

ENVIRONMENTAL LAW NEWS

A Joint Publication of the
CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION
and the
ENVIRONMENTAL LAW ASSOCIATION

IN THIS ISSUE :

	Page
I. EDITORIAL	1
II. ENVIRONMENT ON TRIAL - CURRENT CANADIAN DECISIONS	
Yukon Water Board without Jurisdiction to License Power Project	1
Manitoba's New Water Pollution Law Held Invalid	2
Court Denies Environmental Rights under Ontario Law	4
Judge Wrong in Awarding Costs to Successful Complainant in Air Pollution Case	5
Temporary Injunction Refused in Nuisance Action	6
Air Pollution Prosecution Brings Results	7
III. NEWS AND VIEWS	
Changes Made to Ontario Environmental Law	8
Your Five-Dollar Bill Is Saved - Temporarily	10
Environmental Laws Enforced in Sudbury	12
Firm Ordered to Halt Battery Crushing	13
Breach of Trust Suit Is Filed against Ontario on Sandbanks	14
Back Door Approval for Village Lake Louise Feared	15
Statistics Obtained on Prosecutions under Fisheries and Shipping Acts	16

YOU CAN BECOME A MEMBER of the Environmental Law Association
and help contribute to its efforts by paying one of the
rates listed below. Membership entitles you to receipt of
each issue of ENVIRONMENTAL LAW NEWS as it is published.

Minimum Annual Membership Rates:

Student Membership	\$ 4.00
Regular Membership	10.00
Group Membership	25.00
Sustaining Membership	50.00

Please return the slip below with your cheque to the
Environmental Law Association.

.....
Name _____

Address _____

(Tax deductible donations to support long-range environmental
law research and reform activities may be made by enclosing
a separate cheque, payable to the Canadian Environmental Law
Research Foundation.)

EDITORIAL

The ENVIRONMENTAL LAW NEWS has now reached the stage of broadening its coverage to across Canada. We are in the process of forming an editorial board, with an editor, hopefully, in each province. Our format will, no doubt, be changing as we grow, and as you, the readership, make your ideas known to us.

There are numerous legal and semi-legal periodicals in circulation, many duplicating each other. The ENVIRONMENTAL LAW NEWS will not simply be a law reporter, for any truly important case will, no doubt, be reported fully in one of the more prominent law reports. We hope to bring to your attention unreported cases, case comments, and articles on current developments, some academic and some more practical. To a great extent, the development of the ENVIRONMENTAL LAW NEWS depends upon our readership. Nobody in this country is an expert on environmental law, least of all ourselves. Therefore, we wish to hear from those readers who have interesting environmental cases or problems, or some experience in any particular environmental law area. Our next edition will hopefully contain the names and addresses of our Canada-wide editorial board. In the meantime, any cases or articles that you wish to submit can be sent to our Toronto address.

Admitting to malicious rumours, this edition is not yet printed on recycled paper. It's still too damn expensive!

ENVIRONMENT ON TRIAL -

CURRENT CANADIAN DECISIONS

YUKON WATER BOARD WITHOUT JURISDICTION TO LICENSE POWER PROJECT

[Yukon Territory Water Board]

RE APPLICATION BY THE NORTHERN CANADA POWER COMMISSION PURSUANT TO THE NORTHERN INLAND WATERS ACT FOR A LICENCE TO CONSTRUCT A HYDRO-ELECTRIC POWER SYSTEM.

Whitehorse, Yukon

May 24 & 25, 1972

At the outset of this hearing, Russell J. Anthony, counsel for the Canadian Environmental Law Research Foundation (British Columbia section), submitted that the board was without jurisdiction in hearing the present application submitted by the Northern Canada Power Commission. The board accepted these submissions and turned the hearing into a general one to inquire into all aspects of the proposal. The basis of the submissions in relation to jurisdiction were as follows.

Firstly, the Northern Inland Waters Act and, in particular, section 3 and 10(1)(b), presuppose that a water management area will be created before an application for a licence under the Act is submitted to the board. The area in and around the proposed Aishihik River power development had not been consti-

tuted a water management area, and, hence, an application for a licence was premature and the board was without jurisdiction to entertain the application.

(2) Under section 17 of the Northern Inland Waters Act, the applicant for a licence must serve notice of its application for a licence by publication thereof in the Canada Gazette. No notice of application was published by the Commission, and hence, it was in breach of the mandatory conditions of the Act, and the board for this reason did not have jurisdiction to hear the application.

(3) Further, under section 11 of the Northern Inland Waters Act, the application for a licence is to be in a form and is to contain such information as is prescribed by regulation. No regulations had been proclaimed, and therefore, the sufficiency of the application could not be established.

(4) There was not reasonable notice of the public hearing, as is required and implied by section 17 of the Northern Inland Waters Act.

(5) The notice of public hearing was itself deficient and contrary to the principles of natural justice in that it did not adequately describe the scope of the project so that members of the public would have sufficient knowledge upon which to base their decision whether to file an objection with the board.

