Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

ENVI@PARL.GC.CA

August 24, 2016

Cynara Corbin
Clerk of the Standing Committee on Environment
and Sustainable Development
House of Commons
131 Queen Street, 6th Floor
Ottawa, Ontario K1A 0A6

Dear Ms Corbin:

Re: 2016 CEPA Review – CELA Comment on Letter by Dr. Dayna Scott, Associate Professor, Osgoode Hall Law School, York University to Standing Committee on August 3, 2016

We have had an opportunity to review the letter filed with the Standing Committee by Professor Dayna Scott dated August 3, 2016 commenting on our June 16 and July 7, 2016 submissions respecting (1) environmental justice, and (2) alternatives assessment. In general, Professor Scott's views are helpful in furthering an overall understanding of *CEPA, 1999*. They also give CELA an opportunity to underscore certain, and clarify other, points we made on these issues in our submissions to the Standing Committee. We trust our latest submissions clarifying these matters will assist the Standing Committee in its review of the Act and possible reforms to it.

Environmental Justice

Professor Scott states the following with respect to our June 16, 2016 submissions on environmental justice issues:

1. Our inclusion of a preamble referring to environmental justice principles in our proposed amendments to *CEPA, 1999* could be misunderstood as endorsing a preamble-only approach on the issue of protection of vulnerable Canadians from toxic substances (Scott letter, page 2).

2. The *Pest Control Products Act* ("*PCPA*"), referenced in our June 16th submissions, provides exceedingly limited consideration of environmental justice principles for the Standing Committee to consider incorporating into amendments to *CEPA, 1999* (Scott letter, page 3).

3. Our proposed amendments to *CEPA, 1999* on environmental justice only address assessment but, with one minor exception, not regulatory reform respecting toxic substances (Scott letter, pages 3-4).

As an overall comment on Professor Scott's observations, we trust it was clear to the Standing Committee that CELA was not recommending: (1) a preamble-only approach to the issue of environmental justice; (2) adoption in *CEPA, 1999* of the *PCPA* language on vulnerable populations; or (3) an assessment-only approach to incorporation of environmental justice principles in *CEPA, 1999*. For greater clarity, we would add the following for the consideration of the Standing Committee on these matters.

The Preamble Issue

Professor Scott's letter states that CELA does not appear to support a preamble-only approach to the issue of environmental justice and protection of vulnerable Canadians from toxic substances. That is true. However, her letter also states that because we proposed amendments on this issue for inclusion in the preamble portion of the Act in our June 16, 2016 written submissions to the Standing Committee "this could be misunderstood as endorsing a preambular approach". Her letter continues by stating that she has serious concerns "with any approach that purports to address vulnerable Canadians *only* or *primarily* though a preamble" (Scott letter, page 2) (*italics* in original).

The record before the Standing Committee is clear that CELA would have serious concerns with a "preamble-only" approach as well. It should be recalled that in our appearance before the Standing Committee on May 19, 2016, we specifically stated that environmental justice principles should be embedded throughout *CEPA, 1999* from the preamble to the purpose section to the substantive provisions of the Act and even in the regulations (Hansard Transcript of CELA Testimony, May 19, 2016, page 9). We were asked by members of the Standing Committee to provide them with statutory language illustrating how this could be achieved. The result was our June 16, 2016 written submissions to the Standing Committee that proposed statutory amendments incorporating environmental justice principles into the Act including the preamble, section 2 (the section addressing the duties of the Government of Canada), section 3 (the definitions section of the Act where we provided detailed definitions for "environmental justice", "fair treatment", "meaningful involvement", and "vulnerable population"), section 46 (the authority for the NPRI program), section 56 (the pollution prevention authority), section 76.1 (authority for the weight of evidence approach), section 83 (information in connection with new substances), and section 93 (regulation-making authority) (CELA June 16, 2016 Submission, pages 3-5).

