

Bill C-28: The Good, The Bad, and The Ugly

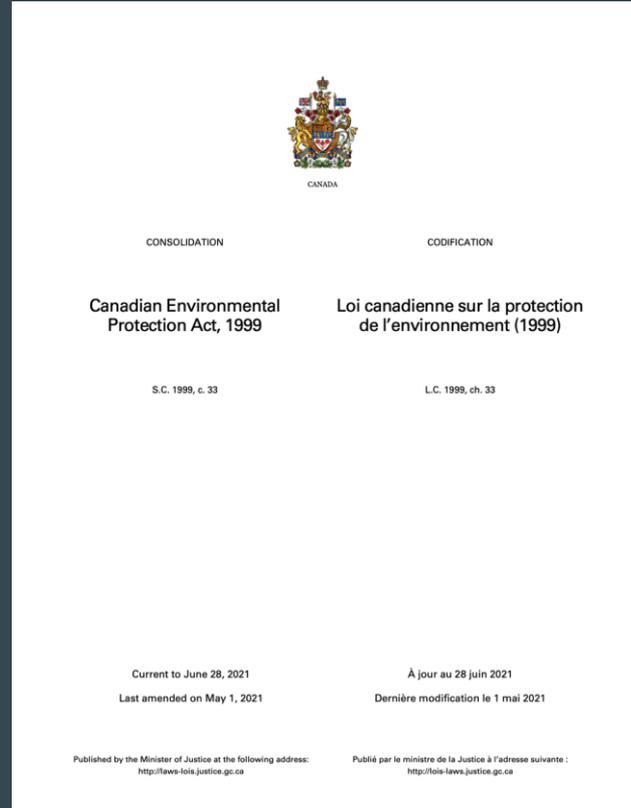


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What is the *Canadian Environmental Protection Act* (CEPA)?

- One of Canada's primary pieces of environmental legislation
- Enacted in 1999
- Empowers environmental protection in a variety of ways
 - Part 2: Public Participation
 - Part 3: Information Gathering
 - Part 4: Pollution Prevention
 - Part 5: Controlling Toxic Substances
 - Part 6: Animate Product of Biotechnology
 - Part 7: Controlling Pollution and Managing Waste
 - Part 8: Environmental Matters Related to Emergencies



CEPA Part 5- Controlling Toxic Substances

- The “Heart” of CEPA
- Provides for the designation and regulation of CEPA toxic substances
- Enactment of legislation in 1999 requires the Minister to compile a ‘Domestic Substances List’ and to categorize substances on the basis of whether they are “toxic or capable of becoming toxic”
- If found toxic, a substance will be added to Schedule 1, the ‘List of Toxic Substances’, and may then be regulated

