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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ONTARIO ENVIRONMENTAL ASSESSMENT BOARD IN RESPONSE TO: "THE HEARING PROCESS: DISCUSSION PAPERS ON PROCEDURAL AND LEGISLATIVE CHANGE"

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I. INTRODUCTION

For the past two decades, the Canadian Environmental Law Association (CELA) has advocated the need for effective environmental assessment legislation in all jurisdictions to ensure that undertakings that might have adverse environmental effects are thoroughly assessed as early as possible in the planning process. CELA, on behalf of its clients, has also appeared before the Ontario Environmental Assessment Board and the Joint Board on many of the major hearings that have taken place during the past few years. Most notably, these include the Halton landfill hearing and the ongoing Timber Management Class Environmental Assessment hearings. As well, a CELA staff person has sat on the Public Advisory Group involved in the Environmental Assessment Program Improvement Project and subsequent Task Force review of the Environmental Assessment Act (EAA). We therefore welcome the Board's initiative in seeking public input regarding proposed changes to the hearings process. We share the concern that the length and cost of these hearings has become prohibitive. However, we believe that any reforms to shorten the hearing process should be done without compromising principles of fairness and the rights of the parties. It is our contention that a number of proposals set out by the Board in its discussion paper (September, 1990) do not meet this objective.

Our comments below will detail our specific concerns with the proposed changes and offer additional suggestions for reform.

Because CELA is a legal aid clinic that represents clients who cannot afford private lawyers, we always represent intervenors in the hearing process. The Intervenor Funding Project Act has been extremely valuable in beginning to address the issue of the imbalance of resources between proponents and intervenors and making the input of intervenors more meaningful. A number of the reforms suggested for pre-hearing scoping can only be effective if intervenor funding is provided at an earlier stage in the process than is contemplated by the existing legislation. To accomplish this goal, consideration should

therefore be given to recommending amendments to the Intervenor Funding Project Act when it is reviewed.

At the outset, we also want to raise concerns about the Board's various proposals to amend the Statutory Powers Procedure Act (SPPA). As the Board is aware, the SPPA codifies certain rules of natural justice and fairness which CELA believes need to remain intact. Further, the SPPA applies to a host of adjudicative and administrative proceedings under other statutes. We would object to any proposals to amend the SPPA or to otherwise modify the rules of natural justice as they apply to Board proceedings. Any proposal to amend the SPPA would require the broadest public inquiry given the diverse and varied proceedings that would be potentially affected.

II. POSITION OF CELA IN RELATION TO THE EAB PROPOSALS FOR REFORM OF THE HEARING PROCESS

The following are CELA's comments on the specific suggestions set out in the discussion paper.

1. Requirements for Meetings of Expert Witnesses Without Counsel

CELA agrees that meetings of technical experts among themselves can be a useful technique to shorten hearing time, and that such meetings can be used not only to identify issues in contention but may also be used, where appropriate, to develop terms and conditions that could ultimately form the basis of an approval of the undertaking. This process was recently used in the Maidstone landfill case where a series of meetings were held between the proponent's experts and the intervenor's experts (both in the presence of counsel and without counsel) to narrow the issues in contention and to agree on terms and conditions of approval for those issues not in contention. Similarly, a series of expert meetings occurred among parties in the Timber Management hearing in order to agree upon the methodology to be used by the proponent to answer a specific interrogatory. Again, these meetings were held with and without counsel. Accordingly, it is our submission that no legislative amendment is necessary to allow these meetings to take place and that if a written agreement were reached to the parties' satisfaction, that this could be put before the Board for consideration. It would be expected that the parties would abide by such an agreement.

We are concerned with the Board's suggestion (at p.4) that a binding agreement between experts would not need to be ratified by counsel or more importantly by the parties involved in the hearing. We submit that such a proposal would breach fundamental principles of fairness. First of all, it is the client's interests that are at stake, not the expert's. The problem here concerns the nature of the relationship between clients and experts or counsel. The latter two only have the authority their clients delegate. It is unrealistic and unjust to propose that somehow the parties can be coerced into delegating more authority than they choose to. Second, experts are often retained to deal with one facet of a complex

technical case and may not be aware of other considerations that may impact on the client's decision whether to agree to a certain proposed resolution of an issue.

