IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Eberle, Potts, McKinlay, JJ.

IN THE MATTER OF Sections 2 and 3 of the Consolidated Hearings Act, 1981;	I. Scott Q.C. and Ms. L. Rothstein for the joint board
AND IN THE MATTER OF Sections 12(2) and 12(3) of the Environmental Assessment Act, R.S.O. 1980, c. 140;	B.B. Campbell and G.F. Willcocks for Ontario Hydro
AND IN THE MATTER OF Sections 6, 7 and 8 of the Expropriations Act, R.S.O. 1980, c. 148;	D.I. Crocker for Minister of the Environment
AND IN THE MATTER OF an undertaking of Ontario Hydro consisting of the planning of, selection of locations for, acquisition of property rights for, operation and maintenance of additional bulk electricity system facilities in Eastern Ontario consisting of switching and transformer stations, communications and control facilities, transmission line and related facilities;	E.L. McArther for Ottawa-Carlton
	S. Shrybman for No Towers Federation and Hydro Consumers Association
AND IN THE MATTER OF Section 11(1) of the Consolidated Hearings Act, 1981;	D.J. Poch for the Energy Probe
	Dr. Lois Smith in person
AND IN THE MATTER OF an application by the joint board for a stated case for the opinion of the Divisional Court.	

BY THE COURT:

This is an application by way of stated case pursuant to s. 11 of the Consolidated Hearings Act, 1981, S.O. 1981, c. 20. Under that statute a case may be stated by a joint board established under the Act upon any question that "in the opinion of the joint board, is a question of law". This court is required to "hear and determine the stated case and remit it to the joint board with the opinion of the Divisional Court thereon".

The Consolidated Hearings Act was passed in July of 1981 to provide for the establishment of a single board to consolidate the procedures and hearings otherwise required in order to obtain statutory approval for major undertakings under the provisions of a number of existing statutes.

"Undertaking" is broadly defined in s. 1(j) of the Consolidated Hearings Act as "an enterprise or activity, or a proposal, plan or programme in respect of an enterprise or activity." The undertaking involved in this application is described by the proponent, Ontario Hydro, as "a project consisting of the planning of, selection of locations for, acquisition of property rights for and the design, construction, operation and maintenance of, additional bulk electricity system facilities in Eastern Ontario consisting of switching and transformer stations, communication and control facilities, transmission lines, and related facilities". This proposed undertaking constitutes a major Hydro project for the providing of bulk electricity to Eastern Ontario. At the time Hydro made application under the Consolidated Hearings Act to establish a joint board, it was anticipated that proceedings under three acts would be consolidated - the Environmental Assessment Act, the Expropriations Act, and the Planning Act. Subsequent to the application the Planning Act was amended to exempt Ontario Hydro from its purview, leaving only proceedings under the Environmental Protection Act and the Expropriations Act to be consolidated for the purposes of this undertaking.

Prior to the establishment of the joint board, Hydro had prepared and submitted to the Minister of the Environment an environmental assessment under the provisions of the Environmental Assessment Act. That assessment identified

a large study area referred to generally as "Eastern Ontario". Five possible areas in Eastern Ontario in which the undertaking could be carried out were identified by Hydro, and for each of these areas a plan was outlined for consideration of the board.

It was decided that the proceedings before the board would be carried on in two stages, each involving its own hearing. The two stages have been referred to in the materials as the "plan stage" and the "route stage". The plan stage hearing was primarily for the purpose of determining which of the five possible plans would be approved by the board for further study. It was anticipated that once the area was narrowed down, more detailed and precise studies could be carried out for the purpose of determining which specific route for the transmission lines and other installations would be recommended by Hydro at the route stage hearing.

It was considered by the board and by Hydro that the plan stage hearing was analogous to a hearing held pursuant to the provisions of the Environmental Assessment Act, and that the route stage hearing was analogous to a hearing pursuant to the provisions of ss. 6, 7 and 8 of the Expropriations Act (which are the only sections of the Expropriations Act to which the Consolidated Hearings Act applies).

