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Canadian Environmental Law Research Foundation

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THE NEED FOR PUBLIC PARTICIPATION IN ONTARIO'S ENVIRONMENTAL PLANNING.

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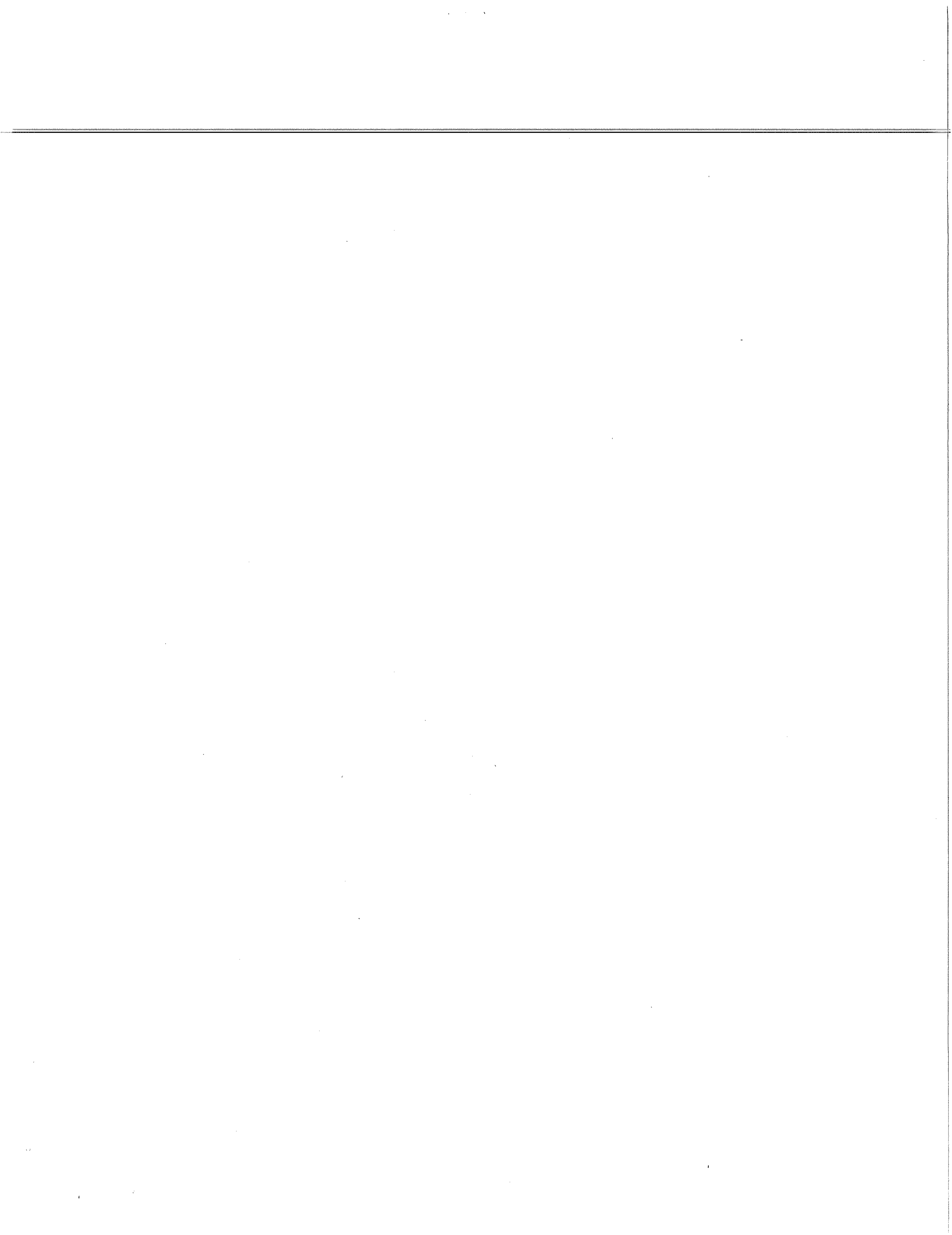

