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RESEARCH, COMMENT AND DIALOGUE:
AN EXAMINATION OF ENVIRONMENTAL
ASSESSMENT IN ONTARIO

A project proposal submitted
to the Laidlaw Foundation by
the Canadian Environmental Law
Research Foundation.

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ASSESSMENT IN ONTARIO

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INTRODUCTION

The Ontario Environmental Assessment Act has been described as the "most important piece of environmental legislation ever enacted in Canada."¹ Because of its requirement that all potential consequences of proposed development be considered, and its extensive opportunities for public review and comment upon development plans, the Act has immense potential to change both the degree of protection provided to the natural and human environment and the extent of public participation in the decision-making process in Ontario.

The application of the Act since it was first introduced in 1975, however, has fallen far short of achieving that potential. Because of the large number of exemptions from application of the Act, in particular a number of large-scale, controversial, government projects, and the failure to extend it to include private sector development, the Act has been largely discredited in the eyes of those who initially hailed it as important advance in the fight for environmental protection.

If present trends continue there is a danger that the Act will simply become irrelevant both to environmental protection and the decision-making process in the province. Its application will be limited to routine government projects, while large-scale government projects and all private sector development will be carried on outside the scope of the Act. Given the potential benefits

which would accrue from vigorous application of the Act this would be a significant misfortune.

This is of particular concern to the Canadian Environmental Law Association and the Canadian Environmental Law Research Foundation, both of which have vigorously advocated the concept of environmental assessment legislation since their inception in 1971. CELA staff and volunteers provided extensive comment on the Green Paper which first set forth the concept of the Act in 1973, appeared before committees of the Legislature during consideration of the Act in its draft form and did everything possible to muster public support for the concept of environmental assessment. More recently, in 1981, CELA successfully prosecuted the Minister of Transportation and his Deputy-Minister for violations of the Environmental Assessment Act. In 1982 the Canadian Environmental Law Research Foundation made a detailed submission to the Royal Commission on Northern Development calling for more meaningful public participation under the terms of the Act.

Both organizations are now convinced that steps must be taken to make environmental assessment a legitimate and meaningful process in Ontario which is automatically applied to all public and private sector development. This requires re-appraisal of the basic concept of environmental assessment, detailed examination of the experience gained to date in key areas of the process and careful study of the ways in which the Act can most effectively be applied to include private sector development.

all w/ Env. consequences

In particular, examination must be made of the (perceived problems with the Act and its administration) which have prevented its wider application since 1975. An attempt must be made to achieve a consensus, in so far as that is possible, among all those involved in the environmental assessment process - government, industry, the environmental and academic sectors - on changes to the process which, because they are acceptable to all, will allow its wider application and particularly its extension to the private sector.

This examination and search for consensus cannot be done by means of academic research alone. It must be based on a foundation of competent research, but must also include opportunities for reflection and comment upon that research, followed by dialogue among all concerned.

For that reason, the project proposed here consists of four distinct phases: research into key areas of the process and the implications of its extension to the private sector; the provision of written comment upon the research findings and recommendations by all interested parties; dialogue among those same parties; and, finally, the formulation of recommendations for (change to the process) based, as much as possible, upon whatever consensus has been achieved during the foregoing process.

BACKGROUND

The intent of the Ontario government, when it first introduced environmental assessment legislation in 1975, was described as follows:

"... the Environmental Assessment Act is an important new decision-making tool designed to see that all potentially significant effects of proposed undertakings are identified at a stage when alternative solutions, including remedial measures and the alternative of not proceeding, are still available."²

Proponents of projects falling within the scope of the Act first engage in informal discussions with staff of the Ministry of the Environment and then, unless the project is exempted from the Act, prepare an Environmental Assessment document, following guidelines supplied by the Ministry. They are advised at that stage to inform interested members of the public of their plans. Once it is completed a government review of the Environmental Assessment document is carried out by staff of a number of Ministries, co-ordinated by staff of the Ministry of the Environment.

The Environmental Assessment and government review are then made public and any member of the public, within a thirty day period, may request a public hearing before the Environmental Assessment Board. After such a hearing, the Board may then approve, amend or reject the project. The decision of the Board is subject to amendment by the provincial cabinet.

