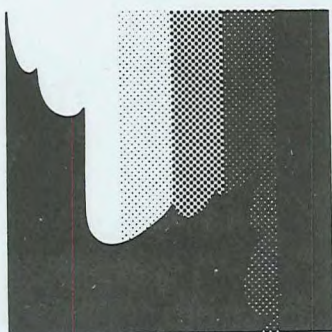




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EDITORIAL: THE NATIONAL PARKS ACT - QUIS CUSTODIET CUSTODIES?

The history of government waffling over duck hunting in Point Pelee National Park, outlined at page 98 of this issue, is a significant illustration of how our political system works.

The hunting is clearly a violation of the federal government's own official parks policy, and it is arguable that the hunting is unlawful as well, and has been since the park was established in 1918. Bearing this in mind, one would think that the requests of conservationists over many years would have resulted in a ban on hunting by now.

To think this, however, would be naive. The government, the environmentalists, the hunters and the press periodically play out a meaningless ritual that will be all too recognizable to citizens' groups throughout the country.

Every few years a new group of people takes up the fight against hunting. The press picks up the issue. The civil service and the politicians promise to end the hunting "soon". But "soon" never comes. As the duck hunters respond with pressure, the government tries to get out from under by some compromise which proves unworkable. Eventually the pressure dies down, the promises are forgotten, and the hunting continues until a new group or individual becomes angry at the blatant breach of policy and begins the cycle anew. The refusal of governments to make decisions, or their changing of "firm" decisions to appease whatever group is applying pressure at the moment, means that each time a group of citizens believes they have stopped a damaging project or activity, they can be sure it will spring to life again soon.

The costs in duplicated effort, spent resources, and wasted manhours for both government and environmental groups in playing out this ritual are high indeed. But government can better afford them than citizens.

In the case of Point Pelee, once again an active opposition to the duck hunting has sprung up. The civil service wants to end the duck hunting. Judd Buchanan, the Cabinet Minister in charge of National Parks, has stated that he supports a ban on hunting in Pelee Park, on February 17th he promised a decision within "a few weeks" (which have since turned into months).

If the National Parks Act does not permit duck hunting, then it should not be read or interpreted by government officials or duck hunting enthusiasts as though it did.

If certain regulations or administrative arrangements have, over the years, permitted duck hunting in Point Pelee National Park despite the apparent lack of legislative authority, such continued abuse should not be sanctioned merely because it has the force of habit on its side.

If government or duck hunting enthusiasts want such activity to continue in Point Pelee, they should have the courage of their convictions. They should lobby for the introduction of amendments to the National Parks Act that would permit hunting.

To continue the half-century-long subterfuge of permitting, by regulation or other administrative device, what is not allowed by the relevant statute law, is unacceptable.

If you agree that hunting for recreation in National Parks is inappropriate, join the members of the Canadian Nature Federation, the Federation of Ontario Naturalists, the National and Provincial Parks Association, and the Toronto Field Naturalists Club by writing to your MP to request an immediate ban on hunting in Point Pelee. Please send a copy of your letter to CELA. We will forward it to Mr. Buchanan and to Mr. Trudeau.

SUPREME COURT GIVES CITIZEN STANDING TO SUE TO DETERMINE CONSTITUTIONALITY OF STATUTE

THE NOVA SCOTIA BOARD OF CENSORS (ALSO KNOWN AS THE AMUSEMENTS REG-
ULATION BOARD OF NOVA SCOTIA) AND THE ATTORNEY GENERAL IN AND FOR
THE PROVINCE OF NOVA SCOTIA V. GERARD MCNEIL

[Supreme Court of Canada]

Laskin, C. J.

May 20, 1975

*(This is the complete, verbatim, unanimous decision of the Court, de-
livered by Mr. Justice Bora Laskin.)*

This appeal from the unanimous judgment of the Appeal Division of the Supreme Court of Nova Scotia, affirming the judgment of Hart J., was brought here by leave of the Appeal Division, purporting to act under s.38 of the Supreme Court Act, R.S.C. 1970, c.S-19. On the opening of the appeal, this Court raised, ex proprio motu, the question whether, in view of s.44 of the Supreme Court Act, it was open to the Appeal Division to grant leave if, as appeared to be the case, a discretionary order was involved. Upon an application thereupon made by the appellant for the leave of this Court, pursuant to s.41 of the Act, as amended by 1974-75 (Can.), c.18, s.5, leave was given with costs to the respondent in any event.

The litigation out of which this appeal arose originated in an application by the respondent, then a resident and taxpayer in the Province of Nova Scotia, for a declaration that the Theatres and Amusements Act, R.S.N.S. 1967, c.304 and some of the regulations thereunder were ultra vires the provincial Legislature. The merits were not reached because of certain preliminary objections which were raised for prior determination. Of these the most important one, and the only one meriting consideration by this Court, was the question of the respondent's locus standi, his standing or status to impeach the constitutional validity of the provincial statute.

In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing. I note that in Smith v. Attorney General of Ontario, [1924] S.C.R. 331, Duff J. thought that the issue of standing was an arguable one and since the merits had been canvassed "we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure, and accordingly we think it right to say that in our opinion the appellant's action also fails in substance" (at p.338).

Although the merits have not been canvassed in this case, it has not been disputed by any of the counsel who supported the position of the appellant, being appellant's counsel and counsel for the Attor-

ney General of Ontario, of Alberta and of Saskatchewan, that a serious, a substantial constitutional issue had been raised by the respondent's declaratory proceeding. The question of standing here begins with this feature of the proceeding, just as it did in Thorson v. Attorney General of Canada, [1975] S.C.R. 138.

It is part of the record before this Court that the respondent, then editor of a weekly newspaper published in the City of Dartmouth in Nova Scotia, had become concerned about the wide powers exercisable by the Nova Scotia Board of Censors, whose name was changed by 1972 (N.S.), c.54 to the Amusements Regulation Board of Nova Scotia. In particular he made inquiries whether the film "Last Tango in Paris" would be permitted by the Board to be shown in Nova Scotia. Early in 1974, the Board made public its decision to prohibit the exhibition of the film, no reasons being given. The respondent invoked the statutory provision for appeal to the Lieutenant-Governor in Council, as provided by s.3(4) of the Theatres and Amusements Act, but was not recognized as having any right to appeal. He also requested the Attorney General to refer the constitutionality of the provincial Act to the Appeal Division, but was unable to elicit any affirmative or negative response to his request. Indeed, in correspondence with the respondent's counsel, counsel for the Attorney General took the position that the Act was intra vires and there appeared to be no right in the respondent to attack its validity. Thereafter, the respondent brought his application for a declaration.

In my opinion, the respondent took all the steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration. It was suggested, albeit faintly, that he ought to have also sought the intervention of the Attorney General of Canada by way of having him direct a reference to this Court. This is not a suggestion which can stand in the way of a determination of the issue which is before this Court.

The submissions on the issue of standing made by counsel for the parties and for the intervenors, who included the Attorney General of Canada and the Canadian Civil Liberties Association (both supporting the respondent) as well as the provincial Attorneys General previously referred to, were very largely concerned with the scope of the Thorson decision and, on the part of the appellant and its supporting intervenors, with an emphasis on the distinction, allegedly the basis of the Thorson case, between a so-called regulatory statute and a declaratory one. The distinction, broadly taken, was sufficient to enable this Court to explain why in the Thorson case it was a proper exercise of discretion to accord standing to the appellant as a mere taxpayer seeking to challenge the validity of a federal statute. It was not a distinction that could be controlling, especially in the light of the reserve of discretion in the Court, and more especially because the word or the term "regulatory" is not a term of art, not one susceptible of an invariable meaning which would in all cases serve to distinguish those in which standing to a taxpayer or citizen would be granted and those in which it would not.

I think it important to distinguish what I would term the administrative law features of so-called regulatory legislation and the constitutionality of such legislation. Its pith and substance, in the latter aspect, may very well disclose a purpose which would be served by its administrative features but would not be limited by them. Thus, the fact that certain persons or classes of persons, or certain activities in which persons engage may be subjected to compulsory regulation on pain of a penalty or other sanction does not always mean that the pith and substance of the legislation is to be determined only in that context, so as to make those regulated the only persons with a real stake in the validity of the legislation.

The Theatres and Amusements Act, whose constitutional validity is challenged by the respondent, is a good illustration of this point. The Act provides for the appointment of a Board empowered by s.3(2) (a)(b) to permit or prohibit the use of exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film or any performance (defined to include, inter alia, theatrical, musical or moving picture performance for public entertainment) in any theatre. Provision is made for the promulgation of licensing regulations in respect of theatres and film exchanges and in respect of theatre performances as well as in respect of cinematograph operators and apprentices. Regulations are envisaged in respect of the exhibition, sale, lease and exchange of films. No film exchange may sell, lease, rent, exchange or exhibit any film without first obtaining a licence from the Board. Moreover, the Board may require any film exchange to submit statements showing the names or other description of films proposed to be distributed. It is given unfettered discretion to suspend or revoke any licence. The statutory provisions are reinforced by regulations, especially in respect of licence requirements, and they make clear the complete power of the Board over the showing of films, even to the point of being empowered to confiscate films exhibited without a previous certificate. The statute prescribes a monetary penalty for breach of the Act or regulations, but, of course, the real sanction lies in the effective control of the Board over the exhibition of films and over theatres in the province.

There is no doubt that film exchanges, theatre owners and cinematograph operators and apprentices are directly regulated by the Act and regulations. This matter was examined by Hart J. who agreed that the film exchanges and theatre owners would be entitled to take proceedings in respect of the legislation that so directly affects them but he was also of opinion that (in his words) "the film exchanges and the theatre owners would not have an interest similar to that of the members of the public and there could be a large number of persons with a valid desire to challenge the prohibitory aspects of the legislation who have no vehicle through which to effect their purpose unless granted standing before the Court."

In the Appeal Division, Macdonald J.A. speaking for the court aptly stated that "the factual situation has some relevancy to the determination of this question [of standing]". I would add to his extensive reference to the facts which led to the challenge to the legis-

lation the situation which the statute itself appears to present, namely, one where joined to a regulatory scheme applicable to a manageable group of entrepreneurs in the theatre and film distribution business there is as well, and as a central piece, an apparently unlimited power in the Board to determine what members of the public may view in theatres or other places of public entertainment.

Since the issue of validity does not fall for determination here and, indeed, has not even been argued in relation to the question of standing, I would not, in this case, go beyond the tentative conclusion that there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing. I would dismiss the appeal with costs against the appellant. There will be no costs to or against any of the intervenors.

