Presentation to the Senate Standing Committee on Environment and Energy Regarding Bill C-32: The *Canadian Environmental Protection Act*

Brief # 374

Prepared by

Paul Muldoon
Executive Director
Canadian Environmental Law Association

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1. Introduction

The Canadian Environmental Law Association (CELA) is a public interest group,founded in 1970, with the objective to use and improve laws to protect the environment and conserve natural resources. Funded as a community legal aid clinic specializing in environmental law, CELA represents individuals and citizens= groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization and law reform activities.

CELA has been involved in the *Canadian Environmental Protection Act* (CEPA) review process since the first consultations hosted by Environment Canada in October of 1993. Throughout the review process, CELA has been the chair of the Toxics Caucus of the Canadian Environmental Network (CEN). The Caucus includes a few dozen public interest organizations from across Canada interested in CEPA and other initiatives that focus on toxic substances.

In preparation for the initial public hearings on the CEPA by the House of Commons= Standing Committee on Environment and Sustainable Development, the Caucus sponsored in-depth research papers on various aspects of CEPA.[1] In addition, the Caucus developed a summary submission entitled, *The Canadian Environmental Protection Act: An Agenda for Reform*. This submission was endorsed by over 50 organizations, representing a variety of sectors from across Canada.

Subsequent to these hearings, the Standing Committee released its report on CEPA in June of 1995, entitled, *It=s About Our Health! Towards Pollution Prevention*. While many members of the Toxic Caucus applauded this report, the government response[2] to it was disappointing, although not surprising due to the intense lobbying by agriculture, industry and natural resource interests. The government response formed the basis for the drafting of Bill C-74, which was introduced for First Reading in December of 1996. This bill died on the order due to the 1997 federal election. The bill was then introduced in 1997 as Bill C-32. A number of important changes were made that made Bill C-32 in fact weaker than Bill C-74. Bill C-32 then proceeded to Second Reading and was reviewed by the House of Commons= Standing Committee.

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[1] These research papers are available to the Senate Committee upon request.

[2] Environment Canada, *Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal* (1995).

CELA appeared before the House of Commons= Standing Committee on Environment and Sustainable Development with respect to CEPA and related matters. In October of 1998, it presented a 288-page submission on Bill C-32 to the Standing Committee.[3] This submission provided a detailed section-by-section analysis of Bill C-32 together with some 172 recommendations to amend Bill C-32.

The present submission does not propose to repeat all of the recommendations outlined in the Standing Committee submission, and in particular does not propose to repeat those recommendations that were not adopted by the Standing Committee. The Standing Committee=s submission is available to this Committee, and for the most part, is still relevant. CELA stands behind those recommendations and urges this Committee to consider those recommendations in detail.

It should be made clear that CELA did not support the passage of Bill C-32 as it was before the Standing Committee. In order to gain CELA=s support, significant changes were required in several key areas. CELA has been consistent in its message that the enactment of the bill without significant changes would be a backwards step in the protection of the health and environment of Canadians.

The Standing Committee on Environment and Sustainable Development considered hundreds of amendments. It is of interest to note that many of the controversial amendments were proposed by Liberal members of the Standing Committee. In fact, some of those amendments were accepted by Standing Committee while the government itself introduced a number of important changes.

At the end of the Committee=s deliberations and amendments, Bill C-32 still represented a weak and problematic bill.[4] Nevertheless, CELA did consider the bill to be supportable, despite its very serious reservations. However, it was a surprise that the Standing Committee=s version of the bill was not accepted at report stage in the House of Commons. At that time, then Minister Christine Stewart proposed a number of important changes to the bill that, in effect, reversed some of the amendments put forth by Liberal members and the government itself. Many of these changes (approximately 6 of 11) were precisely the changes lobbied for by industry. It is fair to state that the industry lobby that occurred between the end of the Standing Committee=s deliberations and Report Stage was perhaps one of the most intense and concerted efforts seen in recent times.

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[3] Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy, *Submission on Bill C-32 - the Canadian Environmental Protection Act* CELA Brief no. 350 and CIELAP Brief No. 98/4, October, 1998.

