#213

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

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

Publication #213
ISBN# 978-1-77189-517-0

TREES ACT REFORM

Response by CELA to the proposed Trees Act amendments recommended by the Association of Municipalities of Ontario Trees Bylaws Advisory Committee

Prepared by:

Gerard Laarhuis
Student-at-Law

October 1992

TREES ACT REFORM

The law detains both man and woman
who steal the goose from off the common.
But lets the greater felon loose
who steals the common from the Goose.

Anon.

Introduction

This submission, prepared by the Canadian Environmental Law Association (CELA) responds to the proposed Trees Act amendments recommended by the Association of Municipalities of Ontario (AMO) Trees Bylaws Advisory Committee. The following is a brief summary of the AMO committee recommendations:

Summary of the Recommendations of the AMO Trees Bylaws Advisory Committee:

6.2.1 The Trees Act should be the primary Act to regulate private forests and trees.

6.2.2 All municipalities should have authority to enact bylaws.

6.2.3. The Act should be permissive and make a distinction for upper tier / lower tier jurisdiction based on: (1) woodlots over 1 ha and (2) woodlots under 1 ha and trees not in woodlots. The Act should maintain the existing woodlot definition.

6.2.4 Upper tier municipalities (countries and regions) should have jurisdiction for woodlots 1 ha or more and local municipalities should have jurisdiction for woodlots less than 1 ha and trees not in woodlots.

6.2.5 The Act should provide for a Permit system, public input into bylaws, appeal procedures, and tree protection orders.

6.2.6 The Act should allow municipalities to provide exemptions in their bylaws. Sample exemptions include: personal use; trees not essential/important to meeting the intent of the bylaws; trees interfering with approved building or development; and trees interfering with statutory work by public body. A definition for "Good Forestry Practice" is provided but no definition of "Good Urban Forestry Practice" is provided.

6.2.7 The Act should provide for maximum fines of $ 500,000 and stop work orders.

6.2.8 The Ministry of Natural Resources should provide training and develop a bylaws guide. The Act should provide for MNR approval of bylaws. MNR should provide public education

CELA supports many of the recommendations made by the AMO Trees Bylaw Advisory Committee. However the recommendations often fall short of the changes necessary to assure the conservation or sustainable management of Ontario's dwindling forest, woodlot and tree resources. We submit that some of the recommendations would result in an Act or bylaws that are unworkable, ineffective or unnecessarily confusing. Some of our comments are expansions of the AMO committee's recommendations. Other comments are departures from the recommendations that we feel are necessary if the Act is to provide meaningful protection against indiscriminate or unsustainable destruction of privately held forests or trees.

BACKGROUND

There are 80 million hectares of forest land in Ontario, 15% of which are privately owned - the vast majority in Southern Ontario. There are 169,000 private woodlot owners in Ontario. Despite such large numbers, these owners possess the tiny remnants of a once vast expanse of almost uninterrupted forest of tremendous biological diversity.

The pre-European settlement landscape of Ontario was a diverse, biologically rich set of species complexes dominated by forest communities of three major types: the boreal forests to the north; the Great Lakes-St. Lawrence mixed deciduous forests in Central and Southern Ontario; and the Carolinian species complex to the south largely along the northern shore of Lake Erie. Interspersed within these species communities were vast tracts of cedars in lower lying areas. With the onset of European settlement, the areas of the province that now comprise the organized municipalities concentrated in the central and southern regions of the province, were substantially cleared of this forest cover.

In the Great Lakes-St. Lawrence forest, the range and abundance of dominant species types has changed dramatically. Eastern White Pine, the official tree and symbol for the province of Ontario, has largely disappeared in many areas of its former range. In the southern areas now dominated by agricultural and urban areas, forest clearing and wetland drainage fundamentally altered the landscape and species mix.[1]

---

[1] Lambert, Richards, S., Renewing Nature's Wealth, Toronto: Hunter Ross Co., for the Department of Lands and Forests, 1967.

These dramatic shifts in species composition and, in many areas, their virtual disappearance, was well under way in the last century in the central and southern parts of the province as a result of commercial logging and clearing the land for agricultural purposes. The unending "demand" for more land, by all potential users, places an increasingly intense pressure on the remaining forest, woodlots and tree stands.

The combined pressures of commercial logging, agriculture, urbanization and cottage and recreational use, has rendered the Carolinian deciduous forest one of the most threatened ecosystems in the province. In some counties, less than 2 to 3 percent of the Carolinian forest remains in its natural state.[2]

The result of past and present consumptive activities is a dwindling forest and tree resource and a corresponding dramatic loss of wildlife habitat, biological diversity and ecological integrity. For example Ministry of Agriculture and Food Statistics indicate that in Essex County from 1961-1986 there was a 73% decline in the area of farm woodlands. As the forest resource becomes increasingly scarce, the need to protect and assure ecological integrity for what remains, intensifies.

