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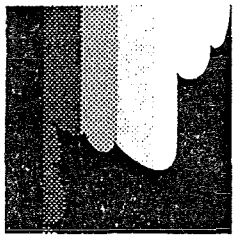

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SUBMISSIONS ON BILL 138

An Act Respecting the Protection of the Health of the Public

to

THE STANDING COMMITTEE ON SOCIAL DEVELOPMENT

prepared by

The Canadian Environmental Law Association

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA) founded in 1970, is a public interest environmental law group committed to the enforcement and improvement of environmental laws.

CELA has often, in the past, urged Boards of Health to use their powers and duties under the current Public Health Act[1] in cases where there may be a threat to public health caused by polluting operations and activities within municipal boundaries.

Indeed, in 1972, CELA, representing residents located near Toronto Refiners and Smelters Ltd., appeared before the Toronto Board of Health arguing that the Board had both a duty and the powers to stop the lead emissions which were causing adverse health effects to people in surrounding homes. The residents in the area had been demanding, since 1970, that the provincial government take action. The Air Management Branch, now a part of the Ministry of the Environment, refused to take action because the lead emissions were within the then legally acceptable levels. Both the Ministry of the Environment (MOE) and the Ministry of Health subsequently refused to admit that the levels of lead being found in the blood of residents were dangerous to health or that the levels of lead allowed in the air were too high.

It was only after the Board of Health used its powers under the Public Health Act to test residents for lead in their blood, and demand that the company clean up contaminated soil from the area around its plant, that the Ministry of the Environment took legal action against the company and passed new regulations lowering the legally acceptable limits of lead in the air.

It is interesting to note that, at the present time, the lead standard set out in the MOE's ambient air regulation is still twice as lenient as the standards set by the United States Environmental Protection Agency and California.[2] The American standards were imposed at a level that would protect children aged one to five, the most critically sensitive population to nervous system and blood disorders, and

the age group that tends to be more exposed from playing in areas where lead emissions have settled into dust and soil.[3]

It is clear that the Board of Health, under the existing Public Health Act would still have the jurisdiction to take action even in circumstances where the MOE regulations were being met, but where there were adverse health impacts.

Therefore, while we agree that the Public Health Act, first enacted in 1884, should be brought into the twentieth century, CELA contends that Bill 138, the proposed Health Protection Act may be a regression to the 18th century as it applies to environmental health.

These submissions will briefly review relevant sections of the existing Public Health Act; comment on the proposed Health Protection Act, and provide recommendations for amendments to this legislation in the area of environmental health.

II. EXISTING STATUTORY SCHEME ON PUBLIC HEALTH

The existing Public Health Act has great potential for dealing with environmental health problems. It is one of the rare statutes on the books that places a duty on public officials to act, instead of giving them the discretion to do so.

The Ministry of Health has the responsibility to investigate dangers to health in the community, and to take immediate steps to deal with them. The inspectors and local Boards of Health, established under the Public Health Act, have wide powers to enforce this responsibility.

The Ministry's duties and powers are specifically enumerated in section 7 and include a number of duties relating to the protection of environmental health. The Ministry has the duty and power to:

- determine whether the existing condition of any premises or of any street or public place, or the method of manufacture or business process, or the disposal of sewage, trade or other waste, garbage or excrementitious matter is a nuisance or injurious to health (s.7(d));
- advise the officers of the Government in regard to public health generally, and as to drainage, water supply, disposal of garbage and excreta, heating, ventilation and plumbing of premises (s.7(b));
- to make investigations and inquiries respecting the causes of disease and mortality in Ontario or in any part thereof (s.7(a)); and
- to enter into and go upon any premises in the exercise of any power or the performance of any duty under this Act, and make such orders and give such directions with regard to the structural alteration of the premises or with respect to any other matter as the Ministry considers advisable in the interests of the public health (s.7(g)).

A nuisance is defined very broadly as "any condition existing in a locality that is or may become injurious or dangerous to health or that prevents or hinders or may prevent or hinder in any manner the suppression of the disease" (s.115). It is important to note that conditions that "may" become injurious to health are brought within the ambit of what constitutes a nuisance.

Section 116 provides a non-exhaustive list of 12 specific nuisances, including "any work, trade or business so situated as to be injurious or dangerous to health" and "any well, spring or other water supply that is injurious or dangerous to health" (s.116(g) and (c)). This enumerated list, even though the language is antiquated, would cover a wide range of situations where environmental health problems can arise.

