# SUBMISSIONS IN RESPONSE TO CONSOLIDATING ENVIRONMENTAL LEGISLATIONS

Prepared for:
Legislative Sub-Committee
Environmental Section
Canadian Bar Association - Ontario

Prepared by:
Ramani Nadarajah

March 14, 1996

# SUBMISSIONS IN RESPONSE TO CONSOLIDATING ENVIRONMENTAL LEGISLATIONS

## GENERAL

### Consolidation of *Environmental Protection Act* (EPA), *Ontario Water Resources Act* (OWRA) and the *Environmental Bill of Rights* (EBR)

The draft document on consolidating environmental legislations ("document") raises the following concerns:

(i) The legislative sub-committee of the Canadian Bar Association-Ontario's Environmental Section (sub-committee) has not cogently established a need for consolidating environmental statutes. Consolidating statutes merely because there may be some duplication and overlap is neither a compelling nor a sound rationale. Moreover, there is no evidence that any serious drain on public resources, or confusion among the regulated community has resulted from the duplication or overlap that might warrant the consolidation.

(ii) Despite the sub-committee's statement that it is "not advocating a relaxation of any standards," no review of the statutes is possible, without making policy choices. There is no assurance that these choices would not result in a negative impact on environmental protection within the province.

(iii) The sub-committee states that its intent is to address problems in legislative drafting of environmental statutes. However, the sub-committee does not provide any specific examples of draftsmanship of the *EPA,* the *OWRA* or the *EBR* that has caused problems for industry, government or the public of Ontario. Furthermore, the sub-committee's suggestion to avoid terminology such as "significant," cannot be addressed without providing a context in which such a term may be problematic.

Terms of evaluation are frequently used in drafting environmental legislation, and the choice of such terms will inevitably involve policy considerations within a particular context. For example, the *EBR* uses terms such as "environmental significance" and "significant harm." Although these terms are not defined in the *EBR,* they function, in effect, as a screen to ensure trivial issues are

not dealt with under the *EBR*. This need for flexibility in environmental legislation has also been acknowledged by our courts.[1]

(iv) Contrary to the sub-committee's suggestion, consolidating three environmental statutes will not result in "one omnibus law governing the environment." There are numerous other statutes that pertain to environmental matters, for example, the *Environmental Assessment Act*, the *Planning Act,* the *Niagara Escarpment Planning and Development Act*, the *Lakes and Rivers Improvement Act*, the *Conservation Authorities Act*, the *Game and Fish Act*, the *Public Lands Act*, the *Municipal Act*, the *Aggregate Resources Act* and the *Mining Act*. Extracting various environmental provisions from myriad statutes and consolidating them into a single legislation will not make it more user friendly for the public, instead it will result in an extraordinarily complex, cumbersome and confusing piece of legislation.

## SPECIFIC COMMENTS ON THE Document

### 1. (a) Discharges of contaminants into water

The fact that section 14 of the *EPA* and section 30 of the *OWRA* address discharges to water does not, in itself, create any unfairness. If a person is charged with offenses under both statutes and the same elements make up both the *EPA* and the *OWRA* charges, the court can only convict for one of these offenses on the basis of the principle in *kienapple*.[2]

Furthermore, there is considerable jurisprudence about the legal standard that applies to discharges under the *EPA* and the *OWRA*, which provide clarification on how courts have interpreted both statutes.

Section 30 of the *OWRA* has been interpreted to mean "that the intention of the legislation is not to prohibit the results of certain acts, but to prevent the discharge of <u>any material which by its nature may impair the quality of the water course.</u>"[3] (emphasis added),

If there is a need for choosing the regime regarding discharges to water, then the *OWRA* standard should be adopted since it provides for greater certainty. The courts will not have to consider conflicting opinions regarding concentrations and quantity of contaminants to determine whether pollution may have occurred in the circumstances. According to a senior prosecutor for the

---

[1] *R.* v. *Canadian Pacific Ltd.* (1995), 17 C.E.L.R. (N.S.) 129 (S.C.C.) at pp.166-167.

[2] *R.* v. *Black Bird Holdings Ltd.* 6 C.E.L.R (N.S) 138 (Ont. Ct. (Prov. Div.)).

[3] *R.* v. *Toronto Electric Commissioners* (1992), 6 C.E.L.R. (N.S.) 301 (Ont. Ct. (Gen. Div.)).

Ministry of Environment and Energy (MOEE) "the message that the law will only tolerate zero discharge in the absence of approval from the government will more clearly and unequivocally deter would be polluters."[4]

**(b) Impair and Adverse Effect**

Please see above comments.

**(c) Provincial Officers**

It is not clear from the document how duplication of the provincial officers' powers in the *OWRA* and the *EPA* cause confusion in matters of compliance.

**(d) Penalties**

The sub-committee fails to indicate how similarities between the penalty provisions in the *EPA* and *OWRA* cause confusion and uncertainty to the public.

The penalty provision, if consolidated, should not lower the available penalties. It is a well recognized principle of sentencing in environmental cases, that the primary aim is to achieve both specific and general deterrence through appropriate penalties. The penalty provision must be sufficient to deter, not simply individuals and small corporations, but also large corporations.

