Summary of Recommendations

1. That The Ontario Municipal Board Act be amended to clearly provide that the Board must conduct substative review of planning decisions made by a municipal council. This amendment should be made in tandem with the issuance of a provincial policy statement under s.2 of the Planning Act, 1983. This statement should detail the types of evidence which must be presented to the OMB before the OMB can decide whether or not to approve an official plan, official plan amendment or zoning by-law which will affect or is likely to affect the natural environment.

2. That Section 17 of the Planning Act, 1983 be amended to provide the following:

   (1) On an official plan referral, where the Minister does not give notice that a matter of provincial interest is or is likely to be adversely affected, the Board must still consider the effect of the proposed official plan on matters of provincial interest (including the protection of the natural environment).

   (2) The Board has the powers of the Minister under s. 17(a); i.e., the Board can call provincial or federal officials to give evidence before it where it considers they may have an interest in approval of the plan.

   (3) Where the Board concludes that a municipality has not given adequate consideration to matters of provincial interest, the Board shall order the municipality to amend the official plan to properly address these matters.

3. That the Environmental Assessment Act be amended to require that the rationale must demonstrate that the need for an undertaking which will or is likely to cause extensive and irreversible environmental damage outweighs the environmental damage. In tandem with this, the Ontario government should issue a clear statement of its policy with respect to the "protection, conservation and wise management in Ontario of the environment", to clarify what the appropriate balance should be.

4. That an open screening process for appointments to the OMB be established. Persons should be appointed on the basis of their ability to make unbiased, fair judgments. Appointments should then be confirmed or vetoed by a tri-partite legislative committee.

5. That OMB and EAB chairmen carefully select the members who will sit on joint boards. Further, joint boards should be comprised of an equal number of OMB and EAB members.

6. That the Ontario Government intensify its efforts to legislate to provide intervenor funding, giving priority to sorting out the difficult issues which must be addressed to provide a satisfactory act.

   Prior to passage of an act for intervenor funding interim regulations should be posed pursuant to the Ontario Municipal Board Act and the Consolidated Hearings Act, 1981 requiring boards to appoint experts where intervenors cannot afford to hire experts needed to scrutinize technical evidence or to provide evidence on matters which the proponent's experts did not address.

7. That OMB and joint board procedures be reformed to improve the ability of the public to effectively participate in OMB hearings in the following ways:

   a. The OMB should hold preliminary meetings to give guidance to members of the public on procedural affairs.

   b. The OMB should prepare a citizen's guide to OMB practice and procedure.

   c. The OMB should tailor its practice and procedure to meet the needs of unrepresented individuals or groups.

   d. The OMB should order production of documents as a matter of course where members of the public are participating at a board hearing.

   e. The OMB should be required to keep transcripts of oral evidence.

   g. A regulation establishing rules of practice and procedure for joint boards should be promulgated pursuant to the Consolidated Hearings Act, 1981.

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1. INTRODUCTION

This study of the Ontario Municipal Board and environmental protection was undertaken in response to concerns expressed by representatives of several environmental organizations in the province to the effect that the Board on several occassions had not adequately addressed the environmental issues brought before it. Since land-use planning is an essential component of environmental protection, the OMB necessarily plays and important role in the environmental policy decision making process. With passage of the Consolidated Hearings Act and creation of joint boards comprised of both Environmental Assessment Board and Ontario Municipal Board members, theat role has become even more important.

The Board was created, however, at a time when environmental concerns were much lower on the political agenda than they are today. To the best of our knowledge, no independent study has yet been done about the way in which the Board can best fulfill the new environmental duties and responsibilities which it has been asked to assume in recent decades. It was thought that a study by the Canadian Environmental Law Research Foundation, albiet of a limited nature, would in some measure fill this void.

In the same manner that it approaches other issues, however, the Foundation was not interested in undertaking a purely academic examination of the subject. The objectives of the Foundation are to both do research and to stimulate dialogue. As has been done many times in the past, most notably during a study of the Ontario Environmental Assessment Act, this project was designed to accomplish both objectives.

It was decided that an essential component of the study research

This report does not address these broader issues. Instead, it focuses upon difficulties which members of the public face in presenting environmental evidence before members of the OMB, and in having the Board deal adequately with the environmental issues which they present. Examples of where these issues arise in the work of the OMB include applications for approval of official plans which would create land use designations affecting preservation of prime agricultural land or environmentally sensitive areas, applications for siting of landfill operations, or large developments such as highways or hydro transmission lines, or the granting of gravel pit licences. In these and other instances, the public have experienced difficulties which arise both from the legislation which grants jurisdiction to the OMB (sitting either alone or on joint boards together with members of the Environmental Assessment Board) to make decisions or recommendations, and from the Board's practice and procedure.

The problems faced by the public were found to fall into two broad groupings. First there are problems relating to how OMB members deal with environmental issues. These problems face all parties, including provincial and municipal government and the private sector, as well as the public, when they appear before the Board.

The second group of problems, unique to public participants, limits the public' ablity to effectively participate before the Board.

The project began with a study of critical literature on the OMB.

Legislation granting to the OMB its general municipal jurisdiction and powers, and governing its practice and procedure was then examined. Three major statutes which

should be discussed with those knowledgable and interested in the Board's activities. Most important, of course, were members of the Board itself. As a further means of enchancing dialogue and consultation, it was decided that the study report, while still in draft format, would be discussed at a workshop to which all interested parties would be invited. The report would then be finalized in light of comments made at that workshop.

The objectives of the project, therefore, can be set out as follows:

- to identify factors, either in legislation or practice and procedure, which hamper the ability of the Board to adequately address environmental issues

- to work in a consultive manner with all parties to develop recommendations for ways in which the Board can more adequately address environmental issues

- to provide the project findings and recommendations to the Ontario Municipal Board

Many large issues arise in the context of considering the role of the OMB and the public in environmental protection. One could question whether only elected officials in municipal government, and not the appointed members of the OMB, should decide on environmental matters which fall within the public interest. The role of public participation prior to a hearing before OMB members also provokes many questions. The appropriateness of other forms of public participation such as mediation could also be discussed.

give jurisdiction to the OMB to influence environmental protection - the Planning Act, 1983, the Consolidated Hearings Act, 1981, and the Environmental Assessment Act - were also studied. Critical analysis of the ways in which this legislation affected the public's presentation of environment evidence and the Board's reception of it was aided by discussions with lawyers who have appeared before the Board, and with the Chairman of the OMB and EAB.

To further identify problems faced by the public in appearing before the OMB, a number of interviews were conducted with individuals and group representatives who had presented environmental concerns before the Board or a joint board, lawyers who had represented interest groups, private developers or municipalities, and Chairmen of the OMB and the EAB. Individuals and lawyers who were interviewed included a proportion of those known to have appeared before the OMb in more recent cases. The interviews were not meant to present comprehensive surveys of all those groups of individuals who have appeared or acted as counsel before the OMB, nor do they study a few representative cases in detail. Rather, the interviews were intended to provide an overview of general problems faced by members of the public whoc present environmental evidence and issues before the Board.

