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SECOND REPORT

on

BILL 94

by the

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PROCEDURES AND CIVIL RIGHTS UNDER BILL 94

INTRODUCTION

Any Bill that purports to protect our natural environment must inevitably resolve two conflicting interests. On the one hand, the environmental legislation must recognize the validity of the conservationists' argument that our natural environment can only be preserved for the future if fairly drastic measures are taken immediately to limit existing and new sources of pollution. On the other hand, the legislation must also take cognizance of the fact that to insist on a pristine pure environment in the 20th Century is both unrealistic and unfair to many segments of society.

Reconciliation of these two opposing points of view into a clear, effective attack on environmental pollution is a difficult, but not impossible task. Unfortunately, Bill 94 has only added more confusion to an already complex problem. Rather than meeting the two points of view head on, the Bill vacillates from one position to another and allows the government to abdicate from its responsibility for solving the problem by delegating it to an administrative department. The result is a Bill that flies directly in the face of almost every key principle propounded by the McRuer Report.

The McRuer Report stated that if control was to be exercised over statutory powers in the administrative process, it was crucial that all rules of law should be stated with such clarity that little or no difficulty would arise in their application to particular fact situations. In Volume 1 of the Report, McRuer states "where a statute confers a power of discretion, rules or standards to govern the

exercise of the power capable of judicial application should be stated in the Statute." Thus, the Legislature has two tasks: stating the rules of law in the legislation and stating them with preciseness and clarity.

Bill 94 leaves most rules of law to be created by the new Department and Directors. When rules are set out in the Bill, the confusion and inconsistencies surrounding them leave any number of conflicting interpretations or alternatives. If the Bill is passed in its present state, it will leave the Courts, an Appeal Board, and principally the Department to develop their own policy of environmental protection; the Legislature will have only contributed a very confusing starting point. Not only is this an abdication of responsibility by the government, but it leaves administrative officials with the problem of deciding precisely how well the Legislature really intended to protect the environment.

The rationale for McRuer's recommendations are not hard to find. Many studies of administrative agencies have illustrated the tendency of the regulator to be unduly influenced by those being regulated. It is only natural that if departmental success depends on its ability to work fairly closely with those responsible for much of our pollution, their interests will be overly emphasized in the department's thinking. Adoption of McRuer's recommendations would tend to offset this tendency by allowing the department to rely on a clear statement from the Legislature as its authority for taking strong independent action.

ALTERNATE APPROACHES TO PERMISSIBLE POLLUTION

Perhaps the best illustration of Bill 94's failure to heed McRuer's recommendations is found in a general discussion of the regulatory provisions of the Bill.

At least two distinct over-riding approaches to environmental control can be extracted from Bill 94. This confusion of approaches emanates from the lack of clarity due to the vagueness, incompleteness and ambiguities within the provisions governing the creation of permissible standards of pollution. By creating a multiplicity of standards and procedures, the government has left the Department free to choose the approach that best reflects their interpretation of the public interest.

One approach evolves from a reading of section 1(1), defining "pollutant", in conjunction with section 6, section 9, and all other sections referring to permissible levels of pollution. These sections combine to establish a four-tiered hierarchy of pollution levels.

The initial level supposes a pristine environment, free of any contamination. However, the provisions of the Bill presuppose that the environment may tolerate a certain permissible level of pollution. Thus a second level of pollution is inaugurated by the establishment of general standards of permissible pollution. These standards, to be ascertained and applied by the Department, legalize any act of pollution below the general standards. Thus industry or any other person may affect the quality of water or air in any manner below permissible levels imposed by the general

standards, without legal sanction.

If an industry or other person contaminates the environment above the prescribed levels, a third possible level of contamination is brought into play. Under section 9 and section 11, an industry or person contaminating above the general standards may submit plans and be granted approval to pollute at a higher level of contamination. Thus contamination by a person above the general level of approval will be governed by specific approval for that particular operation.

Any person or industry may therefore pollute above the general standards if governed by an approval order. This government-sanctioned third level is ascertained wholly by the inner deliberations of the Department.

The fourth and ultimate tier of pollution consists of any act of contamination by a person or industry beyond the confines of their specific approval. Any person contaminating at this fourth level, at the discretion of the Department, is subject to the sanctions of the Bill.

A second general approach to the question of regulating the environment extractable from the bill predicates three levels of pollution.

The first level supposes a non-contaminated, pristine environment. Within the context of this second approach, any contamination emitted, discharged or added to the environment is prohibited by the Bill. Thus, all polluting activities of industry or any person must be approved by the Department. Approvals based on the sole discretion of the Department are awarded to specific "polluters" to operate to a permissible

level of pollution specified by the approval certificate. This constitutes the second level. Acts of pollution in breach of these approvals constitute the third level and may activate sanctions by the Department in the form of control orders, stop orders or prosecution.

There are several basic differences that evolve from these two approaches.

a) The four tier approach does not regulate any contamination below the general standard, whereas the three tier approach governs all contamination.

b) The four tier approach offers a bonus to the first polluter in any area. The first polluter may exhaust all the effluent absorptive capacity of that area up to the general standard. Subsequent polluters, whose contribution to the pollution of the area may be minimal, could be subject to immediate regulation because their addition to the cumulative level of pollution exceeds proscribed general standards. The three tier approach, in focusing on approvals for specific operations, ignores the cumulative effect of various approvals within any given area.

Common problems to both approaches might consist of some of the following points.

a) Potential inequities in the levels of pollution approved for persons operating in the same field. Since all information is withheld by the Department, no person has the means of ascertaining the level of approved pollution allowed a competitor.

b) Both schemes bestow to the Department an inordinate discretionary power over vital questions of policy.

c) Public participation is excluded from the process of balancing conflicting interests to establish permissible levels of pollution equitable to all.

d) Initiation of measures to protect the environment is controlled entirely by the Department.

e) The public has no means of directly prodding the Department to re-evaluate any decision.

f) The operations and decisions of the Department, due to the restriction of vital information, are hidden from public critical analysis.

g) There are few, if any, prospects for compensation for injuries occasioned by decisions by the Department to grant approvals.

All facets of life are directly affected whatever approach is ultimately pursued by the Department. Environmental planning is not constrained to questions of whether fish will survive, birds will return and plants will grow; but touches on every facet of 20th Century living. The very nature of the approach to environmental planning will directly affect the location of industry, the ability of industry to compete for international markets, the balance of our ecological system, the quality and quantity of our natural resources, the entire well being of urban and rural communities. Nothing is beyond the pale of environmental planning.

