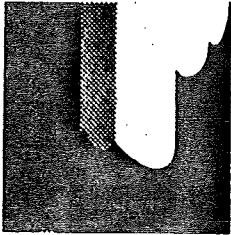


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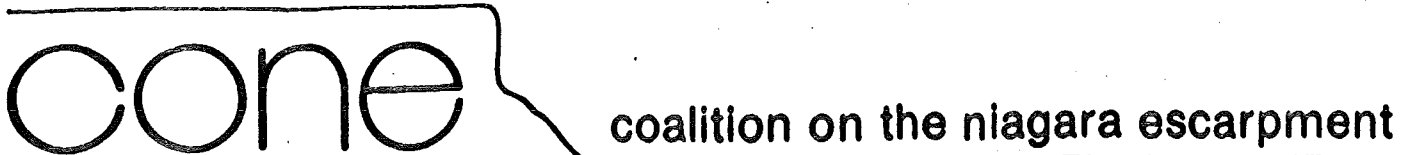
**SUBMISSION OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION**  
**AND THE COALITION ON THE NIAGARA ESCARPMENT TO**  
**THE STANDING COMMITTEE ON THE ADMINISTRATION OF JUSTICE**  
**RESPECTING PRIVATE MEMBERS' BILL 62**

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PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) and the Coalition in the Niagara Escarpment (CONE) welcome this opportunity to address the Standing Committee on the Administration of Justice regarding Private Members' Bill 62 (An Act to amend the Environmental Protection Act in respect of the Niagara Escarpment).

CELA is a public interest group dedicated to the enactment, enforcement and improvement of laws to protect the environment and conserve resources. Founded in 1970, CELA operates as a community legal clinic, and CELA's lawyers represent individuals and groups in the courts and before statutory tribunals on a wide variety of environmental matters. CELA lawyers have been particularly active in casework and law reform involving waste management facilities, environmental assessment, and land use planning, including Niagara Escarpment matters.

CONE is a coalition of environmental organizations and concerned individuals dedicated to the conservation, protection and sustainability of the Niagara Escarpment. CONE's membership includes the Sierra Club of Eastern Canada, Federation of Ontario Naturalists, the Wildlands League, Trout Unlimited (Ontario Chapter), Bruce Trail Association, and CELA. CONE was extensively involved in the public hearings on the Niagara Escarpment Plan in the early 1980's, and CONE was also involved in the recent Five Year Review hearings on the Niagara Escarpment Plan.

As long-time advocates of protecting the unique Niagara Escarpment environment, CELA and CONE strongly support Private Members' Bill 62. In our view, waste disposal facilities are fundamentally incompatible with the long-term sustainability of the Niagara Escarpment, which has been designated as a World Biosphere Reserve. Accordingly, we fully support Bill 62's prohibition on the use, operation, establishment, alteration, enlargement or extension of waste management sites or systems in the Niagara Escarpment Plan Area as set out in the Niagara Escarpment Plan.

The purpose of this brief is twofold: to review the rationale for Bill 62; and to address certain legal issues which arise in relation to Bill 62.

## PART II - RATIONALE FOR BILL 62

### (A) General

Our support for Bill 62 is premised on the need to protect and conserve the unique natural environment within the Niagara Escarpment Plan Area:

The Niagara Escarpment includes a variety of topographic features and land uses extending 725 kilometres from Queenston on the Niagara River to the islands off Tobermory on the Bruce Peninsula.

The particular combination of geological and ecological features results in a landscape unequalled in Canada. It is also a source of some of Ontario's prime rivers and streams, and one of the province's principal outdoor recreation areas...<sup>1</sup>

The Plan Area covers approximately 190,300 hectares, and includes:

- portions of the deciduous and Great Lakes - St. Lawrence Forest Regions, including significant tree species at their northern distribution limits;
- portions of different terrestrial ecoregions and physiographic site regions, including numerous site districts;
- extremely varied and species-rich plant communities, including rare flora and those with Arctic, Boreal, Atlantic, Alleghanian, Cordilleran and Prairie affinities;
- diverse aquatic, riparian, and terrestrial habitat for numerous wildlife species, including 53 mammal species, over 300 bird species, and many significant or sensitive "forest interior" species (eg. red shouldered hawk) as well as rare or threatened species (eg. Massassaga rattlesnake);
- diverse municipal, provincial and national parks and trail systems; and

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<sup>1</sup> Niagara Escarpment Commission, Niagara Escarpment Plan Review Document, p.1.

