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BRIEF TO THE  
ONTARIO MINISTRY OF LABOUR

ON

THE PROPOSED REGULATION RESPECTING  
GENERAL OCCUPATIONAL HEALTH HAZARDS

AND

THE PROPOSED REGULATIONS RESPECTING  
LEAD, ASBESTOS AND SILICA

BY

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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OCTOBER 12, 1978

The Canadian Environmental Law Association welcomes the initiative being taken by the Ministry of Labour to regulate general occupational health hazards and the exposure of the employees to the substances lead, asbestos, and silica. Our comments on the interim drafts of these regulations as published in The Ontario Gazette follow.

#### THE REGULATION RESPECTING GENERAL OCCUPATIONAL HEALTH

##### Section 1

Section 1 sets out the necessary definitions for the regulation. These definitions appear to be well-worded and clear. However, the definitions omit any reference to one of the most obvious methods of controlling exposure to toxic substances: volume control. By "volume control" we do not necessarily mean a term of art, but rather terminology which might be used to designate the reduction or complete elimination of the volume of toxic substances used in the workplace or entering it. In the occupational health field, critics of existing practices have frequently decried the failure of governments and managements to require and to utilize this obvious method of controlling exposure: total elimination of the toxic substance in the work environment or significant reduction of its volume.

The primary methods to be used in controlling exposure to toxic substances; namely, "engineering controls", "work practices", and "administrative controls", are defined in sub-paragraphs (a) (c) and (i). The failure to provide any reference to volume control within these definitions or as a separate method of control implies that this regulation prescribed no method to reduce exposure to toxic substances other than the traditional engineering controls, work practices, and administrative controls. It is arguable that volume controls are inherent in the word "design" in paragraph 1 (1) (c) but experience indicates that design of the workplace in that context refers to the design which will facilitate evacuation of the toxic substance from the workplace and not the reduction of the amount of toxic substance initially allowed to enter the work environment.

The failure to include the concept of "volume control" in the definitions is crucial to the effectiveness, or lack thereof, of section 4, which specifies the methods to be used to eliminate excessive exposure to deleterious substances. The failure to specify the reduction of volumes of toxic substances used in industrial processes or allowed to enter the workplace air - either as an explicit control mechanism or within the definitions - means there is no requirement on management to take such action.

If volume control or another suitable term were to be defined in Section 1, it should include the elimination or reduction of toxic substances in the work environment by any one or more of the following methods: substitution of less deleterious substances; elimination of a product line; elimination of a work process; reduction of output or production; or alteration of production processes which result in the entry of a toxic substance or harmful physical agent into the workplace.

### Section 3

The proposed Section 3 merely states the present practice; namely, to regard the Threshold Limit Values published by the American Conference of Governmental Industrial Hygienists as criteria or guides.

There is a great deal of controversy about whether it is appropriate to approach the problem of exposure to toxic substances by using Threshold Limit Values. The assumption behind Threshold Limit Values is that there is always an arithmetical level below which exposure of workers to a harmful substance is acceptable in exchange for the economic benefits of not completely eliminating or further reducing exposure. The corollary of this assumption is that acceptability does not necessarily mean that there are no ill health effects. Many have argued, and with great force, that the proper approach would be to state that no toxic substance may be present in any work environment in any amount unless the employer can establish before an independent tribunal after a full and fair inquiry that a certain exposure is in fact safe and not merely economically or politically acceptable.

On the one hand, the method of adopting T.L.V.s means that the law accepts the status quo with regard to exposures, only eliminating the worst work environments. This means that there is very little dislocation of production and employment, and incidentally means that the Province has saved the cost of performing its own detailed research on every toxic substance. The approach of basing acceptable levels solely on health criteria could well entail significant disruption in production and employment, and in any event would force employers through a costly process. This would, of course, require

the Province to rethink every standard on its own. However, this approach might also result in a significant reduction of illness and death over the T.L.V. approach.

#### Section 4

The proposed Section 4 states that where exposure is exceeding the T.L.V.s the excess shall be eliminated in progressive stages by engineering controls, work practices and administrative controls. As mentioned before, there does not appear to be any explicit requirement to attempt to eliminate or reduce the amount of the toxic substance in use, but only exposure to it. The Section states that if the methods mentioned above do not succeed in controlling the exposure to the toxic substance, are not immediately practicable or cannot be promptly instituted, then suitable respiratory equipment or other personal protective equipment shall be provided.