Two recent changes to the process should be mentioned here. In order to avoid duplication of hearings required under different pieces of legislation, the Ontario Government in 1981 introduced the Consolidated Hearings Act which provides for one joint hearing by a board made up of members of the Environmental Assessment Board and Ontario Municipal Board. Concern has been expressed that because the joint board applies procedures, in terms of such things as notice, access to information and other matters, drawn from different pieces of legislation it is impossible to know in advance what procedures any particular board will use.³

More recently, the Ontario government appointed the Environmental Assessment Advisory Committee which has been given the mandate to rule on requests for exemptions from the Act. This has been criticized on the grounds that referral to the Committee is not mandatory but is at the discretion of the Minister and for that reason, projects may be exempted without opportunity for comment by the Committee.

The implications of both amendments to the procedure require further study.

The significant potential of the Act, referred to earlier, derives from two sources. The first is the all-inclusive nature of the definition of "environment" in the Act, including as it does not only air, land, water, plant and animal life but also

the "social, economic and cultural conditions that influence the life of man or a community."⁴ The second is the requirement that a public hearing be held if requested by any member of the public. Obviously if the Act applied to all public and private sector development the nature of decision-making, and the extent to which the public was allowed to participate in that process, would be radically altered.

Since the Environmental Assessment Act was proclaimed in force on October 20, 1976, the major criticism directed toward it has been to the effect that it has promised much and delivered little. In 1978, Mr. J.W. Samuels, in an article published in the Canadian Bar Review, pointed out that at the time of writing the Act had not been applied in any sort of meaningful way and went on to recommend as follows:

"Except to those in the Ministry and a few persons outside it, the Act is an illusion. It exists only as an exemption process. Before the people of Ontario lose all faith in the promise, it is time to make environmental assessment meaningful. The Act should be amended to make clear that it applies only to major undertakings of significant environmental concern. Then, instead of granting exemptions, the government should apply its legislation and put into real operation the environmental assessment system."⁵

Since that time, criticism has continued to centre on the number of exemptions granted. In 1982 the Ontario Conservation Council dubbed the Act the "environmental exemption act" and went on to describe the failure to apply the Act as an "awful loss" for the province.⁶ The same phrase was used by the Kitchener-Waterloo

Record, in an editorial published on August 2, 1983:

"Since the act came into force in 1976, the cabinet has exempted a total of 267 projects and required hearings for only eight. The act, quite clearly, was misnamed; it should have been called the Environmental Exemption Act."⁷

In an editorial published January 6, 1983, the Toronto Globe and Mail stated that: " Ontario's Environmental Assessment Act is an attractive piece of paper. You can wrap gifts in it, start fires with it and mail it to your friends." but that as it was presently applied, it could not be used to protect the environment.⁸

By its failure to make wider use of the Act, the Ontario government has failed to secure the potential benefits which it offers. These are benefits which accrue not only to those interested in environmental protection but also to project proponents themselves. It has by now become a truism in the land-development industry that early public involvement, and a flexible willingness to amend plans to accommodate public concerns, will save much time and money in the later stages of the approval process.

By the same token, application of the environmental assessment process which provides an orderly and comprehensive forum for the expression of public concerns, may do much to defuse public opposition in the case of major, controversial projects. Certainly the Ontario government itself is applying this lesson in the case of its

search for a site for hazardous waste disposal in which the Ontario Waste Management Corporation, although not operating under the terms of the Act, is going to extreme lengths to promote public involvement in the expectation that doing so will lessen the amount of opposition generated when a site is finally selected.

For whatever reason, the Ontario government has failed to make wider use of the environmental assessment process, as it now stands. It seems reasonable, therefore, to search for changes to that process which will allow it to be more widely used.

Such a search is best conducted by a neutral and independent body. It must consist of more than simply an academic research study, with its inevitably limited audience, or, on the other hand, a seminar or workshop at which representatives of the various sectors will again do nothing more than put forth their, by now, familiar and solidified positions.

Ideally, such an examination shall combine the following elements: detailed research into key components of the environmental assessment process in Ontario; an opportunity for reflection and written comment upon the research findings by representatives of the different sectors involved; an opportunity for review of those comments by all concerned, followed by dialogue which will lead to identification

of areas of agreement which can form the basis for reform; and, finally, preparation of a comprehensive report which, because it is based upon the comment and dialogue described above, will contain recommendations acceptable, as much as that is possible, to all concerned.

The objectives of the project proposed here, listed on the following page, are intended to meet these criteria.

