



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

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SUBMISSIONS ON
ENVIRONMENTAL REFORM

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I INTRODUCTION

The Canadian Environmental Law Association (CELA), was established in 1970 to use existing laws to protect the environment and where necessary to advocate environmental law reforms.

We welcome this opportunity to set out an 'agenda' for the Ministry of the Environment (MOE) to consider in formulating environmental protection laws and policies for the future. Before turning to specifics, we would like to deal briefly with the issue of "regulatory reform".

While it has become popular to talk about 'deregulation' and the need to minimize government interference in the day-to-day activities of private citizens, we wish to submit that in the area of environmental regulation this approach is inappropriate. We agree with the Economic Council of Canada, which in its reports on 'Reforming Regulation' clearly stated the need for the continuation of comprehensive environmental regulation.¹ CELA interprets the phrase "regulatory reform" to mean more effective regulation and more stringent enforcement: "effective", to be measured by the extent of additional protection to the environment, not whether the cost is less. Regulatory reform should not mean 'deregulation'.

Indeed, the very reason for the creation of Ministries of the Environment and the enactment of environmental legislation in the early 1970s was the fact that the public was becoming increasingly aware and concerned that our environment was facing a series of assaults that threatened both public health and the natural environment and that polluters were not moving quickly enough to clean up the situation. In looking at the

state of the environment in 1984, we can see that while progress has been made in some areas, the need for regulation is unfortunately still here as we face continuing environmental and health threats posed by what has been called 'our chemical society'. For example, the threats to both groundwater and surface water caused by leaky hazardous waste sites and waste storage areas are just now being identified. Dioxin leaching from a waste site in Elmira and PCBs migrating from a CGE plant in Toronto are two recent examples.

Further, the public's concern has not ebbed as surveys show that environmental issues continue to remain near the top of the non-economic agenda of issues needing to be addressed.² It therefore becomes crucial that the Minister of the Environment be a strong advocate for the protection of the environment in Cabinet and that our legislation and policies be updated to meet the concerns of the 1980s and 1990s.

II SUGGESTED REFORMS

CELA advocates reform in the following four areas:

- citizen input into environmental decision-making;
- enforcement of environmental legislation;
- the Environmental Assessment Act; and
- the concept of an environmental bill of rights.

They set a framework in which more specific reforms can be addressed.

A. Citizen Input Into Environmental Decision-Making

CELA has long advocated the establishment of statutory mechanisms to ensure public input into environmental decision-making processes. The MOE is lagging behind the federal government and

other Ontario provincial ministries in opening up the regulatory process. Two important areas for reform include:

(1) Regulation-Making

CELA recommends that the Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA) be amended to provide for:

- ° a general notice of regulation-making procedures to be placed in the Ontario Gazette. Details as to the purpose, factual data, methodology and legal and policy considerations used in formulating the regulation should be identified;
- ° a 'notification list' requirement ensuring that notice is given to the most interested and affected persons;
- ° a requirement to establish a "regulation-making docket" including the initial notice, the proposed draft regulation, background documents, written responses to the regulation, any additional documents and the final regulation;
- ° public accessibility of the docket; and
- ° at least a 60 day period for public comment on the proposed regulation.

Additional procedures may be put in place during the process depending on the subject of the regulation. These could include opportunities for cross-examination of ministry technical staff, interrogatories, conferences, public hearings, and a second round of comments, where appropriate.³

(2) Control and Other Administrative Orders⁴

CELA recommends that the EPA and OWRA be amended to provide clear opportunities for public input into the establishment and amendment of control orders. Presently, only ad hoc public meetings are scheduled at which time a draft control

order is put forward for discussion. Once in place, control orders act as a bar to prosecutions under the EPA or OWRA, and therefore it is important that the order be seen as justified and not as a 'licence' to pollute. Meaningful public participation at the front end will lead to a clearer understanding of the trade-offs in the setting of control orders.⁵

Opportunities for public participation into the setting of guidelines, general policies, and the issuance of Certificates of Approval should also be provided.

