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

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PURPOSE.

1. The purpose of this Part is to promote the protection and conservation of the natural environment from man's 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 citizens 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 which may have a significant environmental impact 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 Ontario or any municipality

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

(iii)(a) any proposed modifications, construction, alterations, extensions, or replacement to any continuing or operational practices by any person

(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 for use by the Government of Ontario or any municipality.

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

(3) "environmental impact" or "impact" means, notwithstanding section 1(i) of this 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 man 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(2) of this Part.

(4) "Government of Canada" includes her Majesty in Right of Canada and any minister, ministry, department, agency, board, 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, or person acting on behalf thereof.

(6) "Impact assessment" or "assessment" means the procedures as prescribed in this Part by which 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 which may result in an environmental impact.

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 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 this manner. 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 composed of

(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. Notwithstanding any special or general Act, and notwithstanding any licencing, 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 from compliance with this Part.

5.(1) Every proponent of an action shall submit to the Board, no later than the feasibility or planning study stages thereof, an affidavit containing 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, whether or not the action has been exempted by regulation under this Part from the application of this Part. 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) Neither the Government of Ontario, nor any ministry thereof as defined in this or any other special or general Act, nor any municipality shall request funds, nor shall any of the above which authorize expenditures 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.

6. One or more members of the Board on behalf of the Board or a person or persons designated by the chairman shall examine the affidavit referred to in section 5, and he or they may consider without a hearing or notice any other relevant information which may come to his or their attention. He or they shall by order compel the proponent to comply with the further provisions of this Part, 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, he or they shall order a preliminary hearing.

7. In examining the information and plans pursuant to sections 5 and 6, or in making an order pursuant to section 8, the member(s) of the board or person(s) so doing shall require that an environmental impact assessment and statement be prepared where he or they find(s) 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 resouces;

(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 any noise, hazardous or toxic substances, radiation, air, land, or water contamination, or waste products which require disposal;

(g) have any adverse effect on health or safety in any factory, office or other workplace;

(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 or any regulation exempting an action from the application of this Part, by order compel the proponent to comply with the requirements of this Part, and the Board shall make such an order where there is a prima facie case that one or more of the 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 assessment is ordered or required, the proponent shall prepare at his expense 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 curtail 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 action.

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

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 significantly impact the environment or pose a threat to public health, safety or welfare and that each of the criteria specified in section 17 are met.

(2) Subject to sections 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;

(b) The proponent 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 approved or adopted by the Governments of Ontario of Canada 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 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 imme-

diately 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 from the Hearing Assistance Fund.

(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 status 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.

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, con-

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

tractors and sub-contractors, any municipality, any person likely to benefit from the proposed action, and 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 who fails to file a full and comprehensive list of materials and two copies thereof is guilty of an offense.

(2) Every such person 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 36 inclusive 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 24.

23. Any person may, within 30 days of the Board's giving notice of a proposed hearing, inspect and copy during normal business hours 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 under section 22.

24. 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 upon hearing submission 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 indentifying 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. For the purposes of production and filing of documents and of determining privilege pursuant to this Part, rules 347 to 352 inclusive of the Rules of Court apply except insofar as they are inconsistent with this Part in which case this Part shall govern.

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, 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 or is about to participate in a proceeding under this Part.*

26. 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 any municipality or in the possession thereof, purporting to be certified under the hand of the proper officer, or 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.

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 manner 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 under the Public Service Act.

* See Appendix B

(2) The Public Service Act, except sections 4, 6 and 10 applies to employees of the Board, but not to members of the Board. Where anything in the Public Service Act is inconsistent with anything in this Part, this Part prevails.

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 be 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 interest 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.

(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 a conflict, 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. Sections 24 and 25 of the Ontario Municipal Board Act, R.S.O. 1970 chapter 323 as amended apply.

38.(1) The Lieutenant-Governor in Council shall from time to time, upon the recommendation 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 recommendation 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. Sections 28 and 29 of the Ontario Municipal Board Act R.S.O. 1970 chapter 323 as amended apply.

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. Sections 33, 34 and 35 of the Ontario Municipal Board Act R.S.O. 1970 chapter 323 as amended apply.

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 officers 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, so far as is not inconsistent with this Part, 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 shall 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, in the prescribed form, whereupon the interim or final order or direction shall be entered in the same way the judgement or order of that court.

ENFORCEMENT

54. After an interim or final order, decision or direction has been entered, it is enforceable by a 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. 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 offense and on summary conviction is liable on a first conviction to a fine of not more than $5,000.00 and on each subsequent conviction to a fine of not more than $10,000.00 for every day or part thereof upon which such offense occurs or continues and is subject to any other remedy provided or contemplated, arising from this Part.