We walk with a heavy foot on this earth forgetting we leave footprints. Our footprint has had an enormous impact on the forest resource. We must learn to walk more lightly and step more delicately. It is only through a recognition of the non-sustainability of our present course that we become receptive to the alternatives which might more fully respect the sanctity of the earth and its holistic web of life. By preventing indiscriminate cutting and encouraging the preservation and restoration of diverse forest communities, the new Trees Act can be a "step" toward sustainable forest practices.

REASONS FOR PROTECTING TREES

There are a number of good reasons, aside from an environmental ethic, for protecting trees and forests. Trees help maintain the groundwater level; aid in regulating drainage and the hydrologic cycle generally; prevent soil erosion; provide habitat for wildlife and other plants; have important aesthetic value; provide spiritual and recreational refuge; contribute to the CO2-O2 balance; are an integral part of the nutrient cycle; contribute to soil development and to sustainable agriculture; absorb heavy metal and other pollutants from the atmosphere; add to biological diversity, and provide shade and an enormous cooling effect.

---

[2] Wildlife Habitat Canada, The Status of Wildlife Habitat in Canada; Ottawa: Wildlife Habitat Canada, October 1986, p. 27.

OUR COMMON ENVIRONMENT AND PRIVATE PROPERTY

The greatest challenge for the Trees Act amendments is how to prevent indiscriminate or ecologically destructive tree cutting on privately held land without unduly infringing the bundle of rights held by property holders.

Unlike property law, the laws of nature and the environment do not distinguish between public and private ownership. The need to protect and restore our forest and tree resource is not altered by the artificial distinction between private and public lands. The new Trees Act must respect the laws of nature without unnecessarily infringing the laws of private property.

At the outset it is useful to explore some principles of property law. It has long been accepted in law, and by property owners that property rights are not absolute. A title to property under the registry system or the land titles system is not a grant of an absolute, unfettered right to do as one pleases with the property. Title also carries with it certain responsibilities and obligations. For example, title holders cannot use their property in a way that creates a public or private nuisance or causes a health or safety risk to their neighbour or to the public.

Some property rights are reserved by statute or the common law. The Ontario Water Resources Act subjects all water to the supervision of the Minister. A land owner may take water only subject to the Act and the riparian rights of others. The Lakes and Rivers Improvement Act requires a title holder to obtain permission prior to diverting a stream that is on her/his property. Under the Planning Act title holders are restricted in some land use choices. The Building Code Act requires a permit prior to building on land. Land use planning was necessitated by the indiscriminate land use choices that where being made by some land owners. However inadequate the present situation, land use planning as it was originally conceived, was intended to provide a holistic and integrated management scheme for land use decisions.

The market system and private property principals often fail to produce a fair allocation of resources and fail to produce environmental solutions. Free enterprise principles offer a theory of production maximization and price equilibrium but are silent about society, justice and our common environment. Legislation is sometimes necessary to respond to such shortcomings. The new Trees Act is needed to respond to the on going indiscriminate and unsustainable destruction of our dwindling tree and forest resource.

The new Trees Act should formalize a mechanism that requires an accounting of unsustainable or indiscriminate destruction of trees or forest. This mechanism would not be an infringement of an existing property right; rather it would be a small, but necessary, clarification and codification of the rights and responsibilities that are contained in the property bundle.

A "LAND ETHIC"

Humans are only one small part of a holistic ecosystem. We are not immune from the limits of the natural community. We are a part of that community. Sustainable forest practice must not only consider the future generations of humans but must also respect the present and future generations of all elements in the interconnected web of life. This conception abandons humans as masters of their destiny in favour of humans as stewards (by virtue of evolutionary hierarchy) who must act with respect and integrity to every element of the earth for which we act as trustee.

Aldo Leopold in his classic Sand Country Almanac describes this ecological respect as the "land ethic". He states that there is yet "no ethic dealing with [human's] relation to land and to the animals and plants which grow upon it... The land relation is still strictly economic, entailing privileges but not obligations" (1966). A land ethic prompts cooperation within an expanded ecological community instead of the present competition with the environment. Leopold suggests we should examine each question of forest use in terms of "what is ethically and aesthetically right, as well as what is economically expedient". He says a thing is "right" when it tends to preserve the integrity, stability and beauty of the biotic community. "It is wrong if it tends otherwise". (Leopold, 1949, pp. 224-225).