These enforcement methods are extremely weak. There is no overall time frame in which the progressive steps of engineering control, work practices and administrative controls must be implemented, nor is it clearly stated who will determine the timing and rigour of the progressive stages. Nor is there any requirement for public communication of the progressive stages. This lack of clarity suggests that the actual process will be the Ministry negotiating in secret with particular employers, extending, altering, and forgiving the application of progressive stages of reduction of exposures. There will, therefore, be no clearcut standard of behaviour which an employer can be seen to be meeting or failing to meet.

The requirement to adopt respiratory equipment or other protective equipment gives the employer no real disincentive to permit exposures in excess of the T.L.V.s since providing such equipment is frequently far less expensive than reducing exposure. One is tempted to think, therefore, that reduction of exposure will never be "immediately practicable" whenever respiratory equipment or other personal protective equipment can be supplied at less cost than reduction of exposure. The problem of relying on respiratory equipment or other personal protective equipment is that such equipment can fail to work as planned, may not in fact be worn as required, can and often does cause inconvenience or discomfort and can decrease the worker's efficiency. Furthermore, whenever toxic substances are dispersed rather than eliminated, the problem of ill effects is merely transferred to another location and not solved.

The term "immediately practicable" must be defined or Subsection (b) of Subsection (2) should be deleted. The danger is that wherever the measures required in Subsection (1) are not the least expensive way of temporarily avoiding a particular worker's exposure to a harmful substance, management and the Ministry will agree that these measures are not "immediately practicable". This term is capable of definition and defining it would clarify the question of when the consequences of failure to meet the T.L.V.s would become effective.

Section 4 is perhaps the weakest of all sections of this Regulation. It should clearly state an overall time frame in which progressive stages of engineering control, work practices, administrative controls and, additionally, volume controls, must be instituted by any employer in control of a workplace environment where the T.L.V.s are exceeded. In this way, every employer would be required to immediately begin eliminating exposures and action would not depend upon the ability of the Director to direct his mind to any particular workplace environment. Where the Director has issued an Order setting out the progressive stages of reduction, the Order should be made public and should be posted in the workplace. Failure to meet the Order should carry penal sanction. The provision of suitable respiratory equipment or other personal protective equipment should not await the failure of the implementation of progressive stages of reduction of exposure, but rather this equipment should be supplied whenever and wherever there is exposure in excess of the T.L.V. Any employer who could not meet the T.L.V.s at the expiration of the overall time frame allowed in the Regulation for meeting them would also be subject to penal sanction unless granted an Exemption Order arrived at after a public hearing and based on criteria set out in the Regulation which would include proof that in the circumstances there would be no ill health effects to the workers involved.

#### Section 6

Subsection (1) of Section 6 requires that a regulated or toxic substance shall be clearly identified by its chemical composition. This Subsection omits to state that the identification shall include the generic name of the substance. We feel that this omission is significant. Most people do not identify substances by their chemical composition but by a commonly known name. Identification by reference to a chemical composition would be meaningless to most workers.

Section 6 also fails to specify who is responsible for identifying regulated toxic substances or for keeping a record of the quantity of a regulated or toxic substance used in the workplace. While the implication is clearly that the employer is responsible, we suggest that because the Regulation fails to specify that the employer has this obligation, there could be no penal sanction for failure to comply.

### Section 7

Before he can order the establishment of a monitoring program the Director should not need to be satisfied that the health of a worker is "likely to be endangered" but only that it "may be endangered". The difference is important since likelihood presumes a higher degree of probability than mere possibility; yet surely the Director should be concerned whenever there is a possibility that a worker's health may be endangered.

The Section should give the Director authority to order the employer to pay the cost of the program. It is not clear from the proposed wording whether the Director would have power to order the employer to pay the cost of the program. Surely in most circumstances the employer rather than the public should bear the cost.

### Section 8

This Section authorizes the establishment of a medical examination program, a personal exposure record program, and a health record program. Assuming that the content of these programs is adequate for the purposes of epidemiology and of tracing pathology, the Section does leave unanswered questions as to how it would be administered.

With respect to the personal exposure record program we would suggest that it would be helpful if the Section were to state that the employer would be responsible for providing the keeper of the records with the information required by Subsection (2), subparagraphs (vi) to (xii), as this information arises. If information is entered in these records only as medical examinations occur or only from the knowledge of the particular worker, these records may tend to be sketchy and incomplete.

