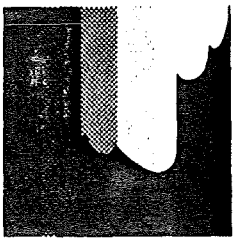

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SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON RESOURCE DEVELOPMENT REGARDING BILL 83

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INTRODUCTION

The Canadian Environmental Law Association (CELA) is pleased to speak to the Committee regarding Bill 83, an Act respecting the Protection of Farm Practices.

CELA has long recognized the connection between agricultural protection and environmental protection. Productive agricultural land is a vital Canadian resource. Without it we lose our ability to feed ourselves. Maintaining the fertility of the soil is a matter of future security. Perhaps the family farm is the paradigm in which it is easiest to comprehend the messages of the World Commission on Environment and Development, commonly known as the Brundtland Commission, where it states that the environment and the economy are inextricably linked.

While most Ontarians are aware of the successive economic crises confronting our farming communities, few are aware of the enormous ecological problems associated with our current agricultural policies and practices. The tools of the modern farm, heavy machinery, monocultures, hybrid crop strains and chemicals have precipitated a number of adverse consequences for soil fertility, water quality, public health and a viable rural economy. Since its inception in 1970 CELA has acted on the behalf of many farmers, rural communities, and public interest groups whose concerns have ranged from fears about pesticides in their well-water to the loss of the sub-soil structure of our valuable farmland.

Globally and locally the productivity of farmland has increasingly become more dependent upon massive chemical infusions of energy, largely in the form of petrochemical-based fertilizers and pesticides. We are also losing productive agricultural lands at an alarming rate to urban development. If Ontario is to maintain its vital ability to produce food, ecological recovery is essential in order to achieve economic viability.

THE LAW OF NUISANCE

The law of nuisance provides ecological protection where Bill 83 does not. Thus, it comes as a surprise that despite the very real and serious problems affecting farmland, such as environmental, planning, zoning and land pricing problems, we are offered a bill which attacks the ability of farmers and environmentalists to protect their property and the environment. In effect, by impairing the law of nuisance in respect of farmland, one of the best protections against environmental and property damage has been undermined.

The law of nuisance has been a most useful common law tool in environmental cases. The common law doctrine of private nuisance provides that no person may use his land in a manner that interferes unreasonably with a neighbour's use and enjoyment of his or her land. Unreasonableness refers to the degree of interference the neighbour suffers, and is determined by a number of factors, principally the character of the area. Thus normal farm noise, odours, and dust will

not be deemed unreasonable in an agricultural community. The issue of reasonable use is the key question in most litigation involving nuisances. The trier of fact balances the value of the two conflicting uses in the light of all the circumstances of the particular case. Numerous factors are inserted into the balancing process, and include the type, extent, and duration of the interference; the social value attached to the conduct of the plaintiff and the defendant; the practicability of either party preventing or avoiding the harm, and the appropriateness in the locality of either party's use of the land. Often the nature of the locality is decisive. The system of balancing is intrinsic to traditional nuisance litigation.

In the centuries-old history of the common law of nuisance, there are very few cases in which a normal farming practice was deemed to be a nuisance to a non-farming neighbour. In Ontario, there has only been one such reported case[1]; however, this case involved a farm that was being established in a traditionally non-farming residential area. Farmers may well receive many complaints regarding odour and such, and may even perceive this to be a threat, but the fact of the matter is these situations are rarely, if ever brought to trial.

Indeed, as the Right to Farm Advisory Committee report makes clear, farmer to farmer complaints constitute the majority of nuisance

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[1] Atwell et. al. v. Knights (1967) 61 D.L.R. (2d) 108 (Ont. H.C.)

complaints. The committee then goes on to say that these problems are usually solved through the mediation of the Farm Pollution Advisory Committee. Where the law of nuisance acts as an impetus to mediation, Bill 83 removes any impetus for a farmer to acknowledge the complaint of his neighbour as the bill eliminates his current liability.