The Ministry of Natural Resources (MNR) recognizes and supports a general shift to a holistic focus for private forest land. In "Private Woodlands Strategy for Ontario Private Forest Land" (p.2) MNR states: "The program involves the following general shifts in focus:... from timber plus other uses to holistic management for all forest values...". In the same document (at p. 5), MNR states:

> "This Private Woodlands Strategy is a key initiative that provides the Ministry with an excellent opportunity to demonstrate its commitment to integrated forest management. Private land forestry is a window for implementing fisheries, wildlife and areas of natural and scientific interest programs, especially in Southern Ontario's predominately non-Crown land ownership pattern".

Among the key elements of the Strategy is "regulation to secure adherence to basic forest management principles" and, "holistic management services to respond to the wide range of benefits possible from trees and forests on private lands..."(p.7).

It may not be entirely fair to place the burden of conservation on the owners of the remaining trees, woodlots or forests when others similarly situated have benefitted economically from the removal of trees. However, if everyone is provided with an equal and unending opportunity to remove trees, the currant unsustainable trend will continue. The little that remains of our natural heritage could be lost entirely. We must be careful

that our claims to occupy land and alter the environment are not exercised so fully that we, as one species amongst many, are left standing alone in a land with few trees and forests.

The Trees Act will not result in a prohibition on cutting trees. It will allow reasonable use of wood within sustainable limits. In most situations, where farmers, cottage owners and woodlot owners carry on in a sustainable and responsible fashion their operation will remain unaffected; only in special circumstances will a permit be required and even then it would be rare that a permit would be outright denied. Most woodlot owners, cottagers, and farmers understand and embrace a traditional land stewardship ethic; to these people the new Trees Act will not alter the woodlot decisions they make.

CELA RECOMMENDATIONS

1. Direct Provincial Legislation or Mandatory Municipal Bylaws

The Trees Bylaws Advisory Committee recommended that the new Trees Act empower local and upper tier municipalities to pass tree protection bylaws if they wanted to. CELA submits that this type of "permissive" legislation does nothing to improve on the most problematic provision of the existing Trees Act. The existing permissive legislation has encouraged only 24 municipalities to pass bylaws, and of those, few are actively enforced.

a. For the sake of consistency, enforcement resources and uniformity of application province-wide legislation, that sets out provincial standards, procedures and administration is necessary. The AMO committee recommendation for a new Trees Act that permits, but does not require, municipalities to pass tree protection bylaws would seriously undermine the intent and effectiveness of the act.

It is clear that environment - development conflicts will continue. Even the best intentioned local municipalities are ill-suited to withstand development pressures. Municipalities with the greatest development pressure will have the greatest need for strong and enforced bylaws, but will face the greatest pressure to pass weak or no tree bylaws, or to enforce them in a lax manner. A clearly articulated provincial policy on tree and forest preservation for private land is necessary to avoid a patchwork of widely varying and inconsistently enforced tree bylaws in individual municipalities.

b. The Trees Bylaw Committee in its final report praised and endorsed the following statement made by Dr. L.G. Smith:

> "people should not expect government to provide solutions for them; the Committees' recommendations for enabling legislation empowers property owners to take responsibility for their own environment; and this is best expressed through the municipal electoral process".[3]

Dr. Smiths' confidence in the municipal electoral process to somehow protect trees and forests ignores history and reality. An election every three years has not and will not protect trees. In this respect the AMO committee recommendations offer no improvement over the status quo. As stated by MNR "Maintaining the status quo will result in a continued inability to address the growing public concern for conservation oriented programs...It will also lead to further loss of southern Ontario forest land and associated loss of environmental benefits".[4]

c. A further problem of permissive municipality-empowering legislation is the practicality of local administration, enforcement and prosecution. Many local municipalities do not have the staff, or the money to hire staff, with expertise in tree and forest management. Few municipalities could afford to prosecute. Raising the levels of fines available under the Act is not likely to address this problem. In 1979, municipalities suggested that they had difficulty enforcing the Trees Act because of low fines. The fines were raised to $500.00, a significant sum at that time, yet a significant improvement in enforcement levels did not result. This experience suggests that unless municipalities are somehow provided with resources specifically targeted to Trees Act bylaw enforcement, municipal enforcement will not succeed in protecting trees and forests and this legislative initiative will fail, as did the 1979 initiative.

d. CELA supports uniform and standardized tree, forest and woodlot protection. Consistency, certainty and predictability are best achieved by strong provincially administered legislation. Failing comprehensive provincial legislation, the new Trees Act should empowers municipal governments to pass tree bylaws. The empowering legislation should:

1. be mandatory;

---

[3] Smith, L.G., 1991. University of Western Ontario, Dept. of Geography from p.i of final Report of the Tree Bylaws Advisory Committee, June 1991.

[4] Private Woodlands Strategy For Ontario's Private Forest Lands, Ministry of Natural Resources, p.7.