In addition, we submit that it is unrealistic to expect that the experts' positions will be "based on technical rather than adversarial considerations." It has been evident in many hearings that experts often act as advocates for their clients rather than as neutral or disinterested participants; in fact, this was expressly recognized by the Joint Board in the Halton landfill decision (p.55).

We are also concerned with the Board's proposal (p.5) that the Board's rules be amended in order that experts "be required to meet with each other, in the absence of counsel, in order to define the technical issues in contention." First, it is unclear whether this would be "required" by the Board on its own initiative or upon a motion by one of the parties. Second, such a proposal would breach the principles of fairness for the reasons outlined above.

Because CELA does not support mandatory "expert-only" meetings nor "binding expert-only" agreements, it follows that we do not support the proposed limits on cross examination set out on page 5 of the Board's discussion papers.

2. Meetings of Parties for the Purpose of Preparing a Statement of Agreed Facts and a List of Outstanding Issues

CELA agrees that it is helpful to delineate the issues in dispute and to also discuss potential conditions, where appropriate, prior to the presentation of evidence. It is our opinion that the SPPA would not have to be amended to accomplish this end, since it is clear that the Board presently enjoys the power to fashion an appropriate "scoping" mechanism. The type of "scoping" procedure will vary from hearing to hearing, depending on the nature of the undertaking, the hearing structure (i.e. regular versus phased), the number of parties, and so on. We also wish to stress that in order for issues to be delineated it is necessary to ensure: (1) full production of the proponent's case well in advance of the hearing; (2)

answers to interrogatories filed in a timely fashion; and (3) provision of intervenor funding early in the process to enable the intervenors to retain their experts and to be able to narrow the issues.

We would point out, however, that our experience with the "statement of issues/scoping" exercises in the Timber Management hearing suggests that this procedure has not led to any appreciable shortening of the proceedings. This may be partly due to the fact that this procedure was not implemented at the beginning of the hearing, but rather, was initiated only after the hearing was well underway. It should also be noted that most Statements of Issues have been marked "without prejudice", or have otherwise reserved the right to cross-examine on issues not delineated in the Statements of Issues. In the result, few issues seem to be eliminated through this scoping process, and it is our view that this exercise has generated more paper and used up additional hearing time without demonstrably shortening the proceedings.

CELA does not support the proposal (at p.8) that Rule 49 be amended to allow Board counsel to act as a facilitator to secure agreement on facts and issues in contention. In our view, this proposal represents an unwarranted and problematic expansion of the role of Board counsel; in particular, Board counsel is retained for the single purpose of advising and assisting the Board in matters of law. We are therefore concerned that encouraging Board counsel to delve into the facts of the case would require counsel to acquire considerable knowledge of the merits of the case, and would give rise to the perception that the Board is akin to a party in the case rather than an independent adjudicator.

3. Pre-Hearing Mediation and Conciliation by Board Members or Staff

CELA agrees that a pre-trial conference may be a useful technique. In civil litigation, a pre-trial conference is held before a different judge than ultimately hears the case. The Board does not make a specific recommendation in this regard but instead discusses mechanisms for mediation and conciliation. In our view, mediation will only be effective if it is undertaken at the request of the parties; it cannot be

forced upon unwilling parties by the Board on its own initiative, for this process is likely to fail in such circumstances. There must also be provision for the parties, if mediation breaks down, to return to the Board for adjudication of the matter. The Board, of course, should always confirm any mediation order. The Board's proposal is also not clear as to who pays for mediation.

4. Use of Pre-Filed Evidence

CELA has some concerns with the discussion and proposal in relation to the use of pre-filed evidence. While we agree that full and early production of the proponent's case and supporting documents is a necessity, and that oral examination should not repeat in detail material that has been filed, we disagree with the proposal to put the onus on intervenors early on in the process to either accept pre-filed evidence "as read" or face potential cost liability, and to then forego rights to cross-examine or present argument at the end of the hearing. We believe this proposal is extremely prejudicial to intervenors who, at the preliminary stages of a hearing, may not have received answers to interrogatories, may have just received their intervenor funding and do not have all their experts in place. No party can make such final conclusions regarding evidence at this early stage of the hearing. Such a one-sided proposal should not be endorsed or pursued by the Board.

