RETURN TO DETOUR LAKE:

RECOMMENDATIONS CONCERNING THE ENVIRONMENTAL ASSESSMENT PROCESS

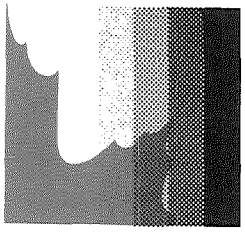
By

THE CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION

RICHARD WOODS, PROJECT DIRECTOR

NOVEMBER 1982

Canadian Environmental Law Research Foundation
La Fondation canadienne de recherche du droit de l'environnement



8 York Street, 5th Floor South, Toronto, Ontario M5J 1R2, telephone (416) 366-9717

CELRF/FCRDE

ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

J.E.J. Fahlgren, Commissioner

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This publication has been prepared with the financial assistance of the Royal Commission on the Northern Environment. However, no opinions, positions or recommendations expressed herein should be attributed to the Commission. They are solely the responsibility of the Foundation.

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CELRF/FCRDE

December 6, 1982

Mr. J. E. J. Fahlgren
Commissioner
Royal Commission on the Northern
Environment

Dear Mr. Fahlgren:

I am pleased to present to the Royal Commission on the Northern Environment this submission made by the Canadian Environmental Law Research Foundation.

The Commission is to be commended for seeking public participation through the hearing process and for extending the financial support which has made this submission possible.

As our submission makes clear, we strongly urge the Royal Commission to endorse the Environmental Assessment Act and to lend its support to the Ministry of the Environment in its attempts to implement and administer the Act in a fair and even-handed manner. The purpose of this submission is not to criticize the Environmental Assessment Act, the way it is administered by the Ministry of the Environment, or the Ministry itself.

The intent of the submission is to put forth constructive suggestions for improvement to the environmental assessment process which we believe will be of benefit to the Commission and, ultimately, to the people of northern Ontario.

Yours truly,

Doug Macdonald
Executive Director

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encl.

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Introduction

The Canadian Environmental Law Research Foundation has submitted this brief to the Royal Commission on the Northern Environment because there is a need for improved decision-making and more effective public participation in the environmental assessment process as it occurs in northern Ontario.

The brief begins with an outline of the past history of the Environmental Assessment Act and its application in recent years. It then goes on to discuss the public participation process and suggests a variety of ways in which that process could be strengthened.

The brief then considers the question of exemptions under the Act and the ways in which the environmental assessment process will be affected by the introduction of joint hearings under the Consolidated Hearings Act.

Finally, a case study, the Detour Lake Road, is discussed to provide concrete illustrations of the theoretical points raised in the main body of the brief.

While preparing this study, the project team reached two major conclusions:

> Past experience clearly shows that the exercise of discretion under the Environmental Assessment Act is unlikely to result in increased environmental protection.
>
> The success of the environmental process in the north will be determined largely by the extent to which it incorporates public participation as a real factor in the decision-making process.

The project team concluded further that environmental assessment in northern Ontario is less than fully adequate because of four major weaknesses. They are:

1. The lack of funding to enable members of the public to participate fully and on an equal footing with the proponent of an undertaking;
2. The broad discretion of the government to exempt projects which clearly have a significant environmental impact, with little or no opportunity for the public to have a say in this decision;
3. The perception by proponents of undertakings (whether or not this perception is accurate) that the Act leads to unnecessary and unacceptable delay, duplication of effort, and expense;
4. The attitude of the Ontario government itself towards environmental impact assessment.

It is to address those weaknesses that the following recommendations are made:

CONCLUSIONS AND RECOMMENDATIONS

I. Public Participation

1. For every undertaking which is under the Act, project-specific guidelines should be drawn up.
2. The Act should be amended so that when the Ministry is about to draw up these guidelines, it will give public notice and invite comments on the proposed guidelines.

3. The second point of notification should occur as soon as the environmental assessment is submitted to the Minister and written submissions should be invited within an established deadline.

4. The third point of public notification should occur when the government review is released.

5. The fourth point of notification should occur when the decision has been taken to hold an Environmental Assessment Board hearing.

6. The Act should be amended to require the Board to give a minimum of sixty days' notice of the hearing and it should also specify that any request for an extension of time will be granted if it is received within thirty days of the initial notice.

7. If an appeal is made to Cabinet regarding the Board's decision, the appellant should be required to serve notice of his appeal on all the parties to the hearing and the Minister should be required to issue a press release indicating that an appeal has been received.

8. The procedures adopted by the Environmental Assessment Board in relation to pre-hearing conferences, witness statements and interrogatories are a major step forward and the Board is to be commended for its actions in this area.

9. Section 32 of the Act, which defines the content of the public record, should be amended to include the project-specific guidelines for each undertaking and all background documents which are relied upon in the environmental assessment document and in the government review.

10. Local depositories should be created in the north to contain copies of the full public record and local municipal offices and band offices be utilized for this purpose in northern Ontario.

11. The Environmental Assessment Board has demonstrated its willingness to grant standing to appropriate individuals and groups. However, the specific designation of standing should be more widely defined and guidelines should be developed by the Board as a framework for exercising its discretion.

12. Not only from environmental groups but from within government itself there has been a virtual flood of public funding recommendations concerning the environmental assessment process. The Commission should consider this question: What would the extent and quality of public participation have been in these deliberations if the Commission had not provided public funding? For the north, refusing to provide public funding for participation in the environmental assessment process would have the effect of totally excluding northerners from the decision-making process.

13. The cost of public participation should be covered by a special fund which is financed by proponents. The amount that each proponent contributes, whether public or private, could be either a percentage of the cost of its environmental assessment study or a percentage of the proposed capital cost of the project.

14. All costs directly related to public participation in the environmental assessment process should be funded. Expanded funding should be available if an environmental assessment hearing is held and the fund should cover the cost of research, expert witnesses, legal counsel, transportation and communication. Funding should be available for both local groups and established interest groups.

15. In order to avoid any appearance of bias or conflict of interest, the proposed fund should not be administered by the Ministry or by the Environmental Assessment Board. Rather, it should be administered by a separate agency such as the Environmental Assessment Advisory Committee. A project-funding approach is preferable to a "one-way" award of costs to be made after hearings have been completed.

II. Exemptions, Designations and the Use of Discretion

16. With respect to phasing-in the Act in the public sector, now that the Act is seven years old, the "advanced stage of planning" argument should no longer be used to exempt projects. Extensions of exemptions first given several years ago should be curtailed. Further phasing-in decisions should be subject to prior scrutiny by the Environmental Assessment Advisory Committee.

17. The definition of the public sector in the Act should be broadened to include institutions that clearly would be considered public by most people, but escape the Act because they are not government agencies, for example, most hospitals.

18. It is recommended that the Commission recommend that the Ontario government establish a firm timetable for making the Act applicable to the private sector and that the Act be made broadly applicable to this sector, perhaps by December 31, 1983.

19. Even after the Act is made applicable to the private sector, there will be a continuing need for a screening mechanism to determine which projects should be exempted from the Act and for the development of criteria for exemption. It is recommended that the Commission recommend to the Ontario government public participation in

the screening mechanism, and safeguards to prevent the excessive use of discretion and to reduce the exemption of significant undertakings in the private sector. The establishment of an Environmental Assessment Advisory Committee to carry out these functions is recommended.

20. The private sector should be given six months' notice of the date on which the Act will apply to it and after the Act is extended to the private sector exemptions on the grounds of advanced planning should be restricted to the most exceptional circumstances and subject to review by the Advisory Committee.

21. It is recommended that the Commission recommend to the Ontario government that it institute suitable safeguards to ensure that class assessments are not used to circumvent the intent of the Environmental Assessment Act. If class assessments are to be used either in the private or the public sector, there must always be a suitable "bump-up" provision to ensure that projects likely to have significant environmental impact individually are assessed individually. A combination of "bump-up" provisions and scrutiny should be carried out by the Advisory Committee.

22. The main criteria for releasing a project from environmental impact assessment must be its anticipated environmental impact. Other criteria should be used sparingly, and discretion to exempt projects from the assessment process should be limited.

23. It is recommended that the Commission make three recommendations to the Ontario government regarding the use of discretion:

    a) Specific, clear guidelines and criteria for designations and exemptions should be promulgated and made public, and decisions must be based on these to the greatest extent possible.

b) As soon as Ministry of Environment staff become aware of undertakings that fall into a gray area between significance and non-significance, or which are clearly significant but the proponent seeks to avoid the Act on other grounds, the Ministry staff should have an obligation to notify the public of this situation and provide an opportunity for public submissions.

c) Anyone who wishes to proceed with an undertaking either under the Act or without complying with the Act, which may have significant environmental impact, should be required to submit to the Ministry of the Environment a pre-screening document. The document should be public and notice should be given that it has been received.

If the proponent continues to take the position that his undertaking should not come under the Act, there should be a public participation before the Environmental Assessment Advisory Committee, before the Minister or Cabinet makes the final decision.

This Board or Committee should follow a fair procedure in that its proceedings are public, it makes public the submissions received by it, and its recommendations, and it gives written reasons for its recommendations in each case.

24. It is recommended that the Commission recommend to the Minister of the Environment and the Premier that they keep their promises to establish an Advisory Committee to replace the defunct Environmental Assessment Steering Committee, as soon as possible. The Advisory Committee should have significant public interest representation from members outside the government. Its role should include the screening of undertakings, review of regulations under the Act, and decision-making on requests for public funding.

III. Streamlining the Environmental Assessment Process: The Consolidated Hearings Act

25. There is a perception, whether accurate or not, that the Environmental Assessment Act increases costs, creates delay, and creates duplication of effort. With the passage of the Consolidated Hearings Act, there is no longer any justification for delay and for attacks on the environmental assessment process on that basis.

26. It is recommended that the Commission recommend to the Government clarification of the Consolidated Hearings Act to ensure that the provisions of the Acts in the Schedule that are most advantageous to members of the public who wish a full and fair hearing are preserved under the Consolidated Hearings Act.

IV. Return to Detour Lake

27. The case of the Detour Lake Road illustrates several problems with the current environmental assessment process. With respect to these issues, the following recommendations are made:

> That the Commission recommend to the Government that Ontario take a leadership role in devising and promoting a mechanism for resolving interprovincial and federal-provincial disputes on environmental issues. This mechanism should ensure that an assessment of an appropriate scope is done in a timely manner whenever an undertaking may have significant impact.
>
> That the Commission recommend that the Government develop an interministerial mechanism for identifying a proponent and preventing delay in deciding

that an undertaking exists for the purposes of the EAA.

That the Commission recommend that the Ontario Government adopt a policy designating any private sector undertakings upon which a public sector project is contingent if the public sector project is under the EAA.

I Overview

The Environmental Assessment Act creates an evaluation and approval process for all undertakings by the public sector (except those which have been exempted) and for private sector projects which have been specifically designated. This process requires the production and acceptance of an "environmental assessment" document prepared by the proponent. Once the environmental assessment document has been accepted, the Minister of the Environment may grant approval to proceed, with or without conditions, or he may refuse approval to proceed. In making this determination, the Minister or the Environmental Assessment Board is required to give consideration to the purposes of the Environmental Assessment Act, the environmental assessment document and any submissions made to the Minister in respect to the environmental assessment (Section 14(2) and (20)).

Consequently, the environmental assessment document is critical in this process of evaluation and approval. Clearly an environmental assessment document is a planning tool, but beyond that its precise meaning has yet to be defined by actual practices. When government officials, developers and public interest groups refer to an environmental assessment, they may not have a common concept in mind. Before consensus is reached concerning this concept, it will be necessary to determine whether the environmental assessment document should be merely;

(a) an information gathering device, or
(b) a decision-making tool which is discretionary, or
(c) a decision-making tool which carries legislative duties.

Basically, an environmental assessment document is the collection and analysis of data about the potential impacts

of a project. It has no action-triggering mechanism requiring anyone to act on the basis of the information collected or conclusions reached. Thus, when used to describe this kind of study, the term "environmental assessment" implies no obligation on the part of the proponent of the project, the licensing or approving agency, or the agency responsible for regulating operation of the project, to take any action to avoid, eliminate, or mitigate potential negative impacts identified in the assessment document. The object of such assessment is merely the identification of impacts.

It is important to note that the term "environment" is given the broadest definition under the Act to include:

(i) air, land or water,
(ii) plant and animal life, including man,
(iii) the social, economic and cultural conditions that influence the life of a man or a community,
(iv) any building, structure, machine or other device or thing made by man,
(v) any solid, liquid, gas, odor, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
(vi) any part or combination of the foregoing and the inter-relationships between any two or more of them.

A senior environmental planner in the Ministry of the Environment has put the purpose of the Act in perspective. He has commented that:

> "Environmental assessment is not intended to make natural environmental factors paramount. Rather, it is intended to see that they are given fair weight and consideration in the decision-making process. Perhaps the intent of the legislature might have been clearer had the statute been entitled, not the Environmental Assessment Act but "The Decision-Making Act".[1]

From the foregoing, it is clear that the Environmental Assessment Act envisages an environmental assessment that is not only an information-gathering device (Section 3), but also, a decision-making tool which is discretionary (Sections 14 and 20). In this regard, the Minister or the Environmental Assessment Board is required to consider:

(a) the purpose of the Act (Section 2, "the betterment of the people...by providing for the protection, conservation and wise management... of the environment");

(b) the environmental assessment;

(c) the submissions with respect to the environmental assessment.

However, there is no duty per se to avoid, prevent or mitigate adverse impacts. Furthermore, there are no environmental standards, criteria or policies of protection with which the decision maker must comply when deciding to approve an environmental assessment document and/or an undertaking. Approval decisions may indeed produce a pattern of environmental protection. Unfortunately, the Act also allows for the opposite possibility - a pattern of environmental sacrifice where unlimited discretion may lead to excessive exemptions and unrestricted approvals.

Regrettably, the Act follows the tradition of allowing government and its agencies almost unfettered discretion to make decisions about development and resource extraction in what they consider to be the public interest, without reference to rights, standards, guidelines or articulated policies. It is too early to judge whether this exercise of discretion will favour environmental protection, or the economic benefits of development. However, when one considers the experience to date, there is an established practice of

granting exemptions from the Environmental Assessment Act. This evidence suggests that this discretion will not be exercised to favour environmental protection and public participation. We will discuss the exemption process in greater detail in Section IV. The concern about exemptions is noted here to demonstrate how unfettered discretion can undermine the environmental assessment process.

At the time of proclamation of the Act, Ontario Regulation 836/76, as amended, exempted thirteen Ministries entirely from the provisions of the Act. Furthermore, the regulation contained "grandfather" clauses exempting certain undertakings from the Act on the basis that they had already reached advanced stages of planning or construction. Finally, municipal undertakings were exempted, with the stipulation that they would be brought back under the Act at some time in the future. This was done in October 1980. By March 1980, the Minister had exempted approximately 170 specific undertakings over and above those dealt with in the sweeping exemptions contained in the regulations.[2]

Combined with the use of "class" assessments, this system of Cabinet regulation and Ministerial orders has led one author to conclude that, "it is not surprising that the public has described the Environmental Assessment Act as 'all show and no go'".[3]

While the Act applies to essentially all public undertakings unless they are exempted, it does not apply to private sector undertakings unless they fall within Section 3(b) and Sections 41(c) and (d). The Act created a three-step procedure for designating private undertakings. First, Section 3(b) had to be proclaimed in force. This occurred

in October 1976. Secondly, a specific day had to be designated by the Cabinet. This was done in January 1977. Finally, before a specific enterprise can be assessed, the Act requires a regulation defining the enterprise or class of enterprises to which it belongs as "major", and designating the enterprise or the class as one to which the Act applies (Sections 41(c) and (d)). As a result of this rather arduous set of preconditions for private assessment, a few private projects have been designated for environmental assessment to date.

These decisions to grant exemptions or to designate private sector projects are made without the benefit of formal criteria and guidelines or public input. The only restriction placed on the Minister's power to grant exemption orders is that, in the Minister's opinion, it must be "in the public interest, having regard to the purpose of this Act, and weighing the same against the injury, damage or interference that might be caused to any person or property by the application of this Act to any undertaking..." Section 30). In reviewing the overall climate of discretion created by the Act, one group of authors has concluded that;

> "...the staff (and the Minister) decide on designations, exemptions and the initial interpretation of key words and phrases such as 'in the public interest'. There are no firm guidelines to guarantee that large, obviously significant, undertakings will be assessed...
>
> While discretion is in itself a necessity in such a complex administrative process as environmental impact assessment...we are concerned here in general with the abuse of discretion, particularly with political expediency. Few would argue that the government should have no discretionary right to exemption from the process, particularly...in 'emergencies'. In Ontario the exemptions are much broader. Almost any exemption can be justified as being 'in the public interest', particularly if public interest is equated with the interest of the proponent and his customers.

> There is clearly a point at which the legitimate use of discretion crosses the line into political manipulation, and it is that abuse of discretion in the the process, particularly in Ontario, that concerns us. The excessive use of discretion is, in our opinion, one of the most prevasive and persistent problems in the environmental impact assessment. Discretion has tended to be the by-word in all provincial assessment processes."[4]

In some quarters, this legislation has been referred to as "The Environmental Exemptions Act".

