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Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings — A History and Case Study

*Alan D. Levy**

The creation of new statutory powers for the provincial Minister of Environment to scope issues (i.e. limit the number and range of issues which might be examined) for an environmental assessment matter referred to hearing, and to set a deadline for the tribunal to conduct the hearing and render its decision, was part of the provincial government's efforts to overhaul the EA process. The lengthy history behind the passage in 1996 of these controversial powers through amendments to the Ontario Environmental Assessment Act is reviewed in this article, along with a description and analysis of the experience of those involved in the only two EA hearings (Adams Mine and Quinte Landfill) which have been conducted since that time. Concerns and suggestions arising out of the use of these powers are discussed and highlighted. They touch on fundamental issues such as the purpose of the hearing process, tribunal independence, fairness, political intervention, procedural transparency, exercise of discretion, the purpose of EA planning, and the integrity of the EA process. Although experience with these powers is still rather limited, the article concludes that it is important to begin now to develop constructive recommendations to address the concerns which have been raised.

Les efforts du gouvernement provincial pour mettre à jour le processus des Évaluations environnementales (ÉE) ont mené à la création de nouveaux pouvoirs statutaires pour le ministre provincial de l'Environnement qui lui permettent de déterminer la portée des questions (c.-à-d., de limiter le nombre et la portée des questions qui pourraient être examinées) en matière d'évaluations environnementales soumises à

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des audiences et d'imposer un délai au tribunal pour tenir une audience et rendre une décision. Dans cet article, on examine toutes les circonstances qui ont mené à la promulgation en 1996 de ces pouvoirs controversés grâce à des amendements à la Loi sur les évaluations environnementales de l'Ontario; on y retrouve également une description et une analyse de l'expérience de ceux ayant participé aux deux seules audiences d'Évaluation environnementale (Adams Mine et Quinte Landfill) qui ont eu lieu depuis ce moment-là. On y souligne et discute les inquiétudes et les suggestions soulevées par l'utilisation de ces pouvoirs. Elles ont trait à des questions fondamentales, telles la raison d'être du processus des audiences, l'indépendance des tribunaux, l'équité, l'intervention politique, la transparence des procédures, l'exercice du pouvoir discrétionnaire, le but de la planification des ÉE, ainsi que l'intégrité du processus des ÉE. Bien que l'expérience avec ces pouvoirs soit encore plutôt limitée, cet article conclut qu'il est important de commencer dès maintenant à développer des recommandations constructives pour aborder les préoccupations ayant été soulevées.

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1. BACKGROUND

As a result of a major overhaul of the Ontario *Environmental Assessment Act* (EAA)[1] in 1996[2] the Ontario Minister of Environment was empowered to set time limits for environmental assessment (EA) hearings and to "scope" or limit the number and range of issues which the parties would be entitled to raise at the hearing and the hearing board would be able to consider.[3] In Ontario, EA applications are referred by the Minister to the Environmental Assessment Board (EAB), now renamed the Envi-

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1 R.S.O. 1990 c. E18.

2 The amendments to the EAA were made pursuant to the *Environmental Assessment and Consultation Improvement Act, 1996*, S.O. 1996 c. 27, referred to also as Bill 76, and came into force at the beginning of 1997. For an excellent critique of the amendments in Bill 76 and the resulting effectiveness of the EAA, see law professor Marcia Valiante, "Evaluating Ontario's Environmental Assessment Reforms" (1999), 8 J.E.L.P. 215.

3 The time limit or deadline power was created by s. 9.1(5):

> The Tribunal shall make its decision by the deadline the Minister specifies or by such later date as the Minister may permit if he or she considers that there is a sufficient reason (which is unusual, urgent or compassionate) for doing so.

Section 9.2(6) is identical but applies to those cases in which the Minister has referred only part of an application to the Tribunal. The issue scoping power was created by s. 9.3(4):

> Despite subsection (2) or (3), if referral of an application or of matters relating to the application is requested but the Minister considers a hearing to be appropriate in respect of only some matters, the Minister shall refer those matters to the Tribunal under section 9.2.

Section 9.2(1) provides:

ronmental Review Tribunal[4] (ERT) for hearing. As will be discussed, the manner and extent to which these powers are exercised can have a very direct and significant affect on the EA process.

Although this article will not address in detail the Minister's new power to approve "terms of reference" (TOR) before an EA study is undertaken,[5] it should be emphasized that an approved TOR will likely have a very significant effect on the Minister's subsequent decision to scope issues when a matter is referred for hearing.

There have only been two applications referred to hearing since the EAA was revised,[6] namely the undertakings involving the Adams Mine Site[7] near the Town of Kirkland Lake, and the Quinte Sanitation Landfill

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> The Minister may refer to the Tribunal for hearing and decision a matter that relates to an application.

Finally, with respect to those matters scoped out of the hearing by the Minister, s. 9.2(3) imposes the following requirement:

> The Minister shall inform the Tribunal of decisions that the Minister proposes to make on matters not referred to the Tribunal in connection with the application.

4 The Ontario Environmental Assessment Board (EAB) was subsequently merged with the Environmental Appeal Board and recently renamed the Environmental Review Tribunal pursuant to the *Red Tape Reduction Act, 2000*, S.O. 2000 c. 26. In this article the terms EAB, Board, ERT and Tribunal will all be used.

5 Terms of reference are dealt with in the following new provision in the EAA:

> 6(1) The proponent shall give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking.
>
> 6(2) The proposed terms of reference must,
>
> (a) indicate that the environmental assessment will be prepared in accordance with the requirements set out in subsection 6.1(2);
>
> (b) indicate that the environmental assessment will be prepared in accordance with such requirements as may be prescribed for the type of undertaking the proponent wishes to proceed with; or
>
> (c) set out in detail the requirements for the preparation of the environmental assessment.
>
> 6(3) The proposed terms of reference must be accompanied by a description of the consultations by the proponent and the results of the consultations.
>
> (3.1) The proponent shall give notice of the proposed terms of reference and shall do so by the prescribed deadline and in the manner required by the Director.
>
> 6(4) The Minister shall approve the proposed terms of reference, with any amendments that he or she considers necessary, if he or she is satisfied that an environmental assessment prepared in accordance with the approved terms of reference will be consistent with the purpose of this Act and with the public interest.

6 In fact the number of cases referred to the EAB has drastically diminished. These two cases have been the only referrals since the current Progressive Conservative government took power in 1995.

7 *Notre Development Corporation, Re*, 28 C.E.L.R. (N.S.) 1, 1998 CarswellOnt 2475 (Ont. Environmental Assess. Bd.)

Site[8] in the City of Quinte West. Both of these cases involved private sector proposals[9] to commence new landfill operations.[10] This article examines the manner in which the Minister exercised his deadline and issue scoping powers in those two cases, and looks briefly at the impact it had on the hearings, the parties, the Tribunal, the decisions and the advancement of the EAA's goal of environmental protection.[11] Section 5 contains a wider review of the influence of these powers, along with a number of suggestions.

In addition to reviewing the two decisions, other material in the EAB's files and some hearing transcripts, I have also canvassed on a confidential basis the experience and opinions of counsel who appeared in both hearings (although not all of them responded to my request for an interview), and others closely connected with these cases. People from all sides were contacted.[12] It should be emphasized that this article is not based on anything resembling a representative opinion survey, and nor has it necessarily attempted to express an impersonal point of view with respect to these matters.[13]

2. DEVELOPMENT OF THE MINISTER'S NEW LEGISLATIVE POWERS

The provincial government and the EAB had been under pressure for many years to improve control over EA hearings so that they are shorter and more focused. Several high-profile hearings in particular lasted for

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8 *Fibre Environmental & Ecology Ltd., Re* (November 27, 1998), Doc. EA-97-02 (Ont. Environmental Assess. Bd.). Subsequent costs applications were decided 31 C.E.L.R. (N.S.) 61, 1999 CarswellOnt 2704 (Ont. Environmental Assess. Bd.).

9 This article does not address the long-standing debate about whether private sector undertakings ought to be subjected to different (and perhaps less rigorous) EA requirements than government projects.

10 In the case of Quinte, the proponent sought to re-open a closed landfill, remediate and mine the old site for valuable wastes, and expand it in order to receive another 10 to 12 million tonnes of waste.

11 The purpose of the EAA, as set out in s. 2, has not been changed. Its goal is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."

12 My thanks to all those who generously agreed to be interviewed and contribute to the development of this article. I have undertaken that I will neither identify them, nor credit any of these sources with the facts, opinions or suggestions provided to me.

13 While I had no role in the Adams Mine or Quinte proceedings, my direct experience with EAB hearings in general, and EAA landfill matters in particular, has very significantly influenced my perceptions of the issues surrounding ministerial scoping and deadlines. This is reflected to some degree in the distillation of concerns and responses, expressed by others, which is found in this article.

years and consumed tens of millions of dollars. Criticism over the length and cost of hearings has come from all quarters (provincial and municipal politicians, government administrators, private sector proponents, community groups and environmentalists). For example, a report on the experience and views of "citizens and their lawyers" maintained that "long hearings are not seen as the ideal way to resolve conflicts, or make environmental policy."[14] It also states:

> Nevertheless, all participants in the long hearings, as well as other critics, agree that shorter processes are desirable. The situation has become serious enough that if reforms are not instituted to reduce the length of hearings, many believe that eventually the Legislature itself could turn against the Act.[15]

In 1988 the government commenced the Environmental Assessment Program Improvement Project (EAPIP) to examine growing concerns about whether the EA process was sufficiently effective, fair and efficient. The following passage is from a 1990 report of the EAPIP Task Force:[16]

> The hearing process, however, by reason of its complexity, duration, and costs needs to be revised. Many submissions received during the course of the review identified problems with the length of time, cost, and format of hearings held under the EA and CH[17] Acts. Some have found the formal and adversarial atmosphere of hearings intimidating and a deterrent to meaningful citizen participation.[18] . . .
>
> It is the opinion of the Board and many others that failure to effectively scope and resolve issues during pre-submission consultation and prior to commencement of a hearing contributes substantially to the length of hearings. Scoping during the proposed PAC[19] should help focus the planning studies and public

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14 *Mega-EA Hearings: Thoughts from the front*, Canadian Environmental Law Association, July 1993, at 13.

15 Ibid. at 2.

16 *Toward Improving the Environmental Assessment Program in Ontario*, Ministry of Environment (68 pages), December 1990.

17 *Consolidated Hearings Act*, R.S.O. 1990 c. C.29.

18 The following comments on this issue are from a written submission made by the former EA Branch Director, Derek Doyle, during the EAB's procedural reform process in 1990:

> There is a view that the adversarial approach has not led to shorter, fairer and more efficient hearings. Indeed, some have expressed to me a contrary view. . . . The process of democratization brought decision-making to the public, now it is threatened of being lost again in the adversarial process.
>
> There are incentives for experts, consultants and lawyers to protract hearings. Yet the people they serve: the public, the proponent and the decision makers almost stand by as observers with limited control.