However, CELA does support language in the preamble regarding environmental justice principles in addition to the other environmental justice proposals we put forward. Preambles serve an upfront guidance function in a statute helping the reader (whether it is government, the judiciary, or the public) understand what Parliament is concerned about, wants to inspire the country about, and wants the statute on its face and as applied to address. Leading authorities on the interpretation of statutes have said the following about the current use of preambles at the federal level: "Preambles…are found in high-profile legislation that relates to fundamental or controversial issues of public policy including criminal and environmental law…"[1] Sullivan on

[1] Ruth Sullivan, *Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) at §14.27 (quoting Kent Roach on the uses and audiences of preambles in legislation)

the *Construction of Statutes* has said that preambles can reveal, or confirm, legislative purpose and while courts can figure out the purpose of an enactment without having it spelled out for them, reliance on the preamble gives their conclusions added force and legitimacy.[2] Preambles are also an important source of legislative values and assumptions.[3] In a statute as lengthy as *CEPA, 1999* these goals are essential to the proper understanding and interpretation of the law and serve to promote public "buy-in" with respect to the statute's overarching objectives. There is no merit or value in leaving the declaratory provisions (i.e. the preamble) silent on such goals and concealing or obscuring them by burying them deep in the statute. However, preambles by themselves may be treated by the courts as lacking weight in the face of substantive provisions that could be interpreted to the contrary. Therefore, the objectives of the preamble also must be reflected in the substantive provisions of the Act if they are to be effectuated in practice. That is what CELA was seeking to illustrate by the amendments of substantive provisions of the Act we provided to the Standing Committee in our June 16th submissions.

The PCPA Issue

Professor Scott's letter states that "the extent to which the provisions referenced in CELA's submission if incorporated into *CEPA, 1999* could promote environmental justice is not just limited [as CELA itself suggested in its June 16th submissions at page 2], but *exceedingly* limited" (Scott letter, page 3). CELA's purpose in referencing the *PCPA* provisions on vulnerable populations in our June 16th submissions was to make it clear to the Standing Committee that there already are precedents in Canadian law for explicit statutory provisions addressing protection of vulnerable populations from toxic substances (i.e. from agricultural chemicals in the case of the *PCPA*).

However, the language in the *PCPA* is well over a decade old. In the intervening period, the statutory precedents in other jurisdictions on the issue of environmental justice have gone well beyond that contained in the *PCPA*. Accordingly, CELA did not recommend that the Standing Committee adopt statutory language contained in the *PCPA* in addressing industrial chemicals under *CEPA*, 1999. CELA's recommendations on this issue are found in the proposed amendments on environmental justice principles referenced above (see CELA June 16, 2016 Submission, pages 3-5), many of which Professor Scott agrees are principles she recommends to the Standing Committee (Scott letter, page 4).

The Assess-Regulate Issue

Professor Scott states that CELA's proposed amendments on environmental justice principles, with one exception, only focus on the need to consider vulnerable populations when assessing toxic substances but not when regulating them (Scott letter, page 3-4). This issue requires clarification. What the June 16th CELA submission stated was that the amendments we proposed were "illustrative of the approach CELA had in mind for embedding environmental justice principles throughout *CEPA, 1999*" and that more may well be warranted but had not been proposed at the time of writing (CELA June 16, 2016 Submission, page 5). We did not undertake

[2] Ruth Sullivan, *ibid.* at §14.28.
[3] *Ibid.* at §14.31.

a complete re-drafting of the entire statute on this point. We certainly agree with Professor Scott that environmental justice principles should be applied to both the assessment and regulation of toxic substances under the Act. As the 2016 CEPA Review proceeds, we may suggest additional amendments on the regulatory aspects of this issue as well.

Professor Scott states that amending, as CELA did in its June 16th submission, the section 93 regulation-making authority to explicitly authorize regulations to protect vulnerable populations from toxic substances simply grants the government enabling authority to act, not a duty to do so (Scott letter, pages 3-4). That is true. However, regulation-making authority is usually discretionary.

Professor Scott also states that the CELA proposal "does no more than codify the Government's existing powers. There is no doubt that the Government already has the legal ability, if it chooses, to protect vulnerable populations when regulating toxic substances under section 93" (Scott letter, pages 3-4). In short, Scott argues for a requirement that: "whenever a substance is identified as a toxic substance under *CEPA*, 1999, the Government…take "mandatory precautionary action to reduce exposures to that toxic substance over time". She adds that her legislative proposal to that end is contained in Recommendation 6 of her June 3, 2016 brief to the Standing Committee (Scott letter, page 4).