The findings from review of the critical literature and the legislation, and from the interviews were then used to prepare a draft report which was circulated to several persons for review. The first draft was then revised and sent to those who had indicated that they would attend the workshop.

Invitations to discuss the revised draft report at the workshop had been extended to members of the public and counsel who had appeared before the Board. Invitations also went out to several OMB members. The Chairman of the OMB declined the

invitation to attend the workshop on behalf of himself and the other invited Board members, giving several reasons as to why the OMB's participation in this phase of the project would not be appropriate.

An invitation was then extended to the Ministry of the Attorney General. Mr. Richard F. Chaloner, Acting Deputy Attorney General, declined the first invitation, giving as reason that the goal of the project was to develop a report for the Ontario government

The invitation was extended again, emphasizing that although one important goal was indeed to develop this report, an equally important goal was to develop the report by means of consultative process, including dialogue among all parties concerned with the issue. No response to this second invitation was given.

Despite the abscence of representatives from the OMB or the Ministry of the Attorney General, consideration of the report by the workshop participants sparked lively and helpful discussion which has been used to prepare this final report. However, the views in this report are those of the Canadian Environmental Law Research Foundation, and do not reflect a consensus arraved at by workshop participants.

This final report is divided into three parts. The first part discusses legislation and practice and procedure affecting the presentation and reception of environmental evidence. The legislation and practice and procedure relates to the members of the OMB as they sit alone or on joint boards. The second part identifies findings from the interviews which are grouped into two sections: problems experienced in presenting environmental evidence, and difficulties that groups had because of the way the Board dealt with the

issues raised by the public. Suggested solutions to problems identified in the first and second parts are set forth in the third part.

Through the course of the project, it has become very clear that there are serious problems relating to the OMB's role in environmental protection. It is hoped that the recommendations advanced in the final part of this report will be used by the Ontario Government to improve the way in which the Board deals with environmental issues, and to improve the effectiveness of participation by members of the public who present these issues before the Board.

II. Legislation and Practice and Procedure Relevant to the Presentation and Reception of Environmental Evidence Before the Ontario Municipal Board

A. The Role of the Ontario Municipal Board in Land-Use Planning Matters Involving Environmental Issues

1. History of the OMB's involvement in planning matters

The forerunner of the Ontario Municipal Board, the Ontario Railway and Municipal Board, was formed in 1906 in response to a recognized need for ongoing regulation of intraprovincial railways. The role of the Board has undergone many changes since then, so that at present, the main areas of the Board's work are in matters of land-use planning and capital expenditures by municipalities, assessment appeals and municipal organization. This report will focus only on the area of land-use planning, since it is in this area that the Board has major impacts on environmental protection in Ontario.

2. Composition of the OMB

Board members are appointed by cabinet. The matters considered by the Cabinet in the appointment process are not specified in the Ontario Municipal Board Act.

At present, the Board is composed, roughly, as follows: Approximately half of its members are lawyers. The other half is made up of four accountants, two architects, three former city managers, two engineers, one former township mayor, and one planner. None of the Board members appear to have specialized expertise in environmental studies or sciences.

3. Jurisdiction and powers of the OMB related to land-use planning.

(a) General powers and jurisdiction under the Ontario Municipal Board Act, R.S.O. 1980, c.347

Section 36 of the Ontario Municipal Board Act gives the Board broad jurisdiction and powers to hear and determine applications made and matters brought before the Board under various Acts including the Planning Act, 1983. For such purposes the Board may make orders and do all things as may be necessary or incidental to the exercise of its powers.

Section 53 sets out the Board's broad jurisdiction and powers in relation to municipal affairs. These powers include the power to approve the exercise of a municipality's powers that may require the borrowing of money, and to approve by-laws.

The Board will be in a position to exercise these powers when, for example, a municipality wishes to set up a large waste disposal operation. The Board must exercise these powers, since s.64 requires the approval of the Board before a municipality can authorize or exercise any of its powers to proceed with or provide any money for an undertaking, where the cost or part of it is to be raised in subsequent years or provided by the issue of debentures.

In giving its approval, the Board also has the power, given to it by s.67, to impose any restrictions, limitations and conditions on the undertaking which it considers necessary or expedient. The input of local citizens on local evironmental conditions may be an important influence on the conditions for approval ordered by the Board.

(b) Specific powers and jurisdiction under the Planning Act, 1983, S.O., c.1, as amended by S.O. 1983, c.82

(i) Official plans and amendments to official plans

An official plan, which is drafted by a municipality, sets out objectives and policies for the physical development of a municipality. Because all public works and by-laws must conform with the official plan, the plan will have an important effect on the natural environment. Thus, the Board, when it is required to decide on a plan, can have a large impact on whether or not environmental concerns are adequately addressed in the plan.

The Board may be required to approve an official plan when a person, under s.17(1) of the Planning Act, 1983, requests the Minister of Municipal Affairs and Housing to refer the plan or parts thereof to the OMB. The Minister must refer the plan if the request is made in good faith, is not frivolous or vexatious, and is not for the purpose of delay. Section 17(11) also provides that the Minister himself may refer the plan to the OMB.

If the plan is referred to the Board, the Board will be required to hold a hearing. In reaching its decision on the plan after the hearing, the Board, by s.17(18), is entitled to make any decision that the Minister could have made. Arguably then, the OMB stands in the shoes of the Minister when it makes its decisions. Thus, if the criteria by which the Minister makes hsi decision can be determined, then those criteria would define the Board's role. However, as will be discussed below, the nature of the Board's role is not clear.

The Board will also have to decide on official plan amendments, if the Minister refers the amendment to it.

(ii) Zoning by-laws and amendments to zoning by-laws

Zoning by-laws are passed, among other reasons, to prohibit the use of land for some purposes, and are essential to land-use control. By definition, decisions about zoning and land-use control will affect environmental interests.

The Board will only have power to make decisions regarding zoning by-laws if an appeal is made to it within thirty-five days of the date of passage of the by-law. If no appeal is made, the by-law is deemed to come into force, and the OMB has no role to play.

If, however, an appeal is made, the Board will hold a hearing, if the objection made in the appeal is considered sufficient. The Board is not limited to making any decision that the Minister could have made, as it is with official plans, but it may dismiss, or allow the appeal. If the appeal is allowed, the Board may repeal and amend the by-law or direct the council of the municipality to do so.

The Board may also assume a recommendatory role if notice is given that a matter of provincial interest is or is likely to be adversely affected by the by-law. The decsion to confirm, vary, or rescind the Board's decision will then rest with Cabinet.

If an application is made to a Council to amend a zoning by-law, and council refuses or neglects to decide on it, the Board will decide on the amendment if the applicant appeals to the Board.

(iii) Petitions to Cabinet not allowed

No one can file a petition to Cabinet regarding the

Board's decision with respect to, among other things, official plan referrals and appeals of zoning by-laws. The role of Cabinet is now limited to cases where the Minister has given notice that a matter of provincial interest is, or is likely to be, adversely affected.

4. Practice and procedure of the OMB

(a) Legislative provisions

(i) Power to award costs

The Board may order by whom and to whom any costs of a proceeding are to be paid.