**

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COMMENT

The Court here adds another authority to defeat the proposition that standing in cases such as the above should depend on whether the statute being challenged is regulatory or declaratory. The Court states, as it did in Thorson, that its discretion to grant standing is exercised because there is a constitutional question to be adjudicated. Smith v. Attorney General of Ontario (1924) S.C.R. 331 is distinguished on the facts: Smith there sought a declaration that Part IV of the Canada Temperance Orders were not in force in Ontario, but in his action he did not question the constitutionality of the statute pursuant to which the Orders were made.

The significance of the McNeil decision lies in the Chief Justice's statements that the merits of the issue ought not to be severed from the question of standing, that one might well be so affected by the other that they ought to be brought before the Court together. In many environmental cases, the question of standing having been decided against the plaintiff at the outset, the merits are never reached and real issues are not brought to the attention of the Courts. If McNeil can serve as a precedent for hearing the merits and the question of standing together, it will be a significant step forward.

H.M.

HOSTILE PUBLIC OPINION CITED AS "THE REAL DETERRENT" IN SENTENCING POLLUTING MINE

R. V. GIANT YELLOWKNIFE MINES LTD.*

[Northwest Territories Magistrate's Court]

Prosecution under Section 33(2) Fisheries Act

Plea: Guilty

F.G. Smith, Q.C., Chief Magistrate

February 24, 1975

(The following are Magistrate Smith's complete verbatim remarks on imposing sentence in this case.)

In considering the sentence that ought to be imposed on Giant Yellowknife Mines, the Defendant, I have only one of the sentencing principles to consider and that is the principle of deterrence. The Defendant is, in my opinion, a concerned and responsible corporate citizen. It was aware before the spill that measures to control the mill tailings and effluent was [sic] indicated and was carrying through with a control program when events caught up and passed them, by the serious spillage of deleterious substances into Yellowknife Bay.

Since then a more ambitious program involving the expenditure of close to a million dollars was instituted. At present no spillage is occurring and if I understand the evidence, will not occur again.

Parliament has indicated its concern by fixing the maximum penalty for an offence of this nature at \$5000.00 per day. This charge is for one day and the Crown has asked for the maximum penalty to be imposed as a deterrent.

Comparing the maximum penalty with the cost of the control program now being instituted, I'm driven to the conclusion that the Defendant is not particularly concerned with the size of the penalty that I am empowered to impose but much more with its corporate image which, if it is seriously damaged, renders it difficult to operate in a climate of hostile public opinion. The Corporation in the past has demonstrated its concern by spending large sums of money on environmental control, particularly dust control. This is the real deterrent. It knows that it simply cannot carry on by shaving nickels from this aspect of its operations.

In this regard I have listened to the Crown cite the various penalties imposed on other corporations for similar offences. These corporations were equally concerned to comply with environmental control regulations under which they operated. I can do no better than by imposing a penalty similar in size. I therefore fine Giant Yellowknife Mine the sum of \$2000.00.

* See "Giant Mine fined," 4 CELN 34, for the background of this decision.

O.M.B. RESTRICTS COTTAGE DEVELOPMENT TO PROTECT FISH AND WATERFOWL

IN THE MATTER OF SECTION 42 OF THE PLANNING ACT (R.S.O. 1970, c. 349) AS AMENDED, AND IN THE MATTER OF AN APPEAL BY THE MINISTRY OF NATURAL RESOURCES FROM A DECISION OF THE UNITED COUNTIES OF LEEDS AND GRENVILLE LAND DIVISION COMMITTEE (O.M.B. FILE NO. A 741457)

[Ontario Municipal Board]

M.C. Corbett

May 20, 1975

This is an appeal by the Ministry of Natural Resources from a decision of the United Counties of Leeds and Grenville Land Division Committee dated the 26th day of September, 1974 granting an application by Eccless Dawson for a consent to an agreement for purchase and sale of 1/2 acre of lands being part of lot 29, Concession 10 in the Township of Bastard and Burgess.

Mr. Dawson is the owner of about 60.5 acres of farmland and proposes to convey the water front parcel of land which has a frontage of 350 feet on Lower Beverley Lake with a proposed access by means of a right of way. The proposed parcel is situated at a point which juts into the lake in between two shallow weedy bays.

Lower Beverley Lake (1,894 surface acres) is a good fishing lake for bass and pike and is heavily utilized for fishing at the rate of 20 fishing hours per surface acre. The Ministry has a fisheries management program and an ongoing restocking program of about 5,000 bass per year. In 1971, the lake contained 207 cottages, two resorts and a marina. Heavy aquatic vegetation and algal blooms occur annually. The shallow weedy bays were described as an excellent habitat for fish and waterfowl, providing a place for minnows to stay, and being spawning areas.

The chief concern of the Ministry was the eutrophication of the lake or the change which occurs when nutrients are added to the water. Natural eutrophication occurs at a slow rate but is speeded tremendously when it is "cultural" or man-made. Such nutrients decrease the supply of oxygen available to fish and retard the hatching of eggs. Such nutrients, particularly phosphorous, enter the lake as a result of septic tank usage. When soil particles reach maximum capacity for holding phosphorous the liquid waste flows out of the tile bed and is not absorbed. The regional biologist of the Ministry testified that, at this site, the septic system would not prevent the flow of nutrients onto the surrounding low land, and into the lake. The District Health Unit recommended that while the site was not satisfactory it could be made so by the addition of 5 feet of granular fill. The regional biologist testified that while this may be satisfactory for public health purposes, it is not satisfactory to control the escape of nutrients to protect the wild life and the lake.

This problem arises at this site because there is only one high-level piece of land on the proposed parcel, which slopes at a 45-degree angle

towards the lake and on the sides and at a 60 degree angle to the rear. In addition, there is exposed bedrock for 50 feet at the lake front, so that tile would have to be placed towards the rear of the high-level land. At the rear is an area containing clay soil which will not absorb the liquid waste of a septic system.

The regional biologist referred to and adopted the views of a 1971 report of the former Ontario Water Resources Commission that the nature of soils and topography of this lake can be considered as unsuitable for cottage development utilizing standard subsurface septic tank systems, and that the high algal densities severely reduce water quality for water-oriented recreational activities and diminish the aesthetic quality of the lake.

Evidence was given that a holding tank, where concrete wastes are stored, pumped out regularly and disposed of elsewhere, would eliminate the escape of nutrients into the lake. No evidence was available as to the existence of a dumping site in the area. Counsel for the Ministry agreed that this Ministry would not object to conditions being attached to provide for a self-contained holding tank system and approval by the Ministry of Natural Resources and the Ministry of the Environment.

While such conditions would satisfy the concern for the escape of nutrients, evidence was adduced by a senior planner with the Ministry whose duties relate to land use planning. He introduced into evidence as Exhibit 6 a report on the Recreational Lakes of the North Leeds Planning Area (in which are located the subject lands and lake) concerning development potential. This report states that continued shoreline cottage development will have a negative impact, and that backshore cluster development with communal water access is preferable to the traditional shoreline ribbon development. Backshore clusters were described as reducing the impact of cottaging on the abutting waterbody. Lot sizes for shoreline cottages were recommended to consist of one acre, although backshore clusters could be smaller. On Lower Beverley Lake backshore clusters were recommended to be encouraged to utilize good access points, and development should be set back a minimum of 100 feet. The senior planner testified if development at this location was possible at all that it should be by way of back cluster.

The owner of the property was represented by his daughter, who advised the Board at the commencement of the hearing that she did not wish to engage counsel and, during the proceedings, declined the invitation of the Board to call or to give evidence. The Board considered not only the conservation of natural resources but also the other matters referred to in section 33(4) of the Planning Act.

The Board finds that the proposed lot is unsuitable for a cottage lot as proposed in the original application for consent. While the suggested conditions as to nutrient control may have been satisfactory, no evidence was called by or upon behalf of the owner as to the feasibility of any such conditions or details as to the proposed use and servicing.

The Board, in addition, finds that the subject lands may be more appropriately developed by means of backshore development and that shoreline ribbon development of this kind ought to be discouraged.

Accordingly, the appeal is allowed, the decision of the Land Division Committee is set aside and the application for consent is **not** granted.

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COMMENT

As in the Coves case (3 CELN 189), the Ontario Municipal Board has recognized here that government standards may not always be stringent enough to satisfy the demands of environmental protection and sound land use planning. In the Coves case, the OMB recognized that even though a factory expansion may comply with provincial standards limiting odours, thus satisfying the Ministry of the Environment, those standards might be inadequate to protect the amenities of adjoining residents from noxious odours.

Here, the Board indicates its unwillingness to accept a level of nutrient emissions into a lake in cottage country which would have protected human health and satisfied local authorities. The Board's decision indicates that sound land use planning on an already polluted lake may require a higher standard of control to protect the wildlife and aesthetics of the lake.

The case also indicates a government policy and concern for reduction of the impact of cottages on the lake in question, on which the Ministry of Natural Resources carries out a fish management program. Both the Ministry of Natural Resources and the OMB recognized that many of Ontario's northern lakes may be unsuitable for further cottage development using standard septic tanks, or for shoreline development. The recognition comes after many lakes are well on their way to advanced eutrophication, because these features have characterized lake development since the post-war boom in cottage building.

The policies applied to Lower Beverley Lake by the Ministry and the OMB represent more than a piecemeal, ad hoc decision. The Eastern Region staff of the Ministry checks all applications for severances. If a lake is overpopulated, the Ministry will send lawyers, planners, biologists and other experts to oppose further overdevelopment. The Ministry's regional staff and the OMB are to be congratulated on formulating and upholding such sensible planning.

We are still concerned, however, since our correspondence with the Ontario Government in 1974 showed that there is no overall official government policy on shoreline development throughout the province. Unless such a policy has recently been adopted that we are unaware of, there is no certainty that on another lake in another Region, with better prepared and better represented applicants, with a dif-

ferent member of the OMB presiding, and with quiet complicity by the other Regional staffs of the Ministry, for political or economic reasons, any of the considerations in this decision would be raised or would be decisive.

The purpose of the OMB is to ensure good land use planning. When there is no government policy with regard to land use planning, the sound planning suggested here by the Ministry and accepted by the OMB can easily be sacrificed to expediency.

J.S.

O.M.B. MUST HEAR ENVIRONMENTAL CONCERNS, COURT RULES

RE TOWNSHIP OF WESTMINSTER AND CITY OF LONDON

[(High Court of Justice) Divisional Court]

Wells, C.J.H.C., Houlden and Van Camp, JJ.

September 24, 1974

(Following are excerpts from the oral decision of Houlden, J., reported in full at (1975) 5 Ontario Reports (2d) 401.)

This is an application for judicial review of certain orders made by the Ontario Municipal Board (hereinafter referred to as the "OMB"). The application arises as a result of proceedings taken by the respondent, the Corporation of the City of London, to establish a sanitary land-fill site on lands located in the municipality of the applicant, the Corporation of the Township of Westminster. The applicant has been using every means at its disposal to try to prevent the location of this facility in its boundaries.