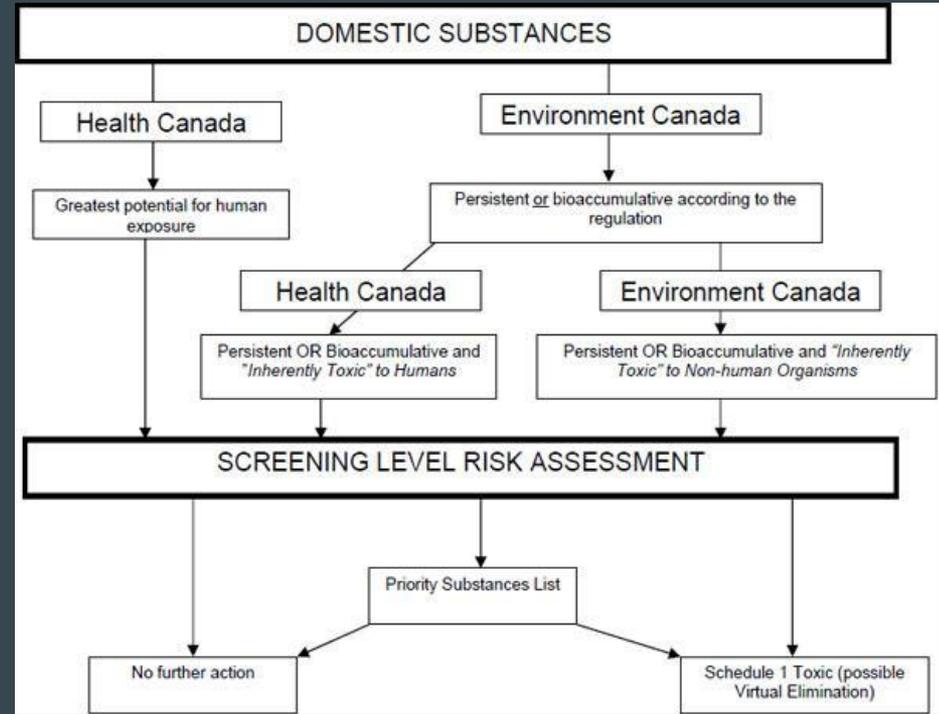
Toxic substances list: schedule 1

Updated Schedule 1 as of May 12, 2021

1. Chlorobiphenyls that have the molecular formula $C_{12}H_{(10-n)}Cl_n$ in which “n” is greater than 2
2. Dodecachloropentacyclo [5,3,0,0^{2,6},0^{3,5},0^{4,8}] decane (Mirex)
3. Polybrominated biphenyls that have the molecular formula $C_{12}H_{(10-n)}Br_n$ in which “n” is greater than 2
4. Chlorofluorocarbon: totally halogenated chlorofluorocarbons that have the molecular formula $C_nCl_xF_{(2n-2-x)}$
5. Polychlorinated terphenyls that have a molecular formula $C_{18}H_{(14-n)}Cl_n$ in which “n” is greater than 2
6. Asbestos
7. Lead
8. Mercury and its compounds
9. Vinyl chloride
10. Bromochlorodifluoromethane that has the molecular formula CF_2BrCl
11. Bromotrifluoromethane that has the molecular formula CF_3Br
12. Dibromotetrafluoroethane that has the molecular formula $C_2F_4Br_2$
13. Fuel containing toxic substances that are dangerous goods within the meaning of section 2 of the Transportation of Dangerous Goods Act, 1992 and that
 - (a) are neither normal components of the fuel nor additives designed to improve the characteristics or the performance of the fuel or
 - (b) are normal components of the fuel or additives designed to improve the characteristics or performance of the fuels, but are present in quantities or concentrations greater than those generally accepted by industry standards
14. Dibenzo-para-dioxin that has the molecular formula of $C_{12}H_8O_2$
15. Dibenzofuran that has the molecular formula $C_{12}H_8O$
16. Polychlorinated dibenzo-para-dioxins that have the molecular formula $C_{12}H_{(8-n)}O_2Cl_n$ in which “n” is greater than 2
17. Polychlorinated dibenzofurans that have the molecular formula $C_{12}H_{(8-n)}OCl_n$ in which “n” is greater than 2
18. Tetrachloromethane (carbon tetrachloride) CCl_4
19. 1,1,1-trichloroethane (methyl chloroform) CCl_3-CH_3
20. Bromofluorocarbons other than those set out in items 10 to 12

CEPA Part 5- Controlling Toxic Substances, con't

- As per section 64, a substance is toxic if “it is entering or may enter the environment in a quantity or concentration or under conditions that”
 - have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
 - constitute or may constitute a danger to the environment on which life depends; or
 - constitute or may constitute a danger in Canada to human life or health.
- Risk Assessment processes are used to determine whether a substance is toxic
- If found toxic, substances are subject to Risk Management
- Under Section 65, a substance may be designated for Virtual Elimination



A Very Short History of CEPA Review and Reform

- CEPA provides for a review of the Act every 5 years
- A review in 2005, but no committee was established in 2010 or 2015
- Government releases a discussion paper in May 2016
- In 2017 the Committee on Environment and Sustainable Development submits a report on CEPA, including recommendations for reform , after public consultation (including from CELA!)
- Government releases a follow-up report in 2018
- Bill C-28 is introduced April 13, 2021