19 "Planning and Consultation" was defined in the report's glossary as: "The first stage of the EA process prior to formal submission of an EA document where the proponent carries out studies and public consultation required to conduct an assessment of alternatives, select a preferred alternative and prepare an EA document."

> consultations on key issues and concerns. This in turn will facilitate resolution of issues to the greatest extent possible and concentrate efforts on the major or outstanding concerns in the EA document. In addition to the recommendation giving the Minister scoping powers,[20] it is recommended that such a provision be introduced for the Board. Scoping decisions should form the basis for the Board to scope the approval hearing. In this regard, it is recommended that any scoping decision made during PAC be binding on the Board at any subsequent hearing, with the proviso that the Board be able to entertain any new evidence of a significant nature that would require variation from the original scoping decision. Issue resolution during the PAC and Review and Acceptance phases should also enable the Board to further scope the hearing.
>
> An area where the Board has introduced scoping is in the identification of issues and presentation of evidence during a hearing. There is a growing tendency among proponents to present extensive evidence in chief to cover every aspect of their cases. Parties respond in kind with extensive cross-examination and evidence of their own. The introduction of formal scoping procedures in the Board's Rules of Practice and Procedure would assist the parties and the Board in focusing evidence on key issues and enable hearing time to be used more effectively.[21]

The report acknowledged "various other procedural measures" adopted by the EAB "to improve the efficiency and expedite hearings without limiting the involvement of participants" and observed that in light of "the increasingly complex and time consuming nature of hearings the Board should have full legislative support and authority to implement any procedural improvements it considers necessary."[22]

In 1990 the Environmental Assessment Advisory Committee (EAAC)[23] was instructed by the Environment Minister to conduct a public consultation and provide advice on how to improve the EA process. The Committee's far-ranging report[24] acknowledged the importance of envi-

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20 Recommendation 4.5 of the report calls for amending the EAA "to provide that the Minister be given the authority to scope the issues and areas to be considered by the Board when referring an undertaking for a hearing on approval" (at 33).

21 Ibid. at 33-34. Recommendation 4.9 of the report proposed that the EAA be amended to "provide authority for the EA Board to convene scoping hearings during PAC and to scope the issues and areas to be addressed in an approval hearing" (at 36).

22 Ibid. at 35.

23 EAAC, an advisory body with a long and effective history, was "established in 1983 to provide for public input and independent advice to the Minister on the application of the [EAA] and other EA-related matters" (from the preface of EAAC Report no. 47, *Reforms to the Environmental Assessment Program*, 1991-1992). EAAC was eliminated in 1996.

24 *Reforms to the Environmental Assessment Program*, EAAC Report No.47 (200 pages), Part 1 (October 31, 1991) and Part 2 (January 27, 1992).

ronmental assessment[25] but also identified the need for administrative and legislative changes:

> Significant improvements can be made immediately through administrative changes and a fundamental change in commitment to the EA program by government. Such changes are absolutely necessary for the program to work. These alone, however, are not enough to address current weaknesses of the process and its implementation. It was evident from the submissions that both proponents and the public see the need for legislative changes to address their concerns.[26]

EAAC concluded that concerns about EAB hearings were valid and needed to be addressed:

> A major criticism of the EA process relates to EA Board hearings — their length, their cost, and their adversarial, formal and intimidating nature. It is imperative that the Board exercise considerably greater control over hearings and that changes be made to the hearing procedures to reduce their length by setting time limits, scoping the issues, using alternative dispute resolution methods, and implementing case management. In addition, the Board should adopt a more investigative role and make its proceedings less intimidating to the public. Finally, the Act needs to be amended in order to ensure that the Board has the clear legal authority to carry out its responsibilities more efficiently.[27]

With respect to time limits, the report included the following observations:

> The Committee believes that, except for the approval decision by the Minister or Board, it is both possible and necessary to require time frames legislatively as long as there are reasonable default options when deadlines cannot legitimately be met. . . . The intention is to ensure timely environmental decision making. . . .
>
> Legislated time limits cannot however be imposed on either the Minister or the EA Board for the final approval decision. In her covering letter to the Discussion Paper,[28] the Minister asked that the establishment of timeframes for EA Board hearings be considered. Constraining the Board in this way, however, is not feasible since the hearing process must meet the tests of natural justice and

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25 Since it was proclaimed in 1976, the *Environmental Assessment Act* has been an important vehicle for improved environmental decision making in Ontario. The principles of the EA Act are still sound — evaluation of potential environmental effects, consideration of alternatives, broad definition of the environment, documentation of the assessment, public and government consultation and review, and where warranted, review by an independent tribunal. The EA program has helped to broaden the way we approach environmental problems. In today's world it is no longer acceptable for decisions affecting the environment to be made without first critically and publicly considering alternatives and the full range of effects on the environment (ibid. Summary at 1)

26 Ibid. at 2 of Summary.

27 Ibid. at 5.

28 Ibid. at 16.

fairness. Instead, it is possible, and the Board is taking some steps, to make the internal workings of the hearings more efficient.[29]

EAAC did encourage the Board to impose hearing time limits:

> However, the Board should attempt to establish time limits on each hearing as a whole on a case by case basis, and on parts of each hearing. Some time limits for parts of hearings might be established as general rules for all hearings; others may need to be set on a case by case basis. The Board should be given clear statutory authority to set, on a case by case basis, time limits on parts of hearings, and if possible on whole hearings.[30]

With respect to the scoping of issues to be aired at hearings, EAAC's report contained the following comments:

> To save additional unnecessary hearing time, the [EAPIP] Task Force recommended that the EA Board have the authority "to scope the issues and areas to be addressed in an approval hearing." Some submitters stated that the parties to a hearing should be allowed to present fully their cases in the way that they deem best, and that therefore the Board should not be allowed to scope the hearing without the consent of all parties. The Committee believes, however, that since the Board has the responsibility for the approval decision, it is best able, and should be allowed, to determine what issues and areas it needs to hear to make an informed and wise decision. The Committee is also convinced that the Board will be sensitive to arguments by the parties during discussions on scoping. The Board should, however, be obligated to hear representations from the parties before making a scoping ruling.[31]

As will be discussed later, the issue of providing reasons for decisions is relevant and important with respect to deadlines and issue scoping. EAAC recommended that revisions to the Act "require that all decisions of the Minister, Board and Director are accompanied by written reasons."[32] Its reasons for this position are expressed in the following excerpt from the report:

> In order to ensure accountability to the public and proponents, all decisions, including decisions on hearing requests, should be accompanied by written reasons. Providing reasons will also assist participants in future EAs to understand EA requirements.[33]

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29 *Supra* note 16, 1990 EAPIP report.

30 Ibid. at 81-82. Recommendation #25 includes the following statement: "The EA Board should implement measures to make its hearing process more efficient. This should include the setting of time limits for hearings and parts of hearings . . ." (at 84).

31 Ibid. at 82. Recommendation #25 also states that efficiency measures to be implemented by the EAB should include "scoping of issues and areas to be addressed in the hearing" (at 84).

32 Ibid. at Recommendation #14, at 68.

33 Ibid. at 68.

The provincial government's response[34] to EAAC's report adopted administrative changes but not legislative reform. It articulated hearing reform goals[35] and listed the various initiatives undertaken by the EAB to achieve these goals, such as "eliciting, at preliminary hearings, good estimates of hearing time required and holding hearing parties to those estimates" and "using preliminary hearings to clearly define issues in contention so that evidence and argument can be confined to those issues."[36] It did not discuss the imposition of issue scoping or time limits. With respect to providing reasons for decisions, the response states that "information considered and the reasons for decisions made by the Minister will be provided to improve the openness and fairness of the process."[37]

The Board continued to expand its efforts to control the length of hearings in EAA cases as well as in other matters.[38] For example, in some cases it established general caps on time spent examining witnesses.[39] In the *West Northumberland Area Landfill, Re* hearing[40] the hearing panel commented at the opening of the first day of preliminary hearings[41] that the eight previous EAA landfill hearings had lasted from 59 to 269 hearing days, with the average being 103 days (excluding the two longest hearings from the average). The joint board indicated that it would attempt to contain the length of the main hearing to 30 days or less. After further

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34 *Environmental Assessment Reform — A Report on Improvements in Program Administration*, Ministry of Environment and Energy, July 1993.

35 The three stated goals were the reduction of average length of hearing process from 20 to 10 months, reduction of average hearing length from 12 to six months, and the rendering of decisions within 90 days of the end of hearings (ibid. at 17 of report).

36 Ibid. at 17.

37 Ibid. at 18.

38 In *ICI Canada Inc.* (file CH-95-02), a proceeding involving the *Ontario Water Resources Act* (OWRA), the joint board refused to proceed to the main hearing with an unfocused issues list and a time estimate of 20 hearing days from the parties; in the pre-hearing process the panel set a preliminary objective of five hearing days. Three days of preliminary hearings were consequently held, in addition to two facilitation sessions conducted by EAB staff and non-panel EAB members. Before the main hearing commenced in the Spring of 1996, the panel had secured the parties' agreement to six hearing days, inclusive of a site visit and a day of final submissions. The breakdown of time for each day during the schedule, and allocation of time among the parties, was pre-arranged by agreement. The schedule was adhered to and the hearing finished on time.

39 The 30/90 model would allow up to 30 minutes for direct examination and 90 minutes for cross-examination, and precludes "multiple" (more than one cross-examination on the same issue) or "friendly" (cross-examination by parties not opposed in interest) cross-examinations.

40 A joint board hearing (file CH-94-02) involving an environmental assessment under the EAA of a proposed new landfill.

41 (September 13, 1994), Doc. CH-94-02(F) (Ont. Joint Bd.)

preliminary proceedings, the panel conducted a Phase 1 preview hearing lasting two days, in which it examined a lengthy list of issues which the parties had previously identified as potentially problematic for the success of the proponent at a full hearing. The joint board reviewed documentary evidence (much of it in affidavit form) which the parties pre-filed, heard oral submissions, and then issued rulings which led to an early withdrawal of the proponent's application.[42]

In the first substantial revision to its procedural rules undertaken in many years, which was released in April 1996, the Board included specific provisions regarding scoping of issues,[43] time limits on hearing length[44] and time limits on oral evidence.[45] In its scoping exercises, the Board in some cases had already begun to ask parties to provide more information to explain and defend issues they sought to raise at the hearing. They were directed to submit the following type of information:

- a specific and concise description of the problem;

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42 This was the last EAA hearing to conclude before the Adams Mine and Quinte applications were referred to the Board at the end of 1997.

