



Canadian Environmental Law Association
L'Association Canadienne Du Droit De L'Environnement

SUBMISSIONS

TO THE

ONTARIO MINISTRY OF THE ENVIRONMENT

ON

CREATING ONTARIO'S
TOXICS REDUCTION STRATEGY
DISCUSSION PAPER

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I. INTRODUCTION

On August 27, 2008, the Ontario Ministry of the Environment (“MOE”) placed on the *Environmental Bill of Rights* registry for 45-day comment a Discussion Paper on *Creating Ontario’s Toxics Reduction Strategy*. The Discussion Paper announces the Ontario Government’s commitment to “introducing new toxic reduction legislation that would reduce pollution, and inform and help protect Ontarians from toxic chemicals in the air, water, land, and consumer products.” As a first step in this process the government is developing a Toxics Reduction Strategy made up of three components: (1) proposed legislation, (2) capacity building, and (3) support for facilities to reduce toxics. The overall strategy is designed to “foster a greener economy, and inform Ontarians about toxics, including carcinogens, in the environment and consumer products.”¹

The Canadian Environmental Law Association (“CELA”) strongly supports measures to reduce toxic substances in the environment and the corresponding disease burden such substances impose on human health. In this regard, CELA congratulates the provincial government in releasing the Discussion Paper for consultation and comment before proceeding to the development of legislation in this area.

The purpose of these submissions is to meet the requirements of *EBR* Registry Notice No. 010-4374 by providing written submissions to the MOE by the comment deadline of October 11, 2008.

Part II of these submissions provides brief background information on CELA and some of our recent initiatives directly related to reduction of toxic substances.

Part III summarizes CELA’s general views on the Discussion Paper by briefly reviewing the nature of the problem that justifies such legislation and the benefits to be expected from the law. Part III also discusses (1) matters not raised for inclusion in the new legislation, and (2) matters where it is unclear what the government’s intentions are with respect to new legislation.

Part IV provides specific comments on the Discussion Paper including (1) the nature of the new requirements proposed, and (2) the scope of the regulated community. Part IV raises a number of concerns, particularly with respect to the latter issue.

Part V provides response to selected questions raised by MOE throughout the Discussion Paper.

Part VI provides final conclusions and summarizes recommendations that appear throughout these submissions.

¹ Ontario Ministry of the Environment, *Creating Ontario’s Toxics Reduction Strategy – A Discussion Paper*, *EBR* Registry Notice Number 010-4374 (August 2008) [hereinafter “*Discussion Paper*”].

II. CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA is a public interest group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and groups in the courts and before administrative tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

For many years, CELA has advocated strong federal and provincial laws controlling toxic substances and the right of the public to know about such substances in their communities. CELA is a co-founder of the "Pollution Watch" website (www.pollutionwatch.org), which provides members of the public with information about potential environmental contamination in their communities based on information from the National Pollutant Release Inventory ("NPRI") authorized under the *Canadian Environmental Protection Act, 1999*.

In 2006, CELA researched and wrote a major report for the City of Toronto on various legal options for implementing community right to know measures at the municipal level. The organization is also a member of the Occupational and Environmental Working Group of the Toronto Cancer Prevention Coalition and has participated in a number of law reform initiatives in this regard.

In 2007, CELA was awarded a grant by the EJLB Foundation of Montreal, Quebec to prepare both a report and model bill on toxics use reduction and community right to know. Portions of the comments in the submissions that follow are based on this work, which was completed in August 2008.

III. GENERAL COMMENTS ON DISCUSSION PAPER ON CREATING ONTARIO'S TOXICS REDUCTION STRATEGY

A. Overview: The Nature of the Problem

There are over 23,000 chemicals in use in Canada today, but very little data available on the effects of many of them on human health and the natural environment.² The effects of multiple toxics in the environment also are not known. However, the Discussion Paper notes that a 2006 report of the Commission for Environmental Cooperation identified a variety of adverse health effects associated with environmental pollution including cancer, birth defects, learning, developmental, and behavioural disabilities, impaired endocrine function, and respiratory problems.³

² Canadian Environmental Law Association, *Our Toxic-Free Future: An Action Plan and Model Toxics Use Reduction Law For Ontario* (August 2008) at 5 [hereinafter "CELA Report and Model Bill"].

