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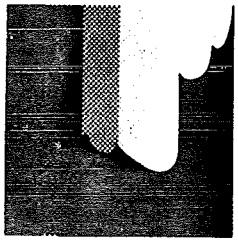

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SUBMISSIONS BY:

THE CANADIAN ENVIRONMENTAL
LAW ASSOCIATION

TO THE LEGISLATIVE COMMITTEE

ON

BILL C-74, THE CANADIAN ENVIRONMENTAL

PROTECTION ACT

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1. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest environmental law group. Since 1980 CELA has focused both its casework and law reform efforts in the area of toxic chemicals, hazardous wastes and pesticides. CELA appeared before the Standing Committee on Fisheries and Forestry in 1975 and made submissions on the then proposed Environmental Contaminants Act (ECA). Subsequently, a CELA staff member published a detailed critique outlining some of the major shortcomings of the legislation.[1] Accordingly, the government's tabling of discussion papers on the proposed amendments to the ECA in June 1985 and the establishment of the Environmental Contaminants Act Amendments Consultative Committee was welcomed by our organization.

CELA was a member of that consultative committee and invested considerable time and effort in its work during 1985-86. CELA commends the government for having taken this approach to the amendment of complex legislation. We believe that the exercise led to a number of innovative and well thought out suggestions for amendments which were put forward in the committee's report. In addition, there was a considerable amount of consensus among the different interests represented on the committee. Unfortunately, this consensus is not always adequately or accurately reflected in Bill C-74.

During the course of its deliberations, the committee heard that Environment Canada was planning "comprehensive" environmental legislation that would take the form of an "Environmental Protection Act." While the committee was assured that its work on amending the EPA would become part of the new Act, no one from the committee was consulted on the contents of this legislation. To the best of our knowledge, no non-governmental organizations were consulted on the framework or proposed content of the statute.

On December 18, 1986, the Minister of the Environment released the proposed Environmental Protection Act as a draft discussion bill. The proposed Act was touted by the Minister as the most comprehensive piece of environmental legislation in the western hemisphere. Mr. McMillan further stated that the proposed preamble "constitutes the country's first Environmental Bill of Rights." The government's media release stated that the new Act would deal with all aspects of a toxic chemical's lifecycle, i.e. from "cradle to grave."

In March 1987, CELA and the Canadian Environmental Law Research Foundation (CELRF) submitted a joint brief to the Minister critiquing the draft legislation. It was our position that the bill was not sufficiently comprehensive or forward-looking and that it most certainly did not contain the essential elements of an "Environmental Bill of Rights." We concluded that, in certain respects, the proposed EPA was a step backward. CELA/CELRF's general recommendations were as follows:

> 1. To ensure that no further delay takes place, the provisions in the proposed EPA amending the ECA should be put in place as soon as possible with a number of important revisions. This could take the form of an Environmental Contaminants Amendments Act. At a minimum, the recommendations contained in the ECA Amendments Consultative Committee report should be followed.
>
> 2. Part V including the enforcement provisions of the proposed EPA should be enacted, again with certain revisions, and these provisions should be made applicable to all major pieces of federal environmental legislation.
>
> 3. The Clean Air Act and Part III of the Canada Water Act should remain in force for the time being.
>
> 4. The government should immediately embark on a public consultation process leading to the enactment of comprehensive federal environmental protection legislation.

CELA then went on to make a number of detailed comments and recommendations on specific provisions of the bill. While a

number of these suggestions made by ourselves and many other environmental organizations and individuals found their way into C-74 when it was introduced for first reading in June 1987, our initial comment at the time was that the bill appeared to be swiss cheese with fewer holes. However, on closer examination there appeared to be three fundamental flaws:

(1) The indirect but nonetheless apparent message that the federal government does not intend to aggressively regulate existing chemicals in Canada;

(2) The failure of the federal government to exercise its clear authority to regulate federal works, undertakings and activities under exclusive federal jurisdiction for their environmental consequences; and

(3) The lack of inclusion of the elements of an environmental bill of rights.

CELA therefore cannot endorse the legislation in its present form. Due to the fact that this Bill is now before the Committee, there are obviously practical limitations to the scope of the revisions possible to the legislation at this time. However, a number of changes are clearly needed to ensure that we at least start the process of enacting comprehensive environmental legislation and address the flaws identified above. The remainder of our brief will therefore deal with specific comments and recommendations which we maintain are needed to improve the legislation as presently drafted.

We support the recommendation made by the Alberta Environmental Law Centre that Bill C-74 not go forward for final reading until such time as the Minister has made public a detailed legislative agenda which will lead to truly forward-looking and comprehensive federal environmental protection legislation. A strict

time-table leading up the proclamation of such legislation, which would include a federal environmental bill of rights should be set out.

II. SPECIFIC RECOMMENDATIONS FOR AMENDMENTS TO THE CANADIAN ENVIRONMENTAL PROTECTION ACT

A. Declaration and Preamble

As was discussed in greater detail in our submissions on the draft bill, a preamble in a statute is not enforceable in and of itself but, rather, is to be used only as an interpretive aid in determining the meaning of substantive provisions which are unclear or ambiguous. What is clear is that no enforceable rights spring from either a preamble or declaration in a statute. However, as a guidepost, CELA would recommend that the third WHEREAS clause be amended to provide that:

> "WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality standards, objectives, guidelines and codes of practice".

