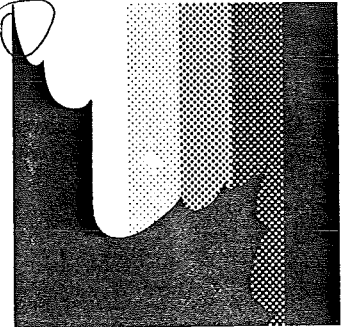


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RESOURCE DEPLETION -
THE LEGAL PERSPECTIVE

November 2nd, 1974.

Submitted by:

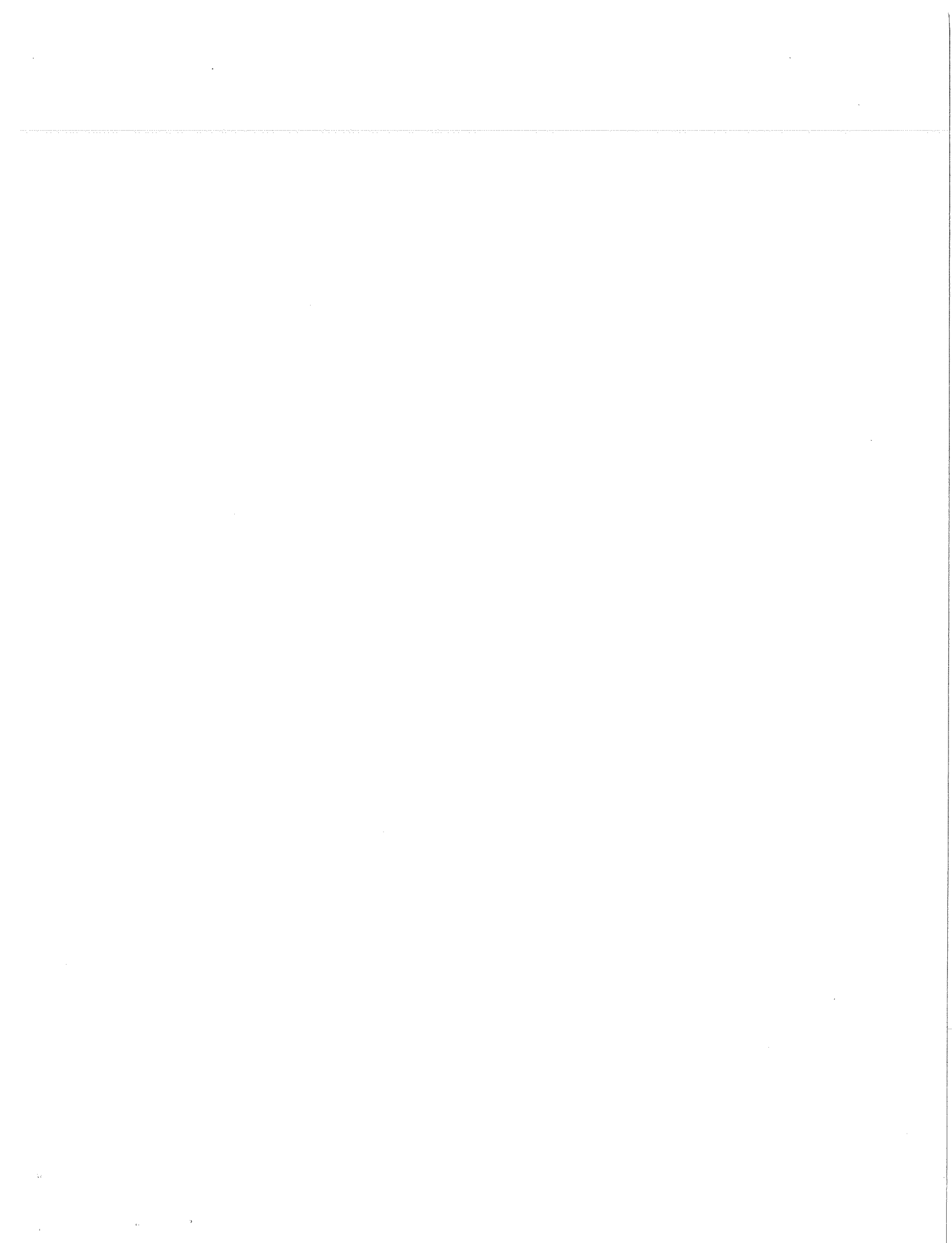
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When the Shiiks and the Shah of Iran shut the oil valves last year, raised the price of oil pre barrel 100% over its previous price and announced to the industrialized nations that the cheap and abundant energy "party" was over - they graphically brought to everyone's attention the realization that oil, the resource on which our civilization has become dependently addicted to, would henceforth be scarce and ultimately - even with new domestic oil finds - be gone.