The right to sue at common law is an important individual right which should not be taken away. The erosion of the right to sue in nuisance is a significant threat to environmental quality and individual liberty. In addition, there are certain procedural protections within Ontario's Rule of Civil Procedure which ensure that truly frivolous or vexatious law suits can be struck out by the courts at any early stage in the proceedings, and that defendants can recover their legal costs if a plaintiff's claim is unsuccessful.

CURRENT STATUTORY FARM EXEMPTIONS

The current law is not unfair to farmers.

Besides the protection built into the common law of nuisance, farmers are specifically exempted from the application of certain pieces of environmental legislation. For example, the Ontario Environmental Protection Act exempts animal wastes disposed of in accordance with normal farm practices in sections 5(2), 12(2) and 14(2).

LEGAL PROBLEMS IN BILL 83

A) CONSTITUTIONALITY

In our view, it is possible that the provisions of Bill 83, by which the Farm Practices Protection Board is empowered settle disputes, may offend the limitation contained in s.96 of the Constitution Act of 1867, and is therefore ultra vires of the Ontario Legislature. This is the section which preserves the inherent jurisdiction of Superior Courts, and prevents their functions from being usurped by provincially appointed tribunals.

The determination of the validity of a provincial adjudicative scheme involves a three step process that was followed by the Supreme Court of Canada in Reference Re Residential Tenancies Act (1981) 123 D.L.R (3d) 554.

The first step in the process involves a historical analysis of the conditions that existed in 1867. The question to be answered at this stage is whether the power or jurisdiction given to the board conforms to the power or jurisdiction exercised by a Superior, District or County Court at the time of Confederation.

The Courts have been handling nuisance cases since before the time of Confederation. The common law of nuisance is as old as the common law itself, thus making the impugned powers of the board not merely

analogous, but identical to the powers exercised by s.96 at the time of Confederation.

The second step involves a consideration of the function of the board within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular the question to be determined is whether the board is exercising a judicial function. This question is determined by answering two further questions

i) Is the board, in effect settling a dispute between parties that needs to be resolved? and,

ii) Is the dispute resolved by applying a recognized body of rules in accordance with the principles of fairness and impartiality?

Section 5 of Bill 83 clearly envisions the board settling disputes between parties, and section 3(b) contemplates the development of rules of practice and procedures for the board in accordance with Statutory Powers Procedure Act. Thus one must conclude that the impugned powers, when viewed in their institutional setting, remain essentially "judicial powers".

The third step involves a review of the tribunals function as a whole in order to appraise the impugned power within its entire

institutional context, namely by examining the impugned judicial powers along with the other powers and jurisdiction conferred by the bill.

It appears upon reading the bill as a whole that the central function of the board is that of resolving disputes. This is done by way of a judicial form of hearing between persons aggrieved "by any odour, noise or dust resulting from an agricultural operation" (section 5(1)) and an "agricultural operator" (as defined by s.1). The bulk of the bill then attempts to define the rights and obligations of these two parties, and to prescribe a method for resolving disputes over those rights.

There is no broad legislative scheme being enacted that would subsume the judicial functions of the board, therefore, it cannot be argued that the board is merely acting ancillary to the policy of "agricultural land protection". Instead the primary purpose and effect of this bill is to transfer jurisdiction over a large and important body of law, affecting individual rights and environmental protection, from s.96 Courts, where it has been administered since Confederation, to a provincially appointed tribunal.

The chief role of the board is not to administer a policy in carrying out an administrative function. Rather, its primary role is to adjudicate.

The powers of the board are aimed at the resolution of differences between the parties. The goal of the legislation is to process controversies in an expeditious manner. If the Legislature enacts this bill, it will be establishing a board with s.96 powers without creating legislation that meets the test of establishing a substantive law, and scheme for its administration to meet a real social problem within its legislative competence. Instead of addressing the real problems associated with the preservation of agricultural land, urban growth and environmental harm, the Legislature is creating a tribunal whose powers are irrational, unjustifiable and functionally inappropriate to the problems at hand. This will serve only to erode current protections and exacerbate current environmental problems.

