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TOXIC SUBSTANCES IN CANADA: THE REGULATORY ROLE OF THE FEDERAL GOVERNMENT

Publication #175
ISBN# 978-1-77189-554-5

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Prepared for "Into the Future: Environmental Law and Policy for the 1990's"

October 18, 1989

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I. INTRODUCTION

At least 30,000 chemical substances are being manufactured or imported for use in Canada. A number of these substances are known to pose serious threats to public health and the environment, particularly if they are not managed or disposed properly. At the same time, the risks posed by other substances have not been fully studied or assessed in terms of their environmental impact. In light of public concern about these substances, there has been a general recognition that both the provincial and federal governments must take steps to ensure that toxic substances do not result in harm to public health or the environment.

For many people, this means that both levels of government must establish strong regulatory programs to control toxic substances. Non-regulatory initiatives, such as consumer education, economic incentives and technology development and transfer, are also important; however, these do not detract from the overwhelming need for effective and enforceable regulations in the area of toxics.

It is our view that in the 1990's, unenforceable environmental guidelines, closed-door negotiations with industry, or voluntary codes of practice cannot and will not provide the kind of environmental protection that the Canadian public wants or deserves. There are clear limits to what we can expect industries to do voluntarily when they are in competition with other industries, both nationally and internationally. Accordingly, we need environmental legislation with teeth, and we need a clear commitment by our governments to enforce these laws.

For its part, the federal government now primarily relies upon two statutes to control toxic chemicals in Canada. The first is the Canadian Environmental Protection Act (CEPA), which

covers "toxic substances" as defined by the Act. The second is the Pest Control Products Act (PCPA), which regulates pesticides in Canada. This morning, I intend to briefly describe the structure of these two Acts; I will also identify some major problems in the content and enforcement of the two Acts. I will concentrate the bulk of my remarks on CEPA, not because it is more important than PCPA, but because it is a newer statute and because this is the Act under which most toxic substances could be regulated in Canada.

The central question that I would like to address this morning is whether or not the federal government is likely to become an active and aggressive regulator of toxics in the 1990's. My answer, based on the federal government's environmental track record, is a clear and resounding no.

II. CANADIAN ENVIRONMENTAL PROTECTION ACT (CEPA)

Prior to the passage of CEPA in 1988, the federal government had several statutes in place to control toxic substances. These included the Clean Air Act, the Canada Water Act, the Environmental Contaminants Act, the Ocean Dumping Control Act and others. However, very few prosecutions were commenced by the federal government under these statutes and few regulations were ever passed.

For example, the Clean Air Act, which was passed in 1971, was a relatively strong law that was designed to regulate "air contaminants" as defined by the Act. This statute empowered the federal government to unilaterally enact national and specific emission standards, as well as national air quality objectives. Nevertheless, only a handful of regulations were actually passed under this Act, most of which focussed on well-known toxics such as asbestos, mercury, lead and vinyl chloride.

Similarly, the Environmental Contaminants Act, passed in 1975, was largely designed to control the manufacture and use of toxics in Canada. However, in approximately thirteen years' time,

only a few regulations were passed under this statute, and again these pertained to known bad actors such as CFC's and mirex.

In 1985, the federal government announced its intention to overhaul the Environmental Contaminants Act, and CELA was a member of a multi-stakeholder advisory committee that reported on the necessary reforms. During its deliberations, the Committee was advised that the Department of Environment was working on a new and comprehensive environmental protection statute. However, the committee was not formally consulted on the new bill; in fact, no non-governmental organizations were involved in the preparation of the new bill.

When CEPA was first released as a draft bill in December, 1986, the Minister of the Environment, Mr. Tom McMillan, called it the most comprehensive piece of environmental legislation in the western hemisphere. He also said that it constituted the nation's first environmental bill of rights, and that it would deal with all aspects of a toxic substance's life cycle from "cradle to grave". Many environmental groups disagreed with Mr. McMillan's assessment and concluded that if anything, the bill represented a significant step backwards.