(6) Finally, under section 10 of the Northern Inland Waters Act, an onus is placed on the applicant that cannot be satisfied without the creation of a water management area, and therefore, the application was premature, and also for this reason, the board did not have jurisdiction. (See article entitled "Your Five Dollar Bill Is Saved - Temporarily".)

MANITOBA'S NEW WATER POLLUTION LAW HELD INVALID

[Manitoba Queen's Bench]

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA v. INTERPROVINCIAL CO-OPERATIVES LIMITED AND DRYDEN CHEMICALS LIMITED.

Matas, J.

June, 1972

Case Comment

by Ian Roland, Canadian Environmental Law Research Foundation

This was a motion to strike out parts of the statement of claim of Manitoba's suit.

The defendants ("IPCO" and "Dryden") are both Dominion companies and operators of chlor-alkali plants. The IPCO plant is located in Saskatchewan close to the South Saskatchewan River, which flows into Manitoba. Similarly, the Dryden plant is located in Ontario on the Wabigoon River, which flows into Manitoba waters. Mercury is a by-product of both companies' manufacturing processes. This was deposited in the respective rivers and hence flowed into Manitoba waters.

Because of mercury contamination, the Manitoba government, on April 1, 1970, put a stop to commercial fishing on Lake Winnipeg and its tributaries. Shortly afterwards the Manitoba Legislature passed the Fishermen's Assistance and Pol-

luters' Liability Act. The constitutional validity of this legislation came before the court on this motion.

The Act does a number of things. It sets up a scheme for Manitoba fishermen to assign their rights to sue to the provincial government. It provides for payments to fishermen for losses suffered because of the prohibition of taking fish from the polluted waters. But more important, the legislation defines the situs of the tort and the defenses available in such an action.

The Manitoba government sought to bring the game into its own backyard and to change the rules of the game as well. The obvious obstacle in any suit in tort is the statutory authority which the defendants operated under in their respective provinces.

Mr. Justice Matas considered the many constitutional problems presented by the Manitoba legislation. Dealing first with the substance of the legislation, he decided that it concerned the effect of pollution on Manitoba water and was not ultra vires. The Act falls on the provincial side of the constitutional line dividing jurisdictions between the federal power to control water quality as that quality affects fish, and the provincial power to legislate respecting tort of injury to a provincial proprietary right (i.e., the right of fishery). And this provincial legislation - otherwise valid - is not ultra vires merely because it affects part of an inter-provincial river.

But where was the tort committed? Case law is divided between the place where the tortious act was initiated and the place where the damage was done in locating the situs of the tort. Matas, J., cuts neatly through this "legal fiction" of dividing a tort into its component parts. Without saying so specifically, he seems to indicate that either or both places might be the place of the tort. In any event, Manitoba may, and in this case has, legislatively altered its common law of tort - removing the jurisdictional impediment to bringing the action in Manitoba. So far, so good.

The Act goes further. It is this next step that is both crucial for a successful tort action and constitutionally fatal to the scheme of the legislation. Section 4(2) of the Act provides that:

"it is not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred if that regulatory authority did not also have jurisdiction at the place where the contaminant caused damage to the fishery."

Without this provision, the defendants have a possible defense of statutory authority making their activity in their own provinces non-tortious. Manitoba's attempt to legislate an end-run to avoid this defense crashes headlong into the now classical Privy Council decision of Royal Bank of Canada v. The King. The result makes section 4(2) ultra vires because it derogates from civil rights that would otherwise be enjoyed outside the province - i.e., the defense of statutory authority. As Matas, J., said at page 32, "The defendants are faced with the anomalous situation of being brought to litigation in this province by special legislation and of being deprived of their extra-territorial civil rights by that legislation."

This case clearly raises the short-comings of our legal structure, as long as each province has exclusive legislative authority to deal with water rights within its own boundaries for its own purposes in spite of the detrimental effects this might have on these waters flowing into another province. This distorts the true meaning of the polluting activity by defining it strictly within provincial boundaries. Manitoba's solution may not be the best kind of solution, but few may deny that an answer is badly needed. Co-operation between provincial governments affected by any activity controlled by one of them has not so far disposed of the problem.

COURT DENIES ENVIRONMENTAL RIGHTS UNDER ONTARIO LAW

[Supreme Court of Ontario]

JAMES HEINEMAN v. DIRECTOR OF THE AIR MANAGEMENT BRANCH OF THE MINISTRY
OF THE ENVIRONMENT AND ADVENTURE CHARCOAL ENTERPRISES LIMITED

Well, C. J., Donnelly, J., Grant, J.

June 29, 1972

The Supreme Court of Ontario recently rejected an application to quash approval by the Environment Ministry of pollution controls at a Madawaska Valley charcoal plant.

The application was brought by the Environmental Law Association on behalf of James Heineman, a musician who had moved to the area with his wife and three children to find an unpolluted, isolated and rural home and a different way of life. The judicial relief was sought after the construction of a charcoal plant commenced 100 yards from his farm.