(ii) Powers of the Supreme Court exercisable by the OMB

The Board has powers as are vested in the Supreme Court with respect to amendment of proceedings, addition or substitution of parties, attendance and examination of witnessess, production and inspection of documents, entry on and inspection of property, enforcement of its orders, and other powers needed to exercise its jurisdiction and powers. Clearly, the Board can, and indeed does, function in ways similar to a court.

(iii) Record of proceedings before the Board

The secretary of the Board must keep a record of all applications and proceedings before the Board. However, this does not include keeping transcripts of oral evidence given at the hearings. A party may hire a court reporter to produce transcripts, but transcripts are not regularly produced at the Board's expense.

(iv) Power to appoint experts

Upon recommendation of the Board, Cabinet may appoint experts to assist the Board in an advisory or other capacity.

(b) Rules of practice and procedure

Regulation 722, R.R.O. 1980, passed pursuant to the Ontario Municipal Board Act, contains rules of practice and procedure which generally preserve the Board's discretion to determine its own procedure. The rules also enable the Board to make orders for production of documents and examination for discovery, and contain rules dealing with the filing of affidavit evidence, production and admission of documents, and other technical matters.

Regulation 722 was promulgated in 1944 and has remained virtually unchanged since that time. The rules have not been updated to deal with the Board's expanding jurisdiction. Nor have the difficulties experienced by public participants led to a revision of the rules. New draft rules have been formulated which gave a somewhat better guide to action before the Board, while still retaining the Board's discretion to determine its own procedure. But the draft rules remain technical, thus contributing to the court-like nature of the OMB.

(c) The Statutory Powers Procedure Act, R.S.O. 1980, c.484

This Act includes several important sections which affect the presentation of environmental evidence before the Board by members of the public. These are briefly presented below.

First, s.1(2) defines "person" to include some entities, but not to include an unincorporated group of persons. Therefore, unincorporated groups do not have standing to initiate proceedings before the Board when it exercises its statutory powers of decision. The Board will hear members of such groups, as individuals, but the groups lack party status, and therefore, lack the privileges of a party which include

the right to call and examine witnessess, to present arguments and submissions, and to conduct cross-examination.

Section 15 allows the Board to admit evidence, whether or not given under oath, including oral testimony and documents, except for evidence that would be excluded by any privilege under the law of evidence. Thus, hearsay evidence, it need not give full weight to such evidence; rather, it "may act on such evidence".

5. Problems related to the legislation and practice and procedure

The previous sections were meant to provide a brief background to a discussion of the problems related to the legislation and practice and procedure which are apparent from a study of the legislation, and from discussions with people who have appeared before the Board. These problems are discussed below.

(a) Lack of a legislatively defined role for the OMB in deciding on planning matters

Although the Ontario Municipal Board Act and the Planning Act, 1983 set out the powers and jurisdiction of the OMB, neither Act defines what the role of the Board is in dealing with matters brought before it that relate to decisions by a municipal council, including decisions on official plans and zoning by-laws. Neither is it clear whether the Board must take into account matters of provinical interest, including the protection of the natural environment, when reaching its decision on planning matters.

In the abscence of clear provisions defining the Board's role, the first question that arises is whether the Board is to engage in procedural review only, or in both procedural and substantive review.

Some members of the Board have expressed their opinion that the Board should only consider the procedural propriety of a Council's decision. For example, Mr. Donald Diplock, former Vice-Chairman of the Board opined that, because municipalities are able to hire their ouwn experts to produce sophisticated and comprehensive evidence, reversals by the OMB of a council's decisions are inappropriate. A council is in the position of deciding questions of public interest, not the Board. Therefore, it was his position that the Board should support a council's decision when it is procedurally proper.

However, former Board Chairman, Mr. J.A. Kennedy, felt that the Board should engage in substantive inquiry: "[The needs of the greatest number] should prevail over minority and individual rights and interests only if the project proposed in the public interest can be justified and supported." (Re Spadina Expressway (1973), 1 O.M.B.R.1)

The nature of the Board's role can also be considered by an examination of sections 62 and 68 of the Ontario Municipal Board Act. Section 62 deals with the scope of the Board's inquiry where a municipality applies to the Board for approval of the exercise of many of the municipality's powers. Before approving, the Board is to inquire into, among other things, the "necessity or expediency" of the power sought to be exercised. Under s.68, the Board has a duty not to approve unless it is satisfied that the exercise of the power is "justified under all the circumstances". The words

"necessity or expediency" and "justified under all the circumstances" are vague, but, arguably, they mandate an inquiry that goes beyond mere examination of the procedural propriety of a council's decision.

Apart from this general question as to whether the Board is to engage in procedural review only, or in both procedural and substantive review, there is a more specific question relating to the Board's role in deciding on official plans. This question is whether or not the Board will always be required to consider the protection of the natural environment as a matter of provincial concern in deciding on official plans referred to it under the Planning Act 1983, although it does expressly list protection of the natural environment as a matter of provindial concern, does not thereby suggest that this is not a matter of municipal concern as well.) To answer this question, we must consider section 17 of the Planning Act, 1983

Subsections 17(19) through 17(21) establish a new procedure for official plan approvals. If a matter of provincial interest (which includes protection of the natural environment as set out in s.2) is, or is likely to be adversely affected by the plan or part of it, the Minister may advise the Board of this in writing within a set time limit. Where such notice is given, the Board's decision will not be final unless Cabinet confirms it. Cabinet is not required to confirm the decision; it may instead vary or rescind the decision.

It is possible to interpret these subsections as indicating that, where no notice is given, matters of provincial interest are not considered to be at stake, so the Board need not look beyond the local interests in making its decision. However, two points should be raised which argue against this conclusion.

First, s.17(19) does not require the Minister to give notice under that subsection. Rather the Minister may give notice. Therefore, there may be cases where the Minister does not give notice of his opinion htat provincial interests may be adversely affected, but where provincial interests may in fact be adversely affected, and the Board should consider this in reaching its decision.

Second, under subsection 17(9), the Minister may choose to confer not only with municipal officials, but also with provincial or federal officials, where the Minister considers that they may have an interest in approval of the plan. This suggests that, apart from subsections (19) through (21), the Minister (and therefore the Board, because it stands in the Minister's shoes in making its decision) should consider national and provincial interests in protection of the natural environment in reaching his decision.

This interpretation suggests that the Board, in deciding upon official plans, should always be required to consider the protection of the natural environment as a matter of provincial concern, whether or not the Minister gives notice that protection of the natural environment is at stake.

One could argue that this interpretation is merely a restatement of the Ontario District Court's decision in Re Township of Westminster and City of London (1974), 5 O.R. (2d) 401. The court there held that the OMB was required to hear all evidence, regardless of whether such evidence had already been heard before the Environmental Hearing Board. However, the above interpretation would go beyond requiring the Board to hear and consider the environmental evidence brought before it. Rather, when insufficient environmental evidence to elucidate the province's interest in the protection

of the environmentis presented, or when environmental evidence is entirley lacking, the Board would have the duty to demand that such evidence be presented before giving their final decision.