5. Motions for "Non- Suit"/Early Dismissal of Application

CELA agrees that the ability of the EAB to order an early dismissal of an application is desirable, whether it be at the end of a phase or the end of the proponent's case, depending on how the evidence is adduced. The OMB has also granted motions for non-suit in proceedings before it. For example, CELA, on behalf of its client was successful before the OMB in 1978 in having applications for official plan and zoning changes dismissed prior to any evidence being called by opponents to the proposal. While it is submitted that the Board already has the jurisdiction to dismiss an application early in the process, CELA would not object to an amendment to clarify the situation.

6. Alternative Means of Examination of Expert Evidence

We would, first of all, reiterate some of our comments made in relation to proposal #1 respecting the "requirements for meetings of expert witnesses without counsel."

In addition to having experts meet at the pre-hearing stage without counsel, the Board has proposed that witnesses on all sides of an issue could be called to testify together before the Board with minimal intervention by counsel (p. 16). CELA does not support this proposal for a number of reasons.

First, this proposal denies parties the fundamental right to present evidence to the Board as they consider most reasonable, within the limits of the law. Second, this proposal seems to be based on assumptions that lawyers are responsible for "blockage of information" and that experts, left on their own, will not take adversarial positions. In light of our experience in the hearing process, we strongly disagree with this suggestion.

This proposal will also be prejudicial to intervenors who often elicit important information during cross-examination of the proponent's witnesses. This information is often commented on by the intervenor's own expert in testimony and subsequent reports. On this point, it should be recalled that there is generally a two-fold purpose in cross-examination: to test the proponent's evidence, and to elicit admissions supportive of the intervenor's case. Further, in some cases, a particular intervenor may not have a witness or may await the outcome of cross-examination of a proponent's witness before determining whether to call a witness.

By calling all the witnesses in one panel, the intervenor's witnesses would not be able to reflect upon and respond to points elicited during questioning.

CELA also questions the Board's proposal to allow counsel to only pursue "certain areas" of cross-examination. It is our submission that cross-examination of expert witnesses should only be restricted

where it is irrelevant, or involves repetitive questioning: see s. 23(2) of the SPPA. At common law, there is no absolute obligation on tribunals to allow cross-examination of witnesses in oral hearings. However, the rules of procedural fairness guarantee parties the right to rebut opposing evidence and to correct or contradict prejudicial statements. In light of this right, the Board's attempted restrictions on counsel presence during expert testimony before the Board and restrictions on cross-examination of expert witnesses deprives parties of the only available method for meeting the case made against it where expert testimony challenges their case.

It should be noted that the closer a tribunal's procedures follow that of a court, the more likely it will be that restrictions on cross-examination of witnesses will constitute a breach of procedural fairness. As de Smith states in Judicial Review of Administrative Action," Seldom can such a refusal be justified if a witness has testified orally and the party requests leave to confront and cross-examine him" (p.214).

In Inisfil v. Vespra[1], the Supreme Court of Canada pointed to the similarities between the Ontario Municipal Board hearings and court proceedings as one reason for holding that the board was obliged to permit cross examination of witnesses tendering evidence at the hearings. Estey J., delivering the judgment of the court, stated that where a board determines "the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which it will rely", the provision of a right to cross-examination is obligatory, unless there is the "clearest statutory curtailment" of the right.

Similarly, Reid and David point out that cross examination is particularly important when vital facts are contested. In this regard, these authors dismiss the concern that lawyers might exploit expanded opportunities to cross-examine "to indulge in an orgy of cross-examination", thereby interfering with the

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1 [1981] 2 S.C.R. 145.

tribunals proceedings. It is their view that a properly instructed tribunal is perfectly capable of imposing reasonable restraints on the availability of cross examination.

The effect of sections 10(c) and 23(c) of the SPPA is to enable tribunals to restrict needless and repetitive questioning while at the same time affording an opportunity for proper cross- examination. Thus, tribunals can ensure that proper cross-examination is used to elicit further information relevant to the issues in the proceedings or to test the reliability of the evidence a witness has given, including the credibility of the witness himself, while preventing witnesses from being harassed or hearings being unnecessarily prolonged due to repetitious questioning.

