SUPPLEMENTARY SUBMISSIONS OF THE

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

TO THE

PUBLIC HEARINGS ON LEAD CONTAMINATION

IN THE METROPOLITAN TORONTO AREA

Toronto, Ontario
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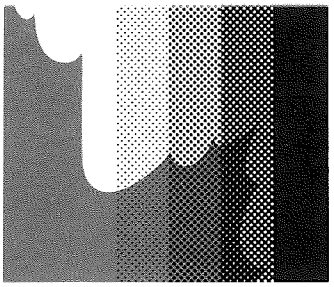

Canadian
Environmental
Law
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L'Association
canadienne
du droit
de l'environnement

In our submissions of January 31, 1975, the Canadian Environmental Law Association made broad recommendations for law reforms which will result in better environmental protection against lead and other pollutants and sources of environmental degradation.

The following is a summary of CELA's recommendations to the Government of Ontario in the January 31 brief, taken from the first page of that brief.

* Implement the recommendations of the Rocke Robertson report and the report of the Working Group on Lead without any further delay.

* Formulate and fund a coherent policy of eliminating existing irreconcilable land use conflicts.

* Introduce the long-promised legislation on environmental impact assessment, so that we will not in future be forced to deal with pollution only after the fact.

* Guarantee access to government information when there is no good reason to withhold it.

* Amend the Environmental Protection Act to make it mandatory rather than discretionary for the Ministry of the Environment to use its powers to protect public health and well-being.

* Provide for public input into the setting of regulations on maximum levels of pollution.

* Shift the onus to the alleged polluter to prove that he is not polluting, and/or that the contaminant is harmless.

This supplementary brief addresses itself to specific amendments to the Environmental Protection Act and to Bill 14, the proposed Environmental Assessment Act. These amendments would implement the principles of public participation and governmental responsibility to the public which are inherent in CELA's recommendations.

I. THE ENVIRONMENTAL PROTECTION ACT

The Environmental Protection Act has been in force for over three years now. During that time it has been amended in a piecemeal fashion several times. It has also been tested in Ontario's courts many times. Among the first cases reported under the new Act were R. v. Adventure Charcoal Enterprises Ltd. (1972) 9 C.C.C. (2d) 31 and R. v. Lake Ontario Cement Ltd. et al. (1973) 2 O.R. 247 - cases taken by the Canadian Environmental Law Association. After an inauspicious beginning, the Ministry of the Environment's Legal Services Branch became very active, particularly in 1974, in setting excellent precedents in the courts.

With over three years of experience in using the E.P.A. under its belt, we are sure that the Ministry of the Environment, and particularly its Legal Services Branch, would agree that the time has come for a comprehensive review of the Act for the purposes of making it a more effective deterrent to environmental degradation.

The following are some of the defects of the Environmental Protection Act and Regulations which should be remedied:

1. Subsection (3) of section 7 of Regulation 15 under the Air Pollution Control Act (R.R.O. 1970) prohibits any person other than a provincial officer from enforcing the E.P.A. by using a smoke density chart to determine smoke density. The subsection should be repealed. It purports to remove a basic common law right of any person to give evidence of facts within his or her own sensory perceptions. It removes this right without any valid reason and in a manner which is probably without legal validity. There is no rational justification for the idea that a provincial officer is better qualified to tell black smoke from white smoke by using a smoke chart. Since virtually all colours of smoke except white are illegal under the Act, a minor error in evaluating the density of the smoke would only be significant with respect to a marginal distinction between white and very light coloured smoke. A citizen would usually be correct enough in his comparison for purposes of the E.P.A. Any special training given an inspector which a member of the public lacks should go to weight

rather than to admissibility.

Although a common law right may be removed by an express statutory provision, it is doubtful whether it can be removed by a regulation without sufficient basis for the regulation in the statute itself, as in this case.

The effect of this subsection is to remove the right of private prosecution for many air pollution offences under the E.P.A., and also to remove any powers municipal officials and police officers may have to enforce parts of the E.P.A. Its significance for the lead issue becomes apparent when we recall the conviction of Prestolite for a massive emission of smoke when a bag broke in its baghouse. It ought not to be impossible to obtain a conviction for such an offence when it is unwitnessed by a provincial officer.