What has governmental and industrial response been to this energy/resource crisis in Canada? Well, like a bad Shakespeare play, there have really been two reactions to the problem by governments and industry - the apparent and the real reaction.

The apparent or if you like, the smokescreen reaction has been for example - a recent governmental publication like the Environmental Action Plan by the Ontario Task Force on the Human Environment responding to the 1972 Stockholm Conference on the Human Environment. When one reads this very good document, for the most part, it seems indistinguishable from the statements that have been made by, for example, Probe, regarding energy conservation or alternate energy sources. It displays the proper concern for proliferating nuclear energy programs before knowing how to deal with, for example, radioactive wastes; it cites the necessity for seeking out mass transit alternatives to present auto transportation to conserve energy and environment; it points to necessary development of insulation standards for buildings and construction to conserve energy; the taxing of non-recycling materials to do the same.

Reading through the document is calculated to make one think that government could not be more enlightened regarding the urgency of the problem of resource depletion and environmental protection, and public safety and welfare. The document as

a statement of the Ontario Government's policy approach is very laudable - we would be pleased to see the government act on the report's precepts. But unfortunately, there are doubts that this document's apparent statements of policy and the government's real actions are one and the same. In fact, there are serious doubts.

Thus, far more concrete governmental and industrial actions to the energy crisis in Canada have been embarrassingly inadequate or worse - unacceptable - demonstrating, at best, the tunnel vision of the ostrich who really isn't interested in taking his head out of the sand after all. Besides simply exhorting the individual citizen to conserve energy x no. of ways, the plans that the federal and Ontario governments have embarked on bear little resemblance to the sensible tone and approach espoused in the Task Force Report. Both government and industry have been pushing the

- burning of more coal (e.g. recent Ontario Hydro application approved by N.E.B. for increased exports of electricity to U.S. from coal burning).
- speeding up construction of nuclear power plants (nine possibly more such plants projected for Ontario within next twenty years)
- stepping up strip mining and off-shore drilling (Beaufort Sea drilling leases)

Such unequivocal and concrete actions - while still sprinkled with symbolic concessions to conserving energy (mostly by you and me) amount to business as usual. The result can only be further diminishing of our limited resources as well as a threat to the health and safety of present and future generations of Canadians.

Assuming there are feasible alternatives to the continued exploitation of non-renewable, hazardous and polluting resources, three questions in the political/legal sphere deserve brief looks:

1. What do some of our present laws provide for in the way of encouraging conservation of energy and other resources and facilitating the search for alternatives to resource depletion?
2. What legal mechanisms or reforms should be instituted to ensure that prudent and feasible alternatives to resource depletion are sought out?
3. How much of the problem of resource depletion is beyond the remedy of law?

Present Laws

I'll begin with an existing statute which sounds innocent enough - the Ontario Farm Products, Grades and Sales Act, 1972 a regulation was passed under this Act which stated that certain vegetables could only be packaged in new unused containers - an anti-recycling regulation in effect. As already noted the value of the recycling process has in its ability to conserve both energy and the particular virgin resource by a commodity's or container's continued re-use.

Perhaps, the government officials responsible for that regulation enjoy living in a throwaway culture, but clearly without any public input, they demonstrated their total lack of understanding of the limitations of living on a planet with finite resources.