- significant historic, archeological, cultural and natural heritage resources.<sup>2</sup>

The provincial significance of the Niagara Escarpment and the exceptional quality of its environmental features and values have been long recognized by the public and the Ontario government. This culminated in the passage of the Niagara Escarpment Plan in 1985, which is intended to protect the Escarpment from incompatible land uses.

In February 1990, the international significance of the Niagara Escarpment was recognized when the Bureau of the UNESCO Man and Biosphere Programme designated the Niagara Escarpment as a Biosphere Reserve. At the present time, there are only five Biosphere Reserves across Canada, which are intended to form part of a global network of significant ecosystems and representative natural regions.

Given the provincial, national and international significance of the Niagara Escarpment, CELA and CONE submit that environmental protection imperatives must predominate within the Plan Area. Accordingly, Ontario's legislation, policies and programs must be aimed at maximizing the protection of the Niagara Escarpment by excluding land uses which are incompatible with this fundamentally objective.

It is beyond dispute that there are numerous adverse environmental impacts associated with landfills and other waste management facilities. These impacts include: groundwater and surface water contamination; methane gas generation and migration; and off-site nuisance impacts such as litter, odour, noise and dust. On a broader level, landfills are generally inconsistent with current waste management approaches which stress the 3 R's rather than the burial of valuable resources which can otherwise be re-used, recycled or composted. In our view, then, waste disposal facilities are fundamentally incompatible with protecting and conserving the Niagara Escarpment, and it is necessary and appropriate to amend the Environmental Protection Act to exclude such facilities from the Plan Area.

#### (B) The Niagara Escarpment Planning and Development Act

The paramountcy of environmental protection and resource conservation within the Plan Area has been specifically mandated under the Niagara Escarpment Planning and Development Act (NEPDA). In particular, the purpose of the NEPDA has been defined as

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<sup>2</sup> Niagara Escarpment Commission, Niagara Escarpment Plan: Biosphere Reserve Nomination, Part 2.

follows:

The purpose of this Act is to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is incompatible with that natural environment.<sup>3</sup>

The NEPDA also directs the Niagara Escarpment Commission to seek a number of objectives, including:

- to protect unique ecologic and historic areas;
- to maintain and enhance the quality and character of the natural streams and water supplies;
- to maintain and enhance the open landscape character of the Niagara Escarpment by preserving the natural scenery.<sup>4</sup>

In light of these provisions, it is clear that the primary purpose of the NEPDA is the protection and maintenance of the physical, natural and visual environment of the Niagara Escarpment and land in its vicinity. In our view, it cannot be seriously contended that landfills, dumps or similar operations "protect" or "maintain" the physical, natural or visual resources of the Niagara Escarpment. Accordingly, given the adverse environmental impacts often associated with waste management facilities, CELA and CONE submit that such facilities are incompatible with the purpose and objectives of the NEPDA.

### (C) The Niagara Escarpment Plan

The Niagara Escarpment Plan is often described as Canada's first large-scale environmental land use plan. Passed with all-party support in 1985, the Niagara Escarpment Plan is intended to fulfill the purpose and objectives of the NEPDA.

In 1992, the Niagara Escarpment Plan was amended to exclude waste collection, disposal and management facilities within the Plan Area. This amendment, known as Amendment 52, was adopted following a full public hearing which identified substantive concerns about the suitability of the Niagara Escarpment for waste disposal purposes:

Evidence heard seriously questions the suitability of

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<sup>3</sup> NEPDA, s.2.

<sup>4</sup> NEPDA, s.8(a), (b), and (d).

Escarpment lands for the siting of landfills. The weight of this evidence was that despite careful engineering in the preparation and management of sites, these Escarpment lands are generally unsuited for the siting of landfills, due chiefly to the uncertainties for satisfactory containment of contaminants (emphasis added).<sup>5</sup>

Accordingly, waste management facilities are not permitted uses within the Plan Area. However, despite the adoption of Amendment 52, it is still open to waste management operators to apply for site-specific Plan amendments to expand or alter existing sites within the Plan Area. Similarly, it is still open to waste management operators to apply for Plan amendments to permit the establishment of new waste management sites within the Plan Area. In our view, this underscores the need for an express legislative prohibition on new or expanded waste management facilities within the Plan Area.