B) PUBLIC NUISANCE

Bill 83 provides in section 2, that a person who carries an agricultural operation, and who in respect that agricultural operation does not violate conditions (a) through (e), "is not liable in nuisance...."

The bill does not bother to distinguish between private nuisance and public nuisance. If the bill purports to prevent public nuisances, it is interfering with the duty of the Attorney-General of the province, who as the official representative of the public interest,

is responsible for conducting prosecutions for common or public nuisance.

Public nuisance describes an offense that materially affects the reasonable comfort and convenience of the life of a class of people. It is not necessary to establish that every member of the public has been affected, as long as a substantial number of people suffer discomfort, inconvenience, property loss or personal injury. One test that has been enumerated is to ask whether the nuisance is "so widespread in its range or indiscriminate in its effect that it is not reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility to the community at large".[2]

The Attorney General's decision to act is a matter of his own discretion; this Act represents a serious fettering of that discretion. If the A.G. is prevented by this bill from acting in the public interest, the rights of whole class of people may go unprotected. In some cases, the rights abridged could include rights under s.7 of the Charter of Rights and Freedoms.

A private citizen aggrieved by an odour, noise or dust that constitutes a public nuisance is currently prevented from bringing

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[2] A.G. v. P.Y.S. Quarries Ltd. [1957] All E.R. 894 (C.A.) at pg. 908.

an action in nuisance, unless he can show "special damage", over and above the general suffering or inconvenience to the public.

Bill 83 in its present form potentially prevents a whole class of people, perhaps entire communities, from enjoying their property free from unreasonable disturbances. In trying to prevent disputes between neighbouring farmers and ex-urbanites, the Legislature has removed protection for whole neighbourhoods, and severely interfered with the duties of Attorney-General in his capacity to protect the public interest.

C) BURDEN OF PROOF

Bill 83 does not provide a clear answer to an important question in a dispute situation before the board, "who needs to prove what"?

Must the agricultural operator prove to the board that his conduct constituted a normal farming practice, in order to receive statutory protection from nuisance suits? Alternatively, must the aggrieved person prove that such conduct was not a normal farming practice, or that it breached a prescribed statute?

Under s.5(3) the board is to hold a hearing about complaints relating to a "normal farming practice", but this occurs after the board has made its inquiries into the dispute, and after the board has

formulated its opinion of what constitutes a normal farm practice via s.4(1)(a).

The manner by which the board will determine a normal farming practice is equally questionable. Specifically, will the board simply investigate whether or not there has been a breach of the statutes enumerated in s.2(1)(a) to (e)? A further discussion of this question is set out below in this brief.

D) INCREASE IN LITIGATION

Section 2(2) states that where an agricultural operator has violated any of the statutes listed in s.2(1)(a) to (e), he will not receive protection against a nuisance suit. How can a board determine whether there has been a violation under these laws? Such questions are not decided until they have been litigated before the courts and a conviction has been handed down. One effect of Bill 83 might be that people aggrieved by an odour, noise, or dust, may now be forced to launch private prosecutions under these Acts in order to preserve their common law rights. The end result for agricultural operations will be an increase in the threat of litigation. Without an effective nuisance law in place an agricultural operators may be more likely to emit odours, noise, or dust, than they would be if their farming practices carried full legal liability. If such nuisances are created, aggrieved persons will now be forced to court in an attempt to show a violation of one of the enumerated statutes listed

in s.2, in order to preserve the common law rights that would be removed by the bill.

Where nuisance law provided both parties with rights, and thus an incentive towards dispute resolution outside the court, Bill 83 demands court action before any meaningful dispute settling can take place.

E) STANDARD OF PROOF

The degree of proof that an aggrieved person must bring forth to prove his case under Bill 83 is much higher than it would be under the law of nuisance.