This subsection clearly assists polluters, and fetters anyone save the Government of Ontario who may wish to enforce parts of the E.P.A.

The E.P.A., Bill 14, and other Ontario Government legislation reflect the paternalistic pattern of government in this province, which can be characterized as the granting by the Government to itself of sweeping powers, without any obligation to exercise them, while removing the ordinary citizen's power to act.

2. The Stop Order - Weaknesses in Section 7 of the E.P.A.

Serious consideration should be given to removing the word "immediate" from section 7 of the E.P.A. Because of its vagueness, this word may seriously weaken the power of the Ministry to issue a stop order where a contaminant constitutes a danger to human life, health or property but either (a) the danger is not "immediate" or (b) the "immediacy" of the danger cannot be readily proved. As was shown in the case of Re Canada Metal Co. Ltd. et al. and MacFarlane (1973) 1 O.R. (2d) 577, the subject of the stop order is probably sufficiently protected by the requirement that the Ministry provide "reasonable and probable grounds" without the further protection of being able to require the Ministry to prove "immediacy".

The phrase "<u>may</u> issue a stop order" should be changed to "<u>shall</u> issue a stop

order". Discretion to act even in the presence of an immediate danger lies solely within the power of the Director. The private citizen has no way to initiate a stop order directly, or to compel the Ministry to issue one. Surely if human life is in immediate danger the Ministry should have an enforceable duty to issue a stop order.

The limitation of application of the stop order to danger to human life, health or property is probably too narrow. There is no provision for a stop order if plant or animal life is in immediate danger.

Under Section 76(2), the Director has unfettered discretion to revoke a stop order without any justification, any notice to affected persons other than the polluter, or any public recourse.

At first glance, Section 7 appears to establish an effective remedy for special circumstances. But the vagueness of the procedures for potential delays and the exclusion of the public give cause for concern. This concern is intensified by the consistent failure of the Government to use the remedy over the past three years.

3. The Control Order

Under section 6 of the E.P.A., when the amount of contaminant entering the natural environment is excessive, the Director may issue a control order directed to the person responsible to tailor his operations to meet permissible standards. Experience has shown the control order process to be subject to unreasonable delays.

CELA realizes that the Ministry prefers to negotiate with polluters rather than prosecute, even where there is a clear violation of the E.P.A. CELA has supported the Ministry by participating in such negotiations on behalf of individual citizens and citizens' groups, rather than taking a private prosecution on their behalf. However, our experience has been that citizens become very frustrated and lose confidence when the Ministry takes a year or more to impose a control order on a continuing source of pollution.

Apart from a private prosecution, the citizen again is without remedy

against the Ministry's refusal to issue a control order or delay in doing so. The Ministry should have an enforceable duty to issue a control order within a reasonable time wherever a provincial officer finds discharges of contaminants in excess of legal standards, and not just an unfettered discretion. At present, if the provincial officer in the exercise of his discretion believes an investigation is not required, the citizen has no recourse to compel an investigation.

Should the provincial officer's report state unequivocally that a level of contamination exists in excess of permissible levels and dangerous to health or property, the Director may refuse to act. The decision cannot be challenged or appealed. Since, under section 73, only the polluter is entitled to notice, to a copy of the Provincial Officer's report, or to make a submission to the Director, there is no means of obtaining public scrutiny of the Director's decision.

CELA is concerned about the long delays in obtaining control orders against clear violations of the statute, and recommends serious scrutiny of procedures to streamline the process and curtail delay, including giving citizens power to compel issuance through the courts.

The contents of control orders are also a cause for concern. There contents are negotiated in secret between the Ministry and the polluter. The citizen has no right to be involved in the process of negotiations, to make submissions on the adequacy of the provisions of the control order, or to challenge the adequacy of the control order in the courts. The paucity of appeals of control orders to the Environmental Appeal Board by polluters on whom they are imposed indicates one of two things. Either the Ministry has such effective power to impose strong control orders that lawyers for polluters advise them that an appeal would be fruitless, or the Ministry is accommodating the polluters by issuing weak control orders which are acceptable to them, but which do not adequately protect the environment. If the latter is the case, the Ministry is compromising the environment so as to avoid appeals. Independent study of the reasons for the paucity of appeals of control orders and stop orders should be done to determine the true cause of industry's acquiescence.

