



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 12, 2009

Standing Committee on Energy, Environment and Natural Resources
c/o Lynn Gordon, Clerk of the Committee
via email: gordol@sen.parl.gc.ca

Dear Ms. Gordon,

Re: Bill S-212 an Act to amend the *Canadian Environmental Protection Act, 1999*

Please find enclosed a joint submission of Ecojustice and the Canadian Environmental Law Association on the above-mentioned matter, prepared for the presentation before the Senate Committee on November 17, 2009.

If you have any questions or comments, please do not hesitate to contact me anytime at (416) 368-7533, ext. 31.

Yours truly,

A handwritten signature in black ink that reads "Marlene Cashin".

Marlene Cashin
Staff Lawyer
Ecojustice



BILL S-212
Ecojustice and Canadian Environmental Law Association Submissions
November 17, 2009

Introduction

These are the joint submissions of Ecojustice Canada (“Ecojustice”) and the Canadian Environmental Law Association (“CELA”) on Bill S-212, An Act to amend the *Canadian Environmental Protection Act, 1999* (“CEPA” or the “Act”).ⁱ

Ecojustice Canada (formerly Sierra Legal Defence Fund) is an independent, non-profit organization supported by 30,000 Canadians. We have a staff of lawyers and scientists who provide services to citizens and groups working to improve environmental laws. Since forming in 1990, law reform and litigation around the protection of the environment have formed the core of Ecojustice’s work. Pollution prevention has been of great concern to many of Ecojustice’s clients and Ecojustice is actively engaged in trying to improve and strengthen the laws that will secure the health and environment of Canadian communities.

CELA is a public interest law group founded in 1970 for the purpose of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental matters, including cases involving pollution prevention. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Ecojustice and CELA support the proposed enactment which would see CEPA amended to:

- remove the requirement that an individual show that an alleged offence under the Act has caused significant harm to the environment in order to proceed with an environmental protection action;
- allow for fine-splitting; and
- permit orders for the recovery of costs in private prosecutions for offences under the Act.

These submissions, while containing some general comments regarding Bill S-212, will primarily respond to concerns raised by the Honourable Hector Daniel Lang during debate on the motion of the Honourable Senator Banks, during the second reading of the bill.ⁱⁱ

These submissions will focus on the following four issues:

- Significant Environmental Harm;
- Costly Private Prosecutions;
- Fine Splitting in Private Prosecutions; and
- Limitation Periods.

1. Significant Environmental Harm

Bill S-212 proposes to remove the requirement that an individual show that an alleged offence under the Act caused significant environmental harm to the environment in order to proceed with an environmental protection action. Environmental lawyers have long been of the view that since environmental protection action only arises from an infraction of a CEPA provision, it is arguably implicit that such an infraction has caused significant harm to the environment.ⁱⁱⁱ The removal of the requirement to show "significant environmental harm" will effectively remove at least one of the barriers to public participation and the use of environmental protection actions.

2. Costly Private Prosecutions

Private prosecutions are important processes whereby the public is able to become directly involved in protecting the environment. Both federal and provincial legislation contain provisions concerning the ability to bring a private prosecution and authorizing the Attorney General to intervene and stay.^{iv} However, numerous obstacles associated with these types of prosecutions stand in the way of pursuing violations of environmental legislation. Commentators have remained consistent in their view that private prosecutions are costly, difficult and loaded with hazards. In his article on individual enforcement of Canada's environmental laws, Roger Proctor notes, "[t]he weak-spirited need not even try."^v

Various authors have written regarding the inherent value in private prosecution as a viable option for ensuring compliance with environmental laws. Similarly, others have written about the need for strict enforcement and zero tolerance in environmental offences (i.e. an effective threat of prosecution -- and resulting liability -- is really the only thing that influences positive corporate behaviour towards the environment). John Swaigen, for instance, has said that prosecution is underutilized, and emphasises that:

"prosecuting flagrant environmental offenders is also the right thing to do. It is likely that every prosecution has a ripple effect throughout the industry and that a single prosecution has a much greater deterrent effect on other potential offenders than administrative remedies."^{vi}

In the same vein, Dianne Saxe has said:

Anecdotal experience in Ontario suggests that a vigorous prosecution policy, added to a well-developed system of administrative controls, can have a notable effect upon corporate behaviour. Since 1985, the prospect of prosecution and of