43 Rule 5.1(1)(b) of the EAB's *Rules of Procedure* (1996) provided that one of the purposes of the preliminary hearing is "identifying, defining and scoping issues." Rule 5.11(2) stated that pre-hearing conferences could be conducted to deal with any matter including:
(a) the scope of parties' participation in the hearing;
(b) simplification or settlement of issues;
(c) establishing facts or evidence that may be agreed on; . . .
(f) other matters that may assist in the just and most expeditious disposition of the proceeding.

44 Rule 7.14: "After considering any submissions from the parties, the Board may set limits, in advance of or during a hearing, governing the length of the hearing and the time required for each component of the hearing, including opening and closing submissions, examinations (including direct evidence, cross-examination and re-examination) of witnesses and site visits."

45 Rule 10.4 contained provisions such as limits on friendly and multiple cross-examinations, which were, to the knowledge of the Board, without precedent elsewhere in rules of practice in courts or tribunals in Ontario:
(1) No oral evidence shall be introduced concerning issues that have been resolved or conditions of approval upon which agreement has been reached, unless the Board orders otherwise. The Board may receive and act on any agreed facts and opinions without proof or evidence.
(2) If a witness statement has been produced, direct examination of the witness, if any, shall be limited to a review of the most important points in the witness statement.
(3) After considering any submissions from the parties, the board may provide time limits on direct evidence, cross-examination and re-examination, and restrict or prohibit "friendly" cross-examination (cross-examination by a party unopposed to the interests of the party calling a witness) and multiple cross-examinations (cross-examination covering an area already dealt with in a previous cross-examination of the same witness by a different party).

- whether it is a substantial concern which must be dealt with by calling evidence at the hearing, in addition to the filing of documentation;
- how the problem can be corrected or avoided (if applicable);
- what steps should be taken to deal with the problem;
- how the issue is related to the decision(s) the board must make at the end of the hearing.[46]

When Bill 76, containing amendments to the EAA, was introduced in June 1996[47] the issue scoping[48] and deadline powers generated debate in the Legislature and elsewhere.[49] A brief from the Canadian Environmental Law Association to the legislative committee reviewing the pro-

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46 From procedural directions issued by the Board in a memorandum to the parties on July 21, 1995 in *ICI Canada Inc.* (*supra* note 38).

47 During her introductory remarks about Bill 76 on June 13, 1996 the Environment Minister, Brenda Elliott, stated:

> A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, the role of the Environmental Assessment Board as an independent decision-maker.
>
> These amendments will ensure high-quality environmental protection while making it easier for people to participate in the decision-making process. (Hansard at 3529)

The following excerpt is from an information bulletin regarding the amendments, issued at the same time by the Ministry:

> During 20 years of experience with the environmental assessment process, a number of issues have arisen on a consistent basis. The primary problems with the current process, particularly as it applies to individual EAs for projects like waste disposal sites, are threefold: it can take too long, it can cost too much, and the results can be unpredictable.

48 Bill 76 initially allowed for an EAB panel to request the Minister to change her scoping order. The following provisions contained in the Act when it was introduced, were changed before 3rd reading:

> 9(3) The Minister may direct the Board to hear testimony concerning only those matters that the Minister specifies, and the Board shall do so. The Minister may amend a direction to the Board at the Board's request or on the Minister's initiative.
>
> (4) A direction by the Minister does not preclude the Board from hearing argument by the parties on any issue relating to the application.

49 The *Staff Report Prepared for the Environmental Commissioner of Ontario* (August 2000) notes the concern raised by that agency, in the context of the *Environmental Bill of Rights, 1993*, about the lack of public consultation in general surrounding Bill 76:

> In our 1996 annual report and other publications, the [Environmental Commissioner of Ontario] noted that this initiative on Environmental Assessment reform should have been subject to the type of expanded consultation on new laws that most members of the public in Ontario expect. These consultations typically involve the release of a discussion paper outlining policy options. Feedback from concerned stakeholders often is then incorporated into the final proposals for a new law. These steps were not followed in the case of Bill 76 (at 12).

posed amendments observed that these new powers would allow "th Minister to greatly constrain the scope of EA hearings by dictating th length of the hearing, and by directing what testimony and matters can b heard by the Board."[50] It pointed to recently revised EAB rules of practic which significantly enhanced "the Board's ability to: scope, narrow o settle issues in dispute; limit hearing length; limit evidence-in-chief; anc limit cross-examination," and it recommended that these proposed new ministerial powers be deleted "in order to maintain the independence and integrity of the EA hearing."[51]

The Canadian Institute for Environmental Law and Policy (CIELAP) submitted a brief[52] which, among other things, also objected to the grant of these powers to the Minister.[53] With respect to ministerial scoping, it observed:

> The concept of the Minister limiting the scope of Board hearings raises serious issues of procedural fairness. It seems likely to invite applications for judicial reviews of Board decisions on the basis that the Board was prevented by a ministerial direction from hearing critical evidence.[54]

Similar concerns were expressed with respect to the deadline power. The brief warned that the Board could be "prevented from fully hearing and interpreting critical evidence due to the limited time provided by the Minister."[55]

Submissions on behalf of two coalitions[56] before the Standing Com-

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50 *Submissions of the Canadian Environmental Law Association to the Standing Committee on Social Development re Bill 76*, July 1996, at 31.

51 Ibid. at 32.

52 *Brief to the Standing Committee on Social Development Re: Bill 76*, August 1996.

53 Two of CIELAP's general concerns about the Bill are described below:

> [T]he scope of the environmental assessment process would be significantly narrowed. Indeed, the process could cease to be an environmental planning process. Rather, there would be a focus on the review of the immediate and direct environmental impacts of proposed undertakings. Issues related to the need for undertakings, and the availability of less environmentally harmful alternatives, seem likely to be removed from the process.
>
> Furthermore, the Bill would grant the Minister of Environment and Energy a great deal of discretion over the application of the environmental assessment process, the content and scope of environmental assessments, the granting of public hearings regarding undertakings, and the content of such hearings if granted. This raises the possibility of less consistency in the application of the Act and in the treatment of individual undertakings than is currently the case. (ibid. at 1)

54 Ibid. at 8. The warning about judicial review came to pass in the Adams Mine case.

55 Ibid. at 9.

56 The first group, Citizens Network on Waste Management, is a "loose network of citizens' groups across the province who have been working for years on waste issues" (Hansard, August 12, 1996 at S-679-680). The second, Great Lakes United, is a "coalition of

mittee on Social Development were critical of some aspects of Bill 76[57] and maintained that issue scoping by the Minister could result in the hearing being "much less significant and a much less serious canvassing of the issues."[58] Instead, scoping by the Board in conjunction with the parties was proposed.[59]

On the other hand, the executive director of the Ontario Waste Management Association "told the committee that if the proposed bill were not amended to give the minister more authority to limit the scope of environmental hearings, private waste operators would not apply to create new landfills and the effect would be to chase waste disposal to the United States."[60]

When third reading of Bill 76 was debated in the Legislature[61] opposition members expressed, among other things, the following concerns:

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citizens' groups, environmental groups and labour groups from Canada, the U.S. and the First Nations." Their spokesperson was John Jackson, an environmentalist, consultant and former member of the Ontario Environmental Appeal Board.

57 One concern raised by other critics as well, though not directly relevant to this article, is that the initial scoping out of issues by the terms of reference approved by the Minister, could result in the need for and alternatives to the undertaking never being canvassed: "that could be scoped out right at the beginning stages, before any discussion begins, before any studies are carried out" (at S-680). Mr. Jackson went on to state that these basic EA issues could, of course, also be scoped out of a Board hearing by the Minister. Another issue he focused on was increasing Ministerial discretion:

> I'm seeing more discretion coming to the Minister and the civil service through this proposed legislation. I'm seeing a weakening public role, with funding gone to help citizens' groups to play a serious role in the job ....
>
> The overall effect that I fear we are going to have from this in terms of waste management decision-making is less predictability, not more, and secondly, more conflict and more confrontation, because as people lose the confidence and the ability to use the environmental assessment planning process to achieve the goals that we all share, they'll then start looking for other avenues to try to deal with it, either trying to block things through the courts if they can afford it or through demonstrations or whatever. I know none of us want to go in that direction. (ibid. at S-682)

58 Ibid. at S-680.

59 Mr. Jackson, at S-681 of Hansard:

> However, again, there needs to be a public process of the scoping of what the topics of the hearing will be, rather than it simply happening in the Minister's office or in some bureaucrat's office. Again, I think the Environmental Assessment Board is beginning to set up processes to scope hearings before they begin, and I think that's working well. It's only starting. But I think that's the way you scope: where all the parties are sitting at the table and say, "Yes, let's take these topics off the table; let's limit the amount of time we spend on this topic." That makes a hearing much more efficient and work much better.

60 Terry Taylor quoted in an article by James Rusk, *Globe & Mail* newspaper, August 8, 1996.

61 October 31 and November 4, 1996.

- the Minister would have sole discretion over "designating which issues can be sent to the [EAB], and the time allotment for board review";[62]
- the amendments would remove far too many powers from the EAB and grant "the minister sweeping discretionary powers over environmentally significant projects";[63]
- the power to approve terms of reference, along with the issue scoping power, can be used to influence whether an undertaking is approved;
- the deadline power over the EAB, together with the substantial elimination of Ministry staff, will result in "very shoddy decisions."[64]

Government members, on the other hand, emphasized the streamlining function of the amendments.[65]

Within days of passage, the Director of the Environmental Assessment Branch of the Ministry[66] informed lawyers that only outstanding contentious issues would be sent to the Board for hearing.[67] This view

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62 MPP Jim Bradley on October 31, 1996. He indicated that under the Act before Bill 76 new issues could be "raised by the public at any time during the current EA process" due to the fact that "sometimes people don't think of a situation or a problem until well into the process."

63 Ibid.

64 Mr. Gilles Bisson in Hansard on November 4, 1996.

65 MPP Ted Arnott in Hansard on November 4, 1996:

> I want to say most emphatically that the implementation of this legislation will be shaped by one overriding principle: the need to protect the environment. That's the reason for the *Environmental Assessment Act* and for the reforms that we're proposing.... If hearings are required, the minister will be able to focus the discussion on specific outstanding issues. This should prevent delays due to endless rehashing of issues which may have already seen some level of resolution. The board's time will be used to facilitate decision-making only with regard to truly significant matters.

He also stated that the new amendments would require "written reasons for most decisions by the minister." MPP Doug Galt, Parliamentary Secretary to the Environment Minister, stated:

> Strict time frames will be adhered to for all key steps in the decision-making process. A full environmental assessment will still be required, and the key elements of environmental assessment are maintained, including the broad definition of environment, the examination of alternatives and the Environmental Assessment Board as an independent decision-maker.

66 The Environmental Assessment Branch and the Approvals Branch have since been merged into one department. For simplicity this article will refer to the EA Branch even where it might be identifying the EA work of the combined department.