A very important duty of the Board of Health arises when a written complaint is given by a resident regarding the existence of a nuisance within the municipality. The Board must investigate the complaint, and take all necessary steps to remedy it (s.32). The Board has the right to close down any premises it finds to be dangerous to health or safety. Local medical officers of health have similar powers and duties (s.117).

Finally, the medical officer has the duty to inspect his territory regularly to ensure that there are no nuisances (s.122). If he finds a nuisance, he may order it cleaned up. If the owner or occupant of the premises refuses to do so, the officer can have it done and bill him for it (s.128).

III. THE PROPOSED HEALTH PROTECTION ACT

A. Overview

CELA contends that, at a minimum, any new public health legislation must maintain the present duties, powers, and capabilities of the Ministry of Health and the Boards of Health to address environmental nuisances and health hazards. In addition, one would expect that public health concerns of the 1980s would be incorporated into this new legislation. It is from this perspective that the proposed Health Protection Act will be evaluated.

B. Part II - Health Programs and Services

Section 5 of Bill 138 outlines mandatory health programs and services that Boards of Health must provide to persons residing in their respective health units. CELA supports imposing duties on the Boards to implement certain health programs. However, section 5 does not establish mandatory programs to deal with environmental causes of disease.

This is surprising, as medical evidence shows that manmade hazards, i.e. chemical contaminants in our environment, are supplanting infectious diseases as significant determinants of human health and life expectancy in 20th century developed nations.[4] Further, cancer is only one of a number of diseases linked to environmental contaminants.

A 1980 report by eighteen U.S. federal agencies, including the U.S. Department of Agriculture, Department of Health, Education, and Welfare, and the Council on Environmental Quality, notes that studies have revealed only limited data directly implicating viruses in a few specific human cancers, whereas chemical and physical agents are known to be important to many types of cancer.[5]

Yet, the mandatory health programs to be provided under the new Act are in the traditional areas of sanitation, nutrition, and control of communicable diseases.

The one enumerated example of the mandatory public health education program is "education in the prevention and control of life-style diseases" (s.5(7)). While "life-style" factors are important, it should be kept in mind that people often do not have 'control' in deciding whether to be exposed to toxic chemicals in the environment. "Health" also "begins" in the workplace and in the environment, and not just "at home".

CELA would recommend that section 5 be amended to provide an additional mandatory program in the area of environmental health.

Further, section 8 provides that Boards of Health are not required to provide the mandatory health programs except as prescribed by the regulations and the guidelines. This is unacceptable as the public has no say in the regulation-making process under this Act and there is no guarantee as to when these regulations will be promulgated and what form these regulations will take.

Further, under section 7, the Minister also has the power to publish guidelines for the provision of the mandatory health programs. These guidelines are a step lower in the regulatory hierarchy than regulations and again provide no mechanism for public input.

CELA would recommend that the regulation-making powers under section 93 of Bill 138 be amended to provide for public input into this process. CELA[6] as well as a number of key government advisory commissions and councils at both the federal and provincial levels, have, for a number of years, called for institutionalizing public participation in the regulation-making process. These include the Ontario Commission on Freedom of Information and Individual Privacy[7], the Law Reform Commission of Canada[8], and the Economic Council of Canada[9].

In addition, a number of statutes, including the Ontario Occupational Health and Safety Act[10], the federal Clean Air Act[11], and the Environmental Contaminants Act[12] currently provide for 'notice and comment' periods and could be used as models for a similar provision in the new Health Protection Act.

It would also seem that the reasons for increased public participation in the regulatory process (e.g. making diverse points of view available to decision makers; fostering greater accountability in and support for our decision-making institutions; and making resulting regulations more publicly acceptable) are extremely valid in the area of "public" health legislation where the avowed purpose is "the protection of the health of the people of Ontario".

CELA would therefore recommend that section 93 of Bill 138 be amended as follows:

> *93(6) No regulations made under this Act shall come into force until,*
>
> > *(a) the proposed regulation has been published in The Ontario Gazette along with a notice calling for briefs or submissions in relation to the proposed regulation; and*
> > *(b) a period of ninety days has expired following the publication of the proposed regulation in The Ontario Gazette.*

C. Part III - Community Health Protection

Section 10 of Bill 138 establishes a duty on the medical officer of health to inspect the health unit for the purpose of preventing "health hazards". This is very similar to the duty presently placed on the medical officer of health under section 122 of the Public Health Act.