The addition of the word standards would set the framework for the federal government to enact standards where appropriate to ensure that no pollution havens are created.

B. Administrative Duties - section 2

CELA supports the concept of setting out various duties for the Government of Canada to follow in the area of environmental protection. As presently worded, this section appears to be limited in the sense that while the duties apply to the Government of Canada, it is only in the context of "the administration of this Act." As only two Ministers presently administer the act, this section would not be of assistance in making the other Ministers responsible for the duties set out in the section.

CELA would therefore recommend that section 2 be amended as follows:

> 2. The Government of Canada shall:
> (a) take both preventative and remedial measures in protecting the environment;
>
> (b) give due regard in making economic and social decisions to the necesssity of protecting the environment;
>
> (c) encourage the participation of the people of Canada in the making of decisions that affect the environment; and
>
> (d) endeavour to establish nationally consistent levels of environmental quality.

The other changes we have made to this section include; the deletion of references to the Constitution and laws of Canada which the government must follow in any event; deletion of references to co-operation with the provinces, as clearly in dealing with federal works and undertakings, the federal government can act on its own and in relation to other matters, while co-operation should be a goal, it should not be an excuse not to regulate. It is suggested that clause (e) be deleted as it seems to be self-evident and need not be placed in legislation.

C. Definitions - section 3

CELA would recommend that a definition of "trade secrets" be added to section 3(1). We would propose the following definition:

> "trade secrets" means a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."

In the absence of a definition, the term trade secret is open to interpretation by the courts which could interpret it broadly. This problem was pointed out recently in the Thacker report which recommended that the federal Access to Information Act (AIA) be amended to include this narrow definition of trade secrets.[2] We believe that in an environmental protection statute, the non-disclosure of information should be kept to a minimum. CELA would also recommend that section 3(1) be amended to include a definition of "health and safety study" as follows:

> "any study of any effect of a substance on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a substance, toxicological, clinical and ecological studies of a substance, and any test performed pursuant to this Act."

This definition of health and safety study is similar to that found in the U.S. Toxic Substances Control Act.[3] As will be discussed below, CELA is proposing that health and safety studies be releasable to the public under a newly amended section.

D. Formulation of Objectives, Guidelines and Codes of Practice - sections 8, 9 and 10

CELA recommends that sections 8 and 9 be amended to authorize the Ministers of Environment and Health and Welfare to formulate environmental quality standards as well as objectives. The addition of an authority to enact national environmental quality standards would conform to a recommendation of the Bruntland Commission that governments should put in place national standards.[4]

These sections could be used to set national ambient water, drinking water and air emission standards, giving all Canadians a uniform minimum of environmental quality. The provinces could then of course set more stringent requirements to meet specific conditions within their respective boundaries.

Section 10 should be amended to contain the following new clause:

> 10.(2) A copy of any national environmental quality standard that the Minister proposes to prescribe shall be published in the Canada Gazette for public comment; and no such environmental quality standard may be prescribed by the Minister except after the expiration of 60 days following such publication thereof.

E. Toxic Substances - section 11

CELA, in its brief on the draft bill, took the position that the definition of toxic substance needed to be rewritten. We note that the section has been amended in Bill C-74 and is an improvement over the earlier draft. However, we would still submit that the definition is still somewhat problematic. Specifically, section 11(a) provides that a substance to be toxic must have an effect on the environment "that is likely to interfere with important biological processes". These words will likely become the subject of debate before the courts and review boards and in our opinion does not add to the already rather onerous test that a substance must have or may have "a significant immediate or long-term harmful effect on the environment..."

Clause 11(b) seems to be unnecessarily restricted to the environment on which human life depends.

CELA would recommend that section 11 be amended as follows:

> 11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that may endanger human health or the environment.

In the alternative we would recommend the use of the phrase

> "...under conditions that may contribute to a deleterious effect on human health or the environment."

The term "deleterious" is recommended because it has been judicially considered under the Fisheries Act.

F. Priority Substances - sections 12 and 13

The concept of a Priorty Substances List was an addition to Bill C-74 when it was introduced for first reading. This list will include substances which both Ministers are satisfied should be given priority in assessing whether they are toxic. This list however, does not in any way lead to the regulation of a substance. It is just a list and there is nothing to compel the Ministers to either assess the substance or regulate. In fact there have been a number of priority substances lists published in relation to the existing Environmental Contaminants Act since its enactment in 1976, but to date only 5 chemicals have been regulated under that Act. Therefore, while there is an opportunity for any person to request that a substance be added to the Priority Substance List, and a responsiblity for the Minister to inform the person as to whether it will be added to the list, this is of limited use. If the Minister refuses to add a chemical to the Priority Substances List, there is no right of appeal. As well, in relation to section 12(5) there is no specific timeframe within which the Minister must reply to the request for a substance to be placed on the Priority Substances List, nor does the section specifically state that reasons must be given nor that the person be informed in writing.