Bill C-28 *An Act to Amend the Canadian Environmental Protection Act 1999*

- Some priorities identified by the Environmental Community in the 2017 Review
 - Recognition of a Right to a Healthy Environment
 - Protection of Vulnerable Populations
 - Better implementation of safe substitution of toxic substances
 - Establishment of National Air Quality Standards
 - Regulate Endocrine Disrupting Chemicals
- How does Bill C-28 address these priorities?
 - Gestures towards safe substitution, vulnerable populations, EDCs, and cumulative effects, but does not significantly change management or create new mandatory duties
 - Recognizes a limited right to a healthy environment
 - Does not address national air quality standards
 - Uncertain impacts on Public Participation

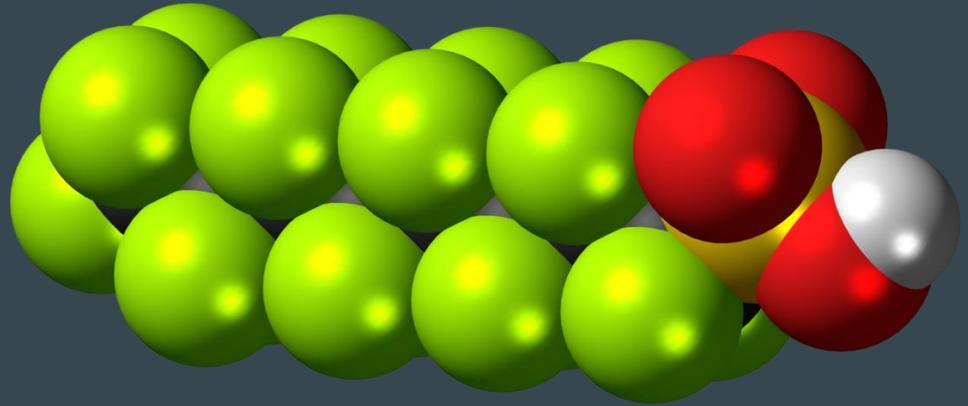
Schedule 1, Virtual Elimination, and Safe Substitution

- A potential point of trouble to focus on
- Bill C-28 proposes to split Schedule 1 into two parts
- The reason is unclear
 - Possibly to mollify industry concerns
 - Possibly to replace Virtual Elimination
- This potentially risks CEPA's constitutional underpinnings, without really improving VE
 - Think back to *Hydro-Quebec* and the criminal law power
- A better route would be to fix the VE regime and better support safe substitution



Virtual Elimination and Safe Substitution

- CEPA provides that some substances may be designated for virtual elimination
 - Under this regime, the minister must develop a plan to eliminate substances that are 'persistent, bioaccumulative, and toxic'
- However, Virtual Elimination has been rarely used
 - Only applied to 2 substances
 - 2016 discussion paper posits this is because of the 'levels of quantification' requirement
- Bill C-28 Proposes to Eliminate VE
 - Replace with Schedule 1 Bifurcation
 - Minister required to prioritize prohibition when considering regulation of a substance on Part 1 of Schedule 1
- Bill C-28 is merely permissive on safe substitution, recognizing its importance and allowing the Minister to consider it, without requiring anything new



Recommendations

- Don't Split Schedule 1
 - Too many risks without sufficient rewards
- Retain VE and remove reference to 'levels of quantification'
 - The goal should be complete elimination and/or 'sun-setting'
- Implement robust safe substitution requirements
 - ie . CELA's proposed CEPA amendments would require the creation of a safe substitution assessment and plan for every substance on Schedule 1

Relevance for Vulnerable Populations

“There exists a pattern in Canada whereby marginalized groups, and indigenous peoples in particular, find themselves on the wrong side of a toxic divide, subject to conditions that would not be acceptable in respect of other groups in Canada. A natural environment conducive to the highest attainable standard of health is not treated as a right; unfortunately, for many in Canada today, it is an elusive privilege.”