As should be evident from the preceding discussions, section 17 does not, in clear terms, require the Board to consider the protection of the natural environment as a matter of provincial concern where the Minister does not give notice that this matter is at stake.

(b) Cost awards aginst members of the public

In the past, the Board has usually not awarded costs against members of the public who have raised environmental issues. However, two recent cases show that the Board has varied its usual practice, thus raising a barrier to participation by members of the public who fear having costs awarded against them.

In one case, the Preservation of Agricultural Lands Society (PALS) had cross-examined witnesses produced by the applicant for a licence under the Pits and Quarries Control Act, R.S.O. 1980, c.378. PALS was attempting to show the absence of proof that a former gravel pit could be successfully rehabilitated for tender fruit production in the long term. But PALS had not produced its own expert witnesses. OMB member Mr. Klaus Bindhardt chastised PALS for failing to call expert witnesses: "To be an independent agency of public interest in an expert field requires expert knowledge, not anxiety." This decision may discourage citizen's groups with funds insufficient to hire their own expert witnesses from cross-examining the applicant's witnesses. This result is

undesirable, since cross-examination may reveal important gaps in the applicant's case which could affect the Board's decision.

The second case, involving an application for a licence to extend a gravel pit on a glacial deposit north of the escarpment, is even more significant. In this case a notice by the applicant to secure costs in advance against PALS was disallowed but, when the case was concluded, a partial order of costs in the amount of $2,600 was awarded against PALS. The reasons given by the Board were not that PALS had failed to produce its own expert witnesses. In fact, PALS had called an agroclimatologist, a senior research officer with Environment Canada and a climatologist with Environment Canada. Rather, the Board stated that PALS' evidence and cross-examination by counsel "served only to reinforce the opinions of the experts called by TCG, and put to rest any reservations with rsepect to the merits." This conclusion is, at the very least, questionable, on the basis of the evidence which PALS presented through its experts, as this evidence was presented in the decision. But more importantly, the Board here denied to intervenors the opportunity to present what they honestly believed to be cogent evidence casting doubt on the undertaking.

The Board's actions in these two cases has caused several environmental interest groups to have to seriously consider whether or not they will appear in OMB hearings, as was indicated at the workshop held to discuss this report. If the public is to remain active in presenting environmental concerns before the Board, the Ontario Government must take action to prevent similar cost awards by the OMB against the public.

(c) Appointments to the OMB

The appointment process to the OMB has led to a Board composed of members without expertise in environmental studies or sciences. by itelf, this is not problematic, but the difficulty arises when it is noted that many persons presenting environmental concerns before the Board have come away feeling that their efforts were futile because the Board members were not open to considering their concerns. An appointment process is necessary which will ensure a Board composed of open-minded individuals willing to consider environmental, as well as political, legal and economic issues.

(d) Failure to keep transcripts

The Board's failure to keep transcripts of oral evidence leads to several problems. First, in long and complex hearings, Board members may not be able to retain the evidence necessary to reach an informed decision. Second, without transcripts, it is very difficult to successfully review a Board's actions in court. Third, lack of transcripts detracts from the accountability of the Board for its decision on issues of fact. Finally, in some instances there have been complaints about the way in which some Board members treated members of the public presenting environment concerns. Transcripts, if available, could either curb such instances, or, the allegations of members of the public, if unfounded, would be discouraged.

(e) Failure to exercise power to appoint experts

The power to appoint experts has very seldom been exercised by the Board. Chairman Mr. Henry Stewart gave as a reason for this that hiring an expert to give advice would deprive parties to the hearing of the opportunity to cross-examine on this advice. This may be a problem but the section clearly allows for the appointment of experts

in other than advisory capacities. Presumably, this could include hiring an expert to give evidence at the hearing on matters not fully addressed or not addressed at all by experts hired by a municipality.

B. THE ROLE OF THE ONTARIO MUNICIPAL BOARD IN JOINT BOARD HEARINGS DEALING WITH ENVIRONMENTAL ASSESSMENTS

1. Purpose of the Consolidated Hearings Act, 1981

The Consolidated Hearings Act, 1981 was passed to decrease the number of hearings that, prior to the Act, would have been required to obtain approval for a project. For example, development by a municipality of a waste disposal site which would have required hearings related to an environmental assessment, official plan amendments, zoning by-laws, debenture financing and expropriation may now be dealt with by means of one hearing before a joint board.

2. Establishment of joint boards under the Consolidated Hearings Act, 1981

Passage of the Consolidated Hearings Act, 1981 has greatly expanded the responsibilities of the OMB in deciding on municipal undertakings and projects undertaken by public bodies. Under the Act, the Chairmen of the OMB and the Environmental Assessment Board (EAB) are required to establish a joint board and determine its composition. The chairmen must select at lease one member from each board to serve on a joint board.

3. Role of joint boards under the Environmental Assessment Act, R.S.O. 1980m c,140

Although there are several Acts with which OMB members who serve on joint boards must be familiar, several provisions of only one of these acts, the Environmental Assessment Act, will be briefly examined in this report. These provisions were chosen because they emphasize the difference between the approach taken to matters which OMB members sitting on joint boards will have to consider and the approach that is taken by some OMB members when hearing matters pursuant to their jurisdiction under the Planning Act, 1983.

(a) Consideration of the purpose of the Environmental Assessment Act

Section 2 provides that "The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment." The purpose of the Act must be considered when a joint board is deciding upon the acceptability of an environmental assessment, and upon whether or not to give approval to proceed with the undertaking.

(b) Approving the rationale for an undertaking

For an environmental assessment to be accepted and for approval of an undertaking to be given, the proponent must provide the board with a statement of the rationale for the undertaking (s.5(3)(b)).

4. Practice and procedure of joint boards

(a) Legislative provisions

Like the OMB, joint boards have the discretion to award costs, and by whom and to whom costs are to be paid under s.7(4) and (5) of the Consolidated Hearings Act.

Joint boards also have the power to appoint experts, under s.10 of the Act.

(b) Practice and procedure

Joint boards have the power to determine their own practice and procedure. No regulations to govern the practice and procedure of joint board proceedings have yet been made, so at present each joint board determines its own practice and procedure. The procedures used in the EAB hearings that have been followed in some joint board hearings include the following:

1. Preliminary meetings: Interested persons meet informally to discuss their various concerns, areas of agreement, disputed issues, and matters helpful in speeding up the hearing process. No decisions are made; the primary purpose of such a meeting is to provide information.

2. Preliminary hearing: These hearings are attended by at least one member of the joint board who will hear the entire application. The purposes of these hearings include the following: to define disputed issues; to arrange for exchanges of documents that witness statements and interrogatories may be filed; to identify parties, participants, witnesses and the nature of their evidence. Once the issues are established, no other issues may be raised without leave of the board.

3. Witness statements: These are statements prepared by the witnesses proposed to be called by parties or participants to the hearing. Their purpose is to advise the opponents of what case they have to meet. They may also be received in evidence without calling the witness or without having the witness available for cross-examination.

4. Interrogatories: These are lists of written questions sent by one party to an opposing party. They serve two main functions: they enable the party to obtain information needed to prepare a case; and they speed up the introduction needed to prepare a case; and they speed up the introduction of non-controversial background evidence at the hearing.

