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BRIEF

OF THE

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Containing Recommendations on

BILL C - 25

The Environmental Contaminants Act

Presented to the

Standing Committee on

Fisheries and Forestry

May, 1975

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and

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CELA: A Word About Who We Are

The Canadian Environmental Law Association is a national non-profit organization of citizens, scientists and lawyers, dedicated to enforcement of present environmental laws and to their improvement.

The Association was founded in 1970 (along with the Canadian Environmental Law Research Foundation) in part because of the frustrations which citizens face, with reference to environmental problems, in dealing with a seemingly inaccessible legal and administrative system, and in part because of a lack of knowledge of those legal remedies that do exist to stop environmental degradation.

In order to fill this gap, the Association established a panel of about ninety lawyers in Ontario (and some in other provinces) who are willing to take cases, without charge if necessary, in environmental situations where legal assistance would otherwise not be forthcoming.

Through our Toronto office, lawyers with the Association provide advice to approximately 500 complainants per year, which in may instances result in positive action by government agencies or in the complainants obtaining further legal advice and assistance through the CELA panel of lawyers.

In order more effectively to inform the public about their environmental rights and remedies, and the legal reforms necessary for the establishment of a healthier and safer

environment, the Association and the Foundation jointly published, in February, 1974, Environment On Trial: A Citizen's Guide to Ontario Environmental Law, the first Canadian book outlining these areas in layman's terms.

Because of the work being done in this critical area by the Association, it has attracted a membership of about 500 from every segment of the public, in addition to the membership and support of many local, provincial and national organizations.

As human technology has grown exponentially, so has the number of industrial byproducts which are introduced into the environment, frequently with little or no pre-production research to discover possible deleterious effects. Even where attempts have been made to analyze and predict hazards, advances in scientific knowledge often, years later, expose the inadequacy of the prior research methods and the inaccuracy of conclusions derived from them.

For example, carcinogenic substances often require a ten or twenty year latency period to reveal their effects. Only recently did scientists discover that vinyl chloride, used for years in the manufacture of plastics, is linked to a fatal liver cancer; that freon, the propellant widely used in aerosol cans, is gradually disintegrating the ozone layer that protects the earth's population from cancer-causing ultraviolet radiation.

Environmentalists agree that objectors to the use of new substances should usually have the burden of proof. However, when they challenge some activities as being serious health hazards where the probability of harm cannot be determined with certainty, public policy requires that the manufacturer of a substance should have to demonstrate safety of its products. Such a modification of the usual burden rules is in keeping with a traditional justification for shifting the burden of proof: that the greater burden should be on the person with the greatest access to information. In addition, it seems reasonable that the person who

stands to gain most should be responsible for inflicting no harm on the public.

Presently, the data necessary to assess the impact of chemicals on human health and the environment is often not made available, partly because many manufacturers are reluctant to release information relative to the chemical substances which they produce. In some instances, the absence of data has meant that environmental health disasters have occurred before toxic substances could be identified.

To increase public support of this bill, it should require technology assessment of new substances prior to production. Secondly, it should be seen by the public to sanction strong regulatory action once toxic contaminants are made known. Thirdly, to have the greatest possible public confidence and support, it should be seen to involve the public as much as possible in mechanisms designed to evaluate and control potential hazards to health and environment.

To the extent that Bill C-25 is deficient in any of these respects, the public cannot have confidence in the Bill's stated aims of protecting "human health and the environment from the release of substances that contaminate the environment".

It is our submission that Bill C-25 would be strengthened if all notices required under the Act were published in a newspaper of general circulation. Reports of a Review Agency should be made public, and notices of their existence should be given in general circulation newspapers. The Canada Gazette is simply not adequate for this purpose.

A timetable for the coming into effect of the legislation ought to be in the Bill. With a firm timetable, regulations makers will be encouraged to produce regulations within a reasonable time. Also, regulation makers ought to consult with people outside the industry being regulated before drafting begins.

For the Bill to be seen as giving meaningful protection, industries must be required to report on new substances they intend to manufacture together with quality and safety test methods and results. It is our submission that mandatory reporting is essential -- otherwise, the government will continue to be looked to for clean-ups and blamed for not knowing how toxic released substances are.