2020 Country Visit Report of the UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Relevance for Vulnerable Populations, con't

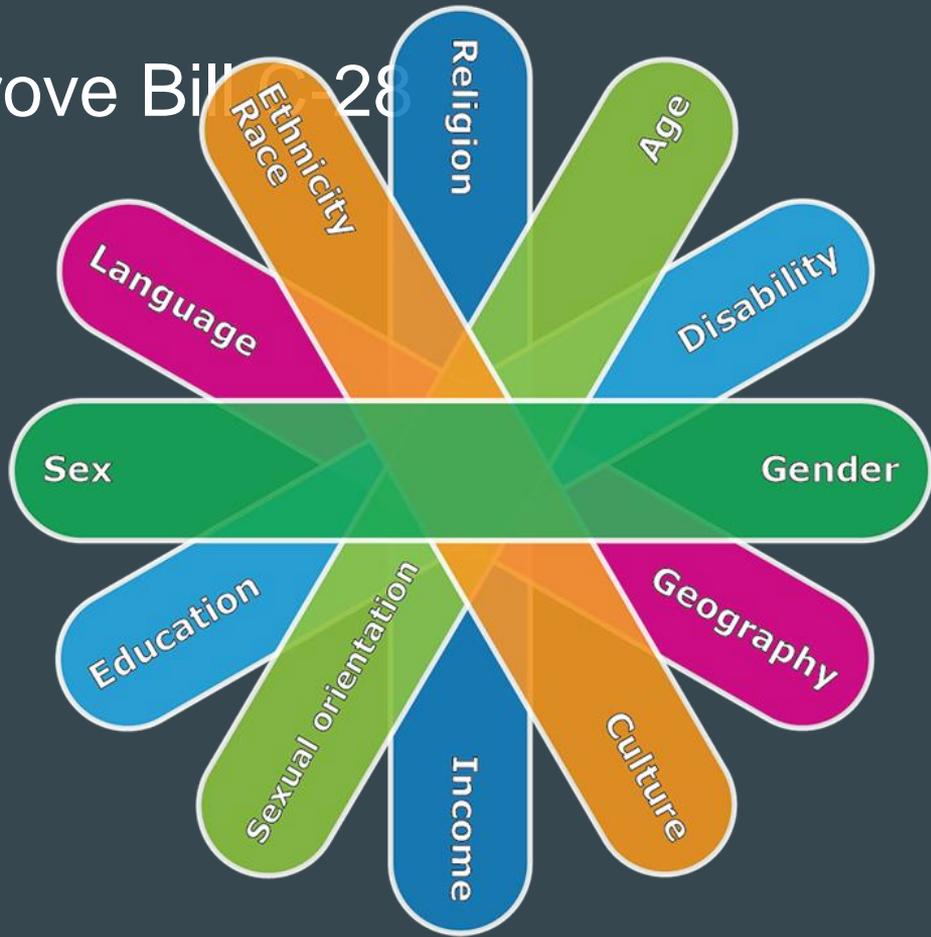
- Vulnerable Populations bear a disproportionate brunt of the impacts of toxic substances in Canada
- The way CEPA is designed perpetuates insensitivity to this disproportionality
 - This, to a large degree, comes from CEPA's generally risk-based approach
 - Especially the case in instances like VE or Safe Substitution, where 'management of risks' is not enough to properly account for impacts on the most vulnerable
 - However, VE and safe-substitution are both areas that lean toward a hazard-based approach that better serves environmental justice
 - More in-line with the precautionary principle



GBA+: A framework to improve Bill 28

What is GBA+?

“An analytical process used to assess how diverse groups of women, men and non-binary people may experience government initiatives, including legislation. The ‘plus’ in GBA+ acknowledges that GBA+ goes beyond biological and socio-cultural differences; GBA+ considers multiple other identity factors, as well as the intersection of these factors”



Why does GBA+ matter?

- Essential for developing effective and equitable policies and legislation for diverse populations, as it assists the government in identifying direct or indirect impacts of its initiatives on various subpopulations and subsequently taking tangible actions to mitigate any negative impacts

In the CEPA context...

Any person's identity factors, either alone or in tandem, can cause them to be more vulnerable to adverse impacts from toxic chemical exposures. As such, by approaching toxic substance management through an intersection vulnerability lens, the government can ensure that CEPA is protecting all Canadians.

