *CEPA*] since 1998. House of Commons Standing Committee on Environment and Sustainable Development, *The Canadian Environmental Protection Act, 1999 – Five-Year Review: Closing The Gaps: Report of the Standing Committee on Environment and Sustainable Development* (Ottawa: House of Commons Standing Committee on Environment and Sustainable Development, 2007) at 44, online: <http://cmte.parl.gc.ca/Content/HOC/committee/391/envi/reports/rp2614246/envirp05/05-rep-e.htm>.

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