[4] House of Commons, Bill C-32, reprinted as amended by the Standing Committee on Environment and Sustainable Development as a Working Copy for the Use of the House Commons at Report Stage and as Reported to the House on April 15, 1999.

The changes to the bill at Report Stage were changes that had profound impact on the effectiveness of the bill. Not only was Bill C-32 an already weak bill, but the changes made a weak bill simply unacceptable. In its present form, CELA does not support the passage of Bill C-32.

As note above, it is not the intention of this submission to review every provision of the present bill. Instead, it proposes to review a number of the crucial provisions, most of which were provisions that were proposed or supported by the House of Commons Standing Committee, but were changed by the Minister at Report Stage at the insistence of industry.

2. Concerns that Warrant Senate Amendments with Respect to Bill C-32

2.1 Virtual Elimination

(a) Introduction

One of the reccurring themes in the CEPA review has been the goal of addressing the environmental and human health problems arising from the most dangerous substances, such as dioxins and furans. How to further this goal has been an issue in the CEPA review from its inception. Hence, in order to understand the significance of the provisions in the current version of Bill C-32, it is necessary to provide some background to the issue.

There are a number of substances that are persistent, bioaccumulative and toxic. A significant amount of scientific work has be undertaken with respect to the environmental effects of toxic substances, particularly in the Great Lakes region. Throughout the CEPA review, public interest groups and the Standing Committee on Environment and Sustainable Development agreed that there is no safe level for these types of substances. It is for this reason that one of most controversial issues in CEPA has been to determine what should be the ultimate goal with respect to these most dangerous substances.

Under the bill, there is, in effect, a special regime for the most dangerous substances. Simply stated, the proposed bill outlines the basic goal for these substances, as Avirtual elimination.@ The bill then details the characteristics of those substances that should be on the Avirtual elimination@ track and a process to have the Minister designate those substances that meet the criteria. Then there are provisions that provide guidance on how to implement or further the goal of virtual elimination.

(b) Definition of Virtual Elimination

Public interest groups have consistently taken the position that the only legitimate goal for the most dangerous substances is Aelimination.@ In this context, CELA proposed a definition that sought *to eliminate the use, generation and release of substances* that meet certain criteria.

Until the Standing Committee=s public hearings, Bill C-74 and then Bill C-32 included a definition of Avirtual elimination@ that was focussed on the control of pollutants, despite the fact that the term Avirtual elimination@ was used. As originally stated, the definition was simply unworkable, ineffective and inherently inconsistent. The basic problem that rather than focusing on *eliminating the use and generation of substances,* the proposed definition focussed on how much of these substances could industry could *release*. The definition prescribed that virtual elimination means that industry could release quantities prescribed by regulation (which is generally those quantities that are measurable) *and* that the amount released must have some adverse impact.

CELA, in its submission, vigorously opposed the definition of virtual elimination for the following reasons:[5]

> (1) **Fails to Respond to Ecological and Human Health Threat:** The proposed definition would not phase out the most dangerous substances known, but in fact, have the effect of allowing and legitimizing the use and generation of these dangerous substances.
>
> (2) **The Definition is Inconsistent with the Concept of Pollution Prevention:** When referring to Ano measurable release,@ the focus is on Acontrolling@ the amount of pollution rather than preventing or avoiding the use and generation of it in the first place. When using the Ano measurable release@ definition, the thrust of initiatives will then be to reduce emissions, not to move toward process change or other measures that avoid the use and generation of toxic substances. Hence, while a goal of CEPA is on pollution prevention,[6] the bill incorporates a pollution control approach to the most dangerous substances known. The approach is also inconsistent with federal policy that states the federal government=s commitment to the pollution prevention approach.[7]
>
> (3) **The Definition is Inconsistent with the *Great Lakes Water Quality Agreement*:** The *Great Lakes Water Quality Agreement*, an agreement between U.S. and Canada, has the goal to Avirtually eliminate@ persistent toxic substances. It is clear that, as interpreted by the International Joint Commission, virtual elimination does not relate to Ano detectable level.@ Instead, it means the complete elimination of these substances.

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[5] Supra, pp. 93-97.

[6] Pollution prevention is defined as a measure that avoids or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution and process reformulation among other such techniques

[7] Government of Canada, *Pollution Prevention: A Federal Strategy for Action* (1995).

