Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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The Honourable James Bradley
Minister of the Environment
135 St. Clair Avenue West
15th Floor
Toronto, Ontario
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Dear Mr. Bradley:

RE: BILL 112 -
ENVIRONMENT ENFORCEMENT STATUTE LAW AMENDMENT ACT, 1986

I. INTRODUCTION

CELA has now had an opportunity to review Bill 112 and believes that it will strengthen the existing enforcement provisions of the Environmental Protection Act (EPA), the Ontario Water Resources Act (OWRA) and the Pesticides Act and will provide the courts with some more imaginative sentencing tools than they presently have to deal with environmental offences. The need for such law reform has been long overdue and, as you have pointed out in your Statement to the Legislature, these amendments are needed to ensure that the penalty provisions of Ontario's environmental legislation are more than just a licence to pollute.

However, while CELA believes that these amendments are a step in the right direction, we feel that the package set out in Bill 112 falls short of the mark in addressing the gaps in our present penalty provisions. We understand that the Bill may be amended before reintroduction in the fall session of the Legislature. We would urge you to do so, and at that time consider some of our recommendations which we will outline below. Rather than putting forward new amendments every six months or every year, the opportunity to reintroduce a strengthened Bill 112 at this time would allow the Ontario Government to move into the forefront in Canada with an innovative environmental enforcement regime. We contend that the public is behind stronger environmental legislation and would support a further stengthening of Bill 112. Our remarks will address certain aspects of the Bill we support and outline areas where the Bill falls short in meeting the goals of improved enforcement mechanisms. CELA will specifically address the issue of minimum fines, which we advocate should be an important component of any environmental enforcement scheme.

II. COMMENTS ON THE PROVISIONS OF BILL 112

A. The Case for Minimum Fines

In respect to fines, Bill 112 in its present form simply increases the maximum fines for various offences committed under Ontario's environmental statutes. Only one section of the Bill provides for a minimum fine and this relates to offences under section 147 of the EPA involving hazardous waste and hauled liquid industrial waste. The question thus becomes whether a minimum fine should be extended to other offences under Ontario's three environmental statutes.

In general, the appropriateness of fines in environmental prosecutions is beyond question. English and American research suggests that fines, particularly heavy ones, are the most effective penalties for virtually all types of offenders.[1] Commentators have argued that the main response to pollution offences must, of necessity, be economic.[2] This is because fines are not intended to rehabilitate the offender; instead, they are "unequivocably punative and designed to deter."[3] The deterrent value of a fine, however, is largely dependent upon the size of the available fine and the willingness of judges to impose large fines. Accordingly, it is quite clear that fines which are limited by low legislative ceilings, or by judicial conservatism, will have little or no deterrent effect on potential offenders.

This is particularly true in environmental prosecutions, where maximum fines for statutory breaches have traditionally been low, and where judges are often reluctant to impose maximum fines.[4] Thus, there is a widespread perception that low pollution fines serve only as "licences to pollute":

> There is...the suspicion that the small penalties specified (usually fines less than a maximum figure) fail to provide an effective deterrent. The high percentage of guilty pleas...followed by fines smaller than the maximum, suggests that the fines may be regarded by some industries as merely part of the cost of doing business.[5]

This contention has been supported in Ontario by the 1983 Peat, Marwick study done for your Ministry which found that in many cases companies found it less expensive to continue polluting than to comply with government requirements for pollution abatement.

Faced with this problem, the automatic response by legislatures has invariably been to raise maximum fines. As John Swaigen found in his Sentencing Report for the Law Reform Commission, while simply "raising the maximum has resulted in a slight upward pressure on fines generally, and has freed the courts to impose very high fines in isolated cases, the vast majority of fines remain at the bottom end of the spectrum."[6] Therefore, it is

possible for a judge to fine a corporate polluter several thousand dollars for water pollution, while another judge may fine a similar corporate polluter a token dollar for essentially the same offence. In Ontario, we have the unfortunate case where Cyanamid Ltd. was fined $1.00 under the Fisheries Act for polluting the Welland River while, in other cases under that Act, corporations have been fined in excess of $20,000. Not surprisingly, much of the literature which criticizes excessive judicial sentencing discretion focuses on the disparity of sentences imposed on defendants in similar cases.[7]

What is required, then, is a sentencing framework which ensures the fulfillment of two fundamental objectives: that judges impose sufficiently large fines which reflect the gravity of pollution offences and which act as a deterrent to the offender and others; and secondly, that defendants who commit roughly similar acts or omissions will be treated in a more or less equal manner.