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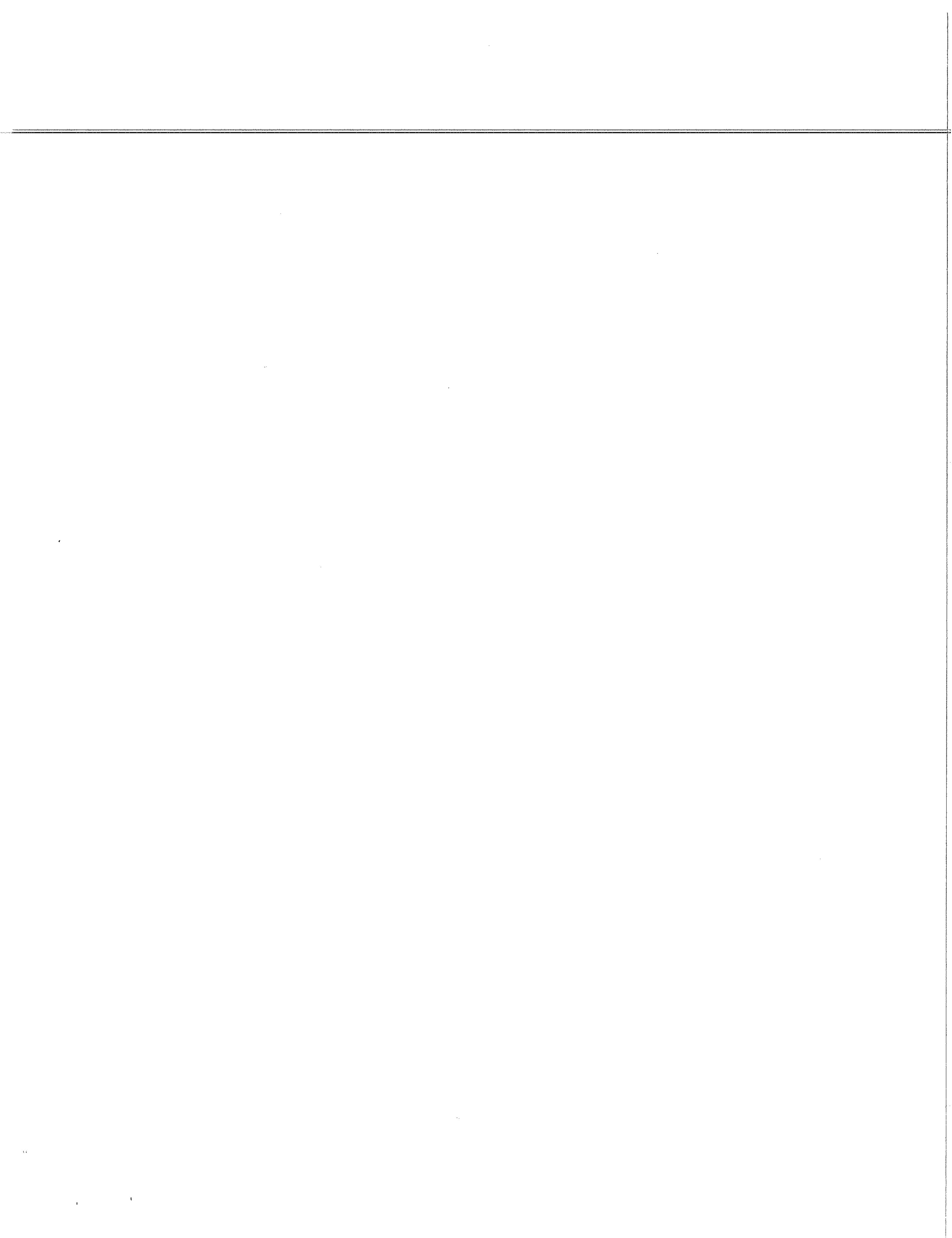

I THE NEED FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL PLANNING. PERSPECTIVE OF C.E.L.R.F.

The Canadian Environmental Law Research Foundation is concerned about the total absence of adequate provisions in the Environmental Protection Act, 1971, and other Ontario legislation, providing interested and directly affected members of the public a meaningful role in the process of setting regulatory effluent standards and in the granting of specific administrative orders or approvals specifying acceptable levels of pollution.

There are three major arguments that underlie our belief that direct public participation in the decision making process is a fundamental prerequisite to the validity of the decisions.

(1) Citizens whose property and health are directly affected by government planning should be accorded a means of presenting their interests before the planning process.

(2) The direct inclusion of the public in the decision making process affords a greater measure of insurance that all competing interests are thoroughly canvassed.

(3) The burgeoning bureaucracies with inordinate expertise are evolving toward an operating stance that protracts the schism between governed and governing. This schism is in itself a serious problem besetting the political order of the twentieth century. Thus any means of involving public participation regardless of whether such involvement is solution productive of specific problems is simply by involvement ameliorating a larger problem; the demise of participatory democracy and consequent rise of bureaucratic insensitivity fostering public discontent.

Major questions of environmental planning are only properly posed when the public is directly involved throughout all problem solving inherent in evolving the major questions.

SPECIFIC REFORMS

Adequate means of public participation do not require elaborate or innovative new techniques, but simply an adoption of procedures employed and proven in the past.

(1) NOTICE - Before any decision is to be made concerning establishment of regulatory effluent standards or granting of approvals for pollution programmes the public must be given suitable notification in order to consider presenting their particular views.

(2) HEARINGS - If the consequences of a government decision affect in a substantial or major manner the interests of a particular citizen or a particular group of industries or taxpayers then such individuals and interests should be granted a forum to present their views, cross-examine opposing views and question proposed plans by submission of feasible alternatives. Such a proceeding sensitizes the decision making process to the needs of all sectors of the community, lends the citizen a role in the process, fosters a thorough evaluation of plans through the criticism of persons not beset by the tasks of daily administration or blinded by the confines of a narrow specialized expertise; and finally the process raises to a higher profile the underlying policy objectives of the planners.