When discretion has been exercised constantly to free undertakings from the requirements of the Act, how is the public to have faith in the use of discretion in relation to the acceptance of an environmental assessment and the granting of approval? The designers of assessment procedures must recognize that the identification of impacts is not enough. The creation of a discretionary decision-making process is not enough. The continual non-application of the Act is surely not enough. It is necessary to consider the reasons for designing a process through which impact may be identified, namely, the need to provide a mechanism for conflict resolution and the need to protect the environment.

In development situations, rights, needs and interests of proponents and affected parties are often in conflict. The government and proponents often wish to deny the reality of this conflict. From their point of view, an informational environmental assessment process is preferable to a decision-making one, because the former need not incorporate adversarial procedures which can be costly, time-consuming and sometimes rancorous. It is easier to hope that the conflict will disappear once "objective" information about a project and its consequences is made available to all. However, the

denial of the existence of opposing interests is unlikely to eliminate such conflicts. It is much more likely to delay it or displace it to a different forum. We submit that a useful process must be a conflict-resolution and decision-making process.

This process will have to take into account the need to reduce the discrepancy between the resources and power available to the proponent and to the opponent of development, while resolving conflicts in a manner viewed as fair. Thus, an assessment process must incorporate a combination of cooperative and adversarial forms of public participation at appropriate stages in the decision-making process. Members of the public who question a project are likely to perceive any attempt to remove adversarial proceedings as an attempt to take away their right to a fair process.

The success of the environmental assessment process in the North will be determined largely by the extent to which the process incorporates public participation. Since intervenors are likely to take environmental protection positions, their role will cause the process to evolve towards environmental protection. Therefore, the more open to public participation the process is, the more it is likely to evolve into a meaningful, decision-making and environmental protection mechanism.

Participation in the environmental assessment is costly to concerned members of the public. Normally the public has the least resources available. They are unlikely to spend time, energy, and money on a purely informational process, or on a process in which their effectiveness is continually undercut by purely discretionary decisions, which are vulnerable to political influence.

If intervenors perceive their participation as tokenism - that is, if they detect that their evidence and opinions are not used in making the decision - they will tend to reject the process. If this occurs, they may become alienated from the assessment mechanism and look for other less productive methods of obtaining their ends. In the alternative, they will demand that the information they have provided be used as a basis for decision-making.

For public interest groups to consider their participation meaningful, it must be structured to ensure that it may affect the outcome of the decision-making. An effective process requires that each of the parties making representations has a reasonable chance of success and that the procedures used are fair. The intervenor will evaluate the cost effectiveness of this participation. To be effective, an intervenor must be in a position to understand, evaluate and test scientific information presented by the proponent. To make this possible, public funding must be available to intervenors.

Public participation at the pre-submission stage in the decision-making process may bring forward alternatives and opinions that will help the proponent to rule out completely unacceptable choices. This involvement also may generate improvements in the proposal which will prevent, eliminate, or mitigate unnecessary adverse impacts on the environment. In some cases, compromise or consensus may be reached between the parties. The issues which need to be resolved through an adversarial approach may be narrowed.

However, where differences still remain after other forms of public participation have taken place, an effective

decision-making process will be needed. In this process opposing views can be exposed, and assessment data can be tested and evaluated before a neutral third party. An effective environmental assessment process will have to incorporate this process of negotiation or adversarial proceedings which recognizes and attempts to resolve remaining conflicts.

The issues raised here - the problem of excessive discretion, the need for effective public participation and public funding - will be examined in detail in the following sections. We will also review the Consolidated Hearings Act and it's implications for the key issues raised in this report. Finally, we will return to Detour Lake, using the Commission's case study to further identify and underline areas for reform of the Environmental Assessment Act.

II The Evolution of the Environmental Assessment Act

A. A Brief History of the Canadian Environmental Law Research Foundation

The Canadian Environmental Law Research Foundation was founded in 1970, along with the Canadian Environmental Law Association, by a group of lawyers, scientists, and conservationists. The Foundation conducts and supports research into the use of the legal system and legislation to promote sound environmental planning and halt environmental degradation. It sponsors research into legal reforms, improvements in government decision-making and policy formulation on environmental matters.

In addition to submitting briefs to government agencies, task-forces, and Royal Commissions, CELRF has published a number of books on Canadian law and policy, including Environmental Management and Public Participation, Environment on Trial, and Protection of Natural Areas in Ontario; Private Ownership and Public Rights. In association with other publishers, CELRF has produced Poisons in Public, A Study of Environmental Contaminants and Environmental Rights in Canada. In addition, CELRF publishes the only environmental law reporter in Canada, the Canadian Environmental Law Reports.

CELRF works closely with the Canadian Environmental Law Association, a community legal clinic supported by the Ontario Legal Aid Plan. CELA provides legal advice and assistance to members of the public who could not otherwise afford to enforce their environmental rights, and acts as an environmental "watchdog", frequently bringing potentially harmful industrial and government practices to the attention of the public and authorities.

B. CELRF and CELA's Involvement in Environmental Impact Assessment

CELRF and CELA have promoted the concept of environmental impact assessment since their inception. Their role in informing the Canadian public about the importance of this planning tool and in helping to shape existing environmental assessment legislation, policies and practices in Ontario has played an important part in the history and the realization of this concept in Ontario.

In 1971, during the debates leading to the passage of the Environmental Protection Act, CELRF pointed out that:

> "The provisions of the Bill providing the tools of control orders and stop orders for serious cases of pollution do not appear to contemplate remedies to avoid anticipated future emissions, additions or discharges of contaminants. These tools are fashioned for present acts of pollution. If the Director is aware of present actions that will ultimately cause an illegal source of pollution, he should have the power of prevention as well as the power of cure." [5]

It was this failure of the Environmental Protection Act to provide for a preventive planning mechanism, as well as the lack of public participation in environmental planning, that the Environmental Assessment Act was intended to remedy. CELRF pointed this out in its comments on Bill 94.

In January of 1972, CELRF recommended that:

> "CELRF asserts that when any government department or agency proposes a work, undertaking or project which may detrimentally affect environmental rights, it be required to publish an environmental impact statement. The environmental impact statement must contain full disclosure of the probable environmental transitions likely to occur as a result of proceeding with the work, undertaking or project and must be published in a reasonable period of time prior to its commencement.

> CELRF proposes that if an environmental impact statement is not forthcoming, or is deficient in detail, then any ten members of the public shall be at liberty to maintain an action for mandamus compelling the issuance of an adequate environmental impact statement in addition to injunctive relief, preventing the commencement of any work thereupon."[6]

Also in 1972, CELRF adopted a resolution to work for the passage of an environmental Bill of Rights in every province of Canada, an essential component of which would be environmental impact assessment.

In the years leading up to the passage of the Environmental Assessment Act, CELRF and CELA members made frequent speeches in support of legislation for Ontario similar to the National Environmental Policy Act in the United States. NEPA was hailed as model legislation on environmental assessment.

When the Ontario Ministry of the Environment published a Green Paper on Environmental Assessment in 1973,[7] the Canadian Environmental Law Association responded with the 46-page "White Paper".[8] CELA's new criticism of the Green Paper centered on the view that the provisions were subject to excessive government discretion and susceptible to political manipulation. We recommended an independent Environmental Review Board similar to the present Environmental Assessment Board. CELA staff members toured the province of Ontario speaking to community groups and the media, and gathering support for a process which provided more public access to information, more public participation, and less discretion than contemplated by the Ministry. CELA appeared before the Standing Committee during debates on the Bill, and ultimately, many of CELA's recommendations were incorporated into the final legislation. However, the problem of excessive discretion was not mitigated, and it is one of the key issues which we will deal with in this report.

Following the passage of the Environmental Assessment Act, CELA continued to monitor the Act's progress. Many members of the public were disenchanted with the government's slowness in bringing municipalities under the Act, the failure to bring private sector undertakings under the Act, and the many exemptions granted to government undertakings with significant environmental impact.

CELA has continued to provide leadership and to attempt to influence government on these issues. In the fall of 1981, CELA provided legal assistance to a citizen who prosecuted the Minister of Transportation and Communications for the province of Ontario, and his Deputy-Minister, for violating the Environmental Assessment Act. This report is another example of our commitment to help shape and strengthen the EAA.

C. A Brief History of the Environmental Assessment Act

In 1972, the government of Ontario announced in the Speech from the Throne that it would introduce legislation to provide for environmental impact assessment. The government decided that the Minister of the Environment would introduce this legislation and would be responsible for administering it. It was envisioned that the legislation would take the form of an amendment to the Environmental Protection Act.

In order to "test the waters" before introducing this legislation, the Ministry of the Environment issued a Green Paper and invited public comment. The Green Paper was a thoughtful and perceptive document. It laid out clearly the need for advanced planning and the philosophy behind such planning.

Although proposing to begin only with assessment of government projects, the Ministry said that ultimately the process would include private sector projects. The Green Paper suggested that the government would provide a timetable for phasing-in of the application of the assessment procedure, first to government and then to private projects.

The Ministry recognized that evaluation must extend beyond solely physical consequences of development, and also look at the social and economic impacts.

The Green Paper recognized that some projects would fall into a "grey area" between activities clearly having a significant effect on the environment and activities having an insignificant effect on the environment. It proposed that some screening mechanism would be needed to deal with these "grey area" projects.

Two areas of discussion in the Green Paper gave environmentalists particular cause for concern. The first was the danger that this screening mechanism would be entirely discretionary, with no meaningful procedure for review or appeal. Environmentalists were concerned that entire classes of projects might be exempted from the environmental assessment requirement by regulations made by the Lieutenant Governor in Council. This procedure would permit no prior scrutiny by the public or by the legislature.[9] Secondly, in suggesting several alternative approaches to environmental assessment, the Green Paper clearly implied a Ministry bias against review of the environmental assessment document and the acceptability of the project by an independent body. The Ministry felt that such a body would be unaccountable to the legislature and that it might misinterpret or alter "government policy".

The Ministry of the Environment was taken aback by the extent and intensity of the public response to this Green Paper. While it had wanted to gauge public opinion, it had not anticipated that environmental impact assessment would be of such great interest to the public.[10] The Ministry received numerous submissions, many of them expressing concerns similar to those raised by the Canadian Environmental Law Association, about the potential for political interference in the process, inadequate participation, and unjustified exemptions from the process.

Although the Ministry had solicited public views, it was reluctant to make public the responses it received. Only after several requests by the Canadian Environmental Law Association for access to these public submissions did the Ministry agree to release them. This secrecy did very little to enhance the trust of the public in the government. When the Ministry finally did make these submissions available, an analysis by the Canadian Environmental Law Association made it clear that the majority of submissions were supportive of the concept of environmental impact assessment and reflected many of the same kinds of concerns as CELA's "White Paper". A dichotomy between the views of environmentalists and the general public as to how an environmental impact assessment process should be designed, and that of the government, was quickly becoming apparent.

The Ministry of the Environment was very reluctant to introduce legislation which placed any restrictions on the right of the government to by-pass the environment impact assessment process at will. It was equally reluctant to delegate any control over the process or decision-making power to any agency outside of the Ontario Cabinet or its individual Ministries.[11]

The reasons for this are clear. First, the Ministry of the Environment did not feel that it had sufficient staff to review all significant projects. In order to avoid an overload that could result in embarrassing errors or omissions that might hurt the credibility of the process in its formative stages, the Ministry chose instead to control the workload.[12] Secondly, the government, probably quite rightly, feared they would face a concerted effort by municipalities and private industry to defeat or undermine the legislation, if those sectors were to be immediately subject to it. Thirdly, even if the legislation were initially limited to government-initiated undertakings, the Ministry of the Environment felt that it had to have the ability to placate other government ministries by exempting projects to which they were strongly committed, in order to obtain their support for the legislation.

The reason for the Ministry of the Environment's concerns is apparent from the structure of the Act. First, the Act defines environment to include not only the natural environment, (over which the Ministry of the Environment has primary jurisdiction) but also social, cultural, and economic matters, over which other ministries would otherwise have exclusive jurisdiction. Secondly, the Act gives one Ministry, a relatively "junior" Ministry of the Environment, a partial veto over the expenditures and projects of all other government ministries.

Environmental groups demanded that all projects of significance should be subject to the Act; that exemptions should be subject to public scrutiny and review; and that safeguards against political manipulation of the process should be built into the legislation. These demands quickly found support from municipalities, consumer groups, civil liberties associations, and the media.

The Ontario government had expected praise for its promise to pass environmental impact assessment legislation. Instead, it was now aware that if it passed the discretionary legislation it envisioned, it would receive much more criticism than support from the general public. On the other hand, if it were to pass legislation that would guarantee assessment of all significant projects except under exceptional circumstances, and reduce the discretion of the individual government ministries, the government would face substantial pressure from municipalities, industry and provincial Ministries. The Ministry of the Environment would become isolated within Cabinet.

Due to these circumstances, there were several delays in introducing legislation. The Minister of the Environment and the Premier stated on several occasions, publicly and privately, that the legislation would be introduced shortly, but it was not introduced. Ultimately, a senior official of the Ontario Ministry of the Environment telephoned the Executive Director of the Canadian Environmental Law Association to explain to him that if CELA continued to exert pressure for the kind of legislation it wanted, no legislation would every be introduced. Undoubtedly, this official did not mean this as a threat. He likely hoped to gain the support of the Association in introducing legislation which, while seriously flawed in the eyes of environmentalists, would be better than no legislation. However CELA, feeling strongly that the safeguards demanded by the public were a matter of principle from which it could not retreat, felt that only one choice was available to it. The following day, CELA called a press conference announcing that it had been informed that if it did not back down on its demands, there would be no environmental impact assessment legislation.

Soon after this, on March 24, 1975, the government introduced an environmental impact assessment bill for first reading. As it stood at first reading, the Act would have required environmental impact studies on activities, whether public or private, only after regulations were made bringing them within the Act. The Act would not apply to any project until it was designated by regulation. Public hearings would be held only if the proponent or Minister demanded them. The public had no right to hearings.

The teeth of the Act would therefore have been in the regulations but the Act contained no timetable for implementation. Both the Act and the the Minister, William Newman, were silent on whether the public would have any opportunity for input into the eventual content of these regulations.

The Act as it was stated for first reading recognized no right of the public to notification of a proposed undertaking, to access to information, to hearings, to court appeal or judicial review of a decision, and no right to enforce the provisions of the Act when the Government would not.

The Act did establish an Environmental Assessment Board. However, the Board would have no power to make decisions, but would only make recommendations to the Minister. The rules of natural justice codified in the Statutory Powers Procedure Act would not apply in hearings before the Board. In other words, the government had rejected many of the recommendations of the public.

After considerable lobbying by citizen groups and critical review by the media, the Act, with numerous amendments, was tabled for second reading. The amended Act would apply to all public sector activities unless they were exempted by regu-

lations. The Act would still not apply to the private sector unless an area of private enterprise were designated by regulation. The Minister announced that all municipalities would be exempted and would be brought under its provisions at a later time. He refused to incorporate any time frame for implementation into the Act, but he made a policy statement in the Standing Committee on Resources Development on July 3, in which his stated intention was that the Act would apply to all undertakings, public or private, within eighteen months. Of course, this never happened.

The amended Act gave the Environmental Assessment Board the status of a decision-making body. The public was given the same right as the proponent to require a hearing, although the Minister had absolute discretion to deny a hearing if he deemed the request frivolous, vexatious, causing undue delay, or unnecessary. Parties to the proceedings were redefined broadly to include any person who "required" a hearing. The amendments required the Minister to give wider notice of hearings, and some access to information.

Between first and second readings, the Deputy Minister of the Environment, Everett Biggs, had addressed the Provincial-Municipal Liaison Committee about the Act. He had advised the representatives of Ontario's municipalities that although there had been considerable pressure to bring all projects under the Act unless exempted, the Ministry intended to continue with the procedure of bringing nothing under the Act unless specifically designated. For some reason, the Ministry partially reversed its stand between first and second readings and made all public projects subject to the Act unless exempted.

There is no doubt that inclusion of all public undertakings, unless exempted, created administrative difficulties for the Ministry. Politically, it felt that it had to exempt many government projects, although in theory they were subject to the Act. It proceeded to produce hundreds of pages of exemptions. Entire classes of projects were exempted. All the projects of entire Ministries were exempted.

Implementation of the Act, even for the public sector, came very slowly. Three years after the Act had been passed, only five environmental impact assessments were being prepared. Not one of these assessments had been completed. No public hearings had been held. It took five years for the first public hearing to be held.

If the Ontario government has a lack of commitment to its own legislation, and this is CELA's strongly-held view, this brief history may help to explain this lack of commitment. The Ontario government never wanted the kind of environmental assessment legislation it now has. It passed it reluctantly, and since then has done everything under its power to avoid following its spirit. If we may take the liberty of speaking metaphorically, in a sense the Environmental Assessment Act can best be understood as an illegitimate child. Its mother was the environmental movement in Ontario. Its father was the Ontario government, which has only very reluctantly accepted responsibility for its paternity.

D. A Description of the Environmental Assessment Process

The following is a point-form description of the steps in the environmental assessment process. We have indicated both the formal requirements of the EAA and the informal policies and practices of the Ministry of the Environment in administering the Act. This description will serve as a reference point when we make specific recommendations later in this report.

1. Through informal correspondence or meetings, the Ministry is informed of the proponent's intention to undertake a development.

