



May 7, 2009

Ms Ana Tinta
Policy Analyst
Ministry of the Environment
Integrated Environmental Policy Division
Strategic Policy Branch
Toxics Reduction Project
135 St. Clair Avenue, Floor 5
Toronto, ON M4V 1P5

Dear Ms Tinta:

RE: Bill 167 – *Toxics Reduction Act, 2009* ("Bill 167")

1. Introduction

The Ontario Bar Association (OBA) welcomes the opportunity to comment on Bill 167. As noted in our earlier comments dated October 14, 2008 regarding *Creating Ontario's Toxics Reduction Strategy – Discussion Paper*, we support Bill 167's goal to give Ontarians better disclosure about the use and release of toxic substances in their communities.

The OBA consists of 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 500 of these lawyers belong to our active Environmental Law Section. Our members have considerable expertise and experience in how environmental laws are interpreted and applied as well as their impacts on regulated persons. The views expressed herein are the views of the OBA and its Environmental Law Section as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

2. Comments

While we will need to review Bill 167's proposed regulations to fully assess the Ontario government's proposed *Toxics Reduction Strategy*, we have the following preliminary comments on Bill 167 for your consideration.

(i) Proposed List of Toxic Substances

It is our view that the interjurisdictional components of regulating toxic substances necessitates significant intergovernmental (federal, provincial/territorial and municipal) cooperation to ensure that regulatory efforts are coordinated, efficient and as uniform as possible. From a harmonization and efficiency perspective therefore, we strongly support the Ontario government's current proposal, which is set out in Bill 167's background documents, to fully regulate only National Pollutant Release Inventory ("NPRI") substances (plus acetone). In our view, this is a

significant improvement from the Ministry's initial approach, which was set out in the Discussion Paper.¹

(ii) Proposed List of Substances of Concern

However, Bill 167 would also require the provision of information on certain prescribed substances of concern. As noted in the Discussion Paper, these substances are currently less well known, making it more difficult to assess their risks. While we understand (and agree with) the importance of evaluating such risks and appreciate that the Toxics Reduction Scientific Expert Panel will play an important role in that regard, we encourage the Ontario government to conserve valuable public resources by working within the existing federal Chemicals Management Plan ("CMP") and the *Canadian Environmental Protection Act, 1999* to assess and ultimately designate, as appropriate, any non-NPRI substances. In other words, it is our view that Ontario should work with the federal government to expand, where necessary, the NPRI substances list.

The federal CMP process is transparent, comprehensive and well respected. By adopting an approach that harmonizes provincial and federal processes, the Ontario government would meet its goal of developing a "living list" (which could be updated over time to reflect new developments such as emerging science), ensure a more uniform approach to regulating toxics in Ontario and permit Ontario to focus public resources on building capacity and support for Ontario's proposed *Toxics Reduction Strategy*. In our view, this cooperative approach would ensure efficient and effective use of public and private resources.

(iii) Proposed Regulated Sectors, Thresholds and Reporting Requirements

We strongly support the Ontario government's current proposal to align the existing NPRI sector, threshold and reporting requirements with Bill 167's proposed regulations to reduce reporting burdens on facilities. As part of the broader *Toxics Reduction Strategy*, we encourage the Ontario government to explore and, if possible, to work with the federal government to implement a "one-window" reporting regime for Ontario facilities that satisfies the reporting obligations under both the Bill 167 and the NPRI regimes. We note that the One Window to National Environmental Reporting System ("OWNERS") has been an effective tool and is well-known to industry officials. We expect integrating any reporting obligations included in Bill 167 and its regulations with OWNERS would also reduce reporting burdens on facilities.

(iv) Confidential Business Information

The regulations made under Bill 167 must clearly protect confidential business information. Our experience with chemical management programs to date (*e.g.*, the federal New Substances Notification Program and Workplace Hazardous Management Information System) highlights the

¹ We are not advocating that there is a constitutional reason for Ontario to restrict itself just to the NPRI substances. However, it is also our view that it would be prudent for Ontario to take all reasonable steps to minimize overlap, duplication and conflict with the federal CMP so as to ensure that regulatory efforts are as efficient and uniform as possible.

importance of balancing the community's right-to-know with a regulated facility's need to protect genuinely confidential business information. Such balance was a fundamental consideration during the development of these programs.

We also recommend that your Ministry consider a regulated facility's security concerns associated with reporting on certain toxics (*e.g.*, toxics that are pre-cursors of chemical weapons or illegal drugs).