On April 13, 1973, the respondent applied to the Waste Management Branch of the Ministry of the Environment for a certificate to operate a waste disposal site on lands in the Township of Westminster. From July 30 to August 3, 1973, a hearing was conducted by the Environmental Hearing Board. At the hearing, concern was expressed by a number of residents in the area of the proposed site with regard to the extent of vehicular traffic that would be coming to the site following the commencement of land-fill operations.

In October, 1973, the Environmental Hearing Board made its report to the executive director, Air and Land Pollution Control Division of the Ministry of the Environment. In its report, the Board recommended the approval of the site for land-fill operations subject to certain conditions, one of which was:

Drop-off points or collection points be established within the City to reduce the number of private vehicles travelling to the site.

By letter of November 12, 1973, the executive director advised the respondent that a provisional certificate of approval had been

granted for the proposed land-fill operation subject to certain conditions set out in the letter. Condition No. 1 was as follows:

- (1) One or more transfer stations shall be located within the City to reduce the number of private vehicles travelling to the site. Since transfer stations are subject to the approval of this Ministry, an application must be filed prior to the establishment of such a collection point.

On November 13, 1973, a provisional certificate of approval was issued for the site. By a decision of this Court, to which reference will be made in due course, it was held that the letter of November 12, 1973, was part of and must be read together with, the provisional certificate. There was no appeal from that decision.

On February 11, 1974, the hearing for approval commenced before the OMB. At the opening of the hearing, counsel for the applicant applied for an order staying the respondent's application (a) until the respondent had fully complied with the Environmental Protection Act, 1971, and (b) until such time as the respondent had taken the proper corporate steps for the acquisition or expropriation of the site by the enactment of a by-law. The applicant also applied for an order deleting from the respondent's application the respondent's request for approval of proposed contracts between the respondent and certain neighbouring municipalities and three Indian Bands for the common use of the site.

Counsel for the applicant submitted to the OMB that it had no jurisdiction to hear the respondent's application as no valid by-law had been passed by the respondent providing for the acquisition and expropriation of the site.

At the outset of the hearing, the OMB stated that its function in applications, such as the one before it, was not to determine the environmental suitability of a particular waste disposal site when such a determination had already been made by the Ministry of the Environment. The OMB further stated that it was the Board's policy not to entertain such an application unless the applicant had first obtained a certificate or a provisional certificate of approval from the Ministry of the Environment with respect to the site under consideration.

During the course of the hearing, and after evidence on the merits had commenced, the OMB on its own motion announced that in light of its stated policy on environmental suitability, it was not prepared to continue with the hearing until condition 1, *supra*, in the letter of the executive director of November 12, 1973, had been complied with. Condition 1 referred to the necessity for the approval of the Ministry of the Environment to the establishment of transfer stations. No steps had been taken by the respondent up to that time to comply with condition 1. The hearing before the OMB was adjourned to give the respondent an opportunity to obtain the necessary approval.

The respondent immediately applied to the Ministry of the Environ-

ment for the requisite approval. It informed the executive director that it was the intention of the respondent to pass a resolution establishing its existing south-east waste disposal site as a collection point to which privately owned vehicles having a gross weight of 7,000 lbs. or less could come from points within the City of London to deposit waste for transmittal to site W12-A.

By letter of February 15, 1974, the acting director of the Waste Management Branch of the Ministry of the Environment replied to the respondent's application as follows:

... As I understand it, the City Council may wish to establish a collection point at the existing southeast waste disposal site, at which individuals can deposit waste into bulk containers. The waste from these containers would then be transferred, either to the operating areas of the southeast waste disposal site or to any other approved disposal site.

This arrangement would be satisfactory and will not require the issue of a separate Certificate of Approval or an amendment to the existing Provisional Certificate No. 040105, applicable to the southeast site.

On February 15, 1974, the City Council of the City of London passed the necessary resolution authorizing the establishment of a collection point at the existing south-east waste disposal site.

On February 18, 1974, the hearing before the OMB was reconvened. At this time, the Board considered the letter from the acting director of the Waste Management Branch of the Ministry of the Environment of February 15, 1974, the resolution of the City Council of the same date establishing the collection site, and heard certain *viva voce* evidence. The Board also considered the provisions of an indenture dated November 20, 1973, executed by the respondent covenanted in the event of the approval of site W12-A to establish one or more collection points within the City of London as might be required by the Ministry of the Environment and further covenanted to prohibit the entry of light vehicles coming to the site from points outside the Township of Westminster. This indenture had been approved by a by-law of the City of London dated November 20, 1973. After considering this material and hearing argument, the OMB ruled on February 20, 1974, that condition 1 had been satisfied to the extent necessary to comply with the policy of the OMB in respect of environmental matters.

The applicant then indicated to the OMB that it intended to take proceedings before the Divisional Court to question its rulings. The OMB agreed to adjourn its proceedings so that this application could be brought.

[There follows a discussion of ss. 241, 336 and 354 of the Municipal Act and ss. 64 and 65 of the Ontario Municipal Board Act.]

On the basis of this legislation, there seems to be no doubt that

in order for the respondent to validly acquire the site in the Township of Westminster and to finance the project, it will have to both enact a by-law and also obtain the approval of the Ontario Municipal Board. But the important question is: does the respondent have to enact the by-law or by-laws before applying to the OMB, or is it in order for the respondent to obtain the approval of the OMB before enacting the necessary by-law or by-laws?

Counsel for the applicant contended that the respondent should have followed the procedure provided for in s. 64(4) of the Ontario Municipal Board Act, *i.e.* it should have passed a by-law which was not to take effect until the approval of the Ontario Municipal Board had been obtained.

As we read s. 64(4), at most, it would confer a discretion on the respondent to pass a by-law in connection with the financing of the project which was not to take effect until OMB approval was obtained. But the section is not mandatory in its terms. In view of s. 39 and s. 65 of the Ontario Municipal Board Act, in our opinion, it is permissible for the respondent to follow the procedure approved by the Supreme Court of Canada in the Bondi case and delay the passing of the necessary by-law both in connection with the acquisition of the site and also in connection with the financing of the project until OMB approval has been obtained.

In the course of the hearing, the OMB ruled that it would not listen to evidence pertaining to such matters as they had already been dealt with by the Ministry of the Environment. The OMB stated that it was only concerned with planning matters and did not wish to hear evidence on environmental matters. Counsel for the applicant submitted that as a result of the Board's ruling, the applicant would be denied a full hearing before the OMB.

Both counsel were agreed that it is most difficult to make a distinction between evidence which relates to environmental matters and evidence which relates to planning matters. We can understand the reasons for the reluctance of the OMB to listen to evidence bearing on environmental matters in view of the lengthy hearing before the Environmental Hearing Board. But we think the ruling of the OMB was wrong, and when the hearing is recommenced, we believe the OMB should listen to the evidence presented to it without attempting to distinguish between environmental matters and planning matters.

The next submission of counsel for the applicant dealt with the OMB's failure to find that the respondent as a matter of law has exceeded or proposes to exceed the extraterritorial powers granted to it by s. 354(1), paras. 76 and 77 of the Municipal Act. Counsel for the applicant did not labour this point before us. The submission was based on the stated intention of the respondent to make the site available for use by certain neighbouring municipalities and three Indian Bands. The OMB has ruled that if it does approve the respondent's application, one of the conditions of its approval will be that the site is to be restricted to the receipt of waste

from municipalities that were before the Environmental Hearing Board. In view of this ruling of the OMB, we think it would be premature for this Court at the present time to give a ruling on this question.

There is nothing in law that requires the OMB to be satisfied that all environmental requirements have been complied with before it proceeds with its hearing. The City of London has a provisional certificate of approval for the land-fill site. The transfer stations are to be located within the boundaries of the City of London; they are a very minor part of the overall project. We think it would be unreasonable for the OMB to refuse to continue with the hearing because the respondent must comply with some provision of the Environmental Protection Act, 1971 in respect of the transfer stations. Even if the OMB erred in finding that condition 1 had been complied with (and as we have pointed out, the OMB refused to make a finding on this point) this, in our opinion, in no way affects the validity of the hearing. If the City of London is required to obtain some further approval under the Environmental Protection Act, 1971 for the transfer stations - and we wish to make it quite clear that we are expressing no opinion on this point - that can be proceeded with as the hearing is continuing before the OMB.

We believe it would be premature for the Court at this time to rule as to whether or not condition 1 of the executive director's letter of November 12, 1973, has been complied with. That point does not arise for decision at this time and the Ministry of the Environment is not a party to these proceedings.

As was pointed out in the earlier judgment of this Court, there are many steps that the respondent must take in connection with the establishment of the proposed land-fill operation, and there is nothing sacred in the order in which those steps may be taken. The OMB is sitting to determine if it will approve the acquisition or expropriation of the site by the respondent and if it will approve the method of financing the project that is proposed by the respondent. In our opinion, the hearing can continue while the respondent is pursuing whatever other steps the respondent deems necessary to comply with the conditions laid down by the executive director in his letter of November 12, 1973.

For these reasons, we believe that the application must be dismissed. The hearing before the OMB should be permitted to continue subject to the comments that we have made in this judgment. With respect to costs, as there was merit in some of the points raised by the applicant, the respondent will be entitled to recover only one-half its costs of this application from the applicant. Counsel for the Attorney-General is not asking for costs and there will, therefore, be no order as to his costs.

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COMMENT

In August 1974, the Canadian Environmental Law News published an editorial which expressed alarm at the refusal of the new chairman of the OMB, William Palmer, to allow members to hear any environmental or engineering evidence. (3 CELN 94) :

"Any refusal to consider the environmental and engineering aspects of a development is premature," we wrote. "Ontario presently has no effective tribunal to decide many environmental and engineering questions before the Board deals with the planning aspects, although a panel of the Board recently demanded that all these questions be decided elsewhere before the OMB hearing.

"The Environmental Protection Act allows an applicant who wishes the OMB to allow him to zone or use his land as a garbage dump, land-fill site, or transfer station to ask the Ministry of the Environment for provisional certificates of approval. But it is questionable whether the OMB can force him to do this before the OMB hearing.... Mr. Palmer is on the right track in encouraging the formation of expert environmental boards to decide some environmental aspects of planning, particularly scientific and engineering questions of whether a process or piece of equipment will prevent pollution.

"But premature rejection of all environmental and engineering evidence is a poor way to do this. The engineering and environmental questions cannot be completely segregated from the other planning issues governing the location, necessity or advisability of a project. The world does not consist of a series of unrelated, closed boxes."