2. If the proponent is a public body (e.g.: a government agency or municipality), the project is automatically designated unless the Minister decides to exempt it. If it is a private undertaking, the project is not subject to the Act unless the Minister designates it. This decision is taken. These regulations and exemptions are published in EA Update and the Ontario Gazette. The following steps apply only to projects which are under the Act, or have been designated under the Act.

3. The proponent is strongly advised to involve interested and affected parties, including government agencies, in public participation at this stage. This is described in the Ministry's publication, Guidelines for Pre-Submission Consultation. The decision to engage in public participation at this early stage and the form it takes is totally at the discretion of the proponent. The Ministry is trying to encourage the concept.

4. There are General Guidelines available to assist proponents in preparing their EA document. Occasionally the Ministry

issues project-specific guidelines, but more often the specific requirements of the EA are worked out informally, through a series of meetings between the proponent and Ministry staff. If specific guidelines are prepared, they are published in EA Update and the Ontario Gazette. This is the first public notice of the undertaking. The case is assigned a file number.

5. The proponent prepares his environmental assessment (EA) document and upon completion submits it to the government. The EA document is the equivalent of an application for permission to proceed with the undertaking. The EA document becomes a public document.

6. The Minister is required to give notice of the receipt of the EA document to the proponent and to the clerk of the municipality in which the undertaking will be carried out. Notice to any other persons is discretionary. However, it is the practice of the Ministry to attempt to inform interested and affected parties at this stage.

7. Notice that the proponent's EA document has been received is published in the EA Update.

8. Staff of the Ministry's Environmental Assessment Branch co-ordinate a review by various government agencies of the proponent's EA document.

9. Notice that the government review (GR) is being conducted is published in EA Update. The proponent can amend or withdraw his proposal or amend his EA document at any time up until the completion of the GR.

10. The government review is completed. Both the EA and the GR are made public, and notice that they are available for inspection is published in EA Update.

11. The Minister is required to give notice of the completion of the government review and the locations where the EA and GR may be inspected. This notice must be given to the proponent and to the clerk of the municipality in which the undertaking will be carried out, but notice to any other persons is discretionary. However, it is the practice of the Ministry to attempt to inform interested and affected parties at this stage.

12. There is a 30-day waiting period during which any member of the public may inspect the EA and the GR at the Ministry's Toronto office or at the regional or district office closest to the site of the undertaking. The Minister can extend this limitation period at his own discretion. No decision on the project can be made, and no work can be commenced until this 30-day waiting period has expired.

13. At any time during this 30-day period any member of the public may "require" the Minister to hold a public hearing on the proposed undertaking. Unless the Minister deems such a request to be frivolous and vexatious, or feels it would cause undue delay, he is obliged to have the Environmental Assessment Board (EAB) hold a hearing.

14. At any time during this 30-day period any member of the public may make a written submission dealing with the proposed undertaking, the EA and the GR. The purpose and requirements of such a written submission are unclear. At present, the Ministry and EAB do <u>not</u> make a written submission a prerequisite to acceptance of a request for a hearing, or to a grant of full party status if a hearing is held. This is a matter of policy, as there appears to be no statutory right to a hearing or to status without first making a submission. Under the Act, any person who

makes a written submission is entitled to be served all notices, and any person who requests a hearing after making a submission is automatically given full party status. The written submission is required to be served on the EAB only.

15. If there is no request from the public for a hearing, the Minister can order a hearing at his own discretion. Where a hearing is not required and the Minister accepts the proponent's EA document, the Minister must give notice of this to the proponent and to any person who made a written submission.

16. If a hearing is not required and the Minister finds the EA document unsatisfactory and proposes to amend it, he must give notice of this, together with written reasons regarding the amendments, to the proponent and to any person who made a written submission. The Minister may then receive further written submissions from the proponent and any other person. Then the Minister can accept, or amend and accept, the EA document. He must give notice of this to the proponent and to everyone who has made a written submission.

17. If the Minister finds the EA document deficient, he can require the proponent to carry out further studies. The Minister must give notice of this to the proponent, together with written reasons. Notice of the order must be given to everyone who has made a written submission.

18. If the Minister finds the EA document acceptable, and no person has required him to hold a hearing, the Minister may, with Cabinet approval, accept the project.

19. The Minister may, in his own discretion, require the Board to hold a hearing.

20. The Minister can ask the Board to hold a hearing on any or all of the following aspects:

    (a) the adequacy of the EA document;

    (b) whether approval for the undertaking should be given;

    (c) whether approval should be subject to terms and conditions.

    Thus, the Minister could accept the EA document and have the EAB hold a hearing dealing only with the issue of approval.

21. The Board is required to give "reasonable notice" of the hearing date to the proponent and the Minister. The Board must also give notice to the public and to any person who has made a written submission to the Minister. The Minister may direct the Board to give notice to others, or the Board in its discretion may give further notice.

22. The parties to the hearing are the proponent, the Minister of the Environment if he requests status, and any person who has required a hearing. Granting party status to any other persons is at the Board's discretion.

23. Copies of the "full public record" are available for inspection at the Ministry's Toronto office and at the Ministry's regional or district office nearest the location of the undertaking.

24. The full public record consists of:

    > "the environmental assessment, the official review, any written submissions, any decisions of the Environmental Assessment Board and the Minister of the Environment, the various notices and any order of the Minister under the Act."

However, the Ministry, at its own discretion, may or may not include the following documents: background studies, studies relied on in either the EA document or the GR, correspondence between the proponent and the Ministry, Ministry memos on the project, the positions taken by individual members of the GR team (which may conflict), and positions taken by other government Ministries. The EA must list all studies and reports relied on, but the Act imposes no similar requirements on the GR.

25. The Board may order that copies of the EA document and the GR be made available at other depositories such as schools, libraries, municipal offices, post offices, etc. This is at the Board's discretion.

26. Although the EAB is not required to provide discovery procedures, the Board announced in 1981 that it would require advance filing of witness statements and exhibits, and that it will require the exchange of interrogatories and will encourage motions for directions.

27. There is no requirement that the Board hand down a decision within a certain time period after the completion of hearings.

28. Only members of the Board present at the hearing can participate in the decision.

29. The Board may appoint a class representative, but this does not exclude other members of the class from taking part in the proceedings at the Board's discretion.

30. The Board must give a copy of its decision with written reasons to the Minister, the parties, the clerk of the affected municipality, and any person who made written submissions.

31. The Board is not subject to any form of judicial review for any of its actions other than acting outside its jurisdiction.

32. The Board can hold in camera hearings at its own discretion.

33. Within 28 days of receiving a decision of the Board, the Minister, with the approval of the Cabinet or designated Ministers, may vary the decision of the Board, in whole or in part, or order a new hearing. In doing so, he must give public notice with reasons.

III Public Participation

A. Pre-Submission Consultation

Pre-submission consultation refers to a process of consultation which takes place before the proponent submits his environmental assessment document to the Ministry of the Environment. The consultation takes place between the proponent and the government reviewers and other government agencies, and between the proponent and concerned or affected parties such as municipalities, organizations, ratepayers and individuals.

Formal Provisions

The EAA places no statutory requirement on the proponent to consult with the government or any other party before submitting the EA document. While one could argue that such consultation is implied and necessitated by other requirements of the Act, there is no legal duty on the proponent to provide participation at this stage.

However, the Ministry of the Environment has issued two documents which urge pre-submission consultation:

General Guidelines for the Preparation of Environmental Assessments, 2nd Edition, January 1982, and Guidelines for Pre-Submission Consultation, September 1981.

The General Guidelines introduce the section on public participation by stating, at page 31,

> "The early involvement of the public in decisions which affect its interests, is increasingly becoming recognized as a citizen right in a democratic society. It has an important role to play...as a means to a more equitable and effective policy planning process."

The document goes on to "strongly advise" the proponent to involve the public in the planning process which leads to the preparation of the EA document, arguing that the proponent "is likely to be on firmer ground if evidence can be presented of previous consultation with those likely to be affected".

In fact, this statement may be misleading. Public participation by the proponent at this stage could have two outcomes. If the proponent is indeed open-minded, flexible and willing to make accommodations to mitigate the problems of those affected by the undertaking, and if there is no serious fundamental opposition to the project, then the statement is true. However, if the proponent is not willing or able to solve the problems of the affected public, and/or there is serious opposition to the project, public participation at this stage may well have the effect of organizing and strengthening opposition to the project. Many proponents are well aware that public participation is a double-edged sword which they would much rather leave untouched. Therefore, we expect proponents will be reluctant to engage in pre-submission consultation.

The General Guidelines go on to list other advantages of early public participation, such as providing data on public attitudes towards the project, highlighting concerns before they lead to confrontation, and the benefit of alternative suggestions from the public. The document also warns, in this section, that the public has the legal right "to require the Minister to have hearings by the Environmental Assessment Board".

The Guidelines for Pre-Submission Consultation, prepared by the Ministry of the Environment, further emphasize the importance of consultation at this stage, and set out a number of sound and practical steps for the proponent to take in the process.

The Introduction to the document explains that Cabinet has directed the Ministry "to pursue a vigorous policy focused on pre-submission consultation". These Guidelines address both proponents and "participants", the latter including "government reviews at all levels, affected groups and organizations and members of the public". Regarding the purpose of pre-submission consultation, the document states,

> "These guidelines are based on the premise that concerns which may arise in the formal review process under the EAA can be addressed and eliminated or minimized in advance of formal submission."

It is suggested that,

> "By following these principles, a proponent can increase the level of certainty with which the outcome and timing of the formal review process can be predicted."

For the participants, the Guidelines state that they,

> "...should find the proponents are much more willing to modify or even drop a proposal at this early stage than they are...later...when considerable investments have been made in detailed design and engineering."

The principle behind this advice is that it is much easier to identify and resolve conflicts at a very early stage, before the proponent has made a large investment in following

a particular plan, and before any affected parties have developed an opposing stance. That is a very sound planning principle, and should be supported fully. The only difficulty with these Guidelines is that they are discretionary, and they put all of the onus on the proponent, and they may simply be unrealistic.

Acknowledging that not all conflicts will be resolved by this process, the Guidelines argue that pre-submission consultation will still be beneficial because it will serve to identify the really important issues on which the EA document should focus.

To ensure early consultation, the Guidelines urge that consultation begin "when the proponent has a general idea of the alternative undertakings...and the geographical area which might be affected. Early participation is emphasized again, under the heading "Timeliness":

> "...the proponent is expected...to commence consultation at an early enough stage in project planning for the opinion and advice of the reviewers and other participants to have an influence on the go/no go decision and on the selection of alternatives. Unrealistic time frames or deadlines undermine the effectiveness of the process."

The Guidelines also indicate that the documents related to the pre-submission consultation will become part of the Public Record files on the case maintained by the Ministry.

Discussion

The Ministry of the Environment is to be commended for this effort to design a process which will truly involve the government and the public in decision-making with respect to environment assessment.

The Guidelines for Pre-Submission Consultation are very carefully thought out and clearly explained. They indicate a broad acceptance of citizen involvement, and a good understanding of the drawbacks and limitations of the adversarial process which emerges at the hearings stage. The recognition that pre-submission consultation would give the proponent an opportunity to change or amend his plans to reflect the needs and concerns of government reviewers and other participants, is insightful. This document envisions a co-operative planning process which involves the proponent, the government and affected parties working together in good faith, united by a common goal of sound environmental planning.

Were these Guidelines to be followed, a good deal of the actual decision-making would take place in the pre-submission stage. The early and broad decision-making would take place within a process that is initiated and controlled by the proponent; within a process that is totally discretionary and confers no rights or duties on any of the parties, including the proponent; and within a process that has no formal legal practices or procedures. Is this desirable?

The arguments in favour of pre-submission consultation are compelling. However, because proponents recognize the "double-edged" nature of public participation, and because neither government nor private industry is accustomed to "letting outsiders into the Board Room," it may be naive to expect proponents to engage in pre-submission consultation.

We do not have a co-operative planning process because the goals of affected parties frequently conflict with the goals of proponents. To expect a proponent to voluntarily let a potential opponent into the Board Room in the very early planning stages is simply unrealistic.

In an attempt to still serve many of the very commendable objectives of pre-submission consultation, we would like to recommend a series of procedural changes designed to involve the public at an earlier stage, but still recognize the realistic limitations of public access to the proponent's decision-making process. The procedural changes we recommend are described in the following parts of this section.

B. Notice

Our concerns regarding pre-submission consultation may best be resolved by changing notice procedures. Presently, no public notice is required until after the proponent has formally submitted an environmental assessment document and the Ministry has prepared its review. If there is no public notice until this rather late stage, the effectiveness of public participation is severely limited. There is also the danger that when the environmental assessment and the review are simultaneously presented as finished documents, the public may tend to perceive the decision-making process as a secretive one in which the proponent and the Ministry act in concert without the benefit of public input or scrutiny.

Thus, we propose that the following amendments be made. For every undertaking which is under the Act, project-specific guidelines should be drawn up. When the Ministry is about to draw up these guidelines, it should give notice to

interested and affected parties, inviting their input on the content of the project-specific guidelines.

Since this would be the initial notification, the notice would be widely publicized in order to contact all potential parties. Although the exact method of achieving wide distribution would depend upon the nature of the undertaking, notification should include advertisements in the local media. In terms of content, the notice should include information concerning the proponent, the proposed undertaking, the anticipated schedule for the project, and directions concerning what citizens can do to become involved. The parties who respond to this first notice should be sent copies of the specific guidelines at the same time as they are sent to the proponent. Then, if these concerned citizens have strong views about adding to or amending the Ministry's guidelines, they may make such submissions to the Ministry and it can pass these concerns along to the proponent.

In some instances, this public input would result in early modifications to the guidelines and the proponent would ultimately enjoy substantial savings. It is clearly more cost effective to expand the initial environmental assessment study than to find it necessary to undertake further studies after it is completed or even later in the process. Both the notification concerning drafting of the specific guidelines and the final version of the guidelines should be published in the EA Update.

The second point of notification should occur as soon as the environmental assessment document is submitted to the Minister. Once again, this notice should invite written

submissions within an established deadline. This notification should not be delayed until the government review has been completed, because some of the ideas and viewpoints from the public submissions may be incorporated into the government review. These public submissions should be filed along with the government review.

The third point of public notification would arise upon completion of the government review. After seeing the government review, parties would be in a position to decide whether to request a hearing.

The fourth point of notification should occur when the decision on holding an Environmental Assessment Board hearing has been taken. At this point in time, the responsibility for giving public notice passes from the Ministry to the Environmental Assessment Board. Under s.12(3), the Board is required to give reasonable notice of the time for the hearing to:

> "the proponent and to the Minister and in such manner as the Minister may direct, notice to the public, to any person who has made a written submission to the Minister pursuant to subsection (2) of section 7 and to such other persons as the Minister considers necessary or advisable, and such other notice as the Board can consider proper..."

It could be argued that at this stage the Board should only be required to give notice directly to those members of the public who have been identified by the previous notice procedures. It could also be argued that for many people, it is only at the hearing stage that the proposal becomes relatively imminent and "real". Consequently, notice of the hearing should be widely distributed again and should

include advertisements in the local media. We believe that this latter argument is consistent with the need to encourage effective public participation. Furthermore, we believe that it is consistent with s.12(3) which requires the Board to notify not only those who have made written submissions, but also "the public". Had the legislature intended to limit notification to those parties who had made previous submissions, it would not have included "the public" in s.12(3).

The actual content of this notice should include the time and place of the hearing, a description of the proponent, the undertaking, the purpose of the hearing, and directions concerning the method of participation and the name of a contact person.

Under s.12(3) the EAB is merely required to give "reasonable notice". Although this discretion enables the Board to avoid unnecessary delay, by varying the notice period to reflect the complexities of a given case, this discretion is too absolute to protect the interests of all the parties. Should the Board inadvertently provide inadequate notice, a party might well seek an adjournment, creating costly delays. Furthermore, where a hearing is called, it is clear that the parties will be in serious opposition. Consequently, this absolute discretion to determine how much notice parties are given is not sufficient to ensure fairness and effective public participation.

In order to strike a balance between the advantages of flexibility and the need for procedural safeguards, we suggest that the Act should be amended to require the Board to give a

minimum of 60 days' notice of hearing. The Act should also specify that any reasonable request for an extension of time will be granted if it is received within 30 days of the initial notice. Although this option for extending the notice period might necessitate issuing a second notice, it would be far easier to do that than to later face the more costly possibility of adjournments.

In addition to the statutory requirements of s.18(17) regarding giving notice of its decision, the Board should also be required to send a press release with a copy of its decision to the appropriate local media. The press release should set out the highlights of the Board's decision and the appeal procedures. This press release should be forwarded to the media after the statutory notice has been served upon the parties in accordance with s.18(17).

In the event that a person makes an appeal to the Cabinet requesting a variation or revision of the Board's decision, that person should be required to serve notice on all the parties to the hearing. In addition, the Minister should be required to issue a press release indicating that an appeal has been received. This release should include the description of the appellant and a summary of the arguments in favour of the appeal. It should be made within 3 days of receipt of the appeal and a period of 30 days should be allowed for written submissions to the Cabinet. Without these notification requirements, it is possible that an unsuccessful party could lobby the Cabinet for a variation in the decision, without the knowledge of the other parties. If an appeal is not seen to be fair and open to the public, it will cast doubt upon the integrity of the EAB, the appeal mechanism and the entire assessment process.

