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May 10, 2022

Chantal Cardinal  
Clerk of the Standing Senate Committee on Energy,  
the Environment and Natural Resources  
The Senate of Canada  
Ottawa, Ontario K1A 0A4

Dear Ms. Cardinal:

**Re: Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.**

We are enclosing our oral testimony for our appearance before the Committee on the above matter.

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

Should Committee members have any questions arising from the attached, please feel free to contact either myself or Ms. de Leon.

Yours truly,  
**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

A handwritten signature in black ink that reads 'Joseph Castrilli'.

Joseph F. Castrilli  
Counsel

c.c. Fe de Leon, CELA

Encl. CELA Oral Testimony on Bill S-5

**ORAL TESTIMONY OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
BEFORE THE STANDING SENATE COMMITTEE ON ENERGY, THE  
ENVIRONMENT AND NATURAL RESOURCES ON BILL S-5 AMENDMENTS TO  
THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999**

The emission of toxic substances to the environment is a serious and growing problem globally, as well as in Canada. In materials we submitted to the Committee, the Canadian Environmental Law Association (CELA) has focused on the emission of cancer-causing agents to illustrate that Bill S-5 will not help solve the problem unless the Bill improves the approach of the Canadian Environmental Protection Act (CEPA) to pollution prevention.

**The Problem Pollution Data Reveals**

CELA analyzed 13 years of national pollution data and found that while federal requirements are reducing on-site air emissions of some of the most harmful chemicals to human health and the environment, on-site disposal and land releases of the same chemicals have been dramatically increasing over the same period. The data appears in Appendices B and C to our written testimony.

To provide the committee with just one example, the CELA review found that in Quebec, for arsenic and its compounds, known cancer-causing agents designated as toxic under CEPA, on-site air emissions increased 49 percent during the period 2006 to 2018. However, on-site disposal / land release of arsenic and its compounds increased by more than 10,800 percent during the same period.

The data for forty-three cancer - causing agents listed in CEPA's Schedule 1 List of Toxic Substances taken together show similar if not as dramatic trends - usually in the form of decreased on-site air emissions but increased on-site impacts to land.

The bottom line: moving a known or suspected carcinogen from one environmental pathway (air) to another (land) does not represent progress in protecting human health and the environment. It merely represents putting a different part of the environment and a different group of people at risk. It is not a solution to the problem for the 150 chemicals the federal government has designated as "toxic" and placed in Schedule 1 of CEPA, let alone the forty-three cancer-causing agents in that Schedule.

**A Proposed Solution From the 1995 House Standing Environment Committee Report**

What is needed is a strategy of prevention and elimination of Schedule 1 toxic substances from Canadian commerce to the maximum extent possible. This was the expectation for CEPA as described in a 1995 House Standing Environment Committee report, summarized in our February 2022 submissions. The goal was not simply to shift emissions of toxics from one environmental pathway to another.

## **Why CEPA Contributes to the Problem and Bill S-5 Does Not Help**

There are three things wrong with the existing statute that Bill S-5 does not correct on the issue of pollution prevention:

1 - pollution prevention is discretionary not mandatory for toxic substances listed in Schedule 1 (this situation has resulted in only one-sixth of all substances in the Schedule in the last 20 years having a pollution prevention plan, a rate that, if continued, will mean that all existing toxic substances in Schedule 1 will not have a plan before the year 2100);

2 - the pollution prevention plan authority in the Act is meant to control the creation and use of toxic substances, however, because of the approach that has been applied under CEPA it has become predominantly a pollution abatement measure (i.e., where only emission concentrations of a substance are sought to be controlled) – something the 1995 House Standing Environment Committee report warned against doing – the result has allowed such substances to stay in Canadian commerce and the environment;

3 - Bill S-5 does not make substitution of safer alternatives to toxic substances a central focus of amendments to the Act thus placing Canadians and the environment at risk, and Canada at a disadvantage relative to other countries that have done so.

Additional problems include:

4 - Bill S-5 proposes to recognize a right to a healthy environment but fails to provide an enforceable remedy under Part 2 of the Act that would make the right effective (the existing remedy provision in CEPA (section 22) has been unused for over 20 years because of a wide variety of procedural barriers to its use recognized as a problem by previous house standing environment committees that have examined the issue);

5 - Bill S-5 also proposes to:

- no longer identify Schedule 1 of the Act as a list of toxic substances – a change a 2007 house standing environment committee report did not support because of concern that it would invite litigation on whether the Act continued to be a valid exercise of the criminal law power under the Constitution; and
- divide the list of 150 substances in Schedule 1 into two classes (Parts 1 and 2) with the larger class (Part 2), consisting of almost 90 percent of the full list of substances in the Schedule, including 40 carcinogens in this group, being made subject to less stringent measures that on their face do not include prohibition, or examination of safer alternatives, compared to those proposed to be listed in the smaller class (Part 1).

Both these Schedule 1 proposals, if enacted, could together sow the seeds of constitutional confusion, divert government resources to defending lawsuits on designation decisions, and have a chilling effect on needed control of toxic substances.

### **How Should Bill S-5 Amend CEPA?**

CELA proposals to amend the Act, as set out in our March 2022 document provided to the Committee, would:

- (1) make pollution prevention mandatory for all chemicals Canada has designated as toxic under the law;
- (2) enshrine analysis of safer alternatives to chemicals as a central pillar of CEPA;
- (3) impose mandatory chemical testing obligations on the private sector where information is not available to determine if a substance is toxic or capable of becoming toxic;
- (4) retain certain measures Bill S-5 would repeal (such as virtual elimination authority and identification of substances as toxic to protect CEPA's authority to address such substances under the criminal law power of the Constitution); and
- (5) provide a clear right to, and effective remedy for, a healthy environment, among other measures.

Thank you.