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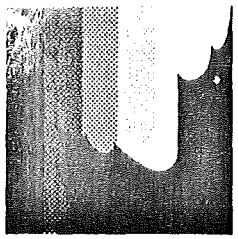

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ENVIRONMENTAL ASSESSMENT ACT HEARINGS:

Preparation and Conduct of the Intervenors' Case

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The problems faced by intervenors at Environmental Assessment Act ("the Act") hearings are quite different from those of the proponent, largely because of the disparity in resources between the two. I agree with much of what Mr. Parkinson said about how to prepare the proponent's case in the early stages of the assessment process, but the intervenor or opposition would never, in my experience, have the money to prepare in the same way. Therefore, I will also try to give some advice on how to acquire funding and how best to deal with the case on a small amount of funding.

Early Involvement

The importance of early involvement in the project cannot be over-estimate from the point of view of the ratepayers or the municipal council that becomes involved. The purpose of the Act is to evaluate undertakings at the early planning stages and, if the proponent is doing that but you aren't, then you're already behind in the process. I don't think that you can become very productively involved until the proponent is at least in the process of preparing its environmental assessment. But, you should be involved at least when the assessment has been completed and before the review document comes out. That certainly doesn't happen at the present time and, in many cases, people don't know the significant details about the project until the review has come out and notice has been given.

The advantage of early involvement is that the ratepayers or the municipal council become knowledgeable about the project, and they have a better chance of influencing the process. One of the problems

with acting for ratepayers' groups is that they don't often win a complete victory. They don't get the project completely stopped so you have to constantly consider not only the methods of having the project rejected, but conditions to improve it if it does get approved. I think that is always one of the important mandates of the lawyer for the intervenor.

It is also important to have at least the appearance of doing an evaluation of the project before taking a stand against it and, in that respect, it's very useful to have experts involved in the technical appraisal of the proposal before coming to a final decision on the position of opposition. If you can make specific recommendations and specific criticisms, based on or corroborated by the advice of experts, you're in a much better position. You also won't be described as having clients who are merely the 'not in my backyard' variety, and that is certainly an allegation that's levelled against many ratepayers' groups.

Role of the Clients

I also wanted to stress that as a lawyer for the ratepayers' group it's important not to stifle the initiative of your own clients. Many lawyers assume that they know best how to conduct the case and if they get it at an early stage, they assume they know best how to conduct it from that early stage as well. There's certainly a function for the lawyer in that process but the ratepayers often are more effective at dealing with the local media, at digging up factual information in the local area and creating support for their position or just getting people involved. You don't have the time to do the job that the ratepayers do.

Many ratepayers' groups have a wealth of information and they don't necessarily know what to do with it. I think that your role is to try to define or focus the issues and have them agree that those should be the issues that you deal with in a concentrated way. You should also provide guidance in deciding which are the important experts that you want to have evaluate the proposal.

I think that the proponents have certainly recognized the importance of information that local people have to offer, for example, in the South Cayuga proposal (1), the hydrogeologists that had been hired by the Ontario Waste Management Corporation went out and did personal interviews with people in the area to find out what people knew about the area. The experts are certainly going to be more credible because they have done that work.

Guidelines for the Assessment

In some proposals, where the Ministry of Environment has assisted in determining guidelines, preliminary information useful in dealing with the environmental assessment is published in the E.A. Update which is a Ministry of the Environment ("MOE") publication. However, that's not done in most cases so you can't rely on E.A. Update for notice of the preparation of the assessment document.

The Public Record

I wanted to talk about the public record, which is the MOE public file on a particular project. In most cases, the public record would be opened when the environmental assessment document ("the EA") is received by the Ministry. Preliminary discussions before environmental assessment

documents are completed do not go in a file on the public record. You'll get a Notice of Completion of the review and the review document, other notices that go out, and comments of the reviewing ministries. You also get copies of any public submissions, responses by the Minister to any submissions, memos of any meetings with the proponent after the review is done and any minutes of meetings with the proponents if they've asked for changes in conditions or other alterations. You also have the Notice of Acceptance of the EA if there has been such an Acceptance.