OBJECTIVES

1. To provide an opportunity for a detailed and critical examination of two of the most important aspects of the environmental assessment process in Ontario, (the procedures followed) and the (information base used) in decision-making, and a similar examination of the implications of extending the process to include the private sector.
2. To provide all interested parties with an opportunity to make written comments on the findings of these examinations.
3. To provide an opportunity for sharing of these comments among all interested parties followed by extensive dialogue in order to identify common ground which can form the basis for recommendations and the environmental assessment process.
4. Based upon the foregoing, to provide the Ontario government with a report and recommendations which, as much as is possible, are likely to gain acceptance by all sectors and which will allow wider application of the process, in particular to include the private sector.

THE PROPOSED PROJECT

A. RESEARCH STUDIES

During this stage of the project, three research studies will be carried forward concurrently. The three areas to be examined are as follows:

- (I) The process
- (II) The information base
- (III) Extension to the private sector

The following factors will be considered during each study:

(I) The process

- presubmission consultation; what factors should be considered during initial planning stages before a formal environmental assessment document is prepared, in particular the guidelines for the assessment, scope of the assessment, relationship to other planning processes and the degree of public involvement which is invited at this stage
- exemptions; the role of the Environmental Assessment Advisory Committee; criteria to be used by the Committee in recommending exemptions; criteria used by the Ontario government in referring or not referring projects to the committee; an examination of reasons for granting past exemptions
- criteria used by government officials in deciding whether to use class or individual assessment

- the hearing process; in particular, experience to date with the Consolidated Hearing Act
- ecological and sociological monitoring after completion of development; the need for such monitoring, how it might be done, the use made of findings

(II) The information base

- technical adequacy of scientific documentation provided in the Environmental Assessment
- quality and methodology of social impact statements provided in the Environmental Assessment
- methodology used in review by government officials; staffing and resources allocated to this task
- the problem of uncertainty inherent in the documentation process
- the problem of value - laden documentation

(III) Extension to the private sector

- cost and time implications
- ways in which the process might augment private sector planning
- application to mixed public/private development
- experience gained in other jurisdictions; e.g., private sector developments in federal lands subject to Federal Environmental Assessment review

Although none of these studies will consist of a case study as such, each will be based upon a examination of Ontario case histories.

Because of the closely related nature of the studies, every effort will be made to maximize communication among all involved.

B. COMMENT

As the next stage in the project, the three research studies, with accompanying summaries, will be circulated to representatives of industry, governmnet, academic, and public interest and environmental organizations. Written comments will be requested upon the major findings and recommendations of each study. Reviewers will be asked to keep their comments as brief as possible and to provide them within a reasonable time frame.

This format was used successfully by the Canadian Environmental Law Research Foundation during a recently completed study of the use of Control Orders in Ontario.

C. DIALOGUE

In this stage of the project, those who provided written comments upon the research studies will be invited to participate in a one or two day discussion.

The research studies and written comments will be

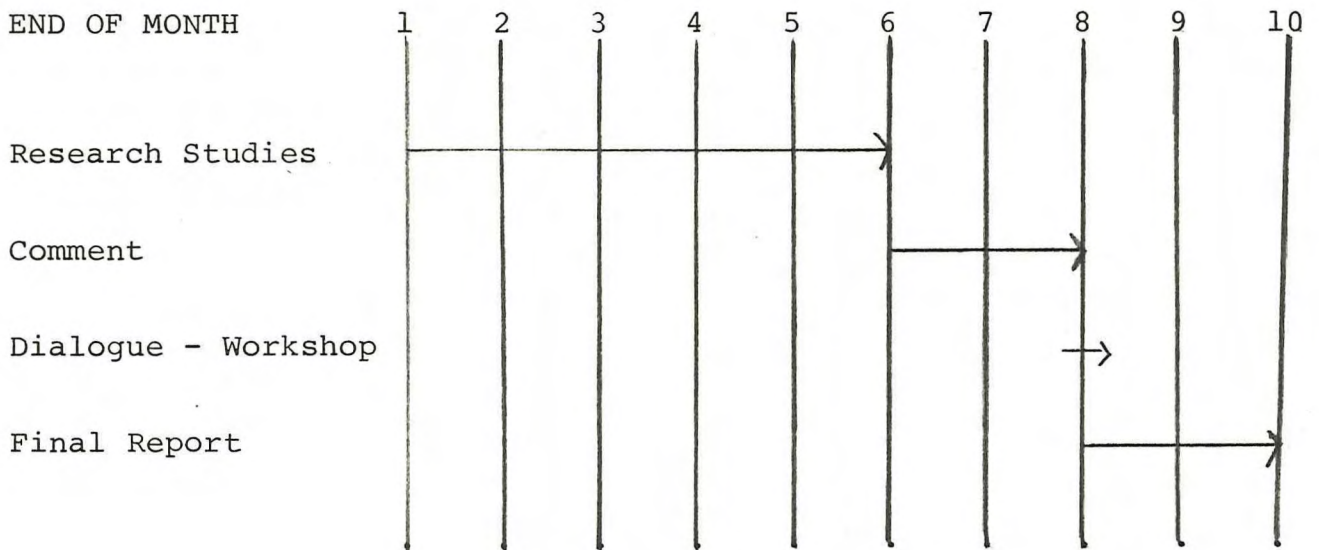
circulated well in advance to all those attending in order that the dialogue might be as focused and productive as possible. The intent would be to move beyond the statement of familiar sector positions and to establish common ground which could form the basis for recommendations to be presented in the final project report. Full reporting of all comments will be made and then used in preparation of the final project report.

