

MEMORANDUM

TO: CATHY COOPER

FROM: STEVEN SHRYBMAN

DATE: FEBRUARY 24, 1986

RE: SUBMISSIONS TO ROYAL SOCIETY ON LEAD

AND RE: LEGAL CONSIDERATIONS

There are ever-frequent reminders of our collective inability to protect our environment, health or welfare from the potentially calamitous impact of thousands of toxic substances that are emitted, leaked, flushed or spilled into our air, land and water every day. From acid rain to toxic wastes ^{at} ~~to~~ Hyde Park, from deep wells at Sarnia to the English Wabegoon River System, from PCBs in polar bear tissue to dioxin in Wallaceburg drinking water, we are daily confronted with reminders of poor management, bureaucratic ineptitude and a lack of political will when it comes to protecting our health and environment. The costs, both ecological and monetary, from these and other disasters are staggering and ^{re} present a constantly growing legacy for our children.

The operation of Toronto Refiners and Smelters and its impacts~~g~~ over the years upon the environment and the health and well-being of the people who share ^{the} this inner city neighbourhood ^{in which it is located} offers an unfortunately ~~an~~ excellent illustration of just how poorly served we have been by ^{the} institutions that we have relied upon ^{for protection} to ~~protect us~~. The following then offers a brief's outline of the law and ~~its~~ associated institutions that have been developed to control polluting activities. The efficacy of existing regimes is assessed and recommendations made for reform.

Common Law Rights and Remedies

The common law is a body of legal principles and rules that have been developed by judges and courts over several centuries. The two most relevant common law principles for present purposes is the common law of nuisance and trespass. Each might serve as a basis upon which the injured party might seek redress for any harm suffered as a result of TRS operations.

Nuisance

Nuisance is defined at law as being the unreasonable interference with a private or public right. When private rights are affected, such as when the use and enjoyment of one's home is interfered with by noise or emissions, the legal wrong is described as private nuisance. Public nuisance occurs when more

than one person or a whole neighbourhood is adversely affected. The following offers a greatly simplified description of these legal causes of action.

To succeed with a claim in private nuisance, one must demonstrate interference with a private (^{read} ~~res~~ property), right that has been caused by the activities of the defendant. Establishing that lead emissions from TRS ^{have} impacted upon one's property would be sufficient to sustain a claim in private nuisance.

A claim in public nuisance is made out if an adverse impact upon two or more people can be associated with the activities of the polluter. An additional obstacle arises here, however, because not everyone is entitled to initiate a legal action in public nuisance. While the Attorney General is regarded by the courts as the most appropriate defender of public rights, there is no case in recent history of such an action being brought. While individuals may bring suit in public nuisance, to do so they must prove interference with a private right or ^{that} they will suffer damages more severe ^{than} for the community as a whole. The advantage of suing in public nuisance is the greater likelihood of obtaining injunctive relief as opposed, or in addition, to damages. An injunction will, of course, stop the offending activity, while a damage award will simply compensate for a nuisance that may well continue.

The other potentially available common law remedy is that of trespass. The impact of air pollutants from an identifiable source, upon one's property amounts to a trespass for which the courts will provide a remedy in damages and conceivably a mandatory order to remove the offending substance. ~~(A trespass against the person?)~~

While both of these legal doctrines and indeed others not noted, provide theoretical opportunities for seeking redress for the impacts of polluting activities, as we shall see with respect to statutory legal rights, there is an enormous gap between theory and practice. A number of impediments exist to render these potential remedies of very little avail to communities such as the one in the neighbourhood of TRS. This is particularly true given the lower income status in the majority of area residents.

To begin with, legal action is enormously expensive. Not only must one find the resources necessary to hire a lawyer, but the fees of expert witnesses also have to be paid. In addition, the course of civil litigation is invariably drawn out and relief ~~is~~ *is probably* ~~be~~ years away. Finally, one must anticipate the possibility of encountering judicial attitudes that are far more sympathetic to the polluter than may seem justified. These and other characteristics of the civil judicial system render it at best, a slow and cumbersome tool for dealing with problems such as the ones caused by TRS.