An amendment to The Statistics Act might be introduced to make information already collected on the quantity and place of use of each biologically active ingredient in Canada available.

Comments on sections of
Bill C - 25

Section 2. (2)

It is submitted that this section should read:

> "This Act is binding on Her Majesty in right of Canada and of any province and any agent thereof."

Section 3

It is our submission that this section should be changed to require the manufacturer or the importer or the distributer of a new substance to report the existence of the substance and the chemicals it contains to the Minister.

The section also should be amended to require reporting to the Minister of all releases of contaminants either over the present regulations or where there are no regulations, all releases. The industries which are using the contaminants should also be required to submit the standards they presently use to ensure the safety of their workers.

There should also be sanctions for failing to report.

The Act does not at present require any reporting and it is our submission that the Minister will not be in a strong position to take action to ensure the safety of humans and the environment if reports are not made to him. Obviously, inspectors cannot be everywhere at all times.

Section 3. (1) should be amended in the last line so that the Minister or the Minister of National Health and Welfare shall do the things set out in this section.

Comment: It is our submission that these Ministers should have the duty to do the things set out in sections (a) and (b) and not just the permission.

Section 3. (2)

A subsection prohibiting a person with a conflict of interest sitting on an advisory committee should be added.

A subsection requiring any committee to represent the interests of industry, government, the public and the environmental interest, should be added.

This section should be amended so that an advisory committee when set up should be required to publish reports on the contaminants it reviews, and the measures it suggests to control the presence in the environment of those substances.

Subsection (2) should be extended to make it clear that submissions to the Advisory Committee, oral presentations to the Committee and any report of the Committee will be made public.

Comment: It seems clear to us that the public has a right to know of contaminants in the environment whether or not they are judged to be hazards at the time such a review takes place. It is our experience that members of the public are more likely to over-react with anxiety when information on possible hazards is withheld from them.

Section 4

Section 4 should be amended so that the Minister can get some data on which to base his suspicions. We suggest that the manufacturer of any new substance be required to submit data on the contents of the substance, the test results, the methods of testing, etc. to the Department of the Environment and/or the Department of National Health and Welfare before a substantial financial commitment is made to manufacturing the substance. Such information could then be reviewed by the Ministry and then the Minister could take the actions set out in section 4.

Section 4. (1)

This section should be amended to read that the Minister shall take any or all of the following steps.

Section 4. (1) (a) and (c)

There seems to be a distinction between these two sections so that anybody engaged in the importation or manufacturing of a substance might be required to do tests, but those who are engaged in any "commercial manufacturing or processing activity involving the substance" might not have to do any tests. It is our submission that the testing requirements should apply to"commercial manufacturing or processing activities".

Section 4. (d)

A subsection (d) should be added to specify the kinds of records which must be kept by each manufacturer, importer or industrial user of contaminants, notwithstanding Section 18 (i) which says regulations specifying what records must be kept may be made. At a minimum, the records must specify the trade name, the generic name, the ingredients, the toxicity of the substance, the quantities manufactured, imported, or used; if sold, to whom (including the address of the buyer), where substances on hand are stored, the safety of that location; the detoxification agent, the dilution agent, the appropriate cleanup procedures, the procedures to avoid human exposure and environmental contamination; the methods used to test for safety and side effects, and the results of those tests including historical data on human experience with the substance.

Once the information has been made available to a government ministry, the subsection should specify that the ministry must keep the information in a place where it is accessible to the public. Such a subsection, of course, should also include the right of any person to inspect the information and make copies at a nominal cost.

Section 4. (2) (b)

This section should be amended to show a certain time. For example, it should read: ". . to whom a notice referred to in paragraph (1) (b) or (c) has been sent shall comply with the notice within thirty days." If it is impossible to comply with the notice within thirty days, "the person to whom a notice is directed may apply for an Order from the Minister of the Environment to extend the time."

Section 4. (4)

This section should be amended to allow the right of the public to know what the substance is.

Comment: It is not appropriate just because a manufacturer asks that his information be kept confidential that it should be so kept. While there may be a need for keeping the proportions of ingredients which go into a certain formula confidential, as being a trade secret; or keeping sales information confidential as a matter of competitive edge, manufacturers should not be allowed to keep from the public information on contaminants which may affect the general environment or the health and safety of some members of the public.