The board gave directions as to the form and distribution of notices to be given of the plan stage hearing, and Hydro carried out those directions. At the plan stage hearing the board approved the plan recommended by Hydro (Plan M3) for further study to determine which specific route within the Plan M3 area would best fulfil the needs of Hydro and the community. Hydro completed its studies and then

gave notice of the route stage hearing in accordance with instructions from the board.

While Hydro was preparing for the route stage hearing the Divisional Court released its decision in Re Central Ontario Coalition Concerning Hydro Transmission Systems et al., 46 O.R. (2d) 715. The factual background of that case was similar to this, with two notable differences. First, that case involved an assessment by a joint board of an undertaking of Ontario Hydro to construct additional bulk electricity system facilities in Southwestern Ontario. Notice was given of the plan stage hearing to a number of individuals and municipalities, and also by newspaper advertisement, the form and distribution being similar to that directed in this case. However, the notices merely referred to the area involved as "Southwestern Ontario". The broad general area within which a number of possible plans were proposed by Hydro (as in our case) actually included parts of Ontario which could not accurately be considered to fall within the broad general description "Southwestern Ontario". In fact a good portion of the area would be considered by residents to be located in Central Ontario. Consequently, the court held that the notices were deficient because they did not adequately identify the broad general area under study.

Second, the joint board in that case approved an alternative study area which included a corridor of at least six kilometres in width centred on the Highway 401 right-of-way extending from London to Milton. This study area was not in any of Hydro's alternative plans, but was suggested by one of the other

participants in the plan stage hearing. Therefore the court also held that because of the choice by the board of a route stage study area not included in those proposed by Hydro, the board had fallen "into an error of jurisdiction and caused a failure of natural justice no less serious than that caused by its defective notice", because no one receiving notice would have had any way of knowing that land in that area might be affected.

In the result, the order of the board emanating from the plan stage hearing was quashed together with all of the board's proceedings leading up to that hearing including the directions given by the board to Hydro as to notice of the plan stage hearing.

In this case the notice given by Hydro of the plan stage hearing was similar in form and content to that in the Central Ontario Coalition case. The distribution of the notice in both cases was based on similar considerations, and it is important to note that the Divisional Court did not criticize the nature of the distribution of notices in that case.

With that factual background, the seven specific questions posed in the stated case are set out below:

> 1. Ontario Hydro's Eastern Ontario Plan Stage Application identified a number of alternatives. One alternative was recommended by Ontario Hydro. Assuming adequate notice:
>
> (a) does the joint board have the jurisdiction to approve one of the alternatives to the undertaking identified by Ontario Hydro?

NO!

(b) does the joint board have the jurisdiction to approve an alternative to the undertaking other than an alternative identified by Ontario Hydro?

(c) does the joint board have the jurisdiction to approve one of the alternative methods of carrying out the undertaking identified by Ontario Hydro?

(d) does the joint board have the jurisdiction to approve an alternative method of carrying out the undertaking other than an alternative method identified by Ontario Hydro?

2. The joint board's plan stage decision approved a route stage study area within which Ontario Hydro has now recommended a transmission line route and has identified several alternative transmission line routes. Assuming adequate notice:

(a) does the joint board have the jurisdiction to approve one of the transmission line routes identified by Ontario Hydro other than the route recommended?

(b) does the joint board have the jurisdiction to approve a transmission line route other than one of the alternative transmission line routes identified by Ontario Hydro?

3. Do sections 7(2) and 22(3) of the Consolidated Hearings Act, 1981 permit notice to be given in a manner which does not meet all requirements of the individual statutes consolidated, either as to form, content or distribution?

4. Was the notice given pursuant to the Order of the joint board dated September 28, 1981 adequate as to:

(a) form;

(b) content; and

(c) distribution?

5. Was the notice given pursuant to the Order of the joint board dated June 29, 1984 adequate as to:

(a) form;

(b) content; and

(c) distribution?

6. If this Court identifies any inadequacy of the plan stage notice either as to form, content or distribution, can that inadequacy be cured by the joint board re-opening and reconsidering its plan stage

decision, after appropriate notice, prior to proceeding with the route stage hearing?

7. Is the joint board's determination in this case to impose a "without constraint" condition in respect of the plan stage a lawful exercise of the joint board's jurisdiction?