(3) PUBLICATION OF GOVERNMENT DECISIONS WITH SUPPORTIVE REASONS

To evaluate the process of administrating and to gauge the success of a particular policy all administrative decisions that substantially affect public interests must be articulated for public consumption.

II BASES FOR REFORMS

Arguments supporting the recommendations are based on principles of common law; analogies to procedures existent in Ontario in similar areas; established practices in other jurisdictions that indicate the trend of administrative practices and finally the requirements of public policy as weaned from notions of participatory democracy.

II (a) Common Law Requirements

The crux of public participation is a Hearing. Once the right to a Hearing is established, notification and publication of decisions is generally acknowledged as concomitant rights to the Hearing. Thus the focus of extraction of arguments from the common law for public participation is based on the right to a hearing.

Both English and Canadian Courts have jealously guarded against legislative encroachment on the notion of affording all citizens the dictates of natural justice whenever his property rights are directly affected.

The decisions of the courts suggest a bias pursuing the requirement of a hearing. In the face of a plethora of different legislative schemes the resultant effort of the courts to preserve the dictates of natural justice have imposed an inordinate extent of confusion encompassing the critical question when an hearing is or is not required by law.

As one learned author on the subject has stated in response to this question. (1)

> "...The confused tangle of jurisprudence that this simple question has produced reflects the vigour and sublety of the law and also its inability to extricate itself from the maze it has created..."

This dilemma has also been recognized by Chief Justice McRuer in his Inquiry into Civil Rights. (2)

> "...Until the courts have made a decision it cannot be said with certainty whether the rules of natural justice do or do not apply to a particular statutory power of decision..."

Although the task may be difficult, it is not hopeless. There can be an abundance of jurisprudence on this subject and although it can be fairly stated that there is no one particular formula which can be applied in all cases, a careful review of the cases will reveal that certain discernible guidelines can be established.

Generally the courts have taken two approaches to this problem. The first is to look at the tribunal itself and determine what kind of power it is exercising. It is not enough to look at the board and say this is a board primarily charged with administrative powers. As stated by Mr. Justice Rand in <u>L'Alliance des Professeurs Catholiques de Montreal v La Commision de Relation Ouvriers de la Province de Quebec et.al</u> (3)

> "...in the complexity of government activities today a so-called administrative board may be charged not only with administrative and executive but also judicial functions..."

It has been fairly well established that there is no right to a hearing when the tribunal is exercising a purely administrative function. Putting it another way, the courts have said that there is an inherent right to a hearing where the tribunal is exercising judicial or quasi-judicial functions (4). It is necessary then to classify the function being performed by the decision maker. Is it purely administrative or is it judicial or quasi-judicial? The following guideline (5) has been adopted by the Ontario Court of Appeal(6) (6a):

> " A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by law; and law means statute or long settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence', (as tested by long settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal ... In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders not on legal rights and liabilities but on policy and expediency... "

A judicial tribunal looks for some law to guide it; an administrative tribunal within its province, is a law unto itself.(6b)

More light is shed on this classification problem by the Ontario High Court (7).

> "...An assessment tribunal acts judicially when its duty is to assess land at its net annual value; for it is governed by a fixed objective standard ascertainable by evidence. But a tribunal acts administratively when empowered by statute to assess a taxpayer whose income is not ascertainable upon such percentage of his total receipts as the tribunal in its judgment thinks proper. For its only measuring rod is purely subjective and arbitrary..."

The rule to be derived from this case then is that where a decision maker is governed by fixed objective standards he will be acting judicially since he will be applying those standards to the facts of the particular case and he will be under a duty to follow those procedures inherent in a judicial process - i.e. the rules of natural justice which require that an aggrieved party be given a hearing.

In his Report, Chief Justice McRuer made the following distiction between administrative and judicial powers:-

> "...A power is administrative if, in the making of the decision, the paramount considerations are matters of policy... It is in the sense of a specific legislative power to make decisions that we use the expression administrative power... (8)
>
> "A power is primarily judicial where the decision is to be arrived at in accordance with governing rules of law; in their application policy enters in only to the extent...

> ...[that it bears on the question of the interpretation of the rule or principle on which the decision is based] (9)

In order to determine what kind of power a tribunal is executing, a court will look at the enabling statute and any rules or regulations passed thereunder. Very often the statute itself will provide that a hearing must be held before the tribunal or board, as the case may be, can make a decision affecting citizens' rights or liabilities.

However, where no hearing is expressly provided for, the tribunal cannot hide behind the silence of the statute. (10) This rule, which has been adopted by the Supreme Court of Canada (11), has been expressed by Maxwell (12) in the following words:-

> "In my opinion nothing less would be necessary than an express declaration of the Legislature in order to put aside this requirement (i.e. a hearing) which applies to all Courts and to all bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual."

In L'Alliance case a union moved to request prohibition of the revocation of a certification order on the ground that no hearing had been held. By virtue of s.41 of the Labour Relations Act, S.Q. 1944 c.30, the Board had the authority to revoke a certification order for cause. The union had been engaged in a strike contrary to the Public Service Employees Disputes Act, S.Q. 1944 c.31.

