

**ENVIRONMENTAL PLANNING AND ENVIRONMENTAL
ASSESSMENT:
PROACTIVE REGULATION BY ADMINISTRATIVE TRIBUNAL**

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INTRODUCTION

I have been asked to speak about the environmental planning and assessment process. Specifically, I have been asked to describe some of the issues raised by the use of such processes and resolve environmental problems and examine some of the legal (and non-legal) questions associated with the use of these processes.

I have come to believe that the task of mapping out an appropriate role for the courts and regulatory bodies in any particular field requires that one first understand the problem at hand and then, having regard to the characteristics of the problem and the potential institutional arrangements to solve it, map out a specific role for the courts and administrative bodies. Sometimes this analysis will suggest a limited, even hands off role for the courts; other times it will argue for a much more active role for the courts. In each case, it will attempt to determine the degree and type of participation from courts, administrative bodies, regulatory departments and other problem solving processes.

I. ENVIRONMENTAL PROBLEMS

While it is difficult to generalize about a field so vast, some things seem common to all environmental problems. First, taken as a whole, environmental protection is an enormous task—potentially far larger than the task of producing commodities and services. Every activity, every product, has some impact on the environment, ranging from the impact generated by the manufacturing process, to the deleterious effects associated with its use, and ultimate disposal of products. Not only is the problem all encompassing, but it surfaces in two distinct ways: (1) as a continual and ongoing discharge into the environment, and (2) as a sudden calamity, such as a spill, explosion, or some other unexpected discharge. In the first example, pollution tends to be regarded by regulators as a predictable and inevitable consequence of what is otherwise a highly desirable activity. Indeed, under this scenario, pollution only becomes a problem requiring public regulation when discharges exceed the carrying or assimilative capacity of the environment. The task of the regulator, therefore, is seen as determining an acceptable level of pollution and then putting regulatory devices in place to achieve that result. In the second example, the problem is sudden, unexpected and generates a “crisis response” that is often relatively short lived. The regulatory focus here is on both proactive and remedial or restorative approaches.

A second feature of pollution is the extent to which trade-offs can be made among various physical manifestations of the problem. Pollution is air emissions, liquid effluent, solid waste, heat and so on. Generally speaking, all forms of pollution are interchangeable. Pollutants can be removed from air emissions, dissolved and discharged as part of the waste effluent stream. Or, pollutants can be removed from the effluent, incinerated and subsequently discharged as air and solid waste pollutants. A regulatory approach directed at one facet of the problem will simply tend to shift or transform pollution into another facet of the problem.

A third characteristic of pollution is uncertainty. Everything about pollution is uncertain. First, the physical effects of pollution are largely unknown. The high cost of generating reliable information about impacts, combined with the long time frame required to identify, study and understand impacts, means that we can never know everything there is to know about pollution and environmental degradation. Even if we did have full knowledge of potential impacts, we are uncertain about the seriousness of these impacts relative to other societal problems. To put the problem more specifically, it is not clear to many members of society that the impact of toxics in the lower Great Lakes (let's assume an 18% increase in the incidence of some types of cancer for those who live within 30 miles of the Lakes), is more or less serious than the deleterious effects of inadequate housing, congested vehicular traffic or violence against women and children. Finally, uncertainty spills over into the realm of risk assessment. Individuals view risk differently. One may find the 18% increase in cancer rates acceptable, another intolerable.¹

Most legal and administrative processes focus on the uncertainty of the physical effects of pollution. Few attempt to deal with either uncertain and perhaps even unknowable societal preferences, and fewer still attempt to address the problem of risk assessment, and the variations in individual perceptions of risk. As concerned as society is about environmental degradation, there is still ambivalence over the priority we should assign to environmental protection.

Identifying uncertainty as a characteristic of the problem is one thing, overcoming it is another. To the extent that it is simply a matter of research time and money, the appropriate questions are: who waits? who pays? how certain is certain? Is 95% certain (generally the scientific standard) good enough, or should we demand more? Is the standard too high? In other words, what is the appropriate standard of proof and who has the onus of proving it? Should the standard change from issue to issue, depending on such factors as: magnitude of potential harm, reversibility of harm, etc.? Who should bear the burden of proof? In an uncertain environment the person who has the onus of "proving" that which cannot be proved is destined to lose.

One last comment on this point. Our scientific ability to know that which was previously unknown has largely been responsible for changing our perception of pollution from one in which the problem can be seen, touched and smelled (the traditional forms of pollution), to one in which it is characterized by the expression "exquisitely toxic", meaning invisible, tasteless and odourless and deadly. With the discovery of each new toxic discharge, or with the knowledge that the synergistic effect of the relatively harmless may be deadly, public apprehension level escalates another notch. Uncertainty breeds fear. Society's resolve to eliminate these new problems grows far faster than its ability to either understand the issues or solve the problem.

A fourth feature of environmental problems is the apparent division between planning (assessment) and residual (pollution) control issues. The former is concerned with questions of siting, resource utilization and facility design, the latter with controlling the more traditional forms of air, water, noise and heat pollution, especially as they impact on proprietary and other rights. The two issues are really quite different. Planning decisions are largely long-term and irreversible. Residual problems, on the other hand, tend to be remedial in the sense that impacts are normally

relatively short-term and the decisions are largely reversible.ⁱⁱ From the standpoint of designing a process appropriate to deal with these issues, it must be noted that one problem requires a proactive, anticipatory process (siting decisions are not easily changed once they are made); the other may be better addressed through a more reactive, remedial process. While this division is useful for purposes of relating problem to process design, it is important to note that the two are clearly interrelated and the division is not as sharp as it may first appear. What now seems clear is that environmental assessment processes must include both a planning (resource allocation) and an adjudicative (right determination) function.

Finally, the problem is incredibly dynamic, complex and interdependent. It is “polycentric”. Efforts to solve one aspect of the problem inevitably impact on another. It is multi-partied. Everyone is touched by the problem—some undoubtedly more than others—and hence everyone is a potential party to the dispute resolution process. It is a “systems” problem or, to use the more recent terminology it is a “wicked problem”.ⁱⁱⁱ The process must address questions as broad as determining societal preferences and priorities; and as narrow as determinations of who did what to whom and what remedy is in order.

II. INSTITUTIONAL DESIGN

Elsewhere, I have argued that the processes (institutional arrangements) for addressing environmental problems are limited; that there is an important correlation between problem and process design; and that processes largely determine results.^{iv} The assumption that underlies these arguments is that some processes are better suited to resolve some types of environmental problems than others. While I don't intend to pursue this theme here, I would note in passing that there may be far more room for consensual decision making and so-called alternative dispute resolution processes in the environmental field than most have assumed to date.

Generally speaking Canadian environmental legislation and policy reflect the characteristics of the problem as described above. Legislation is divided into two types: anticipatory, proactive assessment and review legislation; and reactive or remedial environmental protection legislation. The first is concerned primarily with avoiding or minimizing problems, the second with remedying problems as they are identified. A comprehensive paper would examine and evaluate both types of legislation. This paper, however, focuses only on planning and assessment statutes and procedures.

Conventional wisdom argues that it is “better” (presumably this means more efficient or cost-effective) to anticipate and avoid problems, rather than to permit persons to proceed with proposed undertakings and then attempt to regulate, remedy and compensate for the problems that inevitably develop. In other words, this wisdom argues that it is more cost-effective to commit more of society's resources to planning, assessing and controlling development before proceeding with some proposed undertaking, rather than after.^v I doubt that anyone would disagree with this point. The problem is, it is one thing to agree with the principle, but quite another to put it into practice. Once there is agreement that resources should be committed to planning, assessment (and

presumably monitoring), the next questions are: Who does it? How do they do it? How much of society's resources should be committed to anticipating problems that are, by their very nature, uncertain and hence largely unanticipatable?

Let me begin by suggesting that the task assumed by planning and assessment processes can never be performed to the satisfaction of everyone. Given the characteristics of the problem—all encompassing, interrelated, highly uncertain and unpredictable, little agreement among members of the society about the severity of the problem—no process can know the future well enough to map out “the best course of action”. At best, planning can never be more than a highly speculative and value laden process. In the environmental field, it is even more so.