### PART III - LEGAL ISSUES RESPECTING BILL 62

In our view, there appear to be two main legal issues which may arise with respect to the effect and interpretation of Bill 62. These issues are discussed below.

#### (A) Effect on the Waste Management Approval Process

It has been suggested by some that Bill 62 is unnecessary since the existing waste management approval process (eg. the Environmental Protection Act; the Environmental Assessment Act; and the Consolidated Hearings Act) is sufficient to screen out applications which are unsuitable for the Niagara Escarpment. It has been further suggested that it is inappropriate to limit the site selection process by removing the Niagara Escarpment as a candidate area for waste management facilities.

In response, it must be noted that the above-noted statutes are acts of general application, and unlike the NEPDA, they do not expressly recognize the special status and sensitivity of the Niagara Escarpment environment. In addition, we submit that it is both necessary and appropriate for the province to identify "special areas" in which waste management facilities are not permitted for policy or technical reasons.

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<sup>5</sup> Hearing Officer's Report: Niagara Escarpment Plan Amendment 52/89, p.45.

For example, there is general consensus that landfills should not be located within provincial parks, provincially significant wetlands, or prime agricultural lands in light of the fundamental incompatibility of landfilling with the conservation of significant natural heritage. For this reason, we urge the passage of Bill 62 so that there is an upfront declaration that Escarpment lands are off-limits to landfilling for policy reasons (e.g. protection of the internationally significant environment) and technical reasons (e.g. the hydrogeological unsuitability of Escarpment lands).

It might be suggested that such a restriction represents an undue constraint on the site selection process under the Environmental Protection Act or the Environmental Assessment Act. In our view, such a constraint is in the public interest and can be fully justified on policy and technical grounds, as described above. Thus, the constraint represented by Bill 62 does not eliminate the discretion of proponents in the site selection process; rather, Bill 62 structures the exercise of discretion so that the site selection process can focus on more appropriate alternatives.

#### (B) Effect on Existing Applications

There has been some question about the effect of Bill 62 on waste management applications which have not been finally approved and which remain in the approvals process at various stages. Without commenting on the individual applications that may be in this situation, we would like to offer some general observations about the rules of statutory interpretation respecting the effective date of changes in the law.

In general, there is a presumption that new laws should not be given retroactive operation so as to interfere with existing or vested rights or obligations. However, the caselaw is clear that this presumption does not arise in cases where applicants have filed applications which have not been finally approved. The mere filing of an application does not create vested or enforceable rights to proceed with an undertaking. At most, applicants are entitled in law to have their applications considered on the merits by unbiased authorities, who are free to grant or reject the application in accordance with existing laws, regulations, policies, or other relevant documents.

Thus, once proclaimed in force, Bill 62 should generally apply to all outstanding applications which have not received final approval under the Environmental Protection Act. This principle is recognized on the face of Bill 62, which provides, in essence, that no waste management operations can be established or continued unless a Certificate of Approval has been granted prior to the

effective date of Bill 62.<sup>6</sup>

PART IV - CONCLUSIONS

As described above, CELA and CONE support Private Members' Bill 62 for several reasons:

- waste management facilities are incompatible with protecting and conserving the unique and internationally significant Niagara Escarpment environment;
- waste management facilities are incompatible with the purpose and objectives of the Niagara Escarpment Planning and Development Act; and
- waste management facilities are not permitted uses under the Niagara Escarpment Plan (but site-specific amendments may allow the establishment or expansion of such facilities within the Plan Area).

Accordingly, CELA and CONE submit that it is necessary and appropriate to amend the existing approvals process by specifying that the Niagara Escarpment is off-limits for waste management purposes. In addition, we submit that it is entirely lawful for Bill 62 to affect waste management applications which have not received Certificates of Approval by the time that Bill 62 is proclaimed in force.

For these reasons, CELA and CONE strongly urge the government and opposition parties to live up to their often-expressed commitment to the Niagara Escarpment by enacting Bill 62 and proclaiming it in force as expeditiously as possible.

February 14, 1994

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<sup>6</sup> Bill 62, s.1.