In the Inisfil case, supra, the Supreme Court of Canada relied upon section 10(c) as an additional ground for holding that the Ontario Municipal Board erred in denying the parties before it the opportunity to cross-examine a witness' testimony. Estey J. stated that the effect of this section is to deny tribunals covered by the SPPA of any discretion in this area; they are mandated to permit reasonable cross-examination, absent any other statutory provision expressly abrogating this right. It is CELA's position that the proposed amendments to the SPPA and other legislation should not be pursued. The Board should not limit the public's rights to effectively test the evidence of the proponent. It is CELA's opinion that the public hearings with the full right to cross-examine witnesses has led to better decisions and a greater protection of the environment.

7. Imposition of Time Limits for the Presentation of Oral Evidence

CELA would support the limitations on the presentation of oral evidence-in-chief. We had some experience with the use of "canned evidence" in the recent alachlor hearing before the Alachlor Review Board established pursuant to the Pest Control Products Act. In that case, all material had to be filed by the applicant prior to the hearing and witness statements provided were in a narrative format. Examination-in-chief rarely went for more than half a day and did not repeat in detail the material filed.

The key in making such a process work, is that all documents relied on by the parties must be filed well in advance in the hearing, and that witness statements set out a narrative explanation in some detail of the technical background material. In other words, the witness statements should be a written version of what normally would have been the evidence-in-chief of the witness. CELA, on behalf of its client had suggested such a procedure for "canned evidence" during the preliminary hearings in the Timber Management hearing. Unfortunately, limits on examination-in-chief were not proposed by the Board until the hearing was well underway, and much of the proponent's case already completed.

CELA, however, does not support the Board's proposed amendment set out on page 21 which states:

> (iii) Despite section 10 [of the existing SPPA],an agency may, by order, restrict or limit the right of a party to call witnesses and to cross-examine witnesses.

First of all, this proposal bears no relation to the background discussion of limiting oral examination-in-chief. It is a sweeping amendment that purports to limit the rights of parties to call witnesses and to cross-examine witnesses and it does not provide any criteria or grounds upon which these rights may be restricted by the Board. Again, the proposal denies parties their fundamental right to present relevant evidence to the Board. We do not believe that such an amendment is desirable. The Board can already control the proceedings and can limit examination-in-chief or cross-examination when it is irrelevant or repetitious. We have already discussed this issue in relation to the Board's proposal #6 above. No unqualified authority to limit the right of a party to call witnesses or to cross-examine should be passed as an amendment to the SPPA.

8. Relegation of Procedural and Other Non-Evidentiary Matters to Consideration Outside the Actual Hearing Hours

This proposal is acceptable and should provide for some time and financial savings as witnesses would normally not have to be present during a discussion of procedural matters. We note that a number of the lengthy procedural matters in the timber management case were related to the fact that the EA

document filed by the proponent prior to the hearing was supplemented by thousands of pages of witness statements during the hearing and a motion was brought by the intervenors early on in the hearing to adjourn until all documentation was produced by the proponent. The outcome of the motion was negotiated by the parties and an adjournment took place.

9. Timing of Fairness Challenges

CELA submits that there should be no restriction on the ability of a party to seek judicial review of the Board's decisions, whether such review arises from decisions of the Board during the course of a hearing or from the final decision of the Board. The case law makes no distinction between such types of decisions as they pertain to judicial review opportunities and the right to seek such review is well established. In the Service Employees' International Union v. Nipawin Dist. Staff Nurses Association[2] case, the Supreme Court of Canada discussed the issue of judicial review of statutory tribunals. Mr. Justice Dickson stated:

> There can be no doubt that a statutory tribunal cannot with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty, and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest.

After the Supreme Court of Canada in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police[3] established the common law duty of fairness, it became clear that the courts have a broader power of supervision and ability to tailor Board procedures and decisions than previously existed. The widening of such power has served judicial notice upon tribunals that rather than seeking to impose limits on fairness challenges (as is the case in the EAB proposal) they must become especially sensitive to this doctrine in their decision-making and be aware of their susceptibility to judicial review on grounds of fairness.

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[2] [1975] 1 S.C.R. 382 at 388.

[3] [1979] 1 S.C.R. 311.

