CRITERIA FOR AN ENVIRONMENTAL IMPACT HEARING PROCEDURE

A Brief

presented to the

MACKENZIE VALLEY PIPELINE COMMISSION

OF INQUIRY

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by

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INTRODUCTION

The Canadian Environmental Law Association is a national non-profit organization of citizens, scientists and lawyers, dedicated to enforcement of present environmental laws and maximizing public participation in environmental planning.

The Association was founded in 1970 (along with the Canadian Environmental Law Research Foundation) in part because of the frustrations which citizens face, with reference to environmental problems, in dealing with a seemingly inaccessible legal and administrative system, and in part because of a lack of knowledge of those legal remedies that do exist to stop environmental degradation.

In order to fill this gap, the Association established a panel of lawyers in most provinces and the territories who are willing to take cases, without charge if necessary, in environmental situations where legal assistance would otherwise not be forthcoming.

Through our Toronto office, lawyers with the Association provide advice to approximately 500 complainants per year, which in many instances results in positive action by government agencies or in the complainant's obtaining further legal advice and assistance through the CELA panel of lawyers.

In order more effectively to inform the public about their environmental rights and remedies, and the legal reforms necessary for the establishment of a healthier and safer environment, the Association and the Foundation jointly published, in February 1974, Environment On Trial: A Citizen's Guide to Ontario Environmental Law, the first Canadian book outlining these areas in layman's terms.

Because of the work being done in this critical area by the Association, it has attracted a membership of about 500 from every segment

of the public, in addition to the membership and support of many local, provincial and national organizations.

In addition to examples of our activities given in the body of this submission, the following further illustrate some of the efforts that lawyers from the Association have made in an attempt to establish better environmental rights for the general public:

- The environmental impact assessment study group was established one year ago, to determine various procedures by which environmental problems might be adjudicated. This has included the publication of "Principles for Environmental Impact Assessment", a response to the Ontario Ministry of the Environment's Green Paper on Environmental Assessment. The paper outlines a format which might best permit maximum public participation in the assessment process.

- In addition to this, our group has been monitoring the activities of the Ontario Energy Board in determining the effect which decisions by this board would have on environmental policy, and determining means by which environmental considerations could begin to be determined by the Board at an early stage.

- Our general counsel assisted environmental groups opposing the project at Lake Louise to help determine the ramificaionts for environmental impact that the project would have.

- The Vancouver branch of the Canadian Environmental Law Association, in January 1973, successfully argued in Whitehorse, Yukon, that the first licencing application for a water diversion permit under the Northern Inland Water Act was procedurally and substantively inadequate.

There are several elements prerequisite to an effective hearing procedure which the Canadian Environmental Law Association feels must be

recognized at the Mackenzie Valley Pipeline Inquiry. Underlying these elements is a basic need for balancing the inherent inequalities between contesting parties at the inquiry. Procedural safeguards which take account of these inequities should be incorporated into the hearing process.

It is our intention, in this submission, to outline the most important issues which we feel must be recognized and resolved.

Funding for Environmental Groups - The Need

The Canadian Environmental Law Association believes that adequate funding for intervening environmental groups appearing at the inquiry must be assured if a truly representative case in assertion of environmental interests is to be maintained.

Donald Wright, former counsel for People Or Planes, a group contesting the proposed new Toronto airport, said recently in reference to the commission inquiring into the feasibility of the new airport, "Citizen groups lack money to make an adequate presentation." Thus, he argued, "the commission cannot hold a fair and thorough hearing."

Impecunious environmental groups, while capable of mustering considerable voluntary aid, cannot hope to digest and rebut effectively the amount of data made available through environmental assessment, without an adequate research staff and effective legal counsel at the hearing itself.

A corporate or governmental entity which can spend several million dollars for environmental research has an overwhelming advantage in expertise available when defending its environmental assessment before a hearing tribunal. While access to all the information may be assured to intervening environmentalists, financial resources severely limit the expertise available to assess the adequacy of the document

from an independent standpoint.

The need for funds to help defray the costs of obtaining this adequate scientific and legal expertise in preparation for a hearing should be provided for by a government fund. This step would enable citizen interest groups appearing at environmental impact assessment hearings to place themselves on a footing much more equal with project proponents.