5. Problems arising out of the legislation and practice and procedure

(a) Insufficiency of a mere right of public participation

The Environmental Assessment Act and the Consolidated Hearings Act, 1981 clearly allow for participation by members of the public in joint board hearings. But is a right to participate enough? Mr. Michael Jeffery. Q.C., Chairmen of the EAB, suggests that, by itself, it is not:

> Many of the issues coming before administrative tribunals are both far-reaching in terms of both social and economic impact and complex in terms of the technical information that must be presented. In order for intervenors to be in a position to offer constructive criticism in matters involving highly technical issues, they must, out of necessity, be in a position to counter testimony of expert witnesses called by the applicant with expert witnesses of their own. In many cases they will also require competent counsel. Failure to do so will make it exceedingly difficult and in some cases impossible for tribunals to find in their favour. It follows that for intervenors to play a meaningful role in the adminsitrative process they must not only have the right to participate but also have the financial means necessary in order to participate effectively.

Two developments in the context of joint board hearings have limited the ability of members of the public to effectively present environmental concerns.

First the Ontario Divisional Court has disallowed awards of "cost in advance" by joint boards. (Re: Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc. (1985). 50 O.R. (2d)23). Second, on several occasions where the intervenor groups have asked joint boards to exercise their power to appoint experts to present evidence on technical issues, the boards have declined to do so.

The Court disallowed on order of costs in advance to be paid to the Hamilton-Wentworth Save the Valley Committee, Inc. in the Red Hill Creek Expressway case (CH82-08). The reasons for the order (given by a board chaired by Mr. M. Jeffery) included the following:

1. "To ensure that parties to the hearing may participate and be heard in a fair, effective and meaningful fashion." [16]

2. "A public hearing is fundamentally different from court proceedings." These proceedings "involve issues which go far beyond the interests of the individual parties before the Board." [17] Thus, the board sought to give the order for costs to obtain the information needed to reach an informed decision, one which was balanced in terms of the public interest.

Despite these reasons, the court did not allow the words of the Consolidated Hearings Act, 1981, providing for cost awards to be extended beyond their normal legal meaning. In the absence of such awards, however, public participation in raising environmental concerns in complex cases will be less useful or even futile.

Refusals by several joint boards to appoint experts to present technical evidence have also limited the ability of public participants to adequately present environmental concerns. In the South-Western Ontario Hydro Transmission Expansion Plan hearings Energy Probe made a motion before a joint board composed of the EAB and two OMB members, asking the board to hire three experts to present technical evidence in three areas: Reliability of the exising transmission system, health effects, and the alternative of improved efficiency. Energy Probe considered evidence in these areas as necessary to a proper evaluation of Ontario Hydro's plans. The board turned down their request with little expanation. Engery Probe had sufficient funding to hire only one expert, and thus was unable to adequately present all of its concerns.[18]

In the Eastern Ontario Hydro Transmission Expansion Plan hearing, the Hydro Consumers Association requested the joint board to hire a consultant to examine the liability of the existing transmission system and proposed additions to it. The estimated cost of $75,000 needed to hire an expert to examine this technical issue and board's refusal of the groups request led the group to withdraw from participation at the hearing.[19]

(b) Composition of joint boards

No criteria for determining the composition of joint boards are provided in the Act. When interviewed, Mr. Henry Stewart, OMB Chairman and Mr. Barry Smith, former EAB Chairman had rather disparate ideas as to appointing joint board members.

Mr. Stewart said the two chairmen would discuss whether the issues appeared to be more of an environmental nature, but that, in the end, whether a board was to be comprised with a majority

of OMB and EAB members are regularly required to hear and deal with environmental evidence.[20]

Mr. Smith gave other considerations used in deciding on the composition of joint boards including the availability of members, experience of members as chairperson, and the desire to avoid "hung panels" in controversial cases. Smith considered the nature of the hearing to be a factor in the decision, but not one of primary importance.[21]

Apparently, neither chairmen considered the breakdown of a board between OMB and EAB members to be important. However, an examination of the majority and minority decisions in the Red Hill Creek Expressway case (CH82-08) seems to indicate that some OMB members may be less likely to comprehend the significance of environmental issues than would some EAB members. Therefore, the choice as to whom and how many should be appointed to sit on joint boards where important environmental issues are at stake is a cruical choice.

(c) The OMB's understanding of the purpose of the Environmental Assessment Act

The stated purpose of the Environmental Assessment Act suggests the following application:

> Any decisions which are to be made by....the Board, under the provisions of this Act must be founded in terms of the provincial context, and the public interest in this regard may not necessarily coincide with a particular local interest.

This understanding of what a joint board should consider in reaching its decision in a hearing involving an environmental

assessment clearly differs from the understanding some members of the OMB have of the limited role they have in reviewing planning matters upon which a municipal council has already decided; ie., a review of procedural fairness.[23]

As Mr. Jeffery suggests in the above quote, to take such a limited view of the role of a joint board would render a hearing before a board virtually meaningless.[24]

It is suggested that Mr. Jeffery was at some pains to clarify the role of a joint board in light of the stated purpose of the Act because he felt the OMB members in the Red Hill Cree Expressway case may have unduly fettered their discretion because of their understanding of their role in the OMB hearings.

(d) Absence of the legislative crieteria for assessing the rationale of an undertaking

The Environmental Assessment Act does not provide any criteria which the statement of the rationale for undertaking must meet in order for a joint board to approve the undertaking. OMB members who may lack adequate sensivity to environmental concerns (an opinion held by some members of the public who have appeared before the OMB)[25] may not, in the absence of the legislative criteria for assessing the rationale, give the necessary consideration to the environmental effects of a proposed undertaking when assessing the rationale.

(e) Achieving agreement on joint board practice and procedure

The EAB procedures followed in some joint board proceedings are useful procedures which can improve the ability of all parties

concerned to present their evidence.

Disagreement between OMB and EAB members on the appropriate procedures to be followed because OMB members have not traditionally used these procedures in OMB hearings [26] may explain why these procedures have not been followed in other joint board proceedings where they might have proved useful.

III. Problems Faced by Members of the Public Presenting Environmental Matters before OMB Members

This part of the paper presents the findings of interviews (conducted both personally or by way of questionnaire) and concerns expressed by some workshop participants. The findings, grouped into two sections, are anecdotal to some extent, and so may include findings which are less than concrete. However, it was considered important to present these findings, and to try to relate them to the Board's decision-making process, so as to arrive at concrete recommendations to deal with the real problems which members of the public presenting environmental matters may face.

A. Problems in the Preparation and Presentation of Environmental Evidence

1. Lack of sufficient funding

Fund-raising efforts undertaken by members of the public who appeared before the OMB included the following: Fund-raising events, such as bake sales and rummage sales; [27] personal donations; [28] membership dues; [29] obtaining funding through Canada Works grants; [30] municipalities; [31] and the Federation of Ontario Naturalists. [32] But the amounts raised through these efforts were not sufficient to pay the costs of counsel and/or experts that almost all the groups and individuals felt would have better allowed them to present their concerns before the OMB. There was, therefore, an almost unanimous desire to have some form of intervenor funding.