The application for judicial review (in effect a motion for certiorari coupled with mandamus and injunctive remedies) asked the court to:

- cancel certificates of approval for ten charcoal kilns issued to Adventure Charcoal Enterprises Limited (without such certificates, the kilns could not be constructed);
- order the Director of the Air Management Branch to prepare an environmental impact report about the plant and to make the report available;
- stop the Director from issuing any new or amended certificate of approval until Mr. Heineman was given a chance to see the report and file any objections.

Peter deC. Cory, Q.C., who represented Mr. Heineman at the application, argued that Heineman was denied his basic rights to be given notice of the plant's location and of representation on the charcoal plant's application for certificates of approval in a situation where the Director of the Air Management Branch was making, in effect, a judicial decision. There is no zoning by-law or other local control of industrial sites for the area. It was argued that the Director, in issuing a certificate of approval, was in fact authorizing a change in land use from a rural or recreational to an industrial use, and thus was exercising a quasi-judicial function.

Mr. Justice Donnelly, ruling for the Court, said that the Environmental Protection Act did not provide a right of hearing. He also held the director's decision was not judicial, without giving any reasons, however. Donnelly, J., did consider that Mr. Heineman might have some right to make his opinions and point of view known to Air Management. However, the judge noted that Mr. Heineman had indeed registered his objections in several letters to the Government. The Court ruled that this was the extent of the applicant's rights, since there was no indication that the residents of the area would have their property rights adversely affected.

Mr. Justice Donnelly went on to say, "We have a director in whom the Government apparently has confidence. He says he is satisfied that there will be no harmful emissions." Chief Justice Wells added that the time to test the situation would appear to be when the plant starts operations.

Costs were awarded to the Respondents and were asked for by the charcoal company.

JUDGE WRONG IN AWARDING COSTS TO SUCCESSFUL COMPLAINANT IN AIR POLLUTION CASE

[Supreme Court of Ontario]

HER MAJESTY THE QUEEN ON THE INFORMATION OF DALTON MCCARTHY, APPELLANT,
v. ADVENTURE CHARCOAL ENTERPRISES LIMITED, RESPONDENT.

Galligan, J.

As was reported in our last edition, the respondent company was found guilty of breaching section 8 of the Ontario Environmental Protection Act, 1971, following a private prosecution by Dalton McCarthy. At the same time that His Honor Judge A. A. McLean convicted the company, he purported to award costs against the informant. This latter decision was appealed by way of stated case to the Supreme Court of Ontario. David Estrin, general counsel for the Environmental Law Association, argued the appeal on behalf of Mr. McCarthy. The Hon. Mr. Justice Galligan had no qualms in granting the appeal with costs to the appellant (informant).

It is almost trite law that a Provincial Judge's jurisdiction is strictly statutory. Section 10 of the Ontario Summary Convictions Act and s. 744 of the Criminal Code dealing with costs in a summary proceeding both provide only for awarding costs against an informant if an acquittal occurs, and thus, a Provincial Judge has no jurisdiction to award costs against an informant where a conviction results.

This may be an all too obvious decision to lawyers, but is of importance to the public, for there have been some misunderstandings as a result of an earlier decision of Mr. Justice Galligan, where he stated that "any person has the right at his peril to lay criminal charges against another". Mr. Justice Galligan elaborated on his earlier obiter on this appeal by stating that he was referring to the risk of being sued for malicious prosecution. His earlier obiter could also, no doubt, encompass the logical scheme of section 10 of the Summary Convictions Act and s. 744 of the Criminal Code, wherein a court may, at its discretion, award costs against a frivolous informant where acquittals are obtained.

TEMPORARY INJUNCTION REFUSED IN NUISANCE ACTION

[Supreme Court of Ontario]

DOROTHY GLASS HALLIDAY AND FRANCIS HALLIDAY, PLAINTIFFS, v. ALAN BERRILL, VICTOR TRUSTRUM AND THE CORPORATION OF THE TOWN OF MISSISSAUGA, DEFENDANTS.

Cromarty, J.

June 6, 1972

This case involved an application by the plaintiffs for an interlocutory injunction until trial prohibiting, among other things, the defendants from using the adjoining land as a garbage and refuse dump. The plaintiffs moved to their home in September of 1965, and it was not until early 1966 that the municipality commenced dumping on the adjoining land. Ever since operations commenced, the plaintiffs complained to both the operator and the corporation.

The action was commenced in 1972. Affidavit evidence showed that "noxious odors, rats, flies, dust storms, and large congregations of sea gulls" were affecting the plaintiffs' land, in addition to drainage problems resulting in the death of trees and vegetation surrounding and upon the plaintiffs' property. The plaintiffs also suffered from noise pollution as a result of trucks proceeding to the dumping area.