After the public consultation period, the government went back to the drawing broad, revised the bill slightly and re-introduced it as Bill C-74. CELA believed that the bill was still swiss-cheese, but with fewer holes. In 1988, CEPA was implemented as law, but our view remains essentially unchanged. We still see three important and fundamental flaws in the legislation:

1. The indirect but apparent signal in the Act that the federal government does not intend to aggressively regulate existing toxics;

2. The failure of the federal government to use its clear authority to regulate the environmental impacts of federal works, undertakings and activities; and

3. The Act's failure to include the essential elements of an Environmental Bill of Rights.

Without addressing these concerns, CEPA is little more than window dressing, and it cannot be regarded as comprehensive environmental protection legislation. More importantly, the Act flies in the face of the Brundtland Report's call for national governments to establish clear environmental goals and enforceable regulations and standards. In fact, the Brundtland Report made specific recommendations with respect to toxics:

> The regulations and standards should govern such matters as air and water pollution, waste management, occupational health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and the disposal of toxics substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms (emphasis added).

The Brundtland Report has since been endorsed by both levels of government in Canada and by CCREM's National Task Force on Environment and Economy. In our view, the federal government can no longer pay lip service to the Brundtland Report; instead, it must now take steps to implement and entrench the principles of sustainability. We suggest that a good starting point would be an overhaul of CEPA, and a clear commitment to enact and enforce regulations under CEPA.

Currently, for a chemical to be regulated under CEPA, it must be a "substance" as defined by s.3, and it must be "toxic", as defined by s.11 of the Act. In general, a substance is considered to be toxic if:

- it has an immediate or long term harmful effect on the environment;
- it poses or may pose a danger to the environment on which human life depends; or

- poses or may pose a danger to human life or health.

Having defined toxic substances, the Act then sets out different schemes to regulate new substances, as opposed to existing substances.

A. New Substances

Substances new to Canada are dealt with under ss.25-32 of the Act. Basically, the Minister must produce a "Domestic Substances List". This is essentially a list of all substances used in Canada between 1984 and 1986. The Act then provides that no one can import or produce a substance not on the Domestic Substances List unless that person provides a package of information in accordance with the testing regulations.

The problem is that there are no testing regulations in force yet. In addition, there is a question as to whether or not Environment Canada will have the staff or the budget to assess the data properly or expeditiously. Finally, except for PCB's, there are no storage or disposal regulations in place for substances on or off the Domestic Substances List. In this sense, CEPA is not a "cradle to grave" legislation; but rather, it is "cradle to crib".

B. Existing Substances

Under CEPA, the Minister is required to prepare a "Priority Substances List". This is the list of substances that shall receive priority in assessing whether they are toxic or capable of becoming toxic. In 1988, Dr. Ross H. Hall from McMaster University was appointed to head a committee that will identify and assess the substances on the Priority Substances List. To date, some 44 substances have been draft listed and broken down into three groups. The first group includes well-known bad actors such as arsenic, benzene, pulp mill affluent, dioxins, furans and polyaromatic hydrocarbons.

Of course, being put on this top 44 hit parade does not mean that the substance will be regulated, but it at least provides for the possibility of regulation. I should also point out that it has also been suggested that it may take three to five more years just to assess these substances, let alone regulate them.

Once the Ministers of Environment and Health and Welfare have assessed the substance, the assessment must be released to the public. The Ministers must also state whether the substance will be added to the Schedule I list of toxic substances, and whether it will be regulated. If the Ministers decide against adding a substance to Schedule I, any person can request that a Board of Review be established to review the matter. In addition, if a substance sits on the Priority Substances List for five years without being assessed, any person may request that a Board of Review to look into the matter. Draft procedural regulations for these Boards have been prepared, but again, they have not been finalized.

If the Ministers are satisfied that a substance is toxic, Cabinet may add it to the Schedule I list. Cabinet may also pass a variety of regulations in relation to the substance under s.34 of the Act. However, in order to do so, a number of hoops and hurdles must be overcome. This is really the crux of environmentalists' concerns about CEPA, and this is why environmental groups have properly argued that the federal government has abdicated its responsibilities to the provinces in the area of toxics.

The first hoop is that a federal-provincial advisory committee must be established under s.6 of the Act, and the committee must be given an opportunity to comment on new regulations. This is a requirement not found in previous federal legislation, and in our view, this process may unduly delay or quash regulations that the federal government should be passing unilaterally.