These dual objectives may be achieved in one of the following five ways:

(a) Ontario's environmental statutes could be amended to facilitate greater appellate review of sentencing decisions. As has been pointed out in the United States, a "common law of sentencing" would soon emerge, thereby limiting the amount of sentencing disparity. The main drawback to this suggestion is that appellate review is costly and time-consuming; therefore, it would be necessary to streamline the review process in order to expedite environmental sentence appeals.

(b) As is sometimes done in the United States, sentencing could be handled by a special sentencing council or panel once an adjudication of guilt has been made by a judge. Ideally, these panels would consist of at least three members with expertise in the environmental field. Presumably, the need for consensus among the members would lead to the rejection of sentences at both ends of the spectrum, and would result in sentences which are publicly and politically acceptable. Undoubtedly, this proposal would be costly to establish; however, it has been recognized that these panels are best suited for specialized or unusual cases, such as environmental prosecutions.[8]

(c) The environmental statutes could be amended to introduce the concept of "flat-scale sentencing." Under this scheme, if a judge decides to impose a fine, his discretion as to the size of the fine is limited to two penalty scales or tariffs. The lower one is for the so-called "typical offender," with the possibility of a slight increase or decrease depending on the surrounding circumstances. The second, higher scale is for the "serious offender," with the possibility only of an

increase if specified aggravating factors are present (i.e., wilfullness, great risk of harm, large amount of actual damage).

(d) Related to flat-scale sentencing is the concept of "presumptive sentencing." Upon conviction for a specific offence under the proposal, a particular legislatively defined penalty is "presumptively" the one to be imposed unless the judge can find extraordinary circumstances which demand the imposition of a harsher or lighter sentence. It is interesting to note that an American Task Force on Criminal Sentencing has recommended that presumptive sentencing should be adopted as a general model of sentencing.[9]

(e) Finally, the environmental statues could be amended to provide mandatory minimum sentences for offences against the environment. For example, if an offender commits a specified offence, then that person receives a penalty ranging from a mandatory minimum to a particular maximum. The American task force has recognized that while mandatory minimum sentencing is not suited as a general approach for all offences, there are nevertheless some crimes for which there should be mandatory minimum sentencing. Arguably, environmental offences fall into this category of offences which call for mandatory minimum sentences, especially given the potentially serious consequences of some environmental abuses. It is suggested that if adopted in Ontario, mandatory minimum fines would not totally eliminate judicial discretion; rather, the discretion would be structured in order to give judges a common starting point for sentencing.

Mandatory minimum sentencing holds much promise for environmental prosecutions, as minimum sentences have "the most worthy objective of increasing the deterrent effect of the penalty."[10] Similarly, it is likely that sentencing disparity would be significantly reduced within mandatory minimum sentencing.[11] It is essential, however, that the minimum fines be sufficiently large so as to be more than a nuisance to potential offenders:

> If the legislature were to spell out exactly what the fine was in fact likely to be, the person in question might be deterred from committing the offence...[but] the size of the fine must be large enough to constitute a real threat instead of a mere nuisance.[12]

At the same time, the minimum sentence cannot be excessively high, or judges may become relucant to convict minor offenders.[13] It could, however, be countered that it is preferable to keep fines uncertain, as this would create a fear in potential offenders that could face the maximum fine.