C. Access to Information

The integrity of the environmental assessment process and the degree of public acceptance extended to it will also be a function of access to information. If all parties have access to the same information at roughly the same time, the process will be seen as credible and equitable. We believe that the procedures adopted by the EAB with relation to pre-hearing conferences, witness statements and interrogatories are a major step forward and we commend the Board for its actions in this area.

In addition to the availability of information at the hearing stage, we must also consider the pre-hearing stage. The first documents to be made available under the Environmental Assessment Act are the environmental assessment document and the government review in accordance with s.7, ss. 1 and 2. In addition, s.32(1) requires the Minister to maintain a public record which includes:

(1) the environmental assessment document,

(2) the government review,

(3) any written submission,

(4) any decision of the Board or the Minister with reasons,

(5) any notice accepting the assessment without a hearing (s.9),

(6) any notice of amendment and acceptance of the environmental assessment (s.10(2)),

(7) any notice of approval, approval subject to conditions or refusal (s.14(3)),

(8) any notice of any variation, substitution or requirement of a new hearing (s.24(4)),

(9) any notice to the Minister by the proponent of facts which might impair its ability to proceed with the undertaking according to any conditions imposed (s.39),

(10) any other order of the Minister pursuant to the Act with written reasons.

On the whole, we believe that this is a thorough public record. However, we do offer the following three recommendations. First, since we have recommended that public notice be given when project-specific guidelines are formulated and that there be public input on the formulation of these guidelines, access to information should begin earlier. The finalized project-specific guidelines should be part of the public record.

Secondly, although the Act grants public access to the environmental assessment document and the government review, it does not specifically grant access to the studies and reports relied on in these two documents. In order to prepare written submissions in response to these documents, access to the background material must be made available. Consequently, we recommend that these background documents should form part of the full public record and that s.32 should be accordingly amended.

Finally, there is a need for local depositories at which copies of the full public record are available. The only statutory requirement is that the full public record be made available at the District Office of the Ministry. The Ministry is to be commended for its informal practice of making the full public record available at other local depositories such as local libraries.

In the North, however, it is often a very great distance from a reserve community to a district office of the Ministry or to a public library. Thus, we recommend that the Act be amended to include local band offices as a required depository for undertakings north of the 50th parallel.

The provisions in the Act for giving notice to the Clerk of the Municipality should be extended to include notice to the band administrator for undertakings in the North.

D. Standing

Under s.12(4) of the Environmental Assessment Act, the parties to any proceedings before the Board are: the proponent; any person other than the Minister of the Environment who has required the hearing and anyone else to whom the Board chooses to extend party status. In addition, s.18(16) gives the Ministry the power to "take part in proceedings before the Board". Finally, under s.18(15) the Board may appoint a representative to represent all other members of the class in the proceedings before the Board. However, this does not preclude participation by any other member of the class.

The Act is ambiguous as to whether any person may require the Minister to hold a public hearing and thus gain standing, or whether standing is limited to those who have both made submissions concerning the environmental assessment document under s.7 and also requested a public hearing. In practice, the Environmental Assessment Board has been very liberal in granting standing and it appears that the Board is unlikely to refuse standing to anyone unless they erroneously claim to represent a group or class of people.

Although this liberal interpretation is laudable, we believe that it is subject to too much uncertainty. If a refusal of standing were "appealed" to the courts, the courts would either refuse to review the Board's decision, on the grounds that the Board is not subject to judicial review, or they would substitute their own largely unfettered discretion for that of the Board. Although the Board must retain the discretion of granting standing to parties who are not specifically given standing in the legislation, we believe that the specific designation of standing should be defined, and defined widely.

For example, Section 12(4) should be amended to specifically grant standing to any municipality within which an undertaking is to occur, or which is to be directly affected by an undertaking. Although it is impossible to legislate every instance in which the Board should exercise its discretion in favour of granting standing, the following guidelines could be recommended to the Board as a framework for exercising its discretion. The factors that might be taken into account include:

1. the extent to which the group or person could bring to the EAB a perspective or viewpoint that would not otherwise be presented;
2. the extent to which the potential party represents an interest that would otherwise remain unrepresented;
3. the ability of the person or group to contribute to the Board's understanding of the undertaking and of the interests affected by it.
4. the group's previously demonstrated interest in the matters at hand.

On balance, we believe that the Board has demonstrated its willingness to grant standing to appropriate individuals and groups. Under the Environmental Protection Act and the Ontario Water Resources Act, the Board has already developed a guideline to grant standing to participants who do not seek full party status. We are pleased to note that these guidelines have worked well and that they have been extended to the Board's activities under the Environmental Assessment Act.[13] However, we would like to see municipalities named as parties, and the above guidelines and specific amendments adopted.

E. The Need for Public Funding

There are several compelling reasons for providing funding for intervenors: the need to reduce power differentials, the existence of conflicting interests, the need to enhance the cost effectiveness of the assessment process, and the need to ensure fairness. Funding, either by the proponent or by the Government, must be made available to intervenors to ensure their effective involvement. Although some would argue that this is too costly, especially in times of government restraint, the cost of funding public participation must be weighed against the longer-term costs of inadequate planning and public opposition to a project.

The necessity for funding may best be illustrated by examining one recent case at the provincial level. In Maple, Ontario, a ratepayers' association appeared before the Environmental Assessment Board at hearings under the Environmental Protection Act in 1976 and 1977. They were opposing an application for a provincial Certificate of Approval to operate a 1,000 acre landfill site over a 20-30 year period.

The Environmental Assessment Board hearings lasted 80 days, over a period of 1½ years. During that time the proponents called 14 expert witnesses. The ratepayers' group could not afford to retain expert witnesses and depended upon free legal services provided by the Canadian Environmental Law Association. When the hearings had been underway for one year, CELA wrote to the then Ontario Minister of the Environment, The Honourable George Kerr, asking for government funds so that contrary expert testimony might be called by the ratepayers. The request was refused.[14]

Ultimately, the Environmental Assessment Board recommended against issuance of the licences for the landfill site. At the time of the announcement of the citizens' success, one of the proponents stated that his company had spent over $1 million dollars to obtain the licence and would not accept the recommendation of the Board, but would seek political intervention.[15]

Subsequently, the decision was appealed. The Appeal Board hearings lasted 26 days over a period of 10 months. The proponents substantially changed the size, scope and engineering of their proposed operation. Once again, the proponent produced expert witnesses to justify these changes. Once again, the ratepayers' groups sought financial assistance in order to participate on an equal footing, and these requests were refused by the Ministry of the Environment. Finally, the Appeal Board approved the licence application in April 1980.

This case is merely one example of how public interest groups must continually compete against the extensive financial

resources of proponents, without any funding. The situation is particularly inequitable when one considers that corporate proponents are indirectly funded by the general taxpayer. If a corporation with an incremental tax rate of 50% spends $100.00 advocating its proposals in an environmental assessment process, it generates $100.00 in business expenses and a $100.00 decrease in taxable income. This in turn leads to a tax savings of $50.00. Given these assumptions, the taxpayer would bear 50% of the corporate costs of the environmental assessment process.

In some instances, this subsidy is even more direct. While the enunciated policy was still that no funding was available for intervenors, the Ministry of the Environment extended financial support to two proponents at EAB hearings under the Environment Protection Act. At the Environmental Assessment Board hearing into the establishment of a sewage treatment plant in Ajax, the Ministry of the Environment allocated $100,000.00 to defray the municipal proponent's research costs and $170,000.00 to defray legal costs. The project was ultimately rejected.[16] No funding was provided to the opponents of the project. Similarly, the Minister agreed to reimburse BFI Ltd. for up to $100,000.00 in hearing costs if its application to construct a waste facility at the Ridge Landfill Site in Harwich Township was rejected by the Environmental Assessment Board.[17] This was the same statute under which the ratepayers were refused assistance!

These examples are symptoms of the Ontario government's ad hoc approach to public funding. On April 17, 1980, the Ministry of the Environment announced that funds would be made available to the Environmental Assessment Board to call expert witnesses to appear at hearings held under the Environmental Protection Act

and the Ontario Water Resources Act. Curiously, these funding provisions were not extended to the calling of witnesses under the Environmental Assessment Act. The provisions of such witnesses would be at the discretion of the EAB. We fear that the continuation of this ad hoc approach to the issue of public funding will create further inequity and unfairness.

The EAB itself has exhibited much ambivalence toward funding public participation. A consultant commissioned by the Board in 1977 to study potential hearing procedures wrote,

> "In general, the responses to the Board members' questionnaire suggests that the members expect representatives of public interest groups and lay public to make significant and meaningful contributions to hearings. In addition, a large proportion are generally concerned that some interest may be unrepresented or under-represented at Board hearings. Nevertheless, only one-third is willing to consider providing funds to assist in the preparation of presentations by public interest groups and the public."[18]

The same researcher recommended that,

> "The Board members consider approaching the provincial government with a proposal to operate an experimental public participation funding program run by the Board which would encompass both the provision of direct research grants, as well as reimbursements of expenses in selected cases."[19]

From this and other experiences, the Canadian Environmental Law Association has recommended that:

> "The need for money to defray the costs of obtaining adequate legal and scientific expertise in preparation for a hearing should be provided for in proposed legislation, by a provision mandating funding either by the project proponent (if private) or by a government fund.

> This would enable citizens appearing at EAB hearings to place themselves on a footing more equal to project proponents, who...may have expended hundreds of thousands, if not millions, of dollars in preparations of the environmental assessment documents and applications."[20]

In advancing such a position, the Canadian Environmental Law Association has hardly been a voice in the wilderness. Within government itself, there has been a virtual flood of public funding recommendations concerning the environmental assessment process. These include:

1. The report of the Ontario Royal Commission on Electric Power Planning.[21]
2. Studies by the Law Reform Commission of Canada.[22]
3. A Consultant's Report prepared for the Alberta Department of the Environment.[23]
4. The Economic Council of Canada.[24]
5. The Report of the EARP panel that conducted hearings on proposed oil drilling in Lancaster Sound in the Arctic.[25]

From the same arena of government reports, the Canadian Environmental Advisory Council which reports to the federal Environment Minister, has recommended that:

(i) Given the disparity between the resources available to some proponents and initiating agencies and those available to local community or public interest groups or individuals, funds be made available to such groups for research costs and other expenses where, in the opinion of the panel, the information and points of view to be presented are relevant and worthwhile;

(ii) These costs of participation be born by the proponent and/or initiating agency, unless the panel directs otherwise;

(iii) The determination of the total amount of funds to be allocated to support intervention should be made available well in advance of the hearings, and a substantial proportion of funds allocated be provided in advance to permit adequate preparation of the intervention.[26]

In addition to these many government reports, which speak out in support of funding, many researchers have reached the same conclusions. One has noted that:

> "Funding for public interest participants is desperately required. Without funding, the decision-makers cannot realistically expect anything other than a reactive, negative response, or at worst, very hostile opposition." [27]

We have provided the Commission with considerable detail concerning this question of the need for funding, for we believe it to be one of the key problems in the current process. If the Commission has any reservations about the need for public funding, perhaps it might ask itself this question: What would have been the extent and quality of public participation in the RCNE's deliberations if it had not provided public funding? As this Commission's hearings progress, we are confident that the need for public funding will emerge as a common theme amongst many of the submissions presented to you. The great range of groups, consultants and government agencies who call for funding should make clear this pressing need for public funding. We hope that this Commission will add its voice by strongly recommending that project funding be made available for public interest participants as a matter of policy.

Many of the proponents of funding are from southern Ontario. They see public funding as a pressing need in a part of the

province which enjoys areas of relatively high population densities, good communications, access to public interest support groups and high personal incomes. Since funding is required in these regions, surely the need is even greater in the North where there is a comparative lack of information and resources. The need is also more pressing in the North because there is a far greater likelihood that very large resource development projects, with significant environmental impacts, will occur there. Without public funding, local chiefs and band councillors could not even afford to travel to EAB hearings, let alone be represented at a level comparable to the proponent. For the North, refusing to provide public funding for participation in the EA process would have the effect of totally excluding Northerners from that decision-making process. If this Commission is committed to giving Northerners access to decision-making, it is obliged to recommend public funding under the EAA.

F. Funding Mechanisms

If we accept that public funding is essential to effective public participation, we must then determine who pays, what do they pay for, who do they pay, and how do they administer such a program.

In regard to the issue of who pays, there are essentially three alternatives:

(1) The proponent pays.

(2) The government pays.

(3) A combination of 1 and 2.

It may be argued that since the private proponent is seeking government approvals, in the expectation of later generating

a profit, the proponent should be required to pay for all the costs of the assessment. The cost of the assessment necessarily includes the cost of public participation, since it is an integral part of the assessment process. Where the proponent is a public body, such as a municipality or government ministry, the profit motive is absent. However, we can still argue that the public proponent has a duty to ensure sound planning of his undertaking, and this should include public participation. This is consistent with a concept of "user pays".

On the other hand, it may be argued that since the government has a duty to determine if a project is in the public interest, the government itself should finance the cost of the public participation which is necessary to make this determination, whether the proponent is private or public. However, since the government is in essence the general taxpayer, in the case of a private proponent such a scheme would often merely shift the costs from the private proponent to the general public.

Consequently, we believe that the cost of public participation should be covered by a special fund financed by proponents. The amount that each proponent contributes, whether public or private, could be either a percentage of the cost of its environmental assessment study or a percentage of the projected capital cost of the project.[28] The Ontario government could contribute an initial amount as "seed money" and it could also consider bearing some proportion of the costs where the proponent is a municipality. Under this scheme, the cost of public participation would thus be generated from both the public and private sectors.

What costs should the fund pay for? We believe that all costs directly related to public participation in the environmental assessment process should be funded. Funding should be available first to assist intervenors who wish to make a written submission in response to an environmental assessment document. If notice is given when the EA document is received, or earlier as we recommend, it should be possible to provide funding at this stage without delaying the over-all process. At this stage, funding would be limited to the costs of professional fees for evaluating and interpreting the data contained in the environmental assessment document.

Expanded funding should be available if an Environmental Assessment Board hearing is held. This funding should cover the costs of research, expert witnesses, legal counsel, transportation and communications.

Where the intervenor is an established public interest group, the funds should also cover a percentage of the group's established overhead costs. The priority should be to cover the costs of providing the necessary scientific and legal expertise. Volunteer involvement should also be encouraged.

We have considered and rejected the possibility of allocating funds on the basis of a "one-way" award of costs to be made after the hearings have been completed. Our reason is that without advance funding, public interest groups, whether ad hoc or established, simply could not afford the cost of an effective intervention.

In dealing with the question of who should qualify for these funds we have considered two types of applicants - local groups and established interest groups. First, a group

should be eligible for assistance when it can demonstrate that its members will be directly and substantially affected by a proposed project. Such groups may arise on an ad hoc basis and may include ratepayer groups, Indian bands, municipalities or a Chamber of Commerce. Established public interest groups should also be eligible for funding. In order to qualify, public interest groups would have to fulfill a set of conditions, such as:

(1) Registered charitable status with Revenue Canada,

(2) Corporate status under the laws of Ontario or Canada,

(3) A demonstrated interest in the particular issues and a record of concern for environmental questions.

These are reasonable requirements for an established public interest group, but they should not be imposed upon local ad hoc groups. These requirements would merely represent a barrier to the formation of local groups. The government should remember that there may be several legitimate local concerns about a project, and should remain open to funding more than one local ad hoc group.

In order to avoid any appearance of bias or conflict of interest, the proposed fund should not be administered by the Ministry, which may be a statutory party to Environmental Assessment Board hearings, or by the Environmental Assessment Board, which is the decision-making tribunal. Rather, it should be administered by a separate agency such as the Environmental Assessment Advisory Committee, which is discussed in Section V. The RCNE itself saw the advantages of an arm's length" Funding Committee to assess and make recommendations on funding applications. Using the Environ-

mental Assessment Advisory Committee as the funding body should have many of the same advantages as the Commission's own Funding Committee. The Funding Committee mechanism could also provide a way to decentralize the decision-making and inject local viewpoints, by including some local representation on the committee on a case-by-case basis.

Where funding is provided, accountability will be an important issue. In the case of established public interest groups, this should not present any problem since they will have a clear record of financial responsibility. In the case of ad hoc groups, clear and uncomplicated accounting procedures will be required. When the group is represented by counsel, there may be some benefit in having counsel charged with the responsibility of accounting for expenditures, to further guarantee accountability.

Those who oppose funding public participation often argue that it would open the floodgates for frivolous interventions. We believe that such objections are unfounded. Similar arguments have been raised in opposition to all reforms which are designed to open up the processes of environmental protection. And yet, where judicial standing has been expanded, and individual environmental rights have been given legal status, there is no evidence to suggest that these reforms have led to frivolous actions or protracted delays.[29] Instead of surrendering the potential benefits offered by funding, let us establish a program and test these negative assumptions. We trust that the people of Ontario will not abuse such a program.

The suggestions presented here in regard to funding mechanisms would require greater study. Our main purpose in examining

funding mechanisms is to emphasize the importance of project funding, and to demonstrate that the logistical problems often raised by critics of public funding can be mitigated. We hope that these ideas will prove helpful. But they must not overshadow our primary concern - the need for public funding in the environmental assessment process.