2. establish province-wide minimum standards;
3. clearly define terms;
4. prescribe minimum public notice and participation procedures; and
5. set out a system for designating and protecting trees, forests or woodlots of provincial, regional and local significance.

The legislation must be accompanied with a firm commitment to fund both an inventory and classification program, and municipal administration, enforcement and prosecution.

e. The final Report of the AMO Tree Bylaws Advisory Committee recommends making a distinction between upper tier municipalities and local municipalities. The Committee also distinguishes between:

i. woodlots over 1 hectare;
ii. woodlots under 1 hectare; and
iii. trees not in woodlots.

The Committee recommended that jurisdiction for woodlots of 1 hectare or more be granted to upper tier municipalities and jurisdiction for woodlots less than 1 hectare and trees not in woodlots be granted to local municipalities. We submit this distinction would result in duplicated administration, personnel and enforcement. Under the AMO committee recommendation different municipalities would have jurisdiction depending on woodlot size. Therefore adjacent, or separately owned portions of a contiguous forest or woodlot, could be affected by dramatically different bylaws and procedures depending on the size of the separately owned portion. Severing a large woodlot or forest into fragments less that 1 hectare in area would result in a change in the municipality which has jurisdiction. This distinction may also cause confusion for applicants about where to apply for a permit.

CELA recommends that where an upper tier municipality is in place it should be granted jurisdiction over all trees, woodlots and forests within its boundaries regardless of the size of the woodlot or forest. This power and responsibility would be consistent with the need for upper tier municipalities to do watershed inventory work and work relating to the planning and preservation of natural heritage systems. Where there is no upper tier government, the jurisdiction should be granted to the local municipality and where there is no organized municipal government the jurisdiction and obligation should fall with MNR. Under this scheme there is only one place for an applicant to go for all permits.

2. Prescribed Minimum Bylaw Content

To assure some degree of uniformity in tree, forest and woodlot protection the new Trees Act must set out Province wide minimum standards. Some of the following recommendations go beyond the recommendations of the AMO committee. If the jurisdiction for tree protection is devolved to individual municipalities then the new legislation should include province-wide minimum standards To encourage acceptance and adherence to minimum bylaw content the new Trees Act should couple provincial financial and resource assistance with municipal adoption of the prescribed minimum standards.

The primary objective of our recommended amendments to the Trees Act is the elimination of destructive and indiscriminate tree cutting by encouraging sustainable forest practice. A key element of this objective is setting a threshold which if exceeded, could result in a net diminution of the remaining private forest resource. A forest practice is sustainable provided it does not contribute to the diminution of the area, integrity or holistic function of private trees and forests.

A quantifiable measure, while somewhat artificial, is necessary to establish a minimum standard from which to assess sustainabilty. We recommend what we will refer to as the "10 % rule". The "10 %" rule stipulates that a cutting permit will be required prior to any planned cut, which over any 10 year period, results in a cumulative loss of greater than 10% of the total wood volume or 10% of the tree stand or 20% of any species of tree over the actual area of the cut.

This standard is not unduly onerous or complex. Through sustainable forestry practice it is entirely possible to take wood from a forest or woodlot and still maintain the forest or woodlot within the "10% rule". What the rule essentially means is that a landowner will not require a permit provided her or his cutting practices do not result in a net loss of more than 10% of her or his forest resource. Natural growth and regeneration within the forest or woodlot should allow sustained cutting without exceeding the "10% rule".

The new Trees Act should include a requirement to distinguish between urban trees and forests, and rural trees, forest and woodlots as follows:

a) Urban

i. bylaws should set out special criteria for trees, forest or woodlots that are subject to cutting because of urban or rural residential development pressure. Particular criteria should be established to prevent the indiscriminate cutting of any trees during the pre-plan submission stage of land development.

ii. bylaws should require a permit prior to cutting any and all trees, forests or woodlots within urban municipality boundaries.

iii. bylaws should require prior public notification for all planned cuts in urban areas, including where appropriate, a public posting near the subject trees.

iv. provisions to deal specifically with urban tree protection problems including boundary trees, overhanging trees, utility company cutting, government or private construction and development.

b) Rural/Cottage

i. Bylaws should not require a permit where the cut is taking place within a registered forest, woodlot or sugar bush and the planned cut is in keeping with the "10% rule". In order to qualify for this exemption the owner would have to register her woodlot or forest with the municipality. Once registered the private forest or woodlot should be included in the inventory and classification scheme outlined in our recommendations that follow.

ii. Bylaws should provide that Notwithstanding i, a cutting permit will be required prior to any planned cut, which over any 10 year period, results in a cumulative loss of greater than 10% of the total wood volume or 10% of the tree stand or 20% of any species of tree over the actual area of the cut.