Cromarty, J., in weekly court, applied the "six rules" set out in Williston and Rolls' "The Law of Civil Procedure" in relation to injunctions. All the tests were satisfied by the plaintiffs save three. The second rule states: "An interlocutory injunction should be granted only for the purpose of preserving the status quo while the action is pending." There was no evidence upon which Mr. Justice Cromarty was prepared to act which would show that the injunctive relief sought would achieve the above objective. The fourth rule states: "In deciding whether an interlocutory injunction should be granted, the court must see that the defendant's interests receive the same consideration as those of the plaintiff." Affidavit evidence on behalf of the corporation showed that this refuse site was one of the main disposal areas for the towns of Mississauga, Port Credit, and Streetsville, encompassing 182,000 people, and there was no evidence of an alternate disposal site. The fifth test is that the plaintiff must show the wrongful acts will cause irreparable injury. Even though the results of the use of this refuse dump seemed to be causing obvious nuisance there was no evidence that irreparable injury would occur. Mr. Justice Cromarty added a seventh rule when seeking relief in this area, and that is that the applicants must move as promptly as possible, and in this case this could not be shown to have been done.

There is no doubt that the court followed the accepted rules for granting an interlocutory injunction. However, this case surely points out a need for the formulation of special rules for interlocutory injunctions in environmental matters. In Ontario the legislature has enacted special rules for labour problems, to wit, section 20 of the Judicature Act, and a similar policy should be forthcoming for environmental problems. Among the most obvious rules which should be abandoned is that of the plaintiff having to show irreparable harm. Most environmental damage can be remedied with a sufficient expenditure of funds. But this is an impractical and completely illogical approach to take. If certain activities constitute a sufficient nuisance and bring about sufficient ecological damage, surely such activity should be restrained by an

injunction. It just may be that the courts do not constitute the best forum for obtaining the type of remedy envisaged by the plaintiffs for this action, but that will be the subject of an article in a future edition.

AIR POLLUTION PROSECUTION BRINGS RESULTS

[Judicial District of York Provincial Court (Criminal Division)]

REGINA v. BISHOP BUILDING MATERIALS LTD.

Camblin, Prov. C. J.

April 13, May 17, 1972

This was a successful prosecution by the Ontario Ministry of the Environment under section 14(1)(a) of the Environmental Protection Act, 1971, which, as it read until June 30, 1971, prohibited the emission of a contaminant into the natural environment that "has an offensive odour". (See p. 8 of this edition of ENVIRONMENTAL LAW NEWS for amendments now effective replacing s. 14.)

After a day and one half of trial, the company was fined \$1,000. The conviction has apparently had the salutary effect of causing the company to install abatement equipment, but the legal action by the Ministry was long overdue.

Since 1969 the owner of an electronics firm in the area had complained to the Air Management Branch about sulphur dioxide emissions from the accused's plant, which manufactures mineral wool. The complainant had consulted the Environmental Law Association when, after approximately 30 complaints to the government agency about great discomfort being caused to him and his customers, nothing apparently was being done.

In May, 1971, a ministerial order gave the company six months to take effective action to bring its operation into compliance with the E.P.A. Then the deadline was extended to December 31, 1971.

In this period the Environmental Law Association had corresponded at length with the Air Management Branch, and in December the chief of the abatement section stated to ELA that "appropriate action will be taken under the E.P.A., should the company not be in compliance on the closing date".

Two senior inspectors of the Air Management Branch testified. The first inspector had on previous occasions visited the plant, which is located in a mixed area containing resident, commercial, and industrial uses. The first inspector testified that at 1,000 feet from the accused's plant he observed a plume rising from the plant's cupola, that the smell was nauseating and made him catch his breath as he stood in the plume's haze. The second inspector repeated the same evidence.

No prosecution evidence other than the observations made via the inspectors' noses was introduced.

Since the conviction, although an appeal has apparently been filed, the company has ordered and commenced installation of scrubbers and other abatement equipment satisfactory to the Ministry.

NEWS & VIEWS

CHANGES MADE TO ONTARIO ENVIRONMENTAL LAW

by David Estrin
Executive Director, Canadian Environmental Law Research Foundation

Some important amendments were recently made to Ontario's Environmental Protection Act, 1971.

The amendments, in the form of Bill 168, An Act to Amend the Environmental Protection Act (now the Environmental Protection Act, 1972) were pushed through the Legislature in great haste, and with scarcely any publicity being given to them. The bill was introduced on June 13th, and the amendments (except those dealing with pesticides) came into effect in two weeks (June 30th).

The amendments cover the following topics:

1) Noise

"Contaminant" is redefined so that, although there are no regulations covering the emission of noise, any person who emits noise or sounds which may "impair the quality of the natural environment for any use that can be made of it"

- a) commits an offence under s. 14(1)(a)[as amended], Bill ss. 1(c) and 3; and
- b) must apply for a certificate of approval before he constructs or alters any plant, structure, equipment, or thing that may emit such noise (s. 8(1)[as amended], Bill s. 2).

It is doubtful whether the Ministry of the Environment contemplated it was in fact bringing noise under the E.P.A. through these amendments.