This need for intervenor funding was reiterated by workshop participants who had appeared before the Board on previous occasions to raise environmental issues, and was supported by several other participants. In the absence of such funding,

people were forced to try other avenues to present their concerns. As mentioned earlier, Energy Probe and the Hydro Consumers Association attempted, unsuccessfully, to get joint boards to exercise their power to appoint experts.[33] Mrs. Lynn McMillan, who appeared unrepresented in an OMB hearing for an amendment to the Official Plan for the Vaughn Planning Area[34] conferred with a consultant outside of the hearings, but felt she could have presented her case much more strongly had she had funds sufficient to have the consultant give evidence at the hearings.[35] Mrs. Lois James of Save the Rouge Valley System also stated that her group was seriously hindered from effective participation by lack of funds necessary to hire counsel (especially for the purpose of cross-examination) and experts.[36]

The centrality of the problem of lack of sufficient funds cannot be overemphasized. The findings of the interviews suggest that there are two reasons why intervenor funding of some sort is necessary to facilitate effective participation. First, it may be necessary to hire counsel to deal with technical procedural matters, and to effectively cross-examine the proponents' witnesses. The need for counsel becomes more imperative when it is recognized that the OMB has become, for the most part, a "lawyers' board", with a specialized bar of municipal lawyers who regularly appear before the Board.[37] Second, where environmental evidence in the disciplines of climatology, hydrogeology, soil science, etc. is presented by the proponent, such evidence can only effectively be tested or countered by other experts. Gut reactions against a development which are unsupported by substantial evidence cannot be persuasive in the light of the often extensive studies put forward by a proponent. Such expert evidence can usually only be obtained at great cost.[38] Without intervenor funding, most groups will be unable to obtain the expertise needed.

It is suggested that the failure of the Government to provide intervenor funding to enable members of the public to present environmental evidence shows that the Government is really not interested in hearing a full account of the issues at stake. The provision of intervenor funding would help to remove this perception.

2. Court-like nature of OMB hearings

The Ontario Municipal Board conducts hearings in much the same way that a court does. This has created problems for members of the public who have appeared without counsel. In fact, some of the people interviewed stated that to appear without counsel, and thus to lack the expertise needed to deal with Board procedure, made it almost impossible to successfully argue their case. [40]

The problems which unrepresented groups and individuals related in the interviews indicated the following:

i. In one OMB hearing, Mr. Jim Hasler of PALS raised an issue which the applicant's lawyer and the OMB panel chairman discussed in private. They then came back to announce their decision on the issue. However, they excluded Mr. Hasler from participating in discussing the issue with them.[41] It is unlikely that this would have occurred had Mr. Hasler been represented by counsel.

ii. In another OMB hearing, [42] Mrs. Lynn McMillan, experienced several difficulties. Some lawyers protested her right to give argument. [43] Clearly this would not have occurred had she appeared with representation by counsel.

iii. Several people felt intimidated by the Board's procedures. [44] Although some individuals were able to overcome this

enough to undertake to cross-examine witnesses for the opponent, others did not feel competent to do so.

iv. Members of the Save the Rouge River System were often prohibited from entering hearsay evidence in the nature of the pepers, reports and comments.[45] It should be remembered that the Board does have the discretion to consider hearsay, and will often do so where the relevance of the evidence is persuasively argued by counsel.[46]

3. Difficulties obtaining documents

The Board has the power to order production of documents, but does not exercise this power as a matter of course.[47] Individuals who are unaware of this power may not be able to participate effectively without such documents.

4. Inflexibility in scheduling hearing sessions

Unlike the EAB, the OMB seldom schedules night meetings. This has posed problems for individuals who wish to participate but cannot because they hold day-time jobs.[48]

B. Problems with the Board's Receptivity towards Environmental Issues

Many people interviewed felt that OMB members did not have a sophisticated understanding of the environmental evidence raised or did not show a sensitivity towards environmental issues. Comments included the following:

> "We have come to the conclusion that it is a waste of time and money (to appear at OMB hearings) and will remain so until environmental concerns are given more weight in planning decisions." 49

> The OMB member was less responsive to environmental arguments (as well as to other types of arguments) than was the EAB member in a recent joint board hearing involving Tricil Waste Disposal Ltd. 50 The OMB member also showed a lack of familiarity with environmental issues. 51
>
> In an OMB hearing where APPEAL objected to official plan amendments which they felt failed to preserve prime agricultural land as required by the Foodland Guidelines, members of APPEAL felt that the Board's concern with financial matters far outweighed any consideration of the need to preserve foodland. 52
>
> In a hearing related to an application for a gravel pit license, the OMB panel chairman stated at the outset of the hearing that the hearing would only take one day. PALS representative Mr. J. Hasler suggested that this statement and the hearing itself indicated that the Board was not particularly willing to hear nor was it "comfortable" in hearing their environmental concerns. 53

The frequency of these sorts of comments during the interviews suggests that the problem is a significant one.

lV. Recommendations

This study has indicated many problems faced by members of the public seeking to present environmental evidence and concerns before the OMB joint boards. In this section, recommendations are are made which seek to address some of these problems. The recommendations are divided into two groups. The first set of recommendations addresses changes which should be made to improve the way in which the OMB deals with environmental issues. The second set address means to improve the effectiveness of public participation in preventing environmental issues before the OMB.

A. Improving the Way the OMB Deals with Environmental Issues

Several changes should be made to improve the way in which the OMB deals with environmental issues. The changes involve several suggested measures to clarify the Board's role when deciding upon

matters which involve environmental issues and changes to the process of appointing OMB members who would either sit alone in OMB hearings or with EAB members in joint Board hearings.

1. Definition of the Ontario Municipal Board's role

(a) Substantive review in light of provincial policy statement

The Ontario Municipal Board Act should be amended to clearly provide that the Board must conduct substantive review of planninng decisions made by a municipal council.

The amendment should be made in tandem with the issuance of a provincial policy statement under Section 2 of the Planning Act, 1983. This statement should detail the types of evidence which must be presented to the OMB before the OMB can decide whether or not to approve an official plan, official plan amendment or zoning by-law which will affect or is likely to affect the natural environment. The statement should also give the OMB the power to order a municipality to provide the evidence if it is lacking.

One type of evidence which should be required to be presented is evidence on the means of mitigation of environmental damage.

(b) The Board's consideration of matters of provincial interest

Section 17 of the Planning Act, 1983 should be amended to provide the following:

(1) On an official plan referral, where the Minister does not give notice that a matter of provincial interest is or is likely to be adversely affected, the Board must still consider the effect of the proposed official plan on matters of provincial

interest (including the protection of the natural environment).

(2) The Board has the powers of the Minister under s. 17 (a); ie., the Board can call provincial or federal officials to give evidence before it where it considers they may have an interest in approval of the plan.

(3) Where the Board concludes that a municipality has not given adequate consideration to matters of provincial interest, the Board shall order the municipality to amend the official plan to properly address these matters.