iii. Bylaws should include a provision that a permit be required prior to cutting any of the following: designated trees; shade trees; windbreaks; fenceline trees; conservation land trees; trees on steep slopes; trees on or near water ways or water bodies including headwaters, recharge areas and other significant hydrological areas; trees providing wildlife habitat; trees that are part of areas of natural beauty; trees that provide linkages or corridors between forests or woodlots or other significant natural areas; trees that provide significant recreational, visual, aesthetic or vista resources; and trees with historic or cultural, natural, biological or scientific significance.

iv. Bylaws should require that an area zoned in an Official Plan as "rural residential" or "residential" (or equivalent) the Urban criteria shall apply.

v. Bylaws should require a permit for all cutting for commercial purposes.

vi. Bylaws should include a provision that all persons who cut or harvest timber for hire on private land shall require a licence and shall assure themselves that the necessary permit has been obtained prior to initiating any cutting activities for which a permit is or may be required under the Act.

3. Environmental Review Committees

The AMO committee recommended that each municipality set up a Trees Committee. We submit that a focus solely on trees is too narrow as it ignores the need to make "tree" decisions in a broader holistic environmental context. Also an additional municipal committee should be unnecessary because the work fits well with Environmental Committees that already exist in many municipalities. The new Trees Act should require that each municipality establish an Environmental Review Committee where one does not exist. One purpose of the Committee would be to initiate and oversee the Trees Act. Specifically the functions of the committee should include: overseeing the progress of the tree, woodlot and forest classification and inventory system; to consider requests for designation; to hear appeals; and to advise council on all tree, woodlot and forest issues.

The Committee should recommend a procedure to assure the bylaws are comprehensive and provide the opportunity for public input and participation. If any request for designation by any person or group, is denied or significantly altered by the committee, the applicant should be provided with written reasons without delay.

The Committee should be composed of no more than 50% elected council members. The balance of the committee should be appointed from nominations received from bona fide environmental groups in the municipality. A bona fide environmental group is an organized group of citizens who are active in environmental protection. Persons with relevant expertise should be appointed as ex officio members.

The Committee should make its recommendation to the Municipal Council. When the Environmental Review Committee hears an appeal from the decision of the Environmental Officer it should sit without its elected council member component. The committees decision should be final, subject only to further appeal to the Ontario Municipal Board and the Minister.

4. Officers

Each upper tier municipality should hire a Environmental Officer whose responsibilities would include the implementation, administration and enforcement of the new Trees Act and the municipal trees by-laws. The Environmental Officer would play an integral role in the classification inventory and designation processes. The qualifications of the environmental officer should include training or expertise in sustainable forestry and oboriculture practice.

5. Inventory and Classification

The Act should provide for an ecologically-based inventory and classification of the tree and forest resources within each upper-tier municipality. The inventory should be maintained by each upper-tier municipality with financial and resource support from the MNR. MNR already has Forestry Resource Inventory maps which can serve as a good starting point. MNR should be responsible to compile the individual municipality information into a comprehensive, province wide inventory and classification scheme. The new Trees Act should require that all municipalities and the MNR observe the designation and inventory systems when commenting on, or exercising any decision-making authority respecting land use.

There should also be a mechanism whereby citizens can require specific trees, forests or woodlots to be considered for classification, designation and protection. Such a request should be referred to the officer who, in consultation with MNR, will prepare a report for consideration by the Environmental Review Committee (ERC) who would determine whether special designation is warranted. The ERC would submit their recommendations to the municipal council.

6. Designation Process

The AMO committee recommended that the new Trees Act contain a provision that would empower municipalities to pass bylaws that would allow them to issue tree protection orders. It is our submission that tree designation should be based on ecological factors rather than on political expediency. Our recommendation sets out the ecological factors that make a tree particularly deserving of protection and then automatically attaches special status to them through a designation process.

The act should provide for a designation and protection process for trees, forests and woodlots of particular local, regional, or provincial significance. Trees of particular importance and deserving of special protection include: shade trees; windbreaks; fenceline trees; conservation land trees; trees on steep slopes; trees on or near water ways or water

bodies including headwaters, recharge areas and other significant hydrological areas; trees providing wildlife habitat; trees that are part of areas of natural beauty; trees that provide linkages or corridors between forests or woodlots or other significant natural areas; trees that provide significant recreational, visual, aesthetic or vista resources; and trees with historic or cultural, natural, biological or scientific significance.

All trees, forests and woodlots fitting any of these categories should be deemed to be designated. Subject to an appeal to the Environmental Review Committee, determination of designation should be in the discretion of the Officer. The Officer should make the determination based on the municipalities ecological inventory, public input, her or his own knowledge and MNR guidelines were such guidelines are available.

