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WHAT WAS SAID

"While an unenlightened public response may help explain shortcomings in provincial reforms, it does not absolve the provincial government from enlightenment. In comprehensive lo concerted effort at

The Trees Act Amendments

By John Swaigen, General Counsel, Canadian Environmental Law Association

A concerned group of lawyers, scientists, and conservationists who believed that law could be a useful tool for stopping environmental degradation and for promoting sound environmental planning, founded the Canadian Environmental Law Research Foundation (CELRF) and its legal advisory body, the Canadian Environmental Law Association (CELA), in 1970.

CELA operates an Environmental Law Advisory Office to help people with environmental problems by explaining their legal rights and referring them to the appropriate government agency. If after consultation it is felt that the problem can only be solved in the courts, CELA will either supply a staff lawyer or refer the problem to outside lawyers.

CELA constantly scrutinizes developments in environmental law. New legislative proposals are thoroughly evaluated and progressive measures are vigorously supported.

The purpose of *The Trees Act* is to promote the preservation and protection of trees, especially woodlots and fence rows. In particular, sections 4 to 6, which are central to the amendments introduced in December of 1978,[1] have the object of preventing the indiscriminate destruction of woodlots. There are a number of good reasons for planting and protecting individual trees, windbreaks, and small or large woodlots, including the fact that trees help to maintain the groundwater level, aid in regulating drainage, prevent erosion of soil, provide a habitat for wildlife, and have important aesthetic value, apart from their commercial harvesting potential.

However, apart from section 6 of the amendment, which provides for a substantial penalty for unauthorized cutting of trees and for replanting of areas cut in contravention of the tree by-law, it is doubtful whether *The Trees Amendment Act, 1978,* will further these purposes of tree preservation or conflict with them. There is a good possibility that the new statute will give trees and woodlots less protection than the old Act.

The most glaring defect of the amendments is the failure to broaden the coverage of section 4 of the old Act together with the increase in exemptions from that section. Sections 4 to 6 of the former Act gave the councils of counties and regional municipalities the power to pass by-laws restricting and regulating the cutting of trees on woodlots larger than two acres by purchasers who owned the land for less than two years. The sections gave insufficient protection to woodlots because of the limitation of any by-law to areas larger than two acres, and because of the exemption of most municipal and provincial government agencies.

The proposed amendments do nothing to extend the application of tree cutting by-laws to areas of land less than two acres, which in the opinion of many municipalities, conservation authorities, environmental organizations, and the *Ontario Federation of Agriculture,* is necessary for the protection of wooded areas in Southern Ontario. In fact, the amendments substantially expand the exemptions from the application of tree-cutting by-laws. One exemption in particular, the exemption of any trees cut in accordance with "good forestry practice" may be broad enough to allow any land owner to evade the application of a municipal by-law designed to prevent or regulate the cutting of trees. Furthermore, section 7*b* of the amendments, which allows the owner of any trees affected by a tree-cutting by-law to apply to the municipal council to authorize "minor exemptions" to the by-law, will put municipalities under continual pressure to create further exemptions from the by-law. The Ontario Cabinet also has a right, subject to no prior scrutiny by the Legislature, or the public, to make further exemptions by regulation.

As mentioned, municipalities, individuals, and other public agencies and interest groups, have been requesting since the late 1960's the repeal of section 5(e) of *The Trees Act,* which provides that no municipal by-law to restrict or regulate the destruction of trees can be applied to a woodlot under two acres. Many of the woodlots worth saving in southern Ontario are woodlots under two acres. These woodlots serve the same functions as those of two acres and over in maintaining groundwater levels, acting as windbreaks, regulating drainage, providing wildlife habitat, preventing soil erosion, and aesthetic purposes. The protection of these smaller woodlots is an important, and in some areas even an urgent, matter. For example, a tree cover of 8% or less may be critical for the prevention of soil erosion and lowering of the water table, and in Elgin County tree cover was down to 11% by the end of 1976.[2]

1 The Trees Amendment Act, 1978 (Bill 207) First Reading December 13, 1978, died on Order Paper when session prorogued. It is understood that this legislation was introduced in this manner to allow time for comment. The government intends to reintroduce it in the next session of the Legislature.