The Board considered this just cause and therefore upon the application of the co-respondent (Catholic School Board of Montreal), the Labour Board revoked the certification order. Without dwelling upon the merits, i.e. whether there was in fact just cause, the Supreme Court of Canada noted that the statute was silent regarding the necessity for a hearing and held that the Board had acted without jurisdiction by revoking the certification without a hearing.

In his reasons for judgment, Mr. Justice Rand, after noting that an administrative board may be charged with judicial functions made the following statement. (13)

> "When of a judicial character they affect the extinguishment or modification of private right or interests. The rights here, some recognized and others conferred by statute, depend for their full exercise upon findings by the Board; but they are not created by the Board nor are they enjoyed at the mere will of the Board; and the Association can be deprived of their benefits only by means of a procedure inherent in judicial process."

Mr. Justice Fauteux made the following statement: (14)

> "It is a rule that the application of the principle audi alteram partem is implied in the laws attributing judicial functions to an administrative body."

As adverted to previously the characterization of a tribunal's actions as either purely administrative, judicial or quasi-judicial is a two-pronged test.

The first test discussed earlier is on what basis does the tribunal decide - i.e. primarily on law or primarily policy. As this test is not often decisive the courts also apply a second test. This test is to classify the tribunal's action by simply looking at the effect of the decision. Does it create new rights and liabilities (or) does it alter or extinguish existing rights or liabilities? For this purpose a judicial act has been defined as (15)

> "...a pronouncement, finding or order binding upon the parties and imposing a legal obligation or otherwise affecting property or legal rights of individuals..."

In L'Alliance, the court was concerned with this second test. The court held that the Association could not be deprived of their benefits without a prior hearing.

In Cooper v The Board of Works for the Wandsworth District, (1863), 143 E.R. 414, notwithstanding a statutory requirement to inform the Board of Works within seven days of an intention to build, the plaintiff began constructing a house without notifying the Board. The Board acting strictly within the terms of the statute, demolished the plaintiff's buildings without prior notice or warning. The plaintiff sued the Board in tort arguing that because the Board had not followed the rules of natural justice their decision was ultra vires and therefore they were liable for their torts like any other individual. The court acceded to the plaintiff's argument that "no man is to be deprived of his property without having an opportunity to be heard." The reason for the statutory power to demolish was to enable the Board to ensure that certain planning, health and safety standards were complied with before commencing construction. The court reasoned that it would not make sense to allow the Board to exercise a power with such "enormous consequences" if the house met with the standards but the owner had simply forgotten to advise the Board of his intent to build.

In Cooper, Chief Justice Earle listed three advantages in holding a hearing (16)

> "The advantage in the public order, in the way of doing substantial justice, and in the way of fulfilling the purpose of the statute."

In regard to the third advantage, namely carrying out the purpose of the statute the judge obviously felt that Cooper may have been able to add something worthwhile to the hearing.

From the Board's point of view, the judge could not conceive of any harm coming from hearing a party who may be liable to suffer serious property loss.

A similar fact situation arose in Knapman v Board of Health for Saltfleet Township [1956] S.C.R. 877.
Under fairly broad statutory powers the Board of Health ordered that certain cottages be closed and the occupants forcibly ejected without giving them an opportunity to know the reasons for the order, or an opportunity to answer the allegations. Mr Justice Cartwright stated at p.879, unequivocally that the Court would require the plainest words to enable it to impute that such opportunities were not to be given to the affected parties. Because the order would seriously affect the owner's property rights and because the decision was required to be made on certain specific grounds, (namely the existence of a danger, nuisance, or dwelling unfit for human habitation) it was not only fair to hold a hearing but sensible since the plaintiffs would have something to contribute.

In Calgary Power v Copithorne [1959] S.C.R. 24, the Court relied on a two-pronged test to determine whether certiorari lay. Not only must there be proprietary rights affected, but there must be superadded a duty to act judicially. Implicit in such a test is circuitous logic for to hold that to act judicially depends on whether or not there is a superadded duty to act judicially begs the question. Ridge v Baldwin [1964] A.C. 40 attempted to resolve the confusion of Copithorne by positing that the duty to act judicially is to be inferred from whether or not the administrative body makes decisions affecting the rights of individuals.

In Spackman v Plumstead Dist. Bd of Works (1885), 10 App. Cas. 229, the question raised was whether a certificate fixing a general line of building and issued by the superintending architect of the Metropolitan Board of Works pursuant to the Metropolis Management Act was conslusive. The Act provided that such general line of buildings beyond which no building should be erected without the consent of the Metropolitan Board of Works was to ~~be decided by the architect.~~

The statute was apparently silent as to the procedure to be followed by the architect in reaching his decision. Concerning that feature of the statute the Earl of Selborne L.C. at p.240 said:

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially."

In the face of legislation specifying procedures without provision for Hearings, the Courts have rigorously attempted to inject into the Administratvie Agencies'proceedings a requirement for Hearings. Whenever the court can ascertain that specific property rights of an individual are affected, a hearing is usually imposed.