A review of Professor Scott's Recommendation 6 (Scott Brief, June 3, 2016, pages 14-18) makes it clear that it is predicated on substances being found to be toxic or capable of becoming toxic (whether or not they are also persistent, bioaccumulative, or inherently toxic) and listed in Schedule 1 in order for them to be regulated. In particular, Professor Scott states that: (1) determining a substance is toxic should lead to action by the government to prevent its release, but the current section 77(2)(a) allows the government to do nothing and should be repealed; (2) neither section 77, nor any other provision of *CEPA, 1999* provides any specific guidance on what preventive or control actions should be taken to regulate toxic substances; and (3) there is no duty on the government to undertake monitoring programs in relation to toxic substances. CELA agrees with these observations. However, some of the measures Professor Scott proposes in her Recommendation 6 are themselves assessment-type measures that are pre-conditions to regulation, and not regulation themselves (e.g. investigation of aggregate exposures, cumulative, and synergistic effects in relation to substances determined to be toxic or capable of becoming toxic – Scott Brief, June 3, 2016, page 17). Other of her proposed measures are not unlike those contained in our June 16th submissions (e.g. burden of proof on industry, greater focus on hazard) (CELA June 16, 2016 Submission, pages 5-8).

One further point should be addressed arising from Professor Scott's August 3, 2016 letter regarding the need to regulate toxic substances in order to protect vulnerable populations. The July 7, 2016 CELA alternatives assessment proposal, discussed below, is a form of mandatory precautionary action for all substances listed in Schedule 1 of *CEPA, 1999*. The CELA alternatives assessment proposal is not in the form of a regulation authorized by, or enabling authority under, section 93 because it constitutes an entire new proposed part of the Act (Proposed Part 5.1).The CELA proposal is that once listed in Schedule 1, toxic substances are subject to replacement by safer, including non-chemical, alternatives (CELA Submission, July 7, 2016). Accordingly, the CELA proposed amendments on assessment of alternatives go to the

core issue of how long a Schedule 1 toxic substance will be permitted to remain in industry and commerce as a matter of law before something safer must be substituted for it. The data contained in the CELA June 16th submission on the increasing emission levels in recent years of "CEPA-toxic" (i.e. Schedule 1) substances (including carcinogenic, reproductive, developmental toxicants, persistent, bioaccumulative, and inherently toxic substances) provide more than sufficient reasons as to why seeking safer alternatives is preferable to just using more (1) regulatory control measures of the type characterized by section 93, or (2) "soft regulation" approaches (use of measures that are not legally binding) favoured by government (CELA June 16, 2016 Submission, pages 9-17). Nonetheless, to understand the full scope of the measures we put forward and how they might benefit vulnerable populations, it is also necessary to examine CELA's alternatives assessment proposals.

Alternatives Assessment

Professor Scott states the following with respect to our July 7, 2016 proposed amendments on alternatives assessment:

1. Our proposal, which focuses on just "CEPA-toxic" substances (i.e. those contained in Schedule 1 of the *CEPA, 1999* List of Toxic Substances), is too narrow because it does not address existing substances already in Canada but not yet evaluated (e.g. those on the Domestic Substances List – "DSL" and awaiting evaluation under the Chemicals Management Plan – "CMP"), or substances new to Canada (i.e. those on the Non-DSL – "NDSL") where manufacturers, importers, or users seek to bring them into the country for the first time (Scott letter, page 5).

2. Our proposal requires government to prepare safer alternatives action plans rather than shift the burden to industry to demonstrate that a substance lacks safer substitutions and has essential uses (Scott letter, page 8).

3. Our proposal could result in as little as one substance undergoing alternatives assessment every two years and at this pace would be neither precautionary nor equitable because it would take decades or centuries for even known toxic substances (i.e. those listed in Schedule 1) to be evaluated for possible alternatives (Scott letter, pages 5-6).