³ *Discussion Paper*, *supra* note 1, at 30.

The situation is particularly acute in Ontario as the Discussion Paper indicates:

“...Ontario is one of the top dischargers of toxics in North America and the number one discharger in Canada:

- Ontario industries release the second largest amount of recognized developmental and reproductive toxicants in North America, behind Tennessee;
- Ontario industries release the fifth largest amount of known and suspected carcinogens in North America behind Texas, Ohio, Indiana, and Louisiana;
- Ontario industries account for 36 per cent of the total Canadian discharges of reportable chemicals into the air and 50 per cent of discharges to water.” (references omitted)⁴

Direct discharges of contaminants to air and water, and indirect discharges via municipal sewage treatment plants that are not designed to treat complex mixtures of chemical compounds, have resulted in notable incidents of environmental and human health contamination over the years in the Great Lakes Basin, which contains over 90 per cent of Ontario’s population.⁵

B. Benefits of Toxics Use Reduction

In the face of problems of this magnitude posed by environmental contamination from toxic substances, toxics use reduction has been viewed as providing a number of benefits including:

- Less pollution leading to a cleaner environment and safer products;
- Reduction in public health risks, and contribution to safer and cleaner workplaces;
- Savings in money to companies through implementation of pollution prevention plans;
- Promotion of cleaner, more innovative technologies and development of greener products;
- Lower compliance costs for companies and lower enforcement costs for government agencies; and
- Reduction in the need for further management of hazardous wastes.⁶

⁴ *Ibid.* at 28-29.

⁵ *Ibid.* at 30.

⁶ CELA Report and Model Bill, *supra* note 2, at 7-8.

As the Discussion Paper states “Reducing toxics in Ontario’s economy will not only benefit the environment, it will also create opportunities for developing new ways of doing business.”⁷

C. Scope of Government Legislative Proposal

The province proposes to augment its traditional “end of pipe” approach to control of toxic substances by focusing on reducing or eliminating toxics at the beginning of the cycle, particularly with respect to the use of toxics. In this regard, there are four elements to the government’s proposed legislation:

- New requirements for toxics (materials accounting, toxics use reduction plans, reporting, and public disclosure);
- Identifying the regulated community (through designated lists of toxic substances, thresholds for the application of the requirements, and phasing);
- Addressing toxics in consumer products (restrictions on toxics in products, and public disclosure of toxic contents in products); and
- Governance model (MOE – to ensure compliance; and new external body – to deliver technical and scientific support on toxics reduction, train and possibly certify toxics reduction planners, and provide education and outreach).⁸

With some exceptions noted more fully below, such as the particulars with respect to thresholds and phasing, CELA supports the overall approach outlined in the Discussion Paper but, of course, reserves final judgment on the adequacy of the proposed law until the actual wording of the legislation itself is available.

D. Matters Not Raised in Discussion Paper for Inclusion in New Legislation

Despite CELA’s overall support for the government initiative on toxics reduction, there are some concerns with what does not appear to be contained in the legislative proposal as it is set out in the Discussion Paper. Some of these observations may well not be of concern once the full draft of the legislation is released. However, for the moment and, out of an abundance of caution CELA identifies the following matters of concern.

⁷ *Discussion Paper*, *supra* note 1, at 4.

⁸ *Ibid.* at 9-24.

