



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

IN SUPPORT OF A FEDERAL ENVIRONMENTAL BILL OF RIGHTS

***SUBMISSIONS TO THE HOUSE OF COMMONS STANDING COMMITTEE ON
ENVIRONMENT AND SUSTAINABLE DEVELOPMENT ON
BILL 469
A CANADIAN ENVIRONMENTAL BILL OF RIGHTS***

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November 1, 2010

INTRODUCTION

CELA is pleased to have the opportunity to appear before the Committee today, and appreciates the invitation extended by you to do so to speak to Bill C-469, the proposed Canadian Environmental Bill of Rights (referred to herein as “CEBR”). In the time we had available, we have not had the opportunity to both prepare our remarks and have them translated, and so we will provide the clerk of the Committee with a written copy of our remarks to be provided to you in due course. I wish to thank Richard Lindgren, long-time counsel with CELA for his contribution to this brief; this was especially valuable given his direct involvement in the creation of the Ontario Environmental Bill of Rights.

CELA is a federally incorporated not for profit corporation with a mandate to use law to protect and improve the environment, and to advocate for environmental law reform. We are also funded as an Ontario Legal Aid specialty clinic on the topic of the environment. Accordingly, we are concerned in particular with the rights of the public to participate in environmental decision making, to obtain information about activities and decisions that will affect their environment, and to ensure that participation is available to all Canadians no matter what their income, and no matter how removed they may be from direct contact with those who make such decisions. In our view, the provisions of Bill C-469 are not only important for environmental protection, they also deal with matters of fundamental justice and equity in the provisions to better involve Canadians in environmental decisions, and to provide statutory remedies.

I would note in passing that it is CELA 40th anniversary this year and in preparing for our anniversary event, a review of our archives show that in our very first years we were calling for a federal environmental bill of rights. Proposals for a federal environmental bill of rights have come up in Parliament periodically almost every decade since. We would submit that it is now time to proceed, and furthermore, we now have the benefit of much experience of other EBR systems such as Ontario’s EBR which was passed in 1994, to help in designing a very good Canadian federal EBR.

The following are our general and specific comments on Bill 469 for your consideration.

A. GENERAL COMMENTS

1. Since CELA’s inception in 1970, CELA has long advocated entrenching environmental rights into federal law. Accordingly, CELA strongly supports the proposed CEBR, and we urge all parties to ensure the timely passage and implementation of this important legislation. While CELA still advocates that substantive environmental rights should be incorporated in the *Canadian Charter of Rights and Freedoms*, we support the passage of Bill C-469 because unless and until such *Charter* amendments are made, the CEBR places long overdue environmental rights and remedies on a firm statutory basis at the federal level, and even if such *Charter* amendments were eventually made, Bill C-469 would become an important adjunct to those constitutional rights.
2. Since the early 1990s, CELA has been extensively involved in the drafting, passage and usage of Ontario’s EBR. In particular, CELA was a member of the Environment Minister’s Task Force

that drafted the EBR, and on behalf of our clients, CELA lawyers have made extensive use of the various legal tools within Ontario's EBR. Since the CEBR proposes to adopt many of the same tools, CELA submits that there are "lessons learned" from Ontario's EBR experience which should be considered by the Standing Committee.

B. SPECIFIC COMMENTS

3. While CELA supports the current version of the proposed CEBR, there are opportunities to improve and strengthen the Bill, having regard to Ontario's EBR experience to date. Our specific comments and recommendations on the CEBR may be summarized as follows:
 - (a) CELA supports the various environmental principles set out in section 3 of the CEBR. However, these environmental principles should not merely exist as interpretive aids when construing the CEBR. Instead, they should be established as additional substantive purposes of the legislation (as set out in section 6 of the CEBR), and should form part of the federal government's affirmative legal duties under the legislation.
 - (b) It is unclear whether the section 10 right to access environmental information is intended to change or trump existing federal access to information legislation. This should be clarified in the CEBR prior to its passage, i.e. that such access is in addition to other existing federal access to information provisions, but that information relevant to environmental decision making will in particular be provided in a timely manner so as to be available to members of the public commenting on those decisions.
 - (c) CELA supports section 11's attempt to safeguard public interest standing before the courts or administrative decision-makers. However, this section, as drafted, stipulates that the federal government shall not "deny" any resident the right to participate in decision-making or to appear in court. Strictly speaking, it is usually not the federal government that "denies" (or grants) standing to certain parties; instead, the issue of standing is typically determined by the individual court or decision-maker after hearing submissions from the parties (including the federal government). Thus, it would be more helpful for section 11 to specify that the federal government shall not "deny, oppose, or otherwise contest" the standing of residents interested in environmental protection. In addition, the term "resident" should be defined in the CEBR to ensure that the various rights in the CEBR are conferred upon natural persons as well as incorporated entities such as environmental organizations.
 - (d) CELA supports section 12's creation of a positive duty on the federal government to ensure meaningful public participation in decisions relating to federal Acts, regulations, policies and instruments. In our view, this has been one of the more important aspects of Ontario's EBR, and we would encourage similar provisions at the federal level. However, it might be helpful for section 12 to include additional subsections in order to elaborate upon the various elements of this duty (i.e., creation or maintenance of electronic registries, provision of mandatory public notice, provision of minimum comment periods, etc.). Alternatively, these notice/comment requirements could be prescribed by regulations under section 27 of the CEBR.

