Presentation on Bill C-28

(Schedule 1 of CEPA)

by

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Introduction

Canada has long needed a more robust federal law to address the dramatic expansion in the use of toxic substances that has developed in Canadian and international commerce in recent decades. The stakes are high.

In 2019, the United Nations Environment Programme ("UNEP") released its latest global chemicals outlook report, which indicated that the 2002 goal of the UN World Summit on Sustainable Development, reiterated in 2006 and 2012, of achieving by 2020 the environmentally sound management of chemicals and wastes, would not be achieved. The UNEP report noted that trends data suggested the doubling of the global chemicals market between 2017 and 2030 will increase global chemical releases, exposures, concentrations and adverse health and environmental impacts unless the sound management of chemicals is achieved worldwide. The report added: "Business as usual is, therefore, not an option". The UNEP report also found that:

- Production processes continue to generate significant chemical releases to air, water and soil as well as large amounts of waste, including hazardous waste;
- Chemical pollutants are ubiquitous in the environment and humans;
- The burden of disease from chemicals is high, and vulnerable populations are particularly at risk; and
- Chemical pollution threatens biota and ecosystem functions.

It is within this global context that long-awaited amendments to Canada's premier environmental law – the *Canadian Environmental Protection Act, 1999* ("*CEPA*" or the "Act") – should be considered. Amendments to *CEPA* were expected to transition the statute to a more robust regime that could provide solutions to problems respecting the impacts of toxic substances on human health and the environment that have been accumulating over two decades since the law was last amended. Indeed, it has already been five years since a Parliamentary Standing Committee last held hearings on possible *CEPA* amendments.

As of April 13, 2021, we now have proposed amendments to *CEPA*, introduced for First Reading in Parliament as Bill C-28.

Over this week and next, we will address certain key issues/concerns arising from Bill C-28. Today, we will discuss Part 5 of the Act - Control of Toxic Substances and Schedule 1 – the List of Toxic

Substances. Next week we will discuss a right to a healthy environment and products of biotechnology, among other issues.

Proposed changes concerning Schedule 1 are an example of Bill C-28 purporting to fix things that are not broken in the current law. However, the proposed amendments in Bill C-28 will have the potential to create problems going forward.

Short History of *CEPA*'s Authority to Control Toxic Substances

What is now Part 5 of *CEPA*, entitled "Controlling Toxic Substances", was what the Supreme Court of Canada focused on in its 1997 judgment in *R. v. Hydro-Quebec* when it upheld the Act as valid federal legislation for the control of toxic substances authorized under the criminal law power of the Constitution.

Part of the basis for upholding *CEPA* as valid federal law was that it did not purport to control the universe of all substances that it investigated but only the few bad actors that met what is now the section 64 test under the Act for what is "toxic" (long-term harmful effect on the environment; danger to the environment on which life depends; or danger to human life or health) and that could be placed in Schedule 1 for the purpose of imposing controls. The Court's concern was that otherwise *CEPA* could end up controlling all environmental pollutants and in so doing impinge on provincial constitutional authority over property and civil rights in the provinces and have a resulting adverse impact on federalism (i.e., the balance between federal and provincial powers). As Justice La Forest explained for the majority in *Hydro-Quebec*, for a federal statute to be upheld under the criminal law power it must have a valid criminal law purpose directed at an "evil" or "injurious effect upon the public". Schedule 1 toxic substances are the "evil" which, if used in a manner contrary to the regulations, *CEPA* prohibits and penalizes.

Justice La Forest noted further that the Act applied to a limited number of substances; at the time of the 1997 decision just 9 out of approximately 21,000 substances in commerce in Canada. Today that number has only risen to roughly 150 out of over 23,000. As Justice La Forest put it, the statute provides:

> "…a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on an individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers".

Subsequent decisions of the Supreme Court of Canada in considering *Hydro-Quebec* in the context of other federal legislation seeking to shelter under the authority of the criminal law power have continued to underscore the need for such legislation to have a valid criminal law purpose; i.e., address an "evil" in order to be constitutionally valid. In the 2010 decision of the Court in *Reference re Assisted Human Reproduction Act*, the majority noted that in *Hydro-Quebec* the Court held that the Parliament of Canada had the power to address "the entry into the environment of certain toxic substances". Similarly, in the 2020 Supreme Court of Canada judgment in *Reference re Genetic Non-Discrimination Act* both the majority and minority opinions

of the Court referred approvingly to *Hydro-Quebec* as authority for the proposition that threats of harm to the environment or health, such as from toxic substances, are evils that may be properly targeted by Parliament relying on the criminal law power of the Constitution.

