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PUBLIC PARTICIPATION IN ENVIRONMENTAL AND RESOURCES PLANNING

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There is an utter lack of environmental planning legislation in Canada today.

There is no law in the Province of Ontario, nor in any other Province, which makes the consideration of the environmental impact of a private or governmental project the subject of study so that the likely environmental transitions of the project will be determined in advance and alternatives scrutinised and made public.

In fact, only in one piece of legislation in this country, the federal Northern Inland Waters Act, is there any provision which makes mandatory considerations of environmental impact, and preparation by the applicant for a licence to construct a work using water in the North West Territories or the Yukon, a requirement to submit an assessment of the environmental impact likely to occur.

A close examination of the Ontario legislation shows that it is typically concerned with emissions and discharges of contaminants but places absolutely no controls over the environmental impact of projects. Government or private industry is permitted to do whatever it pleases with regard to such major undertakings as dams, highway widening, bridges, hydro lines, charcoal factories and oil refineries.

If you own a summer home, farm, operate a bird sanctuary or have a wild life reserve on your property, any one of these projects can be built next door to you, and you have no right to have any notice of the new development and you have no right to object to it. You are likely to first hear about it when the bulldozers start construction. The fact that you are there, the fact that there may be no reason for the project, especially hydro lines and highways, in the first place, or that better sites - less costly environmentally speaking - are arguments that you as a citizen concerned both with your own property and about the environment in general, are not given any opportunity to present. New developments are considered to be strictly a matter for the government or the private developer to proceed with.

Even when government agencies do prepare environmental impact statements, there is no duty on the government to make them public and only if the government is put under great pressure, as for example the federal government was with regard to the Pickering airport,

will those studies become public. Yet it is only through public participation that the objectives of the administrative agencies and of the general public are best served in environmental decision making. The 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 articulate government proposals. The emotional harangues of misinformed citizens are replaced by constructive criticism of an informed public able to make enlightened evaluations. The persuasion of influential special interests 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 overlooked probable cost factors or in recognising feasible alternatives not previously 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 to 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 on the precarious balance of nature. Whatever the price of such reflection, if repaid by some conservation of resources or some increased public participation in governing, the costs are fully accounted for.

How would such public participation in environmental planning matters really work with regard to the approval of a specific work such as a pulp mill, refinery or harbour? We recognise that a decision whether or not to licence or approve a proposed work that will have a substantial impact on the community is essentially political and will remain so.

Elected governments will want to retain ultimate control of such decisions, and this desire should be recognized as being consistent with our present system of government. Governments are elected to govern, and while they may delegate many functions to various agencies they remain answerable to the electorate for the policies which are in fact followed and for the consequence of these policies. From this view flows the conception of public hearings as mechanisms for promoting the healthy functioning of the political process in the interest of the community.

We have already spoken of some of the benefits that can flow from public hearings. Perhaps they may be summarised into two. First, they can serve to flush out all relevant information into the public arena. This provides a minimum base from which all affected persons and groups can bring legitimate pressure to bear on the real decision maker. In the absence of this base, the developer alone is in a position to bring external pressure to bear on governmental decisions. Second, public hearings can serve as a valuable source of governmental awareness of relevant facts, opinions, attitudes and perspectives that might not otherwise find their way into the decision making process.

While we shall outline below a process of design that may be adapted to a great variety of works and environmental situations, we should always be aware that what we are trying to build into our decision making processes is an assurance that all those affected by a licensing or approving decision will have a real opportunity to influence that decision, and to encourage and support the full use of such opportunities amongst an electorate who for too long have been subjected to secret deals and decision making, withholding of essential information, and public hearings held after the real decision has been made so that there is no hope of influencing the decision.

A FRAMEWORK FOR PUBLIC PARTICIPATION IN LICENSING AND SIMILAR DECISIONS

(The following suggestions were arrived at during a workshop on Canadian Law and the Environment held in Banff during March, 1972, in which workshop the writer participated.)

Public hearings might be useful at three stages in licensing and similar decisions:

(1) Before legislative committees engaged in prescribing standards for environmental protection.

(2) Before a technical advisory tribunal whose function would be to assess the feasibility of the proposed work, given prescribed standards, and the adequacy of technical data and design.

