Presentation on Bill C-28

(Right to a Healthy Environment)

by

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Introduction – How Bill C-28 Addresses the Right to a Healthy Environment

Three provisions in Bill C-28 purport to address a right to a healthy environment. First, the preamble states that every individual in Canada has a right to a healthy environment (as provided under the Act). Second, Bill C-28 (creating a new subsection (a.2) for existing section 2(1) of the Act) also requires the Government of Canada to protect the right of every individual in Canada to a healthy environment as provided under the Act, which right may be balanced with relevant factors, including social, economic, health and scientific factors. Third, section 5.1(1) states that the Ministers (of Environment and Health) must, within two years after the coming into force of the section, develop an implementation framework for how the right to a healthy environment will be "considered in the administration of this Act", including principles of environmental justice, avoidance of adverse effects that disproportionately affect vulnerable populations, and the principle of non-regression, balanced with the above-noted social, economic, health and scientific factors.

Analysis of the Bill C-28 Provisions on a Right to a Healthy Environment

Read separately or together the provisions in Bill C-28 do not establish a right to a healthy environment. First, as a matter of law, preambles are not enforceable in and of themselves. They are merely interpretative aids.

Second, the proposed amendments to sections 2 and 5.1 are so circumscribed with caveats about balancing, for example, economic factors, that they hardly constitute recognition of environmental rights.

Third, the commitment to develop an "implementation framework" several years down the road is pretty vague and certainly does not on its face create a stand-alone "right" of individuals to a healthy environment. It is a regime entirely dependent on the will of government; i.e., the opposite of a rights-based approach to the law. A right requires a remedy for individuals to invoke in an independent forum (i.e., a court) when, for whatever reasons, government will not act. Such a remedy-based right is precisely what is lacking in Bill C-28. Moreover, section 5.1 does not on its face contemplate further amendments to *CEPA* arising from development of the "implementation framework" that could result in a true "right and remedy" being established. A technical briefing by federal officials held on the day Bill C-28 was tabled in Parliament did not leave such an impression either.

What Previous Parliamentary Committees Have Recommended

The 1995, 2007, and 2017 reports of the House of Commons Standing Committee on the Environment and Sustainable Development, and the 2008 report of the Senate Standing Committee on Energy, Environment and Natural Resources, when read together, provide a better foundation for developing amendments to *CEPA* that would enhance both procedural and substantive rights to a healthy environment.

The 1995 House committee report found that: "Exposure to toxic substances has the potential to cause a broad range of physical harm, including cancer, genetic mutations, central nervous system disorders, fetal and birth injuries, lung disease and sterility" (page 229). As a result, the 1995 report recommended that: (1) the "remedies available to Canadians for violations under the Act be broadened [because] the existing remedies are too few and too restrictive. They must be strengthened if Canadians are to be encouraged to take active part in protecting their environment" (page 225); and (2) "the federal government [should] be encouraged to provide in CEPA a civil remedy for the creation of environmental risk…and once a plaintiff had presented a *prima facie* case demonstrating that the defendant had caused the environmental risk complained of, the onus would be placed on the defendant to disprove causation of injury to the plaintiff" (pages 230-231).

The 2007 House committee report found that: "One of the expected outcomes of CEPA 1999, according to the Formative Evaluation of the Act, was 'the opportunity to initiate investigations of alleged offences, recover personal damage and economic loss, make personal claims and file citizens' suits.' The environmental protection action (section 22), however, has yet to be used". Section 22 was the provision that had been added to the Act in 1999 to meet some of the concerns identified by the 1995 report. The consensus on the 2007 committee was that there appeared to be too many barriers to invoking section 22 to make it an effective provision for citizens to use in the courts (e.g., the need for an individual to first request the Minister to conduct an investigation, the need for an offence to have been committed, and the need for the offence to have caused significant harm to the environment). As a result, the 2007 report recommended that: "section 22(2) of the Act [should be amended] to allow an environmental protection action to be brought in the courts if the offence may result in harm or serious risk of harm to the environment or human, animal or plant life or health". A similar recommendation was made in 2008 by the Senate committee when it recommended that *CEPA* be amended by removing the need for citizens to show that an action has caused significant environmental harm before being able to proceed with an environmental protection action. The 2007 and 2008 reports did not result in any amendments to *CEPA*.

The 2017 House committee report found that section 22 of the Act continued to be unused by members of the public. The 2017 report suggested that one reason that may account for why section 22 had not been used is the "strict test" for bringing an environmental protection action, which requires that the alleged offence "caused significant harm to the environment" as opposed to any harm. The 2017 report noted that the federal government's 2016 discussion paper raised the possibility

of amending *CEPA* "to lower the threshold for bringing an environmental protection action from an allegation that the offence caused "significant harm" to simply that it caused "harm" to the environment. Such a change would have been consistent with the recommendation made in the 2008 Senate committee report, noted above, and is, in fact, one of the recommendations the 2017 report made for amending section 22 along with removing as a prerequisite to an individual bringing an environmental protection action the requirement that the individual first request that the Minister conduct an investigation (pages 37-39).

What Bill C-28 Failed to Do

Bill C-28 deviates significantly from these Standing Committee recommendations. For example, the government could have amended existing section 22 of the Act, as recommended by the 2017 Standing Committee. However, the government made no changes to section 22 in Bill C-28. As noted above, section 22 authorizes any person, after requesting an investigation by the Minister where the Minister fails to conduct an investigation or responds unreasonably, to bring an environmental protection action in a court of competent jurisdiction where there has been an offence committed under the Act that has caused significant environmental harm. Unfortunately, section 22 is circumscribed by many caveats, procedural obstacles, and conflicting legal principles, as noted above. As a result, it has not been invoked by any member of the public since *CEPA* came into force in 2000. However, the 2017 Standing Committee and persons appearing before the Committee believed section 22 could be re-fashioned into a workable remedy for members of the public to use in the courts in vindicating a right to a healthy environment. In 2018, CELA drafted such amendments to section 22 that were supported by over 30 organizations across the country as part of a larger set of proposed changes to *CEPA* (See < Ltr-to-Ministers-and-proposed-CEPA-amendments.pdf (cela.ca) >). Bill C-28 also failed to adopt any of the CELA amendments.

Finally, the proposed Global Pact for the Environment, currently under discussion at the United Nations, also provides guidance on what a true right to, and remedy to ensure, a healthy environment would look like. Article 1 of the Pact (Right to an ecologically sound environment) states: "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment". Moreover, Article 11 of the Pact (Access to environmental justice) states: "Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact".

Conclusion

In short, Canada can do much better than what is currently in Bill C-28 on the issue of a right to a healthy environment. Canadians should not have to wait another 10 to 15 years to see if the issue of a right to a healthy environment is resolved in the next review of *CEPA* mandated by the statute. Bill C-28 should be amended to ensure Canadians have a true right to a healthy environment with appropriate remedies.