Having mapped out the parameters of the problem, how or by what process is it best solved? In this respect, a number of ideas come to mind. First, the matter might be addressed by government as a “management problem”. Alternatively, government might delegate the issues to a regulatory or planning body. Such a body might employ an adjudicative model of decision-making, a bargaining or consensus model of dispute resolution, or some combination of the two. A more radical suggestion might see a role for the affected public (narrowly or broadly defined) on the proponents Board of Directors or planning committee. Whatever the model adopted, it might be statutorily based (Ontario) or policy based (Canada). Finally, whether statutory or not, the process might generally address all environmental problems (Saskatchewan, Ontario, Quebec) or focus only on those problems associated with a particular industry (Alberta). Ontario has adopted a particular approach to assessing and reviewing environmentally disruptive projects, namely, assessment by administrative tribunal. As this paper describes selected issues related to assessment and review principally from the perspective of the Ontario experience you should ask: (1) Is the process well designed to carry out the functions assigned to it? and (2) How and by what means could the administrative board (the *Ontario Environmental Assessment Board*)^{vi} increase its effectiveness?

III. ENVIRONMENTAL PLANNING AND ASSESSMENT ISSUES

A. Introduction

Much of the debate about environmental assessment and review has centered on the process and in particular the hearing portion of the assessment process. The assumption that underlies this debate is that if we can design a fair process, complete with all the appropriate procedural safeguards, then we can be confident of a good result. While I would not want to challenge the need for a fair process—what lawyer would!—I do want to challenge the assumptions about a clear correlation between process and results. The hearing process is in my view instrumentally rational. It attempts to weigh environmental costs against the economic and social benefits of a proposed project. To fit concerns into this cost-benefit analysis, the parties are encouraged to express them in a common currency (usually dollars). So-called soft or fragile values (those that are not easily quantified or converted into dollars and cents) tend to be squeezed out of the process and form little or no part of the final decision. The result may be “rational”, in a narrow sense, but nevertheless

unacceptable from the environmentalist's perspective. I begin this discussion, therefore, with the caveat that the lawyer's zeal to reform process often misses the mark. Instead of tinkering with the way in which decisions are made, our efforts might be better spent conducting a critical analysis of the decisions and whether they correspond with society's increasing preference for more environmental protection.

A second introductory matter concerns the relationship between function (or task) and procedure (or process). To rephrase this point as a question: What process or procedure is most suitable to decide matters that include both resource allocation and right determination issues? Are these matters better resolved through adjudication, negotiation, or some combination of the two? If adjudication, should it be by way of an oral hearing or written submissions? If negotiation, is there a role for a third party neutral mediator? How does a largely private negotiated resolution of the issues receive public approval? These questions challenge the generally accepted wisdom that a formal, adjudicative hearing is the most appropriate process for purposes of resolving these issues. My second caveat, therefore, is that the paper's focus on the hearing process may be misplaced; that while the adjudicative hearing clearly has a role to play in the decision-making process, it may be a much more modest role than the one that we have assigned to it.

While there is clearly a myriad of process issues, I have chosen to focus on four: (1) application; (2) scope; (3) result; and (4) participation. To understand these issues, one must first understand the general framework within which environmental assessment is conducted. The theory is quite straightforward. First, the process must determine to whom and/or to what the act or policy applies. Secondly, it must determine what is required to comply with the assessment provisions of the process: What must an assessment (EA or EIS)^{vii} cover? How detailed must it be?; What are the consequences of failing to comply with these requirements?; and so on. And finally, the process must produce an outcome—a decision, a recommendation, a report, or whatever. All these major steps in the process are either reviewed or made at the hearing stage^{viii} and all these have raised interesting problems, especially as they relate to participation in the process.

B. Application

Environmental assessment processes have never overcome the uncertainty about just what and to whom the process applies. There is no doubt that at either end of the spectrum the application issue is clear, but there is a relatively large grey area in the middle. Thus, major, public undertakings that are likely to have a significant impact on the environment are clearly subject to assessment under most provincial and federal schemes. Conversely, the mere formation of an idea for a future undertaking by a private company is not subject to assessment.^{ix} The issues are less clear cut when one focuses on the criteria that determine whether or not a proposed project is subject to assessment.^x What, for example, does "significant impact" mean? Does it mean only impact to the natural environment, or may it also mean impact to the natural, social and economic environment?^{xi} If the latter, should the environmental components be weighted differently so that the process attaches relatively more significance to the natural as compared to the social environment?^{xii} If so,

how is this to be done? How does one judge or decide significance before the assessment has been conducted? One of the principal functions of the assessment is to determine whether environmental impacts are significant and if so what measures can and should be undertaken to minimize or reduce those impacts. A full predetermination of potential significance (sometimes described as “screening”) could, depending on the procedure adopted, simply replicate the whole assessment and review process, thereby rendering any distinction between significant and insignificant virtually meaningless. On the other hand, an “arbitrary” determination of potential significance (perhaps by the amount of resources or dollars required to carry out the project) is subject to the criticism that low cost significant impact projects may escape assessment, thereby defeating the purpose for environmental assessment in the first place.

The American jurisprudence on this point is instructive. Unlike the *Ontario Act*, the *National Environmental Policy Act* (NEPA)^{xiii} requires an agency to make several primary decisions in the preparation and use of an EIS, the most important of which is the threshold determination of whether the environmental impact of a proposed action is potentially significant enough to warrant a full EIS. In reviewing agency determinations of the significant impact question, courts have developed two tests: the “arbitrary and capricious” standard of review;^{xiv} and the “reasonableness” standard.^{xv} Application of these tests has produced results (justified by the appropriate conclusionary statement) ranging from almost total deference to the agency determination, to almost *de novo* review by the court. The Council on Environmental Quality (CEQ) has adopted standardized procedures^{xvi} and directives^{xvii} to assist agencies to comply with the EIS requirements of NEPA. The procedures require an agency to prepare an EA, a brief document containing sufficient evidence and analysis for the agency to decide whether an EIS is required. If, following preparation of an EA, an agency decides that an EIS is unnecessary, it must state the reason for that in a “finding of no significant impact” (FONSI). Thus, in the context of the present procedures, the question is, what is an appropriate standard of judicial review of the agency’s FONSI?

While a review of the U.S. caselaw is beyond the scope of this paper, it may be helpful to note the approach preferred by one commentator. A note in the *Michigan Law Review* suggests the following multi part test:^{xviii}

- (1) those who challenge an agency decision not to prepare an EIS must demonstrate that there is a substantial possibility that the proposed action will significantly affect the environment;
- (2) the agency has not attempted to substitute an EA for an EIS;
- (3) the agency decision is consistent with other agency decisions with respect to the preparation of an EIS;
- (4) the agency decision should generally be consistent with the advice of other agencies;
- (5) courts should be wary of “*post-hoc* rationalizations” to support a FONSI;
- (6) “controversy” is a factor in determining whether to accept a FONSI, although not a determinative factor.

While there is much about this approach that is question begging, it is clearly an

improvement over a simple reasonableness test.

While the federal *Environmental and Assessment Review Process* (EARP) is modelled along these lines (it requires an *Initial Environmental Evaluation* (IEE) as a first step towards the preparation of a full EIS), the Ontario approach relies on the exemption decision to determine whether public sector undertakings are included, and a designation decision with respect to private sector undertakings. Neither decision has been the subject of judicial review. To assist the Minister in deciding whether to exempt a public sector undertaking under s. 29 (assuming that the undertaking is not exempted by regulation), the Minister has established an *Environmental Review Advisory Committee*. This committee examines exempting issues and although it does not decide the issue or review the Minister's decision, it does advise the Minister with respect to a suitable disposition of the matter.

The issue of how to resolve the question of whether potential impacts are "significant"^{xxix} and thus subject to a hearing, has never been satisfactorily addressed. A recent decision on this point raises the problem in the context of the federal EARP but provides little guidance for either panels or future courts.