What I have described as being contained in the public record is what, broadly speaking, may currently be found there. However, to be more specific, the Act states, in s.31, what is required to be maintained in the public record. This includes:

- the environmental assessment
- the review
- any written submissions
- any decision of the Board or the Minister, with reasons
- any notice accepting the assessment without a hearing (s.9)
- any notice of amendment and acceptance of the EA (ss.10(2))
- any notice of approval, approval subject to conditions or refusal (ss.14(3))
- any notice of any variation, substitution, or requirement of a new hearing (ss.23(4))
- any notice to the Minister by the proponent of facts which may impair its ability to proceed with the undertaking according to any conditions imposed (s.38)
- any other order of the Minister pursuant to the Act, with written reasons

The requirements of section 31 are subject to section 30, which allows the Minister to prevent disclosure of certain matters where the desirability of non-disclosure outweighs the desirability of disclosure.

The Review Co-ordinator (MOE)

I think the advice that you've received about being in touch with the review co-ordinator applies equally to the ratepayers' group and their lawyer. The proponent is - according to the Ministry - responsible for the early public participation programme. If the proponent is not cooperating in terms of providing information and consulting with your clients, then it's up to you to go to the Ministry and find out what they know. You might also want to make representations to the MOE at that stage.

There are two different types of participation by the public in the early stages. There are those I would call real public participation sessions versus information sessions that are sometimes held by proponents. The latter certainly serve their function but tend to be viewed by ratepayers as public relations gestures where there's a slide-tape show and a few speeches but they don't really have the opportunity to ask questions and get answers that are relevant to them.

In relation to the draft environmental assessment document, it's certainly not public at this stage and I think that it's up to the proponent to decide whether or not ratepayers will be allowed to have any input into the draft document. It is in the proponents' interests to have that occur because in the process of early public participation they have a chance of persuading people that it is a good project - and they certainly save themselves time and money if they succeed in that. Again, the ratepayers become more knowledgeable during this process and, therefore, more credible in the long run.

The ratepayers' lawyer should also be in touch with the Ministry co-ordinator during the review stage. I think that the Ministry would be disposed to allow submissions from the ratepayers themselves and the experts hired by the ratepayers to determine some of the issues that might be included in the Ministry's review, and that is always helpful. As Mr. Parkinson said, if you have the Ministry opposing you, your chances of having the project approved are not as good. From the ratepayers' viewpoint, if they have their concerns included in the review document and, for that reason, the assessment isn't accepted, that's certainly advantageous. Also, you don't have much time to put in submissions after the review document has been made public. You have thirty days unless you ask for more time. Thirty days is certainly not enough time to become acquainted with the proposal for the first time and to have your experts review the proposal and make substantive comments.

Submissions and Requirements for a Hearing

Section 7(2) of the Act allows any person to make written submissions to the Minister and to require a hearing. I think this is an important strategic time for the ratepayers. The submission should be general enough to allow expansion later but it should also be persuasive enough to give the Minister sufficient grounds to call for a hearing.

The Minister does have the power under s.12(2)(b) to refuse to require a hearing if he considers that the request is frivolous or vexatious or that a hearing is unnecessary. Many people, including some in the Ministry, think that the Minister would not make a decision to deny a hearing. It would be very politically difficult and he might consider it legally difficult to use his discretion in that way, but the Section

does allow him to decide the matter in his absolute discretion. The part of that section allowing him to refuse a hearing because it is unnecessary as well as the stipulation of absolute discretion is much broader than the similar section included in the Planning Act.

It is also advantageous for the ratepayers' lawyer to require a hearing whether or not there are other parties that are also requiring a hearing, because there's some doubt about the status of a person who simply applies to be a party at the time that the hearing commences or notice of a hearing goes out. (See ss.12(4)(c)) So, in order to be sure that you will be a party rather than just a participant, you should require the hearing. One consequence of not requesting a hearing is being left in the position of having other intervenors withdraw their request for a hearing, leaving the Minister free to approve the undertaking without a hearing.