Once designated and classified any cutting of designated trees, forests or woodlots should require a permit and approval by council. Prior to approving any cutting in a designated area the officer and council must assure that the approved cut meets the prescribed standards and criteria established for such cuts.

7. The Permit Process

The AMO Committee recommended a permit system. Our comments provide some detail to what the permit process should involve and which planned cuts should require a permit.

There is general acceptance that a permit system is necessary for some planned tree cuts. A permit system would be preventative and proactive because it would control the destruction of trees rather than penalize an actor once the tree has been destroyed. A permit system also recognizes that the damage caused by indiscriminate cutting can never be remedied. Once the damage has occurred the environment can never be made "whole" again.

It should be the responsibility of the tree, forest or woodlot owner to determine whether the Trees Act requires a permit for their particular planned cut. If in doubt they should contact the Environmental Officer.

a. A permit will be necessary if the planned cut:

   i) affects designated trees, forests or woodlots;
   ii) affects any urban tree, forest or woodlot;
   iii) results in a loss of more than 10% of the total wood volume or 10% of the tree stand or 20% of any species of tree over the actual areas of the cut;
   iv) is for commercial purposes or is cut by a person who cuts trees for hire.

b. An application for a permit should be submitted in a prescribed form to the appropriate municipality. To encourage compliance with this new law the municipality should be prohibited from charging any form of fee related to the application, inspection or issue of the permit. A prohibition on charging permit fees will also prevent landowners from viewing the new Trees Act as "just another form of taxation".

The initial cost of implementing administering and enforcing the new Act should be borne by the MNR. Once the new Trees Act administration is in place MNR should enter cost sharing agreements with the municipalities. MNR funding for administration, investigation and prosecution should be tied to the municipalities adherence to the prescribed minimum standards.

c. Upon receipt of the application an officer with forestry or aboriculture training should review it to determine if the cut:

i. is necessary;
ii. is consistent with sustainable practice (10% rule);
iii. meets MNR guidelines for designated trees, forests or woodlots if the subject tree, forest or woodlot has been "designated".

d. The officer should make the decision and should have the discretion to:

i. permit the cut as detailed on the application;
ii. to issue the permit with conditions; or
iii. to deny the permit.

e. The permit should set out:

i. what forestry practices should be followed;
ii. the scope of the permitted cut;
iii. reforestation requirements; and
iv. method of removal

The permit should also set out particularly sensitive ecological areas that require special attention. Particular attention should be payed to minimizing the damage to the residual stand, to soil, to waterways, to wildlife habitat, and to biological diversity.

e. All permits should state the term for which the permit is valid.

f. After an initial permit has been issued all subsequent permits that affect the same site will be issued only if the cumulative effect is within sustainable limits as determined by the environmental officer.

8. Notice

In 1979 when the Trees Amendment Act amendments were being discussed at the legislative committee stage, Mr. Swart speaking on behalf of the NDP, supported expanding notification to "any person who requests notice" in addition to abutting owners and others the council considers proper. (Hansard p. 3054) CELA suggests the following notification regime:

a. Where the planned cut affects designated trees, forests or woodlots, the officer should require the person seeking the permit to cause notice to be:

   i. posted at the planned cut site;
   ii. sent to adjacent land owners,
   iii. sent to persons who have requested notification;
   iv. published in a local paper if the magnitude of the cut warrants it.

b. Where the planned cut involves urban trees, forest or woodlots, that are not designated, the officer should require:

   i. notice to adjacent landowners and other landowners who benefit from the shade of the subject trees.

The officer should allow 14 days from the date of notice, for comments before she makes her decision. The officer's decision can be officially appealed to the Environmental Review Committee, who should determine the issue at their next meeting. If the decision is appealed the proponent and anyone who commented will be notified of the appeal. The permit will not be valid until it is endorsed by the Environmental Review Committee.

9. Appeal Procedures

An applicant or specified adjacent landowners can appeal the decision of the Environmental Officer. In the case of cuts of designated trees, forests, or woodlots, and, cuts that result in a loss of more than 10% of the total wood volume or 10% of the tree

stand or 20% of any species of tree over the actual area of the cut, any person can appeal the decision of the Environmental Officer.

The appeal body should be the Environmental Review Committee who should provide written reasons for their decision.

10. Liability

This act should apply to tree owners, land occupiers and commercial operators. A commercial operator is a person who cuts trees for hire or operates a commercial logging business. In all cases, a commercial operator must have a permit or satisfy herself that the land owner or occupier has the necessary permit.

11. Definitions

Uniform and standardized definitions must be developed to ensure consistency, certainty and predictability with the application of the new Trees Act. In the past broad interpretations given to terms like "persons own use" and "good forestry practice" have rendered the Act illusionary and ineffective. The spirit of the Act is the preservation of a dwindling tree and forest resource by controlling unsustainable or indiscriminate cutting. Definitions should be consistent with the spirit of the Act.