2 Resolution from Catfish Conservation Authority, provided as background material by the Minister on tabling the amendments.

There is no effective protection for such small woodlots in any other Ontario legislation. In 1946 when sections 4 to 6 of the Act were enacted, the danger to woodlots was from logging companies who took advantage of the post-war demand for fibre to clear cut or "high-grade" with no regard to proper forest management.

Today, the threat to such woodlots is equally likely to come from development pressure, use of land for garbage dumps or gravel pits, and similar events. As the energy crisis worsens and the demand for biomass for energy increases, this may create further pressure on woodlots under two acres. Neither *The Environmental Protection Act,*[3] under which garbage dumps are licenced, nor *The Pits and Quarries Control Act,*[4] contain adequate provisions to ensure that protection of wood lots and trees is given full consideration when licencing or that filled garbage dumps or depleted pits or quarries are reforested after completion of operations. Although *The Planning Act*[5] contains provisions for subdivision and development agreements, developers have learned to strip the land of trees after purchasing it, but before applying for subdivision approval or re-zoning to avoid being subject to these provisions.

Implicitly, by refusing to amend *The Trees Act* to allow municipalities to regulate or restrict the cutting of trees on land less than two acres in size, which would recognize the amenity value of urban shade and ornamental trees and allow municipalities to preserve trees growing on private residential urban land, and by prohibiting municipalities from using *The Trees Act* to prevent or regulate the operation of pits and quarries, the government has taken a position against the use of the Act as a land use planning mechanism. At the April, 1977 meeting of the *Provincial-Municipal Liaison Committee* Mr. W. Thurston, Ministry of Natural Resources[6] explicitly referred to this in his comments. "There has been a growing feeling in some parts of the province that tree-cutting by-laws are a land use planning or a land use control measure. This is not the intent of *The Trees Act* or the by-laws passed under the Act. For this reason, we are seeking authority to cover an exemption for building construction where that construction is covered by a building permit issued by a municipality."

On the other hand, municipalities have found that such a land use planning tool is needed, and that other statutory instruments are not effective to protect urban and near-urban trees and small woodlots. For example, the City of Toronto, at the initiative of former alderman William Kilbourn, applied to the Ministry of Natural Resources in March, 1973 for amendments to the Act to enable the municipality to pass by-laws applying to areas smaller than two acres. The request was not acted on. However, the City of Toronto, the Borough of York, and the Town of Oakville, have all since applied for, and obtained special legislation giving them the power to pass by-laws to prohibit the destruction of trees on private property within the municipality, including areas less than two acres.

It is interesting to note that while the government does not wish to allow municipalities to use this legislation as a land use planning tool, it has incorporated into it what is in effect a land use planning tool — the "minor exception" similar to the "minor variance" in *The Planning Act.* While this has some merit in allowing flexibility of application of tree-cutting by-laws, it also has the potential to complicate and erode the process of preserving woodlots and certainly turns the process into a planning process in which the owner who wishes to cut trees may well appear before the council with professional planners assisting him in arguing in favour of a minor exception.