Funding for environmental groups - a formula

There are a number of formulae for funding which might be employed of which we would suggest four:

1) A percentage of the total costs of the assessment would be made available to intervening environmental groups, and divided, at the commissioner's discretion, according to manpower employed, expected expenses for expert testimony for research and the hearing itself. This could be done in such a way as to promote as much co-ordination as possible between the intervening groups.

2) A second method might be to make available a percentage of the proponent's assessment costs and estimated hearing costs and divide it among the intervening groups as in (1).

3) A third proposal would be to divide among environmental groups a percentage of the total capital cost of a project, perhaps 1% or 2%, for independent assessment by intervenors and funding for hearing costs.

4) Another method would be to give a percentage from methods 1-3 to a coordinating environmental groups, who would then be responsible for an independent assessment for all the intervening groups.

Funds for intervening environmental groups should be made available through the project proponent or the federal department primarily responsible for the project, i.e. the Department of Indian and Northern Affairs.

Funds supplied through the federal department should be recoverable from the project proponent.

Intervening groups should have funds at least 90 days prior to the commencement of the hearings.

Consideration should be given to the establishment of a permanent office for funding intervenors before federal commissions of inquiry and hearing tribunals.

Terms of Reference and Procedure

Besides funding, there are several principles with respect to the conduct of the hearings which CELA feels are fundamental to an adequate hearing process. Acceptance of some of the principles may, in some instances, preclude or mitigate the need for extensive funding.

1) Federal northern development planning assumptions should be open for discussion and comment at the inquiry.

Since no other forum is available for public examination of development planning assumptions, the inquiry should be prepared and allow federal government planning experts to appear at the hearings.

It is generally recognized by environmentalists that an effective planning policy must permit infusion of environmental values at the formative policy stages before project planning can begin. To ensure that this has been accomplished, in this instance, it is necessary to scrutinize planning assumptions to ascertain that errors of assessment have not been made which may have precluded options, in a project sense, from ever having been considered.

At the provincial level, we have seen, at the Ontario Energy Board, environmental considerations left to a later approval stage, in an application by Ontario Hydro for approval of a five year plan for ex-

pansion of facilities to meet projected demand forecasts. An approval by this Board cannot help but have consequences for the environment, yet why should these issues be left to a later hearing stage to be examined? Such an approach allows only a choice in determining what areas of the environment will be sacrificed, and not whether the sacrifice is necessary at all.

Environmental and social values must be given the same front-end treatment as economic considerations. A process that leaves environmental and social costs to a later stage cannot be said to have given these costs serious consideration in the first place.

On page 13 of the application we find the following statement: "Through the creation of greater opportunities for employment, resultant increases in personal incomes and the development or improvement of such infrastructure as community recreation, communications, transportation, medical and service facilities, the Applicant's project will enhance the continuous development of the socio-economic framework of the relevant communities for the peoples of the North."

Statements like this should be open for scrutiny at the inquiry by interested parties.

2) In general, the terms of reference of the inquiry must be as broad as possible and include for consideration the possibility of not granting a right-of-way. There should be an examination of the economic consequences of proceeding or not proceeding with the building of a pipeline.

Terms of reference which do not allow consideration of whether the right-of-way should be granted at all cannot be said to be adequate.

CELA feels that the mandate to determine whether the right-of-way should be granted is within the inquiry's terms of reference, and that to do less would again indicate that environmental and social values are not

being given the same preeminent importance that economic factors enjoy.

Included within the scope of the inquiry should be an examination of the economic factors which impel the need for the pipeline and a determination of the economic consequences of not proceeding. Again, I would draw your attention to page 13 of the application.

3) An examination of the adequacy of the 1972 pipeline guidelines should be undertaken if intervening environmental groups should so request.

The June, 1972 pipeline guidelines have never been scrutinized in any public forum. Some groups may take serious issue with the adequacy of the guidelines in determining whether environmental values are being protected within their scope.

Since environmental impact statements were prepared in accordance with the terms of the guidelines, deficiencies in the former will often be reflecting errors in the guidelines themselves. Weaknesses in emphasis in the guidelines will again be so reflected in the impact statements.

4) A standard must be established to determine what weight of evidence is necessary in judging whether the right-of-way should or should not be granted.