THE ABSENCE OF HEARING AND APPEAL SAFEGUARDS IN BILL 94

Introduction

> " ... the fundamental protection to the rights of the individual is not so much in the substantive law as in the procedure by which it is administered. "
>
> McRuer Report, page 206

The Environmental Protection Bill like any piece of legislation necessarily deals with the rights of individuals. Very sweeping powers are given to the Department of the Environment proposed in the Bill. In order to ensure that these rights are protected, the exercise of the powers given to the new Department must be carefully scrutinized.

The provisions of Bill 94 should, therefore, be examined with this general background in mind. There are basically two groups of people who may be affected by the Bill. The first group might be termed, somewhat pejoratively, as "polluters"; the other group consists of persons whose interests or rights are affected by pollution.

The only interest group granted some rights of appeal in Bill 94 are the "polluters". Even their rights of appeal fall short of the minimal recommendations of the McRuer Report.

1. RIGHTS OF THE "POLLUTER"

Certificates of Approval, Permits and Licences.

Because of the significance of certificates of approval for the polluter, the procedures whereby these are issued, varied and revoked are important. Since certificates of approval are analogous to licences the following quote from McRuer is appropriate:

> Licensing legislation involves more than conferring power to issue or refuse to issue licences. It involves matters logically related to the licensing scheme, including renewal, revocation and suspension of licences. McRuer p. 1097.

McRuer recommended that notice be given and an opportunity for a hearing be provided when there is a refusal to grant a licence. He also recommended that notice be given in revocation proceedings.

Certificates of approval, provisional certificates of approval, permits, and licences are all of importance to the polluter, giving him statutory authority to carry on his activities. The act does recognize this importance and establishes a procedure concerning what has been referred to as the "procedural aspects of licensing". Sections 78(1) and (2) set out a common procedure in two similar situations and any person affected by any of the circumstances set out is to be served with notice, together with written reasons for the actions so taken. The person to whom such notice has been given may then, by written notice served upon the Director and the Board, within fifteen days after the service of the notice

upon him, require a hearing by the Board to consider the Director's actions. This procedure appears acceptable, except that no provision specifies when the hearing is to be held. The ameliorative effects of a delayed hearing may often be equivalent to no hearing at all.

Orders to Repair

There are other sections in the Act which also have the potential to be used to control private activity without providing adequate opportunity for hearings and appeals. Section 18 empowers the Minister, when he is of the opinion that it is in the public interest to do so, to order a person who injures or damages land, water or plant life to do all things and take all steps necessary to repair the injury or damage. In default of such person complying with the order, the Minister may do the work and recover the cost thereof from such person by action in a court of competent jurisdiction as a dept due to the Crown by such person (section 99). Similar orders and recovery of costs may be taken under sections 44 and 60. There is no opportunity to appeal a decision under these sections. Section 44, however, gives this extraordinary power to the Director, who, unlike the Minister is not even a politically responsible person.

Orders to have Material on Hand

Section 19 empowers the Director, upon reasonable and probable grounds, when it is necessary or advisable for the protection or conservation of the natural environment, to order a person to have on hand, and available at all times,

such equipment and material as may be necessary to alleviate the effect of any contamination of the natural environment for which that person might be responsible. It appears that a person so ordered must comply immediately with the order. The Ontario Water Resources Commission Act has a similar section, that being 27b. By section 27(c) of that Act, however, the Commission shall afford to the municipality or person to whom the order is to be directed, a reasonable opportunity to be heard before making such an order. Bill 94, on the other hand, provides no opportunity to be heard <u>before</u> the order is given, although pursuant to section 79 the order may be appealed to the Pollution Control Appeal Board at some later date.

<u>Control Orders and Stop Orders</u>

Bill 94 contains provisions for both control orders and stop orders. Section 7 provides that a control order may be directed to a person who allows contaminants to escape into the natural environment in excess of the amount, concentration or level prescribed in the regulations. Section 70 sets out what may be included in a control order; almost anything can be included.

A control order must be complied with immediately under section 71, but the person to whom the control order will be issued must be appraised of all the facts forming the basis of the decision to issue it fifteen days before it is served if the order is to be effective (section 73). Section 72 provides that the Director may, by further order, amend, vary or revoke a control order and that he shall cause a copy of the order to be served on the person to whom the order is directed. It is

not clear whether these provisions in section 73 apply to a "further order". This ambiguity ought to be removed.

As the Bill reads now, it is possible for the Director to issue a control order meeting all the procedural requirements set out in section 73, yet the very next day issue and serve an amending order altering the initial control order in such a substantial manner that it deprives the polluter of the safequards presented in section 73.

It is interesting to compare the issuance of stop orders with section 27(a) of the Ontario Water Resources Commission Act which is an analogous provision, relating to the discharge of sewage into any water or watercourse. In that section, the Commission, with the approval of the Minister, may order, prohibit or regulate the discharge of sewage, which includes industrial waste, into any water or watercourse. By the terms of section 27(c) an opportunity to be heard must be afforded to the municipality or person to whom the order is to be directed before the order is made. Section 27(a) imposes two procedural requirements on the Commission not required in the imposition of stop orders in Bill 94. These are ministerial approval and an opportunity to be heard before the order is effected. Section 79 of the new Bill eventually provides an opportunity for a hearing but only after the order has been made and complied with.

The argument might be made, however, that such wide discretion ought to be given to the Director in order to deal with crisis situations. The O.W.R.C. Act on the other hand, in crisis situations, by section 26(3) authorizes the Commission to apply <u>ex parte</u> to a judge of the Supreme Court for an order

prohibiting a discharge for a period not exceeding twenty-one days, if such discharge may impair the quality of the water.

Is there any evidence that this procedure is inadequate as a means of dealing with crisis? It serves both the rights of persons affected and the need for effective action without obviating the recommendations of the McRuer Report.

Certificates for Waste Disposal Sites

The granting of a certificate of approval for a waste disposal site is dealt with separately in section 35. *Prima facie* a municipality may determine the location of waste disposal sites within the municipality. In recognition of this fact, an applicant for a certificate of approval must first have a certificate from the municipality indicating that the proposed site does not contravene any municipal by-law. The Minister may then exempt the applicant from this requirement, if he feels that it is in the public interest to do so.

