ENVIRONMENTAL PROTECTION ACT

PART XIV

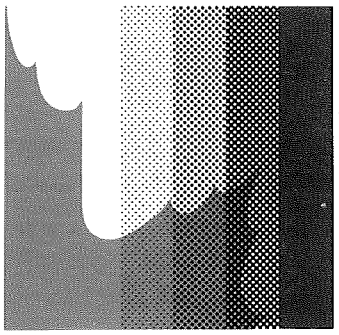
ENVIRONMENTAL IMPACT ASSESSMENT

A Draft

Prepared and Submitted
to the
Ontario Ministry of the Environment
by the
Canadian Environmental Law Association
October 1974

Reprinted with Revisions and Additions
March 1975

Researched and Written by
J.F. Castrilli
David Estrin
John Swaigen



Canadian
Environmental
Law
Association

L'Association
canadienne
du droit
de l'environnement

suite 303
one Spadina Crescent
Toronto Ontario
M5S 2J5

telephone (416) 928-7156

CONTENTS

PREFACE

This draft legislation was born of the recognition that the Ontario government, as early as the March 1973 Throne Speech, publicly announced its intention of introducing amendments to the Ontario Environmental Protection Act, S.O. 1971 c. 86, that would give the government the power (though, if other recent environmentally related legislation passed in Ontario is any indication, not the responsibility) to require environmental impact studies on proposed projects that are likely to be environmental and social problems, before any decision is made to approve them.

Ontario would be the first government in the country to have such a process enshrined in legislation. The present blinkered procedure in the Act - and indeed in almost all environmental legislation in the country, federal and provincial - merely looks at the emissions or contaminants that a proposed project might generate to the detriment of a narrow facet of the environment, such as air or water quality. This initiative would go beyond that to the longer range view of what a proposal's total impact on the social and physical environment might be - for example, the stimulation of increased development and population growth, the creation of conflicting land uses, or the depletion of resources and energy.

It could not be overlooked that Ontario's lead could have incalculable effect - for good or ill - upon the development of the law in this area in other provinces as well as the federal government, which presently has a highly invisible administrative procedure requiring environmental impact studies on certain federal government projects. Moreover, it could not be ignored that the exclusion of the public from environmental decision-making under the existing Environmental Protection Act could well be carried over into the new amendments, thereby perpetuating the government's view that it alone is the possessor of wisdom as to whether a development is or is not in the public interest.

Out of these general concerns, therefore, came an attempt by the Canadian Environmental Law Association to provide an alternative workable model law, which could be compared and constratsed with what the government ultimately brings forth. It is an attempt to show how a mechanism can be established to provide both a planning and decision-making body and a forum in which the public could have confidence to minimize political and special-interest influence, and to provide the opportunity and the tools to ordinary citizens to enable them to participate knowledgeably and intelligently in decisions which directly affect them or in which they have a public interest.

While Part XIV was designed as a series of amendments to the Ontario Environmental Protection Act, it is also a self-contained unit or package which could be easily adapted, with appropriate changes, to other jurisdictions.

We hope that this draft will become the basis for further public discussion and debate on this topic, and we welcome correspondence.

* * * * * * * * * *

Since this draft was written, the Honourable William Newman, Ontario's Minister of the Environment, has tabled in the Ontario legislature the Environmental Assessment Act, 1975 (Bill 14, first reading March 24, 1975).

The government's bill is not drafted as amendments to the Environmental Protection Act, but rather as a separate act. It would require environmental studies of proposed provincial, municipal and private sector activities only when regulations are passed bringing specific projects, or classes of projects, within the scope of the Act.

The regulations would thus be the teeth of the Act; but there is no projected time frame, setting out when these regulations would be promulgated. Nor has it been suggested that there would be opportunities for public input into the content of the regulations.

The government's bill does not guarantee the public the right to notice of a proposed project, to access to information, to public hearings, to funding for intervenors, to appeal a decision, nor to invoke the procedures laid down in the bill when the government does not do so.

The bill thus continues a pattern of legislation, and of its enforcement, which is apparent in the Environmental Protection Act and other Ontario environmental laws, such as the Pits and Quarries Control Act, where it lies solely within the discretion of the government to use, or not to use, the powers given by the Act to protect the environment.

ACKNOWLEDGEMENTS

To members of the National Executive Committee of the Canadian Environmental Law Association - Roger Barton, Marie Corbett, John Dunn, Maurice Green, Clifford Lax, Alan Levy, Harvin Pitch, Ian Roland, Stephen Smart, Dennis Wood - for their insights, comments and criticisms on early drafts of this bill. To Prof. Denis Archambault, Faculté de Droit, Université de Sherbrooke; R.S. Anthony, Barrister, Vancouver; Profs. P.T. Burns and R.T. Franson of the Faculty of Law of the University of British Columbia; Prof. Donald Chant of the Department of Zoology, University of Toronto; John Fraser, M.P. (P.C.) for Vancouver South; Paul Joffe, counsel to the STOP organization, Montreal; Prof. Patrick Kenniff, Faculté de Droit, Université Laval; Sandra McCallum, Law Reform Commission, Ottawa; David Miles, Winnipeg Environmental Law Advisory Office; Dean Walter Pitman of Trent University; Edward Lee Rogers, Assistant Attorney General, Environmental Protection Division, Department of the Attorney General, State of Maine; Pamela Sigurdsen, Barrister, Toronto; Prof. A.R. Thompson, Chairman of the B.C. Energy Commission; Profs. Dixon Thompson and Philip Elder of the Faculty of Environmental Design, University of Calgary; and R.J. Wright, of Osgoode Hall Law School; for their comments and criticisms on later versions of the bill. Responsibility for the final composition remains - for better or worse - with the authors.

ENVIRONMENTAL PROTECTION ACT

PART XIV

ENVIRONMENTAL IMPACT ASSESSMENT

PURPOSE

1. The purpose of this Part is to promote the protection and conservation of the natural environment from human actions having significant impact; to establish environmental impact assessment procedures; to provide for an independent Environmental Review Board; and to assure the right of all persons to participate in decisions affecting the natural environment and to have a right of relief from decisions which do not promote the protection and conservation of the natural environment.

INTERPRETATION

2. In this Part

(1) "action" includes any project, activity, structure, work, undertaking, policy, legislative proposal or program and includes the abandonment, demolition, removal and rehabilitation stages thereof by any person, and without limiting the generality of the foregoing, includes

(i) actions undertaken by or continued by and operational practices of the Government of Canada, the Government of Ontario, or any municipality, in effect prior to this Part being proclaimed in force

(ii) actions undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, mortgage or loan guarantees, or other forms of assistance from the Government of Canada, the Government of Ontario or any municipality, or any modifications, construction, alterations, extensions, or replacement thereof

(iii)(a) any proposed modifications to, construction of, alterations to, extensions of, or replacement of any continuing or operational practice by any person in effect prior to this Part being proclaimed in force

(b) any actions undertaken or to be undertaken by any person which have been approved in principle or for which funding has been

approved before this Part is proclaimed in force but where no construction has begun.

(iv) actions involving the issuance to any person of a lease, permit, license, certificate, or other entitlement by the Government of Canada, Government of Ontario, or any municipality.

(2) "board" means the Environmental Review Board.

(3) "environmental impact" or "impact" means, notwithstanding section 1(i) of the Environmental Protection Act, the probable and possible short-term and long-term, primary and secondary, direct and indirect and cumulative effects of any activity or lack of activity by persons on on the physical, biological, cultural, sociological, and socio-economic environments, including, without limiting the generality of the foregoing, the effect of any action as defined in section 2(1) of this Part.

(4) "Government of Canada" includes Her Majesty in Right of Canada and any minister, ministry, department, agency, board, corporation, public, quasi-public or statutory corporation, or person acting on behalf thereof.

(5) "Government of Ontario" includes the Province of Ontario, Her Majesty in Right of Ontario, and any minister, ministry, department, agency, board, corporation, public, quasi-public or statutory corporation, or person acting on behalf thereof.

(6) "Impact assessment" or "assessment" means the procedures as prescribed in this Part by which significant environmental impacts are identified, described and evaluated.

(7) "Impact statement" or "statement" means a written statement containing the findings and conclusions of an impact assessment.

(8) "Municipality" includes any municipality or local board thereof within the meaning of the Municipal Act, R.S.O. 1970 chapter 295 as amended, or any other special or general Act.

(9) "person" means any individual, group of individuals, including a trade union or professional association or local or branch thereof, firm, association, organization, partnership, business, company, corporation, trust, personal representative, Indian band or tribe, Indian Reserves as defined in the Indian Act, municipality, Government of Ontario,

Government of Canada, a public, quasi-public or statutory corporation, or any other entity or its legal representative, agent, successor or assign.

(10) "proponent" means any person who proposes or is responsible for an action.

CONSTITUTION OF THE BOARD

3. (1) The Environmental Review Board is hereby established.

(2) The Board shall be composed of as many members as the Lieutenant-Governor in Council may from time to time determine.

(3) The Lieutenant-Governor in Council shall appoint the members of the Board and shall appoint one member as the chairman, and may appoint one vice-chairman or more.

(4) The Lieutenant-Governor in Council shall appoint the Board in the following manner.

(a) Each of the legislative leaders of the political parties represented in the Legislative Assembly of Ontario shall place before the Lieutenant-Governor in Council a list of nominees for appointment to the Board.

(b) No person shall be appointed to the Board who is, or was at any time in the three years previous to his appointment, a public servant or civil servant of Ontario or Canada or of any agency of the Crown, or who is a sitting member of the Legislative Assembly of Ontario.

(c) No person shall be appointed to the Board, other than the chairman, whose name was not placed in nomination in accordance with this section. The Board shall at all times be composed of equal numbers of persons from each of the lists of names placed in nomination before the Lieutenant-Governor in Council pursuant to paragraph (a) above.

(5) Membership on the Board shall at all times be

(a) individuals competent in matters of environmental control and conservation or

(b) Justices of the High Court of the Supreme Court of Ontario or

(c) a combination of (a) and (b).

GENERAL

4. (1) Notwithstanding any special or general Act, and notwithstanding any licensing, public hearing or other prior approval, requirement or policy, and without limiting the generality of the foregoing and notwithstanding any provision in any other part of the Environmental Protection Act, no person shall commence or continue an action as defined in this Part that has not received the approval of the Board or been exempted by order of the Board or by regulation from compliance with this Part.

(2) Every day that an action is commenced or continued without approval constitutes a separate offence.

5. (1) Every proponent of an action shall submit to the Board, as early as possible in the decision-making process and in any event no later than the feasibility or planning study stages thereof, an affidavit to which is attached his plans and any other information pertaining to the action required by the Board, including information indicating the level of commitment to the action which has already been reached, and what alternatives if any have been eliminated, and deposing to the accuracy of these plans and information. In this affidavit the proponent shall also depose to the probable effects and extent of the action in language which will be clearly understood by the general public, but this shall not be interpreted as a requirement for an impact statement at this stage.

(2) If the action has been exempted by regulation under this Part from the application of this Part, it shall be exempt from the further provisions of this Part except where this Part has been made to apply by section 62.

(3) Neither the Government of Ontario, as defined in this or any other special or general Act, nor any ministry thereof, nor any municipality as defined in this or any other special or general Act shall request funds, nor shall any of the above which authorize expenditure of funds authorize funds for expenditure for any action other than a request involving only feasibility or planning studies for possible future action which has not been approved, adopted or funded, which may have a significant environmental impact unless such request or authorization is accompanied by an environmental impact statement which has been filed with the Board, and the further provisions of this Part have been complied with.

(4) The Government of Ontario and every municipality either alone, or in co-operation with its member municipalities in a regional municipality, shall with the advice and assistance of the Board if required, within ninety days after the coming into force of this Part or within such further time as the Board may allow, but not to exceed 180 further days, submit such information to the Board as will indicate how they intend by regulation to comply with the further provisions of this Part, including what classes or categories of actions they intend should be exempt by regulation from the further provisions of this Part.

(5) Pursuant to subsection (4), no regulation pertaining to classes or categories of actions requested for exemption, or pertaining to other matters with regard to general compliance by regulation with the further provisions of this Part, shall be effective unless prior public notice has been given in accordance with section 18 of this Part and, where the public demonstrates interest and intention to participate, a public hearing by the Board for the purposes of considering the proposed regulation has been held.

6. One or more members of the Board on behalf of the Board or a person or persons designated by the chairman (hereinafter referred to as "the board") shall examine the affidavit referred to in section 5, and may consider without a hearing or notice any other relevant information which may come to the board's attention. The board shall by order compel the proponent to comply with the further provisions of this Part, including the preparation of an impact statement; or exempt the action from the further provisions of this Part, or, where the affidavit or any other information raises any issue that may involve any significant environmental impact, shall order a preliminary hearing to determine whether to require the proponent to prepare an impact statement.

7. In examining information and plans pursuant to section 5 and 6, or in making an order pursuant to section 8, the Board shall require that an environmental impact assessment and statement be prepared where it finds that the action may result in a significant impact and in any event where it finds one or more of the following facts or circumstances:

That the proposed action may significantly

(a) conflict with environmental goals, objectives, standards, criteria, or guidelines of protection and conservation of the natural environment;

(b) have any effect on a unique, rare or endangered species or feature of the environment;

(c) have any adverse effect on persons, property, or public lands;

(d) result in any irreversible commitment of non-renewable resources;

(e) result in any resource or energy utilization which will pre-empt the use, or potential use, of the resource or energy for other purposes;

(f) cause or produce any sound or vibration, hazardous or toxic substances, radiation, contamination of air, land or water, or waste products which require disposal;

(g) have any adverse effect on health or safety in any factory, office or other workplace whether enclosed or in the natural environment;

(h) result in any costs or benefits to any persons, property or ecological systems that the proponent may not have intended or anticipated to be affected by the action;

(i) arouse public concern or controversy;

(j) involve a new technology the effects of which have not been demonstrated to have no adverse environmental impact, establish a precedent for further actions on a broader scale or represent a decision in principle about a future major course of activity, be the result of decisions about partial aspects of an activity with significant environmental impact by several proponents, or require the establishment of a pilot project;

(k) create effects which may be individually limited but cumulatively considerable;

(l) adversely affect low income populations;

(m) facilitate or make possible another action or actions which may have any of the results referred to in paragraphs (a) through (l) of this section.