**(e) Sewage Systems and Sewage Works**

It is unclear how the proposed consolidation would clarify the need for different approvals. Sewage systems under the *EPA*, and sewage works under the *OWRA*, would still require different approvals.

The sewage approvals required under the *EPA* relate primarily to sewage systems operated in private residences and cottages, such as septic tanks. Sewage systems exempted from Part VIII of the *EPA* are included in the regulatory scheme of the *OWRA*, and apply to larger sewage works such as sewage treatment plants, operated by industries and municipalities.

Although the terminology is similar, there is no evidence to suggest that this has caused confusion or uncertainty. If an applicant for a certificate of approval can not be expected to know which

---

[4] Legal Emissions, Volume 7, Number 3, Fall 1995 *Undermining Toronto Electric Commissioners,* p. 14.

of the two approvals he or she needs, consolidating the *EPA* and *OWRA*, in itself, will not provide any assistance.

## 2. Consolidation of certain environmental spill issues of the *Gasoline Handling Act* and the *Pesticides Act*

The sub-committee fails to establish a connection between the *Pesticides Act* and the *Gasoline Handling Act (GHA)* which warrants the transfer of jurisdiction over the latter to the MOEE. The *GHA* not only addresses spills of petroleum products into the natural environment, but also deals with consumer protection. There are numerous statutes which contain some provisions relating to environmental matters, however, it would not be practical from a government administrative standpoint, to transfer jurisdiction over the entire statute to the MOEE.

There is a protocol agreement between the Ministry of Consumer and Commercial Relations (MCCR) and the MOEE which facilitates cooperation and coordination between the two ministries with respect to the adminstration of the *GHA*. Under the agreement, the MCCR is responsible for on-site investigations and tests and the MOEE has primary responsibility for off-site investigations of spills of petroleum products. The protocol agreement has helped to reduce problems of coordination and enforcement by the two ministries with respect to the *GHA*.[5]

The institutional arrangements between the MOEE and the MCCR with respect to the *GHA*, has been examined in greater detail by a former government lawyer who stated:

> Optimizing the location of administration of any subject matter is always a problem. One approach to locating the adminstration of a regulatory regime is to create a "one-window" approach that allows the consumer of all government services in relation to that subject matter to deal with a single agency. This approach is difficult to implement because the expertise relating to different aspects of this subject is often found in different agencies.
>
> Taken to its extreme, the one window approach would lead to a single government agency to deal with everything, since everything is ultimately connected in some way to everything else. The challenge, therefore, is not to continue to create new agencies, transfer responsibilities from one agency to another, or consolidate agencies each time a problem is discovered with the way existing agencies administer a subject matter, but to allocate functions in the most effective and efficient manner and to coordinate these functions, given that there will always be some degree of overlap and duplication among agencies for different aspects of the same subject matter.[6]

---

[5] J. Swaigen, *Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks.* (Toronto: Emond Montgomery Publications Ltd., 1995), p. 93.

[6] Ibid., p. 91.

The sub-committee fails to identify any specific problems which have arisen as a result of the MCCR administering the *GHA*. However, any problems which may exist as a result of the division of responsibilities, obviously relates to government administration and not legislative drafting.

### 3. Spills and Discharges

Part X of the EPA, dealing with spills came into effect on November 29, 1985. The spill provisions address reporting requirements, impose clean up obligations and provide for a compensation scheme for victims of spills.

There is overlap between the provisions of section 92 (1)(a) and section 15 of the EPA, but there are also differences. Section 92(1)(a) requires notice to be given to more than one person and only applies to discharges from structures, vehicles or other containers. In other words, it applies only to spills. Section 15 applies to notification of discharges for breaches of section 14 of the *EPA*. The wording of both reporting sections, however, are sufficiently straightforward and should be comprehensible to the average citizen.

The sub-committee states that it is concerned about the lack of a "simplified notification sequence in the event of a spill or a discharge." Since the wording of both sections are sufficiently clear, it seems the sub-committee's concern pertains to matters of government administration and not problems with legislative drafting.

In order to address the sub-committee's concern, it is necessary to provide a brief background of the MOEE's institutional arrangements to handle calls about spills and discharges from the public.

The Spills Action Centre (SAC) of the MOEE is located in Toronto and accepts calls pursuant to the notification requirements in environmental legislations, twenty four hours a day, seven days a week. During business hours a person may contact the local MOEE office directly to deal with a spill. However, if a person calls a local office after business hours, the person will hear a pre-recorded message on an answering machine advising that in the event the person is calling to report a spill, or another environmental emergency, the call should be directed to the SAC offices in Toronto. The message concludes by providing SAC's toll free telephone number. A person can find the phone number of the local MOEE office and SAC in the blue pages of the local phone book under Government Listings.

A citizen who wants to report a spill or a discharge should, therefore, have no trouble contacting the appropriate office. It should be noted, that both section 92(1)(a) and section 15 require notification to the MOEE, and not to a particular office of the MOEE. Therefore, either a call to the local MOEE office during business hours or a call to SAC at any time would constitute notification, as both offices are part of the MOEE. In view of the comprehensive set-up at the

MOEE to facilitate and simplify the reporting requirements, it is not clear what else the sub-committee considers necessary.