CONSULTATION

Section 5. (1)

This section should have an additional sentence at the end as follows:

> "The Ministers shall have fifteen days after they become satisfied as set out in section 5. (1) to consult the governments of the provinces or any other departments of the government of Canada, and those governments and departments shall have a further thirty days in which to reply. If no replies are received within that period, then consultation in accordance with section 5. (1) shall be deemed to have taken place, and the Minister and the Minister of National Health and Welfare shall proceed."

Section 5. (2)

Somewhere in the Bill before section 5. (2), there ought to be a requirement that the Governor in Council establish the schedule spoken of in subsection (a).

Section 5. (1) (b)

This section should be amended so that the Minister shall "cause to be published in the Canada Gazette and in at least one newspaper of general circulation..."

Comment: It is our submission that notice in the Canada Gazette will certainly not reach all the people who might have objections. Some more effort than publication in the Canada Gazette should be made to allow the public to participate in a meaningful way.

Section 5. (3)

The first line of this subsection should be amended to read: "Any person having an interest therein or any concerned member of the public may . . ." This would bring the subsection into line with subsection 3(2) which recognizes that "concerned members of the public" have a valuable contribution to make.

ENVIRONMENTAL CONTAMINANTS BOARD
OF REVIEW

Section 6. (1)

This section should be amended to detail who is going to be on the Board. In the amendment there should be a prohibition against present civil servants, people who have been civil servants within the previous two years, or people who have been on contract either to the Ministery of the Environment or the Minister of National Health and Welfare within the previous two years becoming members of the Board. In addition the amendment should make clear that the Board will be representative not only of industry but also of the non-industry scientific community and the environmentalist community.

Comment: It may be that the Board is not to be a full time one. In this case under the present section it would probably be drawn on ad hoc basis from civil servants who were handy in Ottawa or a location where the Board would sit. This might mean that the very civil servants who had been engaged with industry and the drawing up of regulations or the naming of substances to this schedule would sit on the Board. It is our submission that there ought to be prohibition against this kind of natural bias appearing on the Board.

Section 6. (4)

This subsection should be amended to state that a transcript of all the evi-
and all documents presented to the Board shall be depo-
where any person may inspect the-

Comment: Since the hearings appear to be open to the public by reason of subsection (1), while anybody filing a notice of objection should be afforded a reasonable opportunity of appearing, then this provision is merely an administrative tidying up so that an interested person does not have to sit through a hearing in its entirety but may check back on the documents later.

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Section 6. (5)

It is our submission that making the report public within thirty days must be mandatory. As protection for trade secrets, an amendment could be made to allow for the deletion of quantities used in formullae (but not the contents of the substance) or for deletion of identifying material such as the names of persons or the sales figures presented to the Board.

As an alternative the decision of the Board not to make its report public should be appealable to perhaps the two Ministers together or the Minister of the Environment.

In any event a Board's decision not to make a report public ought itself to be made public and the Board ought to be required to give written reasons for withholding the report.

Comment:

Here an instructive example is that of the report concerning arsenic in the lake near Yellowknife. This report was only produced upon close opposition questioning and once produced it was clear that public interest had not been served by keeping it confidential.

SCHEDULE

Section 7. (3)

Since this subsection clearly deals with emergencies requiring fast action this subsection should be amended to impose an obligation to act upon the Governor in Council therefore in line 9 of this subsection an amendment should be made so that the line reads ". . . or the environment, he shall, notwithstand- . . . "

Section 7. (4)

This section should be amended so that the period of time for filing notices of objection is 15 days.

Comment:

Since this subsection deals with emergencies 60 days is clearly too long a time to wait for notices of objection. An industry who had been subjected to an order preventing,say, the manufacture of a certain substance, might effectively be put out of business by the wait of 60 days. The amendment should be to 15 days but the notice should be published in the Canada Gazette and in several newspapers of popular circulation, in that way it is far more likely that it will be brought to the attention of anybody who might want to object.