8. (1) In the event that the Board, pursuant to section 6, has exempted an action from the requirements of this Part, any person may, within 90 days of the date of the notice required pursuant to section 9(2), apply to the Board to review its decision at a preliminary hearing.

(2)(a) Upon an application being made pursuant to section 8(1), the Board shall hold a preliminary hearing.

(b) Upon a preliminary hearing held pursuant to section 6 or section 8, the Board may

(i) uphold its previous order exempting the action or

(ii) notwithstanding any previous order, by order compel the proponent to comply with the requirements of this Part, including the preparation of an impact statement, and the Board shall make such an order where there is a prima facie case that the action may result in significant environmental impact or that one or more of facts or circumstances set out in paragraphs (a) to (m) of section 7 exists.

(3) The date of a preliminary hearing shall not be earlier than 30 days after an application pursuant to section 8(1) has been received by the Board or after the decision pursuant to section 6 to hold a hearing.

(4) Any applicant or proponent may appeal from the Board's order pursuant to section 8(2) to the Supreme Court in accordance with the rules of court.

(5) Notwithstanding anything in the Judicial Review Procedure Act or the Statutory Powers Procedure Act, an appeal under this section may be made on questions of law or fact or both and the court may affirm or may rescind the order of the Board and may exercise all powers of the Board and may direct the Board to take any action which the Board may take and as the court considers proper, and for such purposes the court may substitute its opinion for that of the Board or the court may refer the matter back to the Board for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

9. (1) The Board shall establish a record containing a summary of all information pertaining to actions submitted to the Board whether or not such actions are exempted by subsequent order of the Board. This summary shall contain all materials submitted pursuant to section 5, the order, reasons for decision of the Board, if any, and other information examined by the Board pursuant to section 6.

(2) Where the Board, pursuant to section 6, exempts an action from the requirements of this Part or orders a preliminary hearing, it shall cause notice containing the material described in section 9(1) to be sent to all persons pursuant to notice provisions as prescribed in this Part.

(3) No order under section 6 which exempts an action shall take effect until 90 days from the date of the notice required pursuant to section 9(2) or until appeal proceedings from the order have been completed, whichever is earlier.

10. Where an impact statement is ordered or required, the proponent shall prepare at his extens an environmental impact statement and file ten copies of the statement with the Board.

CONTENTS OF IMPACT STATEMENT

11. Every environmental impact statement submitted to the Board shall include the following:

(a) A description of the need for the action, the persons it is likely to benefit, the persons it is likely to harm, and the period of time over which the impact is likely to occur;

(b) A description of the proposed action adequate to permit a careful prediction of its environmental impact;

(c) An account of any possible adverse environmental effects which cannot be avoided if the proposed action is implemented, including a discussion of their significance;

(d) Measures available to minimize or mitigate the impact;

(e) Alternatives to the proposed action, including the alternative of no action, and an evaluation of their advantages and disadvantages;

(f) An account of any irreversible or irretrievable commitments of energy or resources which would likely be results of the action, including a discussion of the extent to which the action may curtain the range of beneficial uses of the environment;

(g) A description of the energy requirements, the net energy output, and the energy use efficiency of the action;

(h) An account of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term uses of the environment;

(i) The tendency of the proposed action to induce or encourage industrialization, commercialization, urbanization, population change, economic change and related kinds of growth;

(j) A summary, to the extent possible before a mandatory hearing of all existing opinions of interested or affected persons, independent experts and organizations and governmental ministries and agencies, of the possible environmental and social impacts of the proposed acti

(k) Any other matters which the Board may by its order require or which may be from time to time prescribed by regulation.

(1) Persons engaged in the study and their qualifications and the employers of said persons.

12. Every statement filed with the Board shall contain a summary of its contents in such terms as to be clearly understood by the general public.

HEARINGS AND BURDEN OF PROOF

13. Within 60 days of the filing of a statement, the Board, on its own motion or at the request of any person, may hold a hearing as to the adequacy of the statement and of the summary. Upon this hearing, the Board may order the proponent to submit such further material as the Board requires.

14. (1) Upon the filing of a statement, or upon the filing of further material pursuant to section 13, whichever is later, the Board shall hold a public hearing to consider approval of the action.

(2) The Board shall give notice of the hearing to all persons so prescribed and in the manner specified in section 18 of this Part.

15. (1) The proponent's burden is to demonstrate affirmatively that the proposed action will not endanger public health, safety or welfare and that each of the criteria specified in section 17 is met.

(2) Subject to section 16 and 17, the Board may approve the proposed action, with or without conditions, or may refuse to approve the action. The Board may also approve or refuse to approve all or any phase of an action with or without conditions, as it deems appropriate.

16. No approval of an action under this Part takes effect unless the procedures of the Part have been complied with, and until 30 days following the date of the Board's order approving the action.

CRITERIA FOR APPROVALS

17. The Board shall not approve an action or any phase thereof if it finds, on the balance of probabilities, any of the following facts or circumstances:

(a) The environmental, social, cultural, and economic costs of the action to the people of Ontario and future generations thereof may exceed the benefits to be derived from the action directly, indirectly and cumulatively; the costs of the action shall be deemed to exceed its benefits if there is an alternative available (even if beyond the ability of the proponent to implement) which would achieve substantially the same benefits as the proposed action with lower costs.

(b) The proponent has failed to ensure or does not have the financial capacity to ensure that the results in any or all phases of the action will comply with existing or proposed environmental control standards or there is on the balance of probabilities no present technology capable of ensuring the safe disposal or containment of any contaminant as defined in section 1 of this Act, or, where applicable, adequate provision has not been made for the disposal of any such contaminant or waste as defined in this Act or the Regulations thereto or for the securing and maintenance of sufficient and healthful water supplies or for sewage disposal.

NOTICE

18. (1) Where any notice is required or permitted to be given under this Part, the following are minimum contents:

(a) A summary of the matter for which the notice is given, in language which will be clearly understood by the general public;

(b) The date or dates, place and time(s) of any proposed hearing;

(c) A statement of the purpose of the hearing and the power of the Board in that regard;

(d) A statement that any person has the right to attend in person and to participate in a hearing, or to be represented by an agent or counsel;

(e) A statement that material relevant to the matter is on file in premises provided by the Board and that it is available for inspection and copying during normal business hours;

(f) A statement that, subject to this Part, funds may be available to assist any person to appear before and make submissions to the Board concerning the matter;

(g) A summary of section 60 of this Part in language which will be clearly understood by the general public.

(2) The Secretary of the Board shall, for the purpose of giving notice pursuant to sections 18(1) and 18(3), establish a register containing the name and address of each person in Ontario who requests to have his name and address placed on the register. Persons so listed may request notice of actions proposed for their locality (i.e. township or municipality), region, or the Province of Ontario. Every Ministry

of the Government of Ontario shall be given notice for the purposes of this Part.

(3) Any notice under this Part shall be given in the following manner:

(a) by first class mail to all persons on the register, and

(b) by registered mail to all persons who are the registered owners, as defined in the Expropriations Act, of land upon which the action will take place and of such other land as will reasonably be immediately affected by the action. Failure to give such notice to any person other than a person who is the registered owner of the land upon which the action will take place shall not invalidate the proceedings pursuant to the notice, but the Board may in such circumstances adjourn any matter before it if it is of the opinion that in all the circumstances it would not be equitable for the matter to proceed; and in addition

(c) by advertisement once a week for three consecutive weeks in a newspaper having general circulation in the locality in which the action may have an impact; or

(d) by advertisement once a week for three consecutive weeks in a daily newspaper having province-wide circulation; or

(e) by posting of signs or billboards in the area to be affected; and

(f) in such other manner as the Secretary of the Board shall determine or the regulations require.

PUBLIC PARTICIPATION AND ASSISTANCE THERETO

19. (1) In addition to any fees required of proponents specified by regulation, every person filing an environmental impact statement with the Board shall, together with his statement, pay to the Board a fee known as the Hearing Assistance Fee, calculated as follows:

(a) one tenth of one per cent to one hundredth of one per cent of the estimated capital cost of the action or phase thereof for which approval is sought as determined by the Board, or

(b) ten per cent of the total of the proponent's assessment and statement costs, whichever is less, but in no case less than $500, to be held in trust by the Board for the purposes of a Hearing Assistance Fund.

(2) Where a person is likely to receive little benefit except as a member of the public and the action involves legal or factual issues of general public importance, funds adequate to have his position on each issue before the Board fully articulated, and to have the submissions and evidence of other persons fully discussed and cross-examined, shall be made available to such persons from the Hearing Assistance Fund, subject to subsection (4) of this section.

(3) The funds provided pursuant to section 19(2) shall be available for all legal fees and disbursements, conduct money and necessary witness fees for expert witnesses and relevant reports and studies, and other fees and disbursements necessary to every person entitled to assistance by provisions of section 19(2). Nothing in this section shall prevent or prejudice an application for financial assistance under the Legal Aid Act, R.S.O. 1970 chapter 239 or amendments or regulations thereto, or any other special or general Act of the Legislative Assembly of Ontario.

(4) If several persons apply for assistance from the Fund with regard to one action as defined in this Part, having identical interests in the matter, the Board shall have the discretion to issue one sum to all such persons.*

STANDING

20. (1) Any person shall have standing to appear before the Board or to make application to it in regard to any matter over which the Board has jurisdiction, including the right to attend in person, to participate in a hearing, to be represented by agent or counsel, and to cross-examine witnesses.

(2) Notwithstanding section 20(1), the Board may make such rulings and give such directions as may reasonably be necessary to ensure the efficient functioning of the Board, and to prevent multiplicity of proceedings, provided that no such ruling or direction shall deprive any person of his right to a full hearing, including cross-examination.

---

* See Appendix A: Suggested Amendments to the Ontario Legal Aid Act.

ACCESS TO INFORMATION

21. (1) (a) Notwithstanding any provision to the contrary in this or any other special or general Act, within 30 days of the Board giving notice of a proposed hearing pursuant to section 14, or as soon thereafter as he may receive it, the proponent, his agents, contractors and sub-contractors, any municipality, the Government of Canada, or the Government of Ontario, who possess or control any document, writing, tape, information, figures, charts, surveys, photographs, reports or studies containing facts or opinion or both which may in any way assist the Board, the proponent and the persons appearing before the Board to achieve a comprehensive assessment of the proposed action shall file with the Board an affidavit containing a complete and detailed list of such material, together with two copies of the material, one of which shall at all times be available for public inspection and copying.

(b) Every such person and anyone charged with the custody of such material who fails to file a full and comprehensive list of materials and two copies thereof is guilty of an offense.

(2) Every such person, and anyone charged with the custody of such material, and who has actual or constructive notice of the application, and who appears before the Board at a hearing on the action in question who has failed to file a full and comprehensive list of materials as required by section 21(1) shall not tender in evidence any undisclosed materials.

22. (1) Sections 25 to 33(1) and 34 to 36 of the Ontario Evidence Act R.S.O. 1970 chapter 151 as amended apply to this Part except insofar as they are inconsistent with this Part in which case this Part shall govern.*

(2) Where any such person claims privilege in regard to any of the materials or a part thereof he shall nevertheless list and describe the material as required by section 21 and detail the reasons for which privilege is claimed, but need not describe it in a manner that would defeat the purposes for which privilege is claimed, and need not file it with the Board except as provided by section 23.

23. (a) For the purposes of production and filing of documents and of determining privilege pursuant to this Part, Rules 347 to 352 inclusive of the

* See Appendix B.

Rules of Court for the Ontario Supreme Court apply except insofar as they are inconsistent with the Part in which case this Part shall govern.*

(b) Where any person described in section 21(1)(a) is in possession or control of knowledge or material for which privilege is claimed pursuant to section 22, he shall forthwith send this material in a sealed container to the Board, which shall examine the material. If the Board, upon examination of the materials and after hearing submissions by any person, and upon hearing submissions in camera by the person claiming privilege, finds the material relevant in assessing the action but privileged, the Board may consider the material without making it available to any other person, or it may, to the extent required to prevent a clearly unwarranted invasion of privilege, delete identifying details and make the material available to such persons as it may determine in its sole discretion in a form which will not interfere with privilege. In each case the Board shall fully explain in writing the justification for the deletion.

24. Any person may, within 30 days of the Board's giving notice of a proposed hearing, inspect and copy during normal business hours, at a cost not to exceed the direct cost of duplication, any or all of the materials referred to in any list filed with the Board pursuant to section 21, except that material for which privilege is claimed and granted pursuant to sections 22 and 23.

25. (1) Notwithstanding this or any special or general Act, or common law rule of evidence, any person may require by summons pursuant to the Statutory Powers Procedure Act the testimony at any hearing by the Board of any person employed by or in the service of the Government of Ontario and Canada including any minister, deputy minister or other person alleged to be employed or exercising a managerial or other confidential capacity or a person acting or who has acted on their behalf as to his evidence touching the matters in issue before the Board.