Canada's Relationship with GBA+

1981: Ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women

2000: Adopted a 5-year government wide strategy to accelerate the implementation of GBA

2011: SWC expanded GBA to GBA+ to consider diverse and intersecting identity factors

2018: SWC became a federal department named Women and Gender Equality Canada (WAGE)

GBA+ was conducted in the development of Bill C-28 & GBA+ findings are in the MC submission

BILL C-28
2021

CEPA 1999

1995: Signed the Beijing Declaration and Platform for action, in which the Canadian government committed to conducting GBA on all future legislation, policies and programs

2004: Established the Standing Committee on the Status of Women (SWC)

2015: To facilitate improved quality of GBA+, the application of GBA+ was made mandatory for all Memoranda to Cabinet (MC) and Treasury Board Submissions (TBS)

2018: Privy Council Office (PCO) introduced a new MC template (which requires a mandatory annex presenting the findings of GBA+), as well as a Due Diligence and Evidence-Based Analysis Tool (includes a GBA+ section and is mandatory for MC development)

Access to Information Request (June 4 2021)

- PCO's MC template
- PCO's Due Diligence and Analysis Tool
- MC submission for Bill C-28
- MC submission for CEPA 1000

Access to these documents will provide clarity on the application of GBA+ in the development of Bill C-28

GBA+ framework offers opportunity for the government to follow through on their commitments to:

- Conduct GBA+ in the development, implementation and evaluation of Bill C-28
- Protect vulnerable populations under CEPA

by incorporating GBA+ considerations into Bill C-28 proposed amendments

Legislated Due Date:
September 2
2021

How can GBA+ help better protect vulnerable populations?

Current chemicals management approach is failing vulnerable populations

Bill C-28 amendments recognize the importance of considering vulnerable populations in chemicals management

Bill C-28 lacks concrete measures to operationalize the new commitments to vulnerable populations

Incorporating GBA+ considerations into Bill C-28 amendments will operationalize these commitments by:

- Imposing mandatory responsibilities on decision-makers to use GBA+ to identify and address adverse impacts on vulnerable populations
- Incorporating GBA+ into risk assessment and risk management processes

Case Study: The Misregulation of **Critical Health Effects**

What is talc?

- Naturally occurring mineral
- Found in thousands of cosmetic and household products sold in Canada

Proposed human health objective:

- Add talc to the list of toxic substances
- Decrease inhalation and perineal exposures from certain talc-containing self-care products to a level which is protective of human health

Vulnerable populations in relation to talc:

- Women
- Children/infants
- Workers
- Consumers

Critical Health Effects

- (1) Inhalation** of fine particles of talc when using loose powders like baby powder, body powder, and loose face powder, which can damage lungs
- (2) Exposure of the female genital area** to products containing talc such as body powder, diaper and rash creams, baby powder, genital antiperspirants and deodorants, body wipes, bath bombs and bubble bath, which is associated with ovarian cancer

Current chemicals management approach is failing vulnerable populations:

Risk Assessment

Fails to consider:

- Variability in susceptibility and exposure due to sex, gender, socioeconomic status, occupation, and other intersecting identity factors
- Cumulative effects
- Low-dose exposures

Fails to implement:

- Comprehensive information gathering methods

CASE STUDY:

THE MISREGULATION OF TALC



Sex: people with ovaries are more vulnerable

Gender: personal care products disproportionately marketed towards women

Socioeconomic status: less purchasing power

Occupation: workers who work with talc

Education/language: ability to make informed decisions

Multiple co-exposures

Critical windows of vulnerability

Asbestos contamination

Use of aggregated data

Use of 'available data'

Use of predictive models

Current chemicals
management approach is
failing vulnerable populations:
Risk Management

Fails to implement:

- Protective mitigation measures
- Full transparency with the public regarding information on hazardous substances
- Safe substitution
- Precautionary principle

CASE STUDY:

THE MISREGULATION OF TALC



Proposed risk management objectives:

- Amend the existing entries under the CIH and the NHPID
- Public communication to help avoid inhalation or perineal exposure

Risk mitigation measures: **onus on consumer**

- Read product labels and follow all safety warnings
- Avoid inhaling loose talc powder
- Avoid female genital exposure to talc
- Choose a talc-free alternative

Onus on stakeholders to submit:

- Socio-economic considerations
- Alternatives

Same critical health effects determined in draft screening assessment (2018)...

why no action?