As stated above, the plan stage hearing was analogous to a hearing under the provisions of the Environmental Assessment Act. We must first consider whether the board was acting within its jurisdiction at that hearing in approving Hydro's undertaking. "Undertaking" is defined in s. 1(j) of the Consolidated Hearings Act to mean "an enterprise or activity, or a proposal, plan or programme in respect of an enterprise or activity". This broad definition is similar to that found in s. 1(o) of the Environmental Assessment Act. Section 5 of the Environmental Assessment Act, requires the proponent of an undertaking to submit to the Minister of the Environment an assessment of the environmental effect of "the undertaking", "the alternative methods of carrying out the undertaking", and "the alternatives to the undertaking". This Hydro did. The alternatives to the undertaking were stated to be (a) the "null" or "do nothing" alternative; (b) installation of additional generating units; (c) supply of the Eastern Ontario load from neighbouring utilities; (d) alternative locations (i.e. outside the Eastern Ontario study area) for the installation of new bulk power transmission facilities. In addition, Hydro identified five "alternative methods of carrying out the undertaking". These are the five alternative plans described earlier. Plan M3 was Hydro's recommended alternative method of carrying out the undertaking, but any of the five alternative plans would have been acceptable to Hydro.

There is no doubt that the provisions of both the Environmental Assessment Act and Consolidated Hearings Act anticipate that the "undertaking" will be described by the proponent. Because of the very broad definition of undertaking in both Acts, the proponent has substantial latitude to describe the undertaking in broad terms or in very specific terms. However, in this particular case the undertaking was described so broadly by Hydro that it could not constitute an "enterprise or activity", or "a proposal, plan or programme in respect of an enterprise or activity" within the meaning of s. 1(j) of the Consolidated Hearings Act. In the court's opinion those words, though necessarily imprecise, require that the physical location of the undertaking be described with more precision than was done by Hydro.

Admittedly, there is no provision in the Consolidated Hearings Act requiring a geographic location to be included in the description of the undertaking. However, the written notice which that Act requires the proponent to give to the Hearings Registrar must "specify the general nature of the undertaking, the hearings that are required or that may be required or held, and the Acts under which the hearings are required or may be required or held." (s. 3(2)). Given the Acts to which proceedings under the Consolidated Hearings Act apply, and the purpose of hearings under those Acts, a description of the undertaking which did not include its geographic location would be meaningless. Equally meaningless, in the court's opinion, is a geographic location described as "Eastern Ontario". Any dozen Ontario residents asked would likely provide a dozen different opinions as to the area included within those words.

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If the undertaking is the building of a school or a sewage disposal plant in a particular area, precision with respect to physical location (providing for possible alternatives) is easily attained. Precision with respect to the location of a railway or hydro transmission line is much more difficult. We do not mean to suggest that it is necessary, or even desirable, to include an exact geographic location in the description of an undertaking. However, the boundary of the geographic area should be made clear, and the area itself should not be so large that persons whose lands might be affected would not readily realize the fact. While personal service of notice of many of the hearings held under the Consolidated Hearings Act may not be required, persons should be able to ascertain from published notices whether their lands are likely to be affected by any proposed undertaking.

The M3 plan area preferred by Hydro could have been chosen by it as the geographic location of the undertaking and included in the description of the undertaking. Its outline is clearly defined, and it is of a sufficiently limited size that persons within the area, on seeing a graphic or written description of it, could reasonably be expected to know that their lands could be affected. In the opinion of the Court this is what should have been done. The "alternatives to the undertaking" could have remained as described and other "alternative methods of carrying out the undertaking" within that geographic location could have been described. These might very well be the transmission line routes identified by Hydro for the proposed route stage hearing.

We find that an undertaking within the terms of the Consolidated Hearings Act was not specified by Hydro. Consequently, the joint board was acting without jurisdiction, and notice of the plan stage hearing and proceedings at that hearing are quashed.

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However, because this matter comes before us as a stated case, and for the assistance of any joint board which may subsequently be appointed in this matter, we will answer the questions put to the extent possible. An appropriately described undertaking must be assumed.

The individual questions are dealt with below:

1. Ontario Hydro's Eastern Ontario Plan Stage Application identified a number of alternatives. One alternative was recommended by Ontario Hydro. Assuming adequate notice:

(a) does the joint board have the jurisdiction to approve one of the alternatives to the undertaking identified by Ontario Hydro?