1. Purposes of Law

The trend in modern environmental legislation is to include a purpose section, both as an aid to public understanding and support of the law's objectives as well as to assist judicial interpretation and enforcement of the law's provisions. CELA expects that the new toxics bill will contain such a purpose section but did not see any explicit reference to the issue in the Discussion Paper. The model Bill CELA has prepared contains a multi-pronged purpose section: (1) protect human health and the environment by reducing the use of toxic substances, (2) promote the use of safer alternatives to such substances, (3) recognize the public right to know the identify and amounts of toxic substances in their community from various facilities, and (4) apply the precautionary principle and principles of sustainable development to these issues. (See text of Model Bill for complete wording).⁹

Recommendation # 1: Include a purpose section in the Act that recognizes the need to (1) reduce the use of toxic substances, (2) promote safer alternatives, (3) facilitate public right to know about such substances, and (4) apply precautionary and sustainable development principles.

2. Targets

The Discussion Paper does not discuss establishing numerical goals or targets for reduction of the use of toxic substances in the legislation. The CELA Report notes the importance of setting clear and ambitious goals for toxics use reduction in order to galvanize efforts to spur innovation as well as provide benchmarks to measure progress. The CELA Report proposes such goals and also points to statutory precedents for this approach in other jurisdictions (e.g. Massachusetts and New Jersey).¹⁰ These targets have been included in the CELA Model Bill along with a provision requiring the government to report periodically on progress in achieving them. (See text of Model Bill for complete wording).¹¹

Recommendation # 2: Include provincial toxics use reduction targets in the legislation.

3. Fund

The Discussion Paper is silent on establishment of a Fund dedicated to financing the programs and institutions that will be needed to ensure proper implementation of the Act and achievement of its purposes. The value of a dedicated Fund includes: (1) crystallizing the importance within government of the on-going need for secure financing of a regime

⁹ CELA Report and Model Bill, *supra* note 2, at 48 [section 1(a)-(d)].

¹⁰ *Ibid.* at 15.

¹¹ *Ibid.* at 60 [section 7(1)(2)].

dedicated to reduction of toxic substances, (2) instilling confidence in the public that the necessary financing will be in place for the program, (3) underscoring for the regulated community the importance the government places on the program succeeding in achieving its objectives, including with respect to technical assistance measures for businesses that must make production adjustments as a result of meeting the Act's requirements, and (4) providing assurance to employees who must make re-employment adjustments that programs will be in place to meet their needs. The CELA Model Bill contains such a Fund. (See text of Model Bill for complete wording).¹²

Recommendation # 3: Authorize establishment of a Toxics Use Reduction and Safer Alternatives Fund in the legislation.

4. Fees

The Discussion Paper also is silent on the need for a financial engine to ensure the toxics program will be funded adequately. In Massachusetts the program is entirely financed by a fee on the use of toxic substances and precedents exist under Ontario law for the imposition of environmental fees in a variety of contexts.¹³ The principle financing mechanism for the Fund should be a fee on industrial facilities and toxics use reduction and safer alternatives planners. The CELA Model Bill contains such a requirement. (See text of Model Bill for complete wording).¹⁴

Recommendation # 4: Authorize imposition of a toxics use fee on industrial facilities that are subject to the Act's requirements and on toxics use reduction and safer alternatives planners that seek to be certified under the Act.

5. Role of the Public

The Discussion Paper indicates that the provincial government is committed to including "legislative requirements to make, at a minimum, Toxic Reduction Plan summaries, use data from Materials Accounting and Reports publicly available. The Ministry is currently exploring a number of methods to provide access to this information, such as a web-based portal."¹⁵ The Discussion Paper notes further that:

"The Ministry is proposing to provide the public with accessible, easy-to-understand information about toxics, including carcinogens, in the environment and consumer products to help Ontarians make informed choices.

Telling Ontarians about toxic substances in our environment would provide valuable information to the public, industry, government and environmental and health organizations. Enhanced transparency would help keep Ontarians informed about the use of toxics in the province and the progress in toxics reductions. Other jurisdictions have

¹² *Ibid.* at 77-78 [section 16].