Finally, section 13 only provides that "where" the Ministers assess whether a substance on the Priority Substances List is toxic that they then must publish a report indicating whether the substance will be regulated. It is only at that time that amember of the public has a right to appeal.

It is therefore our submission that sections 12 and 13 rather that providing an impetus to regulate, instead create a bureaucratic system of lists and delay with no real opportunity for the public to request that a substance be regulated. For example, there is no requirement that once a substance is placed on the Priority Substances List that it will be assessed. It may sit there for years with no opportunity for the public to request that a substance be regulated. This is a fundamental flaw that must be addressed. CELA would therefore recommend that section 12 and 13 be amended to read as follows:

> 12.(5) The Ministers shall consider a request filed under subsection (4) and the Minister shall within 60 days from the receipt of the request provide in writing to the person who filed it the decision as to whether the Minister intends to add the substance to the List, and the reasons thereto.
>
> 12.(6) Where the Minister makes a decision pursuant to subsection (5) not to add the substance to the List of Priority Substances, any person may, within 60 days after publication of the decision in the Canada Gazette, file a notice of objection with the Minister requesting that a board of review be established under section 81 and stating the reasons for the objection.
>
> 13.(1) Once a substance is placed on the Priority Substances List, the Ministers shall have one year to assess whether the substance shall be added under subsection 36(1) to the List of Toxic Substances in Schedule I, and regulations be made under section 37 in respect of the substance.
>
> (1.1) The Minister shall
>
> (a) prepare a report of the assessment;
>
> (b) make the report available to the public; and
>
> (c) publish a summary of the report in the Canada Gazette, including a statement of whether the Ministers intend to add the substance to the List of Toxic Substances in Schedule I, and regulate pursuant to section 37 in respect of the substance.

13.(2) same wording as in C-74.

These amendments should ensure that substances do not lanquish on a priority substances list for years as is presently the case.

G. Disclosure of Information - Section 18 - 27

The disclosure of information sections have been significantly changed since the earlier draft legislation. It appears that an attempt was made to bring this provision in line with the system being developed under WHMIS. However, the result is far from satisfactory. Specifically, the relationship with the Access to Information Act remains unclear and the provisions as presently worded seem to be unduly convoluted and may in fact represent a step backwards from the AIA in ensuring that information is released by government. CELA would submit that in principle the focus of these sections of CEPA should be on the disclosure of information. As we have already noted, we maintain that there should be a definition of trade secrets in CEPA and that the definition should be as narrow as possible to ensure that the general principle of disclosure of information is followed.

Specifically, we would recommend that section 18(2) which sets out the type of information that is to be releasable be amended to provide that all health and safety studies be releasable and not just summaries of such data as presently set out in 18(2)(f). As we discussed above, health and safety studies should be defined to encompass both raw and finished data. It has long been recognized that summaries of data may not be adequate and that the raw data may reveal important information about a test. Presently U.S. pesticide and toxic chemical legislation does provide for public access to health and safety studies. It is submitted that CEPA should be amended to ensure that public access is provided to this kind of data. Otherwise, Canadians will be forced to obtain health and safety information about a chemical used in Canada through U.S. freedom of information legislation.

CELA would also recommend that section 19(3) be amended to delete "may" and replace it with "shall". Clearly where disclosure is in the public interest and where that interest outweighs financial loss, the Minister should be required to release such information.

CELA is also concerned about the relationship between the Access to Information Act and CEPA. It appears that under CEPA a company can apply to the Minister to determine whether the information it is required to provide is confidential or not. If the Minister determines the information is not confidential, the applicant can file a notice of objection and the issue will then be "finally" determined by a review panel. First of all, CEPA does not specifically provide for intervenors to make submissions before this panel, nor is it clear whether the review is a paper exercise or whether oral submissions can be made before the panel. As well, with four representatives on a Review panel, it is very easy to envision a deadlock situation.

It would also appear that if an individual later on applies under the Access to Information Act for the release of information pertaining to a certian chemical, the determination of a review panel which CEPA says is intended to be final, may preclude review by the Information Commissioner and ultimately the federal court. It is submitted these section of CEPA as presently worded may lead to a closed shop determination of confidentiality and an end-run around the existing access to information legislation.

CELA would therefore recommend that in addition to clearly stating the health and safety studies are releasable and the need for a narrow definition of trade secrets, that sections 20 - 27 be deleted.

H. Regulation of Toxic Substances - section 37

CELA was extremely concerned about section 37(4) of Bill C-74 as

worded at the time of first reading on June 26, 1987. It was our position this section represented an abdication of federal responsibility and authority to act to protect the environment and was a step backwards from existing federal environmental legislation such as the Clean Air Act, which provides for the federal government to enact national ambient air standards without the necessity of consulting the provinces. It has been our contention that the Minister of Environment has been getting extremely conservative advice from the Justice Department as to federal constitutional authority to protect the environment. It is our opinion that an examination of constitutional caselaw under the various heads of federal power listed in section 91 of the Constitution Act, 1867 reveals that not only does the federal government have the legislative authority to enact a variety of enironmental laws, but that it may, in fact, be the level of government most capable of taking a leading role in the protection of the Canadian environment and public health. The following provides a brief overview as to why we maintain that the federal government has an important role to play in environmental protection.