(3) Before a licensing tribunal whose function would be to recommend to the minister or other decision-maker whether to grant the licence or approval.

(1) Legislative Committee

Statutes seldom set out detailed standards. This is left to some delegated authority, usually a minister or departmental agency, to be done with no assurance of public debate or of a chance for interested persons to participate.

Since standards of general application may predetermine many consequences, this seems the appropriate point at which to open up decision processes and force disclosure. At the same time, a measure of planning may be possible at this level, through the application of zoning and quota concepts. This might reduce the likelihood of decisions being made ad hoc, without proper consideration of total environmental context, often in an atmosphere of political crisis caused by unemployment or other economic dislocation.

We envisage general legislation authorizing the creation of minimum environmental standards, quotas and zoning restrictions, as well as specific legislation authorizing the creation of standards for particular industries. Public hearings would enable all elements of the community to have some influence on the setting of "quality of life" standards that would determine in general what kind of balance is to prevail between competing uses of the total environment. While these standards could not be rigid, they could serve as guidelines to the process of resource allocation, creating presumptions for or against particular uses. This creates a toe-hold for public pressure when a proposal is made.

At the same time, more specific standards are possible for particular industries and

can be enforced through technical agencies once established. Thus the public can seek at least minimum protection of the environment through legislative committee hearings.

Since we are concerned here with decisions of a legislative character that will affect the community at large as well as industrial and other developers, there should be open access to any such hearings. It follows equally that hearings should not be held exclusively in the locale of the legislature. Good sense should lead governments to encourage and, where appropriate, support associations of citizens and interest groups so that most effective participation will occur.

A possible procedure at this level would be to have the appropriate public servants or agencies to appear first before the committee to put in recommended standards, fully supported by technical data and all arguments in support. One might require full disclosure of all consultation outside government that preceded the formulation of the proposed standards.

While technical questions will no doubt dominate many of these hearings, it is obvious that the recommendations and decisions will involve interpretation of data, expert opinion, and judgement as to appropriate accommodations of competing uses of resources. These inevitable value judgements should not be permitted to be concealed behind a technical facade. They are "quality of life" judgements that are central to public debate on the environment and should be openly treated as such.

(2) Technical tribunal

So far we have been concerned with the setting of standards of general application, without reference to specific proposed works. This will provide a framework of standards within which particular works may be permitted and will be regulated, and thus within which an application will be examined.

The first requirement is that timely notice be given of intention to seek a licence or approval. This would put in motion appropriate procedure leading up to a hearing, the main requirement being a total impact statement submitted by the applicant, setting out full

technical data on economic, social and environmental impact and presenting alternatives where appropriate. The environmental impact statement would thus be part of a larger report, allowing an integrated assessment of all consequences. This would avoid the common dichotomy which tends to depict environmental values as being anti-development, anti-recreation, or just anti-every kind of activity that affects the environment adversely, cursing conscientious environmentalists with an absolutist kind of image.

The purpose of this hearing would be to test the technical data, to ensure compliance with minimum prescribed standards, and generally to clear the proposal as feasible within those standards and technically as sound as possible. The technical nature of the hearing, coupled with the fact that a general hearing will come later before a licensing tribunal, will dictate who may participate and what procedures are appropriate. It is reasonable to demand that those seeking to participate show technical qualification to do so. We expect that independent research centres will be prominent here, offering a source of expertise beyond that of the applicant and the tribunal. We suggest that governments consider permitting public servants to appear before such tribunals, thus providing a broader base of expertise and experience on technical matters.

The technical tribunal would either clear the total impact statement or refer it back to the applicant with a full statement of inadequacies. If the statement is cleared, the matter would move on to the next stage - preparation for a general public hearing before a licensing tribunal. In addition to the original total impact statement, there would be as a basis for this next hearing a report of the technical tribunal in two parts. Part one would set out the reasons for accepting the total impact statement. Part two would contain a plain language description of the social, economic, environmental and other consequences; that is, a translation of the total impact statement into terms that can be understood by interested citizens, to form the information base on which they can participate effectively at the next hearing. This report would be published and copies sent to all persons and groups that give notice of intention to appear at the general public hearing. Needless to say, dissemination of Part Two of the report through appropriate media would enhance public

confidence and awareness and make for informed public discussion.