¹³ *Ibid.* at 33-34.

¹⁴ *Ibid.* at 78-79 [section 17].

¹⁵ *Discussion Paper, supra* note 1, at 14.

been successful in encouraging toxics reductions and compliance by providing the public with access to information on the use of toxics by facilities and outlining the planned toxic reduction actions explored by those facilities.

The Ministry is proposing to use education and outreach programs that would include a 'one stop' web-based portal to provide straightforward, searchable information about the type and amount of toxic substances used and emitted in Ontario. This proposal could allow the public to be better informed about toxics at a community level and provide links to other organizations and sources of information on toxics reduction.

...¹⁶

CELA supports the government commitment to information disclosure to the public as noted in the above statements. In the CELA Model Bill we set out provisions that are very compatible with the above government commitments.¹⁷

However, CELA submits that the role of the public in a toxics use reduction law should be enhanced further beyond the above commitments in order to improve the overall effectiveness of the law reform initiative. For example, the CELA Report and Model Law address public access to environmental information acquired by government from industry that historically has not been readily accessible to the public. This includes web-site searchable access to contaminated lands, air emissions, and water discharge monitoring information periodically submitted to the MOE under existing environmental laws.¹⁸ Such a reform is compatible with the above principles that the province supports and may well introduce in the forthcoming government Bill, though it is difficult to be certain about this at this time until the Bill is introduced in the Legislature.

Recommendation # 5: Include a public right to know other information compiled under the authority of existing environmental laws.

Furthermore, the Discussion Paper is silent on the opportunity of members of the public to request that the Minister review an industrial facility's toxics use reduction plan or (as we recommend in the CELA Model Bill) substitution implementation plan¹⁹ to determine if they comply with the Act's requirements. The precedent for such an approach is already contained in the *Environmental Bill of Rights, 1993* ("EBR").²⁰ However, resort to that legislation may be hampered by the fact that such plans may not qualify as "instruments" as defined under the *EBR*.²¹ Accordingly, it would be sensible in the circumstances, to extend the *EBR* principle to plans under the new Act or, in the alternative, extend the *EBR* itself to include such plans.

¹⁶ *Ibid.* at 27-28.

¹⁷ CELA Report and Model Bill, *supra* note 2, at 81-82 [sections 20-21].

¹⁸ *Ibid.* at 28-29, and 83-85 [section 22].

¹⁹ *Ibid.* at 85-86 [section 23].

²⁰ S.O. 1993, c. 28, (Part IV – application for review).

²¹ *Ibid.* at s. 1(1) ("instrument" means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation).

Recommendation # 6: Include a public right under the new Act to apply to the Minister for review of toxics use reduction and safer alternatives plans or, in the alternative, amend the *EBR* to ensure that such plans are included in the definition of “instruments” and, therefore, subject to review under the *EBR*.

Finally, the Discussion Paper is silent on the opportunity of members of the public to resort to the courts where, for whatever reasons, government does not act. CELA would expect a government enlightened enough to enact a toxics use reduction law to vigorously enforce its requirements. If nothing else, such a government has a vested interest in the success of a regime that it has staked some of its policy credibility and legacy upon. However, governments change and over time less enlightened governments might administer and enforce the law differently, less effectively, or not at all. In those circumstances, the public should not be locked out of the process of ensuring that the Act's basic requirements are complied with. In this regard, CELA includes in its Model Bill a public right of action provision. (See text of Model Bill for complete wording).²²

Recommendation # 7: Include a public right of action to enforce key provisions of the Act.

6. Technical Assistance Programs for Employees

While the Discussion Paper addresses the issue of technical assistance for businesses,²³ the document is silent on technical assistance for employees who may require re-employment assistance, vocational re-training, or other assistance as a result of the implementation of the new law. The CELA Model Bill explicitly addresses this issue. (See text of Model Bill for complete wording).²⁴

Recommendation # 8: Include statutory authority for the development and implementation of technical assistance programs for employees.