Denial of a Hearing

Various methods of denying a hearing are certainly concerns of ratepayers if they haven't managed to negotiate and are still opposed to the project after they've been involved at the early stage. I've already discussed the Minister's discretion. A more frequently used device is the granting of exemptions. We've already heard some of the reasons given for exemptions. The timing of the exemptions has also been extended recently.

For example, in the Highway 404 case (2), part of the assessment had been exempted and only the second part of the project was still under the Act, thus requiring an assessment. The assessment was done and the review came out, then there was a submission that a hearing should

be held. At that stage it was exempted. This, I think, is a situation where the Minister should be using his power to say that it's unnecessary to have a hearing if he thinks it is unnecessary. The granting of an exemption at this late stage is extremely inappropriate, but we are seeing these kinds of exemptions.

There are many private-sector projects creating large impacts that are not included under the Act. At the present time, we have no environmental assessment advisory committee, or what was previously called the Environmental Assessment Steering Committee, chaired by Dr. Donald Chant, which would recommend to the Premier that a particular project be designated under the Act. There will, I think, be such a committee in the near future. It will allow representations to be made submitting that a project should be designated because of its significant impacts.

Also, there have been recommendations made to the Premier by the Conservation Council of Ontario that there be a public participation process involved in the exemption granting process. The body implementing such a procedure would be the newly created Environmental Assessment Advisory Committee. The procedure adopted would presumably involve notice when an exemption application is made and an opportunity for public input into whether or not the exemption should be granted.

Scope of the Hearing

Now, I wanted to deal with 'Scope of the Hearing' to some extent. This has been dealt with by previous speakers. I think it's important to note that even if the environmental assessment document has been accepted by the Minister, the tribunal can, at the hearing, re-evaluate whether or not it's acceptable. In relation to the role of the Tribunal,

under sub-section 5(3), the assessment must contain certain information. Initially, the Board will decide whether the environmental assessment document provided by the proponent is acceptable; then they will decide whether to approve the project (ss.12(2)(c),(d), and (e)). But if the environmental assessment document is deficient, the Board may send it back for amendment rather than rejecting the proposal entirely (s.12(2)(c)).

In relation to the argument that a particular project is necessary or needed it is interesting to note what was said at the Highway 89 hearing (which was referred to by Mr. Mulvaney). (3) The Board made some points about whether or not they should be dealing with need. They thought that need was a part of the question under sub-section 5(3) of the Act which states that a rationale for the undertaking must be given (s.5(3)(b)). They reasoned that a rational basis for the project could not be put forward if need could not be demonstrated and that the onus is on the proponent to prove need. Phrases such as 'purpose of the undertaking' and 'rationale' point to the need question, and there is an overlapping in the meaning of the words 'purpose', 'rationale' and 'need'. If one alternative is to do nothing, then certainly need must be shown.

The Board in that hearing also said that sub-section 5(3)(d) requires an evaluation of the advantages and disadvantages to the environment before an assessment can be accepted, and that since the whole purpose of the Act is the betterment of the people of Ontario, it follows that advantages must outweigh disadvantages. Extensive argument was heard on the need question during the Highway 89 hearing. (4)

In the Sam Smith hearing need was also discussed (5), and the evidence produced by the proponent, both in the assessment and from witnesses, was relied upon by the Board. The Board Chairman noted that nobody in government could be found to testify on the need for parks and that they had to accept the proponent's evidence large untested. Counsel for the MOE pointed out that the Ministry of Natural Resources and the Conservation Authority are the only ones with expertise in the area. They have a corner on the market just as the Ministry of Transportation and Communications would on the question of the need for roads (6).