The case, *Waste Not Wanted v. R.*,^{xx} involved the selection of an interim site for the disposal of contaminated radioactive soil. The plaintiff corporation alleged, *inter alia*, that the federal government's failure (through its crown corporation *Atomic Energy of Canada Limited* (AECL)) to refer the matter to the *Federal Environmental Assessment and Review Office* (FEARO) for a formal public "hearing"^{xxi} pursuant to the EARP policy resulted in a "lack of fairness". Without a public hearing where potentially affected residents could participate, the process was, according to the plaintiff, flawed and the government's decision unreasonable. The Court rejected this contention and the evidence on which it was based. It noted that AECL had concluded that, on the basis of a consultant's report, there was no significant impact and that the matter need not be the subject of a public hearing. According to the Court the consultant's report was "reasonable" and AECL's decision was therefore, "reasonable".^{xxii} Absent a finding of unreasonableness, the Court was not prepared to overturn the defendant's decision that there was "no significant impact" even though the affected residents were sufficiently concerned that they took the matter to the federal court, and even the "public concern" is an indication of "significance" in the EARP guidelines.

Contrast this approach with the elaborate test that may be extracted from the American cases. Not only did AECL not conduct the normal IEE, it simply relied upon a consultant's report which, it might be argued, was not prepared for purposes of EARP.

A second concern with regard to the applicability of the process relates to the question of *when* the process begins. Generally, the sooner the better. In fact, the later the assessment the greater the likelihood that the project will have acquired forward momentum and thus the less opportunity to conduct a full review of all potential impacts and the less opportunity to stop proposed projects that impose unacceptably high costs on the environment. While conventional wisdom again argues that assessments should be conducted as soon as possible, it still leaves

unanswered the question of how soon. If it is too soon, all that is available for assessment is a concept, and that may not be sufficiently well defined to assess properly. Thus, one might ask, should plans be assessed? The further one proceeds down the road toward a project, the more committed the proponent becomes to the project and the less receptive the proponent is to modifying or abandoning the idea.

The problem of when to assess is well illustrated in the context of the Beaufort Sea environmental assessment and review.^{xxiii} The federal assessment and review was concerned with potential environmental impacts of developing and exploiting hydrocarbon reserves in the Canadian Beaufort. The proponents, however, (a consortium of resource development companies), did not have, at the time of assessment, a clear view of either how to extract the resources or how to transport them to market. Indeed, a number of options were actively being examined during the hearing. The result was that the opponents' success in exposing the deficiencies of one option was invariably met by a second or third option. The proponents' proposal was sufficiently fluid that attempts to subject it to rigorous analysis and evaluation were largely unsuccessful. But in another sense, the review came too late in the decision-making process to permit a full evaluation of the most important question: should Canada develop the Northern frontier in general and the Beaufort in particular? By not assessing the exploration phase of the project, the process accepted—without public debate in the assessment and review forum—the assumption that Northern oil and gas should be an integral part of the solution to Canada's energy needs. The only issue left for the panel was how best, from an environmental standpoint, to carry out the proposed development.

A similar problem arose in the context of Ontario Hydro's "plan stage hearing" into the planning of additional bulk electricity system facilities in Eastern Ontario. In an effort to keep options open at the planning stage, Ontario Hydro described the undertaking so early in the process and so broadly as to make effective public participation almost impossible. The Ontario Court of Appeal found that the plan was not an undertaking within the meaning of the statute.^{xxiv} The Court prefaces its reasons by noting that not only does the *Consolidated Hearings Act, 1981*^{xxv} anticipate that the undertaking will be described by the proponent,^{xxvi} but that only the proponent may describe the undertaking.^{xxvii} While the proponent has the sole power to describe the undertaking, it must nevertheless describe it with sufficient precision and the boundary of its geographic area with sufficient clarity that "persons whose lands might be affected would [...] readily realize the fact."^{xxviii} Anything less than this and the matter before the Board could not constitute an "undertaking" within the meaning of s.1 (j) of the *Act* and thus could not be assessed. The judicial demands for precision and specificity tipped the scale in favour of more detailed notice of the proposed undertaking, at the expense of more timely notice.

C. Scope of Assessment

Most assessment legislation or policy requires the hearing or investigative body to determine first the "acceptability" or completeness of the assessment document and then, after acceptance of the EA, determine whether the proposed undertaking should proceed and if so, pursuant to what

terms and conditions. In other words, the process cannot be completed until there is a proper information and analysis base on which to make informed decisions. But what does this mean? How far reaching must the assessment be to meet the requirements of the act or policy? What degree of analysis and detail is required? With what degree of detail should the process examine “alternatives” to the project, and alternative ways of carrying out the project?^{xxxix} How wide is the alternative net to be cast? Every conceivable alternative, every reasonable alternative? How does one define reasonable? Does it include only those alternatives within the technical, financial and even legal capacity of the proponent, or does it include a potentially far wider range? If the answer to this last question is yes, how can a proponent assess alternatives that it may not know exist and lacks the capacity to carry out? If the answer is no, to what extent should the process rely upon the proponent’s view of what is reasonable? All of the preceding is better answered after one has determined the purpose or objective of the undertaking. Indeed, an alternatives enquiry is virtually meaningless without first answering the question “alternatives to what?” Again, should the proponent be given an unfettered discretion to define the purpose of an undertaking, or should the definition be subject to some reasonable test and if so, administered by whom?

Some of the questions raised above might better be framed in terms of whether the process should apply differently to public and private sector projects. From the perspective of the impact on the environment, there is no logical reason to make any distinction between the two. On the other hand, private and public sector proponents are subject to quite different considerations. For example, a private proponent lacks expropriation powers and thus the ability to acquire sites that cannot be purchased or optioned at a price the proponent can afford. A private proponent may also have less responsibility than public proponents to serve the public interest, and that may affect whether it is subject to assessment or the extent of the assessment.^{xxx} On the other hand, the recent trend among governments to privatise many functions previously carried out by government may provide a means by which governments, as public sector proponents, can either avoid environmental assessment or have it reviewed pursuant to less stringent criteria.

A useful starting point for this enquiry is to ask, To what extent must the EA examine “alternatives to the undertaking” as well as “alternative ways of carrying out the undertaking”?^{xxxi} “Purpose” helps determine “alternatives” in the sense that “alternative” means alternative to something and that something must be related to the purpose, rationale or objective of the undertaking. Who determines purpose and by what criteria? At first blush, the answers seem obvious: the proponent and by some rule of reason.^{xxxii} After all, if the *Act* gives the proponent the responsibility for describing the undertaking, then surely the proponent has the responsibility to define the purpose of the undertaking.

In the context of the Ontario legislation it seems clear that however a rule of reason standard is described, it must at least be consistent with the legislative purpose, namely, “the betterment of the people of the whole or any part of [the province] by providing for the protection, conservation and wise management [. . .] of the environment”.^{xxxiii} Under the *Ontario Act*, environment is defined to include its natural, social and economic components (s.1(c)). The reasonableness standard, therefore, must be broad and all inclusive. Defining the purpose of an undertaking so as to avoid

raising the issue of the “social betterment of an Ontario community”, for example, would not be consistent with the purpose of the *Act* and hence unreasonable.

Another indicia of reasonableness is the extent to which the alleged purpose relates to the real purpose^{xxxiv} of the proposed undertaking. Let me illustrate this point by using first a nonsensical example. Assume that the undertaking subject to assessment is a sanitary landfill facility. Were the proponent to describe the purpose of that undertaking as “the reclamation of a mined quarry by sanitary landfill”, an alternative to that undertaking might be the reclamation of some other mined site, and alternative ways of carrying out that undertaking might include reclamation of the quarry by converting it into a lake as opposed to filling it with municipal solid waste. In this way, the proponent’s description of purpose and the alternatives to that purpose would obscure a full and complete examination of alternative to landfill and hence, the unreasonable. A more reasonable approach would be to define the purpose of the undertaking as waste management, alternatives to disposal as recycling, reduction and reuse and alternative disposal practices as incineration.