Without unduly stretching the rationale or language of the cases, important similarities can be drawn between the notion of private property rights and personal benefits referred to in the cases discussing rights to Hearings and the citizen's right to enjoy his property and his environment, free from onerous effects of pollution. Through orders or approvals the Government acts to sanction a level of pollution that adversely affects the rights of private citizens in the enjoyment of their property.

It must be remembered that the Hearing does not serve to deny the exercise of legislative discretion in regulating the environment. The Hearing merely serves to provide affected individuals with a means of expressing their particular interests and challenging proposed plans of the government by raising possible unforeseen costs, and arguing for alternative plans. In Cloverdale Shopping Centre Ltd. (1966), 57 D.L.R. (2d) 206, the Court did not disturb the decision of the O.M.B., having acknowledged

that the purpose of the hearing was not to deny administrative discretion but to permit full considerations of all questions. This approach combines the best of both worlds in a situation where the decision is to be made primarily on policy grounds. The interested parties have a chance to persuade the Board to their point of view. The Board has an opportunity to listen to both sides, to have the relevant concerns of the parties laid before it and so hopefully to arrive at a "better" decision. And yet the Board is free to consider any overriding policy factors before arriving at a decision.

All the cases we have discussed above have dealt with the question of an individual's right to be heard before a decision is made affecting his rights. However, this does not and should not preclude the question of a public hearing. If our understanding of the common law is correct, there are, as we stated earlier, two bases that determine whether or not a hearing should be granted. The first is the extent to which the tribunal must decide. The second is the extent to which the decision affects the aggrieved person's property. A third consideration might be the extent to which the interested party can offer something relevant to the hearing. A fourth consideration mentioned by the courts is whether a hearing would pervert the purposes of the statute. Bearing these four points in mind we feel that the common law certainly in spirit if not in fact supports the notion that a hearing should be held before an approval is given by the Director under the Environmental Protection Act, 1971

II (b) The Practice Under Similar Ontario Statutes.

The right to a hearing is guaranteed under a number of Ontario statutes that give decision-making power to Directors and Boards. Space restricts us to discussing a few of the more obvious ones in this brief.

First, under the Environmental Protection Act itself, there is provision for public hearings when waste disposal sites are being established. Under section 35(3), where a by-law of a municipality affects the location of a proposed waste disposal site, the Minister shall require a public hearing. Section 37 further requires an applicant for a certificate of approval for a waste management system or waste disposal site to advertise notice of his application in a local newspaper. These are sensible provisions, giving local residents an opportunity to speak to the issue of whether or not they want such a site in that location. Unfortunately, these are the only provisions for a public hearing in the whole Act. Why should it be confined to this particular situation? Surely other sources of contaminants also affect interests which deserve a hearing.

The new Pits and Quarries Bill also makes provision for a hearing. Section 5 of that Bill gives persons directly affected a chance to be heard before the Director decides whether or not to approve the application.

Opportunity to be Heard with Respect to Land Use Decisions.

1. Official Plan.

i. The Planning Act

Section 12(1)(b) requires that Planning Board, as part of its procedure in preparing official plans, shall hold public meetings for the purpose of obtaining the participation and co-operation of the inhabitants of the planning area.

Section 17(1) provides that the above provision applies to amendments to official plans. That section, in conjunction with Section 17(2) does enable the Minister of Municipal Affairs to approve a circumscribed category of official plan amendments without the holding of public meetings, namely those official plan amendments that are initiated by council.

Section 15(1) and section 44(1) enable any person to require the Minister to refer any part or all of the proposed official plan or amendment thereto to the Ontario Municipal Board for adjudication following a public hearing.

ii Procedure in Practice

In practice, in processing an official plan, both Planning Board and council of a municipality usually hold numerous public meetings providing a full opportunity for all interested parties to be heard and for all interests to be considered. Very often, all or part of the official plan will be referred to the Ontario Municipal Board for adjudication following a public hearing.

Generally, municipalities at least in Metro, require a Planning Board to hold a public meeting with full notice to interested parties, to consider proposed amendments to the official plan. In addition, council will normally hold a public meeting to consider a proposed amendment.

As amendments to official plans are generally proposed in conjunction with applications to amend the zoning by-law for particular sites, very often amendments to the officil plan are referred to the Ontario Municipal Board.

11. Rezonings.

i. The Planning Act

Regulations made by the Ontario Municipal Board pursuant to section 35(11) require that notice of any rezoning by-law be given to all property owners within the site to be rezoned and, further, within a radius of 400 feet thereof.

Before approving any rezoning by-law, the Municipal Board, with certain exceptions, is required to hold a public meeting to consider any objections that may be made to the rezoning by-law.

ii. Procedure in Practice

Many municipalities formally or informally, that is through the local aldermen, notify interested parties when applications for rezoning are received by the municipality in order that they might have an opportunity to be heard at planning board, a committee of coucil or board of control and at council during the processing of the rezoning by-law. This procedure has recently been formalized in the City of Toronto where, on receipt of applications for rezoning, the clerk is directed to notify all property owners residing within 1,000 feet of the site in order that they might have an opportunity to be heard as the matter proceeds.