But as noted above, it is well known that judges rarely, if ever, impose maximum fines. Moreover, most offences are committed on the premise that the offender will not be caught and convicted; thus, most people "on the verge of committing an offence tend to minimize the consequences."[14]

It may also be possible for the Ontario Legislature to impose a "quasi-minimum" sentence for environmental offences. As in "presumptive sentencing," the Legislature could specify the minimum penalty to be imposed for certain offences unless there are special circumstances, set out in a written sentencing decision, which require a penalty smaller than the minimum. One writer has argued that "such provisions constitute a forceful directive to the courts as to the policy they are to follow in normal cases, yet it enables them to deviate from this policy if there are unusual circumstances which render this desirable."[15]

It should also be noted that, presently, section 60 of the Provincial Offences Act provides for relief against minimum sentences in appropriate circumstances. The section provides that:

> 60(2) Notwithstanding that the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

CELA therefore recommends that Bill 112 be amended to provide for minimum fines in all three environmental statutes. We would contend that section 60 of the Provincial Offences Act would take care of the rare "smokey barbeque" case that may find its way to court. CELA would also recommend that there be higher minimum fines specified for corporations than individuals. This distinction would reflect the fact that corporations generally have greater financial resources than individuals, and that corporations generally have a greater capacity to commit serious environmental harm. This principle has already been reflected in Bill 112 in the differentiation between individuals and corporations in regard to minimum fine provisions for offences involving hazardous and hauled liquid industrial waste.

CELA contends that not only would a minimum fine system control the current judicial discretion which often leads to inequities in sentencing, but it would also ensure that offenders are subject to penalties which would emphasize the uniqueness and seriousness of environmental offences. The case for minimum fines has been succinctly summarized by one writer as follows:

> The main aim of [mandatory minimum sentences] is clearly that potential offenders should know that to commit and be convicted of the offence in question will inevitably result in the imposition of a penalty at least as severe as the minimum specified by law and, to that extent, he cannot hope for any mercy form the court, since the court will have no discretion in the matter.[16]

B. There Should be Higher Maximum Fines As Well

On this issue, CELA endorses the position taken by Pollution Probe that the maximum fines should initially be raised in Bill 112 and that either future raises in fines should be tied to inflation or that there be a statutorily mandated review of fine provisions every three years.

C. Miscellaneous Amendments

CELA recommends that the phrase "upon application of the Minister" be deleted to the proposed new section 146c which would allow the court to make an order requiring a convicted person to take action to prevent, eliminate and reduce the effects of the offence on the natural environment and to restore the natural environment. CELA would also recommend that the phrase "on the application of the Director" be deleted from the proposed new section 146d which allows the court to suspend any licence held under the Act by a person who is in default of payment of a fine imposed for contravention of the Act.

CELA believes that the court should be given the discretion to use these tools in relation to all environmental offences and that they not be available only on the application of the Minister or Director. The proposed sections would limit the courts in applying these types of orders in private prosecutions, even though the environmental damage may be just as serious in those situations as on a charge brought by the MOE. There would seem to be no rationale for this additional cumbersome step of obtaining the Minister's or Director's application in order for the court to make these types of orders.

CELA would also urge that Bill 112 amend the OWRA to provide that the Act binds the Crown. Presently, both the EPA and Pesticides Act contain provisions which bind the Crown. This seems to be an anachronism from years gone by and there would appears to be no jusitification to continue to grant the Crown immunity from this Act. The government should be seen as a leader in environmental protection and should not hide behind immunity provisions.

Again CELA would like to echo Pollution Probe's concerns about the effectiveness of the proposed amendment which would allow the

courts to suspend licences held under environmental statutes for failure to pay fines. As Probe has stated, many companies do not presently operate with certificates of approvals, due to a loophole in our environmental legislation. We need immediate amendments to the EPA and OWRA to provide that it will be an offence to operate without a certificate of approval. Then and only then will the threat to remove a licence be a meaningful one.

D. Additional Sentencing Tools Should be Considered

In addition to fines, other types of sanctions should be imposed against corporate polluters in order to deter future offences. Section 120 of the U.S. Clean Air Act, for example, allows the EPA to impose penalties which recover the economic benefits an offender has gained by non-compliance with environmental regulations. To its credit, Bill 112 contains a similar provision which enables a court to increase a fine by an amount equal to the monetary benefit obtained by the commission of the offence.