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

* See Appendix A: Suggested Amendments to Legal Aid Act

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 recommendation 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 in so far 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. Notwithstanding anything in this or any other special or general Act, on and after the date of this Part being proclaimed in force the Environmental Review Board appointed pursuant to this Part has sole jurisdiction to determine any matter which this Part gives it jurisdiction to determine whether commenced under this or any other Part of the Environmental Protection Act or under any other Act, except that where a tribunal under any other Part of the Environmental Protection Act or any other Act, has heard any evidence in such a proceeding, such tribunal retains jurisdiction for the purpose of completing the proceedings.

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.

* See Appendix A

APPENDIX A

Suggested Amendments to the Legal Aid Act, R.S.O. 1970 and regulations, as amended, pursuant to sections 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. Section 39a(iv), 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 cases 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

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 advance, 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, M.P. 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. 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.

Section 2(1)

The term "action" as used in this Part is not to be confused with "action" as defined in the Judicature Act.

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, Maple Mountain, the Arnprior Dam, or James Bay. 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 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]

The application of the provisions of such a bill to "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 threatened 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.

Sections 3(4) and (5)

After four years' experience with the U.S. National Environmental Policy Act (the U.S. statute requiring environmental impact assessments), a prime deficiency has become apparent 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.[13]

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.

The Federal Task Report of 1972 argued strongly that if an Environmental Review Board is to fill its proper role in the process of environmental impact review, "its independence must be assured and must be obvious. Accordingly, its members must be appointed for their expertise and disinterest."[14] 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."[15]

Methods of establishing 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,[16] or at least the subjection of its members to evaluation by a standing committee of the legislature and ratification by the whole legislature.

Section 5(1) and (2)

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.[17] 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.

Regulations can, of course, exempt classes of clearly trivial matters. But for gray area[18] 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."[19] 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.

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.[20]

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.[21]

Section 5(2) is also designed to avoid the same problem, and is derived from a similarly worded section of the California Environmental Quality Act of 1970.[22] City of Winnipeg Guidelines[23] also recognize the value of this early stage of control of government proposals by tying environmental statements to budgeting requests.

Section 7

This section sets out a number of conditions which, if met by a particular proposal, would cause it to require and environmental assessment. Several court decisions,[24] the U.S. Council on Environmental Quality,[24a] the California Environmental Quality Act,[25] and statements by Ontario officials[25a] enumerate many of these factors, especially with reference to their cumulative effect.

7(k): Several Canadian sources have similarly recognized this cumulative index.[26]

7(i): New technologies and establishment of pilot projects were recognized by a recent U.S. federal decision[27] as requiring assessment.

Sections 8(1), (4) and (5)

As CELA has noted previously,[28] a serious difficulty arises with a discretionary screening mechanism[29] 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, of which some will be significant and others will not.[30] 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."[31]

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.

Section 8(4) and (5), with appropriate changes for their inclusion here, are from the Ontario Health Disciplines Act, 1974.[32]

Section 11

The requirements laid down here for the contents of an impact statement find support in the provisions of several U.S. statutes,[33] the U.S. Council on Environmental Quality Guidelines,[34] and the City of Winnipeg Guidelines.[35]

With respect to section 11(i), for example, support for the inclusion of this requirement comes from the California Environmental Quality Act,[36] the U.S. Environmental Protection Agency,[37] and several court decisions.[38] The concern expressed in section 11(i) was also acknowledged during the proceedings of a recent national conference on environmental impact assessment in Canada.[39]

Section 12

The requirement that environmental impact statements be comprehensible to the general public has been supported by many sources.[40]

Section 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.[41]

The wording for this section comes from a recent decision under the Maine Site Location Act[42] referred to earlier.

Section 17

The impetus for this section comes in part from recent decisions by Canadian tribunals. They have tended to ignore the dis-economies of proposals from an environmental and social standpoint, which are often greater than the expected economic benefits of such proposals.[43] As with the requirements in section 15(1), the responsibility for provision 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.

Section 17(b) is derived substantially from a similarly worded section in the Maine Site Location Act.[44]

Section 19

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, 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.[45]

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.[46]

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 .1% of capital costs might be necessary in certain instances.[47]

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.[48] 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.

Section 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."[49]

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[50]:
>
> "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.[51]

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.[52]

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.[53]

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[54] should enable them to deal adequately with this concern.

Sections 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.[55]

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".[56]

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.[57] 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.[58] In an environmental context, this is simply unacceptable. Irreversible damage can often be prevented if information is made available in time.[59]

Section 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 in 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."[60]

Sections 27-53

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.