Pursuant to section 72, the Director may amend, vary or revoke a control order without any need to justify his action, or recourse by those affected by his action other than the polluter. If the Director decides to amend or revoke a control order, he must give notice to the polluter, who may appeal the decision to the Environmental Appeal Board if it is unfavourable to him. But if the decision is unfavourable to the public, they have no right to notice, to make submissions to the Minister, to appeal the decision, or to appear before the Appeal Board.

4. Certificates of Approval

Pursuant to section 8, the Director has power to issue a certificate of approval and to prohibit an activity from being carried on until a certificate is issued. The certificate is important to the polluter, giving him statutory authority to carry on his activities and sometimes statutory authority or "licence" to pollute. The certificate and its contents are also of extreme importance to citizens who may be affected by the polluter's activities.

However, such affected citizens have no right

(a) to compel the Director to refuse to issue a certificate;

(b) to a public hearing, except in the case of certain waste disposal sites;

(c) to see the plans, specifications, etc. enumerated in section 8(2) on which the Director relies in deciding whether to issue a certificate.*

The process of issuance of a certificate of approval should be opened to public scrutiny and participation, subject only to protection of trade secrets from disclosure.

5. Program Approvals

Pursuant to section 10, the Director may allow a person to pollute by issuing a "program approval" to him. Again, this can be done in the absence of public scrutiny. Program approvals should not be issued without an opportunity for informed submissions to be made by affected members of the public, and without a right of appeal of the Director's decision to issue a program approval.

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*In fact, neighbours of a polluter have no right to any notice of the polluter's intention to build, expand or change its operations or to any notice of the Ministry's intention to issue, refuse, renew or refuse to renew a certificate.

6. Sections 13 and 15 - The Duty to Notify

Although there are probably many breaches of these sections, we know of no reported case in which the Ministry prosecuted for the offence of failing to notify.

7. Section 19

This section restricts public access to information to the contents of present orders or approvals. A public record of past orders and approvals should also be available. To decide what action is reasonable in many circumstances, from buying a home to commencing a private prosecution, the public must know whether a pollution incident is an isolated occurrence or part of a pattern of pollution.

8. Part X - The Environmental Appeal Board

Section 77 allows the chairman to authorize one member of the Board to conduct a hearing. All contentious applications should be heard by two or more members. This would bring the Appeal Board into line with Recommendation XIX of the Report of the Select Committee on the Ontario Municipal Board, 1972 (at p.8) for the future practice of that Board.

Generally, the criticisms of lack of standing, lack of notice, and lack of participation by affected members of the public already mentioned apply to Part X.

9. The Board of Negotiation - Part XIII

The remedies for compensation arising from injuries caused by pollution are incomplete, vague, impossible to enforce, and geared principally to economic loss by farmers.

There is no provision for compensation for damage to health, homes, or personal property other than livestock, crops, trees or other vegetation. The remedy is restricted to economic loss, excluding loss of use and enjoyment of property, so that an anomalous situation is created in which a far-

mer could negotiate for loss of an income-producing crop, but a homeowner who grows the same crop in his or her garden for home consumption may be remediless.

The complainant may make submissions to a board of negotiation. But its decisions are not binding on any of the parties. In evaluating section 92, the following excerpt from the McRuer Report is appropriate:

> "The ultimate right to arbitrate is the fundamental factor which controls and gives meaning to the process of negotiation."
>
> -- J.C.M. McRuer, Inquiry into Civil Rights, 1968 at page 1030.

Section 92 runs directly counter to this statement. No decision of the Board is binding on either party. Not only is the Board powerless to enforce its decisions, but the injured person cannot even require the polluter to appear before it. The process of negotiation set out has no meaning; the ultimate right to arbitrate is absent.