2) Nuisance

It is now an offence to discharge, notwithstanding any other provision of the Act or of the regulations, any contaminant into the natural environment that, inter alia, as stated in s. 14(1)(a)[as amended], Bill ss. 1(c) and 3

"causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it".

It is suggested that this section has created a statutory prohibition analogous, if not exactly similar, to common law nuisance. This clause is, of course, vague, to say the least, and it remains to be seen what meaning judicial interpretation will give it.

3) Polluter's Holiday

No longer does the Director of the Air Management Branch have a mandatory duty to ensure that plans and specifications submitted for the purpose of

obtaining a certificate of approval pursuant to section 8 will bring emissions within the Act or the regulations. This one duty to ensure that new and expanded operations complied with the E.P.A. has been replaced with a discretion to allow new or expanded operations to be built whether or not emissions will be within the statute.

4) Septic Tanks and Sewage Systems

Jurisdiction over septic tanks and private sewage systems, including waste disposal sites and systems for hauled sewage, is about to be transferred from the Public Health Units to the Ministry of the Environment: Bill s. 23. A system of certificates of approval has been set up which prohibits both the construction and operation of new systems and the use of present private sewage systems without prior approval in an area after the new provisions become effective in a particular part of the province (watch the Ontario Gazette for proclamations relating to the application of Part VII).

5) Compensation Fund for Ruined Water Supply

A compensation fund has been established based on compulsory payments by operators of waste disposal wells for the reimbursement of expenses incurred in the obtaining of an alternative supply of water where an existing supply is rendered unfit by the operation of any waste well: Bill s. 16 [s. 46a and following of the amended Act].

The fees to be paid into the fund will be set by regulations.

Where the water used by any person for ordinary household purposes or for the watering of livestock, poultry, home gardens or lawns, or for the watering or irrigation of crops grown for sale "is rendered unfit for such use by reason of the operation of any well that is a waste disposal site" compensation out of the fund may be applied for.

Application must be made in writing within six months after a claimant becomes aware that his water has been rendered unfit. The Ministry official administering this part of the E.P.A. must then investigate the claim. If there are "reasonable grounds for believing" that the water has been rendered unfit by a waste disposal well he shall determine the amount of the claimant's "reasonable and necessary expenses incurred in obtaining an alternative supply of water substantially equivalent in quantity and quality to such water". In any event, written reasons must be sent to the claimant after the investigation, and he may then appeal.

A claimant may still have recourse to civil court to recover amounts not available through the compensation fund, but in that case he must repay the fund either that which he received from it, or the amount he recovered from the owner of the well, whichever is the lesser.

6) Waste Disposal Site Hearings

Public hearings have been made mandatory (except in emergency situations) whenever the use or establishment of waste disposal sites is proposed which would service the wastes of not less than 1,500 persons: Bill s. 7 [s. 33a as amended].

When sites serving less than that number are proposed, the Ministry has the discretion to dispense with a hearing.

Notice of an application to use, operate, or enlarge a site must be given to adjoining land owners, as well as in the local press for three consecutive weeks.

The Minister has the power to ask the Environmental Hearing Board established under the Ontario Water Resources Act, where a municipal by-law affects the location or operation of a proposed waste disposal site, to hold a public hearing to consider whether or not the by-law should continue to apply to the proposed waste disposal site: [amended s. 35(1)]. After receiving the report of the Hearing Board, and whatever its decision, the Minister may order that the by-law be deemed not to apply to the proposed new waste disposal site.

7) Pesticides

New provisions dealing with pesticides, which appear to be merely a transfer of jurisdiction in this area from the Pesticides Act to the E.P.A., are to come into effect on a day to be named by proclamation: Bill ss. 18-21 and 34.

A more comprehensive analysis of Bill 168 and the inadequacies in Ontario legislation which these amendments fail to recognize is contained in "CELRF's Critique of Bill 168", available at a cost of \$3.50.

YOUR FIVE DOLLAR BILL IS SAVED - TEMPORARILY

by A. R. Lucas

As reported elsewhere in this edition of ENVIRONMENTAL LAW NEWS, Russell J. Anthony, on behalf of the Canadian Environmental Law Research Foundation (British Columbia section) made representations to the Yukon Territory Water Board in relation to an application for a licence by the Northern Canada Power Commission under the Northern Inland Waters Act.

The Water Board is one of the few federal regulatory agencies that specifically requires environmental impact reports as part of its regulatory process. The hearings were held on May 24-25, 1972, by the Yukon Territorial Water Board on a proposal by the Northern Canada Power Commission to construct a hydro-electric facility on the Aishihik River in the southwestern Yukon. This project would involve diverting the East Aishihik River some three and a half miles through a power canal. Control works would be installed at the outlet of Canyon Lake, thus affecting the flow of Otter Falls. Otter Falls is considered a prime tourist attraction in that part of the Territory and is reproduced on the back of your five-dollar bill.