Based on these continual demands over the years for the repeal of section 5 (e), the Ministry of Natural Resources proposed in 1977 to repeal this section. At the April, 1977 meeting of the *Provincial-Municipal Liaison Committee,* Mr. Thurston, of the Ministry told the Committee that "another item of the permit aspect of control is related to clause 5(e) of *The Trees Act,* which states that by-laws cannot be applied to areas smaller than two acres. Again some municipalities sought authority to apply their by-laws to smaller areas of forest. This is particularly so in Haldimand-Norfolk and we recognize this need and are planning an amendment that will allow again a local option provision to apply the by-law below the two acres minimum limit."[7] However, this amendment was vetoed by the Conservative Government Caucus. "The Minister requests former sub-section 5(e) be reinstated. Caucus was not prepared to give the municipalities the power to interfere with the rights of owners of urban lots and small rural residential holdings."[8]

The repeal of section 5(e), as previously contemplated would be consistent with the purpose of *The Trees Act,* and might counterbalance a number of the proposed amendments, which threaten to erode the application of municipal tree-cutting by-laws even further than their present state, which has been found highly unsatisfactory. Failure to repeal this subsection is probably the worst failing of the proposed amendments.

The following are some other comments on the current statute *The Trees Act* and the proposed amendments.

Section 1(e) of the amendment defines "woodlot" by reference to the number of trees per acre of various diameters. The definition of woodlot is being added to the Act apparently because some municipalities have had difficulty in obtaining convictions for unauthorized tree cutting under section 4 because of the court's difficulty in interpreting the word "woodlot" in section 5(e). However, the proposed definition of woodlot is not without difficulties. A Warden of Elgin County has suggested that there are wooded areas worth saving with less tree cover than specified in the definition. Also, he has pointed out, "it would be quite time consuming for the tree commis-

(continued on page 34)

3 The Environmental Protection Act, 1971, vol. 2, chapter 86 as amended.

4 The Pits and Quarries Control Act 1971, vol. 2, chapter 96.

5 The Planning Act, R.S.O. 1970, chapter 349.

6,7 Supervisor W. A. Thurston, Advisory Services Section, Forest Resources Branch, Ministry of Natural Resources addressing the Provincial Municipal Liaison Committee, April 15, 1977.

8 Memorandum to Mr. S. Smith, Director, Legal Services, Ministry of Natural Resources, from W. K. Fullerton, Director, re Forests, Resources, May 12, 1978.

sioner to have to measure off acres and count trees. If part of a wooded area has less than the definition would it be exempt? In an area that has already been bulldozed how could you determine the number of trees per acre?"[9]

As an alternative, rather than defining woodlot, it is suggested that the words "growing in a woodlot" be deleted from section 5(e). The purpose of section 4 is to restrict and regulate the destruction of *trees*. Perhaps this should not be limited to trees growing in woodlots. Section 4 makes no reference to woodlots, but to trees. Rather than attempt to grapple with the impossible task of defining the exact boundaries of a woodlot or the exact number and size of trees that make a group of trees a woodlot, it might be preferable to make the Act apply to any trees growing on a parcel of land more than two acres in size. As mentioned, trees planted as windbreaks, or for the purpose of shade or ornament which are not in a woodlot, are also worthy of protection and the Act should leave municipalities the option of passing by-laws to regulate or restrict the cutting of such trees without having to prove they are part of a woodlot.

In section 2 of the proposed amendments, the last line of subsection 2 of amended section 4 reads "subsection 1 of section 7*a*". This appears to be a typographical error and should probably refer to section 7*b*. Apart from this minor problem, the new section 4(2)[10] appears to be a necessary and important amendment which should make tree-cutting by-laws more enforceable and cure a serious problem in the existing act.

New section 5(h) exempts any trees from a municipal tree-cutting by-law that are cut by an Ontario land surveyor. This exemption is far too broad. It would be better for the surveyor to discuss his intended action and the possible compensation for any damage with the land owner before the damage is done than to cut first and discuss his obligations with the owner afterwards. Mr. J. A. Young, former Chairman of the Regional Municipality of Waterloo has suggested that surveyors should have to seek permission before going onto private land like anyone else, and this requirement would cause them to be more careful.[11]

The amendment may have some unintended consequences. Under the broad wording of the present amendment, it may even be possible for the surveyor to avoid his duty under section 6 of *The Surveyors Act*[12] to pay compensation for any damage. The surveyor might plead as a defence to an action for damages that the statutory authority given in *The Trees Act* overrides any liability under *The Surveyors Act*. The doctrine of statutory authority provides that anyone acting under the authority of a statute has no liability for damage done necessarily and in the absence of negligence — despite the common law right an owner normally would have to recover damage for nuisance or trespass. For both these reasons, even if surveyors are to be exempted from the by-laws the amendments should state explicitly that they are only to be exempted provided that they are acting in accordance with *The Surveys Act*[13] and *The Surveyors Act* and subject to the provisions of those Acts, and particularly subject to the provisions of section 6 of *The Surveyors Act,* which makes them liable for any damage.

