Legislative Overlap and Interdepartmental Jurisdiction with respect to Consumer Products and the In Commerce List

Remarks for a Presentation to the Parliamentary Review of the *Canadian Environmental Protection Act*, 1999

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Legislative Overlap – Interdepartmental Jurisdiction

A. Consumer Products

CEPA and products

The *Canadian Environmental Protection Act, 1999* allows the Governor in Council, on the recommendation of the CEPA ministers, to regulate Schedule 1 toxic substances in consumer products. Section 93 of the Act empowers the government to make regulations controlling the import, manufacture or use of any product containing a toxic substance, and to specify the quantity or concentration of the substance that can be in the product. The packaging or labeling can also be regulated.

Still, products are very rarely regulated through CEPA. This is despite the increased recognition that consumer products are a major source of persistent and toxic substances. On the rare occasion where toxic substances have been regulated in products, it has more often been done through the *Hazardous Products Act* (HPA), weak legislation that only operates product-by-product, is focused on acute, high hazard situations, and is entirely reactive, coming into play only after serious problems have been identified and after damage, even death, has already occurred. Health Canada's implementation of regulation making powers under this act is also extremely slow.

The example of lead in jewelry is a case in point. After six years of discussion, in 2003 Health Canada finally brought in a regulation for jewelry marketed to children. Jewelry marketed to adults or teens can still contain any level of lead. Likewise, any other consumer product that does not have a specific regulation for lead remains on the market, such as promotional key chain fobs, often given out by businesses and charities and which children can easily obtain. After six years, the children's jewelry regulation addressed perhaps one percent of the problem. Lead in children's products continues to be in the news, with yet another recall last week in the United States of lead-containing toy necklaces.

A current example of failure to regulate toxics in consumer products concerns Perfluorooctane Sulfonate (PFOS).[1] In July 2006, the federal government recommended the scheduling of this chemical on the Toxic Substances List. It also proposed a prohibition of the use of PFOS, but to exempt its presence in imported consumer products.

The decision to regulate the flame retardant chemicals, PBDEs, similarly avoids any realistic regulation of consumer products. The government's proposals regarding PBDEs would effectively ban those PBDE mixtures that have already been voluntarily discontinued (the penta- and octa-BDE mixtures). The proposed regulatory action does

[1] For further comments on proposals re PFOS, its precursors and its salts, see Canadian Environmnental Law Association, "Comments …" at http://www.cela.ca/publications/cardfile.shtml?x=2701.

nothing to address highly toxic, persistent substances that remain in use in consumer products, notably the deacBDE mixtures, whose use is increasing,

These examples – we can point to others as well – demonstrate that in the regulation of consumer products, **trade consistently trumps health protection**.

A second issue of overlap and/or confusion between CEPA and the HPA concerns hazard labeling. The HPA does a good job of evaluating hazards and providing symbols, warnings and use instructions about serious hazards, including whether a substance is immediately poisonous, corrosive, flammable, explosive, etc. However, CEPA considers known and/or suspected aspects of chronic toxicity that are not considered under HPA evaluations.

The very same substances for which products are required to carry HPA warning symbols and labels, have already or may soon be evaluated under CEPA. No warning requirement exists under CEPA for consumers to be warned of longer term toxicity concerns (e.g., cancer, neurotoxicity, developmental or reproductive toxicity, etc.) revealed or suspected as a result of chemical evaluations under CEPA. This shortcoming applies even to substances that have been determined CEPA-toxic.

Materials use approach

CEPA needs to be revised to strengthen its powers regarding consumer products. We propose a Materials Use approach that would include several related components. First, where substances are highly toxic, their use should be either banned or strictly controlled. Listing a substance on the List of Toxic Substances should automatically trigger a requirement that safer substitutes be found. The government will of course have the discretion to make exceptions where no reasonable alternatives exist, or in contexts where that substance would not have toxic effects (for example, carbon dioxide in a household product).

A "materials use" approach is in contrast to the cumbersome product-by-product approach used by the *Hazardous Products Act*. The use of Schedule 1 substances in consumer products would be restricted unless specifically exempted by regulation.

In addition, our proposal for consumer products includes amendments to require warning labels where the products contain substances that are carcinogenic, mutagenic, or are toxic to human reproduction and development (including substances that are CEPA-toxic). Products would be labeled if they are designated as hazardous on California's Proposition 65 list, or by the International Agency for Research on Cancer. Similar provisions already exist in California.

CEPA should also be amended to give the Minister of Health and the Environment the power to recall products from retail and wholesale operations where they violate regulations, or are believed to cause an unreasonable risk. Neither CEPA nor the HPA provides for mandatory recalls of dangerous products. Section 235 of CEPA could be

amended to specifically empower environmental protection compliance orders to include the recall and removal from commerce of consumer products that are restricted as described above.

B. In Commerce List

The list

When CEPA, 1999 came into force, substances and products otherwise covered by the *Food & Drugs Act* (F&DA) were not exempted from a CEPA assessment of their environmental and health impacts. Since September 14, 2001, therefore, all new F&DA substances have gone through CEPA's New Substances Notification (NSN) process. Concerns raised through NSN can lead to restrictions on the import, manufacture and/or use of the substance.

Health Canada assembled the so-called In Commerce List (ICL), a list of 9,000 substances believed to be in use between January 1, 1987 and September 13, 2001. The use of ICL substances currently does not require prior notification.

New substances

At present, the In Commerce List substances are defined as "new" and would be subject to NSN assessments. The Formulated Products Industry Coalition would like to see the ICLsubstances treated as "existing substances" and be subject to a categorization and screening process similar to the one for the Domestic Substances List. This would mean that a smaller number of substances would be assessed for their impacts, with the rest remaining on the market without further data being provided or analysis conducted.

The industry proposal to categorize and screen the substances as "existing substances" would impose an even greater burden of proof on government to show there is a problem, rather than on industry to assure Canadians that their products are safe enough to be on the shelves. This would contradict the current thrust of the NSN process, which requires industry to submit data *before* any substance can come on the market.

There is reason to be concerned about some of the substances on the ICL. For example, the list includes potentially harmful synthetic chemicals used in fragrances and perfumes in many different consumer products. These ingredients are not subject to safety assessments when they are approved for use under the F&DA.

Categorization criteria similar to that of the DSL process would exclude from assessment those that are not persistent, bioaccumulative or used in large amounts. A DSL-type categorization would be unlikely to acknowledge the risks particular to those substances that are applied directly to the body.

A new regime

Health Canada officials have expressed the view that the general NSN data requirements are not well suited to F&DA substances and that new specific environmental assessment regulations under the NSN or under the F&DA are needed. Any such new regulations should apply, in our opinion, to substances on the ICL.

It is appropriate that the approach chosen to clarify this situation have its foundation in CEPA, as Canada's "cornerstone" legislation. An NSN-equivalent regime should be set out that treats substances on the ICL as new substances and therefore requires data sets at least as comprehensive as those mandated under the highest tiers of the NSN. It is hoped that this new regulatory regime will include improvements over the existing NSN regulations, such as enhanced requirements for public transparency. The toxicity testing requirements should also be broadened to include endocrine disrupting potential, chronic toxicity, and children's health considerations.

Under this regime, the government would retain its present powers to waive data requirements where the risks are demonstrated to be negligible. The regime would also need to establish timeframes for assessing the 9,000 substances on the ICL at a pace that is manageable for the government. In order to assess the ICL substances in a timely and effective manner, it may be necessary to prioritize them according to their hazardous properties. Additional resources would likely be needed to allow assessment programs to adapt to the additional volume of substances.