The municipal procedures and the statutory hearing before the Ontario Municipal Board generally enable all interests to be heard before a final decision is made with respect to the proposed rezoning by-law.

111 Case Law Regarding Zoning Decisions.

In the case of Wiswell et.al. v Metropolitan Corporation of Greater Winnipeg (1965), 51 D.L.R.(2d) 754, The Supreme Court of Canada adopted the view that when council is deciding whether a rezoning by-law should be approved for a limited site or area, it must act in a judicial manner with fairness to all parties as such a decision involves the adjudication of competing interests and is not a legislative decision. Consequently all interested parties are entitled to receive notice and have a right to be heard prior to a decision being made.

The majority reasons for judgment appear to establish that land use decisions with respect to particular sites, involving as they inevitably do, an adjudication of competing interests, must be made in a judicial manner with the consequence that the deciding authority must afford an opportunity to be heard to the competing interests prior to making a decision.

II (c) Practice in Other Jurisdictions.

A number of other jurisdictions have made elaborate provisions for public hearings at both stages of the environmental decision making process. The result of the hearing procedure has generally been very satisfactory and made a positive contribution to the overall regulatory process. The Environmental Protection Act makes no provision for similar safeguards, a factor which should be considered a glaring oversight in the Act itself as well as a serious denial of fundamental notions of participatory democracy.

(i) Hearings at the Granting of Approvals stage:

Two statutes which provide specifically for hearings at this stage are those of the State of Wisconsin and the Province of British Columbia.

The Wisconsin provisions are contained in Title XV of the Public Health Code, W.S.A. 14430 and following. Section 144536 provides that the Department of Natural Resources shall hold a public hearing relating to alleged or potential environmental pollution upon the verified complaint of six or more citizens filed with the department. Potential environmental pollution is defined as any situation, project or activity which upon continuance or implementation would cause beyond reasonable doubt a degree of pollution that normally would require clean up action if it already existed. Any decision made by the department as to whether to permit the project to continue is subject to judicial review. This provision exists despite the fact that the statute contains a very broad section regarding confidentiality of records. Clearly the legislature was of the opinion that the holding of a public hearing on such matters does not necessarily involve the revealing of confidential records.

The British Columbia provisions are even broader in their application. The present Section 13 of the Pollution Control Act, S.B.C. 1967, C.34 (as amended by S.B.C. 1968, C.38 and 1970, C.36) states:

(i) An objection to the granting of a permit may be filed in such a manner and within a time as may be prescribed in the regulations.

(iii) Where the application is for a permit to discharge or emit contaminant into air an objection may be filed.
(a) by any person who is resident within five miles of the proposed or existing point of discharge or emission of the contaminant into the air.

(iv) The Director shall decide in his sole discretion whether or not the objection will be the subject of a hearing and shall notify the objector of his decision.

(v) If the Director decides to hold a hearing the applicant and objectors are entitled to be notified of the time and place thereof and to be heard and to be notified of the decision following the hearing.

(vi) A person not qualified under subsection (iii) to make an objection to the Director may file an objection with the Board and the Board shall determine whether the public interest requires that the Director shall also take such objection into consideration in making his decision. The determination of the Board is final and the Director shall, when so required, give effect thereto.

At first glance, it would appear that under subsection(iv) the Director has merely to decide not to hold the hearing and then notify the objector. Happily, this is far from the case.

Regina v Venables, Ex Parte Jones (1971), 15 D.L.R. 355 (3rd)(B.C.S.C.) discussed this very situation. In this case the applicant was a commercial fisherman who objected to a permit being granted but the Director decided not to hold a hearing and so notified the objector. The objector then moved to quash the permit on the grounds that the Director exceeded his jurisdiction.

Wooten J. found that the applicant had not heard or seen the reasons for the Director's decision; that being the material upon which he reached his decision and particularly the information supplied him by the applicant for the permit. Hence the objector had no opportunity to consider that material and reply to it. Although under the Statute the Director had the power to determine his own procedure he must lay down some procedure whereby before he makes his decision as to a hearing, the objectors submit their briefs and whereby the objectors may consider the material the Director has from the applicant for the permit. Because he had not done so, the decision not to grant the hearing was quashed.

A crucial factor in the granting of a permit, besides that of public participation in the decision making process itself, is information relating to the reasons why a particular decision has been made. The publishing of reasons should, in our view, be in addition to, and not an alternative to public hearings. The new National Environmental Policy Act of 1969, U.S.C. 1970, Title 42, Public Health and Welfare, Chapter 55, makes great strides in this direction. The Act creates the Environmental Protection Agency and also sets out the guidelines to be followed by all Federal agencies before commencing any activity which has environmental implications. The criteria which must be considered under Section 4332 cover the whole range of environmental factors involved in any federal action. Going even further, however, the section requires the agency prior to submitting a statement of the environmental effect of any decision to consult with and obtain the comments and views of any other Federal agency which has jurisdiction by law or special expertise as well as appropriate Federal, state, and local agen-

cies which are authorized to develop and enforce environmental standards. These are to be made available to the President, the Council of Environmental Quality and to the public as provided by Section 552 of the Administrative Procedures Act, U.S.C. 1970, Title 5, Government Organization and Employees.