We submit that while it is reasonable to require that objections be raised during the hearings, it would be counterproductive to require that a party immediately proceed to judicial review. This is particularly true since the hearing would likely be stayed pending the outcome of the judicial review application, and it may take years for the hearing to re-commence if the matter winds its way through the appellate courts. As well, it may be the cumulative impacts from a number of Board rulings that give rise to grounds for judicial review, and to require that an application be made to Divisional Court at the first instance would again be prejudicial to the parties.

10. Contempt Powers

CELA submits that the proposal that the Board should have contempt powers as a means of disciplining counsel is too draconian and runs counter to recent legal developments in this area. We submit that the existing powers under the SPPA and the opportunity to state a case to Divisional Court are sufficient. In addition, there are other adequate remedies (i.e. a complaint to the Law Society of Upper Canada) if a lawyer has engaged in conduct unbecoming a solicitor.

The power of an agency to maintain order during its hearings through contempt powers has recently been narrowed significantly by courts on the basis of protections within the Charter of Rights. For example, in Regina v. Kopyto[4], the accused, a lawyer, was charged with contempt of court as a result of comments he made following the dismissal of a case in which he acted as counsel for the plaintiff. It was held that statements of a very sincere belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libelous, should as a general rule, come within the protection afforded by s. 2(b) of the Charter of Rights. It was found that while the objective of protecting the administration of justice is of sufficient importance to override a constitutionally protected freedom, the means chosen (i.e. a contempt citation) were not demonstrably justified.

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[4] (1987) 62 O.R.(2d) 449 (C.A.).

It should also be noted that even prior to the enactment of the Charter, the power to punish for contempt has traditionally been used cautiously and sparingly. Most of the civil contempt cases have pertained to instances where witnesses or the media were cited for contempt. Only a very few cases have related to the conduct of counsel (the target of the EAB proposals). In some of these old cases, counsel, in the more serious situations, were merely ordered not to appear in the particular court until an apology was made. In other situations, counsel were penalized by a cost order. We submit that there would be very few instances where a contempt order might be necessary, and that in those limited cases, sections 9(2) and 23 of the SPPA provide the Board with adequate tools for handling such matters.

11. Use of Board Counsel and/or Technical Staff and Definition of Their Roles

In regard to the use of Board counsel and/or technical staff, there are three broad principles of natural justice which must be considered in creating legislative or procedural changes. They include the following:

a. the "he who hears must decide" rule;

b. the "delegatus non potest delegare" rule; and

c. the prohibition against bias in the decision-making process.

The "he who hears must decide" rule requires every decision-maker to independently (a) evaluate the relevant evidence placed before it (b) consider the arguments of both sides, and, finally, (c) to direct its "mind" to the issues at hand so as to render its decision. Accordingly, the participation of non-Board members in the deliberations or decisions of an administrative body may serve to invalidate that body's act. Thus in Leary v. National Union of Vehicle Builders[5], the decision of a union's branch committee was quashed because a non- committee member had participated in formulating it.

Indeed, it may well be the case that even the mere presence of a non-tribunal member while a tribunal's

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5 [1971] Ch.34.

deliberations are ongoing will have the effect of vitiating that tribunal's decision. In Middlesex County Valuation Committee v. West Middlesex Assessment Area Committee[6], for instance, Lord Wright, M.R. said that:

> It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own should be present at the formulation of a decision.

The "delegatus non potest delegare" rule establishes that a statutory body may not sub-delegate powers which have been conferred upon it in its enabling legislation; the general principle is that such powers must be exercised only by the authority to which they have been legislatively committed. While the Board may delegate administrative functions to others, it is clear that any attempt by a tribunal to delegate its decision-making functions will be struck down. Thus, for instance, a tribunal cannot act solely on the basis of recommendations made by one of its own inspectors or investigators. In Re Del Core and Ontario College of Pharmacists[7], Finlayson J.A. of the Ontario Court of Appeal cited a trilogy of cases[8] as standing for the proposition that:

> the courts have consistently held the reasons given by discipline committees of self-governing bodies must be the reasons of the committees and cannot be written by counsel or professional staff. (emphasis added)

Prohibition against bias constitutes the third component of administrative law to be applied to the Board's decision-making function. It is a fundamental principle of natural justice that a tribunal must determine the rights and interest of others in a disinterested and impartial manner. The EAB proposals increase the potential for the charge of bias owing to the greater number of non-Board members who may play a role in the decision-making process.

