Brief also annotated

Dear Joe:

These comments are going to be candid, and I hope you won't be offended. I do think that if you look for a positive response from anyone on this brief, there are sections of pretty unprofessional mud-slinging that you should think pretty hard about. They don't add a damn thing, and they damage the whole tone of the report. I refer in particular to passages on the following pages:

1, 2, 9, 13 especially

Next - you refer on page 3 (in passing) and commencing p. 8 (in depth), to the specific government proposals for the program. As I have said, there are not going to be any specific legislative proposals forthcoming at this stage. The draft that was worked on this summer, does, of course, still exist on paper, and I suppose that if that particular approach is selected by those who respond to the Green Paper, as the preferable one, that draft will be revived. But right now, it would not be accurate to say "This is what the gov't is proposing." It simply is not what the gov't is proposing.

However, the points you make, which are now seated in language of criticism of substantive proposals, are points which must be made. The difference is that they should become positive assertions of what the legislation must include, and what approaches it must avoid.

to write the brief, but I would like
ats of the program that you should
ements on:

on on p.9, the possibility of exempting
projects from EA's is potentially dan-
hardly think, as I noted on the page itself,
will purposely exempt the ~~most~~ projects
nvir'tal impact). Why don't you
specific criteria you would like to
the legislation for defining "significant
mpact", and the way you would
exemptions clause drafted (because
some formulation for the cut-off between
ing assessment, and those which don't -
nciple, you'd need an approval before
a private swimming pool in your
ome suggested criteria might be:
y value of project
(in acres) affected
e of emissions produced by process, etc.

's last quote,

(2) I think the judicial review v pure discretion aspect deserves mention as a separate issue. It really hasn't much to do with class exemption by regulation. And you could elaborate more right at this point on the necessity for the courts of law to be guaranteed the last word on questions of law, at the least.

You haven't made any mention of the Statutory Powers Procedure Act, or the Judicial Review Act. I would suggest that you make it clear that you want any hearing body to be constituted so that it is a court of record and falls within the qualifications for review under one or both of these Acts.

(3) At p 12 - you mention "the proposed envir'tal hearing tribunal". There isn't one - the question is open. Your comment on the nature of its members is extremely important and needs pressure. But the whole point needs to be rephrased to state that E.A. does call for a hearing board, and then to specifically describe the legal nature you want. Features needing discussion:

(1) makeup
(2) guaranteed salaries
(3) no. of members and proposed quorum
(4) assurance that decisions/recommendations be made only by those members who heard evidence
(5) power of subpoena; power to take ev'ce under oath or not.
(6) guaranteed protection for civil servants called to testify.

(7) locations of hearings
(8) provision for charging costs if complaints are frivolous, as one way to demonstrate good faith of proponent and opponents

The third point (p 12) wrt information disclosure, is of critical importance. But the way it is written it tends to be just a general criticism of secrecy of government documents; it loses much of its impact because it isn't specific enough. Think about exactly what parts of the E.A. documentation you should be guaranteed to see, and list them. Think about provisions for notice from the gov't or project proponent, of the availability of these documents - how it should be given, to whom, etc.

I would suggest making a footnote out of the American legislation you cite as exemplary (pp 14, 15) - because it is illustrative of good practice, but does not relate directly to E.A.'s, and the length of the discourse tends to distract concentration from the immediate issue.

Your "fourth deficiency" is well put, except that you'll have to make it into an assertion of what should be, rather than a criticism of [redacted] a schema that is not at issue. And in the third paragraph on p 17 you revert to a general criticism of lack of government action in altering general common

law doctrines. If you can tighten this paragraph up so that it applies to the way you want to see "interest" defined, or standing provided for, in this particular legislative program, it will carry far more force. By expanding the terms of reference of the brief to this extent, you again only distract attention.

Points you haven't mentioned at all:

Who do you think should do the E. I. A.?
- proponent; independent consultant? - gov't?
Who should review it? - gov't?
- ~~an~~ hearing board?
What nature should the hearing board have?
- independent quasi-judicial?
- advisory to Minister only?

What exact elements do you want to see discussed in the assessment?
How much do you want to see in the body of the Act, and what elements would be better enacted as regulations?

Do you want to mention that when E.A.'s are publicized by notice, they should be worded in popular language so that the man in the street knows exactly what is proposed?

Do you want to make any creative comments/ suggestions as to how to integrate a comprehensive E.A. with the limited licensing/approvals functions which might still apply?

Any novel ideas for notice-giving to reach the public at large? And how about emphasizing that notice provisions must be specifically written in, not left to discretion.

You don't come down hard on the necessity for public hearings before approval of a proposed project, if there are non-frivolous objections. I would think this would be worth discussing before you get into judicial review of the final approval, or power to prosecute in case of breach of the terms of the approval.

It would be more persuasive if you used Canadian legislation as examples of points you want to make, rather than always American. See the Manitoba Clean Environment Commission act, Alta. Environment Conservation act, B.C's Environmental Bill of Rights, Ont OMB act, Planning Act, Labour Relations Act (hearing procedures, powers of subpoena, etc).

That's about all I can manage. I will call you later this week (Tues or Wed) about these comments.

Marilyn