67 Chuck Pautler, speaking on November 7, 1996 at a meeting of the Environmental Section of the Canadian Bar Association, Ontario Branch.

was echoed by a Ministry bulletin published shortly thereafter.[68] The EAB's advisory committee[69] promptly developed a recommendation to ensure consultation with Board and parties before hearing directions are given by the Minister with respect to time limits. It was considered important for potential parties to have some input into a decision concerning how long the hearing will take. The challenge was to find a way to allow the Minister to maintain control over the time frames for decision-making, but also provide her with better information upon which to make that decision.

It proposed a two-stage referral process in which the Minister could require the Board to determine, probably at a preliminary hearing, the granting of party status, the issues of concern requiring adjudication, the evidence to be provided, and the time frames required, and to report back within a specified period with recommendations. This approach would permit the Board to give informed advice and suggest deadlines considered to be achievable. In the committee's view the process would be fairer and more transparent, the Minister's decision less arbitrary, and the Board's independence and neutrality more apparent.

Alternatively, in cases where the issues are quite clear, there is unlikely to be any need for a preliminary hearing and no new parties will be involved, the EAB advisory committee proposed that the EA Branch could consult directly with the parties about the time frames required for hearing. Although this approach would not have the same advantages as the Board consulting with the parties, it might save time after the hearing referral has been made.

The approach which the Minister would take was subsequently revealed when two EA matters, the first since the EAA was revised, were referred to the Board for hearing.

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68 From "In Brief," January 1997:

> The public's right to request a hearing remains an integral part of the Act. No one wants unnecessary or lengthy hearings. When a hearing is in the public interest, the Act allows the Minister to focus the hearing to outstanding, environmentally contentious issues only and to set a timeframe for the Board to report its decision.
>
> If hearings are required, concentrating on specific outstanding issues only will prevent the rehashing of issues which have already been resolved. The Minister's power to scope issues will reduce the time and money spent on hearings. Post-hearing cost awards will continue to be available where the EA Board considers them warranted.

69 This committee consisted of a few EAB members and staff, private and public sector environmental lawyers (from the provincial and municipal level), consultants, an environmentalist, a community organizer and a First Nations representative.

3. ADAMS MINE LANDFILL HEARING

(a) Case History

In late 1997 the Minister referred to the EAB for hearing, pursuant to s. 9.2 of the EAA, one issue related to the Adams Mine environmental assessment application,[70] namely the effectiveness of the proposed hydraulic containment design for leachate containment and collection.[71] Included in the referral documentation was a notice, signed by the Minister, setting out four questions related to hydraulic containment, and imposing a deadline of the end of May (approximately 5.5 months hence) for the Board to conduct a hearing and submit its decision. It also indicated that the Minister intended, subject to the agreement of Cabinet, to approve the undertaking.[72] There had been no prior consultation with the Board about the scoping or deadline decisions by the Minister in the referral. Nor had there been any consultation with prospective parties.[73]

Few reasons were given by the Minister in this documentation to explain his decision to refer only one issue to the Board. No explanation was given as to the purpose or need behind the very short deadline. In a letter sent to counsel for the Adams Mine Intervention Coalition on the same date as the referral, the Minister explained:

> . . . I have determined that a hearing is in the public interest with respect to the effectiveness of a specific aspect of the proponent's landfill design, specifically the method proposed for leachate containment and collection. at the Adams Mine site. My reasons for this determination are as follows:

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70 Adams Mine, near the Town of Kirkland Lake, is a former open pit iron mine (consisting of three decommissioned pits) located on a 1,500 hectare (ha) property owned by Notre Development Corporation, the proponent. The proposal was to dispose of 20 million tonnes of solid waste over 20 years, at the rate of 1 million tonnes per year, in the 27 ha (74 acre), 200m deep South Pit. The only waste source large enough to make the project viable was Toronto, some 600 km to the south. Transportation would be achieved by specially designed rail cars.

71 The letter of referral from the Minister of Environment to the EAB was dated December 16, 1997.

72 The approval would be governed by a set of draft conditions of approval which were appended to this notice.

73 Paragraph 9 of the judicial review factum filed in March 1999 by the Adams Mine Intervention Coalition (a party which opposed the undertaking) states:

> Prior to imposing this deadline, there is no evidence that the Minister consulted the Board or prospective parties as to how long it would take to hold a fair and full hearing on the four Questions.

- the effectiveness of the "hydraulic containment" design proposed for leachate containment and collection has not been demonstrated at a site in Ontario with the hydrogeological characteristics of the Adams Mine site;
- a review by the Environmental Assessment Board of the proposed "hydraulic containment" design as an effective solution for the containment and collection of leachate that will be generated at the Adams Mine site, will provide an opportunity for a public hearing to be held and a conclusion to be reached on the matters referred to the Board, after having considered the existing information provided by the proponent, and any other information relevant to those matters referred to the Board that may arise during the hearing; and
- the review agencies have confirmed that any remaining issues can be adequately and effectively addressed through the application of conditions of approval.

This was no ordinary EA referral to the Board. As the Minister noted in his letter, this was the first referral since the government had amended the Act the previous year.[74] In fact it was the first EA referral to the Board in a few years. Further, it involved a high profile potential destination for waste produced by Toronto, which has been searching for more than 10 years for a new long term waste disposal site. Previous processes adopted to approve the siting of new facilities for Toronto were harshly attacked for creating lower standards and special, less rigorous requirements.[75] Two previous elections had been fought with that controversial subject as one of the big issues in several ridings in the region surrounding Toronto.

The Adams Mine alternative raised perennial issues such as the appropriateness of one area exporting its garbage to another, the environmental aspects of long distance transport, the vulnerability of the local environment to a mega-landfill,[76] and the opposition of many people in local communities, particularly those downstream. Allegations as to po-

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74 Although the Adams Mine had been a high profile candidate for Toronto's garbage for many years, the proponent did not file its EA with the Ministry until December 1996, a few weeks after the Act was amended (the Board's Reasons for Decision at 4). The referral to the EAB by the Minister occurred less than two weeks after the Board Chair was abruptly replaced by a senior provincial government employee.

75 In the SWISC (Solid Waste Interim Steering Committee) process adopted by the Liberal government, three new area sites were granted EAA exemption and would be reviewed in separate *Environmental Protection Act* (EPA) Part V hearings. In the IWA (Interim Waste Authority) process subsequently established by the NDP government, the scope of the EAA hearings for three new area sites was altered by special legislation (*Waste Management Act, 1992*, S.O. 1992 c.1) enacted specifically to facilitate these hearings.

76 In the Legislative debates on November 4, 1996 and reported in Hansard, with respect to third reading of Bill 76, the legislation which amended the EAA (*Environmental Assessment and Consultation Improvement Act, 1996*), opposition MPP David Ramsay (Tim-

litical interference by the provincial government were raised by some critics.

The hearing process involved one day of preliminary hearing (February 24, 1998), a meeting of counsel (March 19), the issuance of procedural directions (March 19), 15 days of evidence and oral submissions (extending from March 23 to April 29), a site visit (March 25), the filing of written argument by the parties,[77] and the release of the Board's written decision (June 19). In a 2:1 split decision, the Board gave a qualified "yes" to the question posed as to whether the hydraulic containment design would be effective.[78]

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iskaming) stated:

> When it comes to the dumping of 39 million tonnes of garbage in a fractured rock pit 300 feet above the agricultural clay belt of Timiskaming, I don't care even what the best expert says today; it is not worth the risk, because in 20 or 30 years somebody's going to say: "I guess the system failed. We thought we could pump this leachate out for 100 or 200 years, but it looks like the leachate's gummed up the works here. We can't get down into the pit and properly repair the system that we had designed to the very best ability in 1996 or 1997." It is not worth the risk.

77 In addition to the proponent and the Ministry (which supported the application), the Board granted party status to the Adams Mine Intervention Coalition (representing a number of regional and local groups, and two individuals), and Beaverhouse First Nation. Participant status was granted to 12 individuals or organizations such as municipalities. In addition, 42 individuals came forward at the preliminary indicating that they wanted to give evidence to the Board. The Algonquin Nation Secretariat and the Timiskaming First Nation, through their counsel, wrote to the Minister on February 23, 1998 complaining about the narrow issue scoping and his "decision to hold only a partial hearing" thereby having "their specific interests and concerns excluded" from the hearing, and stated: "Due to the limitations you have imposed on the Environmental Assessment Board hearings, our clients have decided not to appear before these proceedings."

78 The majority's reasons include the following excerpt:

> With this criterion in mind [the purpose of the EAA], the Board, in the case of the groundwater levels in the deep borehole beneath the South Pit, felt constrained to apply the precautionary principle. The doubt arising from the alignment of opposing views leads the Board to a prudent conclusion — to be sure that the undertaking is safe, a way must be found through the EAA conditions to test the findings on groundwater levels in the first monitoring exercise in the single deep borehole. . . . When everything depends on engineering design and works, it better be right.
>
> Hence the Board's conclusion — "yes", if this landfill design dependent upon hydraulic containment can be kept environmentally viable and safe over a very long period of time by appropriate conditions of approval. (Reasons for Decision, *supra* note 7 at 31-2)

The majority on the panel consequently imposed a new condition (no. 10), requiring as a condition of proceeding with its application for a certificate of approval, that the proponent drill two additional deep angled boreholes under the South Pit, and that landfilling not begin until "the Director evaluates the results of the tests and determines, without reservation, that the recorded groundwater levels will sustain hydraulic containment in the South Pit such that the environment will be protected, during both pumping and gravity drainage phases" (at 37)

Even before the date of the preliminary hearing the hearing panel found it necessary to write to the Minister to clarify the scope of the issue which he had directed the Board to determine. The parties were not involved in, nor had they been consulted with respect to, this exchange. After the preliminary hearing the Board ("acting on behalf of the Parties"[79]) once again wrote to the Minister, this time to request an extension of the decision deadline by three weeks.

The impact of the two constraints imposed by the Minister was referred to by the panel majority in the following passage from the Board's Reasons for Decision:

> The nature of the Minister's referral: the defined scope of the matter before the Board and the obligation to meet a deadline, has affected both the hearing and decision-writing process. In both, there has been a striving for focus and a certain conciseness, without the sacrifice of essential information.[80]

There is another reference in the majority's decision which suggests that time limits might have played a factor in the amount of evidence that was receivable during the hearing.[81] The dissenting panel member also commented on the effect of the time limitation. For example, the discussion about the issue of financial assurance in his reasons concluded as follows:

The dissenting panel member did not feel that the proposed hydraulic containment design would be effective, based on concerns with the uncertainty and risk of a 1,000 year contaminating life span, possible failure of the drainage layer, inadequate monitoring, lack of design detail on contingency plans and the resulting lack of financial assurance information, and uncertain groundwater levels beneath the pit. He concluded:

> . . . I come to the conclusion that enough concerns have been raised that a proper exercise of the precautionary principle would lead us to say no to this project.
> Having regard to all of the above concerns it is my considered opinion the proponent has not fulfilled the onus placed on it to demonstrate the effectiveness of the proposed hydraulic containment design, consistent with the requirements of the *Environmental Assessment Act*. (at 53-54)

79 Ibid. at 6. The parties had expressed concern to the Board at the Preliminary Hearing with respect to the draft hearing schedule which the Board had proposed in order to meet the Minister's decision deadline (par. 15 of the judicial review factum of the Adams Mine Intervention Coalition).

