

June 3, 2014

Mr. Leon Benoit, Chair and Members
Standing Committee on Natural Resources
House of Commons
131 Queen Street, Room 6-32
Ottawa, ON K1A 0A6
c/o Clerk of the Standing Committee Mr. R. Bourgault

Sent by email: rnr@parl.gc.ca

Re: Bill C-22, the ``Energy Safety and Security Act``
Comments by the Canadian Environmental Law Association to Standing Committee on
Natural Resources

Dear Mr. Benoit and Committee Members:

Thank you for the invitation to attend and speak to you today regarding Bill C-22. CELA is a 44 year old national ENGO and an Ontario specialty legal aid clinic. When looking at conventional sources of energy such as oil and gas and nuclear power, we look in particular at issues of liability, safety, emergency planning and environmental health.

Our submission will focus on the liability aspects of the Bill. It is important to look at the Bill as a whole in that there is a significant contrast between the approaches to the two sectors in this Bill. The Bill takes strikingly different approaches between offshore oil and gas liability compared with nuclear liability.

In particular, the two compare as follows:

- Both the oil and gas and the nuclear sides of the Bill require minimum insurance or demonstrated financial assurance to support ``absolute`` liability to reimburse third parties harmed by their facilities. This insurance is to be held by a designated person (the nuclear plant operator such as OPG, Bruce Power or New Brunswick Power, or the license holder for the offshore oil and gas works)
- Both sides of the Bill set a maximum for the absolute liability at \$1 billion subject to future adjustment.

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- CELA agrees with providing a certain amount of ``absolute`` liability; our submission however is that the amount of \$1 billion is far too low to provide assurance of the ability to adequately compensate victims of a severe accident in both the offshore oil and gas as well as the nuclear energy sectors. In the offshore oil and gas case we saw the experience with the Deepwater Horizon spill where President Obama established a \$20 billion fund which is not even inclusive of the environmental damages or state clean up costs. The potential consequences of a Fukushima large accident from the nuclear plants in Ontario could far exceed the amount of 1 billion dollars; this number would have to be assessed in light in property values in the GTA as well as the experiences at Chernobyl and Fukushima. The concerns about the reality of potential accidents are not academic concerns; an article written by Dr. Kristin Shrader-Frechette of the University of Notre Dame just after the Fukushima accident listed 26 unintentional nuclear core-melt accidents that have occurred worldwide since the 1950`s; the most notorious of course including Chernobyl in 1986 and the three at Fukushima in 2011¹. For Fukushima, the Physicians for Social Responsibility have cited figures ranging between \$250 billion and \$500 billion in consequences from the events there². The scale of these types of accidents far exceeds the billion dollar amount that Bill C-22 establishes for the absolute liability limit in both the oil and gas and the nuclear sectors.
- However in the case of the offshore oil and gas license holder, Bill C-22 states that there may be further liability over and above this absolute liability amount if negligence is proven against that licensee. This amount is not limited in any way other than the proven amount of damages. In the nuclear operator case, the required ``minimum`` financial assurance of \$1 billion is also a cap on operator liability - there is no possibility of any further liability to third party victims by the operator no matter what, even in case of operator or supplier negligence.
- In addition in the case of the offshore oil and gas license holder, other responsible parties may be held liable if they are proven negligent. This joint and several liability can be apportioned among those found negligent by the court in proportion to their respective degrees of responsibility. So suppliers and contracts to the offshore oil and gas industry have potential liability for their negligent actions. In the case of nuclear operators, no other parties can be held liable whatsoever, even if their negligence contributed to an accident

¹ Shrader-Frechette, Kristin, "Fukushima, Flawed Epistemology, and Black-Swan Events, in Ethics, Policy and Environment, Vol. 14, No. 3, October 2011, 267-272 (Routledge Taylor & Francis)

² <http://www.psr.org/environment-and-health/environmental-health-policy-institute/responses/costs-and-consequences-of-fukushima.html>

causing harm to third parties. Startlingly, it is important to understand that suppliers and contractors to the nuclear industry would have no third party liability risk whatsoever in Bill C-22.

- If harm exceeds \$1 billion in an offshore oil and gas accident, all negligent parties are still potentially responsible to pay damages. But if harm exceeds \$1 billion in a nuclear accident, the only other potential source of compensation for victims of the accident is from the Canadian government by way of its discretionary decision to set up a taxpayer funded compensation fund.
- In the offshore oil and gas case, all license holders and their suppliers and contractors must therefore consider the potential for an accident that exceeds the \$1 billion absolute liability amount and factor that potential into their decision making around risk. But in the nuclear plant case, operators need not worry about any liability over the \$1 billion amount, and suppliers and contractors never have to worry about potential liability as they make their risk decisions.
- I would submit that the remedy is to provide in Bill C-22 a similar regime in the nuclear case such as the Bill provides in the offshore oil and gas case, (at section 19 of the Bill referring to the new section 26 of the *Oil and Gas Operations Act*,) whereby operators as well as their suppliers and contractors may face claims of negligence in the courts for accidents that exceed the 1 billion \$ absolute liability amounts. Therefore section 9 of the proposed Nuclear Liability and Compensation Act that Bill C-22 would establish should be amended to omit the phrase “and no other person than an operator”; section 10 should be amended to make liability absolute up to the specified cap; section 24 should be amended to increase the absolute liability amount; and a provision like section 19 of Part 1 of Bill C-22 providing for additional liability beyond the absolute liability in case of negligence, and providing for the potential for liability of suppliers and operators in case of negligence should be added to section 120 (Part 2 of Bill C-22). Like the offshore oil and gas case in Bill C-22, there should be no artificial cap on that liability for negligence.
- No other energy sector bears the type of protection from the consequences of their actions and risk decisions that Bill C-22 provides to the nuclear sector. We submit that this legislative scheme therefore avoids the polluter pays principle for nuclear operators even though Bill C-22 embraces that principle in the oil and gas sector, even adding it as part of the purpose section in all of the relevant offshore oil and gas bills. The polluter pays principle should also be added to the purpose section of the nuclear liability side of Bill-C22.
- In our submission, the ability to take legal action against offshore oil and gas license holders, as well as their suppliers and contractors in cases of negligence

is appropriate. This incents due care which is one of the aims of the common law tort system. It also brings to bear other levers in favour of safety including the potential losses that shareholders would face in the event of a large accident. The same levers and incentives should apply to the nuclear energy sector as well. We should not be allowing suppliers and contractors to engage in the nuclear sector with full immunity from any and all liability risk as Bill C-22 proposes. And nuclear operators should be facing the full consequences of any negligence on their part as well just like the oil and gas sector. Accordingly as I mentioned earlier we would recommend amending Bill C-22 to bring suppliers and contractors into the liability framework in the nuclear sector, just as it does in the offshore oil and gas sector, and to remove the cap on liability so that the nuclear operators as wells as others in the supply chain are liable for consequences of their negligence beyond their 1 billion insurance.

Canadian Environmental Law Association per

A handwritten signature in black ink, appearing to read 'T. McClenaghan', written in a cursive style.

Theresa A. McClenaghan
Executive Director and Counsel