(b) does the joint board have the jurisdiction to approve an alternative to the undertaking other than an alternative identified by Ontario Hydro?

It is important to keep in mind that in dealing with all parts of question 1, adequate notice is assumed.

Section 7(2)(b) of the Environmental Assessment Act states that any person may "by written notice to the Minister, require a hearing by the board with respect to the undertaking, the environmental assessment and the review thereof". By letter to the Minister of the Environment dated April 15, 1981 Ontario Hydro gave the requisite notice. That notice triggers a further notice by the Minister to the board under the provisions of s. 12 (2)(b) to hold a hearing with respect to:

(c) the acceptance or amendment and acceptance of the environmental assessment;

(d) whether approval to proceed with the undertaking in respect of which the environmental assessment was submitted should or should not be given; and

(e) whether the approval mentioned in clause (d) should be given subject to terms and conditions and, if so, the provisions of such terms and conditions.

By s. 12(3) the board is required to hold the hearing and "decide the matters referred to it in the notice of the Minister".

No provision in the Environmental Assessment Act or the Consolidated Hearings Act gives the joint board jurisdiction to approve at the hearing an alternative to the undertaking whether identified by Hydro or not. Only the proponent describes the undertaking proposed. The alternatives to the undertaking described by the proponent are only for the purpose of assisting the board in assessing the undertaking as proposed in the light of possible alternatives. The board has no jurisdiction to do anything but refuse to approve the undertaking if it considers that an alternative to the undertaking would be a preferable choice.

The answer to questions 1 (a) and (b) is "no".

> 1. Ontario Hydro's Eastern Ontario Plan Stage Application identified a number of alternatives. One alternative was recommended by Ontario Hydro. Assuming adequate notice:
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> . . .
>
> (c) does the joint board have the jurisdiction to approve one of the alternative methods of carrying out the undertaking identified by Ontario Hydro?
>
> (d) does the joint board have the jurisdiction to approve an alternative method of carrying out the undertaking other than an alternative method identified by Ontario Hydro?

There is no specific provision in either the Environmental Assessment Act or in the Consolidated Hearings Act which provides for the board to approve a method of carrying out the undertaking. However, the board is given broad powers under s. 12(2)(e) of the Environmental Assessment Act to approve the undertaking subject

to terms and conditions. We are of the opinion that those powers permit the board to attach as a condition to its approval of the undertaking the acceptance by Hydro of any one of the methods of carrying out the undertaking originally identified by Hydro. Indeed, it could attach as a condition of its approval the adoption by Hydro of a method of carrying out the undertaking never previously considered by Hydro. Hydro's option would then be to accept or decline the approval as qualified by the board. The power given the board under s. 5(3) and (4) of the Consolicated Hearings Act to defer matters and impose terms and conditions with respect to the matter deferred effects the same result. To hold otherwise would diminish the power of the board to approve undertakings and curtail the utility of submissions by interested participants in the hearings.

The answer to questions 1 (c) and (d) is "yes".

2. The joint board's plan stage decision approved a route stage study area within which Ontario Hydro has now recommended a transmission line route and has identified several alternative transmission line routes. Assuming adequate notice:

(a) does the joint board have the jurisdiction to approve one of the transmission line routes identified by Ontario Hydro other than the route recommended?

(b) does the joint board have the jurisdiction to approve a transmission line route other than one of the alternative transmission line routes identified by Ontario Hydro?

It is important also to keep in mind that adequate notice is assumed when dealing with question 2.

Because we have quashed the so-called "plan stage hearing", this "route stage hearing" would constitute the first hearing of the board and could deal with both environmental aspects of the undertaking and the concerns of individuals whose property may be expropriated. In its expropriation aspects it is analogous to

a hearing requested by an owner of land under s. 6(2) of the Expropriations Act, except that this hearing would be ordered by the joint board.

It is appropriate at this stage to consider the powers of the board and the standards and criteria for the exercise of those powers as set out in s-ss. 5(2) and 5(7) of the Consolidated Hearings Act. Those sub-sections are quoted below.