The issue becomes more difficult in the context of a recent assessment of a proposed energy from waste facility in Ontario.^{xxxv} In this case, the private sector proponent described the undertaking as “steam energy generation”, the alternative to the undertaking as “electric energy generation”, and the alternative ways of carrying out the undertaking as “the combustion of oil and or/gas”. By describing the purpose of the undertaking as “the generation of energy”, the proponent effectively avoided detailed discussion and analysis of alternatives to waste disposal or alternative ways of disposing of waste. The question now before the joint board is “Is the EA acceptable?” This in turn raises the question of whether the proponents’ description of “purpose” and “alternatives” is consistent with the true nature or real purpose of the undertaking and is therefore reasonable.

What is the true nature of the undertakings? Some factors that strike one as relevant in the SNC/Petro Sun case are:

- How many people are employed in the facility and what are their functions?;
- What is the principal source of revenue (sale of energy or the municipal waste tipping fee)?
- What are the facilities’ relative contributions to addressing the problems (the two problems being energy generation and waste disposal)?

Although I have not analyzed the evidence, I suspect that the answers to each question suggest that the real purpose is waste disposal and energy generation and hence a reasonable examination of alternatives would include a description and analysis of alternative ways of managing and disposing of waste as well as alternative ways of generating energy from waste. This avoids the potential for a self-serving, potentially anti-environmental definition of purpose. Also, it is more in keeping with the broad purpose of the *Act*. Finally, this approach has been endorsed by the Joint Board in the *Ontario Hydro Southwestern Ontario Plan Stage* hearing decision where the Board rejected the proponent’s assertion that it maintains the sole discretion to determine what is

reasonable under the circumstances.^{xxxvi}

The approach proposed would clearly produce the best result. Again, to use the energy from waste example, purpose would include *both* the generation of energy and waste disposal. This would preclude a proponent from describing a limited purpose, such as energy generation, and thus ignoring the potential impact of its undertaking on alternative waste disposal practices. “Alternatives” would include alternative forms of energy generation, alternative ways of generating steam energy (one of the products or output of the process), and alternative waste disposal plans and strategies.

The one question posed by this approach is, “How can the proponent describe alternatives it doesn’t know exist and has no ability to assess the rationale or feasibility of implementing such alternatives?” This problem strikes me as more theoretical than real. While a proponent of an energy from waste facility may turn a blind eye to the waste management alternatives of the three R’s, landfill or compost, all these alternatives fall within the general range of knowledge and perhaps even expertise of such a proponent.

A second and related question is whether the scope of the assessment varies according to whether the proponent is from the public or private sector. In my opinion the issue is not whether the private sector proponent is required to meet a lower standard than its public sector counterpart, but rather whether the standard is different, and if so, how. Although the statute makes no distinction between the two, I believe that the standard may be different. Duties, including those imposed by statute, should be sensitive to the particular circumstances of the proponent. The duty is, like that found at common law, determined in part by what is reasonable, having regard to all the circumstances including the status of the proponent. A sensitivity to these circumstances will mean that those responsible for applying the *Act* must attempt to weigh the need to protect the environment against a need to appreciate the limited knowledge, resources and range of options open to the private sector proponent.

The English Court of Appeal’s decision in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty*^{xxxvii} may shed some light on the scope of the proponent’s duty. Megaw L.J. stated:

So here. The defendant’s duty is to do that which is reasonable for him to do. The criteria of reasonableness include, in respect of a duty of this nature, the factor of what the particular man - not the average man - can be expected to do, having regard, amongst other things, [. . .] to his means. [. . .] [L]ogic and good sense require that, where an expenditure of money is required, the defendant’s capacity to find the money is relevant. [Emphasis added.]

Leakey followed the Privy Council’s landmark decision in *Goldman v. Hargrave*^{xxxviii} Lord Wilberforce, writing for the Judicial Committee, found Hargrave liable for failing to properly put out a bush fire that had been started by lightning on his property. The occupier is required, Lord Wilberforce suggested, to do “what is reasonable to expect of him in his *individual*

circumstances.^{xxxix} Reasonable conduct is, in the civil sphere at least, to be measured in the context of the particular circumstances of the case.

One final point on this topic. Does the analysis change if the proponent, in preparing its discussion of alternatives, relies upon the advice of the Ministry staff? Or, perhaps relies on Ministerial press releases, or policy statements? At one level of analysis, the answer is clearly no. Neither the proponent, the department, nor the Minister can determine what is ultimately a matter for the Board (and on appeal for the Courts) to decide, namely, the acceptability of the EA. But at another level, the answer is just as obviously yes. If the range of alternatives is subject to a “rule of reason”, then surely what the Ministry says publicly to this and other similarly situated proponents somehow goes to what is or is not reasonable. There is no jurisprudence directly on this point although the matter is presently before the Joint Board.^{xi} The matter did arise peripherally however, in the *Redberry Development Corp.* case.^{xii} In determining whether the proponent Redberry was required to comply with the terms of the Saskatchewan *Environmental Assessment Act*^{xlii} Mr. Justice Barclay observed that statements made by a government official in another Ministry “are of no assistance to the respondents”.^{xliii} He did not deal with the situation in which the statements were made by a person or persons responsible for the administration of the *Act*, or the responsible Minister.

The extent to which a board may defer to government policy, has been the subject of considerable academic and judicial debate. Professor H. Janisch raises the issue in the context of the following questions:

To just what extent should the agency take government policy into account: should it be determinative of the issue or merely persuasive, and if the latter, how persuasive? What is “government policy” and where is it to be found: should an agency look to the speeches of ministers on the hustings or only to formal statements in the legislature. What of that cloud of reports, study position papers, evaluations, strategies and the like which are generated by a plethora of agencies within government: are such documents to be taken into account, and if they are, which ones, how, and to what extent?

The courts have grappled, somewhat awkwardly with only one of these issues. In *Re Township of Innisfil and City of Barrie*, the court was concerned with the extent to which the *Ontario Municipal Board* (OMB) should consider itself bound by government policy, as confirmed by the responsible Minister. The Divisional Court described the OMB’s task as essentially legislative and thus,

considerations which might be appropriate to the exercise of a judicial discretion were inappropriate to what was, at heart, a broad-ranging policy making process. Moreover [the matter] should not be determined in an “intellectual vacuum” and the decision maker, to be realistic, should know and be influenced by the applicable government policies of all levels of government.

Following the hearing, the OMB adopted the government policy and refused to allow cross-examination of government witnesses with regard to the policy. The objectors again appealed to the Divisional Court, this time alleging that the Board had committed an error of law when it held that it was bound by the government policy statement. The majority agreed with the appellants, rejected the earlier Court's classification of the Board's work as "legislative" and held that the Board was a judicial body discharging a quasi-judicial function. As such, government policy statements should simply be treated as evidence and, thus, be tested by cross-examination. This view was subsequently affirmed by the Supreme Court of Canada. In the result, the Court held that government policy is admissible, the policy is relevant evidence, but that the Board has a duty to make up its own mind on the issue.

When this result is applied to the question of the scope of the EA, and specifically, the weight to be given to ministerial policy statements regarding scope, it seems clear that:

- (1) ministerial statements are relevant but not determinative of the issue;
- (2) the statements are of some persuasive value, especially if the board's task is to apply a "rule of reason", but the board must determine, having regard to the circumstances of each case, the weight to be given to the statement.

D. Result

The last of this trilogy of assessment issues concerns the output of the process. Whether the process envisages a binding decision, a reversible decision or merely a recommendation, the result is more or less the same: government acceptance of the decision or recommendation. But what may a board or panel decide or recommend? Generally the Board has three options: approve the proposed project as per the application; refuse it (and permit the proponent to reapply); or approve it subject to terms and conditions. Of the three, the third is by far the most common. But how far may the Board go in recommending or imposing terms? Must it confine its terms to those that address natural environmental impacts, or may it include social concerns such as hiring and retraining programs? A similar question might be asked about a Board's ability to impose financial guarantees on a proponent. Must such powers be specifically provided for in enabling legislation, or may the Board impose such terms and conditions on its own? May the Board approve a project, site or route not proposed by the proponent, or is it required to accept the proponent's proposal(s) and proposed alternatives. What if the Board's terms and conditions prove unrealistically onerous, technically impossible to meet, or perhaps, even worse, completely ineffective? Who, if anyone, may reopen the matter? Does the Board have inherent jurisdiction to establish and supervise the work of a monitoring committee, or must it have specific legislative authority to create such a body?