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6 [1937] Ch.361 at 376.

7 (1985) 51 O.R.(2d)1 (Ont. C.A.).

8 See, Re Sawyer and Ontario Racing Commission (1979), 24 O.R.(2d) 673; Re Emerson and Law Society of Upper Canada (1983), 44 O.R.(2d) 729; and Re Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R.(2d) 447.

CELA would have no objection to the hiring of a number of the support staff listed by the Board in its proposal. With respect to Board counsel, we believe that such counsel should be personally present to hear and make submissions on motions and other procedural matters if they intend (or are instructed) to give an opinion to the Board on these matters. Any such opinions should be made public and parties should be given an adequate opportunity to respond to the submissions of Board counsel. We cannot support the proposal that reports, documents, and other information and material supplied to an agency on a confidential basis are privileged for the purposes of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act. It is our opinion that all parties should have access to all the information relied on by the Board in coming to its decision.

Administrative agencies are required to act fairly in performing all of their functions. Part of this duty entails providing participants in administrative proceedings access to procedural guidelines and other material relied on by an agency in making its decisions. The issue of accountability of non-elected boards and the trend to more open government would seem to run counter to the Board's proposal for more secrecy.

In Dale Corporation and Rent Review Commission[9], a commission refused to disclose portions of its staff manual. The manual contained guidelines which could affect the deliberations of the commission. The court ruled, inter alia, that the failure to disclose the manual was a breach of natural justice. Other cases stand for the proposition that confidentiality is the exception, not the rule.[10] Access to information is all the more justified in that it affects the effectiveness of the participation and of the contribution participants can make in helping the decision-maker to arrive at the "right" decision.[11]

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9 (1983), 29 R.P.R. 22.

10 See for example, Magnasonic Canada Ltd. v. Anti-Dumping Tribunal, [1972] F.C. 1239 (F.C.A.) and Sarco Canada Ltd. c. Tribunal Antidumping, [1979] 1 F.C. 247 (F.C.A.).

11 See for example, Re Canadian Radio-Television Commission and London Cable TV. Ltd.,[1976] 2 F.C. 621 (F.C.A.).

It should be noted that the Court of Appeal in the Consolidated Bathurst case referred to by the Board noted that the principle that he who hears must decide was not in issue on the facts of that case. Nor were there any different ideas put forward from those discussed before the hearing panel and there was also no suggestion that anyone but the hearing panel participated in the final decision. The Court does stress that "if new evidence was considered by the entire Board during its discussion, then both parties would have to be recalled, advised of the new evidence and given full opportunity to respond to it in whatever manner they deemed appropriate." Further, "As in any judicial or quasi-judicial proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice, there can be no participation by other members of the Board in the final decision."

12. Use of Costs Powers as a Penalty

The Board has proposed (a) to incorporate procedures in their rules implementing a process analogous to the "Offer to Settle" procedure found in Rule 49 of the Civil Rules of Procedure; and (b) that the EAB and Joint Board should have the express power to make an order of costs personally against counsel.

In regard to (a), Offers of Settlement are a widely accepted tool for reducing court time and improving case management efficiency. For this reason Rule 49 has been widely accepted as a tactical weapon in civil litigation matters. However, it must be stressed that the civil litigation rule was developed to deal with private disputes primarily about monetary damages, which can be settled. Rule 49 is also to help encourage the settlement of disputes, without trial, which is seen as a legitimate goal of the rules of civil procedure as a whole. On the other hand, in cases involving environmental assessment and protection, the matters before the board are of broad public interest and involve the determination of whether the environmental impacts of a proposed undertaking are acceptable and consistent with the broad purpose of the Environmental Assessment Act. Further, in a case such as the Timber Management hearing, the Board is being asked to determine the details of the planning process that will guide the management of

Ontario's Crown forests, which represent over one-half of the province's land base. It is not a case of a traditional "win-lose" situation; instead, it is a question of how we should be best managing our forest resources in the future. In our submission, an Offer to Settle procedure such as laid out in Rule 49 would be impossible to apply.