Section 7. (5)

It is our submission that this subsection needs to have set out more provisions as to what happens during the 60 days of an emergency when the Board is waiting to hold its hearing. If a substance is seized, for example, there are no provisions here for its storage for getting it back or for preventing it from decomposing, etc. There is no provision for compensation if the Governor in Council has wrongly decided an emergency situation exists.

The duties of a Board appointed under this subsection should be repeated from Section 6 (2). (Perhaps a more efficient way of achieving the same result would be to amend Section 6 (1) to read "Upon receipt of a notice of objection referred to in subsection 5(3) or 7(5)")

A Board hearing triggered by a notice of objection to an emergency order should be public, and should give "the person filing the notice of objection and any other interested or knowledgeable person a reasonable opportunity of appearing before the Board, presenting evidence, and making representations" as set out in Section 6 (2).

Section 7. (7)

It is our submission that this whole subsection should be removed from the Act.

Comment:

If orders made in emergency situations by the Governor in Council are not effective until regulations are in force under paragraphs 18 (a) to (e), then, since no regulation is effective until it is published in the Canada Gazette, Section 7 (7) takes away all the emergency power of Section 7 (3) in a situation where a new substance, not yet within the regulations is suddenly discovered to be a dangerous contaminant.

If the Governor in Council has to make and have published a regulation under Section 18 (a) to (e) before using his emergency powers under Section 7 (3), then, practically speaking, the Government would have to inform a person to whom the regulation would be directed of its intention to use the emergency power after a regulation was in force. The only effective way of dealing with a present emergency would be for the Government to give a warning to stop immediately, then make and have published a retroactive regulation, legitimatizing the informal warning. Retroactive regulations do not seem, on civil libertarian grounds, to be a fair exercise of emergency powers.

It is our submission that the better proceedure would be to remove Section 7 (7) as it is an impediment to swift effective emergency action.

Section 7. (8)

This subsection should be amended so that the Governor in Council when deleting will give reasons for so doing. These reasons along with his order ought to be published in at least the Canada Gazette.

OFFENCES

Section 8. (1)

This section should be amended to read "~~no person shall,~~ in the course of any activity, wilfully release, or permit the release of any substance known to be of significant danger to health or the environment.

No person shall, in the course of any activity, wilfully release, or permit the release of, a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule into the environment in any geographical area prescribed in respect of that substance or class of substances or, if no geographical area is so prescribed, in Canada, ..."

Comment:

It is our submission that there should be no release of any substance which is of significant danger to health or to the environment anywhere in Canada. Then the next part of this section should detail as it does the classes of substances where certain tolerances are acceptable for health. However it is our submission that this subsection should apply"to any activity" and not just to "a commercial manufacturing or processing activity."

Section 8. (3)

This subsection should be amended to require definitions of "good manufacturing practice" in the regulations.

Comments:

While it is apparent that the subsection (2) and subsection (3) must necessarily be read together so as to avoid placing undue hardship on industries which use substances containing small amounts of what would otherwise be considered dangerous contaminants, including the phrase "good manufacturing practice" will lead to considerable litigation on the definition of this phrase. While litigation is going on the effect on the environment or health of the use of the substance challenged on the basis that its use is not "good manufacturing practice" will be overshadowed. It is therefore our submission that tolerances or quantities must be listed so that industry has clear guidelines as to what will lead it into a situation of liability and what will not.

Section 8. (5)

This section should be amended to provide for a minimum fine and it is our submission that the minimum fine of $1,000. a day would be appropriate.

The subsection should further be amended to allow for a fine based on a percentage of the profits made on the sale,use or processing of the substance found to be in offence under this section. It is our submission that one hundred percent of the profit would be appropriate sanction.

This section ought to be amended to provide that every person who contravenes this section is guilty of an offence and liable to be ordered to make restitution and/or to repair the damage caused by the escape of a containment and to be liable for an assessment of the cost of cleaning up the damage caused by the escape of the containment.

This section should further be amended to provide that fines assessed as a result of a conviction started by a private prosecution ought to be distributed on a 50-50 basis between the informant who made the charge and the Crown.

Section 8. (6)

This subsection should be amended to increase the time. If one year is the appropriate time then the phrase should be "from the time when the discovery of the event leading to the proceedings have been made". If, on the other hand, "from the time when the subject matter proceedings arose" is the appropriate phrase then the time should be at least six years.