Needless to say, we are relieved that the Divisional Court has recognized that the OMB should take a broad and flexible approach to fulfill its mandate to give the public a full hearing of all relevant issues, and to make decisions which will take into account environmental protection as well as all the other planning issues.

J.S.

ONTARIO CONSERVATION AUTHORITIES CANNOT REGULATE DUMPING OF FILL BY RAILWAYS

R. V. CANADIAN NATIONAL RAILWAYS COMPANY

[Provincial Court for the Judicial District of Hamilton - Wentworth]

W. R. Morrison, Prov. Ct. J.

May 1, 1975

(The following are excerpts from the transcript of the judgement.)

"To summarize the facts briefly, the C.N.R. did dump or place fill

on their property in the City of Hamilton, said lands being partly covered by water and are within the limits designated by the head-line of Hamilton Harbour as established by the Hamilton Harbour Commissioners.

It is admitted that the C.N.R. has complied in every respect with the legislation of the Parliament of Canada involved and had approval of the appropriate authorities as set out by the legislation of the Parliament of Canada.

The C.N.R. did not, however, have a permit to dump or fill from the Hamilton Region Conservation Authority as required by the Conservation Authorities Act, R.S.O. 1970, Chapter 48 and amendments thereto.

The question to be decided is if the C.N.R. is subject to the regulations promulgated by the Hamilton Region Conservation Authority pursuant to the Conservation Authorities Act.

I have come to the conclusion that the cases commencing with the C.P.R. v. Notre Dame de Bonsecours, and the City of Montreal v. Grand Trunk Railway, and continuing up to R. v. C.S.L., are authorities for the proposition that Section 92, s.s. 10(a) and (c) of the British North America Act, gives the Government of Canada exclusive jurisdiction in regards to the construction, operation and maintenance of a railroad, and that the Conservation Authorities Act is ultra vires of the Province of Ontario insofar as it purports to apply to the C.N.R."

Judge Morrison therefore dismissed the charge against the railroad. He found that the dumping of the fill and the construction of the tract was "a matter falling under the term 'construction, operation and maintenance of a railroad.'"

He did not refer to the question of whether the dumping of the fill and the building of the spur line is a proper act in the construction, operation and maintenance of a railroad, because, he said, "I believe the permit to do so by the proper federal authorities takes the matter out of my jurisdiction."

Also, in discussing this charge, he did not make any ruling on the defence argument that the C.N.R. also had the right to dump because it was dumping into navigable water, which is also a matter under federal jurisdiction.

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COMMENT

Hamilton Harbour, into which the C.N.R. dumped fill without complying with the Conservation Authority's regulations, has been used as a receptacle for domestic sewage and industrial wastes for many years. Besides two major steel manufacturers who have used the harbour to dispose of tailings, many smaller industries pressure government bodies to allow further pollution of the harbour to promote economic growth.

The harbour is badly eutrophied, and a joint report of the Hamilton Region Conservation Authority, which has jurisdiction over dumping and filling in the harbour under the Conservation Authorities Act, and the Halton Region Conservation Authority stated that further reduction of the volume of water and amount of water surface in the bay would adversely affect the ability of the bay to produce sufficient oxygen to regenerate the bay before it is too late.

The Conservation Authority has been, in recent years, the main watchdog protecting the Bay from further deterioration. It has established an admirable record of holding the line against development pressures on the harbour.

The Conservation Authority felt that alternative sitings of the new rail line proposed by the C.N.R. had not been explored sufficiently, and that filling the water lots would contribute to the "nickel and diming away" of the bay's regenerative abilities.

When the C.N.R. refused to comply with the regulations on filling water lots under the Conservation Authorities Act, a provincial statute, the Authority had sufficient courage of its convictions to prosecute.

The C.N.R. had already been subjected to two hearings under federal legislation before permits required under the federal Railway Act and the federal Navigable Waters Protection Act were issued. But nothing in the federal legislation gave the public the right to make any representations at these hearings. The evidence given at these hearings was that the fill would not damage the Bay, but the Joint Report of the Conservation Authorities was not put into evidence.

The Conservation Authority, which would certainly have provided this evidence that the rail line fill would damage the bay, was not given notice of the hearings or invited to appear. Nor were any other local or provincial environmental protection agencies involved.

Most railway cases were determined in the days when railways were virtually the only means of national transportation. Under those conditions, the courts were quick to rule invalid any provincial statute that interfered with the trains getting through.

It is unfortunate that in the days of jets, cross-Canada highways, and a badly degraded environment, Judge Morrison felt bound by these cases. Rodger Inglis, counsel for the Conservation Authority, felt that the Bonsecours case referred to in the judgement could be interpreted to support the jurisdiction of the Conservation Authority. Unfortunately, with its limited financial resources the Conservation Authority was not able to appeal a decision which it would have only a marginal chance of overturning.

J.S.

GOVERNMENT SECRECY AND ITS ENVIRONMENTAL CONSEQUENCES:

AN ALBERTA CASE HISTORY *by Richard P. Pharis, Professor of
Biology, University of Calgary*

In 1973, Alberta's Environment Conservation Authority (ECA), a provincial government agency, held a series of public hearings on "Land Use and Resource Development in the Eastern Slopes of Alberta". (See 3 CELN 226, "Alberta Environment Conservation Authority points out dangers of coal mining on eastern slopes of Rocky Mountains")

During and subsequent to these hearings, the Alberta government called a "moratorium" on development of major recreation facilities, new coal mining operations, and large-scale dispositions to the timber industry along Alberta's Eastern Slopes of the Rocky Mountains. This moratorium will apparently remain in effect until the Cabinet and Legislative Assembly have had a chance to act on Recommendations (both interim and final) brought down by the ECA in June-September 1974.

However, the moratorium was never formalized in government policy. Rather, it was reiterated from time to time by various Ministers of the Cabinet in response to queries from the general public and the press.

The public generally assumed that the moratorium on "development" also covered coal exploration, since current procedures used to determine the value and extent of coal deposits are quite crude and significantly damage the land, both aesthetically and physically. Moreover, the coking coal resources in the foothills and front ranges of Alberta invariably underlie valuable winter range for Alberta's diminishing herds of bighorn sheep, elk, and mountain goat. The government had, however, repeatedly stated that oil and gas exploration would be exempted from the moratorium.

The "understanding" that the moratorium on development extended to coal exploration was shared by the Premier as well as by many citizens. On July 23, 1974, Premier Lougheed wrote to a constituent, "I wish to assure you that at the present time no government approval has been given for exploration permits in this area." But, unbeknownst to the Premier, the Department of Lands and Forests had issued, during the "moratorium year", between 58 and 75 Coal Exploration Permits on the very Eastern Slopes that another government body - the ECA - was studying with intent to make recommendations regarding exploration activities.

Although the issuance of a "Permission to Explore" in no legal way obliges the government to allow subsequent development, it does give the company a significant moral justification to ask for a Development Permit if it has spent a million dollars or more in exploration.

Many hundreds of square miles of Alberta's foothills and front ran-

ges are terribly scarred from crude methods of exploration. Some companies have been required to reclaim past exploration scars. In addition, the Department of Lands and Forests no longer authorizes highly destructive techniques on "sensitive" lands.

To minimize further destruction, the Department has devised 44 excellent conditions which may be applied to any coal exploration permit. However, not all conditions will be relevant to every permit location. But members of the public are denied information on which protective conditions are required at a specific location - denied, that is, until after the fact, when they can view the damage left by inadequate restrictions.

A lengthy and noisy debate over the issuance of these coal exploration permits was triggered by the discovery that a permit had been issued to a coal company on lands set aside for a biological study by the Province's Division of Fish and Wildlife, run with the assistance of the Alberta Fish and Game Association, to analyze the long term aspects of bighorn sheep migration between Provincial and National Park lands (Jasper Park).

Another coal exploration permit was issued on the "Moose Horn Block", an area of de facto provincial wilderness immediately adjacent to the Snake Indian wilderness country of Jasper National Park. In each case, a reasonable compromise was reached between conservationists and the government through correspondence and public debate. As might be expected, the press had a heyday.

However, there was a much larger issue at stake. It appeared that the Environment Conservation Authority itself had not been aware that the Department of Lands and Forests had been issuing exploration permits for well over a year. The ECA was in good company, for, as noted above, even the Premier was under the delusion that his "moratorium" applied also to coal exploration.

Several conservationist groups zeroed in on the government, and especially on the Minister of Lands and Forests, the Honourable Dr. Allan A. Warrack. They contended that the definition of "development" encompassed coal exploration as practiced on Alberta's eastern slopes. In fact, the Public Advisory Committee of the ECA led the attack when it discovered, and made public, the full extent of the carte blanche issuance of exploration permits by the Department. It even appears that in areas with high ungulate* winter range potential, permits were issued by the Department of Lands and Forests over the objections of its own Division of Fish and Wildlife. The government denied that coal exploration constituted "development".

While this was going on, a government memorandum, quoting the environmental protection conditions which may be applied to coal exploration permits, surfaced and was made public by at least one conservation organization. These conditions are excellent - they range from the standard conditions designed initially for oil and gas seismic

*Ungulates: hooved animals, e.g. moose, elk, mountain goats.

exploration trails (e.g. crossing of streams at right angles, etc.) to rigorous conditions to safeguard the wellbeing of wildlife. However, the fact that 44 standard conditions may be applied to coal exploration programs does not mean that they will be applied to any specific location or operation. This is apparently left to the discretion of the "Coal Exploration Review Committee", an interdepartmental government committee with no citizen input. This committee apparently makes its recommendations after receiving information from the various government agencies who are familiar with the area. This information depends upon the grass-roots knowledge of the officer in the field.

Thus, input to this interdepartmental committee regarding the alternative uses of each of the 75 areas (e.g. watershed protection, wildlife habitat, wilderness or wildland recreational potential, etc.) was based on the expertise of the too few and overworked field staff within the Alberta Forest Service and the Fish and Wildlife Division of the Department of Lands and Forests. Valid scientific input to this review committee could thus be expected to be of a limited nature. Even so, it would appear that in certain cases field officers recommended against issuance of exploration permits, and that these recommendations were overridden (apparently at the Deputy Minister level) and the permits were issued.

Albertans, then, are totally dependent for protection of their Eastern Slope wildlands, with their high value for recreation, watershed protection, and ungulate habitat, on the advice allowed to reach the Coal Exploration Review Committee. The government should encourage input to this committee from individuals and groups who are fully conversant with the area in question and with its possible alternative uses and values. But it has resisted attempts by conservation groups to allow for citizen input, although the Minister of Lands and Forests, Dr. Warrack, has indicated his willingness to consider this possibility.