80 Ibid. at 6.

81 In referring to argument on a motion about whether the issue of financial assurance was relevant, the majority's reasons indicate that Ministry counsel had stated that detailed costing evidence could not be pursued because of the "stringent timelines associated within this hearing" (ibid. at 13). The Board determined that the issue was relevant, but ruled that "this hearing with its particular terms of reference" is not "the forum for the consideration, the deliberation over detailed estimates, financial estimates related to financial assurance" (at 13). It later stated:

> We're not in a position in this forum . . . to get into a process where one set of figures will have to be challenged by another witness of another party. That will get us along a path that I don't think we can pursue in this forum. (at 14)

> Given the stringent timelines imposed on the hearing it was not practical to engage in a detailed costing exercise but I agree with Mr. Bowen [an opponent's expert witness] more financial information would have allowed the Board to better judge the effectiveness of the engineered works and contingencies that are an integral part of the hydraulic containment design.[82]

After the decision was released, the Adams Mine Intervention Coalition (an opponent of the proposal) appealed to the Minister, raising among other things concerns about time pressure and scoping.[83] However, by Order in Council he granted approval for the undertaking to proceed. The application for judicial review filed on behalf of the Coalition, alleged that a number of legal errors were made by the panel majority, including issues related to the time constraints imposed by the Minister[84] and concerns related to an appearance or apprehension of bias.[85]

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82 Ibid. at 53.

83 The petition to the Minister on behalf of the Adams Mine Intervention Coalition, dated July 8, 1998 alleged, among other things, that the Minister's scoping "swept virtually every other contentious issue — need, alternatives, 3R's, landfill gas, leachate treatment, socio-economic impacts, etc. — off the table" (at 5). It also states that the evidence regarding a number of concerns was "either glossed over or completely ignored by the Board majority in the apparent rush to meet the unrealistic decision deadline" (at 8).

84 Paragraph 2(i)(vi) of the Notice of Application for Judicial Review claimed that "on the basis of hearing constraints, the Board permitted only limited economic evidence respecting financial assurance for the proposed landfill, despite ruling that it had jurisdiction to receive such evidence, and therefore the Board could not properly answer the four Questions referred to the Board." In par. 2(j)(v) the Coalition alleged that "the Board erred in excluding relevant financial evidence and otherwise rushing the hearing in order to meet the Minister's unreasonable decision deadline, particularly where there are no legal consequences for missing the Minister's deadline, and where there were no urgent or emergency circumstances." Par. 55 of the factum stated:

> The Board has no jurisdiction to refuse to hear relevant evidence for reasons of administrative efficiency. If the evidence is relevant and admissible, then it should be heard and considered by the Board in order to properly adjudicate the matters before it.

Par. 343(iv) of the Coalition's factum alleged that the Board breached the rules of natural justice and principles of fairness by "rushing the hearing in order to meet the Minister's decision deadline" (at 15). Par. 56 stated that "the Board fettered its discretion, lost jurisdiction, and prejudiced the right to a fair hearing" because it "unduly restricted the ability of parties to present their case (i.e. by excluding detailed costing evidence) due to the Board's rigid observance of hearing length constraints imposed by the Minister" (at 25). It also maintained that "neither the Minister nor the Board is free to limit the length of EA Act hearings for policy or other reasons if such limits conflict with natural justice requirements." Par. 57: "If fairness requirements meant that a longer or more complex hearing was needed, then such a hearing ought to have been provided by the Board, even if the Board or the Minister had originally contemplated (or desired) a shorter hearing."

85 Paragraph 54 of the Coalition's factum relied on the fact that "the Minister has already indicated, prior to the hearing, that he intended to approve the undertaking for matters not referred to the Board" (at 23), as part of its objection to the Board's delegating to the Director the task of assessing the additional borehole testing. The Divisional Court found

In a very brief decision the Divisional Court dismissed the application.[86] With respect to issues such as time constraint and narrow scope of the hearing, the court said little more than that they were "without merit."[87] The court characterized the Board's decision as "a response to certain specific questions posed by the Minister, not a final determination of an application under the EAA for approval."[88] The scoped referral to the Board was apparently viewed by the court as more of a request for the Board's opinion or recommendation than a decision-making exercise.[89] Leave to appeal to the Ontario Court of Appeal, which included this issue amongst others, was subsequently refused.[90]

(b) Analysis

The criticism which has been leveled at the Minister's issue scoping and deadline decision in this proceeding echoes some of the concerns raised by EAAC's 1991 report, and again when Bill 76 was debated in 1996. Comments from those interviewed were generally though not unanimously critical.[91] The concerns raised which were case-specific are summarized, and in some instances reproduced below. In addition, some of these issues surfaced during the public debates that raged in the media during the past year while the City of Toronto continued to investigate and debate whether to ship its enormous quantity of domestic waste to this site.

(1) The outcome of the process, namely approval of the undertaking, was "never in much doubt." Neither the scoping nor the deadline seemed reasonable. It appeared to be "out of all proportion" to the scale of issues surrounding the nature and size of this undertaking. The proposed landfill is enormous, one of the biggest in Ontario history, and combined with its novel hydraulic containment design and lengthy contaminating life span (1,000 years), experts agreed

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no basis for this complaint.

86 *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)*, 30 C.E.L.R. (N.S.) 99, 1999 CarswellOnt 2193 (Ont. Div. Ct.).

87 Ibid. at 100.

88 Ibid. at 101.

89 But note that s. 9.2(1) of the Act provides that a part, rather than all, of the application can be referred to the Board "for hearing and decision."

90 This decision was made without any reasons, on October 14, 1999.

91 Some of the respondents who privately expressed criticism were not necessarily calling for a change in policy or legislation, recognizing that this might not advance the interests of their clients or the sectors they represent.

that the proposal is unprecedented in Ontario. The effectiveness of the hydraulic containment design has never been demonstrated in Ontario at a site with these hydrogeological characteristics. The consequences of approval are huge, and policy issues such as long distance transport, recycling, and the thousand year contaminating life span (the Ministry, by comparison, has been in existence for about 30 years) are considerable.

(2) The *Halton* joint board hearing (file CH-86-02) took 180 days, and *Steetley*[92] lasted 140 days, with most of the time spent in each proceeding being focused on hydrogeology. Yet the Board's schedule in this case allowed just two weeks for the same topic.

(3) Neither the Minister nor the Ministry has provided an adequate explanation to opponents as to why the hearing was scoped so severely.

(4) No explanation was ever given by the Ministry to the opponents for the very short deadline. After years in the planning and discussion stage, the hearing by contrast appeared to be a "very rushed process." Even the three week extension of the deadline was perceived to be inadequate by most parties. The schedule set by the Board was "brutal," with hearing days often beginning first thing in the morning and ending late in the evening.

(5) Opponents felt that the Minister was "ramming" the undertaking through a hearing. Some suspected the Minister might have feared that a longer hearing would result in more opposition being generated to the undertaking.

(6) In addition to the parties, the compacted schedule and fast pace appeared to be difficult for panel members as well. At times some or all of the Board members did not appear to have sufficient opportunity to prepare, and it appeared that they would have liked more time. Some wondered why the Board was so concerned about meeting the deadline, in view of the fact that there are no apparent consequences in the legislation for a late decision.

(7) The short deadline was exacerbated by what the opponents perceived as the proponent's pattern of "shoveling" huge amounts of material,

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92 *Quarry Products Inc. (Steetley), Re*, 16 C.E.L.R. (N.S.) 161, 1995 CarswellOnt 68 (Ont. Joint Bd.), additional reasons at 19 C.E.L.R. (N.S.) 212, 1995 CarswellOnt 1447 (Ont. Joint Bd.).

much of it not particularly important or relevant, at the Board prior to and during the hearing. This "overwhelmed" the opponents, provided little time for them to respond, and left the Board with an enormous record to wade through when making its decision.

(8) Although a short hearing was "more merciful" for opponents, who were without the aid of intervenor funding (the proponent did agree to advance money to pay the fees of Dr. Bowen, the Coalition's expert witness), the "rushed" nature of the hearing caused it to be more demanding for them because they and their advisors had to drop other gainful activities to keep up with the very fast pace that had been set by the Board. Given the quick tempo there was little opportunity to seek interim costs.

(9) Without the benefit of adequate funding, opponents might have considered requesting the Board to appoint experts to attend and testify on certain matters.[93] But the short hearing schedule made that option impossible to pursue.

(10) Given that the Minister is required by the Act to give reasons for approving or rejecting an EA, or requiring conditions of approval, it was surprising to some that he gave no reasons to explain the deadline decision and very scant reasons to justify a significant scoping decision.

(11) The Board could never have completed the hearing in the allotted time had the parties not cooperated extensively and made enormous effort to accommodate the time constraints. Opponents felt that they would not have been allowed to participate in the hearing had they not agreed to commit to a "rigid" schedule.

(12) Informing the Board about the Minister's intention to approve the EA application (although this advice is required by amendments made to the Act) created an apprehension of bias, an appearance that the panel might have lost its independence. It seemed to some respondents that the panel had been put "under pressure" by this statement of intention, that it was indirectly being signalled by the Minister (the person who plays a big role in Board members being appointed and reappointed) as to how to decide the matter referred to it.

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93 Pursuant to s. 18(10) of the EAA expert advisors may be appointed by the Board to inquire into, report on and assist with any matter in any capacity.

(13) As a result of the degree of scoping, the hearing was even narrower in focus than one which would ordinarily be conducted under Part V of the *Environmental Protection Act* (EPA). For example, the large and controversial issues of leachate treatment, long-range transportation impacts and waste diversion were never addressed at the hearing. These issues had up until this time been a large part of the debate with respect to the undertaking. The Board was even unable to deal with the fundamental matter of cumulative effects. To make matters worse the EPA's requirement of a mandatory hearing was regarded by the government as inapplicable since an EAA hearing had been held.

(14) The Board allowed the proponent to lead some evidence on leachate treatment because it apparently wanted to know more about this subject, despite the fact that it was outside the purview of the hearing. It appeared to some that the panel was having difficulty with the fragmentation resulting from the issue scoping order.

(15) The hearing did not even remotely resemble a review of alternatives to, alternative methods and rationale, yet opponents maintain that they had been earlier promised that the whole EA would be examined at a hearing. The hearing appeared more like one in which the undertaking had been exempted from the application of the Act.[94]

(16) Opponents advised the Minister in advance of his scoping and deadline decisions that they would like the opportunity to discuss such matters beforehand if the Minister was considering making such orders; he did not respond.