New section 5(i) exempts any trees on land licenced for a pit or quarry or a wayside pit or quarry under *The Pits and Quarries Control Act*. This amendment results from the fact that some municipalities have become so frustrated by their inability to control indiscriminate destruction of the landscape by pit and quarry operators that they have used *The Trees Act* as a last resort to try to prevent this. The 1977 Report of the Mineral Aggregate Working Party recommended this amendment. This reduction in municipal power to control destructive practices by pit and quarry operators must be looked at in the context of other recommendations of the Working Party. The Working Party has also recommended a reduction in the power of municipalities to control the establishment and operation of pits and quarries. The Working Party recommended that municipalities be compelled by the provincial government to accept pits and quarries within their boundaries as allocated by the province. It is our understanding that the province intends to act on this recommendation and to pass a new version of *The Pits and Quarries Control Act* which will reduce powers of municipalities to prohibit or regulate pits and quarries. Unfortunately, this reduction in municipal powers to protect the environment from pit and quarry operators will not be balanced by sufficient provisions to protect the environment. The Working Party recommended that pits and quarries be exempted from *The Environmental Assessment Act* and that the Ministry of Natural Resources, rather than the Ministry of the Environment, be responsible for enforcement of the new Act, even though the Working Party recognized that the Ministry of Natural Resources has not properly administered the existing statute, *The Pits and Quarries Control Act*. In light of this danger of continuing nuisance from this industry, the removal of the municipal power to prevent tree-cutting on pit and quarry sites is of some concern.

New section 5 (j) is of even greater concern. This subsection prevents municipalities from applying tree-cutting by-laws to land intended for use as a pit or quarry in areas not covered by *The Pits and Quarries Act*. In those areas of the province, the public does not even have the limited protection from environmental destruction offered by the licencing procedures under that Act. Although there may be some rationale for new section 5 (i) in avoiding duplication and overlap between *The Trees Act* and *The Pits and Quarries Act,* there can be no such justification for removing what may be the only method of environmental protection in those areas of the province not covered by *The Pits and Quarries Act*.

New section 5 (k) provides that municipal tree-cutting laws do not ap-

9 Submission of a Warden of Elgin County to the Honourable Frank Miller, Minister of Natural Resources and the Honourable Lorne Henderson, Chairman of the Cabinet, undated.

10 The proposed section 4 (2) provides "An officer appointed under a by-law passed under subsection 1, or any predecessor thereof, and any person acting under his instructions may at all reasonable times enter upon and inspect the land of any person for the purpose of enforcing the provisions of any such by-law or inspecting land where an application has been made under subsection 1 of section 7a." (presumably intended to be a reference to section 7b).

11 Letter from J. A. Young, to the Honourable Lorne C. Henderson, August 1, 1978.

12 The Surveyors Act, R.S.O. 1970, chapter 452.

13 The Surveys Act, R.S.O. 1970, chapter 453.

ply to any trees cut in accordance with "good forestry practice".

This subsection may have been introduced because of a concern by the Ministry that by-laws passed pursuant to section 4 have not been as effective as they could be. Instead of setting out standards and specifications for cutting which would ensure proper forest management practices, the by-laws have generally prohibited cutting of trees below a minimum trunk size expressed as a diameter in inches at breast height. But proper forest management requires taking into account individual differences between forests and between trees within a forest, and marking of trees on an individual basis. No single measurement can appropriately be applied to all forests. The municipalities adopted such a rule of thumb because they did not have trained and skilled personnel available to enforce any more stringent standards.