(2) A person summoned pursuant to section 25(1) may claim that his evidence or a part thereof is within the categories for which privilege may be claimed in section 22. In such case, the person so summoned shall nevertheless obey the summons and attend the hearing, but the Board,

* See Appendix C.

prior to hearing his testimony, may exercise its discretion in compelling his testimony.

(3) Notwithstanding this or any other special or general Act, no person shall

(a) refuse to employ or refuse to continue to employ any person summoned pursuant to section 25(1);

(b) threaten to dismiss a person so summoned or otherwise threaten or intimidate him from testifying;

(c) discriminate against a person so summoned in regard to employment, a term or condition of employment or a contractual relationship between the person so summoned and himself

because of a belief that the person summoned as a witness has provided information for the purposes of this Part or that he has testified or may testify in a proceeding under this Part or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Part or because he has made an application or filed a complaint under this Part or because he has participated in or is about to participate in a proceeding under this Part.*

26. (1) Notwithstanding anything in the Ontario Evidence Act, in any hearing under this Part the production of a copy of any report or document prepared by any employee of the Government of Ontario or the Government of Canada or any municipality or in the possession thereof, purporting to be certified under the hand of the proper officer, or of the person in whose custody such document is placed, shall be admitted in evidence to prove the contents thereof and is prima facie evidence of the facts stated therein and of the authority of the person making the certificate, report or document without any proof of appointment or signature.

(2) The Government of Ontario or Government of Canada or any municipality shall authorize persons to so certify such reports or documents and such persons shall have a duty to provide certified copies of any such material within a reasonable time of any request.

* See Appendix D.

ADMINISTRATION OF THE BOARD

27. All Board members shall be appointed for a three-year term, and shall during that term hold office during good behaviour, but shall be removable by the Lieutenant-Governor on address of the Legislative Assembly of Ontario. Board members may have their terms renewed, provided that their names are, prior to termination of their current term, again placed in nomination in the matter described in section 3(5) before the Lieutenant-Governor in Council, and provided that the composition of the Board as provided for above is maintained.

28. (1) Such employees as are necessary to carry out the functions of the Board under this Part shall be employed by the Board.

(2) The Public Service Act shall not apply to members or employees of the Board.

29. The Public Service Superannuation Act applies to members and employees of the Board, except that where the Act is inconsistent with this Part, this Part prevails.

30. Vacancies in membership of the Board caused by death, resignation, or otherwise may be filled by the Lieutenant-Governor in Council, subject always to the proviso that any person so appointed by appointed from current lists of nominees placed before the Lieutenant-Governor in Council pursuant to sections 3(5) and 3(6).

31. Three members of the Board shall form a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board and no fewer than three members shall attend and hear every application or matter that is properly before the Board, provided that one or more members of the Board on behalf of the Board or a person or persons designated by the Chairman may act pursuant to section 6.

32. (1) Any member or officer of the Board who has a direct or indirect pecuniary interest in any contract or proposed contract with or has any other interest in the proponent of or in the impact of the proposed action before the Board shall be deemed to have a conflict of interest for the purposes of this Part, and shall be disqualified from and shall not take part in or discuss the action in any proceeding in regard to which his interest occurs, and shall declare his interest therein prior to taking any steps in regard to the action.

(2) Any Board member or officer of the Board having a conflict of inter-

est as defined in the preceding paragraph shall declare his conflict in writing to the Board as soon as he becomes aware of it and shall declare any role he has had in any way relating to the action or to the proponent, and such declaration shall be available to the public.

(3) Any Board member or officer having a conflict of interest shall not take any steps in regard to the action in which he has an interest, besides those described in the preceding paragraph, and he shall not discuss the action with other members of the Board or officers or staff or any person appearing before the Board.

33. For the purposes of any inquiry or examination conducted by the Board or in the performance of any of the duties which it may perform under this Part, the Board may avail itself of the services of any officer or employee of the Ministry of the Environment. With the approval of the Lieutenant-Governor in Council, the Board may avail itself of the services of any member, officer, or employee of any other Ministry, Board or Commission established by act of the Legislative Assembly of Ontario.

34. The Lieutenant-Governor in Council shall provide a suitable place in which the sittings of the Board may be held, and also suitable offices for the members, secretary, staff and other employees and all necessary furnishings, stationery and equipment for the establishment, conduct, and maintenance of the same and for the performance of the duties of the Board.

35. The Board shall sit at such times and places within Ontario as the chairman may from time to time designate, and shall subject to the rights provided by this Part to persons conduct its proceedings in such manner as it may consider most convenient for the speedy and effectual dispatch of its duties.

36. Board hearings shall at all times be open to the public, subject to sections 24 and 25(2) of this Part.

37. (1) Where sittings of the Board or any member thereof are appointed to be held in any municipality in which a court house is situate, the Board members have in all respects the same authority and right as a judge of the Supreme Court with respect to the use of the court house and any part thereof, and of other buildings and apartments set aside in the municipality for the administration of justice.

(2) Where sittings of the Board or any member thereof are appointed to be held in any municipality in which there is a hall belonging to the corporation thereof, but no court house, the corporation shall, upon request, allow such sittings to be held in such hall and shall make

all arrangements necessary and suitable for such purpose.

38. (1) The Lieutenant-Governor in Council shall from time to time, upon the requisition of the Board, appoint one or more experts or persons having technical or special knowledge of matters or subjects within the jurisdiction of the Board or in question in respect to any particular matter or subject before the Board to assist the Board in an advisory or other capacity. The Board may direct that the costs approved by the Board of such experts shall be paid by the Treasurer of Ontario.

(2) The nature of the advice or report of such experts shall be made known to any persons appearing before the Board so they may make submissions on that advice or report.

39. The Lieutenant-Governor in Council, on the requisition of the chairman of the Board, shall from time to time appoint as an acting member of the Board a person who, in the opinion of the Chairman, is specially qualified to assist the Board with respect to any particular application, to be assigned by the Chairman to act with any three members of the Board for the purpose of hearing and determining such an application, and the person so appointed has all the powers of a member of the Board, except that he has no vote in any decision that the Board may make, and is entitled to such remuneration as the Lieutenant-Governor in Council may authorize.

40. (1) There shall be a secretary of the Board who shall be appointed by the Lieutenant-Governor in Council upon the recommendation of the Board, and he shall hold office during pleasure of the Board.

(2) Where the office of the secretary is vacant or in his absence or inability to act, the Board may appoint a secretary pro tempore, who shall act in the place of the secretary, or a member of the Board may act as secretary.

41. It is the duty of the secretary

(a) to keep a record of all applications to and proceedings before the Board or any member;

(b) to have the custody and care of all records and documents of or pertaining to the business of or proceedings before the Board or any member, or filed in his office;

(c) to have every order, rule, regulation and certificate drawn pursuant to the directions of the Board and according to the provisions of any statute affecting the same properly authenticated and issued, filed and otherwise dealt with as may be requisite;

(d) to keep proper books of record in which he shall cause to be entered a true copy of every order, rule and regulation made by the Board and of every other document that the Board may require to be entered therein, and such entry constitutes and is the original record of every such order, rule, regulation and document;

(e) to carry out such other functions and duties as may by statute, the Lieutenant-Governor in Council or the Board be assigned to him or his office;

(f) to obey all rules, regulations and directions made or given by the Board touching his duties or his office.

42. Whenever the Board by virtue of any power vested in it appoints or directs any person other than a member of the staff of the Board to perform any service required by this Part, such person shall be paid such sum for services and expenses by the Treasurer of Ontario as the Board recommends.

43. No member of the Board or its secretary or any officer or employee is required to give testimony in any civil proceeding or prosecution with regard to the information obtained by him in the discharge of his official duty, provided that he may be required to testify in a proceeding or hearing arising under or from the administration of this Part and the regulations thereunder.

44. No member of the Board or any employee of the Board shall be personally liable for any act, omission or decision made or done under the authority of this Part.

GENERAL JURISDICTION AND POWERS

45. (1) The Board for all purposes of this Act has all the powers of a court of record and shall have an official seal which shall be judicially noticed.

(2) The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.

(3) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Part or by any other general or special Act.

(4) The Board has jurisdiction and power

(a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general

or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act;

(b) to perform such other functions and duties as are now or hereafter conferred upon or assigned to the Board by statute or under statutory authority;

(c) to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any continuance of any act, matter or thing, which any person is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person;
under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;

(d) to make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue;

(5) The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.

46. Every member of the Board, its secretary, and any staff employed by the Board and designated by the Board in writing shall be deemed to be provincial officerts within the meaning of section 84 of the Environmental Protection Act, and shall have all the powers of a provincial officer therein contained, as well as those contained in section 85(1) of the said Act, and in addition section 86 of the Act also applies to such persons.

47. The Board may, of its own motion, inquire into, hear and determine any matter

or thing that it may inquire into, hear and determine upon application or complaint, and with respect thereto has and may exercise the same powers as, upon any application or complaint, are vested in it.

48. Any power or authority vested in the Board under this or any other general or special Act may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require.

49. (1) The Lieutenant-Governor in Council shall, from time to time, upon the request of the Board, appoint counsel to appear on behalf of the Board to assist it in its functions. Counsel shall also be appointed, upon request of the Board, to conduct an inquiry into or hearing or to represent the Board upon the argument of any matter or appeal.

(2) The Board may direct that the costs of such counsel shall be paid by the Treasurer of Ontario.

50. The Board may rehear any application before deciding it, or may review, resume, change, alter or vary any decision, approval, or order made by it where

(a) additional information which a person seeks to call was not available at first hearing and

(b) re-application is bona fide.

51. The Board may order and require any person, as defined in this Part, to do or cause to be done, forthwith or within or at any specified time, and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Part, under or pursuant to any other Part of the Environmental Protection Act or any other general or special Act, or under any regulation, order, direction, agreement, or by-law, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act, or of any such regulation, order, agreement, direction or by-law, provided that the subject matter of the order or requirement of the Board relates to the impact of an action on the environment of Ontario.

52. If default is made by a person in the doing of any act, matter or thing that the Board has authority under this or any other general or special Act to direct or have directed to be done, the Board may authorize such person as it may see fit to do the act, matter or thing, and in every such case the person so authorized may do such act, matter or thing and the expense incurred in the doing of the same may be recovered from the person in default as money paid for and at his or its request, and the certificate of the Board of the amount so expended is conclusive evidence thereof.

53. The Board may file in the office of the registrar of the Supreme Court a copy of an interim or final order, decision or direction made under this Part, exclusive of the reasons therefor whereupon the interim or final order or direction shall be entered in the same was as a judgement or order of that court.

ENFORCEMENT

54. After an interim or final order, decision or direction has been entered, it is enforceable by any person as defined in this Part, as a judgement or order of the Supreme Court on the day next after the date fixed for compliance in the interim or final order, decision or direction.

55. (1) Every person who fails to comply with any order, decision or direction of the Board or who contravenes any provision of this Part or the Regulations is guilty of an offence and on summary conviction is liable on a first conviction to a fine of not more than $10,000.00 and on each subsequent conviction to a fine of not more than $50,000.00 for every day or part thereof upon which such offence occurs or continues and is subject to any other remedy provided or contemplated, arising from this Part.

(2) The directors and officers of any person as defined in this Part, who commit an offence, are jointly and severally liable in a civil proceeding for any damage that results or may result from a failure to comply with any order, decision or direction of the Board or from a contravention of any provision of this Part or the Regulations.

(3) Notwithstanding anything to the contrary in the Environmental Protection Act, proceedings in respect of an offence under this Part may be instituted at any time within two years after the time when the subject matter of the proceedings arose.

APPEALS AND JUDICIAL REVIEW

56. (1) Notwithstanding anything in the Judicial Review Procedure Act or the Statutory Powers Procedure Act an appeal under this Part may be made on questions of law or fact or both and the court may affirm or may rescind the order of the Board and may exercise all powers of the Board and may direct the Board to take any action which the Board may take and as the court considers proper, and for such purposes the court may substitute its opinion for that of the Board or the court may refer

the matter back to the Board for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

(2) The Statutory Powers Procedure Act and the Judicial Review Procedure Act apply to this Part except insofar as they are inconsistent with this Part in which case this Part shall govern.

57. Any person as defined in this Part is a party for the purposes of the Statutory Powers Procedure Act and the Judicial Review Procedure Act, those Acts notwithstanding.

58. Notwithstanding section 25(2) of the Statutory Powers Procedure Act, an application for judicial review under the Judicial Review Procedure Act or bringing of proceedings specified in section 2(1) of that Act, is an appeal within the meaning of section 25(1) of the Statutory Powers Procedure Act.

59. Any decision of the Board may be varied or rescinded by Act of the Legislative Assembly of Ontario.

COSTS

60. Notwithstanding anything in the Judicial Review Procedure Act, the Statutory Powers Procedure Act, the Judicature Act, the rules of practice of the Supreme Court of Ontario, or the common law jurisdiction of the Supreme Court of Ontario, and notwithstanding anything in this Part, no costs shall be awarded by the Board or any court against any person appearing on any hearing, appeal or other proceeding pursuant to this Part, other than the proponent of an action, unless such person makes an application for any hearing, appeal or proceeding which is frivolous and vexatious, keeping in mind the purpose of this Part. Failure of an applicant to appear at the hearing, appeal or proceeding called pursuant to his application without reasonable justification shall be deemed to render the application a frivolous and vexatious one.

