

October 23rd, 1974.

MEMORANDUM ON ENVIRONMENTAL IMPACT ASSESSMENT

To: STAFF AND MEMBERS OF THE CANADIAN
MANUFACTURERS' ASSOCIATION.

The CMA had concerns about some of CELA's recommendations in its brief on Environmental Impact Assessment (EIA) to the Ontario Ministry of the Environment. As you know, EIA procedures will become law in Canadian jurisdictions very soon. They are now being considered at the Ontario and Federal levels. But have you considered the benefits that environmental impact assessment will bring to the business sector:

- (a) many corporate leaders recognize that environmental quality is in the best interests of the community which is, in turn, in the best interests of the corporation;
- (b) it is to the benefit of industry to have serious flaws in its proposals discovered at an early stage in the planning process, rather than when the proposal is complete. A completed environmentally damaging project which creates a political backlash may cost industry more in terms of later financial commitments and lost credibility in the public eye.
- (c) One important approval early on from CELA's proposed EIA review Board will speed up the other many necessary approvals which normally cause costly delays. (More on delays below).

We believe our proposals are in the public interest and we have the research to back us up. Here are the recommendations in question and our comments:

1. Recommendation on standing

"That any person should be able to require the board to consider whether a proposed project needs an environmental assessment or (if an assessment has been filed) whether it adequately explains environmental effects."

Comment:

The argument in opposition to changes in the rules of standing suggest that the most essential economic developments could be frustrated by individuals without any demonstrable interest in the project.

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This argument misses the heart of the environmental problem. The critical question is, for example, "why is a proposed action, which may have a substantial effect upon the environment, not required to comply with the impact assessment process?". Whether a citizen who has decided to intervene is living on the land to be flooded by a given dam is irrelevant, logically, and should be legally, to a consideration of the public policy issues involved.

The absence of a traditional property interest alluded to above hardly suggests that intervention is inappropriate. What about a proposed program of ocean dumping? What about radiation contamination or the possible destruction of endangered species - potential environmental problems which affect all citizens in common. Who then, by existing standards, would have standing to challenge such destructive acts in advance.

There has been recent judicial cognizance in Canada of the need to broaden standing in this context. Mr. Justice Bora Laskin* was cited by Matas, J.A., in Stein v. City of Winnipeg:

As for the suggestion that there would be a proliferation of law suits, Laskin, J., said...

"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

(The City of Winnipeg in) Sec. 653 [of the City of Winnipeg Act] 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.

These Canadian judicial decisions support CELA's position on standing. In other jurisdictions where the laws of standing have liberalized, the courts have not been flooded as predicted.

Closely related to the question of standing, and touched on above, is the concern about delay. We want to avoid delays too because they are not in the best interest of the environmental movement either; delays are costly and environmentalists have less resources than the corporate sector to cope with prolonged haggling.

*Thorsen v. Attorney General of Canada, S.C. Can., Jan. 22, 1974.

Corporations will not object to a measure of certainty being interjected into the approval process such that they will know what kind of time frame they are talking about. Here's what our researchers have found:

When opponents of environmental law reform discuss delays they refer to the American model. After four years' experience with the U.S. National Environmental Policy Act (the U.S. statute requiring environmental impact assessments), 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.

To eliminate one major source of these delays, we have recommended an independent review body which will require the various project proponents to deal with the EIA procedures in a serious way. This will usually eliminate the necessity for adjudication by the courts which in turn will curtail unnecessary delays.

The second and perhaps major source of delay in the U.S. model has 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.

With respect, the point at issue should not be procedural skirmishing on standing which is time-consuming and expensive and which distracts attention from the important environmental question. Changes in the rules of standing (explained above) can eliminate this major source of delays.

Finally, the power of the proposed Board and the Courts to dispose of "truly frivolous" objections should enable them to deal firmly with such problems.

2. Recommendation on Access to Information

"that public access to all information about proposed projects must be guaranteed."

Comment:

Even opponents to this legal reform would admit that without access to relevant information the EIA process would be a farce. The effects of inadequate information has been dealt with adequately by A.R. Thompson,

Chairman of the British Columbia Energy Commission in "Freedom of Information", in Ask the People* His position was supported by the Canadian Bar Association as it related to EIA procedures and to "all other information obtained through public funds."

Your members are concerned about trade secrets. We share your concerns. CELA, for example, thinks that it is wasteful to have research, funded by your tax dollars, kept locked in a closet where it cannot be of benefit to your company, perhaps because of implicit or explicit criticisms of the government.

CELA would adapt aspects of legislation in other jurisdictions for use in Canadian jurisdictions taking care to protect your company from unwarranted and damaging invasions of privilege when you supply the Board with information.

3. Recommendation pertaining to public funding.

"Public or private funds should be available to objectors acting in the public interest."

Comments:

Much has been written recently about the "crisis of confidence" in governments at all levels. Regardless of the extent of this crisis it is fair to observe that society faces problems associated with "rising expectations" with regard to the degree of participation that the public has in the formation of environmental decisions. Failure to permit this participation has created friction in the system. One corporate president told us that "if it takes the heat out of the process, I'm for it".

Therefore, if we assume 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.

One possible way of cutting such citizens' costs would be to mandate that, since government experts (civil servant or scientists) are government employees, their knowledge is in the public domain and should be available to all without charge, e.g. as expert witnesses for opponents.

*a paper presented to the workshop on Canadian Law and the Environment (see p.42 #55)

Funding for such participation may not be large but would be a solid beginning based on several reliable precedents. These costs could be paid by the proponent of the project (if public, by the Government and, if private, by the developer) and could be considered as a cost of development. Thus the costs could be internalized so that those who would benefit from the project would pay for the benefits of the project. Many of the corporate leaders that we have talked to support this. They see this suggestion as being reasonable and fair and, providing that everyone plays by the same rules, they support this proposal.

Conclusion

When CELA approaches firms for funding support, we do so as the major public interest association in Canada doing research and gathering expertise in environmental law. Our achievements are a matter of record. In assessing your position, perhaps you might consider a quotation from G. Alex Jupp, Director of Public Affairs for the Molson Companies Limited, in his letter informing CELA of a grant for its law reform group. Mr. Jupp says:

We consider the formation of public interest associations, such as CELA, vital to the resolving of conflicts which are inevitable in such areas as industrial development. The implications of environmental assessment are too significant to be left to governments and corporations who should have nothing to fear from objective analyses motivated by the public interest. To contend otherwise would be to confess that there is something inherently contradictory about the pursuit of corporate enterprise within the wider context of public good.

We trust that these comments answer many of your questions. If you require further information we will be pleased to provide a more detailed response.

In closing, environmentalists have been accused of not interacting with the business sector. We think the CMA should be complimented for encouraging this responsible process and for giving CELA the opportunity to comment on the earlier CMA memorandum.

Yours sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Gar Mahood,
Executive Director.