If this subsection was intended to promote proper forestry practice, it is misconceived. As mentioned, the problem arose from the lack of resources available to municipalities to hire trained and skilled personnel. The amendments do not address this problem. The unintended effect of the subsection may be instead to allow landowners to evade any tree-cutting by-laws that are passed. The owner would hire a professional forester to advise him how to strip the land of trees either in one cutting or through a series of cuttings over time, each of which would individually be in accordance with "good forest management practices". If the municipality were to charge the owner with violating the Act, it would often be unable to afford the cost of retaining expert witnesses to counteract the testimony of the owner's expert. It would not be necessary for the forester to be unethical to unwittingly assist the owner to strip the land if the owner were to frame his instructions to the forester in a manner that leads him to recommend a great deal of cutting. The amount of cutting required for good forest management would vary with the purposes for which the woodlot is supposedly being managed and those purposes might be varied from cutting to cutting, resulting in the gradual thinning of the woodlot to the point where it no longer can be defined as a woodlot under this new definition or parts of it no longer can be so defined.

Section 5 (1) states that tree-cutting by-laws do not apply in any other case provided for in the regulations. This may permit the Government to make further sweeping exemptions from tree-cutting by-laws without consulting the public or the Legislature.

New Section 6 (1) provides for an increase in the penalty for breaching subsection 4 from a minimum of $500.00 to a maximum of $5,000.00. While this is a very important advance, the *Canadian Environmental Law Association* has always felt that a substantial minimum penalty is also necessary to provide for adequate environmental protection. This is borne out by past experience, particularly with prosecutions under municipal by-laws, the federal *Fisheries Act,* and the low fines given to polluting pulp and paper companies under the provincial statute, *The Environmental Protection Act.* The *Municipal Liaison Committee* had recommended a minimum fine of $1,000.00 to the Provincial government in 1977 on the basis of a resolution submitted by the *Association of Counties and Regions of Ontario* and the *Rural Ontario Municipalities Association.*[14]

This recommendation was accepted in principle by the Ministry of Natural Resources. "We are seeking a minimum penalty of $500.00 as compared to your resolution of $1,000.00. Within the Ministry of Natural Resources there is some feeling that minimum penalties have the effect of dictating to the courts. We are not trying to do that but we are recognizing the fact that if there is not a minimum, a low level penalty, as one court commented, is simply a licence to cut so we have set our sights on a minimum penalty of $500.00 and a maximum $5,000.00, similar to your resolution."[15] However, the Caucus vetoed this amendment.[16]

New Section 6 (2) contains another welcome provision; the power of a court to order an owner of trees who has cut contrary to a tree-cutting by-law to replant the trees. However, planting trees is only one aspect of a proper preservation and management program. To be effective, this section would also have to grant a judge the authority to compel the owner to maintain the tree cover.

Finally, no comment on *The Trees Act* would be complete without making reference to the fact that the government has neglected to raise the absurd fine in Section 3 of the Act. Section 3 provides that anyone who injures or destroys a tree growing for the purposes of shade or ornament on a boundary line is liable to a fine of up to $25.00. This section dates back to 1883, and the fine has not been raised for 96 years. The section is a worthwhile and useful one; however, the fine is so low that it provides no deterrent, and should be raised to $1,000.00 to correspond with the maximum penalty provided in *The Municipal Act* of $1,000.00 for an infraction of most other municipal by-laws.

14 Background, Ministry of Treasury, Economics and Intergovernmental Affairs, issued 77/17, April 29, 1977, pages 13 and 14.

15 Comments of Mr. W. Thurston, Provincial-Municipal Liaison Committee, April 15, 1977.

16 Memorandum from W. K. Fullerton to Mr. S. Smith, May 12, 1978.