In these circumstances section 35(3) provides that the Minister shall require a hearing by the Pollution Control Appeal Board to consider whether the proposed site should be exempt from the provisions of the by-law. Notwithstanding that section 80 states that the decision of the Board is final, section 35(5) enables the Minister to ignore the conclusions of the Board and order that the by-law does not apply to the proposed waste disposal site. Thus, the Minister may render the hearing a total sham. It is particularly absurd because there are no established criteria underlying the Minister's

decision.

Public investment decisions calculated to preserve a measure of environmental quality may be too crucial to be left entirely to the possibly narrow and immediate priorities of municipal councils. In order to accommodate local interests, public participation must play a significant role in specific decisions, and general guidelines affecting all decisions must be openly debated in political forums before their invocation. The Bill does not set out any general guidelines to provoke public discussion and critical analysis. The acceptability and validity of bureaucratic decisions is directly proportional to the extent of public exposure accorded all factors incorporated into the decision.

2. RIGHTS OF PRIVATE CITIZENS

Decisions of the Department in setting levels of pollution, granting approvals to pollute and controlling polluting activities through stop orders, control orders and other powers granted by the Bill will necessarily affect the health, life and property of the public. This power given to the new Department would be of prime concern to McRuer:

> " Where power is conferred to take away or change rights of individuals without all practical safeguards, the mere existence of the power undermines the security of all rights that may be affected and is an encroachment on those rights. "
>
> McRuer Report, page 38.

The intended practice of issuing certificates of approval will definitely be an interference with the property owner's right to bring action in a court of law when his property rights have been infringed. The opportunity should be available for the property owner whose rights must necessarily be interfered with to be present when the issuing of a certificate of approval is being considered.

If one liberally interprets the meaning of "other person specified by the Board" in section 81 of the Bill to include interested members of the public, then, at the discretion of the Appeal Board, members of the public might participate in an appeal. It is only in these very limited circumstances that the citizen can make submissions to the Appeal Board. Even this tenuous privilege is prejudiced by the exclusive power of the polluter to initiate the appeal (section 81). The citizen cannot make submissions at the crucial time of the granting of approval.

Compensation

The only section in Bill 94 that definitely provides for compensation is section 92. It is arguable that section 18 could be used by the Minister to force a polluter to pay compensation to an injured person, but such compensation would be strictly discretionary. In evaluating section 92, the following excerpt from McRuer is appropriate:

> " The ultimate right to arbitrate is the fundamental factor which controls and gives meaning to the process of negotiation. "
>
> McRuer Report, p. 1030.

Section 92 runs directly counter to this statement. No decision reached by the board of negotiation is binding upon either party. Not only can the board not enforce its own decisions, but the injured person cannot even require the polluter to appear before the board. The process of negotiation as set out in section 92 has no meaning; the ultimate right to arbitrate is not present.

Unlike the Environmental Protection Act, the O.W.R.C. Act does attempt to offer constructive procedures for relief in the case of property injuriously affected by government sanctioned environmental activities. Section 33 of the Act provides that the Ontario Municipal Board may inquire into, hear and determine any application by or on behalf of any person complianing that any municipality constructing or maintaining sewage works has done or is doing any such act that is causing deterioration, loss, injury or damage to property.

Section 34 of the O.W.R.C. Act provides for compensation pursuant to The Municipal Act when a person's land is injur-

iously affected by the municipality's operation of sewage works.

Despite the obvious limitations of these sections, they provide a measure of relief not afforded anywhere in the proposed Environmental Protection Act. The right to due process for the protection of property is unconscionably denied by the provisions of the Bill.

> " In this province there is no constitutional restriction on the power of the Legislature to deprive an individual of his property rights without compensation... Notwithstanding the absence of such a legal requirement in Ontario, the principle of compensation has been widely adopted; for example, when land is taken in the public interest. The principle may be accorded the status of a constitutional principle against unjustified encroachments. "

McRuer Report, p. 52.

The intended practice of issuing certificates of approval will definitely be an encroachment; without ample opportunities for hearings and the granting of compensation the encroachment could easily become unjustified.

Planning

With respect to public participation in planning procedures, comparison with the Ontario Water Resources Commission Act may again be useful. It is recognized in at least two sections of that Act that the public can express its interests in the planning process. In section 32(1), where a municipality contemplates the establishment or extension of its sewage works in or into another municipality or territory without municipal organization, the Commission shall, before giving its approval,

hold a public hearing, providing sufficient notice. Also the Act, in section 46a(2) provides for the establishment of a public water service area or public sewage service area. Before exercising the wide powers given by this section, the Commission must hold a public hearing giving at least twenty-one days notice of such hearing.

Any industry or municipality that pollutes will affect property interests within the area. Should not area residents be afforded means of presenting their interests when industries apply for approvals to pollute? Should not down-river recreational interests be fully articulated in consideration of granting approvals to upstream industrial or municipal users? Who is to assess the value of recreation against industrial development? Who is to survey all possible compromises or alternatives? The Department, without legislative guidelines, and without public participation sits as Solomon of the Environment.

The cumulative effect of approvals to pollute cause substantial interference in the normal enjoyment of public and private property. These interferences or nuisances depreciate the market value as well as the personal enjoyment of property. It amounts to an act of expropriation by the polluter. The compensatory provisions of the Bill for such expropriation are, in the majority of cases, totally inapplicable.

3. POLLUTION CONTROL APPEAL BOARD

McRuer uses the term "tribunal" to denote any person or group of persons or corporate body, however described, on whom a statutory power, whether administrative or judicial is conferred. He recommended that an appeal should be provided from the decision of every judicial tribunal, except where an appeal would defeat the purpose of the statute establishing the tribunal and that administrative decisions made by persons other than a Minister should be subject to appeal, preferably to a Minister (McRuer pp. 233-4).

Section 80, however, provides that the decision of the Appeal Board is final. There is no provision for appeal on fact or law. This runs counter to McRuer's recommendations:

> " Administrative decisions made by persons other than a minister should be subject to appeal, preferably to a minister, but at least to senior administrative officers who are close to the minister and have knowledge of his policy views, or who can consult him. " McRuer, Page 234.