A standard, delimiting the amount of environmental deterioration allowed, must be articulated to determine whether a projected pipeline may or may not be built. It must be assumed that there is a limit to environmental degradation which cannot be exceeded; that there is a point beyond which environmental deterioration should not be countenanced.

In a case before the National Energy Board recently, the Board, ruling on an application by Ontario Hydro for approval of a licence to export power, stated in reply to evidence that unquantified social and environmental costs would outweigh the benefits of the sale:

> It is one thing to use an approximate estimate to verify that social costs would not affect the economy of the project, as was done in the Board's New Brunswick (Lorneville) decision. It would be quite another matter, and in my view entirely improper to rely on such an approximate estimate as the sole grounds for denying a major application.

Such a statement asserts that social and environmental costs, which will always necessarily be approximate, are not acceptable as criteria for denying an application.

This inquiry will, we hope, not take this kind of decision as precedent for determining the necessity for a pipeline right-of-way.

There must be an assurance that a certain weight of evidence of projected environmental damage will be sufficient to halt the project.

5) It should be determined that the inquiry will be considering other modes of transport, and not confine itself to investigating only alternate routes for the pipeline.

On page 14 of the application, the applicant states:

> The Applicant submits that its project is in the Canadian public interest as it will enable Canadian arctic gas to be brought to markets more economically and at an earlier date than would otherwise be possible.

Such assertions should be open for detailed scrutiny during the course of the inquiry.

An inquiry that precludes consideration of transportation methods other than the pipeline can be said to have closed off options which have never been given the public scrutiny they deserve.

Other modes of transport have been projected for the Mackenzie Valley area, and it is reasonable to expect that these modes of transport should be examined in relation to the pipeline proposal.

Again, consideration of these alternate methods of transportation could have an important effect in determining the necessity for a pipeline right-of-way.

6) Besides the primary environmental impact caused by the pipeline construction, the secondary impacts engendered by the pipeline's presence must be investigated. These include the growth-inducing or cumulative impacts initiated by a major project.

The growth-inducing impact of a project may best be exemplified by the construction of a highway, which, in later years, becomes the focus for strip development along its length.

In the Mackenzie Valley case, we have already seen the proposal for a hydro-electric plant on the Great Bear River to supply pipeline pumping stations, a direct secondary impact of the pipeline proposal.

The need for assessing secondary impacts under the U.S. National Environmental Policy Act was recognized by a U.S. federal court which ruled, in 1972, in the case of a railroad which wished to abandon a right-of-way, that an environmental assessment would be necessary since the railway's abandonment would cause increased truck traffic on local roads.

The growth-inducing aspect of the pipeline's construction could have significantly greater consequences for the environment of the Northwest Territories than the building of the pipeline itself. The determination of this impact should be one of the major areas of inquiry in assessing the need for the pipeline right-of-way.

7) Access to all information gathered in the course of environmental assessment by the proponent and government agencies must be available to all interested parties at the inquiry.

Environmental groups, who do not have the funds for conducting their own environmental assessments, cannot be certain that project proponents, who naturally wish to present their best case, have not edited their environmental impact statements to leave out evidence detracting from their position.

Thus, data collected in the course of an environmental assessment should

be available to all parties involved in determining the acceptability of the environmental impact statement.

Similarly, the contentions of all responsible persons involved in the environmental assessment should appear in the environmental impact statement and should be heard during the course of the inquiry.

8) The mandate given the inquiry's own assessment group must be examined to determine whether it will be investigating all elements of the environmental assessment which interested parties deem necessary.

Since environmental groups have little scope for conducting their own assessments, the inquiry assessment groups should allow for as much intervenor access as possible.

This would include not only permitting the selection of members for the assessment group, as has already been offered, but allowing intervenors an opportunity to determine in what direction the assessment group should be investigating.

Members of the assessment group could also be made available as expert witnesses for project opponents, or an assurance could be given that a quota of experts, chosen by intervening environmental groups, could be included in the assessment group.

9) Initiation of the hearings should be delayed until intervenors have adequate opportunity to consult expert opinion and to determine the acceptibility of the environmental impact statement and other material.

Commencement of the hearings in the early fall will not allow adequate time for investigation of such aspects of the environmental assessment as the secondary growth-inducing elements caused by pipeline construction.

For example, in the United States, regulatory agencies commenting on environmental impact statements under the provisions of the National