One change is the use of the term 'health hazard' instead of 'nuisance'. While both terms are defined broadly, there is a significant difference. A nuisance, under the Public Health Act, includes conditions that "are or may become injurious or dangerous to health" while health hazard, as defined under section 1(1)(9) of Bill 138, includes "conditions or substances that have or are likely to have an adverse effect on the health of any person".

This difference between the use of "may" and "likely" is crucial. Likely is usually interpreted as "probable" and therefore is a more

stringent test than "may" which usually implies a "possibility".

Therefore, it would appear that the test for determining a health hazard under the proposed Health Protection Act is more stringent than the finding of a nuisance under the Public Health Act. Again, this is unacceptable. CELA would recommend that the definition of health hazard be amended in this regard. (See below.)

Further, it appears that the definition of health hazard is taken, at least in part from the definition of "contaminant" found in section 1(1)(c) of the Environmental Protection Act. That definition also includes "odour, heat, sound, vibration and radiation" as well as a solid, liquid, gas or combination, as possible characteristics of a contaminant. CELA can see no reason why these factors, which clearly can have an impact on public health, are not included in a comprehensive definition of "health hazard". CELA would therefore recommend that section 1(1)(9) be amended to read:

1(1)(9) "health hazard" means,

i. a condition of a premises,

ii. a substance, thing, plant or animal other than man, or

iii. a solid, liquid, gas, odour, heat, sound, vibration, radiation, or combination of any of them, that has or may have an adverse effect on the health of any person.

While section 10(1) of Bill 138 provides for a general duty to inspect the health unit, there are only two examples listed in section 10(2) of the type of premises which are to be inspected. These are (1) food premises, and (2) premises used or intended for use as a boarding house or lodging house. While it can be argued that the list is not exhaustive, it does indicate that the emphasis in the community health protection section appears to be on sanitation rather than an investigation of sites that would likely be the sources of environmental contaminants.

This can be contrasted to the 12 types of nuisances listed under section 116 of the present Public Health Act. While some of the items

are obviously 19th century nuisances, there is a clear intention to deal with the sources of environmental contamination. Again, reference can be made to section 116(c) which deems a nuisance any well, spring or other water supply that is injurious or dangerous to health and (g) which refers to any work, manufactory, trade or business so situated as to be injurious or dangerous to health. This focus must be retained in the new Health Protection Act.

It is also important to remember that the Ministry of the Environment has no medical doctors on staff or public health expertise, and sees itself as having a very limited function to deal with human health impacts. This gap was evident in the Toronto lead controversy, where the MOE neither had the expertise to deal with the health effects of lead, nor did it take regulatory action. To remove a clear mandate from Boards of Health to deal with public health problems caused by environmental hazards is unacceptable. In addition, the fact that the MOE is organized on a regional basis means that it cannot give the kind of attention to local environmental health concerns that Boards of Health can.

CELA would therefore recommend that section 10(2) be amended to include a duty to inspect possible sources of environmental health hazards, such as those listed above.

The requirement under the Public Health Act that a Board of Health must investigate any written complaint by a resident of a nuisance or unsanitary condition within a municipality (s.32) has also been omitted in Bill 138.

CELA would recommend that the following section be added to Part III:

> *10a. (1) Wherein information is given in writing to the medical officer of health by a resident of the health unit of the existence of a health hazard, the medical officer of health shall forthwith cause the complaint to be investigated and all necessary steps to be taken as provided by this Act or by the regulations to abate or remedy the same.*

(2) A person making a complaint under subsection 1 shall be informed in writing of the results of the investigation.

Further, with the unfortunate erosion of the powers of municipalities to pass nuisance laws generally,[13] it is important that the Boards of Health and medical officers of Health be given explicit powers under Provincial enabling legislation to deal with public health nuisance.

Finally, it should be remembered that according to our antiquated rules for 'standing' in court actions, an individual has no right to sue for the abatement of a public nuisance. All such actions must be brought in the name of the Attorney-General unless the individual can show that he has suffered some particular direct and substantial damage over and above that sustained by the general public. It is therefore important that the Board of Health's responsibilities and powers to deal with 20th century public health issues not be eroded.

D. Part VII - Administration

As stated earlier, under the Public Health Act, it is the Ministry of Health that has the ultimate responsibility and duty to investigate the causes of disease and mortality in Ontario and to determine whether nuisances exist.