Despite the problems with the definition, both the government and industry refused to amend the definition stating that, in effect, the definition was a Acompromise deal.@

In 1998, after two years of intense criticism by public interest groups, the government reviewed its position on the definition during the Standing Committee hearings and proposed a modified definition. This definition has many of the same problems noted above, however, it is much clearer as to intent of virtual elimination. The definition reads:

> s. 65(1) In this Part, Avirtual elimination@ means, in respect of a toxic substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification specified by the Ministers in the List referred to in subsection (2).

As noted, this definition has the same problems as the previous definitions.

RECOMMENDATION NO. 1

> **CELA still recommends that a new definition be employed, namely:**
>
> **s. 65(1) In this Part, Avirtual elimination@ means the cessation of the intentional production, use, release, export, distribution or import of a substance or classes of substances.**
>
> **(2) Where a substance is produced as a by-product of the production or use of another substance, virtual elimination means changes to processes or practices or substitution of material or products to avoid the creation of substance in question.**

(c) Implementing Virtual Elimination

The provisions to implement the goal of virtual elimination have become the most controversial aspect of Bill C-32. To understand the significance of the provisions, it is important to review how the provisions worked as envisioned by the Standing Committee on Environment and Sustainable Development.

Bill C-32 Provisions as Recommended by Standing Committee

While section 65(1) provides the ultimate goal for the most dangerous substances, a number of provisions in the Act provide the means to implement this goal. These can be briefly summarized as follows:

ss. 77(2)(c)/
ss. 77(4) *Identifying Substances for Virtual Elimination*: These sections provide that where the Ministers have conducted a screening assessment under section 20, a review of a decision of another jurisdiction to act with respect to a substance, or an assessment of substance on the Priority Substance List, the Ministers may, among other options, recommend that the substance be subject to the goal of virtual elimination (so long as they otherwise meet the criteria outlined in section 77(4)).

s. 79(1)/
s. 79(2)(a) *Required Plans for Virtual Elimination*: This section requires that where a substance has been designated for virtual elimination, the Minister is given the authority to require a plan to achieve the virtual elimination goal.

s. 91(2) *Timeframes for Virtual Elimination*: This section requires the incorporation of timeframes when regulations or instruments are proposed for virtual elimination.

s. 91(4) *Additional Measures*: This section requires an outline of any additional measures required to meet the virtual elimination goal.

s. 92.1 *Regulations for Implementation Made by Ministers*: This section gives the Minister the authority to make regulations to implement virtual elimination.

All of these sections are geared to measures that seek to implement the virtual elimination goal. In order to facilitate the implementation of the goal, section 65(3) gives authority to the Minister to set interim goals pending the achievement of the ultimate goal of virtual elimination. The section, as drafted in the version emanating from the Standing Committee report reads:

s. 65(3) When taking steps to achieve the virtual elimination of a substance, the Ministers shall prescribe the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source, and in doing so, shall take into account any factor or information

> provided for in section 91, including, but not limited to, environmental or health risks and any other relevant social, economic or technical matters.

Bill C-32 Provisions at Report Stage

As the Standing Committee approved the above provisions, industry provided one of the most intense lobbies to weaken the Bill C-32. The proposals put forth by industry become well known.

One of the key issues targeted by industry was to weaken the virtual elimination provisions. Essentially, the same proposals on virtual elimination put forth by industry were accepted by the government and incorporated into the bill at Report Stage.

The general thrust of industry=s proposals, subsequently adopted by the government, was fairly simple. Although the goal of virtual elimination would remain (in section 65(1)), *all of the implementing provisions would not longer be oriented to achieving the ultimate goal of virtual elimination; instead, all of the implementing mechanisms would be oriented to the* ***interim*** *goals.*

To accomplish these changes, sections 65, 77(2)(c), 77(4)(c), 79(1), 79(2)(a), 92(2), 92(4), and other sections were amended to ensure that measures oriented to reach the ultimate goal of virtual elimination in section 65(1) would only be geared to meeting interim targets in section 65(3).

