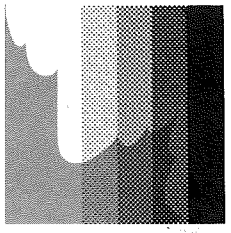

Brief to

THE MACKENZIE VALLEY PIPELINE INQUIRY

Presented in Toronto
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by

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
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My name is Heather Mitchell. I am counsel to the Canadian Environmental Law Association, a natiaonl coalition of lawyers, scientists and laypeople devoted to promoting law reform, and to avoiding, or resolving environmental conflicts through the structure of law.

The Canadian Environmental Law Association, known as CELA, has not participated in the main hearings before except insofar as CELA is a silent partner in the Northern Assessment Group.

CELA has much priase for the Inquiry. And CELA has some concerns too, mainly about the evidence or lack of evidence presented to the Commission. CELA is also concerned about the future of the Commission's recommendations, once made. Late in this brief I will be making suggestions about the content of recommendations which I hope the Commission will consider when deciding on what to include in its report.

But, firstly, the praise.

The Inquiry is unique in many ways. Of particular joy to CELA, a broadly based citizens group, are the community hearings which the Inquiry held in all communities which wanted to speak to the Commission, and which were held in the language of the participants. The Commission's initial ruling that it would listen to submissions on native land claims was particularly heartening, as CELA has often seen projects, which are

assessed when they are assessed at all, only for technological feasibility without any consideration of the context in which they will be carried out.

The format of the Inquiry also deserves praise. It has been informal and unlegalistic enough so that participation has been encouraged -- problems have been solved in a common sense way. Applying common sense to problems usually solved by strict legal interpretation has created respect for the Commission among both the lawyer and non lawyer participants.

There are many more reasons to praise the Commission.

Indeed, we ought to praise the government for establishing the Inquiry in the first place. Undoubtedly, from the government's point of view, the Inquiry has not been the comfortable ride it might have first imagined. The Commission has insisted that the government produce documents it didn't want to produce; the Commission has reprimanded the Territorial Government for telling its employees not to co-operate with the Commission; the Commission has refused to make a snap decision favourable to the pipeline before hearing all the evidence; and the Commission has stood strongly behind principles of fairness and equity by insisting that participants come before the Commission on an equal footing by making sure the poor and powerless were funded so that meaningful knowledgeable par-

ticipation was possible.

It is, however, the fact that the Commission has, by being fair, made things uncomfortable for the government which makes it certain that the government is never again likely to establish an Inquiry which will encourage informed public debate on a national issue as it has on the Mackenzie Valley pipeline. From the government's point of view, the cost in embarrassment in having its procedure criticized and in having someone insist that it "play fair" by, for example, producing all the information at its disposal, has outweighed the benefits to our democracy of the tremendous participation of all kinds of people.

CELA had hoped that the establishment of this precedent-setting Inquiry meant the federal government was at last serious about its "participatory democracy" promises of the early 70's. We hoped that an era of maximum public information and debate was opening for all issues of national importance.

Of course this was the wildest fantasy. For example, since this Inquiry started, we have seen the secretive federal process surrounding the decision to drill for oil in the Beaufort Sea when all experts warn the technology is not available to clean up or even minimize damage. We have seen the Minister of Indian Affairs say on television that environmental studies

were done on the Strathcona Sound mine before the decision was made when there were no such studies. On neither issue was there any informed public debate because the government did not make information readily available until a decision was announced. The government did not think the concerns of the native people were of prime significance in the decision-making.

There is no doubt that the federal government will never again give people the opportunity to participate as it has on the pipeline. It is in the context of being the sole example of participatory democracy that CELA urges the Commission to be aware there will not be another Commission like this one and as such to make recommendations which will become benchmarks against which any public debate on a national issue can be measured.

Groups such as CELA will continue to press for goals so amply reached by your Commission: access to information; time for participants to prepare; funding of poor participants so they'd be on an equal footing with wealthy corporations; technical evidence in understandable lay language; community organization and participation; and informality so that all have access to the person who will make the recommendations.

But, your recommendations, if cognizant of the Commission's uniqueness can stand as beacons for the future.

I will make further suggestions about recommendations in a moment. Now, however, notwithstanding the positive remarks I have been making, CELA has two serious concerns with the Inquiry.