E. Matters Unclear in Discussion Paper Respecting Whether the Subject of Proposed Legislation

Despite the overall quality of the Discussion Paper, there is some ambiguity with respect to certain key issues that, in the view of CELA, ought to be explicitly addressed in new provincial legislation. The CELA submission comments on a number of these matters below.

²² CELA Report and Model Bill, *supra* note 2, at 86-87 [section 24].

²³ *Discussion Paper*, *supra* note 1, at 25-26.

²⁴ CELA Report and Model Bill, *supra* note 2, at 80-81 [section 19].

1. Regime for Substitution of Safer Alternatives

In several places throughout the Discussion Paper there is reference to the issue of substitution of less toxic substances:

“...the government recognizes that solutions and known substitutions are not always readily available to deal with the use of toxics, and that there is a need over time to build capacity and focus our efforts to develop and implement less toxic alternatives.

To harness the broad range of Ontario expertise, the Ministry proposes the following approaches to help build capacity for toxics reduction:

...

- Partnerships and linkages with government agencies, stakeholders and academia to support research into emerging science and engineering dealing with less toxic alternatives and substitutions;

...

- Economic and other incentives to encourage innovations, reductions and substitutions, and to maximize the potential for economic benefits.”²⁵

...

“Input substitutions...are potential options that facilities can consider implementing as a result of receiving technical assistance.”²⁶

...

“The Ministry is also exploring the use of social marketing campaigns to inform Ontarians about the health and environmental benefits of using alternatives to toxics, such as less-toxic substitutes or greener products. Both of these approaches would be developed in consultation with stakeholders and partners to determine the most effective ways of reaching and meeting the needs of Ontarians.”²⁷

However, none of these references are found under the headings of the Discussion Paper that review the content of the proposed new legislation. Indeed, by the very wording of the above quotations, it appears that the province hopes that safer alternative substitution will occur as a result of the regulated community seeing the benefits thereof, not as a result of legal requirements to do so.

In the view of CELA, this might have been an acceptable approach two decades ago, but not today and certainly not in light of Ontario’s position as “one of the top dischargers of toxics in North America and the number one discharger in Canada.”²⁸ After two decades of experience with toxics use reduction legislation in Massachusetts, that state has now decided that it is necessary to implement safer substitution requirements as a matter of law and currently has a Bill in the Massachusetts legislature in this regard. Other

²⁵ *Discussion Paper, supra* note 1, at 25.

²⁶ *Ibid.* at 26.

²⁷ *Ibid.* at 28.

²⁸ *Ibid.* at 28-29.

jurisdictions in North America and Europe have come to the same conclusion.²⁹ It is past due for Ontario to reach the same conclusion. In this regard, the CELA Report and Model Bill make recommendations³⁰ and contain explicit statutory wording, respectively, for establishing four key components of a safer alternatives legislative regime:

- Identification of priority substances for substitution;³¹
- Safer alternatives assessment reports;³²
- Provincial priority toxic substance alternative action plans;³³ and
- Industrial facility substitution implementation plans.³⁴

CELA urges the provincial government to clarify its position on safer alternatives before introducing the Bill for first reading and to include requirements for safer alternatives as a matter of law.

Recommendation # 9: Authorize statutory provisions for safer alternatives containing at least the following components (1) identification of priority substances for substitution, (2) safer alternatives assessment reports, (3) provincial priority toxic substance alternative action plans, and (4) industrial facility substitution implementation plans.

2. Conflict with Municipal By-Laws

The Discussion Paper notes that:

“Jurisdiction for the environment in Canada is shared between the federal and provincial governments. In general, the federal government has the responsibility for matters of national concern, whereas the provinces tend to manage matters of a local nature, such as industrial and municipal emissions.

²⁹ CELA Report and Model Bill, *supra* note 2, at 31-32.