Another serious consequence to corporations would be the forfeiture of equipment or property used in the commission of the offence. Though such forfeitures would not be applicable in all cases (i.e., one could forfeit a tanker truck but not a smokestack), forfeiture has been used extensively and effectively in other cases, most notably where wildlife poachers have forfeited equipment and vehicles to the Ministry of Natural Resources.

A far more serious consequence, however, would be the forfeiture of the offender's corporate charter if the company has engaged in a persistent course of serious criminal conduct. This kind of forfeiture is provided in section 6.04 of the U.S. Model Penal Code, and one writer argues that "this type of sanction should have a much greater deterrent effect than the threat of a mere fine."[17] The main drawback to this proposal is that Ontario may lack the jurisdiction to suspend or revoke the charter of federally incorporated companies. Nevertheless, it may be possible for Ontario to prohibit federally incorporated companies from operating within Ontario upon conviction for serious environmental offences, much in the same way that Ontario courts can suspend drivers' licences issued elsewhere in Canada. Further, the bulk of companies operating in Ontario have been incorporated in Ontario, and the threat of charter revocation would be a most effective deterrent.

III. CONCLUSIONS AND RECOMMENDATIONS

As stated above, CELA believes that you have taken an important step forward in the introduction of Bill 112 during the last session of the Legislature. We would urge you to reintroduce the Bill with some of the recommendations contained in this letter. Specifically, we recommends that:

- Minimum fines be provided for environmental offences with higher minimum fines provided for corporations than individuals;
- Maximum fines be increased and that in the future both minimum and maximum fines be tied to inflation or subject to review every three years;
- The proposed new sections 146c and 146d remedies be available to the court in the absence of a specific application by the Minister or the Director;
- The OWRA be amended to bind the Crown;
- Offence provisions of the OWRA and EPA be amended to provide that it is an offence to operate without a certificate of approval;
- Additional sentencing tools such as the forfeiture of equipment or property used in the commission of an offence and the forfeiture of an offender's corporate charter should be added to the provisions of Bill 112.

We believe that these amendments will greatly strengthen the enforcement provisions of Ontario's environmental legislation and help meet your Government's stated goals of increased environmental protection.

We would be glad to answer any questions you may have regarding our suggestions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Toby Vigod

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Clinic Director

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NOTES

1. J. Carter and G. Cole, "The Use of Fines in England" (1979), 63 Judicature 154; K. Robson, "Fines" (19709), 16 McGill L.J. 633; Note, "Fines and Fining" An Evaluation" (1953), 101 U. of Pa. L.R. 1013.

2. A. Thompson, "Legal Responses to Pollution Problems: Their Strengths and Weaknesses" (1972), 12 Nat. Res. J. 227.

3. R. Morgan and R. Bowles, "Fines: The Case for Review," [1981] Crim. L.R. 203.

4. P. Good, "Anti-Pollution Legislation and Its Enforcment: An Empirical Study" (1971), 6 U.B.C. L.R. 271.

5. A. Lucas, "Legal Techniques for Pollution Control" (1971), 6 U.B.C. L.R. 167.

6. J. Swaigen, Sentencing in Environmental Cases (L.R.C.C., 1985) p. 54.

7. S. Nagel and R. Geraci, "Effects of Reducing Judicial Sentencing Discretion" (1983), 21 Criminology 309.

8. Wilkins et al, Sentencing Guidelines: Structuring Judicial Discretion (Washington, 1976) p. 5.

9. Task Force on Criminal Sentencing, Fair and Certain Punishment (New York, 1976) p. 19.

10. L. Sebba, "Minimum Sentences" (1971), 6 Israel L.R. 227, at p. 234.

11. J.L. Miller, Sentencing Reform: A Review and Annotated Bibliography (1981) p. 38.

12. R. Davidson, "The Promiscuous Fine" (1965-66), 8 Crim. LQ. 74, at p. 85.

13. D. Cressey, "Sentencing: Legislative Role versus Judicial Discretion," in Grosman (ed.), New Directions in Sentencing (Toronto, 1980) p. 56.

14. Davidson, supra, note 12.

15. Sebba, supra, note 10, p. 236.

16. Sebba, supra, note 10, p. 228.

17. Robson, supra, note 1, p. 638.