> 5(2) The joint board may make any decision that might be made by a tribunal that has a power, right or duty to hold a hearing in respect of which the joint board hearing was held or that might be made by any body or person after the holding of the hearing including but not limited to the granting of any authority or directing the granting or issue of a permit or licence and the imposition of terms and conditions.
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> 5(7) The standards and criteria in or under an Act specified in a notice under section 3 that relate to the undertaking specified in the notice apply with necessary modifications in respect of a decision that may be made by a joint board under this Act.

A hearing pursuant to the relevant provisions of the Expropriations Act is merely in the nature of an enquiry, following which the enquiry officer must report to the appropriate approving authority with his findings of fact and opinion on the merits of the application for expropriation. The board under the Consolidated Hearings Act is not so limited. It is clear from a reading of s. 5(2) of the Consolidated Hearings Act that the board has the power granted to the approving authority under the Expropriations Act to approve or not approve the proposed expropriation.

The criteria to be applied by the joint board in making its decision are those set out in s. 7(5) of the Expropriations Act, namely whether "the taking of the lands

of an owner. . . is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority".

The approval of any specific transmission line route, whether identified by Hydro or not, constitutes a narrowed down "method of carrying out the undertaking" and, given appropriate notice, comes within the board's broad power of approval of the undertaking subject to terms and conditions. However, in the facts of this particular case, since the approval involved is approval to expropriate land, the board must apply the criteria quoted above in considering its approval.

The answer to questions 2 (a) and (b) is "yes".

3. Do sections 7(2) and 22(3) of the Consolidated Hearings Act 1981 permit notice to be given in a manner which does not meet all requirements of the individual statute consolidated either as to form, content or distribution?

Those provisions read:

7(2) Upon application without notice, a joint board may change the requirements as to filing of documents or giving of notice in respect of any hearing in respect of which the joint board has been established if the joint board is satisfied that the change will facilitate the joint board hearing and is not unfair to any person entitled to be heard at or to attend the joint board hearing.

22(3) Where a joint board is of the opinion that because the persons who are to be given any notice or document under this Act are so numerous, or for any other reason it is impracticable to give the notice or document to all or any of the persons individually, the joint board may

> instead of doing so cause the notice or reasonable notice of the contents of the document to be given to the persons by public advertisement or otherwise as the joint board may direct, and the date on which such notice or reasonable notice of the contents of the document is first published or otherwise given as directed, shall be deemed to be the date on which the notice of document is given.

There can be no doubt that those provisions of the Consolidated Hearings Act contemplate notices which may not meet all of the detailed notice requirements under the consolidated acts. The extent of any deviation from the requirements of any individual act will always depend upon the nature of the undertaking, the number of persons involved, and the purpose for which the notice is given; but it was obviously intended by the legislature that the joint board should have a reasonable degree of flexibility in its proceedings, including instructions as to notice.

Some concern was evidenced by counsel about the effect of s. 2(4) of the Expropriations Act, which reads:

> 2(4) Where there is a conflict between a provision of this Act and a provision of any other general or special Act, the provisions of this Act prevails.

No conflict with the Expropriation Act can exist when notice is given pursuant to an order of the joint board, because the notice is not one given under the Expropriation Act. The notice involved is one give pursuant to s. z2(3) of the Consolidated Hearings Act. The notice provisions of other acts to which tne Consolidated Hearing Act applies can only be relevant for the purposes of providing guidelines for ascertaining whether any notice to be given under the Consolidate Hearings Act is reasonable in all the circumstances.

The answer to question 3 is "yes".

4. Was the notice given pursuant to the Order of the joint board dated September 28, 1981 adequate as to:

(a) form;

(b) content; and

(c) distribution?

This question deals with the notice of the hearing which was quashed, and is therefore irrelevant except as dealt with in our reasons for quashing.

5. Was the notice given pursuant to the Order of the joint board dated June 28, 1984 adequate as to:

(a) form;

(b) content; and

(c) distribution?

For the purpose of dealing with this question we will have to assume that the notice referred to is the first notice of proceedings, that the form content and distribution is as ordered, but that no previous hearing of the joint board has taken place.