The usual civil standard of proof involves the plaintiff proving a matter on the balance of probabilities. In the case of Bill 83, either the agricultural operator or the aggrieved person (however the board shall work), will have to rebut presumptions and/or opinions already formed by the board. Such a degree of proof requires a preponderance of evidence beyond the 51% of probability required at common law.[3]

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[3] Sopinka and Lederman pgs. 387 to 390

F) NATURAL JUSTICE

Impartiality, fairness, and freedom from reasonable apprehension of bias are necessary requirements for a judicial body.

Under Bill 83, the body which investigates is also the body that holds the hearing. The board calls a hearing after it has already formed an opinion of the case. Rather than having the certainty of judicial principles, rules and standards to rely upon, participants must instead try to convince a board to change its opinion. Rights, rather than being weighed, considered, and balanced, are to be replaced with opinions formed in secrecy, and a hearing that more resembles an appeal, as its main focus will be to try and change opinions already formed. In effect one party enters the hearing process already guilty, prejudged by the investigative process.

G) THE CHARTER OF RIGHTS AND FREEDOMS

i) CHARTER S.7

Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Currently everyone who owns property and experiences a nuisance to that property such that it unreasonably interferes with their use and enjoyment of land has a right to launch a suit for compensation.

This right includes the ability to sue for physical harm or injury that might accompany such a nuisance. Bill 83 removes this right, a right that due to its nature and stature in the law may very well be considered a fundamental principle of justice. Furthermore, the right to protect one's land from nuisances of odour, noise, and dust affect the security of the person in two ways. Firstly, a person's health may be affected by an agricultural nuisance. Given the lack of a definition of dust, for example, and given the definition of agricultural operator, "dust" might very well be a chemical pesticide with carcinogenic risks. Bill 83 would remove protection from a person who was "dusted" by his neighbour.

Secondly, property is often the greatest financial security a person possesses. Should someone's property be exposed to odour, noise, or dust such that their reasonable use and enjoyment thereof is diminished, it is reasonable to assume that their property's value will also diminish, if the situation causing the nuisance is classified as a normal farming practice. Bill 83 would, in effect, expropriate without compensation a person's fundamental right to the reasonable use and enjoyment of his or her property.

ii) CHARTER S.15

Section 15(1) provides that "Every individual is equal before and under the law and has the right to the equal benefit of the law

without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Bill 83 favours one class over another. The class favoured is not farmer over urbanite, but nuisance maker over nuisance receiver; this is so because the majority of aggrieved persons under this bill will be farmers.

The bill unlike the common law does not seek to balance rights or restore equilibrium. Rather, it exempts nuisance causing activities, at the expense of those who bear the burden of receiving them, under the guise of assigning the term "normal farming practice" to them.

AMERICAN JURISPRUDENCE[4]

The first "Right to Farm" RTF statute in the United States was enacted in 1963, when the Kansas Legislature set out a list of standards for livestock feedlot operations and decreed that compliance with those standards "shall be deemed to be prima facie evidence that a nuisance does not exist". By the 1970's RTF's became increasingly prevalent; today, there are 47 American states which have some form of RTF statutes in place.

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[4] This discussion of American jurisprudence is based on the following articles:
18 Willamette Law Review 153 (pgs. 159-160)
9 Harvard Journal of Law and Policy 481 (pgs. 491-493)

These RTF statutes fall into two general categories. The first category includes statutes that prevent farming operations from becoming classified as nuisances due to the fact that area is becoming more residential. These statutes set out certain criteria, which vary from state to state, that a farm operator must satisfy before availing himself of the protections of the Acts. Some of these criteria are as follows: that the farming operation must be in operation for a year or more, and that the operator must show that the farm was not a nuisance when it began operations (that is, it was not a nuisance until the land use in the area began to change to residential use). Other conditions present in American RTF statutes allow recovery of damages for pollution, flooding or change in the condition of watercourses; other conditions prevent the statute being construed to invalidate existing contracts; or to invalidate existing and future municipal ordinances that would act to make farming operations nuisances contrary to the intent of the statute. Most of the laws in this category deny protection to practices which are negligent, improper, in violation of certain laws, injurious to public health, or amount to a significant change in operation or are within a corporate city's limits.

