



# Bill C-28 Proposed Amendments to CEPA

Presentation at CELA/Nature Canada  
Webinar

The Good, the Bad, and the Ugly

July 8, 2021

By

Joseph F. Castrilli, Counsel

Canadian Environmental Law Association

Toronto, Ontario



# Introduction

- ◆ Canada needs robust law to address domestic and international expansion in chemical use
- ◆ 2019 UNEP report - doubling of global chemicals market between 2017 and 2030 will increase global chemical release, exposure, concentrations unless sound management of chemicals achieved
- ◆ Burden of disease from chemicals high, vulnerable populations particularly at risk
- ◆ “Business as usual...not an option”



# Bill C-28: Leading Edge or Business as Usual?

- ◆ Within global chemicals context there were great expectations for long-awaited amendments to transition CEPA to more robust regime
- ◆ Unmet needs have been accumulating for 2 decades since CEPA last amended; 5 years since Standing Committee hearings reviewed/reported on CEPA reform needs
- ◆ Does Bill C-28, tabled April 2021, deliver?



# Environmental Community View of Unmet Needs in CEPA

- ◆ Control endocrine disrupting substances
- ◆ Protect vulnerable populations from toxic substances
- ◆ Substitute safer alternatives to toxic substances
- ◆ Establish enforceable national ambient air quality standards
- ◆ Recognize right to healthy environment and authorize civil enforcement of the Act by the public in the courts



# Bill C-28 Emphasis

- ◆ Focus on highest risk toxic substances but eliminates Act's virtual elimination regime which government viewed as duplicative and unworkable
- ◆ Limited Recognition of Right to a Healthy Environment
- ◆ Considers vulnerable populations and cumulative effects



# Short History of CEPA Authority to Control Toxic Substances

- ◆ SCC upheld CEPA as valid federal law for control of toxic substances under criminal law power (CLP) of Constitution (*Hydro Quebec*)
- ◆ Act did not purport to control universe of substances (23,000+) which could result in impinging on provincial powers, but only controls bad actors meeting s. 64 test for what is “toxic” (currently 150 placed in Schedule 1 List of Toxic Substances)

## Short History (continued)

- ◆ S.64 (if substance creates long-term harmful effect on environment; is a danger to environment on which life depends; or a danger to human life or health = “CEPA-toxic”); To be upheld under CLP federal law must have valid criminal law purpose directed at “evil” or “injurious effect upon the public” – Sch. 1 toxic substances are the “evil” which, if used contrary to the regulations, CEPA prohibits & penalizes



## Short History (cont.)

- ◆ SCC relies on *Hydro Quebec* to underscore need for any federal law relying on CLP to have valid criminal law purpose; i.e., address “evil” if want to be constitutionally valid; *Assisted Human Reproduction* (2010); *Genetic Non-Discrimination* (2020) – HQ authority for view that toxic substance threats of harm to environment or health are evils that Parliament can target using CLP



# Lessons from Short History

- ◆ Any material deviation from toxic substance focus of CEPA could create problems for Act's constitutionality



# What Bill C-28 Does

- ◆ Sends mixed message to the public, the regulated community, and the courts on toxic substance issue:
- ◆ Removes phrase “List of Toxic Substances” from Schedule 1 of Act
- ◆ Divides Sch. 1 into 2 parts – Part 1 (19 substances) can be subject to prohibition and substitution can be considered; Part 2 (130 substances) only subject to pollution prevention - substitution not considered option



## What Bill C-28 Does (cont.)

- ◆ Industry praised Bill C-28: “We are happy to see that the minister has recently proposed changes to CEPA that move away from the inappropriate toxic substances label”.
- ◆ This praise belies fact that all 150 substances on Sch. 1 are there because they meet stringent test for being designated toxic under s. 64 and more than a few merit being virtually eliminated from commerce – but only thing C-28 eliminates is existing CEPA provisions authorizing virtual elimination of toxic substances



## What Bill C-28 Does (cont.)

- ◆ Removing phrase “toxic substances” and dividing Sch. 1, Bill C-28: (1) gives credence to industry view that labelling substances toxic is inappropriate; and (2) creates legal uncertainty that may undermine constitutionality of Act
- ◆ CEPA based on CLP; SCC in *HQ* allowed Act’s approach to studying thousands of substances so long as Act controlled only an “evil” few; this left substantial room for provincial authority and did not upset balance of Canadian federalism