The notice contains a map of the M3 plan area. Treating that plan as Hydro's description of the undertaking, it is clear from the material filed that the notice sets out in clear graphic form the boundaries of the area within which property may be affected. It outlines clearly the location of the transmission route recommended by Hydro, and alternative routes acceptable by Hydro, these latter constituting further alternative "methods of carrying out the undertaking".

The notice contains a clear description of the nature of the hearing and the ramifications of any decision with respect to effect on environment and possible expropriation of land. Its form and content is clearly adequate.

The proposed distribution of the notice is undoubtedly sufficient with respect to the environmental assessment aspects of the proposed hearing. The distribution ordered by the board is broader than that which would normally be required under the provisions of the Environmental Assessment Act.

As far as the expropriation aspects of the hearing are concerned, distribution of the notice is different than what would be required under the provisions of the Expropriations Act. Section 6 of that Act requires that when an expropriating authority is applying for approval to expropriate, it "shall serve a notice of its application for approval to expropriate upon each registered owner of the lands to be expropriated and shall publish the notice once a week for three consecutive weeks in a newspaper having general circulation in the locality in which the lands are situate". The notice involved here is a notice of a hearing at which Hydro will propose to the board a specific transmission route, but will also put before the board alternative possible routes. Consequently, no specific lands have been identified as "lands to be expropriated" within the provisions of s. 6 of the Expropriations Act. Under that Act when lands are identified as "lands to be expropriated" notice must be given to each registered owner of those identified lands. Registered owner within the definition of the Expropriations Act encompasses a broad group as defined below:

> "Registered owner" means an owner of land whose interest in land is defined and whose name is specified in an instrument in the proper land registry or sheriff's office, and includes a person shown as a tenant of land on the last revised assessment role.
>
> "Owner" includes a mortgagee, tenant, execution creditor, a person entitled to a limited estate or interest in land, a committee of the estate of a mentally incompetent person or of a person incapable of managing his affairs, and a guardian, executor, administrator or trustee in whom land is vested.

The distribution of the notice ordered by the joint board was to be served by mail on owners and tenants identified on the property assessment records maintained by the Ministry of Revenue, of property located within possible transmission corridor areas, and within 120 meters of the edge of any possible route, and also within a radius of 1.6 kilometers of any possible telecommunication site unless any proposed site was currently located on Hydro property, and then within 120 meters of the edge of that Hydro property. Notice was also to be given by mail to a large number of named interest groups and public officials. Newspaper notices were to be published in a large number of newspapers in the general area affected.

This distribution of the notice is in one respect substantially broader than that required under the Expropriations Act. It would reach a number of individuals in the general area affected whose properties would never be expropriated, because they would not be within the finally determined specific corridor for the transmission line. Under the Expropriations Act only the owners of properties clearly identified for expropriation are given notice.

The notices are different in another respect from notices required under the Expropriations Act - i.e. in that they are notices of a proposed hearing. Under the Expropriations Act there is no notice of hearing given, and it is not inevitable that any hearing will be held. The notice given under that Act is notice of an intended expropriation of clearly identified properties. A hearing is only held if those receiving notice request such a hearing, and then the parties to the hearing are only those owners who have requested a hearing (see s. 6(2) and s. 7(8)).

The notice in one major aspect, is less broad than that required by the Expropriations Act. It is given to owners and tenants, identified on the property assessment records maintained by the Ministry of Revenue, rather than to registered owners as defined in the Expropriations Act.

Consequently, distribution of notice ordered by the joint board is in some respects broader and fairer to persons whose property may be expropriated, but in one aspect narrower, namely, that some mortgagees and execution creditors and possibly some registered owners may not be actually served by mail.

As stated above the provisions of the Consolidated Hearings Act anticipate the possibility of notices which do not conform in all respects to the notice requirements set out in each of the consolidated acts. In this case the form and content of the notice were clearly adequate for the purpose. Distribution, though not identical to that required under the Expropriations Act, was in some respects broader. We consider that form, content and distribution were adequate to ensure

the protection of the rights of individuals whose land may be expropriated as a result of the undertaking.

It should be kept in mind that the question of compensation for expropriation is in no way affected by these proceedings.

The answer to question 5 is "yes".