The process generally leads to a finding on the acceptability (or not) of the EA or EIS, followed by a decision or recommendation that a proposed undertaking proceed (or not), and if it does proceed, subject to certain terms and conditions. Practically speaking there is little difference

between recommendation and decisions. Decisions in Ontario may be set aside or varied within 28 days by the Minister of the Environment (following consultation with cabinet); recommendations are almost invariably followed by those to whom the recommendations are directed. Nevertheless, the courts have seized upon the distinction between decision-making and advisory powers to find that Boards exercising the former are subject to judicial review, while those that exercise the latter are not.

Its [the Board's] function is solely that of holding a hearing to gather information and make a report. [...] The [...] Director is in no way legally bound by the content of the report in making his decision. [...] There is nothing [...] to indicate that the Director will, in this case, follow the recommendation of the Board, whatever it may be, or that he has normally done so in the past [...]

The courts have not permitted Boards to impose terms and conditions not expressly provided for in the legislation. The leading case on this point is the Supreme Court of Canada's decision in Re Athabasca Tribal Council and Amoco Canada Petroleum Ltd. The case involved an appeal by the Tribal Council from a decision of the Alta Energy Resources Conservation Board (ERCB) and the Alberta Court of Appeal holding that the Board lacked jurisdiction to make project approval conditional upon the development and implantation of an affirmative action program. After setting out the statutory purposes of the relevant legislation, Ritchie J. concluded:

The powers with which the Board is endowed are concerned with the natural resources of the area rather than with the social welfare of its inhabitants, and it would, in my view, require express language to extend the statutory authority so vested in the Board so as to include a programme designed to lessen the age-old disadvantages which have plagued the native people since their first contact with civilization as it is known to the great majority of Albertans.

Key to Ritchie's J. finding was that the enabling statutes were "exclusively concerned with the development of 'energy resources and energy'." Other boards and bodies whose enabling legislation is more broadly concerned with the environmental, social and economic well being of the residents of the jurisdiction might not be subject to the same result.

Attempts by a Board to approve an alternative not included in the proponent's EA, or effectively approve such an alternative by attaching it as a condition of approval have also been rejected by the courts. The Ontario Divisional Court held that the choice by the Joint Board of a route stage study area not included in those proposed by Ontario Hydro, resulted in "an error of jurisdiction and caused a failure of natural justice no less serious than that caused by its defective notice" because no one receiving notice would have had any way of knowing that land for that area might be affected.

E. Participation in the Process

1. Standing

Generally speaking, all interested persons are welcome to participate in the assessment process. I know of no board or panel that has refused to hear someone who has wished to speak. This does not mean that there are not some interesting “standing” issues associated with environmental assessment and review processes, just that getting through the hearing room door is not one of them. Boards and panels have, however, distinguished between “parties” and “participants”. The former are afforded full formal rights under the statute to participate at the hearing and in any subsequent judicial review proceedings; the latter are given a more limited right to participate, and no “as of right” standing in subsequent proceedings.

One narrow standing issue that deserves mention is a person’s ability to seek an order requiring a proponent to comply with the provisions of the assessment process. The issue has arisen in two important cases. The first is *Stein v. City of Winnipeg*. Stein, a resident of the city, sought an interim injunction to restrain the city from spraying an insecticide on trees on certain city property. The city was required by section 653 of the *City of Winnipeg Act* to conduct an assessment of the potential environmental impacts of its actions. The city failed to conduct the required assessment, Stein sought an interim injunction to restrain the city from spraying, and the city challenged Stein’s standing to sue. It argued that since any harm suffered would be by the public at large, the action should have been brought in the name of the Attorney General.

Mr. Justice Matas (with Morin, J.A. and Freedman, C.J.M. concurring on this point) disagreed. He concluded:

[T]he legislature has enacted a novel provision with respect to the protection of the environment. If the city does not comply with the directive of the section it must be possible for a resident of the city to institute action challenging Winnipeg’s right to proceed. [...]

One of the important aspects of the legislation is an express intention to involve citizen participation in municipal government [...] Section 653 has created an obligation to review the environmental impact of any proposal for a public work which may significantly affect the quality of human environment. If that section is not to be considered as a mere pious declaration there must be inferred a correlative right, on the part of a resident, in a proper case, to have a question arising out of the sections adjudicated by the Court.

Mr. Justice Barclay of the Saskatchewan Court of Queens Bench came to the opposite result in *Shiell v. Amok Ltd.* As in *Stein*, Shiell alleged that Amok had failed to comply with the provisions of the Saskatchewan *Environmental Assessment Act*. Amok countered by challenging Shiell’s standing to bring the action. The Court granted Amok’s application and struck out the plaintiff’s statement of claim.

Mr. Justice Barclay's reasoning is somewhat baffling. He does not cite *Stein*. He described the case as "fall[ing] squarely within the cases of anticipated 'public nuisance' caused [by] private concerns in which the 'general rule' as to standing was developed." The general rule is that "[p]ublic interest [those cases in which the plaintiff has no proprietary or financial interest in the outcome] standing should not be conferred to enable a party to sue a private individual or corporation" unless the plaintiff has some "direct personal interest in the issue". The Court adopted the reasoning of the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia*

which set out the standing requirements in the following terms:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

The result is that one cannot enforce a *statutory* requirement to conduct an assessment, unless one can show that the defendant's failure to comply may adversely affect the plaintiff in some direct way. That issue, however, is normally the very one to be determined by the assessment. It effectively puts the plaintiff in the Catch-22 of having to conduct his or her own assessment to establish potential impact, in the context of an action to require the proponent to carry out an assessment and review.

There are, however, some salient differences between the two cases that throw some light on the apparent inconsistencies. First, as a resident of Winnipeg and a person sensitive to chemical spray, *Stein* was clearly "more affected" than *Shiell*, whose "only interest" was in the defendant company's compliance with Saskatchewan's environmental assessment laws. Secondly, the defendants were quite different. *Stein* involved a not for profit municipal corporation; *Shiell* a private, for profit corporation. *Stein* had exhausted all other avenues to force compliance with the provincial statute; *Shiell* could have sought provincial assistance in securing compliance.

2. Intervenor Funding

Participation is more than simply a question of *who* may participate, it is also a question of *how* or the effectiveness of one's participation. While it may seem crass to relate effectiveness to financial resources—it tends to ignore such factors as intelligence, charisma, and oratory skills—there is no doubt that those who lack the resources to collect, analyze, and present information and argument are at a serious disadvantage. I propose not to debate here whether some financial assistance to less well-off groups is a good thing. I assume it is. The question is, who should pay, how much should be spent, who should receive it and who, if anyone, should oversee how the money is spent.

On the first question, the options are limited to the proponent and government (all of society). Proponents might be expected to pay because: (1) it is their proposed undertaking that threatens environmental amenities, and (2) they are one of the principal beneficiaries of effective public participation in the sense that it alerts them to potential problems and assists them to find better solutions to those problems. The argument that the public should pay seems even more compelling, however. First, there seems to be something patently unreasonable about requiring a proponent to fund its “opponents”, particularly if it is a private sector proponent. Secondly, the benefit of effective public participation, namely better decisions, ultimately enures to the benefit of all society, not just the proponent.