The sub-committee also raises an issue about the "lack of language to determine whether a call to the Spills Action Centre satisfies one or both of these notices." By doing so, the sub-committee seems to be implicitly recommending the inclusion of a provision that a call to SAC would constitute notification under both section 92(1)(a) and section 15.

Since SAC is part of the MOEE it is not evident why the sub-committee considers such a provision necessary. Furthermore, if the sub-committee's suggestion is taken to its logical conclusion, the EPA should be amended to also include a list of the approximately twenty six MOEE local offices which can be notified, in the event of a spill or a discharge. This would not improve legislative drafting, but would create overlap and duplication by reproducing information from local Ontario phone books.

Contrary to the sub-committee's submission, there is no requirement in the EPA to notify the Minister of a spill. The requirement to notify the Minister only arises in the context of section 31 of the *OWRA* and applies to discharges of contaminants into waters. Case law has interpreted the notification requirements of section 31 to have been met when a person notifies the Ministry.[7]

## 4. Reference to *Environmental Bill of Rights (EBR)*

The *EBR* is an entirely distinct legislative framework from that of the *EPA* and *OWRA*. Consolidating the *EBR* with any other statute would result in greater confusion, because its scope is much broader than either the *EPA* or the *OWRA*. The *EBR* provisions apply to fourteen ministries and not simply the MOEE.

The *EBR* was designed as to stand alone as a framework for public participation. For example, section 3 of the *EBR* states:

> This part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.

The recommendation that *EBR* approvals ought to be incorporated into the statute under which approval is required would result in amendments to numerous statutes to include the applicable

---

[7] *R.* v. *MacMillan Bloedel Ltd.* 12 C.E.L.R (N.S) 230 (Ont. Ct. (Prov. Div)) affd. 17 C.E.L.R (N.S) 67 (C.A); *R* v *Toronto Electric Commissioners* 6 C.E.L.R. (N.S) 301 (Ont. Ct. (Gen. Div.)).

*EBR* provisions. This would be entirely inconsistent with the goal of avoiding overlap and duplication in statutes.

A fundamental purpose of the *EBR* is to provide the public with an opportunity to participate with respect to decisions about our environment. The Act recognizes that public input is essential for the sound development of environmental policy and the government decision making process. Encouraging citizens to participate in decisions that affect them and the environment, can only be accomplished if citizens are provided with access to the information through the notice provisions of the *EBR*.

An amendment to a Certificate of Approval which does not increase or alter emissions, could still have a significant impact on the natural environment. Under the *EBR*, the public is entitled to know the type of pollution control equipment being proposed in order to comment on its adequacy and whether there are more suitable alternatives available which could lower emissions.

Industries which are seriously committed to modernizing and improving their pollution control devices will do so, regardless of the notice requirements under the *EBR*. Indeed, public comments through the *EBR* may serve to encourage industries to ensure that the best available technology is utilized in abating pollution.

The sub-committee also seems to be concerned about the similarities between some provisions in the *EBR* and the *EPA,* but fails to provide an explanation as to how or why this is a problem. Although there are similarities between the investigation and whistle blower provisions in both acts, there are also differences. The *EPA* does not provide for any protection for employees who have sought, or seek to use, the tools and remedies of the *EBR*. This protection is only afforded in the *EBR*. Secondly, the *EPA* provision not only creates a complaint procedure for employees, but also creates an offence for which employers may be prosecuted.

Regardless of the similarities and differences between the whistle blower provisions of the two statutes, the sub-committee fails to provide any valid reasons why the *EPA* provisions can not operate and co-exist with those under the *EBR*.

Unlike the *EPA*, the *EBR* is fairly recent legislation. The task force which led to the enactment of the *EBR,* represented a broad range of interests and included representatives from industry, the government and non-governmental organizations. The issue raised by the sub-committee was debated extensively in the task-force's multi-stakeholder consultation. The provisions of the *EBR* reflect the consensus that was reached on this issue by the *EBR* task force.

## 5. *EPA* Part V Approvals

The sub-committee notes that delays in the approvals process are not attributable to poor legislative drafting. The reason for raising this matter in a document that purports to address legislative drafting issues is therefore, not apparent.

The sub-committee's proposal to address delays fails to recognize that the applicant has the onus of ensuring all the necessary documentation to obtain a Certificate of Approval is filed with the MOEE, and is accurate. The suggestion that there should be a presumption of approval, unless the MOEE provides a notice of objection within a specified time frame, shifts this onus onto the government. There is no sound policy rationale for requiring the government to assume the responsibility for providing a notice of objection.

If there are delays in the approvals process it can resolved by streamlining the review of relatively straightforward Certificates of Approval or amendments to Certificates of Approval. However, this clearly involves a matter of government adminstration and not policy or legislative drafting concerns. Therefore, it is beyond the mandate of the sub-committee.

## 6. Conclusions

In view of the above concerns, I request that the sub-committee's document on consolidating environmental legislations not be submitted to the MOEE by the Canadian Bar Association - Ontario.