It took two years of prodding by a number of groups to get this regulation revoked. This particular example also serves to suggest that generally rule making and regulations should be subjected to some form of public scrutiny before being approved. Possibly, had the government submitted its regulation to some kind of public review in advance, rather than insulating itself from the public, the shortsightedness of the regulation could have been recognized and overcome. Possibly, the lost energy and resources that went into making that particular throwaway container for a two year period might have been saved.

By itself this one incident doesn't seem significant, but

added together with numerous other insulated governmental decisions not to encourage recycling the enormity of the problem becomes obvious.

The Ontario Petroleum Resources Act is as its name implies, basically interested in the availability of fossil fuels for production and use. There is one concession to reality. The Minister may make regulations "for the conservation of oil and gas". I've recently checked all the regulations ever made under the Act since its passage in 1971. As of August, 1974 as you might have guessed, the Minister has not made any regulations for the conservation of oil and gas. It should be noted that because the Act says "may" rather than "shall", there is no duty on the Minister to ever make such regulations.

No citizen or group could ever legally counsel the Minister to make or even consider such regulations in the interests of conservation. The Minister, in effect, has the discretion to ignore that part of the Act, as long as it's politically expedient to do so.

As with the previous Act, a Minister does not have to consult the public or provide for public scrutiny of any regulation before it is approved. This is true of all Acts in Ontario regarding the making of regulations.

To date, most of the impetus from the Provincial Government has been for voluntary individual restraint in energy consumption. It seems inappropriate to be spending on major advertising campaigns encouraging wise energy use when some simple regulatory action could achieve some of the needed savings.

The Ministry of Energy Act provides that the Minister shall "make recommendations regarding priorities for and the development of research in all aspects of energy of significance to Ontario including the conservation of energy and the improvement of efficiency in its production and utilization and the development of new energy sources."

According to a spokesman for the Ministry recently, they and the provincial government are only now on the verge of funding more energy conservation research. Applications for research funds of potentially energy saving projects are just now being considered. To date and for the immediate future, the vast portion of the research dollar has been devoted to the nuclear energy program. If we remember the Ministry's mandate is "the development of new energy sources" it is quite clear that alternate methods of energy generation must be considered.

In fact, what we now see is Ontario Hydro going full blast for a nuclear generation program with the building of a projected 9 plants in 20 years.

As Dr. Knelman, has pointed out elsewhere "the risk involved in an accident in a nuclear plant is totally out of proportion with the risk in any other kind of plant." The possibility of a nuclear horror story has been continually under-played by Ontario Hydro and the Ministry of Energy. The potential damage from an accident at a nuclear plant can best be gauged by the enactment of a special federal statute recently, which limits the liability of Ontario Hydro to \$75 million. Presumably, the public would pick up the rest, which could reach \$1 billion. When we start talking about these kinds of figures who says we don't have the money to explore alternate sources?

In fact, the best use of government funding can often be in the development of technologies that are still far from practical applications, where the risk and capital requirements are too high, the potential for recovery of development costs too low to attract, private investment. However, the provincial government has not shown much enthusiasm for these kinds of research, preferring to research projects which might have immediate applicability, such as means of saving gas in government automobiles.

The point is not that the latter is unimportant, but that in the spectrum of much broader concerns, more financial resources must be devoted to long range research at a much faster rate.

Some other acts:

The Housing Development Act, which the Minister of Housing administers, could provide for better building insulation materials and better building standards. It is estimated that the Toronto-Dominion Centre in Toronto uses enough energy to supply a large town. Much of this energy is wastefully dissipated via heat through windows in winter and air conditioning in summer. Better building design could have eliminated the high energy appetite of this building. At an Ontario Energy Board hearing, examining Ontario Hydro's 10 year generating program early this year, it was clear that despite their professed concern for energy conservation, Ontario Hydro had not been active in pressuring the Ontario government for an energy saving Building Code or in the pursuit of new energy saving lighting standards. Still no regulations.