IV Exemptions, Designations and the Use of Discretion

A. The Erosion of the Principle of Universality Under the Environmental Assessment Act

It is a basic tenet of the rule of law in a democracy that laws should have equal application to everyone in the class to which they apply. If a law is intended to solve a problem, the law should apply equally to everyone who may cause that problem. Discrimination between people in the same position is inherently invidious.

In the case of the Environmental Assessment Act, there can be no question that the target class of projects or undertakings is all undertakings with the potential to create a substantial or significant impact on the environment. This is reflected in the Green Paper on Environmental Assessment, which describes the environmental assessment process as a "means of ensuring that all environmental factors are considered in a comprehensive and coordinated fashion...before major projects and technological developments proceed".[30]

Although the environmental impact of a project should be the primary consideration in deciding whether it is subject to the legislation, there is certainly room for secondary aspects to be considered. Factors such as the advanced stage of planning of the undertaking at the time of the passage of the Act, an urgent need for the project, and the need to phase in legislation gradually to avoid confusion, uncertainty and undue hardship to those affected must also be considered. However, when such considerations become the primary factor in determining whether an undertaking will even be subject to environmental assessment legislation, the principle of

equality before the law, or universality, is destroyed. Unfortunately, this has been true with the Environmental Assessment Act.

There are three main factors which have contributed to the erosion of universal application in the case of the Environmental Assessment Act:

(1) the unduly prolonged phasing-in process;

(2) the use of class assessments;

(3) and the exemption process.

As is discussed below, the Commission is urged to make recommendations to restore the universality of application of the Act.

B. The Phasing-In Process

Throughout the discussions leading up to the passage of the EAA, the government insisted that the Act must be implemented gradually, with classes of projects or classes of proponents being made subject to the Act in stages. Environmentalists, on the other hand, insisted that either the Act should apply immediately to all significant undertakings, or a firm time-table for implementation should be announced.

An Act passed by the legislature has no legal force until it is officially proclaimed by the Lieutenant Governor. The EAA was not procalimed for the public sector until October 1976, approximately one year and three months after it was passed. At that time, many major Ontario government undertakings were exempted, as were all municipalities. Three years after the Act was passed, only five environmental

impact statements had been submitted to the Minister of the Environment. Of these, only one had been completed. Only three private sector undertakings had been made subject to the Act.

By the beginning of 1980, only 49 environmental impact statements had been submitted to the Minister, almost half of them, class assessments. The first public hearing under the Act was not held until April 1980. Municipalities were not brought under the Act until October of 1980.

As of October 1982, only four private sector projects have been designated under the Act. Little progress has been made on the preparation and review of the environmental impact statements of the first three private projects made subject to the Act, namely, Reed, Onakawana and the Spanish River dam. Seven years after the passage of the Act, it has still not been made applicable to the private sector, or to any class of undertakings in the private sector. Successive Ministers of the Environment have refused to state any timetable for making the Act applicable to the private sector.

When commencing any environmental impact assessment process, there will be a necessary transition period during which many projects that will clearly have significant environmental impact are already in an advanced stage of planning. It is reasonable to exempt such projects. But there should be some provision for making projects which have exceptionally significant impacts subject to the Act, even if the proponent has already made a substantial commitment of time and money to them.

It is a clear principle of our law that legislation should not be retroactive, or at least, that retroactive legislation

should be used sparingly. Fairness to people who have undertaken expenditure and efforts on the basis of the law as it was when they began their efforts requires some "grandfathering", some period of grace.

It was therefore reasonable that in the initial stages of implementation of the Act, some projects were exempted because of advanced planning. Even so, the argument for "grandfather clauses" is much less forceful with respect to government projects than private projects. While the law should not lightly interfere with private rights, projects undertaken by the public sector should be in the public interest and thus should be subject to sound planning principles, regardless of their stage of development.

The problem with exempting public undertakings during the phasing-in period on the basis of "an advanced stage of planning" or "urgency" is that the government has had unlimited discretion and has frequently acted on wrong or incomplete information. Moreover, exemptions intended to be "temporary" have been extended until they became permanent. The Ministry of Natural Resources program for forest management on Crown lands in northern Ontario, and the 10-year exemption period for the Ontario Energy Corporation's exploration activities in northern Ontario are cases in point.

The Ontario Hydro Atikokan coal-fired generating station was exempted on the grounds of "advanced planning", yet this project was subsequently drastically revised when Ontario Hydro decided there was less demand than it had forecast and substantially reduced its size. In light of concerns about acid rain expressed by Ontario Indians, Ontario and Minnesota environmental groups, and the government of Minnesota, it is difficult to see how the Ontario Government can continue to support this exemption.

The Darlington Nuclear Generating Station provides another excellent example of the unnecessary and unfortunate use of "grandfathering" under the Environmental Assessment Act. In October of 1976, the Minister of the Environment announced that although Ontario Hydro's planning for the station was well advanced, the government would not exempt the project at that time, but would wait until the public had had an opportunity to comment on a report on environmental studies to be submitted by Ontario Hydro.[31] The government would then decide whether a formal public hearing would be ordered or whether the project should be exempted from the provisions of the Environmental Assessment Act.

There was apparently very little adverse public reaction to the project at that time, and the Cabinet exempted it. Adverse reaction came later in the form of yearly demonstrations at the site, and in response to revelations that the need for power from this plant was much less than Ontario Hydro had originally projected. The fact that the cost of this plant and of Ontario Hydro's nuclear power plants in general was far higher than anticipated was also revealed. Indeed, the plant still has not been built, and any urgency has, in retrospect, turned out to be illusory. Nevertheless, when the Chairman of the government's Environmental Assessment Steering Committee requested that the exemption of the Darlington Station be re-appealed in January of 1979, on the basis that there was no longer any urgent need to proceed with the project, the Premier refused to reconsider the decision to exempt it.[32]

In October of 1976, the government should have decided either to put Darlington under the Act, or not. To take a "wait-and-see" approach was to use Hydro's environmental study as a trial balloon and use the Act as a public relations tool.

Certainly, public perception and controversy should be grounds for applying the Act, even when government experts do not feel that a project will have significant impact. But the opposite is not true. Lack of controversy should not be an excuse for exempting projects which obviously can have significant impact.

With respect to phasing-in the Act in the public sector, now that the Act is seven years old, the "advanced stage of planning" argument should no longer be used to exempt projects. Extensions of exemptions first given several years ago should be curtailed. Further phasing-in decisions should be subject to prior scrutiny by the Environmental Assessment Advisory Committee* discussed in Part E of this section.

Moreover, the definition of the public sector in the Act should be broadened to include institutions that clearly would be considered public by most of us, but escape the Act because they are not government agencies, for example, most hospitals. An incinerator proposed by Victoria Hospital in London almost escaped assessment in 1981 because the hospital is a "private organization", even though the hospital operates largely on government grants and has municipal officials on its board, and the funding for the project would come largely from the City of London and the Ontario Government. Under severe public pressure, the Hospital ultimately volunteered to submit to the Act.

*Note: In this report reference is made to both an Environmental Assessment Steering Committee and an Environmental Assessment Advisory Committee. The Steering Committee refers to the earlier body which was disbanded. The Advisory Committee refers to the body we recommend be established.

Private Sector Phasing-In

With respect to the phasing-in of the Act, the major outstanding problem is the failure of the government to apply the Act to the private sector. The private sector has already had one "grandfathering", between the time the Act was passed and the present. Projects in an advanced state of planning in 1975 have now escaped the provisions of the Act. When the Act is finally applied to it, the private sector may well again demand a further period of exemption for projects currently under consideration, even though the private sector has been aware of the provisions of the Act since 1975.

The Commission is urged, therefore, to make three main recommendations to the Ontario Government with respect to the phasing-in of the Environmental Assessment Act and its application to the private sector:

1. It is recommended that the Commission recommend that the Ontario Government establish a firm timetable for making the Act applicable to the private sector, and that the Act quickly be made broadly applicable. Specifically, the Commission might recommend that the private sector be brought under the Act by December 31, 1983.

2. Even after the Act is made applicable to the private sector, there will be a continuing need for a screening mechanism to determine which projects should be exempted from the Act, and for the development of criteria for exemption. The Commission is urged to recommend to the Ontario Government public participation in the screening mechanism, and safeguards to prevent the excessive use of discretion and to reduce the exemption of significant undertakings. Specifically,

the Environmental Assessment Advisory Committee should be established to carry out these functions.

3. In light of the lengthy time the private sector has had to familiarize itself with the Act and its requirements, the Commission should recommend to the Ontario government that "grandfathering" be kept to a minimum. Proponents made subject to the Act will certainly be able to claim, when it is applied to the private sector, that they did not know that their particular project would be subject to the Act. However, they should be in no position to claim that they could not have anticipated that this type of project would be brought under the Act at any time. Specifically, it is suggested that the private sector be given six months' notice of the date on which the Act will apply to it, and that after the Act is extended to the private sector, exemptions on the grounds of advanced planning should be restricted to the most exceptional circumstances and subject to review by the Advisory Committee.

The Ministry of the Environment has had ample time to consider how to bring the private sector under the Act. The Ministry sponsored a workshop on the Environmental Assessment Act and the private sector in June of 1979.[33] This workshop produced a report with 26 conclusions. There has been ample time for the Ministry to consider and implement these 26 conclusions.

It is recommended that the Commission endorse the following conclusions of that workshop:

1. The term "major undertaking" should be defined primarily in terms of environmental impact, and only secondarily in terms of project size or cost.

3. A general inclusionary regulation defining major undertakings, supplemented by a list of project types for which an EA is definitely required, is the favoured approach.

5. An initial list of projects which might be designated and/or exempted should be developed. Possible criteria for defining "major undertakings" in terms of environmental effects should also be prepared.

6. There should be maximum involvement of industry, government agencies, and public interest groups in determining these lists and criteria.

7. A screening mechanism is required to determine the disposition of "grey area" projects and to review any exemptions and class EA projects for "bumping-up"*if necessary.

10. The entire private sector should be brought under the EAA simultaneously.

13. Institution of a general reporting mechanism whereby the Ministry of the Environment and the public is informed of any planned new projects and expansion should be considered.

All of the other conclusions of the workshop report have great merit and are worthy of consideration by the Commission. We have focused on the ones above because we feel that they are central to the issue of universality of application of

*Note: "Bumping-up" means that a project which is already exempt should be made subject to the Act.

the Act, and preventing abuse of discretion. The other conclusions are attached in Appendix I.

C. Class Assessments

During the years of debates leading up to the passage of the EAA, there was never any discussion of "class assessments". All parties acted on the understanding that the Act clearly contemplated that individual projects required individual assessments. Subsequently, the Ministry of the Environment has encouraged the use of class assessments, and at times has encouraged proponents subject to class assessment to believe that by carrying out a class assessment, they could avoid doing an individual assessment.[34]

Class assessments are a useful supplement to individual assessments. They may also be a useful "screening" mechanism for determining which individual projects in a class are likely to have such little impact that they need not be subject to assessment. However, class assessments are not a substitute for individual assessment of significant undertakings. Impacts are often project-specific, and can only be determined by carrying out an individual assessment. The workshop on environmental assessment and the private sector concluded that "difficulties with the Class EA approach render its usefulness for the private sector questionable". This is also true of public sector projects. If class assessments are to be used either in the private or the public sector, there must always be a suitable "bump-up" provision to ensure that projects likely to have significant environmental impact individually, are assessed individually.

It is recommended that the Commission recommend to the Ontario government that it institute suitable safeguards to

ensure that class assessments are not used to circumvent the intent of the Environmental Assessment Act. Again, a combination of "bump-up" provisions and scrutiny by the Advisory Committee would be adequate safeguards.

D. The Screening Process

A great deal has been written about the exemption process under the Environmental Assessment Act. In fairness, the more neutral term "screening process" should be used. But in Ontario, the "screening process" has been primarily an "exemption" process. The need for a screening process under any environmental impact assessment procedure cannot be denied. It is necessary to make a preliminary determination as to which projects may have sufficient impact on the environment to require a rigorous assessment process, and which do not.

As we have stated above, the primary screening criterion should be whether or not the undertaking will have significant impact on the environment. All other criteria should be secondary. In Ontario, there is substantial evidence that these priorities have been reversed.

The initial assessment of the significance of a project is not the only legitimate reason for exempting it from environmental assessment. As Bowden points out,

> "As a general rule, exemptions would seem to fall into three discernible groups: exemptions due to the insignificance of the adverse environmental effects; blanket exemptions based on either time considerations or project origin from a specific societal sector; the "public interest" exemption. The nuances of each exemption type should be approached separately as the negative implications of each, in relation to the overall efficacy of

> any EIA process vary, as do the means of limiting those same effects. One may even be so bold as to comment that well-tempered use of some of these exemption tools will indeed contribute positively to EIA success".[35]

Other criteria for releasing a project from environmental impact assessment may be valid, for example: urgency, the need to prevent excessive cost or delay; the advanced stage of planning of the project; the avoidance of retroactivity; and the public interest. However, it is important that these other criteria be clearly and narrowly defined and that exemptions on the basis of such criteria be the exception rather than the rule, and that there be safeguards to prevent the abuse of these rationales.

Even with respect to the primary screening criterion, namely, significance/non-significance, there will be a "grey area" in which projects are not clearly significant or insignificant. Even in this area, there should be some safeguards to minimize the number of discretionary decisions and ensure that all relevant information is brought to the attention of the decision-maker. The decision whether to exempt or not exempt must be made on the basis of relevant and not extraneous factors.

Care must be taken to ensure that mere convenience is not enough to justify exemptions. Decision-makers must not be given such great discretion and allowed to screen projects on the basis of such vague criteria that mere convenience or political expediency can easily pass for "urgency" or "the public interest". The most blatant example of this was the exemption of a road because of an election promise to expedite its construction.

Moreover, any claims that exemption of projects is required because of their urgency should be subject to close and skeptical review. Ontario is one of the most highly industrialized and developed provinces in one of the most developed countries in the world. The province already has in place a diverse industrial and agricultural base, a well-developed communications and transportation network and extensive public services. Under these circumstances, claims that any single project is so urgently needed that it cannot withstand a brief delay in its approval, for consideration of its environmental impacts, ring hollow. Our traditional methods of employing our resources have not stopped us from falling into a serious recession. Any attempts to employ our resources in the same manner that has failed to prevent our current economic hardships, may be as much a contribution to our present problems as a satisfactory response to them. Curtailing environmental impact assessment as a means to solve our current economic problems smacks of panic politics and desperation economics.

The exemption of significant government projects and the failure to designate significant private projects has been and continues to be the Achilles heel of the Environmental Assessment Act. It is interesting to note that many of the significant projects that have escaped assessment have been in the intensely developed areas of southern Ontario, and not in northern Ontario where a more compelling argument might be made for jobs and services. Southern Ontario projects that have escaped scrutiny include: undertakings which are clearly frills rather than necessities, such as the Maple Amusement Theme Park; projects whose need was highly questionable; the Darlington Nuclear Generating Station; and the Elora Gorge Bridge. Assessing the impact of the

dredging of the Keating Channel was resisted for some time. Although the government ultimately made it subject to the Act, an exemption of questionable validity was given in 1981 for "emergency dredging".

Some projects which escaped assessment because of the Government's haste to implement them, may not, in retrospect, even have been viable. For example, the Ontario Government refused requests to designate the proposed gigantic waste disposal site in Maple, Ontario, under the Act. It has now become clear that because of pollution of the groundwater in that area, the site, which was originally to have been used for 20 years, may be useful only for five years.[36] Similarly, the government exempted the proposed South Cayuga Liquid Industrial Waste Treatment and Disposal Facility from the Act on the grounds that a treatment facility was urgently needed, only to have that site ruled out over a year later in a study by the Ontario Waste Management Corporation.

Exempting significant projects frequently backfires. If the reason for exemption is that a proper study will take too long and will delay a decision on the project, exemption is frequently self-defeating. There are sufficient other avenues of protest and other forums available to members of the public opposing a project, that avoiding the Act will merely displace their opposition into other, perhaps less productive forums.

Quelling public protest may be a longer and more difficult job than doing a proper environmental assessment. For example, opponents of the Elora Gorge Bridge challenged it in the courts and before the Ontario Municipal Board for a period of seven years, because the proponent and the Ontario

government refused to require a proper environmental impact assessment. Opponents of the proposed Victoria Hospital energy-from-waste incinerator in London, Ontario, delayed the passage of a Private Bill giving the City of London and Victoria Hospital the authority to spend money on this project. The opponents appeared before the Standing Committee of the legislature considering this Bill and demanded the addition of a provision making the project subject to the Environment Assessment Act. Such Bills normally are passed with almost no discussion.

Because of the opposition of the residents, the Committee postponed its deliberations on this Bill for several months. The hospital corporation and the municipality had resisted requests to designate this project under the EAA because of their fears that a full environmental assessment would increase the cost of the project and delay its implementation. When faced with the fact that the residents had blocked the passage of the Bill giving them the power to spend money on such a project, they reversed their position and asked that the project be designated. It had become clear to them that efforts to avoid the appropriate environmental procedures would create greater costs and delays than compliance with the EAA.

The exemption process by the Ministry and Cabinet has been largely discretionary and little provision has been made for public input. For a period of time, there was public input through the Environmental Assessment Steering Committee. This Committee eventually became Dr. Donald Chant alone, and since he resigned, the Committee has not been reinstated, despite several promises from the Premier and the Minister of the Environment to do so.