(c) Definition of criteria for assessing the rationale for an undertaking

Given the potential for OMB members on joint boards to misunderstand their role in making decisions under the Environmental Assessment Act, it is suggested that the Act be amended to require that the rationale must demonstrate that the need for an undertaking which will or is likely to cause extensive and irreversible environmental damage outweighs the environmental damage.

By itself, this amendment would leave the issue of what is the appropriate balance between need and environmental damage to be decided based upon the personal views of OMB and EAB members. Thus it is also recommended that the Ontario government issue a clear statement of its policy with respect to the "protection, conservation and wise management in Ontario of the environment," (s. 2, Environmental Assessment Act) which would clarify what the appropriate balance should be.

2. Changing the process' for making appointments to the OMB and to joint boards

(a) Appointments to the OMB

As recommended in the draft report on appointment processes prepared for the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions, this report supports an open screening process for appointments to the OMB. It is also recommended that appointments to the Board should not be made based upon the various types of expertise of applicants for Board membership. Rather the person should be appointed on the basis of their ability to make unbiased, fair judgments.

The draft report also recommends that House Committees would have the power to review appointments and make a report to the House stating whether or not the Committee concurs with the appointment. However, this report recommends an alternative review process: a separate tri-partite legislative committee which would have the power to confirm or veto an appointment. This alternate process would serve to emphasize the importance of the appointment process more than would the process recommended in the Standing Committee's draft report.

(b) Changing Appointments to joint boards

Given that some OMB members are preceived to lack sensitivity towards environmental issues, and that joint board hearings may focus upon such issues, the OMB and EAB chairmen should carefully select the members who will sit on joint boards.

Further, the practice of appointing three persons to sit on joint boards should be abandoned. All joint boards should be

comprised of an equal number of OMB and EAB members. If agreement cannot be reached between the members of a joint board, the points in issue which could not be agreed upon should be left to be settled using other means.

The practice of having even numbers of OMB and EAB members sitting on joint boards would avoid the public's perception that the mere selection of a joint board panel will heavily influence the outcome of the hearing.

B. Improving The Effectiveness of Public Perception before the OMB

This study has identified several obstacles to effective public participation which should be removed if public participation at a hearing is to retain its functions of providing information and of providing the public with a forum for deciding upon unresolved issues, even if some issues had already been resolved prior to the hearing. Obstacles include, most importantly, lack of intervenor funding, as well as the fear of cost award against environmental interest groups, and the difficulties which are posed by the court-like procedures of the OMB. Suggestions to remove these obstacles are recommended below:

1. Providing intervenor funding and interim measures

Some would argue that funds for public participation at a hearing should not be provided because this decreases the possibility of producing objective scientific evidence; ie., a "battle of the experts" erupts. Although this may be true to some extent, it must also be recognized that a proponent seeking approval for a development may not produce objective scientific evidence even if the public is not participating. That is, in order to gain the necessary approval from government bodies the

evidence may be presented in a way which hides or ignores matters that could limit the chances for gaining approval for for the grant of approval. These serious difficulties call for much greater consideration than can be provided in this report. In the meantime, before development of a more appropriate forum to deal with complex scientific, political, legal and economic questions that arise when large developments are proposed, this report accepts that adversarial OMB or joint board hearings are an important avenue for conveying environmental concerns which may not have been adequately addressed by the proponent for a development.

The provision of intervenor funding at the the start of the process may decrease the amount of time spent in an actual hearing by limiting the number of issues in dispute, and so may reduce the cost of the entire approvals process. Intervenor funding will also be needed to hire counsel and experts for the hearing itself.

Several difficult issues must be addressed in an act to provide intervenor funding. The source of funding, criteria for funding, the boards, commissions and agencies for which intervenor funding will be provided are just some of the issues. Thus it is recommended that the Ontario Government intensify its efforts to legislate to provide intervenor funding. In doing so, the Government should give priority to difficult issues which must be addressed to provide a satisfactory act.

Because an act to provide intervenor funding will not be passed for some time, it is suggested that interim regulations be passed persuant to the Ontario Municipal Board Act, 1981 requiring boards to appoint experts under the following conditions:

(1) Where intervenors have made sufficient efforts to raise their own funding, but were unable to obtain funds necessary to hire experts; and

(2) where the experts proposed to hired can independently scrutinize technical evidence, or will provide evidence on matters which the proponents' experts did not address.

2. Limiting cost awards

A regulation should be passed under the Ontario Municipal Board Act establishing criteria for awarding costs. These criteria should include the following:

(i) Costs will not be awarded against a party merely because it does not hire its own expert witness.

(ii) Costs will not be awarded against a party which presents evidence which is honestly believed to cast doubt on the propriety of a decision to proceed with a development.

It is hoped that this regulation would remove the barrier to public participation which has arisen because of the recent cost award made against PALS.

3. Performing OMB and joint board procedures

Several procedural reforms should be effected to improve the ability of the public to effectively participate in OMB hearings, and to standardize the procedures of joint boards which will facilitate participation by all parties appearing before joint boards, including the public. These recommended reforms are set out below:

a. Preliminary meetings

The OMB should meet with the parties, including members of the public unacquainted with Board practice and procedure, to give guidance on procedural matters. The Board should also explain the nature of the evidence which they consider persuasive, emphasizing the importance of providing concrete evidence in support of their case, and the limited usefulness to the Board of hearsay evidence.

b. Citizens' guide to OMB practice and procedure

The OMB should produce a guide explaining the rules of practice and procedure in simplified terms. The handbook could include, for example, information on procedures for filing affidavit evidence or subpoenaing witnesses.

c. Discretion in Board practice and procedure

Because the Board has discretion to determine its own practice and procedure, the Board should tailor its practice and procedure to meet the needs of unrepresented individuals or groups.

d. Facilitating access of the public to documents

The Board should order production of documents as a matter of course where members of the public are participating at a board hearing.

e. Scheduling night-time sessions

The Board should schedule night-time sessions to allow members of the public to participate at the hearing. To further facilitate their ability to present environmental concerns, members of the public could be allowed to read statements or to express the public concern over the project (similar to public hearing days that have been held in some OMB hearings).

f. Requiring the OMB to keep transcripts

A regulation should be passed requiring that transcripts of oral evidence be kept by the OMB.

g. Codification of joint board practice and procedure

To avoid disagreement between OMB and EAB members as to appropriate joint board practice and procedure, a regulation establishing rules of practice and procedure should be promulgated persuant to the Consolidated Hearings Act, 1981.