The Gasoline Tax Act could provide for prohibitive taxes on heavy high energy using automobiles. Still no regulations. At the same time the Ontario Transportation Development Corporation Act provides for funding research of mass transit systems, a procedure which should go hand in hand with the discouragement of excessive automobile use.

This discussion has been restricted to Ontario statutes but as one might expect there are many others at the federal level which also have resource saving potential.

As an example, the Aeronautics Act, literally and figuratively paves the way for airport construction and expansion. There should be in fact regulations which require consolidation of flight schedules, control of private aircraft use and encouragement of vertical take off and landing aircraft and high speed

trains. An exploration of just such factors led to the shelving of a projected fourth airport in the New York area. No such undertaking seems to have been done at an early stage in the planning of the Pickering airport.

In the research field, the federal government seems to be in the same rut as the provincial government. Practically no research funds have yet been allocated for exploring alternate energy sources. Of the Energy Research and Development budget, 75-80% has been allotted to the CANDU nuclear program, less than 2% to energy conservation.

Of course, there have been some initiatives at the provincial level which, like the suggested Energy Tax several years ago, were so slumsily introduced that they could never have been acceptable. It is difficult to see how a government could have proposed such a measure without differentiating the energy wasters from those who use it of necessity, for example, those living in Northern Ontario, who were already faced with a high winter heating bill. In some other areas, action on important issues has continued to be stalled despite their obvious value in preventing resource depletion: In an era when the sense in recycling is so apparent, it seems almost ludicrous that the non-returnable soft drink bottle should still be an issue. However, still no regulations.

What legal mechanisms or reforms should be instituted to ensure that prudent and feasible alternatives to resource depletion are sought out?

The acts outlined in the above list are, remeber, to a large degree potential vehicles to prevent resource depletion. The necessary regulations and amendments in many cases have yet to be passed and perhaps only will be with more public pressure.

One of the means which may best be utilized to prevent or lessen future wasteful resource use, will be an adequate environmental impact assessment process, by which there will be a thorough examination of alternatives to resource depletion. It may be safely said, that without the controversy instigated by environmental groups over proliferating landfill sites in Pickering Township before the Environmental Hearing Board, we would not have seen the energetic efforts lately by the Ministry of the Environment to develop a recycling program. The key element is the public participation. For without it, the breadth of concern and the feasibility of alternative strategies would never have been explored publicly.

In fact, there are some who feel that calculating the environmental costs may be the most effective means of preventing potential resource depletion.

Dr. David Brooks of the federal Department of Energy Mines and Resources in an article "Are We Running Out of Minerals" says "I do not believe that increasing the supply of mineral resources per se will pose a significant problem in the foreseeable future; I do believe that the environmental consequences of ever-rising rates of production and consumption will threaten the quality of life, if not life itself. Note the implications of this shift in emphasis. Contrary to conservationist tradition I see most non-renewable resources as all but continuously available over time, whereas the supposedly renewable resources such as air and water are in jeopardy of depletion."

Dr. Brooks goes on to point out that there is a danger in posing threats of mineral depletion, like the historic predictions about oil supplies running out; they may prove to be off the mark and too many cries of "wolf" may lead to misplaced complacency.

Thus even those who foresee no immediate resource supply problems concur with those that do, that the means of dealing with the potential problem lies in assessing the environmental affects. The equation for this has always been simple: wasteful use of resources = pollution. Solve one and you are solving the other one too.

Presently, the provincial government is considering environmental impact assessment legislation which unfortunately does not provide for the scope of public concern in this area that it should. The Canadian Environmental Law Association has written a brief and model bill which would ensure incorporation of citizen involvement procedures. The orange sheets outline the 10 basic principles needed in such legislation which have been supported by numerous organizations including the Canadian Labour Congress and the Conservation Council of Ontario.