The Administrative Procedures Act sets out broad definitions of such terms as "agency, party, rule, order, adjudication, and license." Section 552 relates to public information and states in paragraph (a) that each agency shall make available to the public, information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public

- (c) rules of procedure...
- (d) substantive rules of general applicability adopted as authorized by law, and statement of general policy or interpretation of general applicability formulated and adopted by the agency.

(2) Each agency, in accordance with the published rules, shall make available for public inspection and copying

- (a) final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases;
- (b) those statements of policy and interpretation which have adopted by the agency and are not published in the Federal Register; and
- (c) administrative staff manual and instructions to staff that affect a member of the public.

(3) Except with respect to the records available under paragraphs (1) and (2), each agency, on request for identifiable records made in accordance with published rules, shall make the records promptly available to any person. District courts are given the power to force production of such records.

Paragraph (b) states that the section does not apply to matters that are:

(3) specifically exempted from disclosure by statute
(4) trade secrets and commercial and financial information obtained from a person and privileged or confidential.

This is then further qualified by paragraph (c) which says that the section does not authorize the withholding of information or limit the availability of records to the public except as is specifically stated in the section.

Again, the Ontario Environmental Protection Act is horse and buggy legislation compared to these statutes. These statutes recognize a clear dividing line between manufacturing processes and the installation of specific pollution abatement controls. There is no reason why information cannot be supplied as to the latter without giving away confidential material on the former. Both public hearings and published information and reasons for decisions would be far preferable to the present situation of isolated negotiations between government and industry with no participation by those individuals who may be vitally interested in and affected by the decision to grant an approval.

ii. Hearings prior to setting air pollution standards:

The relevant air pollution statute of the states of Michigan, California and New York as well as the United States Federal Government all provide for public hearings at this stage of environmental planning.

In Michigan, the Air Pollution Control Act, M.S.A. 14 58(1), section 7(2) provides that a public hearing shall be held before rules and regulations are adopted or amended.

The California statute, The Mulford-Carrell Air Resources Act, Division 26, Health and Safety Code, Part 1 states in section 3 under powers and duties of the air pollution board:

Sec. - The Board shall after holding public hearings

(b) adopt standards of ambient air quality.
(c) adopt rules and regulations.
(d) adopt emission standards.
(e) adopt test procedures.

New York State provides several opportunities for private citizens and organizations to be heard at public hearings. Section 15 of the Environmental Conservation Law, Ch.140, Laws of New York, 1970, sets out the general functions, powers and duties of the State Department of Environmental Conservation, Under that section no environmental standards, criterion, rule or regulation or change thereto, shall be proposed for approval unless a public hearing relating to the subject of such standards has been held. Fifteen days notice by public advertisement must be given of the meeting and members of the public must be given an opportunity to be heard.

Under section 30 of the Act, the department must formulate a statewide plan for the management and protection of the quality of the environment, which is to be submitted to the Governor and the office of planning. Subsection (3) provides that in formulating the plan and any revisions the department shall conduct one or more public hearings.

The New York statute transfers certain functions of the Public Health Department to the new state agency. Among these are sections 1272 and 1276 contained in Article 12-A of the Public Health Law, C.L.N.Y., 44. These sections provide for the establishment of codes, rules and regulations for both ambient air quality and emission levels. No such regulation or amendment can be adopted until after a public hearing. Here, thirty days notice by public advertisement must be given and any persons heard at the hearings must be provided with written notice of the action the board takes.

Finally, the Clean Air Act, 42, U.S.C. 1857 provides for numerous public hearings. Section 110(a)(1) specifies that each state <u>shall</u> "after reasonable notice and public hearings adopt and submit, after promulgation of a national primary ambient air quality standard or revision thereof for any air pollutant a plan which provides for implementation, maintenance and enforcement of such standard." If the state does not hold public hearings the Federal administrator must provide for them.

Section 111 deals with emission standards from stationary sources. Paragraph (b) provides that the administrator shall publish a list of categories of stationary sources and propose regulations establishing Federal standards of performance for new sources. At this time the Adminsitrator must afford interested persons an opportunity for written comment on such proposed regulations or for written comment on such regulations or their revision. Under paragraph (d) each State must submit a plan for establishing emission standards for any existing source of air pollution using the same procedure as for ambient air quality standards.

From this brief survey it can be readily seen that the public has a recognized role to play in adopting air pollution control standards at least in some jurisdictions. This is so, ~~despite the fact that several of these statutes specifically~~ provide that information as to trade secrets and manufacturing processes must be kept confidential.

In Ontario, on the other hand, we have the worst of all possible worlds. Not only is information kept confidential but the public had no involvement in setting present standards. No one seems to know on what basis they were determined and on what information they were calculated to be safe. Thus, the public was given no say whatever in balancing economic interest against the desire to have cleaner air through high air pollution control standards.

iii. Conclusions from Legislation in Other Jurisdictions.

