



**Canadian
Environmental Law
Association**
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environmental
defence

DELIVERED VIA EMAIL

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**Re: Canada-European Union Comprehensive Economic and Trade Agreement
Regulatory Cooperation Forum**

Please accept these submissions on behalf of the Canadian Environmental Law Association (“CELA”) and Environmental Defence (“ED”) regarding the Regulatory Cooperation Forum established in chapter 21 of the Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”).

It is essential that the Regulatory Cooperation Forum does not become an obstacle to improving environmental protections and public interest regulations in the European Union or Canada. Regulatory cooperation can result in the weakening of regulations designed to protect human health and the environment. Public interest regulations must be understood first and foremost as a way to improve the lives of the people living in both jurisdictions, not as a barrier to trade and private profit. The precautionary principle must be paramount, and the test for any changes to regulatory standards recommended by the Regulatory Cooperation Forum should be whether the public interest is better protected by the change.

The Regulatory Cooperation Forum must be open and transparent. The public must be aware of all activities conducted by the Regulatory Cooperation Forum, have meaningful opportunities to participate, and all meeting minutes and decisions should be public.

As an example, CELA and ED will focus in this submission on opportunities for Canada to improve its chemicals management regime under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (“*CEPA*”) and related acts by adopting the more precautionary aspects of the European Union’s Registration, Evaluation, Authorisation and Restriction of Chemicals (“*REACH*”) regime. It is an opportune time to improve Canada’s approach because *CEPA* is currently under review.

Canadian Environmental Law Association

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A. Background on Canadian Environmental Law Association and Environmental Defence

CELA is a non-profit, public interest organization established in 1970 for the purposes of using and improving existing 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.

CELA has a long history of recognizing the consequences of globalization on environmental protection. The expansion of international trade regimes has made it more difficult for countries to develop new and progressive laws and policies.

CELA advocates for the integrity and strength of domestic environmental law in light of regional, bilateral and multilateral trade agreements. We review international trade agreements that may adversely affect the ability of all levels of government in Canada to enact and enforce environmental laws. CELA's prior comments on trade agreements can be accessed in our *Acting Globally - International Trade Agreements* publication collection on our website,¹ as well as our archive.²

As well, CELA promotes efforts to meet the requirements of key multilateral environmental agreements including the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on Prior Informed Consent, the Basel Convention on the Transboundary Movement of Waste, and the Minamata Convention on Mercury, and is concerned about the impact of trade agreements on their implementation.

Environmental Defence is a national charity that challenges and inspires change in government, businesses and people to ensure a greener, healthier and prosperous life for all. ED are policy experts and are supported by scientists, business leaders, lawyers and community members working hard to protect Canada's environment and human health.

B. Transparency of Regulatory Cooperation Forum

The Regulatory Cooperation Forum must be transparent. The public interest can only be protected if the public and public interest organizations can truly participate in all decision-making processes undertaken by the Regulatory Cooperation Forum.

Working groups should not be dominated by representatives of industry, as has been the case in the Canada- United States Regulatory Cooperation Council.³

¹ CELA, *Acting Globally - Publication Collection*, available online: <<http://www.cela.ca/collections/acting-globally>>

² CELA Archives, available online: <<http://cela.andornot.com/archives/>>

³ Stuart Trew, Canadian Centre for Policy Alternatives, *From NAFTA to CETA: Corporate Lobbying Through the Back Door: How Regulatory Cooperation Serves as Lobbyists' Boulevard of Influence in NAFTA and CETA*, (9 February 2017), Table 1, pp 12-13.

As well, Canada and the EU should ensure that all activities under the Regulatory Cooperation Forum meet the following criteria:

- 1- All meetings or other activities must include meaningful public participation;
- 2- The public must be notified of all activities. Notice must be adequate to allow for public participation, and include detailed information regarding the subject matter of the meeting and ways to participate in the meeting;
- 3- Meeting minutes, including a list of participants at the meetings, should be posted on a public website;
- 4- There should be a public comment period that permits meeting participants and other interested stakeholders, particularly health, environmental and labour organizations, to provide input on any proposed approach or decision; and
- 5- All decisions should be public, posted on a public website, and include detailed reasons for the decision.