Deficiencies in the Assessment Document

The Sam Smith hearing brought up some interesting points that weren't necessarily obvious before. In the decision, the Board found that the environmental assessment document was acceptable but it did find deficiencies. It was not entirely satisfied with the examination of alternatives to the project (7), or with the assessment of social impact (8). Nevertheless, the Board accepted the assessment and hoped that in the future sub-section 5(3) of the Act would be used as a guide and that the evidence would become more sophisticated. It should be noted that the Board did not send the EA back for further work but instead accepted the assessment in the form presented.

Onus

I want to refer again to the Sam Smith hearing in which an argument was made by the proponent that the Board should refuse approval only if compelling evidence was found. It was argued that the Board should interfere with decisions made by the Conservation Authority and approved by other bodies such as municipalities only when and if they acted

improperly or on bad advice. (9) The Board in its reasons in that case didn't discuss that question specifically, but it appears that they didn't accept the argument. Instead they weighed the benefits of the project against the environmental impact without any reference to weighing them in the proponent's favour and I certainly think that that's as it should be. You should be prepared, however, in cases such as this, to meet arguments claiming that there is an onus on the opposition to the proposal. Certainly the tenor of the Act should lead the Board to the opposite conclusion, that is, that the proponent has an obligation to prove the environmental acceptability of the project.

Funding

Funding is a very important part of your considerations. It is very difficult to receive funding for the whole hearing and if you have a ratepayers group that is really serious, and which has been organized for a sufficient length of time, it should be able to raise funds on its own. But it's certainly difficult and usually impossible for such a group to raise the amount of funds that the proponent is able to amass. The funding sources, in addition to private individuals or foundations, are the Board, the MOE, the Legal Aid Plan, and the proponent.

The Board, when hearing matters under the Environmental Assessment Act alone, does not believe that it has the jurisdiction to provide funds to a party. The Ministry of the Environment doesn't want to create any precedents by giving funds to parties to these hearings. The Legal Aid Plan has in the Niagara Regional Official Plan Hearings given some money to the Preservation of Agricultural Lands Society (PALS) for their presentation at the hearings. It is worthwhile applying to

Legal Aid because they may, in some cases, issue a certificate for the hearings.

Funding from the proponent will not likely be available unless the proponent is willing to provide it voluntarily. In the South Cayuga hearings the proponent is taking it upon itself to provide funding through the Board for the opposition parties. There is currently some debate about what the rules should be for the granting of funding, and the proponent corporation certainly wants to know what criteria the Board intends to use in distributing its funds. However, these are minor problems compared to the option of no funding.

Now that many hearings involving the Environmental Assessment Act will be held under the Consolidated Hearings Act (10), the Joint Board will have the power to award costs, and may even be persuaded to award such costs on an advance or interim basis.

On an individual witness basis, you can possibly obtain funding under subsection 18(9) of the Act. This provision allows the Board to hire expert assistance where it deems that it requires it. In recent hearings under the Environmental Protection Act where this section of the EAA is adopted as part of the Board's powers, the Board did grant funding for an expert whose evidence was requested by the ratepayers' group.

There was a fairly strict onus on the ratepayers to prove first what evidence would be given by this particular expert, the relevance of that evidence to the subject matter of the hearing, and that there would be no other evidence on that issue. A witness statement was prepared and

submitted to the Board to establish the contents of the evidence.

In that case, which dealt with an extension to the Ridge Landfill site in Harwich Township, we succeeded in persuading the Board that an insurance witness should be funded to deal with bonding, trust fund and financial requirements including insurance. One of the major reasons for the hiring of this expert witness was that the applicant, although it had an existing landfill site that had been accepting liquid industrial waste for 15 years, was not willing to provide any evidence on insurance protection or what it was willing to provide in terms of a trust fund or other financial guarantees. So the Board did decide that they would call a witness in that area and I think that that certainly has some precedent-setting effect. The question that remains to be answered is whether the Board will fund and call as its witness an expert whose purpose is not to fill a void in the evidence, but to dispute the evidence of one of the proponent's witnesses.