Implications of Changes to Virtual Elimination Provisions at Report Stage

The implications of the changes made at Report Stage are profound. For even the most dangerous substances known, the ultimate goal is no longer Avirtual elimination.@ Instead, the ultimate goal are those interim targets. As such, section 65(1) which defines virtual elimination is effectively and essentially an irrelevant section since all actions are directed to section 65(3)(interim targets) and not section 65(1) (virtual elimination).

Moreover, the proposed changes send the wrong message to industry. The intent of the virtual elimination concept is to identify and address these most dangerous substances. The design of these provisions is to give an unequivocal signal to industry that these substances are Atargetted@ for elimination in the long term, although social, economic and technological constraints may require interim release limits. Under the present wording, industry will invest in technologies to meet the interim limits rather than the long term goal of virtual elimination suggesting that:

> (i) industry will be spending its capital investment on interim goals rather than long-term goals;
>
> (ii) because industry spends its capital on interim goals, it will be difficult to convince it

to invest additional capital to make the interim goals more strict - the interim release limits quickly become the permanent limits;

(iii) industry will be spending more to get less result, but it will not encourage innovation. Rather than finding innovative techniques to make products with less or no toxic material, emphasis is placed on end-of-the-pipe thinking.

In the end, the Aspecial regime@ for the most dangerous substances known to humans has been reduced to reduction targets based on a variety of factors. It is submitted that the existing CEPA has far more power and authority to deal with these substances than the proposed new CEPA.

RECOMMENDATION NO. 2

Bill C-32 should be amended to reverse the changes put forth by the government with respect to virtual elimination. More specifically, Bill C-32 should be amended to replace the words Aimplementation of subsection 65(3)@ in sections 77(2)(c), 77(4)(c), 79(1), 79(2)(a), 91(2), and 91(4) with the term Avirtual elimination.@

(d) Amending the Preamble - Clarifying Legislative Intent

As noted above, the term Avirtual elimination@ has the long term objective of eliminating the worst pollutants. Often the legislative intent of bills are reflected in the Preamble. In Bill C-32, the Preamble initially noted that one of the objectives of the bill was to Aphase-out@ persistent, bioaccumulative and toxic substances. Before Report Stage, one clause in the Preamble stated:

> Whereas the Government of Canada acknowledges the need to phase out the generation and use the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented.

However, at Report Stage, the wording in the Preamble was changed to remove the phrase: Aphase out the generation and use of.@

Implications

It is unfortunate that the term Aphase out@ was removed. First, the term reflects the long term vision for the most dangerous substances. Second, the term is found only in the Preamble which only helps to interpret legislation - it is not a binding part of the law. Third, its removal signals a retreat by the government from the principle of Aelimination@ of these substances. The Minister of Environment has in the past committed to the elimination principle.

RECOMMENDATION NO. 3

The Preamble of Bill C-32 should be amended to reflect the legislative intent with respect to virtual elimination, that is, the Preamble should state that goal of the law is to phase-out the use and generation of the most dangerous substances.

2.2 Inherent Toxicity

(a) Introduction

Apart from the goal of virtual elimination, another innovation of the Bill C-32 was the incorporation of the concept of Ainherent toxicity.@ CEPA essentially incorporates a risk assessment approach to the review of substances in Canada. According to the definition of Atoxicity@ in CEPA,[8] a substance would be deemed to be toxic if the substance:

(1) was emitted in the environment;
(2) has effects on human health or the environment; and
(3) is emitted in such amounts as to cause the noted effects.

This third requirement requires not only that the substance be toxic, but that there is sufficient ***exposure*** to cause the effects. Under the present CEPA, a substance has to proceed through this lengthy risk assessment process and only if found toxic (that is, meeting these three requirements) is the substance a candidate to be regulated or otherwise acted upon by the government.

Another approach that was debated at length in the development of Bill C-32 was the concept of Ainherent toxicity.@ Inherent toxicity means that a substance could be found to be toxic because of the very nature of the make-up or molecular structure of the substance (such as being persistent and bioaccumulative).