The Constitutionality of Federal Environmental Law

Due to the fact that environmental pollution was not a widespread concern in 1867, it is hardly surprising that the drafters of the Constitution Act, 1867 did not explicitly place "pollution" or "environment" on the list of exclusive federal or provincial powers under section 91 or 92. As Peter Hogg, consitutional scholar, writes, "pollution is not a matter assigned by the Constitution exclusively to one level of government. Like inflation, it is an aggregate of matters which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."[5] However, as stated above there is authority for the federal government to enact

environmental legislation at the national level. The following constitutional doctrines and interpretative principles are also important to consider in this discussion.

(i) Concurrency

Given the general language used to identify the heads of power in ss. 91 and 92, it is quite possible for a specific issue to fall within both federal and provincial competence. For example, several matters such as impaired driving, temperance and securities regulation, have been held to fall within the federal "criminal law" power and within the provincial "property and civil rights" power. Where concurrent jurisdiction exists, both levels of government are free to legislate with respect to the particular issue, but where the resulting legislation is inconsistent, the federal legislation prevails over the provincial legislation through the doctrine of dominion paramountcy. Another way of describing this is to state that as long as compliance with provincial law does not result in a violation of federal law, the provincial law may remain intact.

(ii) Inter-jurisdictional Immunity

It has generally been held that validly enacted provincial laws do not apply to privately owned enterprises under federal legislative jurisdiction, nor to the federal Crown unless the Crown voluntarily submits to the provincial law or the federal legislation explicitly or implicitly subjects the Crown to the provincial law. This doctrine suggests that provincial environmental regulations do not affect the federal Crown or federal undertakings. This means that only the federal government can pass legislation dealing with federal undertakings, a matter which will be discussed below.

Federal Authority

While the most obvious source of provincial power to legislate with respect to environmental matters is s.92(13) ("Property and Civil Rights"), the sources of federal authority over environmental matters are somewhat more numerous. In fact, Peter Hogg has identified at least eleven possible heads of federal power under which environmental legislation might be passed. It is our submission that a strong federal role in pollution control can be justified under the "criminal law" power and under the "peace, order and good government" clause. "Trade and Commerce" is also a relevant head of power. Caselaw has broadened the definition of criminal law to include the protection of "public peace, order, security, health or morality". Commentators have also stated that the peace, order and good government clause, "provides a basis for considerable federal action to abate pollution." This view does not rest on the mere fact that pollution is an important national issue, for some important issues, such as education, are clearly within the exclusive domain of the provinces. Rather, this view is predicated on the fact that toxic chemicals in the environment do not respect provincial boundaries and therefore there is a clear and pressing need for uniform National environmental legislation to combat the problem of pollution havens.

We therefore maintain that the federal government has the authority to take a strong role in environmental protection. However, we want to stress that it does not necessarily follow that the provinces cannot or should not play a role in the control of toxic substances. For example, the provinces are free to set their own environmental priorities and regulatory standards, provided these standards supplement rather than conflict with federal regulations. Nevertheless, the inherent complexity and the nationwide existence of substances dangerous to public health and the environment necessarily calls for an immediate and comprehensive response from the federal government.

In this sense, Professor Paul Emond's conclusion fifteen years ago remains equally valid today, particularly since more is known about pollution and pollution control.

> The constitutionality of a strong federal role in the environmental protection field is undisputable. Similarly, the arguments in favour of immediate federal action in this area are compelling. What is needed now is for the federal government to recognize these facts and take the initiative in designing and implementing a comprehensive pollution control plan that will make a real contribution to improving our national environment.[6]

It is our concern that CEPA as presently worded does not take the initiative. The Minister has brought forward new amendments to section 37(4) which will provide that federal regulations may not apply if "equivalent" provisions are in force in a province. The cabinet, by order, may declare that the valid federal regulations do not apply in a province where there are equivalent provisions which are being enforced. As well, any 12 persons who are of the opinion that an equivalent provision is not being adequately enforced may request that the Minister recommend the revocation of such an order.

We have reviewed that submission made to the Committee by the Alberta Environmental Law Centre and share their concerns with these new amendments. Besides being rather unwieldy, we are concerned that again there appears to be a deliberate attempt by the government not to regulate in the area of toxic chemicals. It is time for the federal government to move forwards and not backwards in the regulation of these chemicals and to meet the challenges set out in the report of the Brundtland Commission. Public opinion is also clearly behind a strong role for the national government in environmental protection.

CELA would therefore recommend that the proposed sections 37(5)-(8) be deleted from CEPA. As well, section 37(4) as presently found in Bill C-74 should either be deleted or amended

to allow the Minister to consult with the provinces rather than require him to do so.