The concept of assembling a small group of professionals representing the entire spectrum of interested parties, each of whom has previously been given comprehensive background material, has been successfully used by the Foundation in its Roundtable Discussions of Toxic Chemicals Law and Policy.

D. PROJECT REPORT

This will be prepared by the Foundation staff, working in conjunction with the project study team. The report will incorporate the original study findings, as modified by the comment and dialogue of interested parties. The report will result in a series of recommendations for amendments to the Ontario Environmental Assessment Act and recommendations for changes in administration of the Act.

The purpose of the report, as stated earlier, will be to present recommendations which are based, as much as possible, upon a consensus among all concerned and which will allow a wider application of the environmental assessment process in Ontario.

TIMELINE

BUDGET1. Research Studies

Salaries:	Project Director (2)	
	\$8,000 X 2	\$ 16,000
	Research Assistance	8,000
	Secretarial Staff	
	18 weeks, \$300 a week	<u>5,400</u>
		29,400
Other costs:	Telephone	500
	Copying	500
	Purchase of Publications	<u>500</u>
		30,900

2. Comment

Copying	\$ 900
Postage	<u>150</u>
	1,150

3. Dialogue - Workshop

Preparation and circulation of background materials	750
Room rental, luncheon	<u>2,000</u>
	2,750

4. Final Report

Salaries: Writing	2,000
Secretarial	600
Printing	<u>2,000</u>
	4,600

5. Administrative Overhead	<u>7,500</u>
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TOTAL

\$ 46,900

WHO WILL DO THE STUDY

Project co-ordination will be done by Mr. Doug Macdonald, Executive Director of the Canadian Environmental Law Research Foundation.

Assistance will be provided during the course of the project by an advisory committee consisting of the following people:

Professor Paul Emond, Osgoode Hall Law School, author of Environmental Assessment Law In Canada, 1978;

Mr. Charles Ferguson, Director of Environmental Affairs, Inco Ltd.;

Mr. Arlin Hackman, Staff Environmentalist, Federation of Ontario Naturalists.

The research studies will be carried out by the two Project Directors, Dr. Robert Gibson and Dr. Beth Savor, who will hire additional research assistance as required. Both have extensive experience with the environmental assessment process in Ontario and are currently members of the Board of Directors of the Canadian Environmental Law Association. A copy of the curriculum vitae for each is attached as Appendix A.

THE CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION

The Canadian Environmental Law Research Foundation is a registered charitable organization, founded in 1970. The Foundation carries out research in a wide variety of environmental law areas and disseminates the products of that research by means of its publishing and conference programs.

The Foundation's best known publication is Environment on Trial (C.E.L.R.F., 1978), a comprehensive guide to Ontario environmental law. Others include Poisons in Public (Lorimer, 1980), Acid Rain: The North American Forecast (Anansi, 1980), Environmental Rights in Canada (Butterworths, 1981), and most recently, Canadian Occupational Health and Safety Law (CCH, 1983). The Foundation is also the publisher of the Canadian Environmental Law Reports, the only environmental law reporter in Canada.

Each year the Foundation plays host to a major conference on a particular aspect of environmental regulation in Canada. The subject of this year's conference, to be held on October 26, 1983, is "Hazardous Substances and the Right to Know". In addition, the Foundation is currently in the process of presenting a series of three Roundtable Discussions on Toxic Chemicals Law and Policy.