CELA suggests that definitions and exceptions should be clearly stated by incorporating the following changes to the existing Trees Act, or to the AMO committee's recommended definitions and exemptions.

a. "Trees on Boundary Lines"

"Trees on boundary lines" appears in s.2 of the existing Trees Act. This term should be expanded to include trees that grow so that the main trunk or main branches extend over the boundary line. The new Act should eliminate the requirement that "boundary trees" be established with mutual consent of adjacent landowner. If the trunk or main branches traverse the boundary line, it should be "Tree on Boundary Line".

b. "Woodlot"

There is difficulty in determining when a woodlot or forest is simply a lot with trees on it, and therefore not protected by the Trees Act. The AMO committee recommended

retaining the existing Trees Act definition of "woodlot". The existing definition is based on tree density and diameter.

This definition is problematic because in some situations lower density and less mature forests may be significant and be deserving of protection. The existing definition does not account for the effect geographical differences might have on tree density or diameter. Also, many land owners would not be able or willing to make density or diameter determinations and therefore would be uncertain if the Act applies to their situation.

To overcome these difficulties CELA recommends that the MNR, after soliciting and incorporating public input, establish density and diameter standards specific to individual geographical areas. Special provisions should be adopted for new growth forests where the diameter and density standards should be more stringent. These standards would become the trigger levels for the application of the "10% rule". There should be no minimum size requirements before "woodlot" or "forest" status attaches.

Little remains of the original forest resource on privately held land and what does remain is often in small fragments. Our past and present unsustainable forest practices have placed us in a situation where all privately held woodlots and forests must be treated as worthy of protection, regardless of size. Many significant woodlots are less than 1 ha. Making the "10% rule" applicable to all remaining forests and woodlots, regardless of size, would prevent landowners from severing off small portions of a larger contiguous woodlot and thereby avoid the act. There are also situations where a contiguous woodlot is owned by more than 1 person. It would be unfortunate if a contiguous forest was destroyed because one owner with less than 1 ha clear cut his portion.

Landowners who are uncertain if their particular treed land meets "Woodlot" status should seek a determination from the Environmental Officer.

If a treed area does not meet the density and diameter requirements, but still requires protection, it could be protected through the designation process.

c. "Person's own use"

Section 5(a) of the existing Trees Act provides an exception for a "person's own use". The definition for this term must be limited and concise. A permit should still required if the planned cut does not meet the criteria set out in this act. (The 10% rule should accommodate most personal use situations.)

"Person's own use" should be limited to domestic consumption of firewood for the owners personal residence. Trees cut for personal building or construction projects should be made subject to the normal "10% rule".

d. "Good forestry practice"

The AMO committee recommendations included the following definition for "good forestry practice":

> "Good forestry practice" shall mean the proper implementation of harvest, renewal and maintenance activities known to be appropriate for the forest and environment conditions under which it is being applied and which minimize detriments to forest values, including: significant ecosystems, important fish and wildlife habitat, soil and water quality and quantity, forest productivity and health; and the aesthetics and recreational opportunities of the landscape.

We are very concerned that the recommended definition places too much emphasis on the timber and other economic values of a forest. In many cases "good forestry management" might mean no "harvest, renewal or maintenance activities" CELA is also concerned about the phrase "known to be appropriate" because in the past "appropriate" has meant appropriate for timber uses. In fact some people might suggest that our past and present care of the forests has been "appropriate". We are also concerned that the definition will be transformed into an exemption.

We recommend a concept of "sustainable forest practice". The objective would be to maintain and enhance the forest and associated animal and plant habitats. In quantifiable terms, the objective should be to halt and reverse the net loss of privately owned forest land and its associated biotic community. Sustainable forestry practice includes minimizing the damage to the residual stand, to soil, to waterways, to wildlife habitat, and to biological diversity. Sustainable forest practice is "conduct that tends to preserve the integrity, stability and beauty of the biotic community".

12. Exceptions Suggested in the AMO Committee Recommendations

The AMO committee recommended "That the exemptions in the Trees Act be deleted and that municipalities be empowered to provide appropriate exemptions in their bylaws". As a matter of note the AMO committee recommendation uses the word "exemption" while the margin notes in the Trees Act use the word "exception". CELA supports the elimination of exceptions but is strongly opposed to empowering municipalities to create their own exceptions.

Such a scheme would result in a confusing array of inconsistent bylaws across the organized part of the province. It also creates the potential for municipalities to create the very types of exception that rendered the existing Act ineffective. The AMO

Committee recommendation does not eliminate the problematic exceptions - it merely transfers the exception granting powers from the legislature to the municipalities.

