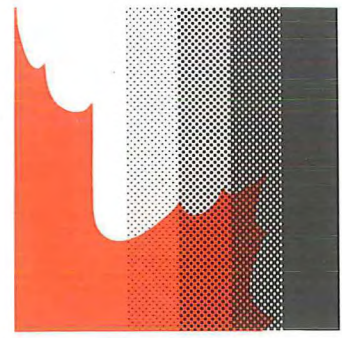


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SANDBANKS REVISITED

Canadian  
Environmental  
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L'Association  
canadienne  
du droit  
de l'environnement

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Press Conference

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PARTICIPANTS IN PRESS CONFERENCE

Panel:

Ann Rounthwaite

Member of Executive Committee of Canadian Environmental Law Association; founder of British Columbia Environmental Law Centre; former director of Sudbury Environmental Law Office; former Pollution Probe Co-ordinator. Author of Pollution and the Law: A Guide to Environmental Law in B.C. Currently 3rd year student at Osgoode Hall Law School and working with Parkdale Community Legal Services.

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Barrister & Solicitor with McCarthy & McCarthy; Director, Canadian Environmental Law Association. Co-author of The Tail of the Elephant: A Guide to Regional Planning and Development in Southern Ontario. Secretary and Director of Don Area Co-op Homes, Inc. (non-profit housing company); special lecturer at Osgoode Hall Law School in housing and land use planning; contributor to Environment On Trial.

David Estrin, LL.B. Founding member and former General Counsel, Canadian Environmental Law Association. Co-editor of Environment On Trial: A Citizen's Guide to Ontario Environmental Law. Was counsel to Larry Green in the Sandbanks case.

Resource people:

For answers to specific question which those present may raise, we may call upon the following CELA researchers:

Sally Leppard  
Linda Cardini  
Joseph Castrilli



There are questions involved in this case other than why should a citizen have to pay court costs in his efforts to make a government act responsibly:

- (a) is the public aware that they, as taxpayers will be asked to provide between \$500,000 to \$1,000,000.00 to compensate this company for this lease? This burden would have been unnecessary had the lease not been granted in the first place.
- (b) will the Province deduct from any settlement figure a sufficient amount to rehabilitate this property which the Government promised would become parkland?
- (c) Will the Province deduct from any settlement a sufficient amount to compensate for the trees which were removed from the site without permission?

The above costs exclude any consideration for the costs of the lost dunes because, since they are irreplaceable, no cost could be estimated.

Second, years have passed without a settlement between the province and Lake Ontario Cement. So far all site offers have been rejected by the Company. Environmentalists are concerned about the delay because no rehabilitation will take place until the settlement is reached and implemented. There is no guarantee that the Province will pursue this expropriation and/or settlement with any determination. Given the Government's record on the Dow case which has languished for almost two years in the Master's Office (see attached Harold Greer article) we think that the public should watch the Government's actions on this settlement with interest.

Finally, we believe that citizens should not miss the opportunity to consider how different things could have been if sound legislation to protect the environment had been on the books.

(a) an effective environmental impact assessment process guaranteed in law would have caught this decision to excavate sand on public lands and would have subjected that decision to public scrutiny;

(b) changed rules on standing would give citizens the right to have a court adjudicate matters in the public interest. The obvious environmental example would be a decision to dispose of public lands to commercial interest;

(c) change rules of costs. Costs should not be awarded in cases: where the provisions of a statute are being challenged; where an injunction or declaration, but no damages, is requested; and where the individual stands to gain little or nothing, except as a member of the public. The undertaking as to damages required for an order in the nature of an interlocutory injunction ought to be limited to a reasonable sum in cases involving a publicly assisted plaintiff.

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These and other principles of reform are covered in CELA's recent publications on environmental impact assessment and legal aid.

## SUMMARY

In 1972, Lawyers at the Canadian Environmental Law Association filed a suit on behalf of Larry Green " on his own behalf and on behalf of all other people of the Province of Ontario now living and on behalf of future generations thereof" against the Government of Ontario and Lake Ontario Cement Limited. Mr. Green's action was made in an attempt to stop the Company's excavation of unique sand dunes in full view of the Sandbanks Provincial Park in Prince Edward County, in the Province of Ontario.

Mr. Green's case was dismissed from court on the grounds that he had no standing (had no special interest in the case) and that his action was "frivolous and vexatious". The court ordered him to pay the full costs of the court action to the Government of Ontario and Lake Ontario Cement Limited, the two defendants.