4. RULES OF PRACTICE AND EVIDENCE

Another failing of Bill 94 is that, while repealing The Waste Management Act, 1970, (section 103), it fails to enact the procedural safeguards in section 26(2) and (3) of that Act, and the rules of practice found in sections 27 to 32 inclusive.

The procedure for the new Pollution Control Appeal Board created under Bill 94 is thus left entirely to the Board's discretion. Surely at least those matters set out in The Waste Management Act, 1970, with respect to adjournment, subpoenas, rules of evidence, right to counsel, right to cross-examination, and open hearings should be clearly enunciated with respect to the new Appeal Board.

5. PUBLICATION OF DECISIONS

It is interesting to note that while Bill 94 repeals The Waste Management Act, 1970, (section 103), it fails to include some of the important procedural safeguards of that Act with respect to the publication of decisions.

Section 34(5) to (7) of The Waste Management Act, 1970 requires the Board set up under that Act to give its decision in writing and to furnish reasons for its decisions to the parties. Provisions such as this call upon the Board to give careful scrutiny to the matters before them so that the written judgment will be well reasoned, and the parties will have the satisfaction of knowing that their arguments have been heard and weighed. In addition, it is submitted that the parties have a right to know the disposition of their case. Part X of Bill 94 fails to contain analogous provisions to guarantee these rights.

Conclusion

McRuer's proposal that rules of law must be clearly stated in regulatory legislation to delineate the bounds of administrative action, seems to have been ignored entirely by the draftsman of Bill 94.

Inconsistent approaches to the same problem, extremely wide discretionary departmental powers, and inadequate procedural safeguards are the rule rather than the exception throughout the Bill. This suggests a marked reversal in Government policy. Not long ago, the Conservative Government enthusiastically welcomed the McRuer Report and immediately amended much of the existing legislation to conform with McRuer's proposals. Has the Government suddenly turned a blind eye on the Report, or has it, despite good intentions to the contrary, simply found the task of defining a consistent approach to environmental protection too difficult and left the job to one of its Departments? It is submitted that the latter explanation is the correct one.

But why has the Government given up so easily? Surely it realizes that control by regulation and departmental discretion is a most unacceptable solution to the problem. The present Bill must be withdrawn immediately and a public hearing held on the subject. Such an approach is not only administratively feasible but essential if conflicting interests are to be effectively reconciled. This open approach has been used successfully for the review of The Income Tax Act and the drug problem (Le Dain Commission). Certainly the preservation of the environment deserves an equally accessible and humanistic approach.

VAGUENESS IN DEFINITION AND DRAFTING

A large number of individual sections are phrased in such a way as to invite interpretations that might nullify their effectiveness. Moreover, many of the vital issues of interpretation are left to those who must administer the new Bill.

Perhaps one of the most unfortunate choice of words in the Bill is found in the definition of "pollutant" set out in section 1(1). This definition refers only to the permissible amounts set by the Department, and thereby abridges the traditional common law tests of infringement of individual rights. There is nothing in this definition to ensure that when standards are set, contaminants will not be present in concentrations disruptive of mans' pleasure, safety or health, or damaging to real or personal property or which obstructs its enjoyment and use. Nor does the present definition assure consideration of potential distruption to the eco-system.

This should be contrasted with the definition of "air pollution" in section 2(b) of The Clean Air Act, now before the House of Commons as Bill C-244. That definition states:

> " Air Pollution means a condition of the ambient air, arising wholly or partly from the presence therein of one or more air contaminants, that endangers the health, safety or welfare of persons, that interferes with the normal enjoyment of life or property, that endangers the health of animal life or that causes damage to plant life or to property. "

It is submitted that this definition is far superior to that used in Bill 94. Not only does it unquestionably indicate to those who

must interpret The Clean Air Act the federal government's policy with respect to certain contaminants, but it further preserves the traditional common law test for application in spirit through the legislation. In the new Ontario Bill, the application of common law tests such as this is confined to section 15.

Section 6 of the Bill is both ambiguous and duplicitous. It is ambiguous in the sense that it is not clear as to whether there is an offence in doing anything which contaminates the natural environment, or whether the offence arises only when an amount, concentration or level in excess of that prescribed by regulation is added to the natural environment. From the manner in which section 6 is presently set out, those persons responsible for composing informations for court charges will have to be exceedingly careful lest such charges be void for duplicity and multiplicity.

An even more serious criticism of section 6 and other prohibition sections of the Bill is that they do not make it clear, though it is doubtless intended, that persons may be convicted for violating the Bill regardless of whether they have *mens rea*, that is, the guilty intention to commit the offence. Defence lawyers in the past, as well as violators charged under former environmental legislation, have had cases held up in the various court levels for months, if not years, by arguing over whether *mens rea* on the part of the polluter had to be proved. Both under The Air Pollution Control Act, 1967 (which is repealed by this Bill) and The Ontario Water Resources Commission Act, the courts, after several cases and continued pollution while persons and companies charged were defending and appealing verdicts against them, held that *mens rea* was not an ingredient of an offence under those acts. The question must be

asked why this Bill does not make this position clear now that such legislation is being consolidated and revised?

There are other examples of dangerous draftsmanship. What, for example, is "out of the normal course of events" as used in section 16 for a polluter who already has permission to pollute "in excess" under a section 9 approval? What are the guidelines for "the wise use" of the natural environment that is to be studied under section 2(d)? And how can the Minister assess the "public interest" in section 18 when the Bill fails to advise him of those matters that are to be of the utmost concern?

There are further examples of what can only be termed poor draftsmanship. For example, section 3(g) was lifted in content, but not in form, from section 3(e) of The Waste Management Act, 1970. As a result, section 3(g)(i) contains what should in fact be two separate sub-sections. Even worse, that sub-section contains the conjunctive word "and" to link it to section 3(g)(ii) whereas the phrases in question were formerly linked by the disjunctive "or" in The Waste Management Act. In view of the content of this section, it is doubtful that the Legislature would truly intend a conjunctive interpretation; yet a court would have to strain to find that "and" really meant "or".

Section 13 of the Bill is a classic example of poor drafting. The word "property" as it appears in that section, either is not modified at all or is modified by "prevention or control" and not "protection or conservation" as was probably the true intent of the draftsman.

Other sections are dangerously worded by virtue of omission. For example, the word "person" as it appears in both sections 14 and 16 should be modified by the words "who directly or indirectly".