The first is the inability, by reason of its terms of reference, of the Inquiry to consider alternatives such as a highway, a railway or not proceeding with a pipeline at all. There is much to be said for each of the three, and it would be more complete if the Inquiry could make its recommendations having considered all alternatives, rather than simply pipeline alternatives. As many native groups have pointed out, a railway, for example, can move goods both ways, and can provide steady employment after construction. A pipeline moves goods only one way, and its construction leads to a boom-bust syndrome in the community.

CELA's second concern is the fact that hearings have been divided into phases. We are concerned that many environmental questions have been referred by witnesses to witnesses not yet before the Commission -- in short, sloughed off for a

later day. The fact that environmental concerns cut across the four phases so as to allow witnesses to refer them from one phase to another is frustrating to an environmental group such as CELA. We need the answers, and I hope they will be properly forthcoming from those testifying later in the hearing.

I now want to return to the subject of recommendations.

I want to make submissions on four areas for the consideration of the Commission when writing its report. The four are: the terms of reference for a MVP regulatory agency; the timing for commencement of the project; economic participation by Native Canadians in the MVP and the settlement of native land claims.

With respect to a regulatory agency, it seems clear that the pipeline will create so many unusual situations that a new independent regulatory agency will have to be set up to oversee not only construction but also throughput and tariffs. Hopefully, you will recommend that it be established by statute.

Such a statute should include at least the following provisions.

(1) Independent inspectors -- necessary to ensure

environmental guidelines are being followed.

(2) The inspectors must have the power to issue stop orders if environmental guidelines are not followed.

(3) Inspectors reports to be filed or tabled or otherwise made public at the end of each month of the project's life.

(4) Membership in the regulatory agency must be balanced between competing interests. Because of the strong possibility of irreparable harm to the environment, CELA suggests that the usual course of chosing agency members from disinterested citizens be reversed. We suggest that fair minded people with competing interests be appointed so that there are an equal number of economists and technologists and of environmentalists and native people.

(5) The statute setting up the agency must make provision for public interest groups to participate in decision-making, whether in a hearing or otherwise and provision must be made for funds for groups and people with inadequate resources to represent their position to the agency.

With respect to the timing of construction, it is CELA's submission that no construction should start until

technology which will be used has been properly tested. We are alarmed to read in the transcripts the following examples of technological problems.

- Erosion control techniques have not been field tested in any way.[1]

- No site for disposal of surplus material have been selected.[2]

- Few of the streams to be crossed by a pipeline have been guaged as to water volume. Apart from the Mackenzie, no measurements of the sediment carrying capacities of the streams have been made.[3]

- The depth of scour has never been measured at any of the major river crossings. The witness who stated this also stated that the model used to predict scour depth was "two dimensional" and that it did not properly take into account the width of scour-causing ice jams.[4]

- The formula on which the design of the Firth River crossing was made was based on the assumption that there is no

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1. Transcript, p. 3271
2. Ibid. 2656, 2657
3. Ibid. 2811, 2812
4. Ibid. 2969, 2970

permafrost. The assumption is based on extrapolation of Alaska data and no drilling to test the assumption has occurred on the Firth.[5]

- The test site in Calgary where measurements of frost heave were made does not contain the wide variety of soils found on the proposed route. The site could not test differential heave.[6] Mr. Scott, Commission Counsel said he'd call evidence to show that less than 1% of the area is the same as the test site.[7]

All these examples, plus many more lead us to the submission that the technology available from the project proponent must prove itself capable before the construction begins. It is our submission that the Commission should not accept the attitude of the technical witnesses who say: well, we don't have an answer for that problem yet, but leave it with us, we are sure all problems can be solved by our technology.

It is CELA's submission that not only must the technology be shown capable of solving the problems, but it must be also capable of doing so while adapting to the culture it will affect.

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5. Transcript, p. 3081
6. Ibid. 3232
7. Ibid. 2561

Simon Ramo, says in his book, Century of Mismatch,[8]

> We must now plan on sharing the earth with machines... We become partners. The machines require, for their optimum performance, certain patterns of society. We too have preferred arrangements. But we want what the machines can furnish, and so we must compromise. We must alter the rules of society, so that we and they can be compatible.