## What Bill C-28 Does (cont.)

- ◆ Bill C-28 approach potentially undermines CLP foundation recognized in *HQ* and is a high price to pay constitutionally speaking to make the chemical industry feel better about its products





# How Should Bill C-28 Change CEPA on Toxics Issue?

- ◆ Restore “List of Toxic Substances” to Sch. 1; do not create two Parts; any substance in schedule should be eligible for full risk management (bans, substitution, etc.);
- ◆ Retain virtual elimination (VE) provision; drop level of quantification for release requirement; goal should be zero discharge and “sun-setting”
- ◆ inorganic substances (e.g., mercury, lead) should be eligible for VE



# Bill C-28: Environmental Rights

- ◆ Bill C-28 preamble recognizes every individual has right to healthy environment (RTHE) (as provided in C-28)
- ◆ Creates duty on Canada to protect right, balanced with e.g., economic factors (EF)
- ◆ Requires “implementation framework” for how RTHE “considered in administration of Act” including environmental justice, avoidance of impacts on vulnerable, non-regression, balanced with e.g., EF



# Analysis of Bill's RTHE Provisions

- ◆ Preamble not enforceable by itself; merely interpretive aid
- ◆ EF balancing caveat undermines Canada's proposed RTHE duty to public
- ◆ Implementation framework development will take years, is not a rights-based approach, lacks remedy if Canada not act, will not lead to amendments in Act enshrining true right and remedy



# Recommendations from Previous Parliamentary Committees

- ◆ 1995 – House Committee on ESD found exposure to toxic substances may cause broad range of physical harm, cancer, genetic mutation, central nervous system disorders, fetal/birth injuries, lung disease/sterility; Recommended: (1) remedies available to Canadians be strengthened; (2) civil remedy for creating environmental risk once prima facie case shown onus shifts to defendant to disprove it caused injury



## Recommendations (continued)

- ◆ 2007 – same committee found expected outcome of CEPA 1999 included opportunity to file citizen suits
- ◆ But new environmental protection action (EPA) provision (s. 22) never used because created barriers (need to first ask minister to investigate, need offence to be committed, & offence must cause significant environmental harm)



## Recommendations (cont.)

- ◆ 2007 committee recommended: “s. 22... of Act [should be amended] to allow...EPA to be brought in the courts if...offence may result in harm or serious risk of harm to the environment or human...life or health”
- ◆ 2008 Senate committee recommended CEPA be amended removing need for citizens to show act has caused significant environmental harm before proceeding with EPA – but no amendments made to law



## Recommendations (cont.)

- ◆ 2017 house committee found s. 22 still not being used by members of public because of “strict test” for bringing EPA requiring that alleged offence “caused significant harm to the environment”; recommended: (1) removing pre-requisite that individual first request minister conduct investigation; and (2) lowering threshold to “caused harm to the environment”



# What Bill C-28 Does: Section 22

- ◆ Deviates significantly from 1995, 2007, 2008, 2017 parliamentary committee recommendations
- ◆ No changes made to s. 22 in Bill C-28 despite two decades in which s. 22 not used by public



# How Should Bill C-28 Change CEPA on RTHE?

- ◆ Need remedy if “right” to be effective
- ◆ Adopt 2018 CELA model statute language on amending s. 22 <  
[ltr-to-Ministers-and-proposed-CEPA-amendments.pdf](#) >
- ◆ Alternatively, adopt parliamentary committee proposed changes – see above



# Other Benefits from Expanding Citizen Enforcement Rights

- ◆ Bill C-28 authorizes consideration of endocrine disrupting substances, impacts of substances on vulnerable populations, and cumulative effects
- ◆ But CEPA as written and as implemented has spotty record on requiring industry testing of substances, preferring to rely on available information, which often is inadequate or non-existent



# Expanding Citizen Enforcement Rights: (cont.)

- ◆ Expanding s. 22 citizen enforcement opportunities could assist in compelling government to extract testing information from industry where necessary, thus improving overall performance of CEPA in controlling toxic substances



# Conclusions

- ◆ Bill C-28 focuses on: (1) house-keeping amendments to CEPA, where robust change necessary; and (2) fixing measures in Act that are not broken
- ◆ Short list of unmet needs identified by environmental community largely unaddressed in C-28, but should be
- ◆ Bill C-28 RTHE needs a remedy; changes to Schedule 1 should be dropped; VE enhanced