As presently worded, a polluting company could escape violation of these sections by passing its contaminants on to a judgment-proof subsidiary for disposal.

Through the use of vague language, Bill 94 fails to meet both the general and, in some instances, the specific intents with which it has been accredited by the Government.

EMERGENCY WEAPONS - POTENTIALLY IMPOTENT?

I. CONTROL ORDERS

When the amount of contaminant exceeds the maximum permissible level, the Director may issue a control order directed to the person responsible to tailor his operations to meet the permissible standards (Section 7). To evaluate the efficiency of control orders it is necessary to develop the possible procedures involved in implementing such an order.

The pervasive vagueness of all Parts of the Bill is epitomized by all the ambiguities encompassing the procedures for invoking control orders. Incomplete or vague provisions governing procedural steps, and lack of specifications for deadlines, precipitate several anomalies potentially eradicating the effectiveness of control orders.

The report of a Provincial Officer stating that a contaminant is being added, emitted or discharged into any part of the natural environment in excess of maximum permissible amounts is required as a prerequisite for the issuance of any control order.

Provincial Officers: A Provincial Officer is a person who is appointed by the Minister or the Lieutenant Governor in Council (Section 82). There are several critical aspects of the role of a Provincial Officer that are not specified by the Bill. How many Provincial Officers will be appointed? What basic qualifications are required for the position? What salaries or security of tenure will be accorded to them? What supportive administrative or scientific staff will they be allotted?

Provincial Officer's Report: The Bill does not provide any means for citizens to require or request investigations by Provincial Officers. It appears that Provincial Officers have complete discretion to investigate whatever they have reason to believe is a source of contaminant (Section 83).

All these factors are vitally important to a citizen injuriously affected by an increased onslaught of pollution. Any delays in instigating a control order may be severely injurious to his health or property. If there are a limited number of Provincial Officers, some time will pass before overworked Officers are able to investigate. If the Provincial Officer in the exercise of his discretion believes an investigation is not required, the citizen has no recourse to compel an investigation. If willing to investigate, but not qualified to conduct the particular type of investigation required, some time will pass before appropriate investigative personnel can be commandeered.

If the investigation is finally commenced, there are no provisions for deadlines. Might the survey take forever to complete? Could the Provincial Officer take forever to file his report? Once filed, may the Director take forever to digest the report before acting?

Should the Provincial Officer's report unequivocably find a level of contamination exceeding permissible levels and dangerous to health or property, the Director may refuse to act. The decision of the Director cannot be challenged or appealed. Since only the polluter is entitled to a copy of the Provincial Officer's report there is no means of public scrutiny of the Director's decision.

Delays Available to Polluter: Several provisions of the Bill afford the polluter a repertoire of delays to forestall or avoid the invocation of a control order. Under section 73(2) a person intended to be subjected to a control order may make submissions suggesting abatement procedures to the Director, generating more time for reflection before issuance of the order. At the initiative of the Minister the whole matter may be referred to the Environmental Council for their perusal and illuminating advice. Again, without time limits, the matter may rest with the Environmental Council to gather dust.

If a decision finally emerges from the Department to issue a control order a further mandatory period of fifteen days for proper notification is required before the order is effective [Section 83(1)]. To avoid unduly harsh measures against the "polluter" the Director may specify that the control order is not to commence until a far distant future date [Section 71(b)]. The "polluter" may compel a hearing by the Board within fifteen days of his notification of the control order under section 79. Thus, before the control order takes effect the polluter may secure relief from the Board. The citizen has no right to present his interests at the hearing.

The Director, at his own initiative, without explanation, may, at any time, amend or revoke the control order by virtue of section 72.

Throughout the entire, potentially contorted, process the citizen has no right to participate and no right to

information. The citizen might get compensation for his losses if they constitute damage to his livestock, crops or vegetation; anything else is on his tab.

If the citizen is permitted to bring a civil action against the polluter, the Bill continues to frustrate him by severely restricting the scope of evidence which a Provincial Officer is permitted to divulge in Court [Section 87(2)]. Without the Provincial Officer's report, the complainant, as plaintiff, has, realistically, no other means of amassing vital evidence. Plaintiffs cannot gain access to the inner operations of the plant. Securing independent scientific analysis of pollution that would be acceptable in court may be prohibitively expensive.

Vagueness, incompleteness and exclusion of complainants from the process suggest the potential of a control order becoming, at one extreme, arbitrary and harsh against the polluter, and at the other, offering inconsequential relief to the "pollutee".

II. STOP ORDERS

Another seemingly important weapon in the arsenal against pollution is the stop order. If, upon reasonable and probable grounds, the Director is of the opinion that a source of contaminant is adding to, emitting or discharging into the natural environment any contaminant that constitutes an _immediate_ danger to human life, the health of any persons, or to property, the Director _may_ issue a stop order directed to the person responsible for the source of contaminant under section 8.

At first glance section 8 appears to establish an effective remedy for special circumstances. Again the vagueness of the procedures, the potential delays, and the exclusion of the public from the process suggest a certain impotence rather than strength.

Who assumes the onus of persuading the Director that on reasonable and probable grounds an immediate danger does, in fact, exist? What criteria will be employed to assess an immediate danger? What action may be taken if the eco-system is threatened? There is no provision for a stop order if anything other than human life, health or property is in immediate danger, i.e. plant and animal life. Discretion to act, even in the face of an immediate danger, lies _solely_ within the power of the Director. The private citizen has no recourse to directly initiate a stop order.

A stop order is not even an immediate remedy. It will take time for detection, time for investigation, time to

contemplate action, time to write up the report with full reasons (section 75), and time to serve the stop order on the person to whom it is directed [Section 76(1)]. Further, without explanation, the Director may revoke a stop order at any time [Section 76(2)].

A similar provision has been in existence under The Air Pollution Control Act, 1967 in section 10. It has never been used. In the Ontario Water Resources Commission Act, section 26(3), the Commission has had the power to apply ex parte for an injunction restraining any act that, in the opinion of the Commission, may impair the quality of the water. Since the inception of the Commission in 1956, this power, also, has never been used (e.g. This section was not employed against the City of Barrie, Ontario in 1970 when that city deposited its waste directly into Lake Simcoe in blatant violation of the provisions of the O.W.R.C. Act).

The provisions for a stop order wash out as a paper tiger.