Larry Green is thus liable to pay up to \$4,000.00 in court costs to Lake Ontario Cement Limited and to the Province of Ontario, all because he was seeking to stop activity that to him and to most reasonable people was something that the government itself ought to be stopping and was failing to do.

We have called this conference today to announce that despite the fact that Mr. Green's action was taken in the public interest, Lake Ontario Cement Limited has taken action to collect their costs from Larry Green. To demonstrate support for Mr. Green, The Canadian Environmental Law Association with the support of the Federation of Ontario Naturalists, Probe at the University of Toronto the National and Provincial Parks Association and the Algonquin Wildlands League, will today pay \$2,245.00 in costs on behalf of Mr. Green to Lake Ontario Cement Limited. To the credit of the Province of Ontario, it has had sufficient discretion to not press Mr. Green for payment of the Province's costs.

Several important points should be brought to the attention of the public. Firstly, actions taken subsequent to the court decision completely vindicate Larry Green's position and prove that Larry Green acted in the public interest. On the public level, the decision of the Government to expropriate the lease thereby ending the excavations would never have been taken if expropriation was not in the public interest. On the judicial level recent court decisions have indicated that the position argued by CELA lawyers, David Estrin and Roger Timms (that a private citizen should have standing in court to challenge the illegal activities or omissions of governments) was eminently reasonable.

The question that might be raised is why this Company which increased its earnings by 54% in 1973 is attempting to collect these costs from Mr. Green. Precedents have been established elsewhere where responsible corporations have not exercised their option to collect costs in public interest litigation.



## Inequities of Justice

Two of the main effects to the public and the private citizen arising out of the Larry Green case, which we would like to point out at this conference, are the apparent injustices which have occurred. We, at CELA, believe that these issues should be brought to the attention of the general public.

Firstly, when we consider the statement made in Lake Ontario Cement Limited's 1973 Annual Report .....

"Consolidated earnings, after provisions for income taxes, for the year were \$2,600,203.00, up 54% over the 1972 levels. Consolidated sales were \$34,882,689.00 up 28% over the previous year's....." (undercore added).

and we consider the obvious financial struggle of a young man, attempting to protect the aesthetic beauty of our provincial parks, at a prohibitive cost of \$2,245.00 which would mean certain bankruptcy if he had to pay it. However, to show our concern and to relieve Larry Green of this extreme financial hardship, the Canadian Environmental Law Association, Pollution Probe of the University of Toronto, Federation of Ontario Naturalists, National and Provincial Parks Association and the Ontario Wildlands League are paying these costs to the Company. It should be pointed out that none of these groups have large financial resources.

The travesty of justice here, occurring between a large rich corporation and the private individual has serious implications. When our Government has "overlooked" collecting costs for this case - it seems unreasonable that a large corporation would consider this a prime necessity, when they have made no effort to rehabilitate the environmental destruction caused by their excavations.

Secondly, because of the Ontario Government's timidity and apparent absent-mindedness with regards to expropriation of the original Company-owned 15 acre site (which could have been acquired by the Government in 1958 for as little as \$12,000.00) we, the public are expected to take lightly a settlement in excess of \$500,000.00. All this is a result of mismanagement on behalf of the government of Ontario when they exchanged the 15 acre forested site for a \$1.00-a-year lease on the clear 16.02 acre site, for the purposes of excavation. Rehabilitating the pits and forestation created by the excavations will also be costly. Unless the government insists that LOCL rehabilitates the dunes, it is certain that once again, the Ontario taxpayer will end up paying the cost. We ask ourselves why we, as taxpayers should be expected to pay for the mistakes of others.

### Status of Expropriation to Date

On March 21, 1973 the Government announced that it would expropriate LOCL's lease. Our latest information from the Attorney General's office indicates that the Government has proceeded as far as registering the plan of expropriation. LOCL has vacated the property and has not excavated there since 1972. In accordance with section 40 of the Expropriation Act, the expropriation will not become final until the government serves a notice of possession to the Company and takes possession 90 days later. The Attorney General's office is planning to do this, but had not as of October 15th, 1974.

