John #47

Environmental Impact Assessment in Canada: Processes and Approaches

February 1977

INSTITUTE FOR ENVIRONMENTAL STUDIES
UNIVERSITY OF TORONTO

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
SUITE 303
1 SPADINA CRESCENT
TORONTO, ONTARIO — M5S 2J5

September 1977

Pub. No. EE-5

THE EVOLVING ROLE OF THE ENVIRONMENTAL ASSESSMENT BOARD IN DECISION MAKING

J. Swaigen
Canadian Environmental Law Association

A REJOINDER

The Environmental Assessment Act, 1975 (EAA) and the Environmental Assessment Board (EAB) established under the Act, appear to establish a mechanism to identify and evaluate potentially significant environmental effects of proposed undertakings at a stage when alternative solutions, including remedial measures and the alternative of not proceeding, are still available to decision makers. The EAA and EAB appear to give due consideration to public opinion and to means of avoiding or mitigating detrimental effects of an undertaking before government grants approval to proceed.[1]

However, this environmental impact assessment process will be effective only if it ensures that the socio-legal systems involved provide full, fair, and impartial procedures to all affected or interested persons. These "procedural ideals" would include the establishment of broad environmental rights, from which fair procedures will naturally flow; broad standing (including the right to adequate notice) to appear and make representations before authorities considering various aspects and stages of the application for approval; access to adequate information about the proposal and its implications; public funding to permit all parties to present their "case" on an equal footing; and, finally, there must be public confidence in the system and its procedures. This public confidence will depend both on an appearance of fairness and competence, and on all parties having a real possibility of success.[2]

This review will discuss only a few of these considerations, and because of space limitation, none of them in detail.

FINANCIAL ACCESSIBILITY

Members of the public who oppose applications for major undertakings involving expenditure or profits of millions of dollars

---

1 See "Green Paper on Environmental Assessment in Ontario" paper presented by Victor W. Rudik, Assistant Director, Environmental Approvals Branch, Ontario Ministry of the Environment, undated.

2 This discussion is adapted from "Necessity for Procedural Rights in Evaluating Environmental Change," unpublished paper by Marie Corbett, June 1975.

cannot compete with government or private applicants in assembling a team of lawyers and technical experts, and in obtaining information. Financially they are severely disadvantaged even when they are an affluent group or an established public interest organization. However, the EAA provides no mechanism for funding informed representation or investigation, despite precedents of government funding of research into native land claims, litigation by native groups over environmental concerns, and of public interventions in the provincial Royal Commission on Hydro-Electric Power Planning and the Federal Mackenzie Valley Pipeline Inquiry.

A number of methods of reducing inequities in resource availability have been proposed and/or adopted in other areas of citizen participation. They include tax reforms, funding by government, funding by the project proponent, and one-way costs rules.[3]

One example of the problem is the lack of availability of transcripts of public hearings at a reasonable cost. The EAB recently raised the price of transcripts of its hearings from 1-1/2¢ a page to 25¢ a page. At one EAB hearing, transcripts are now over 4,000 pages long, costing over $1,000 and the hearing may only be half over. We understand the Board is considering a solution to this problem.

INDEPENDENCE AND IMPARTIALITY

Members of an environmental tribunal should have a demonstrated concern with environmental protection, demonstrated expertise and experience and political independence. Appointment of members of one political party without involvement of other political parties or of the general public raises concerns, as does appointment of sitting members of the legislature, government employees, or persons whose most notable contribution to public life has been fundraising, managing campaigns, or otherwise actively supporting the appointing political party.[4]

Only the members of a tribunal who have heard the evidence, should make the final recommendation or decision. Moreover, to ensure that the decision is not made on the basis of considerations extraneous to the evidence, or that, if it is, the public is made aware of the basis for decision making, the hearing board should make a binding decision, rather than a recommendation. This procedure would not interfere with

---

[3] Environmental Management and Public Participation, (P.S. Elder, ed.), Toronto, Canadian Environmental Law Research Foundation, (1975), p. 354, 363.

[4] Ontario Commission on the Legislature, Dalton Camp, Chairman, First Report, May 1973, p. 35 ff.

Department of the Environment, Government of Canada, Final Report of the Task Force on Environmental Impact Policy and Procedure, August 30, 1972.

legislative sovereignty, since the Legislative or Executive Branch may still overrule the tribunal's decision by Order-in-Council or by legislation. This process merely assures that if the decision is made on the basis of contingencies or policies outside of the scope of the public participation process, its basis will be subject to public scrutiny.

With regard to hearings under the Environmental Assessment Act, the Board now makes a decision, and that decision must be made by those members who have heard the evidence. But under the Environmental Protection Act and the Ontario Water Resources Act, the Board makes only a recommendation, not a decision. Moreover, the final recommendation is not made by the members who heard the evidence, but by the full Board. If the full Board changes the recommendations of the panel who heard the evidence, it has no obligation to inform the parties to the hearing of the changes or the reasons for them. This procedure hurts the Board's credibility. It creates a system of first-class and second-class environmental rights in Ontario with no logical justification for doing so.

PUBLIC CONFIDENCE IN THE PROCESS

In dealing with the Ministry of the Environment and the Environmental Hearing Board, the predecessor of the EAB, people opposing undertakings which they feel may impair the environment have come to believe that they have little chance of success.[5] Insofar as Boards like the Environmental Hearing Board and the Ontario Municipal Board approve the overwhelming majority of applications, these concerned people are right.[6] Even though the opposition might have been "successful" in the sense that public hearings and the processes prior to and subsequent to them might have caused substantial modifications to the proposal, two facts remain. First, in many cases, only complete rejection of a proposal would be sufficient to protect the environment because long-range environmental effects are not predictable. Secondly, if the decision makers have different definitions of "success" from significant segments of the public, lack of confidence will continue.

If full, fair, and impartial procedures are incorporated into the environmental impact assessment process in Ontario, and if the system gives priority to enhancement of the social, economic and cultural conditions that influence the life of man or a community,[7] the impact

---

[5] See, for example, Heather Mitchell and John Swaigen, "Fighting a New Battle for a Clean Scene," Toronto Globe and Mail, p. 7., October 6, 1976; Grand Council Treaty Number 9 Media Release, October 27, 1976; Grand Council Treaty Number 9 Press Statement, October 29, 1976.

[6] Op. cit. footnote 5; also McKenna, Bruce: "The OMB: Citizens as Losers"; City Magazine, vol. 1, no. 7, November 1975, p. 40.

[7] The definition of "environment" in the Environmental Assessment Act.

assessment mechanism may fulfill its promise. But if changes in procedures do not occur, and if one or more of the participants in the impact assessment process, including the Ministry of the Environment, other government ministries, the EAB, applicants and objectors, do not evaluate and adjust their perceptions, attitudes and expectations, the possibility of environmental protection through the EAA and the EAB might prove to be illusory.