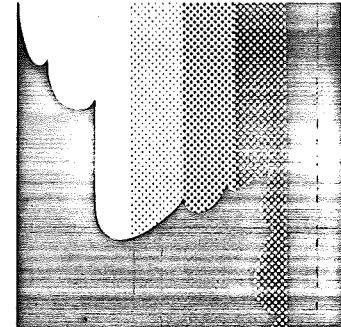


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Publication # 31
ISBN#978-1-77189-698-6

LEGAL IMPLICATIONS OF SOLID WASTE DISPOSAL

IN ONTARIO

A Speech

to the

Municipal Engineers Association 1974 Fall Workshop

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November 1974

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CELA PUBLICATIONS:

Canadian Environmental Law Association; Swaigen,
John

CELA Brief no. 31; Legal implications of solid waste
proposal in Ontario: a speech to the Municipal

RN 11235

LEGAL IMPLICATIONS OF SOLID WASTE DISPOSAL IN ONTARIO

There are a number of methods of waste disposal in common use in Ontario.

The first one is not given any official sanction, but it is certainly encouraged by our attitudes and life style. That is littering and abandonment. Throwing away gum wrappers, pop bottles and newspapers is an easy way to dispose of them. Leaving dead automobiles by the roadside, or on other public or private lands, or dumping old furniture and appliances in the woods are means of interim waste disposal, which lead to environmental degradation.

A second method of waste disposal is incineration. The advantage of burning is a smaller mass of garbage to be buried. The disadvantage is air pollution: hydrochloric acid in the air from the burning of polyvinyl chloride (a plastic), and heavy metal compounds in the air - mercury, cadmium, zinc, barillium, chromium and nickel.

A third method is the garbage dump. Dumping means taking the garbage to a designated dumping ground where it is covered with earth at irregular intervals and sometimes burned as well. Sometimes, garbage dumps are continually smouldering and burst into flame unexpectedly. The disadvantages are numerous:

- littering of neighbouring property since material left uncovered for long periods blows around;
- odour from uncovered putrescible materials;
- possible ground water and surface water contamination and runoff;
- possible methane gas migration;
- breeding ground for insects, rodents and disease organisms;
- unsightly dust and noise;
- a grave misuse of agricultural and recreational land in rural areas.

A fourth method is the sanitary landfill site. This is basically a glorified dump. At its best it may do away with most of the pollution problems of the dump if properly run. If improperly run, there is little difference between a dump and a landfill site. An improperly run landfill site will have all the problems of a dump. The major difference is that at a landfill site the garbage must be covered by at least six inches of fill daily.

Another, and by far the best, method of waste disposal is recycling. Rudimentary recycling is done in Canada; for example, Toronto's newspaper collections every Wednesday morning. But we have ^{few} no mechanical recycling plants yet as they do in the United States. Recycling is a partial answer to the vast waste of resources and energy represented by burying our reclaimable products. Recycling is also a good alternative to using vast quantities of valuable farm land and wilderness as garbage dumps, destroying their value forever for these purposes.

The ultimate answer to our waste disposal problem does not lie in any of these methods of disposal. The fact is that waste disposal is not the real problem. It is waste creation. The real garbage problem is not a problem of waste management but of resource and energy management. While the Canadian Environmental Law Association advocates law reforms to encourage recycling wherever possible, this will be ultimately unsuccessful unless we as a society reduce our production and consumption of unnecessary products. I shall have more to say of this later.

While there are laws such as municipal by-laws; the Waste Management provisions of the Environmental Protection Act; Part VII of the Environmental Protection Act; and the Highway Traffic Act to punish littering; and recent amendments to the Environmental Protection Act to prohibit the abandonment of automobiles, I intend to limit my remarks today to Part V of the Environmental Protection Act - governing our waste disposal sites and waste management systems. This Part contains the key provisions of the now repealed Waste Management Act. The waste management regulation, Ontario Regulation 824, is continued by virtue of Section 48 of the Environmental Protection Act. A waste management system is the term used to describe all facilities, equipment and operations for the complete management of wastes, including its collection, handling, transportation, storing, processing and disposal. This includes waste disposal sites - which are places where the waste is disposed of or treated. For the sake of brevity and simplicity, I am going to talk mainly about waste disposal sites, although many of my comments will apply also to other waste management systems.