Conservation groups were faced with a fait accompli regarding the issuance of coal exploration permits on Alberta's Eastern Slopes during the "moratorium year", and with the public spectacle of the Minister of Lands and Forests attempting to justify his Department's actions by issuing statements hastily drawn up after the fact. They contained several inaccuracies, but the Minister, even when shown proof of these inaccuracies by a member of the Public Advisory Committee of the ECA and an enterprising reporter from the Calgary Albertan, steadfastly stood by his utterances. Within the Legislature, the press and the opposition reacted against the Minister's statements. His eventual response was to challenge one of his most vocal critics, the Public Advisory Committee member, to run against him in the upcoming election.

The debate then degenerated into an argument as to whether or not "significant environmental damage" had occurred on any of the exploration permits. As a member of the executive of an Alberta conservation organization, I stated publicly that in my opinion severe and essentially irreparable damage had indeed occurred on at least

one of the permit locations, where bulldozers had been used to construct roads on alpine tundra at 7,000 feet in elevation. I contended that adequate environmental protection conditions would have required either helicopter spotting of all equipment or the use of rubber-tracked machinery and backhoes, rather than bulldozers, to expose coal seams. Alpine tundra at the 7,000 foot elevation, north and west of Grand Cache, Alberta, does not regenerate readily. Although physical repair might be possible (i.e. the subsoil can be scraped back to contour), rebuilding of the tundra vegetation on the thin mantle of topsoil will take scores or even hundreds of years.

Pushed into the background were the two major points - whether the permits should have been issued in the first place, and why the environmental protection conditions of the permits were kept secret. The government solved the first problem by flatly stating (we understand the Premier had to write several letters recanting his earlier statements) that coal exploration was not "development". The second point, however, was not disposed of so easily. It has a long and tortuous history.

In July, 1974, when conservationists first heard of the coal exploration permit issued on the Moose Horn Block just north of Jasper National Park, they attempted to learn from the Special Land Use Branch, and from the company concerned, what conditions were attached to this permit. They wanted to ensure that new roads would not be constructed to the site, and that bulldozers would not be allowed on the very steep Moose Horn Ridge, valuable for its aesthetic and watershed resources and as ungulate winter range. Initially I was told that the Department of Lands and Forests was prohibited by several provincial Acts from disclosing these conditions. A quick check of the Acts, followed by phone calls to the various Departments administering these Acts, indicated otherwise.

Thus, it appeared that the refusal to make public the environmental protection conditions on coal exploration permits was an intra-departmental decision, apparently made at the Deputy Minister level, at the request of industry (not the coal industry, however; the oil and gas industry had apparently requested confidentiality years ago). No Alberta Act prohibits the release of such information. Secrecy is maintained by an "in-house" decision. Only after the bulldozers and backhoes have done their work can the public see whether their civil servants have been diligent.

The Minister has assured conservation organizations and the public that "it is not the intention of this policy to deceive the public or any organization ... in respect to matters affecting the environment." However, in the very same letter he noted that the decision to conduct only hard trenching (rather than use bulldozers) on the Moose Horn Ridge was a policy initiated by the company itself (after some public outcry) rather than a condition required by the government. Many conservation groups in Alberta believe that the conditions laid down by the government for certain coal exploration operations are not stringent enough. Thus, had the public known before the fact that many of the more stringent of the 44 conditions had been left out, the resulting outcry could have saved wilderness and aesthetic values of certain lands under permit.

After initial attempts to obtain copies of the conditions required of each company had failed, I approached the Minister of Lands and Forests for the second time, this time requesting release of the environmental protection conditions required of companies for 17 "especially sensitive" permit areas in the foothills and front ranges. These areas constitute high quality range for ungulates, are alpine or sub-alpine, are composed of rather fragile plant communities covering a readily erodable soil, are of high aesthetic quality, constitute de facto wilderness, or are an admixture of any or all of these attributes.

In reply to this letter (which gave several examples where environmental protection conditions required by the Department had been inadequate) the Minister stated only that "I believe our correspondence on the subject at hand has been sufficient and complete". In a CBC interview, the Minister later shifted his position and stated that all 44 environmental protection conditions were applicable to all of the coal permits issued, but only certain conditions were relevant.

The Minister was again asked to provide the public with a list of which of the 44 applicable conditions were indeed relevant to the 17 "especially sensitive" coal exploration sites. His reply was negative. Who, then, does determine the relevancy of those 44 applicable conditions - the government or the company? The public is left with a vision of coal companies as the fox guarding the chicken coop.

The most important point to this controversy is not to rap the knuckles of a civil servant or politician for past faux pas, but to make certain that current and future exploration practices are carried out in such a manner that alternative land uses (i.e. other than coal exploration) remain viable: that is, that the aesthetic, watershed production capacity, and ungulate winter range habitat resources are not degraded by exploration procedures.

Alberta's beautiful and much-loved Eastern Slope foothills and front ranges have too long been abused by sloppy mineral exploration practices. Government and industry must learn that alternative resource values must be protected, even if it requires spending extra dollars to prevent serious damage to the land. If remote wilderness areas are to be explored for their mineral resources, then the benefits of maintaining the wildland resource must be weighed as an additional factor when exploration decisions are made.

Alberta's Eastern Slopes have many human uses, and exploitation of the mineral resources is only one. Techniques developed to protect our Arctic and Sub-Arctic lands during exploration can and must be adapted for future exploration and development on the Eastern Slopes. Alberta's wildland resources are no less valuable than those of the Arctic!

VITAL ENVIRONMENTAL ISSUES FACING THE UNITED NATIONS LAW OF THE SEA CONFERENCE *by Robert M. Hallman**

The second substantive session of the Third United Nations Law of the Sea Conference commenced on March 17 in Geneva and continued through May 10. Development of a comprehensive regime to preserve and protect the marine environment was a basic purpose of the Conference. However, environmental protection has not been regarded to date as a high-priority objective by participants; rather, their principal concerns have been enhancement of political and economic power. In Geneva, as during last summer's first formal session at Caracas, environmental issues received less attention than military and commercial ones; and environmental interests experienced strong opposition to adoption of an effective, global system for controlling marine pollution, leaving one with the distinct impression that any final agreements will be seriously deficient from an environmental point of view.

The Canadian Government has over the years been in general a major advocate of comprehensive treatment of environmental problems in a Law of the Sea treaty, and has placed particular emphasis on the need for broad coastal state authority to control pollution from vessels. Moreover, environmental interests in the government have been well-represented on the Canadian delegation. At the same time, however, the delegation has not contained environmental representatives from the private sector - although it has had a large contingent representing private industrial interests.

Some recent developments warrant attention which at least raise questions as to the extent of Canada's continued commitment to securing a treaty which effectively protects the global (as opposed to the Canadian) marine environment. These developments include:

- (1) support for an economic double standard regarding environmental protection obligations which would allow nations to avoid pollution controls where deemed inconsistent with economic development plans;
- (2) failure to support requirements for minimum, internationally established pollution control measures for non-vessel activities in economic resource zones;
- (3) indications of a willingness to limit demands for broad coastal state authority to the establishment of construction

* *The author is an environmental lawyer in the United States. He has acted as consultant concerning a variety of matters relating to the law of the sea, and is the author of Toward an Environmentally Sound Law of the Sea (International Institute for Environment and Development, Washington, D.C., 1974).*

The bulk of this article was drafted just before the 1975 session of the Law of the Sea Conference.

and operating requirements for vessels in Arctic waters, thus excluding from the purview of a treaty other types of vulnerable areas and other major risks of vessel pollution, such as heavy vessel traffic.

Conference participants do not appear shocked that Canada, like other nations, is increasingly motivated by its own self-interest. Those concerned about protecting the marine eco-system as a whole are disturbed to find such an important state - which had taken the lead in espousing comprehensive environmental protection measures - weakening its stance in favour of essentially national interests. One hopes that environmentalists and other concerned members of the Canadian public will seek and be granted an opportunity to play a greater role in development of Canadian policies regarding the Law of the Sea; and, in so doing, will focus on the apparent waning of interest in environmental solutions which would protect and preserve the quality of the marine environment throughout the world.

In approaching this task, it would be appropriate to focus attention upon the following areas:

- (1) relation of economic factors to pollution control obligations;
- (2) environmental standards and requirements for non-vessel activities conducted in economic resource zones;
- (3) control of vessel-source pollution;
- (4) environmental regulation of activities conducted beyond areas of national jurisdiction;
- (5) procedural measures to aid in control of marine pollution.

The issues which must be addressed in each of these areas, together with a preferred outcome from an environmental point of view, are discussed below with reference, where appropriate, to developments in Geneva.

In this connection, it should be noted that "informal single negotiating texts" covering most issues before the Conference, including those relating to marine pollution, were released at the end of the Geneva session. While portions of these texts represent compromises negotiated and generally accepted at working group levels, substantial portions of the texts do not represent "negotiated" solutions or "accepted compromises". The only working group level agreements reached in the environmental area relate to non-controversial issues, i.e., obligations regarding land-based pollution, monitoring, and environmental assessments, and even in those cases the draft texts are vague and quite weak. Little progress was made in negotiations on the contentious issues, e.g., control of vessel-source pollution, the double standard, international measures for zonal activities. They are designed only to provide a basis for negotiation - one considered more workable than the separate committee reports produced at Caracas.

I. RELATION OF ECONOMIC FACTORS TO POLLUTION CONTROL OBLIGATIONS

Basic issue:

To what extent and how should economic factors, like the financial resources and stages of economic development of each state, be taken into account in formulating

- (a) particular obligations of states to protect and preserve the marine environment;
- (b) international (including regional) rules, standards and procedures for preventing marine pollution?

Many developing countries advocate a double standard. They argue that they should be subject to less stringent environmental protection obligations than developed countries now primarily responsible for marine pollution, at least until they reach similar levels of responsibility for such pollution. A few have limited these arguments for special treatment to environmental obligations affecting land-based sources of marine pollution, presumably because the potential impact on development here is more direct and broad based than regulation of marine-based and vessel-based sources of pollution.

Other countries assert that while developing countries' concerns are legitimate, they are not relevant to the basic objective of securing adequate protection for the marine environment, and can and should be accommodated in a manner which does not undermine this objective. They point to at least three factors which could mitigate fears of having to adopt unacceptably expensive and onerous requirements. First, in applying stringent standards a developing state may not necessarily be worse off -- even in economic terms. It is often cheaper to prevent environmental degradation than to remedy it -- if, indeed, a remedy is possible. Further, pollution control is not simply a matter of short-run, economic costs. It can save a wide range of environmental and social costs. Developing states risk being exploited as pollution havens by outside interests which extract profits and run, leaving behind serious, perhaps irreversible harm.

Second, developed countries are not likely to permit economic factors to be utilized only by developing nations to relax environmental obligations. They also are likely to seek to invoke costs of pollution control as an escape mechanism to achieve short-term economic gains.