We think that experience with existing technical tribunals will indicate the appropriate constitution, powers and procedures. In any case, different kinds of works of varying circumstances may call for variations in these matters. We therefore make no attempt to go beyond this rather general conception.

(3) Licensing tribunal

The purpose of this hearing would be to provide an open forum for public participation based on full disclosure of all relevant information at a time before any real commitment to the proposed work is made, either by government or by the applicant. The outcome would be a recommendation to the minister or other decision-maker whether or not to grant the licence or approval, including all conditions thought appropriate if a green light is indicated.

Experience will indicate the most useful form of tribunal and procedure. It would be a mistake to try to lay down any formate as ideal, for two reasons. First, circumstances vary greatly. Secondly, it is more important to establish clearly the duties of the tribunal, which would be to ensure full and fair information to all participants in time for them to prepare, to seek actively the benefit of all points of view, and to give fair weight to all interests in formulating a judgement. If this sounds vague and general, that is the nature of the beast. It is self-deception to think that strict procedures and specific criteria will necessarily induce the best decisions. What is required is open recognition of the fact that these decisions involve a wide range of interdependent technical data and value considerations. Indeed, the ultimate choice may well be a reflection of a particular life-style that is based on a conception of what is meant by "quality of life". The best we can hope for is honest and informed judgement that is based on a whole view of society in historical perspective. That would include a capacity to be seriously concerned with the fate of our civilization 50, 100 and 200 years from now.

The licensing tribunal would make a report to the minister or other decision-

maker, setting out its findings and making a recommendation on whether to grant the licence or approval. It should probably be required to explain the reasons behind its recommendation. The minister or other decision-maker would then make the decision, answering to the public if he declines to follow the recommendation of the tribunal.

Alternate models

There are no doubt many ways of seeking to achieve the purpose of public involvement in decisions that affect the environment. We have simply constructed what we consider a basic design that would be functional and which fits into the Canadian constitutional framework.

Another attractive approach that was discussed, is that used by Mr. de Bane in the Gaspe. If the Member of Parliament or other elected representative is willing and able to help his constituents to organize and to channel their collective will into decisions affecting the environment made outside Parliament or the Legislature, then our system of government begins to work as it was originally intended to and elaborate systems of public hearings can yield in part to a more constructive, consultative process in which the public is involved in these decisions from the outset. We recognize, however, that what is possible in this regard in relation to the planning and development of a park may be less feasible when a pulp mill or refinery is proposed. Nevertheless, we consider this approach worth emphasizing in the hope that more elected representatives will adopt it.

Optimizing the System

Whatever system is adopted to promote public participation, there are certain measures of a general nature that will help. We simply list them here.

(a) independent centre of reasearch should be encouraged and, where necessary, given public financial support either directly in the forms of grants or indirectly in the form of special status under the tax laws.

(b) whenever there is a community or group that will be especially affected by a decision, special status of some form should be given. This can range from special

rights at hearings through consultation to representation on the licensing tribunal.

(c) open decision-making is essential to public confidence in the decisions. This requires a principle of access to all relevant information, a prohibition of closed consultation or negotiation with special interest groups, and a willingness to give reasons for decisions.

(d) legislation delegating power should do so in as specific terms as possible, giving objective standards wherever possible. This is a persistent theme of the McRuer Report on Civil Rights in Ontario and permits judicial review of delinquent administrative agencies.

CONCLUSION

We have discussed many of the principles indicating the urgent need for public participation in Ontario and Canadian environmental planning and also suggested some of the mechanisms which could provide for such planning and public participation.

Whatever the method, it is fundamental to recognize that unless the requirement for an assessment of environmental impact is put into law, and procedures for public participation are similarly enshrined in legislation, and further, that interested and affected members of the public are given status in law to ensure that such laws are obeyed, particularly by the governments which enact them, only then will we enjoy true environmental rights.

We need a guarantee that such environmental assessments will occur. We need an Environmental Bill of Rights, a National Environmental Policy Act (NEPA) or some other such mechanism.

Too often in the past, we have trusted in our elected representatives to carry out what they would think best in the public interest. Yet the public interest in environmental quality management and planning is not and cannot be considered a priority item by our elected representatives in this modern age. We are in an administrative age and we must have meaningful administrative procedures that recognize the need for public representation in the administrative process.