Civil courts are, after all, institutions largely designed to provide private remedies for wrongs done to private rights. Pollution is invariably a public matter that courts are ill-suited by design and temperament to address. These ^{and other} ^{factors} ~~factors~~ ^{in large measure} must explain the complete absence of any civil suit against TRS notwithstanding the severe and widely recognized impacts associated with the smelter's operations. Civil action is clearly ^{neither} ~~not~~ ^{nor} an available, accessible remedy for the residents of the Niagara Neighbourhood.

Statutory Rights and Obligations

It is in part because of the failure of common law institutions ^{to adequately address pollution problems} that comprehensive statutory regimes have been established. ^{for that purpose.} Of particular relevance to the operations of TRS are the provisions of the Environmental Protection Act of Ontario (EPA) and the federal Clean Air Act. The following offers a brief outline of the rights, obligations and remedies that arise pursuant to each statutory regime.

The Environmental Protection Act

The following portions of the Act are relevant to our present discussion:

S. 8 requires that a certificate of approval be obtained prior to the construction, or alteration, of anything (re-^{eg}

smokestack) that may emit or discharge^a contaminant into the environment.

S. 13 prohibits the discharge of a contaminant into the environment that may, inter alia, cause impairment of the natural environment or harm or material discomfort to any person.

S. 16 allows the Minister the authority to require a polluter to take remedial action to repair any damage associated with the discharge of contaminant.

S. 6 allows the Director the authority to issue a control order where there is a finding that the discharge of a contaminant to the environment exceeds permissible amounts or contravenes s. 13.

Regulation 308 - general air pollution - prohibits the emission of an air contaminant that inter alia causes discomfort to persons, causes loss of enjoyment or normal use of property, or damage to property. Reg. 308 also establishes point of impingement standards that environmental discharges may not exceed.

**Federal Clean Air Act - Secondary Lead Smelter National
Emission Standards Regulations**

Relevant provisions include:

S. 4 establishes standards for the emission of particulate matter from a secondary lead smelter.

S. 7 prohibits the emission of particulate matter into the air from the storage of lead scrap.

S. 9 allows the Minister the authority to request information relating to the operation of a secondary lead smelter and to require emission testing and reporting thereof on a regular basis.

Reading these provisions, one might be tempted to conclude that they provide effective regulatory controls for an operation such as TRS. Unfortunately, such ^a conclusion is completely unjustified.

The major shortcoming of both federal and provincial legislative regimes is that each is purely permissive. Thus, neither Act imposes upon the ^{responsible} Minister, or any public official, ^a positive obligation to either;

(a) identify pollution problems that may exist, ^{or} and;

- (b) exercise available statutory authority to address any problems that may come to light.

With respect to the operations of TRS, a control order under the EPA was, during 19__, issued to the company but that action was only taken after ^a public outcry of major proportions and even then action was slow in coming and only partially effective. The same deficiency characterizes federal controls. While the Clean Air Act establishes emission standards that must be met, only ^{three} ~~one~~ ~~have even been carried out~~ tests of stack emissions at TRS has ~~be~~ ever been carried out. This, notwithstanding the highly variable character of plant emissions and the very substantial deterioration of pollution abatement equipment over the years. Neither has the Minister exercised his authority to require regular emission testing and reporting ^{of} from the results of ^{such} ~~these~~ tests. Standards are, of course, of little help when there is virtually no will to enforce them.

It is our recommendation therefore that federal and provincial legislation be amended to impose (as do the provisions of the Health Protection and Promotions Act) ^a positive obligation upon responsible public officials to investigate, where there is reasonable cause to do so, operations of a potentially polluting activity and to further exercise appropriate statutory authority to immediately rectify any breach ^{or} of non-conformity with the requirements of ~~the~~ relevant legislation.