The provisions of the statutes which have been reviewed here, although far-reaching in some cases, are by no means radical. What they simply do is to recognize that the public has the right to as much information as possible, the right to be told how the decisions are made, the right to determine the bases for standards, and the fundamental right to a say in determining the quality of the environment in which they must exist. It is long past the time when governments and companies can deny these rights on the grounds that manufacturing processes, protected by patent law in any case, will be disclosed to people who are standing ready to duplicate them. The right of a company to retain its manufacturing processes for its exclusive use for as long as it can, is important and is not denied, but in no way will the public's rights infringe upon it. The British Columbia courts have seen that this is the case and it is high time that the Ontario Government did the same. It would be hard to find, anywhere in North America, a comparable pollution control statute which imposes such a complete denial of individual rights as the present Environmental Protection Act.

The trend of the environmental law reviewed here shows a concern for encouraging private citizens to participate in the decision making process, a trend which must be reflected in Ontario environmental legislation.

III RECOMMENDATIONS OF THE McRUER COMMISSION and OF THE CANADIAN BAR ASSOCIATION.

Commissioner McRuer, in his Inquiry into Civil Rights in Ontario continually recommends that public hearings be held before important decisions affecting the public are made. In Chapter 14 he states that a number of minimum procedural rules should apply to all "adminsitrative and judicial powers, unless the power is exercised for emergency purposes, the scientific determination of standards, or in circumstances in which the rules would frustrate the object of the statute conferring the power." (P.213)

The first rule is, "the parties who are affected by a decision should have an opportunity to attend a hearing and be heard." (P.213). Decisions regarding approvals, etc., clearly fall within this category and are not excluded by the exceptions. There may be some dispute,however, whether or not decisions as to effluent standards are too scientific to permit public participation. If we analogize the standard setting procedure to drawing up an official plan, and this is a fair comparison, there is no reason why the public cannot be heard. Granted they do not have the technical expertise to either fill in the details of the official plan or the technical data on the standards,but they can make some contribution as to the kinds of values that we want the plan or standards to reflect. Expressing aspirations in terms of precise scientific prohibitions is the task of the departmental experts. But the task of defining those aspirations clearly lends itself to a public input.

Commissioner McRuer made a number of specific recommendations about the Ontario Water Resources Commission Act in Volume 5 of his Report. At page 2124 he suggests that "A person who would be affected by an approval or order permitting the discharge of sewage (broadly defined) into a lake, river, stream or other watercourse...should have an opportunity to be heard before such a decision is made."

Such a procedure is only fair, If an individual's rights are being affected, he must be given an opportunity to express his interests and point of view to the decision maker.

The Canadian Bar Association passed similar recommendations at its annual policy meeting in Banff, Alberta in the summer of 1971. The Canadian Bar Association's statement of policy reads as follows:

> CIVIL LIBERTIES
>
> Whereas the deteriorating quality of our physical environment has become, and is a matter of urgent national concern in Canada; and Whereas it is desirable and necessary for the effective operation of pollution control laws in the various provinces of Canada and that the participation and co-operation of an informed public in enforcement processes be sought and maintained.
>
> THEREFORE BE IT RESOLVED THAT: Provision should be made in provincial legislation for effective participation by individuals and groups through public hearings or other appropriate means in proceedings of environmental protection agencies relating to establishment of environmental quality standards and pollution permit terms and to the enforcement of such standards and terms once established.

lV. PUBLIC POLICY AND PUBLIC HEARINGS

The objectives of Administrative Agencies, and the interests of the general public are best served through the institution of public hearings.

Administrative Agencies through public hearings can establish the wisdom of government objectives thereby placing the onus on critics to establish their claims, not by emotional platitudes or leverage of political power, but rather by the merits of their arguments in face of articulated government proposals.

The emotional harangues of misinformed citizens are replaced by constructive criticism of an informed public able to make enlightened evaluations.

The persuasions of influential special interest groups must be exercised publicly, consequently alleviating some of the subtle pressure for compromise experienced by Administrative Agencies.

Studies of Administrative Agencies establish that even the most competent,well-intentioned agencies make mistakes.

Public hearings can often assist in discovering over-looked probable cost factors or recognizing feasible alternatives nor previousaly fully appreciated. Administrative Agencies being neither omnicompetent nor omniscient, can benefit from the collective input of the general public fostered by public hearings.

The purpose of public hearings is not to subvert or impair effective environmental control by government. Public hearings work to ensure that government planning considers all competing interests and considers the most equitable resolution of conflicting claims.

The larger political questions of our society focus on the increasing isolation of the private citizen from the decision-making process. The mere involvement of the private citizen through public hearings retards the demise of participatory democracy.

In environmental planning, public hearings afford an opportunity to reflect on all environmental costs before launching further assaults against the precarious balance of nature.

Whatever the price of such reflection, if repaid through some conservation of resources or some increased public participation in governing, the costs are fully accounted for.