The Standing Committee on Environment and Sustainable Development, during its initial review of CEPA in 1995 and also outlined in its 1995, explained the concept of Ainherent toxicity@ in the following manner:

> Nonetheless, the Committee considers that an Ainherent toxicity@ approach has merit and could help to identify quickly the most harmful substances. We are concerned that some potentially dangerous substances are not being adequately addressed by the current risk assessment-based [Priority Substances List] PSL system. Particularly, the current definition of toxic has contributed to two important problems, both of which could be addressed by moving in the direction of a hazard assessment. First, extensive amounts of data are required to conduct a full risk assessment. For some substances, these extensive data requirements may

[8] See section 11 of CEPA or section 64 of Bill C-32.

be extremely difficult to satisfy with the result that the PSL process may be fatally compromised. For 13 substances on the first PSL, the assessment process, unfortunately, could not be completed for this reason. Second, the Committee believes that, in some cases, such exhaustive information is not required in order to justify their regulation.

Nonetheless, the Committee considers that an Ainherently toxicity@ approach has merit and could help to identify quickly the most harmful substances. We are concerned that some potentially dangerous substances are not being adequately addressed by the current assessment-based PSL system.[9]

(b) Bill C-32 Debate

Bill C-32 attempted to incorporated the concept of Ainherent toxicity@ by establishing a regime to expedite the treatment of the most dangerous substances. Section 77(3) of Bill C-32, as proposed by the Standing Committee, proposed that if the Ministers of Environment and Health were concerned that a substance was Ainherently toxic@ (as outlined in the provision), the Ministers may put the substance on the List of Toxic Substances and the Avirtual elimination@ track.

Section 77(3) stated:

> s. 77(3) Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that:
> (a) a substance may have a long-term effect on the environment because it is
> (i) persistent and bioaccumulative in accordance with the regulations;
> (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies; and
> (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c).

[9] Standing Committee on Environment and Sustainable Development, *It=s About our Health! Towards Pollution Prevention CEPA Revisited* (June 1995), p. 67.

The effect of this section is that an inherently toxic substance would not have to proceed through the laborious PSL process. Instead, the focus is on whether such substances could harm health or the environment based on its very characteristics, (such as persistence and bioaccumulation), rather than exposure.
Despite the progressive nature this version, this section was amended by the Environment Minister at Report Stage. Section 77(3) now reads:

> s. 77(3) Where, based on a screening assessment conducted under section 74, *the substance is determined to be toxic or capable of becoming toxic and* the Ministers are satisfied that:
> (a) a substance may have a long-term effect on the environment because it is:
> (i) persistent and bioaccumulative in accordance with the regulations;
> (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies; and
> (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c).[Emphasis Added]

The effect of this amendment is to nullify the concept of inherent toxicity. Since the amendment requires that a substance must meet the toxicity requirements of the bill, whether the substance is inherently toxic or otherwise toxic is of little relevance.

RECOMMENDATION NO. 4

Section 77(3) of Bill C-32 should be amended to reflect the wording prior to Report Stage, that is, the wording from the draft bill emanating from the Standing Committee on Environment and Sustainable Development.

2.3 Powers of the Minister

At Report Stage, a number of important amendments were made with respect the powers of the Environment Minister. The common threat in this series of amendments is that decisions that were assigned to the Minister to make are now to be made by Cabinet. The implications of these amendments, by having the matter decided by Cabinet, is to ensure that decisions take longer and to ensure that other strong economic interests can exercise their influence.

Examples where the Minister=s decision making authorities were transferred to the Cabinet

include:

> s. 166 - International Air Pollution [where Cabinet was given an enhanced role over international air pollution];
> s. 176 - International Water Pollution [where Cabinet was given an enhance role over international water pollution];
> s. 92.1 - Release of Pollutants [under Bill C-32, prior to Report Stage, the Minister had greater powers to develop regulations governing release of toxics into the environment]

RECOMMENDATION NO. 5

> **Bill C-32 should be amended to reverse those changes made at Report Stage that removed powers of the Minister in favour of the Cabinet.**

3. Summary and Conclusions

There are many other issues that this submission could have addressed. For example, there are issues relating to biotechnology and the precautionary principle, among others. At this point, CELA understands that other public interest groups will be addressing these issues (we understand that the World Wildlife Fund will be addressing the precautionary principle).

CELA is urging this Committee to review the recent changes made to Bill C-32 and make proposals that will serve to protect the health of Canadians and their environment.