C. CEPA should adopt the stronger precautionary aspects of the European Union's REACH program

Regulatory cooperation seeks to contribute to the protection of human life, health or safety, animal or plant life, or health and the environment.⁴ That purpose aligns with the objective of *CEPA* to protect the environment and human health in order to contribute to sustainable development,⁵ and with the objective of Europe's REACH Regulation to provide a high level of protection for human health and the environment.⁶

It is critical that the Regulatory Cooperation Forum is not used to undermine or weaken environmental protections in Europe or Canada.⁷ The Centre for International Environmental Law found that between March 2003 and June 2011, Canada raised twenty one concerns regarding the REACH program with the World Trade Organization Technical Barriers to Trade Committee. In particular, Canada criticized REACH's precautionary, hazard-based approach, which places a greater and appropriate responsibility on industry to investigate and disclose potentially harmful effects of its chemicals.⁸ Canada's traditional position at the World Trade

⁴ *Canada-European Union (EU) Comprehensive Economic and Trade Agreement*, Canada and European Union, 14 September 2016, ch 21, article 21.3(1)

⁵ *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 ("CEPA"), Declaration and Preamble

⁶ *Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC* (18 December 2006), ("REACH Regulation"), Objective

⁷ ClientEarth, *No Regulatory Cooperation Activities on Chemicals and Pesticides in the Regulatory Cooperation Forum (RCF) under CETA*, (16 February 2018), available online <<https://www.documents.clientearth.org/library/download-info/letter-to-european-commission-on-regulatory-cooperation-in-ceta-on-chemicals-and-pesticides/>>

⁸ World Trade Organization, Statement by Canada to the TBT Committee, *European Union – Revised Proposal for the Categorization of Compounds as Endocrine Disruptors of 19 February 2013 by DG Environment*, (8-9 November 2017), available online

<https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240274,240273,240272,240234,240251,240248,240225,240238,240241,24

Organization with respect to the REACH program is inappropriate, does not respect the precautionary principle, and threatens public health and environmental protection. It would fail a public interest test. The Regulatory Cooperation Forum cannot be used to pressure the EU to weaken its chemicals management regime.

Canadians would benefit from a chemicals management approach which adopted the more precautionary aspects of Europe's REACH Regulations, in particular:

- The EU's REACH authorization framework relies on the "no data, no market" approach which puts the onus on industry to provide data on the safety of chemicals in the market. The onus on industry ensures that sufficient information about problematic chemicals is available. In contrast, *CEPA* places the onus on government to examine the safety of an existing chemical. The Minister of Environment may request that industry conduct toxicological or other tests under section 71(1)(c) of *CEPA* if, under section 72, the Ministers of Health and Environment have reason to suspect that the substance is toxic or capable of becoming toxic.⁹ However, this provision has never been used. Canada should adopt Europe's approach and require industry to bear the burden of proving that a chemical of high concern is safe before it is permitted for use, as was recommended by the House of Commons Standing Committee on Environment and Sustainable Development.¹⁰
- The EU framework uses a hazard-based approach to identify chemicals of very high concern for authorization, rather than a risk based approach. A hazard-based assessment is more precautionary and results in better protections for human health and the environment.
- The threshold to be found toxic under *CEPA* is too lax. For example, the Chemicals Management Plan's criteria for determining whether substances are persistent, bioaccumulative, or toxic rely on a chemical's half-life of 26 weeks in freshwater. In the REACH program, the standard is a 5.7 week half-life in freshwater.¹¹
- The EU system is a precedent for examining safe alternatives to chemicals. Canada needs to examine ways to implement the substitution principle and promote safer

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Centre for International Environmental Law, *Letter from Carroll Muffett to Monsieur Paul Magnette*, (19 October 2016), available online

<<http://www.ciel.org/wp-content/uploads/2016/10/CIEL-letter-to-Mr.-Magnette.pdf>>

⁹ *CEPA*, ss 71(1)(c) and 72

¹⁰ Canada, House of Commons, *Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the Canadian Environmental Protection Act, 1999*, Report of the Standing Committee on Environment and Sustainable Development, (June 2017), p 53

¹¹ CELA and Lowell Center for Sustainable Production, *The Challenge of Substances of Emerging Concern in the Great Lakes Basin: A review of chemicals policies and programs in Canada and the United States* (2 June 2009), p 146, available online

<<http://www.cela.ca/sites/cela.ca/files/667IJC.pdf>>

alternatives where possible in order to better achieve the pollution prevention principle of *CEPA*.