There are two popular models of public interest funding. The first and more limited one sees public participation exclusively in the context of a public hearing, relates the assessment hearing to the judicial process, and thus funds public participation through a cost award at the conclusion of the hearing. The power to award costs derives from the legislature and, in the absence of a statutory provision to that effect, panels have declined to award costs. The *Ontario Consolidated Hearings Act, 1981* permits a joint board to award costs, and boards have done so in recognition of a party’s contribution to the hearing. But this provision has done relatively little to facilitate participation, even in the limited context of a hearing. Few public interest groups can prepare properly for a hearing without knowing beforehand whether their motion for costs will be successful, and without knowing the extent of their success. An Ontario Joint Board’s attempts to use its cost-awarding power to provide “intervenor” funding in advance of the hearing was recently disallowed by the courts.

The second model of public interest funding is also tied to the hearing process, although here the funding is provided in advance of the hearing. This model recognizes that funding via a cost award comes too late and is too uncertain to be useful to all but the best financed groups. Furthermore, it recognizes that public interest funding is not the proponent’s responsibility, but rather the responsibility of the principal beneficiary, the public. Under this model a fund is established pursuant to Order in Council and monies are allocated by the Board to the participants according to eligibility criteria. This model, however, creates new problems: To what extent should the fund be funded?; Who should distribute the money? By what criteria?; Should the funding process be used to encourage coalitions of like-minded groups?; and so on.

Many of these questions have been faced by the Ontario *Environmental Assessment Board* in the context of intervenor funding for both the *Ontario Waste Management Corporation* (OWMC) hearing and the class *Environmental Assessment for Timber Management on Crown Lands in Ontario*. In each case the Board established a Funding Panel to establish eligibility criteria to allocate funds among prospective participants. In the OWMC case the Board was not only authorized to distribute funds among qualified participants, but also to make recommendations to government with regard to the total amount of funding to be provided. In the *Timber Management* case the Order in Council under which funding was provided set a \$300,000 limit. While this is a vast improvement over most alternative forms of participant funding, it is not without problems. Both hearings promise to be lengthy and involve a variety of issues that cannot be known before the

hearing begins. Applicants, however, are required to develop their financial plans without knowledge of all the issues and without anything more than a rough estimate of the time involved.

3. Participation Over Time

An additional participation problem relates to the fact that the hearing process is structured in such a way that participation may be limited to one discreet point in the decision making process, namely, the formal hearing. A local Toronto citizens group complained to the Ontario Municipal Board that the process for resolving environmental issues arising out of the proposed railway lands redevelopment (of which the new Dome Stadium is an integral part) provides little opportunity “for public participation *over time*” [emphasis added]. While that panel dismissed the concern, other proponents and Boards have grappled with the issue.

Ontario Hydro and the Joint Board have addressed this problem in the context of the proposed bulk electricity system facility in Eastern Ontario by adopting a staged hearing format, in which the first hearing examines planning issues while the second looks at specific transmission line routing questions. Another approach is to approve a proposed undertaking subject to the establishment and proper functioning of a monitoring committee that includes public representation. In this way, if concerns develop during the construction and/or operation of the undertaking, the public has a forum in which to raise these concerns. The jurisdiction and powers of the committee will vary, but a committee with independent investigative powers and the ability to reopen an issue before the approving board is preferable from the public’s standpoint.

4. Prehearing Participation

As noted above, effective public participation in the decision-making process should not be confined to the formal public hearing. Nevertheless, relatively little thought has been given among academic commentators to public participation *outside* the formal hearing, although this is where the vast majority of “public” participation takes place. Under most assessment processes, environment is defined to include the *social* environment, and “significant impact” means both impact on the natural environment as well as the social community. Thus, the task of preparing an EA or EIS document includes a determination of potential impacts on the social environment as well as the natural environment. This can’t be done properly without involving the people affected. Thus, from the outset, the affected public must be an integral part of the assessment process.

Participation at the pre-hearing stage is usually by way of some form of public consultation. Most of it has some impact on the proponent, although how much is difficult to gauge. Rather than examining this aspect of participation, I propose to move ahead to the pre-hearing stage of the hearing. It is here that the Ontario *Environmental Assessment Board*, under its recently adopted rules of practice and procedure, has identified two formal opportunities for participation. The first is a preliminary meeting and it provides a limited forum to “discuss” procedural matters only. The

second, and by far the more important is a preliminary hearing. Its purposes are:

- (a) *to identify parties;*
- (b) *to define the issues in dispute;*
- (c) *to arrange for the exchange among parties of all documents relevant to the issues;*
- (d) *to consider the advantages of filing witness statements and interrogations and to establish a procedure for filing;*
- (e) *to identify witnesses and the nature of their existence;*
- (f) *to estimate the length of the hearing;*
- (g) *for any other purpose that the Board considers appropriate.*

Participation during the preliminary hearing phase of the process is very different than that experienced during the hearing itself. First, it is less structured. It offers some—perhaps not much, but some—room for the parties to negotiate in a publicly sanctioned forum and reach agreement on what is and what is not in dispute.

5. Notice, Discovery and Reply

The last participation issue that I propose to discuss relates to notice. A common complaint of concerned and affected members of the public is that they are not notified of a proposed undertaking. The problem has taken two forms. The first is formal notice of a formal EA hearing; the second is notice that an undertaking is being considered and an EA being prepared.

The notice requirements of a formal hearing are normally set out in the relevant legislation or rules of procedure and practice. Again, the Ontario approach is typical of most jurisdictions. Under the Board rules of practice and procedure the proponent is required to notify by registered mail, at least 30 days in advance of the hearing or preliminary hearing, all persons set out in section 9 of the *Regulation*. This includes:

- those persons set out in the *Act*
- those persons determined by the Minister or Director
- such additional persons as determined by the Board
- all owners and tenants located within a specified distance of certain types of matters including both site specific and linear facilities.

These are generous and ample provisions, and clearly remedy the problem that arose in the *Central Ontario Coalition* case where the notice was both general and misleading (it described the affected area as South Western Ontario and not Central Ontario).

There are, however, no requirements to notify affected or potentially affected persons that an EA is being prepared. The completed document, together with the government review of the document must normally be filed and registered as public documents, but this is hardly effective

notice. The result is that unless the proponent adopts a prehearing consultation program that notifies and consults with affected persons, it will invariably be faced with the complaints that:

- (1) the document (EA) was prepared without adequate public input;
- (2) the document is defective in some sense—too narrow and limited, incorrect assumptions, faulty data or whatever.

Here is an opportunity for proponents to avoid many of the problems that they encounter at the hearing stage by properly notifying and consulting with the affected public.

Two discovery and reply issues pose interesting procedural or participation problems. The first problem is demonstrated in the context of the class *Timber Management on Crown Lands in Ontario* assessment. The class assessment proponent is the Ministry of Natural Resources (the regulatory department). The “opponents” are a loose association of public interest groups, including the Canadian Environmental Law Association. The Ministry of the Environment purports to be a neutral party in the sense that its only interest is in environmentally sound forestry practices; in fact, it seems to be more closely aligned with the “opponents”. The industry is represented by the Ontario Forestry Association. Strictly speaking the Association is not a proponent, although it shares much—but not all—of the Ministry of Natural Resources’ position. All four groups have an important interest in the outcome of the hearing, although no one has a greater financial interest than the Forestry Association members who have built an industry on past right transfer policies, and regulatory and management practices of the Ministry of Natural Resources.

The Board has determined that the Ministry will put its case in first, followed by the industry association, followed next by the opponents of Ministry’s forest management practices and followed finally by the Ministry of the Environment. The process is not well designed to give the proponents and those who support the proponent’s position advance warning or notice of the opponent’s case. Naturally a proponent will have some sense of the objections—gleaned in part from prehearing meetings, newspaper reports, opponent cross-examination of proponent witnesses, and the like, but much of the opponent’s case will not be disclosed to the proponent until it is presented as evidence. Herein lies the dilemma: if the industry fails to guess correctly all the opponent’s concerns, and thus fails to address an issue in their examination in chief and re-examination that the opponent subsequently develops, they may be prejudiced because only the proponent has a right to reply. Other parties, such as the industry whose rights may be affected by the adjudicative process, have no such right. The solution to this potential problem is not clear. The Board’s inclination is to give industry a right to call evidence in reply on those issues raised by the opponent, but not previously addressed by the industry in their examination in chief.