The hearing was significant for several reasons. It was the first hearing held by the Territorial Water Board under the recently proclaimed Northern Inland Waters Act. Secondly, the Act provides for mandatory public hearings on water licence applications whenever any person objects and notifies the board of his intention to make representations on the matter. Thirdly, the hearing was based on a type of environmental impact statement prepared in advance by the project proponent. There are indications that the forthcoming

regulations will confirm and amplify this environmental impact statement requirement.

At the outset of the hearing, counsel for CELRF pointed out the lack of jurisdiction required by the board in order to continue this application. As reported in "Current Canadian Decisions", the result was that the board turned the proceeding into a general hearing into all aspects of the proposal. The Water Board will eventually make whatever recommendations it considers appropriate regarding the hearing process in general, and the NCP proposal in particular, to the Minister of Indian Affairs and Northern Development. It will make no decision on the licence application.

The Northern Canada Power Commission was required by the board to prepare an environmental impact report. This report, along with an engineering report, served as the basic reference for the public hearings.

The report was prepared by Pearse-Bowden Consultants Limited, mainly on the basis of consultations with experts in various fields who are familiar with the area. Very little field work was actually done. The report clearly states that it is a preliminary environmental impact report. However, in the recommendation section, the consultants offer their opinion that the "overall impact of the proposed hydro-electric development on the Aishihik area is considered to be slight". In addition, the impact on "selected individual components of the environment (particularly fisheries and flows over Otter Falls) has been assessed as moderate".

It is not surprising, therefore, that the majority of the briefs presented at the hearings questioned the adequacy of the impact report. They recommended that further field studies - particularly on fisheries and flows over Otter Falls - be conducted as a basis for a more complete environmental report. The brief of the Department of the Environment, Fisheries Service, was typical - recommending that no licence be granted until environmental consequences of the project can be adequately determined, and that no diversion of water from an adjoining basin be authorized until completion of necessary fisheries studies. Recommendations to the same effect were made in a brief by the Canadian Society of Wildlife and Fishery Biologists.

The briefs presented by the Yukon Native Brotherhood, a non-status Indians association, pointed out that effects of the proposed development on native people of the area may be considerably greater than "slight". In particular, it appears that erosion of the banks at Aishihik Village and the effect on the Village's spring-fed water supply may be substantial.

In addition to the jurisdictional question, CELRF also made detailed submissions as to the hearing procedure that should be followed by the board and also the type of matters that an environmental impact statement should cover. Copies of the brief can be obtained from the Toronto CELRF office for a nominal fee of \$2.50.

It is hoped that CELRF's representations will assist the Minister in formulating his policies and regulations for future hearings.

ENVIRONMENTAL LAWS ENFORCED IN SUDBURY

by Doug Lash

The Environmental Law Association has been assisting in the operation of an "environmental law advisory and research office" in Sudbury since the beginning of June.

The group was invited to this northern Ontario city of 100,000 persons by the Sudbury and District Committee on Pollution, which has been active for some years now. The office operates in much the same way as the Toronto ELA office, receiving complaints, contacting government agencies, and assisting in legal action where appropriate. Research into the legal aspects of local pollution problems is now underway; several public speaking engagements have been fulfilled, and appearances have been made on local T.V. news and talk shows. Six persons have been working in the area all summer, with great assistance from several members of the Sudbury bar.

Legal Initiatives to Date

(a) The greatest and most obvious environmental problem in the Sudbury area is that of air pollution. Although a Toronto lawyer for the International Nickel Company telephoned the Sudbury office to inform the group that INCO would not answer its telephone calls, reply to its letters, or meet with the group under any circumstances, research has been done into the "smoke easements" that are prevalent in the area.

These are of two types. The first is the inclusion of a "sulphur fumes" clause in letters patent for the grant of Crown Land to individuals whereby the grantee is precluded from suing any mining company for damage to land or vegetation done by sulphur fumes coming from smelters in the area. The sulphur fumes clause was included in patents by a 1942 order-in-council. The practice ceased in 1970.

The second type of smoke easement is provided for by The Industrial and Mining Lands Compensation Act, R.S.O. 1970 c. 219. This Act permits mining companies to purchase the right to pass noxious fumes over the lands of individuals in the Sudbury area by way of agreement made pursuant to the Act. The fact that these agreements run with the land by virtue of the Statute has become a matter of controversy in Sudbury. The rationale for and legal validity of both types of smoke easement are being studied at the present time.

(b) Municipal pollution of water is also a serious problem in Sudbury. Balfour Township to the north of Sudbury allowed large amounts of raw sewage to drain into a watercourse contrary to the Ontario Water Resources Act. The Sudbury Office is assisting the Sudbury and District Committee on Pollution and a private complainant with a prosecution under the Act.

Considerable concern has been expressed about Lake Ramsay, Sudbury's drinking water supply. The lake is situated in the middle of the city and is subject to sewage spills from time to time. The group has met with the mayor of Sudbury to discuss the problem. A course of action is being planned at the present time.