4. Our proposal is also too narrow because it focuses on just industrial activity that releases or emits toxic substances to the environment and not commercial activity that imports or uses products containing toxic substances that risk consumer exposure (Scott letter, pages 6-7).

As an overall comment on Professor Scott's observations, CELA notes that: (1) it recommended applying alternatives analysis to "CEPA-toxic" substances first because they are the ones the government has itself identified as meeting the very stringent tests for listing as "toxic" under the Act and aggregate annual emission levels of these substances continue and in many cases have been increasing dramatically in recent years, though CELA recognizes that many other existing and new substances also should be subjected to alternatives analysis, and government resources should be made available to ensure such analysis occurs; (2) our proposal requiring government to prepare safer alternatives action plans acts as a benchmark standard against which to measure

the adequacy of industry substitution implementation plans, and without such prior government involvement it will be far easier for industry to seek the lowest common denominator approach to substitution in situations where the government will not otherwise be in a position to contradict industry assertions in a coherent and comprehensive manner; (3) our proposals for applying alternative assessment analysis on up to 20 toxic substances per year did not, but should, specify a minimum number of substances that should be subject to the process per year; and (4) relatively minor wording changes could be made to our proposals to ensure consideration of alternatives in respect of toxic substances in products. For greater clarity, we would add the following for the consideration of the Standing Committee on these matters.

The Focus on CEPA-toxic Substances

Professor Scott's letter states correctly that CELA's proposed new Part 5.1 respecting safer alternatives for priority toxic substances is limited to a focus on substances already determined to be "toxic" pursuant to section 64 of the Act and listed in the Schedule 1 List of Toxic Substances of *CEPA, 1999*. Professor Scott's letter also correctly states that the CELA proposal, as drafted and as we acknowledged in the proposal itself, does not apply to other existing substances, or to new substances. She states further that the CELA proposal is "limited to" a "very small group of toxic substances already listed on Schedule 1". Professor Scott's rationale for wanting to expand the universe of substances that are subject to alternatives analysis beyond the CELA proposal is that we need to step off the "toxic treadmill" for existing and new substances (Scott letter, page 5).

In principle, CELA agrees. However, it is not clear if Professor Scott is proposing to apply alternatives analysis to: (1) the 4,300 substances that emerged in 2006 from the 7-year categorization process (2000-2006) and became subject to the CMP process over the last ten years; (2) the roughly 1,500-1600 substances that remain to be evaluated under CMP3, and which the government classified as being of lower priority than the other 2,600-2,700 that have already gone through the CMP process; (3) the original 23,000 substances on the DSL; (4) the approximately 4,000-5,000 new substances that have been added to the DSL since 2006 from the NDSL; (5) just existing substances that are subject to ban in OECD countries, or under the European REACH program; (6) the 400-500 new substances (or new uses of existing substances) that will seek entry to Canada every year going forward; or (7) some other iteration of the problem.

In theory, there are many ways to structure an alternatives analysis program. CELA's concern is that for a government to go as a matter of law from no, or virtually no, track record on the issue of alternatives to examining many substances immediately through that lens is a recipe for regulatory failure in the absence of adequate resources to conduct such a program at that scale. CELA's rationale for focusing alternatives analysis initially on Schedule 1 substances is that by placing substances in Schedule 1 the government has signalled that in its view these substances are the worst of the lot it has evaluated. We may, and do, dispute whether all substances that should be in Schedule 1 are in fact in Schedule 1. But in CELA's view, it may be preferable to start by applying alternatives analysis to substances the government concedes are bad actors and has so designated as a matter of law. Moreover, despite the fact they are "already listed" in Schedule 1, virtually all are still in Canadian commerce and the data show that annual emissions

for many of these substances continue and, in many instances, are increasing, not decreasing, often despite being subject to regulation (CELA June 16, 2016 Submission, pages 9-17). Just because they are "already listed" in Schedule 1 does not mean they have ceased to be a problem for human health or the environment.