Section 28(2)

Neither the members nor the employees of the Board are bound by section 10 of the Public Service Act. This "oath of secrecy" section forces all civil servants to swear not to give any person any information or document that comes to his knowledge or possession by reason of his being a civil servant.

The result is that civil servants are afraid to give even harmless 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.

Section 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 at least two members."

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."[61]

Section 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.

Section 57

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

Section 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 2(1) of the Judicial Review Procedure Act, as well as to appeals under section 25(1) of the Statutory Powers Procedure Act.

Section 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.[62]

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.[63]

Section 60

The effect of this provision would be to institute a "one way cost rule."[64] Citizens bringing bona fide objections would otherwise be unreasonably hindered, or prevented from receiving a full and fair hearing, by the threat of costs.[65]

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[66] 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."[67]

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.

Sections 61 and 62

The requirements set out in these two sections, relating to regulations under this Part, do not pretend to be exhaustive. The principle which it is, however, 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[68] as well as other sources[69], 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.

NOTES TO COMMENTARY

Section 1

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.

Section 2(1)

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).

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.

9. Note 1, supra.

10. Anderson, pp. 290ff.

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. 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.

14. Task Force Report, pp. 6-7.

15. Ibid., p. 10.

16. Ibid., p. 10.

Section 5(1)(2)

17. 38 Maine Revised Statutes Annotated section 483; 3 Environmental Law Reporter 43027, section 483.

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

19. CEQ Guidelines, section 1500.6

20. 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.

21. 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 y. The James Bay Development Corporation and the Attorney General of Canada 3 CELN 3, 17-18 (Quebec Superior Court), November 15, 1973.

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

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

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

24a. CEQ Guidelines 1500.6.

25. California Environmental Quality Act 21083.

25a. 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.

26. 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, 1973; Federal Task Force, p. 5.

27. Scientists' Institute v. AEC.

Section 8(1), (4) and (5)

28. 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.

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

30. Ibid., p. 11.

31 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.

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

Section 11

33. 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.

34. 1500.8.

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

36. Note 1, supra, 21000 g.

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

38. 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.

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

Section 12

40. See, for example, Winnipeg Guidelines, note 23, supra, p. 15.

Section 15(1)

41. 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.

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

Section 17

43. 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).

44. 3 ELR 43028 section 484.

Section 19

45. 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.

46. 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.

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

48. California Environmental Quality Act, section 21089.

49. Remarks of the Hon. Otto Lang, federal Minister of Justice, reacting to the 1973 Canadian Bar Association resolution which endorsed a broad definition of standing, in environmental matters, before courts and tribunals. February 13, 1974; reprinted in The National

50. Thorson v. Attorney General of Canada S.C.Can., January 22, 1974, 43 D.L.R. (3rd)1 at 6 and 7, summarized with comments in 3 CELN 57.

51. Stein v. City of Winnipeg 3 CELN 95 [Manitoba Court of Appeal] June 10, 1974.

52. R.S.B.C. 1970, ch. 36, sections 13(1)(2)(4)(6) as amended. See Lucas/ Utah Controversy, supra, pp. 39, 42, 49, 50, 51, regarding the restrictive application of these standing provisions in one particular case by the B.C. screening body set up under the Act.

53. See, for example, Sierra Club v. Morton 405 U.S. 727 (1972).

54. See the "Sandbanks" case, Larry Green v. The Province of Ontario and Lake Ontario Cement Limited 2 OR 396 (1973). Though it was dismissed as frivolous, few would view the facts of that case as did the court. See Environment On Trial, published by the Canadian Environmental Law Association (1974), pp. 197-198.

55. A.R. Thompson, "Freedom of Information," in Ask the People, a paper presented to the workshop on Canadian law and the environment, Banff, Alberta, March 5-8, 1972, sponsored by the Westwater Research Centre and Environment Canada, pp. 17-37.

56. Canadian Bar Association National Resolution, note 4, supra.

57. 5 U.S.C.A. 552(2)(c).

58. Dr. D. Thompson, "The Scientist, the Civil Servant and Public Participation," in Ask the People, note 55, supra, pp. 4-9.

See also "Clear the air on pollution enforcement," editorial in the Toronto Star, November 10, 1973, on the dismissal of provincial air inspector Ross Mackenzie.

59. J. Sax, Defending the Environment: A Strategy for Citizen Action (New York, 1971), pp. 240-242; Douglas Pimlott, "Offshore Drilling in the Beaufort Sea", report to COPE (Committee for Original Peoples' Entitlement), January 1974.

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

61. Ibid., p.8.

62. 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.

63. The K.V.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.

64. 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.

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

66. 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.

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

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

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