Finally, the economic impact of environmental obligations can be substantially softened through technical and other assistance programs.

Preferred Solution

The most effective way to curb marine pollution is to require all countries to control all sources with the best available means, and to establish an effective international system for providing necessary financial, technical, and other assistance to disadvantaged states to enable them to meet this high standard.

A less desirable but alternative approach would be to place clear, objective limitations on any double standard. Such limitations could include:

- (1) limiting a double standard to land-based activities;
- (2) requiring a case-by-case showing that substantial economic injury will result if pollution controls of a certain kind are adopted, and that modified controls can only be employed as long as such injury will persist;
- (3) allowing developing countries a longer time than others to meet certain pollution control obligations;
- (4) excluding toxic and hazardous substances.

Unfortunately, the Geneva negotiating text incorporates a double standard. It provides that states, in satisfying their environmental duties, shall "take into account their economic needs and their programmes for economic development", and "act in accordance with their capabilities."

II. ENVIRONMENTAL STANDARDS AND REQUIREMENTS FOR MARINE-BASED ACTIVITIES OTHER THAN VESSELS CONDUCTED IN ECONOMIC RESOURCE ZONES

Basic Issues:

1. Whether coastal states should have exclusive authority to formulate measures for preventing and controlling such pollution;
2. Whether coastal states should be required to adhere to minimum, internationally established measures; and if so, how and by whom should such measures be established and enforced.

It appears certain that coastal states will secure control for economic purposes of zones, extending at least 200 miles seaward. Many states oppose proposals that they adhere to minimum international requirements for activities conducted in such zones, arguing that they should merely be required to "take into account" internationally established guidelines in developing national strategies for regulating such activities. They maintain that the self-interest of coastal states in preventing damage to living resources provides adequate assurance that they will exercise effective pollution control in zones.

Those who favor minimum international requirements for all countries point out that the coastal ocean encompassed by economic resource zones is among the most productive, vulnerable areas of the marine environment. It is now and is likely to continue to be subject to the heaviest pollution from all sources. The most likely uses of such areas in the near future will be for production of oil and gas, construction of marine terminals to service larger and larger vessels transporting oil, chemicals and other potentially harmful substances, and location of energy supply facilities (such as nuclear power plants), all of which pose serious pollution risks. Advocates of international controls argue that the international community is entitled to a guarantee that adequate preventive measures will be taken in the vital productive areas used for economic purposes.

Preferred Solution

States should agree to adhere to and apply minimum, internationally established standards and measures adequate to control marine pollution from activities conducted in economic resource zones. The conference should create a mechanism for ensuring establishment of such standards within two years following conclusion of a treaty. States should be obliged to establish additional or more stringent requirements where international ones are lacking or inadequate.

Machinery should be set up to oversee, review, and amend international requirements. It should not only be empowered to monitor compliance with them, but should also have right to participate in and initiate, where appropriate, enforcement proceedings. Such authority is essential to prevent ineffective, lax enforcement by coastal states. This is a real threat given limited resources of many states and because the regulated activities serve the economic interests of such states.

Little progress was made on this matter in Geneva. It appears that development countries will not agree under any circumstances to binding international measures. One possible compromise which emerged at Geneva would require national measures to be "no less effective than generally accepted international measures." Needless to say, this vague language leaves much room for state discretion and abuse.

III. CONTROL OF VESSEL-SOURCE POLLUTION

Basic Issues:

1. Whether states other than flag states should be authorized to establish requirements additional to or standards stricter than those internationally established; and if so, under what circumstances;
2. Whether states other than flag states should be authorized to enforce internationally established standards and requirements; and if so, under what circumstances.

Establishment of requirements

There is considerable agreement that all states should be bound to apply internationally established requirements to their vessels, and that flag states should have the right to apply more stringent requirements to vessels flying their flag. Exclusive reliance on international or flag state requirements, particularly with respect to vessel construction, design, manning or equipment requirements, is strongly supported by maritime interests. They argue that this is essential to avoid arbitrary interference with freedom of navigation and unduly costly environmental requirements. Some advocate extending this approach to the territorial sea, where states traditionally have authority to impose regulations necessary to protect this area and their coasts.

Canada, as well as others who oppose exclusive reliance on international and flag state requirements, maintains that it would be unfair to deny states the right to take protective measures necessary to protect their resources and coasts, particularly when international regulations are often weak and fail to meet the needs of particular areas or nations; and that flag states, particularly "flags of convenience", have little incentive to establish strict environmental requirements for vessels flying their flags.

There are several approaches for providing regulatory authority to coastal states. They differ primarily in the size of the area and the type of requirements, e.g., discharge, construction, navigational aids, they would encompass.

A) Territorial sea (except for international straits)

- continue coastal state authority to establish all kinds of requirements for vessels sailing their territorial seas.
- an alternative would be to limit coastal state authority to discharge standards and dumping.

B) International straits

- establish separate international regimes for important straits.
- alternatively, authorize coastal states to establish certain types of pollution control requirements in straits, e.g., vessel traffic control measures such as traffic routing schemes, collision-avoidance radar systems, size, speed and/or operation requirements.
- or, authorize strait states, individually or jointly, to set the full range of pollution control requirements. In promulgating requirements, states could be required to take into account recommendations or technical advice of competent international organizations and other interested parties.

C) Ports

- continue authority of states to establish additional or more stringent measures than those internationally established for vessels utilizing their ports.

D) Ocean areas beyond the territorial sea and ports

(i) Discharge and dumping requirements:

- authorize states to set additional or more stringent requirements than those set internationally in wide zones off their coasts for these activities. One alternative would limit the right to set discharge standards to standards which do not significantly affect construction, design, equipment or manning requirements.

(ii) Construction, design, equipment and personnel requirements

- authorize coastal states to establish additional or more stringent requirements where necessary to prevent signifi-

cant environmental damage from vessels beyond the territorial sea areas, provided exercise of such authority is subject to opportunity for interested parties to challenge the requirements in appropriate forums. Requirements would be non-discriminatory and provide a reasonable period for compliance.

- alternatively, authorize states to set additional or more stringent measures, provided they do not deviate (unless for good cause) from measures applied to vessels using their ports.
- or, authorize coastal states to set such requirements in "special areas". Criteria for special areas could include unique hazards, ecological vulnerability, and/or other risks such as substantial vessel traffic. Utilizing these criteria, Canada has proposed granting coastal states authority with respect to "vessels navigating waters where ... stricter standards are rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment, in accordance with accepted scientific criteria." [U.N. Doc. A/CONF. 62/C 3/L.6 (July 31, 1974)]
- or, permit states to establish such requirements in "special areas" established by a competent international authority. A variation of this would also require that measures be approved by the international authority before coming into force.

Preferred Solution

The preferable approach is to grant broad regulatory authority to coastal states. By requiring that coastal state action apply equally to all vessels of all states, arbitrary interference with navigation will be avoided. Other safeguards should include adequate notice, opportunity for interested parties to participate in the decision-making process, a reasonable time for compliance, and an appeal mechanism.

States bordering straits should be encouraged to develop joint pollution schemes in consultation with affected parties and experts from international authorities responsible for vessel-source pollution.

Coastal state authority should extend to construction, design, and equipment requirements. These are the most effective means for preventing intentional discharges (particularly in view of the difficulty in enforcing discharge standards) and are vitally important for controlling accidental pollution (e.g., double bottoms for bulk cargo carrying vessels and barges used in shallow, near-shore areas). Even the most expensive of these requirements are unlikely to impose significant economic burdens on maritime interests; indeed, they may result in considerable savings, particularly in environmental costs. There is little evidence that coastal state authority will result in a crazy-quilt of inconsistent requirements for vessel owners. No such "obstacle" to maritime commerce has resulted in the past, even though states have had authority to set their own requirements in their territorial seas and for vessels entering their ports.

The basic alternative to broad coastal state authority, namely, permitting states to establish more stringent requirements for vessels utilizing

their ports, is much less desirable from an environmental point of view. It overlooks the problems facing states which experience little (if any) port activity. Moreover, port states are less likely than coastal states to control vessel-source pollution effectively because of a basic conflict of interest, imposing environmental controls on vessels serving their economic interests.

In Geneva, vessel-source pollution issues continued to prove difficult and were dealt with almost exclusively in private negotiating groups. Maritime interests remain very reluctant to grant much authority to coastal states. Moreover, developing countries may be becoming less interested in securing broad standard-setting rights beyond the territorial sea than in securing broad enforcement rights and, perhaps, standard-setting authority in "special areas". This trend could weaken Canada's chance of obtaining wide-ranging rights for coastal states, but is not necessarily harmful to its desire for a regime permitting it to control Arctic waters.

Enforcement of International requirements

Maritime interests strongly support maintaining flag state enforcement of international requirements, while granting rights of inspection to port states.

Others, recognizing that flag state enforcement has been and is likely to continue to be ineffective, have suggested alternatives, including:

- (1) authorizing port states to enforce violations against vessels serving their ports where flag states decline to investigate and prosecute the matter (the so called "flag-state preemption" approach);
- (2) coastal state enforcement of discharge violations occurring within their territorial seas and, perhaps, within wider zones off their coasts;
- (3) coastal state enforcement of violations of any kind occurring within wide zones off their coast;
- (4) port state enforcement of violations without flag state preemption - such authority could be limited to violations which threaten damage to the port state, or which occur within defined zones off the coast of port states or could extend to violations wherever they occur;
- (5) concurrent enforcement authority for the international standard-setting organization.

Preferred Solution

To ensure effective enforcement of international requirements it is necessary to grant broad authority to coastal states to enforce violations wherever they occur, subject to reasonable procedural obli-

gations to prevent undue interference with navigation. In addition, given the limited resources of many states, it would appear essential to provide monitoring and enforcement authority to an international body - particularly over activities conducted in international areas.

Again, port state enforcement is much less desirable because of the inherent conflict of interest facing port states in considering whether to punish vessels serving their economic interests. Proposals for port state enforcement would appear considerably more attractive if coupled with a requirement for mandatory denial of access to port facilities for vessels in violation of international requirements; and adequate opportunity for coastal states reporting violations to participate fully in enforcement proceedings, or, alternatively, to transfer such proceedings to their courts.

Little time was devoted to enforcement issues at Geneva. Maritime interests, however, continue to push flag state preemption as their "compromise", although there was some indication that limited coastal state enforcement rights, e.g., for discharge violations, might be acceptable if there are no (or limited) standard-setting rights and the enforcement zone is small. The developing countries have not as yet reached a consensus on either enforcement or standard-setting authority; and, until they do, trends will be difficult to predict.