III. CUT-BACKS

Taken together, the provisions for control and stop orders leave no power in the Director to order an immediate cut-back in the emission of pollutants other than by ordering complete cessation under a stop order. The only provisions for moderating the rate of emission are found in section 70 and are limited to imposition through the device of a control order - a technique that is subject to considerable potential delay. How then, can the Director order cut-backs in the discharge of pollutants in power generating stations without ordering a complete stoppage in their operation?

It is submitted that the Director should have discretion to issue control orders to be effective at once, but for a limited time period only. These orders could then be subject to hearings and review, but would remain in effect unless repealed by the Board.

IV. ANTICIPATED ENVIRONMENTAL INJURY

The provisions of the Bill providing the tools of control orders and stop orders for serious cases of pollution do not appear to contemplate remedies to avoid anticipated future emmissions, additions or discharges of contaminants. These tools are fashioned for present acts of pollution. If the Director is aware of present actions that will ultimately cause an illegal source of pollution, he should have the power of prevention as well as the power of cure.

Citizens do not have sufficient access to information, nor the resources, to accumulate necessary information for a basis to anticipate imminent environmental problems. The potential financial sacrifices often incident to common law injunction types of relief, intimidates even informed citizens from pursuing appropriate steps of prevention.

With full access to all information, the resources to investigate, the Department is the logical entity armed with preventive weapons to avoid imminent environmental problems.

NOISE

The proposed Environmental Protection Act deals with noise pollution in a very indirect manner. Section 6 creates a prohibition against the emission or discharge into the natural environment of any "contaminant" in an amount or level in excess of that prescribed by the regulations. Section 94(1) empowers the Cabinet to make regulations prescribing maximum permissible amounts or levels for the emission of contaminants as well as methods or standards for determining such amounts or levels. Since "contaminant" is defined by section 1(c) of the Bill to include any "sound" or "vibration", sections 6 and 94 can be used to prohibit noise pollution in excess of administratively imposed standards. The broad wording of the prohibition under section 15 would seem to provide further protection and would be operative even where no regulations have been passed.

Existing legislation, mainly in the form of municipal by-laws passed under the authority of The Municipal Act, has been difficult to enforce. This is because the enabling legislation is too narrow to allow for the establishment of specific standards and the prescription of methods of measuring noise levels. The maximum penalty of $300 imposed for contravention of a by-law has had little deterrent effect.

The proposed legislation appears to solve these problems which have long plagued municipalities and private citizens in their efforts to control noise pollution. The provincial government, should it see fit, would be empowered to prescribe, by regulation, maximum permissible decibel

levels and appropriate methods of sound measurement. Breach of a provision of the Bill or regulations may be penalized by a fine of up to $10,000 for a second offence.

Although it has sometimes been difficult to obtain a conviction under the existing noise legislation because of its vagueness, and difficult to encourage polluters to take the penalties seriously (because of the present limit on fines), the private citizen presently does enjoy the right to initiate a private prosecution, should the appropriate authority fail to enforce the by-law in question. There have recently been several successful prosecutions commenced on the initiative of private citizens in the Toronto area. Under the new Bill, this common law right of citizens to have the law enforced may be effectively abrogated.

Further, if the government passes regulations which make existing by-laws redundant or which conflict with such by-laws, then the enforcement of any anti-noise laws would be entirely in the discretion of the Minister; as prosecutions under the Bill and its regulations may not be instituted without his approval. Not only may private prosecutions disappear, but so will the right of a citizen to proceed by way of injunction to restrain the breach of a municipal (noise) by-law; a right now enjoyed under section 486 of The Municipal Act.

Equally disturbing are the provisions whereby the Minister may issue a "program approval", in which case the polluter, so long as he complies with the approved program, is immune from prosecution by virtue of section 102(2). Under existing legislation, however inadequate, proof of contravention automatically results in a fine; a polluter *cannot* plead in his defence a license to pollute.

PART V: WASTE MANAGEMENT

Part V of Bill 94 is almost a verbatim re-enactment of the provisions of The Waste Management Act, 1970 which will be repealed by section 103 of the new Bill. Under both Acts, the heart of the scheme formulated to regulate the matters of waste management and waste disposal in Ontario is the "certificate of approval". Sections 30 and 31 of the new Bill, in effect, provide that no "waste management system" or "waste disposal site" can be established, operated or altered unless a certificate or provisional certificate of approval has been issued by the Director.

The major shortcoming of the certificate of approval process is that the public is effectively excluded from participation. This is so despite the provision in section 39(2)(c) that one of the factors that the Director must weigh in deciding whether to issue, renew, suspend or revoke a certificate is whether it is "in the public interest". Not the public, but the Director, decides what is in the interest of the public.

Section 37 re-enacts the provision of The Waste Management Act that an applicant for a certificate must publish notice of his application once a week for three weeks in a locally circulated newspaper. This provision is largely meaningless because there is no provision of any opportunity for any member of the public to be heard thereafter.

The initial decision by the Director is made *in camera* (section 39) and if his decision is appealed by the applicant or holder of the certificate, and he is the *only* person who can appeal the decision of the Director; the only persons

other than the Director and the appellant who are "parties" to the appeal hearing are those "specified by the Board". There is no provision as to whether hearings by the appeal board are even open to the public or whether they too are in camera, and there is no indication of what circumstances are to influence the Board in its determination of the degree of public access to its deliberations.

It appears that section 30 contains a potential loophole. It provides that no existing system or site shall be operated "after a certificate of approval has been refused" or in contravention of the terms and conditions of a certificate. However, it appears that if the operator or owner of a system or site had never applied for a certificate under The Waste Management Act, he would not violate section 30 because he would then not have been "refused" and he would not be in contravention of the terms and conditions of a certificate.

The Waste Management Act provided in section 11(a) that no system or site could be operated "for more than six months after this Act comes into force unless the owner has made application for a certificate of approval". That Act came into force on September 1, 1970 but there must be a great many operators of waste management systems and waste disposal sites in Ontario who were, because of the meagre resources of the Waste Management Branch, not even made aware of their responsibilities under the Act. Many such operators have not applied for certificates of approval and as such are outside of the obligations imposed by section 30.

It is to be hoped that all such cases are covered by sections 40 and 41 which, in effect, provide that no person shall operate a site or system without a certificate or provisional certificate of approval. But it is at least arguable that an operator having no obligation under section 30 to apply for such a certificate is no more subject to these sections than is the owner of land who stores or disposes of his domestic wastes on it and is, by virtue of section 29, in most cases, not subject to the provisions of the Part.