There is also the problem of applying this procedure to proceedings with many parties, some with "deep pockets" and others with limited resources who are often representing a public interest. In addition, it is not equitable to apply offer to settle sanctions due to the fact that they are less meaningful to the parties with "deeper pockets." Such a process would be prejudicial to those parties appearing with limited resources, or without counsel and such parties may be more easily influenced to accept an offer to settle.

There is also the possibility that settlements may be against the public interest and have long-term and possible adverse consequences on the environment. For example, under the EAA, the Board has a duty to ensure that its decisions provide for the "protection, conservation and wise management in Ontario of the environment" and to this end it would have to review any settlement offer to see if it adequately protected the environment. The EPA also serves the broader public interest of environmental protection.

CELA submits that the Board should not pursue adaptation of an Offer to Settle Procedure similar to that set out in Rule 49.

In regard to the issue of giving the power to the Board to award costs personally against counsel, CELA believes that this may have a chilling effect on lawyers appearing on behalf of intervenors with limited financial resources. These lawyers, who may already be retained at lower than the market rate pursuant to the Intervenor Funding Project Act, may not want to face the additional prospect of costs awarded personally against them. Further, it must be stressed that the Board has a duty to ensure that the public interest is protected and will have to conduct a brief public hearing even if a settlement is reached. In

contrast, the goal in civil litigation is to avoid a public trial and one purpose of the Rules is to aggressively encourage the settlement of cases. Thus, very different public policy considerations are found within the administrative and judicial contexts, and the rules developed in one context are not readily transferable to the other context.

III. ADDITIONAL RECOMMENDATIONS FOR REFORM

The Board has raised some additional issues for comment in the preamble to the discussion papers. These include the possibility of establishing generic guidelines for specific types of applications (e.g. landfill sites; and the possibility of establishing by legislation, limits to the duration of each Board hearing. The proposal for generic guidelines is a worthy endeavour but should be the mandate of the Environmental Assessment Branch (with public input) and not the EAB. CELA would not support the proposal to limit by legislation the duration of each Board hearing. This would be extremely problematic and it would be difficult to ascertain what portion of hearing time should be allotted to proponents, intervenors and reply evidence. CELA would urge that some consideration be given to limiting the number of witnesses on panels. We would suggest a maximum of 5 witnesses per panel, without leave. Panels with greater numbers add significantly to the time and cost of hearings and make it very difficult for intervenors, with limited resources to have a number of experts present to hear panels with multiple witnesses.

Finally, while we believe that many of the initiatives proposed by the Board are unnecessary or go too far, we share the concern about the protracted nature of many Board proceedings. Unnecessarily lengthy hearings undermine the value of the participatory rights we have fought so long to establish. For those rights to be meaningful, the hearing process must be an effective and efficient one. In this regard, we believe that a great deal can be done to address the problems that have too often resulted in hearings that have lasted far longer than they should have.

However, the ultimate responsibility for ensuring the efficient course of a particular hearing must rest with the panel that has conduct of that proceeding. With the greatest of deference to the Board's experience and expertise, we believe that it may be helpful for the Board to consider an ongoing program of training for Board members.

One of the key purposes of such training would be to equip Board members with the adjudicative techniques necessary for ensuring the orderly conduct of hearings in a manner that fully respects the legitimate rights of all participants.

If the hearing process is to work, it is essential, in our view, for the Board to assume a more active role in ensuring that the introduction of evidence, cross-examination and re-examination proceed with some efficiency. Several of the tactics that it has become routine for some counsel to use in proceedings before the Board would simply not be tolerated in a court of law. We suspect that judges of the Supreme Court of Ontario might be happy to share with Board members the skills and techniques that enable them to ensure the efficient conduct of proceedings in that venue.

We note that training is routine for provincial court judges and other adjudicators and believe that an ongoing commitment to such a program would greatly contribute to a more effective and expeditious hearing process.

IV. CONCUSIONS

CELA appreciates the initiative the Board has taken in issuing the discussion papers and in suggesting changes to the hearing process. We have outlined our concerns with a number of the proposals. CELA would be pleased to participate in any roundtable discussions the Board intends to have in the future.