The worker should always have the opportunity to examine and correct the information contained in the record, since there are many ways in which inaccurate information can be inadvertently recorded, and since employers may face temptation to understate the risks involved in an occupation.

While the disclosure provisions in Section 12 (b) and Section 13 (a) (ii) are certainly commendable, we believe the Regulation should contain a general subsection as noted above to the effect that a worker always has the opportunity to view his file or to have copies of it forwarded to his physician or representative.

### Section 9

This Section permits the Minister to order in writing the establishment and maintenance of an occupational health service; but does not set

out the criteria on which the Minister may make his decision. We would think it would valuable to the Minister to have these criteria set out or alternatively to require the automatic establishment of such services wherever specified criteria are met. Such criteria might include one or more of the following:

- a workforce exceeding a specific number of employees,
- the employer having exceeded the average accident and illness experience for his class according to the records of the Workmen's Compensation Board, or
- the presence in the work environment of specified regulated or toxic substances.

In Subsection (3) there is no direction given to the physician having direction of the occupational health service as to when he or she is required to issue a certificate to the worker. Presumably, this certificate will be required whenever a worker is changing jobs or is about to encounter a new exposure to a toxic substance. Whatever event triggers the requirement, it should be stated.

Unless the certificate states the reasons for the physician's opinion that the worker may be fit for work subject to specified limitations or that the worker is unfit, the certificate may be useful to the employer in assigning an appropriate job, but it will be of little help to the worker. If reasons were given, the certificate would be useful to the worker for rehabilitation purposes and for evidentiary purposes for the Workmen's Compensation Board.

In an indirect way, this Section raises the question of what happens to workers who are fit only for modified work or who are not fit at all for work. Attention to this problem is needed whether in this regulation or in a separate regulation. At present, many people who are partially fit are unable to obtain any employment because the employer determines that he does not have available the suitable modified employment. The employer in such cases really does not wish to take on any but the most healthy workers.

#### Section 10

Section 10 requires the worker or prospective employee to provide a passport-size photograph to the examining doctor, presumably for the purpose of identifying the worker on the medical certificate. This is a novel suggestion in this area of law, and we wonder whether it is necessary. If the problem of identifying workers is, in fact, great enough to require photographing them, we would suggest that the photograph be taken in the occupational health service, rather than require the worker to provide the photograph.

#### Section 11

Subsection (5) of this Section permits a worker to demand a sample of

his urine or blood taken by a physician in the occupational health service. We would commend this Section for its thrust towards permitting a worker knowledge of his own condition. However, it might be helpful to enlarge this to include giving the worker or applicant samples of any substance taken from him.

#### REGULATION MADE IN RESPECT TO ASBESTOS

##### Section 3

Section 3 states that the Regulation applies to a workplace where a hazard to the health of a worker is likely to occur from exposure to asbestos. This Section leaves open the question of who will be responsible for judging likelihood and according to what criteria. In particular, would it be open to an employer to say after being identified as controlling work environments where there have been several cases of asbestosis to plead that he did not appreciate that his workplace was one which was likely to endanger the health of a worker? On the other hand, can the regulation be applied only after the Director informs employers that he believes their workplaces are likely to endanger the health of a worker due to exposure to asbestos?

We would recommend that the Regulation stipulate that it applies to any workplace in which any worker is exposed to asbestos at or above a certain arithmetical standard.

This recommendation applies also to Section 3 in the Regulation made in respect of inorganic lead and Section 3 of the Regulation made in respect of silica.

##### Section 12

As mentioned above, the certificate will be of only minimal helpfulness unless reasons are given for the worker's unfitness to work. This comment also applies to Section 12 of the Regulation made in respect of silica.

#### REGULATION MADE IN RESPECT OF INORGANIC LEAD

##### Section 9

Subsection (1) of this Section states that certain work practices must be followed where exposure to inorganic lead is high. The obvious question is, who shall determine what is a "high exposure", and what, in fact, is a "high exposure"? Again, we would recommend the requirements of subsection (1) be specified to be effective whenever exposure is in excess of specific arithmetical standards.



REGULATION MADE IN RESPECT OF SILICA

Section 9

Section 9 requires certain work practices where the Regulation applies and where the Director orders, but even though responsibility for determining when the work practices must be implemented clearly rests with the Director, it seems preferable that the criteria for requiring these work practices be made objective and clear.