(c) Planning and zoning in the north part of Georgian Bay have also become issues in the area. A cement plant and major harbour are under construction at the present time. This type of industrial activity, it is argued, is inconsistent with the provincial government's "North Georgian Bay Recreational Reserve" plan. The Sudbury office is assisting two local groups, the McGregor Bay Association and the Save Rainbow Country Committee, in ensuring that economic development in the area is balanced and takes into account all relevant environmental concerns.

In this connection the Sudbury group is assisting the Save Rainbow Country Committee and a private complainant with a private prosecution under the Navigable Waters Protection Act. A causeway to the harbour development was built through navigable waters without Department of Transport approval contrary to the Act.

Ways and means are being sought at the present time to continue the office and the work that has been begun.

FIRM ORDERED TO HALT BATTERY-CRUSHING

Toronto Refineries and Smelters Ltd. was ordered on July 19th, 1972, to close down part of its Bathurst Street plant as an air pollution hazard.

It was the second stop order ever issued by the Ontario Environment Ministry and was effective immediately.

Thomas Cross, deputy director of the ministry's air management branch, said lead emissions "higher than desirable" were monitored in an outdoor battery-crushing operation.

Part of the company's business is the reclamation of material from used automobile and industrial batteries.

The stop order would halt the offending operation until the emissions were brought to acceptable levels. The company has an option to appeal to the air pollution appeals board, but the order would remain in force pending any appeal.

The full effect on the company's operations was not immediately clear. Manager M. B. Kaufman was not available and no other company official would comment.

The stop order is one of the stronger actions available to the Government under the Environmental Protection Act of 1971. The Environment Ministry has shown a marked distaste for using it, depending instead on negotiations with polluters and charges laid under the act.

The order was also available, in weaker form, under the Air Pollution Control Act of 1967.

The director of the air management branch is allowed, on reasonable and probable grounds, to issue an order against the source of any contaminant he believes to be an immediate danger to human life, human health or property.

Mr. Cross said this case involves "a suspected health hazard".

Mr. Cross refused to say whether his branch acted on a citizen's complaint. This information is confidential by law, he said.

On July 7, the Environmental Law Association warned that a private prosecution would be launched against Toronto Refineries unless the Government acted by July 19th.

The complainant was to be Walter Lachocki, who lives on Niagara Street behind the plant. In a letter to the Environment Department, the Association listed Mr. Lachocki's complaints: fumes with an acid smell, fine black dust and vibrations which rattled dishes in the kitchen and awoke people from sound sleep.

Ian Roland of the law association said he expected the stop order would satisfy Mr. Lachocki.

The Environment Ministry's first stop order was issued six to eight weeks prior to this one and escaped public notice. Mr. Cross refused to identify the target of the order or to give details. Secrecy sections of the Environmental Protection Act barred public disclosure at this stage, he said.

The order has since been lifted because the company concerned corrected the problem after a temporary shut-down "and the situation is much safer," Mr. Cross said.

While the order stood, it was public information "but nobody asked us then what was on the index . . . As I interpret the act, I can't say anything about it now that it isn't on the index," Mr. Cross said. The index referred to is a list of official actions.

- adapted from The Globe and Mail, July 20, 1972

BREACH OF TRUST SUIT IS FILED AGAINST ONTARIO ON SANDBANKS

A law suit alleging breach of public trust was filed against the Ontario Government on August 8th for allowing Lake Ontario Cement Limited to remove sand dunes beside Sandbanks Provincial Park near Picton.

It is believed to be the first breach of trust suit ever filed against an Ontario Government and may be the first of its type in Canada, according to the Environmental Law Association.

The province and the company are accused of failing to maintain Sandbanks for "healthful enjoyment and education", as required by the Provincial Parks Act.

Larry Green, a researcher for Pollution Probe at the University of Toronto, is suing on behalf of himself, all residents of Ontario and future generations - the beneficiaries of the trust dedication in the parks act.

The Supreme Court of Ontario is asked for injunctions both to bar future sand excavations and to make the company restore its leased site as nearly as possible to its natural state.

The suit was filed by special counsel Roger Timms of the Environmental Law Association.

It is the latest step in a campaign by environmental groups to have the province take over the 16.02-acre site as part of the park. The company was given a 75-year lease at \$1 a year in 1968, after Government employees accidentally reforested a company plot. The sand is used in the cement company's plant at Picton.

Recently a consultant's report by geologist Walter Tovell, associate director of the Royal Ontario Museum, proposed that the company be allowed to remove another 128,000 tons of sand in two or three years if it then gave up its lease.

Natural Resources Minister Leo Bernier has said the province wants the site for parkland but must provide Lake Ontario Cement with an alternative site.

Mr. Green maintains in his statement of claim that the company's operations have impaired the environment and public enjoyment of the park by the destruction of "the magnificent view" of two towering dunes and creation of swamps in which mosquitoes and other insects breed.

He claims motorcycle gangs, dune buggies and cars on the leased land annoy park users with noise and dirt and that noise from diesel trucks and tractors interferes with the seclusion and privacy of park users.