The CELA Proposal for Government Safer Alternative Action Plans

Professor Scott does not support our proposal that the government be responsible for the preparation of safer alternative action plans, suggesting instead that the burden simply be shifted to industry to demonstrate that a toxic substance lacks safer substitutes and has essential uses (Scott letter, page 8). As noted above, our proposal requiring government to prepare safer alternatives action plans establishes nation-wide priorities for substitution, and acts as a benchmark standard against which to measure the adequacy of industry substitution implementation plans. Without such prior government involvement, it will be far easier for industry to seek the lowest common denominator approach to chemical substitution in situations where the government will not otherwise be in a position to contradict industry assertions in a coherent and comprehensive matter. Put simply, the government needs to develop expertise in alternatives analysis, such as that which has been developed in the Commonwealth of Massachusetts and its Toxics Use Reduction Institute, not only to protect the public but also to guide industry to safer alternatives going forward. If the government simply remains a passive regulator, reviewing industry substitution plans as they come through the door, there is a significant potential that the theoretical benefits of safer substitution will not occur, or be implemented, in practice.

However, we do make one proposed change to our alternatives assessment proposal by adding a provision that makes it clear that the burden of persuasion is on an industrial facility where it seeks to obtain a variance from the deadline for implementing a substitute for a priority toxic substance. This additional provision (see underlining below) reads as follows:

> **Burden of persuasion**
> 103.5(3.1) For the purposes of subsection (3), the burden of persuasion rests with the industrial facility that there is no safer alternative that is technically or economically feasible for the facility's particular use of the substance.

We also propose to add two definitions to assist in interpretation of certain terms used in section 103.5 (see underlining below):

> **Definition**
> 103.1…
> "economically feasible" means that a safer alternative does not significantly reduce the operating margin of the industrial facility;
>
> "technically feasible" means that the technical knowledge, equipment, materials, and other resources available in the marketplace are expected to be sufficient to develop and implement a safer alternative;

The Pace of Examination of Alternatives to Toxic Substances

CELA would certainly be concerned if Professor Scott's prediction that CELA's proposal could result in an "alternatives assessment for as few as one toxic substance every two years" came to fruition (Scott letter, page 6). For the assistance of the Standing Committee, the current wording of our proposed Part 5.1, sections 103.2(1) and 103.2(6) read as follows:

> **Identification of Priority Toxic Substances**
> 103.2(1) Not more than one year following the coming into force of this Part, and at two year intervals thereafter the Minister, utilizing the assistance of any advisory committees the Minister considers appropriate, shall identify and publish a list pursuant to subsections (4) and (5) of not more than twenty priority toxic substances contained in the List of Toxic Substances in Schedule 1.
>
> …
>
> **Ministerial authority to add to list**
> (6) Notwithstanding subsection (1), the Minister may at any time add a substance to the first or subsequent lists if it meets one or more of the criteria set out in subsection (3), in which case subsections (4) and (5) apply and each such list may contain more than twenty priority toxic substances at any one time.

If the CELA proposal applied to as many as 20 toxic substances every two years the timeframes set out under our proposed Part 5.1 would result in the safer substitution of virtually all of the approximately 130 substances currently in Schedule 1 of the Act[4] in slightly longer than a decade (i.e. roughly 12-14 years). If the Minister exercised her discretion under section 103.2(6), and added more than 20 substances to a list under our proposal, this would result in the safer substitution of virtually all of the approximately 130 substances currently in Schedule 1 in an even shorter period of time.

However, we agree with Professor Scott that as currently worded the exercise of Ministerial discretion could see as few as only one substance being proposed every two years under our section 103.2(1). Therefore, we would recommend a minimum threshold number of substances be required to be listed every two years. To illustrate, below we have amended section 103.2(1) (see underlining) by inserting such a minimum threshold as an example:

> **Identification of Priority Toxic Substances**
> 103.2(1) Not more than one year following the coming into force of this Part, and at two year intervals thereafter the Minister, utilizing the assistance of any advisory committees the Minister considers appropriate, shall identify and publish a list pursuant to subsections (4) and (5) of not less than fifteen, and not more than twenty priority toxic substances contained in the List of Toxic Substances in Schedule 1.