As mentioned in the landfill case public involvement in the assessment process will have a potentially major impact on resource management policy. Those assessing the effects of a given project would have to give, according to the CELA Bill:

1. An account of any irreversible or irretrievable commitments on energy or resources which would likely be results of the project;
2. A description of the energy requirements, the net energy output, and the energy use efficiency of the action.

Through public scrutiny of these explanations, within the impact statement must be assured, by an environmental review Board.

The CELA bill also proposes that all legislation be assessed for environmental impact. The effects on resource management policy could be significant.

In addition, more public involvement before potentially resource depleting regulations are implemented must be assured. As earlier mentioned, the public now has no right to a public forum before some of these regulations are passed.

Access to information must be guaranteed. In many instances the evidence of wasteful resource use and shoddy environmental practices is withheld from the public. Our office is aware of a writer on arctic affairs who has been continually refused, without reason, access to publicly financed research by the Federal Department of the Environment. Freedom of information legislation has long been a valuable tool in the United States and much evidence that has come to the attention of our office shows that it is needed here.

In a more specific vein, there could be legislation to create a Consumer Product Review Board to approve new products on the basis of their energy consumption and environmental impact, both in manufacture and consumer use; standards which would require greater use of recycled materials in new products with minimum content levels; standards which would prevent overpackaging of consumer products; and enact standards that would force car manufacturers to redesign engines to achieve both high mileage and low pollution emissions.

How Much of the problem of resource depletion is beyond the remedy of law?

Law is a reflection of man's social values and priorities. In few cases can legal reform move faster than the social and political forces that impel the need for change. Most would perhaps believe that this is the way it should be. However, a strong case can be made for a fresh approach to the environmental resource depletion problem.

Political arenas in this country lend themselves only to the needs of the short-term, ie. an election every four or five years with the immediate want always taking precedence to the long term need. The long term cumulative problem generated by the misuse of nature is not apparently one of much interest to our legislators. How else can one explain the paradox of billions of gallons of untreated sewage floating past a multi-million dollar World Fair site or Olympic Village extravaganza. Closer to home, how does one explain any million dollar pleasure dome (Maple Mountain) juxtaposed with the dead lakes of Killarney killed by sulphur dioxide fallout.

Perhaps our political institutions are not equipped to deal with the problem how else could we have made these incredible choices? Or perhaps we were not aware that we were being asked to make these choices? An effective environmental assessment process will make the choices explicit for all to see and do so in a legal context that affirms the public's right to a quality environment. A right which has yet to be given statutory affirmation.

The CELA model environmental impact bill, with the view that environmental control and resource conservation should have the highest kind of priority, would provide for an impartial hearing board. This would provide the strongest affirmation of the importance of environmental quality. But it must also allow for full citizen access and participation.

William Ophuls, a writer on ecological affairs, in a recent article predicted that if man did not grasp effectively and soon with the resource depletion problem we would be headed for a totalitarian state, caused by a scarcity of now freely available resources, which had been recklessly squandered in the quest for happiness, which up to then had been synonymous with material gain.

Thus, he poses the essential problem of man's political activity:
".....we are indeed a corrupt people. We understand liberty as a license for self-indulgence, so that we may exploit our rights to the full while scanting our duties. We understand democracy as a political means of gratifying our desires rather than as a system of government that gives us the precious freedom to impose laws on ourselves -- instead of having some remote sovereign impose them on us without our participation or consent. Moreover, the desires we express through our political system are primarily for material gain; the pursuit of happiness has been degraded into a mass quest for what wise men have always said would injure our souls. We have yet to learn the truth of Burke's political philosophy: man is a passionate being, and there must therefore be checks on will and appetite; if these checks are not self-imposed, they must be applied externally as fetters by a sovereign power. The way out of our difficulties, then, is through the abandonment of our political corruption."

This perhaps is our greatest challenge, to control modes of human behaviour which over the past century we thought needed no control, that limits to our quest for material gain must be applied, to preserve our quality of life, and come within the scope of legal control.

The orange sheet represents our Association's contribution to self-imposed checks. We hope you can agree and will tell your MPP's and cabinet ministers as much.

Thank you.