IV. ENVIRONMENTAL REGULATION OF ACTIVITIES CONDUCTED BEYOND AREAS OF NATIONAL JURISDICTION

Basic issue:

What types of environmental regulations, institutions and powers, for example, enforcement, are required at the international level to ensure adequate control of marine pollution from exploitation of the deep sea bed?

An international authority is likely to be established to oversee economic activities, such as mining and drilling in the deep seabed, carried out in areas beyond national jurisdiction. While there is general agreement that such activities should be subject to minimum internationally established environmental requirements, little attention has been focussed on the nature of those requirements, or the makeup and workings of the institution responsible for formulating, monitoring, and enforcing them.

Preferred Solution

It is essential that environmental requirements be established and enforced by an independent entity with environmental expertise, separate from any body responsible for resource development. Conflicts of interest of this kind must be avoided at the international level.

Environmental safeguards should extend to all potentially harmful activities (for example, processing as well as mining), and should include: exemption of areas of special ecological, scientific, cul-

tural or historical value from development; environmental assessments of proposed area selections and activities; promulgation of environmental requirements prior to authorization of any development activities.

V. PROCEDURAL MEASURES TO AID IN CONTROL OF MARINE POLLUTION

Basic issues:

- (1) Whether, when, and how, states should assess the implications for the marine environment of actions taken within their jurisdiction or under their control;
- (2) Whether, under what circumstances, and how, states should be required to report on their environmental protection programs and measures;
- (3) If non-environmental factors are deemed relevant to state obligations to control marine pollution, whether, and how, states should be required to justify on this basis failures to adopt or implement environmental protection measures or standards;
- (4) Whether and how, responsibility for controlling marine pollution should be separated from resource development (or commercial) responsibilities.

A variety of procedural obligations can provide an important supplement to substantive obligations to control marine pollution. Such obligations can encourage states to engage in open, environmentally-oriented planning and management of ocean uses. Moreover, they can provide a basis for cooperative efforts among potentially affected and interested parties to eliminate or minimize adverse environmental effects, provide technical assistance, and avoid conflicts; increase public awareness of marine pollution problems; and encourage objective environmental regulation.

Procedural obligations may be relatively more acceptable than strong substantive ones since they are not likely to involve the broad economic implications and commitments of vast resources which may accompany substantive obligations. Further, the possibility that substantive obligations will be weak provides an additional reason to pursue strong procedural requirements.

Preferred Solution

Obligations to encourage states to engage in environmentally-oriented planning and management of ocean uses should include timely environmental assessments and consultations. States should be required to ensure that the implications for the marine environment of all proposed actions (by governments or persons under their jurisdiction or control) are assessed and considered along with non-environmental considerations in deciding whether, and how to implement such actions. States would be obliged to make such assessments available to and to

consult with interested parties prior to authorizing or undertaking any such actions with a view toward eliminating or minimizing any adverse effects. States could be required to report on how they conform to (or take into account, as appropriate) international standards and requirements in developing national pollution control strategies, and to provide explanations for failures to adopt international standards or requirements.

Obligations designed to ensure objective expert environmental regulation should include requiring states, where economic factors are involved, to demonstrate a significant adverse economic impact in order to justify refusal to adopt particular environmental measures, and to provide a detailed public assessment of economic impacts. Responsibilities for environmental regulation must be institutionally separated from responsibilities for resource development, or at a minimum, mechanisms to ensure that environmental interests are adequately represented in any management and regulatory institutions and decision-making affecting the marine environment and its resources.

At Geneva, the only procedural obligation subject to considerable negotiation related to environmental assessments. The U.S. introduced a comprehensive, strong proposal calling for preparation and dissemination of detailed environmental assessments for activities which may create a risk of significant pollution, and consultation with other states and competent international organizations. The proposal proved quite controversial, and the draft text agreed on at the working group level is very weak. It provides, in effect, that states shall assess the effects of potentially harmful actions and communicate "reports of the results of assessments" to other states. There is no requirement to consult with other states regarding the actions, or to make available the assessments themselves.

THE LAKE SIMCOE LANDFILL CASE:

CAPRICIOUS EXERCISE OF DISCRETION BY AN ONTARIO CABINET MINISTER

Section 23(1) of the Public Lands Act, R.S.O. 1970 c. 380, gives the Minister of Natural Resources a discretionary power to issue a licence of occupation to a person who is occupying any public land.

The abuses of this discretionary power can be seen in the case of Slan and Beyak, where a licence of occupation was issued in an arbitrary fashion and in the face of local opposition.

The situation arose in 1970, when John and Mary Beyak bought a lakefront property on Lake Simcoe and asked their neighbours - the in-laws of Toronto businessman Joel Slan, the owner of the next cottage - for their consent to the construction of a boathouse and a 10' x 40' dock. However, by the summer of 1972, tons of landfill were dumped into the lake, and the Beyaks added to their original lakefront lot of 80' x 100' by filling in an 80' x 70' section of

Lake Simcoe.

Beyak's neighbours and the Georgina township council objected strenuously to Beyak's "dock", since the artificially built parcel of land upset current flows and caused their beaches to become clogged with silt.

Slan then initiated a civil action against Beyak, claiming \$10,000 damages for nuisance and interference with his rights. This action is still before the courts. In 1973, the Ministry of Natural Resources laid charges about unlawful deposits in the lake, but the charges were dismissed on technical grounds.

In November 1974, Slan received a letter from Lorne Maeck, parliamentary assistant to Natural Resources Minister Leo Bernier, stating that Bernier would not issue a licence of occupation until the settlement of the litigation and until further consultations between the Ministry and the township council took place. On March 3, 1975, the council unanimously passed a resolution requesting Bernier to take immediate action under the Public Lands Act to require the Beyaks to remove the illegally created water lot.

In the face of the local opposition, and contrary to the assurances of his parliamentary assistant, on April 17 Bernier issued a licence of occupation, thus making the illegal landfill legal. Bernier allegedly took a dislike to Slan as a result of the efforts of Slan and his lawyer, and this apparently influenced his decision to issue a licence of occupation.

Furthermore, Bernier was concerned that a decision ordering the removal of Beyak's landfill would place in a vulnerable position the owners of the approximately 150,000 illegal encroachments on crown lands throughout the province.

It should be pointed out that Bernier's decision would encourage other lakefront property owners to increase the size of their properties.

Bernier's decision created a furor in the Lake Simcoe area, and a number of influential politicians and newspapers, including Stephen Lewis, Morton Shulman, the Toronto Globe and Mail, and the Toronto Star, took up Slan's cause.

On April 23, Bernier announced publicly that he was reversing his previous decision and revoking the licence of occupation.

After nearly two months of questioning in and out of the Legislature as to when the licence would indeed be revoked, Bernier finally revoked it in the middle of June.

This represents a qualified victory for those interested in the protection of the environment. However, it should be noted that the terms of Bernier's revocation have not yet been made public, and it is unclear whether the entire landfill will be removed. Further-

more, this victory came about only after the expenditure of substantial amounts of time and money by Mr. Slan and the espousal of the cause by a number of public figures.

It is hoped that in future the discretionary power of the Minister will be used less capriciously and in a manner more responsive to local interests.

David Bereskin

CONSERVATIONISTS CALL ON GOVERNMENT TO STOP DUCK HUNTING IN NATIONAL PARKS

On June 18th, representatives of five conservation organizations, speaking for over 35,000 Canadians, called upon the federal government to put an end to duck hunting in Point Pelee National Park. They met in Ottawa for two hours with senior officials of Parks Canada, who agreed that hunting in the park was an anomaly, and agreed to take the case for an end to hunting at Point Pelee to the Minister, Mr. Judd Buchanan.

Despite the fact that duck hunting is in direct violation of official national parks policy, it has been allowed in Point Pelee since the park was established in 1918.

The exception to parks policy was made because of pressure from local hunters. But CELA counsel John Swaigen has stated that despite implications by federal officials that they have some obligation to allow hunting, there appears to be nothing that binds them. Hunting can be easily terminated by an order in council passed by Cabinet.

The park was created as a sanctuary to protect the unusual variety of birds that nest in and migrate through Point Pelee every year. It consists of approximately six square miles on the southernmost tip of Canadian territory. Its strategic location between two major bird migration routes and its variety of flora combine with rich marsh habitats to make the park one of Canada's truly unique natural areas.

Each year, up to 200 hunting licences are granted for use in Point Pelee, allowing an activity which conflicts with the enjoyment of thousands of other park visitors. The noise of hunters' motorboats and the firing of guns in close proximity to other visitors means that a few hunters create a nuisance far out of proportion to their numbers.

With the logical exception of some native groups, no hunting is allowed in any other National Park.

In addition to CELA, the National and Provincial Parks Association, the Federation of Ontario Naturalists, the Toronto Field Naturalists

Club, and the Canadian Nature Federation have passed resolutions calling for an end to hunting in the park.

This is not the first time opposition has arisen to the hunting. The history of the park has been marked by futile attempts by the public and the civil service to ban the hunting.

In 1947, the Deputy Minister at the time decided that since hunting was inconsistent with National Parks principles, hunting in the Park should be terminated in five years. When this became known, various hunting organizations in the area made strong representations for the continuance of duck hunting in the Park. To appease the hunters, the Government considered removing the hunting area, a marsh, from Parks jurisdiction and placing it in the hands of the Province. The Government found out that the transfer of ownership to the Province would be a backward step because there was no Provincial legislation which would ensure preservation of the marsh for wildlife. It looked as though, if the marsh were transferred to a municipality, it would be drained and used for market gardening. This Government ignored its policies and principles and agreed to continue duck hunting, raising the permit fee from \$2 to \$7 as a token gesture to discourage hunting.

In May 1958, a local hunting club (the Green Head Duck Club) raised some inconsequential points and accepted, without question, an explanation of official policy which stated:

"Although the hunting of game of any kind in a Park is contrary to the concept of National Parks, provision is made in the National Parks Game Regulations (Section 5) whereby duck shooting is permitted in a portion of Point Pelee National Park at specified periods during the open season prescribed by the regulations made under the Migratory Birds Convention Act. This situation, although anomalous and perhaps undesirable, has been permitted to continue only because of commitments made prior to the establishment of the Park in 1918."

In 1964, our National Parks Policy was announced, and the general public became increasingly aware and critical of the obvious conflict which exists between our policy and the situation at Point Pelee.

In September 1967, the Minister decided that duck hunting would be excluded from the Park at the end of the 1967 hunting season. Nothing happened.

In December 1968, the Honourable Jean Chretien, Minister in charge of National Parks, wrote that he hoped to terminate duck hunting in Point Pelee in the very near future.

In a 1969 internal memorandum of the Department, its historian wrote: "Many more people have given their views in favour of discontinuing the duck hunting privileges, than those in favour of continuing the privilege as represented primarily by the Green Head Duck Club."