In terms of timing of funding submissions, as early as possible is the preferred date but you're not necessarily going to get a decision even if you act quickly. We had certainly written to the Environmental Assessment Board previous to the start of the Harwich hearings and received no commitments whatsoever. The end result is that you will usually have to take your chances and make the application during the hearing, when the Board knows more about the evidence which will be presented by the other parties.

In addition, of course, there is the issue of whether or not you want the Board to call evidence that you wish to see presented. You do have the advantage of cross-examining a witness that the Board would call but,

in order to properly prepare a witness - if it's important to you - you might want to find another way and call the expert as your expert. In the Harwich case the Board decided that although they were calling the witness as their witness they would allow me, as the ratepayers' lawyer, to conduct the direct examination, since we had prepared the witness statement in the first instance. This procedure will not necessarily be followed in the future, especially in cases where the Board has its own counsel.

Witness Statements and Interrogatories

I was going to talk about the new procedures being adopted by the Board. These have been discussed to some extent, and include the pre-hearing procedural meetings or preliminary meetings, and witness statements and interrogatories.

In preparation for the procedural meeting or the preliminary meeting, you must have as much of your case determined as you can. It is certainly difficult to be completely set in your position although I think it's easier with an Environmental Assessment Act process because the documents have been available for some time. The Board at that stage will want to know the issues you intend to deal with, so your grasp of the case should be substantial by that time.

This preliminary meeting is extremely important in terms of setting up the procedures which will apply throughout the hearing. At that time the Board will determine when your witness statements and interrogatories have to be in. In that respect, it's important to have the Board provide enough time. Otherwise you will have interrogatories coming

in during the hearing, and either they won't be accepted or they won't be of as much use as if you received the answers before the hearing actually started.

There is also another consideration in relation to the witness statements and interrogatories and that is how extensive should the witness statements be and how extensive, then, should you make the direct examination. The latter question arises because you've already submitted your "canned" evidence. In considering the former question, the rate-payers will not have a large amount of money available to put together extensive witness statements. I also think it is of some advantage to have your witness statements in a very summary form so that all of the issues are included, and to make sure that you have the documentation appended that should be appended, but that you leave the explanation and verbalizing until the time for direct examination. My perception of giving extensive witness statements and then merely taking the witness through a summary of the witness statement is that the Board doesn't get a good enough feel for the evidence. Then when the witness is cross-examined, the cross-examiner can do an extensive cross-examination merely bringing out a lot of the evidence and helping his own case because the Board and other parties haven't understood it well enough from the witness statement and direct evidence. If it's technical evidence, it is advantageous to have it expalined in full to the Board despite the fact that it's also included in written submissions.

Another tactic that I have discussed with other lawyers is whether or not you should submit extensive interrogatories. The purpose of the interrogatories is to get out evidence which would be time-consuming to bring out during the hearing, and I think that it should be limited

to that purpose. The proponent has the time and the money to spend considerable effort in answering the interrogatories to its best advantage. You don't necessarily have that opportunity so I think it's a better strategy to keep the interrogatories to the extensive background information or data that you want to receive for your cross-examination, and save your cross-examination strategy for the hearing itself.

The Hearing Itself

In relation to the hearing itself, I think you must deal throughout the hearing with potential conditions to be imposed on any approval. In the Highway 89 hearing, the Board came back after it made its decision and heard representations on the wording of conditions. That is one way of doing it. In other cases the wording has been dealt with in argument before the Board at the end of the hearing. Before argument you certainly want to question the relevant expert witnesses on the substance of the conditions that your experts or your client would like to see included.

Post Hearing Involvement

In many cases, you, as the ratepayers' lawyer, will want to ensure that your clients will continue to be involved after the hearing is over. One of the conditions of approval which might be sought is a requirement that all documents produced after the hearing be made public. These documents might include final design documents, further data which is required under a condition for approval, etc. Further time periods for representation to the responsible MOE officials might also be sought, although at present such representations are generally ~~informally~~ arranged and considered.