- The EU also considers a wider range of toxicity concerns, including endocrine disruption. Canada should adopt a similar approach to address the risks posed by endocrine-disrupting chemicals.

In 2014, CELA identified six substances that were listed for authorization under the REACH program but were not listed as toxic in Schedule 1 of *CEPA*.¹² Those chemicals have been found not to be *CEPA* toxic, and so are subject to less stringent management regimes.

With respect to phthalates, Canada has only listed bis(2-ethylhexyl)phthalate as *CEPA* toxic under schedule 1 to date, which is also listed on the EU's Authorisation List.¹³ The EU's Authorisation List includes eight other phthalates, and requires a phase out of these phthalates unless industry demonstrates a need for their continued use. Canada recently conducted a risk assessment on twenty eight phthalates and determined that only two should be listed as toxic under schedule 1 of *CEPA*. Five of the twenty eight phthalates that were assessed are on the EU's Authorisation List, and two are currently on the Candidate List.¹⁴ The Canadian approach has been to restrict the uses of phthalates in some limited circumstances, or to take no action at all regarding other phthalates, and is less protective of public health and the environment.

Canada has yet to fully implement the Globally Harmonized System ("GHS") of Classification and Labelling of Chemicals. The European Union adopted the Classification, Labelling and Packaging Regulation in 2008, which is consistent with the GHS and is now in force.¹⁵ The Regulatory Cooperation Forum presents an opportunity for Canada to fully adopt the GHS.

Another area of concern is the way that important information on chemicals are protected as Confidential Business Information in a manner that undermine the public's right to know about potential risks posed by chemicals on the market. The Regulatory Cooperation Forum is an opportunity to ensure that claims of Confidential Business Information are not overly broad.

¹² CELA and Ecojustice, *Petition to the Office of the Auditor General- Implementation of CEPA 1999, section 75(3) and EU REACH*, (15 April 2014), p 2, available online

<http://www.cela.ca/sites/cela.ca/files/Final%20Ecojustice%20CELA_CEPA_75%283%29AG_petition_April_15_2014pdf_0.pdf>

¹³ *CEPA*, sched 1, s 30; REACH Regulation, Annex XIV, Authorisation List, available online <<https://echa.europa.eu/authorisation-list>>

¹⁴ *CEPA*, sched 1; REACH Regulation, Annex XIV, Authorisation List; Health Canada, *Phthalate Substance Grouping*, last modified 16 October 2017, available online <<https://www.canada.ca/en/health-canada/services/chemical-substances/substance-groupings-initiative/phthalate.html>>

¹⁵ European Commission, *Classification and Labelling (CLP/ GHS)*, last updated on April 11, 2018, <https://ec.europa.eu/growth/sectors/chemicals/classification-labelling_en>

D. Conclusion

The Regulatory Cooperation Forum should only be used to harmonize regulatory standards upwards to better protect the public interest in both jurisdictions. Canada and the EU need to publicly commit to ensuring that a public interest test will be used to determine whether a regulation should be amended, or a new regulation should be discussed.

CELA and ED therefore make the following recommendations regarding the Regulatory Cooperation Forum:

- The Regulatory Cooperation Forum cannot be dominated by industry.
- All meetings or other activities must include meaningful public participation.
- The public must be notified of all activities. Notice must be adequate to allow for public participation, and include detailed information regarding the subject matter of the meeting and ways to participate in the meeting.
- Meeting minutes, including a list of participants at the meetings, should be posted on a public website.
- There should be a public comment period that permits meeting participants and other interested stakeholders, particularly health, environmental and labour organizations, to provide input on any proposed approach or decision.
- All decisions should be public, posted on a public website, and include detailed reasons for the decision.

Canada's *CEPA* and chemicals management regime should be strengthened:

- Industry should bear the onus of proving that a chemical is safe.
- Canada should use a hazard-based approach to determining and addressing substances of very high concern.
- Canada's approach for determining whether a chemical is toxic should be strengthened.
- Industry should be required to explore safe alternatives to toxic chemicals.
- Both jurisdictions should ensure that industry claims of Confidential Business Information do not limit the government or the public's ability to assess the impacts of chemicals on human health and the environment.
- Canada should fully implement the GHS for Classification and Labelling.

Yours truly,

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