The civil action is the second legal initiative to be thrust at Lake Ontario Cement Limited by the Environmental Law Association concerning sand dune destruction.

Trial date has been set for September 15th in Picton for charges of mischief to property and environmental impairment laid by a Toronto secretary under the Criminal Code and the Ontario Environmental Protection Act against Lake Ontario Cement and the trucking company hauling the sand from the dunes, Triad Truckways Limited.

- adapted from The Globe and Mail, August 9, 1972

BACK DOOR APPROVAL FOR VILLAGE LAKE LOUISE FEARED

According to the Environmental Law Association, legislation pending in the House of Commons has the potential to convert the Hon. Jean Chretien's recently acquired image as a conservationist to that of a hypocrite.

The Minister, who is responsible for Canada's National Parks, on July 13 blocked development by a Toronto-based company of a large tourist centre, Village Lake Louise, in Banff National Park.

Yet Bill C-200, An Act to Amend the National Parks Act, introduced by Mr. Chretien in Parliament in May, would allow him, with the concurrence of the Cabinet, to grant the Lake Louise corridor to the Province of Alberta so that the very same tourist centre could be built by that province.

Section 3 of Bill C-200 gives the Cabinet power of:

"authorizing agreements with any province to permit such province to use and occupy public lands within a park for the purpose of providing accommodation for persons visiting the park."

The usual government procedure in making regulations under any statute, regulations being the legal way in which any agreement with Alberta would be constituted, is that the agreement is made in secret and takes effect when the regulation is published. There is no legal obligation on the government to tell anyone that such an agreement has been entered into prior to the agreement's taking effect.

Thus, through a secret decision, the federal government could give Alberta the responsibility of providing a tourist centre for Lake Louise, and yet the Bill does not provide that the federal government can control the type of development the Alberta Government might invite for such a centre.

And although the Alberta Government has been touted as itself opposing the Village Lake Louise proposal on several grounds, a close reading of the Alberta position discloses a marked desire of that province to take over the development of the Lake Louise corridor.

This is evident from the Hon. Don Getty's (Alberta Minister of Federal and Intergovernmental Affairs) letter of May 24 to Mr. Chretien, setting out Alberta's objection to Village Lake Louise, but going on to state that the first alternative that the Alberta Government can consider is "removal from National Park status of the existing highway transportation corridor, perhaps in exchange for some other part of our province".

Thus, if the Bill were to pass unmodified, Village Lake Louise could yet be a reality, and any criticism of Ottawa could then be passed off on Alberta.

The Environmental Law Association has called upon Mr. Chretien to assure Canadians that the Bill will not be passed in such a broad form. ELA is expected to present its criticisms of the Bill to the Standing Committee on Indian Affairs and Northern Development this autumn.

STATISTICS OBTAINED ON PROSECUTIONS UNDER FISHERIES AND SHIPPING ACTS

The Environmental Law Association has managed to obtain from Environment Canada recent statistics on the number of prosecutions instituted during a 24-month period, pursuant to the Fisheries Act and Shipping Act (oil spill regulations). The period ran from February 1969 to February 1971. The figures are set out below, and a further study is being undertaken into the relevancy of such figures and the lessons to be learned from them.

One preliminary observation can be made in relation to the statistics on oil spill prosecutions, and that is the absolute inconsistency in penalties. Fines range from \$50 for spilling approximately 1,000 gallons of light diesel oil in Harbour Grace, Newfoundland, to \$5,000 or six months as a result of a "small discharge due to pumping bilges" in Point-aux-Trembles, P.Q. The former ship was Canadian, the latter Panamanian, and the figures generally show that Canadian and U.S. ships received lighter fines than those of other nations. Also, repeat offenders suffered no greater punishment the second time around - probably because they were in a different port.

Statistics for prosecutions under both Acts over the 24-month period are set out in the table below:

<u>Fisheries Act</u>	<u>B.C.</u>	<u>Alberta</u>	<u>Ontario</u>	<u>Maritimes</u>	<u>TOTAL CASES</u>
Fed. Admin. Cases	28	N/A	N/A	3	31
Fines in \$'s:					
Low	0			5	
High	5,000			200	
Average	675			85	
Prov. Admin. Cases	18	8	0	0	26
Fines in avge. \$'s	550	1,000	0	0	<u>57</u>

<u>Shipping Act</u>	<u>Cases</u>	<u>High</u>	<u>Low</u>	<u>Average</u>	<u>TOTAL CASES</u>
Oil Spill Regulations	91	\$5,000	\$50	\$1,526	91

From The Manchester Guardian . . . "FACTS OF LIFE"

"On average considerably more people discharge to each mile of the badly polluted rivers than to each mile of the cleaner rivers."

And, believe it or not, "there was a tendency for discharges to the cleaner rivers to be more satisfactory than those to rivers which were badly polluted."

Wisdom, from the Department of the Environment's circular on a river pollution survey.