INSPECTION

Section 10

It is our submission that the records of the inspector's visits and his report on his findings should be available for inspection either in the Department of the Environment or the Department of National Health and Welfare offices or some other designated convenient place, during the normal business hours. Every person should have the right to inspect these records and to make copies at a nominal cost. Provision should also appear allowing for deletions of the information which would protect trades secrets.

Section 10. (2)

The first sentence in this section should be amended to read "the owner and the person in charge. . . ."

Comment:

It is clear that both the owner and the occupant ought to give inspectors their help. For example there might be a situation where an occupant has no access to records which are kept by an owner in a safe on the premises. In such a case an inspector ought to be able to require the owner to open the safe and produce the documents therein.

SEIZURE AND DETENTION

Section 11.

Comment:

The two sections dealing with seizure and detention should be amended to make sure that pending an investigation none of the possibly hazardous substances can be used in any way. In addition a provision should be contained in these sections so that in an emergency total ban on the use of a suspected substance is possible for a short period of time.

Section 11. (4)(b)(ii)

This subsection creates a time gap. Under the subsection the seized substance cannot be retained after sixty days unless proceedings have been instituted whereas elsewhere in this statute the time for commencing a prosecution is one year.

Section 11. (5)

This section ought to be amended to define what security measures must be taken if a contaminant is stored in a place where it is found. There should be definite security measures so that the substance is not used pending an investigation or a prosecution; so that nobody on the premises can get at the substance; and so that a record is kept of who has access to the storage place and when such persons have near it.

Comment:

This appears to be a unique section where a possible accused has control over the Crown's evidence until the date of prosecution without safeguards suggested above or records being kept then one would not be able to prove the continuous possession and care of the substance at trial.

Section 12. (4)

This subsection should be amended to include a provision for the retaining of a sample of the substance which may later be produced in evidence.

FORFEITURE

Section 13.

This section should be amended to include provisions for the disposal of forfeited substances and to include assessing the cost of detoxification of a substance against the person in charge or the owner of the premises on which the substance was seized.

GENERAL

Section 14.

This section seems to exclude employees. It is our submission that they should be included.

REGULATIONS

Section 18.

This section sbould be amended to include a requirement of public participation in the regulatory process or in the vetting of regulations before they are proclaimed. A provision should also be included to require manadatory non-industry participation in the making of regulations.

Press Release

Release Date & Time
Thursday May 8, 1975
@ 12 Noon.

ENVIRONMENTAL GROUP URGES GREATER PUBLIC PARTICIPATION AND REPORTING REQUIREMENTS IN CONTAMINANTS BILL

Ottawa--

"Industry must be required to report on new substances they intend to manufacture, and public participation must be encouraged, if proposed federal contaminants legislation is to provide the public with meaningful protection from toxic substances," was the contention today of the Canadian Environmental Law Association.

"Mandatory reporting is essential," stated association Counsel Heather Mitchell, "otherwise the federal government will continue to be looked to for clean-ups and blamed for not knowing how toxic substances are released."

Ms. Mitchell and CELA researcher J.F. Castrilli appeared before the Commons Committee on Fisheries and Forestry which is hearing testimony this week on the proposed Environmental Contaminants Act, an Act to protect "human health and the environment from the release of substances that contaminate the environment."

The Association 20-page submission to the Commons Committee noted that "presently, the data necessary to access the impact of chemicals on human health and the environment is often not made available, partly because many manufacturers are reluctant to release information relative to the chemical substances which they produce. In some instances, the absence of data has meant that environmental health disasters have occurred before toxic substances could be identified."

The Association brief recommended that the bill require technology assessment of new substances prior to production. Secondly, that it should be seen by the public to sanction strong regulatory action once toxic substances are made known. Thirdly, it should be seen to involve the public as much as possible in mechanisms designed to evaluate and control potential hazards to health and environment.

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This paper contains post-consumer waste

In addition, the association recommended a number of measures to increase public participation in the process, which it contended would increase public support generally for the bill. These included, better notice requirements; greater public availability of review board and government advisory committee reports; consultation by regulation makers with people outside the industry being regulated before regulation drafting begins.

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