This scenario (if just the minimum number was applied) would result in the safer substitution of virtually all of the approximately 130 substances currently in Schedule 1 of the Act in less than two decades (i.e. roughly 18 years). CELA has chosen to use fairly conservative minimum and maximum numbers under this scenario. What the optimum minimum and maximum numbers should be will be a function of the resources dedicated to the program. If even a fraction of the resources that have been dedicated to the CMP program are applied going forward for use in an

[4] It should be noted that a small number of toxic substances listed in Schedule 1 are effectively banned (e.g. Mirex). Accordingly, CELA's proposed Part 5.1 would not likely need to be applied to them.

alternatives assessment program, achieving expeditious safer substitution of problematic chemicals along the lines proposed by CELA, or even faster, appears entirely feasible.

Toxic Substances in Consumer Products

Finally, Professor Scott states that our proposal does not appear to be designed to deal directly with exposures to toxic substances arising from consumer products. She notes that our definition of "industrial facility" appears to exclude businesses that do not manufacture, import, process, or use toxic substances themselves, but instead import or sell products that contain toxic substances (Scott letter, page 6-7). Our alternatives assessment proposal is intended to address priority toxic substances in consumer products (see CELA July 7, 2016 Submission, section 103.5(2)(c) and (e)). However, our proposal can be improved upon in this regard in order to make it clearer that toxic substances in consumer products are meant to be caught as well. The current definition of "industrial facility" in our proposal reads:

> **Definition**
> 103.1…
> "industrial facility" means a place where a priority toxic substance is manufactured, imported, processed, or used; (CELA July 7, 2016 Submission, page 3).

We propose to amend that definition to read as follows (see underlining):

> **Definition**
> 103.1…
> "industrial facility" means
> (a) a place where a priority toxic substance is manufactured, imported, processed, or used; or
> (b) a place where a product is manufactured, imported, sold, or offered for sale and the product, including a consumer product, contains a priority toxic substance;

We would also propose to add under our section 103.1, a definition for "consumer product" based on the *Canada Consumer Product Safety Act*[5]:

> "consumer product" has the same meaning as in the *Canada Consumer Product Safety Act*, S.C. 2010, c. 21;"

Summary

With respect to CELA's proposals regarding **environmental justice** issues, we do not recommend:

(1) a preamble-only approach to the issue of environmental justice;

(2) adoption in *CEPA, 1999* of the *PCPA* language on vulnerable populations; or

[5]The *Canada Consumer Product Safety Act*, S.C. 2010, c. 21, s. 2 defines "consumer product" as follows: "consumer product" means a product, including its components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes its packaging".

(3) an assessment-only approach to incorporation of environmental justice principles in *CEPA, 1999*.

With respect to CELA's proposals regarding **alternatives assessment**:

(1) we recommend applying alternatives analysis to "CEPA-toxic" substances first because they are the ones the government has itself identified as meeting the very stringent tests for listing as "toxic" under the Act and aggregate annual emission levels of these substances continue and in many cases have been increasing dramatically in recent years. CELA recognizes that many other existing and new substances also should be subjected to alternatives analysis, and government resources should be made available to ensure such analysis occurs;

(2) our proposal requiring government to prepare safer alternatives action plans acts as a benchmark standard against which to measure the adequacy of industry substitution implementation plans. Without such prior government involvement it will be far easier for industry to seek the lowest common denominator approach to substitution in situations where the government will not otherwise be in a position to contradict industry assertions in a coherent and comprehensive manner;

(3) our original proposals for applying alternative assessment analysis on up to 20 toxic substances every two years did not, but should, specify a minimum number of substances that should be subject to the process every two years. We have amended the proposal to require a minimum number every two years; and

(4) relatively minor wording changes could be, and have been, made to our proposals to ensure consideration of alternatives in respect of toxic substances in products.

We would ask that in addition to the attached being distributed to the Committee members that it also is posted on the Committee website.

Should Committee members have any questions arising from the attached, or wish us to re-appear before the Committee to discuss this material, please feel free to contact either myself or Ms. de Leon.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Joseph F. Castrilli
Counsel

Fe de Leon
Researcher