I. Emergency Powers - section 38

The proposed new amendments to section 38 require the Minister of the Environment to consult with the governments of all the provinces and other federal ministers before the Cabinet can approve an emergency order. This is in addition to the requirement that both the Minister of the Environment and the Minister of Health and Welfare must believe that immediate action is required to deal with a significant danger in Canada to human health or the environment before an emergency order can be issued. Finally, section 38(4) provides that where an emergency order has been made but not approved by Cabinet the order "shall be deemed not to have been made." This latter clause could leave inspectors and others who act pursuant to an emergency order vulnerable to civil suits.

We believe that section 38 (2) and (3) as presently worded and the proposed amendments are unduly onerous and in fact will render the emergency power virtually useless. We would recommend that the requirements of consultation and the provision that an order need be approved by the Cabinet for it to be valid be deleted. We would also recommend that as quick action is usually needed to effectively respond to most chemical emergencies, that the authority to issue emergency orders be vested in the Regional Directors of either the Department of Environment or Health and Welfare.

J. Release of Toxic Substances - Sections 39 - 43

These sections again have been substantially amended and improved from the draft bill. However, there are still some problems which need to be addressed. Section 39(1) provides that where there is a release or a reasonable likelihood of a release of a

substance on the List of Toxic substances the owners or persons in charge, as well as persons who cause or contribute to the initial release, shall report the matter and take all reasonable measures to remedy any dangerous situations or mitigate any danger to the environment or human health. We note that Bill C-74 has quite properly extended the duty to report and to take remedial measures to any person who causes or contributes to the initial release.

We raise the following concerns with the Committee:

1. Since Schedule I presently lists only 9 substances to date, the duty to report and take remedial measure is inapplicable to the thousands of non-designated, non-regulated substances in Canada. Therefore, the listing of toxic substances and the drafting of s.37 regulations must be carried out expeditously in order to make s.39 meaningful and effective. At a minimum, CELA would recommend that the duty to report and take remedial measures be extended to apply to any substances released in contravention of any requirement of the Act. This amendment, would insure that, for example, releases into the environment in contravention of emergency orders would be covered.

2. Section 39 presently does not specify to whom notification should be made. We would recommend that s.39 be amended to require the notification of the municipality in which the release occurs, owners of the substances where applicable and members of the public who may be adversely affected by the release or potential release of a substance. These reporting requirements would be similar to those under the Ontario Environmental Protection Act (Part IX).

3. Section 40 provides that individuals outside the scope of section 39 may make voluntary reports concerning actual or potential releases of toxic substances. The section does not create a new duty, but purports to offer that person the

protection of confidentiality if requested. Unfortunately, this section does not adequately offer "whistleblower" protection:

a. It does not guarantee that federal sector employees complying with CEPA or providing information to Environment Canada will not be disciplined or discharged;

b. It does not establish a mechanism for redress where employees have been disciplined or dismissed for complying with CEPA; and

c. It does not confer the right to employees to refuse work where an illegal release occurs or is likely to occur, or where the work itself will, or is likely to, result in harm to the environment or public health and safety.

CELA would recommend that CEPA be amended to encompass the three points mentioned above, and to ensure that there will be adequate "whistlebower" protection for those employees who report breaches of this legislation.

K. Recovery of Costs and Expenses - section 42

Section 42 entitles the federal Crown to recover the reasonable costs of remedial works undertaken pursuant to section 39(5) from the owners or persons in charge of spilled toxics. Section 42 also imposes liability on any person who caused or contributed to the release, but only "to the extent of the person's negligence in causing or contributing to the release." CELA would recommend that this clause limiting liability to the extent of the person's negligence be deleted. As you are aware, Ontario's "Spills Bill" provides for absolute liability for cleanup costs and expenses in respect to owners and controllers of spills. We maintain that absolute liability is entirely justified in the area of toxic

chemical releases. Those who create the risks should bear the costs of cleanup, not the innocent victims, or the government or the taxpayer.

L. Export of Toxic Substances and Waste Materials - section 44

CELA continues to recommend that section 44 be amended to prohibit the export of substances that are banned in Canada. This would reflect the dissent of the environmental groups on the ECA Amendments Consultative Committee. We would note that the proposed CEPA sections do not even go as far as the recent resolution adopted by the Food and Agriculture Organization to incorporate the principle of "prior informed consent (PIC)" into the International Code of Conduct on the Distribution and Use of Pesticides within the next two years. This means that before the export of banned and severely restricted pesticides occur, the governments of importing countries are not only notified but must give explicit consent for the shipments to cross their borders. It should be noted that while the resolution to include PIC in the Code within the next two years was adopted by consensus, Canada was one of nine industrialized countries that placed reservations on the resolution deeming it better to wait for more information on the matter before taking any decisions. While this reservation does not affect the impact of the resolution, it is disappointing that Canada did not support this principle of PIC, especially when the Third World countries, which acknowledged that pesticides were causing serious health and environmental problems, gave overwhelming support to the principle. The PIC principle should apply equally to industrial chemicals as well as pesticides. We believe that Canada should take a lead role and prohibit the export of banned substances and provide for prior informed consent in relation to the export of severely restricted substances.

M. Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands - sections 51 - 54

As stated above, CELA believes that one of the major weaknesses of CEPA is the failure of the federal government to exercise its clear authority and responsibility to regulate federal works and undertakings and to put in place in CEPA a regime which ensure that federal agencies and crown corporations are subject to environmental protection laws. The need for such a regulatory regime is illustrated by the following cases. In 1981, the Ontario Ministry of Environment prosecuted Eldorado Nuclear Ltd., Port Hope, in relation to a spill of raffinate into Lake Ontario. The charges were brought under the Ontario Water Resources Act and were ultimately thrown out of court on the basis that Eldorado, as a federal crown corporation, was immune from the application of provincial environmental law as the legislation did not expressly or by necessary implication bind the federal crown.

More recently, the National Research Council and Council employees were charged under the Ontario Environmental Protection Act with illegal transfers of waste to an unauthorized waste hauler without completion of any waste manifests as required by the regulations. The preliminary issue raised by the NRC was whether the Ontario legislation applied to the Federal Crown and her agents and employees. The Provincial Court held that the Ontario legislation did not bind the federal crown and the charges were dismissed. The unfortunate result is that federal agencies can continue to hide behind Crown immunity and act in an environmentally unsound manner.

It is clear that strong federal environmental legislation is needed to cover off these loopholes and to ensure that federal agencies and works are subject to environmental laws. CEPA would seem to be the ideal vehicle to once and for all set up a binding regulatory regime that will (a) prohibit the discharges of

pollutants or contaminants from federal facilities (b) create a licencing and permitting scheme for the construction of federal facilities and the carrying on of hazardous activities by federally regulated businesses, including waste disposal, and (c) provide for control orders to prevent and abate harmful activities by such entities. Pollutants or contaminants should be defined under CEPA.[7] None of these provisions are presently found in Bill C-74.

Section 52 provides that the Minister of Environment with the approval of Cabinet may establish guidelines for use by federal departments. The need for cabinet approval seems to be an unnecessary hurdle for the establishment of guidelines. Section 53 goes on to provide that only where no other Act of Parliament provides for the making of regulations that result in environmental protection, may the Cabinet then promulgate regulations. This section does not even state that the regulations actually be in place but only that the authority exists in the other federal law. This is inadequate. Finally, section 54, while giving the Minister the authority to ask for plans and specifications of any undertaking that may result in the release of substances into the environment, does not give him any authority to prohibit or modify a proposed undertaking if environmental harm may occur.

CELA therefore would recommend that these sections be amended as follows:

1. Section 52 should be amended to provide that the power to establish guidelines be vested in the Minister alone and that Cabinet approval need not be sought.

2. Section 53 should be deleted and instead a series of new sections should be enacted:

a. defining pollutant or contaminant;

b. prohibiting the discharges of pollutants or contaminants from federal facilities;

c. creating a licensing and permitting scheme for the construction of federal facilities and the carrying on of hazardous activities by federally regulated businesses; and

d. providing for control orders to prevent and abate harmful activities by such entities.

3. Section 54 should be amended to give the Minister the specific authority to modify or prohibit an undertaking if he is of the opinion that damage to health or the environment may occur.

N. International Air Pollution - sections 55 - 59

Again there have been some improvements in the revised international air pollution sections in Bill C-74. However, CELA still has some concerns with the sections as presently worded.

1. Section 55 provides for the setting of regulations for the purpose of controlling or preventing air pollution and specifically s.55(a) speaks about the situation where an air contaminant may create air pollution. CELA would recommend the reference to "air pollution" be changed to "pollution" as air emissions from Canada can also significantly contribute to the pollution of the oceans and the Great Lakes in violation of the Great Lakes Water Quality Agreement. Deletion of this wording would reflect an up-to-date understanding of cross-media impact and give authority for control action in Canada in such situations.

2. We also maintain that the consultation or equivalency provisions found in section 57(2) should be deleted as was

recommended in relation to the general regulation-making power under section 37. While the Minister should be allowed to consult with the provinces, he should not be required to do so.

3. Finally, we are concerned that Part V only applies to international air pollution. It fails to recognize that Canada contributes to international water pollution. It is therefore recommended that Part V be revised to allow for regulation of "international pollution" and the sections in this part should be revised to allow for control of sources of water pollution beyond Canada's borders. It is important to note that the U.S. Clean Water Act contains a provision similar to section 115 of the Clean Air Act which is not reflected anywhere in Bill C-74.

O. Board of Review Proceedings - section 81

CELA commends the government for ensuring that "any person" has a right to file a notice of objection and the right to appear before a Board of Review. CELA believes that the Ministers should only have the power to reject a request for a hearing if it is frivolous or vexatious. We believe that the test of "if they think fit to do so" as set out in section 81 is vague in law and leaves too much to the discretion of the Ministers. It is recommended that the phrase be deleted and that a section be put in giving the Ministers the authority to reject a request for a hearing if it is frivolous or vexatious. The latter phrase is well known in law and is in accord with many other statutes.