It is CELA's opinion that the funding of public participation in environmental decision-making must go hand-in-hand with the development of a more open process. While some small steps are being taken in regard to the funding of intervenors at public hearings, CELA maintains that funds should also be available to allow citizens to participate more meaningfully in regulation-making and other less formal processes.

B. Enforcement of Environmental Laws

CELA would strongly urge the MOE to increase its enforcement of existing legislation. It is trite to state that the law is only as good as its implementation. Indeed, recent studies have shown that companies often find it less expensive to pollute than to clean up.⁶ CELA suggests that the MOE take the following actions.

- ° increase minimum and maximum fines as called for by the Minister;
- ° increase enforcement staff and expand the Special Investigation Unit;⁷
- ° clarify when prosecutions should be launched rather than entering into interminable discussions with polluters hoping they will voluntarily comply with the legislation; and

- ° increase the placement of binding terms and conditions in licenses, permits, certificates of approval and control orders so that it is easier for the Ministry and the public to take legal action.

C. Environmental Assessment Act (EAA)

It is CELA's contention that the EAA can indeed fulfil the purpose it was enacted for, i.e., preventive medicine to "provide for the protection, conservation, and wise management in Ontario of the environment". CELA maintains that the Act should be retained in its present form. The act contains a number of important features that should be stressed. These include: the broad definition of environment, the examination of need and alternatives and the opportunity for public hearings. The exemption power must not continue to be abused to exempt important projects from the ambit of the Act. For example, it is still CELA's contention that the Ontario Waste Management Corporation's (OWMC) search for hazardous waste facilities should not be exempted from the Act. The recent court challenge to the OWMC would not have been possible had the undertaking been subject to the Act.

We would like to see the Ministry commit itself to strengthening the administration of the Act, extending it to the private sector and becoming an advocate of good environmental planning.

Mediation, an idea which has received Ministry attention lately, should be seen as a possible option available to parties to an environmental dispute, but must be an entirely voluntary and consensual process. CELA, along with Pollution Probe and the Federation of Ontario Naturalists, have recently written to the Minister of the Environment outlining some of the principles and safeguards which we believe must be in place

for environmental mediation to work.

D. Environmental Bill of Rights

CELA's long term objective has been the enactment of both federal and provincial Environmental Bills of Rights. The bills would specifically provide for a substantive right to environmental quality. This would be an important step forward as it would clearly elevate environmental quality to the status of other major competing social values. In addition these bills would provide many of the rights and remedies not presently available to citizens to protect the environment under current legislation. We urge the Minister to seriously consider working towards the enactment of such a comprehensive Bill.

Indeed, during the past few years, all three major political parties in Canada have proposed Environmental Bills of Rights while in opposition, eg., the Liberals and NDP in Ontario, and the Conservatives in Saskatchewan. Key elements would include:

- the right to a clean environment
- citizen access to the courts
- intervenor funding
- access to information
- mechanisms for public input into environmental regulation-making
- class action reform
- changes in onus of proof rules

We maintain that any discussion of environmental law reform should not fail to consider an Environmental Bill of Rights.

III NOTES

1. Economic Council of Canada. Responsible Regulation, An Interim Report. (Ottawa, November 1979) and see Economic Council of Canada. Reforming Regulation (Ottawa, 1981) at 93.
2. L. J. D'Amore & Associates Ltd. Study in Trends in Canadian Environmental and Water Issues Concerning Ontario and the Great Lakes Region. (Environment Canada, 1983).
3. See Toby Vigod. Submissions on An Approach to Environmental Standard-Setting in Ontario with Specific Reference to Mobile PCB Destruction Facilities. (Toronto: CELA, March 1984).
4. "Control Orders" are referred to in the EPA, while "Requirements and directions" is the terminology used for such orders under the OWRA.
5. See recommendations in Dr. Robert Gibson. Control Orders and Industrial Pollution Abatement in Ontario. (Toronto: CELRF, 1983).
6. See Peat Marwick and Partners. Economic Incentive Policy Instruments to Implement Pollution Control Objectives in Ontario. (Toronto, July 1983).
7. We realize that the Ontario government and not just the MOE would have to make this budgetary commitment.