The second and more objectional hoop is found under ss.34(5) and (6). These sections essentially provide that the regulation can be made inapplicable to a province where the

Minister and the province agree in writing that the province has an "equivalent" regulation, and that the province's investigation provisions are "similar" to s.108-110 of CEPA.

In our view, these vague sections effectively and deliberately undermine the federal government's ability to implement a comprehensive nationwide toxics program. Clearly, extensive use of the equivalency provisions can only result in a patchwork of inconsistent regulations and enforcement practices across Canada. Different penalties for essentially the same offences may be established, and this may result in so-called "pollution havens". This stands in clear contrast to the Brundtland Report's call for strong national standards.

So why has the federal government done this? One suspects that the federal government is still plagued by what I would call conservative legal advice in relation to its constitutional authority to act in environmental matters. We submit that the constitutional constraints invoked by Environment Canada are more perceived than real, and we suggest that a number of heads of federal power can be used to support and justify a strong national toxics program. These heads of power include the criminal law power, trade and commerce power, and the "peace, order and good government" power which the Supreme Court of Canada in Crown Zellerbach held can be invoked to support legislation in the area of marine pollution. Other Supreme Court of Canada decisions have confirmed that the federal government also enjoys concurrent jurisdiction with respect to "health".

I would point out that the preamble of CEPA states that the presence of toxics in the environment is a matter of national concern, and that there are interprovincial aspects to this problem. We believe that the statements are demonstrably true, and they clearly indicate that we need strong federal leadership in the area of toxics. Therefore, the federal government cannot continue to defer to the provinces under the guise of "equivalency" or "constitutional constraints".

A good case in point involves the emergency power under CEPA. Under s.35, the Ministers may make interim orders where immediate action is necessary to deal with significant danger to the environment or human health. Interim orders must be approved by Cabinet within fourteen days of issue and may last up to two years. Nevertheless, the Act provides that Cabinet shall not approve the interim order unless the Minister has offered to consult with the governments of all the affected provinces within twenty-four hours to see if the provinces are prepared to deal with the danger. At the same time, Cabinet cannot approve an interim order unless the Minister has consulted with other federal Ministers to determine if action could be taken under other statutes to deal with the significant danger. This dual requirement appears to us to be a classic recipe for inaction. If the Minister needs emergency powers, and we believe that he does, then why superimpose these additional requirements?

As some of you know, the federal government did use the interim order power to pass PCB storage regulations after the St. Basile fire. In our view, this represented yet another example of the "regulation-by-disaster" approach that we have come to expect of the federal government. We also believe that this amounted to a misuse of the emergency powers, particularly since all provinces except P.E.I. have been exempted anyways. In addition, the order will lapse in two years in any event; what we need are permanent storage regulations.

It is our position that the true test of whether CEPA will be effective is to see how many chemicals are actually listed and regulated. To this point, we have seen no indication that we will soon have much more than the few regulations that have been rolled over from statutes repealed by CEPA.

This inaction may be briefly demonstrated by referring to the CEPA provisions relating to the import and export of toxic substances. Here, the basic regulatory structure is similar to that outlined above; that is, the Minister is to prepare a variety of lists such as:

- a list of prohibited substances that cannot be exported;

- a list of toxic substances requiring export notification; and

- a list of hazardous waste requiring import and export notification.

These provisions look great on paper, but they are virtually meaningless since we export very few toxics from Canada. I would also point out that the export regulations are still only in the draft form and have not yet been finalized.

However, assuming that these and other regulations under CEPA are forthcoming, what can we expect to see in terms of enforcement? We foresee very little change in enforcement trends by the federal government. As I have mentioned, very few environmental charges were laid by the federal government prior to the enactment of CEPA, and under CEPA, this inertia has continued.

In fact, since June 30th, 1988, Environment Canada has initiated only four prosecutions under CEPA. The first two involved the dumping of fish remains at sea; one defendant was found not guilty, and the second was convicted and fined $500. The third prosecution involves a charge of failing to report an unauthorized release of a regulated substance. The company has pleaded not guilty, and a trial will be held in December, 1989. The fourth prosecution involves charges under the PCB storage regulations. The defendants operated a sawmill that burned down with PCB's on the property. Again, not guilty pleas have been entered and a trial date was to be set in late October, 1989. It is our understanding that this prosecution is proceeding by way of summary conviction, so that the $1,000,000 fines and three year imprisonment provisions of CEPA are not applicable.