The procedure while the Steering Committee existed was that described by Bowden:

> "Generally, a loose screening mechanism was developed which outlined various factors to be considered in the assessment/no assessment decision.
>
> Notably these factors were, and for that matter still are, not the sole determinants in concluding that a project had significant impacts. Similarly, it should be remembered that any determinations involve, to a certain degree, a value judgment as to the degree of negative environmental effects, justaposed with analysis of the beneficial aspects of the project.
>
> On the basis of this give and take determination, Ministry officials have traditionally made a recommendation to the Minister who then reviews the project on the basis of exemption/non-exemption. Inevitably, the Minister has been influenced by factors beyond immediate environmental considerations. Perhaps as a limited safeguard to the emphasis which the Minister has placed on non-environmental factors, his decision has been submitted to the Environmental Assessment Steering Committee for "critical review" before final Cabinet approval is sought. However, at this level, dialogue is very much in-house, and the degree to which the Minister is influenced by Committee input remains open to question.[37]

Now, of course, even the limited scrutiny of the Steering Committee is gone.

The members of the Environmental Assessment Steering Committee consisted of the Chairman and Vice-Chairman of the Environmental Assessment Board, Dr. Donald A. Chant; a member of the EAB, as well as a member of the Boards of the Canadian Environmental Law Association and Pollution Probe, and the Deputy-Minister of the Environment. They initially were appointed to aid in the implementation of the Act. At the time of the drafting of new municipal regulations in 1978, the Canadian Environmental Law Association expressed concerns

about further exemptions under those regulations without any adequate scrutiny or public participation. CELA suggested to the Government that such scrutiny be provided by giving the public an opportunity to question any exemptions of significant projects. CELA suggested that this could be accomplished through one of three mechanisms: by an application to the Environmental Assessment Board; by extension of the role of the Environmental Assessment Steering Committee; or by establishing the Environmental Council provided for in the Environmental Protection Act, but which has never been set up.

The government decided to expand the mandate of the Steering Committee to become "an independent body, fielding problems regarding possible MOE designations or exemptions".[38] As Bowden notes, to the credit of the MOE, even though this expanded role arose in the context of the municipal regulations, the government allowed the Committee to review projects in all sectors within the Environmental Assessment Act, and to make recommendations to the Premier. Bowden comments,

> "when questions of designation arose, the public was free to approach the Steering Committee before the exemption was granted, which would in turn, alert the MOE, the Minister or even the Premier, to the possible problem so that consideration of a possible environmental assessment designation would be made... The one major drawback to the Steering Committee solution, caused probably by lack of public knowledge, was that (the Committee) was often approached after a Cabinet decision had been reached - even though the "ear" was still there the effectiveness of his recommendations was greatly reduced as reconsideration by Cabinet is rare once a decision has been made."[39]

It soon became apparent that many of the members of this Committee had a potential conflict of interest, as a result

of their membership on the Board or their employment by the Ministry. As a result, Dr. Chant was made the sole member of the Steering Committee for the purpose of receiving submissions from the public, and he resigned his memberships on the Environmental Assessment Board and in the Canadian Environmental Law Association to avoid conflict of interest.

It is difficult to assess the effectiveness of this procedure. It was clearly effective to the extent that Dr. Chant frequently recommended designation or re-designation of projects to which the public had alerted him. As the number of requests made to him is not public knowledge, it is impossible to know how frequently he did this. However, he clearly did this with respect to several projects which obviously had a high degree of significance. However, it is also clear that the Ontario government refused to follow his recommendations in certain important cases, such as his recommendation of designation for the Elora Gorge Bridge, the Darlington Generating Station and the Keating Channel dredging.

When Dr. Chant was appointed Chairman of the Ontario Waste Management Corporation, he resigned his position as the Steering Committee. The Steering Committee has never been reconstituted, despite promises by the Premier and the Minister of the Environment that this would be done.

It is essential to limit the discretion to grant exemptions and to refuse requests for designations in secret and without clear criteria upon which to base such decisions.

In this regard, the Commission is urged to make four recommendations to the Ontario Government:

1. Specific, clear guidelines and criteria for designations and exemptions should be promulgated and made public, and decisions should be based on these to the greatest extent possible.

2. At some point, staff of the Environmental Assessment Branch of the Ministry of the Environment will become aware, either through contact with the proponent or reports by concerned members of the public, of undertakings that fall into a grey area between significance and non-significance. It will also know of projects which are clearly environmentally significant, but in which the proponent seeks to avoid the Act on other grounds.

   As soon as possible after this occurs, the Ministry staff should have an obligation to notify the public of this situation and provide an opportunity for public submissions to the Branch. These submissions can be most helpful if a pre-screening document is submitted by the proponent.

3. Any one who wishes to proceed with an undertaking either under the Act, or not under the Act, which may have significant environmental impact, should be required to submit to the Ministry of the Environment a pre-screening document. This document should contain a project description, indicate the level of commitment to the project, the alternatives considered, potential impacts, and any other relevant information available at this early planning stage. This document should not be considered the environmental impact statement, or an alternative to it. The document should be public and notice should be given that it has been received.

4. At some point, if the proponent continues to take the position that his undertaking should not come under the

Act, Ministry staff will have to make a recommendation to the Minister. At this point, anyone who feels strongly about it, including the proponent, should have the right to trigger some form of public discussion. Although the ultimate decision whether to exempt or designate will be made by a Cabinet Minister or by the Cabinet, there must be a role in this process for public participation before an independent tribunal or agency before the Minister or Cabinet makes the final decision. A Board or Committee which has some members from outside government, for example, from environmental groups and other citizens' groups, should have an opportunity to make recommendations to the government on the basis of submissions from the public. Again, the recommended mechanism is the Advisory Committee discussed in Part E. This Board or Committee should follow a fair procedure in that its proceedings are public, it makes public the submissions received by it, and its recommendations, and it gives written reasons for its recommendations in each case, even though it need not be subject to the more stringent provisions of the Statutory Powers Procedure Act.

E. The Environmental Assessment Advisory Committee

As we described earlier, this Environmental Assessment Steering Committee was originally given the responsibility of supervising the regulations implementing the Act. In response to public pressure for a "watchdog" body on screening decisions, the Committee was later given authority to make recommendations to the Premier about the exemption or designation of undertakings. Later, this advisory function was assigned to the former Committee Chairman alone, since his other Committee

members had a potential conflict of interest because of their position in the Ministry of the Environment or on the Environmental Assessment Board. Since Dr. Chant resigned, this watchdog function has been non-existent. In the absence of such a Committee, decisions have been taken to exempt such important matters as Detour Lake road and to renew the interim exemption for Crown Land forest management.

In May of 1981, the Conservation Council of Ontario recommended to the Premier of Ontario that this Committee be re-established with a new Chairman and at least two representatives from public interest groups.[40] The reinstated and restructured "Environmental Assessment Advisory Committee" would have the right to review and comment on any exemption decisions that have been taken in the current absence of a Chairman. Further potential exemptions should be referred to the Committee before the Minister of the Environment or Cabinet makes a final decision on them.

On July 20, 1981, the Premier wrote the Conservation Council of Ontario making a commitment to improve the exemption screening process along the lines proposed in its submission. The Algonquin Wildlands League prepared a list of 13 candidates put forward by the environmental community and eminently qualified to serve on the Advisory Committee and recommended these candidates to the Premier in November of 1981.[41]

Most recently, the Minister of the Environment promised action on this issue "in the very near future". In a speech delivered May 3, 1982, to the Environment Section of the Canadian Bar Association, the Honourable Keith C. Norton stated:

> "While the Act is, for the most part, working out well, there are still some areas of controversy

> which may need eventual revision. Primary to these would be application of the Act and the process of exemptions.
>
> As some of you are aware, the Premier's Advisory Committee on the Environmental Assessment Act was originally created to advise the government on these matters. I would like to report at the Premier's request the Environment Ministry has completed the revised terms of reference for the Committee and the government is currently considering individuals to act as its Chairman.
>
> I know some of you have been concerned about what you perceive to be an unwarranted delay in putting this Committee back into operation. However, I hope to be able to satisfy your concerns in the very near future."

Despite these assurances, the Committee has not been set up.

It is recommended that the Royal Commission on the Northern Environment recommend to the Ontario Government that it re-establish and restructure this Committee as soon as possible. The Committee should have significant public interest representation from members outside the government. Its role should include the screenings of undertakings, review of regulations under the Act, and decision-making on requests for public funding. This should be done before a final decision has been made by the government. The Committee should be accessible to the public and should carry on its deliberations in an open and public manner and provide reasons for its decisions and recommendations. The Advisory Committee should be able to add one or two local members to give it the advantage of a local perspective.

V Streamlining the EA Process: The Consolidated Hearings Act

One of the main barriers to full implementation of the Environmental Assessment Act has been the perception that environmental assessment increases costs, creates delay, and creates duplication of effort, particularly duplication of hearings. This perception, whether accurate or not, has been used effectively by opponents of environmental assessment to delay full implementation of the Act. It has been given by the Ministry of the Environment as a reason for delaying bringing the private sector and municipalities under the Act. Municipalities themselves have opposed being included on this ground.[42]

At the same time, environmental groups have been skeptical about demands for streamlining because it may curtail legitimate public participation in the planning process. Environmentalists have no objection to avoiding unnecessary duplication; however, they do object to attempts to circumvent or subvert the environmental assessment process under the guise of "streamlining". Unnecessary and undesirable overlap and duplication should be avoided; however, overlap is not in itself necessarily undesirable if it brings to bear a more rigorous analysis of the issues and a greater diversity of viewpoints.

Indeed, "streamlining" has been incorporated into the Environmental Assessment Act from the very beginning through the concept of an overall government review, in which the views of all affected government agencies would be co-ordinated by the Ministry of the Environment. Moreover, the idea of a single environmental assessment document which incorporates economic, social and natural environment considerations is a streamlining mechanism.

In the United States, environmental groups have had extensive experience with industry-sponsored "short-cut" procedures such as the Strip Mining Act, and Deep Sea Mining Act, the Marine Sanctuaries Act, the Energy Mobilization Board, and attempts to avoid applying NEPA to major federal actions outside the United States. Consequently these groups have developed a skepticism towards "streamlining". Some of the largest conservation organizations in the United States have warned about the misuse of streamlining. The National Audubon Society has stated,

> "We probably tend to be rather suspicious of attempts to 'streamline' the environmental assessment process, since it has been our experience that the very process of environmental assessment all too frequently identifies the need for data on some hitherto unconsidered aspect that necessarily entails some delay in completing the process, because of the need for time to obtain the required information. This may be almost inherent in the process of attempting to do a complete environmental assessment, inasmuch as the proponents of a given project will almost surely tend to overlook those impacts that could threaten their own proposal."[43]

The National Wildlife Federation says of streamlining:

> "Many American industries are opposed to environmental restraints of any kind and would like to abolish the EIS procedure established in our National Environmental Policy Act. This organization...is opposed to the idea of a super-powered agency which could by-pass or circumvent sound environmental protection laws in the guise of speeding of the established processes."[44]

Some proponents will never be satisfied, regardless of how much streamlining is built into the process, because they are utterly opposed to any restraint on their freedom to develop. However, to the extent that concerns about delay, cost and duplication are legitimate, this issue should be laid to rest by the passage of the Consolidated Hearings Act

in 1981. In describing the intention of the Consolidated Hearings Act, the Honourable Harry Parrott, then Minister of the Environment, stated that:

> "The new process will be quicker, more efficient and should be less costly. But I also think it would be more effective in producing good decisions because there will be one forum in which all of the competing interests, all of the alternatives and all of the advantages and disadvantages can be discussed and balanced in the single, comprehensive process.
>
> ...(T)he proposed arrangements will be subject to only one comprehensive review process and one possible hearing and appeal procedure. A key principle underlying the approach is that all of the matters to be considered under existing statutes will continue to be considered. And all of the persons who have rights to hearings under the present statutes will continue to have them." (Emphasis added) [45]

Where hearings might otherwise be held by different boards under a number of different provincial statutes, the Consolidated Hearings Act provides for one comprehensive hearing by a Joint Board made up of members of the Environmental Assessment Board and the Ontario Municipal Board. This Joint Board will deal with all of the matters to be decided under all the pieces of legislation subject to the Act, i.e., all legislation in the schedule. These are: the Environmental Protection Act, the Expropriations Act, the Municipal Act, the Municipality of Metropolitan Toronto Act, the Niagara Escarpment Planning and Development Act, the Ontario Municipal Board Act, the Ontario Water Resources Act, the Parkway Belt Planning and Development Act, the Regional Municipality of Ottawa-Carleton Act, and the Regional Municipality of York Act.

To the extent that the Consolidated Hearings Act provides greater efficiency without curtailing rights, and fulfills the promises made by the Minister of the Environment, the Canadian Environmental Law Association and other environmental groups support it. However, the legislation has the potential to circumvent sound planning procedures and fair public participation. CELA's concerns about this Act are discussed below.

A. A Brief Description of the Consolidated Hearings Act

The purpose of the Consolidated Hearings Act, as its title implies, is to ensure that any undertaking which may require hearings under more than one Act, will now require only one hearing. This one "consolidated" hearing will deal with all of the issues arising from both the project and the various Acts to which it is subject. The following brief description highlights specific provisions of the CHA.

The Act defines "establishing authority" as the Chairmen or Vice-Chairmen of the Environmental Assessment Board and the Ontario Municipal Board. "Person" is defined to include a municipality, the Crown and an unincorporated association (s.1). The Act applies to an undertaking which requires or may require more than one hearing under the Acts mentioned above (s.2). To trigger a consolidated hearing, the proponent gives written notice to the Hearings Registrar, who is the Secretary of the Environmental Assessment Board. This notice must specify the hearings that are, or may be, required. Section 3 would, if and when it is proclaimed, allow any person affected by the undertaking to make an application to the Divisional Court for an order to make the proponent give notice to the Hearings Registrar.

The Hearings Registrar refers the matter to the Chairman of the EAB and the Chairman of the OMB, and these Chairmen establish a Joint Board, which is selected from the members of the EAB and the OMB. The composition of the Joint Board cannot be changed after hearings have begun. The decision of a majority of the members of the Joint Board is the decision of the Board. The Joint Board can hold hearings on any of the matters that could be considered at hearings under the Acts listed in the notice to the Hearings Registrar (s.4).

The Joint Board can make any decision that could have been made by the tribunal that would have held the hearing under the Acts listed in the notice. The Joint Board can defer matters to be decided later, or can defer a matter to the tribunal that normally would have heard it. When the Joint Board defers a matter, it can impose terms and conditions, or give directions on it, including a directive that the matter be decided without a hearing.

A Joint Board may make a decision without holding a hearing, if it feels that a hearing would not normally be held under the Act specified in the notice. A Joint Board can amend a notice given under Section 3 if a person with standing asks the Board to do so, and this can be done after hearings have begun (s.5).

The requirements of notice, practice and procedure under the Acts in the notice to the Registrar, will apply also under this Act. However, the Joint Board can change the filing requirements to make it more efficient, so long as they ensure fairness. The Joint Board can set its own practice and procedure. The Board can award costs of a

proceeding, order by whom and to whom the costs are paid, and fix the amount of the costs or the scale of the costs (s.7).

The same rules of standing that apply to the Acts in the notice to the Registrar shall also apply under this Act. The Joint Board can also appoint a class representative and amicus curiae (s.8). The Board may also appoint expert witnesses (s.10) and it has the power to state a case for the Divisional Court (s.11).

To participate in a decision, a member of the Joint Board has to have been at all the hearings. A written decision and reasons will be given to parties who took part in the proceedings, and to any other parties who would have received notice of the decision under the requirements of the Acts in the notice to the Registrar (s.12).

The Lieutenant-Governor-in-Council can order that all or any part of a decision by a Joint Board be changed, or can substitute a decision, or can require a different Joint Board to hold a new hearing. Any person with standing at the hearings can apply for such a change in the ruling of the Joint Board within a 28-day period (s.13).

The decision of the Joint Board becomes final if there is no appeal (s.14).

Where a hearing is, or may be, required under any of the above-mentioned Acts, the decision of the Joint Board on whether there will be a hearing stands, and cannot be affected by any of the tribunals under any of the other Acts in the schedule. Only the appeal proceedings described in this Act apply (s.15).

The same information that can be disclosed for proceedings under the individual Acts in the schedule may be disclosed for proceedings under this Act (s.18).

The Lieutenant-Governor-in-Council may make regulations:

> "exempting any undertaking or class of undertakings or any hearing or class of hearings in the application of this Act or the regulations or any portion or section of this Act, the regulations, and prescribing conditions that shall apply to any such exemption."(s.19).

Once a proponent gives notice to the Hearings Registrar, no hearings under any of the Acts in the schedule can be held (s.20). Any of the matters not decided under this Act can be decided under the other Acts in the schedule (s.21).

If a hearing has already begun under one of the Acts in the schedule, this Act does not apply. However, if a hearing is in progress under one of the Acts in the schedule, and a party to those proceedings gives notice, the hearing can be moved under the Consolidated Hearings Act (s.24).

The Act binds the Crown (s.23).