When one considers the shortcomings associated with ~~an~~ provincial air regulation, the problems are even more disturbing. By establishing point of impingement, as opposed to stack emission standards, the Ministry has created an obstacle to enforcement that is virtually ^{is} ~~un~~surmountable. To establish an exceedance of such a standard requires that sophisticated monitors be established that must actually be located in the path of a pollution plume that of course changes from moment to moment with every wind current. Even when exceedances of standards are detected, an additional problem arises in proving a causal relationship between a particular source and that exceedance. _____

It is extremely difficult,

~~may be difficult,~~ if not impossible, to establish that the operations of the smelters are wholly responsible for an exceedance of Reg. 308 standards that may be detected in the vicinity of the plant.

These difficulties in part explain why the Ministry has over the past fifteen years only initiated one successful prosecution pursuant to ~~its~~ ^{the} provisions. ^{of the 308, and} ~~It~~ ^{why} may also explain repeated exceedances of statutory standards in the vicinity of TRS have not been the subject of ^{even} one prosecution against the company.

Another major deficiency of this air pollution regulation is that ~~it makes not attempt~~ ^{does not} to establish enforceable standards with respect to dust emissions that may be the greatest cause of concern with respect to the operations of TRS. In the

alternative, the Ministry has established a set of guidelines, the ^{vi}effectiveness of which is vividly demonstrated by the situation at TRS. Dustfall collectors established by the Ministry in the vicinity of TRS have, on hundreds of occasions, registered significant exceedances of the Ministry dustfall guidelines for lead. By reason of the fact that a guideline as opposed to a standard, is unenforceable, the company continues to conduct its operations with complete disregard to these exceedances. Presumably, ^{se}the guidelines are established to protect the environment and public health, and clearly they are not doing so.

It is our recommendation then that:

Regulation 308 be revised * in a fashion that will:

- require regular monitoring of all contaminants that may in consequence of a particular operation be discharged to the environment;
- facilitate such monitoring;
- facilitate enforcement;
- establish standards with respect to all emissions including stack, ambient and dustfall discharges;

- allow public participation in the licensing process;
- impose upon responsible public officials a duty to enforce regulatory requirements;
- impose upon the operator of a polluting activity a legal obligation to cease operations in the event that exceedances of regulatory standards are identified.

* We note that the Ministry is presently in the process of undergoing a regulatory reform of Regulatory 308 and we trust that they would be pleased to receive society's recommendations with respect to needed reforms.

Health Protection and Promotions Act

The following provisions are relevant:

S. 11 imposes upon the Medical Officer of Health (MOH) the obligation to investigate and report upon all complaints with respect to health hazards.

S. 13 allows the MOH the broad authority to issue a variety of orders with respect to health hazards.

In large measure, exercise by the MOH of the authority and responsibility accorded to him by the provisions of this

legislation have significantly benefitted the residents of the Niagara Neighbourhood and ^{has} served to raise the public profile of the pollution problem in that community.

(Cathy, as I am relatively unfamiliar with the activities of the Department of Health, I'll leave this section for you to draft. However, I can offer the following comments and suggestions.)

The first is that the Public Health Act, which was replaced by the HPPA, included a provision that imposed upon the MOH a duty to take steps to remedy ^a nuisance (read Health Hazard) that was identified. While the MOH presently has an obligation to investigate and report, he has no similar duty to actually take effective remedial action. We might recommend, therefore, that the HPPA be revised to reinstitute this positive obligation.

My impression is that the Department of Health and the HPPA have, over recent years, largely served to have blood tests carried out of children in the neighbourhood. I have always found this approach to identifying a pollution problem or health hazard extremely disconcerting. Presumably, we must prevent adverse human health effects before they are actually identified in living organisms. Blood lead levels in the neighbourhood ^{that} aren't _____ higher ^{than for} the population as a whole should not suffice to exonerate the company, or lead one to the conclusion that emissions of lead into the environment are not potentially ^{and the environment is general.} problematic in terms of human health. This is the "dead body"

approach to environmental regulation and it is one that we have left far behind in the whole area of environmental regulation. This would be tantamount to sampling the blood of Wallaceburg residents to identify dioxin actually in people before regulatory action is considered necessary, ~~(clearly preposterous)~~.