(17) At the public evening sessions people were allowed by the Board to address the wide array of concerns which were connected with the undertaking, both for and against approval, and which they felt strongly about. Some of them expressed concern about the scoping down of the hearing. They would have been angered had they not been allowed to present these concerns to the Board, yet most of it was beyond the Board's limited decision framework. The opportunity for public testimony was therefore seen by many as little more than a public relations exercise.

(18) The Board allowed and seemed quite interested in evidence led on aboriginal history and the First Nation's unique relationship to the

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94 EAA s. 3.2.

land, yet constitutional issues advanced by Beaverhouse First Nation were rejected by the panel at the preliminary hearing.

(19) The hearing was "politicized" and "tarnished" by the Minister's scoping and deadline decisions.

(20) The credibility of the Board was harmed as a result. It appeared that it was being forced to conduct the hearing in a manner that it would not have otherwise considered following.

(21) The opponents were disillusioned not only with the majority's decision on the merits, but also by the scoped and rushed process that was followed.

(22) The Reasons for Decision issued by the hearing panel demonstrated that the Board had been "rushing" to meet the deadline. The majority's decision was described as "skimpy" and "one-sided." Some felt that it listed only that portion of the evidence which supported the decision.

4. QUINTE SANITATION LANDFILL HEARING

(a) Case History

On the same day as the *Adams Mine* referral, the Minister signed a notice requiring a hearing into the Quinte Sanitation Landfill EA. However, in this case no matters were scoped out by the Minister and the entire application was left to the Board to handle in its own way. A deadline of almost one year was imposed on the Board to conduct a hearing and file its decision. No reason was given for the deadline and there does not appear to have been any prior consultation with the Board or the parties with respect to it. Nor has the Ministry subsequently provided any explanation for the deadline. After *Adams Mine*, this case is the second and only other EA referral to hearing under the amended legislation, to my knowledge.

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95 The Quinte Sanitation Landfill, located in the City of Quinte West, is an old site which was operated from 1972 to 1987 by Quinte Sanitation Services Limited. The proponent of this EA, Fibre Environmental and Ecology Limited, sought approval to re-open, remediate and expand the former landfill and to dispose of an additional 10 to 12 million tonnes of solid, non-hazardous, industrial, commercial and institutional waste, and municipal waste, as well as to mine 500,000 tonnes of waste already buried at the site. The amount of waste for this expansion would be enormous by comparison with other landfills, and capable of serving a very large population and geographic area. It was described by

The hearing process in *Quinte*[95] involved two days of preliminary hearings,[96] the issuance of procedural directions and several procedural orders, and 23 hearing days in the main hearing. The hearing was divided into three phases (EAA requirements, bird strike hazards at Canadian Forces Base Trenton, and any other matters), and evidence ended after four days of hearings in Phase II. At that time the proponent elected to discontinue with the hearing.[97] Motions were brought by three opponents[98] for summary determination, as well as for costs thrown away. The proponent advised soon after that it was withdrawing its application. Submissions were heard and the Board's decision was rendered terminating the hearing and awarding costs thrown away. Further costs applications were argued and determined in 1999.

Some unexpected events occurred during the hearing which had the potential to affect the time available for the Board to render a decision before the deadline set by the Minister. The proponent's lawyers withdrew from the hearing in July, necessitating an adjournment to allow time for new counsel to be arranged. The new lawyer acted for a short time and then withdrew in August. This resulted in a further adjournment at the proponent's request. Had the hearing proceeded to Phase III, there was a serious concern that the Board might have encountered a problem meeting the deadline. As it is, the decision was issued just three days short of the time limit.

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one counsel as ranking among the five biggest landfills in the province, larger than the Halton landfill and half the size of Toronto's Keele Valley site. Its service area would be Southern Ontario but exclude Toronto.

96 In addition to the proponent and the Ministry, which supported the application, the Board granted party status to the Department of National Defense (DND), a residents' group named People Opposed to Garbage from Ontario (POGO), the City of Quinte West and an individual resident, J.H.A. Lassing.

97 The hearing did not go well for the proponent or the Ministry. The primary rationale for the undertaking, that the old landfill was leaking leachate and needed to be remediated to prevent a serious environmental problem, fell apart as the hearing progressed. The Board heard evidence indicating that the site was not leaking and did not require remediation. Although the Ministry had documentation and staff opinions to this effect in its possession, it was not disclosed to the opposing parties until after the hearing had commenced. The Government Review did not disclose or reflect this fact. It was revealed in the hearing during vigorous cross-examination of Ministry witnesses.

The site was dangerously close (1.8 km) to the military airport at C.F.B. Trenton, and less than the minimum distance required by provincial and federal standards (8 km). Once DND accepted during the hearing that the site did not need remediating, it no longer had any reason to try to support the undertaking and it took a firm stand in opposing it.

98 POGO, the City and DND.

(b) Analysis

Comments from those surveyed revealed no criticism of the one year deadline or the Minister's decision to leave issue scoping entirely with the Board. Case-specific responses are summarized below:

(1) The deadline constituted a positive and useful constraint, in that it put pressure on the parties to organize themselves and their cases more efficiently. The time limit by itself imposed additional discipline on the parties. There was little "wheel-spinning" as has occurred at some other hearings. As a result, counsel did not appear to be attempting to address every single matter, however small.

(2) The panel chair appeared to be setting targets for each phase of the hearing, rather than rigid limits. This flexible approach was considered quite reasonable and effective. The Board did an excellent job of keeping the hearing moving along and controlling the process.

(3) It would have been helpful to know the reason why the Minister imposed this deadline.

(4) None of the parties to the hearing complained that the deadline was unfair or unreasonable. However one lawyer not only lost the opportunity for any summer holidays (the first summer missed in a long time) because of the pace of the hearing, but he also had to retain an assistant to help him with some of the preparation that he would have undertaken himself had the hearing schedule allowed him more time.

(5) If the proponent had been well financed and capable of presenting a thorough case at the hearing, there would have been a problem meeting the Minister's deadline. Towards the end of the hearing there was an "air of unreality" about the deadline, which seemed to be apparent to the Board as well.

(6) In accordance with the Regulations there would probably never have been an EPA Part V hearing into the environmental details and effects of the undertaking. According to one counsel, this was the first full EAA landfill hearing without an EPA component; in the past all other matters proceeded before joint boards under the *Consolidated Hearings Act.* Opponents were planning to use Phase III of this hearing for an examination of environmental impacts, and this could have required a considerable amount of time.

(7) Compared to *Adams Mine* with its six month deadline, this case

involved numerous issues, most of them contentious. In that light, the allowance of a one year time frame was not considered to be generous.

(8) If the Minister had scoped the hearing relying on the advice of Ministry EA Branch staff and the Government Review, the issues of need (i.e. remediation of the site) and airport safety, which became critically important during the hearing, might not have even been referred for hearing.[99]

5. DISCUSSION

The advantages and disadvantages of ministerial scoping and deadlines for hearings have been the subject of comment and discussion in reports and studies, legislative debate and committee proceedings (and were reviewed above in section 2). However the ideas, opinions and concerns expressed at that time were not based on exposure to the exercise of these powers in real cases. Now we have accumulated a measure of actual experience upon which to reflect further and do some reality-testing.

In terms of issue scoping and deadline setting by the Minister, the hearings in *Adams Mine* and *Quinte* had little in common. As can be seen from the previous two sections of this article, they are more like opposites in some respects. Yet it is clear from observing what transpired in those cases that the imposition of ministerial scoping and deadlines can each have a significant impact on the hearing process. In tandem their effect can be enormous. Although these cases constitute a very small sample (they are, unfortunately, the only EA cases which have been referred to the Board or Tribunal since the Act was amended) they have nevertheless provided an opportunity to consider how these new ministerial powers have been utilized, the themes that have emerged from the experience, and their significance.

They also created an opportunity to benefit from the critical views of lawyers and others knowledgeable about tribunals, the EA process and environmental protection, who have now had the benefit of experiencing a hearing in which one or both of these new powers has been exercised. A number of concerns of a general nature have surfaced and have been

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99 For example, issues like need, alternatives and site selection were accepted by the Government Review in Adams Mine and scoped completely out of that hearing by the Minister.

grouped into the following categories: purpose and nature of the Board/Tribunal, independence, role of the Minister, transparency, and exercise of discretion. They are discussed synoptically below. The last part of this section will then focus more directly on the two powers.

(a) Purpose and Nature of the Board/Tribunal

For the most part the Board has always functioned as an independent (i.e. separated from the political and administrative arms of government), quasi-judicial agency.[100] Like other tribunals, the government and public have looked to it for specialized knowledge, a fair and open adjudicatory process, independence from government and political pressure, and informed and reasoned decisions. It is expected that decisions will above all else protect the environment, and as well be credible (and therefore acceptable) to the parties and others affected by the outcome. Some have viewed the Board as an environmental watchdog.[101] As indicated earlier, EAAC's report recommended that the Board take on a more investigative role, and this was a view once shared by many EAB members.[102]

The direction taken by the suite of new powers acquired by the Minister appears to be different, and the Tribunal's role in the EA process has been diminished as a result.[103]

(b) Board/Tribunal Independence

Increasingly, concerns about whether this agency is sufficiently independent from government in order to properly carry out its mandate have been raised. Questions regarding the political and private nature of the appointment (and reappointment) process for members (and Tribunal

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100 Until the late 1980s the EAB operated in an advisory capacity with respect to matters under the EPA and OWRA.

101 In *Gary Steacy Dismantling Ltd.* (December 4, 1997), Doc. EP-97-03 (Ont. Environmental Assess. Bd.), additional reasons at (January 7, 1998), Doc. EP-97-03 (Ont. Environmental Assess. Bd.), a 1997 EPA hearing involving a PCB incinerator, a community resident testified that he was reassured that the Board was present as an "environmental watchdog" to review the application and make the decision as to whether the proposed undertaking posed any threat of harm to the community.

102 The EAB discussed its purpose, roles, goals and strategies in a Strategic Plan developed over a period of months during 1993 and released to the public.

103 One lawyer suggested that with respect to the EAB, the government appears to want it both ways: an independent credible watchdog tribunal, yet one that it can direct and control. This person indicated that these amendments would be more suited to a recommendatory regime.