The above suggestions for revision of the E.P.A. are a starting point for the needed comprehensive review of the Act - a need which is demonstrated by the interminable delays, reports, hearings, and litigation which have yet to lead to a resolution of Toronto's lead problem.

II. BILL 14 - THE ENVIRONMENTAL ASSESSMENT ACT, 1975

The Rocke Robertson Report on the Effect on Human Health of lead from the Environment made the following recommendations on planning:

> Recommendation 4: In long-term planning, industrial zoning should be done on a regional basis reasonably remote from residential and public areas. The nature and size of a "buffer zone" for each kind of industrial process should be established.
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> Recommendation 5: Short-term planning to tackle existing problems (such as the secondary lead smelters in Toronto) should include the following:
>
> a) A return to objective scientific data removed from emotional and political influence;
>
> b) The accumulation of extensive information leading to a detailed evaluation of the environmental problem as it exists;
>
> c) Rapid action on remedial work and abatement arising from the evaluation;

d) Major uncontrollable emitters of lead and residential housing should not be permitted to coexist side by side or in close proximity under any circumstances.

These and other recommendations of the reports which are the subject of these hearings support the immediate need for environmental impact assessment legislation. Further, they support the kind of legislation proposed by the Canadian Environmental Law Association, with the support of over a dozen municipalities and many environmental groups and other interest groups, rather than Bill 14.

Such environmental impact assessment legislation as was recommended in our January 31 brief would provide the planning tools to anticipate and prevent environmental injury which are lacking in the Environmental Protection Act.

Control orders, stop orders, and prosecutions for emission of contaminants are insufficient to anticipate and prevent future acts of pollution. These tools are designed to stop present acts of pollution. If the Government is aware of present actions that will ultimately cause an illegal source of pollution, or, beyond that, will cause many other adverse environmental effects, such as unwise land use, depletion of agricultural land, resource depletion, or energy waste, it should have the power and the duty to prevent as well as to cure.

Citizens do not have sufficient access to information, nor the necessary resources, under either the E.P.A. or Bill 14, to accumulate necessary information with which to anticipate imminent environmental problems.

A thorough, politically independent, mandatory and enforceable environmental assessment process is the logical preventive weapon to avoid environmental problems.

The long-awaited Environmental Assessment Bill, introduced by the Ontario Government on March 24th, will apply, for an indefinite length of time, only to Government projects. It will apply only to those activities which are designated by regulations at some indefinite future time, and without any right of the public to scrutinize or participate in the process of deciding which activities, if any, should be subject to the Act.

The assessment would be done by the developer itself (a Government Ministry or agency) and submitted to the Minister of the Environment (another arm of the same Government) for approval of the assessment and permission to proceed with the undertaking. The Minister will then have his officials review the assessment and notify the developer and the clerk of the municipality or municipalities where the project will be built or the activity carried on, of the assessment, the review of the assessment, and the place or places where the assessment and review may be inspected. There is no requirement that the Minister or the municipal clerk make any public announcement of the fact that a project is contemplated, an assessment being done, or a review being carried out. However, any person may inspect the documents if he or she happens to hear about them, and may make submissions thereon to the Minister.

In the words of Harold Greer, a syndicated columnist:

> "The minister then considers the whole matter and, with the approval of the cabinet, either allows the project to proceed, turns it down, or allows it subject to terms and conditions. Here things get very tricky indeed.
>
> The bill would create an environmental assessment board of at least five persons appointed by the government, but from outside the civil service. This board would, on direction from the minister, hold hearings and advise - repeat advise - the minister as to whether an environmental assessment referred to it should be approved, disapproved, or approved with conditions. This minister would not be bound by the advice. There is no provision for a board hearing where the minister simply turns the assessment down. Indeed, if one reads the bill carefully, there is no clear authority for the minister to turn an assessment down. He can amend it but not reject it."
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> -- Montreal Star, Saturday, March 29, 1975

The entire process is discretionary. The Minister can make every major decision, and most minor ones, with no public involvement or recourse against the decision. The Ministry will decide unilaterally what a major project is, whether an assessment is needed, whether a public hearing should be held, and whether to follow or ignore the recommendations of the assessment board arising out of any public hearing.