REGULATIONS

61. The Lieutenant-Governor in Council may make regulations pertaining to any matter that may be necessary or expedient for the better implementation of this Part and to establish criteria for the exemption of any action or category of action permanently or temporarily from the application of this Part, but no regulation shall be effective unless prior public notice of

the proposed regulation has been given in accordance with the provisions for the giving of notice in section 18 of this Part and, where the public demonstrates interest and intention to participate, a public hearing by the Board for the purposes of considering the proposed regulation has been held.*

62. Any person may apply to the Board for a hearing as to the revision, revocation, or institution of a regulation under this Part. Upon such application, and provided that the subject matter has not been dealt with in the preceding twelve (12) months from the date of the Board's original decision on the matter, if any, the Board shall give notice as provided under this Part and hold a public hearing, and upon the request of the Board the Lieutenant-Governor in Council shall revise, revoke or institute the regulation in accordance with the Board's recommendation.*

MISCELLANEOUS

63. This Part applies to the Government of Canada and to persons and actions subject to the exclusive legislative jurisdiction of Her Majesty in Right of Canada only insofar as, pursuant to the British North America Act, 1867 and amendments thereto Her Majesty and such persons and actions are subject to the laws of Ontario.

64. Where, at the date the Environmental Review Board is constituted and appointed pursuant to this Part, a tribunal under any other Part of the Environmental Protection Act or any other Act has heard any evidence in a proceeding relating to any matter which this Part gives the Board sole jurisdiction to determine, whether commenced under this or any other Part of the Environmental Protection Act or any other Act, such tribunal retains jurisdiction for the purpose of completing the proceedings, notwithstanding section 45(3).

65. The Board shall, as soon as possible after the close of each calendar year, make an annual report upon the work of the Board to the Minister, who shall submit the report to the Lieutenant-Governor in Council and shall then lay the report before the Legislative Assembly of Ontario if it is in session, or, if not, at the next ensuing session.

66. The Board, its officers and staff shall have power to carry out surveillance and monitoring of any action approved pursuant to this Part during the final

* See Appendix A: Suggested Amendments to the Legal Aid Act.

design stage, the construction stage and the operation stage.

67. Upon application of any person and at a cost not to exceed the direct cost of duplication, the secretary shall deliver to such person a certified copy of any order, rule, regulation, certificate or other document made, given or issued by the Board.

68. This Part comes into force on the day of its passage.

APPENDIX A

Suggested Amendments to the Legal Aid Act, R.S.O. 1970 and regulations, as amended, pursuant to section 19, 61 and 62 of this Part.

1. Notwithstanding anything in the Legal Aid Act or regulations, a certificate shall be issued to a person otherwise entitled thereto in respect of any proceeding or proposed proceeding before the Environmental Review Board, and in regard to proceedings arising therefrom. Section 39(a)(iv) and (b)(i) and (ii) of Ontario Regulation #557 As Amended shall not be a bar to the issuance of a certificate pursuant to this Section.

2. The Legal Aid Plan shall be entitled to disburse funds from the Law Foundation of Ontario for the purposes of Part XIV of the Environmental Protection Act.

3. In considering applications for Legal Aid in respect of any proceedings or proposed proceedings before the Environmental Review Board, the Legal Aid Plan shall take into account the purposes of Part XIV of the Environmental Protection Act with reference to public interest and environmental matters and shall favourably consider matters involving legal or factual issues of general public importance. But if several persons make application for certificates with regard to one such action as defined in that Part, having identical interests in the matter, the Legal Aid Plan shall have discretion to issue one group certificate to all such persons.

APPENDIX B

The Ontario Evidence Act, R.S.O. 1970, chapter 151, sections 25-33(1) and 34-36.

25. Letters patent under the Great Seal of the United Kingdom, or of any other of Her Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against Her Majesty as against all other persons whomsoever. R.S.O. 1960, c. 125, s. 25.

26. Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1960, c. 125, s. 26.

27. *Prima facie* evidence of a proclamation, order, regulation or appointment to office made or issued,

(*a*) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or

(*b*) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or

(*c*) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada.

may be given by the production of,

(*d*) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment; or

(*e*) a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or by the government printer for the province or territory; or

(*f*) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the executive council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his deputy or acting deputy. R.S.O. 1960, c. 125, s. 27.

28. An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by the Provincial Secretary and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1960, c. 125, s. 28.

29. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are *prima facie* evidence of the originals and of the contents thereof. R.S.O. 1960, c. 125, s. 29.

30. Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R.S.O. 1960, c. 125, s. 30.

31. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to producing the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and has the same effect, as if such member of the Executive Council or head of the department were personally present and made the objection. R.S.O. 1960, c. 125, s. 31.

32. A copy of an entry in a book of account kept in a department of the Government of Canada or of Ontario shall be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the department that such book was, at the time of the making of the entry, one of the ordinary books kept in the department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the department, and that such copy is a true copy thereof. R.S.O. 1960, c. 125, s. 32.

33.—(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted.

34.—(1) In this section, "bank" means a bank to which the *Bank Act* (Canada) applies or the Province of Ontario Savings Office, and includes a branch, agency or office of any them.

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book of record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit.

(4) A bank or officer of a bank is not, in an action to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause.

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank.

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of any thing done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1960, c. 125, s. 34.

35.—(1) In this section,

(*a*) "person" includes,

(i) the Government of Canada and of a province of Canada, and a department, commission, board or branch of any such government,

(ii) a corporation, its successors and assigns, and

(iii) the heirs, executors, administrators or other legal representatives of a person;

(*b*) "photographic film" includes any photographic plate, microphotographic film and photostatic negative, and "photograph" has a corresponding meaning.

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

(*a*) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and

(*b*) is destroyed by or in the presence of such person or of one or more of his employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

(3) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement or other executed or signed document was so destroyed before the expiration of six years from,

(*a*) the date when in the ordinary course of business either the object or the matter to which it related ceased to be treated as current by the person having custody or control of the object; or

(*b*) the date of receipt by the person having custody or control of the object of notice in writing of a claim in respect of the object or matter prior to the destruction of the object,

whichever is the later date, the court may refuse to admit in evidence under this section a print from a photographic film of the object.

(4) Where the photographic print is tendered by a government or the Bank of Canada, subsection 3 does not apply.

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1960, c. 125, s. 35.

36.—(1) In this section,

(*a*) "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

(*b*) "record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. 1966, c. 51, s. 1, *part*.

(3) Subsection 2 does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. 1968, c. 36, s. 1.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. 1966, c. 51, s. 1, *part*.

APPENDIX C

The Ontario Rules of Court, Rules 347-352.

PRODUCTION OF DOCUMENTS

Rule 347

347. Each party, after the defence is delivered or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents that are or have been in his possession or power relating to any matters in question in the action, and to produce and deposit them with the proper officer for the usual purposes and a copy of such affidavit shall be served forthwith after filing.

Rule 348

348. The court may at any time order production and inspection of documents generally or of any particular document in the possession of any party, and, if privilege is claimed for any document, may inspect the document to determine the validity of such claim.

Rule 349

349. Where a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled, the court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy that may be used for all purposes in lieu of the original.

Rule 350

350.—(1) A party is entitled to obtain the production for inspection of any document referred to in a special endorsement on a writ of summons, the pleadings or affidavits of the opposite party by giving notice to his solicitor, and is entitled to take copies of such documents when so produced for inspection (Form 32).

(2) The party to whom such notice is given shall forthwith deliver to the party giving it a notice stating a time within two days from the delivery thereof at which the document may be inspected at the office of his solicitor, and shall at the time named produce the document for inspection (Form 33).

(3) Inspection may also be ordered at such place as the court directs.

Rule 351

351. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Rule 352

352.—(1) If a party fails to comply with any notice or order for production or inspection of documents, he is liable to attachment and is also liable, if a plaintiff, to have his action dismissed, and, if a defendant, to have his defence, if any, struck out.

(2) Service of the notice of motion upon the solicitor of the party is, unless the court otherwise directs, sufficient.

APPENDIX D

Suggested amendments to the Employment Standards Act, R.S.O. 1970, chapter 147, as amended, pursuant to section 25 of the Environmental Protection Act, Part XIV.

1. A person who believes he has been dismissed, threatened, or discriminated against pursuant to section 25 of the Environmental Protection Act, 1974, Part XIV may apply to the Director of Employment Standards for a hearing seeking
   (a) reinstatement and recompense as if no such dismissal, threat or discrimination had occurred; or
   (b) consent to prosecute
   or both.
2. In an application under section 1(a) and in a prosecution pursuant to section 1(b), if evidence on a balance of probabilities is given of the matters referred to in section 25 of the Environmental Protection Act, 1974, Part XIV, then unless the person named in the complaint or the person exercising managerial control proves on a balance of probabilities that he did not cause or permit the acts alleged he shall be
   (1)(a) ordered to reinstate the applicant, or to refrain from doing anything which the determination requires him not to do;
   (b) ordered to recompense said applicant for loss of earning and other employment benefits if applicable;
   (c) ordered to pay full solicitor and client costs of the applicant;
   (d) ordered to pay damages for wrongful dismissal, to be computed on the basis of three times the amount in subsection (b), if applicable; and/or
   (2) guilty of an offence and liable on summary conviction to a fine not to exceed $10,000.00.
3. The provisions of these sections are binding upon the Crown.

COMMENTARY

Section

1 When one considers the pervasive influence of high-density urbanization, industrial expansion, energy and resource exploitation and technological advances, even the most sanguine observer of environmental problems is filled with a sense of urgency about the proliferation of hazards whose potential for harm is great, whose consequences are not fully known, and yet whose development is going forward with great rapidity.[1]

Environmental impact assessment procedures are, as John Fraser, P.M. for Vancouver South, has said, a clear "insistence that we be sure we know what we are doing before we announce that we are doing it."[2]

To this end, a high-level Federal Task Force Report in 1972 argued firmly and persuasively for an independent, non-partisan body to oversee the process.[3] We believe that such a body is essential to the proper functioning of the impact assessment process, provincial or federal. Creating another anonymous regulatory agency would simply lock the agency into the all-too-familiar pattern of invisible political pressure and insulation from public view.

The establishment of the right of citizens to take part in this process is long overdue.[4] Providing them with the proper tools - both legal and technical - is even further overdue. But having said that they have such a right, the next obvious question is "What substantive right can they assert?"

Citizens should have the right to enforceable obligations, on the part of government, to environmentally and socially sound planning - planning in the interest of the whole public - obligations to them simply as members of the public concerned about the problems being raised.

As members of the public, citizens should be entitled to protection, for example, of agricultural land, as well as of provincial parks and forests and other public lands, from significantly disruptive activities. They should have the right to environmentally acceptable highway and airport planning, and to the wise control of finite resources and energy.

The dark ages of environmental rights as second-class rights cannot continue. In the long run, no one will escape the dis-economies of environmentally unwise activities.

2(1) The term "action" as used in this Part is not to be confused with "action" as defined in the Judicature Act (i.e. as used in the civil litigation sense).

The definition of "action" in this bill has purposely been drawn in its widest sense, to include policies, programs, operational practices, etc. which may have significant environmental impact, and not just single projects, such as, for example, James Bay, the Garrison Diversion, the Arctic pipeline, or Village Lake Louise.

Adequate protection of the environment and the effectiveness of public participation in the planning process require that ongoing policies, and policies which will result in major energy consumption, resource allocation and depletion, employment and urbanization patterns be reviewable, as well as individual projects. The justification for this proposition is legion.[5]

A single project, like the visible portion of an iceberg, is only the tip of a potentially far more serious problem. That problem, particularly with regard to government, is that early-stage, long-term commitments and decisions are made without public review or reference to environmental and social factors. These decisions and commitments then give rise to, and provide justification for, numerous subsequent individual projects.

Presently, citizens' objections are often local in focus, and come into being only when a specific environmental threat, such as a power station, hydro-electric transmission corridor, dam or highway materializes. Citizens are therefore reacting to a very late stage in the decision-making process, the early stages of which were conducted behind closed - or only partially open - doors. Basic governmental and private sector commitments are often made long before all factors are weighed, and before citizens realize what is happening and how it affects them. This leaves them unable to react otherwise than as victims.

For example, a recent Ontario government notice for hearings before the Ontario Energy Board, on Ontario Hydro's application for expansion of facilities and Generation Development Program for the period 1977-1982, consigned consideration of environmental factors, "including the siting of power stations and transmission corridors," to other governmental agencies, presumably environmental in orientation, at an undetermined future time.[6] With such a time scheme in effect, it would be impossible, for practical purposes, for an environmental agency to say, for example, "In Thunder Bay all possible sitings of power stations present unacceptable environmental risks," because an earlier decision had fixed the program demand forecast at a certain level.[7]

By the time citizens can connect, for instance, a local proposal for a new Hydro power plant with a prior governmental program expansion approval, they are likely to find that the option of no power station at all - perhaps in certain cases the only environmentally and socially sound one - is gone.[8]

It seems clear that an Environmental Review Board, if it is really to provide an early environmental input into governmental decision-making, should be able to require environmental impact assessments for policies and programs, as well as for localized projects, so that the total environmental impact on the province can be comprehensively reviewed in time to avert unacceptable environmental and social costs.[9]

It would be misguided judgement to require strict assessment only of specific, highly visible project proposals which merely implement policies formulated much earlier. Such a process would lack the leverage that assessment at a much earlier stage of policy formation could exert to bring about environmentally sound planning.[10]

By applying the assessment process to "continuing and operational practices" in effect at the time of passage of the bill, the bill prevents actions approved before the bill comes into effect from escaping scrutiny on merely formalistic grounds where environmental protection requires review of their ongoing impacts. We have limited this to government. Ongoing practices in the private sector, that is, established businesses, are not subject to the provisions of this Part. Hopefully, higher pollutant standards, better enforcement of existing environmental protection statutes, advances in pollution abatement technology, and relocation programs will reduce the worst excesses of present polluting industries. Statutes like this one will prevent future problems of this kind.