Therefore, in 16 months, there has only been one successful prosecution by the federal government under CEPA, and this resulted in a $500 fine. Can we take this as an indication that very few companies are violating CEPA? The answer is no; according to Environment Canada figures, hundreds of companies have violated the Act, but most have received warnings

only. Can we take this prosecution record as evidence of a break from the past, or a new "get tough" approach by the federal government? Again, the answer is no; the clear message is that the federal government does not want to be in the business of regulating and enforcing in the environmental field. As I have stated, this must change. We need strong federal regulation, coupled with strong federal enforcement. Anything less is simply unacceptable from a public and environmental point of view.

III. PEST CONTROL PRODUCTS ACT (PCPA)

The Pest Control Products Act is the principal federal statute controlling pesticides in Canada. Under the PCPA, there is a general prohibition against importing, producing or using a pesticide unless it has been registered by the federal government, and has been properly labelled and packaged. There are detailed regulations which prescribe data package requirements for registration under the PCPA, and the Minister can refuse to register a product if its use may lead to an unacceptable risk of harm to human health, plants, animals or the environment. If the product is registered, registration lasts five years, and can be renewed upon application to the Minister of Agriculture.

At anytime during registration, the pesticide may be re-evaluated by the Minister, who can require the registrant to provide further evidence of safety, merit and value. However, to this point, only 10% of the 600 existing active ingredients have been re-evaluated in Canada. If re-evaluation reveals a problem, it is possible for the Minister to suspend or cancel the product's registration. This decision can be appealed to a special board of review. Nevertheless, in the past 20 years there have been very few product suspensions or cancellations. In addition, there appears to be very few prosecutions by Agriculture Canada under the PCPA. Therefore, we again have a federal department that has allowed its enforcement powers to fall into disuse.

Aside from the lack of enforcement, there are a number of problems that have been identified with the PCPA and the regulations thereunder. An excellent review of these problems may be

found in the Law Reform Commission of Canada's paper on pesticides, authored by Toby Vigod and Joe Castrilli. The federal government, to its credit, has recognized the need for reform, and has established a multi-stakeholder advisory group that will make recommendations on the necessary changes. CELA is involved in this initiative; farm groups, labour groups, industry and others are also involved in this review process. A draft report is due in June 1990, which will be followed by public hearings in the summer, and a final report is due by end of the year.

Because of this review process just underway, it is difficult to predict with any certainty where it is going. The terms of reference are quite broad, and they include at least 20 different issues such as:

- the criteria used to assess environmental and human health effects;
- the role of the public in the registration process;
- reevaluation;
- access to information; and
- enforcement and penalty provisions.

Predictably, there has been a divergence of opinion on the advisory committee to date. Industry appears to want a quicker registration process and cheaper pesticides, while environmentalists want to promote sustainable agricultural practices that reduce our current over-reliance on pesticides and chemical fertilizers. Environmentalists also want to get rid of existing products that have not been properly tested or that lack full data packages.

IV. CONCLUSION

Let me conclude my remarks by returning to my central question: is the federal government likely to become a true regulator of toxic substances in the 1990's? My answer, based on the federal government's track record to date, is no. The next logical question is: should the federal government become a regulator of toxics in the 1990's? My answer here is yes; the federal

government must take a strong leadership role because of the serious and widespread risks to the environment and public health posed by toxics.

This is not to say that the provinces cannot or should not play a role in the control of toxics. For example, the provinces should be free to set their own environmental agendas, priorities and standards, provided that these standards supplement rather than conflict with federal minimum standards. The point here is that the federal government must be prepared to develop and implement an effective and comprehensive toxics program, even if the provinces initially object on jurisdictional grounds.

This issue was addressed in a article written by Professor Paul Emond some 15 years ago, and his words appear equally true today:

> The constitutionality of a strong federal role in the environmental protection field is indisputable. Similarly, the arguments in favour of immediate federal action in this area are compelling. What is needed now is for the federal government to recognize these facts and to take the initiative of designing and implementing a comprehensive pollution control plan that will make a real contribution to improving our national environment.