It is thus clear that any material deviation from this focus in future amendments to *CEPA* would be highly problematic. If the federal government purports to expand control to "non-toxic" substances under the statute, then it risks the constitutional underpinning that supports Part 5 of the Act. (Part 6, dealing with "Animate Products of Biotechnology" also rests on the test under section 64). If the government tries to call toxic substances by a benign-sounding name it may send the wrong message to the public and the courts as to whether it regards them as such.

Bill C-28 Sends a Mixed Message on Control of Toxic Substances and Creates the Potential for Legal Uncertainty Not Previously Seen Under *CEPA*

With this as background, what does Bill C-28 do? In our view, it sends a mixed message to the public and the courts. It does at lease three things that are highly problematic:

- It removes the phrase "List of Toxic Substances" from Schedule 1. Henceforth, the Schedule will simply be known as "Schedule 1";

- Section 58 of Bill C-28 proposes to divide the existing single list of approximately 150 toxic substances in Schedule 1 of the Act into two parts. Part 1 of the proposed revised schedule would list a few substances (19 at this time) that can be subject to prohibition and restriction (e.g., PCBs). Part 2 of the proposed revised schedule would list approximately 130 substances that would only be subject to pollution prevention measures (e.g., PBBs). The approach appears consistent with a long-held view of the chemical industry that many of the substances on the current Schedule 1 are not "toxic" in the traditional sense, and therefore should not be stigmatized and subjected to the most rigorous of measures available under the Act. Indeed, industry representatives praised the introduction of Bill C-28 in the following terms: "We are happy to see that the minister has recently proposed changes to CEPA that move away from the inappropriate toxic substances label" (Representative from Dow appearing before the Standing Committee on Environment and Sustainable Development, 21 April 2021). This view belies the fact that all of the substances on the existing Schedule 1 are there because they meet the very stringent test for being designated toxic established under section 64 of the Act and more than a few of them merit being virtually eliminated from commerce. Instead, the government in Bill C-28 proposes to eliminate existing *CEPA* provisions (sections 65 and 65.1) authorizing virtual elimination of such toxic substances (See Bill C-28, section 12).

- Moreover, Bill C-28, by removing the phrase "toxic substances" and bifurcating Schedule 1 not only gives credence to the industry view that labelling substances as toxic is inappropriate, but also creates legal uncertainty that has the potential for undermining the constitutionality of the Act. As noted above, the constitutionality of the *CEPA* is based

on the criminal law power as decided by the Supreme Court of Canada in its 1997 judgment in *Hydro-Quebec*. In that case, as noted above, the court was prepared to countenance the Act's approach to studying the universe of thousands of pollutants in the environment, so long as the Act only purported to control an "evil" few (i.e., the very worst actors, roughly 150 toxic substances currently out of over 23,000 in Canadian commerce). In this way, the Act left substantial room for provincial authority to address the thousands of other "non-toxic" substances and did not otherwise upset the balance of Canadian federalism (i.e., the division of powers between Parliament and provincial legislatures under the Constitution). The Bill C-28 approach, coupled with an industry view, that maybe some (most?) of the substances in Schedule 1 really are not toxic in the traditional sense, has the potential to undermine the constitutional foundation of *CEPA*. This is a high price to pay to make the chemical industry feel better about its products.

What Should Be Done?

The federal government should: (1) restore the phrase "List of Toxic Substances" to Schedule 1; and (2) not create two Parts to Schedule 1. Any substance in Schedule 1 should be eligible for the full suite of risk management measures, including complete bans, where necessary.

If the federal government is concerned that the virtual elimination provision is too difficult to meet (because it requires that a level of quantification be specified before a substance can be released below that level) then it should propose amendments to that provision, rather than simply eliminating the provision altogether.

The federal government also could modify the current s. 77(4) to make it clear that naturally occurring inorganic substances (e.g., lead, mercury, asbestos) are eligible for virtual elimination. Under Bill C-28, all of these substances would be placed in Part 2, not Part 1.

Conclusion

There are many aspects to *CEPA* that require reform. For the most part, Schedule 1 *per se* is not one of them.