### Status of Settlement - Compensation to Company

On September 24, 1971, the government announced that it would take over, hopefully without having to expropriate, the lands on which LOCL was excavating in accordance with its lease. Negotiations thus began between LOCL and the government in order to agree on an appropriate compensation figure for LOCL. It was decided that the land to which LOCL had the lease would be valued by two independent appraisers, and negotiations would proceed through the Department of Public Works.

In addition, or perhaps as a substitute, the Government sought alternative sites to offer the Company. Both sides hired experts to assess the amount of sand on the leased site and to sample the sand on various sites proposed by the Government. The experts differed on whether the sand deposits on the leased site were non-renewable or renewable. Since that factor would significantly affect the value of the leased site to the Company, arrival at a settlement would be difficult.

So far, all site offers have been rejected by LOCL. As recently as last summer, the Government hired geologists to test various samples for their suitability for cement making. The results of the tests are not available to the public as negotiations are still underway. The parties have taken their case to the Board of Negotiation, where they were unable to reach a settlement. The case will go next to the Land Compensation Board.

Thus, three years have passed without a settlement. Environmentalists are deeply concerned about the delay because no government rehabilitation will take place until the settlement is reached and implemented. Although precise information regarding the value of the settlement is not available to the public, it is estimated the figure is near \$500,000.00 This has been arrived at by multiplying the average selling price of a cubic yard of sand - \$2.50 - by the Company's requirement of 200,000 cubic yards of sand.\*

\*Source - experts hired by the Ontario Government.



Thus, the taxpayers of Ontario can expect to pay approximately half a million dollars to settle with LOCL. While the public awaits a settlement, the users of the Sandbanks Provincial Park and local residents must tolerate visual pollution and illegal activities on the land, as discussed below.

#### Current State of the Excavated Dunes

The current status of the site is shown more clearly in our photographs. However, a visit to the site earlier this year by our people, and discussions with the local residents reiterate the fact that dunes over 100 feet high have been removed, leaving several areas of depression below the level of the lake. These areas are filled with water and growing swamp vegetation during the spring months. These swamp areas cause serious mosquito problems as they provide perfect breeding grounds. It is also apparent within recent weeks, that the private entrance way fencing used by LOCL during their excavations has been removed allowing trucks, cars, motorcycles and dune buggies access to the site. Hunters have been illegally using the property, and we strongly suggest that until a settlement is reached, this area is potentially dangerous without adequate policing or fencing.

#### Recommendations for Law Reform

1. Enact legislation to grant citizens standing concerning public interest litigation such as environmental protection.

Two cases in Canadian law have granted citizens standing in public interest matters. They are Thorson vs. the Attorney General of Canada and Stein vs. the City of Winnipeg. As a result of these cases, the Ontario courts would probably not deny standing if a case like Larry Green's were to be brought today. They certainly would not be able to justify describing the action as frivolous and vexatious.

As helpful and encouraging as the cases are, we believe legislation is needed to solve the problem once and for all. Such a law would avoid delays caused by arguments regarding the citizen's legal standing, which must now take place in each case brought to court.

The precedent for such legislation can be found in the Michigan Environmental Protection Act which explicitly gives standing to any citizen to bring a court action to protect a park or other important environmental resource. Studies of the Michigan experience show that the courts are not flooded with unjustified litigation; that about one-third of the actions filed have been brought by government agencies.

2. Enact legislation that provides for an environmental assessment of projects expected to have significant impact on the environment. The Canadian Environmental Law Association is actively campaigning for legal reform which would require greater consideration of the environmental and social costs and benefits of proposed projects and which would provide citizens an opportunity to participate in the environmental decision-making process. The Association has drafted an environmental assessment bill which can be used as a model to judge government legislation. Further information may be obtained from the Canadian Environmental Law Association in Toronto.

3. Ensure the public a voice in decisions regarding the use of public lands, especially in proposals to make public lands such as provincial parks available to private commercial purposes. Decisions regarding public lands should not be made secretly by the Cabinet.



FACT SHEET

History of land transactions

- 1922: Provincial government began buying and reforesting land in the West Lake area because the clearing and farming of the land made the dunes very unstable. Drifting of dunes caused extensive property damage. One parcel not purchased by the government was owned by the West Lake Brick Company until:
- 1939: Lot purchased by a farmer, Mr. Cockburn. The government reforested the land, although it was privately owned.
- 15/5/58: Lake Ontario Cement Limited (LOCL) made an agreement with Mr. Cockburn which allowed LOCL to excavate the sand on his land for the next 20 years.
- 28/9/58: Cockburn sold lot to Harvey McFarland, chief founder of LOCL, a director of the company, and the mayor of Picton (town in which lot is located).
- 21/10/58: McFarland sold lot to LOCL at the same price he paid for it.
- 15/1/59: Ontario government completed survey to establish boundaries for a provincial park. Park wasn't officially designated until 1970 - the Sandbanks Provincial Park.