The past experience and present capabilities of the Foundation make it well suited to carry out the project described here. Examples of projects done on a similar scale include a major study of

legislative reforms required in Canada and the United States to control acid precipitation, done for Environment Canada, and compilation of an index of all federal, provincial and territorial statutes, regulations and court decisions respecting accidental discharges into the environment, done for the Petroleum Association for the Conservation of the Environment.

The Foundation is presently carrying out a study of environmental prosecutions in Ontario, done under contract with the Great Lakes Institute, and is about to begin a major study of transboundary toxic and oxidant air pollution, to be done jointly with the Environmental Law Institute of Washington, D.C.

Through its close association with the Canadian Environmental Law Association, other environmental organizations, Canadian universities, all levels of government and a variety of industrial sectors, the Foundation is well situated to play the type of co-ordinating role which is essential for the successful conclusion of a project of this nature.

FOOTNOTES

1. Paul Emond, Environmental Assessment Law in Canada, Emond-Montgomery Ltd., Toronto, 1978, page 31
2. Dennis Caplice, "Ontario's Environmental Assessment Act: What It Is and How It's Going to Work" (Paper presented to the Professional Engineering Association, June, 1976), quoted in Emond, page 31
3. Andrew Roman, "How Fair are Existing Environmental Assessment Processes in Ontario?" paper presented at a conference in Vancouver, February 1-3, 1983, sponsored by the Canadian Institute of Resources Law, University of Calgary and Federal Environmental Assessment Review Office, page 6.
4. Emond, page 64
5. J.W. Samuels, "Environmental Assessment in Ontario: Myth or Reality", Canadian Bar Review, Vol. LVI, 1978, page 532
6. "Public land plans cloaked in secrecy, group charges", Sunday Star, December 19, 1982
7. "The exemptions become the law", Kitchener-Waterloo Record, August 2, 1983
8. "How to use the law", Globe and Mail, January 6, 1983

APPENDIX A: CURRICULUM VITAE

Robert B. Gibson

Academic history

(i) research areas

the following outlines three major general areas of research interests and activity, and specific research topics addressed in the past 5 years

the numbers in parentheses refer to relevant employment and contract work (see above section on employment)

1. Canadian northern development policy and practice
 - northern development decision making practices (3, 13, 14)
 - socio-economic impact of resource extraction projects (3,5,9,10,14)
 - environmental impact of resource extraction projects (3,5,7,8,9,14)
 - project assessment practices and problems (3,5, 9,14)
 - northern mining policy (3,5,9,10)
 - northern hydrocarbon exploration and production policy (14)
2. Environmental problems and solutions
 - acidic precipitation: practical and policy difficulties posed by needs to evaluate uncertain effects (7,8)
 - use of legal mechanisms to force or encourage industrial pollution abatement (7,8,11)
 - environmental assessment policies and procedures (3,5,9,14,16)
 - administrative difficulties facing governmental agencies with resource husbandry and environmental protection responsibilities (4,7,8,11,14,15)
 - conflicts between wilderness preservation and resource extraction demands in Ontario (15,16)
 - historical and ideological roots of modern environmental attitudes and problems (thesis)
3. Participatory democratic theory and practice
 - basis for valuing political participation (thesis)
 - treatment of non-factual considerations in public decision making (11,14,16)
 - public participation opportunities in project assessment, land use planning and other resource and environmental decision making (3,5, 9,11,14,15,16)

Robert B. Gibson

Courses taught

(i) undergraduate courses

1. M-ENV 241 Social Change

University of Waterloo, Department of Man-Environment Studies

- second year winter term course providing an introduction to social change theories, surveying the general problems of social ethics, of identifying social forces, and of directing change, as well as providing an opportunity for close examination of social change (or resistance to change) strategies and tactics used by participants in specific current issues

- enrolment (1983): 50

- taught in 1981, 1982 and 1983 winter terms

- full responsibility for course design and teaching

- course outline attached

2. INI 320Y Canadian Environmental Issues

University of Toronto, Innis College, Environmental Studies Programme

- third year fall and winter term course (in effect two half courses) focussing on two current environmental issue areas, one per term, with concentration on past and present policies, policy options, decision making practices and considerations, and policy implementation; the fall term is devoted to an examination of the problems and controversies surrounding northern development policy and non-renewable resource extraction projects in the Yukon and Northwest Territories