Section 29 of the Bill exempts from the operation of the Bill's provisions, the storage or disposal of domestic wastes by a person on his own property unless the Director is of the opinion that this "is or is likely to create a nuisance". This section appears to be deficeint in that the term "domestic wastes" is not clearly defined and is, therefore, susceptible of a very wide interpretation. There is, therefore, a potential danger that very large concentrations of waste stored or disposed of on the same parcel of land as that on which they were produced could result in a serious pollution problem. This section should be redrafted so that anyone desiring to store or dispose of his domestic wastes on his own property must first obtain a certificate of approval from the Director. In this way, the Director will make a determination, in every case, as to whether "such storage or disposal is or is likely to create a nuisance". At present private disposal sites are governed, if at all, by the Public Health Act. Any governing by the Department of Public Health occurs only when the site is an excessively blatant

health hazard.

Section 42 should provide a summary procedure whereby a person to whom an order is directed under the section can recover the cost of compliance with the order from the person who deposited the waste.

Under The Waste Management Act the equivalent of section 46 provided for a minimum fine of $100. There appears to be no reason for not providing a similar minimum fine in section 46.

Finally, it is submitted that exemptions of certain wastes from the provisions of Part V should be made in the Act, not in the regulations [Section 94(4)(e)]. This is a political decision and should be exposed to public debate.

PART VI: HERBICIDES AND PESTICIDES

Part VI, which is concerned with the use of pesticides and herbicides, does not improve the present state of affairs to any great extent, but rather continues the status quo. In the present regulations of The Pesticides Act, 1967 (Regulations 76 to 78) householders and farmers are permitted to perform extermination on their own property without the requirement of a permit or license. In light of section 50(2) and section 54(1) these regulations will continue to be in effect if the Bill is enacted.

The Bill seems to continue the separation of responsibility among different legislation. "Indoor use" is still reserved to The Public Health Act, and "outdoor use" will be controlled by the proposed Bill; while the types of herbicides and pesticides allowed on the market remains within Federal control. This separation of regulatory controls exemplifies an illogical and needless division of responsibility.

The most conspicuous omission occurs in section 53. The Director by that section is empowered to issue a stop order only where an extermination is dangerous to the health of persons, thus excluding any other part of our ecological system, i.e. plant and animal life.

Under The Pesticides Act, 1967, a wider discretionary power was given to the Director to issue stop orders. Under that Act the Director could take action whenever he considered that extermination may be dangerous to health. Under the Environmental Protection Bill the Director can issue stop orders only when the extermination is dangerous.

Penalties for violations of this part of the Bill are a maximum fine of $1,000 whereas under the old act a fine of $2000 and/or 3 months imprisonment was in effect.

ENVIRONMENTAL PROTECTION BILL AND THE FARMING COMMUNITY

The Bill restricts rights and excludes participation of farmers with the same severity awarded all members of the public. Farmers are simply exempted from most of the provisions of the Bill relevant to their operations.

The Bill presumes to protect all of the environment, except that part of the environment affected by farming operations. Section 5 excludes from the purview of the Bill the disposal of animal wastes in the normal operation of a farm. The plans and specifications for the construction of any plant, structure or thing that discharges a contaminant of any quality or of any quantity regardless of consequent injury to health, life or property, if used in the pursuit of agriculture, need not be approved by the Director [Section 9(4)]. All other construction of anything that will discharge any contaminant into the natural environment, if not used in pursuit of agriculture, must be approved.

"Pursuit of agriculture" is one of the many undefined, vague terms of the Bill. It may mean everything from the establishment of a compost heap to the construction of a large fertilizer factory. It might cover construction of anything used in any aspect of agriculture (planting, harvesting, transportation, storing, selling of produce and all steps in marketing cows, horses, pigs or fowl).

It could not be the intent of the Legislature that plants or other things would be permitted to be constructed without approval and then subsequently be prosecuted for

polluting. Thus, if approval is not required before the construction of anything to be used in the pursuit of agriculture, it would logically follow that all such operations have implicit approval to pollute. Further, unlike the case of all other construction, the Director has no authority to require changes in location, or in plans of anything constructed to be used in the pursuit of agriculture (section 10).

Until regulations or litigation lend clarity to the vague provisions of the Bill it is impossible to speculate on the full extent of the probable implicit approval for pollution granted to farmers for construction of anything to be used in pursuit of agriculture.

Evidence suggesting that a farm with a feedlot for cattle or pigs produces more effluent per day than a city many times the size, provides an insight to the full ramifications emanating from exemptions accorded to farmers. Farming operations are traditionally recognized as one of the worst sources of environmental pollution.

In light of all this one might ask why the only section establishing a procedure for compensation for environmental harm is slanted favourably to farmers. Section 92 limits the scope of damage claims to injuries to live stock, crops, trees and vegetation resulting in economic loss.

The chorus of protest against this Bill will feature the voices of industries, municipalities, conservationists and members of the urban community but the voice of the farmer will be understandably quiet. This Bill serves the farmer by principally ignoring him.

PART VII: PRIVATE SEWAGE DISPOSAL SYSTEMS

Part VII might prove to be a positive step in the establishment of a comprehensive plan for environmental control. Prior to the introduction of this Bill, all but particular types of private sewage works have been regulated through The Municipal Act and the regulatory powers of The Public Health Act. Neither of these acts have an environmental focus. The Public Health Act is concerned with those aspects of private sewage works that might prove a danger to health, and should no such health hazards exist, one might assume that the approval would be given. The Municipal Act focuses on how these private sewage systems should be managed once they have been approved by the local health unit.

Under section 57 of the Bill, no private sewage disposal system, except a system subject to the provisions of the Ontario Water Resources Commission Act and the regulations thereunder, shall be established unless a certificate of approval has been issued by the Director. This section is commendable as it brings private sewage systems such as vault-privies, cesspools, septic tanks and reservoirs under the central administration of the Director of that branch of the Department designated to administer Part VII of the Act. At present, private sewage disposal systems are approved by the local Medical Officer of Health of each respective Health Unit in Ontario. This is under the authority of Schedule B of the Public Health Act, R.S.O. 1960, c. 321, section 14. Every County or District Health Unit administers municipal by-laws which prescribe standards for the construction, location,

operation and maintenance of private sewage disposal systems.