B. Discussion

The Environmental Assessment Act was passed more recently than most of the other Acts in the schedule. It reflects a concern for fair notice, access to information, public participation, and holistic, comprehensive planning to a greater degree than most of these other Acts. In recognition of this, the government made commitments on several occasions to ensure that the Environmental Assessment Act would take precedence in any streamlining process.[46] The Consolidated Hearings Act represents a reversal of those commitments.

There is no guarantee in the Act that the procedures established by the Environmental Assessment Act will take precedence over the requirements of other statutes.

The main drawback of the Consolidated Hearings Act is that it fails to address how a Joint Board will deal with differing requirements for such policies and procedures as notice, access to information, filing of documents, etc., when the requirements of two separate Acts have to be merged. What happens if a hearing is held under both the EAA and the Planning Act, and one Act has considerably greater notice requirements than the other? Will we get the highest or lowest common denominator?

For example, access to information in the Board's files is far more extensive under the EAA than the access provided by the Ontario Municipal Board under the Planning Act and and other Acts under which the OMB holds hearings. Over the years, the Ontario Municipal Board has made it very difficult for ordinary members of the public, and for lawyers who do not practice regularly before the Board to obtain access to its files or copies of documents in the files. The EAA, on the other hand, provides that all the basic documents are part of the public record and makes them available at various locations.[47] Standing, costs, funding, discoveries and motions are other areas where these two Acts differ considerably.

There are no statements in the Consolidated Hearings Act which explain how the Joint Board or anybody else is supposed to merge these overlapping and possibly conflicting requirements.

An equally important concern is the fact that the Act may authorize the Joint Board to refuse to hold a hearing and to decide matters without hearings, with little or no opportunity for judicial review of the Board's decision. The Board can do this whenever it forms opinions on certain matters, with no safeguard to ensure that those opinions are based on fact. Administrative and quasi-judicial tribunals are appointed agencies not directly accountable to the public. It is only in recent years this kind of delegation by the elected representatives of government has even achieved any degree of acceptance. Normally, the right to refuse a hearing by such Boards is restricted to Ministers of the Crown. Such Ministers are accountable to the public, and have rarely exercised their discretion to withhold the right to a hearing. Without such direct accountability, it is dangerous to give this power to a Joint Board.

Because the Consolidated Hearings Act attempts to combine the procedures, rights and duties imposed by several Acts, it is inherently difficult legislation. It is difficult to determine how it will apply in practice, and whether it will curtail or expand the rights provided by the Acts which it supersedes. As a matter of principle, streamlining legislation should neither curtail nor expand the rights given by other legislation unless it does so explicitly. Whether the Consolidated Hearings Act will be used to augment or to circumvent the requirements of the Environmental Assessment Act remains to be seen, and the fact that either could happen is a deficiency in the Consolidated Hearings Act.

However, it is clear that it augments certain provisions of the Environmental Assessment Act and for that reason should be strongly supported. For example, where the Environmental

Assessment Board has no right under the EAA to award costs, a Joint Board can do so under the Consolidated Hearings Act. Obviously, this creates an anomaly which should be cured by giving the Environmental Assessment Board a similar right under the EAA (subject to our previous comments that project funding is a far more appropriate mechanism than after-the-fact costs).

Similarly, the Consolidated Hearings Act appears to provide clearly for an appeal of a decision of the Board to the Cabinet, including certain safeguards to ensure that all parties to the original hearing have some procedural rights on the appeal. The Environmental Assessment Act, on the other hand, has a vague and confusing provision for review by the Minister and Cabinet. This provision has been interpreted by some observers as an appeal with no clear procedures, and by others merely as a right of the Minister to re-open proceedings without any right of review by any of the parties. While we are pleased to see fairer procedures under the Consolidated Hearings Act, it would be preferable to provide similar procedures under the Environmental Assessment Act.

On the other hand, it is possible that the Consolidated Hearings Act will remove some of the rights provided by Acts in the schedule. For example, Section 19 allows the Lieutenant-Governor-in-Council to exempt any undertaking or class of undertakings, or any hearing or class of hearings from the application of the Consolidated Hearings Act by regulation. If a matter comes under the Consolidated Hearings Act, it is because the undertaking was already under more than one of the Acts in the schedule. Does exemption of the undertaking from the Consolidated Hearings Act merely restore

the status quo ante, so that hearings will be held under both the Acts the undertaking originally came under? Or does it also exempt the undertaking from those Acts? Obviously, to give the power to exempt an undertaking which is already under more than one of the Acts in the schedule from those Acts, would be to give the Consolidated Hearings Act more power than a streamlining Act should have. Other sections, such as s.3(3) raise similar concerns.

We respectfully submit that the Royal Commission on the Northern Environment should recommend to the Ontario Government clarification of the Consolidated Hearings Act. The government should ensure that the provisions of the Acts in the schedule that are most advantageous to members of the public who wish a full and fair hearing by an independent tribunal under any of the Acts in question, are preserved under the Consolidated Hearings Act.

VI Return to Detour Lake

Introduction

First, the Commission should be commended for examining the Detour Lake Access Road matter as a case study in environmental assessment in the North, and for producing the report, The Road to Detour Lake.[48] This Report provides a detailed and well-documented account of the events and of government decision-making regarding the Detour Lake case. The Report is thorough, comprehensive and objective. It reports the actions and decisions of various government Ministries and comments on, questions, or criticizes these actions in an analytical manner. The author clearly avoids any temptation to lay all the blame at one doorstep or to discover a villain in the process. Instead, the Report points to the mandates, the pressures, and the actions of each of the Ministries, and comments accordingly.

Detour Lake is located in northeastern Ontario, about 90 miles northeast of Cochrane, Ontario. In 1975 Amoco Canada Ltd. discovered a large gold ore reserve near Detour Lake. By 1979 Amoco invited other companies to join as venture participants, and Dome Mines, and its subsidiary, Campbell Red Lake Mines joined Amoco to form a consortium.

The development plan for the mine called for a production date of October 1983. It was with this date in mind that the joint venture approached the Ontario government regarding the provision of an access road to the mine. Amoco made a formal request to the Minister of Natural Resources in March 1978. About a year later, that Ministry called together an interministerial committee to deal with the proposed development. The committee included representatives from the

Ministries of Natural Resources, Northern Affairs, Environment, Transportation and Communications, Energy, Labour, Industry and Tourism, as well as Ontario Hydro and the Cabinet Committee on Resources Development.

The Commission's report traces the role of this committee and the various ministries in dealing with the request for assistance with the road. In particular, the report examines the application of the Environmental Assessment Act to the project. As a case study on the application of the EAA to a northern project, this report provides compelling evidence of the need for certain amendments to the Act. Some of these issues have been raised earlier in our study, and are further underlined by the Detour Lake road experience.

This section will examine issues raised by the facts reported in the Road to Detour Lake, and discuss those issues in relation to the Environmental Assessment Act and possible amendments to the EAA. The discussion assumes that the reader is well acquainted with both the Road to Detour Lake and the EAA.

A. The Ontario vs. Quebec Issue

Time was inordinately paramount to all other concerns in this case because the Province of Ontario perceived itself to be constantly under the threat of losing the entire economic spin-offs from the mining project to Quebec. Since the mine is quite close to the Quebec border, road access from Quebec is only a distance of 40 km, compared to 100 km access in Ontario. The Quebec government had already offered the mining consortium road access and hydro at no cost to the company. Thus, Ontario

felt pressured by the threat of losing the whole project to Quebec.

From an environmental management standpoint, access from Quebec might have made more sense. Quebec access was half the distance and would make use of an existing remote access road. It is also possible that a Quebec road would not have disturbed private remote cottages and commercial fly-in fishing camps, as would Ontario access.

Had the mining consortium been paying for the road, it likely would have used Quebec access because the cost would be half that of Ontario road access. But in the discussions with Ontario, it was never suggested that Ontario would pay all of the costs of the road. So why, when the company apparently had a "no strings attached" offer of road access and hydro from Quebec, did it even enter into discussions with Ontario?

Does it not seem likely that the company had some reason for preferring Ontario access? This is speculation, but it is important because had Ontario realized that perhaps the company had some preference for Ontario access, the government may not have put itself in such a powerless position in its negotiations with the company, and the pressure of time may not have totally over-ridden the normal provincial planning and environmental assessment process. It appears that Ontario took the company's position (that they had no preference as to which province provided access) at face value, and allowed the company's time-frame for bringing the

mine into production to become the moving force behind their actions. Surprisingly, this was done in the absence of a firm commitment from the company to proceed with the mine. Such behaviour is typical of the "desperation economics" which characterizes so many resource development decisions in the North.

The proximity of the mine site to a provincial border raises another important issue. It is likely that two provinces will compete for the economic benefits of the development in such a situation, and it is likely that in so doing each province might give more weight to economic and political benefits, than to sound environmental management. It would be preferable, from an environmental and planning standpoint, to have a resource development within a 100 km radius of a provincial boundary assessed by a federal government authority, or to have an agreement between provinces for joint assessment by both.

It is interesting to note that the "MOE Guidelines - Detour Lake Gold Mine Access Road E.A." included, under the heading "Road Options": "From Quebec or Ontario". Thus, the Ministry of the Environment directed the proponent to assess the option of road access from Quebec. While it makes good sense to assess the Quebec road option from an environmental management standpoint, it is questionable whether the Ontario Ministry of the Environment, in administering the EAA, has the mandate or the jurisdiction to assess a Quebec road as an alternative to an Ontario road.

B. Access to a Mine vs. Access to a Region

The Report indicates that throughout the process there was disagreement and/or misunderstanding as to the purpose of

the road. Ontario's consideration of and preliminary decision to build the road arose because the mining company asked the Province to provide access to the Detour Lake mine. So, it would seem that the road's original purpose was to provide access to the mine.

Yet, very early in the process, the road was seen by some of the Ministers and Ministries involved as a Northeast Ontario Access Road, and promoted for that reason. At page 8, the Report quotes a preliminary investigation by the Cochrane District of the Ministry of Natural Resources thus:

> "The road might eventually be Phase 1 of the road to Moosonee."

At page 17, the interministerial committee minutes note that the Minister of Northern Affairs, at a March 1981 meeting of the Cochrane Board of Trade,

> "noted the formation of this Committee and indicated that the mine development was one additional reason for building a development type road into the area."

Providing an access road to a mine site in order that a few towns might benefit from the economic spin-off is quite a different matter from building an access road to open up a remote area of northeastern Ontario. The author of the Report points out at page 12,

> "According to one view of resource development, any kind of access into a remote region increases the incentive for further access to be established and for further exploration and development to be undertaken."

The Green Paper on Environmental Assessment clearly identified this kind of issue as one of the key reasons for providing for environmental impact assessment in Ontario.

Although one could argue that the net effect of building the road would be the same, certainly the planning and decision-making process would vary according to the purpose. Since building a road into a region which has no other road access would have a regional impact, it would be sensible to assess the Detour Lake Road as an access road to northeastern Ontario. Assessing it as such may well require completion of a Northeast Strategic Land Use Plan (SLUP) by the Ministry of Natural Resources, a full program of public participation in the SLUP, taking in communities from Cochrane, Timmins and Moosonee, all the way east to the Quebec border, and possibly an Environmental Assessment of the SLUP itself, before an Environmental Assessment of the road could begin.

Because providing road access to a previously remote region had such far-reaching ramifications for that region, the detailed and time-consuming planning process described above is justified. However, that planning process requires a time-frame that would have been clearly impossible under the constraint of completing the road in time for the projected start-up of the mine. It appears that a high-level and private decision was made to trade off regional environmental planning and "controlled development" in favour of reaping the economic spin-off of the mine.

In the Detour Lake mine case, the mine development itself was not under the EAA because it was a private undertaking. And it was not clear for some time whether the road was under the Act, because the level of government financing and involvement had not been determined. The Ministry of the Environment took the position all along that if the government was going to have anything to do with the road, the

road was under the EAA. But, as the Report points out, at page 38,

> "The Committee's preference, as discussions progressed, and as the minutes indicate, was to have the road exempted from environmental requirements."

It was not until the fourth Interministerial Committee meeting that the Ministry of the Environment set out, in a memorandum from its Deputy Minister to the Deputy Minister of Northern Affairs, "that the Environmental Assessment Act would apply to the construction of a road to Detour Lake site, regardless of the level of Provincial involvement in the undertaking" (Page 39). In fact, Environment's Deputy Minister goes on to reprimand the Ministry of Natural Resources for their attitude, stating "....I am rather surprised that questions on the applicability of the Act are being raised by members of your staff at this late stage." (Page 39).

It is noteworthy that the Ministry of the Environment, in the space of a year, moved from a position that the EAA did not apply to the road, to a position of exempting the road from the Act.

Does it make any sense to assess the social, economic and environmental impacts of a road to a mine, and not assess impacts of the mine itself? If the reason for government involvement in the road is to ensure that Ontario will reap the economic benefits of the mine development, does it not make sense to assess the mine, the economic benefits it will bring, and the social costs it will incur? "Need" is also an issue to be addressed under the EAA. How can the

"need" for an access road to a mine be assessed without consideration of the benefits of the mine itself?

The fact that the mine was not designated and thus could only be mentioned peripherally in the environmental assessment of the road made the assessment of the road almost a farce. One can almost understand the failing of the proponent to define the purpose of the undertaking in his environmental assessment document. For if he defined it simply as "to provide access to Detour Lake mine" he could only justify it in terms of the benefits of the mine, and discussion of the mine itself was beyond his terms of reference. Since Ontario's apparent interest in financing the road was to secure for Ontario the economic spin-off, does it not make sense to assess the mine? The only other way to assess the road would be to define it as an access road to northeastern Ontario and that, as we have discussed previously, would likely have led to considerable further delay.

In commenting on the Ministry's intention to bring private undertakings under the Act, some time in the future, the author of the Report comments,

> "What the Detour Lake road case indicates is that attempts to enforce the applicability of the Act to government projects, as currently required, is difficult enough."

It is a sad commentary that government should have such a negative attitude towards its own legislation that it would attempt to avoid its application in the first place, and having failed at that, blatantly undermine it. But, the resistance of government ministries to compliance with the Act is no excuse for not extending it to apply to private

undertakings. Nor is it reason for avoiding designating at least some of the more significant private developments, such as Detour Lake mine. In the 8 years since the Act was passed, only 4 private undertakings have been designated: the Onakawana Lignite Mine near Moosonee, the Reed Forestry Development in northwestern Ontario, the Inco Spanish River dam and power station, and the Victoria Hospital waste incinerator in London, Ontario.

The Detour Lake Road story raises the exemption issue again. Late in the process of discussion and evaluation, the Ministry of Natural Resources issued a work permit to a Hearst contractor for the clearing of the right-of-way for the road. On February 11, 1981, about two weeks after this work permit was issued for clearing, an exemption order for clearing activities drawn up by the Ministry of the Environment was ratified as an Order-in-Council by Cabinet. The exemption order was carefully worded to state that the exemption of the clearing was not to be construed as implying any approval of the road, but clearly it was impossible for the clearing not to advance the acceptance of the road itself.

Thus, MNR issued a work permit for the clearing of the road two weeks before clearing activities were legally exempted from the Act, while all matters pertaining to the road were under the Act, and while the government review of the EA document was in progress! To add utter insult to injury, on January 23, 1981, while the government review was in progress, the Ministry of Northern Affairs issued a news release announcing the awarding of a contract to begin construction of the Detour Lake Road!

There are no criteria, either in legislation or in regulations, dealing with exemptions. In this case, the Minister of the

Environment, with Cabinet approval, exempted a public undertaking even while an environmental assessment of that undertaking was in progress. In other words, the Minister can "change his mind" at any time, for reasons of his own, without any criteria, without any public notice, without giving reasons, and without any direct public accountability.

The logical response when a proponent proceeds with an undertaking contrary to the Act and without the proper exemption is for the Minister of the Environment to apply the legislation, by prosecution for violation, by seeking an injunction from the courts, or by asking the Premier to order the offending Ministry to halt work. This was not done.

The Order-in-Council exempting the clearing operation did list reasons for exempting it, the strongest of which was "to ensure that 150 km of road can be completed on schedule by the time the mine becomes operational" (Page 70). The Report indicates that the terms and conditions of the order stressed that despite the clearing exemption, the road itself could only proceed after approval under the Act, and that this exemption was without prejudice to that decision.

Why would the proponent risk spending the money to clear the road when neither the road alignment nor the construction of the road had been approved? In light of the sequence of events surrounding the clearing exemption and the final exemption of the road itself, it is difficult to see these terms and conditions as anything more than an abuse of Ministerial discretion, or a rearguard action taken by a Ministry of the Environment that had been outflanked by the other Ministries.

Contrary to all the promises, terms and conditions surrounding the exemption of the clearing of the road on June 24, 1981, the Detour Lake access road was exempted from any further assessment. This was the final step in a series of manoeuvres designed to remove the Detour Lake road from the environmental assessment process.

D. Conclusions and Recommendations

The Detour Lake case, and this analysis of it, offer several clear and compelling options for reform. Five issues were identified in the foregoing discussion which will form the basis for our recommendations arising from the Detour Lake story. These are: the provincial boundary issue; the hidden proponent; assessing a public undertaking which is contingent on a private undertaking; the problem of excessive discretion; and the lack of enforcement of the EAA.