The converse of this point raises a concern for the opponents. Knowing that they are generally opposed to a plan or project, opponents seek from the proponent specific proposals that they can address in detail. Anything less than that means that the opponents will be continually trying to anticipate what the proponent’s real case is. This problem was particularly well illustrated in the context of the federal assessment and review of the proposed hydrocarbon development in the

Beaufort Sea. A key aspect of that proposal was the means by which the development companies transported hydrocarbons from the Beaufort to shore and then to market. Not surprisingly, the proponent was considering a number of potential alternatives (tanker to market, tanker to onshore pipeline, well directly to underwater pipeline, and so on), but was not at this early stage committed to one particular approach. The result: as the opponents began to develop a detailed critique of one proposal at the hearing, the proponent would begin to shift support from the proposal under attack to the next alternative. The opponents likened the process to trying to shoot at a moving target in which the trigger was connected to the target. The harder they focused on one proposal, the faster the proponent moved on to the next.

Again, the solution to this problem is not clear. One solution is to require the proponent to commit itself beforehand (presumably in preparing its EA or EIS) to a particular set of alternatives, thereby preventing it from developing unanticipated alternatives in response to a successful cross-examination. But such an approach denies the potential for growth at the hearing. Environmental assessment hearings are not simply adjudicative in the sense that they decide questions of “right or wrong” in the context of a proposed activity or undertaking. These hearings also include a rule-making or planning component in which the hearing panel attempts to decide or make recommendations on questions of “should” or “preferred courses of action”. What is best is not necessarily limited to the range of alternatives put forward by the proponent, but might be one proposed by the opponents. Surely a sound procedure should admit of this possibility and enable opponents to raise and proponents to respond to and even incorporate such proposals into their EA.

Another potential solution is to phase the process into an initial or preliminary phase and a final phase. Under this proposal the initial phase would enable the panel to identify and evaluate all alternatives and issue a “draft decision”, while the final phase would provide the parties with an opportunity to address in detail and at the hearing all possible issues. Thus, the “problems” described above would arise during the preliminary phase and be remedied during the final phase. While this procedure appears to meet the concerns raised above, it would certainly lengthen the proceedings and increase the cost substantially, and this may impact much more harshly on the opponents than on the proponents.

The problem is essentially one of notice: in a process that does not include prehearing discovery, abbreviated prehearing conferences (if any at all), while encouraging a broad examination of issues, how does one develop a procedure that gives all parties notice of the case they must make or meet?

While “solutions” to the problem described above all seem to entail a more lengthy and costly hearing, it is worth noting that a failure to solve the problem attracts similar results. Under the present procedures proponents will attempt to anticipate in their case every possible objection (they have no advance notice of the actual objection) and this in turn will produce a very comprehensive case (much of which will not be an issue or in dispute) and a very lengthy and expensive process. For their part, opponents can also find some weakness in the proponent’s case, some stone unturned (indeed it may be a very large one) which will prompt (one way or another) more evidence, and that

in turn will generate more criticism from the opponents.

CONCLUSION

Having suggested, although not promised, a broad and free wheeling review of environmental assessment in general, and the *Ontario Act* in particular, I have focused on much of the nitty gritty that is troubling practitioners and board members. In a practical setting such as this, it occurs to me that this is where the interest lies.

The environmental assessment process is evolutionary, continually changing and adjusting to meet the challenges of sound planning, careful review of potential impacts, and appropriate terms and conditions. How successfully those challenges will be met depends, of course, on a variety of factors, including the creativity of all persons associated with the process, and the receptivity of government (legislature) and the Board to constructive suggestion. The next step in this process is to return to the earlier questions raised in the introduction and, in the context of a full review of EA, ask whether the present approach really does serve the best interests of the environment.

POSTSCRIPT

Since preparing this paper a number of developments have occurred that should be brought to the readers' attention.

First, the *SNC Petro Sun* case was decided by the Board. Two passages from that case are relevant to this paper.

The overall purpose of a private sector proponent is business for gain and the environmental assessment should describe and evaluate the environment impact of its project-making activities. [...] If the description of the undertaking is accurately formulated then the purpose of the undertaking will naturally follow.

The requirements of the description of the undertaking and the purpose of the undertaking should be consistent for private and public sector proponents. [...] To accept the suggestion that the proponent's business mandate alone should determine the definition of the purpose of the undertaking could, in the Board's view, lead to such a narrow definition of purpose as to render the EAA process meaningless.

The second point is that in 1988, the Ontario legislature enacted the *Intervenor Funding Project Act, 1988*. The *Act* has permitted more efficient direct public involvement in the process.

Thirdly, the courts have recently grappled with the scope and application of the Federal EARP (guidelines order SOR/84-467). The thrust of the so-called *Rafferty Alameda* and *Oldman*

River Dam cases is that the policy applies to “any proposal [...] that may have an environmental effect on *an area of federal responsibility*” and that “area of federal responsibility” included any activity or undertaking over which the federal government has regulatory or decision-making responsibility.

Finally, two recent developments have raised the spectre of a more innovative approach to designing EA planning and dispute resolution processes. Both the draft federal *Environmental Assessment Act* (Bill C-78) and the proposed new *Rules of Procedure of the Ontario Environmental Assessment Board* (September 1990) either mandate or envisage the possibility of environmental mediation. This step has, in my view, been far too long in coming. Now that legislatures and boards have accepted the possibility of a formal role for such “alternative processes, it is now incumbent on students and practitioners of the process to map out an appropriate course for this new approach.

FOOTNOTES

- i. No current example illustrates this point better than the “great steroid” debate. Many Canadians were astounded to learn that 67% of Canadian athletes surveyed would take a fatal drug if it *guaranteed* a gold medal in an upcoming competition. How one views and assesses risk depends very much on *individual* priorities.
- ii. Even here, however, the effect of residuals is not easy to reverse, at least in the short to medium term.
- iii. Wicked problems normally include the following characteristics: multiparty, high level of interdependency between parties and issues, polycentric, unclear linkages, poor understanding of the issues by the parties.
- iv. D. P. Emond, “Alternative Dispute Resolution: A Conceptual Overview” in Emond ed., *Commercial Dispute Resolution* (Aurora: Canada Law Book, 1989) at 1.
- v. This helps explain the recent enthusiasm for planning and assessment processes in Canada.
- vi. Environmental Assessment Board, O. Reg. 4/88 [hereinafter *Regulation*].
- vii. Legislation and policy requires the proponent to prepare either an environmental assessment (EA) or environmental impact statement (EIS). The two are used synonymously throughout this paper, although they have quite different meanings in the American literature on the subject. Americans regard an EA as a preliminary assessment, an EIS as a full assessment. Ontario uses EA to refer to a full assessment.
- viii. Note that relatively few undertakings will proceed to a hearing.
- ix. “Undertaking” is defined in the Ontario *Environmental Assessment Act*, R.S.O. 1980, c. 140, s. 1(o) [hereinafter *Ontario Act*] as :
 - i) an enterprise or activity[...];
 - ii) a major commercial or business enterprise or activity or a proposal, plan or program[...]The *Act* presently requires public sector undertakings to be assessed unless exempted and private sector undertakings to be assessed only if designated.
- x. The Ontario *Act* exempts a “feasibility study, including research”, but does not define “feasibility study.” (See s. 5(2).)
- xi. The *Ontario Act* at s. 1(c) defines environment to include:
 - iii) the social, economic and cultural conditions that influence the life of man or a community.The federal regulations define “significant” to include “public concern” over a proposed undertaking as well the potential impact on the environment.
- xii. After all, there are normally other regulatory mechanisms for dealing with social and economic concerns.
- xiii. 42 U.S.C. 88 4321-4347 (1982).
- xiv. See: *Sierra Club v. Marsh*, 769 F. 2d 868 (1st Cir. 1985); *Hanly v. Kleindienst*, 471 F. 2d 823 (2nd Cir. 1972).
- xv. See: *Louisiana v. Lee*, 758 F. 2d 1081 (5th Cir. 1985).
- xvi. 42 U.S.C. 4332 (2)(B)(1982).
- xvii. 40 C.F.R. s. 1501, (1986) 4.