The application of the bill to such continuing and operational practices, especially governmental actions with significant environmental impact, such as an ongoing long-term highway construction program is firmly supported by other sources.[11] Because an action may have been approved before a bill such as this comes into force does not mean that its significant "spillover" impact to a time when the bill would apply should be ignored. "It would be ironic," one author has suggested, "if actions which threatenedy endlessly repetitious environmental injury could escape [the bill's] reach much more easily than new proposals which had only one chance.[12] In this context, the program impact statement approach would be highly useful for evaluating long-standing activities which are overdue for an environmental review.

3(4), 3(5) Devising an effective method to administer environmental impact assessment procedures raises a number of important considerations, including amount of expenditure, the kind of decision-making process preferred, bureaucratic complexity, and personnel selection.

A first question is whether to attempt to adapt existing government departments, agencies and institutional arrangements - for example, in Ontario, the Ontario Municipal Board, the Environmental Hearing Board, or the Ministry of the Environment - to new roles, a process which one constitutional authority in a similar context has described as pouring new wine into old bottles,[13] or to design and create new institutional arrangements.[13a]

Establishment of new agencies may appear to be unduly complicating and increasing the bureaucratic superstructure. Superficially there appears to be a monetary saving in revamping existing structures. But it is suggested that a new agency is the better solution,[14] for the following reasons.

First and most important, a new agency promises the opportunity to assure independence, which is lacking in existing institutions.

Secondly, our experience indicates shortcomings in all existing organizations we have encountered, which lead them to fail, frequently and in some cases consistently, to fulfill their environmental protection potential.

Often this failure is due to conflicting expectations and goals within their present functions. To add a further function may simply increase the number of conflicts to be resolved, and require a chain of further

adjustments within the agency and between the agency and those interest groups with which it interacts.[15]

Thirdly, it is suggested that any monetary savings which seem available from using existing structures may prove to be illusory. In the long run it may be more expensive to convert existing institutional arrangements to purposes for which they were not designed, than to begin anew.

The question of personnel selection to administer the new process resolves itself into at least two important considerations:

1. Eliminating political bias and ensuring independence, and
2. Eliminating or neutralizing other systematic biases.

The American experience with NEPA and the recommendations of the Environment Canada Task Force discussed below illustrate the choices involved in both these considerations.

In regard to the second consideration - eliminating or neutralizing systematic biases - we would only add to the discussion below that it is obvious that a tribunal composed entirely of judges will have one set of operating assumptions, a tribunal of lawyers another, a tribunal of engineers a third, conservationists a fourth, and businessmen a fifth.

For example, a tribunal composed of personnel from the practical sciences may be predisposed to structural and engineering solutions, while a tribunal composed entirely of conservationists may lean to solutions which stress removal of human activities from the physical area rather than structural adaptations to it, even at the risk of undue restriction of needed development. Obviously, then, a form of interdisciplinary or multidisciplinary structure within the tribunal itself is one approach to this consideration.

Four years' experience with the U.S. National Environmental Policy Act (the U.S. statute requiring environmental impact assessments) has revealed deficiencies in that Act. In every instance, the proponent of an action (one of the many federal agencies) also has the initial power of decision on whether that action shall proceed, subject to court appeal. Such a process naturally tended and tends to breed indifference to environmental requirements, since most federal agencies have a prior mission orientation which ignores environmental concerns.[16]

After studying these developments in the U.S., an Environment Canada Task Force recommended the creation of an independent body to do this reviewing in Canada.

Our recommendations regarding independence of the Environmental Review Board, outlined in these two subsections, are not inscribed in stone. There are undoubtedly other methods of achieving the same end, several of which will be mentioned briefly in this commentary. The purpose of enumerating them, however, is to highlight the need for serious public and governmental consideration of this institutional suggestion and to elicit further thought on the matter.[17]

The Federal Task Force Report of 1972 argued strongly that if an Environmental Review Board is to fill its proper role in the process of environ-

mental impact review, "its independence must be assured and must be obvious. Accordingly, its members must be appointed for their expertise and disinterest."[18] The report went on to stress that to confirm its independence and disinterest, "the Board would have none of the regulatory, administrative or other routine responsibilities of a department of government; nor should it in any way be part of any department. To preserve its flexibility the Board would have authority to call upon personnel of government and engage the services of non-government experts when required."[19]

Methods of estabilshing independence and disinterest, other than those listed in our sections 3(4) and (5), might include the Board's establishment as a Crown Corporation (an example: the Science Council), as the Task Force Report suggested,[20] or at least the subjection of its members to evaluation by a standing committee of the legislature and ratification by the whole legislature.

5 Section 5(1) is a consolidation of several procedural requirements presently in effect in other jurisdictions. The requirement that every proponent of an action submit an affidavit containing certain basic information - though not an environmental impact statement - to the Board is derived from a requirement in the Maine Site Location Act.[21] Under this scheme the Board can, as does its Maine equivalent, begin to ascertain how much growth or where such growth and development is taking place in the province, and what impacts this may have on the province's resources and environment.

The requirement of an affidavit in addition to the more comprehensive impact statement to be filed in cases not exempted reflects the fact that environmental assessment should not be a one-shot matter, but a continuing process, with a rudimentary assessment to be supplanted later by a more detailed one if necessary. (See also Section 66, which provides further continuity by giving the Board powers of surveillance and monitoring of projects through various stages of their planning, construction, and operation.)

Regulations can, of course, exempt classes of clearly trivial matters. But for "gray area"[22] class exemptions, as is recognized by the U.S. Council on Environmental Quality, "the significance of a proposed action may vary with the setting, with the result that an action that would have little impact in an urban area may be significant in a rural setting or vice versa."[23] Therefore, unless the Board has some preliminary information upon which to decide whether an environmental impact statement is necessary, and whether the public should be alerted so that it can raise objections if necessary (see section 8), many potential environmental problems may be overlooked. It is also open to a proponent who realizes that what he is proposing will certainly be deemed to need a full-blown assessment to file one with the Board, thereby speeding up the process toward a final determination.

It is important to begin public input and other elements of the political process at the earliest possible stage.

The requirement that the first filing of information be done "no later than the feasibility or planning study stages" is derived from a number of court decisions in the U.S. where the question of timing has been at issue.[24]

The basic premise here, as in section 4, is that a continued commitment of financial and other resources beyond this stage works to foreclose alternatives. To go beyond this stage without Board and public review creates a momentum for a "go" decision which can be reversed only with difficulty.[25]

Section 5(2) is also designed to avoid this problem, and is derived from a similarly worded section of the California Environmental Quality Act of 1970.[26] The City of Winnipeg Guidelines[27] also recognize the value of this early stage of control of government proposals by tying environmental statements to budgeting requests.

The requirement in sections 5(4) and (5), which is derived from the B.C. Land Commission Act[28], is designed to make the bill a more workable piece of legislation, by creating channels for two-way communication with respect to compliance. On the one hand, it provides the Board or its designate with information and sensitivity respecting the programs and activities unique to each government ministry and municipality, which can thereby allow some flexibility, though not laxness, as to how compliance with the Part by each government body can be effected. On the other hand, it places the responsibility on government to address itself to the environmental consequences of its various programs and activities, and to come forth with ideas for meeting the bill's requirements. Exemption of classes and categories of actions in a forum available to public scrutiny, then, will serve not only to streamline the process by eliminating from further consideration clearly trivial matters, but will also give the public greater confidence in the process of exemption because it has had the opportunity to have some input into it.

6 This section creates three possibilities:

1. The Board will find one or more of the facts or circumstances in section 7 which indicate a significant impact. In this case the Board has a duty to require an impact statement and compliance with the further provisions of this Part.

2. The action has specifically been exempted by regulation, or the Board finds that none of the significant impacts of section 7 apply. It may then exempt the proponent from the duty of preparing a statement (subject to safeguards further on which allow the public or the Board to reopen the question) or,

3. The Board may have doubts whether any of the section 7 impact apply. For example, there may be a dissent with in the panel of the Board making the decision. Then there is a duty to order a preliminary hearing to determine whether to require preparation of an impact assessment and statement.

7 This section sets out a number of conditions which, if met by a particular proposal, would cause it to require an environmental impact assessment. While most of these factors are self-explanatory, a few may require some comment.

Several court decisions,[29] the U.S. Council on Environmental Quality,[30] the California Environmental Quality Act,[31] and statements by Ontario officials[32] enumerate many of these factors, especially with reference to their cumulative effect.

The checklist of factors serves both to limit and to channel the Board's discretion by elucidating the areas of overriding public interest worthy of protection.

7(g) This section recognizes that Canada has a history of industrially caused illnesses prior to the enactment of industrial safety statutes and regulations throughout Canada, and that despite these measures, serious illnesses to workers still occur, and there is still a lack of research into and knowledge of the effects of many industrial processes. Lead from secondary smelters and refineries; uranium and arsenic from mines; asbestos from factories and mines are examples from newspapers of recent months of an area in which knowledge of the effects upon the health of workers and surrounding residents - not to mention action based upon what knowledge there is - is disturbingly incomplete.

Moreover, in the vast majority of collective agreements, this area of plant design and working conditions is still a non-negotiable matter, within the sole discretion of management.

Other related non-negotiable questions are the long and short term decisions as to extent of production, kinds of products manufactured, and methods of production which will ultimately affect management's ability to provide continued employment in an era of resource and energy depletion.

While these questions are potentially capable of being incorporated into the field of labour relations, there is a need to protect the interests of the invisible third party at the bargaining table - the public sector - which subsidizes the victims of industrial disease through public medical insurance and other social welfare measures. The public sector also has an as yet unadmitted interest in the allocation by management of scarce resources and energy.

While several subsections of section 7, notably 7(d) and (e), address this latter problem, 7(g) attempts to establish a systematic method of discovering and controlling adverse impacts in the workplace environment at the earliest possible time.

7(j) New technologies and establishment of pilot projects were recognized by a recent U.S. federal decision[33] as requiring assessment.

7(k) Several Canadian sources have similarly recognized this cumulative index.

7(l) This section recognizes an established link between socio-economic status and the effects of pollution and other forms of environmental degradation. It is apparant, for example, that the two most incompatible forms of land use - residential and industrial - rarely occur side by side in wealthy neighbourhoods, but frequently do so in areas of less expensive housing. This subsection is not intended to alleviate poverty per se, but to prevent future occurrences of the kind of planning which takes advantage of the relative powerlessness and lack of political organization of the poor.[35]

8 Section 8 permits the public to require a review of the exemption of any action from the need for an impact statement, except where the action has been exempted by regulation after public hearings.

As CELA has noted previously[36], a serious difficulty arises with a discretionary screening mechanism[37] for making threshold determinations of the significance of a proposal and its need for an environmental assessment, if those decisions are not subject to possible further public questioning and appeal. This is especially true in the "large gray area" of proposals some of which will be significant and others not.[38] As P.S. Elder, Professor of Law at the University of Calgary's Faculty of Environmental Design, has written, "Of what use is it to cut environmental deterioration from individual sources by 90% if exponential growth results in ten times as many sources of degradation?"[39]

If there is no mechanism which the public can set in action to guard against the potential, and inevitable, errors in judgement which a discretionary and non-reviewable decision might contain, then the public might be left with environmental assessments being required for only those projects where it is found convenient, from an administrative viewpoint, to do so. We think it necessary to add the provision of section 8(1) to any environmental assessment bill for the greater integrity and closer scrutiny it would ensure.

The question of what is a "significant" action requiring an impact study is probably at this point in time (maybe permanently) beyond more than a general definition. The U.S. CEQ (Council on Environmental Quality) Guidelines[40], for example, state that "a precise definition of environmental 'significance' valid in all contexts, is not possible." The Canadian Environmental Advisory Council[41] states, "Our perception of what is significant is one which will take many years to develop." And while the participants in an EIA workshop in Winnipeg[42] found the term "significant" to be the best criterion, subject to a later definition of significance, the written proceedings indicate that they never did get around to defining significance.

Some of the best indices utilized in the U.S. consider, first, the extent to which the action by itself will cause adverse environmental effects in excess of those created by existing uses, and second, the quantitative adverse effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions. That is, U.S. courts have been concerned with the absolute effect of the project itself and the cumulative effect of the project when considered together with other pre-existing uses, as well as how publicly controversial it is. Again, this is such a general, nebulous kind of guideline that it is obvious that the likely best result is to give as many points of view (as in sections 5(4) and (5)) as possible the opportunity, with respect to public sector exemptions for example, to speak to the matter of significance on a case-by-case, class-by-class or category-by-category basis. To suggest that more should be expected from a statute of general application is itself unrealistic.

Sections 8(4) and (5) provide a system of safeguards for all parties through wide powers of appeal from or judicial review of the Board's decisions. These sections, with appropriate changes for their inclusion here, are from the Ontario Health Disciplines Act, 1974.[43]

11 and 13 Again, as in section 7, it is necessary to provide legislative guidelines for the contents of a statement to ensure that the study does not evolve into a merely formalistic device. CELA's experience has shown that environmental assessments provided on an ad hoc basis because of political pressure fluctuate greatly in quality, and in general rely unduly on secondary sources rather than field tests, and on incomplete or unverified data. It is obvious that without statutory safeguards a proponent of an action who funds and is responsible for the preparation of an impact study will make the minimum effort and spend the minimum amount consistent with approval of his project.[44]

The requirements of section 11 are not to be construed as an attempt to force a more extensive or expensive study when a lesser one will be adequate; and here section 13, combined with provisions for appeal and judicial review, can be used by the Board or by the proponent to inject a requirement of common sense into any demand for a more elaborate study than necessary.