The Department of Health has recommended to the various Health Units, standards for private sewage disposal systems which were developed as a result of research conducted within that Department. The standards were incorporated to some degree by the various Health Units. However, there still exists a substantial disparity in the specifications for private sewage disposal systems required by the various Health Units. It is anticipated that the offence created under section 62 will encourage all persons wishing to establish private sewage disposal systems to submit an application to the Director pursuant to section 58. Presently persons establishing private sewage disposal systems without the approval in writing of the local medical officer of health face a fine of not more than $20 under section 29 of Schedule B of The Public Health Act.

Under section 94(6)(c) private sewage systems may be exempted from Part VII or the regulations. It would be assumed that the purpose of the regulations is to minimize pollution. Why, then, would regulations be proclaimed to exempt sewage systems from the standards established by other regulations?

Under section 94(6)(g) classes of licence holders may be declared exempt from the provisions of Part VII or any regulation. The purpose of Part VII is to ensure that private sewage disposal systems be properly serviced and established by competent and qualified personnel. Why, then, should any person servicing or constructing a private sewage system be exempt from the regulations that prescribe the qualifications of such persons?

PART XII: ENVIRONMENTAL COUNCIL

Citizen participation in the decision making process of environmental planning and regulation is enshrined by the establishment of an Environmental Council in Part XII of the proposed Act. Ensconced within the Environmental Council, citizens appointed by the Cabinet shall advise the Minister as to the results of current research related to pollution and the natural environment [Section 90(a)]. At the initiative of the Minister, the Council shall also advise the Minister on such matters as he refers to it [Section 90(b)].

All aspects of the Council: appointment, qualification, remuneration, tenure, and work are governed by the Cabinet or Minister. The Minister may staff the Environmental Council with civil servants. The Minister may obviate any significant work by the Council simply by restricting the nature of referrals. Whatever import the creation of the Council presents will be largely dependent upon the Minister.

Within the realm of its activities, the Council's responsibilities are perfunctory. As the one body that might, hopefully, introduce a small measure of public participation in the administrative process of regulating the environment, the impotence of the Council affords little inducement for service from eminently qualified citizens.

A similar body overseeing the operations of the Pesticide Act, 1967 has immensely greater responsibilities. The Advisory Committee established by the Pesticide Act, 1967 in section 5, has the power to review annually the content and operations of the Pesticide Act and the regulations [Section 5(4)]. The Committee, at its own initiative may inquire into and consider any matter concerning the use of substances for exterminations that affect the environment. Why does the Environmental Council created by Bill 94, being concerned with much larger questions of total environmental regulation, not possess at least similar powers? Why is the initiative of the Council inextricably tied to Ministerial discretion?

If qualified citizens are to serve, and if the Council is to have a significant impact on administrative policies, then the Council must be invested with the power to make inquiries, to conduct investigations and to make public reports at its own initiative on any matter of environmental planning.

To bestow a vestige of responsibility on the Council and provide some information to the public, the Council should be required to produce an annual report on the quality of the environment.

SECTION 21: CROWN "POLLUTERS"

Some of the most obnoxious sources of pollution are either owned or operated by the Government. Metro Toronto Incinerators, the Hearn Generating Plant, the Lakeview Generating Plant and some of the local hospitals are among the very first polluters to be asked to cut back when the air pollution count climbs above maximum allowable levels of pollution. Thus it is only natural that the provisions of the Act should be binding on the Crown. (Section 21).

The full import of this section must be assessed in light of overshadowing political realities. How often will any government employ the powers of an administrative agency under its control to take effective action or, if required, drastic action (stop order, prosecution), against other departments of the same government? Governments are reluctant to expose their own incompetence or failure to operate within the law.

The Environmental Protection Bill, by restricting access to information, excluding public participation in setting standards of permissible pollution, and either pre-empting [Section 102(2)] or restricting [Section 102(3)] citizen initiated prosecutions, fails to provide to the public a direct recourse to bring delinquent Crown operated or controlled polluters to task. The public must rely on the government to police and challenge its own operations. At the operative level of government decisions, a significant aspect of the democratic "check and balance" process is consequently impeded.

The recourses available to the citizen for damages against the Crown are grossly inadequate. Section 92 restricts the scope of damages. Further, the only procedure for settlement of damage claims established by the Bill is by way of negotiation in section 92. The board of negotiations established by that section has no power to force an obstreperous polluter to attend negotiation proceedings before it. Furthermore, if the Crown or "other person responsible" for the environmental damage chooses to ignore the settlement negotiated by the Board there are no means of compelling enforcement.

Thus the Environmental Protection Bill leaves the decision to negotiate claims for damages caused by Crown polluters entirely at the discretion of the Crown.

If the Minister is of the opinion that it is in the public interest so to do, he may order any person, including the Crown, to do all things and take all steps necessary to repair the injury or damage under section 18. It may be possible to liberally interpret this section to encompass compensation to individuals suffering personal damages caused by the Crown. If so, then at the discretion of the Minister, a complainant may be compensated for his injuries, if it is in "the public interest" to do so. But at best section 18 affords a dubious prospect of relief for the individual.

CONCLUSION

The far-reaching manifestations of any legislation that purports to regulate the environment as extensively as the Environmental Protection Bill requires extensive public discussion and disclosure of governmental policy.

It is preposterous that the Bill is presented to the public without extensive explanations of the policies motivating the cold law of its provisions. In the absence of a government White Paper stating the well-reasoned conclusions that fostered the provisions of Bill 94, the public is left to speculate on the meaning, purpose and underlying policies of the Bill.

The Bill cannot be treated as a mere gathering of assorted tidbits of environmental legislation into one grab-bag. If that was the vision of its drafters, the import of the Bill far exceeds their vision. The extensive discretion accorded to the Department; the exclusion of the public from any effective role in planning, regulating or prosecuting; the creation of permissible levels of pollution; the absence of a comprehensive appeal process and procedural safequards; the restriction of adequate remedies for environmental injuries; the power to indirectly affect the location and development of industry; the ability to exempt persons, operations or substances from any regulation, all are affected by the Bill. All of these matters are far too critical to be slipped into legislation without extensive public scrutiny.

The Environmental Protection Bill is a deceptive placebo for all members of the community.