Because the lot purchased by LOCL was well-forested, it is uncertain where LOCL was excavating sand. There is a suggestion that LOCL was illegally excavating Crown lands near its own lot: the Crown lands were not forested, and an examination of the two areas showed evidence of excavation on the Crown lands.

The government told LOCL it couldn't excavate on its own land because the quarrying was incompatible with the use of the nearby provincial park. LOCL countered that it had the right to excavate sands on Crown land above its own lot because the law of accretion provided that the company was entitled to any sand which drifted and accumulated in front of their property.

- 12/12/68: Government gave LOCL a \$1 per year, 75 year lease enabling LOCL to excavate a 16.02 acre Crown site, in return for a deed to the 15 acre LOCL lot. Lease was retroactive to 1/1/65.

This raised the question: why didn't the government take a stronger stand and simply expropriate LOCL's 15 acre site and not permit quarrying so close to the park?

Events leading to expropriation of lease

- 24/9/71: Government announced it would take away LOCL's excavation rights. Hoping to avoid expropriation, the government looked for alternative excavation sites to offer LOCL.
- 12/2/72: Announcement that a site on the Ridge Road esker\* was offered to LOCL because preliminary study showed the sand to be suitable for cement making. LOCL rejected the offer, claiming the sand wasn't fine enough and didn't have a high enough silica content.
- 1/3/72: Government announced it would take over the dunes in 3 months.
- 13/7/72: Dr. Tovell of the Royal Ontario Museum, hired by the government, issued written report which recommended that the lease be surrendered but that LOCL be permitted to extend its quarrying activity to the park boundary.
- July 1972: Mrs. Agda Raynor's lawyer from the Canadian Environmental Law Association laid charges against Triad Truckways Limited and LOCL for polluting the environment with noise emanating from quarrying activities. (See next page for details). LOCL stopped excavating, pending trial.
- 8/8/72: Larry Green's lawyer from the Canadian Environmental Law Association filed suit on behalf of Larry Green and the citizens of Ontario against the Ontario government and LOCL for breach of the public trust regarding provincial parks. (See next page for details).
- 12/12/72: Larry Green lost case and was assessed full cost of the court proceedings.
- 21/3/73: Government announced it would expropriate the lease.

\* An esker is a sinuous ridge of sand deposited in glacial times by streams of meltwater. It is an excellent source of well-washed sand and gravel.

Source: Arthur L. Bloom, The Surface of the Earth, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1969.



Details of legal cases

- 30/5/72: Environmental Law Association requested Attorney General's permission to prosecute under the Beach Protection Act. The letter was never acknowledged.
- July 1972: Criminal case filed by Canadian Environmental Law Association lawyer:  
Regina ex rel Rayner vs. Triad Truckways Ltd. and Lake Ontario Cement Ltd.
- October 1972: Case heard
- 12/1/73: Decision handed down that section 14 of the Ontario Environmental Protection Act was ultra vires; that noise pollution was a matter for the federal, not provincial government.
- 1/2/73: Case appealed by the Attorney General for the Province of Ontario
- 16/3/73: Supreme Court held that section 14 was intra vires and referred the matter back to the provincial court for a continuation of the charges.
- 8/8/72: Civil case filed by Canadian Environmental Law Association lawyer:  
Larry Green on his own behalf and on the behalf of citizens of Ontario vs. the Government of Ontario and Lake Ontario Cement Limited
- Suit filed for breach of the public trust regarding provincial parks. Requested Supreme Court injunctions to bar future excavation and to require the company to rehabilitate the leased site.
- 12/12/72: Plaintiff told by court that he was being "frivolous and vexatious" because section 2 of the Provincial Parks Act imposes no duty of public trust on the government; the power of the province regarding provincial parks is absolute; and the plaintiff had not standing to prosecute on behalf of the public. Costs of court case were assessed against the plaintiff.
- Lawyers for Green decided not to appeal the decision because the court proceedings would be costly and it was hoped that a political settlement of the excavation problem would be reached.