The requirements laid down here for the contents of an impact statement find support in the provisions of several U.S. statutes,[45] the U.S. Council on Environmental Quality Guidelines,[46] and the City of Winnipeg Guidelines.[47]

With respect to section 11(i), for example, support for the inclusion of this requirement comes from the California Environmental Quality Act,[48] the U.S. Environmental Protection Agency,[49] and several court decisions.[50] The concern expressed in section 11(i) was also acknowledged during the proceedings of a recent national conference on environmental impact in Canada.[51]

12 The requirement that environmental impact statements be comprehensible to the general public has been supported by many sources.[52]

14 This section contemplates that the Board will hold many hundreds of hearings a year. This is a necessity if this Board is to make a serious attempt to protect our environment. This will require a substantial budget and personnel. We make no apologies for this. Existing tribunals are holding many more hearings than in the past, and their workload is increasing heavily because of increasing demand by the public for planning and protection. This tendency is bound to increase.[53]

The requirement of a mandatory public hearing is not intended to preclude other valuable methods of public participation in the planning process. Indeed, if the public inputs have been utilized effectively, the public hearing may be unnecessary. Rather than propose a cumbersome formula for deciding when to forgo a public hearing, we feel it is preferable to provide a basis for public hearings in all cases, whether or not it is actually resorted to in every case. Where there are no objectors or minimal objections, the hearing will be pro forma and will be a minimal expense of the Board's time and budget.

In the alternative, we are not opposed to provisions allowing the Board to waive the mandatory hearing requirements where no public objections have arisen or are likely to arise.

15(1) The requirements in this section place the responsibility upon the proponent of an action to show that his proposal is reasonable; i.e. that what he wants to do is consistent with the public welfare, and that there are no more feasible or prudent alternatives for getting the job done. To put the onus on the proponent is a simple matter of common sense, for we expect a proponent of any activity to have considered all reasonable avenues to his goal. To ask him to support his decision is merely to ask that he reveal the process which he must already have undertaken, if he operates rationally and with the public interest in mind.[54]

The wording for this section comes from a recent decision under the Maine Site Location Act[55] referred to earlier.

17 The impetus for this section comes in part from recent decisions by Canadian tribunals. They have tended to ignore the diseconomies of proposals from an environmental and social standpoint, which are often greater than the expected economic benefits.[56] As with the requirements in section 15(1), the responsiblity for proving that a proposal's total costs will not exceed its total benefits should rest with the person who proposes the action. He is the one with the facts and figures, and who stands to gain the most from the proposal. Society should not be put in the position of conferring a benefit on a proponent - if from the private sector - if the effect of that action is to impose burdens on other segments of society less able to afford them.

In regard to section 17(a), Professor P.S. Elder raised an interested question in a letter to the authors:

"Why limit it to the people of Ontario? Remember, many of us felt that the Quebec Government had an obligation to consider the citizens of Ontario in looking at the James Bay Project. Yet, your criteria would not force the Board to consider the citizens of Canada. Is there some way you can respond to this type of problem?"

We agree in principle with Professor Elder, and have only one reservation - to what extent is it constitutionally and politically possible for a provincial statute to have this national or international effect? The answer may lie in a workable system of intergovernmental cooperation - perhaps, for example, links between a federal Environmental Review Board and Review Boards in each province specifically to evaluate those aspects of the action which may be extra-provincial in their effect, and similar links between the Review Board in Canada and in U.S. jurisdictions.

Section 17(b) is derived substantially from a similarly worded section in the Maine Site Location Act.[57]

18 This section provides for effective dissemination of notice of actions and of this environmental impact assessment process to those segments of the public who may have reason to scrutinize and perhaps to oppose them. A lack of sufficient notice of the intended actions of members of both the private and public sectors, and of meetings and hearings to discuss these actions is one of the most common complaints which citizens bring to CELA. While this is due in part to our complex social and political structure, and not entirely to neglect by the public agencies, there is a perceived

need for better communication with those who are directly and indirectly affected by projects. To some extent this section merely recognizes existing practices of public agencies which have grown in a rather piecemeal fashion in recent years.

19 This section provides a partial funding mechnism to assist public participation in this planning process. It also sets out a scheme for distribution of funds to the general public in such a way as to maximize the effectiveness of their involvement before the Board. This funding proposal should be read together with Appendix A, Suggested Amendments to the Ontario Legal Aid Act. In effect, this may be looked at as a tax imposed on the proponent. We have made no attempt to explore the constitutional issues involved in the division of taxing powers between the federal government and the provinces. Nor have we made any attempt to explore the question of what is a tax and what is not. While the constitutional difficulties should not be ignored, we wish only to point out here that in order for an environmental impact assessment scheme to include adequate public participation and scrutiny, it must incorporate a suitable funding scheme to ensure that adequate resources will be available to the public, and especially to those members of the public who act in the interest of preserving the environment, with no intention or possibility of personal financial gain.

If we are to establish and maintain the opportunity for public review before decisions affecting the environment are made - if we are to operate on the assumption that public participation is legitimate in matters that affect the general public welfare - then we must make it possible for members of the public to equip themselves with the necessary tools to participate knowledgeably and intelligently. This means that we must provide the economic means for them to make representations which are legally and technically adequate. To continue as we have been doing, with proponents spending hundreds of thousands, if not millions, of dollars in preparation for hearings, and citizens having virtually nothing with which to prepare, is hypocrisy. Under such circumstances there simply is not going to be a sophisticated explication of technical or policy issues. Surely this is an obvious conclusion to be drawn from the recently completed Pickering Airport Inquiry.[58]

As a first step, therefore, we have adopted the figure as represented in section 19(1)(a) for assistance to objectors. It is based on approximate sums of money that have been made available, for example, to Indian groups opposing the James Bay Project and to environmental and Indian groups intervening in the Berger Commission Inquiry into the Arctic Gas application to build a pipeline up the Mackenzie Valley.[59]

Of course, these sums may be inadequate to the task required of them. But they are a solid beginning based on several reliable precedents which, if institutionalized, would put citizens in a vastly better position than they are in now.

One author has suggested that 0.1% of capital costs might be necessary in certain instances.[60]

Subject to section 10, and perhaps as a slightly different approach, it might be possible to have the Board commission an environmental impact

study and have it paid for by the proponent. Such a provision is in practice in California under the California Environmental Quality Act.[61] This might reduce the amount of money that intervenors would need to have their own studies done, as well as taking the preparation of environmental impact statements, as suggested in section 10, out of the hands of the proponent. This process is presently at work to some extent in the Berger Commission Inquiry, in that the government's assessment group (GAG) has done some studies which followed the completion of the proponent's, albeit with considerably less money.

Having the impact study done by a consultant commissioned by the Board might help to eliminate the problem, faced by the Indians in the James Bay case, of lack of sufficient time to prepare their submission.

20 These remarks also apply to matters of appeal under sections 8, 56 and 57 of this Part.

For too long in this province and this country, reaction to a provision such as section 20(1) has been similar to the following, from the Hon. Otto Lang:

> "As worded, this [section] could have the effect of frustrating even the most essential of economic developments, for example by allowing a small number of determined individuals to force protracted hearings at public expense in every such case regardless of the circumstances, and without being required to demonstrate any interest that could be tested as being worthy of recognition."[62]

This argument misses the heart of the environmental problem. The critical question, for example with reference to section 8, is "Why is not this proposed action, which may have substantial effect upon the environment, required to comply with the impact assessment process?" Whether a citizen who has decided to intervene is living where he will be flooded out by a particular dam, or displaced by a nuclear power plant or airport, is logically, and should be legally, irrelevant to a consideration of the public policy issues involved.

The absence of a traditional property interest - which seems to be referred to in the above quotation from Mr. Lang - hardly suggests that intervention is inappropriate. What about the disposition of provincial park and other public lands to commercial interests? What about a proposed program of ocean dumping? What about radiation contamination? What about the possible destruction of endangered species? Such potential environmental problems, and many others, would affect all citizens in common. Yet who, by Mr. Lang's standard, would have standing to challenge these and other potential environmental insults?

Indeed, there has been recent judicial cognizance in Canada of the need to broaden standing in this context. Matas, J.A. said in Stein v. City of Winnipeg:

> "As for the suggestion that there would be a proliferation of law suits, Laskin, J., said at pp. 2 and 3 of Thorson[63]:

> 'I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder.... The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs .... '

He continued:

> "Sec. 653 has created an obligation to review the environmental impact of any proposal for a public work which may significantly affect the quality of human environment. If that section is not to be considered as a mere pious declaration there must be inferred a correlative right, on the part of a resident, in a proper case, to have a question arising out of the sections adjudicated by the court. In the case at bar, taking into account the facts outlined above, I am of the opinion that Stein has the status to bring this action for the court's consideration."[64]

It would not be useful, however, to attempt a modified version of standing, as was done in British Columbia under the B.C. Pollution Control Act.[65]

Moreover, in response to the other concern expressed by Mr. Lang (and no doubt by others) that a standing provision such as is proposed here would lead to unconscionable delays of essential developments, the following should be noted.

It appears so far that major delays, in the U.S. for example, have been caused by administrative agencies trying to prevent public interest groups from participating, and by the U.S. Justice Department arguing the sovereign immunity defence, namely that "the Queen can do no wrong" (otherwise known in Canada as crown immunity), and that organizations representing thousands of citizens dedicated to the protection and conservation of the environment have no business "interfering" with government and business arrangements - for example, those concerning the fate of the Mineral King Valley in California.[66]

It is only in this context that "delay" is an undesirable cost which ought to be eliminated.

With respect, the point at issue should not be procedural skirmishing on standing. Such an approach is time-consuming and expensive, and distracts attention from the truly important matter to be decided. That matter is the necessity of making intelligent and well-informed decisions in an environmental context.

Moreover, the power of the Board and the courts to dispose of "truly frivolous" objections[67] should enable them to deal adequately with this concern.

21 - 25 The present impediments to access to information, and the effects of these impediments on informed decision-making, have been amply dealt with by Prof. A.R. Thompson.[68]

The Canadian Bar Association has also, in this context, supported greater public right of access to information on environmental impact studies "and all other information obtained through public funds."[69]

These sections have been drafted to reflect those concerns, but at the same time care has been taken not to allow unwarranted and damaging invasions of privilege.

The change from present Canadian law found in section 24 is derived from the U.S. Freedom of Information Act.[70] Otherwise the present rules of court and evidence apply.

Section 25 has been included because of the chronic problem of internal pressures on employees, in government and elsewhere, to keep silent on sometimes vital matters.[71] In an environmental context, this is simply unacceptable. Irreversible damage can often be prevented if information is made available in time.[72]

Section 24 is adapted from the U.S. Freedom of Information Act and amendments thereto. Generally, the parties have the right to claim privilege and the Board has the right to rule on the validity of the claim in the same manner and according to the same rules as in civil proceedings before the courts in Ontario. However, recognition must be given to the fact that in addition to,or in many cases instead of, the interest of any parties to a dispute, the overriding consideration in an environmental impact assessment is the public interest. The Board therefore is accorded powers of viewing otherwise privileged documents to protect the public interest which are not accorded to any of the parties either in a lis inter partes or in these proceedings.

Although we have made no attempt to remove any of the traditional grounds for the claiming of privilege, it should be recognized that in matters where the public interest (and indeed world survival in some situations) takes priority over the interests of private parties, it may become necessary to restrict grounds on which privilege is claimed.

Furthermore, it is submitted that the public should, as a matter of course, have greater rights to government information than to information compiled by private interests.[73] To this extent the onus in regard to public documents should be shifted by legislation from an onus on the public to prove documents should be available, to an onus on government to prove they should not, as in the United States. This refers to the fact that courts which previously would not question a government claim to privilege will now demand to look at the documents themselves, to see whether the claim is justified.

26 Citizens acting in the public interest often find themselves stymied by the hearsay rule. They may have government and municipal reports and studies supporting their position, but are unwilling to call the authors because of expense, time, or lack of cooperation by the author.

The Select Committee on the Ontario Municipal Board recognized this deficiency in Board hearings, recommending that "the Board should make a practice of accepting reports and other written material without insisting on the author giving oral evidence.

"However," the Committee continued, "such authors, including officials of the various ministries, should be available (after adequate notice) for examination before the Board if the Board requires their presence."[74]

There is ample precedent under the Ontario and Canada Evidence Acts and other provincial and federal statutes for such exceptions to the hearsay rule. For example, section 97 of the Ontario Environmental Protection Act allows admission of government certificates of analysis of contaminant levels without testimony by the government employees who did the analysis.

27 - 35 These sections are adapted from corresponding sections of the Ontario Municipal Board Act, with some changes to provide for greater effectiveness, independence, public participation, accountability to the public, and consistency with other sections of this Part.

28(2) Neither the members nor the employees of the Board are bound by section 10 of the Ontario Public Service Act. This "oath of secrecy" section forces all civil servants to swear not to give any person any information or document that come to their knowledge or possession by reason of their being civil servants. Similar oaths of secrecy bind employees of the federal government and other provinces.

The result is that civil servants are afraid to give even innocuous information to their real employers, the public.

This section reinforces section 24, which does not open all government information to scrutiny, since it retains worthy claims to privilege. We have not interfered with the common law rules for determining what materials are privileged.

We have decided to make the bulk of the Public Service Act generally not apply to this Part, because of administrative difficulties such as consumption of time and clumsy procedures in hiring which could render the Board ineffectual while it waited for adequate staffing. Moreover, giving the Board independent opportunities for hiring can further contribute to the Board's efficiency and flexibility of operation.