³⁰ *Ibid.* at 33.

³¹ *Ibid.* at 67-69 [section 11] (requirement to identify potential priority toxic substances from list of reportable toxic substances established elsewhere in Bill based on criteria set out in section 11 and following public consultation).

³² *Ibid.* at 69-71 [section 12] (requirement for Minister to direct Institute established under Bill to prepare safer alternatives assessment report for each priority toxic substance selected based on report content requirements set out in section 12 and following public consultation).

³³ *Ibid.* at 71-73 [section 13] (requirement for Minister to establish provincial alternatives action plan for each priority substance that is the subject of a safer alternatives assessment report based on plan content requirements set out in section 13 and following public consultation).

³⁴ *Ibid.* at 73-76 [section 14] (requirement for industrial facility that manufactures, processes or uses priority toxic substance to develop and complete a substitution implementation plan for any substance that is the subject of a provincial alternatives action plan, with such plan becoming part of the facility’s toxics use reduction plan).

Municipalities may further impose reporting requirements or bylaws. In particular, the City of Toronto is currently developing its Environmental Reporting and Disclosure Program, which would aim to track and reduce 25 key toxic substances present in Toronto's environment. Toronto is proposing that the program would require businesses and municipal operations to track and report to the public on their use and emission of toxics that have been designated as of priority health concern. Additionally, the program would support affected businesses in undertaking actions to reduce those toxics.

...

As the Strategy is developed the Ministry will work to consult with the City of Toronto to better align the approaches to reducing toxics and to minimize duplication and potential burdens on Ontario facilities."³⁵

However, the Discussion Paper is otherwise silent on the issue of whether and, if so, how provincial legislation will address potential conflicts with municipal by-laws that might purport to impose greater toxics use reduction or other requirements on industrial facilities than that proposed under the new provincial law. In the respectful submission of CELA, the trend in both legislation³⁶ and judicial interpretation³⁷ has been and should continue to be toward expanding, not contracting, municipal authority to act to protect the environment. In this regard, the CELA Model Bill contains explicit authority that would allow municipalities to enact more restrictive toxics use provisions, or grant greater information access, if necessary. (See text of Model Bill for complete wording).³⁸

Recommendation # 10: Include a conflicts provision that allows for municipal by-laws to operate in conjunction with the new provincial law.

IV. SPECIFIC COMMENTS ON DISCUSSION PAPER

A. New Requirements Good as Far as They Go, But Are Not Enough

B. Scope of Regulated Community Too Narrow

1. Too Few Toxics Designated For Immediate Action

³⁵ *Discussion Paper*, *supra* note 1, at 31.

³⁶ *See, e.g., Smoke-Free Ontario Act*, S.O. 1994, c. 10, s. 12 (if there is a conflict between certain sections of Act and a provision of another Act, regulation, or municipal by-law that deals with smoking, the provision that is more restrictive of smoking prevails).

³⁷ *See, e.g., Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (Ont. C.A.) (upholding by-law limiting application of pesticides within City under s. 130 of *Municipal Act* despite existence of federal and provincial pesticide legislation dealing with same subject matter).

³⁸ CELA Report and Model Bill, *supra* note 2, at 91 [section 58].

2. **Too Many Schedules That Defer Action on Many Toxics to Indeterminate Future**
3. **Phasing Too Slow, Even if Appropriate**
4. **Thresholds Too High**
5. **Too Few Sectors?**

V. RESPONSE TO SELECTED MINISTRY QUESTIONS

A. Materials Accounting

B. Toxics Use Reduction Plans

C. Reporting Requirements

D. Public Disclosure

E. List of Toxic Substances

F. Thresholds

G. Consumer Products

H. Institutions and Toxics Use Reduction Planning

I. Technical Assistance?

J. Alternatives

K. Incentives?

L. Public Access to Information

VI. CONCLUSIONS AND RECOMMENDATIONS