Chair), relatively short terms of appointment, the political background and connections of some appointees, and the independence of the Chair have been discussed in professional and environmental circles, the press and elsewhere.[104] Concern about the issue of the Board's independence is of course by no means new:

> While independence may be encouraged through physical separation, the Board remains inextricably linked to the Ministry of the Environment. . . . [T]he Minister may be a participant in the proceedings before the Board . . . as well as the final arbiter of the dispute . . . . This, coupled with the fact that the Ministry sets the guidelines for individual assessments, reviews the assessment statement and acts as an information depository for the assessment, suggests that independence will not come easily. Until the Board breaks its ties with the Ministry, it will be *seen* as little more than an arm of the Ministry, more or less committed to Ministry policy, and thus unable to develop its own policy on the contentious issues that come before it. The steps that have been taken to free the Board from the Ministry are important, but they do not go far enough. The Board must report directly to the Premier or Cabinet before it will become an independent and effective voice in the decision-making process.[105]

The Minister's new power to approve potentially narrow terms of reference before an EA study and report has been carried out, coupled with her power to further limit the issues at the hearing and impose a deadline, has not enhanced the image of independent decision-making by the Tribunal.[106]

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104 For example, in the text of an address to the annual Conference of Ontario Boards and Agencies on November 20, 1997 the Chief Justice of Ontario (the Honourable Mr. Justice R. Roy McMurtry) stated:

> Fundamental to a high level of administrative justice is the requirement that tribunals be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way which reflects respect for their independence. If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite in the appointees either a passive commitment or create a deterrent to courageous judgment calls. It is clearly essential that the collegial internal tribunal environment be not dominated by fear of non-renewal. (at 12-13)

105 D. Paul Emond, *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery Limited, 1978) at 137-138. Professor Emond teaches law at Osgoode Hall Law School, York University.

106 One respondent stated that the Minister's decision should not be seen to be tied into any political issue. Another suggested that the Minister is expected to act in a political way, and therefore such decisions are readily perceived as political.

(c) Role of the Minister

The Minister wears many hats in the EA process — some say too many. She is the individual responsible for the work of Ministry Directors and staff, particularly in the EA Branch, some of whom are witnesses in hearings before the ERT.[107] She plays a role in the appointment of the ERT Chair and its members, yet at EAA hearings she is a party in an adversarial process and represented by Ministry lawyers. She approves the terms of reference of an EA study and report before it is undertaken, and then can scope the hearing and limit its duration.[108] Under the revised EAA she is to inform the Tribunal at the time of the referral about any decisions she intends to make on any aspects of the application not included in the referral,[109] and the Tribunal is required to take this into consideration when making a decision.[110] She can review the Tribunal's decision and with the consent of Cabinet vary it, substitute her own decision in its place, or require the Tribunal to hold a new hearing and reconsider its decision.[111]

The combined effect of these multiple roles has raised concerns in some circles about the potential for conflicts of interest, political meddling and bias. They question whether it is appropriate, reasonable or fair for the government, through the Minister, to have such pervasive power over the entire process. Why is EA administration not left in the hands of trained and experienced Ministry staff at the EA Branch? Why has the Minister been compelled by the 1996 amendments to now micro-manage the EA process? If comprehensive political control of this magnitude is considered to be necessary and appropriate, then why not do away with the ERT altogether?

(d) Transparency

The Minister provided scant information in *Adams Mine* to explain his approach to issue scoping, and gave no indication whatsoever in either

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107 A respondent advised that the public does not distinguish among the roles of the various components of the Ministry (e.g. the Minister, the Branches and the Directors). It is seen to be one organization.

108 One respondent suggested that no one would imagine the Crown in a criminal proceeding giving orders to the judge with respect to the how long the trial ought to be, when her verdict should be rendered, and which issues should be addressed.

109 EAA s. 9.2(3).

110 EAA s. 9.2(5), par.6.

111 EAA s. 11.2(2).

case to indicate his reasons for imposing time limits. It is generally understood that the EA Branch makes recommendations to the Minister with respect to these issues before he makes a decision, but such briefings are not made public and the advice given is not disclosed. The Act itself recognizes the need for the Minister to give reasons for other sorts of decisions, and transparency has long been a fundamental and guiding principle of EA planning. Although reasons are not required by the EAA for ministerial scoping and deadline determinations, without adequate explanation these decisions can easily appear to be based on political or other hidden motives.

Given the impact that the exercise of these two powers can have on the entire hearing process, an understanding of the purpose and justification behind any decisions made by the Minister in this regard was considered by most respondents to be vital.

(e) Exercise of Discretion

A few of the decision-making powers accorded to the Minister by the EAA are accompanied by some direction as to what factors should be considered.[112] The issue scoping and deadline provisions contain no such legislative criteria, except for requests to extend the time limit for decision. This unfettered discretion is unwise, in the view of critics, because it is open to uncertainty and potential abuse. It is believed that the identification of circumstances which would justify scoping or deadlines, would serve not only the Minister but also the EA Branch which advises her on making such decisions. It would of course also contribute to more transparency in the process.

There may be a concern within the Ministry, however, that including criteria in the EAA or establishing policy guidelines may give rise to judicial review applications based on allegations that the prescribed criteria were not followed when decisions were made. The fear is that these judicial review applications could lead to lengthy hearing delays if stays are granted by the Tribunal or the courts while those proceedings are pending.

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112 Exemption from Act, s. 3.2(1): public interest, purpose of Act, and possible injury, damage or interference. Approval of terms of reference, s. 6(4): consistent with purpose of Act and public interest. Decision on the EA application, s. 9(2): lists 7 factors to be considered. Extension of decision deadline, s. 9.1(5) and 9.2(6): requires unusual, urgent or compassionate reasons. Referral of application to ERT, s. 9.3(2): unless frivolous or vexatious, hearing unnecessary or undue delay.

(f) Focus on the Two New Powers

The views and concerns expressed by respondents with respect to the scoping and deadline powers, focused generally rather than on the specifics of the *Adams Mine* and *Quinte* hearings, are summarized below. The first part reflects comments applicable to both powers, and the second and third parts deal with each power separately.

(i) *Both Powers*

Some interviewees felt that the exercise of controls by the Minister will provide more consistency in the hearing process. There appear to be some parties who always want more time than is reasonable and therefore intentionally delay hearings. It was felt that the Board's ability to control hearings depends too much on the experience, ability and approach of each panel and its chair. The opposite view is that there is no need for ministerial control of hearings.[113] It was suggested that the Minister should focus on making political decisions elsewhere, not politicizing the EA process. In any event, he should not control the process while simultaneously participating in it as a party, unless perhaps there is a situation involving urgency. His orders may so constrain the process as to offend one's notions of fairness. There is also doubt that his unfettered discretion will be applied evenly.

Concerns about preserving the integrity of proper EA planning were expressed. If issues can be removed by the Minister at either or both ends of the process (the terms of reference and hearing referral stages), the examination of rationale, alternatives and impacts may be limited, segmented or omitted entirely.[114] Furthermore, the protection afforded by

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113 The processing of EAs before referral to hearing has been expedited under new rules which impose timelines; this was the area where most of the delay had occurred in the past. The Tribunal has developed more experience and technique for controlling hearings. In addition, a series of amendments over the past few years to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, provides Ontario tribunals with significantly increased powers and techniques to better control and expedite their hearings. Opponents are no longer provided with funding to participate in hearings since the demise of the *Intervenor Funding Project Act*, R.S.O. 1990, c. I-13, in 1996. The length of hearings has plummeted drastically since the intervenor funding program was eliminated by the government. Critics maintain that the loss of intervenor funding has virtually crippled the opportunity for meaningful public participation in hearings, and that issue scoping and hearing deadlines only serves to exacerbate that result.

114 One respondent suggested that alternatives to are broader and therefore more important than alternative methods, and should be left unscoped.

technical scrutiny during EPA Part V hearings is disappearing because such hearings have been eliminated by Regulation where the Minister refers an EA (or even just a small part of it) to the Tribunal under the EAA.[115]

There was dissatisfaction over the lack of any consultation with the parties when issue scoping and deadline decisions are being considered by the Minister.[116] If these powers are to be used, some feel that a process allowing parties to make representations before decisions are taken is necessary. It was suggested that the Board should also have input. One option is to have a different panel of the Board,[117] possibly at a preliminary hearing, receive submissions from the parties, consider the documentary evidence, and then make recommendations to the Minister. A concern

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115 See O. Reg. 206/97, made pursuant to the *Environmental Protection Act*. An August 2000 public report, *Staff Report Prepared for the Environmental Commissioner of Ontario*, comments on this regulation and similar ones made under the *Ontario Water Resources Act* and the *Consolidated Hearings Act*:

> As a result, if a hearing is being held under the EAA, the hearing provisions of the EPA and the OWRA do not apply. Critics say that these regulations have reduced opportunities for public participation, and they note that the hearings labelled "duplicate" by the MOE (such as hearings for new landfills) are not identical in purpose. The [Environmental Commissioner of Ontario] is monitoring the application of these regulations by the [Ministry of Environment] to determine whether public consultation is being altered by these changes. (at 12)

Before the Act was amended by Bill 76, former s. 33 governed and had the same effect with respect to EPA and OWRA hearings:

> Where a proponent is required under this Act not to proceed with an undertaking until an environmental assessment of the undertaking has been accepted by the Minister and a public hearing is required or permitted under the *Environmental Protection Act* or the *Ontario Water Resources Act* other than by the Environmental Appeal Board or the Ontario Municipal Board with respect to the undertaking, the Minister shall order,
>
> (a) that the public hearing under such other Act may be proceeded with and that this Act or the regulations or any matter or matters provided for in this Act or the regulations that is specified in the order does not apply to the undertaking or proponent; or
>
> (b) that this Act applies to the undertaking and proponent and the public hearing under such other Act shall be deemed not to be required or permitted.

116 One critic pointed with some irony to the fact that the amendments to the EAA were contained in a statute which stressed the importance of consultation: the *Environmental Assessment and Consultation Improvement Act, 1996* (*supra* note 2). Some respondents questioned whether the Minister would receive balanced or proper advice by receiving only EA Branch recommendations. Some also suggested that the Branch is in a conflict situation, having already reached agreement with the proponent, taken a position to support the application, and committed itself in the Government Review. As was seen in *Quinte*, delving into some of the fundamental EA issues at a hearing can lead to difficulty and criticism for the EA Branch.

117 A two-panel model was employed in the *Intervenor Funding Project Act*.

about this approach is that it will cause delay and may not be very productive.[118]

Most of those interviewed believe that criteria should be developed both to guide Ministry staff in advising the Minister, and to focus the decision itself. The scoping or deadline power should not be exercised unless these criteria have been met. As indicated earlier most of the respondents seemed to agree that written reasons should be required from the Minister or the Board whenever scoping or time limit decisions are made.

Retaining flexibility after decisions have been made by the Minister is considered necessary by some. Accordingly, it was suggested that the Minister provide specific hearing guidelines or targets, or express preferences, instead of making specific orders or imposing rules, requirements or limits.[119] Alternatively, the Tribunal should be given the power to override the Minister's orders in appropriate circumstances. This would address the problem in which constraints imposed are such that the Tribunal finds itself unable to provide a fair hearing. Another option is to put in place a procedure whereby the Tribunal can, if necessary, request the Minister to amend her orders,[120] or adjourn the hearing and allow the parties to petition the Minister directly. However, there was a concern that the Board might be very reluctant to approach the Minister on requests to alter her decisions (i.e., allow more time or add more issues).