31 This section is similar to Recommendation XIX of the Select Committee on the O.M.B.: "Except at preliminary hearings and appeals from committees of adjustment and land division committees, where a single Board member could preside, every application to the O.M.B. should be heard by <u>at least two members</u>." (Our emphasis)

We have increased this to three members as a greater safeguard for impartiality, and to avoid the problem which might arise should two members hear a matter, disagree and go to a third, the Chairman, who was not present at the hearings, for a tie-breaking decision.

Our reasoning is similar to that of the Select Committee:

> "With a large number of Board members all sitting individually at separate hearings, the frailties of human nature make it likely that certain inconsistencies will creep into the Board's approach to matters that should, for fairness, be treated uniformly. Beyond that, it disturbs this Committee to know that one member of an appointed body is thus empowered to overrule the elected council on a matter of far-reaching and intense concern.

"For this reason, the Committee believes there is a clear advantage in having two or more members hear all contentious applications."[75]

32 This section further provides for impartiality of the Board by requiring members and officers to declare any conflict of interest and to refrain from participation in any aspect of the decision-making process. See also section 55(2) which provides for civil liability of directors for breaches of the provisions of this Bill.

33 - 39 These sections enable the Board to seek advice both from within and from outside government, by empowering it to retain the services of persons qualified to assist the Board with technical matters, while retaining the decision-making power in the Board itself. This is in addition, of course, to the broad power of the Board to subpoena witnesses, including government and non-government experts, given in section 45.

This power to appoint experts to assist the tribunal is available to the Ontario Municipal Board and to the courts. Although seldom used, it is an important tool in environmental protection decisions which will often turn on difficult scientific and sociological questions which are open to a variety of interpretations and conclusions by the experts, including the opinion that the data is inconclusive.

Professor A.R. Thompson has expressed the opinion that "in the environmental context most decisions involve complex issues about biological relationships, technical processes, cost-benefit evaluations, and analysis of legal rights and responsibilities. Therefore, if the decision is to be tested on rational grounds, there should be a proceeding which permits rigorous contest between the various affected interests in an adversary context.

"It is the writer's view that such a rigorous evaluation can only be accomplished if there are known procedures of a fairly elaborate kind ensuring proper disclosure of information. <u>This is the scientific method</u>.

"If these minimum standards [of disclosure of information] are not to be met the hearing does not test the decision. That is not to say that the hearing does not serve some other purpose. The hearing may only be intended to supply information to the decider (usually information about the <u>attitudes</u> of the persons appearing, in which case the person appearing need not be informed about the facts available to the deciders. Or the hearing may be intended to serve merely as a public forum at which the parties appearing can benefit from the catharsis from venting their opinions and feelings about the subject)."[76]

While Professor Thompson's comments support many of the other provisions of this bill, it is worthwhile mentioning them in the context of access of the Board to experts, since a Board which is determined to "test the decision" in a scientific manner, rather than merely to provide information to the decider or a forum for "letting off steam", will need as much information as possible.

The Ontario Environmental Hearing Board has recently recognized the need

to acquire as much independent information as possible about the technical aspects of applications for approval of municipal and privately run waste disposal sites and sewage works, by requesting the Ontario Ministry of the Environment to produce expert witnesses, subject to cross-examination by all parties, at hearings to explain the Ministry's position on the application. Previously, the Board listened to the technical evidence by the applicants and by objectors, as well as the public reaction to the application, then made recommendations to the minister, without hearing any submissions from the Ministry about the acceptability of the proposal. While this new procedure has its disadvantages in relation to the independence of a Board which has no decision-making powers, but merely reports to a Ministry from which it has heard submissions at the hearing (perhaps a circular procedure), it does recognize the need for theoretically neutral technical and scientific data to be brought before the Board, if the Board is to test the decision rather than be a rubber stand for decisions actually made elsewhere.

37 This section incorporates sections 24 and 25 of the Ontario Municipal Board Act. These sections provide that the Board, which is itinerant, has the right to the use of the courthouse and the town hall respectively of any municipality in which sittings of the Board are appointed to be held. It enables the Board to go to the people, instead of forcing the people to come to some central location which may be hundreds of miles from the subject matter of the action.

41 Section 28 of the Ontario Municipal Board Act provides for the duties of the Board's secretary - to keep minutes, custody of records, authentication of regulations, orders, etc., record books, and other matters, and to obey all directions of the Board.

45 This section incorporates sections 33 through 37 of the Ontario Municipal Board Act. Section 33 gives the Board the powers of a court of record and an official seal. Section 34 gives the power to determine all questions of law and fact. Section 35 gives the Board exclusive jurisdiction in all matters in which jurisdiction is conferred on it. Section 36 gives the Board a general jurisdiction and powers to make orders, rules and regulations and to do anything necessary or incidental to the exercise of the powers conferred on it under this or any other Act. Section 37 confers all the powers of the Supreme Court on the Board with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and other matters. This would include subpoena and contempt powers.

46 - 55 These sections deal largely with the powers of the Board and its ability to enforce its orders and decisions.

Having imposed great duties on the Board, and, we hope, having left the Board little or no discretion to avoid assessing significant projects, we must give the Board equally wide powers to carry out this mandate effectively and to enforce its orders and decisions.

Probably the greatest significance of deeming the Board members, officers and staff to be "provincial officers" in section 48 is that this confers wide powers of search and seizure.

56 See section 8(5). For greater clarity, we have included this section of the Ontario Health Disciplines Act, both with specific reference to hearings pursuant to section 8, and with general reference to the whole of this Part.

57 The purpose of this action is to facilitate the expansion of the concept of standing, as discussed in section 20.

58 We assume that, under section 25(1) of the Statutory Powers Procedure Act, an appeal operating as a "stay in the matter" implies that the proponent cannot proceed while the decision on the appeal is pending. We have dealt with this problem in section 4, but for greater certainty we wish to ensure that, if this interpretation of the meaning of "a stay in the matter" is correct, it will apply to applications for judicial review and to the proceedings specified in section 25(1) of the Statutory Powers Procedure Act.

59 The purpose of this section is to provide a public procedure for varying decisions of the Board or a court, and to ensure that debate, visible to the public, on the merits of such a change will occur before a decision is made, not afterwards.

Final determination by the Cabinet, acting in secret without being required to make public the reasons for its decision, is not the best method for instilling confidence in parliamentary democracy.[77]

Moreover, such a requirement does not infringe on the paramount right of the legislature to approve actions it feels are in the public interest. If the legislature wishes an action to go forward, there is already firm precedent in this province for it to override the appropriate tribunal by special Act in the manner outlined here.[78]

60 The effect of this provision would be to institute a "one way cost rule".[79] Citizens bringing bona fide objections would otherwise be unreasonably hindered, or prevented from receiving a full and fair hearing, by the threat of costs.[80]

This appears to be an unwritten rule of the Ontario Municipal Board in its present procedures for facilitating citizen objections: it has awarded costs to objectors, but has never awarded costs against them.

The mechanics of this proposal would still leave available to the Board or the court the usual discretion as to costs where the objection has no merit, but a "Sandbanks" objection[81] could no longer be categorized as "frivolous and vexatious".

Indeed, there has been recent judicial recognition of the barrier which costs present to the vindication of the rights of citizens. The Hon. Edson L. Haines, of the High Court of Justice for the Province of Ontario, noted in the December, 1973 issue of the Canadian Bar Review:

> "Our citizens must have confidence in our system of civil justice. Its availability at minimum expense is essential.... There is only one obstacle in the way, and that is our system whereby the loser pays the costs of the winner. The result is that only the

> poor financed by Legal Aid or the very rich can afford to exercise their rights.... To the man of modest means, costs can be ruinous....
>
> Why should a taxpayer be obliged to place his home, his earnings and his resources on the line as a condition to the exercise of his rights?"

His Honour went on to say:

> "There will be those who say the penalty of heavy costs prevents overcrowding of our civil courts. They provide their own answer. By making litigation expensive, they discourage those who would seek justice."[82]

These remarks are equally applicable to the public hearing and appeal situations contemplated in this section. It should be noted that our section, as worded, would also allow the Board to decide not to invoke the costs rule against the proponent. The effect of this would be that each side would pay its own legal and technical expenses, the prevailing system in the U.S. and the one suggested by the Hon. E. L. Haines.

61, 62 The requirements set out in these two sections, relating to regulations under this Part, do not pretend to be exhaustive. The principle which, however, it is necessary to get across is that regulations are often vital to the efficient working of a statute, and that therefore the public should have input into the process of making them.

This view has been supported by the Canadian Bar Association[83] as well as other sources[84], with reference to the setting of standards for environmental quality. We feel that there is no rational reason for excluding the public from the making of environmental impact assessment regulations.

64 This is a transitional provision. Exclusive jurisdiction of the Board after any transitional period is guaranteed in section 45(3).

65 The requirement that a government tribunal or department produce an annual report is a standard one in many Ontario statutes. We have varied the provision in the Ontario Municipal Board Act only by providing a duty to produce the report "as soon as possible" after the new year to discourage long delays in making it available. Such reports are among the best indices of the diligence and effectiveness of public bodies available to the public.

66 Adapted from SCOPE-WISE Conference, noting Environment Canada guidelines.[85]

NOTES TO COMMENTARY

1. See, for example,"Legislative Proposals to the Government of Ontario on Environment, Conservation and Pollution Control," submitted by the Ontario Federation of Labour (1973); "Statement on Environment, Conservation, Resource Management and Pollution Control to the 17th Annual Ontario Federation of Labour Convention," November 12-14, 1973, Toronto; "Farm leader fears spread of asphalt," Toronto Star, November 27, 1973; speech by Gordon Hill, president of the Ontario Federation of Agriculture at the Federation's Annual Convention, Oshawa, November 26, 1973.

2. Minutes of Commons Committee on Fisheries and Forestry, Issue No. 8 at 8:10 (April 10, 1973).

3. Federal Department of the Environment, Task Force on Environmental Impact Policy and Procedure, Final Report of the Task Force , August 30, 1972, Ottawa (hereinafter Task Force Report).

4. See, for example, Canadian Bar Association, Ontario Branch, brief to the Ministry of the Environment, November 13, 1972; Canadian Bar Association, National Resolution on Public Participation in Environmental Decisions, September 1973, Vancouver; Stein v. City of Winnipeg, 3 CELN 95 (Manitoba Court of Appeal), June 10, 1974. See also Denis Archambault, "Environnement, Usage Public et Democratie," (1974) 20 McGill Law Journal 1 @ 1-3, 24; Patrick Kenniff et Lorne Giroux, "Le droit quebecois de la protection et de la qualite de l'environnement," 15 Les Cahiers de Droit 5 @ 51-52 (1974); A.R. Lucas, "Legal Techniques for Pollution Control: The Role of the Public," (1971) 6 U.B.C. Law Review 167 @ 185-190; and Harold Greer, "Suing over Pollution: If the Government will not, who can?" Brantford Expositor, October 28, 1974.

5. Task Force Report; Frederick R. Anderson, NEPA In the Courts: A Legal Analysis of the National Environmental Policy Act (Johns Hopkins University Press for Resources for the Future, Inc., 1973)(hereinafter Anderson), pp. 108, 122, 177, 220, 290ff.; "Environmental Impact Assessment: A Brief to the Minister of the Environment in Response to Ontario's Green Paper on Environmental Assessment", Faculty of Environmental Studies, York University, February, 1974; SCOPE-WISE: International Conference on Environmental Impact Assessment, Victoria Harbour, Canada, January 29-February 8, 1974 (from Chapter 1 of forthcoming publication arising from proceedings of that conference); Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir.1973); U.S. Council on Environmental Quality, "Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), also quoted in Scientists' Institute v. AEC, above; Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971); Prof. A.R. Lucas, "Environmental Impact Assessment: Another View", Nature Canada, January-March 1974, III, 1, 29 (hereinafter Lucas/NC); U.S. Council on Environmental Quality, "Guidelines for Preparation of Environmental Impact Statements" 38 Fed. Reg. 20550-20562, August 1, 1973 (hereinafter CEQ Guidelines). Canadian Environmental Advisory Council, "An Environmental Impact Assessment Process for Canada," Report No. 1, February 1974.

6. Ontario Gazette, Vol. 106-47, November 24, 1973, pp. 4631-32.

7. This is an interpretation which may be drawn from statements made by Ontario Energy Board Counsel R.W. Macauley during the recent OEB hearings. See, for example, OEB Proceedings, February 28, 1974, pp. 3310 and 3315.

8. Ibid. Energy Probe, "A Report on Hydro's Planned Expansion Program and How it Will Affect Your Future," January 1975.

9.

10. Anderson, pp. 290ff. See also COMMENT, "The National Environmental Policy Act: How it is Working, How it Should Work," 4 Environmental Law Reporter 10003, @ 10006-7; Edward L. Strohbeln, Jr., "NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change," 4 Ecology Law Quarterly 93 @ 102 (1974); and J.F. Castrilli and Elizabeth Block, "The Need for an Environmental Bill of Rights," The Globe and Mail, February 7, 1975.

11. Task Force Report, p. 5; SCOPE-WISE, ch. 1; CEQ Guidelines, section 1500.5; Lucas/NC, p. 30; Anderson, pp. 142-178.

12. Anderson, p. 176.

13. Dale Gibson, "The Environment and the Constitution: New Wine in Old Bottles," in Protecting the Environment, edited by O.P. Dwivedi (Copp Clark, Toronto, 1974).

13a. J. L. Sax, Defending the Environment: A Strategy for Citizen Action (New York, 1971), p. 61, where the author states, "Our need is not for more or fancier procedures before the same old agencies -- it is for a shift in the center of gravity of decision-making. The recognition of public rights can, to a striking degree, effect that shift."