Both municipally operated and privately operated waste disposal sites must have approval from the Ministry of the Environment. The basic rule is that no one may operate, use, establish, alter, enlarge or extend a waste management system or a waste disposal site without a Certificate of Approval or a Provincial Certificate of Approval from the Ministry of the Environment. This applies to landfill sites run by municipalities, corporations, individuals or provincial government agencies. It applies to sites and systems already in existence when the EPA came in force as well as to future sites.

There are nine kinds of waste disposal site that are governed by Part V: composting sites; derelict motor vehicle sites where three or more vehicles are stored outdoors, dumps, grinding sites, incineration sites, land-filling sites, organic soil conditioning sites, packing and bailing sites, and transfer stations.

Five of these categories - dumps, landfills, incinerators, organic soil conditioning and derelict motor vehicle sites are subject to standards for their location, maintenance and operation, to which their operators must adhere.

For example, Regulation 824 stipulates 19 conditions which any landfill site must meet. They are designed to prevent environmental damage such as water contamination, to prevent health hazards like rodents and insects, and to improve aesthetics by requiring that there be a greenbelt around the site. It also requires good housekeeping practices and adequate and continual supervision of the site.

Interestingly, three of the categories - grinding sites, packing and bailing sites, and transfer stations are not governed by a list of standards in the regulation, although they are subject to the general provisions of Part V and to Section 14 of the EPA which makes pollution an offence.

When an operator applies for a Certificate of Approval or Provisional Certificate, he must submit plans and specifications of the site. Until 1973, when changes were made to the regulations, the Ministry had a duty

to ensure that the standards for location, operation and maintenance (which I mentioned above) were met by the operator before he issued an approval. It would appear that the Ministry also had a legal duty to revoke the Certificate of any site that was not operating in conformity with these standards. Now the Ministry apparently only has to use these standards as a guide. He can issue or continue a certificate even if these standards are not met.

However, he can refuse to issue or renew Certificates, or he can revoke ^{them} ~~it~~ if he is satisfied that the site or system may create a nuisance; is contrary to the public interest; or may result in a hazard to any person's health or safety.

Before issuing or refusing a Certificate of Approval, the Director may hold a public hearing, if, in his opinion, the site will serve less than 1500 people. If the site serves over 1500 people, the Director must hold a public hearing before he issues or refuses a Certificate of Approval - unless he deems there to be an emergency that requires the site to operate without a prior public hearing. Even if the Director decides that the site serves less than 1500 people, he still would probably hold a public hearing if enough opposition comes to his attention. This is true also where an operator applies to the Minister to enlarge or extend his site.

The trouble with this procedure is that it is essentially one-sided. The applicant is given the opportunity to take positive action by applying for a certificate to operate or extend a site. The citizens, who may have excellent reasons for wanting to protect their environment, are cast in the role of objectors to this application. Thus their role in the proceedings has the negative connotation of objecting or reacting to a proposal, rather than initiating a proposal. There is no mechanism for residents to make application to the Director to shut down a waste disposal site, and to have the right to a public hearing of this application. Only if the applicant applies for a Certificate of Approval to enlarge or extend his site do citizens have the right, in some cases, to demand a public hearing.

If residents have serious opposition to an operating site, they have only three choices:

Firstly, they can ask the Director to revoke the Certificate, or to refuse to renew it at the end of each year when it comes up for renewal. However, the Director is under no legal duty to do this - even if the operator is flagrantly breaking the law; Secondly, the residents can ask the Ministry to prosecute for breaches of the law, or to apply a control or stop order to the site if it is flagrantly breaking the law - but the Director can refuse, and the citizens have no legal recourse to compell him; Thirdly, the citizens do have a right to launch private prosecutions on their own if the Ministry fails to do so. This is their main safeguard against Ministry neglect, but it is a costly and time consuming one for the average citizen. Of course, if the operator has no Certificate and one is required, he is committing a continuing offence and is liable for a fine of up to \$2,000.00 on summary conviction for each day of operation without the required certificate.