(v) New Authorities to Address Toxics in Consumer Products

Bill 167 also includes regulation-making authority to (i) ban or restrict the manufacture, distribution or sale of a designated toxic and products known to contain a toxic and (ii) require manufacturers and/or sellers of consumer products to publicly report on products containing toxics. Background documents regarding Bill 167 state that, as the "first course of action", Ontario would continue to work with the federal government to promote the use of existing federal powers to deal with toxics in consumer products.

While we agree that Ontario has an important role to play in ensuring the health and safety of Ontarians, we strongly encourage the Ontario government to work with the federal government to enhance the existing (and complex) federal regulatory framework, which is designed to prevent and respond to dangers to human health or safety posed by consumer products.

From a harmonization and efficiency perspective therefore, we respectfully recommend that additional consideration be given to the potential costs and benefits of implementing new provincial restrictions or requirements on consumer products manufactured, distributed or sold in Ontario. In particular, consultation with stakeholders would be prudent to ensure that any proposed consumer protection actions would not create an unlevel playing field for consumer products that are manufactured in Ontario.

(vi) Absolute Liability

Bill 167 imposes absolute liability with respect to administrative penalties (up to \$60,000) for contraventions relating to, among other matters, toxic substance reduction plans or reports on substances of concern. As we have commented in the past, it is our view that there should be a defence of due diligence available with respect to such penalties. Some minimum requirement of fault strikes a better balance between fairness and the compelling need to protect our environment. We are not aware of any evidence that a higher standard of care results from absolute liability. Indeed, the Supreme Court of Canada has concluded otherwise.² We recommend, therefore, that your Ministry reconsider its proposal to impose absolute liability.

² The Supreme Court of Canada considered the concept of liability in relation to public welfare offences in *R. v. Sault Ste. Marie (City)*. In that case, the Supreme Court carefully considered the basic principles of liability and balanced them against the public goals sought to be achieved through regulatory measures. A unanimous Supreme Court held that strict liability represented an appropriate compromise between the competing interests involved. It is our view that the Supreme Court's conclusion in *Sault Ste. Marie* is no less valid today.

(vii) Facilitating Toxic Substance Reductions

Bill 167 does not expressly require reductions; it uses disclosure to encourage reductions. We expect that Bill 167 will result in many facilities reducing their use and creation of toxic substances that are relatively easily achieved with some facilities going beyond "easy" reductions. To encourage reductions, we submit that your Ministry should consider (as part of its broader *Toxics Reduction Strategy*) recognizing in a meaningful, positive manner facilities that actually achieve reductions, especially those that go beyond the "easy" reductions (*e.g.*, "Ontario's Environmental Leaders" program). Such recognition may be another driver for facilities to reduce their use or creation of toxic substances.

(viii) Better Understanding the Benefits and Costs of Bill 167

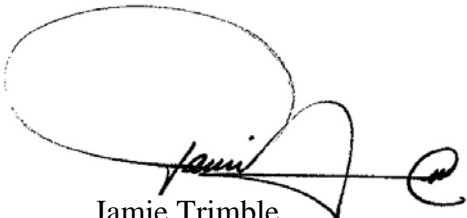
In reviewing Bill 167 and the information regarding Ontario's proposed *Toxics Reduction Strategy*, we have not seen a comprehensive regulatory impact analysis assessing Bill 167, including its benefits and costs. We assume that your Ministry has undertaken this analysis, but has not provided it to the public. As you may know, other governments (such as the federal government) provide this type of information to the public. For example, when the federal government published its PCB Regulations in *Canada Gazette*, Part II, it also provided a regulatory impact analysis statement. Among other things, it assessed: the status quo; the use of voluntary measures, market-based instruments and regulation; the costs to PCB owners and the government; and benefits to Canadians of the PCB Regulations. In our view, such information facilitates meaningful public comment.

With respect to Bill 167, it is not clear to what extent Bill 167 would result in toxic substance reductions beyond those that would arise in any event from the federal government's NPRI program and at what costs those reductions would be achieved. We submit that these are important factors and that the public should be provided with the necessary information so that it can provide meaningful comments. As a point of broader application, we submit that your Ministry should provide a regulatory impact analysis with each proposed act or regulation to facilitate more meaningful public participation.

3. Conclusion

Given that Bill 167's details will be spelled out in regulations, we support your proposal to involve meaningful stakeholder consultation in the development of Bill 167's regulations.

Yours truly,



Jamie Trimble
President
Ontario Bar Association



Barry M. Weintraub
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