- (e) CELA supports section 13's establishment of the public right to seek a review of the need to make or amend federal Acts, regulations, policies, or instruments in order "to protect the environment". However, this ground for review is narrower than the stated purposes of the CEBR. Therefore, it might be useful for section 13 to specify that the application for review is available to ensure compliance (or consistency) with the purposes of the Act.
- (f) CELA supports the CEBR's proposal to create a general public right to request investigations of suspected environmental offences by way of section 14. However, one problem that has emerged under similar provisions of Ontario's EBR is that at the outcome of the investigation, the relevant official may confirm that an offence has been committed, but then he/she does not undertake any action to address the non-compliance (i.e., prosecution, mandatory abatement, etc.). To overcome the lingering problem of governmental discretion, CELA suggests that section 15 of the CEBR should be amended to impose a positive duty on the responsible Minister to initiate appropriate legal proceedings (i.e. prosecutions or civil action), or to utilize appropriate legal measures (i.e., orders, licence revocations, etc.) in relation to investigations which find evidence of non-compliance. Such a provision would hopefully reduce the need for individual citizens to commence judicial review applications under section 16(1)(c) against Ministers who fail or refuse to "enforce an environmental law."
- (g) CELA supports section 16's establishment of a public right to seek judicial review in certain circumstances. In our view, this is an important mechanism for ensuring that the purposes of the CEBR are achieved, and for ensuring that federal officials may be held legally accountable for their environmental acts or omissions under the CEBR. We also view this provision as a significant improvement over Ontario's EBR, which limits judicial review opportunities available to public interest litigants under the EBR. In our experience, the environmental track record to date clearly demonstrates that public interest groups use judicial review as a last resort only after other non-litigious methods of resolving disputes have been tried without success. In other words, the judicial review applications brought to date by environmentalists have tended to raise important or novel questions of statutory interpretation, and it has been in the public interest to have these questions adjudicated in court in order to clarify the law's interpretation or application.
- (h) CELA supports the CEBR's attempts to limit undertakings as to damages (section 17(3)), and to create special cost rules (section 21). In our opinion, this removal of potential fiscal barriers is necessary in the public interest, and represents an improvement over Ontario's EBR.
- (i) CELA supports section 23's creation of a new civil right to sue in respect of significant environmental harm arising from actual or imminent contraventions of federal Acts, regulations or instruments. From the public interest perspective, we do not anticipate that section 23 will result in a floodgate of frivolous or vexatious civil actions, particularly given the cost, complexity, uncertainty and time-consuming nature of environmental litigation. We also view this new right of action as far preferable to the unduly complex and underutilized right of action to protect public resources under section 84 of Ontario's EBR. In the unlikely event that a non-meritorious action is brought under section 23, we

are confident that existing rules of court can and will be used by defendants to have the action dismissed at the earliest possible stage without a trial.

- (j) CELA supports section 28's proposed amendment to the *Canadian Bill of Rights*. As noted above, CELA's preference is for the *Charter* to be amended to include a substantive right to environmental quality. However, given the difficulty and complexity associated with amending the *Charter*, CELA submits that the CEBR's amendment of the *Canadian Bill of Rights* should be undertaken as an interim measure, and should remain in place until such time as the necessary *Charter* amendment has been passed.

C. CONCLUSIONS

- 4. For the foregoing reasons, CELA strongly supports the enactment of the CEBR because the Bill would help ensure access to environmental justice in Canada. Accordingly, CELA submits that the Standing Committee should recommend speedy passage of the CEBR, either in its present form, or in accordance with the above-noted changes outlined above.

All of which is respectfully submitted

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