Practice before the Environmental Hearing Board

Where the Director has ordered a public hearing, it will be held before the Environmental Hearing Board in the area where the waste disposal site is located.

The Board is established under the Ontario Water Resources Act. Under that Statute, it holds hearings on sewage works, extension of sewage treatment plants, and extension of sewers from one municipality to another. Under the EPA, the Board deals with waste management systems and waste disposal sites. It also holds certain ad hoc hearings such as international hearings on trans-boundary movement of air pollution in the Detroit-Windsor area, and in the Sarnia-Port Huron area; and hearings to get public reaction to a draft plan for river use in the Thames River watershed, prepared by the Ministry of the Environment.

It is a technically "independent" Board, which reports to the Minister of the Environment, but is not part of the Ministry. The Board does not make any decisions; it has an advisory function only. It makes recommendations to the Director who retains the decision-making power. This means that the Board is free to set its own procedures without reference to the safeguards in the Statutory Powers Procedure Act, and it is probably

not subject to judicial review except in very narrow circumstances.

Before a public hearing is held, notice is sent to the Municipal Clerk, to the applicant, to all owners or occupants of lands adjoining the site, and to anyone else the Director decides to inform. In addition, the hearing will be advertised once a week for three consecutive weeks in at least one newspaper having general circulation in the area. At the hearing, the counsel for the applicant will examine his witnesses, usually engineers, hydrogeologists and other experts in designing waste disposal sites and in detection and prevention of water pollution, and perhaps the site manager, other officials of the company or the municipality and residents of the area who are sympathetic to the operation.

After counsel has examined each witness, other counsel present will have an opportunity to cross-examine the witness. Then, individual citizens in attendance are given an opportunity to question each witness.

After all witnesses called by counsel have been cross-examined, individuals in attendance are given the opportunity to make statements; but any citizen who makes a statement may be cross-examined by any counsel or by other citizens.

If requested, the Board will usually hold one evening meeting at which all citizens may speak who are not able to attend during the day. The Board does not give notice of this hearing, but announces that it will be the responsibility of any citizens present to inform their neighbours and the citizens groups they represent of the time of this meeting.

It is difficult to determine just what factors will influence the Board. The Board has stated that its main concern is "the public interest", but this in itself is not very enlightening. The Board has stated that it is more interested in the public reaction to a proposal than the technical and engineering aspects. This would seem to indicate that the Board will be influenced by social and aesthetic considerations; but past recommendations of the Board seem to indicate that: the Board will seldom recommend against an application if the evidence indicates that it is technically feasible from an engineering viewpoint; and that if the Ministry and the applicant's

technical experts support the application, the Board is unlikely to find that the design or location of the site is technically unsound.

An analysis of recent environmental hearing board recommendations reveals that the Board generally rubberstamps the application. Regardless of the expense and seriousness of resident opposition to a waste disposal site, to our knowledge the Board has never refused an application for a major waste disposal site.

The obviously pro-government composition of the Environmental Hearing Board, together with its lack of any real power, have made the Board subject to continuing criticism. Nevertheless, it is the only established forum where citizens affected by proposed waste disposal sites can ventilate their views. The hearings may be useful, because, even though the Board will rarely refuse an application, it may limit the size of the site, or place some conditions on the use of the site which will ameliorate the nuisance or the pollution that the citizens are complaining about.

A typical scenario before the Board consists of Metro Toronto applying to use lands in surrounding townships for waste disposal sites for Metro's garbage, or a large company which owns a waste disposal site in a township surrounding Metro, applying to extend the use of its private waste disposal site to take Metro's unending supply of garbage. The residents appear to give the following evidence: they do not want Metro's garbage, the site consists of valuable agricultural land, rural residential lands, recreational lands, and wildlife habitat. The duration of use of this site for five or ten years is far too long and there should be no long-term commitments to landfill, no longer than two years for example, because although small landfill areas will always be needed, reduction and recycling are realistic alternatives for the bulk of the problem in the long term. The residents then bring some evidence that the site will cause serious water pollution, and through cross-examination by their counsel and through their own expert witnesses they show that studies done by the applicant are insufficient to prove that there will not be pollution and they point out weaknesses and gaps in the studies done by the applicant's experts. The Board listens politely to the citizens, it thanks them at the end of the hearing, and then it adjourns to consider its decision. It reserves its decision and after some weeks it makes a