The second category of RTF legislation includes statutes that prevent a farming operation from becoming a nuisance if the operation was established before the plaintiff acquired the property and if the operation is not in violation of certain laws. These statutes give great emphasis to the priority of a farming operation's use of land,

thus they seek to prevent new residential users of property from claiming nuisance.

RTF statutes provide one of two types of protection. In the first type, compliance with certain state statutes provides an absolute defense to a nuisance suit. In the second type, compliance raises only a presumption that the farming practices comply with federal, state and local laws and are therefore protected.

These differing categories and types of legislation vary considerably in their language, yet share a core of common features. RTF statutes all define a sphere of activity, such as "agricultural operations", which allegedly is in need of governmental protection. These statutes then set out one or more conditions under which the activity is eligible to receive protection, such as that the activity precede in time the plaintiff's appearance in the area. Then RTF statutes exempt certain farming activities from the protection of the statute, primarily negligent activities, or activities that violate other statutes.

COMPARISON OF AMERICAN STATUTES TO BILL 83

The most notable difference between the American statutes and the Ontario bill, is that the American RTF laws do not create a separate judicial body to administer their acts. The RTF's are left to the courts to administer. Another difference is the emphasis in most

American statutes on protecting those farming operations that have been in existence for sometime.

Ontario's bill, like the RTF in Oregon (1981 Oregon Laws Chapter 716) protects farming operations in general, even those that opened up in traditionally residential areas. The Ontario bill seems to have adopted heavily from American RTF legislation of both categories: those that provide an absolute defence to nuisance actions, and those that raise only the presumption that normal farming practices are reasonable, subject to the plaintiff's rebuttal of the presumption. Section 2 of Bill 83 seems to set out an absolute protection for farm operation's, except that the activity in question must be a "normal farm practice" (as defined by s.1). It is unclear whether this categorization of a farm practice as normal, is a rebuttable presumption or not. Section 4(1)(a) suggests the determination of a normal farming practice requires investigation, but what will the board investigate? There are several possibilities:

i) Simply investigate whether or not a statutory violation has occurred pursuant to section 2(1)(a) to (e) (a matter that only a Court can finally determine); or

ii) Investigate the customs and standards in the area generally, leaving it open to the Board to determine whether a particular farmer's practice conforms to the customs which have been identified; or

iii) Investigate whether a particular farmer's practice conforms with the customary practice of the area.

As a result of the investigation conducted under s.4, the board will have arrived at a definition of a Normal Farming Practice. This definition then becomes the focus of the hearing process pursuant to s.5.

The question then becomes what happens at the hearing process. The problem here is that it might no longer be a matter of rebutting a presumption, but of over-turning or finding of fact and law. It is at this point where the distinction between a rebuttable presumption and absolute bar become blurred.

Can the definition of "Normal Farming Practice" be at once a determinitve standard and at the same time operate as a rebuttable presumption?

This will depend upon the process from which the NFP emerges (pg. 18 i, ii, iii). If an NFP emerges pursuant to (i), then the hearing would only be to allow the parties an opportunity to contradict the finding of the board as to whether a prohibited statutory violation has occurred. In this instance, such a finding of no statutory violation would act as an absolute bar to any nuisance action. A major problem with a procedure based on this formula is that only a

court of law can determine whether or not a violation of a provincial statute has occurred. The board would surely only be venturing a guess in trying to decide if a violation of a statute outside their jurisdiction has, in fact, occurred.

If the definition of NFP emerges from an investigation analogous to that discussed above in (ii), the hearing would then determine if the farmers particular farming practice was an NFP. The focus of the hearing would be on whether the farmer's practice was normal, not on whether the odour, dust, or noise that resulted was normal, or reasonable.