The bill continues a pattern of legislation and enforcement of environmental laws which is apparent in the Environmental Protection Act and other environmental legislation in Ontario. Under the E.P.A., the Ministry consults with the polluter over whether to issue certificates of approval, program

approvals, control orders and stop orders, and what conditions to put in them. The public has no right to participate in these negotiations, and no way to find out the trade-offs that were made, or the reasons for them or the criteria used. The third party in the negotiations - the public affected by pollution - is locked out of the negotiating room.

Under Bill 14, one Ministry of the Government negotiates the contents of assessments and whether to accept the assessment and the project with the proponent, who is either another government body or, perhaps ultimately, private industry. The dealings are carried on behind closed doors again, and the public participates only if the Ministry in its absolute discretion decides to hold public hearings. This will probably occur only when the Ministry and the proponent have been unable to reach a compromise satisfactory to them (though perhaps unsatisfactory to affected members of the public, and sacrificing environmental protection for political expediency). The very intent of the assessment process - to replace political expediency with (in the words of the Rocke Robertson report) "objective scientific data removed from emotional and political influence" is denied by this bill.

Another pattern of Ontario legislating and enforcing which is perpetuated by this bill is the use of skeleton statutes which have no teeth until implemented, at an indefinite time, by regulations made by Government behind closed doors, frequently in consultation with industry and with resource-exploiting and development-oriented ministries. No public scrutiny of the regulation-making process is allowed.

This is a frequent way to avoid implementing statutes which are passed as window-dressing (pre-election or otherwise).

One example is the Endangered Species Act, passed by the Ontario Government in 1971. This Act provided for protection of species which would be designated as endangered, by regulations to be made in future. No regulations were made for two years, although the Government had lists of many species which were endangered.

The bill continues the Ontario Government theme of one-sidedness throughout: the proponent can appeal from the Minister's request for a better assessment; but if the Minister expresses satisfaction with an inadequate assessment, the public has no appeal. The Minister must hold public hearings at the request of the proponent, but the public cannot initiate or compel public hearings. The proponent must be given notice of a public hearing, but not the public.

Because of the narrowness, secrecy and lack of objectivity in the bill, the Environmental Hearing Board, in making its recommendations, must choose between accepting recommendations 4 and 5 of the Rocke Robertson report, and accepting the contents of the bill, because these clearly conflict.

By neglecting to make the assessment procedures of Bill 14 applicable to the private sector, the Ministry refuses to apply the obvious planning tool which would most effectively implement Recommendation 4. Impact assessment procedures are designed to be necessary prerequisites to the long-term planning process, and would prevent the lead problem from recurring.

By refusing to implement an independent, non-partisan, mandatory review process with decision-making powers in a body outside the government, and with public involvement, and review of decisions by the courts or by some other body outside the sphere of political interference, the Government has made it impossible to apply Bill 14 to short-term planning in compliance with Recommendation 5(a).

CELA recommends the following law reforms in Bill 14 to make it conform to the Rocke Robertson recommendations, and to make it useful in preventing future lead problems and similar problems:

1. The Environment Minister's decision not to require an environmental assessment of a project that may have major environmental impact must be reviewable by an independent Board or by the courts.

2. The public must be given notice that the project is being considered by the Ministry, adequate notice of any public hearing, and access to all relevant information, except information which would reveal trade secrets.

3. The public must have the power to appeal the Minister's decision to accept an assessment to the courts or to an independent Board.

4. The public must have the power to require a public hearing by an independent Board.

5. The Environmental Assessment Board should be totally independent of government interference, and its decisions should be binding on the government unless overruled by a vote of the legislature - not a secret decision in Cabinet.

6. The bill must apply to all major private projects, as well as to government projects.

7. Citizens opposed to a project on the grounds that its environmental damage will outweigh its benefits must have access to financial and legal assistance and expertise, to enable them to participate knowledgeably and intelligently in evaluating the project.

8. The Act should be proclaimed very soon after passage, so that environmentally damaging projects cannot be rushed through before it comes into effect.