Under the proposed Health Protection Act, the Minister has the power to make investigations, direct the Chief Medical Officer of Health to investigate situations which may cause a health risk, and to provide services if none are being provided in a health unit (sections 75, 80 and 81). However, these powers are discretionary, and not mandatory.

CELA would recommend that, at a minimum, these powers be changed from discretionary to mandatory duties.

As the Minister of Health has the ultimate responsibility for the administration of the Health Protection Act and a general duty under the Ministry of Health Act,[14] to oversee and promote the health and the physical and mental well-being of the people of Ontario, it is important that the Minister have clear oversight duties stated under any new public health legislation.

E. Part VIII - Regulations

Comments on the need for amendments to Bill 138 to provide for public input into the regulation making process have been made above at pages 6-7.

IV. ADDITIONAL PROPOSALS FOR REFORM: 'RIGHT TO KNOW' AMENDMENTS

Over the past few years, municipal governments have become increasingly aware of the large number of toxic chemicals used within their boundaries and the public health problems that may result. This awareness has led to municipal interest in knowing what substances its citizens and work force are exposed to and where these chemicals are located within municipal boundaries.

In January, 1981, the City of Philadelphia became the first local government in North America to pass "right to know" legislation. This took the form of ordinances requiring disclosure to the public by industry of toxic substances emitted into the atmosphere, used, manufactured, or stored, including the health effects that might occur from exposure to those chemicals. Amendments to the City's Air Management Code require companies to report to the City Health Department any toxic substances emitted from their plants[15] and amendments to the City's Fire Code require companies to identify toxic materials they use or store on their premises[16].

While City of Toronto health officials have expressed interest in similar provisions as part of their health programs[17], there are concerns about the legal authority of municipalities to pass 'right to know' by-laws under current enabling legislation.

It would be most appropriate, and CELA would therefore recommend, that these provisions be put in place under the health enabling legislation which is before the Committee. Amendments to Bill 138 allowing municipalities to pass 'right to know' by-laws would clarify the situation and provide important health protection and knowledge to citizens of this Province about the toxic chemicals to which they are exposed. In the alternative, a 'right to know' Part should be added to Bill 138, requiring industries to disclose to local Boards of Health toxic substances emitted from their plants, as well as those used or stored on their premises. A list of chemicals which must be identified could be placed in a regulation passed pursuant to this section.

Finally, in Philadelphia, industry representatives who had argued that the 'right to know' legislation would duplicate existing regulations

and discourage businesses from remaining in the City, have conceded that the law's requirements have not been nearly as onerous as they had feared.[18]

V. CONCLUSIONS

The Public Health Act, enacted almost 100 years ago, has been largely successful in addressing the public health concerns of the 19th century, which centered largely on the threat of infectious diseases. However, in combatting these problems, there was a recognition that certain duties must be placed on health officials, from the Ministry level to the local Board level, to ensure that health units were inspected and that complaints of nuisances were looked into. Environmental causes of diseases including air and water pollution were recognized as "nuisances" which health officials had both the responsibility and the authority to address.

These provisions, clearly spelt out in the Act, have proved themselves invaluable in dealing with public health problems of the past few decades - namely exposure to toxic chemicals. Again, the Toronto lead problem is a case in point.

Any new public health legislation must obviously be updated to remove many of the antiquated sections found in the present Act. However, there should be a clear intention and mandate in the new legislation to address major health problems of this decade - which include the health effects of toxic chemicals.

CELA submits that the proposed Health Protection Act fails in this regard and if passed in its present form does not even maintain the present duties, powers and capabilities of the Ministry of Health and the Boards of Health to address environmental public health concerns.

CELA would therefore recommend:

Recommendation	Discussion at page infra.
(all section references are to Bill 138)	
1. Section 5 should be amended to provide for an additional mandatory program in the area of environmental health.	5-6
2. The regulation-making powers under Section 93 should be amended as follows to provide for public input into this process: 93(6) No regulation made under this Act shall come into force until, *(a) the proposed regulation has been published in The Ontario Gazette along with a notice calling for briefs or submissions in relation to the proposed regulation; and* *(b) a period of ninety days has expired following the publication of the proposed regulation in The Ontario Gazette.*	6-7
3. The definition of health hazard under section 1(1)(9) should be amended to read: *1(1)(9) "health hazard" means,* *i. a condition of a premises,* *ii. a substance, thing, plant or animal other than man, or* *iii. a solid, liquid, gas, odour, heat, sound, vibration, radiation, or combination of any of them, that has or may have an adverse effect on the health of any person.*	7-8
4. Section 10(2) should be amended to include the duty to inspect possible sources of environmental health hazards.	8-9
5. There should be a duty on the medical officer of health to investigate written complaints by a resident of any health hazard occurring in the health unit. Specifically, an additional section should be added to Part III:	9

10a. (1) Wherein information is given in writing to the medical officer of health by a resident of the health unit of the existence of a health hazard, the medical officer of health shall forthwith cause the complaint to be investigated and all necessary steps to be taken as provided by this Act or by the regulations to abate or remedy the same.

