

Brief to the Standing Committee on Environment and Sustainable Development

From Elizabeth May, O.C.

Member of Parliament, Saanich-Gulf Islands

Leader, Green Party of Canada

December 9, 2016

Re: Canadian Environmental Protection Act

Introduction:

The Canadian Environmental Protection Act (CEPA) was initially developed in the late 1980s and received Royal Assent in 1988. It combined a number of related acts – Ocean Dumping, Commercial Chemicals legislation, Controls on Phosphorus and Water pollution.

It promised “cradle to grave” comprehensive regulation of toxic substances. I worked in the Minister’s Office in the development of the legislation at that time. A significant amendment brought forward by Opposition parties in committee created the Priority Substances List to fast track regulation of the backlog of toxic substances.

CEPA received a significant overhaul in 1999, expanding its preventative powers and building on the growing adherence to sustainable development.

In your review, transformational change is still possible.

This brief focusses on areas that I have not found raised in other testimony to the committee. To avoid repeating points made strongly and clearly by others, I wish to endorse the recommendations of the Canadian Environmental Law Association

and its excellent brief, as well as supplemental letters aimed at correcting distressing and unworthy testimony from Environment Canada officials. I also commend to you the brief from former Acting Director General, Legislative and Regulatory Affairs, Environment Canada, James Riordan. The focus on the missed opportunities for preventative action in Part 4 of the Act is very strategic. Part 4 of CEPA gives the federal government essential tools for action on climate, but is under-utilized and rarely mentioned.

The recommendations from Dr. David Boyd are also important in extending CEPA to an environmental bill of rights. Lastly, EcoJustice provides important points on timelines and transparency.

The Scope of “Toxic”

It was a disappointment to me at the time when I joined the Minister’s office in 1986 that the scope of the Act, still under development, had already been significantly limited. Section 93 (4) of the current version of CEPA sets out the limitation that where substances are already regulated under other federal acts, they will not be considered under CEPA. This was largely a function of the existing scope of Environment Canada’s reach in regulating commercial chemicals. The major threat of toxic contamination from pesticides, used as intended, was outside Environment Canada’s reach. So too was control and regulation of radionuclides. However, given the intended purpose of the Act, leaving out pesticides and radionuclides is an unacceptable retreat.

I urge the committee to consider recommending that the time has come, thirty years after CEPA’s original framing, for a transformational change. Where use of pesticides or contamination of the environment by radionuclides or pesticides pose a threat to health and the environment, CEPA should provide tools to protect health and the environment. The control by Health Canada over pesticides under the Pest Control Products Act and that of the Canadian Nuclear Safety Commission over radionuclides should not extend to environmental contamination. CEPA should be extended to cover pesticides and radionuclides.

Appeals:

The approach to appeals of decisions to restrict or ban chemicals and other substances listed as “toxic” should be re-examined based on experience with the US legislation, the Federal Insecticide Fungicide and Rotenticide Act.

Under CEPA, the appeals process is found in sections 333-341. There is no reference as to which party bears the onus of proof. The current act establishes a review panel with the powers set out in the Inquiries Act. The inquiries Act is also silent as to onus of proof.

The approach under FIFRA is preferable in the case of appeals. In US law, when a substance is banned, in any appeal a reverse onus is applied. It is called the Rebuttable Presumption Against Registration (RPAR). As the name suggests, the EPA appeals place the burden on the company seeking to overturn a ministerial decision. The presumption is rebuttable, but the burden is clearly on the appellant, not the Minister. The bureaucracy in Canada has always resisted banning any dangerous substance. Those of us in the practice of environmental law, as I once was, often wondered if toxic chemicals had constitutional rights in Canada – innocent until proven guilty beyond a shadow of a doubt.

Note the historical record: Canada, virtually alone in the industrial world never took regulatory action against 2,4,5-Trichlorophenoxyacetic acid (2,4,5-T), more notoriously known as half of the Agent Orange mixture, contaminated with the most toxic of all man-made chemicals, 2,3,7,8-Tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD). The US had banned it in. Sweden banned it. Ontario, Quebec and Saskatchewan took independent action to ban it. Not the federal government of Canada. It sent its public servants to testify to its safety when a group of Nova Scotia residents (myself included) went to court in 1982 to stop a wide-spread spray programme.

By the time the bureaucracy is prepared to ban a substance, the threshold for proof has been met at a very high bar. Despite the stated commitment to adhere to the precautionary principle, Canada still has a lousy record. Note the current status of the asbestos debate in Canada. Note the evidence from CELA and the “apples to apples” comparisons of Ontario to New Jersey, Michigan and Louisiana. We need to toughen up our approach to toxic emissions.

A reverse onus for any and all appeals within CEPA is overdue.

Thank you for the opportunity to share some thoughts with the committee. I am, of course, available to present oral evidence and answer any questions to put my perspective on the record of your hearings.

Submitted electronically,

Respectfully,

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