Another recommendation might include the establishment of a permanent monitoring committee comprised of representatives of the proponent, the MOE, municipal officials and ratepayers/citizens.

Appeal and Rehearing

Under s.23 of the Act the Minister may overturn, with cabinet approval, any decision of the Board. He may vary the decision in whole or in part, substitute his decision for that of the Board, or require the Board to hold a new hearing on all or part of the matter referred to the Board.

Any such action by the Minister must be taken within 28 days after he receives the Board's decision, unless he extends the period within the original 28 days. It is therefore abvisable to request reconsideration or rehearing as soon as possible. Even if the 28 day period is not to be extended, the Minister would presumably want to allow other parties to comment on the appeal, making it even more necessary for the appellant to submit his appeal request quickly.

The rehearing provision under ss.23(1)(e) is not of great advantage to an opponent with limited financial resources, so you would generally be in the position of arguing against such a request from the proponent of the undertaking. However, this provision might be useful in having a very limited part of the matter re-heard.

Enforcement of Conditions

If conditions have been imposed on an approval given under the Act, it is worthwhile for your clients to familiarize themselves with the conditions and enquire occasionally as to whether these are being met.

This type of action should keep both the MOE and the proponent on their toes. If and when a blatant breach becomes apparent, the MOE should be asked to prosecute under s.39 or to bring a Divisional Court applicatic under s.28 to enjoin any act to proceed with the undertaking or invalidate any licence, permit, approval, permission, or consent prohibited under ss.6(1) unless the Minister has approved the undertaking.

A Divisional Court application can be brought only by the Minister but a prosecution can be pursued privately. The embarrassment and/or monetary penalties ($5000/day maximum for the first offence and $10,000/day maximum for subsequent convictions) may prove useful in stopping the breach. Also, if the MOE previously refused to act under s.28 they may be forced to reconsider after a conviction is obtained.

Consolidated Hearings Act

The implications of the Consolidated Hearings Act on hearings involving environmental assessment have yet to be seen. However, one of my major concerns relates to the exemption-making provisions. Under the Act, ss. 5(4)(b), the Joint Board can defer a particular matter and later decide that there will not be a hearing if it is not a contentious point. The purpose of this power is purportedly to allow exemptions in non-controversial areas, but it seems superfluous in light of the general practice of dispensing with a hearing or holding a perfunctory one where the issues have been settled.

Another exemption power is given in ss.19(e) of the Act. This has the potential of allowing exemptions under legislation which would not previously have allowed exemptions.

In addition to these concerns, the actual conduct of the hearings will be difficult because of the number of issues to be dealt with, depending on the number of statutes under which the hearing is to be held. It will be even more important to have the major issues identified under each piece of legislation so that you can cover them in evidence and satisfy each statute.

The Joint Board will, as I mentioned earlier, be capable of awarding costs. The prospect is encouraging for ratepayers' groups, but it is also somewhat frightening because there is the potential for costs to be awarded against them. This, it is hoped, is not a serious threat, since a similar cost provision allowing the Ontario Municipal Board to award costs at hearings conducted by its members has been used sparingly, and mostly to award costs to ratepayers' groups. The Canadian Environmental Law Association has in the past advocated a one way costs award system (11), and did again in submissions relating to this Act (12). However, since this recommendation has not been adopted, we will have to place some faith in the Joint Board to refuse to award costs against ratepayers' groups.

REFERENCES

1. The South Cayuga proposal describes the Ontario government's plan to have a central waste management facility developed by the Ontario Waste Management Corporation on land in the South Cayuga area of Ontario.

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4. See transcript of hearing on Highway 89 extension, pp.89-148.

5. Reasons for Decision, Colonel Samuel Bois Smith Waterfront Area Master Plan submitted by Metro Toronto and Region Conservation Authority

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9. See #6 supra, p.5822

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11. Costs, Undertakings and Public Interest Cases. Brief to the Civil Procedure Revision Committee, July 1978, by John Swaigen.

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