(2) A person making a complaint under subsection 1 shall be informed in writing of the results of the investigation.

6. The Ministry's powers under sections 75, 80 and 81 should be changed from discretionary to mandatory duties. 11

7. 'Right to Know' amendments should be passed to either give municipalities the power or to set out in the Act a requirement that industries disclose to local Boards of Health toxic substances emitted from their plants, as well as those used or stored on their premises. 12-13

VI. NOTES

1. R.S.O. 1980, c.409.

2. The MOE criterion for air-borne lead has been 2.0 micrograms per cubic metre measured by geometric mean over a 30-day period. See O.Reg. 296. This is equivalent to 3.0 micrograms per cubic metre measured by arithmetic mean over a 30-day period. (This latter figure is expressed in an MOE guideline, but is just a conversion from the existing regulation and does not represent a tightening of EPA requirements.)

   The U.S. ambient air lead standard has been 1.5 micrograms per cubic metre, maximum arithmetic mean averaged over a calendar quarter.

3. See David Cohen, "Lead and Children: U.S. EPA Journal, Vol. 4, No. 2 (February, 1978) at 20. See also, "EPA Sets Final Lead Standards; cites possible need for remedial action", BNA Environment Reporter (October 6, 1978) at 1091-92.

4. Council on Environmental Quality: Carcinogens in the Environment. Reprinted from the Sixth Annual Report of the Council on Environmental Quality (Washington, D.C.: Government Printing Office, 1976) at 12.

5. Toxic Substances Strategy Committee. Toxic Chemicals and Public Protection, A Report to the President. (Washington, D.C.: May, 1980) at 118.

6. See, generally, J.F. Castrilli and C. Clifford Lax, "Environmental Regulation-Making in Canada: Towards a More Open Process", in Environmental Rights in Canada. John Swaigen, ed. (Toronto: Butterworths, 1981).

7. The Ontario Commission recommended to the Ontario Government that governmental institutions engaged in rule-making activity be encouraged to adopt notice and comment procedures so as to facilitate public discussion and informed comment on particular rules proposed for adoption; and that consideration be given to the adoption of provisions requiring notice and comment opportunities in specific statutes which confer rule-making powers on government institutions. See, Public Government for Private People, the report of the Commission on Freedom of Information and Individual Privacy. (Toronto: 1980, Vol.2) at 412.

8. The Law Reform Commission of Canada has recommended that both 'notice and comment' procedures and regulation-making hearings may be necessary. Law Reform Commission of Canada, Administrative Law: Independent Administrative Agencies, Working Paper 25. (Ottawa: 1980) at 114-117.

9. The Economic Council of Canada has considered it a "fundamental principle" that "funding of "public interest groups" be considered as an essential component of regulatory reform". This funding would be, in part, to assist groups to undertake consultation with and make representations to governments concerning proposed new regulations. See, Economic Council of Canada. Responsible Regulation. Interim Report (Ottawa: Supply and Services Canada, 1979) at 81-84. This approach is confirmed in the Economic Council's final report. See, Economic Council of Canada. Reforming Regulation. (Ottawa: Supply and Services Canada, 1981) at 133-136.

10. R.S.O. 1980, c.321. Section 22(a) and (b).

11. S.C. 1970-71-72, c.47 as amended.

12. S.C. 1974-75-76, c.72 as amended.

13. See, Cox Construction Ltd. v. Township of Puslinch (1982), 36 O.R. (2d) 618.

14. R.S.O. 1980, c.280, section 6(1)(b).

15. City of Philadelphia. Air Management Code. Chapter 3. January 14, 1981. Bill No. 270.

16. City of Philadelphia. Fire Code. Chapter 5. January 14, 1981. Bill No. 475.

17. "City May Screen Toxic Chemical Use", The Toronto Star, January 25, 1981.

18. Roger Cohn, "City's pioneering law on disclosure of toxic wastes quietly takes effect", The Philadelphia Inquirer, November 15, 1981.