The Provincial Boundary Issue

The earlier discussion of the proximity of the mine site to the Quebec-Ontario border, and the implications of the inter-provincial competition for the project, points to an unmet need. We lack a mechanism for assessing projects which are located close to a provincial boundary, and for determining which provinces should "get" the undertaking.

In a case such as Detour Lake it is logical that each province would compete for the economic spin-off of the project. But would access from Quebec be preferable, from an environmental management standpoint, or access from Ontario? It would be difficult for either Ontario or Quebec to decide that question objectively, because each has a vested interest in securing the project, and neither province has jurisdiction to decide which of the two should get the project. The problem points strongly to the need for cooperation between Quebec and Ontario and for an environmental assessment coordinated by both provinces or by the federal government.

Detour Lake is not an isolated case of an inter-provincial or federal-provincial dispute on an environmental matter. The test drilling by AECL for researching suitable deep-well disposal sites for nuclear wastes in northwestern Ontario offers a closely-related example. AECL is a federal agency and radioactive wastes come under federal jurisdiction, but the location of a disposal site in northwestern Ontario - were that to be proposed in the future - would have significant effects on the people of the North and Ontario. What body would assess such an undertaking - the federal Environmental Assessment Review Process (EARP), the Ontario Environmental Assessment Board, or both? Or would it escape assessment because each expects the other to carry out the assessment? For the project clearly has implications for both jurisdictions.

Similarly, the proposed dredging of the Keating Channel in Toronto, where the Don River meets Lake Ontario, met with a federal-provincial jurisdictional conflict. The purpose of the dredging was to improve navigation and to prevent flooding. Local environmentalists were concerned that the dredging would disturb the channel sediment which likely contained serious concentrations of heavy metals and other contaminants. Since navigation is within federal jurisdiction, and the owner of some of the affected property, the Toronto Harbour Commission, an agency created by a federal statute, it was partially a federal matter. On the other hand, some of the property involved was under provincial control, and flood-protection is a provincial role.[49] Because we do not have a mechanism for resolving these jurisdictional conflicts, there is often undue delay, resulting in environmental degradation, or an <u>ad hoc</u> decision which is poor from

an environmental perspective. It is an issue that needs attention.

It is recommended that the Commission recommend to the Ontario Government that it take a leadership role in devising and promoting a mechanism for resolving inter-provincial and federal-provincial disputes on environmental issues. Such a mechanism should ensure that an assessment of appropriate scope is done in a timely manner whenever an undertaking may have significant impact.

The Hidden Proponent and the Non-Existent Undertaking[50]

The Detour Lake story lucidly points to the problems that arise when an undertaking has no clear proponent. This situation creates undue delay in determining whether the undertaking is subject to the Act, and if so, in moving ahead with the EA process. This situation arises most frequently when there is a public project involving several ministries, any one of which could reasonably be the proponent. Since many provincial ministries have a blanket exemption under the EAA, the difference between having one ministry or another be the proponent, could mean the difference between the undertaking being subject to the Act, or being exempt.

Another variation on the same theme is the non-existent project or undertaking. The federal government has over the years refused to designate the proposed dredging of the Oshawa Second Marsh to deepen and extend the Oshawa Harbour. The reason always given is that no federal agency has yet made a firm decision to promote this project, although the City of Oshawa wants it to proceed. Meanwhile, federal agencies have restricted access to

the marsh and so they have raised the level of the water in the marsh. The provincial government has allowed decisions to be made about the disposition of adjacent lands which may affect the viability of preserving the marsh. OMB hearings have been held on the zoning of these adjacent lands. But no federal environmental assessment will be held until a federal department formally accepts responsibility for the undertaking.

It is recommended that the Commission recommend that the provincial government develop an interministerial mechanism for identifying a proponent and preventing delay in deciding that an undertaking exists for the purpose of the EAA.

Public Undertakings Contingent on Private Undertakings

The fallacy of assessing the Detour Lake road and not assessing the mine was discussed earlier. Again, the Detour Lake example is not an isolated instance. The Oshawa Second Marsh situation described above illustrates aspects of this public/private dichotomy. Similarly, the Victoria Hospital incinerator almost escaped assessment because the hospital was considered a "private" entity under the EAA. This example is discussed elsewhere in this brief.

Therefore, it is recommended that the Commission recommend that the Ontario Government adopt a policy of designating any private sector undertakings upon which a public sector project is contingent, if the public sector project is under the EAA.

The Problem of Excessive Discretion

We fully recognize and support the need for Ministerial and Cabinet discretion in managing the affairs of the province. However, the Detour Lake story forces us to reconsider the degree and nature of discretion with respect to the EAA.

The fact that the Detour Lake mine itself was not designated raises the possibility of abuse of discretion. The fact that the inter-ministerial committee was given a mandate to "facilitate the development" before any kind of cost/benefit analysis of the mine or the road was conducted, raises this issue. The Minister of Northern Affairs misused this discretion in announcing the construction of the Detour Lake road while the matter was under assessment. Finally, the action of Cabinet in exempting the road, while the project was under assessment and without public input or public reason, points to a serious abuse of discretion.

The best response to excessive discretion, however, may not be to remove all opportunities for the Minister or Cabinet to exercise their judgment. The specific actions of Ministers or of Cabinet mentioned above may indeed not be seen as abuse of discretion if we knew all of the information and considerations which led to those decisions. But the fact that the exercise of this discretion takes place totally in private, leaves the public suspicious that behind such decisions may be forces such as: a Minister's political self-interest, the influence of corporate powers, a minister's personal goals and aspirations, and favouritism. Therefore, the solution we see is two-fold. First, for those matters which are to be left to ministerial discretion, clear and precise policy, criteria and

guidelines should be drawn up, with public input. This would help to ensure that the Minister's private motives would not override considerations of the public interests.

Secondly, a number of very important decisions which are now discretionary, such as the decision to exempt a public project or to designate a private project, should become the jurisdiction of the Environmental Assessment Advisory Committee. Those decisions which we recommend become the Committee's jurisdiction have been discussed in detail in Section IV.

Lack of Enforcement

In May 1982, Ron Reid of the Federation of Ontario Naturalists, represented by legal counsel from CELA, successfully prosecuted the Minister of Transportation and Communications and his Deputy Minister, for breach of the EAA. The Minister had ordered that construction of Highway 404 extension begin, without waiting for the mandatory 30 days during which a member of the public can request a hearing.

The situation cited above is strikingly similar to the issuing of a work permit for the clearing of the Detour Lake road, two weeks before the Exemption Order was passed. Although this was a clear transgression of the EAA, no legal action was taken against the Ministers, government officials, or private contractors involved. It seems that the government is unwilling to enforce its own legislation and to prosecute those who violate it.

Again, the decision to exempt illegal activities after-the-fact rather than prosecute wrongdoers is symptomatic of a

more widespread problem. The Ministry of the Environment has frequently refused to enforce its legislation in the past. Indeed, in 1978 a Royal Commission investigated whether the Ministry's failure to enforce the Environmental Protection Act against certain waste disposal companies resulted from a large donation from one of those companies to the Progressive Conservative Party of Ontario. Although the Commission cleared the Government of any wrong-doing, it recommended that the Ministry prosecute whenever its legislation is violated, rather than only as a last resort when cooperation between the Ministry and the transgressor has broken down.

Government Resitance to the EAA

From the description of the history of EAA and CELA's role in raising public pressure for the passage of the Act, it seems fair to say that government was - at least - reluctant to pass the EAA. This viewpoint is supported by the lack of application and enforcement of the Act to date. The Detour Lake story further documents the resistance of various government officials to the environmental assessment process.

One can speculate that the source of this resistance is that many government officials see the EAA as causing delay, being burdensome and unncessary. However, the evidence doesn't support these views. When projects have been delayed, it has usually been because they were not feasible or advisable in the first place. The road to development is littered with such white elephants as the South Cayuga Waste Disposal facility, the Maple landfill site, the Darlington Nuclear Generating Station, the Reed tract, the Inco Spanish River dam, and the West Montrose Dam. All of these projects have died or

languished not because of the environmental assessment process, but because of problems which were or could have been revealed through the EA process.

The Commission should urge the Government to learn from the lessons of Detour Lake and take a more positive approach to the Environmental Assessment Act.

FOOTNOTES

1. Willms, J. et al., The Legal and Administrative Basis of Land Use and Environmental Decision-Making North of Latitude 50°--A Guidebook and Selected Observations, Prepared for the Royal Commission on the Northern Environment by the Canadian Environmental Law Research Foundation, March, 1980, page 114 (hereinafter Willms).

2. Willms, page 113.

3. Cotton and Emond, "Environmental Impact Assessment," in Environmental Rights in Canada, Swaigen, ed. (Toronto: Butterworths, 1981), page 257 (hereinafter Cotton).

4. Cotton, pages 257-8.

5. Canadian Environmental Law Research Foundation (hereinafter CELRF), Second Report on Bill 94, 1971.

6. CELRF, Public Rights and Environmental Planning: A Preliminary Report, January, 1972.

7. Ontario Ministry of the Environment, Green Paper on Environmental Assessment, September, 1973 (hereinafter Green Paper).

8. CELA, Principles for Environmental Assessment, October, 1973 (hereinafter CELA White Paper).

9. CELA White Paper, page 20.

10. Bowden, Marie-Ann, The Use and Impact of Exemption Procedures on Ontario's Environmental Assessment Act, 1975, Master's Thesis, Graduate Programme in Law, Osgoode Hall Law School, Downsview, Ontario, September, 1981 (hereinafter Bowden).

11. Green Paper.

12. Bowden.

13. Smith, Barry E., Chairman, Environmental Assessment Board, "Practice and Procedures before the Environmental Assessment Board," September 1981.

14. Letter from George A. Kerr, Minister of the Environment, to John Swaigen, General Counsel, Canadian Environmental Law Association, July 25, 1977.

15. The Globe and Mail, Toronto, June 1, 1978.

16. CELA Newsletter, February, 1980, "Of Christians vs. Lions?"

17. See CELA Newsletter, February, 1981, "Environmental Hearings under Ontario's Environmental Protection Act: A Case Study in Political Interference."

18. Maurer, K. F., A Public Participation Program for the Ontario Environmental Assessment Board, February 22, 1978, page 86 (hereinafter Maurer).

19. Maurer, page 88.

20. CELA White Paper, October, 1973, page 80.

21. Porter, Arthur, Chairman, Report of the Royal Commission on Electric Power Planning, Government of Ontario, February, 1980, vol 8, page 44.

22. Fox, David, Public Participation in the Administrative Process, Ottawa: Law Reform Commission of Canada, 1979, Report No. 13, Advisory and Investigative Commissions.

23. Duncan, Linda, Resources to Public Intervenors; the Environmental Review Process, unpublished study prepared for the Alberta Department of the Environment, June 1979.

24. Responsible Regulation: Interim Report of the Regulation Reference, Economic Council of Canada, Ottawa, 1980.

25. Report of the Lancaster Sound Assessment Panel: Lancaster Sound Drilling, February 12, 1979, page 80.

26. Canadian Environmental Advisory Council, Environmental Assessment and Review Process, Observations and Recommendations, November, 1971, page 4.

27. Cotton, page 274.

28. For example, the Green Paper states at page 14 that "Based on experience in Ontario and other jurisdictions, the costs incurred by the proponents of an undertaking in completing an environmental assessment are less than one per cent (.0013-.0076) of the total project development costs. As a percentage of feasibility analysis costs, environmental assessment expenditures on larger projects range between four per cent and seven per cent."

29. There is a wealth of research supporting the proposition that an expansion of legal rights does not create serious problems. For example, Swaigen, J. and Woods, R. E., "A Substantive Right to Environmental Quality," and Simon Chester, "Class Actions to Protect the Environment: A Real Weapon or Another Lawyer's Word Game?" in Environmental Rights in Canada, supra.; Ontario Law Reform Commission, Report on Class Actions, Toronto: Ministry of the Attorney General, 1982.

30. Green Paper, Introduction by the Honourable James A. C. Auld, Minister of the Environment, page 1.

31. E. A. Update, Vol. 1, No. 1, October 1976, page 2.

32. Letter from D. A. Chant to the Honourable William G. Davis, January 19, 1979.

33. Proceedings of a Workshop on the Environmental Assessment Act, 1975, and the Private Sector. Conducted by The Institute for Environmental Studies, for the Ontario Ministry of the Environment.

34. Ministry of the Environment, The Environmental Act and Municipalities, October, 1977, page 2.

35. Bowden.

36. "Metro Will Pay Dollars 39 Million for Dump With Shaky Future," Toronto Star, Saturday, October 16, 1982, page A16.

37. Bowden, pages 60-62.

38. Bowden, page 92.

39. Bowden, pages 92-93.

40. Conservation Council of Ontario, Brief to the Premier of Ontario on Exemptions to the Environmental Assessment Act, May 27, 1981.

41. Letter from Arlin Hackman, Executive Director, Algonquin Wildlands League, to the Honourable William G. Davis, November 11, 1981.

42. See for example, Report of the Municipal Working Group, Recommendations for the Designation and Exemption of Municipal Projects under the Environmental Assessment Act, December, 1976.

43. Letter to the Public Interest Advocacy Centre from Richard L. Plunkett, Staff Ecologist, National Audubon Society, July 8, 1980.

44. Letter to the Public Interest Advocacy Centre from Charles Roberts, Director of Information, National Wildlife Federation, July 11, 1980.

45. The Honourable Harry C. Parrot, D.D.S., Minister of the Environment, "A Statement on Streamlining Waste Disposal Site Hearings," to the Provincial-Municipal Liaison Committee, June 22, 1979.

46. The Environmental Assessment Act and Muncipalities, Ministry of the Environment, 1977, page 18; Interministerial Committee on Solid Waste Disposal, May 1979, page 22; Statement of Dr. Parrott, supra., at pages 4-5.

47. For a description of some of the difficulties the public has experienced in obtaining access to information from the Ontario Municipal Board, see Young, J. and Swaigen, J., The Environmental Assessment Process: Procedures and Practices, Prepared for the Public Interest Advocacy Centre, June, 1981. Since that study was done, the Ontario Muncipal Board has provided greater accessibility. For example, the Board has now made available to the public a coin-operated photocopying machine, a matter considered by the three previous Board chairmen and not acted upon by them.

48. Margaret Tanaszi, The Road to Detour Lake, Royal Commission on the Northern Environment, 1981.

49. Bowden, supra.

50. For examples of this problem in the federal environmental assessment and review process, see Cotton at page 252-253.

APPENDIX

Appendix I - Conclusion of the Workshop on the EAA and the private sector

9. Summary of Conclusions

1. The term "major undertaking" should be defined primarily in terms of environmental impact, and only secondarily in terms of project size or cost.

2. Regulations defining projects as being major undertakings and designating such undertakings as being subject to the Act must be simple and clear in order to minimze any uncertainties.

3. A general inclusionary regulation defining major undertakings supplemented by a list of project types for which an EA is definitely required is the favoured approach.

4. Greater consideration must still be given to the manner in which plant expansions shall be handled.

5. An initial list of projects which might be designated and/or exempted should be developed. Possible criteria for defining "major undertakings" in terms of environmental effects should also be prepared.

6. There should be maximum involvement of industry, government agencies and public interest groups in determining these list(s) and criteria.

7. A screening mechanism is required to determine the disposition of "grey area" projects and to review any exemptions and Class EA projects for bumping-up if necessary.

8. The nature and composition of the screening body requires further consideration.

9. A consultative "scoping and triggering" procedure is desirable, particularly in defining feasibility studies and Class EA's, but more consideration must be given to how such a procedure might work.

10. The entire private sector should be brought under The EA Act simultaneously.

11. An estimate of the anticipated workload for MOE and the EAB from private sector projects would be helpful.

12. Consideration should be given to the development of a program assisting small businesses through the EA process.

13. Institution of a general reporting mechanism whereby MOE and the public is informed of any planned new projects and expansions should be considered.

14. The education of the private sector with respect to the nature and requirements of EA must begin now.

15. Given clarity about WHO must prepare an EA, WHEN in the approvals process the EA must be completed, and WHAT the contents of an EA must include, there should be no problems with respect to appropriate triggering of the EA process.

16. The question of how many alternative project sites must be considered in an EA remains to be settled. Proponents should be required to put forward an acceptable or "least worst" site, but not necessarily the best site.

17. Time limits on the EA process and on approvals granted under The EA Act should be considered to avoid "locking up" of any one site or market, and to engender confidence that the EA approvals process will not result in undue delays.

18. Land acquisition by private operators should not come under The EA Act.

19. Where land acquisition is of such a scale as to incur significant environmental impacts, such acquisition should be specifically designated under the Act.

20. Proponents should be encouraged to take out options to purchase on alternative potential project sites.

21. Site ownership should not influence the final decision of the Minister or the Environmental Assessment Board.

22. While jurisdictional overlap is not necessarily bad, co-operative procedures of affected jurisdictions must be developed to ensure a single, streamlined approvals procedure is available to the proponent.

23. Clarity in the designation of projects and wide public participation in this procedure will minimize confusion and conflict resulting from jurisdictional overlap.

24. Difficulties with the Class EA approach render its usefulness for the private sector questionable.

25. Exemptions on grounds of confidentiality should only be granted by the Minister, and only where it can be clearly shown that disclosure would have a detrimental effect on the proponent's business.

26. Careful consideration should be given to the monitoring of projects approved under the EA process for compliance with conditions of approval.