- xviii. “A New Approach to Review of NEPA Findings of No Significant Impact” (1986), 85 *Michigan L. Rev.* 191 at 210.
- xix. Note that the *Ontario Act* does not require a finding of “significant impact” for an EA to be conducted.
- xx. (1988), 2 C.E.L.R. (N.S.) 24.
- xxi. Described in the federal regulations as “meetings”.
- xxii. *Supra* note 19 at 59.
- xxiii. Federal Environmental Assessment Review Office, *Beaufort Sea Hydrocarbon on Production and Transportation Proposal*, Report of the Environmental Assessment Panel (Ottawa: Minister of Supply and Services Canada, 1984).
- xxiv. *Re Joint Board Under the Consolidated Hearings Act and Ontario Hydro* (1985), 51 O.R. (2d) 65 [hereinafter *Re Joint Board*].
- xxv. *Consolidated Hearings Act, 1981*, S.O. 1981, c. 20.
- xxvi. *Re Joint Board*, *supra* note 24 at 71.
- xxvii. *Ibid.* at 73.
- xxviii. *Ibid.* at 72.
- xxix. Under s. 5(3) of the *Ontario Act* both must be addressed in the EA.
- xxx. Although even here, enlightened corporate managers see a much broader role for their corporation than simply profit or market share maximization.
- xxxi. The *Ontario Act* requires the proponent to include within its EA a description and statement of the rationale for both. See section 5(3).
- xxxii. *Re Joint Board*, *supra* note 24 at 71.
“[The Act envisages] that the ‘undertaking’ will be described by the proponent. [...] [T]he proponent has substantial latitude to describe the undertaking in broad terms or in very specific terms.” Although, as one court does point out, a too broad description of the undertaking would lead the court to conclude that it could not constitute an undertaking within the meaning of s. 1(j) of the *Consolidated Hearings Act 1981*, *supra* note 25.
- xxxiii. *Ontario Act*, *supra* note 9, s. 2.
- xxxiv. I hesitate to even attempt a definition of “real purpose”.
- xxxv. Petro-Sun/SNC Ltd. proposed Energy from Waste Facility, Brampton, Ontario. The matter has been heard by the Joint Board. A decision is expected in early November.
- xxxvi. *Ontario Hydro South Western Ontario Bulk Electricity Undertaking* (1983), 13 O.M.B.R. 257 (Joint Board); Supp. Reasons at 14 O.M.B.R. 333. Also see D. Estrin, *Environmental Law* (Toronto: Carswell, 1984) at 223.
- xxxvii. [1980] Q.B. 485 (C.A.) at 526 [hereinafter *Leakey*]. The case related to the defendant’s duty to take appropriate corrective measures on its property to protect the plaintiff’s property from a natural mud slide.
- xxxviii. [1966] 2 All E.R. 989.
- xxxix. *Ibid.* at 996. [Emphasis added.]
- xl. Petro Sun/SNC Ltd., Energy From Waste Facility.
- xli. *Minister of the Environment v. Redberry Development Corp.* (1987-88), 2 C.E.L.R. (N.S.) 1 [hereinafter *Redberry*].

- xlii. *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1.
- xliii. *Redberry*, *supra* note 41 at 6.

- *H. N. Janisch*, “Policy Making in Regulation: Towards a New Definition of the Status of Independent Agencies in Canada” (1979) 17 *Osgoode Hall L. J.* 46 at 74.
- (1978), 80 D.L.R. (3d) 85 (Ont. Div. Ct.).
- *Janisch*, *supra* note 44 at 94-97.
- *Township of Innisfil v. Township of Vespra*, [1981] 2 S.C.R. 145 at 167 per Estey, J.:
[W]here the rights of the citizen are involved and the statute affords him the right to a full hearing [. . .] one would expect to find the clearest statutory curtailment of the citizen’s right to meet the case made against him by cross-examination.
- *Re Nanticoke Ratepayers Assoc. and Environmental Assessment Board et al.* (1978), 19 O.R. (2d) 7 (H.C.).
- *Ibid.* at 15. Note that this passage describes only the Board’s advisory powers under the *Environmental Protection Act*. It also exercises decision-making powers.
- *Re Athabasca Tribal Council and Amoco Canada Petroleum Ltd.* (1981), 124 D.L.R. (3d) 1 [hereinafter *RE Athabasca*].
- A board with environmental assessment functions.
- *Re Athabasca Tribal Council and Amoco Canada Petroleum Ltd.* (1981), 112 D.L.R. (3d) 200.
- *Re Athabasca*, *supra* note 50, at 7.
- *Re Central Ontario Coalition Concerning Hydro Transmission Systems and Ontario Hydro; Energy Probe Intervenor* (1984), 46 O.R. (2d) 715 [hereinafter *Central Ontario Coalition*].
- Hearing bodies are, however, able to distinguish among participants by determining (without explicitly stating) what weight to give to their input. In this way, it is possible to attach more credence to the concerns of those who live adjacent to a proposed facility as compared to the policy concern of a regional organization. Courts, on the other hand, have used the standing doctrine to deny members of the public status to enforce compliance with EA legislation.
- Although I have not researched the Quebec case law on this point, I understand that standing has not posed any problems for residents seeking to enforce environmental protection standards in Quebec.
- *Stein v. City of Winnipeg* (1974), 48 D.L.R. (3d) 223 (Man. C.A.) [hereinafter *Stein*].
- 1971, c. 105.
- *Stein*, *supra* note 58 at 236.
- *Shiell v. Amok Ltd.* (1987), 27 Admin. L.R. 1 [hereinafter *Shiell*].
- *Supra* note 42.
- *Ibid.* at 14.
- (1980), 54 A.L.J. 176.
- *Ibid.* at 181.
- The federal process is not statutory, but rather established by Order in Council.
- In fact, without the resources to participate effectively, there is no reason to lend credibility

- to the process by participating in it.
- Only the Alberta *Energy Resources Conservation Amendment Act*, S.A. 1981, C. E-11 s. 6 permits a Board to award costs in advance of the hearing to intervenors.
- Most assessment and review bodies lack statutory authority to award costs to participants at the hearing.
- *Supra* note 25.
- A board comprised of Environmental Assessment Board and Ontario Municipal Board members.
- *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23 (Div. Ct.); and see *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333 (Div. Ct.).
- The Timber Management hearings, for example, are already behind schedule 3-4 months.
- *Re City of Toronto Official Plan Amendment 333; Re Metro Toronto Domed Stadium* (1987), 19 O.M.B.R. 232.
- The recommendations from the federal Environmental Assessment Panel examining the proposed Ashak Highway in Yukon Territory include the establishment of a monitoring committee.
- *Supra* note 6.
- *Ibid.* s. 19. There is no requirement that the “public” be notified of such meetings.
- *Ibid.* s. 20.
- *Re Central Ontario Coalition Concerning Hydro Transmissions Systems et al.* (1984), 46 O.R. (2d*) 715 (Div. Ct.).
- O. Reg. 4/88, s. 47 (8).
- This procedure would mean that a proponent’s failure to address all possible alternatives in the EA or EIS document would render the document unacceptable and thus insufficient for purposes of proceeding to hearing.
- As attractive as this proposal may sound, it creates new notice problems. The Board cannot approve an alternative unless notice was specifically proffered of that alternative.
- See C.H. file 87-1, October 1988.
- S.O. 1988, c. 71.
- For a recent decision of the Board applying the funding guidelines set out in the *Act*, see *Ontario Hydro Supply and Demand Plan Intervenor Funding Program* (EA file 90-1, June 1990).
- See *Canadian Wildlife Federation Inc. v. Minister of the Environment* (1989), 3 C.E.L.R. (N.S.) 287 (F.C.T.D.); (1991), 5 C.E.L.R. (N.S.) 157 (Fed.C.A.).