- enrolment (1982-83): 22

- taught in 1981-82 (fall term and half of winter term) and 1982-83 (fall term only)

- full responsibility for fall term course design and teaching (lectures and tutorials)

- joint responsibility, with B. Savan, for design and teaching of winter term 1981-82 offering on pollution prevention and abatement policies in Ontario; directed 6 week section on policy and program approaches to abatement of polluting discharges from existing industrial sources

- course outline (1982-83) attached

Robert B. Gibson

Courses taught (continued)

3. INI 421Y Environmental Thought

University of Toronto, Innis College, Environmental Studies Programme

- fourth year fall and winter term seminar devoted to examining (a) the history of expressed and implicit assumptions about humans and their place in nature and (b) contemporary analyses of the nature, sources and means of correcting malignant current relations between humans and their environment

- enrolment (1982-83): 25

- taught 1981-82, 1982-83

- full responsibility for course design and teaching - course outline and reading lists attached

4. INI 319Y Politics of the Environment
(also graduate courses JVP 2606/2607)

University of Toronto, Department of Political Science and Innis College, Environmental Studies Programme (joint offering)

- undergraduate/graduate course in two terms examining the ideological underpinnings, theory and practice of current decision making and potential future action on environmental issues in Canada; fall term work covers the background to, and current practice of, environmental decision making in Canada with emphasis on ideological roots and influences, the distribution and application of powers and mechanisms for action, relations between politics and environmental science, and approaches taken in major environmental policy areas; work in the spring term focusses on political aspects of the most significant needs for greater environmental stewardship, and on the tools, strategies and tactics available for political action to meet these needs

- enrolment (1982-83): 22

- taught: 1982-83 (first year offered)

- major responsibility for course design and teaching; responsibility shared with m. Brownstone
- course outline attached

Robert B. Gibson

Courses taught (continued)

5. M-ENV 190-191 Research Seminar Workshop

University of Waterloo, Department of Man-Environment Studies

- first year fall and winter term courses designed as a single course providing an introduction to research and analytical techniques and group project work through an examination of how regional development, forestry, energy and parks issues are handled in the Ontario Ministry of Natural Resources Strategic Land Use Planning documents for 3 administrative districts in Northern Ontario

- enrolment (1982-83): 110 in course, 26 in parks section

- taught: 1982-83

- joint responsibility for overall course design and teaching shared with J. Robinson, M. Kesik and G. Michalenko; full responsibility for design and teaching of parks section work

- course outline attached

6. INI 420Y Environmental Research Seminar

University of Toronto, Innis College, Environmental Studies Programme

- fourth year fall and winter term course providing an opportunity for professional style group research project work on topics of practical importance for specific government, media and public interest group "clients"

- enrolment (1981-82): 12

- participation in teaching in 1981-82; informal involvement in 1982-83

- very minor role in course design; responsible for one-quarter of teaching in 1981-82; major responsibility for course design and teaching is carried by B. Savan

7. M-ENV 490B Senior Honours Assignment

University of Waterloo, Department of Man-Environment Studies

- fourth year individual project intended to allow for demonstration of mastery of problem solving and communication skills on a selected problem or issue concerning human-environment relationships

- 1982-83: advisor for one student editing and producing bi-monthly newsletter on wilderness preservation for a public interest group

- co-advisor, with R. Keith, for one student reviewing the socio-economic benefits programmes of three major northern development projects - Dome's Beaufort Sea hydrocarbon exploration, Imperial Oil's Norman Wells oil production, and Amok's northern Saskatchewan uranium mine

Robert B. Gibson

Courses taught (continued)

8. POL 496H Reading Course on Approved Topic

University of Toronto, Department of Political Science
- fourth year half course initiated by the
individual student interested in examining in some detail
a subject not adequately covered in existing departmental
offerings

- winter term 1982-83: advising one student reading
on the history of anarchist thought

- course designed jointly with student

(ii) graduate courses

1. JVP 2606/2607 Politics of the Environment

University of Toronto, Department of Political Science
and the Institute for Environmental Studies (joint
offering)

- same as fall and winter term of INI 319 Politics
of the Environment (see above)

Robert B. Gibson

Other relevant information

voluntary positions:

director, Canadian Environmental Law Association (1980-present)

director, Wildlands League (1979-present)

director, Pollution Probe Foundation (1983)