We are also concerned that Board of Review proceedings will be used to delay the implementation of regulations. We would therefore recommend that a clause be put in section 81 allowing a person to make application to the Board of Review, once it has been established, requesting that the regulation or order apply in whole or in part pending the determination of the matter where the Board is satisfied that there may be a danger to human health or the environment. We believe this is a reasonable approach given the fact that we are dealing with toxic substances.

We are pleased to see that Bill C-74 now contains a cost power for the Board. However, a costs power which the Board can only exercise at the end of a hearing, does not help those intervenors who do not have sufficient resources to retain experts and appear at what may be a lengthy hearing. We would support the recommendations made by the national environmental law section of the Canadian Bar Association that the Board of Review be given the explicit power to award interim costs to those applicants or intervenors who meet certain criteria. As well, we support the CBA's recommendation that a provision be added to allow the Minister to grant funding to participants in Board of Review hearings.

P. Investigation of Offences - section 100(1)

CELA would recommend that "any person" rather than any twelve persons may apply to the Minister for an investigation of an offence. There is no apparent reason why one person rather than twelve should not be able to petition the Minister.

Q. Orders of Court - section 122

CELA would recommend that the phrase "on application by the prosecutor on behalf of the Minister" be deleted. Surely this broad range of offers should be available to the court on its own motion or at the initiative of a private prosecutor.

R. Injunction - section 127

CELA would recommend that the phrase "on the application of the Minister" be deleted and replaced by "any person. Again this remedy should not be limited to the Minister.

S. Civil Cause of Action - section 128

Section 128(1) allows any person who has suffered loss or damage

as a result of conduct contrary to any provision of this Act to sue for damages. Section 128(2) also provides for a person to seek an injunction in this case. This section in no way can be construed as a radical departure from existing law. There is no right for a person to seek an injunction or a declaration where there has been a breach of the act that does not involve direct loss or damage to the environment. This provision can in no way be called a environmental bill of rights.

III. AN ENVIRONMENTAL BILL OF RIGHTS

CELA, since its inception in 1970, has been advocating the need for an environmental bill of rights at both the federal and provincial levels of government. It would seem essential that any comprehensive revision to federal environmental law be updated in its provision of public rights to protect the environment. Even without initiating a Charter amendment, the federal government acting alone can go a long way toward redressing the impediments to public action and enhancing the rights of Canadians. In our brief to the Minister on the draft bill CELA outlined both substantive and procedural rights that could be included in federal legislation. Key provisions would include:

- the right to a healthy environment;
- the right to protection by government of common resources and the public trust therein; and
- the right of a member of the public to seek a declaration or injunction for actual or threatened environmental harm for breach of federal law, without the necessity of having to show personal injury to health or property interests of that individual.

The Michigan Environmental Protection Act has since 1970 granted the public the right to sue government and any polluter "for the protection of air, water and other natural resources and the

public therein from pollution, impairment or destruction." Finally, the Minister of Environment, Mr. McMillan in July 1981 eloquently supported the elements of an Environmental Bill of Rights which CELA has been advocating over the years. CELA recommends that CEPA be amended to include the three provisions outlined above.

IV. CONCLUSIONS AND RECOMMENDATIONS

It is common ground that federal environmental legislation is in need of a major overhaul. The ECA Amendments Consultative Committee after meeting for a year issued a report containing a number of innovative and well thought out suggestions for amendments to the outdated ECA. It was unfortunate that there was no opportunity for consultation on the proposed framework or contents of what became the draft discussion bill issued by the Minister of the Environment on December 18, 1986. While billed as the most comprehensive piece of environmental legislation in the western hemisphere, containing the "first Environmental Bill of Rights", it is clear that neither the draft bill or C-74 measures up to this billing.

CELA has identified three major flaws with the legislation as presently drafted. These include:

(1) the indirect but nonetheless apparent message that the federal government does not intend to aggressively regulate existing chemicals in Canada;

(2) the failure of the federal government to exercise its clear authority to regulate federal works, undertakings and activities under exclusive federal jurisdiction for their environmental consequences; and

(3) the lack of inclusion of the elements of an environmental bill of rights.

CELA has reviewed the legislation and offers the following recommendations for amendments to the Committee. It is our opinion that many of these amendments are needed to ensure that we at least start the process of enacting comprehensive environmental legislation and to address the flaws identified above. We also support the recommendation made by the Alberta Environmental Law Centre that Bill C-74 not go forward for final reading until such time as the Minister has made public a detailed legislative agenda which will lead to truly forward-looking and comprehensive federal environmental protection legislation.

Recommendations

The following are recommendations for amendments to Bill C-74. The page numbers where discussion of these recommendations are found are in square brackets.