The memorandum noted that there were many areas open for public hunting which lie within a reasonable distance of Point Pelee.

In 1972 Judd Buchanan, the federal M.P. for London West, wrote to a constituent that he supported the ban on duck hunting in Point Pelee.

In February 1975 this same Judd Buchanan, now the Honourable Judd Buchanan, Minister of Indian and Northern Affairs, in charge of National Parks, wrote to CELA that the 1918 Order in Council allowing duck hunting creates a conflict of interest with the National Parks Policy. Mr. Buchanan promised a decision "within a few weeks".

Substantial opposition to duck hunting in the Park has been the recurring theme since the early 1960's. Each time, Deputy Ministers suggest abolition of duck hunting, the Ministers make statements that make it appear that duck hunting will be banned in the immediate future, the environmentalists believe they have won, and nothing happens.

One new development in the fight is research by CELA which indicates that not only is the hunting contrary to policy, but the orders in council and regulations permitting it may also be ultra vires of the National Parks Act and therefore illegal.

It is clear that the civil services wishes to end the duck hunting, and that Judd Buchanan supports the ban. We are closer than ever before to a victory, but still just as far away. Mr. Buchanan must convince Cabinet, and within Cabinet there is strong opposition from Eugene Whelan, who has been in the Government a long time, is owed a lot of favours, and has a strong political base.

It will be interesting to see whether the Government once again places political expediency above policy and principle. (See Editorial, page 64.)

J.S.

RESOURCE CONSERVATION CAN BE UNCONSTITUTIONAL

Saskatoon ---

The Court of Queen's Bench has ruled Saskatchewan's potash prorating system unconstitutional.

After a 21-day trial, following six trips to the provincial Court of Appeal by the parties on interlocutory matters, Mr. Justice D.C. Disbery handed down a 222-page decision awarding the Central Canada Potash Company \$1.5 million against the Government of Saskatchewan.

The Government, in seeking to uphold its regulations, cited the system as an example of conservation and good resource management.

The Government sought through its prorationing system to limit the supply of potash produced for export each year. It justified the limitations as a method of conserving potash supplies. The Government admitted that in the physical sense there was no immediate need to conserve the potash, since there is known to be enough potash in Saskatchewan to supply the world demand for 1500 to 2000 years.

But the Government argued that the prorationing was conservation and good resource management because whenever potash is sold at a loss, as sometimes happens, this was the wasting of a resource.

Mr. Justice Disbery rejected this argument. He felt that the regulations were not aimed at resource conservation, but at getting a better price for Saskatchewan potash producers. His judgment called the regulations an attempt to influence international trade and commerce, a federal responsibility.

The Saskatoon Environmental Society felt that the judgment overlooked "the environmental impact of potash mining as practised in Saskatchewan".

The province is appealing to higher courts, and it is likely that the case will eventually go to the Supreme Court of Canada.

N.E.B. RULE CHANGES REQUIRE IMPACT ASSESSMENT

Recent amendments to the National Energy Board Rules of Practice and Procedure* indicate the evolution of concern regarding the environment and control over Canadian resources.

In 1959, the Board, pursuant to the powers given it by section 7 of the National Energy Board Act, formulated Rules of Practice in proceedings before the Board. These rules provided that an applicant requesting a certificate for an oil or gas pipeline had to submit to the Board, among other things, information regarding "... the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line."

The 1975 amendment contains a number of welcome changes. First, applicants are now required to file an environmental impact assessment of the pipeline on the existing environment "and a statement of the measures proposed to mitigate the impact."

Secondly, the loose term "Canadians" in the old rules has been replaced by the newly-defined term "Canadian content".

It is suggested that these changes do not go far enough. First,

*The amendments are in SOR/75-41 published in the Canada Gazette, Part II, Vol. 109, No. 3, February 2, 1975.

"Canadian content" embraces corporations incorporated in Canada, and thus presumably includes multi-national giants.

Secondly, the amendments merely require the applicant to file pertinent information before the Board regarding the Canadian content and the environmental impact assessment. No mention is made of the weight, if any, the Board will give to such factors. The Board is under no obligation to take these factors into account in their deliberations.

While it is true that the amendments indicate a growing concern with the environment, it is apparent that they will offer scant protection during the Mackenzie Valley Pipeline hearings before the Board.

David Bereskin

MICHIGAN E.P.A. UPHELD

Lansing, Michigan ---

The Michigan Supreme Court in January unanimously upheld the validity of the state's 1970 Environmental Protection Act, which grants citizens the right to apply to a court to stop projects that may damage the environment.

In a 13-page decision, the court held that the Act also "imposes a duty" on public officials to "prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities."

This duty has proven to be an important adjunct to the National Environmental Protection Act. Under NEPA, citizens can take court action only to compel government officials to write an environmental impact statement on a project, not to halt a project, as the Michigan law provides. Environmentalists have felt that NEPA should go further to provide assurances that the recommendations of impact statements will be implemented, and to provide further public input (see "Government expert and CUSEC reaffirm value of U.S. EIA process", 4 CELN 14).

The decision came in a suit filed by 56 landowners near Scottville, Michigan, who were opposed to a \$213,000 plan that would turn a meandering creek into a deep, fast-flowing ditch to prevent the flooding each spring of about 100 acres of cropland owned by two farmers. The plaintiffs, who represented 70 per cent of the landowners assessed to finance the project, argued that it would lower the water table in the area and thereby damage wetlands.

GERARD MCNEIL ON BARRIERS TO CITIZENS DEFENDING ENVIRONMENTAL AND OTHER CIVIL LIBERTIES

(This letter was printed in the Toronto Globe and Mail on April 2, 1975. The Supreme Court of Canada helped Mr. McNeil to exercise his constitutional rights by granting the Province of Nova Scotia leave to appeal only on condition that Mr. McNeil be awarded costs of the appeal, win or lose. Without this assistance, McNeil could not have afforded to pursue the case, even though he was obviously winning, and would have been beaten by the expense of using our legal system. See the Supreme Court decision, page 65 of this issue.)

John Beaufoy did a good job of reporting the movie censorship case I am trying to get into court.

I have been trying for more than a year but have run into the stumbling block of standing, or the right of a citizen to challenge the constitutionality of censorship.

These two issues - censorship and access to the courts - are important to all Canadians. In the United States, the Government pays the cost when the courts rule that a substantial constitutional issue has been raised.

The Nova Scotia courts have ruled that I have raised a substantial question about the constitutionality of provincial movie censorship. However, in Canada not only the rule of standing - which usually demands a personal financial interest - but costs are used to discourage court tests, no matter how legitimate the issue may be.

The Nova Scotia Government could have settled this matter a year ago by referring the censorship law for a court test. It refused to do this because it would have been a tacit admission that a citizen could force such an issue. And that would have opened the way for many other cases that have been blocked by standing.

Next month two lawyers from Dartmouth, Nova Scotia, will go before the nine justices of the Supreme Court of Canada with this case, and they probably will face not only Nova Scotia's lawyers but representatives of the attorneys-general of other provinces.

I'll try to give an example to illustrate why the provinces are concerned: Nova Scotia is about to embark on a major hydroelectric project at Wreck Cove, Cape Breton. The only people who could go to court against the Government on this project are the residents of Wreck Cove, or any person or company whose financial interests in the area might be affected.

The interpretation of standing would rule out any other Nova Scotian, or Canadian, who was worried about the environmental effects of the project on Wreck Cove and the Cape Breton Highlands.

If the Supreme Court of Canada broadens the rule of standing in my case, it may open the path for serious challenges of government actions in every province. A few examples: the James Bay hydro project, the Mackenzie Valley pipeline, the comfortable neighbourhood in your town that is about to be rezoned into a parking lot.

I don't have the funds to fight this case alone. I doubt that 10 per cent of the Canadian population does. Perhaps this says something about our legal system.

Gerard McNeil, Ottawa

SNOWMOBILER FINED FOR CHASING WILDLIFE

Prince George, B.C. ---

A trapping school instructor and big game guide was fined \$400 early in June in provincial court for harassing wildlife with a snowmobile.

Joseph Carty was charged March 2 with harassing wildlife February 25 in ice-covered Nukko Lake, 22 miles north of this central British Columbia city.

Judge Harold Kenney also ordered that Carty be denied a snowmobile licence for one year. The judge said Carty had set a poor example for student trappers. Carty was teaching a course through the B.C. Registered Trappers Association, which included human trapping methods, at the time of the incident.

The court heard evidence that Carty was among a group of men on snowmobiles who set out after two animals on the lake. A pilot, flying overhead, said he saw the men on snowmobiles attempting to run the animals down.

WINDSOR CELA BEGINS THIRD SUMMER

The Windsor branch of the Canadian Environmental Law Association has begun its third summer.

The branch operates full time during the summers under an Opportunities for Youth grant at the University of Windsor. During the university term, the members speak at high schools to educate students about environmental law.

This summer, two second-year law students will man an environmental complaints bureau located in the basement of the Faculty of Law at the University of Windsor. The students will also do research and

are considering publishing a guide to environmental law for distribution to high school students.

Charles Spence and Harry Perets invite the public to phone (519-253-4232 ext. 258), write, or come to the bureau with their environmental problems. They give advice, refer citizens to helpful government agencies, provide preliminary legal assistance and advise on problems that might require action in courts or tribunals.

Last summer, Windsor CELA was involved in a lengthy sand dredging hearing before the provincial mining commissioner, in an attempt to gain a moratorium on dredging until needed environmental studies were complete.

CELA PLAINTIFF HONOURED

Shirley Strathy, the citizen who launched a successful private prosecution against a construction company for injuring trees (4 CELN 36), has been given an award for her action by the Ontario Association of Landscape Architects.

Mrs. Strathy, a landscape architect, was a student at the time the action was taken. She was represented by a CELA staff lawyer. She was presented with the award at the Association's annual meeting in May.

CANADIAN PUBLIC LAND USE IN PERSPECTIVE

edited by J.G. Nelson, R.C. Scace, R. Kouri. 579 pages with bibliography. Paper cover. \$10.00. Published by and available from the Social Science Research Council of Canada, 151 Slater St., Ottawa.

Canadian Public Land Use in Perspective is a survey of the present state of knowledge relating to land use and management. The objectives of the book are twofold: to present those areas of study where sufficient research and data is available to enable informed planning and policy decisions to be made; and to determine those areas where further research is required. The articles contained in this volume provide an assessment of past and present land policies in the various regions of Canada, outline some of the major issues and problems of land management, and consider the actions being taken in other countries.

The book is the record of a symposium organized by the Social Science Research Council of Canada. The papers presented at the conference, together with the prepared commentaries and transcripts of the discussions, provide a multidisciplinary perspective of Canadian public land use.