Bill C-28 amendments recognize the importance of considering vulnerable populations in chemicals management

Addition of a **definition of vulnerable populations**

New language in the preamble **recognizing the importance of considering vulnerable populations** in risk assessments and of minimizing the risks posed by the cumulative effects of toxic substances

Recognition that the government's duty includes exercising its powers in a manner that protects the environment and human health, **including the health of vulnerable populations**

... but 'recognizing the importance' is not the same as mandating tangible actions

Bill C-28 lacks concrete measures to operationalize the new commitments to vulnerable populations

Amendments do not:

- Specify how the government will implement their commitments
- Create any new **mandatory** duties (too much Ministerial discretion!)

Definition of **vulnerable populations**: a group of individuals within the Canadian population who, due to greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances

Incorporating GBA+ considerations into Bill C-28 amendments will operationalize these commitments

GBA+ can address the limitations of the amendments; requires 4 overarching steps:

- (1) **Generating & reviewing data**
- (2) **Consultation**
- (3) **Examination of vulnerability considerations**
- (4) **Identification of risk-mitigation measures to address inequalities**

GBA+ also prioritizes public transparency throughout

GBA+: expand the definition to define specific vulnerable subpopulations, including those who by reason of one or more intersecting identity factors (GBA+ factors: sex, gender...) are subject to a disproportionate potential for exposure to, or for adverse effects from a substance

Bill C-28 Limitations

Ministers must consider **available information** regarding vulnerable populations and cumulative effects when conducting and interpreting the results of risk assessments under CEPA

Minister of Health's obligation to conduct biomonitoring surveys as part of the obligation to conduct research and studies in relation to the health effects of substances **may** include vulnerable populations

GBA+ Recommendations

The minister **shall**:

- Actively **seek out and generate information** and conduct investigations/tests on vulnerable populations and cumulative effects
- Identify critical data gaps and take tangible action to fill these gaps

The Minister **shall** conduct biomonitoring surveys in relation to the health effects of a substance on vulnerable populations; in all information gathering provisions, the Minister **shall** generate research and data **disaggregated by GBA+ identity factors**

Bill C-28 Limitations

For the purposes of assessing whether a substance is toxic or capable of becoming toxic, the Minister **may** collect or generate data and conduct investigations respecting:

- Whether exposure to the substance in combination with other substances has the potential to cause cumulative effects
- Whether there is a vulnerable population in relation to that substance
- The ability of a substance to cause delayed effects
- The ability of the substance to disrupt the reproductive or endocrine system

GBA+ Recommendations

The Minister **shall** collect or generate data (**including disaggregated data**) and conduct investigations/tests respecting the factors listed under the provision (s 68(a))

Add a GBA+ factor under this provision: **the manner in which the intersection of sex and gender with other identity factors can impact exposure and/or susceptibility**

For the purposes of conducting human health risk assessments, require the use of a human receptor (hypothetical person) with predefined physical and biological characteristics representative of a **maximally exposed person**

Bill C-28 Limitations

Continued...

- The existence, development and use of safer or more sustainable alternatives to the substance/product
- The manner in which the public may be provided with information regarding the substance or product, including by labelling it

When conducting and interpreting the results of risk assessments under CEPA, the Ministers must employ the **weight of evidence approach** and the **precautionary approach**

GBA+ Recommendations

The Minister **shall**:

- **Seek out/develop and use** safer or more sustainable alternatives, in accordance with the substitution principle
- Require the **hazard labelling** of all products with hazardous substances

The Minister **shall** employ the WoE approach, the precautionary approach, **and GBA+**

- Define the approaches
- Amend PP: where there are ~~threats of serious or irreversible harm~~ **reasonable grounds for concern**, lack of full scientific certainty shall not be used as a reason for ~~postponing~~ cost-effective measures to prevent environmental degradation

Bill C-28 Limitations

In developing and implementing a plan (that specifies the substances prioritized for assessment and **may** specify the activities or initiatives in relation to assessing, controlling or managing the risks posed by substances), the Minister **may** consult with stakeholders

Access to justice?

GBA+ Recommendations

The Minister **shall**:

- Specify the activities and initiatives
- Require that the activities/initiatives include:
 - The generation and use of research/data **disaggregated by identity factors**
 - The creation of publicly available information regarding the substance or product, including specific ingredients and associated risks, that does not require individual consumers to seek out this information
- Deliberately seek out participation and meaningful consultation with diverse stakeholders, including vulnerable populations

Thanks for
listening!