Finally, the least fair of all scenarios is set out in scenario (iii), wherein the NFP is determined with specific reference to a particular farmer's agricultural practice, in which case the farmer need not prove anything at the hearing, as his method of operation becomes the very standard by which he will be judged at the hearing.

RECOMMENDATION #1

WITHDRAW THE BILL

In our view, the Bill should be withdrawn. The problem that Bill 83 attempts to address - nuisance suits against farmers - is only a symptom of a much larger problem. The real crisis facing Ontario agriculture is the failure to implement stringent municipal and provincial land use laws, guidelines and polices. Bill 83 may well

aggravate the urban encroachment problem by providing local planners with an excuse to further relax zoning laws on the theory that this statute would provide adequate protection for agricultural lands. If municipal and provincial governments wish to seriously address the problem of urban encroachment, they should simply protect agricultural land through better planning and zoning laws. Agricultural zoning should become part of a comprehensive land use plan. Such a plan would strictly control agricultural use, limiting the number of acres that could be sold for non-agricultural purposes. Another way of preserving farmland that has been used in the U.S. has been:

a) Private and public land trusts. - These are set up to preserve farmland through donations or easements by enabling landowners who then receive tax breaks.

b) Purchase of development rights - Here the province or the municipality could pay local farmers the difference between the agricultural and development value of their property in return for an agreement that the land would be used for agricultural purposes only.

RECOMMENDATION #2

ESSENTIAL AMENDMENTS IF THE BILL IS TO PROCEED

A) DEFINITIONS

i) "Agricultural Operation"

The definition of "agricultural operation" must be amended by removing

s.1(h) "the application of fertilizers, conditions and pesticides, including ground and aerial spraying.

This definition of the Act extends the protection of the Act to commercial pesticide applicators as well as farmers. The removal of this section would ensure that chemical spraying will not enter the protected categories of odour, noise or dust. The prime purpose of the bill should be to preserve agricultural land, not protect agricultural practices or related commercial undertakings.

ii) Normal Farming Practice

The definition of normal farming practice" needs to be amended, so as to include consideration of whether such a practice is reasonable, as well as normal.

B) WITHDRAWAL OF THE PROVISIONS THAT ESTABLISH THE FPPB

The provisions which create Farm Practices Protection Board must be deleted from the Act. There is no reason to take this important area of law out of the supervision of the courts. Any legislation that seeks to amend the law of nuisance can be better served through the courts, given the courts' lengthy experience in balancing the rights and obligations of individuals with social facts and legislative initiatives in a manner that is fair and impartial.

C) DELETE SECTION 6

Injunctive remedies are necessary, as damages are often an inadequate remedy in the context of nuisance. As well, where human health and property are threatened, an injunctive remedy is the only one that will suffice. Under its equitable jurisdiction, the court has power to order a variety of different types of injunctions, and can tailor an injunction to suit the circumstances of individual cases. The board under s.5(3)(b) can only order what amounts to a prohibitive injunction. The removal of the injunctive remedy appears to apply in respect of a particular practice before the board. Does this mean parties that are not represented at a hearing are prohibited from getting an injunction?

CONCLUSIONS

If RTF laws provide any benefit at all, it is at the psychological level: perhaps farmers will <u>feel</u> better protected by this law, where as before they <u>felt</u> threatened by possible nuisance suits. The fact of the matter is that a farmer is best protected by the law of nuisance, both from encroaching urban development, and from the nuisance impacts of his fellow farmers. The current bill exposes farmers to nuisances without giving them recourse to the law for a remedy. Even if farmers were being constantly hauled into court to defend against the nuisance claims of new residents (and they are not), and they were losing (and they are not), Bill 83 would not protect farmers from suits based on the common law of trespass for dust or noise, or for claims based in the law of negligence. Bill 83 gives no new protection to farmers, rather it removes their best protection, the law of nuisance. The bill should be withdrawn from the Legislature.

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