(ii) *The Issue Scoping Power*

There was a strong view among most respondents that the Minister should not have the power to scope hearings, or if the power is retained he should choose generally not to use it.[121] Such scoping can deny the opponents "their day in court." One perception is that scoping always

118 According to this view, the Tribunal has not in the past been particularly successful in getting parties to agree to take issues off the table. Further, the Tribunal would not likely be able to get enough information quickly in order to make an informed recommendation.

119 One counsel suggested that this would put the Board in the position where it was being pushed in opposing directions by the parties, and would then have to arbitrate these disputes.

120 As was indicated earlier, Bill 76 at first reading contained such a provision. One respondent indicated that the government received criticism of this provision as this type of request could lead to a delay of up to three months. In the result, the government removed it from the amendments before third reading.

121 A respondent who supported this power nevertheless believed that those opposing the undertaking would probably be left feeling that "the deck was stacked against them" before the hearing had even begun.

enures to the benefit of the proponent, while another is that scoping could interfere with a proponent's chance of success as well. In any event, it is felt that the Tribunal is in a better position to do issue scoping by relying on its hearing experience[122] and communicating directly with the parties. They are in a good position to inform the Tribunal not only with respect to the important issues, but also on the best sequence for dealing with them.

If scoping by the Minister is to occur, prior and direct consultation with all interested parties was considered to be necessary.[123] Components of this consultation would include such things as adequate notice[124] and full disclosure,[125] as well as an opportunity to review and respond to submissions made by others. Most agreed that criteria should be developed to guide the Minister's decision.[126] With respect to creating a procedure for requesting the Minister to reconsider a scoping decision, one respondent suggested that a minimum threshold and possibly other criteria be included.[127] One observer indicated that if a matter is to be scoped, greater precision is required by the Minister in defining the issues and identifying the supporting documents which are to be sent to the Board.

Reaction was mixed with respect to the Act's requirement that the Board be informed at the outset by the Minister as to how he plans to decide those parts of the application which have not been referred for hearing.[128] One point of view is that it is good to "know where you stand"

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122 One respondent stated that the Board tries to focus the parties' attention on "criticality and priority."

123 The revised EAA does require consultation "with such persons as may be interested" before submitting draft terms of reference to the Minister for approval: s. 5.1 and 6(3).

124 This might include posting on the EBR Registry (an electronic bulletin board maintained by the MOE and established under the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28).

125 It was suggested that this should include the file of the EA Branch, and the advice given by that Branch to the Minister.

126 For example, the decision should be consistent with the Act, and issues considered frivolous or vexatious would be obvious candidates for scoping. It was suggested that if scoping is to remove a full review of the natural environment impacts of the undertaking, then an EPA-type hearing would have to be ensured. As indicated earlier, the information released by the Ministry after Bill 76 was passed indicated that only outstanding contentious issues would be sent to the Board for hearing. But in *Adams Mine* most contentious issues were scoped out of the hearing by order of the Minister.

127 For example, there could be a requirement that any evidence filed in support of the request should contain information which either did not exist, or was not reasonably available, at the time the Minister's decision was taken. Before adding a new issue there should be some explanation provided as to why it was missed, overlooked or not understood at the time of the original decision.

128 EAA s. 9.2(3).

with respect to the other issues. Otherwise, would it not be an "affront" to the Board and the parties if the Minister refused to tell them his position on these matters? In any event, it may be somewhat obvious that the Minister is proposing to approve an application if he refers only some aspects of the EA to the Board. If this is less than obvious, is it not better that the Minister make clear his intentions so that the proponent and others can know what decisions are likely to be taken by the government after the hearing?[129] This can assist a party to decide whether it should participate in the hearing, and to what degree. Requiring this disclosure by the Minister, it is argued, adds to the transparency of decision-making and enhances the credibility of the process.

The opposing view, as discussed earlier, is that the Board might be (or appear to be) unduly influenced when told how the Minister proposes to deal with the other issues and conditions. Some suggested that this can be coercive and affect Board members' objectivity, even at a subconscious level. One might doubt that the government would take seriously a decision which was not consistent with the Minister's stated intentions. In other words, it can appear from a declaration made before the hearing has commenced that the Minister has "already made up his mind" with respect to the undertaking. This in turn might raise in some minds a potential bias on the part of the hearing panel.

(iii) *The Deadline Power*

Many feel that time limits are useful to prevent "sprawl" so long as they are reasonable. It is critical that they do not compromise the issues or "truncate the information base essential for a sound decision." When a hearing time limit is imposed both the Board and the parties are forced to maintain a quicker pace, and it is the view of some that this can stop delay tactics.[130] Some feel that such limits can also force larger proponents

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129 For example, if the Minister declared that he was intending to refer other parts of the EA to other tribunals for hearings after the ERT decision had been rendered, the proponent and other participants might want to consider the availability of their resources for such other hearings, the need for a consolidated hearing, or whether other strategies should be pursued.

130 One observer suggested that a deadline helps to maintain the Board's neutrality by giving it an external reason to push a hearing along, rather than appearing to be impatient or critical of one or more parties. This person also indicated that proponents are motivated to seek agreement on the hearing schedule from opposing parties in order to avoid the risk of a judicial review application based on complaints of unfairness. However, it is not at all clear how the Board should proceed where there is limited time available for the hearing and the parties cannot agree on how to divide it among themselves.

to be more fair, rather than overloading the record and hearing schedule (and everyone else in the process) with mounds of evidence, much of it unnecessary.[131] One respondent indicated that ordinary people and small businesses or other organizations (both public and private) do not have the time or funds to actively participate throughout a full EA-type hearing.

If time limits are imposed then fairness demands that disclosure must be even more prompt and comprehensive, and greater reliance must be placed on the pre-filing of material. This adds significantly to preparation time and expense.[132] Of course, the amount of time allotted for the hearing must be in proportion to the array of issues that must be considered. As one respondent put it, time constraints cannot be allowed to "pre-empt relevancy."[133]

In addition to the general concerns expressed above about having the Minister make such determinations, it was felt that the Minister would not likely be in a position to know, and could not know in advance, the timing that would be appropriate for a hearing. There are numerous factors related to this question such as the schedule, availability and other work load of Tribunal members, counsel and consultants. The extent of their need for preparation time may vary considerably with the extent of their prior involvement with the case.[134]

It was the view of many that time limits should be negotiated. In the event that the Minister intends to impose a deadline, the parties and the

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Where this has happened in the past (resulting from a Board-imposed deadline) the Board has "created" more hearing time by adding evenings and weekends to the schedule in order to meet the deadline. However, this marathon approach to deadlines can create other serious problems for the parties, witnesses and panel members.

131 Yet, as was noted earlier, this allegation was made about the proponent's approach in *Adams Mine*.

132 It has been the Board's experience that achieving shorter more efficient hearings requires far more advance planning, preparation and cooperation among parties. One respondent suggested that Board counsel would have to be enlisted to aggressively supervise the pre-hearing process in these situations.

133 One of the grounds in the *Adams Mine* judicial review application was that the Board unduly limited the admission of evidence on a relevant issue (the quantum of financial assurance) because of the severe pressure on the hearing schedule created by the Minister's deadline. One respondent suggested that a more effective area to examine in order to cut down hearing time is the range of alternatives to and alternative methods. With the imposition of time constraints the options to be scrutinized at the hearing must be very reasonable: "If you don't put limits on environmental planning, you cannot ask the hearing to put limits on relevancy." This person claimed that the analysis required by the EAA is old and out of date, and needs to be "reviewed in an honest and intellectual process."

134 Preparation time became a problem from the outset in *Adams Mine*, necessitating a joint request for a deadline extension to the Minister before the main hearing could even commence.

Board should be allowed to present their views before a decision is made. One respondent suggested that it would help to make clear what the consequences might be to the parties and Board if the deadline is breached.[135] A process should be in place from the outset in case there is a need during the course of the hearing process to seek a time extension. One suggestion is to allow one automatic extension of the Minister's deadline, if needed. Beyond that there would have to be a request to the Minister for any further extensions.

6. CONCLUSION

A considerable history of debate over the length, cost and unpredictability of environmental assessment hearings in Ontario culminated in controversial legislative amendments in 1996.[136] They granted to the Minister of the Environment the power, among other things, to scope hearing issues and impose hearing deadlines. These powers were used by the Minister, to a greater or lesser extent, in the two EA matters he referred to the Board one year later. But although the EAB has rendered its decisions in these cases (and Cabinet appeals and all court proceedings have concluded) the controversy has not ended. Most of those interviewed appeared to have at least some concern about the appropriateness of these particular ministerial powers, or the manner in which they were exercised, or both. Many other significant EA applications are currently working their way through the system and may one day be referred to hearing by the Minister. These are live issues which will arise again.

An examination of the concept and application of hearing-related ministerial issue scoping[137] and deadlines appears to raise fundamental

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135 If the delay is caused by one or more parties, can sanctions be imposed beyond costs? Does the Tribunal lose jurisdiction to make a decision if it misses the deadline? Will Tribunal members face discipline, termination or loss of opportunity for reappointment if deadlines are breached?

136 An illustration of this controversy is found in the following passage of Professor Valiante's evaluation of Bill 76 (*supra* note 2 at 243):

> As a whole, the new provisions ignore most of the recommendations of the earlier reviews; the exception is the change from two decisions to one. Some existing processes, consistently recommended for change, were not changed; others, not recommended for change, were changed dramatically. The overall thrust of the decision-making provisions is to endow the Minister with broad discretion to control every aspect of the process. This concerns both proponents and environmentalists.

137 As indicated at the outset, this article does not address the issue of scoping at the front-end of the process through Minister-approved terms of reference. Most EA practitioners and observers maintain that this new power, and the manner in which it is being exercised by the Minister, is of enormous significance.

and age-old questions about what society wants or needs to accomplish from environmental assessment planning and public hearings. This is a good thing, for we must have in mind the big picture goals when striving to improve the process.

Critics say that these two ministerial powers do much more than just tinker or repair — they contribute to a major and potentially harmful alteration in the process. Their criticism of the Minister's exercise of these powers raises questions of fairness, Tribunal independence and accountability. They worry that use of these new powers will contribute to the erosion of public confidence and participation in the hearing process. Supporters say that environmental assessment in Ontario had been in difficulty, if not disrepute, for a long time and needed substantial overhaul. These powers were part of the toolkit devised to attempt to make EA work in a more acceptable fashion.

This article does not recommend specific reforms or procedures to address the concerns which have been raised. However experience gained from just two hearings appears to indicate that the necessary task of developing constructive recommendations is both important and timely.