6. If this Court identifies any inadequacy of the plan stage notice either as to form, content or distribution, can that inadequacy be cured by the joint board re-opening and reconsidering its plan stage decision, after appropriate notice, prior to proceeding with the route stage hearing?

The answer to this question becomes irrelevant given our decision that the plan stage hearing was held without jurisdiction.

7. Is the joint board's determination in this case to impose a "without constraint" condition in respect of the plan stage a lawful exercise of the joint board's jurisdiction?

The answer to this question also becomes irrelevant as it is addressed only to the plan stage hearing. However, the question can be answered for the purpose of directing the board with respect to any possible "without constraint" order made by it at a hearing properly commenced.

The actual decision of the board at the plan stage hearing, is stated to be "without constraint to the decision or decisions to be made by this joint board in respect of any matter or matters deferred by order of this board made November 25, 1981". It is not clear on the face of the order what matters were in fact

deferred by the board, although counsel for the board construes the order to mean that any matters dealt with at the first hearing may be dealt with again, in the discretion of the board, at a later hearing involving the same undertaking. A "without constraint" order was also made in the Central Ontario coalition case and the court commented on that order as follows:

> Even if the board had seen fit to permit those who failed through inadequate notice to address the plan stage issues without the necessity first to obtain leave I question if those persons would thus have restored to them the full rights they have been denied. They have lost, I think irretrievably, the right to which they were entitled to contest the issue from the start. They did not hear the evidence taken over 35 days of hearing. They cannot, at this stage, cross-examine upon evidence already received. Even with transcripts they cannot now be given the same opportunity that they should have had. I can see no way in which the rights of the group represented by Mr. Smith can be restored to them by further hearing before this board.

Both comments must be looked at in the full context of the facts in the Central Ontario coalition case. In that case it was held that persons whose lands might have been affected were not given adequate notice of the plan stage hearing. Because of that, persons who may have wished to address the environmental assessment issues were not given an opportunity to do so at that stage because of lack of notice. If we assume that Hydro will start proceedings in this case with the type of notice which we have found is adequate for the purposes of dealing with most environmental and expropriation matters, no such denial of opportunity will occur. Consequently, should any subsequent hearing be held, a "without constraint" order made at the first hearing could only benefit persons who did not attend the first hearing, although adequate notice of that hearing was in fact given. The

"without constraint" order also would enable Hydro or members of the board to re-open issues in the light of possible changed circumstances or new information obtained prior to any subsequent hearing. Of course, in such a situation, appropriate notice would be required, and the nature of the notice required would depend on the facts.

Section 5 of the Consolidated Hearings Act empowers the board to defer any matter or any part of any matter, and in so doing "impose such terms and conditions or give such directions, or both, in respect of the proceedings or the matter or part deferred as the joint board considers proper". It is argued that such a provision empowers the board to make a "without constraint" order such as that made in this case. Should a "matter" be deferred, a "without constraint" order is unnecessary, if it has not been dealt with at all at the first hearing. If "part of a matter" is deferred, or if a matter is to be reconsidered in total, then a "without constraint" order would be appropriate to permit further representations before the board.

We were also referred to s. 12 of the Consolidated Hearings Act which empowers the board to "rehear all or any part of any matter before issuing its decision in the proceedings before it". It was argued that when a board makes a decision, imposes a "without constraint" condition, and schedules further hearings, that the board does not "issue" a decision within the terms of s. 12. We agree. While the board constituted under the Consolidated Hearings Act is likely to make decisions at every hearing held by it, it is appropriate to characterize such

decisions as "interim". Characterizing it in any other way would hamper the board's power to rehear all or any part of a matter after articulating its decision at the end of an individual hearing.

Taken together, ss. 5 and 12 of the Consolidated Hearings Act confer on the board the power to make a decision at a hearing without constraint to the board's rehearing part or all of the same issue at a subsequent hearing. Such a right must assume that appropriate notice is given of the subsequent hearing to all persons who could be affected by decisions taken at that hearing.

The answer to question 7 is "yes".

We were not addressed by counsel on the subject of costs, and it appears that it would be appropriate that no order be made. However, if any counsel wishes to make representations, they may be made in writing to the court with copies to all other counsel.

Released: February xx, 1980.