1. The third whereas clauses should be amended to add a reference to establishing national environmental quality standards. [p. 4]

2. Section 2 should be amended to provide that:

> The Government of Canada shall:
> (a) take both preventative and remedial measures in protecting the environment;
> (b) give due regard in making economic and social decisions to the necessity of protecting the environment; and
> (c) endeavour to establish nationally consistent levels of environmental quality. [p. 5]

3. A narrow definition of "trade secrets" should be added to section 3(1). [pp. 5-6]

4. Section 3(1) should also be amended to include a definition of "health and safety study." [p. 6]

5. Sections 8 and 9 should be amended to authorize the Ministers of Environment and Health and Welfare to formulate environmental quality standards as well as objectives. These standards should be published and a 60 day public comment provided. [pp. 6-7]

6. CELA recommends that the definition of toxic substances be amended and has suggested two possible alternative amendments. [pp. 7-8]

7. Sections 12 and 13 should be amended to provide for an appeal from a decision not to list a substance on the Priority Substances List and there should also be a time-frame within which the Ministers must assess and report on a substance once it is placed on the Priority Substances List. [pp. 8-10]

8. Section 18 should be amended to provide for the disclosure of health and safety studies. Sections 20-27 should be deleted as these sections as presently worded may lead to a closed shop determination of confidentiality and an end-run around the existing access to information legislation. [pp. 10-11]

9. Section 37(4) and the proposed government amendments to this section should be deleted. The Minister should be allowed to consult with the provinces prior to regulation but should not be required to do so. [pp. 12-15]

10. The requirements of consultation and the provision that an emergency order need be approved by the Cabinet should be deleted from section 38. We would also recommend that authority to issue emergency orders be vested in the Regional Directors of either the Department of Environment or Health and Welfare. [pp. 15-16]

11. Section 39 should be amended to provide that the duty to report and take remedial measures be extended to apply to any substance released in contravention of any requirement of the Act. [pp. 16-17]

12. Section 39 should also specify that notification of a release should be provided to the municipality in which the release occurs, owners of the substances where applicable and members of the public who may be adversely affected by the release or potential release of a substance. [p. 17]

13. Section 40 should be amended to provide for "whistleblower" protection. [pp. 17-18]

14. The phrase "to the extent of the person's negligence in causing or contributing to the release" should be deleted from section 42. [p. 18]

15. Section 44 should be amended to prohibit the export of substances that are banned in Canada and should provide for prior informed consent in relation to the export of severely restricted sustances. [pp. 18-19]

16. Part IV should be amended to include a regulatory regime for the dischargers of pollutants from federal works, undertakings and federal lands. There can be no debate about the clear federal authority to act in this area and CEPA is a good vehicle to ensure that federal agencies do not continue to hide behind crown immunity. [pp. 19-22]

17. Part V should be revised to allow for the regulation of international pollution and the control of sources of water pollution beyond Canada's borders. The sections dealing with the requirement for consultation with the provinces should be deleted (see recommendation 9 above). [pp. 22-23]

18. Boards of Review should be given the power to award interim costs and a separate subsection should be added to section 81 which would allow the Minister to provide funding to intervenors. The section should also be amended to allow a person to make application to the Board of Review, once it has been established, requesting that the regulation or order apply in whole or in part pending the determination of the matter where the Board is satisfied that there may be a danger to human health or the environment. Finally, the phrase "if they think fit to do so" should be delected, and a section should be put in place giving the Ministers the authority to reject a request for a hearing if it is frivolous or vexatious. [pp. 23-24]

19. Section 100(1) should be amended to provide that "any person" rather that any twelve persons should be allowed to apply to the Minister for an investigation of an offence. [p. 14]

20. The phrase "on application by the prosecutor on behalf of the Minister" should be deleted from section 122. [p. 14]

21. The phrase "on application of the Minister" should be deleted from section 127 and replaced by "any person". [p. 25]

22. CEPA should be amended to include key elements of an environmental bill of rights:

- the right to a healthy environment;
- the right to protection by government of common resources and the public trust therein; and
- the right of a member of the public to seek a declaration or injunction for actual or threatened environmental harm for breach of federal law, without the necessity of having to show personal injury to health or property interests of that individual. [pp. 25-26]

V. ENDNOTES

1. J. F. Castrilli, "Control of Toxic Chemicals in Canada: An Analysis of Law and Policy" (1982), 20 Osgoode Hall L.J. 322.

2. "Open and Shut: Enhancing the Right to Know and the Right to Privacy", Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act. (Ottawa: Supply and Services, March 1987) at 26.

3. Toxic Substances Control Act, 15 USC 2601 as amended, section 3(6).

4. World Commission on Environment and Development, Our Common Future, 1987.

5. Peter Hogg, Constitutional Law in Canada (Toronto: Carswell, 1985) at 598.

6. Paul Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972), 10 Osgoode Hall L.J. 646 at 656.

7. See, for example, the definition of contaminant in section 1(1)(c) of the Ontario Environmental Protection Act, R.S.O. 1980, ch.141 as amended.

> "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,
>
> (i) impair the quality of the natural environment for any use that can be made of it,
>
> (ii) cause injury or damage to property or to plant or animal life,
>
> (iii) cause harm or material discomfort to any person,
>
> (iv) adversely affect the health or impair the safety of any person,
>
> (v) render any property or plant or animal life unfit for use by man
>
> (vi) cause loss or enjoyment of normal use of property, or
>
> (vii) interfere with the normal conduct of business.