Unlike Ramo, CELA suggests that the machines and not society that must change

Why we value our society and why machines should change to conform to that higher value is a metaphysical question which technology cannot answer.

Economists in the media and before the Inquiry have made calculations based on purely economic factors to show the pipeline is viable. But the economic model cannot take account of metaphysical needs. It is a waste of time to talk to an economist about values such as beauty, tradition, and the serenity of a way of life.

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8. New York: David McKay; 1970, p. 192

Economic analysis is tied to power, and, by definition, must ignore the powerless, such as the individual trapper, in its calculations. We note that none of the trappers whose traplines are in the path of the proposed route were consulted by Arctic Gas.

Nonetheless, economists and others will try to quantify metaphysical values to arrive at a trade off position between what native people must give up in return for compensation for a pipeline right of way.

It is CELA's submission that, although we disagree with this analysis, if it has to be, then an appropriate economists measure of compensation for the right of way would be an award of a minimum of one third the voting stock in whatever corporation becomes holder of the right of way.

Just as we have said, that the project should not go ahead before the technology is certain, we also say it should not go ahead before native land claims are settled. CELA, as a group of mostly European Canadians should not put forward submissions on the value placed on land by Native Canadians.

What we can say about land, however, is this. From our experience, most environmental problems have, at

their centre, the use of land. Often it is ownership which defeats sound environmental planning.

As Mr. Justice Dubin recently said in the Rockcliffe case, a person can do whatever he wants on land he owns as long as it does not directly and immediately affect his neighbours. In the Rockcliffe case, a marsh was filled in destroying an area essential to the beginnings of the ecosystem. The loss of marsh, and the loss of its important life cycle processes affected everyone in that neighbourhood, but not, apparently, so proximately as to convince an Ontario Court of Appeal judge that the owner should be restrained from destroying it.

The opposite environmental land use case is where someone wants to preserve the land, to use it as he found it, to live with it, to be part of it, not to be apart from it and against it. It is this philosophy we find throughout the submissions of Native Canadian to the Inquiry. As European Canadians, as designers of the laws of Canada, we can only see a way of fitting this land use philosophy into existing laws if there is ownership of the land in question. In law, land is treated differently than other commodities. It is one of few things which the law recognizes as not being capable of being translated into money. In legal cases other than

land cases, the law gives money compensation for interference with rights a person has over a thing. In land cases, the law can give specific performance -- the very land is awarded to the person who makes his case, and the holder of the land is forced to transfer it to him. In this way, the law recognizes the finiteness of land and the special status of land as a good in society.

The existing system of law is therefore capable of dealing justly with the Native Canadian land claims. It is therefore our submission that to preserve the integrity of the law, the possibility of specific performance must not be denied to Native Canadians. And it will be if native land claims are not settled before any pipeline is built. We must realize that no court will award specific performance plus a mandatory injunction to remove an obstruction and to restore the land if the pipeline is already built.

Only money will be awarded if land claims are settled after construction.

Money is not what a land claim is about, and money is not adequate to answer a land claim.

Let me draw an analogy from the writings of Nobel

prize winner Annie Dillard. In her book, Pilgrim at Tinker Creek[9] she says she saw in her creek a frog:

> He was a very small frog. And just as I looked at him he began to sag. The spirit vanished from his eyes as if snuffed. His skin emptied and drooped... I watched the taut glistening skin on his shoulders ruck, and rumple, and fall. Soon, part of his skin, formless as a pricked balloon lay in floating folds like bright scum on top of the water: it was a monstrous and terrifying thing. An oval shadow hung in the water behind the drained frog; then the shadow glided away. The frog skin bag started to sink.
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> The frog had been the victim of a giant water bug: which seizes its victim with its grasping forelegs, hugs it tight and paralyzes it with enzymes injected during a vicious bite. That one bite is the only bite it ever takes. Through the puncture shoot the poisons that dissolve the victim's muscles and bones and organs -- all but the skin -- and through it the giant water bug sucks out the victim's body, reduced to a juice.

It is my submission that without the settlement of native land claims before a pipeline is approved, Native Canadians will be in exactly the same position as that frog.

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9. Bantam Books; New York, 1974, p. 6