a written recommendation to the Director in which it approves the landfill site and discounts all the arguments of the residents. The Board typically will state that Metro has to put its garbage somewhere, that these lands are not the only good agricultural, recreational, residential or wildlife habitat lands available, that recycling is insufficiently advanced to take into account in approving landfill sites and that the Board is satisfied that there will not be any pollution because it is satisfied that there will be sufficient engineering done.

The Board generally recommends to the Ministry of the Environment what the Ministry wants to hear. In the case of a landfill site in Northern Ontario which was opposed by a neighbouring Indian Reserve because the Indians felt that there would be water pollution which would destroy their livelihood from fishing, the Ministry of the Environment stated that the Indians should be pleased to have this landfill site because the landfill could be piled up and covered over and could create ski hills for the Indians. The Hearing Board approved the site. At the hearings in 1973 where Metro applied to use Pickering as its garbage dump, lawyers for the citizens' group protested the prejudgment of the issues by the Board and the Government from the very beginning of the Hearing. Finally, when John Root, the Chairman, was reported as privately telling one of his constituents that he intended to approve the application before the witnesses for the residents had even been heard, the residents and their lawyer walked out of the hearing, rather than waste additional money on lawyers and expert witnesses.

Just as a sidelight, I might mention that the written decisions of the Board which are referred to are not available to the public. One can see all the materials in the Board's files at 1, St. Clair Avenue West, in Toronto. You can copy anything in the files except the decisions. This is the very opposite of the Ontario Municipal Board where everything in the file can be scrutinized but only the decisions and orders may be copied. How the Ontario Government rationalizes this discrepancy, I have no idea. Probably, the same way they rationalize keeping information from the public about the levels of mercury in the Wabigoon River or the number of tons that York Sanitation has been putting into its garbage disposal site in Whitchurch-Stouffville in contravention of its control order.

Law Reform

I would like to end with a word not about our present regulation of waste management, but about the kind of laws we will ultimately need to conserve our energy and resources and reduce our need for waste management. We need laws to discourage our production and importation of junk. The manufacture and importation of disposable items should be carefully scrutinized. We should prohibit expensive and useless excess packaging. Not only should we ban non-returnable bottles and encourage deposits for the return of other bottles, but as citizens we should demand of our government that it order the standardization of containers so that they can be manufactured and designed less expensively and recycled more easily. We need laws to limit excessive and ugly advertising which is basically a waste of our resources and energy.

Since Ontario seems to have a policy of taxing highly those consumables which the government considers unnecessary luxuries such as entertainment, cigarettes, alcohol, junk foods such as potato chips, chocolate bars and other snack foods should be highly taxed for the same reasons. This tax could be used to provide direct or indirect subsidization of more healthy and inexpensively packaged staples.

Our transportation laws and policies can be oriented to saving energy and resources by promoting public transportation and discouraging the automobile and other wasteful forms of transportation.

Our recreation laws and policies could discourage the use of the snowmobile and the motorboat and encourage less wasteful and environmentally damaging past-times like hiking, snowshoeing, skiing and canoeing.

Our consumer protection laws can be revamped to provide tougher manufacturing standards, more durable products, mandatory availability of replacement parts, and more standardization of parts.

As engineers, you have a valuable part to play in changing the focus of the scientific community from better waste disposal methods to less

waste disposal through less waste creation. You can also provide your experience, your expertise, and your information to the citizens who oppose landfill sites as well as to the proponents of these sites, and to the citizens who wish to implement recycling as a practical alternative to landfill and incineration.

Finally, you can take a humanistic approach to landfill. Even if a site can be made safe against pollution and nuisance, citizens may have valid social concerns which should be given every consideration.