14. In a slightly different context (flood control management), Professor J.G. Nelson and his associates reach this conclusion regarding establishment of a new entity versus adding new responsibilities onto existing organs. J.G. Nelson, J.G. Battin, R.A. Beatty and R.D. Kreutzwiser, "The Fall 1974 Erie Floods and Their Significance to Resources Management," Department of Geography, University of Western Ontario, 1974 (unpublished).

15. C.P. Case and D. Schoenbrod, "Electricity of the Environment: A Study of Public Regulation Without Public Control," 61 California Law Review 961 @ 979, 983-984.

16. Anderson, pp. 257-258. This view was also strengthened by CELA interviews with Philip E. Soper of the University of Michigan Law School, former assistant counsel to the U.S. Council on Environmental Quality, February 8, 1974, in Ann Arbor, Michigan, and with Edward Lee Rogers, Assistant Attorney General, Environmental Protection Division, Department of the Attorney General, State of Maine, November 12, 1973 in Toronto. See also J. L. Sax, "The (Unhappy) Truth About NEPA," 26 Oklahoma Law Review 239 (1973).

17. See, for example, remarks of Professor Barry Stuart regarding an environmental court in "The Last Bottle of Chianti and a Soft Boiled Egg," Canadian Law and the Environment, Workshop No. 1, October 7-8, 1971, Multi-Disciplinary Workshop on Law and the Environment, sponsored by Environment Canada and the Agassiz Centre for Water Studies, University of Manitoba, Winnipeg, Manitoba; Walter Kiechel, Jr., "Re-examination of Environmental Court Study: Outlook for Improvement in Judicial Review of Environmental Decision-Making," 4 Environmental Law Reporter 50143. But cf. Sax, note 13A above, @ 106-107.

18. Task Force Report, pp. 6-7. See also CEAC recommendations, pp. 4 and 6.

19. Ibid., p. 10.

20. Ibid.

21. 38 Maine Revised Statutes Annotated section 483; 3 Environmental Law Re

21. 38 Maine Revised Statutes Annotated section 483; 3 Environmental Law Reporter 43027, section 483.

22. Ontario Ministry of the Environment Green Paper on Environmental Assessment, September 1973, pp. 10-12.

23. CEQ Guidelines, section 1500.6.

24. Scientists' Institute for Public Information v. AEC 481 F.2d 1079, 1093-98 (D.C. Cir. 1973); Lathan v. Volpe 455 F. 2d 1111, 1121 (9th Cir. 1971); Environmental Law Fund v. Volpe 340 F. Supp. 1328, 1332-33.

25. See, for example, Prof. A.R. Lucas and P.A. Moore, "The Utah Controversy: A Case Study of Public Participation in Pollution Control," 13 Natural Resources Journal 36, 56-57 (January 1973), and reasons for judgement of Mr. Justice Albert Malouf in Chief Robert Kanatewat v. The James Bay Development Corporation and the Attorney General of Canada 3 CELN 3, 17-18 (Quebec Superior Court), November 15, 1973.

26. Section 21102 of that Act. 3 Environmental Law Reporter (hereinafter ELR) 43010.

27. Guidelines for the Preparation of Environmental Impact Reviews under Section 653 of the City of Winnipeg Act, pp. 3 and 5, May 1974.

28. S.B.C. 1973, c. 46, sections 8 and 9.

29. For example, Hanley v. Kleindienst, 2 ELR 20717 at 20720.

30. CEQ Guidelines 1500.6.

31. California Environmental Quality Act, 21083.

32. Victor W. Rudik, Assistant Director, Environmental Approvals Branch, "Green Paper on Environmental Assessment in Ontario," a paper presented to the Pollution Control Association of Ontario, 1974 Conference, 1 May 1974, Toronto.

33. Scientists' Institute v. AEC. See also COMMENT, "Agency may be required to file environmental impact statements for research and development program as a whole even though general implementation of the technology is remote," 87 Harvard Law Review 1050 (1974).

34. A.R. Lucas, "Environmental Impact Assessment: Legal Perspective," published by the Agassiz Centre for Water Studies, University of Manitoba, for a conference on Environmental Impact Assessment: Philosophy and Methodology, Winnipeg, November 15-16; Federal Task Force, p. 5.

35. A. Kneese et al., Managing the Environment: International Economic Cooperation for Pollution Control (1971) @ 14. A. Reitze, Jr., Environmental Law (2nd ed., 1972), @ 1 and 9 of ch. 3.

36. Canadian Environmental Law Association, "Principles for Environmental Impact Assessment: Submissions concerning the Ministry of the Environment's 'Green Paper on Environmental Assessment,'" October 1973, p. 20.

37. Ontario Ministry of the Environment, "Green Paper on Environmental Assessment," September 1973, pp. 10-12.

38. Ibid., p. 11.

39. P.S. Elder, "American Environmental Law: A Survey of Developments," from a paper delivered to the Department of Continuing Education, Law Society of Upper Canada, Osgoode Hall, May 11-12, 1972 and reprinted in The Bulletin of the Conservation Council of Ontario, Vol.20 No.3 (1973), p.11.

40. See Note 23, supra.

41. See Note 5, supra.

42. Proceedings of the Workshop on the Philosophy of Environmental Impact Assessment in Canada, sponsored by the Environmental Protection Board, Winnipeg, October 1973, pp. 51-52.

43. Government Bill-22, sections 13(1) and 13(2).

44. See, for example, the remarks of Dr. Douglas Pimlott and Dougald Brown regarding a recently completed impact study for Panarctic with respect to proposed offshore drilling in the Arctic Islands, done by a Vancouver consulting firm, F.F. Slaney. Pimlott and Brown state in part, "The environmental impact assessment prepared for Panarctic offered only a very general account - and one that many scientists would hotly dispute - of the potential effect of an oil blowout on marine life.... It is obvious that it was prepared almost entirely on the basis of library research.... Slaney's letter to Panarctic accompanying the assessment maintained (regarding oil blowouts, for example) that ... 'an oil blowout would not have extensive environmental consequences when contained by burning; the consequences of an oil blowout would not interfere with current resource exploitation activities of native people.' ... Scientists within the Department of Environment certainly took a less benign view of the consequences of an oil blowout. An internal department report stated flatly that an oil

blowout at Hecla would be 'an environmental disaster of the highest magnitude.' ...The inadequacy of the Slaney assessment simply underscores existing questions about the present arrangements under which assessments are made. In this case, Panarctic undoubtedly established the terms of reference and the cost limits of the Slaney study." D. Pimlott and D. Brown, "Arctic Offshore Drilling," 2 Northern Perspectives 1 @ 3 (November, 1974), a publication of the Canadian Arctic Resources Committee.

45. National Environmental Policy Act of 1969, 42 U.S.C. section 4332(2)(c); California Environmental Quality Act of 1970; Public Resources Code 21000, 38 Fed. Reg. 20550-20562, August 1, 1973.

46. 1500.8.

47. Guidelines for the Preparation of Environmental Impact Reviews under Section 653 of the City of Winnipeg Act, pp. 14-21, May, 1974.

48. Note 31, supra, 21000 g.

49. 37 Fed. Reg. 883(1972).

50. Environmental Defense Fund, Inc. v. Corps of Engineers 325 F. Supp. 728, 748 (E.D. Ark., 1971); Sierra Club v. Froehlke 3 ELR 20248 at 20271-72.

51. National Conference on Environmental Impact Assessment: Philosophy and Methodology, Agassiz Centre for Water Studies, Winnipeg, November 1973, e.g. p. 205.

52. See, for example, Winnipeg Guidelines, note 27, supra, p. 15.

53. In 1973, the Ontario Municipal Board, for example, held 1,953 hearings on applications and appeals, and a total of 6,841 orders of the Board were prepared and issued during the year. There were 16 members on the Board for that year. In anticipation of a substantial increase in the rate of applications coming to the Board, its membership has been increased to its present size of 25 members. The Board has also introduced a number of procedural changes to further expedite applications. The Ontario Municipal Board 68th Annual Report (for the year ended December 31, 1973), pp. 3, 5 and 9. Dr. A.R. Thompson, Chairman of the B.C. Energy Commission, has also addressed the question of the size and scope of activities of a future environmental tribunal: "So far as sustaining the earth's life support systems is concerned, the outline of an environmental protection law is now clearly discernible. There will be a rapid development of institutions, both public and private, that will impose environmental standards and ensure their enforcement. The pervasiveness of these institutions will be as embracing as those that now regulate the fields of employee safety and labour relations, and the bureaucracies serving these institutions will be as large. Indeed, because all activities, non-industrial as well as industrial, can have environmental impact, these new institutions and bureaucracies may in time dwarf their labour counterparts. Lawyers will appreciate that this possibility is not fanciful when they learn that the Supreme Court of California recently held that the issue of a building permit by a local government must be preceded by an environmental impact assessment

and a public hearing under the State's new environmental legislation." A.R. Thompson, "Natural Resources and the Ecosystem: Is Ten Years the Future?" 51 Canadian Bar Review 295 @ 303-304 (1973).

See, for example, Conclusions of the Proceedings of the Workshop on the Philosophy of Environmental Impact Assessment in Canada, sponsored by the Environmental Protection Board, Winnipeg, October 1973, p. 58.

In Re Maine Clean Fuels, Inc. (1973) 310 A.2d 736.

56 See, for example, In the Matter of an application by the Hydro-Electric Power Commission of Ontario for a licence to export power under Part VI of the National Energy Board Act to replace the existing licence No. EL-33. [National Energy Board] November 15, 1973, reported in 3 CELN 26 (February 1974).

57 3 ELR 43028 section 484.

58. See, for example, "Airport foes plan court challenge," The Toronto Star, March 19, 1974; remarks by Donald J. Wright, former lawyer for People Or Planes, in explaining the unfairness and incompleteness of inquiries where citizen groups lack financial resources to prepare an adequate representation.

59. The sum of money available to the various Indian groups opposing the James Bay project was approximately $1,000,000, compared with an estimated capital expenditure for the project of between $5.8 billion (1971-72 estimates) and $11.8 billion (1974 estimates). The difference between the two estimates is due not only to inflation, but also, quite significantly, to a subsequent decision by the Quebec government to provide a 20% increase in the final generating capacity of the LeGrande complex. The sum of $1,000,000 was made available by the federal government at intervals to the Indian groups, well before the present $11.8 billion figure for the project had been reached. Our selection of the figure of .01% is based on a ratio of $1 million to $10 billion. If funds were made available to the Indians before the estimated capital cost of the project reached $10 billion, then they were actually funded at a level greater than .01% of the project's total estimated capital cost. The funding was made available not only for legal representations but also for what have been termed environmental impact studies for remedial action. The environmental and Indian groups intervening in the Arctic Gas application have recently received approximately $600,000, with the possibility of further funds from the federal government if necessary. The estimated capital cost of the pipeline is presently $5 billion. Interview with Environment Canada official, Ottawa, September 23, 1974.

60. CELA interview with Joseph L. Sax, Professor of Law, University of Michigan, February 8, 1974 in Ann Arbor, Michigan.

61. California Environmental Quality Act, section 21089.

62. Remarks of the Hon. Otto Lang, federal Minister of Justice, reacting to the 1973 Canadian Bar Association resolution which endorsed a broad

1971), pp. 240-242; Douglas Pimlott, "Offshore Drilling in the Beaufort Sea," report to COPE (Committee for Original Peoples' Entitlement), January 1974.

73. See, for example, the Canadian Bar Association National Resolution on Public Participation in Environmental Decisions, which resolved that "(a) every project having a significant environmental impact be preceded by an environmental impact study, paid for by the proponent of the project and that this study and all other information obtained through public funds be made available to the public," Vancouver, 1973.

74. Report of the Select Committee on the Ontario Municipal Board, 1972, Recommendation XI, p.5.

75. Ibid., p.8.

76. Note 68, supra, @ p. 22.

77. See, for example, "St. James Town verdict cloaked in secrecy," Toronto Star, January 5, 1974, and "Cabinet approves St. James Towers," The Globe and Mail, January 4, 1974.

78. The K.Y.P. Co. Limited Act, 1950, S.O. 1950 c.33, dissolved a court injunction in the case of a pulp and paper mill which was polluting the Espanola River. McKie v. K.V.P. Co. [1948] 3 D.L.R. 201. See also R.T. Franson and P.T. Burns, "Environmental Rights for the Canadian Citizen: A Prescription for Reform" 12 Alberta Law Review 153 @ 169 (1974); and Speech by John A. Fraser, M.P., at the Annual Meeting of the Canadian Environmental Law Association at the University of Toronto, November 27, 1974.

79. Remarks of A.R. Thompson, Professor of Law, University of British Columbia and Chairman of the B.C. Energy Commission, at an Environmental Law seminar sponsored by the government of British Columbia and the Westwater Research Centre at Victoria, B.C., May 13, 1974.

80. See Recommendations of the Canadian Environmental Law Association to the Task Force on Legal Aid for the Province of Ontario, Toronto, March 26, 1974.

81. Larry Green on his own behalf and on behalf of all other people of the province and future generations thereof v. The Province of Ontario and Lake Ontario Cement [1973] 2 O.R. 396.

82. Remarks by Mr. Justice Haines in his review of Canadian Negligence Law by A.M. Linden, 51 Canadian Bar Review 707 - 709 (1973).

83. Canadian Bar Association Resolution Recommending Effective Public Participation in Provincial Pollution Control, 53rd Annual Meeting, Banff, Alberta, 1971.

84. Prof. R.T. Franson, "Standing to Challenge Environmental Degradation," in Ask the People, note 55, supra, p. 58.

85. See note 5, supra.