END NOTES

1. See Appendix I for list of literature reviewed for the project.
2. See Appendix II for list of persons interviewed.
3. Correspondence, May 2, 1986.
4. Correspondence, May 14, 1986.
5. Correspondence, May 20, 1986.
6. See list of workshop participants in Appendix III, and agenda for workshop in Appendix IV.
7. Jeffery, "Procedural Safeguards in the Context of Ontario Municipal Board and Environmental Assessment Board Hearings" (1984), 5 Adv. Q. 23 at 26.
8. Personal communication with Chairman of the OMB, Mr. Henry Stewart, February 26, 1986.
9. Speech given by Mr. Donald Diplock at a meeting of the Canadian Institue of Planners, Metropolitan Toronto Library, March 3, 1986.
10. Unreported decision of the OMB, February 14, 1986.
11. Re: certain application by Telephone City and Gravel Resources Ltd. Unreported OMB decision, March 12, 1986.
12. Id. at 7.
13. Supra note 8.
14. Smith, "Practice and Procedures before the Environmental Assessment Board" (1981-82), 3 Adv.Q.195 at 201-205.
15. Supra note 7, at 47-48.
16. Board's reasons for Order of Costs in Advance, November 5, 1985, at 4.
17. Id. at 3.
18. Personal communication, Mr. David Poch, Energy Probe, May 21, 1986.
19. Personal communication, Mr. Stephen Shrybman, CELA, February 26, 1986.

20. Supra note 8

21. Personal Communication, February 26, 1986.

22. Mr. M. Jeffery, Q.C., dissenting opinion in the Red Hill Creek Expressway case, CH82-08, at 306.

23. See this report, Supra at

24. Supra note 22, at 307.

25. See this report, infra at

26. Personal communication, Mr. M. Jeffery, Q.C., March 26, 1986.

27. Personal communication, Ms. Verna Flowers (APPEAL), January 29, 1986.

28. Personal communication, Mrs. Joan Phillips (Mississauga - Kane Rds. Association), (questionnaire); Mrs. Lynn McMillan, March 7, 1986; Mr. Don Cuddy (Ottawa Field - Naturalists' Club), (questionnaire).

29. Personal communication, Mrs. Lois James (Save the Rouge River System), March 12, 1986; Mrs. Verna Flowers, Supra note 27.

30. Personal communication, Mrs. Lois James, Supra note 29.

31. Personal communication, Mrs. Sherry Morrison (Lambton Anti-Pollution Association), (questionnaire); Mr. D.F. Brunton (Ottawa Field - Naturalists' Club), February 26, 1986.

32. Personal communication, Mr. D.F. Brunton.

33. See this report, Supra at

34. Re: Proposed Amendment no. 190 to Official Plan for the Vaughn Planning Area. Unreported OMB decision, March 25, 1985.

35. Personal communication, Mrs. Lynn McMillan, Supra note 28.

36. Supra note 30.

37. Personal communication, Mr. Phil Sanford (McCarthy & McCarthy), March 7, 1986.

38. For example, in the recent Tricil hearing before a joint board, the Lambton Anti-Pollution Association paid $11,500 to hire a hydrogeologist and a specialist from the United States Environmental Protection Agency. Without funding from the Township of Moore, it is unlikely that these experts would have been hired. (questionnaire).

39. This was suggested by Mrs. McMillan, Supra note 28.

40. Personal communication, Mrs. Lynn McMillan, supra note 23, Mr. Phil Sanford, supra note 37. See also the quote from Jeffery, in this report, supra at

41. Personal communication, Mr. J. Hasler, February 26, 1985.

42. Supra note 34.

43. Supra note 35.

44. Personal communication, Mrs. Lois James, supra note 29; Mrs. Lynn McMillan, supra note 28; Sheila May, Binbrook Anti-Dump Committee.

45. Supra note 30.

46. Personal communication, Ms. Eva Ligeti (Counsel), May 20, 1986.

47. In one OMB hearing (decision, supra note 34), Mrs. Lynn McMillan had to request the Board to order the opponent to provide her with exhibits which the opponent used at the hearing. Supra note 28.

48. Supra note 27.

49. Mr. Don Cuddy, member, Conservation Committee, Ottawa Field - Naturalists' Club (questionnaire).

50. Ms. Sherry Morrison, Lambton Anti-Pollution Association (questionnaire).

51. Personal communication, Ms. Eva Ligeti (counsel for Lambton Anti-Pollution Association), January 29, 1986.

52. Supra note 27.

53. Supra note 41.

APPENDIX I

LITERATURE REVIEWED

Canadian Bar Association - Ontario, Municipal Law Section, Committee on the Rules of the OMB, Draft Report on the process of appointments to agencies, boards and commissions prepared for the Standing Committee on Procedural Affairs and Agencies, Boards and Commissions., Interim Report, February 25, 1986.

Jeffery, "The Consolidated Hearings Act, 1981" (198), Canadian Bar Review.

Jeffery, "Procedural Safeguards in the Context of Ontario Municipal Board and Environmental Assessment Hearings" (1984), 5 Adv. Q. 23.

Report of the Planning Act Review Committee, c. 10.

Sanford, "Municipal Land Use Controls". A paper presented to the Workshop, "How to Fight for What Left (of the Environment)." February 22, 1985.

Smith, "Practice and Procedures before the Environmental Assessment Board" (1981-82), 3 Adv. Q. 195.

APPENDIX III

LIST OF WORKSHOP PARTICIPANTS

Richard Alabaster, Aird & Berlis
Ross Boncore, Association of Peel People Evaluating Agricultural Land
Robert Boxma, Perry, Farley & Onyschuck
Marilyn Churley, Canadian Environmental Defense Fund
Joseph Curtin, Planner
Joseph de Pencier, Goodman & Goodman
Verna Flowers, Association of Peel People Evaluating Agricultural Land
James Hasler, Preservation of Agricultural Lands Society
Catherine James, Foundation for Aggregate Studies
Lois James, Save the Rouge Valley System
Nancy Kleer, Canadian Environmental Law Research Foundation
Thomas Lederer, Osler, Hoskin
Doug Macdonald, Canadian Environmental Law Research Foundation
James Mahon, Citizens Coalition to Maintain the Environment
Peter Pickfield, Canadian, Environmental Law Research Foundation
David Poch, Energy Probe
Harry Poch, Metropolitan Toronto Legal Department
Herman Turkstra, Turkstra Partners

APPENDIX IV

THE ONTARIO MUNICIPAL BOARD AND ENVIRONMENTAL PROTECTION

WORKSHOP DISCUSSION

Wednesday, May 28, 1986,

2:00 - 5:00 p.m.

Price, Waterhouse Boardroom,

Toronto-Dominion Centre, 50th Floor

AGENDA

1. Introduction - Doug Macdonald

2. Presentation of study findings - Nancy Kleer

3. Discussion of draft recommendations:
   - (a) An act to provide intervenor funding;
   - (b) Defining the Board's role in reviewing planning matters which affect environmental interests;
   - (c) Limiting cost awards against public intervenors;
   - (d) Changing the process for appointing members to the OMB;
   - (e) Criteria for establishing the composition of joint boards;
   - (f) Creating a provincial policy statement to assure adequate consideration of environmental matters by the OMB;
   - (g) Legislating a standard by which to assess the rationale for an undertaking;
   - (h) Changes related to Board practice and procedure:
     - (i) Regulation to require the OMB to keep transcripts;
     - (ii) Legislation to require Boards to appoint experts in certain situations;
     - (iii) Codification of Joint board practice and procedure;
     - (iv) Preliminary meetings with the OMB;
     - (v) Preparation of a citizens's guide;
     - (vi) Other changes.
   - (i) Study of U.S. experience with legislation to limit potential conflicts of interest in the preparation of consultant's reports;

4. Completing the study