Illustrative of our concern is the exemption provision suggested by the AMO committee: "trees interfering with approved building or development". This appears to say that if, for example, draft plan approval is granted by a municipality, then the trees that might be on the site could be destroyed without the requirement for a permit. This is precisely the situation we are trying to prevent.

Another exemption suggested by the AMO Committee is: "trees not essential/important to meeting the intent of the bylaws". This broad exemption is dangerously unclear and could potentially cover a large number of trees, forests and woodlots.

Granting municipalities the power to create broad exceptions will result in a patchwork of widely varying and inconsistently enforced tree bylaws. The result will be a Trees Act that is even less effective than our present Act. Municipalities with the greatest development pressure will have the greatest need for strong and enforced bylaws, but will face the greatest pressure to pass weak or no tree bylaws, or to enforce them in a lax manner.

13. Exceptions in the Existing Trees Act

The AMO committee recommends replacing the existing statutory exemptions with similar municipal made exceptions. Therefore the exemptions that are enumerated in the existing Trees Act warrant comment.

a. Section 5(e) - "woodlot that is two acres or less"

The current Trees Act makes a distinction between a "woodlot that is two acres or less" and those greater than two acres. The AMO recommendations use a similar distinction but with the added provision that "local" municipalities should have the authority to pass bylaws affecting woodlots that are less than two acres in size. No distinction should be made based on forest or woodlot size. Many significant woodlots, (particularly in southern Ontario) are less than two acres. A distinction between woodlots more than 2 acres and those less than 2 acres is arbitrary.

b. Section 5(f) - "trees destroyed in order to erect any building"

This is a common problem, particularly in urban and other small lot areas. Some people manage to destroy few or no trees during construction - others destroy a large swath - sometimes extending onto adjacent lands. Perhaps the remedy is through the building

permit system or, through subdivision agreements. During the 1979 committee discussions the NDP supported the elimination (Hansard p. 2831) of this exemption. CELA supports the requirement of a permit prior to any cut made necessary by urban construction. This would not prevent construction; only assure that it is done with the least damage possible.

c. Section 5(h) - "trees cut by person licensed under the Surveyor Act".

CELA recommends that surveyors should require a permit. The permit requirement would put people on notice and assure sensitive areas are not needlessly harmed. At the least, surveyors should be required to obtain a general permit that clearly sets out the parameters of their planned cutting activities.

d. Section 5(i) - "pit or quarry"

The Aggregate Resources Act (ARA) does provide for some notice, permit approval, and appeal opportunities. Unfortunately the Aggregate Resources Act provides little protection for significant trees or forests (an accounting for trees on and near the site is only required through a proponents report that must be submitted to the MNR but only in the case of pits that extract more than 20000 tonnes of material per year). The Aggregate Resources Act applies only in designated areas of Southern Ontario. The reformed Trees Act should apply to existing and planned quarry sites throughout Ontario. At the very least, it should apply in all areas not covered by the ARA.

e. Section 5(k) - "trees that are cut in accordance with good forestry practice".

This should be a requirement of the permit not an exception to it. In 1979, during the legislative committee stage of the Trees Act amendments the Liberals and NDP supported eliminating this exception entirely (Hansard p. 2830) - saying "proper forest management requires taking into account individual differences between forests and between trees within a forest and marking trees on an individual basis."

The AMO committee recommendations included a definition for "good forestry practice". We have made our comments on that topic in the "definition" section above.

14. Penalties

CELA supports raising the maximum fine to .5 million dollars. In cases where economic advantage is obtained from violating the Act there should be an additional fine equivalent to the potential benefits obtained. There should also be a provision similar to that found

in the Provincial Parks Act, that allows for the confiscation of equipment and resources that are used or obtained during the violation.

To encourage enforcement and to offset the cost of administering the Act and bylaws CELA suggests that the fine proceeds should go to the municipality.

We suggest that the MNR should conduct the prosecution and litigation that arises as a result of the enforcement of the act; particularly precedent cases. The MNR should use investigators and lawyers who are experienced in investigating, preparing and conducting complex environmental cases. Without such a program, these amendments are unlikely to prove any more enforceable than the 1979 amendments.

15. Minister Regulations

In 1978 the NDP stated that the Minister should not have the arbitrary power to make regulations which could change the Act in any way she wished (Hansard p. 3055). CELA believes that the Act should empower the Minister to make regulations that strengthen or clarify the Act. The Minister should not be permitted to make any regulations that create exemptions or that otherwise narrow the application of the Act.

Alternately, the new Act should provide for mandatory public notice and comment periods before the regulations are finalized. To do otherwise would be inconsistent with the governments commitment to an Environmental Bill of Rights.